The Case-law of the European Court of Human Rights on the Immunity of States

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Introduction

Invoking State immunity in court proceedings is a way for a State to prevent judicial scrutiny of its responsibility for its actions. Such scrutiny, however, is the main raison d'être at least of those human rights regimes that provide for a supervision of States' compliance with human rights. It would therefore come as no surprise if human rights jurisprudence, especially the jurisprudence of the European Court of Human Rights (the 'Strasbourg Court') would prove to be a challenge to State immunity. As we shall see, it is not, or, at most, in a roundabout way.

Every invocation of sovereign immunity before the forum involves two States: the State invoking immunity and the forum State. States in both positions have been made respondents in proceedings before the Strasbourg Court under the European Convention on Human Rights and Fundamental Freedoms¹ (the 'European Convention' or ECHR).

I. Applications brought against a State invoking immunity

Applications brought against a State for having invoked immunity before the courts of the forum State have been given short shrift by the Court. On the one hand, the duty, undertaken by the Contracting States in Art. 1 ECHR, to secure to everyone within their jurisdiction the Convention rights, as a rule does not translate into a duty to waive defence positions those States enjoy under general international law, among them prominently the invocation to sovereign immunity. On the other hand, invoking immunity is not an exercise of jurisdiction and therefore does not open the way to

¹of 4 November 1950, ETS 5.
protection by the European Convention under its Art. 1\(^2\). Rather, a respondent State in civil proceedings "could be likened to a private individual against whom proceedings are instituted"\(^3\). In any case, "the jurisdictional competence of a State is primarily territorial", and the impugned proceedings by definition do not take place within the State invoking immunity\(^4\). Thus, for the Court, there are several reasons not to entertain an application against such a State. This jurisprudence obviously does not pose any challenge to State immunity.

II. Applications brought against a forum State extending immunity to another State

Applications brought against a forum State for having extended immunity to another State are regularly pleading an infringement of Art. 6 ECHR which guarantees the right to a fair trial. From early on, the Court has construed that right as presupposing a right of access to court\(^5\). The Court accepts that the latter right is not absolute but may be subject to limitations. Extending immunity to a respondent State obviously is a limitation of the plaintiff's right of access to a court. In concordance with its general pattern for dealing with such limitations, the Court grants the Contracting States a certain margin of appreciation, but reserves the last word for itself; in particular, such limitations must not impair the very essence of the protected right. The limitation must also have a legitimate aim, and it must be proportionate to that aim\(^6\). The Court generally accepts that compliance with international


\(^3\)ECtHR, Kalogeropoulou and others v. Germany and Greece (dec.), no. 59021/00, Rep. 2002-X, The Law, 1D2.

\(^4\)Ibid.

\(^5\)ECtHR, Golder v. United Kingdom, no. 4451/70, Series A, no. 18, §§ 28-36.

\(^6\)Cf. eg ECtHR, Waite and Kennedy v. Germany, no. 26083/94, Rep. 1999-I; ECtHR, Al-
law is a legitimate aim for restricting Convention rights\textsuperscript{7}. Indeed, according to its established case-law, the European Convention must be interpreted as part of general international law, not as a self-contained regime. That means that it must be construed as far as possible in conformity with the principles of international law\textsuperscript{8}. The Court will respect such principles even if they prevent a maximum protection of human rights; Convention rights do not necessarily have priority over other rules of international law.

In our context, extending immunity to another State regularly has the legitimate aim of complying with the relevant principles of international law. At the same time, the fact that immunity is extended to another State in conformity with those principles has, for the Court, that further consequence that measures taken by the Contracting States which reflect generally recognised rules of public international law cannot in principle be regarded as imposing a disproportionate restriction\textsuperscript{9}. Hence, a State cannot be required to override against its will the rule of State immunity\textsuperscript{10}. The decisive question in proceedings before the Court therefore generally is whether the forum State's position on State immunity reflects rules of international law.

In the course of the Court's relevant jurisprudence, the authoritative source of those rules has become, insofar as it was applicable, first the International


\textsuperscript{7}Cf. eg ECtHR, \textit{Al-Adsani}, § 54; ECtHR, \textit{Bosphorus Hava Yillari Turizm Ve Ticaret Anonim Sirketi v. Ireland}, no. 45036/98, Rep. 2005-VI, § 150. Interestingly, the \textit{European Commission}, in: Bulletin of the European Communities, Supplement 2/79, Accession of the Communities to the European Convention on Human Rights, Commission Memorandum, available at \url{http://aei.pitt.edu/6356/4/6356.pdf}, 10, assumed that in such a case “the Member State would certainly be unable to rely on the defence that it was merely fulfilling an obligation under Community law”.

