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State Immunity and Human Rights: Heads and Walls, Hearts and Minds

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State Immunity and Human Rights: Heads and Walls, Hearts and Minds

Roger O'Keefe*

ABSTRACT

This Article suggests that arguments against the availability of state immunity as a bar to civil actions alleging internationally wrongful ill-treatment abroad are not only destined to fall by and large on deaf ears but are also misdirected as a matter both of fairness and of the ultimate policy objectives of human rights advocates. It would make more sense for victims' interest groups to target the failure of allegedly responsible states to afford victims the opportunity of a remedy and the failure of victims' states of nationality to do enough to defend their nationals' interests.

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I. INTRODUCTION

It is not unusual these days for natural persons alleging ill-treatment abroad at the hands of a foreign state in violation of some rule of international law pertaining to the humane treatment of individuals to attempt to sue that state for damages in the courts of another state. It may be that the chosen forum state is the complaining party's state of nationality or residence, or it may simply be that the forum state's law, courts, and perhaps even legal profession are more conducive to civil actions of this sort. Like many trends, this one started in the United States, in this instance in the wake of the rediscovery of the Alien Tort Claims Act in 1980,¹ and spread from there to Australasia, Canada, Europe, and from the last to the European Court of Human Rights.² In nearly all such actions brought against the allegedly responsible foreign state as such or against its government or some organ thereof or—leaving aside the eccentric approach taken in at least one federal circuit in the United States³—against its serving or former officials for acts performed in

1. See *Filártiga v. Peña-Irala*, 630 F.2d 876, 887 (2d Cir. 1980) (applying the Alien Tort Claims Act, 28 U.S.C. § 1350 (2006)).

2. See cases cited *infra* notes 20–71.

3. It has long been held in the Ninth Circuit—albeit under the Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1330, 1602–1611 (2006) as would not be the case after the Supreme Court's decision in *Samantar v. Yousuf*, 130 S. Ct. 2278 (2010)—that while the individual officials, serving and former, of a foreign state are prima facie entitled to state immunity in U.S. courts for acts performed in their official capacity, this does not serve to shield them from suit in respect of acts performed beyond the scope of their authority. See *Chuidian v. Philippine Nat'l Bank*, 912 F.2d 1095, 1106 (9th Cir. 1990). For a successful application of this dictum to circumvent state immunity, see for example, *Trajano v. Marcos*, 978 F.2d 493, 498 (9th Cir. 1992).

their official capacity, the claim has been defeated by the defendant's procedural plea of state immunity, an immunity from the jurisdiction of its courts which the forum state is generally obliged as a matter of international law to accord foreign states in respect of acts of an inherently sovereign nature.⁴ Judgments to this effect have come under criticism from victims' advocates and campaigners,⁵ as well as from a range of academic commentators,⁶ and as one jurisdiction rebuffs such claims others are seized of them. The assumption on the part of opponents of state immunity in cases of this sort would appear to be that final victory, as a matter of both international and domestic law, is just a question of time.

This Article argues that any such assumption would be a mistake. The indications are instead to the contrary. There is little reason to think that many domestic courts or any international court will eventually sidestep state immunity as it pertains to civil actions alleging internationally wrongful ill-treatment inflicted abroad. Equally, the chance that many national governments will legislate or conclude a treaty to similar effect is slim. While those who contest the availability of state immunity in such cases seem ever intent on

The principle enunciated in *Chuidian* was adopted by a district court in the First Circuit in *Xuncax v. Gramajo*, 886 F. Supp. 162 (D. Mass. 1995), and by a district court in the Second Circuit in *Cabiri v. Assasie-Gyimah*, 921 F. Supp. 1189, 1197–98 (S.D.N.Y. 1996). The approach accords with neither international law nor the decisions of courts in other countries.

4. See *infra* Part III.

5. See, e.g., Press Release, Redress, Amnesty Int'l, & Justice, UK: Saudi Torture Ruling Is a Sad Day for British Justice (June 14, 2006), available at http://www.amnesty.org.uk/news_details.asp?NewsID=16992.

6. See, e.g., Kerstin Bartsch & Björn Elberling, *Jus Cogens vs. State Immunity, Round Two: The Decision of the European Court of Human Rights in the Kalogeropoulou et al. v. Greece and Germany Decision*, 4 GERMAN L.J. 477, 483–90 (2003); Andrea Bianchi, *L'immunité des Etats et les violations graves des droits de l'homme: la fonction de l'interprète dans la détermination du droit international*, 108 REVUE GÉNÉRALE DE DROIT INTERNATIONAL PUBLIC 63 (2004) [hereinafter Bianchi, *L'immunité des Etats*]; Andrea Bianchi, *Overcoming the Hurdle of State Immunity in the Domestic Enforcement of International Human Rights*, in ENFORCING INTERNATIONAL HUMAN RIGHTS IN DOMESTIC COURTS 405 (Benedetto Conforti & Francesco Francioni eds., 1997) [hereinafter Bianchi, *Overcoming State Immunity*]; Rory Stephen Brown, *Access to Justice for Victims of Torture*, in ACCESS TO JUSTICE AS A HUMAN RIGHT 205 (Francesco Francioni ed., 2007); Stacy Humes-Schulz, *Limiting Sovereign Immunity in an Age of Human Rights*, 21 HARV. HUM. RTS. J. 105 (2008); Lorna McGregor, *Torture and State Immunity: Deflecting Impunity, Distorting Sovereignty*, 18 EUR. J. INT'L L. 903 (2007); Alexander Orakhelashvili, *State Immunity and Hierarchy of Norms: Why the House of Lords Got It Wrong*, 18 EUR. J. INT'L L. 955 (2008); Alexander Orakhelashvili, *State Immunity in National and International Law: Three Recent Cases Before the European Court of Human Rights*, 15 LEIDEN J. INT'L L. 703 (2002); Isabelle Pingel, *Droit d'accès aux tribunaux et exception d'immunité: la Cour de Strasbourg persiste* 106 REVUE GÉNÉRALE DE DROIT INTERNATIONAL PUBLIC 893, 906 (2002); Elina Steinerte & Rebecca M. M. Wallace, *Jones v. Ministry of Interior of the Kingdom of Saudi Arabia*, [2006] UKHL 26, 100 AM. J. INT'L L. 901 (2006).

trying again, for the most part all they should realistically expect, in the words of Samuel Beckett, is to fail better. Moreover, even in the event of some, small success when it comes to overcoming immunity from proceedings, there remain other obstacles—in particular, immunity from measures of enforcement—which are likely, for the most part, to prove intractable.

Nor, the Article submits, need this be seen as a bad thing, at least in the abstract. (In any concrete, humanly deserving case, it can only be a tragedy.) To decry a domestic court's grant of state immunity to a foreign state defendant to such a claim or to berate a state's government for declining to abrogate such immunity by way of statute is to finger the wrong culprit—or, where the latter is also the victim's state of nationality, to finger the right culprit for the wrong thing. The rightful objects of opprobrium, and consequently those against which public campaigns for redress stand to have greater rhetorical purchase, are the foreign state that denies local or international remedies and the government of the state of nationality which makes no genuine effort to intercede with the allegedly responsible state on behalf of the victim. In addition, a focus on these actors in respect of these specific acts stands a better chance of attaining what ought to be the ultimate policy objective of victims' interest groups, namely universal subscription to the rule of international law.

What follows does not presume to provide a detailed alternative strategy for advocates of redress for death or personal injury caused by foreign states in alleged violation of rules of international law pertaining to the humane treatment of individuals—alternative, that is, to the current and mostly futile and misdirected attack on the availability or otherwise to those states of state immunity as a procedural bar to civil actions in the courts of other states. Indeed, the question need not be binary in the first place. Campaigners for redress may wish to continue to target state immunity in the hope of a breakthrough, albeit in the realistic expectation that none is very likely to be forthcoming, even as they recalibrate their efforts to place greater stress on other, rhetorically more attractive and maybe more promising arguments. This is, needless to say, a matter for them. The analysis in Part IV below seeks merely to sketch the outlines of a few possible courses of action, looking first at measures targeting the victim's state of nationality, which may or may not be the potential forum state in any related "human rights" case, and then at moves directed towards the allegedly responsible state. Some of these measures are admittedly of a generic and prospective bent. As a result, they may be of little practical help in relation to some individual cases of alleged past violations, even if others stand to be of more general benefit. Many of the suggestions involve no more than a continuation and renewal of emphasis on precisely the sorts of activities to which the organizational advocates of the denial of state

immunity in “human rights” cases already lend their support.⁷ To this extent, Part IV is acknowledged as both an exercise in preaching to the converted and a recommendation to others of existing best practice. It should also be conceded at the outset that none of these suggestions necessarily have a significantly greater chance of success than any legal challenge to the availability of state immunity in “human rights” cases. Even if some small but practically valuable progress is more likely than not to result, this simply remains to be seen. By the same token, however, none of the strategies proposed could fare appreciably worse than the focus on state immunity. Moreover, and just as importantly, even in the event of failure, the blame would lie where it should, namely with the victim’s state of nationality and with the allegedly responsible state. Finally, even if the suggested measures should fail in the short term, the fact that most of them seek to respond with more than (completely understandable) expediency to the challenge of securing redress for victims of internationally unlawful ill-treatment at the hands of foreign states provides at least some small hope that each might contribute, even in failure, to the eventual, lasting resolution of the problem of civil impunity for international wrongs.

II. PREFATORY CLARIFICATIONS

The term “human rights” is used in two different senses. It is often employed loosely to denote a generic concern, reflected in various branches of international law, for the humane treatment of individuals and certain groups. In this first sense, the label encompasses not only international human rights law properly so called but also international humanitarian law, prohibitions like those on the commission by a state of genocide, and sometimes even international criminal law.⁸ In its second, alternative sense, the term

7. Taking the Redress Trust (better known simply as “Redress”) as an example, see REDRESS, IMMUNITY V. ACCOUNTABILITY: CONSIDERING THE RELATIONSHIP BETWEEN STATE IMMUNITY AND ACCOUNTABILITY FOR TORTURE AND OTHER SERIOUS INTERNATIONAL CRIMES 57–58 (2005) [hereinafter REDRESS, IMMUNITY V. ACCOUNTABILITY] (Recommendation 4: Redress advocates Parallel Developments in Related Areas); REDRESS, THE PROTECTION OF BRITISH NATIONALS DETAINED ABROAD: A DISCUSSION PAPER CONCERNING DIPLOMATIC AND CONSULAR PROTECTION 23–25 (2005) [hereinafter REDRESS, PROTECTION OF BRITISH NATIONALS] (highlighting nine questions to be addressed in relation to the United Kingdom’s exercise of consular and diplomatic protection in respect of UK nationals detained abroad).

8. See, e.g., Comm. on Int’l Human Rights Law and Practice, *Final Report on the Exercise of Universal Jurisdiction in Respect of Gross Human Rights Abuses*, in INTERNATIONAL LAW ASSOCIATION, REPORT OF THE SIXTY-NINTH CONFERENCE HELD IN LONDON 25–29TH JULY 2000 (2000), 403; STEVEN R. RATNER ET AL., ACCOUNTABILITY FOR HUMAN RIGHTS ATROCITIES IN INTERNATIONAL LAW (3d ed. 2009); Andrea Bianchi,

“human rights” is limited to international human rights guarantees properly so called, *viz* those entitlements, opposable in principle to states on the international plane, which public international law, be it custom or treaty, vests in individuals and certain groups as an avowed function of their humanity. Used this way, the label refers strictly to the rights secured by universal instruments such as the two international covenants on human rights,⁹ the International Convention on the Elimination of All Forms of Racial Discrimination,¹⁰ the Convention on the Elimination of All Forms of Discrimination Against Women,¹¹ and so on; by regional instruments such as the European Convention on Human Rights (ECHR),¹² the American Convention on Human Rights (ACHR),¹³ the African Charter on Human and Peoples’ Rights,¹⁴ and the like; and by customary international human rights law. While the second, legally more accurate meaning of “human rights” is to be preferred,¹⁵ the first must also be acknowledged and engaged with.

