Can serious Human Rights Violations justify a Breach of State Immunity?:

The current legal provisions of international law on why serious human rights violations cannot be brought to domestic courts.

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Abstract

Being created to establish a system protecting the individual for a peaceful and safe international environment, human rights often break into smithereens when it comes to individual claims. The lack of a global human rights court and defects in regional systems force many people to bring their claims to domestic courts. But after the ICJ's judgment on Germany vs. Italy of 2012 it is definitely not possible anymore to take a state to a foreign court due to a human rights violation. Still, this decision has a huge insularity towards the circumstances of the case: The ICJ had to deal with claims of victims of World War II, and in the end the court ruled that no individual human rights violation at all can be enforced before a court of another state. This is not satisfying, because instead of creating a generalized group of forbidden individual claims, it would have been more effective to establish two different case groups: One of forbidden claims of violations during systematical conflicts, and one of possible claims of victims during peaceful times. The paper presented in this abstract deals with the statement given last. It primarily explains the current provisions of international law on how human rights could be claimed before foreign courts and sums up why it would have been more human rights friendly to establish two case groups. It also depicts the case and circumstances of Germany vs. Italy and distinguishes this case from current human rights violations.

Keywords

Human Rights, International Court of Justice, International Law, Law Enforcement, State Immunity, Violation of Human Rights

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Introduction

In early times of international public law states were granted full immunity for all of their sovereign acts,[93] and their powers of sovereign international legal personalities[94] only found their limits just in front of other international legal personalities.[95] The individual person actually had no real power and could only make an appearance as an object of public international law.[96]

But since the establishment of a constantly developing multinational human rights protection system after World War II this situation has drastically changed. The individual gained more and more importance in matters of international law,[97] so that we are currently even referring to individuals as *partial international legal personalities*,[98] which is a revolutionary development of international legal relationships.[99] Because of the ongoing approximation of individuals to actors of international law – in truth, without their equalization[100] - the meaning of state immunity is shrinking[101] and its history slightly became a story of numbers, kinds and extents of possible exceptions.[102]

Nevertheless, the banner of state immunity and its nearly axiomatic claim of validity are still upheld. Even in 2012, the International Court of Justice (ICJ) ruled in *Germany vs. Italy*[103] that the principle of state immunity is applicable in cases of serious human rights violations.[104] This actually leads to a very alarming asymmetry between the securely established thought of better human rights protection[105] and the international community's real respect for enforcing it.

This is why voices of different jurisdictions and international scholars are rising in the past years, trying to turn away from nowadays' state practice and trying to justify a breach of state immunity in cases of serious human rights violations.[106] The ideas behind these attempts, their compatibility with legal doctrines and their future are going to be examined in the following pages to understand why human rights still turn into smithereens when they are faced with state immunity.

Preface

At the beginning, it is very important to shortly examine the two central terms of "state immunity" and "serious human rights violations".

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93 *Henkin/Pugh/Schachter/Smit/* p. 1126 f.; *Hobe*, Völkerrecht, p. 296; *Vitzthum/Proelß*, section 3, m.n. 90.
94 Isensee/Kirchhof/*Randelzhofer*, §15, m.n. 25, 35.
95 *Arnauld*, Völkerrecht, p. 25; *Hobe*, Völkerrecht, p. 40 f.; *Kindt*, p. 30.
96 ICC, D. f. 30.08.1924, series A nr. 2, p. 12; *Doehring*, Völkerrecht, m.n. 967; *Hobe*, Völkerrecht, p. 166.
97 *Arnauld*, Völkerrecht, m.n. 317; *Kälin/Künzli*, m.n. 36 f.
98 *Ipsen*, §1, m.n. 11 f.; *Ress*, Supranationaler Menschenrechtsschutz, p. 625; *Stein/Buttlar*, m.n. 493.
99 *Doehring*, Völkerrecht, m.n. 967.
100 *Doehring*, Diplomatischr Schutz, p. 14 f.; *Hobe*, p. 169; *Ress*, Supranationaler Menschenrechtsschutz, p. 625.
101 *Dahm*, p. 153.
102 BVerfG, D. f. 30.04.1963 – 2 BvM 1/62, m.n. 26; *Strupp/Schlochauer*, p. 662.
103 ICJ, *Jurisdictional Immunities of the State* (Germany v. Italy: Greece intervening), ICJ Reports 2012, 99.
104 *Ibid.*, 145.
105 *Bautze*, p. 29; *Bröhmer*, p. 1; *Cremer*, p. 137 f.; *Henkin/Pugh/Schachter/Smit*, p. 596 f.; *Kälin/Künzli*, m.n. 2 f.
106 Amongst others: Decision of the Greek *Areios Pagos* in the *Distomo* case, decided on 04.05.2000; decision of the Italian *Corte di Cassazione* in the *Ferrini* case, decided on 11.03.2004; differing opinion of judge *Wald* in the *Princz* case, ILM, 1994; *Bröhmer*, p. 223; *Ipsen*, Völkerrecht, §5 m.n. 173; *Kokott*, p. 148 f.; *Pepper*, p. 313.

I. The concept of state immunity

The term "immunity" is frequently used in international law, as it may refer to diplomatic immunity, immunity of heads of states and other governmental functionaries or state immunity.[107] In general, this term always has the same meaning: to protect the actions of various actors against prosecution and jurisdiction of third parties,[108] before both, civil and criminal courts.[109] The following remarks and analyses will mainly focus on state immunity before (foreign) civil courts.

