A note on the development of

State immunity for Human Rights violations

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Introduction

The scope of this study is to explore the controversy regarding sovereign immunity for the violations of international human rights and the possibility of individual legal action against foreign states.

The starting point is to discover if and in which cases of human rights abuses state immunity is allowed.

The question considered is: in which cases does the state engaging in conduct that violates international law but is still entitled to immunity. This requires analysis of the criteria used by a State to determine whatever or not accept a case where the plaintiff is an individual claiming damages from a foreign state for an action that violates international human rights law.

To address this problem requires developing the study in two parts. Part one will focused on the history and the evolution of the concept of sovereign. I will look at the development from the traditional absolute approach to immunity to the newer relative approach. An analysis of the complexities for the two phases in the development of state immunity is important for understanding the core issue.

To ascertain the principles and rules of international law relating to immunity I will undertake a review of some important treaties (as 1972 European Convention on State immunity) and draft proposals (as 1991 ILC Convention on Jurisdictional immunities) and an analysis of the adoption of restrictive doctrine in selected national laws, such as the 1976 Foreign Sovereign Immunity Act (FSIA) adopted by the USA, the 1978 State immunity Act (SIA) adopted by the UK, and the 1982 Immunity Act adopted by Canada.

Part two of the study will be devoted to the examination of some practise by the national courts of States to understand the current practice concerning the application of sovereign immunity in different jurisdictions. Consideration of the position in national jurisdictions is necessary because the majority of prosecutions are expected to take place in domestic courts.

This part will include first, a general overview of some of the international recent decisions, as the judgement on the merits of the International Court of Justice in the arrest warrant of 2000, upholding immunity from criminal jurisdiction, and the ruling of European

Court of Human Rights in *Al-Adsani v. United Kingdom*, that the dismissal of proceedings by reason of plea of State immunity did not constitute a violation of a litigant's right to access to a court. It is argued that despite the fact that sovereign immunity are primarily designed for horizontal interstate relationships, there are important reasons of principles and policy for recognizing that international immunities may also be pleaded before international tribunals.

Then, the study will turn to the development of the law regarding sovereign immunity though the decisions of national courts in comparative context by looking at some domestic cases. The cases are selected from both countries with sovereign immunity laws and countries without such laws.

Finally, some conclusion will be drawn as to the different interpretations of sovereign immunity or human rights abuses in different domestic courts.

FIRST PART

- **HISTORY AND DEVELOPMENT OF SOVEREIGN IMMUNITY**

  The origin of immunity concept

The concept of "sovereign immunity" or "state immunity" is a concept of international law which has developed out of the principle *par in parem non habet imperium*[1] (An equal has no power over an equal) by the virtue of that principle, one state is not subject to the jurisdiction of another state.[2] The law of state immunity is the result of a process dynamic evolution in the past 50 years, until the end of the nineteenth century the state immunity was absolute immunity. The development of international relations and the increasing intervention of the States in the spheres belonging to private law have caused an increase number of disputes opposing individuals and foreign States.[3]

The last hundred years has seen a lot of changes in the doctrine and practise, and the doctrine continues to change responding to the priorities of States.[4]

There are, at present, two theories of state immunity: absolute state immunity, as the consequence of principle stated above: since a State is sovereign no one State can be excepted to submit to the courts and verdicts to another, and that of relative state immunity which is tending to predominate. In fact many jurisdiction have adopted a restrictive doctrine of immunity but there is no an authoritative version of this doctrine.

The latter theory establishes that the state enjoys immunity for acts *iure imperii* (i.e. public acts of state), but not for acts *iure gestionis* (private acts of state), when the State acts in the same way as a private person in relations governed by private law.

The rules of state immunity are derived in part from customary international law[5] and in part from conventional international law. Actually, there is no a multilateral instrument setting out the rules of sovereign immunity, as for diplomatic law that is codified in the

[1] The maxim expresses the sovereign equality of States in their relationship and signifies independence as primary subjects of international law, so one sovereign State is not subject to the jurisdiction of another State.
[2] Explanatory Report on the European Convention on State immunity, prepared by the Committee of Experts.
[3] DICKINSON ANDREW, LINDSAY RAE AND LOONAM JAMES P., STATE IMMUNITY SELECTED MATERIALS AND COMMENTARY, Oxford University Press, Cambridge (2004).
[4] HAZEL FOX, THE LAW OF STATE IMMUNITY, Oxford University Press, Oxford (2002).
[5] In order to constitute a rule of customary international law there must be evidence of State practise (*usus*) and *opinio iuris* to the effect that this rule exists.

Vienna Convention on Diplomatic Relations 1961 and in the Vienna Convention on Consular Relations 1964.

The absence of an uniform enforcement consequently involves the examination and comparison of States in their domestic legal systems. That it means that the issue of immunity arises before national courts so it is necessary to look at the domestic provisions for immunity.

Jurisdiction and Immunity

Jurisdiction is closely intertwined with the concept of sovereign immunity. Both concept answers the question when a court can decide a fact brought before it by a specific plaintiff against a specific defendant. Part of doctrine introduces the distinction between the jurisdiction, in positive way, and immunity, in negative way.

First jurisdiction "in positive way" in international law may be defined as the power of the State to affect people, property and circumstances by means of legislative or judicial action.[6] One of the criteria to delineate jurisdiction include the principle of territoriality, as a territorial link derived from the act or conduct in question if the conduct took place within the territory of the forum or if the conduct took place outside and had a substantial effect within the forum state.

The State's jurisdiction is comprised of a bundle of abilities, both civil and criminal, and includes the right to make and to enforce laws within its geographical boundaries and regarding its national residents.[7] Abstract from the territoriality and personality principle is the universal jurisdiction, which gives at any the right to assert jurisdiction for certain crimes, i.e. crimes against humanity.

Second, immunity "in negative way" aims to establish when a State may not hear a case.[8]

It is important to underline that question of jurisdiction logically precedes that of sovereign immunity, if there is not jurisdiction the question of immunity cannot arise.

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[6] CONFORTI DOMENICO, DIRITTO INTERNAZIONALE, Giuffré, Torino, (2002).
[7] DO THAN CLAIRE AND SHORTS EDWIN, INTERNATIONAL CRIMINAL LAW AND HUMAN RIGHTS, SweettMaxwell, London (2003).
[8] BROHMER JURGEN, STATE IMMUNITY AND THE VIOLATION OF HUMAN RIGHTS, Martinus Nijoff Publishers, The Hague (1997).

- **SOURCES OF LAW CONCERNING STATE IMMUNITY**

***TREATIES*:**

1.1 Convention on the Unification of certain Rules Concerning the Immunity of State-owned Ships (Brussels, 10 April 1926) and its additional Protocol 1934

This Convention was one of the first international instrument dealing with the subject of sovereign immunity, adopted to react at important role played by the states in international trade conducted by the sea.[9] This Convention was signed 10 April 1926[10] and it is in force between a numbers of states. This attempt at the international unification in the field of State immunity, which has proved successful in practise, but this, concerned only with state-owned vessels.

The Convention employs a restrictive immunity, according to art. 1, is established an "equal" liability of state owned and private owned vessels[11] and also at art. 2[12] that requires that the same procedures would be available to ensure the liabilities as in the case of private owned merchants vessels.[13] In this way, the Convention puts state owned ships on same footing as private vessels, expect "ships of war, government yachts, patrol vessels, hospital ships and other crafts owned or operate by a State and used at the time a cause of action arises exclusively on government and non-commercial service."

This instrument could be considered as one of the first example of distinction between *acta iure imperii* and *acta iure gestionis*[14], aforementioned.

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[9] BROHMER JURGEN, STATE IMMUNITY AND THE VIOLATION OF HUMAN RIGHTS, Martinus Nijoff Publishers, The Hague (1997).

[10] 176 League of Nations Treaty Series (L.N.T.S.) 199.

[11] Art. 1: "Seasoning vessels owned or operated by States, cargoes owned by them, and cargoes and passengers carried on Government vessels, and the States owning or operating such vessels, or owning such cargoes, are subject in respect of claims relating to the operation of such vessels to the carriage o f such cargoes to the same rules of liability and to the same obligations as those applicable to private vessels, cargoes and equipment."

[12] Art. 2: "As regards such liabilities and obligations, the rules relating to the jurisdiction of the Courts, rights of action and procedure shall be the same as for merchant ships belonging to private owners and for private cargoes and their owners."

[13] BROHMER JURGEN, STATE IMMUNITY AND THE VIOLATION OF HUMAN RIGHTS, Martinus Nijoff Publishers, The Hague (1997).

[14] BRAD GAMAL MOURSI, STATE IMMUNITY: AN ANALYTICAL AND PROGNOSTIC VIEW, Martinus Nijhoff Publishers, The Hague (1984). The Convention distinguishes between governmental and commercial service in no other way than that the general immunity statutes in England or United States.