As for “state immunity,” or foreign state immunity, by this is meant the immunity from the jurisdiction of its courts, premised on the sovereign equality of states, which a state is required by public international law, whether custom or treaty, to accord in respect of acts performed in the exercise of sovereign authority (that is, acts of an inherently sovereign character) to other states, be it to those states sued as such or to their governments and various organs of

Immunity Versus Human Rights: The Pinochet Case, 10 EUR. J. INT’L L. 237 (1999); Bianchi, *Overcoming State Immunity*, *supra* note 6, especially at 415–16; Jürgen Bröhmer, *Diplomatic Immunity, Head of State Immunity, State Immunity: Misconceptions of a Notorious Human Rights Violator*, 12 LEIDEN J. INT’L L. 361 (1999); Jennifer A. Gergen, Note, *Human Rights and the Foreign Sovereign Immunities Act*, 36 VA. J. INT’L L. 765 (1996); Humes-Schulz, *supra* note 6; Christopher Keith Hall, *UN Convention on State Immunity: The Need for a Human Rights Protocol*, 55 INT’L & COMP. L.Q. 411 (2006); Pasquale de Sena & Francesca de Vittor, *State Immunity and Human Rights: The Italian Supreme Court Decision on the Ferrini Case*, 16 EUR. J. INT’L L. 89 (2005).

9. See International Covenant on Civil and Political Rights, Dec. 19, 1966, 999 U.N.T.S. 171; International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3.

10. See International Convention on the Elimination of All Forms of Racial Discrimination, Mar. 7, 1966, 660 U.N.T.S. 195.

11. See Convention on the Elimination of All Forms of Discrimination Against Women, Dec. 18, 1979, 1249 U.N.T.S. 13.

12. See Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221 [hereinafter ECHR].

13. See American Convention on Human Rights, Nov. 22, 1969, 1144 U.N.T.S. 123 [hereinafter ACHR].

14. See African Charter on Human and Peoples’ Rights, June 27, 1981, 1520 U.N.T.S. 217.

15. The author nonetheless confesses to at least one use of the first, albeit as a much younger man. See Roger O’Keefe, *Civil Actions in US Courts in Respect of Human Rights Abuses Committed Abroad: Would the World’s Oppressors Be Wise to Stay at Home?* 9 AFR. J. INT’L & COMP. L. 15–41 (1997).

government, to their serving and former officials in respect of acts performed in their official capacity, and so on.¹⁶ Another name for such immunity is sovereign immunity or foreign sovereign immunity.

There are two ways in which human rights might in theory influence the availability of state immunity to a foreign state, whether sued *quâ* that state or *quâ* of one of its several emanations, in domestic proceedings.¹⁷

It might be submitted straightforwardly that the fact that the defendant state to an action in the courts of another state for damages in respect of death or personal injury is alleged to have violated either international human rights law or some other international norm on the humane treatment of individuals serves to deprive that state of recourse to the procedural bar otherwise posed by state immunity. A range of alternative arguments have been marshalled in support of this contention: that the conduct in question cannot, by definition, be considered a sovereign act; that claims in respect of such conduct constitute an exception to the obligation on the forum state to accord state immunity in respect of foreign sovereign acts; that where the foreign state is alleged to have violated a rule of the status of a peremptory norm of general international law (*jus cogens*), the obligation to accord state immunity in respect of sovereign acts is somehow trumped, the violation is deemed to

16. See generally IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 323–48 (7th ed. 2008); HAZEL FOX, *THE LAW OF STATE IMMUNITY* (2d ed. 2008) [hereinafter FOX, *STATE IMMUNITY*]; Hazel Fox, *International Law and Restraints on the Exercise of Jurisdiction by National Courts of States*, in *INTERNATIONAL LAW* 340, 344–67, 372–79 (Malcolm D. Evans ed., 3d ed. 2010); Peter-Tobias Stoll, *State Immunity*, MAX PLANCK ENCYCLOPEDIA PUB. INT'L L., http://www.mpepil.com/subscriber_articles_by_subject?subject=Immunities&resultsPerPage=25 (last visited Oct. 1, 2011). Unless otherwise indicated or obvious from the context, the terms “foreign state” and “defendant state,” as used throughout this Article, should be taken to include all entities and individuals encompassed by the definition of “state” laid down in Article 2(1)(b) of the UN Convention on Jurisdictional Immunities of States and Their Property, G.A. Res. 59/38, Annex, U.N. Doc. A/RES/59/38 (Dec. 2, 2004) [hereinafter UN Convention on Jurisdictional Immunities]. But see *Samantar v. Yousuf*, 130 S. Ct. 2278, 2289 n.12, 2290–91 (2010), for the suggestion that the immunity of the state as such and the immunity of its officials acting in that capacity may not be one and the same thing, even if the court “did not doubt that in some circumstances the immunity of the foreign state extends to an individual for acts taken in his official capacity.”

17. The various arguments considered here have all been put forward by complaining parties and on occasion restated by judges in the domestic and international cases discussed *infra*, as will become evident. In terms of the secondary literature, most of the arguments are usefully summarized and their proponents cited in ROSANNE VAN ALEBEEK, *THE IMMUNITY OF STATES AND THEIR OFFICIALS IN INTERNATIONAL CRIMINAL LAW AND INTERNATIONAL HUMAN RIGHTS LAW* 301–65 (2008), Katherine Reece-Thomas and Joan Small, *Human Rights and State Immunity: Is There Immunity from Civil Liability for Torture?*, 50 NETH. INT'L L. REV. 1 (2003) and Francesca de Vittor, *Immunità degli Stati dalla giurisdizione e tutela dei diritti umani fondamentali*, 85 RIVISTA DI DIRITTO INTERNAZIONALE 573 (2002). See generally articles cited *supra* note 6.

amount to an implied waiver of immunity or the conduct cannot be considered a sovereign act; and so on. Such arguments have to date fared poorly, by and large, in domestic proceedings and in the only international jurisdiction in which they have been advanced, namely the European Court of Human Rights (ECtHR).¹⁸ Their proponents, however, do not accept defeat. Cases framed around this first basic contention and any of its supporting arguments are hereafter referred to as "human rights" cases, the quotation marks being designed to indicate that the alleged wrong on the part of the foreign state need not be a breach of international human rights law properly so called but, rather, may comprise a breach of any rule of international law relative to the humane treatment of natural persons.

Equally, in a sophistication on what boils down to the same contention, it might be submitted before a national or international jurisdiction in which internationally guaranteed human rights may be relied on directly in argument that the forum state's grant of state immunity to a defendant state sued for damages in respect of death or personal injury occasioned by the alleged violation by that defendant state of some international norm on the humane treatment of individuals constitutes a violation by the forum state of the right of access to a court implied by the plaintiff's internationally guaranteed right to fair trial.¹⁹ There are, in turn, two versions of this argument.

The more radical claim that the grant of state immunity in civil proceedings is per se contrary to the right to fair trial has been categorically rejected in the European context. The ECtHR, reiterating that the exercise of the right of access to a court implied by Article 6(1) of the ECHR can be subject to such limitations as are proportionate to a legitimate aim, has declared on four occasions not only that "the grant of sovereign immunity to a State in civil proceedings pursues the legitimate aim of complying with international law to promote comity and good relations between States through the respect of another State's sovereignty"²⁰ but also that "measures taken by [states] which reflect generally recognized rules of public international law on State immunity cannot in principle be regarded as imposing a disproportionate restriction on the right of access to a court as embodied in Article 6(1)."²¹ In short,

18. See domestic and ECtHR cases cited *infra* notes 20–71.

19. For the enunciation of the right of access to a court as a function of the right to fair trial, see *Golder v. United Kingdom*, 57 I.L.R. 200, 218 para. 36 (Eur. Ct. H.R. 1975).

20. *Al-Adsani v. United Kingdom*, 123 I.L.R. 24, 40 para. 54 (Eur. Ct. H.R. 2001); see also *Kalogeropoulou v. Greece*, 129 I.L.R. 537, 546 (Eur. Ct. H.R. 2002); *Fogarty v. United Kingdom*, 123 I.L.R. 53, 65 para. 34 (Eur. Ct. H.R. 2001); *McElhinney v. Ireland*, 123 I.L.R. 73, 85 para. 35 (Eur. Ct. H.R. 2001).

21. *Al-Adsani*, 123 I.L.R. at 40 para. 56; see also *Kalogeropoulou*, 129 I.L.R. at 546; *Fogarty*, 123 I.L.R. at 65 para. 36; *McElhinney*, 123 I.L.R. at 85 para. 37.

“[j]ust as the right of access to [a] court is an inherent part of the fair trial guarantee . . . , so some restrictions on access must likewise be regarded as inherent, an example being those limitations generally accepted by the community of nations as part of the doctrine of State immunity.”²² These statements seem not in themselves to have aroused great controversy. As such, the grant of state immunity *per se* is not the focus of this Article.

The other, more nuanced argument, on which the following discussion *will* center, is that where domestic proceedings for damages in respect of death or personal injury relate to the alleged violation by the defendant state of international human rights law in the strict sense or of international humanitarian law, of the international prohibition on the commission of genocide by a state, or of some other rule of international law on the humane treatment of natural persons, the forum state’s grant of state immunity to the defendant state represents a disproportionate restriction on the plaintiff’s internationally guaranteed right of access to a court in that the grant of state immunity in respect of such conduct is not, in the words of the ECtHR, a generally recognized rule of public international law—in other words, that this grant is not required by international law.²³ In support of the last link in the chain of reasoning, the sorts of submissions outlined above are advanced, *viz* that the impugned conduct cannot be considered a sovereign act, that civil claims in relation to death or personal injury allegedly caused by such conduct form an exception to the forum state’s obligation to accord state immunity in respect of sovereign acts, that state immunity is trumped or otherwise obviated in analogous claims for alleged violations of *jus cogens*, and so on. In this way, those claims for the lifting of state immunity founded upon the allegedly wrongful interference by the forum state of the plaintiff’s international human right of access to a court merge conceptually with claims based on the

22. Cases cited *supra* note 21.

23. It may pay to underline that the argument posited—namely that the right of access to a court implied by the international human right to fair trial precludes the grant of state immunity in civil actions for death or personal injury allegedly resulting from a breach of a relevant rule of international law by the defendant state—is that the grant of immunity would constitute a violation of international human rights law by the *forum* state. Whether or not the international norm alleged to have been violated by the *defendant* state is one of international human rights law is immaterial to the analysis. It may indeed be some such norm, for example the right not to be subjected to torture, the right to liberty or the freedom from slavery. But it may equally be some other, non-human rights-based rule of international law relevant to the treatment of individuals. Indeed, there is no inherent reason in this context why the respondent state’s alleged conduct need implicate international law at all. It could just as plausibly be argued that the grant of state immunity in respect of any allegation of serious interference by a foreign state with a person’s physical or psychological integrity constitutes a disproportionate restriction by the forum state on that person or their next of kin’s human right of access to a court.

more straightforward contention that the grant of state immunity in the sort of case at issue is not required, and is perhaps prohibited, by international law. The submission that the right of access to a court encompassed by the international human right to fair trial precludes the forum state from according state immunity in appropriate cases involving the alleged violation of rules of international law by the defendant state has been rejected by the ECtHR in the specific contexts of torture and crimes against humanity²⁴ and in two subsequent domestic cases.²⁵ But partisans of this approach maintain the rage, so to speak. Given that this second basic contention and its supporting arguments ultimately merge with the first and its, these more specifically and genuinely human rights-based claims will hereafter, unless otherwise indicated, be subsumed under the more general rubric of “human rights” cases.