II. The concept of serious human rights violations

Besides, it is very important to clarify what exactly is meant when talking about a "serious human rights violation", a term which is also used in context with humanitarian responsibilities to protect.[110]

1. Provisions of current human rights treaties

To start with, contract law is the most important part of the global human rights protection system.[111] By now, this system has developed on two different levels. Under the ongoing influence of the United Nations a broad range of internationally binding treaties has been adopted, amongst others the UDHR, the ICCPR,[112] the ICESCR or the CAT.[113] On the other hand, a lot of regional human rights system have been created in the past decades, which are the ECHR, the ACHR, the African Banjul Charter and the Arab Charter on Human Rights.[114]

On the first place, all these charters are quite similar to each other,[115] especially when considering protection against torture,[116] slavery and forced labour.[117] But when having a closer look at them it is observable that there are substantial differences on those different universal and regional levels.[118] In addition to this, rights, whose wording has been accepted by the overwhelming majority of the international community, are being interpreted differently,[119] as the concept of the margin of appreciation[120] of the European Court of Human Rights (ECHR) or the very controversial discussion about freedom of speech and religion and gender equality,[121] especially in

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[107] *Karl*, p. 23 f.; *Stein/Buttlar*, m.n. 713, 723.
[108] *Doehring*, m.n. 656; *Dörr*, p. 202; *Stoll*, m.n. 13.
[109] ICJ*, Case Concerning the Arrest Warrant of 11 April 2000* (Democratic Republic of the Congo v. Belgium), ICJ Reports 2002, 3 (20f.); *Cremer*, p. 138.
[110] *Arnauld*, Responsibility to protect, p. 27; *Kreuter-Kirchhof*, p. 351 f.; *Rudolf*, p. 22.
[111] *Kälin/Künzli*, m.n. 99; *Shelton*, p. 74 f.
[112] *Donnelly*, p. 26; *Schilling*, m.n. 5 f.
[113] *Kälin/Künzli*, m.n. 115, 118; *Vitzthum/Proelß*, section 3, m.n. 234, 236, 243.
[114] *Arnauld*, Völkerrecht, m.n. 602; *Cavallaro/Brewer*, p. 768 f.; *Kälin/Künzli*, m.n. 128; *Schilling*, m.n. 21, 24, 27, 29; *Steiner/Alston/Goodman*, p. 925; *Hobe*, Völkerrecht, p. 438; *Rishmawi*, p. 169 f.
[115] Isensee/Kirchhof/*Kirste*, §204, m.n. 30 f.; *Kälin/Künzli*, m.n. 129, 138, 141, 145; *Trindade*, p. 629 f.
[116] Art. 5 UDHR; art. 3 ECHR; art. 5 Banjul Charta; art. 8 ACHR.
[117] Art. 4 UDHR; art. 4 ECHR; art. 5 Banjul Charta; art. 10 ACHR.
[118] *Di Fabio*, p. 82; *Herdegen*, §4, m.n. 15; on the ECHR: *Buergenthal/Thürer*, p. 233 ff.; on the ACHR: *Steiner/Alston/Goodman*, p. 1022 ff.; on the Bajul Charter: *Eze*, p. 259 f.; on the Arab Charter on Human Rights: *Rishmawi*, MPEPIL, m.n. 10 ff.
[119] *Doehring*, m.n. 980; Isensee/Kirchhof/*Kirste*, §204, m.n. 30 f.; *Stahl*, p. 197 f.
[120] Karpenstein/Mayer/*Mayer*, introduction, m.n. 60 f.; *Yourow*, p. 13 f.
[121] *Chinkin*, MPEPIL, m.n. 35; *Henkin/Pugh/Schachter/Smit*, p. 616; *Ipsen*, Völkerrecht, §37, m.n. 23; *Rishmawi*, p. 171 f.

Arab and African regions, show. Now and then, even social and economic rights are being included into the range of suable human rights.[122]

2. Limiting the proper elements of "serious human rights violations"

So there is a very broad range of human rights, which makes it difficult to clarify which human rights have to be violated to which extend to assume a serious violation. To limit the sphere of possible rights, some scholars refer to the Rome Statute of the International Criminal Court (ICC) and recognize violations of the crimes recorded there as serious human rights violations.[123] This approach is convincing, as the Rome Statute basically refers to human rights belonging to the category of *ius cogens*, amongst which are genocide,[124] crimes against humanity (and therefore torture, too[125]) and a number of war crimes.[126] These crimes are the very core elements of human rights protection, which negate, simply by their existence, the universal meaning of the principles of law which contain the elements of peace under law on a global scale.[127] As a result, in the following the crimes listed in articles 6 to 8 of the Rome Statute are being referred to when talking about serious human rights violations.

The Connection between State Immunity and Human Rights Protection

Next, the question has to be risen in how far we can connect the principle of state immunity with ideas of human rights. As already stated, state immunity is used to protect one state from prosecution and punishment of other states – so how can this fit into a scheme of international human rights protection?

The answer to this question actually is not that simple. To get the proper essence of what this paper will deal with we have to examine the current possibilities of protecting and enforcing human rights on the following pages to understand why it is necessary to talk about state immunity in the end.

First of all, we can observe that human rights protection takes place on three different levels. The first is on a national scale, where both provisions of constitutions and national customary law can easily be enforced with national enforcement mechanisms. This protection can be granted beginning on the lowest court level up to highest courts or even constitutional courts (if established in a country). Secondly, if people find themselves in a situation where these national mechanisms do not help them protect their human rights, it is partially possible for people to initiate proceedings on a regional level. For this we nowadays have some international conventions that have been created in different regions on the world: The European Convention on Human Rights, the African Banjul Charta, the Arab Charter on Human Rights and the Inter-American Charter on Human Rights. Until now, we do not have any system for the Asian continent. Dependent on the convention and the courts allocated to it, these regional bodies grant more or less efficient human

[122] *Karimova*, p. 6.
[123] *Cremer*, p. 142; *Karl*, p. 71.
[124] ICJ, *Case concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Bosnia-Herzegowina s. Serbia and Montenegro), ICJ Reports 2012, 43 (110 f.); *Kälin/Künzli*, m.n. 192; *Charlesworth/Chinkin*, p. 68.
[125] Art. 7 lit. f of the Rome Statute; *Ambos*, p. 354; *Manske*, p. 169 f.
[126] *Werle*, p. 828.
[127] *Gierhake*, p. 286.

rights protection. And thirdly, we have a row of international conventions, basically initiated by the United Nations.

