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STATE IMMUNITY AND THE RIGHT OF ACCESS TO COURT. THE NATONIEWSKI CASE BEFORE THE POLISH COURTS

Abstract

On 29 October 2007, Winicjusz Natoniewski filed the lawsuit against the Federal Republic of Germany in the Circuit Court in Gdańsk (Poland), demanding a payment of PLN 1,000,000 as a redress for injuries he suffered as a result of activities of the German military forces during World War II. The Circuit Court, Appellate Court and the Supreme Court rejected the lawsuit stating that the State immunity of the Federal Republic of Germany excluded the jurisdiction of Polish courts in this case and thereby deprived Natoniewski of the right to dignity guaranteed by Polish, European, and international law.

The actions taken by German forces in the Natoniewski case constitute a war crime and a crime against humanity. In the case of such serious crimes, a State cannot invoke its immunity. The infringement of fundamental human rights entails the withdrawal of all benefits and privileges provided by international law, and thus is an implied waiver of the State immunity. This consequence results from the principle that no one can benefit from his/her unlawful conduct. Granting immunity to a State in case of international crimes committed by the State is contrary to the foundations of international law and it destroys the values which are the most important for the international community.

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1. LEGAL FRAMES

The Universal Declaration of Human Rights, adopted at the third session of the UN General Assembly on 10 December 1948, considers human dignity as the foundation of freedom, justice and peace in the world. The International Covenant on Civil and Political Rights of 1966,¹ which unlike the Declaration of 1948 is binding on the signatory countries, defines dignity in the same way. The Charter of Fundamental Rights of the European Union recognizes the existence of human dignity,² and states that it must be respected and protected. The Constitution of the Republic of Poland, already in its preamble, notes the existence of “the inherent dignity of man.”³ Article 30 of the Constitution adds that dignity is an inherent, inalienable and inviolable “source of freedoms and human and civil rights.”

The fundamental documents mentioned above – international, European, as well as Polish – all state that every person, regardless of race, age and religion, has the right to dignity and, moreover, has the right to the legal protection of dignity through the judicial process. Article 6(1) of the Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) guarantees everyone “the right to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.”⁴ Article 45 of the Polish Constitution also states that “[e]veryone shall have the right to a fair and public hearing of his case, without undue delay, before a competent, impartial and independent court.” Unfortunately, Winicjusz Natoniewski has not been allowed to enjoy his rights, guaranteed by international law, in particular the right to dignity and the right to protect his dignity before an independent and impartial court.

2. CASE OF WINICJUSZ NATONIEWSKI

During the World War II, Winicjusz Natoniewski lived with his family in the village Szczecyn in Poland. On 2 February 1944, German military forces carried out a cruel suppression of this village and the neighboring ones. They displaced

¹ The International Covenant on Civil and Political Rights adopted by the United Nations General Assembly on 16 December 1966, in force from 23 March 1976.

² Charter of Fundamental Rights of the European Union (2007/C 303/01).

³ *Konstytucja Rzeczypospolitej Polskiej z dnia 2 kwietnia 1997 r.* [The Constitution of the Republic of Poland of 2 April 1997], *Dz.U.* 1997, No. 78, item 483.

⁴ Convention for the Protection of Human Rights and Fundamental Freedoms entered into force on 3 September 1953, as amended by Protocols Nos 3, 5, 8, and 11 which entered into force on 21 September 1970, 20 December 1971, 1 January 1990, and 1 November 1998 respectively.

and executed people, burned buildings, and robbed properties. They burned 142 farms, throwing both the dead and wounded into the burning buildings. Several hundred people were killed during this massacre. Among the victims, there were women and children burned alive. That day, while trying to escape from a burning building, Winicjusz Natoniewski, a six-year old child at that time, suffered numerous, extensive burns to the head, chest, and both hands. Treatment of the burn effects lasted for several years, but despite numerous procedures taken by the doctors, there still remains many nasty scars and distortions on Mr Natoniewski's body, which made and still make normal functioning in a society impossible for him. On 29 October 2007, Winicjusz Natoniewski filed the lawsuit against the Federal Republic of Germany in the Circuit Court in Gdańsk, demanding payment of PLN 1,000,000 as redress for injuries. All courts – the Circuit Court, the Appellate Court and the Supreme Court in decisions of 8 November 2007, 13 May 2008 and 29 October 2010, respectively⁵ – rejected the lawsuit, stating that the State immunity of the Federal Republic of Germany excluded the jurisdiction of Polish courts in this case and thereby deprived him of the right to dignity guaranteed by Polish, European, and international law.