It is worth emphasizing that it is immaterial under both the first²⁶ and second²⁷ basic scenarios whether or not the domestic claim for damages relating to the alleged breach of international law by the defendant state is framed as one for the violation of international law as such. The wrong alleged might equally be pleaded as a garden-variety tort, such as wrongful death, battery, or false imprisonment, or the domestic legal equivalent. All that matters for the sake of the argument when the domestic proceedings are said to relate to the defendant state’s breach of international law is that the conduct alleged to constitute the relevant domestic wrong is said in parallel to be internationally wrongful.

The present Article will not consider separately a third hypothetical means by which international human rights law might be relevant to the availability to a foreign state of immunity from proceedings in a “human rights” case, namely as a function of the express right to a remedy for breach of any of the guarantees embodied in the respective international human rights treaties. Article 2(3) of the International Covenant on Civil and Political Rights (ICCPR), for example, provides:

Each state Party to the present Covenant undertakes:

24. See *Kalogeropoulou*, 129 I.L.R. at 547 (crimes against humanity); *Al-Adsani*, 123 I.L.R. at 41–43 paras. 61–67 (torture).

25. See *Réunion Aérienne v. Libyan People’s Socialist Jamahiriya*, Cour de cassation [Cass.] [supreme court for civil and criminal matters] 1e civ., Mar. 9, 2011, Bull. civ. I, No. 247 (Fr.); *Jones v. Ministry of Interior of the Kingdom of Saudi Arabia*, 129 I.L.R. 629 (H.L. 2006) (appeal taken from Eng.) (U.K.), both discussed *infra*.

26. The reference is to the straightforward contention that, for whatever reason, state immunity is unavailable to a foreign state defendant in a “human rights” case.

27. The reference is to the contention that the forum state’s grant of state immunity to a foreign state defendant in a “human rights” case is incompatible with the plaintiff’s human right of access to a court.

- (a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;
- (b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;
- (c) To ensure that the competent authorities shall enforce such remedies when granted.

Equivalent provisions are found in the ECHR and ACHR.²⁸ As to whether the right to a remedy encompasses remedies in the courts of a state not responsible for the original violation, the Human Rights Committee's General Comment No. 31, adopted in 2004, which deals with, *inter alia*, Article 2(3) of the ICCPR, contains no suggestion that the provision obliges states parties to provide an effective remedy for violations of the Covenant by another state party²⁹—and this despite the contemporaneity and controversy of the question. As regards the analogous article in the ECHR, the Grand Chamber of the ECtHR has made it plain that the obligation on a state party to provide “an effective remedy before a national authority” for violations of the Convention relates only to violations which take place within the jurisdiction of that party or with the occurrence of which that party had some causal connection.³⁰ On the other hand, the Committee Against Torture, referring to the obligation imposed on a state party by Article 14(1) of the UN Convention Against Torture³¹ to “ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation,” recommended to Canada in 2005, after its courts and its representative before the Committee had rejected the application of Article 14(1) to that state in respect of a claim alleging torture in Iran,³² that it “should review its position under article 14 of the Convention to ensure the provision of compensation through its civil

28. See ECHR, *supra* note 12, art. 13; ACHR, *supra* note 13, art. 25.

29. See Human Rights Comm., The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, General Comment 31 to the International Covenant on Civil and Political Rights, U.N. Doc. CCPR/C/21/Rev.1/Add.13 (May 26, 2004).

30. See *Al-Adsani v. United Kingdom*, 123 I.L.R. 24, 36 para. 40 (Eur. Ct. H.R. 2001).

31. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. 14(1), *opened for signature* Dec. 10, 1984, 1465 U.N.T.S. 112 (entered into force June 26, 1987) [hereinafter UN Convention Against Torture].

32. See *Bouzari v. Islamic Republic of Iran*, 128 I.L.R. 586, 602–03 paras. 72–81 (Can. Ont. C.A. 2004); *Bouzari v. Islamic Republic of Iran*, 124 I.L.R. 427, 439–41 paras. 48–54 (Can. Ont. Sup. Ct. J. 2002).

jurisdiction to all victims of torture,”³³ regardless of whether Canada was in any way responsible for the act of torture. But this recommendation—being only a recommendation, and coming as it does from what, despite the deference generally shown to its views, is ultimately merely a monitoring body, not vested by the states parties that created it with any formal powers of legal interpretation—is not binding on the states parties,³⁴ and is seemingly rejected by them.³⁵ Moreover, even if the Committee’s interpretation were indeed binding, it stands to reason that it would be applied in essentially the same manner as the right of access to a court enshrined in the various international human rights instruments—in other words, that any limitation on the availability of a civil remedy before the courts of a state not responsible for the torture which is strictly required by the international legal rules on state immunity would be considered proportionate to a legitimate aim and therefore permissible.³⁶ In this way, even if the generic international human right to a remedy for violations of international human rights law were to be opposable to states not involved in these violations, the analysis brought to bear in determining whether this right was breached would merge with the analysis brought to bear, from the perspective of international law, on any other “human rights” case.

33. Comm. Against Torture, Consideration of Reps. Submitted by States Parties Under Article 19 of the Convention: Conclusions and Recommendations of the Committee, 34th Sess., May 2–20, 2005, ¶ 5(f), U.N. Doc. CAT/C/CR/34/CAN (2005).

34. See also *Jones v. Ministry of Interior of the Kingdom of Saudi Arabia*, 129 I.L.R. 629, 726 para. 23 (H.L. 2006) (Lord Bingham of Cornhill) (appeal taken from Eng.) (U.K.).

35. In addition to Canada, see for example the United Kingdom. *Jones v. Ministry of Interior of Saudi Arabia*, 129 I.L.R. 629, 659 para. 21 (Mance L.J.) (Eng.); *Jones*, 129 I.L.R. at 727 para. 25 (Lord Bingham); *id.* at 733 para. 46, 736–37 paras. 56–57 (Lord Hoffmann) (including references to statements made by Germany and New Zealand). For New Zealand, see *Fang v Jiang* [2007] NZAR 420 (HC) para. 64 (N.Z.). For the United States see United States, Reservations, Declarations, and Understandings Under the Convention, 136 CONG. REC. S17486 (daily ed. Oct. 27, 1990) (“That it is the understanding of the United States that article 14 requires a State Party to provide a private right of action for damages only for acts of torture committed in territory under the jurisdiction of that State Party.”). The U.S. understanding, as noted in *Jones*, 129 I.L.R. at 725 para. 20 (Lord Bingham), “was expressly recognised by Germany as not touching upon the obligations of the United States as a party to the Convention.” For the German response, see *Status: Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, UNITED NATIONS TREATY COLLECTION, http://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-9&chapter=4&lang=en#23 (last visited Oct. 1, 2011). See generally Andrew Byrnes, *Civil Remedies for Torture Committed Abroad: An Obligation Under the Convention Against Torture?*, in TORTURE AS TORT: COMPARATIVE PERSPECTIVES ON THE DEVELOPMENT OF TRANSNATIONAL HUMAN RIGHTS LITIGATION 513 (Craig Scott ed., 2001).

36. See *infra* Part III.A.1.(a) for a detailed account of relevant ECtHr jurisprudence.

Next, it may make sense to specify that what we are talking about is the infliction of death or personal injury outside the territory of the forum state. Actions for damages in respect of death or personal injury occasioned by a foreign state on the territory of the forum state constitute a well-recognized exception to the forum state's presumptive obligation to accord state immunity,³⁷ even when the act from which the death or injury results can be characterized as inherently sovereign.³⁸ (The situation may, however, be different as regards the acts of a foreign state's armed forces.)³⁹

Lastly, it remains by way of preface only to emphasize that the following discussion focuses on civil proceedings alone. The availability of state immunity as a bar to the prosecution in domestic courts of foreign state officials, serving or former, in respect of violations by them of international criminal law or of violations by the state to which their acts are attributable of international human rights law or some other body or rule of international law on the humane treatment of individuals binding on states does not necessarily implicate identical considerations to those canvassed here.⁴⁰

37. See, e.g., Foreign Sovereign Immunities Act, 28 U.S.C. § 1605(a)(5) (2006); Law No. 24488, June 28, 1995, B.O. art. 2(e) (Arg.); Foreign States Immunities Act, No. 196 of 1985, § 13(a) (Austl.); State Immunity Act, R.S.C. 1985, c. S-18, § 6(a) (Can.); State Immunity Act of 1979, c. 313, § 7(a) (Sing.); Foreign States Immunities Act 87 of 1981 § 6(a) (S. Afr.); State Immunity Act, 1978, c. 33, § 5(a) (U.K.); UN Convention on Jurisdictional Immunities, *supra* note 16, art. 12; European Convention on State Immunity art. 11, May 16, 1972, 1495 U.N.T.S. 182.

38. See, e.g., *Letelier v. Republic of Chile*, 488 F. Supp. 665, 671–72 (D.D.C. 1980); *Schreiber v. Attorney-General of Canada*, [2002] 3 S.C.R. 269, paras. 32–36 (Can.); *Prefecture of Voiotia v. Federal Republic of Germany, Areios Pagos [A.P.] [Supreme Court]* 11/2000, 129 I.L.R. 513, 517–19 (Greece); para. 8 of the commentary to draft art. 12 of the International Law Commission (ILC)'s Draft Articles on Jurisdictional Immunities of States and Their Property, Rep. of the Int'l Law Comm'n, 43d Sess., Apr. 29–July 19, 1991, U.N. Doc. A/46/10, GAOR, 46th Sess., Supp. No. 10 (1991), reprinted in [1991] 2 Y.B. Int'l L. Comm'n 1, 45, U.N. Doc. A/CN.4/SER.A/1991/Add.1. Article 12 of the Draft Articles has since become Article 12 of the UN Convention on Jurisdictional Immunities, *supra* note 16.

39. See, e.g., State Immunity Act of 1979, c. 313, § 19(2)(a) (Sing.); State Immunity Act, 1978, c. 33, § 16(2) (U.K.); European Convention on State Immunity, *supra* note 37, art. 31; *Greek Citizens v. Federal Republic of Germany (Distomo Massacre)* Bundesgerichtshof [BGH] [Federal Court of Justice] June 26, 2003 (Ger.), translated in 129 I.L.R. 556, 560–61 (2003); *Margellos v. Federal Republic of Germany, Anotato Eidiko Dikastirio [A.E.D.] [Special Supreme Court]* 6/2002 (Greece), translated in 129 I.L.R. 525, 531–32 para. 14; *McElhinney v. Ireland*, 123 I.L.R. 73, 85 para. 38 (Eur. Ct. H.R. 2001). No such exception is found in the UN Convention on Jurisdictional Immunities, *supra* note 16.

