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After *Pinochet*: Foreign Sovereign Immunity in Respect of Serious Human Rights Violations - The Decision of the European Court of Human Rights in the *Al-Adsani* Case

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A. Introduction

[1] For want of an effective and accessible universal system for redress of international human rights abuses, victims of human rights violations increasingly seek reparations in domestic civil courts. In the United States in particular, the federal courts, since the 1980 *Filártiga* decision of the U.S. Court of Appeals for the Second Circuit, (1) have already decided on a remarkable number of civil suits alleging human rights violations committed abroad, (2) the most recent example of this trend being a class action of members and supporters of opposition political groups in Zimbabwe who invoke the so-called Alien Tort Claims Act (ATCA) (3) against President and Foreign Minister Robert Mugabe with respect to alleged acts of torture. (4) According to the proponents of such lawsuits, international human rights litigation in domestic civil courts can serve as an important tool in the worldwide effort to enforce international norms concerned with the protection of the individual which may complement criminal prosecutions of the offenders. (5) As stated by Professor Stevens, who has litigated many of the international human rights cases in the U.S. federal courts, \\\"civil lawsuits for human rights violations [...] serve a role similar to tort litigation in a domestic forum: to offer victims of violence a legal remedy which they control and which may satisfy needs not met by the criminal law system.\\\" (6)

[2] However, given that international human rights violations are generally committed by state officials, (7) sovereign immunity may operate as a bar to suits in domestic civil courts arising from human rights abuses committed anywhere in the world. As the American experience shows, this holds particularly true where the case is brought not against the individual perpetrator but against the foreign state itself, which, as in the *Princz* case, (8) normally escapes liability by invoking state immunity. (9)Yet, in the last decade, legal commentators have increasingly argued that, in view of the changing position of the individual in international law as well as the emergence of the concepts of *jus cogens* norms and obligations *erga omnes*, it was time to deny immunity to foreign sovereigns and their officials for serious human rights violations such as torture, genocide or enslavement. (10) *Prima facie*, the 1999 *Pinochet* decision of the British House of Lords (11) seemed to have lent some support to this view. (12)

[3] Nonetheless, in its recent judgment in the case of *Al-Adsani v. United Kingdom*, (13) the Grand Chamber of the European Court of Human Rights (ECHR) took the view that international law has not yet accepted the proposition that states no longer enjoy immunity from civil suit in the courts of another state where acts of torture or other gross human rights violations are alleged. The ECHR, interpreting the European Convention of Human Rights (14) in the light of the international law rules pertaining to state immunity, therefore found that the grant of sovereign immunity in respect of such acts could not *per se* be regarded as a violation of the substantive rights and procedural safeguards of the Convention, thus putting an end to scholarly discussions about the significance of the fundamental human rights provided by the Convention for the international law of state immunity. (15)

B. Factual Background and Proceedings in the English Courts

[4] The underlying dispute concerned one of the few civil lawsuits for international human rights violations that was filed outside the United States courts so far. The applicant, a dual British/Kuwaiti national, had brought civil proceedings in the English courts against the Government of Kuwait and three individual defendants in respect of injury to his physical and mental health caused by alleged acts of torture committed against him in Kuwait as well as by alleged threats against his life and well-being made after he had come to England in 1991. While he obtained a default judgment against one of the three individual defendants, the applicant was granted leave to serve the proceedings on the two other individual defendants but was refused leave to serve the writ on the Government of Kuwait on the ground that he had failed to show that the Government was not entitled to sovereign immunity under the British State Immunity Act of 1978. (16)