3. STATE IMMUNITY

State immunity is an institution that at its basis belongs to public international law. It is widely known that it derives from the principle of equality of states (*par in parem non habet imperium*) and is an expression of non-interference and respect for the sovereignty of other States. Since its establishment, this institution has been subject to constant evolution. Initially, State immunity covered virtually the entire spectrum of disputes between the State and the individual. This theory prevailed in many countries until end of World War II.⁶ After the war, many actions were taken to limit the number of situations in which a State could prevent proceedings before a foreign court due to its immunity. These actions were related to the increasing economic activity of States, as manifested *inter alia* in the establishment of state enterprises. Limited State immunity divided State acts to *acta iuri imperia* and *acta iure gestionis*, granting the State immunity only in relation to the former. However, currently there are new trends, which claim to further limit

⁵ Judgment of the Supreme Court, *Winicjusz Natoniewski v. Federal Republic of Germany*, 29 October 2010, case no. IV CSK 465/09

⁶ P. Grzegorzczak, *Immunitet państwa w postępowaniu cywilnym* [State immunity in civil proceedings], Wolters Kluwer Polska, Warszawa: 2010, p. 23

State immunity and assert that a foreign State cannot enjoy immunity for sovereign acts which can be classified as international crimes. These trends illustrate the growing conflict between State immunity, as a reflection of State sovereignty, and the idea of human rights protection and ensuring the individual with the right of access to a court. These modern views are a growing part of demands requiring a significant reduction or even elimination of State immunity.⁷

According to the new trends in international law, a State that violates fundamental human rights cannot enjoy sovereign immunity under international law. These theories use the concepts of waiver of State immunity or “incapacitated” State immunity as a result of the actions clearly contrary to international law. A waiver of immunity was raised in the famous *Distomo* case by the court in Livadia in Greece. The court stated that if the State violates peremptory rules of international law, it cannot assume that it is granted the right of extraterritoriality. It is assumed then that the State tacitly waived this right.⁸ The same argumentation was used by Judge Patricia Wald in her dissenting opinion in the *Princz v. the Federal Republic of Germany* case.⁹

Another approach, similar to “implied waiver,” states that in a case of serious violation of *jus cogens* norms the State loses its immunity (forfeiture of State immunity). According to the principle *lex superior derogat legem inferiorem*, when State actions can be classified as a breach of peremptory norms of international law, the State cannot enjoy immunity. Otherwise the prosecution of breach of *jus cogens* norms would be prevented due to State immunity, which would be in defiance to the nature of peremptory norms.

As Matias Reimann points out:

Sovereign immunity is also a manifestation of the principle that all States are considered equals in the international community. They should thus treat each other with deference and mutual respect rather than sit in judgement over one another. Yet, this principle makes sense only as long as these

⁷ H. Fox, *The Law of State Immunity*, Oxford University Press, Oxford: 2008, p. 2; Grzegorzcyk, *supra* note 6, pp. 23-24; A. Fischer-Lescano, *Wyjątki od zasady immunitetu państwa w postępowaniu rozpoznawczym* [Exceptions from the rule of state immunity in the preparatory proceedings], legal opinion, 2010, on file with author (Polish version of report can be obtained from European Center for Constitutional and Human Rights: <http://www.ecchr.eu/expert-opinions/articles/reparation-claim-against-germany-before-polish-supreme-court.html>); R. Garnett, *Should Foreign State Immunity be Abolished?* 20 *Australian Yearbook of International Law* 175 (1999), pp. 175–190.

⁸ *Prefecture of Voiotia v. Federal Republic of Germany*, case no. 137/1997, Judgment, District Court of Livadeia, 30 October 1997.

