CASE NOTE

AL-ADSANI v UNITED KINGDOM*

STATE IMMUNITY AND DENIAL OF JUSTICE WITH RESPECT TO VIOLATIONS OF FUNDAMENTAL HUMAN RIGHTS

CONTENTS

I INTRODUCTION

The tension between the principle of state immunity and the principle of access to court has proven a challenge to courts and has recently been drawing increasing attention from international law specialists. Since plaintiffs are making use of private lawsuits in human rights abuse cases more frequently than in the past,[1] the practical importance of the issue is enhanced. Consequently a thorough analysis of the bases of those principles is necessary. This case note demonstrates the need for a new approach to sovereign immunity in claims related to fundamental human rights violations attributed to foreign states. It points out that only by resorting to the rationale of both the aforementioned principles can domestic courts reach an adequate judgment in cases dealing with such claims. This means that there are situations where immunity should be rejected — in compliance with international law — even when the reading of applicable legislation would provide differently. This case note is based on the recent decision of the European Court of Human Rights in *Al-Adsani v United*

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* *Al-Adsani v United Kingdom* (2002) 34 EHRR 273.

1 See International Law Commission, *Report of the Working Group on Jurisdictional Immunities of States and Their Property*, UN Doc A/54/10, annex, ch VII.

Kingdom,[2] which emphasises the relevant and present controversy that the theme engenders. A brief account of the case provides a convenient introduction to the subject.

The case arose from the allegation that Sulaiman Al-Adsani, a British and Kuwaiti national, was tortured in Kuwait by order of a Kuwaiti Sheikh in 1991.[3] In civil proceedings first instituted in the United Kingdom, Al-Adsani sought compensation against the Sheikh and the State of Kuwait and, later, against two further individuals. On 21 January 1994 the British Court of Appeal granted leave to serve the writ on the Kuwaiti government,[4] mainly on the basis that there were three elements indicating the existence of the responsibility of the foreign state: the claimant was taken to a state prison, government transport was used for his transportation to the prison, and then, in prison, he was mistreated by public officials.[5] However, on 12 March 1996, the Court decided to grant immunity to Kuwait on the basis that the circumstances of the case did not constitute an exception to the immunity principle under the terms of the *State Immunity Act 1978* (UK).[6] As Al-Adsani was refused leave to appeal by the House of Lords on 27 November 1996, and his attempts to obtain compensation via diplomatic channels proved unsuccessful,[7] he initiated proceedings against the UK in the European Court of Human Rights on 3 April 1997.[8] The Court delivered its judgment on 21 November 2001.

According to the applicant,[9] in abstaining from asserting its jurisdiction by recognising immunity for Kuwait, the UK failed to secure his right to not be tortured and denied him access to court, therefore violating arts 3 (together with

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2 (2002) 34 EHRR 273 ('*Al-Adsani*').

3 The factual circumstances of the case can be summarised as follows: Al-Adsani went to Kuwait during the Gulf War in 1991 to serve as a pilot in the Kuwaiti Air Force. While there, he 'came into possession of sexual video tapes involving Sheikh Jaber Al-Saud Al-Sabah, who is related to the Emir of Kuwait and said to have an influential position in Kuwait'. Afterwards, 'the compromising tapes entered general circulation, for which Al-Adsani was held responsible by the Sheikh'. After the expulsion of Iraqi armed forces from Kuwait, the applicant alleges to have been persecuted, arrested and tortured on more than one occasion by the Sheikh. On approximately 2 May 1991, the Sheikh and two other men allegedly 'beat him and took him at gunpoint in a government jeep to the Kuwaiti State Security Prison', where he was repeatedly beaten by guards until he was released on 5 May 1991, after being 'forced to sign a false confession'. Then, on approximately 7 May 1991, the applicant was allegedly kidnapped by the Sheikh and taken to the palace of the Emir of Kuwait's brother, where he was 'repeatedly held underwater' and then 'seriously burnt'. With serious burns and severe psychological damage, Al-Adsani was initially treated in a Kuwaiti hospital. Before returning to England on 17 May 1991, where he spent a further six weeks in hospital. While he was in England, he 'received threats warning him not to take action or give publicity to his plight'. On 29 August 1991, Al-Adsani instituted civil proceedings in the UK for compensation against the Sheik and the State of Kuwait: *Al-Adsani* (2002) 34 EHRR 273, [9]–[19].

4 Ibid [16].

5 Ibid.

6 Ibid [18].

7 Ibid [19].

8 Similar issues and findings appeared in *Fogarty v United Kingdom* (2002) 34 EHRR 302 and *McElhinney v Ireland* (2000) 29 EHRR 322.

9 *Al-Adsani* (2002) 34 EHRR 273, [H6].

arts 1 and 13) and 6(1) of the Council of Europe *Convention for the Protection of Human Rights and Fundamental Freedoms*.[10]

The alleged violation of art 3 (prohibition of torture) was promptly rejected by the European Court of Human Rights, which unanimously recognised the lack of causal connection between the torture suffered by the applicant and any act or omission of the UK government.[11] The complexity of the case increased substantially with regard to the alleged violation of art 6(1), which addressed access to court. This generated a number of questions: to what extent does the principle of immunity from jurisdiction imply a violation of the principle of access to court? Would a breach of peremptory norms of general international law (*jus cogens*) (such as the prohibition on torture) give rise to a new exception (*contra legem*) to the principle of state immunity? Should the principle of access to court prevail in these situations?

These questions call for an analysis of the foundations of state immunity and its compatibility with the principle of access to court, and of the possible effect of a breach of fundamental human rights by a foreign state on this relationship. This case note will critique the decision of the Court and conclude whether, or in which cases, the breach of fundamental human rights by a state could create an exception to the principle of state immunity.

II THE PRINCIPLE OF STATE IMMUNITY

A *The Concept and Its Evolution*

Immunity from jurisdiction is defined as 'the exemption of certain persons from civil, criminal or administrative jurisdiction, by virtue of international legal norms, originally from custom, practice, doctrine, jurisprudence and, more recently, treaty law'.[12] The main effect of the principle of jurisdictional immunity[13] is apparent in international procedural law, where it removes the judicial competence of local courts. This then prevents jurisdiction from being asserted over the beneficiaries of immunity. Foreign states represent only one of the several categories of beneficiaries of jurisdictional immunities granted by

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10 Opened for signature 4 November 1950, 213 UNTS 222 (entered into force 3 September 1953) ('*ECHR*'). As at 1 October 2003, there were 58 states parties. The UK ratified the *ECHR* on 8 March 1951.

11 *Al-Adsani* (2002) 34 EHRR 273, [35]–[41].

12 Haroldo Valladão, *Direito Internacional Privado* (1978) vol 3, 145 (trans of: '*isenção, para certas pessoas, da jurisdição civil, penal, administrativa, por força de normas jurídicas internacionais, originalmente costumeiras, praxe, doutrina, jurisprudência, ultimamente convencionais*').

13 Some make a distinction between 'immunity from jurisdiction' and 'jurisdictional immunity', arguing that the latter designates both immunity from jurisdiction in the true sense of the term (court hearing), and immunity from execution of the sentence: Paul Reuter, 'Quelques réflexions sur la nature des immunités de l'État en droit international public' in Paul Reuter (ed), *Le développement de l'ordre juridique internationale: Écrits de droit international* (1995) 99, fn 2. This distinction is not made in this case note, since the current and classic usage of the term 'immunity from jurisdiction' allows one to apply it both in the broader sense (as a synonym of 'jurisdictional immunity') and in the strict sense of the term. Specifically with regard to immunity from execution of sentence, see Guido Fernando Silva Soares, *Órgãos dos estados nas relações internacionais: formas da diplomacia e as imunidades* (2001) 206; Christoph Schreuer, *State Immunity: Some Recent Developments* (1988) 125–67.

international law: consular agents, diplomatic agents, heads of state, other government agents, international organisations and their personnel, as well as foreign warships and troops regularly admitted within the territory of the forum also enjoy immunity before local tribunals.[14]

Paul Reuter identifies two distinct groups of jurisdictional immunities, each with different origins and foundations. The first group includes the immunities related to diplomatic and consular services, foreign war vessels in national and territorial waters, and foreign troops occupying a state's territory.[15] The second includes the immunities invoked by a state when it faces the jurisdiction of a foreign state's tribunals or enforcement proceedings.[16] The first group of immunities is founded on the need to ensure the right of foreign agents legally established in a country to conduct their activities freely, and to secure the inviolability of the property of foreign states situated within that territory.[17] It aims to guarantee the exemption and the independence of activities that need to be carried out by a state in the territory of another state. Such immunities are firmly established under public international law[18] and are universally codified.[19] The second group of immunities includes state jurisdictional immunity, which is more directly relevant to *Al-Adsani*. As the title denotes, this immunity applies

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14 It is important to note that, for the purpose of recognition of immunity, 'foreign state' is predominantly understood to include political subdivisions within a state (such as the state units comprising a federal state, and other entities of a state, including corporations integrating its indirect administration). In this regard, see Hildebrando Accioly, *Manual de direito internacional público* (10th ed, 1973) 36; Jacob Dolinger, 'A imunidade jurisdicional dos Estados' (1982) 76 *Revista de Informação Legislativa* 5, 9; Júlio Marino de Carvalho, 'A renúncia de imunidades no direito internacional' (1991) 674 *Revista dos Tribunais* 31, 50; Valladão, above n 12, 152. Valladão points out that this question cannot be considered resolved, as in 1932 the French *Cour de Cassation* rejected immunity for the state of Ceará. Similarly, in 1949 the Seine Civil Court rejected immunity for the state of Amazonas.

15 Reuter, above n 13, 102.

16 Ibid.

17 Ibid 103–4.

18 These immunities do indeed date far back. According to Celso de Albuquerque Mello, '[*a*]*s imunidades e privilégios diplomáticos existem desde a Antiguidade, quando os agentes diplomáticos se revestiam de um aspecto sagrado. Em Roma, a violação de embaixadores romanos era dos motives que tornavam uma guerra justa*' (trans: '[i]mmunities and diplomatic privileges date back to Antiquity, when diplomatic agents gave themselves a sacred air. In Rome, the violation of Roman ambassadors' immunity was sufficient grounds for just war'): Celso de Albuquerque Mello, *Curso de direito internacional público* (11th ed, 1997) vol 2, 1210.

19 Reuter, above n 13, 104:

> *Ces immunités se présentent comme de corolaires necessaires de certaines dérogations à l'exclusivité de la competénce territoriale; elles sont rattachées à des règles fondamentales du droit international public et encadrées par des institutions aujourd'hui bien assises sur un plan universel. Il est ainsi en ce qui concerne l'exercice d'un pouvoir qui se presente comme une dérrogation licite à l'exclusivité de la souveraineté territoriale et qui comporte, en conséquence de son caractère licite des immunités qui permettent son fonctionnement pratique*[.]

