STATE IMMUNITY AND *JUS COGENS*

The General Assembly first proposed that the International Law Commission look into the issue of state immunity in 1977. As State immunity, by its very nature, sits at the interface between traditional and contemporary notions of international law, the span of the negotiations over three decades inevitably exposed the resulting Convention to gaps and inconsistencies with evolving areas of international law. In 1999 the International Law Commission established a Working Group on Jurisdictional immunities of States and their property,

> to consider outstanding substantive issues … taking into account the recent developments of State practice and legislation and any other factors related to this issue since the adoption of the draft articles [in 1986].[1]

Beyond the five issues identified by States during informal discussions in 1993,[2] the Working Group highlighted another developing area of international law relating to the 'existence or non-existence of jurisdictional immunity in actions arising, *inter alia* out of violations of *jus cogens* norms'.[3] However, although the Working Group noted the 'current interest' in the interaction between immunity and *jus cogens* norms, it concluded that the issue 'did not seem to be ripe enough for the Working Group to engage in a codification exercise over it'.[4] The Working Group then referred the issue to the Sixth Committee which did not consider the relationship between the Convention and *jus cogens* norms any further. The Third Committee also did not look into the interaction, despite the Working Group's suggestion that it might present the more appropriate body in which to address the issue due to its focus on 'non-impunity'.[5]

As a general matter, the position of the Working Group appropriately excludes the relationship between State immunity and *jus cogens* norms from the purview of the Convention. The interaction between State immunity and *jus cogens* norms reflects an area of international law in a state of flux. As the purpose of the Convention is to promote 'uniformity and clarity in the law of jurisdictional immunities of States and their property',[6] any definitive treatment of the issue would have been premature. However, the failure of the Convention to expressly exclude *jus cogens* norms from its coverage could potentially result in regressive development of international law. In this regard, this article first examines the current developments in international law which indicate a progression towards the denial of immunity in cases concerning *jus cogens*

[1] Annex to the *Report of the International Law Commission on the Work of its Fifty-First Session,* A/54/10 (3 May–23 July 1999) para 4 (quoting General Assembly Resolution 53/98, 8 Dec 1998).

[2] ibid para 7 (outlining the five outstanding substantive areas requiring clarification as: '(1) the concept of a State for the purposes of immunity: (2) Criteria for determining the commercial character of a contract or transaction; (3) Concept of a State enterprise or other entity in relation to commercial transactions; (4) Contracts of employment and (5) Measures of constraint against State property.)'

[3] (n 1) para 9.

[4] General Assembly *Convention on jurisdictional immunities of States and their property: Report of the Chairman of the Working Group,* A/C.6/54/L.12 (12 Nov 1999) para 47.

[5] ibid para 48.

[6] General Assembly Resolution 59/38 United Nations Convention on Jurisdictional Immunities of States and Their Property A/RES/59/38 (16 Dec 2004).

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norms. The article then addresses three main ways in which the Convention could restrict the development of international law in this area: namely, the structure of the Convention as providing for a general rule of immunity subject to enumerated exceptions; the understanding in the *travaux préparatoires* that the Convention should be interpreted to exclude criminal proceedings; and the removal of the clause subjecting the Convention to future developments in international law. Taken together, these aspects of the Convention could potentially freeze rapidly evolving areas of international law. As a result, this article supports the idea of a human rights protocol which would guard against the potentially adverse impact of the Convention on the development and clarification of international law in this area.

I. DEVELOPMENTS IN THE RELATIONSHIP BETWEEN STATE IMMUNITY AND *JUS COGENS* NORMS UNDER INTERNATIONAL LAW

In drafting the Convention, 'all the relevant doctrines as well as treaties, case law and national legislation',[7] were ostensibly taken into account. Yet the majority of State practice cited in the commentaries to the Convention relates back to the late 1970s and early 1980s.[8] Moreover, in the examination of *jus cogens* norms, the Working Group only looked at developments up to 1999, at which point only a limited number of cases and scholarly articles had considered the relationship between the two sets of norms.[9] On this basis, the Working Group concluded that 'national courts, in some cases, have shown some sympathy for this argument. However, in most cases, the plea of sovereign immunity has succeeded.'[10] As this was the last time the interaction was considered before the Convention opened for signature in 2004, the further developments discussed below which have taken place in the intervening years were not addressed. In an area of evolving international law, the lag in the adoption of the Convention renders it outdated. Current jurisprudence which, taken in conjunction with broader developments on the right to reparation, impunity and State responsibility under international law,[11] indicates a move away from the availability of State immunity in cases concerning *jus cogens* norms.

