ARTICLES

State Immunity and Fundamental Human Rights

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Abstract: Should state immunity from jurisdiction be denied to states that violate fundamental human rights in breach of international law? This article critically discusses three analytical approaches which can be used to answer the question at the level of international law. These approaches are derived from a review of principles of state immunity and fundamental human rights, including *ius cogens*. The article goes on to examine why the results dictated by these approaches at the level of international law may not be reflected by municipal legal systems, using US domestic statutes and case law as an example of how a domestic legal system has dealt with this question.

1. INTRODUCTION

Hugo Princz, an American Jew, was 16 years old when the Nazis transported him to Auschwitz. There they tattooed him with the number '36 707' and 'leased' him to a German chemical cartel that used him as slave labour at a facility known as Birkenau. During his two years of enslavement he was subjected to unrelenting physical, mental, and emotional abuse. Princz sued Germany for reparations. The US Court of Appeals dismissed Princz' claim, holding that Germany was immune from jurisdiction.[1]

This example illustrates the central question that this paper seeks to address. Should state immunity from jurisdiction (immunity) be denied to states that violate fundamental human rights of international law (fundamental human rights)? This question involves two inherently complex and conflicting principles of international law and their interpretation by domes-

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1. Princz *v.* Federal Republic of Germany, 26 F.3d 1166 (D.C. Cir. 1994), reproduced *in* 33 ILM 1483 (1994).

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tic courts.

The problem will be approached by first briefly outlining the content and basis of the immunity rule at international law (Section 2). Secondly, fundamental human rights and states' obligations and/or rights to provide domestic civil judicial remedies to individuals (civil remedies) for their breach will be summarized (Section 3). Thirdly, the interaction of these two principles will be considered in order to determine which should prevail at international law (Section 4). Fourthly, the possible results of the meeting of these principles in municipal legal systems will be discussed (Section 5). Finally, an examination of relevant US case law will be undertaken. The purpose of this is to provide an example of how municipal courts deal with the interaction of these two international rules in the context of domestic legal constraints (Section 6).

The analysis will show that international law requires refusal of immunity if a state violates fundamental human rights encompassed in the concept of *ius cogens* norms. Even in the absence of such a characterisation international law may allow a refusal of immunity in the face of human rights violations in some circumstances. Finally, the analysis will show that there may be a divergence between the results dictated by international law and those reached by municipal courts. Such a divergence is attributable to the manner in which international law is incorporated into domestic law and municipal courts' view of their role in the domestic and international legal systems.

2. IMMUNITY

Immunity is a rule of public international law that is applied in domestic legal systems. While there is a divergence of interpretation in domestic legal systems, this is intended to reflect[2] and is governed by international law. The rule prohibits the courts of one state from assuming jurisdiction over a foreign state. The immunity granted is from the pre-existing jurisdiction of the municipal court and does not affect substantive liability under international law.[3] Therefore, states may waive their immunity, expressly or by implication. Any question regarding immunity involves consideration of two issues: the pre-existing jurisdiction of the forum state and application of immunity as an exception to that jurisdiction.[4]

2. A. Bianchi, *Denying State Immunity to Violators of Human Rights*, 46 Austrian Journal of Public International Law 195, at 197 (1994).
3. I. Brownlie, Principles of Public International Law 326 (1990).
4. 35th Report of the International Law Commission, General Assembly Official Records, 38th Session, Supplement No. 10, UN Doc. A/38/10, at 53 (1983).

2.1. Pre-existing jurisdiction

States have the discretion to decide the extent to which and the manner in which they assert jurisdiction, subject to the permissible limits determined by international law.[5] The basic rule of jurisdiction is that it is territorial. However, extraterritorial jurisdiction has been exercised by municipal courts in the context of criminal matters regarding individuals. The limits of the exercise of such jurisdiction are not clear. However, it is probable that there is a necessity for a direct and substantial connection between the forum state and the act. Examples of exceptions to the territoriality principle that have such a connection are: nationality (where the offender is a national of the state), passive personality (when the victim is a national of the state), and the protective principle (when an extraterritorial act threatens the state's security).[6]

Extraterritorial jurisdiction may also be exercised on the basis of the universality principle. This does not require a direct and substantial connection with the forum state. In this case jurisdiction is exercised on the basis of every state's interest to combat egregious offenses that are universally condemned by all states. This is a controversial principle of international law and there are serious questions relating to its application.[7]

This jurisdictional issue is complicated by the fact that while international law may prescribe the general limits of the exercise of jurisdiction, a state's courts or legislature may exercise their discretion to restrict the exercise of domestic jurisdiction within the basic parameters, for political reasons. Similarly, they may extend the exercise of their jurisdiction beyond the limits of international law for political reasons.

2.2. The extent of the immunity rule at international law

The doctrine of absolute immunity prevailed until the end of the last century. The rule was based purely on status. It was enough for the defendant to show that it was a state or a government and that it was being impleaded directly or indirectly, for it to be granted immunity. From the 1950s onwards the courts of an increasing number of states tended towards the restrictive theory of immunity. This doctrine makes a distinction between public acts (*acta iure imperii*) that attract immunity, and commercial or private acts (*acta iure gestionis*) that do not. Status remains important in so far as it de-

5. R. Jennings & A. Watts, Oppenheim's International Law 475 (1992).
6. *Id.*, at 459-478.
7. K. Randall, *Universal Jurisdiction Under International Law*, 66 Texas Law Review 785, at 789 (1988).

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fines the class of defendants who can claim immunity.[8]

The main mechanism for the development of immunity from an absolute principle towards a limited one, was judicial activism. States began to act as private commercial entities and inevitably had legal disputes with individuals and companies. In response to such litigation states pleaded immunity. While the plea did not remove legal liability, its effect was tantamount to denying a remedy to the injured party for what would otherwise be a valid legal claim.[9] The state trader was granted a privileged position as compared with private traders.[10] In response, national courts unilaterally asserted national jurisdiction because it was necessary to provide justice to individuals and other non-state actors.

There is consensus that an international rule of absolute immunity no longer exists. However, this negative assertion does not necessarily lead to the assumption that a restrictive immunity rule exists as a matter of international law. It is possible that international law has not prescribed an alternative rule. Further, the difficulty of ascertaining the position of the rule is compounded because whatever the bare minimum prescribed by international law, national legislation, or domestic court practice may accord a wider immunity to foreign states than required for political or economic considerations or in the hope of reciprocal treatment.[11]

However, it can be said that there is a trend towards the restrictive principle in general.[12] The most influential source material in this area is case law.[13] The restrictive approach has been adopted by the courts of at least 20 countries.[14] However, at least 16 states adhere to the absolute doctrine.[15] The other important sources of state practice are domestic enactments regarding immunity. They have been adopted in a number of countries: Australia, Canada, Pakistan, Singapore, South Africa, the United Kingdom, the United

8. R. Higgins, Problems and Process: International Law and How We Use It 79 (1994).
9. P. Trooboff, *Foreign State Immunity: Emerging Consensus on Principles*, 200 RCADI 268 (1986) and Jennings & Watts, *supra* note 5, at 342.
10. *See* Trooboff, *supra* note 9, at 268.
11. C. Schreuer, State Immunity: Some Recent Developments 6 (1988).
12. *See* Brownlie, *supra* note 3, at 328.
13. Case law may be characterized as state practice or judicial decisions as subsidiary means of determining the law. One cannot help but agree with Professor Crawford's view that judicial decisions should not be viewed as subsidiary in this context, but rather as an aspect of state practice. For "state immunity is *about* the operation of domestic courts in matters involving foreign states [...] municipal courts [...] are the primary forum and their practice must be regarded as primary rather than subsidiary". *See* J. Crawford, *A Foreign State Immunity Act for Australia*, 23 Australian Yearbook of International Law 71, at 77 (1983).
14. These countries include the US and most European states. For a list of these countries and citations from the relevant jurisdictions, *see* Brownlie, *supra* note 3, at 327-328.
15. These include the Soviet Union and China, *see* Brownlie, *supra* note 3, at 328. In addition much of Latin America remains solidly opposed to the restrictive approach, *see* Higgins, *supra* note 8, at 81.

States, and most recently in Argentina.[16] These eight instruments all provide for immunity as the general rule and indicate detailed lists of exceptions. These exceptions commonly include activities governed by private domestic law such as contracts or commercial activities and injury to person or to tangible property (torts). These instruments also commonly include the exception of implied or express waiver of immunity. These enactments are based on what the local legislature has understood to be required and permitted by international law.[17]

There is little evidence in state practice that there is a specific positive rule of customary international law that requires a refusal of immunity when a state has violated international law.[18] There are some nineteenth and early twentieth century US cases regarding refusal of immunity for breaches of international law of neutrality[19] and prize.[20] Furthermore, the US State Immunity Act contains an exception to the grant of immunity for expropriation that is in violation of international law.[21] On the other hand there is authority from various jurisdictions that adopt a restrictive approach to immunity, that expropriation which may constitute a breach of international law, is classified as a public act that enjoys immunity.[22] Therefore international practice is ambiguous on this issue.