Trans:

> These immunities constitute necessary corollaries to certain derogations from the exclusivity of territorial jurisdiction; they are related to fundamental rules of public international law and are framed by institutions today firmly based on a universal level. It is such with regard to the use of a power, which presents itself as a licit derogation from the exclusivity of the territorial sovereignty and which bears, as a consequence of its licit character, immunities that allow its practical functioning[.]

directly to foreign states,[20] and means that the local courts of a state may not hear legal disputes to which other sovereign states are party without the consent of those states.[21] State immunity is derived from the fundamental rights of states to independence and legal equality,[22] corollaries of the concept of sovereignty. Indeed, how could the courts of one state be allowed to assert judicial jurisdiction — one of the most expressive functions of state sovereignty — over an equally sovereign foreign state?

In the 19th century recourse was sought to the ancient feudal rule *par in parem non habet imperium* to justify the state immunity doctrine.[23] The doctrine, based on the adapted adage '*par in parem non habet judicium*' or '*jurisdictionem*', was initially conceived in absolute terms. In other words, except when the immunity

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20 It can be seen that immunities conferred on other beneficiaries — with the exception of the immunities of international organisations and their personnel — also have the foreign state they represent as their ultimate holder, and only exist because of the existence of this state. This does not, however, apply in identifying the rationale and purposes of the two kinds of immunities, in that the logic of the regime to which the one is subject cannot always be transposed to the other: Reuter, above n 13, 103. The immunities of international organisations and their personnel would, by analogy, be in the first group. According to Lalive,

> [*q*]*uant aux organisations internationales, nous avons constaté que l'immunité juridictionelle reposait sur un autre fondement, à savoir sur impérieuses nécessitées de fonctions, qui justifient une immunité absolue. Celle-ci, prévue par de nombreux textes, est devenue — tout au moins pour les grandes organisations à vocation universelle, mais peut-être aussi pour certaines organisations régionales — coutume internationale, dont l'observation s'impose aux États membres et même, dans certaines conditions, aux États tiers. En d'autres termes, il est indispensable à une organisation internationale publique, dotée de la capacité juridique de droit interne et d'une large mesure de personnalité internationale, de pouvoir bénéficier de certaines immunités — au premier rang desquelles l'immunité juridictionelle — pour exercer ses fonctions avec efficacité et en toute independence*[.]

Jean-Flavien Lalive, 'L'immunité de jurisdiction des états et des organisations internationales' (1953) 84 *Recueil des Cours* 14, 387–8. Trans:

> [a]s regards international organisations, we have verified that jurisdictional immunity relies upon another basis, that is, functional necessity, which justifies an absolute immunity. This, provided for by many statutes, has become — at least for the large organisations with universal scope, but maybe also for certain regional organisations — an international custom, whose observance imposes itself on member states and even in certain conditions, on third states. In other words, it is indispensable for a public international organisation, endowed with legal capacity in municipal law and with extensive international personality, to benefit from certain immunities — above all from the jurisdictional immunity — in order to perform its functions with efficiency and with full independence[.]

In the words of Celso de Albuquerque Mello, '[*a*]*s organizações internacionais, para que possam bem desempenhar as suas funções, gozam de privilégios e imunidades que são dados também a seus funcionários ... que são consagrados em acordos internacionais concluídos entre elas e os Estados-membros*': Mello, *Curso de direito internacional público*, above n 18, vol 1, 567 (trans: '[i]nternational organisations, in order to perform their functions well, benefit from privileges and immunities which are also granted to their personnel, and which are provided for in international agreements concluded between them and the member states').

21 Eugenio Hernández-Bretón, 'La relatividad de la regla "*Par in Parem Non Habet Jurisdictionem*"' in Instituto de Derecho Privado, Facultad de Ciencias Jurídicas y Políticas, Universidad Central de Venezuela, *Libro-Homenaje a Haroldo Valladão* (1997) 525, 526.

22 Mello, *Curso de direito internacional público*, above n 18, vol 1, 416.

23 According to that rule, the feudal lords were only accountable to their superiors, and not their peers: Dolinger, 'A imunidade jurisdicional dos Estados', above n 14, 6.

was waived by its holder, the local judiciary could never judge a claim to which a foreign state was party.[24] However, with increased state activity in economic sectors which had previously been considered private, '[i]t was not long before those who considered this [state] immunity to be a wholly unjust disadvantage for the individuals or legal entities of private law that transacted with the governments reacted'.[25] This is because the state organisations kept 'demanding the right to invoke immunity in legal proceedings arising from questions relating to their competitive activities'.[26]

As a result, by the end of the 19th century the doctrine began to differentiate between acts practiced by states that were *acta jure imperii* and those that were *acta jure gestionis*. Hence the doctrine of relative state jurisdictional immunity was created, which was restricted to actions relating to sovereign or public acts (*jus imperii*), and excluded civil actions concerning private or commercial acts (*jus gestionis*).[27] This doctrine slowly gained support in European jurisprudence. In the period between the World Wars it reached a point where the theories of absolute immunity and relative immunity coexisted;[28] after World War II, the latter superseded the former. Today, three normative instruments have enshrined this change in international law, burying the concept of absolute state immunity;[29] namely the *European Convention on State Immunity*,[30] the *Foreign Sovereign Immunities Act 1976* (US),[31] and the *State Immunity Act 1978* (UK).[32]

The International Law Commission's Draft Articles on Jurisdictional Immunities of States and Their Property also reflect the universal acceptance of

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24 See generally de Carvalho, above n 14, 31; Soares, above n 13, 198; Luiz Carlos Sturzenegger, 'Imunidades de jurisdição e de execução dos estados: proteção a bens de Bancos Centrais' in *Folheto do departamento jurídico do Banco Central do Brasil* (undated) 8.

25 Dolinger, 'A imunidade jurisdicional dos Estados', above n 14, 10 (trans of: '[*n*]*ão tardou a reação dos que consideravam que esta imunidade redundava numa injusta desvantagem para os particulares e às pessoas jurídicas de direito privado que transacionavam com os governos*').

26 Ibid (trans of: '*os governos continuaram exigindo o direito de invocar imunidade em processos judiciais decorrentes de questões surgidas de suas atividades competitivas*').

27 Ibid.

28 Ibid. Bröhmer questions whether it can be said that state immunity was ever in fact absolute, given that the state could always waive its immunity: Jürgen Bröhmer, *State Immunity and the Violation of Human Rights* (1997) 16–17. At the time so-called absolute immunity was created, states did not engage in trading activities as they later came to do, so the activities they carried out in former times that ensured state immunity would be equally covered by the restricted principle today.

29 Absolute jurisdictional immunity had already been banned in the states signatory to the *Convention on Private International Law*, opened for signature 20 February 1928, OAS 34 ('*Bustamante Code*') arts 333–9.

30 Opened for signature 16 May 1972, ETS 74 (entered into force 11 June 1976) ('*Basel Convention*'). As at 1 October 2003, there were eight states parties.

31 *Foreign Sovereign Immunities Act of 1976*, 28 USC § 1602 (2000) ('*FSIA*').

32 For a detailed analysis of these three instruments, see Dolinger, 'A imunidade jurisdicional dos Estados', above n 14, 20. Australia, Canada, Pakistan, Singapore and South Africa have also drawn up specific laws on the subject. In Brazil, with the exception of the *Bustamante Code*, above n 29, (which is only applicable to the party states), there is no written law on the subject. The Brazilian Federal Supreme Court only belatedly admitted relative state immunity in 1989, in *Civil Appeal No 9696-SP* (1989) 21(133) *Revista Trimestral de Jurisprudência* 159.

this change;[33] the International Law Commission embarked upon the codification process in 1978, and they were adopted in 1991. Article 5 starts with the general rule according to which 'a State enjoys immunity, in respect of itself and its property, from the jurisdiction of the courts of another State subject to the provisions of the present articles'. Part III (arts 10–17) then provides for 'proceedings in which State immunity cannot be invoked', establishing exceptions that confirm the restricted theory.

B *Exceptions*

The relative immunity doctrine allowed for exceptions to the principle of absolute jurisdictional immunity of states. In approaching these exceptions, national courts had but one parameter to guide them: the distinction between sovereign and commercial acts. This distinction often proved difficult to put into practice. The different definitions ascribed to *jus imperii* and *jus gestionis* by the courts of various countries led to uncertainty. It was possible for the same set of facts to yield divergent judgments, depending on the country in which they were submitted. This was exacerbated by the existence of two possible criteria for the classification of the act as *jure imperii* or *jure gestionis*: one focused on the nature of the act, the other on the purpose of the act. Judgments could be completely disparate depending on which criterion the courts adopted.[34] For this reason, contemporary state immunity conventions have preferred to avoid referring to the concepts of *jus imperii* and *jus gestionis*, opting instead for enumerating each of the categories of acts that constitute exceptions to the general immunity rule.[35]

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33 International Law Commission, Draft Articles on Jurisdictional Immunities of States and Their Property [1991] 2(2) *Yearbook of the International Law Commission* 12; UN Doc A/46/10 (1991).

34 Dolinger, 'A imunidade jurisdicional dos Estados', above n 14, 12–14.

35 This was the method adopted in the *Resolutions of the Institute of International Law (Hamburg)*, 11th session (1891) and the *Resolutions of the Institute of International Law (Aix-en-Provence)*, 46th session (1954): see Dolinger, 'A imunidade jurisdicional dos Estados', above n 14, 15–16. Two of the instruments that are directly related to the case under analysis — the *Basel Convention* and the *State Immunity Act 1978* (UK) — establish the following exceptions to state jurisdictional immunity:

1 commercial transactions;
2 contractual obligations to be performed in the territory of the forum;
3 labour contracts;
4 state participation in other legal entities;
5 intellectual property;
6 rights in immovable property situated in the territory of the forum;
7 rights in moveable or immovable property arising by way of succession or
8 gift;
9 rights relating to ships and their cargo;
10 arbitration; and
11 torts.

Note that the problem of classification as either *jus imperii* or *jus gestionis* has only been partially resolved, bearing in mind that the classic exception to jurisdictional immunity regarding proceedings relating to commercial transactions — maintained as one of the exception categories expressly cited in the instruments on state immunity — remains vague as to consensus on the definition of 'commercial transaction': Schreuer, above n 13, 10–14.