[7] General Assembly *Report of the International Law Commission on the Work of Its Forty-Third Session* A/46/10 (29 Apr–19 July 1991) 38.

[8] ibid (n 68) p 37 (citing the surge in the adoption of domestic legislation on immunity).

[9] Appendix to the Report of the International Law Commission (n 1) para 3 (discussing, *Al-Adsani v Government of Kuwait* 107 ILR 536 (1996); *Ex parte Pinochet R v Bow Street Metropolitan Stipendiary Magistrate, ex p Pinochet Ugarte (No 3)* [2000] 1 AC 147; *Controller and Auditor General v Sir Ronald Davidson* [1996] 2 NZLR 278; and the series of cases in the United States of *Argentine Republic v Amerada Hess Shipping Corp* 109 SCt 683 (1989), *Siderman de Blake v the Republic of Argentina* 965 F 2d 688 (9th Cir 1992), *Saudi Arabia, King Faisl Specialist Hospital and Rovspec, Petitioners v Scott Nelson et ux* 507 US 349, 113 SCt 1471 (US Fla 1993), the dissenting opinion of Justice Wald in *Princz v Federal Republic of Germany* 26 F 3d 1166 (DC Cir 1994) as well as s 221 of the Anti-Terrorism and Effective Death Penalty Act 1996 which amends the Foreign Sovereign Immunities Act of 1976 in the United States and the Report of the International Law Association Committee on State Immunity (1994).)

[10] Appendix, ibid 6–7.

[11] *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law* UN Doc E/CN.4/RES/2005/35, Annex (20 Apr 2005) ('Van Boven-Bassiouni Principles'); Economic and Social Council *Promotion and Protection of Human Rights: Impunity: Report of the Independent Expert to Update the Set of Principles to Combat Impunity, Diane*

Since 1999 four national court decisions, in particular, highlight the divide in the approach to the relationship between *jus cogens* norms and State immunity. On the one hand, the Italian Supreme Court in *Ferrini v the Federal Republic of Germany*[12] and the Greek Supreme Court in *Prefecture of Voiotia v the Federal Republic of Germany*[13] have found that State immunity is not available as a bar to jurisdiction in cases concerning *jus cogens* violations. In contrast, despite underlying allegations of torture, the English Court of Appeal upheld the plea of immunity in *Al-Adsani v Kuwait*[14] and the Ontario Court of Appeal granted the Islamic Republic of Iran immunity in *Bouzari v Iran*.[15] Both decisions were based on the lack of an express human rights exception in the respective domestic statutes on immunity. However, as discussed below, the Committee against Torture subsequently made clear in its consideration of Canada's State party report that its failure to provide a civil remedy to all victims of torture did not comport with its obligations under the Convention against Torture.[16] This development, coupled with the decisions of the Greek and Italian Supreme Courts, questions the continuing weight to be granted to the European Court of Human Rights decision in *Al-Adsani v the United Kingdom*,[17] which accorded a wide margin of appreciation to the United Kingdom without a detailed assessment of how the provision of State immunity fulfilled a legitimate aim or met the requirements of proportionality.

