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STATE IMMUNITY AND WAR CRIMES: THE POLISH SUPREME COURT ON THE *NATONIEWSKI* CASE

Abstract

The article critically assesses the decision of the Polish Supreme Court in Natoniewski v. Federal Republic of Germany. It argues that the decision as such reflects contemporary international law practice. Consequently, the holding of the Supreme Court that State immunity is applicable to acts de iure imperii committed on the territory of the forum State during an armed conflict even tough they may amount to war crimes seems to be correct. This conclusion also means that the Court refused to engage in law-making activity by declining to endorse interpretation, which would permit to reject State immunity by attaching superior importance to human rights.

Although the article recognizes that the reasoning of the Supreme Court as well as the choice of arguments is well-balanced and convincing, it also identifies certain instances in which the Court is not entirely persuasive. In the opinion of the author, one of the most important drawbacks in the reasoning relates to the characterization of State immunity as a procedural, rather than substantive, issue.

INTRODUCTION

In the recent judgment in *Natoniewski v. Federal Republic of Germany*,[1] the Polish Supreme Court decided that Polish courts did not have jurisdiction over Germany in a case related to actions of German forces during the World War II on

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[1] *Winicjusz N. v. Republika Federalna Niemiec – Federalny Urząd Kanclerski w Berlinie*, Supreme Court (Civil Chamber), case no. CSK 465/09, 29 October 2010 (hereinafter: Judgment).

the Polish territory, because Germany was protected by State immunity. The plaintiff, Winicjusz Natoniewski, sustained bodily injuries on 2 February 1944 during the pacification of a Polish village Szczecyn by the armed forces of the Third German Reich. The German forces had entered the village and subsequently expelled and executed Polish inhabitants. Their households were burnt and private property was pillaged. Mr. Natoniewski – then a six years old boy – was heavily burnt on his head, chest and arms. The consequences of the event persist until today, as the plaintiff still suffers from psychological and physical pain.

The judgment of the Supreme Court is very significant for international law for various reasons and subscribes to a series of the latest decisions of international and national courts concerning the limits of State immunity and its relation with fundamental human rights and international crimes. Moreover, *Natoniewski* is the first judgment of the Polish Supreme Court discussing the unlawful German acts in the context of State immunity and decisions issued by Greek and Italian courts. It needs to be underlined that the line of reasoning as well as the choice of arguments seems to be well-balanced and convincing, although there are certain instances in which the Supreme Court is not entirely persuasive and may be criticized.

This article aims at analysing basic issues concerning State immunity in the light of the decision of the Supreme Court. It starts with a summary of the judgment (Section 1) and proceeds with a critical examination of the reasoning followed by the Court. This includes discussion on the methodology in ascertaining customary norms of international law (Section 2.1), personal injuries and State immunity (Section 2.2), balancing of values (Section 2.3), *ius cogens* norms (Section 2.4) and the problem of perceiving State immunity as a concept of procedural law (Section 2.5). The final part gives some overall conclusions.

1. THE SUPREME COURT'S DECISION ON *NATONIEWSKI*

The Polish Supreme Court decided that it had no jurisdiction to decide the dispute since State immunity barred Polish courts from considering the merits of the claim. The Court's reasoning may be briefly summarized as follows:

1. Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters was not applicable in the dispute since the plaintiff's claim fell outside the scope of civil and commercial matters as provided by Article 1 of the Regulation.[2]

[2] *Ibidem*, p. 10.

2. Polish law accepted diplomatic and consular immunity as well as jurisdictional immunity of foreign States.[3]
3. State immunity was the principle of customary international law which Poland was bound to abide by under Article 9 of the Polish Constitution.[4]
4. The jurisdictional immunity of States stemmed from the principle of equality of States (*par in parem non habet imperium*).[5]
5. There were two basic prerequisites which had to be fulfilled cumulatively in order to assert the jurisdiction of Polish courts: first, there must have been a link between the case in question and Polish jurisdiction (e.g. lex loci delicti commissi); second, the foreign State could not have invoked successfully immunity under international law.[6]
6. The content of customary international law was to be determined according to Article 38 § 1(b) of the Statute of the International Court of Justice (ICJ). This required establishing two elements: practice and a belief that such practice is obligatory.[7]
7. Contemporary international law recognized the restrictive theory of State immunity, whereby immunity was recognized for foreign State's sovereign or public acts, but not for its private acts. The absolute theory had been valid until 1950s and was subsequently replaced by the restrictive theory, which prevented the sovereign nations from lawsuits or prosecution without their consent for the *acta de iure imperii*.[8]
8. German acts in Szczecyn constituted acts *de iure imperii*. Nonetheless, new trends have emerged in international law concerning a further limitation of State immunity which demands an independent examination. This particularly referred to torts committed in a forum State (i.e. the tort exception). The Court stressed the fact that such an exception had

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[3] *Ibidem*, p. 11.

[4] *Ibidem*.

[5] *Ibidem*.

[6] *Ibidiem*, pp. 11-12.

[7] *Ibidem*, p. 12. *See e.g.*: *The North Sea Continental Shelf case*, ICJ Reports 1969, p. 44: "Not only must the acts concerned amount to a settled practice, but they must also be such, or be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it."

[8] Judgment, p. 13. The Supreme Court recalled even its previous decision from 26 September 1990 in which it had still been accepting the absolute theory of State immunity (the decision of seven judges, case no. III PZP 9/90). In the 1990s, the Court changed its attitude and accepted gradually the restrictive theory. *See* A. Wyrozumska, *Polskie sądy wobec immunitetu państwa obcego* [Polish Courts and Foreign State Immunity], Państwo i Prawo 2000, no. 3, pp. 23-42.

a strong rationale as the limitation was closely connected with the legal order of a forum State. A forum State should have had the competence to assess legality of such actions because it exercised the territorial sovereignty. After having carefully examined various national State immunity acts and the practice of domestic courts, the Supreme Courts declared that the tort exception has reached the status of international customary law and therefore a forum State in such cases could not have been required to grant immunity to a foreign State.[9]

9. The law of State immunity was of procedural, and not of material, nature. Therefore, even though the German acts had been committed almost 70 years ago, the tort exception was applicable to the present case since procedural law was regulated by the intertemporal rule according to which new-proceedings were governed by the present set of procedural rules. Hence, the Supreme Court concluded that the decision whether to grant or not the State immunity should take into consideration the present state of international law and not international law as of the date of committing the wrongful act. This meant for the Supreme Court that procedural law applied retrospectively to acts that occurred prior to the adoption of the tort exception.[10]
10. The next point discussed by the Court was whether the tort exception might have been applicable to acts committed at the time of armed conflict. The Court reviewed the practice of domestic courts and reached a conclusion that the tort exception could not have justified jurisdiction of the forum State and the denial of State immunity for acts committed at the time of an armed conflict.[11]
11. However, according to the Supreme Court there were new trends in the international legal doctrine and the jurisprudence of domestic courts, which required additional examination. In this context, the Supreme Court referred the *Distomo* case[12] and the *Ferrini* case.[13] It noted that

[9] Judgment, pp. 13-15.

[10] The Polish Supreme Court referred to the US Supreme Court judgment in the *Altmann v. Austria* case in which it was decided that the Foreign State Immunity Act should be applied to pre-enactment conduct, *Republic of Austria v. Altmann*, 327 F 3d 1246 (2004); ILM 43 (2004) 1421.

[11] Judgment, pp. 17-19.

[12] *Prefecture of Voiotia v Federal Republic of Germany*, Hellenic Supreme Court (*Areios Pagos*), Case No. 11/2000, 4 May 2000, published in parts with comment by Gavouneli and Bantekas, 95 American Journal of International Law 198 (2001).