16. The 1979 State Immunity Act of Singapore, the 1981 State Immunity Ordinance of Pakistan, and the 1981 Foreign Sovereign Immunity Act of South Africa are reproduced *in* UN Legislative Series, Materials on Jurisdictional Immunities of Foreign States and Their Property, UN Doc. ST/LEG/ SER.B/20, at 28 *et seq*. (1982). The 1976 Foreign Sovereign Immunities Act of the United States is reproduced *in* 15 ILM 1388 (1976). The 1978 State Immunity Act of Britain is reproduced *in* 17 ILM 1123 (1978). The 1982 State Immunity Act of Canada is reproduced *in* 21 ILM 798 (1986). The 1985 Australian Foreign States Immunities Act is reproduced *in* 25 ILM 715 (1986). The Argentinean immunity statute is La ley 24.488 (ADLA, 1995-A-220) on the *Imunidad Jurisdiccional de los Estados Extranjeros ante los Tribunales Argentinos* of 31 May 1995, Boletin Oficial, 28 June 1995. This is the first immunity statute to be passed in a civil law country. For a recent description of the current legal situation in states with immunity statutes *see* J. Bröhmer, State Immunity and the Violation of Human Rights 51-103 (1997).
17. *See* Higgins, *supra* note 8, at 81.
18. *See* Schreuer, *supra* note 11, at 56.
19. J. Paust, Federal Jurisdiction Over Extraterritorial Acts of Terrorism and Nonimmunity for Foreign Violators of International Law Under the FSIA and the Act of State Doctrine, 23 Virginia Journal of International Law 191, at 239-240, nn. 199-200 (1993).
20. Id., at 239-240. See also J. Paust, Draft Brief Concerning Claims to Foreign Sovereign Immunity and Human Rights: Nonimmunity for Violations of International Law Under the FSIA, 58 Houston Journal of International Law 49, at 51-54 (1985).
21. Section 1605 of the 1976 Foreign Sovereign Immunities Act, *supra* note 16.
22. Authority comes from decisions in French, Italian, German, South African, and English pre-state immunity act cases. Opposing this view is *obiter dictum* by Lord Denning in the I Congreso del Partido case, A.C. 244 (1983). *See* Schreuer, *supra* note 11, at 55, nn. 62-66 and 68.

2.3. Structural rules of international law that provide a rationale for immunity

The traditional rationale behind immunity is said to be the international legal principle expressed in the maxim *par in parem non habet iurisdicionem*. That is, legal persons of equal standing cannot have their disputes settled in the courts of one of them.[23] The maxim is concerned with the equality and independence of states.

Professor Lauterpacht offered an excellent analysis of these rationales in 1951. He convincingly argued that the principle of independence requires no more than a municipal court's recognition, that the legislative acts of a foreign state are valid so long as four conditions are met. Firstly, the acts must not be contrary to international law. Secondly, they must not be contrary to fundamental principles of justice. Thirdly, they must not require other states to enforce foreign public or fiscal law. Fourth, they are not intended to have an extraterritorial effect.[24] This reasoning is equally applicable to all acts of foreign states. Addressing the issues of equality and dignity, he argued quite compellingly that the principle is not contravened if the state exerting jurisdiction over a foreign state, submits itself to the full operation of its own law.[25] That is, the requirement of equality is met if the forum state and the foreign state are subject to the same rule of law. Further, he held the view that a state's dignity is no more impaired if it is subject to the law of the forum state, impartially applied, than by its submission to its own law.[26]

Professor Crawford has suggested that three other structural rules of international law are analogous and suggestive of the immunity rule: firstly, the rule that a state cannot be required to submit to international adjudication without its consent ('international dispute settlement rule'); secondly, the principle of non-intervention in the domestic jurisdiction of states and thirdly, the exhaustion of local remedies rule. In respect of these structural rules, Professor Crawford states that they are indicative of the application of some rule of deference which need not necessarily be a grant of immunity.[27]

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23. *See* Brownlie, *supra* note 3, at 324 and Lord Wilberforce's summary of the basis of the doctrine after reviewing US and UK case law of the 19th and 20th centuries in I Congreso del Partido, *supra* note 22, at 262.
24. H. Lauterpacht, The Problem of Jurisdictional Immunities of Foreign States, 28 BYIL 220, at 229 (1951).
25. *Id.*
26. *Id.*, at 231. Jennings also makes the same point stating "[t]here is no obvious impairment of the rights of equality, or independence, or dignity of a foreign state if it is subjected to the ordinary judicial processes within the territory of a foreign state – in particular if that state, as appears to be the tendency on countries under the rule of law, submits to the jurisdiction of its own courts in respect of claims brought against it". *See* Jennings & Watts, *supra* note 5, at 342.
27. J. Crawford, International Law and Foreign Sovereigns: Distinguishing Immune Transactions, 54 BYIL 75, at 114 (1983).

2.4. Conclusions

The position of the rule at international law is unclear, complex, and fragmented. Clearly, there is no rule of absolute immunity at international law. There is a tendency to assert the existence of a rule of restrictive immunity based on the distinction between private and public acts of state. However, neither this approach, nor any other particular distinction between immune and non-immune acts, can claim to represent international law.[28]

The traditional rationales underlying the principle indicate that immunity may only be applied in limited circumstances or may not need to be applied at all, if domestic rules of deference such as Act of state and non-justiciability rules are available. Further, domestic courts may apply rules of private international law such as *forum non conveniens*, or find that there is no jurisdiction to hear the matter, thereby reaching the same result as a grant of immunity, that is, a refusal to provide a decision on the merits.

3. FUNDAMENTAL HUMAN RIGHTS

3.1. The nature and sources of fundamental human rights rules at international law

The nature and sources of human rights laws are significant for our discussion because they directly affect the manner in which these rights are incorporated in municipal law. This in turn, affects the answer given by domestic courts to the central question of this paper.

There are a large number of international conventions that contain human rights obligations. These obligations also exist in customary international law, although there is considerable debate about its exact content. The existence of customary norms beyond treaties is important because custom can create obligations that mitigate the negative significance of the non-ratification of international treaties.[29] The most important source of human rights norms for the purposes of this discussion are *ius cogens* rules. They are peremptory non-derogable norms of international law which represent the interests of the international community as a whole.[30] State consent or

28. *Id.*
29. B. Simma & P. Alston, *The Sources of Human Rights Law: Custom, Jus Cogens, and General Principles*, 12 Australian Yearbook of International Law 82, at 84-85 and 87 (1992).
30. Art. 53 of the 1969 Vienna Convention on the Law of Treaties, reproduced *in* 8 ILM 679 (1969), defines *ius cogens* as "accepted and recognised by the international community of states as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character." The substantive content of *ius cogens* norms is evolving because it reflects the constantly changing in-

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persistent objection to these norms is irrelevant to their existence. Accordingly, these norms are of a higher normative value than other rules of international law that are an expression of state sovereignty through the provision of consent. *Ius cogens* norms give rise to *erga omnes* obligations that provide all states with a legal interest to protect them.[31] They are also the highest ranking norms of custom,[32] which are contained in the Universal Declaration of Human Rights and/or other General Assembly resolutions. In addition these obligations are contained in various treaties and conventions.[33]

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terests of the international community as a whole. In the Barcelona Traction case, the International Court of Justice suggested that the prohibition on genocide and principles and rules concerning basic rights of the human person including protection from slavery and racial discrimination are obligations *erga omnes*. *See* Barcelona Traction, Light and Power Company, Limited (Belgium *v.* Spain), Second Phase, Judgment of 5 February 1970, 1970 ICJ Rep. 3, p. 30, para. 34. The Restatement presents a more detailed list of six prohibitions that are *ius cogens* norms and obligations *erga omnes*: genocide, slavery or slave trade, murder or causing the disappearance of individuals, torture or other cruel, inhuman, or degrading treatment or punishment, prolonged arbitrary detention, and systematic racial discrimination. *See* American Law Institute, Restatement (Third) Foreign Relations Law of the United States, Vol. 2, at 161, 165 *et seq.*, nn. n. and o (1987).

31. In the Barcelona Traction case, the International Court of Justice defined obligations *erga omnes* as "obligations of a State towards the international community as a whole". These obligations "are the concern of all States", accordingly "all States can be held to have a legal interest in their protection". The court did not mention the concept of *ius cogens* explicitly. However the phrase "obligations towards the international community as a whole" partly coincides with Art. 53 of the Vienna Convention which refers to *ius cogens* norms that are accepted and recognized by "the international community of States as a whole". Accordingly, the Court's judgment is usually interpreted as referring to norms of *ius cogens*. *See* Barcelona Traction case, *supra* note 30, at 30, para. 33; and A. de Hoogh, *The Relationship Between Ius Cogens, Obligations Erga Omnes and International Crimes: Peremptory Norms in Perspective*, 42 Austrian Journal of Public International Law 183, at 193 (1991).
32. K. Parker & L. Neylon, *Jus Cogens: Compelling the Law of Human Rights*, 12 Hastings International and Comparative Law Review 411, at 417 (1989).
33. The prohibition of genocide is contained in the 1948 Convention on the Prevention and Punishment of the Crime of Genocide, 78 UNTS 277 (1951). Slavery and slave trade are prohibited by the 1926 Slavery Convention and the 1930 Forced Labour Convention, 39 UNTS 55. Torture is prohibited by the 1984 Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 23 ILM 1027 (1984) and with minor changes in 24 ILM 535 (1985), and the 1966 International Covenant on Civil and Political Rights, 6 ILM 368 (1967), Art. 13. Prolonged arbitrary detention is prohibited by the 1966 International Covenant on Civil and Political Rights, Art. 9. Systematic racial discrimination is prohibited in the 1973 International Convention on the Suppression and Punishment of Apartheid, 13 ILM 50 (1974), the UN Charter, Art. 55, and the 1965 International Convention on the Elimination of All Forms of Racial Discrimination, 5 ILM 352 (1966). The prohibition on the arbitrary deprivation of life is contained in Art. 6(1) of the 1966 International Covenant on Civil and Political Rights.

3.2. Civil remedies against states for violations of fundamental human rights

Whether individuals have a right to a civil remedy for breaches of fundamental human rights norms or states have an obligation to provide them, is a significant question in two respects. Firstly, such a right or obligation can form the basis of an argument for refusal of immunity. Secondly, it affects the exercise of states' pre-existing jurisdiction. The existence of such rights or obligations depends on the source of the human rights obligation.