1.2. The European Convention on State Immunity[15] and additional protocol[16]

The European Convention on state immunity was the first attempt to put in legislative form the restrictive approach to sovereign immunity.[17] The scope of the Convention was to establish commune rules to govern the state immunity from the jurisdiction of another State and, at the same time, to give the protection to individuals in their private claims against States.[18]

The Convention approach, is very different from the other international and national instruments, its provisions allows immunity for all cases not covered by its articles[19]: "immunity must be granted in all cases, which are not included in the list set out in article 15."[20]

The main focus has to be put on the first fourteen articles of the Convention that are related to the issue of immunity from jurisdiction.

According to article 11 the Convention states that in case of injury to a person or damage to (tangible) property the State cannot claim immunity if two conditions are fulfilled: the first is that the injury or the damage has to occur in the territory of the *forum* State and second that the author of the injury or the damage was present in the territory when injury occurred. Therefore if "there has been no physical injury (or) damage to tangible property does no apply" (art. 11).

Between the exceptions to allow jurisdiction it is possible for a State to "express consent to jurisdiction of a foreign State" or a waive can arise from international agreement signed by the State or in a contract or by express consent given after a dispute (art.2).

In addition, there is not general rule that excludes immunity for commercial activities; however at art.7 it does precludes immunity when the litigation concerns "industrial, commercial, or financial activity."

Finally it is important to remark that the Convention provides an "armed conflict" exception that prevents to apply the provisions in case of armed conflict.

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[15] European Convention on State immunity adopted by the Council of Europe on 16 May 1972, 1 ILM 470 (1972).
[16] ETS n. 74 A. The additional protocol entered into force on May 1985.
[17] FOX HAZEL, THE LAW OF STATE IMMUNITY, Oxford University Press, Oxford (2002).
[18] Only seven states have ratified the Convention and one of the signatory States is the United Kingdom, which allows its State immunity Act control any inconsistent provision of the European Convention.
[19] Von Heggis Reinhard, *25 Anniversary of the Foreign Sovereign immunities act: European Convention on state Immunity and Other International Aspects of Sovereign Immunity,* 9 WILLIAMETTE J. INT.L L. DISPUTE RES. 185 (2001).
[20] Council of Europe, explanatory reports on the European Convention on State Immunity P1 (1985), available at http://www.conventions.coe.int/Treaty/EN/WhatYOUWant.asp?NT=074&CM=7&DF=07/03/02.

The Convention has tried to incorporated the principle implicit arises in the different conceptions of foreign immunity by countries, and also has to be noted that the evolution of state immunity in domestic law and internal application created two different approaches by different legal traditions: the common law system and the civil law system.

1.3 Vienna Convention on Diplomatic relations of 1961

While a discussion of diplomatic immunity is beyond this study, a brief illustration of Vienna Convention on Diplomatic relations is helpful. This Convention establishes the particular exception to jurisdiction regarding diplomatic immunity and widely reflects the customary international law.

According art. 19 immunity from detention, arrest and attack is granted to diplomatic agents and art. 31 except them from criminal jurisdiction of the host State.

The principle is if a person who enjoys diplomatic immunity is suspected of a crime under national law or of an international crime, he cannot be arrested. The diplomats of a State enjoys of some privileges in order to perform their mission in the host State. Not only diplomat agents enjoy of this particular immunity, but also it accepted that also Heads-of-State and the Minister of Foreign Affairs enjoys this according to customary international law.[21]

Also, diplomatic immunity is not absolute, in case a diplomatic function commits a breach of domestic or international law the host State can ask him to leave. In fact diplomatic immunity may be considered an exception from application of territorial jurisdiction but not from other State's power.[22]

2. DRAFT PROPOSALS:

2.1 The Inter-American draft convention on Jurisdictional Immunity of States

The Organisation of American States (OAS) took the problem of state immunity and approved a draft Convention on Jurisdictional Immunity of States on 21 January 1983. This Convention has not received much attention.

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[21] CONFORTI DOMENICO, DIRITTO INTERNAZIONALE, Giuffré, Torino (2002).
[22] DO THAN CLAIRE AND SHORTS EDWIN, INTERNATIONAL CRIMINAL LAW AND HUMAN RIGHTS, SweettMaxwell, London (2003).

The art. 1 introduce the general principle of State immunity: "a State is granted immunity from jurisdiction for acts performed by virtue of governments powers." In arts. 5,6,7 are described the exceptional circumstances where immunity can not be invoked, as with art. 5 is establish a commercial activities exception. The art. 6 (e) contains the torts exception and is strictly related to commercial tort, in fact it affirms: "in proceedings for losses and damages no tort liabilities arising from activities mentioned in art. 5 para. one."

A brief analysis of few most interesting articles shows that the approach to the immunity problem is not sufficient by the fact that the position of individual is not enhance. In fact, the scope looks like to protect commercial relationships.

2.2 The UN Convention on Jurisdictional Immunities

The last draft-proposal considering the State immunity issue has been adopted by the UN General Assembly on December 2, 2004.[23] The UN Convention on Jurisdictional Immunities of States and their property was elaborated by an Hoc Committee and originated by the work of the International Law Commission.[24] The particularity is that this Convention, for the first time, was built on the state practice under domestic regime and also by the application of 1972 European Convention on immunity.

In the international context many states actually lack domestic statutes addressing the issue of foreign sovereign immunity and even if they have, the practise is not unanimous, so there are many diversity and approach.

For these reasons, the adoption of the UN Convention tries to provide a substantial harmonization of national laws in the area of transitional practise.[25]

The Convention establishes that, subject to certain exceptions, a State enjoys immunity from jurisdiction of foreign court in respect of itself and its property and the *forum* state must refrain from exercising that jurisdiction in a proceeding before its courts.

Face to this general principle, the exceptions, *inter alia*, include claims arising from (articles 7 to 18):

- ***Commercial transactions:*** art. 10 (1) that provides that "if a state engages in a commercial transaction with a foreign natural or juridical person and, by virtue of the

[23] The treaty was opened for signature on January 17, 2005 and will enter into force when thirty States have deposited their instruments of ratification, acceptance, approval or accession with the UN secretary-general.
[24] The ILC work was finally adopted in the spring of 1991 and submitted to the United Nations General Assembly in the autumn of 1991.
[25] Stewart P. David, *Current Development: The UN Convention on Jurisdictional Immunities of States and their property,* 99 A.J.I.L. 194, January 2005.

applicable rules of private international law, differences relating to the commercial transaction[26] fall within the jurisdiction of a court of another State, the State cannot invoke immunity from that jurisdiction in a proceeding arising out of that transaction";

- ***Torts:*** art. 12 provides that "in proceeding which relates to pecuniary compensation for death or injury to the person, or damage to or loss of tangible property, caused by an act or omission which it is alleged to be attributable to the State, if the act or omission occurred in whole or in part in the territory of that other State and if the author of the act or omission was present in that territory at the time of act or omission."

  This provision tries to incorporate the possibility to sue a foreign state for monetary compensation in case or death or personal injury resulting from the foreign state's act or omission.

  The nexus territorial requirement is double: first the act or omission causing the death or injury has to occur in whole or in part in the territory of the foreign State and, second, the author of that act or omission must be present in that state at the time of the act or omission. For this reason the extraterritorial torts are excluded, even it is no easy in certain situation distinguish between the place of injury and the place of the tort (*locus commissi delicti*).

  This disposition rests unclear regarding the distinction that it must be done between the losses caused by a foreign state's tortious or omission or that result as consequence of sovereign acts.[27]

Others exceptions include: contracts of employment, ownership, possession and use of property; intellectual and industrial property, state-owned or-operated ships used for other than government noncommercial purposes; certain matters relating to arbitration proceedings; and situation involving consent to jurisdiction.

This Convention does not contains any exception to immunity regarding the question if an act or omission of a foreign state is contrary of a applicable norms of international law, that could be considered as an implicit waived of their immunity. It does not exist any

[26] Art. 2 (1)(c) defines commercial transactions:
" 1. any commercial contract or transaction for the sale of goods or supply of service;
2. any contract for a loan or transaction of a financial nature, including any obligation of guarantee or if indemnity in respect of any such loan or transaction;
3. any other contract or transaction of a commercial, industrial, trading or professional nature, but not including a contract of employment of person."

[27] Stewart P. David, *Current Development: The UN Convention on Jurisdictional Immunities of States and their property,* 99 A.J.I.L. 194, January 2005.