[13] *Ferrini v. Federal Republic of Germany*, Italian Court of Cassation (Corte di Cassazione (Sezioni Unite)), Judgment No. 5044 of 6 November 2003, registered 11 Mar. 2004, 87 Rivista diritto internazionale 539 (2004); 128 ILR 659.

in both cases the domestic courts held that the Germany did not enjoy immunity under customary international law for committing international crimes and a breach of *ius cogens* norms, in particular, norms pertaining to the respect for human dignity and the inalienable rights of individuals (*Ferrini*). On this basis, one could argue that in cases of serious breach of human rights a foreign State may not invoke its immunity and domestic courts may assert their jurisdiction over such breaches. Moreover, the Polish Court referred to the argument concerning the implied waiver and the argument that sovereign immunity from jurisdiction of foreign courts could be forfeited in cases involving the violation of *ius cogens* human rights.[14] Another argument was that *ius cogens* norms prevailed over other norms of international law. This was also connected with the right to fair trial which had a particular relevance in cases of serious breaches of human rights.[15]

12. The Supreme Court noted that the above-mentioned arguments were not really supported by the considerable part of international doctrine and domestic practice. Furthermore, all arguments for denial of immunity were controversial and Poland itself has invoked immunity in cases before foreign courts.[16]
13. The Court noted that the Greek Special Supreme Court in *Margellos v. Federal Republic of Germany* held that it had been inappropriate to single out an individual incident incurred during an armed conflict and assess it in separation from the whole legal context. Moreover, Article 3 of the IV Hague Convention of 1907 did not provide for judicial remedy in case of violations of the Hague Regulations concerning the Laws and Customs of War on Land. These questions were governed by public international law, which limited jurisdiction of courts by the law of State immunity. According to the Special Supreme Court, at the present stage of development of international law one could not find a rule, which would allow for an exception to State immunity and pursuing a claim in

[14] *See,* J. Kokott, *Mißbrauch und Verwirkung von Souveränitätsrechten bei gravierenden Völkerrechtsverstößen*, in: U. Beyerlin et al. (eds.), *Recht zwischen Umbruch und Bewahrung. Festschrift für Rudolf Bernhardt*, Springer-Verlag, Berlin: 1995, pp. 135-152; J. Bröhmer, *State Immunity and the Violation of Human Rights*, Kluwer Law International, The Hague: 1997, p. 192.

[15] Judgment, pp. 19-23. It is perhaps worth adding that the Court also noted that sometimes it had been argued that acts inconsistent with peremptory norms were not of a public nature.

[16] Judgment, p. 23. *Garb et al. v. the Republic of Poland*, 440 F 3d 579, 3 March 2006, US Court of Appeal, 2nd Circuit.

cases of torts committed by a foreign State's armed forces on the territory of the forum State. This covered both acts in the time of peace and of war. The Court highlighted that there was no international practice which would suggest otherwise.[17]

14. Furthermore, the House of Lords in *Jones*[18] held that although the prohibition of torture was a *ius cogens* norm, it did not remove State immunity in civil cases. According to the House of Lords, the fact that particular conduct was unlawful or objectionable was not, of itself, a ground for refusing immunity. State immunity would be inconsistent with the prohibition of torture only if there was an additional procedural rule allowing for jurisdiction of domestic courts in torture claims. However, there was no such norm in international law, and the duty of domestic courts was not to unilaterally "develop" international law, which was founded on the common will of States. This also applied to cases in which decisions against State immunity would nonetheless reflect values enshrined in the imperative norms of international law. In conclusion, the Supreme Court stated that in such cases immunity should have been granted to foreign States.[19]
15. Similarly, the ICJ in the *Arrest Warrant* case[20] ruled that a breach of *ius cogens* norm did not automatically trigger the denial of immunity. The highest State officials enjoyed immunity under customary international law and at present there was no exception to this rule.[21]
16. The Polish Supreme Court also stressed that, according to some authors, there could be no conflict between State immunity and *ius cogens* norms since both of them were of different nature. The former was the norm of procedural nature whereas the latter had a substantive character. Therefore, the prohibition of torture could not imply the obligation to overrule State immunity as much as State immunity could not imply the permission to commit acts of torture. Moreover, State im-

[17] Judgment, pp. 23-24. *Margellos v. Federal Republic of Germany*, Case No. 6/2002, 17 September 2002, 129 I.L.R. 526.

[18] *Jones v. Ministry of Interior Al-Mamlaka Al-Arabiya AS Saudiya (the Kingdom of Saudi Arabia) and others*, [2006] UKHL 26, 14 June 2006, House of Lords.

[19] Judgment, pp. 24-25.

[20] *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, I.C.J. Reports 2002, judgment of 14 February 2002.

[21] Judgment, p. 25.

munity did not preclude the settlement of such disputes between States by referring to pacific means envisaged in public international law.[22]

17. The Supreme Court also invoked the jurisprudence of the European Court of Human Rights (ECtHR), and, particularly, *Al-Adsani*[23] and *McElhinney*[24], as an argument for denying a breach of the right to fair trial prescribed in Article 6 of the European Convention on Human Rights. This right was not of an absolute nature and thus immunity should not have been regarded as a disproportionate limitation of the right. This view was also supported in *Kalogeropoulou* with regard to State immunity from execution.[25] The Supreme Court also recalled the recent US decision suspending execution from diplomatic and consular property of States supporting terrorism because such actions would amount to a breach of US treaty obligation and deprive US diplomatic and consular mission of international protection.[26]
18. Finally, the Supreme Court arrived at the conclusion that there was no sufficient ground for reaching a decision that there was customary exception to State immunity for military acts committed by armed forces on the territory of the forum State (even if they amounted to breaches of human rights). Having in mind the Greek and Italian cases, one could argue that a new exception was in the process of formation but in light of the cited decisions and the doctrine of international law such a process did not yet amount to a new, binding norm of international law. Moreover, the Supreme Court recalled the fact that notwithstanding the great importance of human rights, both State immunity and the principle of sovereign equality of States also played a significant role in international relations by sustaining friendly relations between States and preventing tensions among them.[27]

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[22] *Ibidem*, pp. 25-26.

[23] *Al-Adsani v. United Kingdom*, Application No. 35763/97, ECtHR, judgment of 21 November 2001, available at www.coe.echr.int.

[24] *McElhinney v. Ireland*, Application No. 31253/96, ECtHR, judgment of 21 November 2001, available at www.coe.echr.int.

[25] *Kalogeropoulou and Others v. Greece and Germany*, Application No. 59021/00, ECtHR, judgment of 12 December 2002 (admissibility), available at www.coe.echr.int.

[26] Judgment, pp. 25-27. See: *Suits Against Terrorist States By Victims of Terrorism*, CRS Report for Congress, 7 June 2005, available at http://www.dtic.mil/cgi-bin/GetTRDoc?AD=ADA444784&Location=U2&doc=GetTR Doc.pdf.

[27] Judgment, pp. 28-29.

19. Therefore, the Court concluded, that although the pacification of Szczecyn had amounted to a flagrant breach of international humanitarian law and, as of today, had breached peremptory norms of human rights, claims arising from the German acts could not be regarded as covered by an exception from State immunity. The Supreme Court also observed that the claimant had alternative, reasonable and effective legal remedies to seek justice. In the Court's view, the claimant could lodge a claim with a court of a wrongdoer State which breached its human rights obligations.[28]

2. THE LINE OF REASONING IN THE *NATONIEWSKI* CASE

The decision of the Supreme Court definitively needs to be welcomed although there are certain points which may be criticised and which demand an independent examination. The judgment of the Supreme Court reflects contemporary international law, but one may raise certain objections as to specific points in the reasoning of the Court. The Court broadly applied international legal arguments and reached its findings in light of customary international law focusing also on the relations between State immunity and human rights and/or *ius cogens* norms. On its face, the decision holding that there is no customary exception to State immunity for acts committed by armed forces on the territory of the forum State which are at variance with basic human rights, may appear to be drastic and difficult to accept under the terms of public international law and, in particular, internationally protected human rights. This is especially unintelligible and unfair to victims who appear to be left with no legal remedy of their own. However, the line of reasoning advanced in *Natoniewski* is, nevertheless, consistent with contemporary international law as it properly applies and interprets principles of international law embodied in treaties and customary international law. Below, I analyze the findings of the Court in order to make certain general observations on the consequences of this decision. In particular, this article outlines some of the legal issues discussed in *Natoniewski* and raises basic questions relating to State immunity in the contemporary discourse on international law with special regard to human rights and *ius cogens* norms.