And this sequence of protection mechanisms is where we observe the collision between human rights and state immunity. If you try to get compensation from states which maliciously and purposefully violate human rights, for example to stabilize the government, suppress journalists or following the track of repressing policies, you will for sure fail if you try to activate national mechanisms, as repressing states will not punish their own national policies. Next, the regional bodies in existence are very ineffective in means of good protection – the only court which has enough resources, expertise and legal backing is the European Court of Human Rights. And for the international scale this is even worse, because most of the conventions do not contain enforcement possibilities – starting with the Universal Convention on Human Rights. On an international scale, only the International Covenant on Civil and Political Rights and its Second Optional Protocol have established a system that allows more or less efficient individual claims. For the rest of the treaties, no legal enforcement instruments have been created so far, which means that global human rights protection is very limited.

So many people who suffered from violations try to make use of the last resort to hopefully get justice for what occurred, and in their situation many people try to sue violating states in front of foreign courts. Here, state immunity usually blocks the possibility to really initiate proceedings, but we will look at this in more detail in the following sections.

Development of the concept of State Immunity

The rule of state immunity is based on the idea of sovereign equality of all states,[128] which actually exists since the Peace of Westphalia[129] and has been enshrined in article 2 nr.1 of the Charter of the United Nations.[130] One aspect of this equality amongst states is the prohibition to exercise sovereign power over another state,[131] which also includes not to bring another state before a domestic court.[132] *Bartolus*, one of the most important law professors of Medieval Roman law, illustrated this point in 1354 with his sentence *par in parem non habet imperium*.[133] This protection against foreign jurisdiction finally is called state immunity,[134] and it has been a rule of customary international law until this very day.[135]

I. Absolute Immunity

Until quite recently ago, the concept of state immunity was considered essential to such an extent, that every sovereign act could be excluded from foreign jurisdiction;[136] this approach was called

[128] *Arnauld*, Völkerrecht, m.n. 319; *Doehring*, Völkerrecht, m.n. 658.
[129] *Hobe*, Völkerrecht, p. 39 f.
[130] *Vitzthum/Proelß*, section 3, m.n. 87.
[131] *Henkin/Pugh/Schachter/Smit*, p. 1126 f.; *Uerpmann-Wittzack*, p. 34.
[132] *Doehring*, Völkerrecht, m.n. 658; *Hobe*, Völkerrecht, p. 296; *Ipsen*, Völkerrecht, §5, m.n. 264; *Karl*, p. 23.
[133] *Arnauld*, Völkerrecht, m.n. 319.
[134] *Herdegen*, Völkerrecht, §37, m.n. 1; *Hobe*, Völkerrecht, p. 296.
[135] *Bautze*, p. 45; *Kokott/Doehring/Buergenthal*, m.n. 467.
[136] *Ahrens/Lipp/Varga*, p. 235; *Henkin/Pugh/Schachter/Smit*, p. 1126; *Hobe*, Völkerrecht, p. 296; *Stein/Buttlar*, m.n. 716.

the theory of *absolute state immunity*,[137] which was formulated for the first time in the US Supreme Court's decision on *The Schooner Exchange v. McFaddon*.[138]

II. Relative Immunity

But during the age of industrialisation, states became more and more active and important in the private economic sector.[139] So, very early the question was risen if absolute immunity would disadvantage contracting private parties,[140] so that a change of the concept of state immunity was necessary. This shift was firstly boosted by Belgian and Italian courts,[141] and later by the so called *Tate Letter* of US State Department law counsel Jack B. Tate, which limited the US policy concerning absolute state immunity.[142] Afterwards, this tendency was caught up by many national jurisdictions and legislations,[143] so that it is nowadays a rule of customary international law.[144] The central statement of the restrictive immunity theory simply is that government actions can be categorized into sovereign (*acta iure imperii*) and non-sovereign (*acta iure gestionis*) actions.[145] According to this approach, only sovereign actions can be protected by immunity, while other acts can be taken to domestic courts.[146] But due to the very difficult distinction between these two categories[147] and the lack of usable criteria, the classification of the act in question is up to the courts.[148]

III. Summary

As it has been shown above, the rule of state immunity is not absolute anymore. Since the distinction between *acta iure imperii* and *acta iure gestionis* a boarder has been crossed, domestic courts are allowed to initiate proceeding against foreign states.

Exceptions to the Rule of State Immunity in Cases of serious Human Rights Violations

So it becomes clear that a state basically acting in the frameworks of laws, as it is the case during economic activity, may not be protected by immunity. So the question is to raise whether, *ipso facto*, human rights violations, which take place in a clearly extrajudicial frame, can also be excluded from state immunity.[149] To answer this question a number of jurisdictions and scholars of international law have tried to develop approaches to justify a breach of state immunity in such cases. These approaches are now presented and examined.

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137 *Cremer*, p. 140; *Herdegen*, §37, m.n. 1.
138 US Supreme Court, *The Schooner Exchange v. McFaddon*, D. f. 24.02.1812, US 116, 122.
139 *Brownlie*, p. 329 f.
140 *Arnauld*, Völkerrecht, p. 322; *McCaffrey*, p. 191; *Suy*, p. 673.
141 *Bishop*, p. 94; *Karl*, p. 29 f.
142 Department of State Bulletin, Vol. 26, June 23 1952, p. 984; *Bishop*, p. 94; *Niehuss*, p. 1142.
143 *Appelbaum*, p. 49; *Henkin/Pugh/Schachter/Smit*, p. 1127 f.; *Herdegen*, §37, m.n. 2 f.; *Karl*, p. 30.
144 *Carty*, p. 402; *Kokott/Doehring/Buergenthal*, m.n. 467 f.; *Paech*, p. 49; *Stein/Buttlar*, m.n. 714, 716, 718.
145 *Brownlie*, p. 330; *Doehring*, m.n. 661 f.; *Henkin/Pugh/Schachter/Smit*, p. 1127 f.; *Herdegen*, §37, m.n. 5; *Ipsen*, Völkerrecht, §5, m.n. 265; *Karagiannakis*, p. 11 f.
146 *Arnauld*, Völkerrecht, p. 322; *Herdegen*, §37, m.n. 5; *McCaffrey*, p. 192; *O'Brien*, p. 265; *Wirth*, p. 433.
147 *Doehring*, Völkerrecht, m.n. 663 f.; *Higgins*, p. 267; *Hobe*, Völkerrecht, p. 296; *Ipsen*, Völkerrecht, §5, m.n. 266; *Kokott/Doehring/Buergenthal*, m.n. 467.
148 *Boguslavsky*, p. 168 f.; *Kokott/Doehring/Buergenthal*, m.n. 468; *Vitzthum/Proelß*, section 3, m.n. 90.
149 *Hatfield-Lyon*, p. 335.