"human rights" or *jus cogens* exception to immunity. In fact the issue is controversial, ad the ILC has not found a general practise, accepted by the States, that the jurisdiction could be existent just for the allegation that the foreign sovereign acts violate a customary international norm or some treaty provisions. This question was considered by Sixth Committee who has found that a number of civil claims has been brought in municipal courts and in same cases the national courts "have shown sympathy" to the argument that the States are not entitled to plead immunity where there has been a violation of a human rights norm, but in most cases the sovereign immunity has succeeded.[28]

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International treaties and also the drafts proposals, above-mentioned, seem to reflect more or less the present state of law of state immunity in combining the different ideological views of different countries. The general approaches adopted in two of most important instruments, as European Convention and ILC Convention, define the boundaries of sovereign immunity by indicating the exception of state immunity as seems to reflect a general view to consider the immunity as the general rule and the exercise of jurisdiction the exception.

This reflects the state of practise regarding the difference of acts *iure imperii* and *iure gestionis*. Both the European Convention an ILC Convention, reflect in their provisions this distinction and particularly, the ILC Convention does not expressly, but all the exception mention at third part concern the second type of act. Also the European Convention, except for contract employment norm (art. 5), seems to reflect this distinction. The recent practise, particularly of Italian courts, seems to except this distinction and to research some other objective criteria because the difficulties in qualifying provide judges to extend the boundaries of acts *iure imperii*. The ambiguous distinction necessitates objective criteria to be uniformly applied.

Instead, both European Convention (art. 11) and ILC Convention (art.12) subject the tort exception to a strict territorial nexus requirement, not only the action took place within the forum State territory, but also the tort-fearer were to present there at the same time. This provision assures the exclusion of transboundary tort from the scope of Conventions.

Finally, according to the practise of domestic jurisdiction, all international instruments are denied the possibility to enclose a specific provision in case of violation of international norms or *jus cogens* disposition. Particularly, the UN Convention on Jurisdictional

[28] Report of ad Hoc Committee on jurisdictional immunities of state s and their property, 1-5 March 2004, General Assembly, official records system Fifty –ninth session supplement n. 22 (A/59/22).

Immunities and their property has failed this opportunity, addressing the domestic courts to interpret the antinomy between state immunity and international human rights.

3. NATIONAL LAWS:

It is interesting to note that national statutes relating to State immunity have been adopted in most of countries of common law- i.e. United States, United Kingdom, Canada- whereas civil law countries it is up to courts to determine the scope of immunity. This difference also will be particularly relevant in the second part of study concerning the domestic jurisdictional practise. In fact, that question it will be to consider which system seems to contribute to the evolution of the law of sovereign immunity in cases involving violation of human rights law.

3.1 U.S.A.: The Foreign Sovereign Immunities Act 1976

The Foreign Sovereign Immunity Act (hereinafter referred to as "FSIA") adopted by United in 1976, is an important instrument if we consider that most immunity litigation has taken place in the United States.

The Act provides the sole basis for obtaining jurisdiction over a foreign state[29] in the United States courts by a principle rule of immunity. Under the Act, a foreign state is presumptively immune from jurisdiction unless a specified exception applies. Exceptions to foreign sovereign immunity are codified in 28 U.S.C.S. section 1605 (a) (2), clauses 1-3.

In this case a federal court lacks subject-matter jurisdiction over a claim against a foreign state.[30]

Between these exceptions is useful in this context to examine:

"Commercial activity exception"[31]***:*** this clause provides that a foreign State shall not be immune from the jurisdiction of United State in any case in which the action is based upon a commercial activity carried on in the United States by the foreign state.

The definition of commercial activity is provided by the Act, first, as commercial activity carried on by the state and, second, as activity having substantial contact with the United

[29] According to the interpretation given by F.S.I.A., the term "foreign state" includes "an agency or instrumentally of a foreign state".
[30] The Foreign Sovereign Immunities Act of 1976, 28 U.S.C.S., § 1602 e s..
[31] The Foreign Sovereign Immunities Act of 1976, 28 U.S.C.S.,§ 1605.

States. Particularly, a commercial activity may be determinated by its purpose or by the reference to its nature, in any case could be a particular commercial transaction or act or a regular course of commercial conduct. In case of sovereign acts related to commercial activity the jurisdiction will not exist under the FSIA, §1605 (a) (2).[32] Regarding the distinction, aforementioned, between the restrictive theory of sovereign immunity and the opposed absolute theory, the Act codifies the first theory, as the Supreme Court of United States has ruled.[33]

"tortious conduct"[34]: this exception doesn't include any difference between private and governmental acts, in fact, are subjects all the acts on the basis of a strict territorial nexus requirement, giving effect to the territoriality principle according to which courts in principle enjoy unlimited jurisdiction over all acts taking place within state territory;[35]

"No immunity for violation of international law": this exception is built into two provisions: 1) 28 U.S.C., §1330 which declares that district courts have jurisdiction over "any nonjury civil action against a foreign State … as to any claim for relief *in personam* with respect to which foreign State is not entitled to immunity either under §1605-1607 of this title or under any applicable international agreement" and 2) under §1604 a foreign State's immunity is "subject to existing international agreements to which the United States is a party…" and subject to exceptions to immunity based on this agreement. This two disposition, read together, confirm the existence of an international agreement exception.[36] With regard to no immunity for violations of international law under §1330

[32] 1605 (a) (2) provides that a "foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case … in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon ac act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere; or upon can act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States."

[33] Republic of Argentina *v.* Weltover, Inc., 504 U.S. 607, 612, 119 L.Ed. 2d 394, 112 S. Ct. 2160. The state is immune from the jurisdiction of foreign courts when its acts are public or sovereign, but not when those are private or commercial in character. A state engages commercial activity when it exercises those powers that can also be exercised by private citizens.

[34] "Not otherwise encompassed in paragraph (2) above, in which money damages are sought against a foreign state for personal injury or death, or damage to or loss of property, occurring in the United States and caused by tortius act or omission of that foreign state or of any official or employee of that foreign state while acting within the scope of his office or employment…"

[35] House of Representatives, Report 94-1487 at 6619-20.

[36] Paust Jordan, *Draft brief concerning claims to foreign sovereign immunity and human rights: no immunity for violations of international law under FSIA,* 8 HOUSTON JOURNAL OF INTERNATIONAL LAW 49 (1985).

and §1604, no "contacts" are required with the *forum* State, because "there is a universal jurisdictional competence over violations of international law".[37]

Finally, the § 1605 (a)(3) denies immunity to foreign states for suits over rights in property taken in violation of international law. The application of this provision is strictly related to the nexus territorial requirement, in fact human rights violations committed outside cannot be brought under this exception.

The FSIA has been amended to limit the foreign state's immunity and to increase the occasions on which it can be brought before the US courts.

Relevant for this study is a 1996 amendment[38] that it introduced an exception to immunity by which a suit can be brought in case of act of terrorism or other similar activities, but only against a foreign State indicated as a State sponsor of terrorism.[39] If the act occurred in the foreign State against which the claim is brought, the claimant must have afforded that State "a reasonable opportunity to arbitrate the claim." Also the claimant or the victim has to have been U.S. citizens when the conduct occurred.[40]

3.2 U.K.: State Immunity Act 1978

The State immunity Act of 1978, incorporates the restrictive approach to immunity, too. The adoption on the SIA was influenced by the changing of international environmental, particularly the drafting of the European Convention on State immunity.[41]

The SIA is structured in tree parts. Just the first part contains the provisions regarding the immunity will considered.

The general rule of this Act is that there is immunity for the State, though it exempts certain types of claims. The exceptions are included in sections 2-11.[42]

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[37] Paust Jordan, *Draft brief concerning claims to foreign sovereign immunity and human rights: nonimmunity for violations of international law under FSIA,* 8 HOUSTON JOURNAL OF INTERNATIONAL LAW 49 (1985).

[38] The new exception was introduced by section 221 of the Anti-terrorism and Effective Death Penalty Act of 1996, that provides that immunity will not be available in any case: "in which money damages are sought against a foreign State for personal injury or death that was caused by ac act of torture, extra killing, aircraft sabotage, hostage-taking…"

[39] The State in question must be designated as a State of sponsor of terrorism under section 6(j) of the Export Administration Act of 1979, 50 U.S. C. App. § 2405 (j) 2000, or section 620 A of the Foreign Assistance Act of 1961, 22 U.S.C. § 2371 (2000).

[40] This exception was applied in two cases: (United States) Rein *v.* Libya, 38 ILM 447 (1999); (United States) Cicippio *v.* Iran, 18 F 2d 62 (1998).

[41] DICKINSON ANDREW, LINDSAY RAE, LOONAM JAMES P., STATE IMMUNITY SELECTED MATERIALS AND COMMENTARY, Oxford University Press, Cambridge (2004).

Commercial transactions

The exception for commercial transactions is contained in section 3, defined as:

" (a) any contract for the supply of goods and services

(b) any loan or other transaction for the provision of finance and any guarantee or indemnity in respect of any such transaction or of any other financial obligation; and

(c) any other transaction or activity (whether of a commercial, industrial, financial, professional or other similar Character) into which a state enters or in which it engages otherwise than in the exercise of sovereign authority."