One of the categories provided for is that of torts.[36] Accordingly, a foreign state may not invoke immunity from jurisdiction before local courts for lawsuits in which it is alleged to have committed a tort. This restriction of the immunity principle is intimately related to the case under analysis, as violations of human rights are invariably addressed in domestic law as torts. As such, whatever is considered torture under international law will usually be considered personal injury actionable as a tort,[37] for which (at least in principle) the victim will be entitled to compensation under domestic law. It is interesting to note that the *Basel Convention* and domestic codifications of state jurisdictional immunity have distanced themselves from the classical theory of relative jurisdictional immunity, in that for certain categories (such as torts), it is no longer considered necessary to question whether the act was *jure imperii* or *jure gestionis*.[38] However, to constitute an exception under these instruments, a 'territorial connection' between the act committed by the foreign state and the forum state is required.[39]

In the UK this situation is regulated by the *Basel Convention* (which is very emphatic on this point) and the *State Immunity Act 1978* (UK). The *Basel Convention* provides that a foreign state cannot claim immunity from the courts of another state in proceedings which relate to redress for personal injury or damage to property 'if the facts which occasioned the injury or damage occurred in the territory of the state of forum, and if the author of the injury or damage was present in that territory at the time when those facts occurred'.[40] Section 5(a) of the *State Immunity Act 1978* (UK) confirms this requirement by establishing that a foreign state is not immune to proceedings in respect of death or personal injury 'caused by an act or omission in the United Kingdom'. The instruments also clearly provide that, unless the case falls within one of the statutory exceptions, the foreign states are entitled to jurisdictional immunity[41] — which explains the exhaustive enumeration.

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36 With the exception of the Pakistani law on state immunity, all the other laws on state immunity provide for an exemption for torts: George Ress, 'The Changing Relationship between State Immunity and Human Rights' in Michele de Salvia (ed), *The Birth of European Human Rights Law: Studies in Honour of Carl Aage Nørgaard* (1998) 174, 183. See also Schreuer, above n 13, 44–62.

37 Ibid.

38 José Francisco Rezek, *Direito internacional público* (2nd ed, 1991) 179; Schreuer, above n 13, 44.

39 Schreuer, above n 13, 51–2. The countries that have not adopted written law on the subject and continue to base themselves solely on the classical distinction between *acta jure imperii* and *acta jure gestionis* do not recognise this requirement of territorial connection; the limits on the judgment of foreign states for torts committed abroad are found in their general rules on international competence. On the other hand, as classification as *jus imperii* or *jus gestionis* is still of fundamental relevance in these systems, state immunity can be maintained if the illegal act resulting from an action or omission by the foreign state in the territory of the forum is qualified as *jus imperii*: Ress, above n 36, 186. Brazil is one of the countries that has no written law on the matter and bases its decisions on the customary *jure gestionis–jure imperii* distinction, yet seems to scorn this dichotomy when dealing with torts committed by foreign states. This can be inferred from the judgment of the Superior Court of Justice in *Interlocutory Appeal No 36493–2–DF* and *Civil Appeal No 14–2–DF* (1996) 8(81) *Revista do Superior Tribunal de Justiça* 143, the amendment to which reads that 'there is no jurisdictional immunity for the foreign State for torts'. No distinction is made between *jus imperii* and *jus gestionis*.

40 *Basel Convention*, above n 30, art 11.

41 Ibid art 15; *State Immunity Act 1978* (UK) c 33, s 1.

Article 12 of the International Law Commission's Draft Articles on Jurisdictional Immunities of States and Their Property follows this trend when it establishes that:

> Unless otherwise agreed between the States concerned, a State cannot invoke immunity from jurisdiction before a court of another State which is otherwise competent in a 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 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 the act or omission.

Classifying human rights violations which are attributable to states as *jus imperii* does not necessarily entitle violating states to sovereign immunity. Bearing this in mind, the greatest obstacle for plaintiffs who wish to file lawsuits against such states in countries that adopt the codified state immunity system is the territorial connection requirement.[42] This is because such violations generally occur in the territory of the offending state, not in the forum state. In recognition of this, a theory has emerged which asserts that states cannot plead immunity in respect of gross human rights violations,[43] even if committed outside of the territory of the forum state.[44]

III THE PRINCIPLE OF ACCESS TO COURT

A *Article 6(1) of the* ECHR

Article 6(1) of the *ECHR* provides that

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

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42 The legislation of other countries also demands this territorial nexus, although to differing extents: see, eg, *Law No 24488: Inmunidad de Jurisdicción de los Estados Extranjeros Ante los Tribunales Argentinos* (1995, Argentina) art 2(e); *Foreign States Immunities Act 1985* (Cth) s 13; *State Immunity Act* RSC 1985 (Canada) s 6; *State Immunity Act 1979* (Singapore) s 7; *Foreign States Immunities Act 1981* (South Africa) s 6; *FSIA*, 28 USC § 1605(a)(5) (1976). Section 13 of the Australian *Foreign States Immunities Act 1985* (Cth) provides:

> A foreign State is not immune in a proceeding in so far as the proceeding concerns
> (a) the death of, or personal injury to, a person; or
> (b) loss of or damage to tangible property, caused by an act or omission done or omitted to be done in Australia.

43 Such violations are unlikely to be classified as commercial acts in the majority of cases, which (according to Ress) helps to explain why this type of theory has not gained greater acceptance in civil law countries that have not codified state immunity: Ress, above n 36, 186.

44 See generally Bröhmer, above n 28, 19; Jordan Paust, 'Federal Jurisdiction over Extraterritorial Acts of Terrorism and Nonimmunity for Foreign Violators of International Law under the *FSIA* and the Act of State Doctrine' (1983) 23 *Virginia Journal of International Law* 191.

> the court in special circumstances where publicity would prejudice the interests of justice.

Article 6 of the *ECHR* establishes what can be termed the principle of legal protection, or principle of jurisdictional control, which corresponds to 'the principal guarantee of subjective rights'.[45] The content of this principle is present in various conventions on human rights and in the constitutions of many democratic countries.[46] As with all legal guarantees, this precept plays a fundamental role in 'ensuring the respect, effective enjoyment and enforcement of the rights of individuals'.[47] Indeed, '[t]here must be organs, instruments and procedures able to ensure that legal norms be transformed from abstract demands on human behaviour into concrete actions'.[48]

Within the range of guarantees that art 6 of the *ECHR* provides, one aspect is of prime interest; namely the availability of an accessible court.[49] Article 6(1) states: 'everyone is entitled to a … hearing … [by a] tribunal established by

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[45] José Afonso da Silva, *Curso de direito constitucional positivo* (15th ed, 1998) 431–3. Article 6 encompasses the principles of independence and impartiality of the judge, natural justice, rights to a hearing and defence, and the due process of law. Articles 6(2) and 6(3) of the *ECHR*, above n 10, provide:

> (2) Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.
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> (3) Everyone charged with a criminal offence has the following minimum rights:
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> (a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;
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> (b) to have adequate time and facilities for the preparation of his defence;
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> (c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;
>
> (d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
>
> (e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court.

[46] The legal guarantees are set forth in the *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171, art 14 (entered into force 23 March 1976) ('*ICCPR*'); *American Convention on Human Rights*, opened for signature 22 November 1969, 1144 UNTS 123, art 8 (entered into force 18 July 1978); *African Charter on Human and Peoples' Rights*, opened for signature 27 June 1981, 21 ILM 58 (1982), art 7 (entered into force 21 October 1986).

[47] da Silva, above n 45, 420 (trans of: '*assegurar o respeito, a efetividade do gozo e a exigibilidade dos direitos individuais*').

[48] Luís Roberto Barroso, *O direito constitucional e a efetividade de suas normas: limites e possibilidades da Constituição Brasileira* (5th ed, 2001) 123 (trans of: '[*é*] *preciso que existam órgãos, instrumentos e procedimentos capazes de fazer com que as normas jurídicas se transformem, de exigências abstratas dirigidas à vontade humana, em ações concretas*').

[49] See Jean-Claude Soyer and Michel de Salvia, 'Article 6' in Louis-Edmond Pettiti, Emmanuel Decaux and Pierre-Henri Imbert (eds), *La Convention Européenne des Droits de l'Homme* (2nd ed, 1999) 257–8.

law'.[50] Indeed it would be pointless for states to constitute 'independent and impartial' tribunals in their territories if they impede access to these courts. In *Golder v United Kingdom*, the European Court of Human Rights was of the opinion that

> [i]t would be inconceivable … that Article 6(1) should describe in detail the procedural guarantees afforded to parties in a pending lawsuit and should not first protect that which alone makes it in fact possible to benefit from such guarantees, that is, access to a court. The fair, public and expeditious characteristics of judicial proceedings are of no value at all if there are no judicial proceedings.[51]

The Court concluded that 'the right of access constitutes an element which is inherent in the right stated by Article 6(1)'.[52] The conflict between the right of access to court on the one hand, and the principle of state immunity on the other, arises because the latter serves precisely to impede the access of the applicant to local courts. Unless the defendant waives immunity, domestic courts must abstain from pronouncing final judgment on the merits of the case.

B *Compatibility with the Principle of State Immunity*

When examining the conflicting principles of non-denial of justice and state immunity, it is necessary to bear in mind that neither principle is absolute. The right of access to court is not an absolute right to a final judgment on the merits of the case;[53] otherwise it would lose its safeguarding role which guarantees the judiciary's control over the alleged violation of a subjective material right. This is because the right of access is subject to the ability of, and the need for, the forum to regulate access to court through norms that limit or condition the bases of jurisdiction. As such, the forum state enjoys a certain margin within which to restrict its jurisdictional activity; and in fact is obligated to do so, in keeping with the relevant rules of international law.[54] For instance, there is nothing to impede a domestic law prohibition on the provision of a final judgment when a procedural requisite or a cause of action is identified as lacking.[55] Another limitation on domestic jurisdiction is provided by the rules on the judicial

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50 Some claim that the tribunal, in addition to being accessible, should also be adequate (ie independent), impartial, established by law and competent to decide the cases brought before it: Soyer and de Salvia, above n 49, 259. The right to an independent and impartial tribunal thus comprises three elements:
(a) tribunal established by law and observing the principles of independence and impartiality;
(b) a tribunal endowed with jurisdiction broad enough to address all aspects of a suit to which art 6 of the *ECHR* is applicable; and
(c) a tribunal to which all individuals can have free and full access:
A A Cançado Trindade, *Tratado de direito internacional dos direitos humanos* (2003) vol 3, 156.

51 (1975) 18 Eur Court HR (ser A) 17; (1979) 1 EHRR 524, [35].

52 Ibid [36].

53 Soyer and de Salvia, above n 47, 259.

54 Gaetano Morelli, *Derecho procesal civil internacional* (1953) 146.

55 See, eg, *Code of Civil Procedure 1973* (Brazil) art 267.

competence of the forum, which consequently (and inevitably) has a restrictive impact on access to court.[56]

Hence the conditions on exercising jurisdiction over the merits of a claim, and on access to court, are also independent of the effective existence of a substantive legal relationship.[57] This enabled the European Court of Hunan Rights in *Al-Adsani* to state that the hearing and judgment of a claim may depend not only on its substantive content (eg the violation of a basic human right), but also on the existence of procedural bars.[58] Of course, the acceptance of such limitations by the forum state must be controlled by the domestic judiciary; otherwise the effectiveness of art 6(1) could be threatened.[59] As such, an alleged violation of a right (or threat to a right) may only be legitimately removed from jurisdictional control if a 'legitimate' aim is being pursued, and 'a reasonable relationship of proportionality between the means employed and the aim sought to be achieved' exists.[60] Exceptions that satisfy these two elements constitute 'immanent' or 'inherent' limitations on art 6(1), which reveals the restricted enforceability of this provision.