⁹ Judge Wald in the judgement of the Appellate Court in *Princz v. Federal Republic of Germany*, in Fischer-Lescano, *supra* note 7.

States mutually adhere at least to the norms that are considered indispensable for the community of which they wish to be a member. Where a nation violates *jus cogens*, however, it steps outside the boundaries drawn by the international community for itself. It thus forfeits the privileges accorded to the members.¹⁰

There are many international and national legal acts that are the reflection of this idea, stating that by violating peremptory international norms a State forfeits its sovereign immunity. For example, the European Convention on State Immunity (the Basel Convention),¹¹ adopted as the first postwar convention of a general nature by the Council of Europe in 1972, provides in Article 11 that:

A Contracting State cannot claim immunity from the jurisdiction of a court of another Contracting State in proceedings which relate to redress for injury to the person or damage to tangible property, if the facts which occasioned the injury or damage occurred in the territory of the State of the forum, and if the author of the injury or damage was present in that territory at the time when those facts occurred.

A similar exception to the State immunity is also provided in the UN Convention on State Immunity.¹² The International Law Association also refers to the exemption of immunity in case of serious violations of fundamental principles of international law.¹³ Moreover, legislation and judicature of some countries such as the United Kingdom (State Immunity Act), as well as case law in Italy (the *Ferrini* case) or Greece (the *Prefecture Voiotia v. the Federal Republic of Germany* case) provides further confirmation that the extent of State immunity is limited.

Thus, we can raise the question: can a State claim immunity for infringement of *jus cogens* norms? Can a State defend itself with immunity in a situation where it committed a serious violation of fundamental values of the international community?

¹⁰ M. Reimann, *A Human Rights Exception to Sovereign State Immunity: some Thoughts on Prinz v. Federal Republic of Germany*, in Fischer-Lescano, *supra* note 7.

¹¹ The European Convention on State Immunity signed in Basle on 16 May 1972, available at: <http://conventions.coe.int/treaty/Commun/QueVoulezVous.asp?NT=074&CM=0&CL=ENG> (last accessed 21 March 2011).

¹² UN General Assembly, United Nations Convention on Jurisdictional Immunities of States and Their Property, 2 December 2004, A/RES/59/38, not yet in force, available at: <http://www.unhcr.org/refworld/docid/4280737b4.html> (last accessed 21 March 2011).

¹³ See, International Law Association, Report of the Sixtieth Conference, Montreal 1982, Resolution no. 6 State Immunity, *Annuaire de l'Institut de Droit International* 64-I (1991).

4. BREACH OF INTERNATIONAL LAW IN THE CASE OF NATONIEWSKI

In the situation concerning Mr. Natoniewski, we are dealing with international crimes, i.e. crimes against humanity and war crimes. There is no doubt that the pacification of the village Szczecyn, which resulted in the injury of the plaintiff, constituted both a war crime and crime against humanity. Article 3 of the statute establishing the Polish Institute of National Remembrance – Commission for the Investigation of Crimes against the Polish Nation states:

Crimes against humanity are crimes of genocide, in particular, within the meaning of the Convention on the Prevention and Punishment of the Crime of Genocide adopted on 9 December 1948 (Dz. U. 1952 No. 2, 9 and 10 and No. 31, item 213 and of 1998 No. 33, item 177), and other serious persecution because of the membership in ethnic, political, social, racial or religious group, if it was made by public officials or inspired or tolerated by them.¹⁴

At this point, it should be noted that the Institute of National Remembrance – Commission for the Prosecution of Crimes against the Polish Nation, based on the article quoted above, instituted a criminal proceedings in 2003 with respect to the pacification of Szczecyn village on 2 February 1944. The proceedings are conducted under the ref. S. 52/03/Zn, and currently remain at the stage *ad rem*. The evidence is being gathered during the investigation and it has already successfully secured testimonies of victims and archival material. In June 2010, prosecutors from Germany were requested for international legal assistance. It is indisputable fact that Winicjusz Natoniewski has the status of the victim in this case.