It is important to underline the absence of any territorial nexus requirement in regard to commercial transaction. For this reason this exception could be applied for the activity carried out by a foreign state outside the UK if the general rules of private international law, allow for proceedings before English courts.[43]

Tort exception

The tort exception is contained at sec. 5 and holds a State to be

"immune as respects proceedings in respect of (a) death or personal injury; or (b) damage or loss of tangible property, caused by an act or omission in the United Kingdom."

The language of torts exception is clear that the torts have to cause immaterial damage and not only economic loss, to be considering under the SIA.[44] Also the damage or injury must to have been caused by an act or omission in United Kingdom. And the language of the SIA implies that the effect of the damage could occur somewhere else.

Other particular aspect is the nexus requirements, does mean that an effect might have had in Britain.[45] This provision could be read in line with the "conventional" jurisdictional rule covering torts committed by defendant not present in England (Order 11, r.1 (1) (f), R.S.C.)[46] could provide that a tort committed abroad could be brought before English Court if part of damage was sustained in England.

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[42] Sec. 2: waiver, referred to as "submission" to the jurisdiction of the UK courts; sec. 3: commercial transactions; sec. 4: contracts of employment; sec. 5: torts; sec. 6: possession and control of property; sec. 7: patents, trademarks, designs, plant breeders' rights, copyrights; sec. 8: membership of body corporate, unincorporated body of partnership; sec. 9: submission to arbitration; sec. 10: admiralty proceedings and actions *in rem* against commercial ships; sec. 11: taxes and rates.

[43] Delaume Georges R., *The State immunity Act of United Kingdom*, 73 A.J.I.L.185 (1979).

[44] BROHMER JURGEN, STATE IMMUNITY AND THE VIOLATION OF HUMAN RIGHTS, Martinus Nijoff Publishers, The Hague (1997).

[45] The nexus requirement is an important obstacle to provide a jurisdiction basis for SIA sec. 5, as arises from the case Kuwait Airways Corporation *v.* Iraq Airways Company and Republic of Iraq, Lloyd' s Law Reports 276 (1994).

[46] The order is part of the rules covering the jurisdiction of English Courts.

3.3 CANADA: State Immunity Act 1982

The state immunity act of 1982 codifies the restrictive approach to state immunity. The CSIA stipulated a general rule of immunity in sec. 3(1)[47] with the exceptions listed in the sections 4 to 8, known as the commercial activity exception in sec. 5[48] and the torts exception in sec. 6.[49]

Concerning the commercial activity exception, the CSAI, in contrast with the FSIA and the British SIA, doesn't include any territorial nexus requirement.

The tort exception instead is similar to the provision of the FSIA (sec. 1605 (a)(5), and prescribes that the relevant effect of the tortius act (dealth, injury, property, damage) must occurs in Canada. Does it mean that if an individual, subjected to torture outside Canada, who has found refuge in Canada and who still suffers from the effects of the torture, will be able to bring damage claims against the foreign state in Canada.

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Whether in the United States, United Kingdom and Canada, foreign immunity appears to have developed from the each nation's conception of its own sovereign immunity.

All statutes attempt to a restrictive state immunity theory.

The general approach is to provide immunity and spell out the exceptions in which immunity does not exist, instead the European Convention immunity exists just for all residual cases not covered by the fourteen articles. The exceptions are enumerative and exclusive.

The FSIA prescribes immunity in ambiguous terms allowing a amount of judicial interpretation about immunity, yet, the SIA, which defines the nonimmunity precisely, leaves court little space for discretion.

In regard tortious exception, the statutes move away from traditional distinction between acts *iure imperii* and *iure gestionis*, seems the governmental nature of the act is irrelevant, but the disposition present some differences. The FSIA and SIA provide a nexus territorial requirement, but the nexus requirement for SIA is more lenient than FSIA and also,

[47] 3 (1), provides "Except as provided by this Act, a foreign state is immune from the jurisdiction of any Court in Canada".

[48] 5 provides " A foreign State is no immune from the jurisdiction of a court in any proceedings that relate to any commercial activity of the foreign State".

[49] 6 provides: " A foreign State is not immune from the jurisdiction of a court in any proceedings that relate to
(a) any death or personal or bodily injury, or
(b) any damage to or loss of property
that occurs in Canada".

abovementioned European Convention and ILC Convention. In fact the FSIA requires that tort feasor must be present within the territory of the forum State at the time of commission of the tort, instead the SIA allow that a tort committed abroad bring before a English Court if only part of damage was sustained in England.

In Canada the tort exception is similar to that of FSIA and SIA, but differs from this latter because does not prescribe a territorial nexus, but instead stipulates that the relatives effects of the tortious act must occur in Canada.

Regarding the FSIA, it is important to underline that this Statute "attempt to create a genuine exception"[50] covered the violation of international law, which does not exist in other national statutes. It could be examine in the second part as the practise of domestic jurisdiction apply this exception regarding the violation of human rights law.

[50] BROHMER JURGEN, STATE IMMUNITY AND THE VIOLATION OF HUMAN RIGHTS, Martinus Nijoff Publishers, The Hague (1997).

SECOND PART

The national statutes attempt to codify the international law principles, which are in process of dynamic development. The practise under the domestic instruments is first of all a practise of domestic law and also that cannot always reflect international law developments. But any case the practise in domestic court is important to determine the content of international law in the field of sovereign immunity.

Before to examine the different approaches elaborated by domestic courts could be useful to examine the *status* of international practise to see if some guide-lines could be arise. In fact the presence of some decisions of an international judicial authority on this field could be useful to clarify the contours of the antinomy existent between sovereign immunity and the protection of human rights law.

- **INTERNATIONAL PRACTICE**

Regarding the international law, it is important to recognise the pre-eminence of a restricted number of obligations, regarded as obligations *erga omnes*, by their subject matter which any State has a legal interest to their fulfilment.

1. INTERNATIONAL COURT OF JUSTICE

One of recent case of ICJ was related to difficult balance existing between two principles of international law and jurisdiction for international crimes and immunity from them, which appear to be in conflict.

1.1 Case concerning arrest warrant of 11 April 2000

The dispute concerns the lawfulness of the international arrest warrant issued on 11 April 2000 by a Belgian judge against an incumbent Minister for Foreign Affairs of the Democratic Republic of Congo[51].

The warrant states that Mr Yerodia is charged with being "the perpetrator or co-perpetrator" of crimes under international law and crimes against humanity concerning "various speeches inciting racial hatred" made during "public addresses reported by the media" allegedly having the effect of inciting the population to attack Tutsi residents in Kinshasa, dragnet searches, manhunts and lynching.

[51] The request for an Interpol Red Notice was only made, after Mr. Yerodia had ceased to be a Minister, Belgium did not request Mr. Yerodia' s extradition as long as he was in office.

The majority of the ICJ found the warrant unlawful and the ground of the decision simply was that the State official was immune from criminal trials abroad. The court stated that the immunity as applied to "ensure the effective performance of their functions on behalf of their respective States."

Also Belgium has been prevented to issue an arrest warrant because no one of the following circumstances are fulfilled: "1. When charged in their own State; 2. Where their national State has waived immunity expressly; 3. For acts committed before of after serving as an official, or those committed in a private capacity while serving falthough arrest abroad while serving would still not possible; 4. Trial by a properly-constitued international tribunal such as the ICC." These are the only circumstances in which state-officials would lose their immunity against persecution.

The most important part of the *dispositif* of the Court, related to present study, is the analysis of the Congo' originally claim concerning legality of the arrest warrant on two separate grounds: first, the exercise of a universal jurisdiction and second the alleged violation of the immunities of the Minister of Foreign Affairs of the Congo then in office. The court states that it is only "where a State has jurisdiction under international law in relation to a particular matter that there can be any question of immunities in regard to the exercise of that jurisdiction" (Judgement, para. 45).

It is interesting to dwell on the reason develop for the dissenting view of the judge Van Den Wyngaert who asserts that "did not decide the question of (universal) jurisdiction, and has only decided the question of immunity from jurisdiction, even though, logically the question of jurisdiction would have preceded that of immunity." Judge Van Den Wyngaert criticized the Court for not taking any pronouncement regarding the international-law jurisdiction for international law crimes. In fact in the proceedings on the merits the Court reduced its reason to the entitlement of immunity from jurisdiction only. The question on what international law requires or allows States to do as "agents" of the international community when they are confronted with victims of international crimes is controversial. Also the legal opinion and practises are divided.