In *Ferrini v the Federal Republic of Germany*,[18] Mr Ferrini brought a civil claim for reparation before the Italian courts, alleging that he was forcibly deported from Italy to Germany by the German military forces during the Second World War, for the purpose of forced labour. He had previously attempted to bring a claim for compensation in Germany but had failed as his case did not fall within the terms of a domestic statute which provided the exclusive basis for reparation claims arising out of the Second World War. The Italian *Corte di Cassazione* acknowledged that Germany's military actions amounted to *acta jure imperii* that would normally enjoy the protection of immunity.[19] However, the Court distinguished the case before it from previous cases granting immunity for military activities on the basis of the underlying act involved. By defining the prohibition of forced labour as a peremptory norm under international law, the Court held that *jus cogens* norms 'trump' the plea of state immunity as an 'ordinary'

Orentlicher: Addendum: Updated Set of Principles for the Protection and Promotion of Human Rights Through Action to Combat Impunity E/CN.4/2005/102/Add 1 (2005) ('The Joinet–Orentlicher Principles'); Draft Articles on Responsibility of States for Internationally Wrongful Acts, in Report of the International Law Commission on the Work of Its Fifty-Third Session UN GAOR 56th Sess, Supp No 10, UN Doc A/56/10 (2001).)

[12] *Ferrini v Federal Republic of Germany* (Cass Sez Un 5044/04) (reproduced in the original Italian text in (2004) 87 Rivista di diritto internazionale 539.

[13] *Prefecture of Voiotia v FRG* Case No 11/2000, Areios Pagos. (Maria Gavouneli and Ilias Bantekas, *Sovereign Immunity—Tort Exception—Jus Cogens Violations—World War II Reparations—International Humanitarian Law* (2001) 95 AJIL 198–204, 200 (translating the judgment of the court).

[14] *Al-Adsani v Kuwait* (n 9).

[15] *Bouzari v Iran (Islamic Republic)* Ont CA (2004).

[16] See Section II below.

[17] *Al-Adsani v The United Kingdom* (35763/97) [2001] ECHR 752.

[18] *Ferrini* (n 12).

[19] Judgment (n 12) para 9. (The court distinguished the two decisions of Presidenza Consiglo ministry e al c Federazione italiana lavoratori trasporti e al; Stati Uniti d'America c fedrazione italiana lavoratori trasporti e al, Italian Court of Cassation, 530/2000 (3 Aug 2000) and Presidenza Consiglio ministry v Markovic Order No 8157, 5 June 2002 (2002) 85 Rivista di diritto internazionale which provided immunity in cases involving personal injury to civilians during military activities).

customary international law rule.[20] In particular, the Court contrasted the progressive movement away from the principle of absolute immunity which 'has become, and continues to become, gradually limited',[21] to the absolute nature of a *jus cogens* norm. The court questioned whether

> immunity from jurisdiction can exist even in relation to actions which . . . take on the gravest connotations, and which figure in customary international law as *international crimes,* since they undermine *universal* values which transcend the interest of single States.[22]

As a result, the Court denied Germany the protection of immunity on the basis that it 'would *hinder* the protection of values whose safeguard is to be considered . . . essential to the whole international community'.[23]

In 2001 the Greek Areios Pagos, in *Prefecture of Voiotia v the Federal Republic of* Germany,[24] held that Germany did not enjoy immunity in another civil claim for reparation arising out of *jus cogens* violations committed during the Second World War. Similar to the Italian Corte di Cassazione, the Court found that immunity only applies to acts of a sovereign nature. However, its reasoning differed from the Italian Court in two main respects. First, the Court found that as Germany's actions were, 'in breach of rules of peremptory international law . . . they were not acts jure imperii',[25] and that 'crimes carried out by organs of the occupying power in abuse of their sovereign power do not attract immunity'.[26] Secondly, in contrast to the Italian Court, the Areios Pagos did not employ the normative hierarchy theory (or trumping argument). Rather, it based its decision on the theory of implied waiver whereby by violating a peremptory norm under international law, the State is understood to have waived any immunity that might otherwise attach by implication.[27]

In a later case involving war reparations, the First Chamber of the Areios Pagos

[20] For further discussion of the 'trumping' argument or normative hierarchy theory, see Lee Caplan *State Immunity, Human Rights and Jus Cogens: A Critique of the Normative Hierarchy Theory* (2003) 97 AJIL 741–81.

[21] *Ferrini v Germany* (n 12) para 5 (translated in Pasquale De Sena and Francesca de Vittor *State Immunity and Human Rights: The Italian Supreme Court Decision on the Ferrini Case* (205) 16 EJIL 89–112, 94).

[22] Judgment (n 12) para 7 (translated in De Sena and De Vittor, ibid 98) (emphasis in translation and original).