\textsuperscript{8}ECtHR, \textit{Al-Adsani}, § 55.

\textsuperscript{9}ECtHR, \textit{McElhinney}, § 37.
Law Commission's 1991 Draft Articles and then the UN Convention on the Jurisdictional Immunity of States and Their Property\(^\text{11}\) (the 'UN Convention'). While that Convention is not yet in force the Court takes it to reflect customary international law applicable to any State that has not objected to the Convention's adoption\(^\text{12}\), or to the adoption of a specific rule thereof in the Draft Articles\(^\text{13}\). To quote the Court, on the basis of a State's participation in the negotiation and/or the adoption of the Convention “it is possible to affirm that [one of the Draft Articles] applies to the respondent State under customary international law”\(^\text{14}\). Thus, the Court considers such participation as proof of the development of customary law applicable to that State. The Court does not look at the state the law of State immunity was in before the ILC started its work on the UN Convention, and it never asks whether specific provisions of the UN Convention reflect pre-existing, or emerging, rules of customary international law or whether, to the contrary, they lack any customary law character\(^\text{15}\). While the Court's approach appears to remain within the mainstream of judicial pronouncements on the impact the codification process has on customary law\(^\text{16}\), it effectively challenges traditional concepts of State immunity by relying on a text more restrictive of that immunity and which is not (yet) binding on States as a treaty.

III. Groups of cases

The Court's case-law dealing with Art. 6 applications in immunity cases can be divided in five groups each of which has distinctive features. Most of

\(^\text{10}\)ECtHR, Sedelmayer v. Germany (dec.), nos. 30190/06; 30216/06, 10.11.2009, The Law, 1.
\(^\text{13}\)ECtHR, Wallishauser v. Austria, 156/04, 17.7.2012, § 69.
\(^\text{14}\)ECtHR, Cudak, § 67.
\(^\text{15}\)Cf. Tullio Treves, Customary International Law, in: Max Planck Encyclopedia of Public International Law (article last updated November 2006), § 75; ECtHR, Cudak, Concurring Opinion of Judge Cabral Barreto, joined by Judge Popovic.
\(^\text{16}\)Cf. Treves, ibid., §§ 65-7.
those groups reflect exceptions from the principle of State immunity provided for in the UN Convention. The first group covers the invocation of immunity in proceedings relating to damages for grievous bodily harm caused within the forum State\textsuperscript{17}. A second group covers the invocation of immunity in proceedings which relate to questions of employment\textsuperscript{18}. A third group covers the invocation of immunity in enforcement proceedings\textsuperscript{19}. A fourth group covers the immunity of international organisations\textsuperscript{20}. A fifth and final group covers the invocation of immunity in proceedings relating to damages for gross human rights violations, especially torture and war crimes\textsuperscript{21}. Apart from the international organisations group this is the only group which does not reflect an exception provided for in the UN Convention and therefore is the most contentious one.

1. The invocation of immunity in proceedings relating to damages for grievous bodily harm caused within the forum State

This group of cases consists to date to my knowledge of just one member. McElhinney, the applicant in that case, was an Irish policeman attacked, as the result of rather farcical events for which he himself was largely to blame, by a British soldier within Ireland. He alleged that he had feared for his life and suffered severe post-traumatic shock from that attack, and lodged an action in the Irish High Court against the soldier and the UK government, claiming damages. The United Kingdom raised the defence of

\textsuperscript{17}ECtHR, McElhinney v. Ireland, no. 31253/96, Rep. 2001-XI.
\textsuperscript{18}ECtHR, Fogarty v. the United Kingdom, no. 37112/97, Rep. 2001-XI; EChHR, Cuak; EChHR, Sebeh El Leil v. France, 34869/05, 29.6.2011; EChHR, Wallishauser.
\textsuperscript{19}EChHR, Kalogeroupoulou; EChHR, Manoilesco and Dobrescu v. Romania and Russia (dec.), no. 60861/00, Rep. 2005-VI; EChHR, Treska v. Albania and Italy (dec.), no. 26937/04, Rep. 2006-XI; EChHR, Sedelmayer.
\textsuperscript{21}EChHR, Al-Adsani.
sovereign immunity; the Irish courts granted it. Before the Strasbourg Court, the case turned mostly on the question of the proportionality of the restriction of access to a court by the extension of immunity.