[5] The applicant having applied to the Court of Appeal, the Court, citing, *inter alia*, the *Filártiga* precedent, held that

the applicant had established a \\\"good arguable\\\" case, based on principles of international law, that Kuwait should not be afforded immunity under the State Immunity Act in respect of acts of torture. (17) Yet, following service upon the Kuwaiti Government, the latter applied to the High Court, which decided that the Government was immune from suit with respect to the acts allegedly committed in Kuwait. (18) To reach this result, the Court drew heavily on the jurisprudence of the U.S. federal courts, according to which the American immunity statute, the 1976 Foreign Sovereign Immunities Act (FSIA), (19) provides the sole basis for obtaining jurisdiction over a foreign state in the courts of the United States and does neither contain an explicit nor an implicit general human rights exception to foreign sovereign immunity. (20) Because the British State Immunity Act largely parallels the FSIA, the High Court found that by making express provision for exceptions to the general immunity of sovereign states for acts committed outside of the jurisdiction of the English courts, (21) the Act excluded - just like the FSIA - as a matter of construction the possibility of an implied exception with respect to acts of serious human rights abuses for which the applicant had contended.

[6] The Court of Appeal dismissed the applicant\\\'s appeal, stating that none of the exceptions in the State Immunity Act were applicable in the case at hand and that a number of decisions in the United States courts supported the conclusion that there was no general exception to immunity in respect of acts of torture or other violations of international law. (22) Yet, Lord Justice Ward, citing American Circuit Judge Fletcher\\\'s opinion in *Siderman de Blake v. Republic of Argentina*,(23) explained the Court of Appeal\\\'s holding by saying that the Court had to deal with an affirmative act of Parliament by which the judiciary was bound, not with customary international law. Thus, as Judge Fletcher before him, Lord Ward at least showed some sympathy for the argument that as a matter of *international* law, the cloak of sovereign immunity falls away when a state violates fundamental norms dealing with the protection of the individual.

[7] Leave to appeal having been refused by the House of Lords, the applicant lodged an application against the United Kingdom of Great Britain and Northern Ireland with the European Commission of Human Rights under former article 25 of Convention, alleging that the United Kingdom courts, by granting immunity from suit to the Government of Kuwait, failed to secure enjoyment of his right not to be tortured and denied him access to court contrary to articles 3, 6 § 1 and 13 of the Convention. The application was transmitted to the ECHR on 1 November 1998, when Protocol No. 11 to the Convention came into force.

C. The Findings of the Court

[8] The ECHR first dealt with the alleged violation of article 3 of the Convention which provides:

"No one shall be subjected to torture or to inhuman or degrading treatment or punishment.\\\"

The applicant had contended that article 3, when read in conjunction with articles 1 and 13 of the Convention, (24) imposed a duty on the British Government to assist one of its citizens in obtaining an effective remedy for torture against another state. In the view of the applicant, the grant of state immunity to the Government of Kuwait had frustrated this protection. The ECHR, citing its recent jurisprudence on the matter, (25) conceded that, taken together, articles 3 and 1 indeed placed a number of positive obligations on the state parties to the Convention, including, *inter alia*, the duty to carry out an effective official investigation in the event that an individual raised an arguable claim that he had been seriously ill-treated by a state official. The Court held, however, that the positive obligations under articles 3 and 1 of the Convention applied only in respect of ill-treatment allegedly committed *within* the jurisdiction of the state parties.

[9] Yet, in the famous *Soering* case, (26) the ECHR had recognized that article 3 had some limited extraterritorial application inasmuch as the decision by a state party to extradite a fugitive might engage the responsibility of that state, where substantial grounds had been shown for believing that the person concerned, if extradited, faced a risk of being subjected to torture or to inhuman or degrading treatment or punishment in the receiving country. The judgment had emphasised though that liability under the Convention would arise in such circumstances because the state party concerned had taken action which had as *a direct consequence* the exposure of the individual to proscribed ill-treatment. Hence, short of any causal connection between the United Kingdom authorities with the alleged torture in Kuwait, there was no room for the application of the *Soering* principles in the case at hand. The Court therefore concluded that the United Kingdom had not been under an obligation, pursuant to articles 3 and 1 of the Convention, to provide a civil remedy to the applicant in respect of torture allegedly committed by the Kuwaiti authorities.