[28] *Ibidem*, p. 29.

2.1. Methodology

The quest for finding an adequate methodology in ascertaining the rule of customary international law is always problematic for domestic courts and, probably, except for the earlier decisions of the ICJ as well as the Permanent Court of International Justice which made a substantial contribution to the development of customary international law, no court or tribunal has fully and convincingly established the existence of a customary rule which would have been of significant importance in a given legal dispute.

The primary question regarding the law of State immunity is how to ascertain the existence of a customary rule on immunity.[29] The Polish Supreme Court started by recalling Article 38(1)(b) of the ICJ Statute which establishes that both practice and *opinio iuris* are required in order to show the existence of rule of customary international law. The customary law on State immunity could be evidenced through reference to the European Convention on the State Immunity (ECSI), United Nations Convention on Jurisdictional Immunities of States and their Property (CJISTP), jurisprudence of international courts as well as doctrine of international law. This list is of course not exhaustive and there are other sources, relating to both objective and subjective element, which are relevant for determination of State immunity rules.

Possible examples would include discussions in the United Nations or resolutions of international bodies (e.g. a recommendation made by the Committee against Torture to Canada on 7 July 2005). It is worth to recall that practice may be evidenced not only by external conduct but also by such internal materials as domestic legislation, national judicial decisions, diplomatic dispatches, internal government memoranda, ministerial statements in parliaments and elsewhere. The subjective element may be also deduced from sources, such as the conclusion of bilateral or multilateral treaties,[30] attitudes towards resolutions of the UN General Assembly and other international meetings as well as statements

[29] This question is nowadays of paramount importance in international legal arguments due to the lack of proper methodology and precision in international legal reasoning when establishing and discussing customary international law. Not only do domestic courts apply insufficient or incorrect methodology, but also international courts sometimes ascertain customary international law by using controversial methods. See e.g.: *Cudak v. Lithuania*, Application No. 15869/02, ECtHR, judgment of 23 March 2010, available at <www.coe.echr.int>, in which the Court discussed the State immunity in cases of contracts of employment.

[30] However, note that the inclusion of a provision in a treaty does not necessarily mean that the parties believe they are merely reflecting what is already a matter of legal obligation.

by state representatives.[31] In similar vein, Ian Brownlie explains that the material sources of custom are numerous and include diplomatic correspondence, policy statements, press releases, the opinions of official legal advisers, official manuals on legal questions, comments by governments on drafts produced by the International Law Commission (ILC), state legislation, international and national judicial decisions, recital in treaties and other international instruments, the practice of international organs, and resolutions relating to legal questions in the UN General Assembly.[32] The problem of ascertaining customary international law is of course much more complex and difficult,[33] but basing on a prevailing two-elements theory it would appear that the Supreme Court could be more careful in examining, analysing and establishing existence of relevant practice and *opinio iuris*.

The Court observed that Poland had not ratified the European Convention while the UN Convention had not yet entered into force. Therefore, it focused on decisions of foreign courts and the European Court of Human Rights. This is in line with the general approach of the doctrine on State immunity, which tends to discuss international and domestic judicial decisions in order to ascertain existence of relevant rules. What appears to be quite peculiar here, is that the case law rarely refers to legislative and executive acts (except for state immunity statutes passed in some countries). However, it must be borne in mind that domestic judicial decisions form only a part of State practice and consequently ascertaining the existence of a customary rule by relying mostly on such decisions is not fully appropriate. It seems that the both legislative and executive branches are somehow underestimated and should be also taken into account while ascertaining a norm of customary international law.[34] For example, many courts and authors refer to the *Pinochet case*,[35] but they discuss only the decisions of the House of Lords leaving aside the attitude of Chile, Spain and the executive branch of the

[31] R. Jennings, A. Watts (eds.), *Oppenheim's International Law*, 9th ed. Oxford University Press, Oxford: 1997, Volume I, Part I, pp. 26-28.

[32] I. Brownlie, *Principles of Public International Law*, Oxford University Press, Oxford: 2008, pp. 6-7.

[33] *See, e.g.*, R. Kolb, *Selected Problems in the Theory of Customary International Law*, 50(2) Netherlands International Law Review 119 (2003), and the voices of doctrine quoted there.

[34] *See e.g.*, I. Brownlie, *Contemporary Problems Concerning Immunity of States. Preliminary Report*, ADI 62-I (1987), p. 16, para. 9, who warns against placing too much reliance on municipal case law. He points out that the views expressed by courts may be inconsistent with those of the executive and legislative and hence not the best evidence of State practice.

[35] *R v. Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte (Amnesty International Intervening) (No. 1)*, 1999, 119 ILR 49; *R v. Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte (Amnesty International Intervening)*

United Kingdom during and after the final decision was rendered. Moreover, the scope of decisions quoted is limited mainly to the European and North American countries (including Australia and New Zealand). It takes no notice of the rest of the world where one may at least try to find examples of practice in regard to State immunity. Such selective methodology, which disregards the practice of other States, may lead to confusing results and in some cases even to violations of international law. Last but not least, even though the Supreme Court recognized a difference between practice and *opinio iuris*, it did not really distinguish in its reasoning between these two elements. The legal validity of the restrictive theory is more than obvious today and the restrictive rule is indeed established as a mater of international law.[36] Nonetheless, one may expect from the Supreme Court to be more precise and convincing when establishing the existence of such rule by referring more exhaustively to evidence of both practice and *opinio iuris* as provided for in the Article 38(1)(b) of the ICJ Statute (or, at least, referring to its previous decisions on this point).

2.2. Personal injuries and state immunity

There is a wealth of authority strongly indicating that in a case of torts a foreign State may not successfully invoke jurisdictional immunity if a wrongful act was committed on the territory of the forum State.[37] This exception seems to be expressed for the first time by the 1891 Resolution of the Institut de Droit International in its draft provision on the reception for delictual or quasi-delictual acts committed within the forum State.[38] The authoritative formulation is embodied

(No 2), 2000, 119 ILR 111; *R v. Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte (Amnesty International Intervening) (No. 3)*, 2000, 119 ILR 135, available at <http://www.uniset.ca/other/cs5/2000AC147.html>.

[36] *See, e.g.,* J. Crawford, *International Law and Foreign Sovereigns: Distinguishing Immune Transaction*, British Yearbook of International Law 85 (1983).

[37] But do note the remark of Sucharitkul that "[b]efore the intervention by legislatures in the 1970s and, indeed, prior to the adoption and ratification of international conventions on State immunities, the practice of States [in respect of proceedings for personal injuries and damage to property] had been neither uniform nor consistent." *Fifth report on jurisdictional immunities of States and their property, by Mr. S. Sucharitkul, Special Rapporteur*, YILC 1983, vol. II, part I, para. 76. Still, a careful research on the current States practice concerning tortuous acts needs to be carried out, since hardly any such examination has been conducted in the recent years.

[38] Article 4(6) of the *Projet de règlement international sur la compétence des tribunaux dans les procès contre les Etats, souverains ou chefs d'Etat étrangers*, ADI II (1885-1991), Hamburg, 1215, available at <http://www.idi-iil.org/idiF/resolutionsF/1891_ham_01_fr.pdf>.

in Article 11 ECSI and Article 12 CJISTP.[39] The question of invoking immunity before domestic courts has been discussed practically in each jurisdiction.[40] The scope of this exception seems to be wide enough to cover also intentional physical harm such as assault and battery, malicious damage to property, arson or even homicide, including political assassination. The basis for the exercise of jurisdiction in cases covered by this exception is territoriality. The *locus delicti commissi* by definition reflects territoriality regardless of the motives which stand behind the act or omission, whether it is intentional or malicious (e.g. a political act of violence), or rather accidental, negligent, inadvertent, reckless or careless (e.g. a car accident), and – what is more important – irrespective of the nature of the activities involved, whether they are *iure imperii* or *iure gestionis* character.[41] The Polish Supreme Court also added that many international jurists accept this view as a contemporary norm of international law. Consequently, the Court rightly observed that it was under no legal duty to accept immunity of a foreign State with regard to tortious acts committed in the territory of the forum State.