Beyond defining substantive human rights, treaties usually include implementation provisions. In some, the state has a wide degree of discretion.[34] In others, the obligations are more specific. The closest that treaty obligations come to requiring the provision of a civil remedy, are contained in obligations to provide an effective remedy to individuals whose rights under a particular treaty have been violated. However, these provisions are inherently limited, firstly, because the state obligation is limited to providing an effective remedy for the rights it is obliged to protect within its own territory and not breaches of human rights committed in third countries.[35] Secondly, such provisions give states a wide discretion to decide what form the remedy may take and a civil remedy is not strictly required. Thirdly, if a state breaches this obligation there is no direct recourse available to individuals. Similarly, it is debatable whether there is a customary obligation for states to provide civil remedies based on Article 8 of the Universal Declaration of Human Rights. If individuals have a right to an effective remedy, then there

34. *E.g.*, pursuant to Art. 56 of the UN Charter, states pledge to "take joint and separate action" to achieve the purposes of Art. 55(c) that provides that the United Nations shall promote "universal respect for, and observance of, human rights and fundamental freedoms for all". However, the obligations are general and lack precise definition. An argument may be made that a civil remedy must be provided to individual victims of human rights violations pursuant to Art. 8 of the Universal Declaration of Human Rights, UNGA Res. 217A (III), UN Doc. A/810 (1948). This is based on the view that the Universal Declaration of Human Rights is an authoritative interpretation of Art. 55(c) of the UN Charter and states are bound to provide such a remedy pursuant to Art. 56. The effect of such an argument is to make the provision of a civil remedy a Charter obligation that prevails over other treaty obligations of member states pursuant to Art. 103 of the UN Charter.

35. An example of such a provision is contained in Art. 2(3) of International Covenant of Civil and Political Rights, *supra* note 33. This provides that an effective remedy need only be provided to individuals for rights protected by the Covenant. Pursuant to Art. 2(1), a state is obliged to ensure the rights contained in the covenant to all people within its territory including aliens, subject to its jurisdiction. Accordingly, there is no obligation to provide an effective remedy to an individual for a violation of a right that a state is not obliged to ensure. That is, a violation which occurs outside its territory. Therefore, if a violation is perpetrated by a foreign state within its own territory against an individual who subsequently comes to the forum state, then there is no obligation on the forum state to provide an effective remedy for this violation. *See* M. Singer, *Jurisdictional Immunity of International Organisations: Human Rights and Functional Necessity Concerns*, 36 Virginia Journal of International Law 53, at 89 (1995).

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is a corresponding state obligation to provide this remedy. However, this is not a convincing argument as, firstly, there is no universal acceptance that this article constitutes custom. Secondly, even if there were one, the individual right granted is subject to it being incorporated into domestic law. Thirdly, states have discretion to decide what form the remedy may take. It could be civil or criminal in nature or it could be provided through administrative procedures.

Despite the debate described above, it is clear that states have the right, if not the obligation, to provide civil remedies in order to implement customary human rights, which include *ius cogens* as a subset, so long as they have both a legal interest and jurisdictional competence to do so.[36] These conditions are met if the victim or perpetrator of a breach is a national of the forum state or if the violation occurred within the forum state, or if there is some other substantive connection with the forum. The characterisation of a fundamental human right as *ius cogens* is most significant where these jurisdictional requirements are not met.

In this situation, it is clear that states have a legal interest and may exercise universal jurisdiction against individuals for a limited number of *ius cogens* norms, which if breached, constitute the international crimes of genocide, slavery, or war crimes.[37] It is debatable whether universal jurisdiction can be invoked for international crimes beyond those listed above.[38] Whatever the outcome of that debate is, it is clear that the concept of *ius cogens* is broader than the set of norms which if breached, constitute international crimes.[39] For *ius cogens* norms that do not fall within the category of international crimes for which universal jurisdiction may be exercised, a legal interest may be established on the basis that *ius cogens* norms give rise to obligations *erga omnes*, which every state has a legal interest in protecting. However, it is by no means clear that this legal interest based on obligations *erga omnes* in *Barcelona Traction* justifies the exercise of universal jurisdiction. On one view, the broad dictum of the court was providing guidance for the contemporary application of the universality principle by courts as a way of protecting obligations *erga omnes*. Another interpretation restricts the protection states may exercise in respect of the offenses outlined to the sphere of diplomatic protection.[40]

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36. These have been identified as the two requirements of *ius standi* before the International Court of Justice for a state not directly injured by a breach of international law. *See* De Hoogh, *supra* note 31, at 196.
37. *See* Higgins, *supra* note 8, at 62-63.
38. Some authors argue that whatever the definition of international crimes, they are all presumably subject to the universal jurisdiction of all states, *see* Randall, *supra* note 7, at 828. Others argue against this, *see* Higgins, *supra* note 8, at 63.
39. Art. 19 ILC Draft Articles on State Responsibility, reproduced *in* YILC 1980, Vol. II (Part Two) 30.
40. *See* Higgins, *supra* note 8, at 57.

3.3. Conclusions

There is a core group of fundamental human rights that can be identified in treaties, custom and general rules of law through the concept of *ius cogens*. In so far as these rights are characterized as *ius cogens,* they are at the pinnacle of the international law hierarchy and prevail over all other rules of international law. There are no explicit obligations on states to provide for a civil remedy to individuals for breaches of human rights, particularly if the breaches occurred in a third state. However, an argument can be made that such remedies can be provided pursuant to treaty obligations or as a way of implementing customary international law, on the condition that the state has a legal interest and a jurisdictional basis to do so. If the victim or perpetrator are not citizens of the forum state and the offence occurred in a foreign state, then the forum state will have to exercise universal jurisdiction in order to hear the matter. Whichever argument is used to justify the exercise of universal jurisdiction, its application in order to provide for civil remedies against states is a step beyond the current boundaries of the doctrine. This principle which has been traditionally concerned with individual criminal responsibility[41] for a small category of international crimes, must be extended to state civil responsibility for a broadened definition of applicable offenses. Domestic courts that take this step will necessarily be involved in judicial activism which incorporates and extends international jurisdictional law into domestic law.

4. The International Rule of Immunity for Violations of Fundamental Human Rights

There are three types of analytical approaches that may be taken to answer the central question posed by this paper, in isolation from municipal legal issues. They are: the hierarchy of norms approach, the implied waiver approach, and the structural rules approach. The first two approaches hinge on the legal characterisation of fundamental human rights. The third approach is based on structural rules of international law which provide the underlying rationale for immunity.

4.1. Hierarchy of norms approach

The rule of immunity at international law is not absolute and is subject to limitations. Whatever the domestic limitations are, it is clearly not a non-derogable rule of international law. It does not have the status of a *ius co*

41. *See* Randall, *supra* note 7, at 830.

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gens norm.[42] Human rights law stipulates a hierarchy of norms in the international legal system.[43] At the top of this hierarchy of rules are *ius cogens* norms that give rise to obligations *erga omnes*. These norms are non-derogable. A theoretical balancing of these two rules at international law, a jurisdictional rule subject to state consent and fundamental human rights norms that are non-derogable, must lead to the prevalence of the non-derogable norms so as to preclude a grant of immunity.

A potentially problematic element of this reasoning is derived from the possible characterization of equality of states as a *ius cogens* rule. This could lead to characterization of the immunity rule as a *ius cogens* norm in so far as it reflects the principle of equality. This argument is not convincing. We have seen that the principle of equality does not necessarily require a grant of immunity. As the principles of sovereign equality and immunity are not synonymous, immunity cannot be characterized as a rule of *ius cogens*.

4.2. Implied waiver approach

A second approach to the central question is the analysis based on the fact that immunity may be waived. Two types of implied waived arguments can be made that may lead to a denial of immunity for a violation of fundamental human rights.

Firstly, if a state has violated any of the fundamental human rights that constitute *ius cogens*, such a state impliedly waives immunity.[44] The act constituting the implied waiver in these circumstances is the violation of *ius cogens*. The underlying rationale is that, it is beyond the sovereign power of a state to act in breach of *ius cogens* and as such a state can not expect to be held immune from the consequences of such violations. This argument is closely connected to, and in part based on, the hierarchy of norms approach. Accordingly, it is an argument which carries much weight.

Secondly, it can be argued that a state's ratification of human rights treaties with an obligation to provide for effective remedies and generally the UN Charter as authoritatively interpreted by Article 8 of the Universal Declaration of Human Rights, amount to an implied waiver of immunity before domestic courts. The rationale behind this approach is that states which have ratified these treaties have specifically agreed to the adjudication of their violations of those treaties. Accordingly, they have implicitly waived their

42. *See* Crawford, *supra* note 27, at 87.
43. *See* Bianchi, *supra* note 2, at 203.
44. T. Johnson, A Violation of Jus Cogens Norms as an Implicit Waiver of Immunity Under the Federal Sovereign Immunities Act, 19 Maryland Journal of International Law and Trade, 259 (1995).

immunity with respect to such adjudication.[45] This argument is not convincing. A waiver cannot reasonably be implied from a state's ratification of a treaty that obliges it to provide effective remedies. Such obligations are inherently limited and amount to a state agreeing to provide, and be subjected to, an undetermined method of local adjudication for breaches occurring within its territory. They cannot be read as a blanket waiver of immunity by a state which allows any court of a foreign state to award civil damages against it. Furthermore, the variation of this argument based on the UN Charter is also debatable, as previously outlined.

4.3. Structural rules approach

A third analytical approach is based on structural rules of international law of immunity and not the legal characterisation of the fundamental human rights violation. Accordingly the approach is applicable to human rights generally, irrespective of whether they fall into the *ius cogens* category.