The Court referred to a wealth of legal material - State immunity acts of various States\(^{22}\), Art. 12 of the draft articles of what is now the UN Convention, and Art. 11 of the European Convention on State Immunity (Basle Convention)\(^{23}\) - to recognise "a trend in international and comparative law towards limiting State immunity in respect of personal injury caused by an act or omission within the forum State". However, it found "that this practice is by no means universal". Therefore, Irish law which provided for the extension of immunity in such a case did not conflict with the general principles of international law\(^{24}\). In any case, granting sovereign immunity was not disproportionate because the applicant could pursue an action in the United Kingdom.

The dissenters basically claimed that the majority had misrepresented the state of international law; according to them, Art. 12 of the UN Convention reflected the law as it was at the time of the facts and covered them so that the Court should have held Art. 6 (1) ECHR to apply in the case under consideration. Put differently, majority and minority of the Court agreed on the dispositive role of international law in the decision of the case, but disagreed on the contents of that law.

2. The invocation of immunity in cases which relate to questions of employment

Claims from employment especially by employees of diplomatic and consular representations of States are countered rather often by the invocation of sovereign immunity. Insofar as an employment contract is

\(^{22}\)i.e. of the United Kingdom, the United States of America, Canada and Australia.

\(^{23}\)of 16 May 1972, CETS 74.

\(^{24}\)ECtHR, McElhinney, § 38.
with an international organisation, cases are best dealt with under the heading of the immunity of such organisations. Insofar as an employment contract is with a diplomatic agent rather than with his sending State, the question of immunity is governed by the Vienna Convention on Diplomatic Relations\textsuperscript{25} rather than by customary international law and will not be dealt with here\textsuperscript{26}.

There remain four cases which were decided by the Strasbourg Court. The judgments rendered in those cases demonstrate perfectly the Court's close adherence to what it sees as the customary international law of sovereign immunity. Indeed, whether the denial of access to court because of the invocation of sovereign immunity in proceedings related to employment questions is compatible with Art. 6 (1) ECHR is decided by the Court on the basis of Art. 11 of the UN Convention or, before the latter's adoption, on the basis of its Draft Articles.

On this basis, the Court denied in \textit{Fogarty} an infringement of Art. 6 (1) ECHR because, under Art. 11 (2) (c) of the UN Convention, a State can still invoke immunity from jurisdiction if the subject matter of the proceeding is, as it was in that case, the recruitment of an individual\textsuperscript{27}. In \textit{Cudak} and \textit{Sabeh El Leil} the Court found an infringement because the subject matter of those proceedings - the dismissal of an employee - did not fit any of the exceptions of the said para. 2 and therefore was to be judged according to

\textsuperscript{25}of 18 April 1961, UNTS 500, p. 95.
\textsuperscript{26}An example is Regional Labour Court Berlin-Brandenburg, judgment of 9 November 2011, no. 17 Sa 1468/11, available at http://www.gerichtsentscheidungen.berlin-brandenburg.de/jportal/portal/t/1kst/bs/10/page/sammlung.psm?pid=Dokumentanzeige&showdoccase=1&js_peid=trefferliste&fromdoctodoc=yes&doc.id=JURE110021446&doc.part=L&doc.price=0.0#focuspoint [Ger]. According to that judgment, a diplomatic agent's immunity from civil jurisdiction is not dependent on the gravity of his alleged or real infringement of the law. The case dealt with a diplomatic agent's having allegedly held a domestic employee as a slave. According to the Federal Labour Court, judgment of 22 August 2012, 5 AZR 949/11, available at http://juris.bundesarbeitsgericht.de/cgi-bin/rechtsprechung/document.py?Gericht=bag&Art=en&nr=16236 [Ger], deciding on the plaintiff's \textit{revision} against the lower judgment, the agent's immunity from jurisdiction ended with his later return to his home country.