There was, however, another question to be addressed by the Court, namely, whether the above exception to State immunity is also applicable in time of an armed conflict. The Supreme Court referred to Article 31 ECSI and Article 12 CJISTP (and the commentary of the ILC) in order to conclude that this exception may not be applied to acts committed during armed conflicts. None of the agreements applies to situations involving armed conflicts.[42] In the Court's

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[39] *See also,* the Australia Foreign States Immunities Act of 1985, section 13; the Canadian State Immunity Act of 1982, section 6; the US Foreign State Immunity Act of 1976, § 1605(5), the UK State Immunity Act of 1978, section 5; the Act on the Civil Jurisdiction of Japan over Foreign States of 2009, Article 10.

[40] *See e.g.*, *Holubek v. The Government of the United States*, Austrian Supreme Court, 10 February, 40 ILR 73. Most decisions have been delivered in the US Courts: *Letelier v. Chile*, 488 F Supp 665 (DDC 1980), 63 ILR (1982) 378; *Liu v. Republic of China*, 892 F Supp 1419, (CA 9th Cir 1993), 101 ILR (1995), 519; *Frolova v. Union of Soviet Socialist Republic*, 761 F 2d 370 (CA 7th Cir 1985), 85 ILR (1991) 236; *Von Dardel v. Union of Soviet Socialist Republics*, 623 F Supp 246 (DDC 1985), 77 ILR (1988) 258; *Argentine Republic v. Amerada Hess Shipping*, 102 L Ed 2d 818 (SC 683 1989), 81 ILR (1990), 658; *Nelson v. Saudi Arabia*, 923 F 2d 1528 (CA 11th Cir 1991), 88 ILR (1992) 189, reversed by the Supreme Court, 113 S Ct 1471, 87 AJIL (1993) 442; *Siderman de Blake and others v. Republic of Argentina*, 965 F 2d 699 (CA 9th Cir 1992), 103 ILR (1996) 454; *Hugo Princz v Federal Republic of Germany*, 813 F Supp (DDC 1992), 103 ILR (1996) 598, overruled by Court of Appeals, District of Columbia Circuit, 26 F 3rd 1166 (1994), 103 ILR (1996) 604.

[41] *Draft Articles on Jurisdictional Immunities of States and their Property, with commentaries*, YILC 1991, vol. II, part II, p. 45.

[42] *See,* the statement of the Chairman of the Ad Hoc Committee, Gerhard Hafner, Summary Record of the 13th meeting of the Sixth Committee (25 October 2005), UN Doc. AC6./59/SR.13; A. Dickinson, *Status of Forces under the UN Convention on State Immunity*, 55 International and Comparative Law Quarterly 427 (2006).

view, the specific character of such conflicts justifies granting State immunity. An armed conflict may not be reduced to a relation between a State and individual. It is a conflict between States. Therefore, all the claims arising out of such conflicts are to be regulated in peace treaties. The rationale behind the elimination of judicial remedies is to ensure normalization of relations between States which could be hindered by claims against a foreign State in respect of war-related damages.[43] The Court also quoted the ECtHR which stated that acts of soldiers on foreign territory relate to the core area of State sovereignty which, of their very nature, may involve sensitive issues affecting diplomatic relations between States and national security.[44]

The Court's reasoning on State immunity with regard to armed conflicts seems to be in conformity with international law, although there are also other compelling reasons to decline jurisdiction of the forum State. Firstly, State immunity applies to military activities *de iure imperii* of State both in time of peace and of war.[45] Claims brought by individuals for personal injuries or damage to property have been addressed by laws of war with individuals having no right to claim compensation. Article 3 of the Hague Convention (IV) respecting the Laws and Customs of War on Land of 1907 specifies that such claims may be raised only by a State. In particular, Art. 3 stipulates that "a belligerent party which violates the provisions of the said Regulations shall, if the case demands, be liable to pay compensation. It shall be responsible for all acts committed by persons forming part of its armed forces." This provision was confirmed by Article 91 of the Additional Protocol I of 1977 to the 1949 Geneva Conventions. National courts also decline to adjudicate claims brought by individuals since these claims are barred by State immunity as they concerned activities in exercise of sovereign authority.[46] Conse-

[43] Judgment, pp. 17-18.

[44] *McElhinney v. Ireland*, Application No. 31253/96, ECtHR, judgment of 21 November 2001, para. 38, available at <www.coe.echr.int>.

[45] *Contra*, Dickinson, *supra* note 42, p. 431.

[46] German practice: *Italian Military Internees Case*, *Joint constitutional complaint*, 2 BvR 1379/01, Federal Constitutional Court; *Distomo Massacre Case (Greek Citizens v. Federal Republic of Germany)*, BvR 1476/03, Federal Constitutional Court, 15 February 2006; *Kowaleski v. Germany*, I W 32108, Higher Regional Court for Berlin (Kammergericht), 17 November 2008; for UK practice: A. P. V. Rogers, War Crimes Traials under the Royal Warrant: British Practice 1945-1949, 29 International and Comparative Law Quarterly 780 (1990); for US practice: *Tel-Oren v. Libyan Arab Republic,* 726 F.2d 774, 810 (DCC 1984) (Bork, J., concurring); *Goldstar (Panama) S.A. v. United States,* 967 F 2d 965, 968-69 (CA, 4th Cir.1992); *Dreyfus v. Von Finck,* 534 F.2d 24, 30 (CA, 2d Cir.1976); *Handel v. Artukovic,*601 F. Supp. 1421, 1425 (C.D.Cal.1985); *Argentine Republic v. Amerada Hess Shipping*, 102 L Ed 2d 818 (SC 683 1989), 81 ILR (1990), 658. The Court of Appeal, DDC, pointed out

quently, the only possible way of settling individuals' claims would appear to be diplomatic protection of the victim State against the wrongdoer State engaged in an armed conflict. When one considers the above, the Supreme Court is correct in not following *Voiotia* and *Ferrini* judgements and declining to adjudicate the case due to State immunity. Nonetheless, this also means that claims of individuals are left in an adjudicative vacuum, since there is no judicial forum which could adjudicate them. This remark is of special importance in the case of German-Polish relations as Poland undertook not to support private claims against the German state on the international plane with regards to World War II. This step was also connected with the establishment of the Foundation "Remembrance, Responsibility and the Future".[47] Thus, State immunity bars a remedy for a violation of international law and, because Article 3 of the Hague Convention is not self-executing, a claim is deemed to be unjusticiable. One may consider such a situation in terms of a specific type of denial of justice because there is no legal possibility to address claims in relation to personal injuries and damage to property incurred during the armed conflict. Of course, it needs to be remarked that the Supreme Court was of the view that the claimant had alternative, reasonable and effective legal remedies to seek justice before courts of the wrongdoer State which breached its human rights obligations.[48] However, having in mind the above decisions of German courts it seems very unlikely to happen.

2.3. Balancing of values

A claim against a foreign State can be based on domestic law or international law. When a claim is founded on domestic law and a foreign State claims immunity, a domestic court is more willing to grant immunity. A claim based on international law seems to be more complex and difficult to assess, especially when a victim seeks damages for serious human rights violations. In such a case, a domestic court may hesitate whether sovereign immunity should indeed serve as a ban for adjudicating the human rights claim, with the wrongdoer State hiding behind the shield of immunity, or rather whether the protection of human rights should prevail over customary international law. There are clearly two different sets of values here which appear to be in direct or indirect opposition. Both represent interests which

that "[t]he cases are unanimous, however, in holding that nothing in the Hague Convention "even impliedly grants individuals the right to seek damages for violation of [its] provisions." *Hugo Princz v Federal Republic of Germany*, 26 F 3d 1166 (1994), 103 ILR (1996) 604.