This case was to be the first opportunity for the International Court of Justice to address the question about balancing two divergent interests in modern international law: the need of international accountability for such crimes as torture, terrorism, war crimes and the principle of sovereign equality of States, which presupposes a system of immunities[52]. Instead the

[52] Dissenting Opinion of Judge Van den Wyngaert.

judgment of Court has not addressed the question from this perspective but has instead focused on the question of immunities of incumbent Foreign Ministers. In fact the International Court of Justice has found that there is a rule of customary international law protecting incumbent Foreign Ministers suspected of war crimes and has not engaged in the balancing exercise. So, in this way, the Court has *de facto* balanced in favour of the interests of State in conducting international relations.[53]

2. EUROPEAN COURT OF HUMAN RIGHTS

During the recent years, significant cases appear in the European Court of Human Rights concerning sovereign immunity. Application has been made to the European Court of Human Rights challenging the validity of State immunity in respect of international norms of *jus cogens* character. As regard two different types of claims will be considered, concerning a particular rights as the right to access to court (art. 6 ECHR): one alleged torture committed abroad in a prison of the foreign State – *Al-Adsani v. United Kingdom* – and other concerning an assault by a soldier of the foreign State while within the territory of the *forum* State – *McElhinney v. Ireland*.

2.1. Al-Adsani v. United Kingdom[54]

The issue of state immunity and human rights violation was subject in the interesting case Al-Adsani *v.* United Kigdom .

In that case, the applicant, a Kuwaiti/British national, claimed to have been the victim of serious human rights violations (torture) in Kuwait by agents of the Government of Kuwait. In the United Kingdom, he complained about the fact that he had been denied access to court in Britain because the courts refused to entertain his complaint on the basis of the 1978 State Immunity Act.[55]

Previous cases before the ECHR had usually arisen from human rights violations committed on the territory of the respondent State and related to acts of torture allegedly committed by the authorities of the respondent State itself, not by the authorities of third States. Therefore, the question of international immunities did not arise. In the *Al-Adsani* case, the alleged human rights violation was committed abroad, by authorities of another State and so the question of immunity did arise. The ECHR (with a 9/8 majority), has rejected Mr. Al-

[53] Dissenting opinion of Judge Van Den Wyngaert.
[54] Al-Adasani *v.* United Kingdom, App. N. 35763/97, (Eur. Ct. H.R. Nov 21, 2001) at http://www.echr.coe.int.
[55] The court of Appeal has stated that the Government of Kuwait is not entitled to immunity.

Adsani's application and held that there has been no violation of Article 6, paragraph 1, of the Convention (right of access to court).

However, the decision was reached with a narrow majority (9/8 and 8 dissenting opinions) and was itself very narrow. As affirmed judge Ferrari Bravo in his dissenting opinion the Court " had a golden opportunity to issue a clear and forceful condemnation of all acts of torture. To do so, it need only have upheld the thrust of the House of Lords judgement in the *Pinochet* case, to the effect that the prohibition of torture is now *jus cogens*, sot that torture is a crime under international law. It follows that every State has a duty to contribute tot eh punishment of torture and cannot hide behind formalist arguments to avoid having to give judgement".

Also dissenting judges, Judges Rozakis and Caflisch joined by Judges Wildhaber, Costa, Cabral Barreto and Vajiæ and also Loucaides[56] read the decision of the majority as implying that the court would have found a violation had the proceedings in the United Kingdom been criminal proceedings against an individual for an alleged act of torture (para. 60 of the judgment, as interpreted by the dissenting judges in para. 4 of their opinion).

2.2. McElhinney v. Ireland [57]

The applicant an Irish national, Mr McElhinney, was a police officer in Ireland and accidentally he drove his vehicle into the checkpoint barrier between Northern Ireland and Ireland. A British soldier approached the vehicle, that did not stop and the soldier fired six shots in the republic of Ireland. Mr McElhinney after that accident suffered from post-traumatic shock and he brought a claim in the Irish Court for damages, but the claim was dismissed also by the Court of Appeal, by the fact that the soldier were exempt from the jurisdiction of the Irish courts on the basis of the doctrine of sovereign immunity.

Mr McElhinney brought a claim before European Court of Human Rights alleging a violation of his right under art 6 ECHR, to a fair hearing by a tribunal.

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[56] Lord Loucaides in his dissenting opinion concluded that: "once it is accepted that the prohibition of torture is a *jus cogens* rule of international law prevailing over State immunity rules, no such immunity can be invoked in respect, of any judicial proceedings whose object is the attribution of legal responsibility to any person for any act of torture. There is nor reason for a distinction between criminal and civil proceedings. In view of the absolute nature of the prohibition of torture it would be a travesty of law to allow exceptions in respect of civil liability by permitting the concept of state immunity to be relied on successfully against a claim for compensation by any victim of torture. The rationale behind the principle of international law that those responsible for atrocious acts of torture must be accountable is not based solely on the objectives of criminal law. It is equally valid in relation to any legal liability whatsoever".

[57] McElhinney *v.* Ireland, App. N. 31253/96, (Eur. Ct. H.R. Nov 21, 2001), at http://www.echr.coe.int.

The European Court hold that the decision of Irish court to entitle the UK claim to immunity could not be considered exceeding the margin of appreciation allowed to States in limiting an individual's right to access to court. This limitation that recognized rules of international law on State immunity could not in principle considered a disproportionate restriction on the right of access to a court, according art. 6 ECHR. In fact the Court recalled its established case/law to the effect that Article 6, para. 1, does not itself guarantee any particular content for civil rights and obligations in the substantive law of the Contracting States. Certainly the Convention enforcement bodies may not create by way of interpretation of Article 6 a substantive civil right, which has no legal basis in the State concerned.

The Court acknowledged that "there appears to be a trend in international and comparative law towards limiting State immunity in respect of personal injury caused by an act or omission within the *forum* state" and it noted that the practise "by no means universal". Also the Court in its reason considers the personal insurable injury, as the incident arising from the road traffic incidents, rather that the matter related to the state sovereignty such a soldier on a foreign territory which may involve issues related to diplomatic relations between states and national security. For these reasons that Court refuse to adopt the view that states should be exposed to foreign courts jurisdiction for the tortious acts or omission committed *iure imperii*. In fact the Court according to the Supreme Court in this case does not find international standards to deny the immunity relating to suits in respect of such torts committed by *acta jure imperii*.

DOMESTIC PRACTISE

The aim of this part is to ascertain in which terms some national courts reconstruct and interpret the international law of state immunity and consequently if it is possible today to trace a non-immunity exception for violations of human rights.

The analysis will be conducted through only some of most important cases. The criteria to distinguish is between the countries with sovereign immunity law and without according to the first part. In countries without immunity legislation, it id up to courts to determine the law of state immunity, instead domestic codification of state immunity "ease" the task of the courts in the adjudication of cases.[58] As above-mentioned, the purpose is to underline the differences, if they exist, between common-civil laws.

[58] Bianchi Andrea, *Denying State immunity to violators of Human Rights,* 46 AUSTRIAN J. OF PUBL. INTL LAW 195 (1994).

1. JURISPRUDENCE IN COUNTRIES WITH IMMUNITY ACT

1.1 USA

It is widely recognized that the most part of the decisions related to state immunity for the international human rights violations can be traced by judicial practise of the United States, for this reason it is particularly relevant to consider the determinations adopted to individuals asserting violations of their rights.[59]

One good example of domestic courts interpretation of domestic codification is *Saudi Arabia v. Nelson*[60], in which arises the question of whether a foreign State that has allegedly committed a serious breach of international human rights obligations is entitled to immunity.

Saudi Arabia v. Nelson

Mr. Nelson, a US citizen, was tortured by Saudi Police officers allegedly acting in relation to Nelson's negative report on safety conditions at King Faisal Specialist Hospital in Ryadh. The Court of appeal[61] has denied immunity holding that the recruitment of Nelson was a commercial activity upon which the Nelson's claim was based for the purpose of 1605 (a) (2) of the Foreign Sovereign Immunity Act. The Supreme Court reversed, maintaining that Saudi Arabia's tortious conduct failed to qualify as commercial activity within the meaning of the Act. The Supreme Court avoided any determination on the state of international law on the subject and confined itself to interpreting the FSIA, eventually allowing immunity.

The difficult question was to identify the conduct on which the action was based. In fact the Court decided that even if Saudi Arabia's recruitment constituted a commercial activity having substantial contact with the United States; Nelson's claims was not be "based upon" that commercial activity so the claims fell outside the FSIA's commercial activity exception.

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[59] De Vittor Francesca, *Immunità degli Stati dalla giurisdizione e tutela dei diritti umani fondamentali*, 3 RIVISTA DIRITTO INTERNAZIONALE 573 (2002).

[60] Saudi Arabia, King Faisal specialist Hospital and Royspec *v.* Scott Nelson et Ux, US Supreme Court, 23 march 1993 (113 S. Ct. 1471), 87 AJIL 442 (1993).