To establish a rule of international law requires either a sufficiently general consensus as to the existence of the rule, together with some agreement on key aspects of its formulation, or it requires the rule to be inducible through recognised methods of reasoning from clearly established rules. The first type of rules are referred to as positive rules. The second type are referred to as structural rules. Where there is sustained disagreement about the content of rule, but there is agreement that it is subject to legal regulation in principle, the presumption is that the structural rule represents the law. This presumption depends on the inductive links between that rule and other rules.[46]

As discussed, there is no positive rule of international law that dictates how immunity is limited. In this situation

> [t]he better approach is to deal with the specific categories or classes of case that have arisen in practice and elaborate specific rules for each such category, taking into account the reasons for extending immunity or asserting jurisdiction in that context. [47]

Therefore, in order to determine the content of the immunity rule with respect to human rights at international law, it is necessary to induce it from basic and clearly established rules of international law.

The principles of independence, equality, and dignity of sovereign states do not require a grant of immunity if the forum state and the foreign state are subjected to the same or similar international and domestic human rights

45. *See* Bianchi, *supra* note 2, at 213-214.
46. *See* Crawford, *supra* note 27, at 86.
47. *Id.*, at 114.

laws. The principle of non-intervention in the affairs of foreign states is not applicable to violations of human rights in so far as they are not considered to be within the reserve domain of states. The exhaustion of local remedies rule is also said to indicate a rule of immunity by analogy. This will only apply if the act complained of is a breach of international and domestic law and effective remedies are available in the national system. However, by definition, if these preconditions are met and there has been some unsuccessful attempt to pursue remedies in the defendant state, then this rule should not indicate a grant of immunity. Another justification for immunity is the international dispute settlement rule. Of all the arguments that can be used to justify a grant of immunity in the face of alleged violations of human rights, this is the strongest. However this argument is based on analogy only and does not have direct application to disputes with non-state parties in matters governed by municipal law or specifically referred to the jurisdiction of the forum state. In so far as human rights actions involve individuals or violations that occur on the forum state's territory, the rule is not applicable by analogy to human rights actions against states. Even if the three foregoing rules are relevant to human rights actions against states, the most they require is the application of some rule of deference which need not be a grant of immunity.

A further structural rules argument is based on the basic principle that sovereign states cannot place themselves above international law. That is, states are sovereign, and subject to international law. If there is no international mechanism to enforce state responsibility in the field of human rights, then a grant of immunity before domestic courts may effectively place states above the rule of law.[48] This argument may be criticized on two levels. Firstly, the rule of immunity is simply jurisdictional and does not eliminate state responsibility. There is a distinction between state responsibility and provision of effective remedies for enforcement of state responsibility. This structural argument relates to failure to provide effective remedies and not the existence of responsibility. It is therefore difficult to argue that states are above the law when they are considered responsible for their breaches. Secondly, even if civil remedies are denied by a grant of immunity, there are usually other enforcement options open to states and individuals. For example, diplomatic protection, treaty complaint procedures, and the mechanisms under Chapter VI of the UN Charter regarding the pacific settlement of disputes. These mechanisms are far from a comprehensive and universal enforcement system for state responsibility, but they exist. Therefore, in so far as states are considered responsible at international law for human rights breaches and some mechanisms exist for the enforcement of this responsibility, this structural argument is not compelling.

48. *See* Bianchi, *supra* note 2, at 200.

4.4. Conclusions

In conclusion, when the rule of immunity interacts with human rights at the theoretical level of international law three analytical frameworks can be applied to indicate the outcome. If the fundamental human rights norm violated is a rule of *ius cogens* it must operate to prevail over the operation of the derogable rule of immunity, whatever its content at international law. An equally compelling argument of implied waiver is derived from the nature of *ius cogens* norms. But the fact that a state has ratified an international treaty which provides for effective domestic remedies for breaches of its provisions is not as convincing.

Notwithstanding the source of the human rights norm, basic principles of international law indicate that immunity need not be granted if three requirements are met. Firstly, the foreign state is subjected to the same international human rights laws and similar domestic laws related to them, as the forum state. Secondly, local remedies have been pursued unsuccessfully in the foreign state, if they are available. Thirdly, the forum state's courts have rules of deference, other than immunity, available to them.

5. Municipal Effect of Immunity and Fundamental Human Rights Rules

The theoretical analysis of the central question at the level of international law will not necessarily be translated into the domestic sphere by municipal courts, where the ultimate decision between immunity and fundamental human rights will be made. The manner in which these international principles are incorporated into domestic law is the decisive factor in determining whether the same result will be reached at the domestic level as is reached at the international level.

5.1. Municipal effect of international law generally

Treaty obligations may be transformed into norms of domestic legal systems in a number of ways. In some systems treaties that are made in accordance with the constitution bind domestic courts without the need for specific incorporating legislation. In other words, they are self-executing.[49] In other cases such as the United Kingdom, treaties only become part of domestic law if specific legislation is passed which enables this to happen. Even if a treaty is self-executing or is specifically incorporated, its effect over prior or

49. *E.g.* Argentina, Austria, France, Luxembourg, Belgium, Greece, Germany, Spain, The Netherlands, Switzerland, United States, and Mexico. *See* Brownlie, *supra* note 3, at 51, n. 15.

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subsequent legislation may differ. However, with very few exceptions contemporary constitutions put treaties on the same footing as other domestic statutes.[50] A number of states follow the principle of incorporation of customary law into domestic law, either through judicial practice or on the basis of constitutional provisions. In some cases, customary rules are granted a superior rank to domestic statutes.[51] Even if custom is incorporated into domestic law the fact is that many rules of international law do not provide specific guidance for their application.

If the two rules systems coincide, there is no difficulty in determining the substantive rule to be applied by the municipal court. However, international and domestic rules may differ because international law imposes an obligation on states that is not reflected in its national law or because domestic and international law directly conflict.[52]

5.2. Municipal effect of international human rights and immunity rules

The central question of this paper will only be considered by a municipal court if a cause of action and pre-existing or basic jurisdiction are established. These are also affected by international law and accordingly the principles discussed above. A cause of action may be established if treaty provisions regarding the provision of an effective remedy are considered self-executing. However, as discussed, these provisions are inherently limited to violations occurring within a state's territory. This requirement will also be met if there is specific domestic legislation providing a cause of action for breaches of international law. Finally, this condition may be satisfied through the plea of a domestic law cause of action such as a tort claim.

A pre-existing jurisdictional basis must exist before the municipal court can consider the central question. The problem of jurisdiction cannot be underestimated and is complicated by two main factors. As discussed, while international law prescribes the parameters of the exercise of jurisdiction, the way in which it is exercised depends on the discretion of municipal courts and legislatures. Further, consideration of immunity and human rights will often involve the exercise of extraterritorial jurisdiction. The manner in

50. *See* Simma & Alston, *supra* note 32, at 86. For an example of an exception *see* Art. 55 of the 1958 French Constitution which provides: "[t]reaties or Agreements duly ratified or approved shall, upon their publication, have an authority superior to that of laws, subject, for each agreement or treaty, to its application by the other party".

51. *E.g.* Art. 25 of the German Basic Law of 8 May 1949, as amended on 1 January 1966 provides: "[t]he general rules of public international law are an integral part of federal law. They shall take precedence over the laws and shall directly create rights and duties for the inhabitants of the federal territory".

52. A useful framework for determining which law is to prevail is proposed by Sieghart. *See* P. Sieghart, The International Law of Human Rights 41 (1982).

which such jurisdiction may be exercised is subject to debate. The most pertinent example of the difficulties faced by municipal courts in this context, is the application of the universality principle for breaches of *ius cogens* norms. If the *ius cogens* violation did not have any connection to the forum state, municipal courts will be faced with the question as to whether they are able to extend an already controversial principle of international jurisdictional law.

Once the preceding preconditions have been established a municipal court can deal with the central question of whether immunity should be granted to the foreign state. As discussed, custom requires a refusal of immunity in the face of *ius cogens* breaches and may not require immunity for other breaches of human rights, if certain requirements are met. The application of the rule at a domestic level will depend on the way that international law of immunity has been incorporated into the domestic legal system.

Codification of the immunity rule has mainly occurred in common law countries. The dominant principle in common law jurisdictions is that customary rules are to be incorporated only in so far as they are not inconsistent with statutes or prior judicial decisions of final authority.[53] These codifications make immunity the basic rule subject to enumerated exceptions. None of these statutes provide for a specific human rights exception. Therefore, if municipal courts in these jurisdictions construe the statutes narrowly, the customary rule of immunity will not be incorporated into the domestic system because it conflicts with the content of the domestic statute.

However, it is possible for domestic courts to use methods of statutory interpretation in order to imply such a specific exception or accommodate such violations in the enumerated exceptions.[54] This process of interpretation should be undertaken according to the long established rule of statutory construction, both in civil and common law countries, that a domestic statute is to be construed, where reasonably possible, in a manner that does not bring it into conflict with international law.[55] Therefore, there is an important role for the courts to play in order to bring the dextrous product of domestic legislatures into line with international law.[56]

The states which do not have codifying statutes and rely on the case law distinction of public and private acts are in a different position. The courts in these jurisdictions commence from the proposition that the public acts of a foreign state attract immunity. In order for a state to incur responsibility for

53. *See* Brownlie, *supra* note 3, at 43.
54. *See* Section 4, *infra*, for a discussion of the US legislation and case law as an example of the arguments which can be used in support of such interpretation.
55. *See* Bianchi, *supra* note 2, at 211 and n. 58.
56. L. Marasinge, *The Modern Law of Sovereign Immunity*, 54 Modern Law Review 664, at 684 (1991).

a breach of human rights, the alleged violation must be a public act of the state or attributable to it. Therefore a cursory application of this distinction to a human rights violation attributable to a foreign state, will lead to a grant of immunity because the violation will be characterized as public.