It also should be noted that numerous international documents – from the Resolution (I/95) of the UN General Assembly of 11 December 1946 to the statutes of criminal tribunals¹⁵ (*ad hoc* tribunals: International Criminal Tribunal

¹⁴ Ustawa z dnia 18 grudnia 1998 Instytut Pamięci Narodowej – Komisja Ścigania Zbrodni przeciwko Narodowi Polskiemu [The Institute of National Remembrance – Commission for the Investigation of Crimes against the Polish Nation statute], Dz.U. 1998, No. 155, item 1016.

¹⁵ Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, U.N. Doc. S/25704 at 36, annex (1993) and S/25704/Add.1 (1993), adopted by Security Council on 25 May 1993, U.N. Doc. S/RES/827, available at: www.icty.org; Statute of the Court for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighboring States between 1 January 1994 and 31 December 1994, Security Council Resolution 955, 8 November 1994, available at: www.ictcr.org.

for the Former Yugoslavia, International Criminal Tribunal for Rwanda) – state unequivocally that inhumane acts (crimes against humanity), and violations of the laws or customs of war (war crimes), are considered international crimes under international law.

Furthermore, the Charter of the International Military Tribunal at Nuremberg¹⁶ penalized ill-treatment of the civilian population of or in occupied territory as a war crime (Article 6, paragraph b), as well as inhumane acts committed against any civilian population as crimes against humanity (Article 6, paragraph c). Moreover, the Nuremberg Tribunal in its decision of 30 September 1946 stated that the principles laid down in the Hague Convention of 1907 acquired the status of customary rules. Attention should be also paid to article 23 point B of the Regulations Respecting the Laws and Customs of War on Land (Hague Convention IV of 1907), which prohibits “kill[ing] or wound[ing] treacherously individuals belonging to the hostile nation or army.”¹⁷

It is clear that the actions taken by German forces in the *Winicjusz Natoniowski* case constitute a war crime and a crime against humanity and in the case of such serious crimes, the State cannot invoke immunity. Violation of these international law norms is an infringement of fundamental human rights and it entails the withdrawal of all benefits and privileges of international law, and thus is an implied waiver of State immunity. This interpretation emanates from the legal principle that no one can benefit from his unlawful conduct. Granting immunity to a State in case of international crimes committed by the State is contrary to the foundations of international law and it destroys the values which are the most important for the international community.

In the judgement of the Greek Supreme Court (Areopag) in *Prefecture Voiotia v. Federal Republic of Germany* case¹⁸, the court stated that in the event of a serious violation of sovereign rights, and therefore in case of gross violations of international law, the State is not entitled to rely on jurisdiction immunity. State acts that violate *jus cogens* norms cannot be regarded as *acta de iure imperii*.

Areopag recognized the existence of newly created rules of customary international law based on: Article 11 of Basel Convention; United States, Canada, Australia, South Africa and Singapore statutory rules; Article 12 of

¹⁶ The Charter of the International Military Tribunal at Nuremberg, 8 August 1945, 82 U.N.T.S. 279.

¹⁷ Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land, The Hague, 18 October 1907.

¹⁸ *Prefecture of Voiotia v. Federal Republic of Germany (Distomo Massacre case)*, International Law Reports 2007, vol. 129, p. 51.

the Draft Convention on State Immunity prepared by the International Law Commission; Article 2(2) of the Draft Convention on State Immunity by the Institut de Droit International; and an analysis of the relevant jurisprudence of the United States.

As it is pointed out by Fischer-Lescano, the Greek jurisprudence in respect of the *Distomo* case gives a clear picture:

- a) If a State violates the mandatory rules of international law, it cannot legitimately assume that it will be granted the right of extraterritoriality. It is therefore assumed that it tacitly resigned from having this right (constructive waiver through operation of international law).
- b) State actions, violating the mandatory rules of international law, do not have characteristics of authority actions. In such cases, it is assumed that the respondent State had not acted within its sovereign authority.
- c) Acts contrary to the mandatory norms of international law are ineffective and cannot be the source of legal rights, such as the right of extraterritoriality (the general principle of law *ex injuria ius non oritur*).
- d) Recognition of extraterritoriality for actions contrary to the mandatory provisions of international law would be understood the same as cooperation of national courts in implementing the action which is judged harshly by the international legal order.
- e) Claiming the extraterritoriality for actions that violate the mandatory rules of international law would be an abuse of the law.