\textsuperscript{27}ECtHR, \textit{Fogarty}, § 38.
Art. 11 (1) of the UN Convention according to which a State cannot invoke immunity in proceedings which relate to employment\(^2\). In *Wallishauser*, the Court, referring to *Cudak* and *Sabeh El Leil*, found an infringement (a) because the foreign State, under Art. 11 (1) of the UN Convention, could not invoke immunity and (b) because, contrary to the view of the respondent forum State, service of process on the foreign ministry of the employer State was sufficient under Art. 22 (1)(c)(i) of the UN Convention so that the latter's refusal to serve summonses on its ministry of justice was immaterial\(^2\). In the latter three cases, the Court considered the forum to have impaired the very essence of the applicant's right to access to court\(^3\).

3. The invocation of immunity from execution or other post-judgment measures of constraint

There are four decisions of the Strasbourg Court dealing with a State's immunity from execution. The Court's jurisprudence in the matter is unequivocal in its results but appears inconsistent in its reasoning. While the Court does here, too, closely adhere to what it perceives as the current state of customary international law, the rules it invokes are those on the immunity from execution in some cases and those on jurisdictional immunity in others. Insofar as the Court invokes the rules on immunity from execution, its starting point is the judgment creditor's right to see a final judgment, or a final decision of another appropriate body, enforced\(^3\). This is another right developed by the Court on the basis of Art. 6 (1) ECHR\(^3\) as part of the right to a court but which may be subject to limitations. Accordingly, the Court rejects an application based on the non-enforcement of a final administrative decision restituting to the applicants property actually used by a foreign State for the housing of diplomatic staff,

\(^{32}\)Cf. e.g *Burdov v Russia*, no. 59498/00, Rep. 2002-III, § 34, with further references.
remarking that it "is not aware of any trend in international law towards a relaxation of the rule that foreign States are immune from execution in respect of their property serving as the premises of ... missions in the forum State"\(^{33}\), even if that property has been acquired illegally\(^{34}\). In another relevant case, the Court summarises its previous jurisprudence holding that "international legal instruments governing State immunity set forth the general principle that, subject to certain strictly limited exceptions, foreign States enjoy immunity from execution in the territory of the forum State"\(^{35}\), switching thereby, without explanation, from customary international law to undefined "international legal instruments".

Insofar as the Court invokes the rules on jurisdictional immunity, it holds in one case that "the decision in which the national courts refused to order the administrative authorities to take measures of constraint ... can be regarded as a justified restriction on the applicants' right of access to a court"\(^{36}\). In another case, the Court rejects, again without any reference to an international law rule concerning immunity from execution, an application based on the non-enforcement of a final court judgment which, after having expressly denied the immunity invoked by the respondent State, awarded damages for crimes against humanity against that State. Here, the Strasbourg Court did not find it established "that there is yet acceptance in international law of the proposition that States are not entitled to immunity in respect of civil claims for damages brought against them in another State from crimes against humanity"\(^{37}\), thereby criticising, at least implicitly, the final judgment. Therefore, in the Court's opinion, that judgment did not oblige the forum State under the Convention to ensure that the applicants could recover their debt through enforcement proceedings in the forum State.

\(^{33}\)ECtHR, Manoilescu, § 81; cf. also ECtHR, Treska, The Law, 2 a) ii).

\(^{34}\)ECtHR, Manoilescu, § 77.

\(^{35}\)ECtHR, Sedelmayer, The Law, 1.
4. The immunity of international organisations

There are only two parallel cases in which the Court had to decide on the immunity of an international organisation. Those cases concerned Labour Court proceedings against the European Space Agency38. The Court considered the Art. 6 (1) ECHR right protected in those cases as the right to a court which was not necessarily satisfied by the mere access to a court if the action was immediately barred by operation of law because of the invocation of immunity by the international organisation39. It also considered that the immunity from jurisdiction commonly accorded by States to international organisations is a long standing practice established in the interest of the good working of these organisations and therefore has a legitimate objective40. As to proportionality, the Court considered it a material factor whether the applicants had available to them reasonable alternative means to protect effectively their Convention rights41. It found that such alternative means existed in fact and concluded therefore that the Labour Courts had not exceeded their margin of appreciation as the applicants' limitation of access to these courts did not impair the essence of their right to a court42.

