

The International Law of State Immunity and Torture

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Abstract

The absence of an international provision, governing State immunity in civil cases based on extra-territorial torture, has made the issue a disputed area in the law of sovereign immunity. In recent years, national courts mostly ruled in favor of State immunity and denied to hear claims of torture victims. Although being compatible with a State's preference not to be prosecuted before foreign courts, this norm would accord the State effective freedom to avoid accountability for torture. In the unlikely emergence of a new State practice, a possible way to move the practice in a direction that is responsive to States' obligation in international law would be to adopt an exception to the *United Nations Convention on Jurisdictional Immunities of States and Their Property* that expressly annuls State immunity in cases of torture.

Introduction:

The *UN Convention on Jurisdictional Immunities of States and their Property*¹ (UN Convention) has successfully codified a complex area of international law, excluding the immunity of a foreign State in litigations over commercial matters, personal injuries and property damages within the territory of the Forum State. Nonetheless, the development of international law in the fields of human rights, and the growing recognition of the importance of the prohibition of torture, has called into question the necessity of an exception for torture. The question is whether the claim of State immunity should be available in torture claims. In the absence of an international provision governing the issue and considering the current trend in the practice of national, regional and international courts, upholding the perpetrator's immunity in majority of the cases, torture victims would encounter a permanent obstacle in accessing a fair trial.

States' Practice: Sovereign Immunity and Torture

Any study of international law of State immunity must take into account the judicial practice of States. It has only been a decade since sovereign immunity has been internationally codified under the *UN Convention*. Hence, the current law of State immunity has been developed primarily from judicial decisions in cases. In the absence of a treaty law to determine the status of State immunity in the cases of torture, the judicial practice of States, rulings of international courts and scholarly opinions are the main sources from which the issue can be determined. According to the report of the Special Rapporteur, Sompong Sucharitkul, of the International Law Commission (ILC) on the topic of immunities of States, there are difficulties encountered in an effort to find uniform rules of international practice on State immunity. One reason is "the diversity of legal procedures and the divergence of judicial practice, which varies from system to

¹ *United Nations Convention on Jurisdictional Immunities of States and Their Property*, GA Res, UNGAOR, 59th Sess, UN Doc. A/RES/59/38 (2004), online: <<http://www.refworld.org/docid/4280737b4.html>>. [*UN Convention*]

system and from time to time”.² Another reason is that legal decisions on State immunity yield to foreign policy considerations and political relations with the offending State actor.

There are several important cases within the US, UK and Canadian case law which have been used as leading cases in the field. They mostly ruled in favor of immunity and denied to hear claims of torture victims, a trend that can be expected in future decisions. However, I conceive this movement as a result of several political considerations, which make it tough for States to decide without prejudice. From a foreign policy perspective, prosecuting a State before national courts of another State may lead to the deterioration of diplomatic relations between the two States. By rejecting immunity in cases of torture, States might be treated similarly by the offending State. In addition, the forum State may have the perception that it would be inundated with a flood of litigation from the torture victims around the world if allowing individuals to seek reparation through its courts. From the perspective of international law, judicial reasoning being advanced by judges rejecting civil claims of extra-territorial torture are without due regards to the States’ obligations under international law. It’s been forgotten that international norms including sovereign immunity should be interpreted and implemented considering the wider concepts of international law including *jus cogens* norms and *erga omnes* obligations. Granting immunity to the perpetrators of torture would accord States the effective freedom to avoid accountability for the heinous crime of torture, while there is a rhetorical commitment to its prohibition in international law.³

In the US jurisdiction, the principle statute on the law of State immunity is the *US Foreign Sovereign Immunities Act*.⁴ It presumes immunity for foreign States unless the

² Sompong Sucharitkul, *Preliminary Report on the Topic of Jurisdictional Immunities of States and Their Property*, UNGAOR, 1979, UN Doc. A/CN.4/ 323 at para 28 [Sucharitkul, *Preliminary Report*]

³ Lorna McGregor, “Torture and State Immunity: Deflecting Impunity, Distorting Sovereignty” (2007) 18 EJIL 903 at 916. [McGregor, “Torture and State Immunity”]