The issue before the municipal court in these circumstances will be whether the case law can be interpreted so as to accommodate the customary rule. The answer to this question depends on the forum's rules of international law incorporation. If such laws provide for the prevalence of general principles of international law or the conformity of domestic law with customary law, then the rule of immunity at custom should operate so as to bring domestic case law into conformity with it. Municipal courts could reach this result by developing a further exception to specifically deal with violations of human rights. Alternatively, they could adapt the current criteria by providing immunity for public acts only if they are in accord with international law or through the implication of a waiver when states violate human rights.

5.3. Arguments against municipal courts' supervision of human rights violations against foreign states

The tasks of a national court must be carried out within domestic constitutional parameters and may be complicated by the need to maintain a proper relationship between courts, legislature, and the executive. If a municipal court engages in judicial activism that results in a refusal of immunity for foreign states violations of human rights, it may be considered as interfering with the conduct of foreign relations by the executive, or as overruling the legislature. For this reason, municipal courts have the discretion to apply domestic rules of deference that can serve to protect these relationships.

A further argument arises when the forum court belongs to a state that is not a party to the human rights treaty it seeks to uphold and therefore not subject to its supervisory procedures. This creates the impression that the primary motive for the refusal of immunity for human rights violations is the pursuit of partisan political ends.[57] These problems can be avoided if courts apply international law using clear and unbiased procedural rules and rules of deference.

It has also been said that domestic courts cannot become an effective substitute for international procedures. Accordingly, progress in enforcement of human rights should be sought primarily through the ratification of international instruments and submission to procedures under them.[58] Ideally, human rights should be supervised through some type of universal and

57. *See* Schreuer, *supra* note 11, at 60.
58. *Id.*

binding mechanism. In this situation, the role of municipal courts could be limited to the determination and award of damages in cases where an international supervisory body has determined authoritatively that a violation has occurred.[59] The present international mechanisms do not meet this ideal. However, this is an argument for the improvement of these international mechanisms and not for the preclusion of municipal court supervision.

5.4. Arguments for municipal courts' supervision of human rights violations by foreign states

Municipal courts have an important role to play in the enforcement of international law in a decentralized legal system. The nature of such a legal system is that it involves the concentration of authority and therefore responsibility on the national level.[60] In this system courts have a dual role. They are servants of various national interests. They are also organs of the state for the purposes of state responsibility and have a corresponding obligation to ensure that their acts are in accordance with international law. Their function is different from supranational courts. Their location in the national system makes it desirable to curtail their consideration of the hostile substantive policy of another state in the area of legitimate diversity. This aim may be adequately served through the use of domestic doctrines of deference.[61] Furthermore, this issue should not arise when a foreign state violates fundamental human rights, as a state policy decision to breach such rights cannot reasonably be considered an area of legitimate diversity.

Despite the politically sensitive nature of immunity, domestic courts have shown a willingness to engage in judicial activism by adapting the rule in order to provide fair treatment of individuals in response to a changing international commercial environment. Should they not engage in the same activism to provide a remedy to individuals who have suffered the greatest injustice of all, a violation of their human rights?

Of course, the situations differ in that the development from an absolute principle of immunity to a restrictive one, was a response to the tension between the private law obligations of states pursuant to contracts and the application of a principle of public international law which effectively allowed them to avoid these obligations. Furthermore, states had expressly consented to readily discernable standards by which their performance of obligations could be judged.

The conflict between human rights and immunity involves a clash between two principles of international law. The contents of both principles

59. *Id.*
60. R. Falk, The Role of Domestic Courts in the International Legal Order 65, n. 2 (1964).
61. *Id.*, at 74.

are not clear. Furthermore, the acts in question relate to the public acts of the state and not its private ones. However, there is a convincing argument to be made that fundamental human rights provide clear discernable standards upon which states can be judged by any court with a jurisdictional basis. Despite these differences, the development of the law of immunity stands as a clear precedent of judicial activism that leads to a refusal of immunity in order to provide justice for individuals in response to the changing nature of the state.

5.5. Conclusion

Customary international law requires refusal of immunity when foreign states have breached *ius cogens* norms and may allow a refusal of immunity if they violate human rights in general. However, municipal courts may not reach the same result. Even if municipal courts are prepared to refuse immunity to foreign states, a human rights action may not be heard on the merits because of a lack of a cause of action or jurisdictional basis. This is due to the way in which international law of human rights, jurisdiction, and immunity are interpreted and incorporated into domestic legal systems. However, there are methods within these constraints that domestic courts can utilise to provide individuals with a remedy. These methods can and should be utilised as far as possible in order for municipal courts to harmonise national law with international law. In this way they could fulfil their role in the decentralized international legal system.

6. Immunity and Fundamental Human Rights in US Courts

Examples of the interaction between fundamental human rights and immunity in municipal courts are primarily to be found in the US case law. It is not possible to infer the content of a customary rule from one nation's state practice.[62] However, this jurisprudence is useful because it provides an example of the reasons why domestic courts may have difficulty in refusing immunity to foreign states that violate human rights.

62. *See* Bianchi, *supra* note 2, at 211.

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6.1. Municipal effect of international law in US domestic law

The US Constitution includes international treaties as a source of US law.[63] However, under municipal law principles, treaties are only considered to be self-executing when their provisions explicitly enable courts to carry them out. Treaties are not superior to federal statutes; they are equal in status.[64] If an inconsistency exists, statutes will supersede earlier treaties.[65] Human rights instruments are not generally considered to be self-executing under US law. Therefore, human rights treaties require implementing legislation before they can provide a cause of action for victims of human rights violations. Customary international law is incorporated in US common law.[66] However, it is not considered to be self-executing and requires implementing legislation before it can be invoked as providing a cause of action in domestic courts.[67] Furthermore, no statute can be challenged on the ground that it violates custom.[68] Finally, there is a presumption in US case law that legislation is intended to be in conformity with international law,[69] and should be interpreted as such.

6.2. Domestic legislation and case law relating to human rights and immunity

6.2.1. Torture Victim Protection Act and Alien Torts Claim Act

The Torture Victim Protection Act (TVP) gives US citizens and aliens a jurisdictional basis to sue foreign nationals for torts including violations of human rights that are committed under actual or apparent authority or under the colour of law of a foreign nation. The Alien Torts Claim Act (ATC) allows for civil suits by an alien for a tort committed in violation of the law of nations or a treaty of the US. The seminal case in the interpretation of the ATC was *Filartiga* v. *Pena-Irala*.[70] The court held that the ATC provides a

63. Art. VI: "[t]his Constitution and the laws of the United States which shall be made in pursuance thereof; and all treaties made or which shall be made under the authority of the United States, shall be the supreme law of the land".
64. J. Simon, *The Alien Tort Claims Act. Justice or Show Trials?* 11 Boston University International Law Journal 1, at 12 (1993).
65. Committee of United States Citizens Living in Nicaragua *v.* Reagan, 859 F. 2d 929, at 939 (1988).
66. The Paquette Habana, 175 US 677, at 700 (1900).
67. *See supra* note 1, at 1492, n. 1.
68. *See supra* note 65, at 939.
69. Schroeder *v.* Bissel, 5 F. 2d 838, at 842 (1925).
70. 77 ILR 169; *see also* 19 ILM 966 (1980). The case concerned seventeen year old Joelito Filartiga, who was tortured and murdered by electric shock and beating, by police in Paraguay. He was the son of a political opponent of the then Paraguayan Dictator General Alfredo Stroessner. The court found for the Plaintiffs who were the deceased's father and sister.

jurisdictional basis and a direct cause of action for breaches of international law. The court confirmed that the law of nations was incorporated into US common law and held that US courts were bound to apply contemporary standards of international law. These were held to include the prohibition of torture based on the prohibitions contained in the Universal Declaration of Human Rights, the Declaration on the Protection of All Persons From Being Subject to Torture and various treaties and conventions.[71]

This decision has been followed by a number of other cases that pleaded the following violations of international law: torture, prolonged arbitrary detention, cruel inhuman or degrading treatment,[72] rape, summary execution, genocide, war crimes, and crimes against humanity.[73]

In the *Karadžić* case,[74] the court confirmed that international law permits a state to establish appropriate civil remedies, such as those authorized by the ATC, against individuals for breaches of international law such as piracy, war crimes and genocide, without regard to territory or the nationality

71. *Id.*, at 176-178. The Declaration on the Protection of All Persons From Being Subject to Torture, UN Doc. A/RES/3453 (XXX), UN Doc. A/4684 (1960); and the Universal Declaration of Human Rights, *supra* note 34.