5. The invocation of immunity in proceedings relating to damages for gross human rights violations

a) This group consists to date to my knowledge of just one member. Al-Adsani, the applicant in that case, made allegations of severe torture on Kuwaiti soil in a suit brought before the English courts against the State of Kuwait. In England, the case turned on the interpretation of the State Immunity Act 1978. The applicant's argument was that the act which

38ECtHR, Treska, The Law, 2 a) ii).
37ECtHR, Kalogeropoulos, The Law, 1 D 1 a), referring to ECtHR, Al-Adsani, § 66.
38ECtHR, Waite and Kennedy; ECtHR, Beer and Regan.
39Ibid., § 51.
40Ibid., § 63.
41Ibid., § 68.
actually read: "A State is immune ..." should be construed as if it read: "A State acting within the Law of Nations is immune ..." although no words to this effect were included in the act. The English courts disagreed\textsuperscript{43}.

Before the Strasbourg Court, the applicant claimed a violation of Art. 3 (prohibition of torture) and Art. 6 (fair trial) of the European Convention. Concerning Art. 3, he submitted that that Convention required a Contracting State to assist one of its citizens in obtaining an effective remedy for torture against another State\textsuperscript{44}. The Court unanimously rejected that argument. It held that a Contracting State's engagement under Art. 1 of the European Convention was confined to securing Convention rights to persons within its jurisdiction, and any positive obligation which might flow from those rights was likewise restricted to the Contracting State's territory\textsuperscript{45}.

The central point of the case rather was Art. 6 of the European Convention (fair trial). The applicant alleged that he was denied access to a court in the determination of his claims against the State of Kuwait\textsuperscript{46}. The extension of immunity by the English courts to that State indubitably restricted that access. The dispute between the parties was about whether that restriction pursued a legitimate aim and was proportionate to that aim\textsuperscript{47}. This was also the dispute over which the Grand Chamber of the Court split 9 to 8.

b) As in McElhinney, which was decided on the same day, the Court referred to a wealth of legal material\textsuperscript{48}. The Court's majority, in accordance with the Court's general approach to that question, held that the legitimate aim was compliance with international law. Similarly, it held that measures taken by the Contracting States which reflected generally recognised rules of public international law could not in principle be regarded as

\begin{flushright}
\textsuperscript{42}Ibid., § 73.  \\
\textsuperscript{43}ECtHR, \textit{Al-Adsani}, § 18.  \\
\textsuperscript{44}Ibid., § 35.  \\
\textsuperscript{45}Ibid., §§ 37-41.  \\
\textsuperscript{46}Ibid., § 42.  \\
\textsuperscript{47}Ibid., §§ 50-51.
\end{flushright}
disproportionate\textsuperscript{49}. It noted that the applicant accepted, "except insofar as it affects claims for damages for torture", that State immunity is still preserved in respect of civil proceedings for damage for personal injuries not caused in the territory of the forum State\textsuperscript{50}. So all boiled down to the question whether there was a special international law rule for torture claims.

The Court's majority recognised the special stigma torture has\textsuperscript{51} and went on to accept, on the basis of various judicial authorities\textsuperscript{52}, that the prohibition of torture has achieved the status of a peremptory norm of international law\textsuperscript{53}. However, while noting the growing recognition of the overriding importance of the prohibition of torture\textsuperscript{54}, it was unable to discern, in the materials before it, "any firm basis for concluding that, as a matter of international law, a State no longer enjoys immunity from civil suit in the courts of another State where acts of torture are alleged"\textsuperscript{55}. In a later case, \textit{Kalogeropoulou}, the Court held that where a judgment denied, under similar circumstances, sovereign immunity and awarded damages against the respondent State, its enforcement was not required under the European Convention\textsuperscript{56}.

c) The leading dissenting opinion by six judges\textsuperscript{57} with which a seventh expressly agreed\textsuperscript{58} argued that the prohibition of torture was a peremptory rule of international law, as indeed the majority accepted. State immunity, on the other hand, was not \textit{jus cogens}. Ergo the peremptory rule must