⁴ The US national statute on the law of State immunity: *Foreign State Immunity Act*, 1976, 28 U.S. Code, C 97, s 1605 (a)(5). [*FSIA*]

claim is subject to one of the exceptions listed in Section 1605(a).⁵ An overall view on the practice of the US courts shows that lower courts have occasionally resorted to a variety of interpretive doctrines to avoid immunity for foreign violators of human rights. The arguments have developed either around the issue of waiver of immunity or efforts to bring the case under one of the listed exceptions under the *FSIA*.⁶ But, in 1993 the Supreme Court in *Saudi Arabia v Nelson*⁷ outrageously held that act of torture is by definition a sovereign act, which entitles the foreign State to immunity. The binding force of the Supreme Court's precedent has caused lower courts, although in some cases reluctantly,⁸ to adjust their case law accordingly. What is clear is that the Supreme Court has tried to implement a deliberate foreign policy of the US government upholding State immunity in this area. The court in *Smith v Libya* emphasizes that the lack of *jus cogens* exception in the *FSIA* is not a reflection of Congress's "condonation of such lawless conduct". Rather, "Congress might well have expected the response to such violations to come from the political branches of the US government".⁹ It seems that the US government does not want its courts to become tribunals for claims of human rights violations against foreign States, particularly where its own relations with such States may be harmed. This is particularly the reason for the *amicus* brief it has filed in several

⁵ *FSIA*, *supra* note 4, s 1605(a)(1):

"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 foreign State has waived its immunity either explicitly or by implication, notwithstanding any withdrawal of the waiver which the foreign State may purport to effect except in accordance with the terms of the waiver."

⁶ Michele Potesta, "State Immunity and Jus Cogens Violations: The Alien Tort Statute Against the Backdrop of the Latest Developments in the Law of Nations" (2010) 28 Berk J Intl L. 571 at 556.

⁷ *Saudi Arabia v Nelson*, 507 US 349, (1993) at 1480. [*Nelson*]

⁸ See for example *Siderman de Blake v. Republic of Argentine*, 965 F.2d 699 (9th Cir. 1992) [*Siderman*] at 718: "when a State violates *jus cogens* the cloak of immunity provided by international law falls away, leaving the State amenable to suit"; *Smith v Lybia*, 101 F. 3d 239, (US 2nd Cir. 1996) at 244. [*Smith*]: "as a matter of international law State immunity would be abrogated by *jus cogens* norms". Cited from Andrea Bianchi, "Immunity Versus Human Rights: The Pinochet Case" (1999) 10 EJIL 237 at 263. [Bianchi, "Immunity v Human Rights"]

⁹ *Smith*, *supra* note 8 at 244.

cases, requesting the court to deny hearing the case.¹⁰ Intervention of the US State Department in support of Saudi Arabia in *Nelson* is one illustrative example.¹¹

It should be noted, however, that constant calls over many years for amendments to the *FSIA* to exclude acts of torture resulted to the enactment of *Antiterrorism and Effective Death Penalty Act* in 1996.¹² The *Act* created a new exception to immunity “for personal injury or death that was caused by an act of torture, extra-judicial killing or provisions of material support or resources for such an act”.¹³ However, the scope of this exception was limited to “State sponsors of terrorism”. This *Act* was re-codified during the 2008 amendments of the *FSIA* and established a “terrorist State exception”.¹⁴ According to the “terrorist State exception”, the deprivation of the perpetrator State from immunity would depend on the US government if it considers the State as a sponsor of terrorism. Although, this *Act* may give individual victims of torture or other human rights violations an opportunity to seek reparations,¹⁵ several conditions should be available to open the US forum to this category of suits. First, the acts on which suit could be brought would be limited to torture, extrajudicial killing, aircraft sabotage, hostage taking, or the provision of material support for such an act. Second, the act must be committed by an agent of a foreign State acting within the scope of employment. Third, the defendant State must be designated by the Department of State as a State sponsor of terrorism. Forth, the claimant or victim must be a US national. Finally, the claimant must have offered the foreign State an opportunity to arbitrate the claim.¹⁶ The strength of practice of this exception is weakened by its selectiveness and lack of reciprocity: there is no

¹⁰ Richard Garnett, “The Defence of State Immunity for Acts of Torture” (1997) 18 Aust. YBIL 97 at 113 at 112. [Garnett]

¹¹ *Nelson*, *supra* note 7.