[47] *Gesetz zur Errichtung einer Stiftung 'Erinnerung, Verantwortung und Zukunft'*, 38 Bundesgesetzblatt, 11 August 2000, p. 1263.

[48] Judgment, p. 29.

are enshrined in treaty and customary international law. On the one hand, there is State sovereignty, independence and equality of States as well as the prevention of unwarranted interference as the result of an excessive curtailment of immunities.[49] On the other hand, there are internationally protected human rights, freedom and dignity of persons and the need to counteract impunity. The new emerging trend in international law refuses to grant State immunity when a State has committed serious violations of human rights within its public capacity. This may be seen as a challenge to the classical structure of international law where sovereign immunity plays an important role with no exceptions to State immunity.[50] One may legitimately ask whether States have already accepted that this classical structure has come to an end and does not need to be rebuilt in order to meet human rights claims.

The answer to this problem lies in the present State practice and *opinio iuris* of States. To tackle this issue, one may start with the observation of Professor Gerhard Hafner, Chairman of the Ad Hoc Committee of the UNGA Sixth Committee, who explained the omission of the human rights exception in the UN Convention in the following terms:

> Some criticism has been levelled at the Convention on the ground that it does not remove immunity in cases involving claims for civil damages against States for serious violations of human rights. This issue was raised in the ILC and it was dropped. It was raised again in the UN General Assembly and it was dropped because, in the light of the *Al Adsani* case and other developments, it was concluded that there was no clearly established pattern by States in this regard. It was recognised, therefore, that any attempt to include such a provision would, almost certainly jeopardise the conclusion of the Convention. In my view, there are other arguments which militate against including such an exception. It is said that we must limit impunity but suing a State for civil damages does not address the issue of impunity. To remove immunity, we must prosecute the individual person or persons responsible for the serious violations and this can be undertaken in other fields but not in the context of this Convention. Anyway, what is meant by "serious violations of human rights"? What would be the scope of any such exception? Is the denial of freedom of speech a serious violation? There would be significant problems of interpretation and this was also a reason why we did not take up the issue.[51]

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[49] *See, Joint Separate Opinion of Judges Higgins, Kooijmans and Buergenthal*, *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, 14 February 2002, ICJ Reports 2002, para. 77.

[50] H. Fox, *The Law of the State Immunity*, Oxford University Press, Oxford: 2008, p. 141.

[51] G. Hafner, *State Immunity and the New UN Convention*, Chatham House, 5 October 2005, available at <http://www.chathamhouse.org.uk/files/3280_ilpstateimmunity.pdf>. *Contra*, Dickinson, *supra* note 42, pp. 427-435.

The above suggests that the question of State immunity and human rights exception should still be considered in the frames of customary international law. And it is quite apparent that State practice on this issue remains sparse and lacks uniformity and, therefore, it is not clear how to draft a new rule in order to meet practice and States' expectations in the context of the progressive development of international law. Thus, it seems that the general rule of State immunity should be applied if a claimant fails to prove the existence of new State practice and *opinio iuris*. Such conclusion has been reached by Professor Hazel Fox who argues:

> (…) given the present structure of international community with no agreed allocation of jurisdictional authority, State immunity continues to serve as the indicator and supervisor of the boundary line between the sphere of international relations between States and relations with private individuals conducted on the basis of private law. It is essential that personal immunity should continue to enable heads of State and diplomats to carry out their official duties unimpeded. Violations of international law in general remain on the international relations side of the line and may only be made subject to adjudication, whether of international or of regional human rights or of national tribunals, with the consent of the alleged wrongdoer State. Exceptionally (…) some modification *de lege ferenda* of functional immunity in respect of civil proceedings solely in respect of the commission of international crimes when such persons have left the office is put forward for consideration (…) the rule of immunity in respect of acts in exercise of sovereign authority continues as the general regime.[52]

The Polish Supreme Court did not follow the reasoning adopted by Italian and Greek courts. In *Ferrini*, the Italian Supreme Court "progressively" conducted a "balancing of values" exercise between State immunity (State sovereignty) and the protection of inviolable human rights. The Court perceived Ferrini's deportation and forced labour as international crimes and as violations of the peremptory rule protecting human rights. Freedom and dignity of a person formed universal values which were protected by general norms of international law. Furthermore, the Italian Court observed that international crimes seriously damaged the integrity of the freedom and dignity of a person. Therefore, international crimes undermined universal values which transcended the interests of a single State.[53] Moreover, the Court underlined the exceptional seriousness of the wrongful acts to which Ferrini was subjected and it assumed the existence of such crimes in

[52] Fox, *supra* note 50, p. 141 [italics in the original].

[53] *See,* P. De Sena, F. De Vittor, *State Immunity and Human Rights: The Italian Supreme Court Decision on the* Ferrini *Case*, 16(1) European Journal of International Law 89 (2005), p. 98, who describe the Court's line of reasoning in the case.

international law at the time when the violations had taken place.[54] Violations in *Ferrini* were contrary to universal values shared by the whole international community and these values represented the fundamental principles of international legal system.[55] Thus, State sovereignty should be overruled by human rights. This allowed the Italian Court to assume the existence of an exception to the general rule on State immunity, which justified the exercise of municipal jurisdiction.

The Polish Supreme Court held exactly the opposite view. It assumed that the acts of German forces had amounted to war crimes and had flagrantly breached human rights, but it did not waive State immunity since there was no customary exception in this respect.[56] Moreover, in the opinion of the Court such a decision did not infringe the European Convention on Human Rights. Notably, the Court did not express its opinion on the issue concerning the balance of values nor even referred to *Ferrini*. It simply recognized the existence of State immunity and the lack of an appropriate exception thereto. The critical remark on the *Natoniewski* case is that although the Court noted the Greek and Italian decisions, it did neither endorsed nor openly rejected them, but merely applied the traditional immunity rules. It appears that the Polish Supreme Court simply followed the majority of decisions granting immunity because this was prevailing view and not because of the reasons that stood behind such position. This is what is missing in the Supreme Court's line of reasoning. It did not discuss the arguments but rather simply followed prior decisions in relations to similar cases. In particular, the Court did not stress that such a balancing exercise is not to be performed by courts, since it is their duty to apply existing law and not to revise it. Instead, the Court noted only that it is not a duty of "a domestic court to 'develop' unilaterally international law by conferring it such content that would anyway correspond and would be desired by values inherent in peremptory norms of international law, if it is not accepted by other States."[57] Moreover, in the other part of its decision, the Supreme Court expressed a very accurate view that, while not negating the significance of human rights, one should recognize the importance of State immunity. It is founded on the principle of equality of States which presumes that sovereign States are not subjected to foreign jurisdiction. It serves to maintain friendly relations between

[54] *Ibidem*, p. 99.

[55] *Ibidem*, pp. 99-100.

[56] Note the opinion of the ILC Working Group that in most cases a plea of sovereign immunity has succeeded in the case of death or personal injury resulting from acts of a State in violation of human rights norms having the character of *jus cogens*. Report of the Working Group on Jurisdictional Immunities of States and their Property, 6 July 1999, UN Doc. A/CN.4/L.576.

[57] Judgment, pp. 24-25.