40. For example, as made clear by the UN Human Rights Committee, the right to fair trial "does not provide a right for an individual to require that the State party criminally prosecute another person." *Rodríguez Veiga v. Uruguay*, Human Rights Comm., Dec. No. 322/1988, para. 6.4, UN Doc. CCPR/C/51/D/322/1988 (July 18, 1994); *S.E. v. Argentina*, Human Rights Comm., Dec. No. 275/1988, para. 5.5, UN Doc. CCPR/C/38/D/275/1988 (Mar. 26, 1990); *H.C.M.A. v. Netherlands*, Human Rights

III. THE CURRENT STRATEGIC FOCUS ON STATE IMMUNITY

A. Heading Nowhere

The current strategic focus on state immunity on the part of advocates for redress for those killed or physically injured as a result of international wrongs by states is likely to yield precious little in either abstract legal or material terms in the short or long run. This is not to suggest that attempts by plaintiffs to circumvent the immunity from national proceedings owed to foreign states in respect of acts of an inherently sovereign character are doomed to fail in each and every national jurisdiction. For example, it remains to be seen after *Samantar* whether actions brought in U.S. courts under the common law against individual serving or former state officials in respect of conduct performed in their official capacity⁴¹ prove a rare growth area, in spite of the current and likely future position under customary international law, although there is reason to think that any possible growth will be marginal.⁴² Nor is it to predict that no government will legislate to abrogate state immunity in “human rights” cases. Rather, what is argued is as follows. In the short term, it is only in a tiny minority of national jurisdictions that claims for damages in respect of death or personal injury allegedly occasioned by a foreign state in violation of some international norm on the humane treatment of individuals stand any real chance of overcoming the immunity of the defendant state from proceedings. In the long term, it is likely that decisions by international courts will continue to discourage, and may even put paid once and for all to, the circumvention of state immunity in cases of this sort in national courts and the legislative abrogation of such immunity in respect of the same. Finally, even in the handful of instances in which the defendant state’s immunity from proceedings is overcome, other hurdles—most formidably, the immunity of most of that state’s property in the forum state from post-judgment measures of constraint and the need to rely on foreign courts to enforce the

Comm., Dec. No. 213/1986, para. 11.6, UN Doc. CCPR/C/35/D/213/1986 (Mar. 30, 1989). That is, there is no internationally-guaranteed human right which the forum state could be said to violate by accepting state immunity as a procedural bar to the criminal prosecution of a foreign state official implicated in the alleged mistreatment of the plaintiff or deceased.

41. In *Samantar v. Yousuf*, the Supreme Court did not doubt that “in some circumstances the immunity of the foreign state extends to an individual for acts taken in his official capacity.” 130 S. Ct. 2278, 2290–91 (2010). In other words, as noted by the Court, “[e]ven if a suit is not governed by the [FSIA], it may still be barred by foreign sovereign immunity under the common law.” *Id.* at 2292. The question remains in what circumstances this might be.

42. See *id.* at 2292 (discussing the unlikelihood of success of “artful pleading” to circumvent the immunity of the foreign state itself under the FSIA).

judgments in question in foreign jurisdictions—stand in the way of the successful securing of redress.

The following discussion is divided into three parts. First considered are the obstacles to the circumvention by national or international courts of what would otherwise be the foreign state's entitlement to immunity from proceedings in "human rights" cases in respect of acts by the foreign state of an inherently sovereign character. Next examined are the obstacles to states' legislative abrogation of a foreign state's immunity from domestic proceedings in "human rights" cases. The final focus is on the obstacles to obtaining redress from a foreign state in such cases even in the unlikely event that its immunity from proceedings can be overcome. The gist of all three sections is that the current approach is likely to head nowhere.

1. Obstacles to the Circumvention of Immunity from Proceedings by National or International Courts

- (a) The Case Law of the ECtHR

One of the chief obstacles to the success of the contention that the forum state is under no international duty to accord state immunity in civil claims against foreign states in respect of alleged breaches of international law causing death or personal injury is the case law of the ECtHR, which exerts an influence that goes beyond the forty-seven member states of the Council of Europe.

In *Al-Adsani v. United Kingdom*, a Grand Chamber of the ECtHR dismissed the argument that the grant of state immunity to bar civil proceedings in respect of allegations of torture by the respondent state violated the right of access to a court secured to the applicant by Article 6(1) of the ECHR.⁴³ The Court, emphasizing that the exercise of the right of access to a court could be subject to such limitations as were proportionate to a legitimate aim, reiterated both that "[t]he grant of sovereign immunity to a State in civil proceedings pursues the legitimate aim of complying with international law"⁴⁴ and that "measures taken by a High Contracting Party which reflect generally recognized rules of public international law on State immunity cannot in principle be regarded as imposing a disproportionate restriction on the right of access to a court embodied in Article 6 § 1."⁴⁵ It all came down to whether international law required the forum state to accord state immunity in any given case, and the Grand Chamber held by the narrowest of margins that,

43. *Al-Adsani v. United Kingdom*, 123 I.L.R. 24, 43 para. 67 (Eur. Ct. H.R. 2001). The margin was a razor-thin nine votes to eight.

44. *Id.* at 40 para. 54.

45. *Id.* at 40 para. 56.

despite the fact that the international prohibition on torture had acquired the status of *jus cogens*, there was “[not] yet acceptance in international law of the proposition that States are not entitled to immunity in respect of civil claims for damages for alleged torture committed outside the forum State.”⁴⁶ Quite simply, “[n]otwithstanding the special character of the prohibition of torture in international law, the Court [was] unable to discern in the international instruments, judicial authorities or other materials before it any firm basis for concluding that, as a matter of international law, a State no longer enjoys immunity from civil suit in the courts of another State where acts of torture are alleged.”⁴⁷ The UK legislation granting immunity in the instant case was “not inconsistent with those limitations generally accepted by the community of nations as part of the doctrine of State immunity.”⁴⁸ As such, the application of the legislation by the English courts to uphold a foreign state’s plea of state immunity in a civil action alleging torture by that state abroad “[could not] be said to have amounted to an unjustified restriction on the applicant’s access to a court.”⁴⁹

In the subsequent case of *Kalogeropoulou v. Greece*, the ECtHR (First Section)—reaffirming that the grant of state immunity as required by international law represented a permissible restriction on the exercise of the relevant right—held similarly that despite the applicant’s claim that the prohibition on crimes against humanity enjoyed the character of *jus cogens*, there was “[not] yet acceptance in international law of the proposition that States are not entitled to immunity in respect of civil claims for damages brought against them in another State for crimes against humanity.”⁵⁰

In neither *Al-Adsani* nor *Kalogeropoulou* did the ECtHR preclude the future development of customary international law in favor of the unavailability of state immunity in civil claims relating to torture and crimes against humanity.⁵¹ Nor did it venture an opinion on the availability of state immunity as a bar to actions for damages in respect of violations of other international norms on the treatment of individuals. The Court’s judgments have nonetheless generated a dynamic which in practice is inimical to attempts, whether based specifically on the right of access to a court or on more general grounds, to overcome state immunity in civil proceedings in domestic courts for alleged breaches of international law by the defendant state causing death or personal injury.

46. *Id.* at 43 para. 66.

47. *Id.* at 42 para. 61.

48. *Id.* at 43 para. 66.

49. *Id.* at 43 para. 67.

50. *Kalogeropoulou v. Greece*, 129 I.L.R. 537, 547 (Eur. Ct. H.R. 2002).

51. *See explicitly Kalogeropoulou*, 129 I.L.R. 537.

Within the *espace juridique* of the ECHR, calls for the judicial circumvention of state immunity in domestic proceedings of this sort are now stymied by a sort of “chicken and egg” conundrum created by *Al-Adsani* and *Kalogeropoulou*, as follows.

The courts of the states parties to the Convention set great store by the judgments of the ECtHR. In *Margellos v. Germany*, involving a claim for damages against Germany for war crimes and crimes against humanity committed during the Second World War, the Greek Special Supreme Court (*Anotato Eidiko Dikastirio*) was persuaded by, *inter alia*, *Al-Adsani* to uphold the availability to Germany of immunity from proceedings.⁵² In the subsequent *Greek Citizens v. Federal Republic of Germany* (the *Distomo Massacre* case), in which the plaintiffs attempted to enforce in the German courts a default judgment rendered against Germany prior to *Al-Adsani* and *Margellos* by a court in Livadia in Greece and relating again to war crimes dating from the Second World War,⁵³ the German Supreme Court (*Bundesgerichtshof*), having come to the provisional conclusion that state immunity should have prevented the Greek court from exercising jurisdiction,⁵⁴ found that any possible initial “objective doubts” as it might have entertained were “removed” not only by *Margellos*—which, guided by the intervening decision of the ECtHR in *Al-Adsani*, rejected (albeit in a different case) the reasoning of the Livadia court—but also by the later *Kalogeropoulou*, in which the ECtHR rejected a challenge to the refusal of the Greek Minister of Justice and the German authorities to enforce the Livadia court’s judgment.⁵⁵ The decision of the Supreme Court was upheld on appeal

52. *Margellos v. Federal Republic of Germany*, *Anotato Eidiko Dikastirio* [A.E.D.] [Special Supreme Court] 6/2002 (Greece), *translated in* 129 I.L.R. 525, 529–33 paras. 12–15. Although the case involved conduct by Germany on Greek territory, the court held that no “territorial tort” exception to state immunity applied in respect of the acts of a foreign state’s armed forces. *Id.* at 531–32 para. 14.

53. *See Prefecture of Voiotia v. Federal Republic of Germany*, *Protodikeia Livadia* [Mon. Pr.] [District Court Livadia] 137/1997 (Greece). The judgment became final when it was upheld, by seven votes to four, by the Greek Supreme Court in *Prefecture of Voiotia v. Federal Republic of Germany*, *Areios Pagos* [A.P.] [Supreme Court] 11/2000 (Greece), *translated in* 129 I.L.R. 513. Like the decision of the district court, the Supreme Court’s decision predates *Al-Adsani* and *Margellos*, and the latter effectively overturns it. The Minister of Justice’s refusal to authorize enforcement of the decision against German property in Greece (believing as he did that the judgment was obtained in violation of the international rules on immunity from proceedings), along with Germany’s refusal to enforce the decision in Germany, formed the factual bases of the challenge in *Kalogeropoulou*, 129 I.L.R. 537.

54. *Greek Citizens v. Federal Republic of Germany* (*Distomo Massacre*) *Bundesgerichtshof* [BGH] [Federal Court of Justice] June 26, 2003 (Ger.), *translated in* 129 I.L.R. 556, 559–61.

55. *Id.* at 561–62.

to the German Constitutional Court (*Bundesverfassungsgericht*).⁵⁶ In the UK, where the courts are required by the Human Rights Act to take into account the ECtHR's jurisprudence,⁵⁷ the House of Lords in *Jones v. Saudi Arabia*, a claim for damages in respect of alleged torture, not only adopted the reasoning of the ECtHR in *Al-Adsani* and *Kalogeropoulou* in specific relation to Article 6(1) of the Convention but also drew strong support for its own eventual finding as to the present state of the customary international law of state immunity in civil actions for torture from the majority's finding in *Al-Adsani* on the same contested point.⁵⁸ Most recently, in a suit involving not the victims or their next-of-kin but instead the insurers of the former French airline UTA to recover sums paid out by them, the French Court of Cassation (*Cour de cassation*) recalled and applied *Al-Adsani's* take on Article 6(1) of the ECHR to uphold Libya's immunity from proceedings in respect of the destruction via sabotage of UTA flight 772 over Niger in 1989 (the allegation being not that Libya was directly responsible but rather that it had neither punished nor disavowed the act).⁵⁹

Now, it is a truism that states parties to the ECHR are entitled to give effect to the human rights guaranteed by the Convention in a manner going beyond the minimum regional standard expounded by the ECtHR. But the consequence of any such move when it comes to state immunity would be an international wrong, in the form of the denial of state immunity to the defendant state in a manner not in accordance with international law. This is something Italy is likely to learn to its chagrin, after Germany's initiation of proceedings against it in the International Court of Justice (ICJ) in late 2008 in respect of the application by the Italian courts, in *Ferrini v. Germany* and subsequent cases,⁶⁰ of a putative rule of customary international law

56. See *Greek Citizens v. Federal Republic of Germany (Distomo Massacre)*, Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Feb. 15, 2006 (Ger.), translated in 135 I.L.R. 186, 191–92.