And finally:

- f) Assuming that the principle of territorial sovereignty as a fundamental norm of international law takes precedence over the principle of extraterritoriality, a State which objected to this principle through the illegal occupation of another country cannot rely on extraterritoriality for acts committed during an illegal occupation.¹⁹

As it was already pointed out above, Judge Wald in her dissenting opinion in *Princz v. Federal Republic of Germany* also argued that it is impossible for a State that violated principles of international law to rely on immunity, which is an expression of respect for these principles. She stated:

Since the definition of “crimes against humanity” in the Nuremberg Statute sets out the rules now called jus cogens, the State never has the right to immunity in respect of acts violating jus cogens norms, regardless of where or against whom the action was committed. (...) Therefore, the prominent role of international law is to reject the foreign State claims of immunity if the State was indicted for violation of universally recognized norms that

¹⁹ Fischer-Lescano, *supra* note 7.

are necessary to maintain international order. In other words, in accordance with international law, the State waives State immunity if it violates jus cogens norms.²⁰

Again it should be pointed out that the crimes committed by Germany are grave violations of fundamental human rights whose protection is provided by the international law. These standards lie in the center of the international legal system and prevail over all other standards – regardless of whether they are based on treaty or customary law – and thus they prevail over State immunity as well.

The values and principles referred to in the judgments cited above are also protected by Polish law.

Prof. Andreas Fischer-Lescano – a representative of German doctrine, the director of the Centre for European Legal Policy (ZERP) at the Faculty of Law in University of Bremen, and a recognized authority of international law – in an opinion issued especially for the case of *Winicjusz Natoniewski* tried to directly answer the question: “Is there a binding rule of international law granting the Federal Republic of Germany the immunity in civil proceedings relating to the operations during the Second World War? Or is it obligatory to adapt an exception to immunity in this case?” Summarizing his opinion, the professor pointed out that both the international law, the general principles of law, as well as the customary international law do not grant the Federal Republic of Germany State immunity in the civil proceedings where the plaintiff demands redress.

5. THE NATONIEWSKI CASE BEFORE THE SUPREME COURT

In its judgment of 29 October 2010, the Supreme Court did not share the opinion of Winicjusz Natoniewski’s attorneys, finding a lack of jurisdiction due to the existence of State immunity. The Supreme Court indicated that it is true that the approach to State immunity changed from absolute to limited immunity. The Court also referred to the trend which aims to further reduce State immunity, for instance in cases involving torts committed in a forum State, as in Winicjusz Natoniewski’s case. It acknowledged that the practice and doctrine of international law recognize that the State is not entitled to the immunity in cases where a crime was committed in a forum State. The Supreme Court emphasized the existence of jurisprudence supporting the exception of the State immunity in

²⁰ Judge Wald in the judgement of the Appellate Court on *Princz v. Federal Republic of Germany* case, cf. Fischer-Lescano, *supra* note 7.

case of serious violations of international peremptory norms. It also drew attention to the dissenting opinions in *Margellos v. Federal Republic of Germany*²¹ and *Al-Adsani*²² cases.

Nevertheless, the Polish Supreme Court held that the exception of the State immunity in case of serious violations of *jus cogens* norms is not supported by a considerable part of international doctrine and jurisprudence so as to be recognized as a mandatory rule of international law and therefore it dismissed Mr. Natoniewski's claim. It stated:

A global perspective on the judgements and doctrine discussed above, that serve to reproduce the contents of the current customary norms of international law in the field of State immunity tends to share the view that there is still lack of sufficient basis for an exception excluding the State immunity in case of military actions committed in territory of the forum State that violated human rights. Although some of these judgements – especially the Greek Supreme Court Judgement on *Distomo* case, the Italian Court of Cassation on *Ferrini v. Federal Republic of Germany* case²³ and the voices of the doctrine supporting these judgments – may indicate the beginning of the new rule of the State immunity in all matters associated with serious human rights violations, if we take into account another significant part of these judgements – especially the Greek Supreme Court Case in *Margellos v. Germany* case, House of Lords judgement in the *Jones and others v. Saudi Arabia* case, the ruling by the European Court of Human Rights on *Al-Adsani v. United Kingdom* case and the voices of the doctrine accepting the opinion from those judgments – we cannot assume that such a rule has already been formed. Although it would be desirable in the light of the axiology of human rights we cannot assume that this rule is a binding norm of international law.²⁴

The Supreme Court held that State immunity as an institution of public international law serves to maintain friendly relations between sovereign states. The Court also stated that the character of military conflicts between States justifies the existence of the State immunity, because this institution along with the elimination of judicial remedies for civilians, is supposed to help in the normalization of relations between the countries after a war. It would be more difficult to sustain friendly relations and prevent tensions between States with claims brought to a court by civilians with respect to war damages.

²¹ *Margellos and others v. Federal Republic of Germany*, International Law Reports 2007, vol. 129, p. 526.

²² *Al-Adsani v. United Kingdom* (35763/97), Judgment, ECHR 21 November 2001.

²³ *Ferrini v. Federal Republic of Germany*, International Law Reports 2006, vol. 128, p. 659.

²⁴ *Winicjusz Natoniewski v. Federal Republic of Germany*, p. 28.

The Supreme Court held that civil claims caused by a war shall be regulated in international treaties. It concluded that despite the obvious violation of international law by German military forces in Szczecyn, there is no reason to exclude State immunity in this case. At the same time, the Court did not consider the use of State immunity as a disproportionate restriction of the right of access to court and a violation of Article 6 of the ECHR.

The most striking aspect of this decision is that the Supreme Court only described the jurisprudence, legislation and the doctrinal view on State immunity and, in the summary, concluded that at this stage of development of international law there is no binding rule which allows the court to use an exception to State immunity. The Court did not balance two sets of opposing values: the protection of human rights and the State immunity. The Court did not consider the substance of the matter, which is the rights of the victim so badly injured during World War II: his right to dignity and his right of access to court. To the contrary, after this judgement, he is deprived of the opportunity to invoke his right before an independent and impartial court and is left alone with a huge sense of injustice.

6. LEGAL OBLIGATIONS OF POLAND

It is indisputable that, in accordance with Article 9 of the Polish Constitution, Poland is obliged to respect international law. The principle that Poland respects the international law applies to all sources of international law. The Constitution does not specify a catalogue of these sources, nor defines it. Generally, in democracies these sources include:

- 1) international agreements,
- 2) international customs,
- 3) general principles of international law.²⁵

Article 87 of the Polish Constitution states that one of the sources of universally binding law in Poland are international agreements. If they relate to freedom, rights or obligations, such as the ECHR, ratification may occur only with prior consent granted by the statute, which makes such an international agreement take precedence over an incompatible statute.

Poland and Germany have not signed the UN Convention on Jurisdictional Immunities of States and their Property of 2 December 2004. They are not parties to multilateral or bilateral agreements on immunity either. However, both Poland

²⁵ See generally, B. Banaszak, *Konstytucja Rzeczypospolitej Polskiej. Komentarz* [Constitution of the Republic of Poland, commentary], CH Beck, Warszawa: 2009.

and the Federal Republic of Germany are parties to the International Covenant on Civil and Political Rights of 1966, which, as it was pointed out earlier, recognizes human dignity as the foundation of freedom, justice and peace in the world. These two countries are also parties to the ECHR. Article 6 of the ECHR guarantees everyone the right to a fair and public trial, reflecting the principle of the rule of law. As it is underlined in the doctrine: "Article 6 should be interpreted along with general principles of law accepted by civilized nations, including the principle that everyone should have the opportunity to present their case to the court and the other principle which prohibits the denial of justice."²⁶