[10] The ECHR then turned its attention to the main issue of the case: the question whether the denial of access to court in the determination of the applicant\\\'s claim constituted a violation of article 6 § 1 of the Convention. The provision reads as follows:

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

Citing its judgment in the *Golder* case from1975 as well as its recent decision in the case of *Waite and Kennedy v. Germany*,(27) the Court noted that, in principle, article 6 § 1 secured the right to have any claim relating to civil rights and obligations brought before a court and that a limitation on this right is only compatible with this right if it pursues a legitimate aim and if there is a reasonable relationship of proportionality between the means employed and the aim sought to be achieved.

[11] As regards the aim of the limitation in question, the Court considered that the grant of sovereign immunity to a state in civil proceedings pursued the legitimate objective of complying with international law to promote comity and good relations between states through the respect of another state\\\'s sovereignty. Concerning the question whether the restriction was proportionate to the aim pursued, the Court, relying on article 31 of the Vienna Convention on the Law of Treaties, (28) recalled that the Convention should so far as possible be interpreted in harmony with other rules of international law, including those relating to the grant of state immunity. According to the Court, it followed that measures taken by a state party which reflected generally recognized rules of public international law on state immunity could not, in principle, be regarded as imposing a disproportionate restriction on the right of access to court as embodied in article 6 § 1 of the Convention.

[12] The decisive question therefore was whether the grant of immunity to the Government of Kuwait with respect to the alleged acts of torture was compatible with the relevant rules of international law pertaining to state immunity. The ECHR\\\'s answer was in the affirmative: while it conceded that the prohibition of torture was now accepted as a peremptory norm of international law, (29) the Court observed that notwithstanding this special character of the prohibition of torture, it was unable to discern in the international instruments, judicial authorities and other materials before it any firm basis for concluding that, as a matter of international law, a state no longer enjoyed immunity from civil suit in respect of alleged acts of torture committed within the territory of that state. In this context, the Court explicitly distinguished the *Al-Adsani* case from the *Pinochet* decision: whereas the former concerned the immunity *ratione personae* of a sovereign state in respect of civil claims for damages, the latter dealt with the individual criminal liability of a former head of state, thus concerning the issue of immunity *ratione materiae* from criminal jurisdiction. To reach its conclusion, the Court further relied on the findings of the Working Group of the International Law Commission, which, in its 1999 Report on Jurisdictional Immunities of States and their Property, (30) had stated that while national courts had in some cases shown some sympathy for the argument that states were no longer entitled to sovereign immunity where there had been a violation of human rights norms with the character of *jus cogens*, in most cases, the plea of immunity had succeeded. In the view of the ECHR, it followed from all this that the application by the English courts of the provisions of the 1978 State Immunity Act to uphold Kuwait\\\'s claim to sovereign immunity could not be said to have amounted to an unjustified restriction on the applicant\\\'s right of access to court under article 6 § 1 of the Convention.

D. Commentary

[13] Being the first decision of an international judicial body on the crucial issue of state immunity with respect to serious human rights violations, the *Al-Adsani* judgment constitutes a very important precedent. The decision will not only have a strong impact on future human rights claims against foreign states, but also sheds new light on the recent *Distomo* case in which the Greek Court of First Instance of Leivadia found that the Federal Republic of Germany was liable, on the basis of article 3 of the 1907 Hague IV Convention, (31) to pay compensation for summary executions and the complete obliteration of the village of Distomo on 10 June 1944 by the German occupation forces. (32) According to both the prevailing opinion in theory and the current practice of states, the Court held, a state could not invoke immunity when the act attributed to it had been perpetrated in breach of a peremptory norm of international law. The claimants having already attempted to enforce the decision against such emanations of the German state as the Goethe Institute Athen and the German Archaeological School, the ECHR\\\'s judgment now gives strong support for the position of the German Government who has contested the jurisdiction of the Greek courts. (33)

[14] Not surprisingly, the view taken by the ECHR was by no means uncontroversial within the Court: while three of the seventeen judges of the Grand Chamber delivered a concurring opinion, eight (!) dissented, stating - along the lines of the *Distomo* decision - that given the jus cogens character of the prohibition of torture in international law, a state could not validly hide behind the rules of sovereign immunity to avoid proceedings for claims of torture made before a foreign jurisdiction. (34) Yet, to infer from the *jus cogens* character of the prohibition of torture that the general rule of state immunity is deprived of its legal effect is a much too simple line of argumentation. In his