57. See Human Rights Act, 1998, c. 42, § 2(1)(a) (Eng.). In *Jones*, Lord Bingham explained that the Judicial Committee of the House of Lords—formerly the United Kingdom's highest appellate court, now replaced by the UK Supreme Court—“would ordinarily follow . . . a decision [of the ECtHR] unless it found the court's reasoning to be unclear or unsound, or the law had changed significantly since the date of the decision,” none of which was so in the instant case. *Jones v. Ministry of Interior of the Kingdom of Saudi Arabia*, 129 I.L.R. 629, 723 para. 18 (H.L. 2006) (appeal taken from Eng.) (U.K.).

58. See *Jones*, 129 I.L.R. at 722–23 para. 18 (Lord Bingham); *id.* at 731, paras. 40–41, 736, para. 55 (Lord Hoffmann). The three other Lords agreed with Lords Bingham and Hoffmann.

59. See *Réunion Aérienne v. Libyan People's Socialist Jamahiriya*, Cour de cassation [Cass.] [supreme court for civil and criminal matters] 1e civ., Mar. 9, 2011, Bull. civ. I, No. 247 (Fr.).

60. See *Ferrini v. Federal Republic of Germany*, Corte di Cassazione [Cass.] [supreme court in civil and criminal matters] Mar. 11, 2004 (It.); Federal Republic of

said by those courts to be “in the process of being formed”⁶¹ whereby state immunity is unavailable in respect of alleged violations of *jus cogens*. Especially given the last, it is likely that the courts of states parties to the ECHR—with the exception, that is, of the Italian courts, although even these are now having second thoughts⁶²—will leave it to the ECtHR to make the first move, after which the parties would be not merely permitted but indeed obliged to deny immunity in cognate cases.

In turn, the ECtHR, in the event that it is ever required to retake the pulse of state practice on the issue, is unlikely to conclude, if and when confronted by the generally consistent upholding of state immunity in such cases by the courts of states parties to the Convention, that customary international law no longer permits the latter.

In short, *Al-Adsani* and *Kalogeropoulou* have given rise to a customary international legal feedback loop. The ECtHR holds that states do not currently accept that state immunity is unavailable as a bar to domestic proceedings for damages in respect of death or personal injury allegedly caused by an international wrong at the hands of the defendant state. As a result, the courts of nearly all of the member states of the Council of Europe dismiss legal arguments in favor of the unavailability of state immunity in such cases. In turn, it stands to reason that the ECtHR, and indeed other relevant international jurisdictions, will hold in future that states do not accept that state immunity is unavailable as a bar to domestic proceedings for damages in respect of death or personal injury allegedly caused by an international wrong at the hands of the defendant state. And so on *in sæcula sæculorum*.

In addition, we are already seeing the courts of states outside the Council of Europe, when similarly faced with the submission that international law does not require the grant of state immunity in civil claims for torture, looking for guidance to the decisions of the ECtHR in *Al-Adsani* and *Kalogeropoulou* or to subsequent decisions of the courts of states parties to the ECHR in analogous cases—especially, in the common law world, to the influential conclusion of the House of Lords in *Jones*.

Germany v. Mantelli, Corte di Cassazione [Cass.] [supreme court for civil and criminal matters] May 29, 2008 (It.), translated in I.L.D.C. 1037 (IT 2008); Italy v. Milde, Corte di Cassazione [Cass.] [supreme court for civil and criminal matters] Jan. 13, 2009 (It.), translated in 128 I.L.D.C. 1224 (IT 2009), involving civil proceedings attached to a criminal prosecution. For further consideration of the current ICJ proceedings between Germany and Italy, see *infra* Part III.A.1.(e).

61. Lozano v. Italy, Corte di Cassazione [Cass.] [supreme court for civil and criminal matters] Jul. 24, 2008 (It.), translated in I.L.D.C. 1085 (IT 2008), para. 6 (referring explicitly and additionally to the civil liability of a foreign state).

62. For a discussion of the Italian jurisprudence, see *infra* Part III.A.1.(e).

The year after *Al-Adsani*, in the torture case of *Bouzari v. Islamic Republic of Iran*, Justice Swinton of the Superior Court of Justice of the Canadian province of Ontario looked to, among other things, the ECtHR's ruling, emphasizing the majority's words that, "[n]otwithstanding the special character of the prohibition of torture in international law, the Court [was] unable to discern in the international instruments, judicial authorities or other materials before it any firm basis for concluding that, as a matter of international law, a State no longer enjoys immunity from civil suit in the courts of another State where acts of torture are alleged."⁶³ On this and other grounds, Justice Swinton concluded that, as it stood, international law recognized no exception to state immunity in respect of civil actions for torture committed outside the forum state and that any recognition by her of such an exception would place Canada in breach of customary international law.⁶⁴ (Additionally, she relied on *Al-Adsani* to hold that the grant of state immunity in the circumstances of the case did not violate the right to fair trial guaranteed by Article 14 of the International Covenant on Civil and Political Rights.)⁶⁵ The Ontario Court of Appeal upheld this decision and agreed with Justice Swinton's reasoning.⁶⁶ Next, in *Fang v. Jiang*, Justice Randerson in the High Court of New Zealand was persuaded by *Jones* that the common law of New Zealand, which permitted direct reliance on the customary international law of state immunity, obliged him to dismiss an application for leave to serve the statement of claim and notice of proceeding *ex juris* in a civil action for torture against, *inter alia*, the former head of state of the People's Republic of China.⁶⁷ The two later torture-claim decisions in *Zhang v. Zemin* in the Australian state of New South Wales ultimately rested on a point of statutory construction.⁶⁸ That said, Justice Latham in the New South Wales Supreme Court relied on *Jones*, *Bouzari*, *Fang*, and *Al-Adsani* itself to conclude that, as a matter of international law, there was "no exception to foreign State immunity for civil proceedings alleging acts of torture committed in a foreign State."⁶⁹ Nor is it without relevance that, in the New South Wales Court of Appeal, Chief Justice Spigelman (with whom President Allsop and Chief Justice at Common Law McClellan agreed) referred to *Al-*

63. *Bouzari v. Islamic Republic of Iran*, 124 I.L.R. 427, 445 para. 69 (Can. Ont. Sup. Ct. J. 2002) (quoting *Al-Adsani v. United Kingdom*, 123 I.L.R. 24 (Eur. Ct. H.R. 2001)).

64. *Id.* at 443 para. 63, 446 para. 73, 449 para. 86, 450 para. 89.

65. *Id.* at 441 para. 55.

66. *Bouzari v. Islamic Republic of Iran*, 128 I.L.R. 586 (Can. Ont. C.A. 2004).

67. See *Fang v Jiang* [2007] NZAR 420 (HC) paras. 62–72 (N.Z.).

68. See *Zhang v Zemin* [2010] NSWCA 255 (Austl. N.S.W. C.A.); *Zhang v Zemin* [2008] NSWSC 1296 (Austl. N.S.W. S.C.).

69. *Zhang* [2008] NSWSC paras. 35–39 (quote para. 39).

Adsani, *Kalogeropoulou*, *Jones*, *Bouzari*, and *Fang* as forming “a considerable body of authority denying [the court’s exercise of] jurisdiction, despite the recognition of the prohibition of torture as *jus cogens*.”⁷⁰ Subsequently, in the further Ontario case of *Arar v. Syrian Arab Republic* (in which, despite *Bouzari*, the plaintiff was “seeking a second kick at the can,” in the words of counsel)⁷¹, Justice Echlin pointed to *Jones*, as well as to U.S. case law, to conclude that any decision by him to read into Canada’s State Immunity Act an exception for civil claims alleging state-sponsored torture “would put Canada out of step with the international order at this time.”⁷²

In this way, the customary international legal feedback loop set in train by the case law of the ECtHR is perpetuating—insofar as the grant of state immunity by the courts of states from outside the Council of Europe supports a future conclusion by the ECtHR or some other international judicial or similar organ that states do not presently accept the unavailability of state immunity in “human rights” cases—a conclusion which in turn promises to influence national courts both within and without the *espace juridique* of the ECHR.

(b) The Statutory Embodiment of State Immunity in Certain Jurisdictions

State immunity finds statutory embodiment in certain key jurisdictions in the form of a general grant of immunity from civil proceedings qualified by an exhaustive enumeration of exceptions. Legislative schemes along these lines currently govern the availability of state immunity in the courts of the United States, the United Kingdom, Canada, Australia, Argentina, Israel, Pakistan, Singapore, and South Africa.⁷³ In none of these states does the relevant legislation contain an exception to the immunity of a defendant state in relation to suits in respect of death or personal injury alleged to result from the violation by that state of some international rule on the humane treatment of individuals. Not only does this militate against the success of “human rights” cases in these jurisdictions themselves. The absence of favorable case law from key jurisdictions also serves seriously to undermine similar claims in other jurisdictions, both national and international, given that the alleged unavailability under customary international law of state

70. *Zhang* [2010] NSWCA para. 121.

71. *Arar v. Syrian Arab Republic*, (2005) 127 C.R.R.2d 252, para. 9 (Can. Ont. Sup. Ct. J.).

72. *Id.* paras. 23, 31 (quote para. 31).

73. See Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1330, 1602–1611 (2006); Foreign States Immunity Law, 5769-2008 (Isr.); State Immunity Ordinance, No. 6 of 1981, PAK. CODE (Pak.); statutes cited *supra* note 37.

immunity in such cases ultimately hinges on whether there is sufficient and sufficiently representative state practice and *opinio juris* to this effect.

When a domestic court is required by unambiguous legislation to accord state immunity in the absence of any relevant statutory exception, it is—except where some other, competing domestic legal constraint, perhaps constitutional, is engaged thereby—beside the point in proceedings before that court whether or not, absent such an exception in the instant case, international law considers the impugned conduct an inherently sovereign act or recognizes an exception to state immunity specifically in respect of such conduct or in respect of violations of *jus cogens* or for any other reason. The domestic court will simply apply the domestic law, whatever the consequences for the forum state under international law. This has been seen in the United States in a range of suits involving the alleged violation by the defendant state of some international rule, even of the status of *jus cogens*. Examples include *Argentine Republic v. Amerada Hess Shipping Corp.*,⁷⁴ *Siderman de Blake v. Republic of Argentina*,⁷⁵ *Princz v. Federal Republic of Germany*,⁷⁶ and *Smith v. Socialist People's Libyan Arab Jamahiriya*.⁷⁷ It is equally for this reason that, prior to the coming into force of the UK's Human Rights Act, both the High Court and the Court of Appeal of England and Wales dismissed the personal injury claim in respect of allegations of torture in *Al-Adsani v. Government of Kuwait*,⁷⁸ with the House of Lords refusing leave to appeal; that, failing any argument under Canada's Bill of Rights, the Ontario Superior Court of Justice and Court of Appeal dismissed the analogous claim in *Bouzari*,⁷⁹ with the

74. *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 433–38, 443 (1989).

75. *Siderman de Blake v. Republic of Argentina*, 965 F.2d 699, 714–19 (9th Cir. 1992).

76. *Princz v. Federal Republic of Germany*, 26 F.3d 1166, 1171–76 (D.C. Cir. 1992). While the majority did not conclusively determine whether the FSIA applied to the facts of the case, which predated the Act, they held that, in the event that the FSIA did apply, the court lacked jurisdiction, since the impugned acts did not fall within any of the exceptions to state immunity recognized in the Act.

77. *Smith v. Socialist People's Libyan Arab Jamahiriya*, 101 F.3d 239 (2d Cir. 1996).