I. Classification of Human Rights Violations

To begin with, it is considered to adapt the rules of the restrictive state immunity to human rights violations.[150]

In this context, a few criteria have been developed to make a distinction between *acta iure imperii* and *acta iure gestionis*. At first, the purpose of the action cannot be applied,[151] so that a recourse to the objective nature of the act comes into consideration.[152] Subject of this approach is to find out whether the act examined is characterized as an act of private law, which could be made by anybody,[153] or an act of sovereign nature.[154] Some scholars assume an exception of state immunity. On the one hand, acts of torture or slavery can also be carried out by private persons, so that a state appears as private offender and should not be granted immunity.[155] On the other hand, some other scholars try to classify an act as typical manifestation of state functions,[156] because political assassinations for example are no typical state functions and can therefore not being protected by state immunity.[157]

But at the same time, there are many judgements of different origins that apply the rule of state immunity in cases of human rights violations. In its *Arrest-Warrant* judgement, the ICJ granted immunity to state representatives in cases of human rights violations.[158] The US Supreme Court also ruled in *Nelson v. Saudi-Arabia* that the use of violence against Nelson was a sovereign act and therefore worth being protected.[159] Moreover, in *Bouzari v. Islamic Republic of Iran*, the Ontario Superior Court of Justice approved *acta iure imperii*, if the act in question, despite all possible purposes, is carried out by a state official.[160]

Another argument against human rights violations being *acta iure gestionis* is the fact, that war crimes[161] and, like in *Al-Adsani*, tortures[162] can be mandated by the government and still count as *acta iure imperii*.[163] So recurring to the theory of restrictive state immunity does not justify an exception to state immunity.

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[150] BVerfG, D. f. 30.04.1963, Zeitschrift für ausländisches öffentliches Recht und Völkerrecht, 1964, p. 293 f.; *Bröhmer*, p. 83 f.; *Caplan*, p. 744, 759; *Stein/Buttlar*, m.n. 721.
[151] Schweizerisches Bundesgericht, D. f. 22.05.1984, 110 II 255, p. 260; *Kren Kostkiewicz*, p. 293; *Stein/Buttlar*, m.n. 719.
[152] BVerfG, D. f. 30.04.1963, Zeitschrift für ausländisches öffentliches Recht und Völkerrecht, 1964, p. 293 f.; High Court, *I° Congreso del Partido*, D. f. 28.01.1977, All England Law Reports 1978, volume 1, 1193 f.; *Ipsen*, Völkerrecht, §5, m.n. 266.
[153] *Bröhmer*, p. 197; *Dörr*, p. 206; *Dahm/Delbrück/Wolfrum*, §72, p. 458; *Doehring*, Völkerrecht, m.n. 662; *Stein/Buttlar*, m.n. 71.
[154] High Court, *I° Congreso del Partido*, ruling of 28.01.1977, All England Law Reports 1978, volume 1, 1193 f.
[155] *Heidbrink*, p. 88; *Lauterpacht*, p. 220, 225.
[156] *Malina*, p. 239; *Schaumann/Habscheid*, p. 1, 289.
[157] *Crawford*, AYBIL, p. 89.
[158] ICJ, *Case Concerning the Arrest Warrant of 11 April 2000* (Democratic Republic of the Congo v. Belgium), ICJ Reports 2002, 3 (29).
[159] US Supreme Court, *Saudi-Arabia and others v. Nelson*, D. f. 23.03.1993, 507 U.S. 349, 361.
[160] Ontario Superior Court of Justice, *Bouzari and others v. Islamic Reublic of Iran*, D. f. 01.05.2002, 124 ILR 427, 435.
[161] *Cremer*, p. 157.
[162] ECHR, *Al-Adsani v. The United Kingdom*, D. f. 21.11.2001, m.n. 11 f.
[163] Lord Lloyd of Berwick, House of Lords, *Regina v. Bow Street Metropolitan Stipendiary Magistrate and others, Ex parte Pinochet Ugarte*, D. f. 25.11.1998, Weekly Law Review, volume 3, p. 1488.

II. Implied Waiver of Immunity

Next, in *The Schooner Exchange v. McFaddon,* the US Supreme Court also recognized that a state could freely waive its immunity.[164] This possibility is nowadays universally accepted,[165] but for such a waiver a clear declaration of will is absolutely needed,[166] because au fond a consensus is established between parties to submit oneself to a foreign jurisdiction.[167] As immunity may refer to both, main and enforcement proceedings, the waiver has to be announced in both proceedings if necessary.[168] If a state does not evade jurisdiction through conclusive behaviour, an implied waiver of immunity can be assumed.[169] So this constellation can be expanded by assuming that a violation of human rights, which belong to *ius cogens,* can be interpreted as implied waiver of immunity, too.[170] Similar thoughts have been expressed by judge Wald in her dissenting opinion on the *Princz* case when assuming that a state who violates human rights loses its right to claim immunity.[171]

This approach is not convincing, as a waiver always needs some kind bilateral agreement; but here, such a consensus is established without further indications, and the violations of human rights cannot be used to create a consent, as this is, unlike trading activities, not settled as customary international law.[172] On the contrary: A state violating human rights will always try to avoid responsibility and explicitly refer to state immunity,[173] so that it is very difficult to talk about an implicit waiver in such cases.