States.[58] Therefore, it seems that the Supreme Court's reasoning was based on the respect for State immunity which may not be reversed by human rights regime in the absence of a specific provision to this effect. Nevertheless, the Supreme Court remained silent with respect to more general problem of balancing values behind State immunity and protected human rights. It is often underlined that the problem of putting together two sets of norms which are allegedly in conflict needs to give preference to one set of norms over another. Therefore, a strong argument is needed in order to make one set of values prevail over another. Such an understanding of this issue has been introduced and applied by those relying on human rights who perceive them as enshrining basic values of modern international legal order. Various arguments, which are advanced in this context, can be reduced to two general propositions. First, human rights express values of more universal and fundamental nature than State immunity. Second, it is submitted that basic human rights have acquired the status of peremptory norms of international law and consequently prevail over any other inconsistent norms of international law. If so, one may argue that referring to the German military acts in *Natoniewski* as an international crime and a violation of *ius cogens* norms gives rise to an entitlement to invoke fundamental values standing behind human rights and their peremptory status as a legal argument for dismissing the plea of immunity.[59] Such views are based on the belief that human rights values are superior to any other values and as such they should prevail in any circumstances. However, one may legitimately assume that both sets of values reflect and correspond to international law and emanate from the free will of States as expressed in treaties and custom generally accepted as expressing principles of law and established in order to regulate the relations between these co-existing communities or with a view to the achievement of common aims.[60] Both human rights and State immunity express legitimate values enshrined in international law. Thus, one norm may not automatically prevail over another. One may refer here to the separate opinion delivered by three judges in the *Arrest Warrant* case:

> We wish to point out, however, that the frequently expressed conviction of the international community that perpetrators of grave and inhuman international crimes should not go unpunished does not *ipso facto* mean that immunities are unavailable whenever impunity would be the outcome. The

[58] *Ibidem*, pp. 28-29.

[59] Indeed, the Polish Supreme Court stated that the acts committed by German forces had amounted to war crimes and constituted a manifest breach of peremptory human rights norms. However, it did not remove the application of State immunity (Judgment, p. 29).

[60] *See, S.S. "Lotus" (France v. Turkey)*, Series A, No 10 (1927), p. 18.

> nature of such crimes and the circumstances under which they are committed, usually by making use of the State apparatus, makes it less than easy to find a convincing argument for shielding the alleged perpetrator by granting him or her immunity from criminal process. But immunities serve other purposes which have their own intrinsic value (...) *International law seeks the accommodation of this value with the fight against impunity, and not the triumph of one norm over the other*. A State may exercise the criminal jurisdiction which it has under international law, but in doing so it is subject to other legal obligations, whether they pertain to the non-exercise of power in the territory of another State or to the required respect for the law of diplomatic relations or, as in the present case, to the procedural immunities of State officials.[61]

The author subscribes to the view that human rights values should not automatically triumph over State immunity, which also represents certain legitimate values and interests of States enshrined in the principles of international law. There is a need to accommodate both sets of values in a way that does not deprive one set of its legal significance. States may seek and assert jurisdiction over human rights claims but they also have an obligation to observe other binding international norms. Human rights may not remove State immunity simply because they are human rights and are considered to protect more important values in the international legal order. Therefore, as far as a tort exception is concerned, it appears from the materials referred to above that as a matter of international law the exception is not applicable to actions which relates to the core area of State sovereignty such as military actions.[62]

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[61] *Joint Separate Opinion of Judges Higgins, Kooijmans and Buergenthal*, *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, 14 February 2002, ICJ Reports 2002, para. 79 [emphasis added].

[62] *See also, S.A. "Eau, gaz, Electricity et applications"* v. *Office d'aide mutuelle* (1956). The Court of Appeal of Brussels granted immunity in proceedings arising out of a motor accident which had occurred in March 1945 involving a British military truck carrying troops back from leave. At the time of the accident, the troops were engaged in belligerent operations in Belgium. The Court decided that: "As far as allied belligerents who carry out operations of war on Belgian territory are concerned, the immunity from jurisdiction of foreign States acting *jure imperii* prevents their being sued in Belgian courts." *Pasicrisie belge* (Brussels), vol. 144 (1957), part 2, p. 88; 1956 ILR 23, p. 207. *Fifth report on jurisdictional immunities of States and their property*, by Mr. S. Sucharitkul, Special Rapporteur, UN Doc. A/CN.4/363 & Corr.1 and Add.1 & Corr.1, YILC 1983, vol. II(1), para. 78. *McElhinney v. Ireland*, para. 38. The ECtHR underlined that "there appears to be a trend in international and comparative law towards limiting State immunity in respect of personal injury caused by an act or omission within the forum State, but that this practice is by no means universal. Further, it appears (…) that the trend may primarily refer to "insurable" personal injury, that is incidents arising

2.4. *Ius cogens* norms and State immunity

The Supreme Court dismissed the argument that peremptory norms of international law should prevail over jurisdictional immunity which is in an alleged conflict with these norms. Firstly, the Court rightly observed that the violation of peremptory norms did not constitute an implied waiver of State immunity.[63] In the opinion of the Court, such a waiver could not be derived merely from committing wrongful acts or from concluding a human rights treaty.[64]

Secondly, the Court discussed the argument concerning the formal hierarchy and formal supremacy of *ius cogens* norms. It noted that both domestic courts and doctrine were divided on this issue. However, it identified a number of decisions that respected State immunity in cases concerning breaches of fundamental human rights, both in time of peace and in time of war.[65] Referring to *Jones*, the Supreme Court noted that State immunity did not infringe the prohibition of torture which is a peremptory norm of international law, but only limited the jurisdiction of domestic courts to decide such a dispute. State immunity would be inconsistent with the prohibition of torture only if the prohibition would also entail an additional procedural norm imposing on domestic courts an obligation to assert jurisdiction. The Court underlined its obligation not to develop unilaterally international law by giving it such a content that would anyway correspond to and would be desired by values inherent in peremptory norms of international law. Therefore, the general principle on State immunity should be applied, if there is no evidence to the effect that States accept by way of an exception to the principle of State immunity the jurisdiction of domestic courts in relations to breaches of peremptory norms of international law. The Supreme Court once again con-

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out of ordinary road traffic accidents, rather than matters relating to the core area of State sovereignty such as the acts of a soldier on foreign territory which, of their very nature, may involve sensitive issues affecting diplomatic relations between States and national security."

[63] *See, Prefecture of Voiotia v Federal Republic of Germany*, Supreme Court (Areios Pagos), Case No. 11/2000, 4 May 2000; *Margellos and Others v. Federal Republic of Germany*, Case No. 6/2002, Greek Special Supreme Court, 17 September 2002, 129 ILR 526.

[64] The Court quoted *Princz*, (*supra* note 25), and *Hirsch v State of Israel and State of Germany*, 962 F. Supp 377, Southern District of New York, 8 April 1997, 113 ILR (1999) 542. See for a different and controversial view concerning the treaty waiver in the opinions of certain Lords in *Pinochet*, and an excellent and dissenting statement of Lord Goff demonstrating that "how extraordinary it would be, and indeed what a trap would be created for the unwary, if state immunity could be waived in a treaty sub silentio".

[65] *Margellos and Others v. Federal Republic of Germany*; *Jones v. Ministry of Interior Al-Mamlaka Al-Arabiya AS Saudiya (the Kingdom of Saudi Arabia) and others*; *Bouzari v. Iran*, 30 June 2004, Court of Appeal for Ontario, CanLII 871; *McElhinney v. Ireland*; *Kalogeropoulou and Others v. Greece and Germany*; *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, 14 February 2002, ICJ Reports 2002.

firmed, relying on the recent jurisprudence and doctrine, that it could not accept the existence of a new exception to State immunity.