78. See *Al-Adsani v. Gov't of Kuwait*, 103 I.L.R. 420, 427–31 (EWHC (QB) 1995) (Eng.); *Al-Adsani v. Gov't of Kuwait*, 107 I.L.R. 536, 542–44 (EWCA (Civ) 1996) (Stuart-Smith L.J.) (Eng.); *id.* at 547–50 (Ward L.J.). As made clear in *Jones*, a more nuanced analysis is called for today when rights under the Human Rights Act are pleaded. *Jones v. Ministry of Interior of the Kingdom Saudi Arabia*, 129 I.L.R. 629, 719–20, para. 13 (H.L. 2006) (Lord Bingham) (appeal taken from Eng.) (U.K.).

79. See *Bouzari v. Islamic Republic of Iran*, 128 I.L.R. 586, 599 paras. 57–59, 601 para. 67, 605 para. 90, 608 para. 104 (Can. Ont. C.A. 2004); *Bouzari v. Islamic Republic of Iran*, 124 I.L.R. 427, 433 para. 18, 438 para. 41, 446 para. 73, 450 para. 90 (Can. Ont. Sup. Ct. J. 2002).

Supreme Court of Canada refusing leave to appeal, and that the first of these courts also dismissed the later claim in *Arar*,⁸⁰ and that the New South Wales Court of Appeal dismissed the equivalent action in *Zhang*.⁸¹ Nor have attempts in these jurisdictions to shoehorn claims in respect of torture or other alleged mistreatment in breach of international law into one or other of the enumerated statutory exceptions to state immunity been looked on with favor by the courts.⁸²

In turn, the upshot of such dismissals is a dearth of state practice in support of the denial of state immunity in cognate cases,⁸³ a fact which in further turn stands to influence national jurisdictions where state immunity legislation is not necessarily the end of the story⁸⁴ or where there is no such legislation (recourse being had to customary international law, perhaps via common law,⁸⁵ or treaty), as well as relevant international jurisdictions.

It should nonetheless be noted that, in an exception to the general pattern in both U.S. and other national jurisdictions, a relevant legislative exception to statutory state immunity exists in the United States with respect to what today number four foreign states. Formerly under 28 U.S.C. § 1605(a)(7), originally introduced by § 221 of the Antiterrorism and Effective Death Penalty Act of

80. See *Arar v. Syrian Arab Republic* (2005), 127 C.R.R.2d 252, paras. 21–22, 25–26, 28, 30–31 (Can. Ont. Sup. Ct. J.).

81. See *Zhang v Zemin* [2010] NSWCA 255, paras. 153, 157–64, 172 (Austl. N.S.W. C.A.).

82. See, e.g., *Saudi Arabia v. Nelson*, 507 U.S. 349, 361–62 (1993); *Siderman v. Republic of Argentina*, 965 F.2d 699, 719–20 (9th Cir. 1992); *Princez v. Federal Republic of Germany*, 26 F.3d 1166, 1173–75 (D.C. Cir. 1992); *Smith*, 101 F.3d at 242–46; *Bouzari*, 128 I.L.R. at 597–99 paras. 42–55; *Bouzari*, 124 I.L.R. at 433–36 paras. 18–34.

83. This is not to suggest that the dismissal of a domestic claim by reference to domestic law alone can be taken as support for the customary international legal *status quo*. On the contrary, where the content of customary international law has no bearing on the decision, nothing by way of *opinio juris* can be gleaned. It is simply, rather, to highlight the resulting lack of state practice in favour of a putative customary rule denying the availability of state immunity in such cases. Nor, it should be added, is any of this to say that a domestic court might not proffer a view on the content of the customary international law of state immunity even as it ultimately applies, per force, the statute and only the statute. Any such dicta would naturally go towards either the *lex lata* or the putative *lex ferenda*. In practice, however, judicial economy and judicial caution make unnecessary conclusions on contentious points of customary international law a rarity in domestic proceedings.

84. Examples include the United Kingdom, after the coming into effect of the Human Rights Act, and Canada, in light of its Bill of Rights. See Canadian Bill of Rights, 1960, c. 44 (Can.); Human Rights Act, 1998, c. 42 (Eng.).

85. Examples include New Zealand and, after the Supreme Court's decision in *Samantar*, the jurisdiction of U.S. federal courts over individual state officials, serving and former. See *Samantar v. Yousuf*, 130 S. Ct. 2278 (2010).

1996,⁸⁶ and now under 28 U.S.C. § 1605A, inserted by way of § 1083(b)(1) of the National Defense Authorization Act for Fiscal Year 2008,⁸⁷ the immunity from proceedings to which a foreign state designated as a state sponsor of terrorism⁸⁸ would otherwise be entitled under the Foreign Sovereign Immunities Act (FSIA) is abrogated in respect of actions for damages for personal injury or death caused to a U.S. national or, under 28 U.S.C. § 1605A, to a member of the U.S. armed forces or U.S. government employee or contractor acting within the scope of their employment by that foreign state's act of torture, extra-judicial killing, aircraft sabotage, or hostage-taking or by its provision of material support or resources for any such act.⁸⁹ There are only four states currently designated as state sponsors of terrorism, namely Cuba, Iran, Sudan, and Syria.⁹⁰ But this legislation, although presenting an opportunity in its own right to certain plaintiffs, cannot be said to manifest an *opinio juris* on the part of the United States that customary international law permits the denial of state immunity in civil proceedings against any state in respect of the conduct specified.⁹¹ The exception therefore cannot contribute to a customary international rule to this effect. The same goes for what is reported to be retaliatory legislation to similar ends on the respective parts of Cuba and Iran.⁹²

(c) The UN Convention on Jurisdictional Immunities of States and Their Property (2004)

On December 2, 2004, the UN General Assembly, “[b]elieving that an international convention on the jurisdictional immunities of

86. Antiterrorism and Effective Death Penalty Act, Pub. L. No. 104–132, 110 Stat. 1214 (1996) § 221 (formerly codified at 28 U.S.C. § 1605(a)(7) (2006), now repealed).

87. National Defense Authorization Act for Fiscal Year 2008, Pub. L. 110–181, 122 Stat. 341 (2008), § 1083(b)(1) (codified at 28 U.S.C. § 1605A (2008)).

88. States are designated as state sponsors of terrorism by means of a determination by the Secretary of State pursuant to § 6(j) of the Export Administration Act, 50 U.S.C. § 2405(j) (2006), § 620A of the Foreign Assistance Act, 22 U.S.C. § 2371 (2006), or § 40(d) of the Arms Export Control Act, 22 U.S.C. § 2780(d) (2006).

89. See JENNIFER K. ELSEA, CONG. RESEARCH SERV., RL 31258, SUITS AGAINST TERRORIST STATES BY VICTIMS 69–74 (2008) (listing judgments rendered against such states up to August 8, 2008).

90. States formerly on the list comprise Iraq, Libya, and North Korea. *State Sponsors of Terrorism*, U.S. DEPT OF STATE, <http://www.state.gov/s/ct/c14151.htm> (last visited Oct. 1, 2011).

91. See also *Al-Adsani v. United Kingdom*, 123 I.L.R. 24, 42–43 para. 64 (Eur. Ct. H.R. 2001); FOX, STATE IMMUNITY, *supra* note 16, at 149; Vittor, *supra* note 17, at 607; Joanne Foakes & Elizabeth Wilmshurst, *State Immunity: The United Nations Convention and Its Effect* 8 para. 34 (Chatham House Int'l Law Program Briefing Paper, 2005).

92. See ELSEA, *supra* note 89, at 66–67.

States and their property . . . would contribute to the codification and development of international law and the harmonization of practice in this area,” and “[t]aking into account developments in State practice,” adopted without a vote the UN Convention on Jurisdictional Immunities of States and Their Property (2004).⁹³ The adoption of the Convention marked the culmination of a process formally begun in 1977, when the Assembly invited the International Law Commission (ILC) to commence work on the topic of jurisdictional immunities of states and their property.⁹⁴ The Convention, which to date has attracted twenty-eight signatories and ten states parties, will enter into force a month after the deposit of the thirtieth instrument of ratification, acceptance, approval or accession.⁹⁵ The provisions of the Convention on immunity from proceedings are organized around a general grant of immunity qualified by enumerated exceptions which for the purposes of the Convention are exhaustive.

Absent from the Convention is any exception to state immunity for civil proceedings in respect of death or personal injury alleged to have been inflicted in breach of international law in general or of *jus cogens* in particular. The absence reflects a decision taken early on in the process by which the draft articles on jurisdictional immunities of states and their property adopted by the ILC in 1991 were worked up into the Convention. When the open-ended Working Group of the Sixth Committee of the General Assembly convened in 1999 to examine outstanding issues relating to the ILC’s draft articles,⁹⁶ it considered whether to take up a matter raised in the appendix to the report to the ILC earlier that year of the Commission’s own Working Group on Jurisdictional Immunities of States and Their Property,⁹⁷ “namely the question of the existence or nonexistence of immunity in the case of violation by a State of *jus cogens* norms of international law.”⁹⁸ “It was generally agreed,” however, by the delegates to the Working Group of the Sixth Committee, “that this issue, although of current interest, did not really fit into the . . . draft articles.”⁹⁹ Moreover, the issue “did not seem to be ripe enough for the Working

93. UN Convention on Jurisdictional Immunities, *supra* note 16.

94. See G.A. Res. 32/151, ¶ 7, U.N. Doc. A/RES/32/151 (Dec. 19, 1977).

95. UN Convention on Jurisdictional Immunities, *supra* note 16, Art. 31(1).

96. See G.A. Res. 53/98, ¶1, U.N. Doc. A/RES/53/98 (Dec. 8, 1998).

97. See Rep. of the Int’l Law Comm’n, 51st Sess., May 3–July 23, 1999, App., U.N. Doc. A/54/10; GAOR, 54th Sess., Supp. No. 1 (1999), reprinted in [1999] 2 Y.B. Int’l L. Comm’n 1, U.N. Doc. A/CN.4/SER.A/1999/Add.1 (Part 2).

98. Chairman of the Working Group, *Convention on Jurisdictional Immunities of States and Their Property*, para. 46, UN Doc. A/C.6/54/L.12 (Nov. 12, 1999) (by Gerhard Hafner).

99. *Id.* para. 47.

Group to engage in a codification exercise over it.”¹⁰⁰ The chairman of the Sixth Committee’s Working Group therefore concluded as follows:

In the light of the discussions held in the Working Group of the Sixth Committee, it does not seem advisable to include this matter among the issues to be covered by the forthcoming considerations on the topic.¹⁰¹

No objection to this manner of proceeding was subsequently raised in the Sixth Committee itself, and the Japanese delegate who introduced the draft of what became General Assembly resolution 54/101 of December 9, 1999 (“Convention on jurisdictional immunities of States and their property”) explicitly supported the exclusion of future discussion of the matter in the drafting of the proposed Convention.¹⁰²

The preamble to the Convention affirms “that the rules of customary international law continue to govern matters not regulated by the provisions of the . . . Convention,” thereby leaving open the theoretical possibility that an exception to state immunity exists for actions for damages for death or personal injury alleged to have been caused by a foreign state in violation of international law generally or of *jus cogens* specifically. In this light, on ratification in 2009, Sweden, in words which reproduce almost verbatim Norway’s declaration of 2006, declared its understanding that “the Convention is without prejudice to any future international legal development concerning the protection of human rights.”¹⁰³ Notwithstanding this, however, the practical effect of the noninclusion in the Convention (which is viewed as by and large a codification of customary international law)¹⁰⁴ of any such exception is very likely to be the undermining of arguments in favor of its existence.¹⁰⁵ This effect has already begun to be seen. In *Jones*, the Lords drew support from the Convention for their conclusion that customary international law did not recognize an exception to state immunity along the lines submitted by the claimants. Lord Bingham, the senior Law Lord,

100. *Id.*

101. *Id.* para. 67.