III. Forfeiture of State Immunity

Another possibility is the forfeiture of immunity, which has been expressed by *Kokott* in a very detailed way.[174] According to her, forfeiture is a legal principle of international law[175] and can be applied to questions of immunity due to many reason. First of all, immunity is, as waivers on one's own accord imply, a dispositive law, so that it can be forfeited respectively.[176] Secondly, violations of *ius cogens* lead to the invalidity of international treaties, so that unilateral offenses lead to an exclusion of rights.[177] Finally, even reprisals that violate international law are allowed under certain circumstances, so that a state should be able, at minus, to exercise jurisdiction over another state through the breach of state immunity.[178]

As a result, this opinion is very interesting, because the problem of a "forced" waiver is circumvented. Nevertheless, critique has been expressed on this topic. In reality, a legal principle

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[164] US Supreme Court, *The Schooner Exchange v. McFaddon*, D. f. 24.02.1812, US 116, 136.
[165] *Bosch*, p. 90 f.; *Brownlie*, p. 343; *Kren Kostkiewicz*, p. 380; *Paech*, p. 53.
[166] *Ress*, State Immunity and Human Rights, p. 175, 193.
[167] *Bröhmer*, p. 191; *Finke*, p. 864.
[168] *Doehring*, Völkerrecht, m.n. 665.
[169] *Brownlie*, p. 343; *Paech*, p. 53; *Stein/Buttlar*, m.n. 717.
[170] *Bergen*, p. 186; *Pepper*, p. 369.
[171] Dissenting Opinion Patricia Wald, US Court of Appeals, District of Columbia, *Princz v. Federal Republic of Germany*, International Legal Materials, volume 33, 1994, 1497 ff.
[172] *Appelbaum*, p. 276.
[173] *Ibid.*; *Bröhmer*, p. 191; *Schaarschmidt*, p. 29.
[174] *Kokott*, p. 135 ff.
[175] *Ibid.*, p. 140.
[176] *Ibid.*, p. 148.
[177] *Ibid.*; *Reimann*, p. 423.
[178] *Bröhmer*, p. 194; *Kokott*, p. 149.

of international law that brings a loss of state immunity in cases of human rights violations cannot be observed as intensely as *Kokott* tries to show.[179] Additionally, state immunity does not only satisfy or protect interests of single states, it is also needed as instrument for intergovernmental issues, especially to maintain proper international relations.[180] And according to current opinions there can be no collision between the procedural content of state immunity and the substantive guarantees of human rights.[181] Thus. the concept of forfeiture is not applicable in cases of serious human rights violations.[182]

IV. Human Rights and their Obligations erga omnes

Besides, it is also considered that human rights constitute obligations *erga omnes*, and for this reason every single member of the international community is allowed to react on violations.[183] As obligations *erga omnes* have been removed from the *domain reserve* of states and are now under surveillance of the international community, state immunity should not stand in the way in such cases.[184]

1. Legally protected Goods, Circle of Beneficiaries and legitimate Means

As a cluster of too many legally protected goods would hold international conflict potential[185] it is obvious to recognize only all those human rights as legally protected goods which can clearly be classified as *ius cogens*.[186] Besides, the circle of actors qualified to react on violations is controversial, but in general it can be said that obligations *erga omnes* allow every state to take actions as there is no international human rights protective body, so that the enforcement of commitments owed to the international community should be up to every single member of this community,[187] which has already been implied in the ICJ's decision on *Barcelona Traction*.[188]

In the *East-Timor* case it was also pointed out that even the ICJ itself is not allowed to judge on the behaviour of a state which is not part of a lawsuit.[189] Additionally, the ILC's *Draft Articles on Responsibility of States for Internationally Wrongful Acts* only contains limited possibilities for action in art. 48 para. 2.[190] In the end, greatest restraint is necessary when considering actions against violations of obligations *erga omnes*.

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[179] *Appelbaum*, p. 282.
[180] *Appelbaum*, p. 282; *Tams*, p. 338; in the case foreign ministers: *Zeichen/Hebenstreit*, p. 190.
[181] ICJ, *Jurisdictional Immunities of the State* (Germany v Italy: Greece Intervening), ICJ Reports 2012, 99 (140); *Fox/Webb*, p. 5; *Kreicker*, p. 113; *Schaarschmidt*, p. 22.
[182] Likewise: *Bröhmer*, p. 194; *Moll*, p. 581; *Schaarschmidt*, p. 30.
[183] *Bröhmer*, p. 157; *Karagiannakis*, p. 16.
[184] *Reimann*, p. 422.
[185] *Appelbaum*, p. 241; *Doehring*, Undifferenzierte Berufung auf Menschenrechte, p. 355, 361.
[186] *Doehring*, Undifferenzierte Berufung auf Menschenrechte, p. 361.
[187] Fiedler/Klein/Schnyder/*Klein*, p. 50 f.; *Frowein*, p. 262; Coester-Waltjen/Kronke/Kokott/*Kokott*, p. 86 f.
[188] ICJ, *Case Concerning the Barcelona Traction, Light and Power Company, Limited* (Belgium v. Spain), ICJ Reports 1970, 3 (32).
[189] ICJ, *Case Concerning East Timor* (Portugal v. Australia), ICJ Reports 1995, 90 (102).
[190] Article 48 para. 2: *Any State entitled to invoke responsibility under paragraph 1 may claim from the responsible State: (a) cessation of the internationally wrongful act, and assurances and guarantees of non-repetition in accordance with article 30; and (b) performance of the obligation of reparation in accordance with the preceding articles, in the interest of the injured State or of the beneficiaries of the obligation breached.*

2. Reprisals

In this context it is important to ask if reprisals are a legitimate mean to react on human rights violations.[191] A reprisal usually is an action illegal under international law which is meant to force another state breaking international law to act according to international law again.[192] According to this, a state may be allowed to exercise jurisdiction over another state in cases of the latter one breaking an obligation *erga omnes*.[193]

But this idea fails when taking into consideration some other arguments. When a state exercises jurisdiction over another state, proceedings are initiated which shall examine the violation in question. If the result of such proceedings is that a state did not act against international law, the state exercising jurisdiction broke international law[194] and cannot justify its misfeasance.[195] Besides this, it is still not clear which connection has to be drawn between the violation and the exercise of jurisdiction (for instance the violation of citizens[196]), to justify a breach of state immunity when carrying out reprisals. In fact, reprisals therefore are no adequate mean to react on human rights violations.

3. Conclusion

As there are many insecurities in this area, obligations *erga omnes* in cases of human rights violations can only justify a breach of state immunity if there is a more detailed international specification on the relevant elements, which is currently not the case.