That said, bearing in mind that relative jurisdictional immunity reflects a public international law rule[61] that is founded on the need to safeguard the functional sovereignty of the foreign state — and consequently international peace and justice — it is difficult to argue that state immunity should not be included among the 'inherent limitations' to art 6(1) of the *ECHR*.[62] Indeed, this view was expressed by the European Court of Human Rights in *Al-Adsani*.[63] The key issue that arises in *Al-Adsani* is the applicant's contention that international human rights law has developed in such a way that granting immunity to a foreign state charged with violation of fundamental human rights can no longer

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56 Guido Soares, invoking Carnelutti's doctrine, concludes that the limitations on the scope of judicial jurisdiction can 'come from legal provisions in its own legal system (self-limitation) or from another legal system, beyond its boundaries, and superior to it (hetero-limitation)'. This corroborates Morelli's previously cited argument, according to which international law either authorises or imposes restrictions on the exercising of national jurisdiction in certain cases: Morelli, above n 54, 146. The principle of jurisdictional immunity would be a case of 'hetero-limitation' of state jurisdiction: Guido Fernando Silva Soares, *Das imunidades de jurisdição e de execução* (1984) 15.

57 Morelli, above n 54, 93.

58 (2002) 34 EHRR 273, [47].

59 Soyer and de Salvia, above n 47, 259. As Cançado Trindade points out, the right of access to court occupies a prominent place in democratic societies; hence a restrictive interpretation of art 6 would not be compatible with the objects and the aims of the *ECHR*: Cançado Trindade, above n 50, 156–7.

60 *Ashingdane v United Kingdom* (1985) 93 Eur Court HR (ser A) 1, [57]; (1985) 7 EHRR 528, [57]. The Court followed this formulation in *Al-Adsani* (2002) 34 EHRR 273, [53]–[55].

61 If local tribunals do not grant the immunity to which the beneficiary is entitled, they commit an international wrong: see generally the recent judgment of the International Court of Justice condemning Belgium for violating the jurisdictional immunity of the Minister for Foreign Affairs of the Democratic Republic of the Congo: *Arrest Warrant of 11 April 2000* (*Democratic Republic of the Congo v Belgium) (Merits)*, 14 February 2002 <http://www.icj-cij.org/icjwww/idocket/iCOBE/iCOBEframe.htm> at 1 October 2003 ('*Arrest Warrant*').

62 In fact, the European Commission on Human Rights had the opportunity to include the parliamentary immunities traditionally recognised by the states party to the *ECHR* and the immunities of international organisations as acceptable limitations to art 6, though consistently holding that, formally, there are no other 'inherent' limitations to the right of access to court than the fostering of human rights and democracy: Ress, above n 36, 199.

63 (2002) 34 EHRR 273, [53]–[54].

be considered legitimate or proportionate. Effectively, the principle of access to court should only be overridden by the principle of state immunity in circumstances when, under the doctrine of relative jurisdictional immunity, the granting of immunity is justified. As already discussed, international law no longer imposes absolute state immunity. For this reason, if the local courts decide to grant the privilege, even in circumstances in which immunity is excluded, they violate the right of access to court.[64]

It remains, then, to establish whether or not fundamental human rights violations by a foreign state create an exception to the principle of state immunity.

IV THE PROPOSED EXCEPTION OF FUNDAMENTAL HUMAN RIGHTS VIOLATIONS

A *The Hypothesis and Some Pointed Tendencies*

The granting of jurisdictional immunity to states which have allegedly violated fundamental human rights is a subject of great controversy, due to the special characteristics of such rights.[65] Among the various human rights enshrined in global and regional conventions, there is an essential nucleus, a '*noyau dur*' that encompasses 'intangible' rights from which the states may not derogate under any circumstances. These include the right to life (prohibition of summary and extra-judicial executions); the right to physical, mental and moral integrity (prohibition of torture and cruel, inhuman or degrading treatment or punishment); the right to freedom (prohibition of slavery); and the

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64 Great caution should be exercised in interpreting the assertion made by both Schreuer and Lauterpacht, according to whom there is nothing to stop a state conferring immunity on another state, even in cases in which such a measure is not required by international law: Schreuer, above n 13, 6. Even if it does not constitute a violation of international law — in terms of the right of the foreign state not to be subject to local jurisdiction — the 'generous' attitude of the forum could violate an international convention that provides for guarantee of access to court to the plaintiff (in the event that the state is party to such a convention) or even its own domestic law, since the 'right to access' is often enshrined in the constitutions of democratic nations: Bröhmer, above n 28, 8–9.

65 The term 'fundamental human rights' might seem redundant at first sight. In fact, it can be considered so when used as a simple synonym for 'human rights' or 'fundamental rights'. In this work, however, it is used to mean those human rights that are elevated to a *jus cogens* status due to their fundamental importance to the international society as a whole, giving rise to *erga omnes* obligations: see, eg, *Barcelona Traction, Light and Power Company, Limited (Second Phase) (Belgium v Spain)* [1970] ICJ Rep 3, [33] ('*Barcelona Traction*'). They correspond to what Cohen-Jonathan calls 'intangible rights': Gérard Cohen-Jonathan, 'Responsabilité pour atteinte aux droits de l'homme' in Société Française pour le Droit International, *La responsabilité dans le système international* (1991) 100, 123. Mello identifies these intangible rights as 'stony clauses' in international human rights law, irrevocable even in extreme cases: Celso de Albuquerque Mello, *Direitos humanos e conflitos armados* (1997) 51–8.

non-retrospectivity of criminal law.[66] The norms that ensure these rights, by protecting values of interest to the international community as a whole, are peremptory or *jus cogens* norms[67] — they can never be derogated from and translate into *erga omnes* obligations.[68] All members of the international community may legitimately demand their observance and reparation for any violation thereof. Thus fundamental human rights (including the right not to be subjected to torture)[69] are established through peremptory norms that do not depend on consent to take effect, precisely because they contain values fundamental to the entire international community. Moreover, disrespect for such norms permits any member of the international community to demand reparation for the violation.[70]

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66 These four rights are present in *ICCPR*, above n 46, art 4(2); *ECHR*, above n 10, art 15(2); *American Convention on Human Rights*, above n 46, art 27(2); and common art 3 of *Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, opened for signature 12 August 1949, 75 UNTS 31 (entered into force 21 October 1950), *Geneva Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea*, opened for signature 12 August 1949, 75 UNTS 85 (entered into force 21 October 1950), *Geneva Convention (III) Relative to the Treatment of Prisoners of War*, opened for signature 12 August 1949, 75 UNTS 135 (entered into force 21 October 1950), and *Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War*, opened for signature 12 August 1949, 75 UNTS 287 (entered into force 21 October 1950). All these instruments prohibit derogation from the abovementioned rights, unlike other rights, which may be derogated from in exceptional circumstances: Cohen-Jonathan, above n 65, 123. Other examples of fundamental human rights include the right of self-determination and the right of equality: André de Carvalho Ramos, *Processo internacional de direitos humanos* (2002) 69.

67 The *jus cogens* notion was first conceived of in treaty law. The *Vienna Convention on the Law of Treaties*, opened for signature 23 May 1969, 1155 UNTS 331, art 53 (entered into force 27 January 1980) defines a *jus cogens* norm as a 'peremptory norm of general international law', clarifying that this type of norm should be understood as 'a norm accepted and recognized by the international community of states as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character'. A gross (flagrant or systematic) violation of a *jus cogens* norm frequently constitutes an international crime. Examples of international crimes are slavery (gross violation of the right to freedom); genocide (gross violation of the right to life); apartheid (gross violation of the right to equality); torture (gross violation to the right to personal integrity); forced disappearance; and extra-judicial, summary and arbitrary executions (gross violation of the right to life). Besides these crimes related to violations of fundamental human rights, there are also those linked to the maintenance of international peace and security; the defence of the right of self-determination; and environmental protection. An international crime also concerns international responsibility of the individual. With regard to international crimes, see Antonio Blanc Altemir, *La violación de los derechos humanos fundamentales como crimen internacional* (1990).

68 The concept of *erga omnes* obligations in opposition to inter-state obligations emerged as a result of *Barcelona Traction (Merits)* [1970] ICJ Rep 3.

69 In addition to the *ECHR*, above n 10, art 3, torture is prohibited by the following instruments: *ICCPR*, above n 46, art 7; *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, opened for signature 10 December 1984, 1465 UNTS 85, art 2, (entered into force 26 June 1987); *European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment*, opened for signature 26 November 1987, ETS 126 (entered into force 1 February 1989); *Inter-American Convention to Prevent and Punish Torture*, opened for signature 9 December 1985, OAS 67 (entered into force 28 February 1987); *American Convention of Human Rights*, above n 46, art 5; and the *African Charter on Human and Peoples' Rights*, above n 46, art 5. The *Kuwaiti Constitution*, art 31, provides for the prohibition of torture: *Al-Adsani* (2002) 34 EHRR 273, [25]–[31].

70 Ramos, above n 66, 47.

All of these factors reveal a great concern for the international protection of fundamental human rights. As a result, there is a substantial body of thought that considers the granting of state immunity unacceptable in cases where there have been violations of such rights.[71] To a large extent, this is a result of fear that granting immunity to a foreign state charged with violating such rights could stimulate gross violations of these rights, by enabling the violators to rely on their immunity. This argument supports the idea that jurisdiction should be affirmed in these cases,[72] and has the further advantage of entitling victims to prompt compensation.[73] Moreover, since a clear hierarchy has been established under international law in favour of *jus cogens* norms, it would be illogical and regressive to admit any exception, imposed by non-peremptory norms of international law, to means of reparation for injuries arising out of the breach of a *jus cogens* norm.[74]

Contradicting this is the argument that domestic courts are inadequate when it comes to judging violations of human rights by foreign states without the consent of these states. Domestic courts are argued to provide an improper forum for controlling violations of international norms of such significance. In addition, the domestic courts might be used as a tool for political meddling in the arena of foreign sovereignty, under the pretext of combating violations of fundamental human rights.[75]

The following discussion will analyse some of the theories that justify an exception to the general rule of state immunity in the case of fundamental human rights violations.

1 *Applying Countermeasures through Universal Jurisdiction*

One theory suggests the inapplicability of state immunity is accompanied by the recognition of a type of universal jurisdiction[76] over violators of fundamental human rights, which operates irrespective of the nationality of the victim or the

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71 See, eg, Paust, above n 44.