[23] Judgment (n 12) para 9.2 (translated in De Sena and De Vittor (n 21) 102).

[24] *Prefecture of Voiotia v the Federal Republic of Germany* (n 12). See Gavouneli and Bantekas (n 12) 198 (translating the decision of the *Areios Pagos*).

[25] Gavouneli and Bantekas (n 12) 200 (translating the decision of the Court, 15).

[26] ibid 200 (translating the decision of the Court at 10).

[27] ibid 203. For further discussion on the concept of implied waiver, see Adam C Belsky, Mark Merva, and Naomi Roht-Arriaza 'Implied Waiver under the FSIA: A Proposed Exception to Immunity for Violations of Peremptory Norms of International Law' (1989) 77 Calif L Rev 365–415 and Roger O'Keefe 'European Convention on State Immunity and International Crimes' (1999) 2 Cam YB of Euro Legal Studies 507–20, 512–18. However, this theory has recently lost support. In *Ferrini v the Federal Republic of Germany*, the Italian Corte di Cassazione supported the Areios Pagos' findings but noted that 'a waiver cannot … be envisaged in the abstract, but only encountered in the concrete' (n 11) para 8.2. (translated in De Sena and De Vittor (n 21) 101–2 (emphasis in translation and original). Notably, in line with the separation under international law, the Areios Pagos upheld the plea of immunity at the enforcement stage, Decision of the Greek Supreme Court No 36/2002 (2003) 51 Nomiko Vima 856. The German Federal Court of Justice also held that the Greek courts did not have jurisdiction to hear the case as the underly-

referred the case to the Special Supreme Court,[28] an ad hoc court composed of a combination of judges and legal scholars convened to decide on whether rules of international law are 'generally recognized'.[29] By six votes to five, the Greek Special Supreme Court found, 'that Germany enjoyed immunity without any restrictions or exceptions and therefore could not be sued before any Greek Civil Court for torts committed'. The Court based its decision on 'a general norm of customary international law that rendered inadmissible any claim against a foreign state for tortures committed by its armed forces'.[30] However, as Supreme Court decisions only carry persuasive and not precedential value,[31] the decision again serves to demonstrate the flux in international law.

As will be discussed, the cases of *Bouzari v the Islamic Republic of Iran* and *Al-Adsani v Kuwait* present the relationship of State immunity to *jus cogens* norms as one between domestic and international law. In contrast, as the Areios Pagos and the Corte di Cassazione follow the monist tradition, they interpreted State immunity and *jus cogens* norms as rules of international law, directly incorporated into domestic law through provisions in their respective constitutions.[32] By framing the relationship of State immunity and *jus cogens* norms as a matter of international law, these cases are particularly instructive for the purpose of examining the compatibility of the Convention with evolving jurisprudence under international law.

II. THE FRAMEWORK OF THE CONVENTION AND ITS POTENTIAL TO OSSIFY THE DEVELOPMENT OF INTERNATIONAL LAW

Despite the Working Group's conclusion that the Convention is not the appropriate context in which to address *jus cogens* violations, the framework of the Convention, which provides for a general rule of immunity subject to enumerated exceptions, could create the assumption that States will remain immune in cases involving allegations of violations of *jus cogens* norms, regardless of the current or future developments in international law.

Beyond the question of whether international law even recognizes a default or general rule of immunity subject to enumerated exceptions,[33] the approach of courts in

ing acts constituted *acta jure imperii*, their illegality notwithstanding, and therefore it did not recognize the judgment. Distomo, Bundesgerichtshof (BGH), decision of 26 June 2003, III ZR 245/98, published in (2003) NJW 3488. The European Court of Human Rights subsequently rejected the survivors' claim that the German and Greek courts had violated their right of access to a court under Article 6(1) as inadmissible in *Kalogeropoulou et al v Greece and Germany* (App 59021/00).

[28] Under Art 100(1F) of the Greek Constitution.

[29] *Federal Republic of Germany v Miltiadis Margellos* Case 6/17-9-2002, The Special Highest Court of Greece (Decision of 17 Sept 2002).