¹² Garnett, *supra* note 10 at 113.

¹³ *Antiterrorism and Effective Death Penalty Act* of 1996, 110 Stat. 1214, *FSIA*, *supra* note 4, s 1605(a)(7).

¹⁴ *FSIA*, *supra* note 4, s 1605A

¹⁵ See for e.g. *Gates v. Syrian Arab Republic*, 580 F. Supp. 2d 53, 54 (US D.D.C.2008); and *Rein v. Socialist People's Libyan Arab Jamahiriya*, 162 F.3d 748 (US 2d Cir. 1998)

¹⁶ Lori Fisler Domrosch, “Changing the International Law of State Immunity Through National Decision”(2011) 44 Vand. J. Transnat'l L. 1185 at 1193.

recognition that current immunity enjoyed by the US might equally be removed for the alleged act of torture. Outside the scope of this exception, US courts have largely rejected claims of extra-territorial torture due to State immunity.

The UK case law has also made a significant contribution to the different scholarly opinions around the issue of State immunity and torture. Decisions of the British courts on the well-known cases of *Al-adsani*,¹⁷ *Pinochet*¹⁸ and *Jones*¹⁹ have had national and international consequences. The UK case law is reflective of diverse opinions and judicial reasoning on the field. The UK courts tried to justify their different approaches, denying immunity in *Pinochet* on one hand and upholding immunity in *Al-Adsani and Jones* on the other, by referring to the different nature of the suits, being criminal or civil in nature. In *Pinochet*, the Law Lords generally, with a few exceptions,²⁰ regarded the *Al-Adsani* irrelevant for its being concerned exclusively with civil proceedings.²¹ The same contention has been raised in *Jones*, considering *Pinochet* inapplicable due to its criminal nature. One may conclude that after the *Pinochet* case, while State and State officials would continue to be held immune for acts of torture in civil proceedings before the UK courts, they might be held accountable and not immune in criminal proceedings. Nevertheless, such civil-criminal distinction by the UK courts was made without any considerations of the different purposes of the two forms of liability and that both forms need to be available to enforce the peremptory norm of the prohibition of torture. The criminal condemnation of torture only affirms that the

¹⁷ *Al-Adsani v Government of Kuwait and Others*, 1996 U.K.C.A., [1998] 107 ILR 536. [*Al-Adsani*, CA]

¹⁸ *R v Bow Street Metropolitan Stipendiary Magistrate, Ex Parte Pinochet Ugarte (No. 3)*, (1999) UKHL, [2000] 1 A.C. 147 41. [*Pinochet (No. 3)*]

¹⁹ *Jones v. Kingdom of Saudi Arabia and others*, [2004] CA 1394. [*Jones*, CA]

²⁰ *Regina v. Bartle and the Commissioner of Police for the Metropolis and Others Ex Parte Pinochet (No.1)*, 119 I.L.R. 135 (1999) at 1324. [*Pinochet (No. 1)*] ; Lord Lloyd quoted *Al-Adsani v the United Kingdom*, 2001 ECtHR 35763/97, [2002] 34 EHRR 273. [*Al-Adsani*, ECtHR] and *Siderman*, *supra* note 8 to hold that allegations of torture may not trump a plea of immunity. Cited from Bianchi, “Immunity v Human Rights”, *supra* note 8.

²¹ See for e.g. *Pinochet (No. 1)*, *supra* note 15 at 1331 opinions of Lord Nichollas. Cited from Bianchi, “Immunity v Human Rights”, *supra* note 8.

perpetrator State or its officials have breached their obligation under international law by engaging in acts of torture contrary to its international prohibition, but it does not give individual victims any redress for the harm they suffered. In the concept of modern international law that individuals and their rights are the principal concerns of international society, providing torture victims with the opportunity to seek civil redress is as significant as considering States and their officials criminally liable for torture.