V. Qualification of Exceptions of State Immunity in Cases of serious Human Rights Violations as Customary International Law

As *Hailer* convincingly shows, there is no provision in international contract law which codifies an exception of state immunity in cases of human rights violations.[197] Therefore, such an exception could be derived from international customary law. *Paech* for example refers to the *Distomo*-judgement and assumes that the current development of state-based and international regulations is enough to accept customary international law in cases of an exemption of immunity.[198] The same thoughts have been expressed in the *Ferrini*-case[199] and examined by the ICJ.[200] How the current tendency is orientated will now be illustrated.

Especially in the United States of America, which have developed a very vivid human rights claim system, some national immunity laws play an important law. Since the *Alien Tort Claims Act* was established in 1789, two more laws have been passed, namely the *Foreign Sovereign Immunities Act* (1976) and the *Torture Victim Protection Act* (1992).[201] In the 2nd half of the 20th century, many other

[191] *Karl*, p. 134; *Malanczuk*, p. 58 f.
[192] *Herdegen*, Völkerrecht, §59, m.n. 6; *Hobe*, Völkerrecht, p. 308.
[193] *Cassese*, p. 262; *Ipsen*, Völkerrecht, §55, m.n. 3; *Zemanek*, p. 37, 39.
[194] *Appelbaum*, p. 286; *Bröhmer*, p. 193.
[195] *Hailer*, p. 195 f.
[196] *Ipsen*, Völkerrecht, §7, m.n. 3.
[197] *Hailer*, p. 170 ff.
[198] *Paech*, p. 70 f.; same tendencies: *Bröhmer*, p. 188; *Hobe*, IPRax, p. 371; *Hobe*, Völkerrecht, p. 404; *Zimmermann*, p. 433.
[199] Corte di Cassazione, Sezioni Unite*, Ferrini v. Reppublica Federale di Germania*, D. f. 11.03.2004, n.5044, 87 Rivista di diritto internazionale 539 (2004).
[200] ICJ, *Jurisdictional Immunities of the State* (Germany v. Italy: Greece intervening), ICJ Reports 2012, 99 (140 ff.).
[201] *Bosch*, p. 185, 187; *Hailer*, p. 29.

states passed laws and regulations concerning state immunity. These are: the *UK State Immunity Act* (1978), the *Singapore State Immunity Act* (1979), the *South African Foreign States Immunities Act* (1981), the *Pakistani State Immunity Ordinance* (1981), the *Act to provide for State Immunity in Canadian Courts* (1982), the *Australian Foreign States Immunities Act* (1986) and the *Argentinian Immunidad Jurisdictional de los Estados Extranjeros ante los Tribunales Argentinos* (1995).[202]

These different laws and the *United Nations Convention on Jurisdictional Immunities of States and their Property* indicate that there could be a rule of customary international law. This is partially convincing. On the one hand, the fast establishment of many national laws concerning questions of immunity show how important this topic is becoming on the international level. The ongoing restrictions since the creation of the restrictive immunity theory are underlined and the very lively *Human Rights Litigation* in the USA has given birth to many interesting cases (for instance *Liu v. China*, *Letelier v. China* or *Princz v. Germany*). Additionally, the US-jurisdiction and the jurisdictions of Italy and Belgium[203] are tending to restrict state immunity since many years now.

But nevertheless these tendencies cannot withstand any criticism. Firstly, the tendency of restricting state immunity in cases of human rights violations has not enough support in the international community as whole.[204] Furthermore, the European and the United Nations conventions on state immunity do not have any indications for such an exception;[205] and Canadian, Polish, Slovenian, French and New Zealand courts tend to grant immunity.[206] The ECHR also holds on the principle of state immunity in its decision on *McElhinney*.[207] Apart from that, the cases of *Al-Adsani*,[208] *Germany v. Italy*,[209] *Jones v. The United Kingdom*[210] as well as *Kazemi Estate v. Islamic Republic of Iran*[211] clearly show that there currently is no rule of customary international law restricting state immunity in cases of serious human rights violations.

VI. Human Rights Violations and national Tort Legislations

As previously mentioned, some states have passed laws which regulate state immunity, and each of these provisions contains one or more articles that prohibit protection under state immunity in cases where a state's action leads to injuries, death or the loss of property of a person.[212] In such circumstances the conflict between national legislation and principles of international law becomes very obvious: The decision whether a state's sovereign action can be put under state immunity is up to the national courts. But when making their decisions, they are not allowed to act beyond the basic frame of international law, so that it is forbidden to refuse state immunity in cases when international law would grant such protection.[213]

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[202] *Appelbaum*, p. 46 f.; *Paech*, p. 66, 69.
[203] *Fensterwald*, p. 623; *Kren Kostkiewicz*, p. 121, 184.
[204] *Dörr*, p. 218; Heintze/Ipsen/*Hofmann*, p. 151; *Kreicker*, p. 113; *Schmalenbach*, p. 423 f.; *Tams*, p. 346 f.
[205] *Appelbaum*, p. 77.
[206] ICJ, *Jurisdictional Immunities of the State* (Germany v. Italy: Greece intervening), ICJ Reports 2012, 99 (141); *Kren Kostkiewicz*, p. 121 ff.
[207] ECHR, *Case of McElhinney v. Ireland*, D. f. 21.11.2001, m.n. 38, 40.
[208] ECHR, *Al-Adsani v. The United Kingdom*, D. f. 21.11.2001, m.n. 67.
[209] ICJ, *Jurisdictional Immunities of the State* (Germany v. Italy: Greece intervening), ICJ Reports 2012, 99 (154 f.).
[210] ECHR, *Jones and Others v. The United Kingdom*, D. f. 14.01.2014, m.n. 215.
[211] Supreme Court of Canada, *Kazemi Estate v. Islamic Republic of Iran*, 2014 SCC 62.
[212] *Paech*, p. 69.
[213] *Ipsen*, Völkerrecht, §5, m.n. 266; *Kokott/Doehring/Buergenthal*, m.n. 468; *Stein/Buttlar*, m.n. 720.