[30] See Maria Panezi *Sovereign immunity and violation of ius cogens norms* AED 6/2002 56 RHDI 199 (2003).

[31] Under Art 87 of the Greek Constitution.

[32] Under Art 10(1) of the Italian Constitution and Art 28(1) of the Greek Constitution respectively.

[33] This position has been contested by a range of courts and scholars who maintain that State immunity reflects an exception to the full and absolute jurisdiction that the forum State would otherwise be entitled to exercise, rather than an exception itself. *The Schooner Exchange v McFaddon* 11 US 116; 7 Cranch 116 (1812) 137; *Separate Opinion of Judges Higgins, Kooijmans and Buergenthal)* in *Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic*

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dualist States with domestic statutes similar in structure to the Convention demonstrates the restrictive impact this construction could have on the development of international law. The domestic statutes on immunity in Canada and the United Kingdom provide for a general rule of immunity subject to specific exceptions, within which *jus cogens* norms do not feature. Despite the express acknowledgment of the peremptory status of the prohibition of torture under international law, the English and Canadian courts have interpreted their respective domestic statutes as 'comprehensive' and therefore unable to respond to developments under international law since the enactment of the national laws in 1978 and 1985.

In the recent case of *Bouzari v the Islamic Republic of Iran,* Mr Bouzari initiated civil proceedings against the Islamic Republic of Iran, alleging that he was tortured in the State prison as a result of his refusal to accept the assistance of the then Iranian President for a commission of $50m. The Ontario Court of Appeal found that none of the enumerated exceptions in the Canadian State Immunity Act of 1985 applied.[34] Although the Court expressly acknowledged the peremptory status of the prohibition of torture under international law, it refused to read a human rights exception into the Act. The Court went as far as to state that even if international law required the courts to provide a civil remedy for torture committed extraterritorially, the State Immunity Act would prevail in the case of inconsistency.[35]

However, following the Ontario Court of Appeal's decision (and while the Convention was still in draft form), the United Nations Committee Against Torture considered Canada's State Party Report. The Chairperson noted that the Convention would not prevent Canada from enacting an exception to State immunity in cases of torture. It observed that:

> as a countermeasure permitted under international public law, a State could remove immunity from another State_a permitted action to respond to torture carried out by that State. There was no peremptory norm of general international law that prevented States from withdrawing immunity from foreign States in such cases to claim for liability for torture.[36]

The courts of the United Kingdom have adopted a similar approach to the Canadian courts in prioritising their domestic legislation. In *Al-Adsani v Kuwait,* Mr Al-Adsani brought a civil suit against Kuwait for his alleged torture in the Kuwaiti State prison. Although the court noted that torture, as 'a violation of a fundamental human right . . . is a crime and a tort for which the victim should be compensated',[37] it granted Kuwait immunity nonetheless. The Court reasoned that none of the enumerated exceptions in the State Immunity Act 1978 applied and as a result no further exceptions could be read into the Act which it characterized as a 'comprehensive code'.[38] As the House of Lords

of Congo v Belgium) (ICJ 2002) reprinted in (2003) 42 ILM 852; Sir Ian Sinclair *The Law of Sovereign Immunity: Recent Developments* (1980-II) 167 Recueil des Cours 113–284, 215; Rosalyn Higgins *Certain Unresolved Aspects of the Law of State Immunity* (1982) 29 Neth Int'l L Rev 265–7, 271.

[34] *Bouzari v the Islamic Republic of Iran* (n 15) para 44 (finding that the commercial exception (s 6) did not apply although the purpose of the alleged torture could have been for commercial gain, due to Canada's application of the 'nature' of the act test and at paras 46–7, finding that tort exception did not apply due to the territorial nexus requirement).

[35] ibid para 67.

[36] Committee Against Torture *Summary Record of the Second Part (Public) of the 646th Meeting,* 6 May 2005. CAT/C/SR.646/Add 1, para 67.

[37] *Al-Adsani v Kuwait* (n 9) 4.

[38] ibid 5.