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dissenting opinion to the decision of the International Court of Justice (ICJ) in the *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide* of 11 July 1996, Judge Kreca correctly noted that it was necessary to draw a clear distinction between the *legal nature* of a norm of international law and the *enforcement* of that norm. (35) Thus, the peremptory character of the prohibition of torture does not necessarily imply the forum state\\\'s right to deny foreign sovereign immunity in respect of civil suits for damages as a means of enforcement of the prohibition. As stated by Andreas Zimmermann in the wake of the *Princz* litigation, both issues involve different sets of rules which do not interact with each other, the traditional concept of *jus cogens*, as embodied in articles 53 and 64 of the Vienna Convention on the Law of Treaties, having the sole effect of invalidating incompatible treaties. (36)

[15] Moreover, there is much to be said for the prevailing judges‘ distinction between criminal and civil proceedings as regards states\\\' adjudicatory jurisdiction over gross human rights abuses committed abroad. In fact, it was rightly argued not only in legal literature, (37) but also by Lord Hutton and Lord Millet in the *Pinochet* decision itself that the latter had no bearing on the scope of the immunity *ratione personae* of foreign states from civil jurisdiction in respect of acts of torture. (38) The basic argument in the House of Lords\\\'s decision was that as the 1984 Torture Convention (39) provided for the criminal liability of individual persons for acts of torture committed abroad, it contained an implied waiver of immunity with regard to criminal proceedings. (40) By contrast, as noted by the ECHR, (41) none of the primary international instruments relating to the prohibition of torture provides for the possibility of civil suits outside the territorial state. (42) Furthermore, there are important functional differences between immunity from criminal proceedings and immunity in the context of civil litigation, which should not be overlooked. (43)Thus, there is \\\"nothing illogical or contrary to public policy in denying the victims of state sponsored torture the right to sue the offending state in a foreign court while at the same time permitting [...] other states to convict or punish the individuals responsible if the offending state declines to take action.\\\" (44)

[16] It should be noted, however, that the scope of the ECHR\\\'s judgment is limited insofar as the decision does not explicitly deal with human rights suits brought against foreign government officials. In fact, the U.S. federal courts, while constantly granting sovereign immunity to foreign states under the FSIA even in cases of gross human rights abuses, tend to regard acts of torture, summary execution and other serious human rights violations as being beyond the official\\\'s scope of authority and thus outside of the individual immunities conferred by the FSIA. (45) This approach was, *mutatis mutandis*, rejected in the House of Lord\\\'s *Pinochet* decision. (46) It also is hardly compatible with the assumption that the individual\\\'s conduct, being a \\\"private act\\\" not attributable to the sovereign then, still violates international law. (47) Nevertheless, as the ECHR did not pronounce on the immunities of individuals, lawsuits against state officials might, as a matter of fact, still offer an opportunity for redress of human rights violations. (48)

[17] In any event, just like the recent judgment of the ICJ in the Case of *Congo v. Belgium*, (49) the *Al-Adsani* decision shows that the international immunity law is not accessible to simple solutions proposing a general human rights or *jus cogens* exception to any kind of immunity, irrespective of the character of the proceedings and the persons involved. As stated by Professor Tomuschat, \\\"denying immunity for purposes of criminal prosecution is subject to other considerations than denying immunity to a foreign State in a civil lawsuit.\\\" (50) One, therefore, cannot but express satisfaction with the decision of the ECHR.

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(1) *Filártiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980). For a discussion of the *Filártiga* case, *see, e.g.*, Blum/Steinhard, *Federal Jurisdiction Over International Human Rights Claims: the Alien Tort Claims Act After Filartiga v. Pena-Irala,* 22 HARVARD INTERNATIONAL LAW JOURNAL 53 (1981); George, *Defining Filartiga: Characterizing International Torture Claims in United States Courts*, 3 DICKINSON JOURNAL OF INTERNATIONAL LAW 1 (1984); Hassan, *A Conflict of Philosophies: the Filartiga Jurisprudence*, 32 INTERNATIONAL AND COMPARATIVE LAW QUATERLY 150 (1983).