In the Canadian jurisdiction, *Bouzari*,²² is the first case in which a plaintiff sought civil redress for acts of extraterritorial torture. *Bouzari* and *Kazemi*²³ are the Canadian contributions to this area of law. *Kazemi* is the more recent case, involving allegation of torture and extrajudicial killing, which after being heard in the Quebec Superior Court and the Court of Appeal, was heard before the Supreme Court of Canada on March 18, 2014. Not surprisingly the Supreme Court of Canada, after *Bouzari*, *Jones*, *Al-Adsani* and the ICJ decision in *Jurisdictional immunities of the State*,²⁴ did not depart from the general practice in favor of granting immunity to the perpetrator State.²⁵ In October 10, 2014 the SCC rejected the claim of the estate of Kazemi against Iran based on the *State Immunity Act*.²⁶ The SCC made it clear that it doesn't have the power to amend the *SIA* and that this is the duty of the parliament to decide whether it intends to allow citizens to sue foreign States in Canadian courts for the extra-territorial torture. Judicial scrutiny in the Canadian case law shows that similar to that of the US and the UK, references have been made to the practice of other States without any consideration of their compatibility with States obligations under international law. Throughout the *Bouzari*, the position of the Attorney General was mostly reflective of Canadian political concerns. Referring to

²² *Bouzari v. Islamic Republic of Iran*, 2004 OCA 2800, 243 DLR (4th) 406. [*Bouzari*, OCA]

²³ *Kazemi (Estate of) v. Islamic Republic of Iran et al*, 2011 QCCS 196, 227 C.R.R. (2d) 233. [*Kazemi*, QCCS]

²⁴ *Jurisdictional Immunities of the State (Germany v Italy: Greece intervening)*, [2012] ICJ Rep 99. [*Germany v Italy*]

²⁵ *Kazemi Estate v. Islamic Republic of Iran*, 2014 SCC 62 (CanLII), <<http://canlii.ca/t/gdwh>> retrieved on 2015-02-19.

²⁶ The Canadian national statute on the law of State immunity: *State Immunity Act*, RSC 1985, c S-18, (available on CanLII) [Canada SIA]

Schreiber v Canada,²⁷ the court endorsed the view that “it is not in Canada’s interest to attempt to adjudicate every – or any but the most egregious- act of a foreign State.” According to the Attorney General of Canada, if the Canadian courts were to view jurisdiction expansively, other countries would be less inclined to respect the Canadian legal system and its authority and this could lead to actions in foreign States against Canada or Canadian interests.²⁸ Therefore, the final decision of the court was, to a high degree, influenced by Canada’s political interest. The danger of balancing between individual rights and foreign policy interests, as Amnesty International has noted, is that “the State will often sacrifice the legal rights of the victims to competing political considerations, such as maintaining friendly relations of the State responsible for the wrong”.²⁹

Along with *Jones*, *Al-Adsani* and *Bouzari*, the newly decided *Kazemi* helped the progressive development of the general practice, which if being supported by *opinio juris* would lead to a customary international law in the interest of States who practice torture. Courts in almost all cases consider it the responsibility of the legislature and not the court to add an exception for torture if it deems it necessary. The Courts were clear in their decisions that if there were an exception in treaty law, which excludes acts of torture from immunity, cases would have been decided differently. In deciding whether to grant immunity to the foreign State, courts were looking for a customary international law or a treaty law to solve the problem and since there were no treaty law determinative of the law on the field they followed the general practice of States in previous cases which was also compatible with forum States political tendency to keep friendly relations with the offending State.

²⁷ *Schreiber v Canada* (Attorney General), 2002 SCC 62, [2002] 3 SCR 269 at para 27.

²⁸ Noah Benjamin Novogrodsky, “Immunity from Torture: Lessons from *Bouzari v Iran*” (2008) 18 EJIL 939 at 944.