\textsuperscript{49}Cf. text at n. 21 et seq.
\textsuperscript{50}Ibid., § 56.
\textsuperscript{51}Ibid., § 57.
\textsuperscript{52}Ibid., § 59.
\textsuperscript{54}Ibid., § 60.
\textsuperscript{55}Ibid., § 66.
\textsuperscript{56}Ibid., § 61.
\textsuperscript{57}ECtHR, \textit{Kalogeropoulou}, The Law, 1 D I a), referring to ECtHR, \textit{Al-Adsani}, § 66.
\textsuperscript{58}ECtHR, \textit{Al-Adsani}, Joint Dissenting Opinion by Judges Rozakis and Caflish, joined by Judges Wildhaber, Costa, Cabral Barreto and Vaji.
prevail. The dissenting opinion also alleged an inconsistency in the majority opinion in that the latter maintained that “the standard applicable in civil cases differs from those applying in criminal matters when a conflict arises between the peremptory norm of international law on the prohibition of torture and the rules of State immunity”\(^{59}\).

d) As it stands, it is submitted, the dissenters’ main argument is not very convincing. An argument apt seriously to challenge the majority opinion would at a minimum have to spell out those rules of the core and the penumbra of the prohibition of torture which it considers as *jus cogens*, and to explain why it did so. Indeed, even if one accepts that that prohibition itself, *stricto sensu*, is *jus cogens*, it is still necessary to make the argument that the same applies to derivative propositions\(^{60}\) ie that there is a *jus cogens* norm overriding the immunity from criminal jurisdiction of a former head of State if that person is being accused of torture\(^{61}\), or that the forum has a *jus cogens* obligation to entertain a suit for damages for torture against a foreign State\(^{62}\) or again that it has a *jus cogens* obligation to permit the enforcement of a judgment for damages for torture into the public or diplomatic property of the torture State\(^{63}\). There is nothing in the dissenting opinion which comes even close to such an argument.

How could such an argument run? The way to demonstrate the existence of a *jus cogens* rule identified by Art. 53 of the Vienna Convention on the Law of Treaties\(^{64}\) is its recognition as such by the international community of States. It is submitted that there is no such State consensus even on the prohibition of torture *stricto sensu* as a general rule, much less on any of the

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\(^{58}\)ECtHR, *Al-Adsani*, Dissenting Opinion of Judge Loucaides.  
\(^{59}\)Joint dissenting opinion (n. 56), before § 1.  
\(^{61}\)Cf. the facts of Pinochet case (*supra* n. 52).  
\(^{62}\)Cf. the facts of ECtHR, *Al-Adsani*.  
\(^{63}\)Question raised by ECtHR, *Al-Adsani*, concurrent opinion of Judge Pellonpää joined by Judge Sir Nicholas Bratza, and also by ECtHR, *Kalogeropoulos*.  
\(^{64}\)of 23 May 1969, UNTS vol. 1155, p. 331.
three derivative propositions mentioned above. Concerning the prohibition of torture itself, Art. 1 para. 1 second sentence of the Convention Against Torture\textsuperscript{65} excepts from that prohibition torture inflicted as a lawful sanction\textsuperscript{66}. The fact that it may very well be “that this exception exempts even the cruellest treatment from classification as 'torture' if such treatment is authorised by domestic law”\textsuperscript{67} clearly shows that there is no consensus of the international community on a general prohibition of torture, much less on the \textit{jus cogens} status of such a prohibition\textsuperscript{68}. For the extradition of a torturer the lack of such consensus is shown by the ultimate outcome of the Pinochet case; as is well known, in spite of the House of Lords' judgment permitting his extradition to Spain, Pinochet was not so extradited but allowed to return to his home country, and all the governments involved appear to have been greatly relieved by that outcome\textsuperscript{69}. For the remaining

\textsuperscript{65}Convention Against Torture and Other Cruel and Inhuman or Degrading Treatment or Punishment of 10 December 1984, UNTS vo. 1465, p. 85.

\textsuperscript{66}Therefore, it appears that the re-introduction by law of a death sentence “by breaking on the wheel”, on which cf. e.g. Lynn \textit{Hunt}, Inventing Human Rights (2007), 70-72, would not contravene the CAT. However, the apparently clear meaning of the exception appears to be by no means clear. Indeed, according to \textit{United Nations Voluntary Fund for Victims of Torture, Interpretation of Torture in the Light of the Practice and Jurisprudence of International Bodies}, available at http://www.ohchr.org/Documents/Issues/Interpretation_torture_2011_EN.pdf, p. 26, “[t]he UNCAT explicitly states in article 1 that lawful sanctions do not fall within the scope of this Convention. However, the fact that a sanction is considered as lawful under national or even constitutional law does not mean that it would fall outside the scope of article 1 or 16 of the UNCAT.” But what else is it supposed to mean? In any case, the jurisprudence quoted by the UNVFVT to buttress its contention does not refer to the CAT but to the prohibitions of torture in the ICCPR and the ACHPR, respectively.