72 Ibid.

73 Günther Handl, 'The *Pinochet Case*, Foreign State Immunity and the Changing Constitution of the International Community' in Wolfgang Benedek, Hubert Isak and Renate Kicker (eds), *Development and Developing International and European Law: Essays in Honour of Konrad Ginther on the Occasion of His 65th Birthday* (1999) 79.

74 Cançado Trindade, above n 50, 164, fn 121.

75 Schreuer, above n 13, 60.

76 The principle of universal jurisdiction, initially conceived in the sphere of criminal law (universal criminal justice), constitutes one of the exceptions to the principle of the territoriality of the criminal law, and was initially created to regulate the punishment of the crime of piracy at sea. In accordance with this principle, the first state (whichever it happened to be) to detain the pirate had the right to judge and punish him. The application of the principle extended into other fields that also required greater international cooperation and solidarity, such as for the responding to of international crimes relating to gross violations of fundamental human rights. By dealing with international crimes such as genocide, slavery and torture, so emerged the right — or the obligation, depending on the case — of the state to extradite or punish criminals: see M Cherif Bassiouni, 'International Crimes: *Jus Cogens* and *Obligatio Erga Omnes*' (1998) 14 *Nouvelles Études Pénales* 133, 137; Jacob Dolinger, 'Jean Claude Duvalier: *Hostis Humani Generis*', *O Estado de São Paolo* (São Paolo, Brazil) 4 March 1986; Brigitte Stern, 'Better Interpretation and Enforcement of University [sic] Jurisdiction' (1998) 14 *Nouvelles Études Pénales* 175, 177.

location of the violation.[77] In this context, an *actio popularis* would become justified on the basis of the general system of international responsibility of states. This is due to the possibility that reparation for certain human rights violations could be demanded by any state within the international community, in view of the *erga omnes* nature of the obligation breached. Such states could then impose countermeasures against the violating state.[78] The state is 'free to establish the forms by which it analyses the international responsibility of another state for violations of human rights'.[79] Therefore there is nothing in principle to impede the choice of the domestic judiciary as that form. The state could then use this as the basis for the unilateral mechanism of the countermeasure, to the extent that it is not important by which state entity the countermeasure is issued. This supports the use of domestic jurisdiction for claims related to violations of fundamental human rights by any foreign state, in which case there could really be no room for state immunity.

However a solution along these lines is subject to criticism, in that it admits the possibility of wide and unrestricted *actio popularis* in dealing with violations of fundamental human rights through the enlargement of the bases of jurisdiction normally accepted. Critics argue that the international community has its own mechanisms for protecting human rights. These are the conventional systems for the monitoring of and the protection of human rights, which have both global (through the UN organs for the protection of human rights) and regional (through institutions such as the Inter-American Court of Human Rights and the European Court of Human Rights) scope.[80] Reparation for state violations can be demanded in a safer manner by means of such collective institutional

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77 The question of the pre-existence of national jurisdiction is obviously important, as it constitutes a logical starting point from which to discuss the question of whether or not immunity exists. As mentioned above in Part II, the principle of immunity from jurisdiction acts by removing local rules of international competence that may determine the exercising of national jurisdiction. In the words of Judge Rosalyn Higgins, '[a]nyone litigating a human rights issue in a domestic court has first to establish jurisdiction and second, to ensure there is no immunity to that jurisdiction': Judge Rosalyn Higgins, 'Role of Litigation in Implementing Human Rights' (1999) 5(2) *Australian Journal of Human Rights* 4, 5.

78 On the implementation of the international responsibility of a state, see International Law Commission, 'Draft Articles on the Responsibility of States for Internationally Wrongful Acts', UN Doc A/56/10 (2001) arts 42–54. Any countermeasures (formerly called reprisals — a term now used only in the area of armed conflicts) should be limited to inducing the offending state to fulfil its obligation of reparation, must be proportionate to the damage suffered and may not affect: limitations on the use of force, in the terms of the *UN Charter*; obligations relating to the protection of fundamental human rights; obligations of a humanitarian nature; obligations resulting from imperative norms of general international law; and the inviolability of consular agents, diplomats, diplomatic missions, and their files and documents. Specifically on international state responsibility with respect to human rights violations, see also Cohen-Jonathan, above n 65, 101–35; Jaume Ferrer Lloret, *Responsabilidad internacional del estado y derechos humanos: estudio de la práctica relacional e institucional* (1998).

79 Ramos, above n 66, 41 (trans of: '*o Estado é* livre *para fixar as formas pelas quais analisa a responsabilidade internacional de outro Estado por violações de direitos humanos*').

80 On the conventional global and regional systems for monitoring and controlling violations of human rights, see generally Henry Steiner and Philip Alston, *International Human Rights in Context: Law, Politics, Morals* (2nd ed, 2000).

mechanisms, which should always prevail over unilateral mechanisms.[81] They reduce the risk of abusive interventions by more powerful states acting under the pretext of human rights protection, and reduce the danger of double standards being applied.

Such collective mechanisms also remove the possibility, always present in unilateral countermeasures, that the violating state will disagree with the measure (considering it a violation of international law itself) and decide to apply countermeasures against the state of forum. This generates enormous friction and damages international relations.

There is also the risk that the violating state will be condemned for the same reason by more than one country, as the right to demand reparation for damage resulting from a fundamental human right violation would, in principle, be recognised in all other countries.[82] It therefore seems less controversial to limit discussion on the subsistence of state immunity to cases where domestic courts, using criteria that are generally accepted and practised under domestic law,[83]

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81 The mechanism of collective control of human rights violations being favoured over unilateral control can be seen in the *Military and Paramilitary Activities in Nicaragua* (*Nicaragua v US*) (*Merits*) [1986] ICJ Rep 14, in which the International Court of Justice did not accept the US justification that they had based their actions on observation reports of the US Congress which indicated that Nicaragua was committing human rights violations. This was based on the understanding that Nicaragua, 'as a party to various human rights treaties, including the *American Convention on Human Rights*, was already being monitored by the collective mechanisms set forth in that treaty': Ramos, above n 66, 99–100 (trans of: '*por ser parte contratante em diversos tratados de direitos humanos, inclusive da Convenção Americana de Direitos Humanos, já estava sendo monitorada com base nos mecanismos coletivos previstos naquele tratado*').

82 On these collateral effects, see Bröhmer, above n 28, 192–3; Ramos, above n 66, 91–101. The US is the only country for which there is a reliable record of the assertion, by a lower court, of the national jurisdiction and of the denial of immunity in a case involving human rights violations by a foreign state without the existence of any territorial connection. In *Von Dardel v USSR*, 623 F Supp 246 (DDC, 1985), the USSR had default judgment entered against it in respect of the kidnapping, illegal imprisonment and assassination of the Swedish diplomat Raoul Wallemberg; rev'd *Von Dardel v USSR [No 2]*, 736 F Supp 1 (DDC, 1990). See also Bröhmer, above n 28, 219; Ress, above n 36, 187.

83 In principle, it can be argued that a state is free to establish its international competence and, therefore, to provide for the possibility of exercising its national jurisdiction for whichever cases it pleases, without any limitations. On the other hand, it is also possible to sustain the argument that public international law restricts the bases of judicial jurisdiction to those claims which have at least some connection with the forum. Nevertheless, 'exorbitant forums' tend to have limited effectiveness in practice, because the judgment would likely not be enforceable, and therefore not meet the requirements of the principle of effectiveness: Haimo Schack, *Internationales Zivilverfahrensrecht* (3rd ed, 2002) 87. Examples of points of connection required by the forum in order to establish national jurisdiction are the nationality of one of the parties, or the act occurred or had repercussions in the territory of the forum. For example, in Brazil, the rules on international civil competence are set forth in art 88 (concurrent) and art 89 (exclusive) of the *Code of Civil Procedure 1973* (Brazil):

may normally assert their domestic jurisdiction. In these cases, the basis of judicial jurisdiction derives from the state's interest in resolving a dispute related to a tortious act which violates its domestic law (although it may also constitute a violation of international law). It should be noted that unrestricted jurisdiction to punish violators of human rights can sometimes be inferred from the domestic legislation of states for civil wrongs resulting from such violations.[84] This reflects the need for international solidarity to eliminate this type of infringement. It should be stressed though that there are disagreements as to the magnitude of this basis of jurisdiction (both criminal and civil), as its support is generally contingent on the existence of some territorial connection with the local forum.[85] In *Al-Adsani* (which related to the civil liability of a foreign state)

Artigo 88: É competente a autoridade brasileira quando:

(1) o réu, qualquer que seja a sua nacionalidade, estiver domiciliado no Brasil;

(2) no Brasil tiver de ser cumprida a obrigação;

(3) a ação se originar de fato ocorrido ou de fato praticado no Brasil.

Parágrafo único: Para o fim do disposto no (1), reputa-se domiciliada no Brasil a pessoa jurídica estrangeira que aqui tiver agência, filial ou sucursal.

Artigo 89: Compete à autoridade judiciária brasileira, com exclusão de qualquer outra:

(1) conhecer de ações relativas a imóveis situados no Brasil;

(2 proceder a inventário e partilha de bens, situados no Brasil, ainda que o autor da herança seja estrangeiro e tenha residido fora do território nacional.

Trans:

Article 88: The Brazilian authority has jurisdiction when:

(1) the defendant, regardless of her/his nationality, resides in Brazil;

(2) an obligation is to be performed in Brazil;

(3) the cause of action originates in a fact that has occurred or is being practised in Brazil.

Sole paragraph: To the end provided for in (1), a foreign legal entity is reputed to be domiciled in Brazil when it has an agency, a branch or a main branch here.

Article 89: The Brazilian judiciary authority has jurisdiction, to the exclusion of any other:

(1) to hear actions related to real estate situated in Brazil;

(2) to perform probate and apportionment of assets, situated in Brazil, even if the deceased had been a foreigner and resided out of the national territory.

84 The standard being the US *Alien Tort Claims Act of 1789*, 28 USC § 1350 (2000), which provides that 'the district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States'. This little-known rule, largely unused in US tribunals, was first applied in the area of human rights violations in 1980, in *Filartiga v Pena-Irala*, 630 F 2d 876, 887 (2nd Cir, 1980) ('*Filartiga*'), in which US jurisdiction was recognised for a tort suit involving parties with Paraguayan nationality, resulting from acts of torture and assassination which had taken place in Paraguay.