The above line of reasoning of the Supreme Court touches upon a very interesting and often disregarded question of the alleged conflict between fundamental human rights and State immunity. The Court rightly observed that a relevant *ius cogens* norm could not prevail over State immunity, as it did not include an additional procedural norm requiring domestic courts to exercise their jurisdiction. However, one may also consider the relation between State immunity and *ius cogens* from a different angle. First, one may ask whether there is indeed a genuine conflict between State immunity and a *ius cogens* norm. Is State immunity inconsistent with a peremptory norm? Does State immunity say that a State may perform atrocities which amount to war crimes, torture or genocide? A *ius cogens* norm may invalidate only those norms which are in conflict with it. Only in such a case a State organ would be obliged to refuse the application of a norm inconsistent with the *ius cogens* norm thus giving precedence to a norm of a superior status. The above issue needs particularly careful analysis. This unfortunately is missing in the reasoning of the Supreme Court. The Court made only basic comments on *Jones* and observed (rightly) that State immunity did not infringe the prohibitions of torture. However, the Court should have elaborated on this issue with respect to war crimes. The basic argument is that state immunity does allow States to commit war crimes and consequently it cannot be regarded as inconsistent with a peremptory norm. State immunity rule simply states that a court may not adjudicate a claim because it lacks jurisdiction under international law. This does not mean that the claim is non-justiciable or denied and the wrongdoer State will remain unpunished. There are some authors who believe that State immunity in fact amounts to impunity and a denial of justice. This argument is very misleading and at variance with basic structure of international law. State immunity does not aim at denying just claims. It aims at denying jurisdiction to an inappropriate forum. It is not concerned with the merits of a claim. It only targets the right of a State to adjudicate a certain claim without even entering the merits phase, which is reserved for an appropriate forum. Moreover, one may add that the object of international law is not to work injustice nor to prevent the enforcement of just demands,[66] but to apply the will of States and

[66] *See,* the decision of Sir Robert Phillimore in *The Charkieh*, who stated that "[t]he object of international law … is not to work injustice, nor to prevent the enforcement of a just demand, but to substitute negotiations between governments …" *The Charkieh* (1873) LR 4 A & E 59, 97; available at < http://unisetca.ipower.com/other/cs2/ LR4AE59.html>.

refer claimants to remedies prescribed by international law, be it judicial or diplomatic, as it has been agreed between States.

Unfortunately, this discussion is missing in *Natoniewski*. In the author's view, the decision of the Supreme Court could have included more elaborated legal reasoning in this regard. Such an approach would allow the Court to bring some added value to the current international discussion on State immunity and claims for the alleged human rights breaches. However, the Court decided otherwise and it only repeated previous decisions on this issue opting for the view held by majority. This is the important point which needs to be clearly underlined: the Supreme Court – as opposed to other domestic courts[67] – chose not to enrich its judgement on its own grounds stemming from international legal arguments, and thus enrich international law as such, but referred to previous decisions to reach the final conclusions.

Another point concerns the issue of *ius cogens* norms as such. The Court did not analyze whether the alleged breaches of fundamental human rights constituted a breach of *ius cogens* norms. One may consider whether the concept of peremptory norms existed in 1944 and whether a court should consider the relations between State immunity and *ius cogens* as of the date when a wrongful act occurred. Secondly, it is a common methodological flaw in judicial decisions on both the international and domestic levels that they do not fully prove the status of certain international legal norm that has been raised to a level of a peremptory norm of international law. They merely state that particular norm is a *ius cogens* norm and then carry out with further legal arguments. In fact there is no judicial decision up to date which convincingly proves the peremptory status of a certain norm (starting with the infamous ICTY decision in *Furundzija*[68]). What is more important, no one has yet appropriately defined the concept of *ius cogens* norm under general international law and this critical remark refers especially to international and domestic courts which should operate under intelligible and clearly defined international legal terms which leave no room for any uncertainty.[69] This is also true for the Polish Supreme Court, which simply decided that the German wrongful acts had violated peremptory norms of international law. It is quite easy to say that a norm has acquired a *ius cogens* status.

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[67] *See e.g.*, *Ferrini*, *Pinochet*, *Jones* etc.

[68] *Prosecutor v. Furundžija*, International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case No. IT-95-17/1-T, 2002, 10 December 1998, paras. 153-154.

[69] Determining the existence and content of a peremptory norm of international requires the adoption of a theory of the nature and source of such norms. Obviously, to set out such a theory in full would require a separate study and it is not the object of this article to present the theory of peremptory norms. It is not the view of this author that such norms do

It is, however, very difficult to prove that it has acquired such status in international law. It might be argued that the community of international and domestic courts supported by international doctrine should try to seek and establish the criteria for an international norm to be regarded as a *ius cogens* norm. Such a process should predominantly take into account the position of States and their practice, including Article 53 of the Vienna Convention on the Law of Treaties. In this score, the Polish Supreme Court could have delivered its own thought as to how it had ascertained the existence and content of *ius cogens* norms in international law. Of course, the Court could not have discussed these issues since it accepted German immunity. Nevertheless, it referred to the concept of *ius cogens* norms and some discussion on the content of *ius cogens* norms both in 1944 and 2010 would be more than welcome.

2.5. State immunity – material or procedural law?

This is the question, which causes some confusion in domestic courts and part of the doctrine as some authors fail to properly situate State immunity within international law in the process of adjudicating international claims on a national level. The Polish Supreme Court held that it had to address the issue whether the contemporary norm on tort exception could be applied to acts which occurred several dozen years ago when such a norm had not existed.[70] The Court noted that international law was governed by the principle according to which facts are assessed by the law which is in force when the relevant act in question is performed.[71] Although State immunity is a concept of international law, it is clearly of a procedural nature. It has an impact on the possibility of delivering a decision on merits of a case. In the context of procedural law the basic intertemporal rule is different: proceedings instituted under a new law are governed by this law (the principle of direct application of a new law).[72] Therefore, the Court held that questions concerning State immunity may not be assessed in light of international law as of the date of committing the wrongful acts in question, but according to contemporary international law having effect at the time when the decision of the Court has been made.[73]

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not exist in international law. Rather, the argument is that both international and domestic courts should explain more thoroughly, convincingly and reliably the existence and content of these norms, especially those derived from general international law.

[70] Judgment, p. 15. See also: *Republic of Austria v. Altmann*; *Jones v. Ministry of Interior Al-Mamlaka Al-Arabiya AS Saudiya (the Kingdom of Saudi Arabia) and others*, Lord Bingham, para. 24; Lord Hoffman, para. 44 (quoting H. Fox, *The Law of State Immunity* (2002), p. 525).

[71] Judgment, pp. 15-16.

[72] *Ibidem*, p. 16.

[73] *Ibidem*.

The above reasoning of the Court remains doubtful and does not convincingly prove why State immunity should be regarded as procedural law within the frames of a domestic court's procedure.[74] It is a well-established principle of international law that States are equal and sovereign and thus – according to the rule *par in parem not habet imperium* – no State can claim and assert jurisdiction over another in relation to acts *de iure imperii*. State immunity may be regarded as a corollary of sovereign equality of States which forms one of sources of State immunity. Moreover, State immunity has been often derived not only from the principle of equality but also from the principles of independence and dignity of States.[75] These principles form the core of international legal order and no one has ever thought to perceive them as principles of a merely procedural nature. One may also add that the concept of jurisdiction is a concept of international law which stems from the sovereignty of States. Sovereignty in the relations between States signifies independence. Independence of a State in regard to a portion of the globe is the right to exercise therein, to the exclusion of any other State, the functions of a State, including jurisdiction over all acts committed at its territory (*lex loci delicti commissi*).[76] It must also be stressed that international law does not know procedural law as such. This means that virtually every international legal norm is of uniform (international) nature.[77] Therefore, the division between substantive and procedural law has little,

[74] It seems that most domestic courts treat State immunity as a procedural rule since it poses a bar to assume jurisdiction by a forum State. Moreover, the considerable part of international doctrine seems to admit that State immunity is of a procedural nature, e.g. H. Fox, *supra* note 50, passim, incl. pp. 150-152 (see also the first edition, pp. 524-525), referring to State immunity as a procedural plea which has no substantive content. See also: D. Akande, *International Law Immunities and the International Criminal Court*, 98 American Journal of International Law 407 (2004) ; L. M. Caplan, *State Immunity, Human Rights and Jus Cogens*, 97 American Journal of International Law 741 (2003); T. Giegerich, *Do Damages Arising from Jus Cogens Violations Override State Immunity from the Jurisdiction of Foreign Courts?*, in: C. Tomuschat and J.-M.Thouvenin (eds.), *The Fundamental Rules of the International Legal Order*, Martinus Nijhoff Publishers, Leiden: 2006, p. 203; A. Orakhelashvili, *State Immunity and Hierarchy of Norms: Why the House of Lords Got It Wrong,* 18 European Journal of International Law 964 (2008); Ch. Tomuschat, *L'immunite des etats en cas de violations graves des droits de l'homme*, 109 RGDIP 51 (2005); A. Zimmermann, *Sovereign Immunity and Violations of International Jus Cogens – Some Critical Remarks*, 16 Michigan Journal of International Law 433 (1995).