(2) For a recent survey of the existing case law, *see*, Rau, *Domestic Adjudication of International Human Rights Abuses and the Doctrine of Forum Non Conveniens*, 61 ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT, 176, 178 *et seq.* (2001). For a detailed analysis of human rights litigation in the U.S. federal courts, *see*, STEPHENS/RATNER, INTERNATIONAL HUMAN RIGHTS LITIGATION IN U.S. COURTS (1996).

(3) 28 U.S.C. § 1350. The ATCA reads: "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." For a brief overview of the statute, *see*, Rau, *Schadensersatzklagen wegen extraterritorial begangener Menschenrechtsverletzungen: der US-amerikanische Alien Tort Claims Act*, 2000 PRAXIS DES INTERNATIONALEN PRIVAT- UND VERFAHRENSRECHTS 558 (2000).

(4) *Tachiona v. Mugabe*, 169 F.Supp.2d 259 (S.D.N.Y. 2001).

(5) *See, e.g.,* Van Schaack, *In Defense of Civil Redress: The Domestic Enforcement of Human Rights Norms in the Context of the Proposed Hague Judgments Convention*, 42 HARVARD INTERNATIONAL LAW JOURNAL 141, 155 *et seq.* (2001); Murphy, *Civil Liability for the Commission of International Crimes as an Alternative to Criminal Prosecution*, 12 HARVARD HUMAN RIGHTS JOURNAL 1, 47 *et seq.* (1999).

(6) Stephens, *Conceptualizing Violence Under International Law: Do Tort Remedies Fit the Crime?*, 60 ALBANY LAW REVIEW 579, 581 (1997).

(7) In fact, there are only a few international human rights norms, such as the prohibitions of slavery and genocide, that also apply to private individuals. *See*, in this regard, the decision of the United States Court of Appeals for the Second Circuit in *Kadic v. Karadzic*, 70 F.3d 232, 240 et seq. (2nd Cir. 1995). For a discussion of the *Karadzic* decision, *see, e.g.*, Aceves, *Afirming the Law of Nations in U.S. Courts: The Karadzic Litigation and the Yugoslav Conflict*, 14 BERKELEY JOURNAL OF INTERNATIONAL LAW 137 (1996); Johnson, *Kadic v. Karadzic and Doe I and II v. Karadzic: The Latest Stage in Alien Tort Act Jurisprudence*, 39 GERMAN YEARBOOK OF INTERNATIONAL LAW 434 (1996); Kunstle, *Kadic v. Karadzic: Do Private Individuals Have Enforceable Rights and Obligations Under the Alien Tort Claims Act?*, 6 DUKE JOURNAL OF COMPARATIVE AND INTERNATIONAL LAW 319 (1996); Lu, *Jurisdicton over Non-State Activity under the Alien Tort Claims Act*, 35 COLUMBIA JOURNAL OF TRANSNATIONAL LAW 531 (1997).

(8) *Princz v. Federal Republic of Germany*, 813 F.Supp. 22 (D.D.C. 1992), *reversed*, 26 F.3d 1166 (D.C.Cir. 1994). For a discussion of the *Princz* case, *see, e.g.*, Bergen, *Princz v. Federal Republic of Germany: Why the Courts Should Find that Violating Jus Cogens Norms Constitutes an Implied Waiver of Sovereign Immunity*, 14 CONNECTICUT JOURNAL OF INTERNATIONAL LAW 169 (1999); Reimann, *A Human Rights Exception to Sovereign Immunity: Some Thoughts on Princz v. Federal Republic of Germany*, 16 MICHIGAN LAW JOURNAL OF INTERNATIONAL LAW 403 (1995).