85 On this discussion in the criminal field, see Stern, above n 76, 180–2. Judge Rezek, in his separate opinion in *Arrest Warrant*, 14 February 2002 [9] <http://www.icj-cij.org/icjwww/idocket/iCOBE/iCOBEframe.htm> at 1 October 2003 asserted that

the question concerning the exorbitance of the British jurisdiction was easily resolved, as the plaintiff/victim was a UK national both when the facts occurred and when the civil proceedings were instituted in England. This alone provides sufficient basis to justify the interest of that country in asserting its civil jurisdiction.[86]

However an important progressive doctrine opposes this more restricted conception of domestic civil jurisdiction assertion. Founded on the consolidation of the procedural capacity of the individual as a subject of international human rights law and on the development of modern international law, Cançado Trindade emphasises the role of *jus cogens* norms and of *erga omnes* obligations of protection as bases not only for the possibility, but also for the obligation of all states to assist individuals in redressing breaches of fundamental human rights.[87]

Apart from the 'universal jurisdiction' polemic, violations of fundamental human rights by states entail more specific issues regarding jurisdictional immunity itself. Hence, once it is admitted that the forum state does have jurisdiction to judge the case, the obstacles of the lack of territorial connection or the *jus imperii* characterisation may yet have to be overcome.[88] The theories presented below deal specifically with such immunity conditions.

> *si l'application du principe de la compétence universelle ne présuppose pas la présence de la personne accusée sur le territoire de l'État du for, toute coordination devient impossible et c'est bien le système international de coopération pour la répression du crime qui s'effondre*[.]

Trans:

> if the application of the principle of universal competence does not presuppose the presence of the accused in the territory of the state of forum, all co-ordination becomes impossible and it is the international system of international co-operation for the repression of crime that falls into ruins[.]

The majority of the Court, however, failed to address the Congo's original allegation that Belgium had engaged in 'an excessive universal jurisdiction', for the Congo 'dropped this argument in its final submissions and relied exclusively on the alleged violation of diplomatic immunity': David Turns, '*Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium*): The International Court of Justice's Failure to Take a Stand on Universal Jurisdiction' (2002) 3 *Melbourne Journal of International Law* 383, 386. An important step towards increasing the possibility of punishment of international criminals was taken when the *Rome Statute of the International Criminal Court*, opened for signature 17 July 1998, [2002] ATS 15 (entered into force 1 July 2002) came into force, creating the International Criminal Court. As to civil jurisdiction, the defendant in the *Filartiga* case was in US territory when the claim was filed: 630 F 2d 876, 878–9 (2nd Cir, 1980). In view of this, plaintiffs can only sue defendants who are in US territory: Anne-Marie Slaughter and David Bosco, *Alternative Justice* (2001) Global Policy Forum <http://www.globalpolicy.org/intljustice/atca/2001/altjust.htm> at 1 October 2003.

86 Indeed, the only reason British jurisdiction was not asserted was because the State of Kuwait was granted immunity: *Al-Adsani* [2002] 34 EHRR 273, [20], [45].

87 Cançado Trindade, above n 50, 164; A A Cançado Trindade, 'A consolidação da personalidade e da capacidade jurídicas do indivíduo como sujeito do direito internacional' (2003) 16 *Separata del Anuario Hispano-Luso-Americano de Derecho Internacional* 237, 264.

88 See above Part II(B).

2 *The Implied Waiver Approach*

In order to illuminate the inappropriateness of recognising jurisdictional immunity in cases where fundamental human rights have been violated, it is often argued that by violating such rights, the foreign state tacitly waives its exemption from the jurisdiction of other states. This solution resolves the issue, both in cases in which the obstacle to national jurisdiction is the absence of a territorial connection, and in those in which the impediment derives from the classification of the act as *jus imperii*. However this argument lacks logical reasoning in that any waiver, even if implicit, presupposes a manifestation of the will of the party holding the right, in the sense that it consents to submit to local jurisdiction. It cannot be said that the foreign state desires to submit to the local jurisdiction because it violated a *jus cogens* norm.[89]

This solution reveals the fragility of all other endeavours to fit the violation of human rights into one of the statutory exceptions to state immunity specified in international instruments, rather than trying to find answers within the rationale of the institutions involved and of pertinent legal principles. This misapprehension was apparent in *Princz v Germany*,[90] where, in addition to argument that Germany had tacitly waived immunity by subjecting American Jew Hugo Princz to slave labour during World War II, it was also alleged that exceptions in the *FSIA* (such as that relating to 'commercial activity' of the foreign state[91] and those deriving from international agreements)[92] were applicable.

3 *The Reprisal Approach*

Another theory advocates the restriction of immunity as a form of 'reprisal' against the state that violates fundamental human rights. This concept brings with it a series of potential problems already mentioned herein, particularly the risk of a vicious circle of alleged violations of international law and their respective claims for reparation. In addition this allows the possibility of an

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89 Bröhmer, above n 28, 190–1.

90 26 F 3d 1166 (DC Cir, 1994). The Court of Appeal recognised Germany's jurisdictional immunity; however note especially the dissenting opinion of Wald J.

91 *FSIA*, 28 USC § 1605(a)(2) (2000):

> 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 an 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.

92 *FSIA*, 28 USC § 1605(a)(2) (2000):

> Subject to existing international agreements to which the United States is a party at the time of enactment of this *Act* a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided in sections 1605 to 1607 of this chapter.

As to the exception of international agreements, legislative history shows that it was inserted in the *FSIA* to ensure immunities to states over and above those provided for in the law: Schreuer, above n 13, 59.

underlying pretext of universal jurisdiction with no limits for the control of breaches of *jus cogens* norms.[93]

4 *The Forfeiture of Sovereignty Approach*

Some argue that violation of fundamental human rights necessarily entails the forfeiture of sovereign rights.[94] According to this view, the sovereign status of violating states should no longer be recognised. Consequently the principle of jurisdictional immunity should no longer be applicable. Accordingly, the state would only be granted immunity to the extent that it acts in accordance with its status as a sovereign state, which could only be viable so far as it complies with international law. This theory is without doubt superior to the previous ones, but can still lead to problems if a distinction is not made between the different circumstances in which *jus cogens* norms of international human rights law are violated; without such a distinction this theory faces the same problems as reprisal theory.[95]

5 *The Option and Risk-Calculability Approach*

The distinction between different circumstances of fundamental human rights violations is a source of concern for Bröhmer. In view of the diversity of cases, Bröhmer maintains the need to verify whether the sovereignty of states would be threatened if immunity were not granted, as a condition for authentic reconciliation between the demand to protect human rights and the principle of state jurisdictional immunity. Bröhmer tries to establish objective criteria to determine the cases in which the refusal to grant state immunity would put the sovereignty of the foreign state at risk, bearing in mind that this is, in the final analysis, the spirit of sovereign immunity itself. This leads to the idea of bringing together the elements of 'option' and 'risk calculability', as well as safeguarding international peace and justice.[96]

The *jus gestionis–jus imperii* dichotomy is therefore justified in the following terms: by having the option to act commercially and deciding to do so, the state voluntarily exposes itself to the potential risks of responsibility that this transaction could cause.[97] The greater the risk for the state, 'the more difficult it will be to argue that the state really *opted* to take that risk'.[98] The greater the freedom that a state organisation has to opt for one or another mode of action, the lower the chances that non-recognition of the prerogative of immunity will put its sovereignty at risk in the context of that activity. The concept of international peace and justice tempers the application of 'option' and 'risk calculability', in that it acts as a reminder that another purpose of the immunity principle is to

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93 Bröhmer, above n 28, 192–3.

94 See, eg, Bröhmer, above n 28, 194.

95 Julianne Kokott, 'Mißbrauch und Verwirkung von Souveränitatsrechten bei gravierenden Völkerrechtsverstößen' in Ulrich Beyerlin et al (eds), *Recht zwischen Umbruch und Bewahrung: Völkerrecht, Europarecht, Staatsrecht — Festschrift für Rudolf Bernhardt* (1995) 149, cited in Bröhmer, above n 28, 194.

96 Ibid 197.

97 Ibid.

98 Ibid 198 (emphasis in original).

avoid conflicts between states.[99] As such, the more delicate and complex the questions involved, the greater the chance that the judgment of one state by another can put international peace at risk.[100]

In the field of violations of fundamental human rights, Bröhmer concludes that as 'nothing can force a state to engage in the torture of individuals'; by torturing a specific individual the foreign state will have assumed the risks that could result. In international law this implies there are no grounds that justify granting immunity to a violating state, whether due to lack of territorial connection or as a result of the qualification of an act as *jus imperii*.[101] Nevertheless, it will not always be convenient for violations of fundamental human rights to be submitted to the domestic jurisdictions of other states. In the same way that not all state acts should be considered equal, one should weigh the consequences of any basis of judicial jurisdiction for the states and victims involved, in view of international security and international peace and justice.

Hence there is a distinction between non-individualised violations (such as those resulting from armed conflicts) and individualised breaches of fundamental human rights directed at specific and pre-identified individuals. This does not mean to say that violations en masse are less important than individualised violations, but rather that the former will not find efficient remedy through domestic jurisdictions. Non-individualised violations are generally a consequence of other violations of international law (war crimes, aggression, genocide in armed conflicts, etc), the circumstances of which can only be adequately addressed by competent international courts. To leave the resolution of such questions to domestic jurisdictions could threaten international peace and security and generate countless unilateral countermeasures in counterattack. Added to this consideration is the fact that the number of potential victims is far greater; the removal of state immunity, as well as the fact that victims are unable to be compensated adequately, threatens the 'functional sovereignty' of the defendant state that could find itself unable to exercise its basic state functions because of the volume of lawsuits and claims for compensation that it would have to face in various countries.[102]

This approach to distinguishing between the different forms of human rights violations by states is subject to criticism, especially with regard to borderline cases. However, it has merit in tackling the bases of the question, examining the fundamentals of the principle of state jurisdictional immunity and presenting solutions that are more balanced and conciliating.

6 Pinochet *and the* Foreign Sovereign Immunities Act

In *Al-Adsani*, the applicant limited himself to submitting that the rules of the *State Immunity Act 1976* (UK) and the *European Convention on State Immunity*[103] should not take precedence over the prohibition on torture, due to the *jus cogens* status of the latter.[104] Citing *R v Bow Street Metropolitan*

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99 Ibid 197.
100 Cf ibid 197–8.
101 Ibid 199–204.
102 Ibid 204–11.
103 Opened for signature 16 May 1972, 1495 UNTS 181 (entered into force 11 June 1976).
104 (2002) 34 EHRR 273, [57].

Stipendiary Magistrate; Ex parte Pinochet Ugarte [No 3],[105] Al-Adsani asserted that the recognition of immunity of the foreign state by the UK did not serve a legitimate aim and was disproportionate (violating his right of access to court).[106] The form of conflict, and the correlation between all of these norms, is not however very clear. Indeed, it does not seem correct to say that the principle of jurisdictional immunity is incompatible with the *jus cogens* norm that prohibits torture. This could instead be characterised as a conflict between the principle of state immunity and the principle of access to court (which does not have *jus cogens* status), which should be resolved through careful consideration of the facts of the concrete case — bearing in mind the international law in force and the interests at stake — and not through a hierarchical relationship between conflicting norms.