[75] *Oppenheim's International Law*, *supra* note 18, pp. 341-342.

[76] *See, Island of Palmas case (Netherlands, USA)*, 4 April 1928, Arbitrator: Max Huber, UNRIAA, vol. 2, p. 838.

[77] The author argues that there is little number of procedural norms in international law, which mainly relate to procedure before international courts or tribunals and other international organs.

if any, significance in international law. Both the concept of State jurisdiction and immunity are part of international law and there is no reason to assume that they should be regarded solely as part of procedural law of the forum State.

One may discuss this issue from a different angle and add another argument for perceiving State immunity as substantive rule. If a case concerning State immunity was discussed by the ICJ, the Court would deliberate on State immunity in the merits phase and not at the jurisdiction stage of its proceedings. Therefore, it follows from the above that if one assumes eventually the existence of the substance/procedure division of norms in international law, the ultimate test for establishing the nature of an international legal norm would be whether the norm in question were discussed by the ICJ in the procedural or merits phase. For these reasons, there is certain force to the view that it is an oversimplification to treat State immunity as (purely) procedural norm of international law.

It can be also argued that the substance/procedure division is a false dichotomy in terms of State immunity. In some respects, it is a procedural bar as it denies the right to adjudicate a claim to certain domestic court. It can be waived even impliedly, by conduct, e.g. by pleading to the merits. It has to be taken as a preliminary point in domestic proceedings. A decision granting immunity is not *res iudicata* as to the merits. But in other respects, it behaves like a substantive rule. At any rate, no one can reasonably argue that State immunity does not protect substantive values. Besides, this division has been introduced by domestic laws and domestic courts dealing with claims brought against foreign sovereigns. State immunity is an international legal norm derived from customary international law as codified and developed by relevant treaties and confirmed by subsequent State practice. It is difficult to argue that it has a solely or mainly procedural nature while it serves to fulfill basic needs of the international community concerning friendly relations between States and the respect for the equality and independence of States.

Thus, the problem arising from the jurisdiction and immunity is that these concepts are also regulated by domestic law prescribing the limits of State's jurisdiction which may be inconsistent with the jurisdiction governed by international law. Similarly, State immunity is the principle of international law, but is often embodied by domestic laws. This may lead municipal courts to believe that both concepts are of a procedural nature since they are regulated in forum State's procedural law.[78] Therefore, regarding State jurisdiction and immunity as mere procedural

[78] The assumption of jurisdiction by a domestic court over a claim under domestic law may trigger State responsibility, when at the same time the claim is outside the scope of jurisdiction of such a court under international law.

concepts leaves aside their international aspect. It is a duty of a domestic court to interpret and apply a norm of international law as it is and not as a domestic norm established in the procedural law of the forum State. Considering the above, the author believes that the Supreme Court erred in assuming that State immunity is of a procedural nature. The decision of the Court would be acceptable to some extent if one could prove that there is an additional norm inherent in State immunity according to which State immunity has a procedural character and may be applied retroactively according to the rules of domestic procedural laws.[79]

CONCLUDING REMARKS

This article critically assesses the decision of the Polish Supreme Court. The Court's approach can be regarded as conservative in the sense of giving precedence to values that are not derived from human rights. The decision as such reflects contemporary international law practice. Nevertheless, there are certain objections with regard to the Court's reasoning which merit attention. Even though the choice of arguments and connections between them have not been always fully convincing, the Supreme Court's pronouncement on international law is of importance. It appears that there is a strong proposition and trend in some international and domestic quarters according to which State immunity should be limited as much as possible so as to give the individual a right to pursue a claim before a foreign court with regard to the alleged breach of human rights. If one accepts such a view, it may be also inferred that State sovereignty is an archaic relict incompatible with modern reality[80] as much as the dignity and respect for States. However, such a view simply does not reflect the present state of international law.

[79] The Supreme Court quoted a judgment in *the Republic of Austria v. Altmann*, (*supra* note 10). An additional (and unconvincing) argument was found by the Court in the interpretation of Article 4 CJISTP and Article 35(3) ECSI. According to the Court, although Article 4 does not allow the retroactive application of the Convention, it does not include a provision similar to Article 35(3) ECSI ("Nothing in this Convention shall apply to proceedings arising out of, or judgments based on, acts, omissions or facts prior to the date on which the present Convention is opened for signature.") and therefore such an omission suggests that the rule established by the Court is correct and reflects contemporary international law.

[80] *See, Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 703-704, 27 June 1949, US Supreme Court.

In its judgment, the Supreme Court held that State immunity is applicable to acts *de iure imperii* committed on the territory of the forum State during an armed conflict even tough they may amount to war crimes. In other words, the Court was unable to discern in international instruments, judicial authorities or other materials any firm legal basis for concluding that, as a matter of international law, a State no longer enjoyed immunity from civil suit in the courts of another State if international crimes committed during the World War II were alleged. The Supreme Court rightly observed that there was no evidence that States had recognised or given effect to an international obligation to exercise jurisdiction over claims arising from alleged breaches of peremptory norms of international law (war crimes). No such consensus could be also detected in the judicature or doctrine. One may also add, as Lord Bingham observed, that this lack of evidence is not neutral: since the rule on immunity is well understood and established, and no relevant exception is generally accepted, the rule prevails.[81]

The Supreme Court noted the importance of the prohibition of war crimes, but at the same time it did not find that the international community of States accepted the proposition that States were not entitled to immunity in respect of civil claims for damages for alleged war crimes committed in the forum State. The Court refused to engage in law-making activity by declining to endorse "interpretation" which would permit to reject State immunity and to attach superior importance to human rights as legal norms allegedly enshrining more fundamental values of the international legal order. The Supreme Court applied international law as its stands now and declined to assert its jurisdiction over Germany on the account of the substantial importance of protected rights. Therefore, the conclusions reached by the Supreme Court seem to be the result of appropriate interpretation and application of international law and finding a right place for State immunity as embodying legitimised values enshrined in various international legal norms. The proposed exception to State immunity would imply a fundamental overruling of the current State practice and, particularly, of national courts. Courts do not create international law. It is their duty to interpret and apply international law, and not to revise it.

It may be seen as unfortunate that the opportunity given to the Court will be followed by the deliberation of the ICJ in *Jurisdictional Immunities of the State (Germany v. Italy)*. The decision of the ICJ will probably seek to find a (new) balance between State sovereignty and internationally protected human rights as the Court did in the *Arrest Warrant* case. However, it may also be a good aspect of

[81] *Jones v. Ministry of Interior Al-Mamlaka Al-Arabiya AS Saudiya (the Kingdom of Saudi Arabia) and others*, para. 27.

Natoniewski that the Supreme Court delivered its decision before the ICJ, adding thus the Polish State practice to the general State practice on the law of State immunity. The Supreme Court's pronouncement will undoubtedly assist the ICJ in ascertaining the present state of international law with regard to State immunity and claims arising under the breach of peremptory norms of international law. It may be reasonably assumed that the *Natoniewski* case will be regarded as a positive example of State practice in respect to relations between State immunity and breaches of fundament human rights amounting to international crimes.