(9) In the United States, foreign states are protected from suit by the 1976 Foreign Sovereign Immunities Act (FSIA) (28 U.S.C. §§ 1330, 1602-1611 [1988]), which does not contain a human rights exception to sovereign immunity (*see, Siderman de Blake v. Republic of Argentina*, 965 F.2d 699 [9th Cir. 1992]; *Princz v. Federal Republic of Germany* [note 8]). By contrast, it is not yet completely clear whether suits against state officials also trigger immunity. While current heads of state recognized by the United States enjoy absolute immunity from suit under the common law head-of-state immunity doctrine (*see, Lafontant v. Aristide*, 844 F.Supp. 128 [E.D.N.Y. 1994]), individuals acting within the scope of their official authority seem to be protected by the FSIA (*see, Chuidian v. Philippine National Bank*, 912 F.Supp 1095 [9th Cir. 1990]). Yet, in *Hilao v.Estate of Ferdinand Marcos*, 25 F.3d 1467 (9th Cir. 1994), the Ninth Circuit found that acts of torture, summary execution, and disappearance could not be qualified as acts taken within an official mandate and were therefore not immunized by the FSIA.

(10) *See, e.g.*, Bianchi, *Denying State Immunity to Violators of Human Rights*, 46 AUSTRIAN JOURNAL OF PUBLIC AND INTERNATIONAL LAW 195 (1994); BRÖHMER, STATE IMMUNITY AND THE VIOLATION OF HUMAN RIGHTS 196 (1997); Kokott, *Mißbrauch und Verwirkung von Souveränitätsrechten bei gravierenden Völkerrechtsverstößen, in* RECHT ZWISCHEN UMBRUCH UND BEWAHRUNG. VÖLKERRECHT – EUROPARECHT - STAATSRECHT. FESTSCHRIFT FÜR RUDOLF BERNHARDT 135, 148 *et. seq.* (Beyerlin, Bothe, Hofmann, Petersmann eds., 1995); LÜKE, DIE IMMUNITÄT STAATLICHER FUNKTIONSTRÄGER, 347 et seq (2000); Reimann (note 8).

(11) *Regina v. Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte*, House of Lords, [1999] 2 W.L.R. 827.

(12) *See, e.g.*, Bianchi, *Immunity versus Human Rights: The Pinochet Case*, 10 EJIL 237, 264 (1999).

(13) ECHR, Al-Adsani v. United Kingdom, Judgment of 21 November 2001, Application no. 35763/97, available at: <http://hudoc.echr.coe.int>.

(14) Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950, ETS no. 5 [hereinafter: the Convention].

(15) *See, generally,* Bröhmer (note 10), at 160 et seq.; HESS, STAATENIMMUNITÄT BEI DISTANZDELIKTEN 313 et seq (1992); Heß, *Staatenimmunität bei Menschenrechtsverletzungen, in* WEGE ZUR GLOBALISIERUNG DES RECHTS. FESTSCHRIFT FÜR ROLF A. SCHÜTZE ZUM 65. GEBURTSTAG 269, 282 et seq (Geimer ed., 1999).

(16) The text of the Act is reproduced in: 17 I.L.M. 1123 (1978).

(17) *Al-Adsani v. Government of Kuwait and Others*, Court of Appeal, Judgment of 21 January 1994, reprinted in: 100 I.L.R. 465 (1995).

(18) *Al-Adsani v. Government of Kuwait and Others*, Hight Court, Queen's Bench Division, Judgment of 15 March 1995, reprinted in: 103 I.L.R. 420 (1996).

(19) *Supra*, note 9.

(20) *See, Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428 (1989); *Siderman de Blake v. Republic of Argentina*, *supra*, note 9; *Princz v. Federal Republic of Germany*, *supra*, note 8.

(21) *See*, sections 2-11 of the 1978 State Immunity Act.

(22) *Al-Adsani v. Government of Kuwait and Others*, Court of Appeal, Judgment of 12 March 1996, reprinted in: 107 I.L.R. 537 (1997).