²⁹ Amnesty International, “Letter to the Foreign and Commonwealth on the UN Convention on the Jurisdictional Immunities of States and Their Properties” (2005). Cited from McGregor, “Torture and State Immunity”, *supra* note 3 at 910.

The decisions of international and regional courts on the law of State immunity and torture have also made significant precedents for domestic courts. While there is no formal hierarchy between international institutions, in practice, decisions of international and regional courts such as the ICJ and the ECtHR respectively, are given considerable weight by other judicial bodies.³⁰ The International Court of Justice on *Jurisdictional Immunities of the State (Germany v Italy: Greece intervening)* decided that Italy had violated its obligation to respect Germany's immunity under international law, when it allowed civil claims to be brought against Germany based on war crimes committed by its military forces during the Second World War. Similarly, the ECtHR, notwithstanding significant dissenting opinions, upheld immunity in cases of *Al-Adsani* and *Jones*.³¹ Accordingly, although rejection of civil claims raised by victims of extra-territorial torture on State immunity grounds is not in line with obligations of States under international law, after the ICJ decision, being affirmed by the 2014 ECtHR decision in *Jones*, it is unlikely that courts will depart from this trend in future cases.

Torture Victims and the Right to Remedy:

The rights of victims and their families to obtain reparations for crimes under international law has been affirmed in a number of international instruments adopted over the past two decades.³² Even before that, in 1966, the right to a remedy was recognized in

³⁰ Jonathan Charney, "The Impact on International Legal System of the Growth of International Courts and Tribunals" (1999) 31 NYU J Intl L & Pol 697 at 700.

³¹ *Jones and Others v. The United Kingdom*, European Court of Human Rights, [34356/06](#), 14 January 2014

³² *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 1984, 1465 UNTS 85 (entered into force 26 June 1987) [CAT] Article 14(1); 1985 *UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*, UNGA Res 40/34, (20 Nov 1985); The 1988 *Rome Statute of the International Criminal Court*, UN Diplomatic Conference on the Establishment of an International Criminal Court, UN Doc: A/CONF. 183/9 (17 July 1998); *The UN Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity*, UN Comm'n Hum Rts Res E/CN.4/2005/L93, (15 April 2005); *The UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and International Humanitarian Law*, UN Comm'n Hum Rts Res E/CN.4/2005/L48, (13 April 2005). Cited

Article 2(3) of the International Covenant on Civil and Political Rights.³³ The apparent bar in the *UN Convention* for victims of torture to seek reparations on the basis of extra-territorial torture is at odds with this and other internationally recognized rights of victims, such as right to access to a fair trial.³⁴ Although the right to access to justice is not an absolute right, any restriction on this right, as it was affirmed by the ECtHR both in *Al-Adsani* and *Jones*, should be proportionate.³⁵ Nevertheless, in the absence of an alternative forum before which victims could bring their claims, such restrictions are not proportionate, since it has the effect of extinguishing the underlying rights. Also, other methods of access to justice such as diplomatic protection is unlikely to provide victims of torture with any reparations, since the ILC's draft Articles on diplomatic protection do not include an obligation to exercise diplomatic protection, leaving it to the complete discretion of States.³⁶

The current law of State immunity and torture does not substantiate the rational basis behind the international law of sovereign immunity, which is to maintain comity and friendly relations among States. The current approach, instead, makes it possible for States to breach international obligations and remain immune from civil accountability for the atrocities they already committed or will commit in future. This is inconsistent

from Christopher Keith Hall, "The UN Convention: The Need for Human Rights Protocol" (2006) 55 ICLQ 411 [Hall].

³³ International Convention on Civil and Political Right [ICCPR], Article 2(3):

Each State Party to the present Covenant undertakes: (a) to ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity; (b) to ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy; (c) to ensure that the competent authorities shall enforce such remedies when granted.