72. Five lawsuits were filed against the former Philippine dictator Ferdinand Marcos in 1986. On Appeal the jury granted $1.2 billion in punitive damages and $766 in compensatory damages, *see Re* Estate of Marcos Litigation, D.C. No. MDL 840 (D. Haw. 3 February 1995). In another group of cases, the families of Argentine citizens who had 'disappeared' sued the Argentine General Carlos Guillermo Suarez-Mason for torture, prolonged arbitrary detention, summary execution, disappearance, and cruel, inhuman, or degrading treatment. Default judgment was entered and punitive and compensatory judgment were awarded. *See* Forti *v.* Suarez-Mason, 672 F. Supp. 1531 (N.D. Cal. 1987) and 694 F. Supp.707 (N.D. Cal. 1988), Martinez-Baca *v.* Suarez-Mason, No. 87-2057 (N.D. Cal. 22 April 1988), and Quiros de Rapaport *v.* Suarez-Mason, No. C87-2266 (N.D. Cal. 11 April 1989). In 1991, six Haitians who were detained and tortured for their opposition to the military regime sued the former dictator Avril for ordering and condoning torture, cruel inhuman or degrading treatment, and arbitrary detention. An award of $41 million in damages was made against the defendant, *see* Paul *v.* Avril, 901 F. Supp. 330 (S.D. Fla. 1994). Two law suits were filed against Guatemalan General and defence minister Gramajo, and served while he was studying at Harvard University, for summary execution, torture, disappearance and cruel, inhuman, or degrading treatment, kidnapping, and rape committed by his forces. Default judgment was entered against him and damages were awarded for $47.5, *see* Xuncax *v.* Gramajo and Ortiz *v.* Gramajo, 886 F. Supp. 162 (D. Mass. 1995). The mother of a man killed in the Dili Massacre sued an Indonesian General who was studying in Boston. Default judgment and an award for damages was made for $14 million, *see* Todd *v.* Panjaitan, No. 92-12255 (D. Mass. 26 October 1994). Three women were tortured in Ethiopia by a former government official who was working in Atlanta as a bellman. The matter went to trial without jury and damages were awarded for $1.5 million, *see* Abebe-Jiri *v.* Negewo, No. 1-90-DV-2010-GET (N.D. Ga. 1992). Relatives of victims of genocide and war crimes sued the Rwandan leader of a paramilitary group. Default judgment was entered and damages were awarded in the sum of more than $105 million, *see* Mushikiwabo *v.* Barayagwiza, No. 94 Civ. 3627 (S.D. NY April, 1996). *See generally*, B. Stephens & M. Ratner, International Human Rights Litigation in US Courts, Appendix A (forthcoming). The appendix contains a summary of the key ATC cases.

73. Kadić *v.* Karadžić, 1995 WL 604585 (2nd Cir. (N.Y.)), at 2 and 8.

74. *Id.*, at 2.

of the defendant, even though criminal jurisdiction was usually applicable in such circumstances.[75] By implication, it was prepared to find civil jurisdiction in respect of rape, torture, and summary execution to the extent that Karadžić was a state actor.[76]

The *Filartiga* jurisprudence has been criticized on two levels. Firstly, it has been said that the ATC gives US federal courts jurisdiction to hear cases involving international law but does not provide a cause of action. In the absence of self-executing treaty provisions or custom, the cause of action must arise from an independent statute or the common law.[77]

Secondly, the jurisprudence has been criticised for the extraterritorial exercise of jurisdiction.[78] Strictly speaking, the *Filartiga* exercise of jurisdiction did not involve the principle of universal jurisdiction but was based on the domestic jurisdictional principle of transitory torts, whereby jurisdiction may be exercised if the parties are physically present in the jurisdiction for the commencement and service of proceedings.[79] From an international law perspective, this exercise of jurisdiction could also be justified on the basis of universal jurisdiction. As discussed, this has usually applied in the context of criminal proceedings for a limited number of international crimes. In so far as the *Filartiga* jurisprudence has applied the principle in order to extend civil jurisdiction for all violations of customary human rights law, it has extended this jurisdictional principle.

The interpretation of this legislation is significant for two reasons. Firstly, it overcomes two of the main barriers to human rights suits in municipal courts. It allows international law to be directly actionable in a domestic courts and constitutes an exercise of extraterritorial jurisdiction. Secondly, it serves as a dynamic example of municipal court interpretation of domestic legislation, originally enacted in 1789, consistently with and beyond contemporary standards of international law.

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75. *Id.*, at 5.
76. *Id.*, at 8.
77. *See* Simon, *supra* note 64, at 37-38. *See also* Judge Bork's opinion in Tel-Oren *v.* Libyan Arab Republic, 726 F. 2d 774 (1994). According to Judge Bork only self-executing treaties or customary rules of international law that provide individual remedies can give a cause of action in US courts. For an opposing opinion, *see* Judge Edward's opinion in the same case who was of the view that the ATC grants jurisdiction as well as a domestic cause of action. *See generally*, S. Jetter, *International Terrorism: Beyond the Scope of International Law: Tel-Oren* v. *Libyan Arab Republic*, 12 Brooklyn Journal of International Law 505 (1986); and L. Wellbaum, *International Human Rights Claims After Tel-Oren* v. *Libyan Arab Republic: Swan Song for the Legal Lohengrin*, 9 Hastings International and Comparative Law Review 107 (1985).
78. *See* Simma & Alston, *supra* note 29, at 86.
79. *See* Filartiga case, *supra* note 70, at 179.

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6.2.2. Foreign Sovereign Immunities Act

In 1976, the Foreign Sovereign Immunities Act (FSIA)[80] was enacted in order to codify the restrictive theory of immunity. Under this Statute a foreign state has a statutory right to immunity unless its acts fall into one of the enumerated exceptions which will be discussed at length below.

6.2.3. Interaction between the Alien Torts Claim Act and the Foreign Sovereign Immunities Act

The interaction of the ATC and FSIA under US domestic law has been considered when the defendant to an action under the ATC is a state or where the defendant is a foreign official who claims immunity as an "agency or instrumentality of a foreign state".[81] Generally, if a foreign national is acting outside actual authority but under the colour of that authority, the FSIA will not allow a grant of immunity and jurisdiction will exist under the ATC.[82]

In *Argentine Republic* v. *Amerada Hess Shipping,*[83] the Supreme Court held that if the defendant is a foreign nation, jurisdiction must be established under the FSIA and not under the ATC.[84] The court thereby closed the jurisdictional door opened by the ATC. In order for individuals to successfully sue foreign states in US courts they must establish a domestic cause of action and a jurisdictional basis prescribed by the enumerated exceptions of the FSIA.

6.3. Arguments for the refusal of immunity based on the exceptions to the FSIA

6.3.1. Tort exception

Section 1605(5.a) of the FSIA provides that a foreign state will not be immune for torts which cause personal injuries or death or damage to property occurring in the US.[85]

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80. *See* FSIA, *supra* note 16.
81. *Id.*, FSIA Paragraph 1603(a).
82. *In Re* Estate of Ferdinand E. Marcos Human Rights Litigation, 978 F. 2d 493 (9th Cir. 1992). The case concerned kidnapping, torture, and murder by military intelligence personnel, under orders from the defendant who was President Marcos' daughter and chairman of the state body which controlled police and military intelligence personnel.
83. 488 US 428 (1989).
84. *Id.*, at 438.
85. This section provides non-immunity in a case "in which money damages are sought against a foreign state for personal injury or death, or damage to or loss of property occurring in the United States and caused by the tortious act or omission of that foreign state or of any official or employee of that foreign state while acting within the scope of his office or employment:

A notable application of this provision occurred in *Letelier* v. *Republic of Chile*.[86] In this case the court refused immunity to Chile for a car bomb assassination in the US of the former Chilean ambassador to the US. The court rejected a Chilean argument that the act was public and therefore subject to immunity, thereby declining to graft the public-private immunity dichotomy on to the words of the statute. In addition, it rejected the argument that the act was a performance of a discretionary function, which is a specific exception under the statute. The court stated:

> there is no discretion to commit, or to have one's officers or agents commit, an illegal act [...]. Whatever policy options may exist for a foreign country, it has no "discretion" to perpetrate conduct designed to result in the assassination of an individual or individuals, action that is clearly contrary to the precepts of humanity as recognised in both national and international law.[87]

A similar approach leading to the application of the tort exception was reached in a case concerning the assassination of a Taiwanese dissident murdered in California by Chinese agents.[88] Therefore, this provision, which was primarily directed at the problem of traffic accidents, has been interpreted so as to deny immunity for tortious acts committed in violation of international law within the territory of the US.

However, US courts have consistently held that both the injury and damage must occur within the US before this section will be used to deny immunity for violations of international law that constitute domestic law torts.[89] Therefore, when former US hostages and their families brought tortious actions against Iran for their detention in the American embassy in Teheran in breach of international law,[90] they were not able to successfully plead the tort exception for two main reasons.[91] Firstly, the court found that Congress intended the FSIA to be consistent with international law of im-

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except this paragraph shall not apply to (A) any claim based upon the exercise or performance or the failure to exercise or perform a discretionary function regardless of whether the discretion be abused, or (B) any claim arising out of malicious prosecution, abuse or process, libel, slander, misrepresentation, deceit, or interference with contract rights". *See* note 16, *supra*.

86. 488 F. Supp. 665 (D.D.C 1980).
87. *Id.*, at 673.
88. Lui *v.* Republic of China, 892 F.Supp. 1419 (9th Cir. 1989).
89. *See* Berkovitz *v.* Islamic Republic of Iran, 735 F. 2d 329 (9th Cir. 1984) which concerned the murder of a US employee of a Californian engineering firm in Iran; Kline *v.* Republic of El Salvador 603 F. Supp. 1313 (D.D.C. 1985) which concerned the beating and murder of a US traveller by soldiers in El Salvador; and De Nergi *v.* Republic of Chile, 1992 WL 91914 (D.D.C. 6 April 1992) which concerned two participants in a student protest who were detained by a group of Chilean soldiers, doused with gasoline, set on fire, beaten, and detained without medical assistance. One died and the other was permanently maimed.
90. United States Diplomatic and Consular Staff in Teheran (United States *v.* Iran), Merits, Judgment of 24 May 1980, 1980 ICJ Rep. 3.
91. McKeel *v.* Islamic Republic of Iran, 722 F.2d 582 (9th Cir. 1983).

munity. It found that under international practice, immunity could only be denied where the acts of foreign sovereign states occurred in the territory of the forum state. For this reason, the court rejected the plaintiffs' claims that extraterritorial jurisdiction could be exercised on the nationality or protective principles. Secondly, the court decided not to exercise such jurisdiction because it could interfere with the conduct of US foreign policy and lead to similar exertion of jurisdiction over the US on the basis of reciprocity.[92]

Thus, US courts have been willing to deny immunity to foreign states for breaches of international law which constitute domestic torts when they occur in the US. In doing so they have been constrained by foreign policy concerns, their view of legislative intent and therefore, the content of international law of immunity.