Therefore, if there are two acts of international law, which were signed by the States that are parties to the dispute, the easiest and most equitable solution for an individual would be to use them and provide him an opportunity to protect his rights. The Supreme Court in its judgement stated that Winicjusz Natoniewski could use alternative and effective legal remedies to seek justice, meaning that he could lodge a claim before the court of the wrongdoer State which violated his fundamental human rights. However, it should be noted that the provisions of Article 6 of the ECHR grant an individual the right to "fair and public hearing within a reasonable time by an independent and impartial tribunal." It is obvious that German courts do not fulfill the conditions of impartiality, because no one may be the judge in his own case (*nemo iudex in causa sua*). It is evident that a Polish citizen would not win the case before a German court, claiming redress from the Federal Republic of Germany under the German legislation. German courts in this case, already at the preliminary stage of proceedings, stated that "there is insufficient prospect of success," such that the only option for Mr. Natoniewski was to claim his right before Polish courts. However, the Supreme Court relied on the international custom of State immunity, despite the fact that it was possible to apply the standards of Article 6 of the ECHR.

The Supreme Court stated that the compensation claims for war events shall be the subject to regulations in the international treaties, forgetting the fact that the ECHR is also an international agreement adopted after World War II in order to underline the fundamental values that should be protected after the horrors of war.

The Supreme Court refused the plaintiff the right to a fair trial guaranteed by the ECHR because of State immunity, even though in the Convention there is no rule saying that its provisions are not applicable in cases of State

²⁶ M. A. Nowicki, *Wokół Konwencji Europejskiej, Krótki Komentarz do Europejskiej konwencji Praw Człowieka* [Around the European Convention on Human Rights, short commentary], (3rd ed.), Wolters Kluwer Polska, Kraków: 2009, p. 148.

immunity. It seems obvious that if the parties to the Convention had intended to exclude State responsibility in such cases, they would include a specific provision to this effect. Therefore, it is surprising that a man as affected by actions of German military forces, committed on the territory of his own country, is refused the protection of his rights, guaranteed by international, European, and Polish law only on the basis of State immunity which is derived from the customary law. As it was emphasized in the *Delcourt v. Belgium* judgment, “in a democratic society the right to a fair trial is so important that any narrowing interpretation of Article 6 paragraph 1 does not correspond to either the purpose or the nature of the article.”²⁷

CONCLUSION

To sum up, it should be stressed again that, given how important the right of access to court is from the individual point of view, it is becoming more and more difficult to justify the existence of State immunity in such cases. Grzegorzczuk points out that:

the difficulty of justifying the existence of state immunity is the most apparent in the civil process, where the idea of judicial protection is the most important issue and (...) the driving force. It should be realized that many of the political and juridical foundations that shaped the state immunity are not current any more. Motives that could justify an exemption from the jurisdiction for the kings and then transposed to the country (...) nowadays are archaic and cannot convince anyone.²⁸

Again, in reference to the judgement of the Supreme Court in the *Winicjusz Natoniewski* case, the Court referred to the *Al-Adsani* case. In this context, it is worth to remember that eight judges in that case held dissenting opinions and claimed breach of guarantees set out in Article 6 of the ECHR. Furthermore, in the *Al-Adsani* case, the event giving rise to the proceedings did not happen in a territory of the forum State. We should also consider other very important judgments of the European Court of Human Rights (ECtHR). For example, in the *Cudak v. Lithuania* case²⁹, the ECtHR found a breach of the Convention because the Lithuanian courts decided that they had no jurisdiction due to the existence of

²⁷ *Delcourt v. Belgium* (2689/65), ECHR 17 January 1970, in Nowicki, *supra* note 26, p. 149.

²⁸ Grzegorzczuk, *supra* note 6, p. 207

²⁹ *Cudak v. Lithuania* (15869/02), Grand Chamber, 23 March 2010.

State immunity. Therefore, we cannot prejudge the direction of court judgements in the future with respect to the State immunity, with two sets of norms to balance: the protection of human rights as the foundations of the international legal order and State immunity as a reflection of state sovereignty. Perhaps the recent actions of the ECtHR herald the new approach to State immunity in its jurisdiction. Hopefully, the case of Winicjusz Natoniewski will become a symbol of a new chapter in its jurisprudence.