[61] The Court held "the recruitment and hiring of Nelson in the United States was a "commercial activity" of the Saudi Government". The case was decided under the commercial exception and no under the tortiuos exception for the nexus territorial requirement of the last provision that requires that the effect of the tortuous act must have taken place within the territory of United States., but in this case the conduct has taken place in Saudi Arabia. In fact only the recruitment and the hiring has taken place in United States.

First remark is the relationship between the commercial exception and tort exception, it is necessary to underline that the open clause of section 1605 (a) (5) makes clear that the tort exception is subsidiary to commercial activity exception in section 1605 (a) (2) FSIA, so the tort exception is not *legis specialis* to the commercial activity.

In this case the Supreme Court has reduced the latitude for interpreting the FSIA to provide a remedy in domestic court for international torts, as violation of human rights committed by foreign states outside the forum state. The tort exception was precluded for lack of a territorial link and the commercial activity could not be a basis for the claim, because the activity was held to be governmental, it would be irrelevant for the tort exception.

The Supreme Court seems to have remained entrapped in the acts *jure imperii* and *jure gestionis* categorisation.

It is important to consider that national courts had be free to interpret the content of the rule of State immunity in case of violation of human rights, at the time of decision, maybe the *Nelson* case will be not decided in the same way.

The restrictive interpretation adopted by the Supreme Court of United States affirms the immunity of foreign State in cases of violation of fundamental human rights.

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It is remarkable that lower courts has resorted to various means to interpret the statute that the foreign State was not entitled to immunity for important violations of international law, between this theories

Alleged waiver by violation of fundamental human rights law argument

In *Princz* and other cases a broader argument based on implied waiver has been advanced.

Hugo Princz v. Federal Republic of German

Hugo Princz, a United States national, was arrested by German officials in what is now Slovakia and sent to several concentrations camps. There he was forced to work under conditions defying any standards of humanity. The plaintiff tried to seek a compensation, but his request was denied because his inability to the requirements of the statute.

He sued the Federal Republic of Germany in USA and the Germany's plea of immunity was rejected by the District Court. Then the Court of Appeal reversed and dismissed the case. The plaintiff invoked the commercial activity exception, the international agreement exception and the implied waiver exception of the FSIA.

The most important issue was if in this case would be applicable the implied waiver exception of section 1605 (a)(1) FSIA[62]. It has been argued that Germany has waived sovereign immunity under the FSIA by violating *ius cogens.*[63]

The implied waiver has been advanced in the following lines: genocide, slavery murder and torture are recognized as international crimes and constitute violations of *jus cogens* norms of international law. As they are non-derogable, binding all States, and cannot be set aside by the consent of a State.[64] The State who abdicates to act in accordance with the *erga omnes* obligations consciously waives its right to sovereign immunity.

The argument implied the majority of the Court has rejected waiver of sovereign immunity by a State, which acts violating human rights norms, because it was the only possible result under the FSIA.[65] The Court held that the provision of FSIA relating to waive of immunity is subject to an intentionally requirement.

For the judge Waid was applicable the principle of universal jurisdiction, and for this effect a state violating international law was always internationally responsible. This case is important to underline the potential conflict between states and individual in international law. The international law recognises the state and its sovereignty, by granting immunity and the position if individual, i.e. his fundamental human rights, has to be integrated into the system.

Other argument, quite similar is

The Treaty Exception

This exception provides that immunity should not apply if its application expressly conflict with provision to which the *forum* state is a party[66], particularly by the reference to human rights treaties.

One important example of application of this theory was *Von Dardel v. URSS*[67].

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[62] § 1605. General exceptions to the jurisdictional immunity of a foreign state (a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case-- (1) in which the foreign state has waived its immunity either explicitly or by implication, notwithstanding any withdrawal of the waiver which the foreign state may purport to effect except in accordance with the terms of the waiver.

[63] Judge Waid in his dissenting opinion said "Germany waived its sovereign immunity by violating the *jus cogens* norms of international law condemning enslavement and genocide".

[64] FOX HAZEL, THE LAW OF STATE IMMUNITY, Oxford University Press, Oxford (2002).

[65] Hugo Princz did not succeed, but on 19 September 1995, the German and United States Governments concluded an executive compensation agreement in which the German Government agreed to pay $ 2,1.

[66] De Vittor Francesca, *Immunità degli Stati dalla giurisdizione e tutela dei diritti umani fondamentali*, 3 RIVISTA DIRITTO INTERNAZIONALE 573 (2002). This theory seems to be found on a extremely wide interpretation of conventional norms. Also, the treaties doe not affirm any rights to individual to suit a claim against a State.

[67] Von Dardel *v.* Union of Soviet Socialist Republics, 11 ILR 258 (1985).

Von Dardel v. URSS

Mr Von Dardel brought an action against URSS for damages caused for an unlawful imprisonment and possible death of his half-brother Raoul Wallenberg, a swedsh diplomat. Wallenberg was arrested by the Soviet Union, despite the fact that he was entitled to diplomatic status. The Court entered a judgement against the URSS and denied immunity on the basis that FSIA includes standards of international law, so a government is not immune for certain acts in violation of the universally accepted law of nations.

The Courts stated, "By explicitly agreeing to be bound by terms of those agreements, the URSS has implicitly waived in this section alleging their breach."

This case is the only decision that contains an exception to immunity for "violations of significant international standards". The Court justified her reason on the basis that of universal jurisdiction for violations of international law norms with *jus cogens*, as *erga omnes* character.[68]

This example is particularly significant on the basis that the plaintiffs were not US citizens and also the acts were be caused outside the forum State.

Unfortunately, this case is the only example of the application of treaty immunity argument and cannot be considered relevant for international practise.

1.2 **UNITED KINGDOM**

Pinochet case [69]

This case is important because illustrates the problem of jurisdiction and immunity found by national courts. Before House of Lords, Pinochet alleged that he was entitled to immunity because he was a former Head of State and so the facts committed were with government authority no committed by him.

The decision of House of Lord was about extradition and the court's statement on international criminal jurisdiction and immunity was *obiter dictum*.

Pinochet was arrested in London on 16 October 1998 pursuant to a provisional warrant issued by Metropolitan Stipendiary Magistrate and the principal charges were torture, conspiracy to

[68] The concept of extraordinary judicial jurisdiction over acts in violation f significant international standards has also been embodies in the principle of "universal" violations of international law (…) The concept of universal violations is not limited to criminal jurisdiction, but extends t the enforcement of civil law as well", 77 ILR (1988).

[69] R. *v.* Bow St. Magistrates *ex parte* Pinochet (No 3), ILM 1302 (1999).

torture, hostage taking, conspiracy to make hostages, murder and conspiracy to murder. Pinochet affirmed to be entitled as a former Head of State to sovereign immunity and charges against him concerned acts, which he was alleged to have performed in the exercise of his functions as Head of State.

The House of Lords decision found that a former Head of State was not entitled to immunity for violation of international criminal law because a Head of State have such immunity for its officials acts, but "torture" has not capable to be classified as "official act " of State. The majority decided that section 20 of S.I.A. 1978, according immunity to a former head of State "only in respect of acts performed in the exercise of his functions as head of State."

The Pinochet case supports a difficult model where international crimes relating to violation of fundamental human rights are involved. The State is responsible in international law for certain group of international crimes at the present time causing personal injuries. In this case officials of State may be held subject to personal criminal liability for their participation in such crimes.

Concerning the national statute adopted by United Kingodm regarding the issue of foreign immunity, the SIA, as mentioned-above, don't include any international law exception and law tort exception, art. 5, requires strict conditions for its application that seems difficult to deny immunity in case of violation of human rights.

Other example of application of SIA is there cent case of *Jones v. Saudia Arabia*.

Jones v. Saudia Arabia [70]

The first claim was made by Mr. Jones against the Kingdom of Saudi Arabia for damages for torture and unlawful imprisonment. Tree claimants against four Saudi Arabian individuals for systematic torture made the second claim.

The first claim's against the Kingdom was dismissed, in the light of the decision of the ECHR in the case Al-Abusani *v.* United Kingdom, and the Court found that the Kingdom was entitled to immunity under section 1 of the State immunity Act 1978. The Court of Appeal stated that there is no basis for an argument that a violation of *jus cogens* norm would exclude immunity. Also if an international agreement requires to punish particular crimes or impose to

[70] UK Court of Appeal (Civil Division), Jones *v.* Ministry of the Interior Al-Mamlaka Al-Arabiya as Sudiya, [2004] EWCA Civ 1394 [2004], All ER (D) 418 (Oct. 28 2004).

provide civil remedies for the victims of the prohibited conduct, cannot be considered as a waiver of immunity, for the same reason cannot be consist a general rule binding on non-parties. The State has the in any case the option to agree explicitly to such a provision.