³⁴ Being recognized in Article 10 of the Universal Declaration of Human rights, Article 6 of the ECHR, Articles 14 and 16 of the ICCPR

³⁵ *Jones*, C.A *supra* note 14 at para 13 quoting *Al-Adsani v the United Kingdom*, 2001 ECtHR 35763/97, [2002] 34 EHRR 273 at para 54. [*Al-Adsani*, ECtHR]

³⁶ ILC, *Report on the Work of its 56th Sess*, UNGAOR, 2004, Supp No.10, UN Doc. A/59/10.

with the fundamental rule of State responsibility for internationally wrongful acts and omissions. States are responsible for their wrongful acts under international law including the act of torture.³⁷ As REDRESS points out, “one of the worst aspects of torture under international law is that the State, the very body that is designed to protect the rights of individuals, has abused its position of power and itself been responsible for the perpetration of serious crimes”. Despite ingrained State responsibility for international crimes, the current approach allows States to hide behind the barrier of State immunity and thus not be held accountable for the alleged heinous crimes from the civil perspective. In this sense, the *UN Convention*, in the absence of other reasonable alternative means holding States accountable for torture,³⁸ may result in impunity of States for torture.³⁹

³⁷ILC, *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, UNGAOR, 2001, Supp No 10, UN Doc. A/56/10, Article 1: “Every internationally wrongful act of a State entails the international responsibility of that State”; Permanent Court of Justice, *Chorzow Factory Case (Pol v. FRG)* [1927] PCIJ (ser. A) 17 at 47; Security Council, UNSCOR, 1990, UN Doc. S/RES/0647 reprinted in 29 ILM 1561. Cited from REDRESS “Immunity v Accountability: Considering the Relationship Between State Immunity and Accountability for Torture and Other Serious International Crimes” (2005), online: The Redress Trust <http://www.redress.org/downloads/publications/Immunity_v_Accountability.pdf> at 4. [REDRESS, “Immunity v Accountability”]

³⁸ *Ibid*, principle 1:

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

³⁹ Diane Orentlicher, *Updated Set of Principles for the Protection and Promotion of Human Rights Through Action to Combat Impunity*, (2005) UN Doc. E/CN.4/2005/102/Add.1, cited from [REDRESS, “Immunity v Accountability”], *supra* note 31 at 44. According to the *UN Principles for the Protection and Promotion of Human Rights through Action to Combat impunity*:

“Impunity is defined as the impossibility, *de jure or de facto*, of bringing the perpetrators of violations to account – whether in criminal, civil, administrative, or disciplinary proceedings – since they are not subject to any inquiry that might lead to their being accused, arrested, tried and, if found guilty, sentenced to appropriate penalties, and to making reparations to their victims.”

Considering the current practice toward the State immunity and torture, there are two options available to bring it in line with other concerns and obligations under the contemporary international law. The first option is to advocate for a new judicial approach, which requires national courts to hear claims concerning extra-territorial torture. The second option is to call for the adoption of an exception to the *UN Convention*, which would lift immunity protections for foreign States when the alleged act is torture. During the past several years, national, international and regional courts followed the same path and none took the initiative to change the trend. After consistent decisions in jurisdictional immunity of the State in *Jones*, *Al-Adsani*, *Bouzari* and *Kazemi*, a new judicial approach to immunity appears foreclosed. Judges, in almost all the relevant cases, considered it the duty of legislature and not the judicial system's to add a torture exception to the law of State immunity if deems it necessary.⁴⁰ Analogically, in the context of international law it is the duty of the ILC, being primarily responsible for drafting of the *UN Convention*, to engage in a codification exercise over the issue.

The UN Convention and Torture:

The negotiation history of the *UN Convention* shows that neither the 1986 nor the 1991 draft Articles of the ILC included any exceptions for acts contrary to international law. In its 1998 Report, the ILC raised concerns regarding “the existence or non-existence of immunity in the case of violation by a State of *jus cogens* norms of international law”. Nonetheless, according to Gerhard Hafner, the chairman of the ILC ad hoc Committee, “the issue does not seem to be ripe enough for the Working Group to engage in a codification exercise over it.”⁴¹ “This issue was raised in the ILC and the UN GA and it was dropped because, in the light of the *Al-Adsani* case and other developments, it was concluded that there was no clearly established pattern by States in

⁴⁰ *Arar v. Syria (Arab Republic)* (2005), 28 C.R. (6th) 187, 127 C.R.R. (2d) 252 at para 28; *Siderman*, *supra* note 8 at para 718.