102. See U.N. GAOR, 54th Sess., 36th mtg., ¶¶ 1–36, U.N. Doc. A/C.6/54/SR.36 (Apr. 24, 2000).

103. See U.N. Secretary-General, *Convention on Jurisdictional Immunities of States and Their Property: Depository Notification, Sweden*, U.N. Doc. C.N.912.2009.TREATIES–1 (Dec. 24, 2009); U.N. Secretary-General, *Convention On Jurisdictional Immunities of States and Their Property: Depository Notification, Norway*, U.N. Doc. C.N.280.2006.TREATIES–2 (Apr. 6, 2006), both available at Status: *United Nations Convention on Jurisdictional Immunities of States and Their Property*, *supra*, note 35.

104. See, e.g., *Hirschhorn v. Romania*, App. No. 29294/02, Eur. Ct. H.R. para. 8 (2007) (Caflisch & Ziemele, JJ., concurring); see also FOX, STATE IMMUNITY, *supra* note 16, at 4, 11–12, 35, 167, 373; Foakes & Wilmshurst, *supra* note 91, at 10 para. 45.

105. See Brown, *supra* note 6, at 212; Hall, *supra* note 8; Lorna McGregor, *State Immunity and Jus Cogens*, 55 INT’L & COMP. L.Q. 437 (2006).

describing the Convention as “the most authoritative statement available on the current international understanding of the limits of state immunity in civil cases,” held that “the absence of a torture or *jus cogens* exception [was] wholly inimical to the claimants’ contention.”¹⁰⁶ Justice Randerson in *Fang* and Justice Latham in *Zhang* subsequently quoted Lord Bingham’s dictum with approval.¹⁰⁷ The former, referring to the Convention as “a very recent expression of the consensus of nations on this topic,” expressly “agree[d] with the House of Lords that the absence of a torture or *jus cogens* exception to state immunity in the UN Immunities Convention 2004 speaks powerfully against the plaintiffs’ argument.”¹⁰⁸

Moreover, as more states become party to the Convention, with its presumptive grant of immunity qualified only by express exceptions, the number of national jurisdictions in which the availability of state immunity is governed by a statutory arrangement of the sort discussed above, and in which no exception to immunity is recognized in respect of civil actions for death or personal injury alleged to be caused in violation of international law or more specifically of *jus cogens*, is bound to increase, perhaps significantly. The practical consequence of this will be a continuing want of state practice in support of arguments in favor of such an exception.

(d) The Unpersuasiveness of the Arguments

Even leaving aside the foregoing obstacles, perhaps the most basic reason why attempts to circumvent state immunity in “human rights” cases are likely to lead nowhere in the long run is that no knock-down argument can seemingly be marshalled in support. As a matter of both first principles and common-sense attractiveness to a court, the various possible contentions stand little chance of carrying all before them, even if there is always the possibility that a court or judge here or there may be persuaded.

One of the main arguments in the repertoire of the opponents of the grant of state immunity in the sorts of cases under discussion here is that acts in violation of international law itself are *ipso facto* to be characterized not as inherently sovereign acts (“acts *jure imperii*,” as the terminology has it), which would attract immunity, but instead as acts which, although committed by a state in the instant case, are the sort of thing a private person could do (“acts *jure*

106. *Jones v. Ministry of Interior of the Kingdom of Saudi Arabia*, 129 I.L.R. 629, 727 para. 26 (Lord Bingham) (H.L. 2006) (appeal taken from Eng.) (U.K.); *see also id.* at 733 para. 47, 741 para. 71 (Lord Hoffmann).

107. *See Zhang v Zemin* [2008] NSWSC 1296, paras. 35–36 (Austl. N.S.W. S.C.); *Fang v Jiang* [2007] NZAR 420 (HC) paras. 49, 62–63, 65 (N.Z.).

108. *Fang* [2007] NZAR para. 65.

gestionis").¹⁰⁹ This, however, is hardly compelling. For a start, it requires the court in question to look to the nature, rather than to the purpose, of the impugned act to determine whether it should be qualified as *jure imperii* or *jure gestionis*; and while this approach to the legal qualification of the relevant conduct is seemingly today the most widely accepted, it is far from universally so.¹¹⁰ Secondly and more tellingly, applying the "nature" test, the argument is logically hoist on its own petard. The essence of the contention, namely that international law cannot possibly be taken to consider as inherently sovereign acts in violation of international law itself, is dependent on characterizing the impugned conduct as "the international wrong of X," rather than as simply "the act of X." The problem with this, however, is that—leaving aside international criminal prohibitions and those norms directed at international organizations and certain organized armed groups—only states can commit international wrongs.¹¹¹ And if only states can commit international wrongs, such acts must be inherently sovereign—that is, necessarily *jure imperii*. Conversely, if one characterizes the impugned conduct as simply "the act of X", the argument that it must be qualified as an act *jure gestionis* by mere virtue of its being a breach of international law falls away. In the final analysis, all this is no more than a complicated way of saying what national courts have long said in the context of breaches of international law generally and more recently in specific relation to torture, namely that the argument that state conduct in violation of international law cannot be an act *jure imperii*, and therefore cannot attract state immunity, mistakenly brings a normative approach to bear on what is intended to be a purely descriptive exercise.¹¹² In short, whether or not state conduct is

109. See *supra* Part II.

110. See, e.g., UN Convention on Jurisdictional Immunities, *supra* note 16, art. 2(2) ("In determining whether a contract or transaction is a 'commercial transaction' . . . reference should be made primarily to the nature of the contract or transaction, but its purpose should also be taken into account if the parties to the contract or transaction have so agreed, or if, in the practice of the State of the forum, that purpose is relevant to determining the noncommercial character of the contract or transaction.").

111. It may be that there is room for manoeuvre when it comes to those few international norms, such as the prohibition on genocide, which are directed not only at both states and individuals but also, as regards the latter, at both state functionaries and non-state actors. When it comes, however, to torture, the wording of Article 1 of the UN Convention Against Torture, *supra* note 31, rules any such possibility out. See *Jones*, 129 I.L.R. at 724 para. 19 (Lord Bingham); *id.* 743–44 paras. 79–85 (Lord Hoffman); see also *Zhang v Zemin* [2010] NSWCA 255, paras. 166–71 (Allsop P) (Austl. N.S.W. C.A.); *Zhang* [2008] NSWSC paras. 27–28; *Fang* [2007] NZAR paras. 52–60, 62–63.

112. In specific relation to torture, see *Zhang* [2010] NSWCA paras. 169, 171 (Allsop P), *Fang* [2007] NZAR paras. 38, 62–63, 72, *Jones*, 129 I.L.R. at 718–19 para. 12 (Lord Bingham) and *id.* at 742–44 paras. 72–85 (Lord Hoffman).

inherently sovereign, and therefore capable of attracting state immunity to the benefit of a defendant state in foreign civil proceedings, is separate from whether it is internationally lawful.¹¹³

The *jus cogens* argument is even weaker. While it seems no longer true that the status of a prohibition as a peremptory norm of general international law goes solely to the norm's applicability in the first place (*viz* to the question whether a state may derogate from such a norm) and not to the consequences of its breach,¹¹⁴ it remains the case that *jus cogens* has no necessary implications for the availability of a remedy for such breach in any chosen forum.¹¹⁵ This is not to deny, as the Italian Court of Cassation (*Corte di Cassazione*) in *Ferrini* thought relevant,¹¹⁶ that Article 41 of the ILC's Articles on Responsibility of States for Internationally Wrongful Acts provides that "[n]o State shall recognize as lawful," "nor render aid or assistance in maintaining," a situation created by a "serious breach of an obligation arising under a peremptory norm." But it takes an exceptionally adventurous court to read this as a mandate to deny state immunity in the sorts of civil claims at issue here, even leaving aside the question whether in each case the alleged international wrong represents "a gross or systematic failure by the responsible

113. In this regard, see also the dismissals in 2003 and 2004 respectively by the French Court of Cassation of claims for remuneration (rather than for compensation for injury suffered) brought against Germany by plaintiffs who had been used as slave labour in German territory during the Second World War after their arrest and transportation by the German authorities in occupied France. In *Bucheron v. Federal Republic of Germany*, Cour de cassation [Cass.] [supreme court for judicial matters] 1e civ., Dec. 16, 2003, Bull. civ. I, No. 258 (Fr.), the Court of Cassation upheld Germany's immunity from suit on the ground that consigning the plaintiff to forced labour in an enemy country was an *act jure imperii* by the German occupation authorities. Similarly, in *Gimenez-Esposito v. Federal Republic of Germany*, Cour de cassation [Cass.] [supreme court for civil and criminal matters] 1e civ., June 2, 2004, Bull. civ. I, No. 158 (Fr.), the Court upheld the immunity from proceedings accorded to Germany by the lower court on the basis that forcing deportees to work in enemy territory in aid of the war effort was an *act jure imperii* by the authorities of the Third Reich.

114. See, e.g., Responsibility of States for Internationally Wrongful Acts, G.A. Res. 56/83, Annex, arts. 27, 40–41, U.N. Doc. A/RES/56/83 (Dec. 12, 2001).

115. See, e.g., Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Rwanda), 2006 I.C.J. 6, 32 para. 64 (Feb. 3) ("The same applies to the relationship between peremptory norms of general international law (*jus cogens*) and the establishment of the Court's jurisdiction: the fact that a dispute relates to compliance with a norm having such a character, which is assuredly the case with regard to the prohibition of genocide, cannot of itself provide a basis for the jurisdiction of the Court to entertain that dispute."); see also *United States v. Tissino*, Corte di Cassazione [Cass.] [supreme court for civil and criminal matters], Feb. 25, 2009 (It.), translated in I.L.D.C. 1262 (IT 2009); *Zhang* [2008] NSWSC para. 36; *Jones*, 129 I.L.R. at 727 para. 24 (Lord Bingham).

116. See *Ferrini v. Federal Republic of Germany*, Corte di Cassazione [Cass.] [supreme court for civil and criminal matters], Mar. 11, 2004 (It.), translated in 128 I.L.R. 659, 669 para. 9; see also Andrea Bianchi, *International Decision: Ferrini v. Federal Republic of Germany*, 99 AM. J. INT'L L. 242, 247 (2005).

State to fulfil the obligation,” as Article 40 defines a “serious breach” of a peremptory norm. Quite simply, the acknowledgement of the merely procedural bar of state immunity, precluding as it does any consideration by the court of the merits, in no way constitutes a ruling that the impugned conduct is lawful.¹¹⁷ Nor in any real sense could it be characterized as a form of aid or assistance in the maintenance of the situation created by the defendant state’s alleged serious breach of *jus cogens*. In short, arguing from first principles, *jus cogens* ought to give little cause for hope to the opponents of state immunity in “human rights” cases.

That said, reasoning based on *jus cogens* was championed by a sizeable minority of the Grand Chamber of the ECtHR in *Al-Adsani*,¹¹⁸ proved persuasive, it would seem, to the Court of Cassation in *Ferrini v. Germany*,¹¹⁹ as not only affirmed but elaborated on by the same court in subsequent cases;¹²⁰ was accepted by the Greek Supreme Court (*Areios Pagos*) when upholding the decision of the Court of First Instance of Livadia in *Prefecture of Voiotia v. Germany*,¹²¹ and later by a sizeable minority of the Greek Special Supreme Court in *Margellos*,¹²² and formed the basis of Judge Wald’s dissent in the Court of Appeals for the D.C. Circuit in

117. See, e.g., *Jones*, 129 I.L.R. at 727 para. 24 (Lord Bingham); *id.* at 732 para. 44 (Lord Hoffman); see also Enzo Cannizzaro & Beatrice I. Bonafé, *Of Rights and Remedies: Sovereign Immunity and Fundamental Human Rights*, in FROM BILATERALISM TO COMMUNITY INTEREST: ESSAYS IN HONOUR OF JUDGE BRUNO SIMMA 825, 837 (Ulrich Fastenrath et al. eds., 2011).