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refused to grant Mr Al-Adsani permission to appeal,[39] he brought a case against the United Kingdom under Article 6(1) of the European Convention on Human Rights. In a judgment of 9:8, the European Court of Human Rights (ECtHR) accorded a wide margin of appreciation to the United Kingdom, without conducting any significant analysis as to whether State immunity pursues a legitimate aim and presents a proportionate restriction on the individual's right of access to a court under Article 6(1).[40] However, in upholding the English Court's decision, it should be noted that the ECtHR only took into consideration the same developments as highlighted by the Working Group. As such, the decision may not reflect an accurate presentation of current international law. A further case is currently on appeal and cross-appeal from the English Court of Appeal to the House of Lords in *Ron Jones v Saudi Arabia*.[41] The Court of Appeal found that the State continued to enjoy immunity, the allegations of torture notwithstanding, but the named individual officials did not. The court held that although 'international law is in the course of continuing development',[42] '*as of yet*, no evidence exists to show that the peremptory status of *jus cogens* norms means that immunity should not apply'.[43]

Although, the 'comprehensiveness' or clarity of the terms of domestic law provides no basis or justification for the failure to take international law into account,[44] the decision of the English and Canadian courts to grant immunity nonetheless highlights the potential for restrictive interpretation of the Convention by national courts. Moreover, the general rule of immunity calls into question whether the Convention comports with the Vienna Convention on the Law of Treaties which under Article 53 provides that: 'A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law.'

While the availability of immunity is sometimes framed as a matter of forum allocation only,[45] the de facto impunity that usually accompanies the provision of immunity due to the lack of an alternative forum by law or in practice[46] highlights the potential conflict with the Vienna Convention. The International Law Commission points out in the commentaries to the *Draft Articles on State Responsibility*[47] that

[39] Leave to Appeal refused on 27 Oct 1996.

[40] *Al-Adsani v United Kingdom* (n 17). See Alexander Orakhelashvili 'State Immunity in National and International Law: Three Recent Cases Before the European Court of Human Rights' (2002) 15 Leiden Journal of Intl Law 703–14; Emmanuel Voyiakis 'Access to Court v State Immunity' (2003) 52 ICLQ 297–332.

[41] *Jones v Ministry of Interior Al-Mamlaka Al-Arabiya (The Kingdom of Saudi)*; *Mitchell and others v Al-Dali* [2004] All ER (D) 418 (Oct).

[42] ibid para 16. [43] ibid para 17.

[44] Ian Brownlie *Principles Of Public International Law* (6th edn OUP Oxford 2003) 34 ('A State cannot plead provisions of its own law or deficiencies in that law in answer to a claim against it for an alleged breach of its obligations under international law'); See also Human Rights Committee, General Comment 31 CCPR/C/21/Rev1/Add.13 (adopted on Mar 2004) ('Where there are inconsistencies between domestic law and the Covenant, Article 2 requires that the domestic law or practice be changed to meet the standards imposed by the Covenant's substantive guarantees').

[45] See Hazel Fox QC *The Law of State Immunity* (The Oxford International Law Library 2002) 525; Andreas Zimmerman 'Sovereign Immunity and Violations of International Jus Cogens—Some Critical Remarks' (1994–5), 16 Mich J Int'l L 433–40, 438.

[46] Christopher Keith Hall 55 ICLQ 411–26,

[47] Draft Articles on Responsibility of States (n 11).

> it is necessary for the Articles to reflect that there are certain *consequences* flowing from the basic concepts of peremptory norms of general international law and obligations to the international community as a whole within the field of State responsibility.[48]

In this respect, Article 41 of the Draft Articles imposes a positive duty on States to 'cooperate to bring to an end through lawful means any serious breach'. If no forum exists before which to hold the State responsible for the breach to account, the provision of a general rule of immunity within the Convention may very well be interpreted as conflicting with *jus cogens* norms.