1.3 CANADA

Finally, also the domestic courts of Canada face to cases brought by an individual to obtain a kind of remuneration for damages in violation of human rights, caused by a foreign State, apply strict the disposition of State Immunity.

Bouzari v. Iran[71]

Bouzari commenced the action in the Ontario Superior Court of Justice, on November 24, 2000, against Iran seeking a compensation suffered in Iran. From June 1993 to January 1994 Bouzari was imprisoned and tortured by the agents of the Islamic Republic of Iran.

The decision of the Ontario Court dismissed Bouzari'civil action and was confirmed by the court of Appeal.

The reason of the Court of Appeal was focused in two principles: the prohibition of torture, as international human rights, and the state immunity, which requires that sovereign states not be subjected to other jurisdiction.

This action, before a foreign state, necessary engaged the principle of sovereign immunity. This principle of international law has been incorporated into the Canadian domestic law trough the enactment of the Federal State Immunity Act. The Court has found that none of the tree exceptions the appellant advances applied to this case, so none of the relevant exceptions in the SIA permits a civil claim against a foreign state for torture committed abroad.

The appellant argued that the SIA must be read in conformity with the Canada's public international law, so Canada is bound to permit a civil remedy against foreign state for torture.

The Court dismissed this argument because "the SIA so clearly provides the code for according state immunity as a matter of Canadian domestic law. Even if Canada's international law obligation required that Canada permit a civil remedy for torture abroad, Canada has legislated in a way that does not to do."

According to the SIA, sec. 3 is there a complete state immunity except as provided by the SIA.

[71] Bouzari v. Iran, 2004 CanLII 871 (On.C.A.), (2004), 243 D.L.R. (4th) 406.

Regarding the Canada obligation under customary international law the Court found that prohibition of torture is a rule of jus *congens*, but doesn't carry with it the obligation to provide the right to a civil remedy for torture committed abroad.

The balance between the condemnation of the torture as an international crime against humanity and the principle that a "state must treat each other as equals not be subjected to each other's jurisdiction does not provide a civil remedy against a foreign state for torture committed abroad."

Maybe the Court affirmed this balance could be change through the domestic legislation of States, however is not a change that could be caused by a domestic court to add an exception to the SIA.

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This case gives the opportunity to introduce some first considerations regarding domestic practise in state with sovereign immunity laws. In fact Bouzari case presents some similarity with other two cases, analysed before, as Al-Adsani case and Nelson case. The first particularity, even quite obvious, is that in all cases the domestic courts applied national laws prevailed the immunity concept, even if the individual claimed for serious human rights violation, as torture in Al-Adsani and Nelson cases.

The European Court of Human Rights, particularly, has found no international standards to support the reason in the opposite view, so even is reasonable to consider the existence of a different trend in international law in the cases concerning personal injury, this is not universal.

The most strict interpretation resulted from Nelson case, where the national court found not applicable the tort exception, even in front a case of torture, for the lack of a territorial link as foreseen.

2 *JURISPRUDENCE IN COUNTRIES WITHOUT IMMUNITY ACT*

2.1 GREECE

The decision *Prefecture de Voiotia v. Republic of Germany* is one of most important case regarding the necessity to adapt the traditional concept to immunity to the changes of the society. This decision, even it has been modified by the Special Court after two years, maybe will have a considerable effect on the future development and treatment of foreign state immunity.

Prefecture de Voiotia v. Republic of Germany[72]

The Prefectura of Voitia claimed US $ 30 million damages in compensation for atrocities committed by German occupation forces in the village of Distomo on June 10th, 1994. The Ellenic Supreme Court decided to deny immunity to German for acts *jure imperii* in breach of jus *cogens* obligations.

The Court held that the "torts in question were directed against specific persons limited in number who resided in a specific place, who has nothing to do with the resistance activity resulting in the death of German soldiers taking part in a terror operation against the local population … (they were) hideous murders that objectively were not necessary in order to maintain the military occupation of the area or subdue the underground action, carried out in the territory of the forum by organs of the German Third Reich in abuse of sovereign power." Such acts were "in breach of rules of peremptory international law (art. 46 of the Hague IV Regulations) and they were not act *jure imperii*." Also the Court concluded that the Germany has tacitly waived the privilege of immunity and that Greek court has jurisdiction to adjudicate this case.

The Court to support its conclusion that there is a customary international law of international law restricting sovereign immunity in case of tort committed in the territory of the forum of the State, noted that this rule was reflected in the European Convention of State Immunity (art. 11) and also in art. 12 ILC Convention.

Faced to the objection that the tort exception does not apply in the course of an armed conflict, the Greek Supreme Court had resorted that the argument that the violation of peremptory norms of international law protecting fundamental human rights law determine renunciation of all benefit and privileges according by international law, amounting to an implied waiver of sovereign immunity.

The doctrine has not unanimously accepted this argument affirming that international instruments on the subject, require the express consent of the interested party for submitting to the jurisdiction of the *forum* state and the adoption of this controversial waiver argument can be attributed only to a case of judicial activism.[73] The problem was that the Court was not able to offer any authority in support of this position.

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[72] Bantekas Ilia, *Case report: Prefectura of Voiotia Areios Pagos (Hellenic Supreme Court) May 4th , 2000 , case n. 11/2000,* 95 A.J.I.L. 198, January 2001.

[73] Bantekas Ilia, *Case report: Prefectura of Voiotia Areios Pagos (Hellenic Supreme Court) May 4th , 2000 , case n. 11/2000,* 95 A.J.I.L. 198, January 2001.

In fact the argument of Supreme Court was most important that was not mean because the absence of any precedent in the practise has pull the Greek to elaborate this argument. In any case the implicit waiver of State immunity by violation of binding rules of *jus cogens*, does not imply express consent because the State has not the faculty to waive.

Even if the Areios Pagos' arguments was subsequently reversed by the Special Supreme Court, is very interesting and suggests some solutions for overcoming the defence of state immunity.

2.2 ITALY

One of first effect of the argument adopted in *Prefectura of Vioitia v. Republic of Germany* was the case issued by the *Corte di Cassazione* in *Ferrini v. Republic of Germany*.

Italy was between the first states to recognize a restrictive doctrine of State immunity. In Italy a number of cases in the 1980s applied a restrictive approach, distinguishing between the State as bearer of sovereignity authority (ente pubblico) and the State as subject of private law (ente civile) and activities of a sovereign or private law nature (atti d'impero e atti di gestione).

By the 1970s, the rule was established in the Court of Cassation among the customary rules of international law. The Italian legal order recognised customary rules of international law the States from jurisdiction only has "to those relations which remains completely outside the Italian legal order or because those states act, albeit within the territory of some other states, as subject of international law, or because they act as the holders of a power of command within their own legal order and within their limits of their own territory."[74]

Since Italy has not foreign immunity act, courts make direct application of customary international law under article 10 of the Constitution[75] to settle disputes involving immunity claims.

Ferrini v. Republic of Germany

The plaintiff Mr. Ferrini, an Italian citizen, brought suit against the Federal Republic of Germany (hereinafter referred as FRG) a tort action for deportation and forced labor during World War II. Ferrini was deported to Germany for slave labour in 1944 and stay there until

[74] FOX HAZEL, THE LAW OF STATE IMMUNITY, Oxford University Press, Oxford (2002).
[75] Art. 10 provides: "The Italian juridical order conforms to the generally recognized norms of international law…".

1945. The Tribunal of first instance of Arezzo[76] dismissed the suit holding that the alleged acts were *iure imperii* acts and therefore the FRG was entitled to foreign sovereign immunity and so to the protection under customary international law. Ferrini than appealed the decision to the Florence Court of Appeal[77], but again lost on ground on state immunity.

But in its judgement of March 11, 2004, the Italian Court of Cassation overruled the lower courts findings and denied to FGR state immunity under customary international law.

The Court of Cassation rejected the petitioner's attempt to invoke the violation of article 10 and 24[78] of Italian Constitution to affirm the non-existence of an international customary rule on state immunity.

Briefly, articles 10 and 24 of the Italian Constitution assure the automatic incorporation of customary international law into the Italian legal system and the protection of individual by the courts.[79] The Court has rejected these contentions by stating that the foreign sovereign immunity is a rule of customary international law, also the Court stated that the scope of the application of this immunity is subject to a process of erosion.

Most important is the fourth grievance, based on the lack of immunity for violations of *jus cogens* that in the words of the court necessitated "a longer discourse", who took 24 pages before to reach the conclusion that "Federal Republic of Germany has no right to be recognised immune from the jurisdiction of the Italian judge (para. 12 of the judgement).