\textsuperscript{67}“However the issue is not resolved, and it may be that this exception exempts even the cruellest treatment from classification as 'torture' if such treatment is authorised by domestic law”: Seeking Remedies for Torture Victims. A Handbook on the Individual Complaints Procedures of the UN Treaty Bodies, Part IV: Jurisprudence of the CAT Committee, p. 214, available at http://www.omct.org/files/2006/11/3979/handbook4_eng_04_part4.pdf.

\textsuperscript{68}ICTFY, \textit{Prosecutor v. Furundzija}, §§ 144 et seq. (\textit{supra} n. 52), completely ignores this rather evident point.

two propositions, there is nothing coming even close to such a consensus. Certainly, there is nothing in the UN Convention, which is applicable only to those two propositions, that could be interpreted in this sense, and, before the finalisation of the Convention, the relevant report of the ILC’s working group had been inconclusive\textsuperscript{70}.

But beyond Art. 53 of the Vienna Convention, \textit{jus cogens}, it appears, can also be created by judicial decisions\textsuperscript{71}, as Art. 38 (1) (d) of the Statute of the ICJ indicates. Such a decision will rarely create a rule \textit{ex nihilo} but rather be value based. In general, of course, a value based approach to whatever question may lead to results which, while convincing to some persons, are not readily acceptable to others\textsuperscript{72}. Still, convincingly argued values are the main if not the only reason for the international community to elevate a norm to the position of \textit{jus cogens}. A court decision accepting a value proposition may create such a rule in the individual case; if it does so, it will have a certain persuasive authority beyond that case. Put differently, it takes a “courageous judgment”\textsuperscript{73} to make a value based \textit{jus cogens} proposition into a - still debatable - \textit{jus cogens} rule.

Such “courageous judgments” exist in respect of the prohibition of torture

\textsuperscript{70}Cf. ECtHR, \textit{Al-Adsani}, §§ 62 et seq.

\textsuperscript{71}Cf. Theodor Schilling, On the Constitutionalisation of General International Law, Global Law Working Paper 05/05, NYU School of Law, 43 et seq.

\textsuperscript{72}A telling example in the present context is the discussion whether there is a peremptory norm completely prohibiting commercial whaling „because of the special characteristics of whales as intelligent creatures” or whether „what has emerged as a new peremptory norm is not prohibition, but sustainability“; cf. Douglas M. Johnston, reported in Chairman’s Report, Legal Workshop on Assessment of Actions of the International Whaling Commission under the International Convention for the Regulation of Whaling (ICRW, 1996), \textit{sub} II. Have the Rights and Duties of States under the ICRW been Violated? — Role of the Vienna Convention on the Law of Treaties, available at http://luna.pos.to/whale/icr_legal_chair.html, visited 21 May 2012, who, however, concludes that „[t]he argument for either position is too vague to be considered definitive“.

\textsuperscript{73}Cf. ECtHR, \textit{Al-Adsani}, diss. op. of Judge Ferrari Bravo.
stricto sensu\textsuperscript{74} and the extradition of a torturer otherwise protected by immunity in criminal matters\textsuperscript{75}, but not for the other two propositions. It is this difference which apparently was decisive for the Court's majority in denying \textit{Al-Adsani}'s application. Contrary to the minority's view, it is difficult to see an inconsistency in the majority's reliance on this difference\textsuperscript{76}.

To be persuasive, therefore, an argument challenging the majority's opinion in \textit{Al-Adsani}, instead of simply referring to a supposed hierarchy of norms, would have to balance against one another the different values at play, including the pros and cons of the different possible outcomes. Such an argument the dissenters have failed to deliver. Interestingly, a persuasive, value based counter-argument has been made in the concurring opinion of Judge Pellonpää\textsuperscript{77}.

Conclusion

In ascertaining the content of the international law of State immunity the jurisprudence of the Strasbourg Court looks for a consensus of the international community of States. It finds such consensus especially in the UN Convention which it considers as an expression of customary law. It

\textsuperscript{74}Especially ICTFY, \textit{Furundzija} (\textit{supra} n. 52), § 153.