When talking about *ius cogens* before it already became clear that there currently is no sufficient international practice to assume an international customary law concerning exceptions to state immunity, and even higher US courts doubt that the FSIA is applicable to human rights violations.[214] In total, an exception to state immunity cannot be based on articles of immunity laws.

VII. Foreign Tort Exceptions

Another possibility to justify an exception to state immunity is the so-called *foreign tort exception*. This approach can be found amongst some scholars[215] and is based on the idea that a state that commits illegal actions on the territory of another state is less worth protecting[216] and should not enjoy the benefits of immunity.

Initially this question was posed in *Letelier v. Republic of Chile*, where immunity was denied to the Chilean government after it assassinated the Chilean ambassador to the US.[217] Later, the Court of Appeals refused to accept immunity in the *Olsen* case, where Mexico showed negligence during the landing approach of an airplane carrying US passengers.[218] In *Liu v. China* again immunity was not granted to the Chinese government after it assassinated the US-American journalist Liu.[219] Besides, the Greek *Areios Pagos* came to the conclusion that war crimes carried out by the German Wehrmacht during World War II on Greek territory should not be protected by state immunity.[220]

However, this decision was rejected by the Greek Supreme Special Court, the ECHR, the German Federal Court and the German Constitutional Court.[221] The ICJ, too, dealt with the foreign tort exception in *Germany v. Italy*, but denied it,[222] and combined with the examination given in section *V*. it becomes clear that the foreign tort exception cannot justify a breach of state immunity in cases of serious human rights violations.

VIII. Human Rights in the international Hierarchy of Norms

This special approach is based on the idea of an international hierarchy of norms. Ius cogens, being binding and non-optional legal principles,[223] to which some human rights commitments belong, too, [224] stand above every other regulations of international law.[225] State immunity on the other hand is subjected to the states' disposition and consensus,[226] so that if these two principles were about to collide, state immunity would be derogated due to its inferior position.[227] Through this approach the important position of human rights on the international level is crucially highlighted,

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214 US Supreme Court, *Saudi-Arabia and others v. Nelson*, D. f. 23.03.1993, 507 U.S. 349, 361.; US Court of Appeals, District of Columbia, *Hugo Princz v. Federal Republic of Germany*, 26 F.3d 1166, 1175 f.
215 *Bosch*, p. 95; *Karagiannakis*, p. 18.
216 *Appelbaum*, p. 114.
217 US Court of Appeals, Second Circuit, *De Letelier v. Republic of Chile*, 748 F.2d 790, 799 (2d Cir. 1984).
218 US Court of Appeals, Ninth Circuit, *Olsen v. Government of Mexico, Sanchez v. The Republic of Mexico*, 729 F.2d 641 (651).
219 US Court of Appeals, Ninth Circuit, *Liu v. Republic of China*, 892 F.2d 1419, 1432 (9th Cir. 1989).
220 *Areios Pagos*, D. f. 04.05.2000 (Az. 11/2000) – not published, see: *Gavouneli/Bantekas*, p. 200.
221 *Ipsen*, Völkerrecht, §5, m.n. 276; *Schaarschmidt*., p. 8 f.
222 ICJ, *Jurisdictional Immunities of the State* (Germany v. Italy: Greece intervening), ICJ Reports 2012, 99 (127).
223 *Schöbener/Funke*, p. 249.
224 *Ipsen*, Völkerrecht, §16, m.n. 59; *Kälin/Künzli*, m.n. 191 f.
225 *Bosch*, p. 107.
226 *Crawford*, BYIL, p. 87; *Karagiannakis*, p. 20.
227 *Dörr*, p. 214 f.; *Karagiannakis*, p. 20; *Orakhelashvili*, p. 264.

as they basically are the conceptual and ideational framework of international law, the *ordre public*, and it is not allowed to deviate from them.[228]

An appropriate discussion on the very nature of ius cogens also helps to lever out a very frequent counterargument. It is argued that there cannot be a collision between the violation of ius cogens and state immunity, as the latter one is a procedural matter while human rights and ius cogens are a question of substantial law.[229] The same was argued in *Al-Adsani*[230] and with a lot of rigour in *Germany v. Italy*.[231] Nevertheless, it is important to acknowledge that if ius cogens is fully understood as the incredibly central function it plays for international law,[232] it must also have a procedural impact and collide with state immunity.[233] As McGregor says:

"Sovereignty cannot be asserted to avoid state responsibility."[234]

Still, this approach is deficient. Article 53 of the Vienna Convention on the Law of Treaties for example lists the consequences for violations of ius cogens, and thus it is very difficult to extract more legal consequences as the ones listed; this article is going to be overstretched if used to justify a hierarchy of norms in international law.[235] In addition to this, ius cogens is based, as international law in general, on the consensus of states. As it consists of state practice and an *opinio iuris,* both factors that can be object of changes over time, it would be inappropriate to give them a constitutional-like character.[236] Furthermore the ICJ denied a collision between state immunity and human rights,[237] so that there is no space to manoeuvre right now. This approach is not adequate to justify a breach of state immunity.

IX. Conclusion

After intense examinations the conclusion has to be drawn that all the approaches created to justify a breach of state immunity in cases of human rights violations are not entirely convincing. There are too many decisions of different supreme courts and also a lot of dogmatic hindrances. But notwithstanding the possible development of a rule of customary international law and the partial acceptance of a hierarchy of norms indicate a positive tendency of state practices. However, the next section will show why such a development of state practices will be difficult to achieve in the short term.