This form of national remedy for the enforcement of international law has been described as novel and radical.[93] This approach depends on the congruence of national torts law and international law of state responsibility.[94] A suggestion has been made advocating extraterritorial jurisdiction for breaches of international law which also constitute domestic torts, through the application of a domestic effects doctrine.[95] One author has suggested that "the direct effects in the forum state might be derived from the legal interest that every state has in the protection of *erga omnes* obligations".[96] However such an interpretation of the torts exception is unlikely because of the current wording of the FSIA. The commercial activities exception to immunity specifically allows the exercise of extraterritorial jurisdiction based on an effects doctrine.[97] If Congress intended to apply this doctrine to torts it would have also specified a similar jurisdictional basis for that exception.

92. A similar result was reached in Persinger *v.* Islamic Republic of Iran, 729 F. 2d 835 (D.C. Cir. 1984), which concerned a US marine who was held hostage in the US embassy in Iran in 1979.
93. H. Fox, State Responsibility and Tort Proceeding Against a Foreign State in Municipal Courts, 20 Netherlands Yearbook of International Law 3, at 34 (1989).
94. *Id.*, at 13.
95. *See* Schreuer, *supra* note 11, at 62.
96. *See* Bianchi, *supra* note 2, at 217.
97. The commercial activities exception contained in Section 1605(a) of the FSIA, *supra* note 16, states that a court shall not be immune from jurisdiction in any case: "(2) in which the action is based upon a commercial activity carried on in the United States by the foreign state: or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States". Section 1603 states: "[a] 'commercial activity' means either a regular course of commercial conduct or a particular transaction or act. The commercial character or an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose".

6.3.2. Commercial activity exception

A recent attempt to accommodate human rights violations into the commercial activity exception[98] was rejected by the US Supreme Court. The case of *Saudi Arabia* v. *Nelson*[99] concerned a US national who had entered into a contract with, *inter alia*, the Kingdom of Saudi Arabia, to be a monitoring systems engineer at a hospital in Riyadh. He repeatedly reported safety hazards in the hospital over a period of 7 months and was told to ignore them. Finally, he was summoned to the hospital's security office where agents of the government arrested him. He was placed in gaol, shackled, beaten, tortured and deprived of food. Mr Nelson argued that "but for" his recruitment in the US, he would not have suffered his injuries and that this recruitment was a commercial activity carried on in the US by a foreign sovereign.

The court rejected his argument that these circumstances fell into the commercial activity exception.[100] The court held that it was not Saudi Arabia's commercial activities in the US which caused his injuries but its abuse of police powers in Saudi Arabia. This abuse was a sovereign act in terms of the restrictive theory of immunity.[101]

Therefore, while this exception allows the exercise of extraterritorial jurisdiction, it has been interpreted narrowly so as to preclude action for breaches of human rights, because of the public nature of the sovereign acts.

6.3.3. International agreements exception

Under Section 1604 the rule of immunity is "subject to existing international agreements to which the United States is a party at the time of enactment of" the FSIA.[102] The rationale behind this exception is that the FSIA should not be applicable so as to frustrate the operation of an international agreement which expressly conflicts with the immunity statute.[103] US courts have refused to apply this exception on the basis that treaties with respect to which this exception has been pleaded are not self-executing. Specifically, it has been held that Articles 55 and 56 of the UN Charter do not confer private rights enforceable by litigants in US courts.[104]

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98. *Id.*
99. 113 S. Ct. 1471 (1993).
100. *Id.*, at 1473.
101. *Id.*, at 1479.
102. *See* note 16, *supra*.
103. *See* note 83, *supra*, at 692.
104. *See e.g.* Siderman De Blake v. The Republic of Argentina, 965 F. 2d. (1992). In addition the court held that the Universal Declaration of Human Rights is not an international agreement and is simply an authoritative statement on the content of custom. This view of the UN Charter was also held in Frovola v. Union of Soviet Socialist Republics, 761 F. 2d 370. In this case the court also found that the Helsinki Accords were not self-executing.

However, this exception was applied so as to refuse immunity in *Von Dardel v. Union of Soviet Socialist Republics I*.[105] The case concerned the unlawful detention and imprisonment of Raoul Wallenberg, a Swedish diplomat. In this case the FSIA was held to conflict with and thwart the effective operation of the 1961 Vienna Convention of Diplomatic Relations[106] and the 1973 Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons Including Diplomats[107] to which both the US and the USSR were signatories. The holding was based on the fact that these instruments were designed to protect diplomats from offenses against them. The court found that in order for such conventions to operate effectively the perpetrators of offenses must be liable for their acts. This decision is an example of a broader interpretive technique as opposed to the 'self-executing' requirement, which lead to the denial of immunity for a state which had violated the very rights it had promised to punish.[108]

6.3.4. Implied waiver exception

Under Paragraph 1605(a)(1) of the FSIA, foreign states may waive immunity either explicitly or by implication. This provision has been the basis of arguments for the implicit waiver of immunity, either through the ratification of an international treaty or the violation of *ius cogens* norms, as discussed above. These arguments have not generally been successful before US courts.

The implied waiver argument based on treaty ratification was raised and rejected with respect to Articles 55 and 56 of the UN Charter and the Helsinki Accords in the *Frovola* case.[109] Here the court interpreted the implied waiver provision narrowly. It required convincing evidence that a treaty was intended to waive immunity before holding that the foreign state could be sued in the US. The vague and general nature of the treaties in question did not provide evidence that the parties to them anticipated that US courts would enforce them.

However, in *Von Dardel I*[110] the court accepted that when the Soviet Union explicitly agreed to be bound by human rights treaties it implicitly waived its immunity because any other result would rob those agreements of

105. 623 F. Supp. 246 (D.D.C. 1985).
106. 500 UNTS 95.
107. 13 ILM 42 (1974).
108. There was a second Von Dardel case in which the Soviet Union entered a special appearance and successfully moved for the dismissal of the first judgment. *See* Von Dardel v. Soviet Socialist Republics II, 736 F. Supp. 1 (DDC 1990).
109. *See* note 104, *supra*.
110. *See* note 105, *supra*.

their substantive effect. In *Von Dardel II*[111] the plaintiff relied on the 1973 Convention on the Prevention and Punishment of Internationally Protected Persons as the basis for implied waiver. This argument failed. The court applied a narrow construction of the implied waiver provision and held that waiver could not be implied from the ratification of a non-self-executing instrument which does not confer private causes of action and requires jurisdiction over crimes and not civil suits against foreign states.[112]In this manner, the court returned to a narrow interpretation of this provision.

The implied waiver argument on the basis of *ius cogens* norms was recently discussed in *Princz* v. *Federal Republic of Germany*.[113] The court accepted that *ius cogens* norms are non-derogable, enjoy the highest normative status within international law and prevail over other rules of international law which are in conflict with them. It accepted that the actions of the defendant were in breach of *ius cogens*. However, it rejected the argument that a breach of *ius cogens* norms constitutes an implied waiver because the defendant never indicated any intention, express or implied, to amenability to suit before US courts.[114]

In a dissenting opinion, Judge Wald reached the opposite conclusion using three main steps in her analysis. Firstly, she characterized the nature of *ius cogens* and immunity at international law. She held that prohibitions of genocide and slavery were *ius cogens* norms which had been violated by Nazi Germany. *Ius cogens* norms were held to be non-derogable, an expression of the will of the international community and therefore not subject to the consent of any one state. Immunity on the other hand, hinged on a state's consent to suit as a prerequisite to another state's exercise of jurisdiction.[115]

Secondly, the Judge considered the intersection of immunity and *ius cogens* at international law. She concluded that when a state violates a non-derogable rule of *ius cogens*, "in effect overriding the collective will of the entire international community, the state cannot be performing a sovereign act entitled to immunity".[116] In support of this proposition the Judge found that a breach of *ius cogens* norms justified the exercise of universal jurisdiction, citing the Nuremberg Trials, the *Eichmann* case, and the statute of the International Criminal Tribunal for the former Yugoslavia, as authority for this proposition. She held that immunity could not provide protection from the exercise of universal jurisdiction. On this basis she found that "the clear import of international law is to disavow a foreign sovereign's claim to immunity where that sovereign is accused of violating universally accepted

111. *See* note 108, *supra*.
112. *Id.*, at 5.
113. *See* note 1, *supra*.
114. *Id.*, at 1491 and 1492.
115. *Id.*, at 1499.
116. *Id.*, at 1500.

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norms of conduct essential to the preservation of the international order".[117]

Thirdly, she invoked the principle that US courts must, whenever possible, interpret US law consistently with international law. Accordingly the only way to reconcile the FSIA with international law was to imply a waiver of immunity by states which breach *ius cogens* norms.[118] This statutory interpretation was held to be consistent with Congressional intent because nothing in the legislative history of the FSIA excluded the possibility of implied waiver for violations of *ius cogens*.[119]

The majority agreed with Judge Wald's first analytical step, did not reach any conclusion with respect to the second step and rejected the third step. The court accepted that international law is part of US law but under domestic law, municipal courts were not competent to hear a claim arising under international law, absent a statute granting such jurisdiction. Furthermore, they were reluctant to imply a waiver given an absence of Congressional intent.[120]

The analytical process and content of the dissenting opinion serves as an example of how a municipal court can reconcile domestic law with international law. However, the opinion can be criticised from an international law perspective on one level. The analysis on the intersection of *ius cogens* and immunity based on the universal jurisdiction principle is not compelling. The examples of the Nuremberg Tribunal and the International Criminal Tribunal for the former Yugoslavia related to exercise of jurisdiction by non-domestic criminal tribunals. The *Eichmann* case[121] was an example of the exercise of universal jurisdiction by a domestic court. In each of these cases criminal jurisdiction was exercised against individuals. Therefore, universal jurisdiction is not directly relevant to the determination of the status of immunity at international law, which is a rule applied by domestic courts in the context of civil proceedings against states.