⁴¹ Gerhard Hafner, *Report of the Chairman of the Working Group: Convention on Jurisdictional Immunities of States and Their Property*, UNGAOR 6th Committee, 1999, 54th Sess, UN Doc. A/C.6/54/L.12 at paras 47-48 at paras 46-47.

this regard”, Gerhard Hafner explained.⁴² Therefore, “any attempt to include such a provision would, almost certainly jeopardise the conclusion of the Convention”, the drafters believed. A difficulty on determining the scope of the “serious violations of human rights” and the potential of various interpretations were also other reasons that the ILC did not engage on the issue.

Given this history, one might not infer that the Convention’s silence has denied any possibility for further developments in international law that would allow States to provide civil jurisdiction over claims of alleged violations of peremptory norms committed by foreign governments. Although the Convention provides no textual basis on the field, the ILC Working Group cautioned about the ignorance of the States’ developments and nascent trend toward a *jus cogens* exception to immunity.⁴³ Likewise, nothing in the negotiation history of the Convention expressly prohibits the possibility of exercising such jurisdiction by its parties. The lack of textual basis in the *UN Convention* is not, however, surprising because the ILC finalized its drafts Articles in 1991 and it is only in the last two decades that the rights of victims to recover reparations for crimes under international law have received serious recognition.⁴⁴

In my opinion, Hafner’s assertion regarding the lack of clear pattern by States on the issue of State immunity and human rights violations makes the issue even more appropriate for the ILC to engage in a codification exercise over it. It has been asserted, in the preamble of this Convention,⁴⁵ that it would “contribute to the codification and development of international law and the harmonization of practice in this area”. Therefore, this Convention should also contemplate the disputed area of the law of State immunity when the alleged act is extra-territorial torture. It is appropriate to produce a

⁴²Gerhard Hafner, Remarks at the Chatham House Conference on State Immunity and the New U.N. Convention, Oct 5 2005, Transcripts and Summaries of Presentations and Discussion. Online: <<http://www.chathamhouse.org/sites/default/files/public/Research/International%20Law/ilpstateimmunity.pdf>>

⁴³ *Ibid*, appendix at para 13.

⁴⁴ Hazel Fox, *The Law of State Immunity*, 1st ed (Oxford: Oxford University Press, 2004) at 140

⁴⁵ *UN Convention*, supra note 1, pmbl.

universally applicable legal regime in order to unify the States' practice in this field compatible with the contemporary international law.

Conclusion

The *UN Convention on Jurisdictional Immunities of States and their Property* neither expresses a rule on the issue nor endorses the idea of an exception, and at best leaves the question open to be determined in the case law. In the absence of a specific provision on the issue, the current trend of national courts could possibly expand so as to become a general practice supported by *opinio juris* that would establish a new rule of customary international law.⁴⁶ In ratification of the Convention three States, including Norway, Sweden and Switzerland, made the declaration that this instrument was “without prejudice to any future international development in the protection of human rights”.⁴⁷ Switzerland recorded that “Article 12 does not govern the question of pecuniary compensation for serious human rights violations which are alleged to be attributable to a State and are committed outside the State of the forum”. Therefore, this Convention is without prejudice to developments in international law on the law of State immunity and torture. A possible way to move this law in a direction that is responsive to States obligations under the contemporary concepts of international law is to adopt an exception to the *UN Convention* that expressly drops States immunity in torture claims. Such an exception might not be quickly drafted or widely ratified, however, in the current status of international law of State immunity it seems a plausible way to ensure justice for the victims of one of the most heinous crimes in the world.

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⁴⁶ Sévrine Knuchel, “State Immunity and the Promise of Jus Cogens” (2011) 9 NJIHR 149 at 150.

⁴⁷Declaration made by Norway, Sweden and Switzerland. Online: UN Treaty Collection <http://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=III13&chapter=3&lang=en#EndDec>

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