Evaluation of the current Situation

The result presented above is very alarming when keeping in mind a better enforcement of human rights on the international level. Although they are a well-established ideal and principle of

[228] *Appelbaum*, p. 260.
[229] ICJ, *Jurisdictional Immunities of the State* (Germany v. Italy: Greece intervening), ICJ Reports 2012, 99 (140); *Hobe*, Völkerrecht, p. 632; *Kreicker*, p. 111 f.; *Zimmermann*, p. 437 f.; against this approach: *McGregor*, p. 12.
[230] ECHR, *Al-Adsani v. The United Kingdom*, D. f. 21.11.2001, m. n. 66 f.
[231] ICJ, *Jurisdictional Immunities of the State* (Germany v. Italy: Greece intervening), ICJ Reports 2012, 99 (140 f.)
[232] *Paech*, p. 65.
[233] *Ibid.*
[234] *McGregor*, p. 912.
[235] *Appelbaum*, p. 258; *Evans/Shelton*, p. 169.
[236] *Appelbaum*, p. 272.
[237] ICJ, *Jurisdictional Immunities of the State* (Germany v. Italy: Greece intervening), ICJ Reports 2012, 99 (140 f.)

international law, human rights are still fighting for better recognition and enforcement, and often they fail on the argument of state immunity.

I. Tendencies until 2012

But until 2012, this situation seemed to improve: The US-American human rights litigation indicated a clear tendency, and the third *Pinochet* judgement provided further impulses. Although state immunity was upheld in *Al-Adsani*, this was only possible with the least possible majority of 9:8 judges.[238] The Greek *Areios Pagos* and the Italian *Corte di Cassazione* followed. International state practice took not an extensive, but clear direction.

But a saving of this situation became obsolete in 2012 when the ICJ passed its sentence on *Germany v. Italy*, which acted like a handbrake for an exception of state immunity in cases of human rights violations.

II. The Case of Germany v. Italy

The happenings leading to the ICJ's case of *Germany v. Italy* date back to World War II, when German troops committed a massacre in the Greek village of Distomo. Relatives and survivors tried to get compensation for the violations suffered and initiated claims before Greek courts in the 1990's. The case went up to the Greek supreme court, the *Areios Pagos*, which ruled that state immunity could not be granted to Germany and that compensation should be paid. The Greek *Supreme Special Court* had to deal with similar issues and on behalf of the *Areios Pagos* it ruled the opposite. As the Greek government refused to initiate foreclosure, the claimants went to the *ECHR* (2002), the *German Federal Court* (2003) and the *German Constitutional Court* (2006). In the end, since the decision of the *Supreme Special Court* the result always was the same and the German government successfully referred to state immunity.

But the Greek claimants stayed restless: After it became known that Italian courts repeatedly accepted claims of Italian war victims and sued the German government to pay compensation for war crimes committed during World War II in Italy, like it was the case in the *Ferrini* decision, the Greek claimants initiated proceeding in Italy. Then, in 2008 the Italian *Corto di Cassazione* passed its judgement on Germany to pay compensation to Greek victims.

As the German government wanted to react against this it called the ICJ in 2009 and the case *Germany v. Italy* was initiated. The court put a lot of effort in its decision and examined the current legal situation of state immunity and exceptions due to human rights situations on a broad international level. Amongst many other results it drew the following very substantial conclusion: that it is not possible to justify a breach of state immunity in cases of serious human rights violations.

III. Developments after Germany v. Italy

The subsequent developments were very disillusioning. Until 2014, only two other sentences of higher courts have been passed: In January 2014 the ECHR denied an exception to immunity in cases of serious human rights violations in *Jones and Others v. The United Kingdom,* and afterwards the Supreme Court of Canada also arrived to the conclusion that immunity could not be granted. Both

[238] ECHR, *Al-Adsani v. The United Kingdom*, judgement of 21.11.2001, m.n. 67; *Cremer*, p. 139; *Tams*, p. 332.

judgements simply refer to the decision on *Germany v. Italy* so that it seems that everything important concerning immunity has already been illustrated. The tendencies before the ICJ's judgement are not picked up again, the ICJ is simply accepted and the *status quo* has not been changed since then.

Conclusion: Better Human Rights Protection through different Case Groups

Bröhmer already pointed out in 1997 that human rights violations appear in two different constellations.[239]

On the one hand there are violations of human rights during systematic conflicts, like in war times, where it would not be helpful to allow every single person infringed to initiate proceedings against violating states. After wars, individual infringements are usually mediatized and covered by reparations, peace treaties or multilateral support mechanisms.[240] Legal actions of thousands or millions of people at the same time would be an unsuitable burden both for domestic courts and bilateral relations of states.[241] So it is right to follow the ICJ and prohibit compensation of war crimes through individual claims; if this would be allowed, *Pandora's box* would literally be opened up.

Then again, there are individual infringements during peaceful times where a state only violates an individual or a limited circle of persons, so that possible claims or procedures could clearly be isolated from other law suits and initiated on behalf of an individual's motivation; this is the case group the ICJ should have paid more attention to. Actually, most of today's violations are to be put into this case group. As freedom of expression, freedom of religion, protection against torture and other basic human rights are often violated by repressive states, we can see that for many countries it is daily business and a part of national policies to restrict individual freedoms.

In this context it is clearly difficult to draw the exact line between systematical conflicts and peaceful times. As the ICJ had to deal with a case that happened nearly 70 years ago it was completely blind for all the individual violations that take nowadays place on a daily basis. Formally, the ICJ cannot be criticized, but every argument that had been developed to justify a breach of state immunity in cases of serious human rights violations has been rejected in a way that a general reference was created which will block every further approaches. Individual violations, which are completely different from violations during war times, are not accessible anymore. It would have been more tactful and human rights friendly to create two different case groups and close the debate for violations during war times while leaving the debate for nowadays' human rights infringements open.

Keeping this in mind, *Payandeh's* observation of just narrowed possibilities of national courts can be agreed to.[242] Actually, the development of immunity exceptions now lays in the hand of national courts. Their importance for developing state immunity may have been weakened, but interestingly the ECHR found a more moderate approach to this very basic problem of human rights enforcement than the ICJ did:

[239] *Bröhmer*, p. 207.
[240] *Schmahl*, p. 716.
[241] *Bröhmer*, p. 223.
[242] *Payandeh*, p. 958.

> "However, in light of the developments currently underway in this area of public international law, this is a matter which needs to be kept under review by Contracting States."[243]

So the chains of the ICJ have slightly been loosened and the future will show in how far state practice will jump over the outdated understanding of sovereignty and immunity of states in times of growing value orientation.

[243] ECHR, *Jones and Others v. The United Kingdom*, D. f. 14.01.2014, m.n. 215.

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