6.4. General arguments for the refusal of immunity under the FSIA

There are two general arguments which have been used to support a plea for a refusal of immunity under the FSIA. The first is the common law principle that domestic law should be interpreted consistently with international law. This has been pleaded in conjunction with the specific exceptions to immunity discussed above.

The second is the hierarchy of norms argument. The argument has been

117. *Id.*, at 1500.
118. *Id.*, at 1501.
119. *Id.*, at 1501.
120. *Id.*, at 1492, n.1.
121. Israel *v.* Eichmann, District Court of Jerusalem, Judgment of 11 December 1961, reproduced *in* 56 AJIL 805 (1962).

made in the context of implied waiver. It was also made independently of any specific exception to the FSIA in *Siderman de Blake* v. *Republic of Argentina*.[122] The case was filed by an Argentine family for the beating and torture of Jose Siderman and the expropriation of a family business. The court held that *ius cogens* norms as non-derogable rules, enjoy the highest status at international law and prevail over all other rules of international law including immunity.[123] On this basis the court accepted that Argentina would not enjoy immunity at international law for a *ius cogens* breach. Despite this holding the argument did not succeed because it did not fall into one of the enumerated exceptions of the FSIA. The court concluded "that if violations of *ius cogens* committed outside the United States are to be exceptions to immunity, Congress must make them so".[124]

6.5. Reasons for US courts to deny immunity to states that violate fundamental norms in the form of *ius cogens*

Why have US courts rejected a broad approach to the statutory interpretation of FSIA exceptions so as to provide immunity for states which violate peremptory norms? The court in *Princz* explained:

> [w]e think that something more nearly express is wanted before we impute to the Congress an intention that the federal courts assume jurisdiction over the countless human rights cases that might well be brought by the victims of all the ruthless military juntas, presidents-for-life, and the murderous dictators of the world, from Idi Amin to Mao Zedong. Such an expansive reading [...] would likely place an enormous strain not only upon our courts but [...] upon our country's diplomatic relations with a number of foreign nations. In manny [sic] if not in most cases the outlaw regime would no longer even be in power and our Government could have normal relations with the government of the day – unless disrupted by our courts, that is.[125]

Therefore, the underlying reasons for the court's interpretation of the FSIA are first, the desire to avoid the risk of interfering in US foreign relations and second to avoid the practical problems of a litigation flood in an already overloaded legal system. A third and related concern is, that if the US refuses immunity to foreign states for breaches of peremptory norms, foreign courts will be likely to claim jurisdiction over the US for similar matters on the basis of reciprocity.

However, as noted above, courts have at their disposal a number of rules of deference. These can serve as a more effective and equitable way of

122. *See* note 104, *supra*.
123. *Id.*, at 718.
124. *Id.*, at 719.
125. *See* note 1, *supra*, at 1492.

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avoiding foreign relations interference on a case by case basis than the application of immunity so as to effectively preclude a remedy against outlaw states. This approach would also allow US domestic courts a role in the enforcement of international law, in a decentralized international legal system.

Furthermore, the floodgates concern is not realistic because of the limited definition of actionable *ius cogens* norms. In addition, domestic legal restrictions act as a barrier to suits. In the US, for example, plaintiffs must establish personal and venue jurisdiction and defendants may move to dismiss actions on the basis of *forum non conveniens* and on the basis of domestic rules of deference.[126]

In response to the concern about reciprocity, there is nothing inherently objectionable in allowing the US to be held accountable for its serious breaches of international law.[127]

6.6. Conclusion

US courts evidence a contradictory approach in the supervision of human rights. On the one hand, they have revived and interpreted an 18th century statute, the ATC, so as permit aliens to sue directly for any breach of human rights law by a state actor no matter where the violation occurred. This interpretation was undertaken notwithstanding the fact that Congress could not have expressly intended the statute to be used for such a purpose, given that the law of international human rights did not exist at the time the ATC was enacted. On the other hand they have specifically precluded such a remedy against states, by requiring that suits against them be justified on the basis of the FSIA, a statute which does not contain a specific exception for human rights violations.

The FSIA has been interpreted so as to deny immunity for torts which also constitute violations of international human rights law perpetrated on US territory. The decisions which dealt with this exception noted that this interpretation of the tort exception was consistent with international law.

The remainder of exceptions have generally been interpreted narrowly so as to grant immunity to foreign states for human rights violations. The international agreements and implied waiver arguments based on ratification of international treaties, have been rejected on the basis that they are not self-executing. In other words, these arguments were rejected on the basis of a domestic law principle which governs the incorporation of international law into the US domestic system.

The most compelling argument for refusal of immunity is based on the implied waiver and/or hierarchy of norms approaches. The dissenting judg-

126. *See* Johnson, *supra* note 44, at 287.
127. *Id.*

ment in *Princz* and the decision in *Siderman* accepted that international law precludes a grant of immunity when a foreign state violates *ius cogens* norms. Immunity was nonetheless granted to the foreign states in those cases, at least in part, because of a lack of congressional intent to make the breach of *ius cogens* an exception to the FSIA.

The shining light in this jurisprudence was the dissenting opinion of Judge Wald in *Princz*. She used the domestic principle that US law should be interpreted consistently with international law and the fact that Congress had not specifically precluded implied waiver for *ius cogens* violations, to deny immunity to Nazi Germany for genocide.

The underlying reasons for the narrow interpretation of the majority in the *Princz* case serve as an insight into the attitude of US courts. They have refused to engage in a broad interpretation of the FSIA for domestic political and practical reasons and have used the domestic legal rules available to them to that end. However, US courts, as all municipal courts, should not ignore the role they have to play in the enforcement of international law in a decentralised legal system. These domestic and international roles must be balanced. The courts of one legal system should not act as the world's judge and jury. Similarly, they cannot completely abdicate any involvement in the supervision of international law.

7. CONCLUSION

International law and practice indicate different results to the question of immunity in the light of egregious human rights violations. From the lofty heights of theory, international law dictates that a state cannot be immune when it commits the most heinous offenses against the person, breaches of *ius cogens*. This result may be reached by using either one of two equally sound and compelling theoretical frameworks, a hierarchy of norms approach or an implied waiver approach. Even in the absence of a *ius cogens* characterization, immunity need not be granted to a state that violates human rights if: the foreign state and the forum state are subjected to the same rule of law, the victim has exhausted remedies in the foreign jurisdiction and domestic rules of deference are available to the forum court. This conclusion is based on a subtle argument using structural rules of international law, which underlie or are analogous to the immunity rule, in order to deal with the legal lacunae that currently exists for human rights violations.

Other arguments for the refusal of immunity are less convincing. Implied waiver based on ratification of a human rights treaty with an implementation clause seems to stretch the interpretation of these treaty provisions beyond what their terms can reasonably sustain. The structural argument that a grant of immunity in the face of a breach of international law effectively places

states above international law, is interesting at first glance, but looses appeal when one realises that immunity goes to jurisdiction and not substantive liability. Lack of domestic or international enforcement of international law does not amount to lack of state responsibility.

Legislative and domestic court practice indicate a different result to that reached through international legal theory. The reasons for this are largely related to domestic rules regarding the municipal effect of international law. However, in nearly all jurisdictions there are methods of judicial interpretation which may be employed to bring domestic laws of immunity in line with the international rule. Whether these methods are used is dependent on whether domestic courts recognise that they have a responsibility to uphold international law in addition to their domestic law role. Obviously these roles should be balanced.

Unfortunately, the US case law is an example of municipal courts acting like Pontius Pilate. They have recognised, in some cases, that international law requires a refusal of immunity, however, they have washed their hands of the victims and handed the problem over to a politically self-interested Congress. Thereby viewing the issue from a domestic perspective, notwithstanding the requirements of international law. While the mechanism for their general refusal to deny immunity has been based on domestic law principles, the underlying reasons are practical and political. As discussed above, these concerns are unrealistic when considered in relation to fundamental human rights violations constituting *ius cogens* breaches.

In addition to the domestic interpretation of immunity, other barriers exist to the success of such actions. Victims must also establish a cause of action. It is doubtful whether effective remedy clauses in treaties provide for civil remedies for foreign state's violations abroad, given their territorial limitations. Therefore, unless there is implementing legislation like the ATC, individuals must fit human rights violations into a domestic law cause of action. If the violations have not occurred in the forum state, the most difficult barrier to overcome is jurisdiction. Extraterritorial exercises of jurisdiction are controversial and any civil application of the principle of universal jurisdiction for a limited category of *ius cogens* offenses will necessarily involve the extension of this principle. Accordingly, it is realistic to conclude that domestic courts will not take this step as a matter of course and will usually require compliance with domestic jurisdictional rules which provide for a sufficiently close connection with the forum.

In conclusion, the answer to the question of whether immunity should be denied to states that violate fundamental human rights was well put by Judge Wald:

> [w]hen the Nazi's tore off Princz's clothes, exchanged them for a prison uniform and a tattoo, shoved him behind the spiked barbed wire fences of Auschwitz and

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Dachau, and sold him to the German armament industry as fodder for their wartime labour operation, Germany rescinded any claim under international law to immunity from this court's jurisdiction.[128]

128. *See* note 1, *supra*, at 1500. While Hugo Princz did not win his case, he did, however, succeed in gaining compensation from Germany as a result of an executive compensation agreement between the US and Germany, concluded on 19 September 1995, whereby Germany agreed to pay $ 2.1 million to compensate all US citizens who had not received any compensation prior to that agreement. *See* Bröhmer, *supra* note 16, at 82.

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