The *Pinochet* judgment and the *FSIA* were both pointed to in *Al-Adsani* as illustrating a new trend whereby states may not plead immunity with respect to human rights violations.[107] In the appendix to its 1999 Report, the International Law Commission's Working Group on Jurisdictional Immunities of States and Their Property[108] drew attention to the fact that '[i]n the past decade, a number of civil claims have been brought in municipal courts ... arising out of acts of torture committed not in the territory of the forum State but in the territory of the defendant and other States'.[109] It further pointed out that although national courts have shown some sympathy for the argument that 'States are not entitled to plead immunity where there has been a violation of human rights norms with the

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105 [2000] 1 AC 147 ('*Pinochet*').

106 *Al-Adsani* (2002) 34 EHRR 273, [51].

107 Ibid [63].

108 The International Law Commission was invited to present comments on the issue in the *Resolution on the Convention on Jurisdictional Immunities of States and Their Property*, GA Res 53/98, UN GAOR, 6th Comm, 53rd sess, 83rd plen mtg, UN Doc A/RES/53/98 (1998) [1]–[2]:

> The General Assembly…
>
> (1) Decides to establish at its fifty-fourth session an open-ended working group of the Sixth Committee, open also to participation by States members of the specialized agencies, to consider outstanding substantive issues related to the draft articles on jurisdictional immunities of States and their property adopted by the International Law Commission, taking into account the recent developments of State practice and legislation and any other factors related to this issue since the adoption of the draft articles, as well as the comments submitted by States in accordance with paragraph 2 of [*R*]*esolution 49/61* and paragraph 2 of [*R*]*esolution 52/151*, and to consider whether there are any issues identified by the working group upon which it would be useful to seek further comments and recommendations of the Commission;
>
> (2) Invites the International Law Commission to present any preliminary comments it may have regarding outstanding substantive issues related to the draft articles by 31 August 1999, in the light of the results of the informal consultations held pursuant to General Assembly [*Resolution 48/31*] of 9 December 1993 and taking into account the recent developments of State practice and other factors related to this issue since the adoption of the draft articles, in order to facilitate the task of the working group.

109 International Law Commission, *Report of the Working Group*, above n 1, ch VII, Supp 10, Appendix, [4].

character of *jus cogens*' in some cases,[110] in most cases the plea of sovereign immunity has succeeded.[111] *Pinochet* and the amendment to the *FSIA* are also cited by the Working Group as 'important developments' which 'give further support to the argument that a State may not plead immunity in respect of gross human rights violations'.[112]

In *Pinochet*, the House of Lords had to decide whether to recognise criminal jurisdictional immunity for the former President of Chile, General Augusto Pinochet Ugarte.[113] Pinochet was in the UK when the request for his extradition was issued by a judge in Spain, where he was facing prosecution for a series of criminal offences that constituted violations of human rights, committed during the time he governed Chile. The Lords decided, in their judgment of 24 March 1999,[114] that the international legal system could not confer immunity *ratione materiae* on heads of state regarding criminal jurisdiction for official acts of torture,[115] since it is precisely these acts that it intends to criminalise as violations of fundamental norms of the international community.[116]

It has been argued that *Pinochet* 'has emphasized the limits of immunity in respect of gross human rights violations by State officials'[117] and that

> there can be no doubt that this case, and the widespread publicity it received, has generated support for the view that State officials should not be entitled to plead immunity for acts of torture committed in their own territories in both civil and criminal actions.[118]

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110 Ibid ch VII, Supp 10, Appendix, [5]–[6]; citing as examples *A1-Adsani v Kuwait* (1994) 100 ILR 465, 471 (Evans LJ; Butler-Sloss and Rose LJJ concurring) (UK); *Princz v Germany*, 26 F 3d 1166, 1176–85 (DC Cir, 1994) (Wald J dissenting); *Controller and Auditor-General v Davison* [1996] 2 NZLR 278, 290 (Cooke P).

111 International Law Commission, *Report of the Working Group*, above n 1, ch VII, Supp 10, Appendix, [5], [7]; cited as examples *Argentina v Amerada Hess Shipping Co*, 488 US 428 (1989); *Siderman de Blake v Argentina*, 965 F 2d 699 (9th Cir, 1992); *Saudi Arabia v Nelson*, 507 US 349 (1993); *Princz v Germany*, 26 F 3d 1166 (DC Cir, 1994); *Al-Adsani v Kuwait* (1996) 107 ILR 536.

112 International Law Commission, *Report of the Working Group*, above n 1, ch VII, Supp 10, Appendix, [8]–[13].

113 *Pinochet* [2000] 1 AC 147.

114 Ibid.

115 The difference between *ratione personae* immunity and *ratione materiae* immunity is also present in diplomatic immunities, as can be seen in the *Vienna Convention on Diplomatic Relations*, opened for signature 18 April 1961, 500 UNTS 95, art 39(2) (entered into force 24 April 1964):

> When the functions of a person enjoying privileges and immunities have come to an end, such privileges and immunities shall normally cease at the moment when he leaves the country, or on expiry of a reasonable period in which to do so ... However, with respect to acts performed by such a person in the exercising of his functions as a member of the mission, immunity shall continue to subsist.

As such, the *ratione personae* immunity is formal and covers, in principle, all and any acts committed by the diplomat or head of state, whereas the *ratione materiae* or material immunity continues even after the beneficiary has left his post of diplomat or head of state, but is limited to those official acts performed in the exercising of his functions as state agent.

116 For further details on *Pinochet*, see Handl, above n 73, 65.

117 International Law Commission, *Report of the Working Group*, above n 1, ch VII, Supp 10, Appendix, [11].

118 Ibid [12].

It seems that the only contribution *Pinochet* could bring to the question of the denial of state immunity in cases concerning violations of fundamental human rights would be the idea that jurisdictional immunities necessitate a special approach when *jus cogens* norms are breached. Nevertheless, each kind of immunity should also be analysed according to its own particularities when such an issue is concerned. There can be no doubt that there are significant differences between cases such as *Pinochet* and *Al-Adsani*. The former deals with the immunity from criminal jurisdiction of a former head of state, while the latter concerns the immunity of sovereign states from civil jurisdiction. In this sense, the distinction between the two types of immunity has a raison d'être, based on their different foundations.[119] Hence, in principle, the solutions applied to one cannot be transplanted to the other. Moreover, the House of Lords itself made it clear in the *Pinochet* judgment that the decision would not affect the plea of sovereign immunity in respect of civil claims.[120]

Nevertheless there is as yet no consensus at an international level even as to the extent of immunities from criminal jurisdiction. Having examined state practice, including national legislation and decisions of national higher courts such as the UK House of Lords (in *Pinochet*) and the French Court of Cassation (in *Re Qaddafi*),[121] the International Court of Justice in *Arrest Warrant* was

> unable to deduce from this practice that there exists under customary international law any form of exception to the rule according immunity from criminal jurisdiction and inviolability to incumbent Ministers for Foreign Affairs, where they are suspected of having committed war crimes or crimes against humanity.[122]

The amendment to the *FSIA* consisted of the inclusion of s 1605(a)(7), which incorporated the following text:

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119 See above Part II(A).

120 *Pinochet* [2000] 1 AC 147. See also International Law Commission, *Report of the Working Group*, above n 1, ch VII, Supp 10, Appendix, [12].

121 *Arrêt No 1414* (Unreported, *Cour de Cassation*, France, 13 March 2001). The French court ruled that Libyan leader Colonel Muammar el-Qaddafi could be prosecuted in France for complicity in the bombing of a French airliner over Niger in 1989 in which 170 people died. In so ruling, the court rejected arguments that Colonel Qaddafi was immune from prosecution as a head of state.

122 *Arrest Warrant*, 14 February 2002 [58] <http://www.icj-cij.org/icjwww/idocket/iCOBE/iCOBEframe.htm> at 1 October 2003. In his dissenting opinion, Judge Oda questioned whether diplomatic immunity could 'also be claimed in respect of serious breaches of humanitarian law' and if, furthermore, a Foreign Minister would be 'entitled to greater immunity in this respect than ordinary diplomatic agents'. He concluded that 'these issues are too new to admit of any definitive answer': at [14]. Turns, above n 85, 387 criticises the Court's decision in this case, contending that 'at no stage were any substantive reasons given' for the findings of the majority, and that it

> simply accepted the Congolese submissions and dismissed the Belgian ones, effectively holding that the immunity of foreign ministers is absolute (although the judgment did not state this in as many words, and even suggested certain circumstances in which immunities did not represent a bar to prosecution).

> (a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case —
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> (7) not otherwise covered by paragraph (2) [commercial activities], in which money damages are sought against a foreign state for personal injury or death that was caused by an act of torture, extrajudicial killing, aircraft sabotage, hostage taking, or the provision of material support or resources (as defined in section 2339A of title 18) for such an act if such act or provision of material support is engaged in by an official, employee, or agent of such foreign state while acting within the scope of his or her office, employment, or agency, except that the court shall decline to hear a claim under this paragraph —
>
> (A) if the foreign state was not designated as a state sponsor of terrorism under section 6(j) of the *Export Administration Act of 1979* (50 USC App 2405(j)) or section 620A of the *Foreign Assistance Act of 1961* (22 USC 2371) at the time the act occurred, unless later so designated as a result of such act; and
>
> (B) even if the foreign state is or was so designated, if —
>
> (i) the act occurred in the foreign state against which the claim has been brought and the claimant has not afforded the foreign state a reasonable opportunity to arbitrate the claim in accordance with accepted international rules of arbitration; or
>
> (ii) neither the claimant nor the victim was a national of the United States (as that term is defined in section 101(a)(22) of the *Immigration and Nationality Act*) when the act upon which the claim is based occurred.

This provision has been applied in at least two cases in the US: *Rein v Libya*[123] and *Cicippio v Iran*.[124] The amendment can be regarded as indicating a substantial trend towards a new conception of state immunity in cases related to fundamental human rights abuses. It is also important to note that s 1605(a)(7)(A) imposes certain limitations on the assertion of jurisdiction over, and exemption from immunity of, a 'state sponsor of terrorism'. These limitations include the condition that either the claimant or the victim must be a US national. This guarantees a minimum connection with the forum state, justifying both the forum state's and the plaintiff's interest that the judgment be delivered there. In view of this, it is necessary to consider the content of the decision of the European Court of Human Rights in *Al-Adsani*.

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123 162 F 3d 748 (2nd Cir, 1998).