III. CONCLUDING REMARKS: THE DISTINCTION BETWEEN CRIMINAL AND CIVIL PROCEEDINGS AND THE EXCLUSION OF FUTURE DEVELOPMENTS

The potential for the Convention to have a regressive effect on the development of international law is further impacted by the General Assembly's support of the Ad Hoc Committee's understanding[49] that the Convention should be interpreted to exclude criminal proceedings.[50] This exclusion is understood to have arisen out of concern that the availability of immunity in criminal proceedings would conflict with the duty to prosecute certain crimes under international law.[51] By only excluding criminal proceedings, the Convention could create a contentious position in terms of accountability for international crimes. Essentially, the exclusion would mean that immunity would be available in civil but not criminal proceedings in cases involving allegations of violations of *jus cogens* norms. In relation to *jus cogens* norms in particular, the division appears inconsistent with the developments on reparation, impunity and State responsibility discussed above. Moreover, such an approach has never been recognized in the history, rationale or practice on State immunity. The availability of immunity has always been determined on the basis of the nature or purpose of the underlying act[52] rather than the type of proceeding involved. Indeed, the Committee against Torture in its consideration of Canada's recent State Party report highlighted the incompatibility of a division between civil and criminal proceedings with the requirements of interna-

[48] *Commentaries to the Draft Articles on the Responsibility of States for International Wrongful Acts,* Report of the International Law Commission on the work of its Fifty-third session, *Official Records of the General Assembly,* Fifty-sixth session, Supplement No 10 (A/56/10) (Nov 2001) Ch II(7) 281 (it should be noted that Ch III addresses what the International Law Commission refers to as 'serious breaches of obligations arising under peremptory norms' defined under Art 40(2) as involving 'a gross or systematic failure by the responsible state to fulfil the obligation').

[49] General Assembly *Report of the Ad Hoc Committee on the Jurisdictional Immunities of States and Their Property* Official Records, Fifty-Ninth Session, Supplement No 22 UN Doc A/59/22 (2004) 3 (reiterating the general understanding that the Convention does not apply to criminal proceedings) and 19 (proposing in Annex II, *Written Proposals Submitted During the Session of the Ad Hoc Committee,* that the preamble to the Convention contain the clause, '*Recognizing* the general understanding that the provisions of the present Convention do not cover criminal proceedings). See also General Assembly (n 7) (stating that 'Although the draft articles do not define the term "proceeding", it should be understood that they do not cover criminal proceedings').

[50] General Assembly (n 6) para 2.

[51] Mr Reuter and Mr Ushakov *Year Book of the International Law Commission* (1986) vol I, 1943rd Meeting (7 May 1986) para 30 and para 56 (cited in Fox (n 51) 222.)

[52] See *Al-Adsani v the United Kingdom* (n 17), Joint Dissenting Opinion of Judges Rozakis and Caflisch Joined by Judges Wildhaber, Costa, Cabral Barreto and Vaji, 29–31 and Dissenting Opinion of Judge Loucaides, 34.

tional law.[53] The Commission pointed to 'the absence of effective measures to provide civil compensation to victims of torture in all cases'[54] and recommended that Canada 'review its position under Article 14 of the Convention to ensure the provision of compensation through its civil jurisdiction to all victims of torture'.[55]

Finally, the commentaries note that the original text of the Convention adopted by the International Law Commission on first reading stated that

> the present articles did not prevent the development of international law and that, consequently, the immunities guaranteed to States were subject both to present articles and to general international law.

However, since some members expressed the concern that the provision might allow the 'unilateral interpretation of the draft articles to the extent that exceptions to State immunities could be unduly widened', the Commission removed the phrase at the second reading. The Commission justified its decision by noting that

> it was considered that any immunity or exception to immunity accorded under the present articles would have no effect on general international law and would not prejudice the future development of State practice. If the articles became a convention, they would be applicable only as between the States which became parties.[56]

However, the combination of the general provision for immunity; the exclusion of criminal but not civil proceedings; and the removal of the provision allowing for future developments in international law, collectively risk the ossification of the development of the relationship between State immunity and *jus cogens* norms under international law. On this basis, the Convention should not be ratified without an express human rights protocol.

LORNA MCGREGOR*

[53] Christopher Keith Hall 55 ICLQ 411–26.

[54] Committee against Torture *Consideration of Reports Submitted by States Parties under Article 19 of the Convention: Conclusions and Recommendations of the Committee against Torture*, 34th Session (May 2005) CAT/C/CO/34/CAN para C (4)(g).

[55] ibid D(5)(f).

[56] General Assembly (n 7) 38–9.

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