(23) *See, Siderman de Blake v. Republic of Argentina*, *supra*, note 9, at 718 *et seq.*: "Unfortunately, we do not write on a clean slate. We deal not only with customary international law, but with an affirmative Act of Congress, the FSIA. [...]. Clearly, the FSIA does not specifically provide for an exception to sovereign immunity based on *jus cogens*. [...]. [I]f violations of *jus cogens* committed outside the United States are to be exceptions to immunity, Congress must make them so. The fact that there has been a violation of *jus cogens* does not confer jurisdiction under the FSIA."

(24) Article 1 of the Convention reads: "The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention", article 13 provides: "Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."

(25) *See*, ECHR, *A. v. United Kingdom*, Judgment of 23 September 1998, Reports of Judgments and Decisions 1998-VI; ECHR, *Aksoy v. Turkey*, Judgment of 18 December 1998, Reports of Judgments and Decisions 1996-VI; ECHR, *Assenov and Others v. Bulgaria*, Judgment of 28 October 1998, Reports of Judgments and Decisions 1998-VIII.

(26) ECHR, *Soering v. United Kingdom*, Judgment of 7 July 1989, Series A no. 161.

(27) ECHR, *Golder v. United Kingdom*, Judgment of 21 February 1975, Series A no. 18; ECHR, *Waite and Kennedy v. Germany*, Judgment of 18 February 1999, Reports of Judgments and Decisions 1999-I.

(28) Vienna Convention on the Law of Treaties of 23 May 1969, 1155 U.N.T.S. 331.

(29) The Court cited, *inter alia*, the *Furundzjia* judgment of the International Criminal Tribunal for the former Yugoslavia (ICTY, *Prosecutor v. Anto Furundzija*, Judgment of 10 December 1998, Case No. IT-95-17/1-T) in this context.

(30) Report of the International Law Commission on the Work of its Fifty-First Session, 3 May-23 July 1999, UN Doc. A/54/10 (Annex).

(31) Hague Convention on the Laws and Customs of War of 18 October 1907, Martens, NRG (3e série), Tome 3, 461.

(32) Court of First Instance of Leivadia, *Prefecture of Voiotia v. Federal Republic of Germany*, Case No. 137/1997, Judgment of 30 October 1997, reprinted in: 50 REVUE HELLÉNIQUE DE DROIT INTERNATIONAL 595 (1997). The decision was confirmed by the Greek Supreme Court on 4 May 2000. See, Areopag, *Prefecture of Voiotia v. Federal Republic of Germany*, Case No. 11/2000, Judgment of 4 May 2000. For a discussion of the *Distomo* case, *see*, Dolzer, *Der Areopag im Abseits*, 54 NEUE JURISTISCHE WOCHENSCHRIFT 3525 (2001); Hobe, Durchbrechung der Staatenimmunität bei schweren Menschenrechtsverletzungen - NS-Delikte vor dem Areopag, 2001 IPRAX 368 (2001); Kempen, *Der Fall Distomo: griechische Reparationsforderungen gegen die Bundesrepublik Deutschland, in* TRADITION UND WELTOFFENHEIT DES RECHTS. FESTSCHRIFT FÜR HELMUT STEINBERGER 179 et seq (Cremer, Giegerich, Richter, Zimmermann eds., 2002).

(33) *See*, ATHENER ZEITUNG, 19 April 2002, at 1.

(34) *See, supra*, note 13, Dissenting Opinion of Judges Rozakis and Caflish joined by Judges Wildhaber, Costa, Cabral Barreto and Vajic; Dissenting Opinion of Judge Ferrari Bravo; Dissenting Opinion of Judge Loucaides.

(35) ICJ, *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Bosnia and Herzegovina v. Yugoslavia), Preliminary Objections, Judgment of 11 July 1996, ICJ Reports 1996, 595, 658 (Dissenting Opinion of Judge Kreca), para. 101.

(36) Zimmermann, *Sovereign Immunity and Violations of International Jus Cogens - Some Critical Remarks*, 16 Michigan Journal of International Law 433, 438 (1995). For a comprehensive discussion of the legal consequences of international *jus cogens, see,* KADELBACH, ZWINGENDES VÖLKERRECHT, 324 et seq.