Regarding to the *dispositif* of the Court the most crucial issue was whatever the foreign state was entitled to immunity when its conduct, qualified by the Court as an act of "extreme gravity", has to be included under customary international law to an international crime, defined as a violation of international law who jeopardize "universal values that transcend the interests of the individual national communities."[80]

Definition of international crime

The Court has defined that the deportation and forced labour can be considered as crime under international law regarding numerous international instruments.

In the reasoning, we find cited the General Assembly Resolution 1/95 of December 11, 1946, the Statutes of *ad hoc* tribunals for the former Yugoslavia (ICTY) and Rwanda and the International Criminal Court. Also, at the time of Nuremberg Judgment, the prohibitions

[76] Tribunale of Arezzo, decision n. 1403/98, 3 November 2000, unpublished.
[77] Florence Court of Appeal, 16 November 2001.
[78] Art. 24 provides: "Everyone can take judicial action for the protection of individual rights and legitimate interests…".
[79] De Vittor Francesca, *Immunità degli Stati dalla giurisdizione e tutela dei diritti umani fondamentali*, 3 RIVISTA DIRITTO INTERNAZIONALE 573 (2002).
[80] Bianchi Andrea, *International decision : Ferrini v. Federal Republic of Germany: Italian Court of Cassation ruling on immunity for deportation and forced labour during World War II,* 99 A.J.I.L. 242, January 2005.

on deportation and forced labor laid down in the 1907 Hague Regulations were considered as customary law rules.

Moreover, the Court referred to the German law establishing the Foundation "Remembrance, Responsibility and Future" relating to compensating the victims of deportation and forced labour, that the court consider as an evidence that the facts alleged was not isolated but part of a strategy pursued by the German Reich.[81]

According to the art. 40 of the International Law Commission draft articles on state responsibility[82], the Court has elaborated in Ferrini case a notion of international crime, as serious violations of norms that aim to protect fundamental human rights. These norms are non derogable and take priority over other international rules (be customary or treaty based). Also the Court noted that the international crimes trigger the application of the principle of universal jurisdiction, for these reason the Court stated that it was no doubt that the universal jurisdiction was applicable in Ferrini, despite its being a civil case.[83]

In the Court's view, the grant of immunity in the case of international crimes can be prevent by the hierarchy thesis: peremptory norms such those protecting fundamental human rights law are on the top of international legal order and for this reason they prevail over all other treaty and customary rules, including those on state immunity. Also the Court dismissed the objection[84] that there is any norm of international law that expressly include this derogation to state immunity with the fact that all international customary rules belong to a system and that they must be interpreted each in relation to the others.[85]

The important remark that the Court has done is that the Ferrini has to be distinguish from the other recent case by the fact that the violation occurred in a state other than the forum state.

Finally, the Court affirm that it is uncontroversial that "in case of international crimes, functional immunity may not be invoked by foreign state' organs."[86] The Court stated that the functional immunity is a corollary of foreign sovereign immunity, so there would be no

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[81] Agreement concerning the Foundation "Remembrance, Responsability and the future", July 17, 2000, U.S.-FRG, 39 ILM 1298 (2000).

[82] See Commission's electronic archive on state responsabilità at http://www.un.org/law/ils/artchives/stateresposability.

[83] Gianinelli Alessia, *Crimini internazionali ed immunità degli stati dalla giurisdizione nella sentenza Ferrini,* 3 RIVISTA DIRITTO INTERNAZIONALE 685 (2004).

[84] Cf. para. 9 of the judgement:"Norme inderogabile che si collocano al vertice dell'ordinamento internazionale, prevalendo su ogni altra norma, sia di carattere convenzionale, che consuetudinario".

[85] Cf. para. 9.2 of the judgement.

[86] Gianinelli Alessia, *Crimini internazionali ed immunità degli stati dalla giurisdizione nella sentenza Ferrini,* 3 RIVISTA DIRITTO INTERNAZIONALE 685 (2004). The Court didn't seem to be aware of the International Court of Justice's 2002 judgement in *Arrest Warrant of 11 April 2000* (Dem. Rep. Congo *v*. Bel.), 2002, ICJ.

reason to uphold the immunity of the State while denying the immunity of its organs in respect of the same acts.[87]

The facts that the facts were carried out in the *forum* state and their qualifications as international crimes triggering the principle of universal jurisdiction, leaded the court to affirm the jurisdiction against the Federal Republic of Germany and to charge the Tribunal of the first instance.

First of all, is undoubting that the most important feature is the richness in terms of cross references to the case law of national and international courts. It is really important that the Court pay heed to what other jurisdictions do.[88] Also the Italian Court doesn't hesitate to take distance.

This decision was not unanimously accepted by the legal doctrine.

[87] Bianchi Andrea, *International decision: Ferrini v. Federal Republic of Germany: Italian Court of Cassation ruling on immunity for deportation and forced labour during World War II,* 99 A.J.I.L. 242, January 2005.
16 De Vittor Francesca, *Immunità degli Stati dalla giurisdizione e tutela dei diritti umani fondamentali*, 3 RIVISTA DIRITTO INTERNAZIONALE 573 (2002).

CONCLUSION

The first part of this paper has shown that the law of State immunity is not static. In fact the last hundred years have seen enormous changes. The principle of State immunity has long ceased to be a blanket rule exempting States from the jurisdiction of courts of law. The edifice of absolute immunity of jurisdiction began to crumble in the quarter of the 20th century with the advent of State trading. The exceptions to absolute immunity have gradually come to be recognized by national legislators and courts. The exceptions in question have also found their way into the international law on State immunity, especially the torts exception.

That this is so shown for example by the State immunity Act 1978 of United Kingdom or in the Section 1605 (a) of the United Stets Foreign Sovereign Immunities Act (1976).

The same solution has been retained in treaty law. Even if it was also seen that there are no uniform international rules on the subject–for example, there is no widely ratified treaty containing the rules relating to State immunity generally as opposed to specific treaties such as the UN convention on Diplomatic Relations from 1961.

This makes it necessary to look to customary international law as revealed by the practise and *opinio juris* of States.

The practice of international tribunals has not been so supportive of an expanded view of responsibility for human rights abuses. The International Court of Justice and the European Court of Human Rights have supported the more classical rule providing for State immunity (albeit by slim majorities, for example, in the *Al-Adsani* case before the ECHR), and probably the International Courts have unfortunately missed the opportunity to iterate a ruling on the widely debated issues of the demand of state immunity and the protection of human rights.

National courts in adopting the doctrine of state immunity have attempted to adapt, by way of interpretation, its content to the changing demands of international system.

Looking at domestic practice we have seen that a number of domestic courts, both in states with sovereign immunity acts and in those states without sovereign immunity acts, have allowed exceptions to State immunity for claims involving serious human rights violations. In fact the many countries where State immunity is an issue left to be determinate by the courts - these are, paradoxically, the courts of civil law countries - follow the same rule.

However, an analysis of the reasoning of selected domestic practice shows a clear split between States with sovereign immunity acts and those without such acts.

First US and UK legislation, on one hand, and case-law of civil law countries, on the other, differ in the jurisdictional connections that are required to allow the *forum* State to exercise jurisdiction over claims brought against a foreign State that involve human rights abuses.

Also the presence of national laws provide the opportunity to a more restrictive application of the traditional principle of sovereign immunity in fact the application of national statutes which grants immunity to States in respect of personal injury unless the exceptions expressly included, in the most of the cases not allowed to provide a civil remedy to the applicant in respect of human rights violations alleged carried out by the foreign State.

Instead, the practise of civil law seems to apply customary international law to determine claims involving sovereign immunity. This general tendency, together with a complete absence of an immunity act, appears to show a greater reliance on international law in civil law countries. The Italian Court of Cassation and Hellenic Supreme Court have used international law when have no authority to support their reasons. So the arguments adopted to deny immunity for acts *iure imperii* in breach of *jus cogens* obligations, were originals.

Also, the practise of courts without immunity laws seems to move away from the traditional distinction between acts *iure imperii* and *iure gestionis.* In the case of *Prefectura of Voiotia v. Republic of Germany* acts *iure imperii* adopted in breach of *jus cogens* obligations were found not to be entitled to immunity.

The doctrine of restrictive immunity excludes commercial or private transactions from immunity and it is becoming common for the courts to hold that a mere sovereign act is not sufficient to guarantee a State immunity from the jurisdiction of the other state's courts when a *jus cogens* norm is violated even in cases where the acts would be described as *jure imperii*. In fact the invocation of sovereign immunity served legitimate interest, but when we come to the balancing exercise of weighing the various interests involved, the plea of sovereign immunity loses much of its weight in view of the development of international law and the current status of the law on sovereign immunity.

The doctrine of state immunity has in modern times been subjected to an increasing number of restrictions, maybe with the help of legal doctrine and judicial incentives and activism the trend being to reduce its application in view of development in the field of human rights that strengthen the position of the individual.

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