124 18 F Supp 2d 62 (DDC, 1998). See also International Law Commission, *Report of the Working Group Report*, above n 1, ch VII, Supp 10, Appendix, [10]. *Rein v Libya*, 162 F 3d 748 (2nd Cir, 1998) raised the question whether Libya should be granted immunity in the suit for damages filed against it by the families of some of the victims of the bombing of the Pan Am Flight 103, which exploded on 21 December 1988 over Lockerbie, Scotland. Iran had no immunity recognised by US courts in *Cicippio v Iran*, 18 F Supp 2d 62 (DDC, 1998), which concerned a claim for compensation filed by Joseph Cicippio, who was kidnapped in Lebanon by Iranian terrorists.

B *The Decision of the European Court of Human Rights in* Al-Adsani

The position of the European Court of Human Rights regarding the alleged violation of *ECHR* art 6(1) is developed in *Al-Adsani*.[125] [52]–[67]. The Court stressed that the right of access to court is not absolute, but 'may be subject to limitations'.[126] Any such limitation must only be imposed on the grounds that it 'pursue[s] a legitimate aim' and there is 'proportionality between the means employed and the aim sought to be achieved'.[127] It considered that the granting of jurisdictional immunity to Kuwait by the British courts in civil proceedings resulting from an act of torture pursued a legitimate aim, based on the international law rule *par in parem non habet imperium*.[128] Furthermore, the granting of jurisdictional immunity was proportionate to the aim sought to be achieved,[129] as it is not yet possible to assert that the international law in force permits the removal of civil jurisdictional immunity in claims relating to torture committed in the territory of the violating state.[130]

As regards the modifications brought about by *Pinochet* and by the amendment to the *FSIA*, the Court held that they had no bearing on the case before them,[131] since *Pinochet* referred to immunity *ratione materiae* of a head of state from criminal jurisdiction, in no way affecting the immunity *ratione personae* of foreign sovereign states from civil jurisdiction.[132] Moreover, the amendment to the *FSIA* did not, on its own, have the ability to modify a general rule of international law — the scope of the amendment is limited to specific cases in which the foreign state must be designated as a state sponsor of acts of terrorism, and the claimant must be a US national.[133] The Court noted that even in these cases the property of a foreign state is immune from 'attachment or execution unless one of the statutory exceptions applies'.[134]

For these reasons, the Court held, by nine votes to eight, that there had been no violation of art 6(1) of the *ECHR*.

C *Consideration and Criticism of the Decision*

The close decision reveals the high level of controversy surrounding the subject of state jurisdictional immunity and violations of fundamental human rights. In addition to the majority judgment, the case includes five separate opinions: two concurring and three dissenting. The reasons why the Court held the limitation to art 6 to be proportionate were criticised in the dissenting opinions. Judges Rozakis and Caflisch (joined by Judges Wildhaber, Costa, Cabral Barreto and Vajic) lamented the dichotomy adopted by the majority as the grounds for the decision that suggests different standards should be applied for civil and criminal jurisdictions in respect of violations of peremptory norms of

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125 (2002) 34 EHRR 273, [52]–[67].
126 Ibid [53].
127 Ibid.
128 Ibid [54].
129 Ibid [55]–[56].
130 Ibid [66].
131 Ibid [63]–[65].
132 Ibid [65].
133 Ibid [64].
134 Ibid.

international law.[135] In this sense, they contended that 'the majority, while accepting that the rule on the prohibition of torture is a *jus cogens* norm, refuse to draw the consequences of such acceptance'.[136]

Nevertheless, the dissenting opinion of these judges does not deal clearly with the subject in terms of a conflict between *jus cogens* norms and norms that guarantee state jurisdictional immunity. As already discussed, the principle of jurisdictional immunity does not strictly conflict with the norm on prohibition of torture. Rather, the conflict in need of resolution is between the principle of state immunity and the principle of access to court, particularly in disputes relating to violations of norms that guarantee fundamental human rights. This point, in fact, is not adequately explained in the Court's judgment.

In this sense, the argument put forward in the dissenting opinion of Judge Ferrari Bravo is pertinent. After highlighting that the prohibition of torture is *jus cogens*, he concludes that

> [i]t follows that every State has a duty to *contribute* to the punishment of torture and cannot hide behind formalist arguments to avoid having to give judgment. I say 'contribute' to punishment, and not, obviously, to punish, since it was clear that the acts of torture had not taken place in the United Kingdom but elsewhere, in a State over which the Court did not have jurisdiction.[137]

This position seems to invoke, to some extent, the 'reprisal theory', which if not properly delimited can lead to undesirable consequences for the international community.[138]

Consequently, the more agreeable argument is in Judge Loucaides' dissenting opinion, which is based on the examination of the principles involved. He reasons that:

> [a]ny form of blanket immunity, whether based on international law or national law, which is applied by a court to block completely the judicial determination of a civil right without balancing 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, is a disproportionate limitation on Art 6 § 1 of the [*ECHR*] and for that reason it amounts to a violation of that Article. The courts should be in a position to weigh the competing interests in favour of upholding immunity or allowing a judicial determination of a civil right, after looking into the subject matter of the proceedings.[139]

With the exception of the brief opinion of Judge Loucaides, it can be seen that the Court failed to confront the problem of proportionality in recognising state immunity for violation of the peremptory norm on the prohibition of torture in light of the principle of access to court.

The Court restricted itself to stating that the limitation to art 6(1) was proportionate because examples cited as tendencies towards change in the international scenario (*Pinochet* and the amendment to the *FSIA*) were not applicable to the case under consideration. For this reason, it could not allow

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135 Ibid [O-III4].
136 Ibid.
137 Ibid [O–IV1]–[O–IV2] (emphasis added).
138 See above Part III(A).
139 *Al-Adsani* (2002) 34 EHRR 273, [O–V2].

opposition to the assumption that a legitimate international norm (namely, the norm that orders the recognition of state immunity) is also proportionate. By doing so, the European Court of Human Rights decided the case on the simplistic rationale that it is proportionate because it is legitimate.

It seems the distinctions made by the Court between criminal and civil jurisdiction — 'immunity *ratione materiae* of heads of state' and 'immunity *ratione personae* of foreign states'[140] — were not addressed adequately. It is true that particularities exist regarding the rules for establishing and extending judicial competence with respect to domestic civil or criminal jurisdiction. However, it is not clear to what extent this could impede the association of solutions possibly adopted in one or another sphere with regard to immunity. It would have been interesting if the Court had examined the distinction between these immunities in more depth — instead of concluding *a priori* that they cannot be utilised — since it raised the question of whether the solutions found for one context could be transplanted to the other.

As regards the amendment to the *FSIA*, the Court made the point that the very fact that the amendment was needed confirmed the endurance of the general rule of international law which grants immunity even in respect of claims concerning official acts of torture.[141] Had the Court perhaps discarded the possibility that the amendment could be reflecting or even forming new international law? In effect, international custom is formed through the reiterated practice of states, which behave in a certain manner considering the need for such behaviour, making it obligatory.[142] Furthermore, the jurisdictional immunity of states remains in force, in most parts of the world, in the form of custom. By framing the amendment to the *FSIA* in these terms, the European Court of Human Rights (in addition to asserting by implication that the US violated international law by including new exceptions to state immunity)[143] simply denies international subjects their potential to collaborate in the evolution of international law. This implies that international law is immutable in this regard.

Perhaps this timid posture towards the evolution of international law helps explain why the Court preferred not to contribute to the recognition of a change in the rules that — according to the decision — do not 'yet' accept that states are not entitled to immunity in respect of civil claims of compensation for torture committed outside the forum state.[144]

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140 Ibid [65].

141 Ibid [63]–[65].

142 According to Podestá Costa and José Maria Ruda, one of the requirements for the creation of an international custom is precisely that '*se efectúe en la convicción de ejercer una acción que responde a una necesidad jurídica (*opinio juris sive necessitatis*), y no de que se realiza meramente un acto de cortesía*': L A Podestá Costa and José Maria Ruda, *Derecho Internacional Público* (5th ed, 1979) 16 (trans: 'is formed with the conviction of exercising an action which responds to a juridical necessity (*opinio juris sive necessitatis*), and not that it reflects a mere act of comity').

143 Obviously this interpretation is possible, but the point criticised here is the adoption of premises without due investigation and the total abandonment of other possibilities. On the basis of the new provision, for example, the US courts did not grant immunity to Iran in *Cicippio v Iran*, 30 F 3d 164 (DC Cir, 1994).

144 *Al-Adsani* (2002) 34 EHRR 273, [66].

V CONCLUSION

The question of the denial of justice resulting from recognising state immunity in proceedings relating to fundamental human rights violations remains highly controversial, and has yet to reach a satisfactory solution. The one-vote margin in *Al-Adsani* demonstrates this fact, and suggests that the opinion of the Court's majority could change easily at the next opportunity it has to consider the issue.

The investigation of the rationale behind the principle of state immunity — taking into consideration the doctrinarian theories developed in this field — provides a sufficient basis to justify the inapplicability of granting state jurisdictional immunity in cases such as *Al-Adsani*. In this case the action by the state was directed at a single victim, who was a national of the forum state. Therefore there were sufficient elements to justify the interest of the state in asserting its jurisdiction, as well as the interest of the victim in applying to his domestic jurisdiction to obtain redress for the injury caused to him. Moreover, such circumstances do not cause any major threats to the sovereignty of the offending state or to international peace and security. In fact the converse is true: the denial of a remedy to the victim in such cases represents a lamentable regress considering that human rights law has been developing in order to assure effective protection to individuals against breaches of such vital obligations by states.

The analysis of the interests involved points to the prevalence of the principle of access to court to the detriment of the state immunity principle in cases related to breaches of fundamental human rights, because the guarantee of a remedy against these is of key interest to the international community as a whole. With the criteria to determine when state immunity can be legitimately and proportionately upheld are rather imprecise, it should be remembered that the criteria that operate the traditional distinction between *acta jure imperii* and *acta jure gestionis* are far from being clearly defined, and even so, there is no doubt that the doctrine of absolute state jurisdictional immunity has been replaced by a restricted immunity. It is necessary then to inquire whether these criteria will one day become clearly and generally established, or indeed whether it would be desirable for them to become so. Civil law countries hold a certain advantage in not having codified their rules on the immunity of foreign states, as this gives them greater flexibility in the application of the principle. In Brazil, for example, there is nothing in theory to oppose the assertion of jurisdiction in proceedings regarding a tort attributed to a foreign state, even if it was committed outside the national territory. The sole limitation is in the field of the Brazilian general rules on judicial competence; in practice these could function as a natural brake to the collateral effects of unrestricted domestic jurisdiction over cases that have no connection with the forum. This being the case, international jurisdiction, where available, is the desirable forum for plaintiffs.

In conclusion, it is fitting to note that the international principle of state jurisdictional immunity seems to be undergoing a process of adaptation to new challenges present in the international system. If, in the second half of the 20th century, its transformation was necessary because of the so-called 'reality of global trade', the change now seems to be driven by the need for the efficient

protection of human rights as a result of the development of international human rights law.

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