(37) *See*, Rensmann, *Internationale Verbrechen und Befreiung von staatlicher Gerichtsbarkeit*, 1999 IPRAX 268, 272 et seq. (1999).

(38) *Regina v. Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte, supra,* note 11, at 901 (*per* Lord Hutton); at 909 (*per* Lord Millet).

(39) United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 10 December 1984, reprinted in: 23 I.L.M. 1027 (1984).

(40) *Regina v. Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte, supra*, note 11, at 847 *et seq*. (*per* Lord Browne-Wilkinson); at 899 (*per* Lord Hutton); at 903 *et seq.* (*per* Lord Saville); at 913 *et seq.* (*per* Lord Millet).

(41) *See*, Judgment, supra, note 13, para. 61.

(42) It has sometimes been argued though that the provision of a civil remedy in the courts of a country other than the one in which the torture occurred was consistent with article 14 of the Torture Convention. *See*, INGELSE, THE UN COMMITTEE AGAINST TORTURE 362 *et seq* (2001); Rosen, *The Alien Tort Claims Act and the Foreign Sovereign Immunities Act: a Policy Solution*, 6 CARDOZO JOURNAL OF INTERNATIONAL AND COMPARATIVE LAW 461, 484 (1998); Schwartz, *"And Tomorrow?" The Torture Victim Protection Act*, 11 ARIZONA JOURNAL OF INTERNATIONAL AND COMPARATIVE LAW 271, 287 (1994). This was also contended by the United States District Court for the District of Massachusetts in *Xuncax v. Gramajo*, 886 F.Supp 162, 183 (note 25) (D.Mass. 1995). Yet, article 14 of the Torture Convention is, arguably, directed toward redress of torture occurring within the party's own territory and is thus referring only to the principle of territoriality. *See*, Lüke, *supra*, note 10, at 60 *et seq.*; Rau, *supra*, note 2, at 195.

(43) Bradley/Goldsmith, *Pinochet and International Human Rights Litigation*, 97 MICHIGAN LAW REVIEW 2129, 2158 (1999). *See, also*, Tomuschat, *Individual Reparation Claims in Instances of Grave Human Rights Violations: The Position under General International Law, in* STATE RESPONSIBILITY AND THE INDIVIDUAL. REPARATION IN INSTANCES OF GRAVE VIOLATIONS OF HUMAN RIGHTS 1, 17 *et seq* (Randelzhofer and Tomuschat eds., 1999). According to Rensmann, *supra*, note 37, at 273, in particular in respect of large-scale human rights violations, national civil courts might be daunted by the task of reconciling the legitimate claims of all victims while at the same time avoiding the imposition of overwhelming financial burdens on the perpetrating state; cf. also Bröhmer, *supra*, note 10, at 205 *et seq.*, who therefore wants to make the distinction between immunity protected and non-immune conduct according to the quantitative effects of the human rights abuses in question; similarly Lüke, *supra*, note 10, at 347 *et seq*.

(44) *Regina v. Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte, supra,a/i> note 11, at 914 (per Lord Millet).*

(45) See, supra, note 9.

(46) See, Regina v. Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte, supra, note 11, at 859 (per Lord Goff); at 881 (per Lord Hope); at 902 (per Lord Saville); at 906 et seq. (per Lord Millet); at 924 (per Lord Phillips).

(47) See, Bedermann, Dead Man's Hand: Reshuffling Foreign Sovereign Immunities in U.S. Human Rights Litigation, 25 GEORGIA JOURNAL OF INTERNATIONAL AND COMPARATIVE LAW 255, 258 et seq. (1995/96).

(48) For a discussion of the current state of international immunity law in respect of civil suits against government officials who are alleged to have committed serious human rights violations, see, Lüke, supra, note 10, at 277 et seq.

(49) ICJ, Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of Congo v. Belgium), Judgment of 14 February 2002, available at: http://www.icj-cij.org/icjwww/idocket/iCOBE/icobejudgment/icobe_ijudgment_20020214.PDF.

(50) Tomuschat, supra, note 43, at18 (note 46).

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