\textsuperscript{75}House of Lords, \textit{ex parte Pinochet Ugarte} (No. 3) (\textit{supra} n. 52).

\textsuperscript{76}In any case, the minority itself is inconsistent in its views in a similar way: if the prohibition of torture is \textit{jus cogens}, if this peremptory nature is also the nature of Art. 3 ECHR as they claim based on a 1983 judgment of the Swiss Federal Court (BGE 109 Ib 64, 72: \textit{zwangende Regel des Völkerrechts}), and if, as say insist, the prohibition of torture includes the duty of Contracting States to permit suits for damages for torture against the torture State, then it is difficult to see how the dissenters could join the majority in the Court's unanimous decision denying, for territorial reasons, that there was, in \textit{Al-Adsani}, a violation of Art. 3, and not just of Art. 6, ECHR by the fact that the UK granted immunity to the State of Kuwait. The denial of a suit for damages for torture clearly was an intraterritorial matter for the United Kingdom.

\textsuperscript{77}ECtHR, \textit{Al-Adsani}, Concurring Opinion of Judge Pellonpää.
accepts State immunity in the form it has found by State consensus as an inherent limitation of rights guaranteed by the European Convention, especially its Art. 6 right of access to court. By elevating the UN Convention, which appears not only to codify existing customary law but to develop it by restricting State immunity in various ways, but which is not (yet) in force, to customary law binding also upon States which have not even signed it the Court at least marginally challenges the traditional meaning of State immunity in a roundabout way. A more direct challenge, however, especially in cases of alleged grave violations of human rights, cannot be found in its jurisprudence.

As the leading dissenting opinion in Al-Adsani shows, challenges to State immunity beyond what has been just stated may come from criticisms of the Court's jurisprudence. Three further important such criticisms have been raised from within the Court.

The dissenting opinion of Judge Ferrari Bravo in Al-Adsani calls for "a courageous judgment" in the matter of State immunity in proceedings relating to damages for crimes against humanity or for acts of torture. There appears to be an inherent logic in the claim that the Strasbourg Court, as a human rights court, must not necessarily wait for some other judicial authority to accept a value-based human rights norm as jus cogens but may sometimes lead the way. The least which could be expected of such a court is to discuss the underlying value questions, as has indeed been done in the concurring opinion of Judge Pellonpää, instead of simply referring to a missing State consensus.

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78ECtHR, Zylkov v. Russia, 5613/04, 21.6.2011, the Court raised the question of State immunity on its own motion to reproach the respondent State for its courts' decisions not to entertain a civil claim against Russia, referring the applicant instead to the Lithuanian courts which, in the Court's opinion, would have no substantive jurisdiction in the matter because of Russia's immunity.

79ECtHR, Al-Adsani, Concurring Opinion of Judge Pellonpää.
More generally, Judge Loucaides claims in a whole series of dissenting opinions\(^80\) that Art. 6 ECHR is infringed every time a Contracting State's court has no discretion to examine the competing interests before it because the immunity invoked by the respondent State is a blanket immunity which automatically blocks access to court. Indeed, the Strasbourg Court's frequent acceptance of the proposition that such an extension of immunity is proportionate as long as it respects general international law is somewhat disconcerting as on the face of it the respect for international law has nothing to do with the proportionality of the restriction of the right to access to court. This acceptance is also difficult to reconcile with the Strasbourg Court's other approach for assessing proportionality in which it considers whether there are alternative possibilities of access to a court\(^81\).

Restricted to cases in which a Contracting Party of the European Convention invokes State immunity, Judge Ress, in an unrelated case, has opined that the starting point for the Court's interpretation of Art. 6 ECHR should have been to ask whether the Contracting States, by concluding the European Convention, had waived their right to invoke State immunity in Convention cases. If so, Art. 6 could have been construed as overriding, in such cases, the State immunity rule which however would have remained untouched as a rule of general international law.

All those criticisms, as well as the dissenters' position in \textit{Al-Adsani}, would more or less severely restrict the immunity of States. But they all are roads not taken by the Strasbourg Court. Rather, the latter's relevant jurisprudence as here presented does not offer any challenge to State immunity beyond what the States themselves have accepted by negotiating and/or concluding the UN Convention.

\(^80\)ECtHR, \textit{McElhinney}; ECtHR, \textit{Al-Adsani}; ECtHR, \textit{Fogarty}.