118. See *Al-Adsani v. United Kingdom*, 123 I.L.R. 24, 49–51 (Eur. Ct. H.R. 2001) (Rozakis, Cafilisch, Wildhaber, Costa, Cabral Barreto & Vajic, JJ., dissenting); *id.* at 52 (Bravo, J., dissenting); *id.* at 52 (Loucaides, J., dissenting).

119. See *Ferrini*, 128 I.L.R. at 668–74 paras. 8.2–12 (especially at 668–69, paras 9–91). While the judgment refers consistently to ‘international crimes’, rather than to *jus cogens*, it characterizes the norms in question as ones ‘from which no derogation is permitted’ and which ‘prevail over all other conventional and customary norms’, and cites in this context articles 40 and 41 of the Articles on Responsibility of States, which relate to serious breaches of obligations arising under peremptory norms of general international law. Responsibility of States for Internationally Wrongful Acts, G.A. Res. 56/83 Annex, *supra* note 114, arts. 40, 41.

120. See *Federal Republic of Germany v. Mantelli*, Corte di Cassazione [Cass.] [supreme court for civil and criminal matters] May 29, 2008 (It.), translated in I.L.D.C. 1037, para. 11 (IT 2008); *Italy v. Milde*, Corte di Cassazione [Cass.] [supreme court for civil and criminal matters] Jan. 13, 2009 (It.), translated in I.L.D.C. 1224 (IT 2009), paras. 3–7; see also *Lozano v. Italy*, Corte di Cassazione [Cass.] [supreme court for civil and criminal matters] Jul. 24, 2008 (It.), translated in I.L.D.C. 1085 (IT 2008), para. 6 (referring to *jus cogens* in the criminal context, but expressly including civil liability in its analysis).

121. See *Prefecture of Voiotia v. Germany, Areios Pagos* [A.P.] [Supreme Court] 11/2000 (Greece), translated in 129 I.L.R. 513, 521.

122. See *Margellos v. Federal Republic of Germany*, Anotato Eidiko Dikastirio [A.E.D.] [Special Supreme Court] 6/2002 (Greece), translated in 129 I.L.R. 525, 535 (Rizos, Kroustalakis, Simopoulos, Prasos, & Gyftakis, JJ., dissenting).

Princz.¹²³ In this light, it is not out of the question that a court might accede to the proposition that a defendant state is not entitled to immunity from proceedings in respect of allegations of a breach of *jus cogens*. But the improbability of the latter's winning more than a marginal band of judicial followers on its merits is pointed to by its failure to convince the majority of the Grand Chamber in *Al-Adsani*, the majority of the First Section of the ECtHR in *Kalogeropoulou*, courts in the United Kingdom (*Jones*),¹²⁴ Germany (*Greek Citizens*),¹²⁵ Canada (*Bouzari*),¹²⁶ New Zealand (*Fang*, agreeing with dicta in *Jones*),¹²⁷ and Australia (*Zhang*, agreeing with dicta in *Jones*),¹²⁸ or the majority of the Special Supreme Court in Greece (*Margellos*)¹²⁹.

Moving away from arguments based on first principles,¹³⁰ it is sometimes asserted by the opponents of the grant of state immunity in civil actions against a foreign state in respect of alleged violations of international law leading to death or personal injury that the worldwide abrogation of immunity in such cases is historically inevitable. The Whiggish contention is that, just as—in recognition of its injustice to plaintiffs in certain circumstances—the absolute doctrine of state immunity gave way via an incremental and contested process to the restrictive doctrine, so too over time will an exception be carved out for “human rights” cases. The invitation to courts is not to resist the unstoppable, progressive tide of history. But the argument, which is doubtless seductive, has its weaknesses, and there is reason to suspect that it will not be uncritically embraced by more than a few. There are key differences between the shift from the absolute to the restrictive doctrine of state immunity and the

123. See *Princz v. Federal Republic of Germany*, 26 F.3d 1166, 1179–85 (D.C. Cir. 1992) (Wald, J., dissenting).

124. See *Jones v. Ministry of Interior of the Kingdom of Saudi Arabia*, 129 I.L.R. 629, 726–27 para. 24 (Lord Bingham) (H.L. 2006) (appeal taken from Eng.) (U.K.); *id.* at 732 paras. 42–45 (Lord Hoffman).

125. See *Greek Citizens v. Federal Republic of Germany (Distomo Massacre)* Bundesgerichtshof [BGH] [Federal Court of Justice] June 26, 2003 (Ger.), translated in 129 I.L.R. 556, 560 (2003).

126. See *Bouzari v. Islamic Republic of Iran*, 128 I.L.R. 586, 604–06 paras. 84–95 (Can. Ont. C.A. 2004); *Bouzari v. Islamic Republic of Iran*, 124 I.L.R. 427, 443–46 paras. 63–73 (Can. Ont. Sup. Ct. J. 2002).

127. See *Fang v Jiang* [2007] NZAR 420 (HC) paras. 33, 34, 51, 60, 62–63, 72 (N.Z.).

128. See *Zhang v Zemin (NSW)* [2008] NSWSC 1296, para. 36 (Austl.).

129. See *Margellos v. Federal Republic of Germany*, Anotato Eidiko Dikastirio [A.E.D.] [Special Supreme Court] 6/2002 (Greece), translated in 129 I.L.R. 525, 532 para. 14 (2002).

130. Note that the third formal argument commonly mustered in support of attempts to deny state immunity in cases of interest to this Article, namely the purely empirical proposition that states recognize an exception to state immunity in respect of such cases, stands or falls (and currently falls) on a straightforward survey of the relevant state practice and *opinio juris*. It is not an argument from first principles.

suggested evolution of an exception to state immunity in respect of alleged violations by the defendant state of some rule of international law conducive to the humane treatment of individuals.¹³¹

For a start, the move from absolute to restrictive immunity was motivated, and eventually rendered compelling to courts (and, where relevant, legislatures), by pressing commercial considerations.¹³² And the sad, scandalous fact is that money will often speak much louder than considerations of human dignity.¹³³

Secondly, the change from absolute to restrictive immunity was possible without undermining the logic of the sovereign equality of states, the principle underpinning the doctrine of state immunity in both its forms. It remains the case under restrictive state immunity that sovereignty (inhering in the defendant state) cannot be made subject to sovereignty (inhering in the forum state, as manifest in the coercive authority of its courts). It is simply that the touchstone of the first sovereignty is no longer the mere identity of the defendant as a foreign state but is also, more narrowly, the inherently sovereign character of the acts of that state which are sought to be impugned. The recognition of an exception to state immunity, on the other hand, in respect of alleged violations of relevant norms of international law cuts across the logic of the sovereign equality of states by saying that even acts by a foreign state of an inherently sovereign character can be denied immunity in the courts of the forum state. Such a proposition is not, it should be made clear, unprecedented or *per se* intolerable: the exception to state immunity recognized in respect of torts committed by a foreign state in the territory of the forum state amounts to just such a statement.¹³⁴ But the justification for the territorial tort exception derives from the undisputed sovereign interest of the forum state in the regulation of natural and legal persons within its territory. The conduct in the "human rights" cases at issue here takes place, in contrast, on the territory of the defendant state or a third state.

Lastly, civil actions under the exceptions to state immunity developed in accordance with the restrictive doctrine, involving as

131. Compare FOX, STATE IMMUNITY, *supra* note 16, at 746–47; with note 132 and accompanying text.

132. See, e.g., Letter from Jack B. Tate, Acting Legal Adviser, Dep't of State, to Philip B. Perlman, Acting Att'y Gen., Dep't of Justice (May 19, 1952), in 26 DEP'T ST. BULL. 984 (1952); see also Claim Against the Empire of Iran, Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Apr. 30, 1963 (Ger.), translated in 45 I.L.R. 57, 61 (1963); ANDREW DICKINSON ET AL., STATE IMMUNITY: SELECTED MATERIALS AND COMMENTARY 331 ¶ 4.002 (2004) (noting that financial interests played a part in the passing of the State Immunity Act of 1978); FOX, STATE IMMUNITY, *supra* note 16, at 217–18.

133. Cf. Richard Garnett, *The Defence of State Immunity for Acts of Torture*, 18 AUSTL. Y.B. INT'L L. 97, 124 (1997).

134. See *supra* note 38.

they do no more than alleged breaches of contract, alleged torts, alleged breaches of employment law, property claims, and so on, generally call for the application of only the domestic law of the forum state or, depending on the applicable rules of private international law, of another state.¹³⁵ Claims founded on the alleged violation of international law by the defendant state, on the other hand, even when pleaded as garden-variety torts, require a domestic court to stand in judgment of the international lawfulness of the actions of a foreign state.¹³⁶ Even in jurisdictions where this is not formally precluded by the act of state doctrine or some comparable domestic law principle of nonjusticiability, it is often the case that national courts are reluctant to adjudge matters of public international law and to call into question the legality of the acts of foreign states, especially when this has the potential to impinge on the forum state's international relations.

In the final analysis, then, while none of this is to say that no court, where the possibility is formally open to it, will be swayed by perceptions of the historical inevitability of the development of an exception to state immunity in "human rights" cases, it is improbable that the argument will prove irresistible to a majority—and all the more so given the abject want of state practice to suggest such a trend.

Nor is the argument that the violation by a foreign state of some relevant rule of international law requires the forum state to go out on an international legal limb, and perhaps risk its friendly relations with the defendant state, an intuitive one. Even less intuitive is the specific contention that the refusal by the courts of the forum state to lift state immunity in appropriate cases amounts to a violation by that state of its own international human rights obligations. In short, it is likely that few national courts will consider it self-evidently incumbent on them to stick their necks out. Indeed, some of them may not take kindly to the suggestion that the refusal to do so amounts to a violation by the forum state of the plaintiff's human rights.

135. Note, however, the exception to state immunity recognized in the Foreign Sovereign Immunities Act, 28 U.S.C. § 1605(a)(3) (2006), in respect of proceedings

in which rights in property taken in violation of international law are in issue and that property or any property exchanged for such property is present in the United States in connection with a commercial activity carried on in the United States by the foreign state; or that property or any property exchanged for such property is owned or operated by an agency or instrumentality of the foreign state and that agency or instrumentality is engaged in a commercial activity in the United States.

Id.

136. *Cf.* Garnett, *supra* note 133, at 124.

It is true that a powerfully emotive countervailing policy consideration in the sort of cases at issue here is the likely inability of the plaintiff to obtain satisfactory redress in the courts of the defendant state or even at the international level. Judges are not heartless, and they take no pleasure in dismissing cases which are compelling from the point of view of basic humanity. But most tend also to be conscious of the fact that a judicial forum is no guarantor of a happy ending and that, as tragic as it may be, many morally deserving cases are lost.

(e) *Jurisdictional Immunities of the State* (Germany v. Italy: Greece Intervening)

The final nail in the coffin of attempts to circumvent state immunity in domestic civil proceedings for death or personal injury alleged to be caused by the defendant state in breach of some norm, perhaps peremptory, of international law relative to the humane treatment of individuals may well prove to be the case of *Jurisdictional Immunities of the State*, brought by Germany against Italy in the ICJ and currently in progress. The proceedings relate to several rulings in the Italian courts, starting with *Ferrini*, to the effect that Germany may not rely on state immunity as a bar to actions for damages in respect of undisputed German violations of international humanitarian law during the Second World War. Germany's argument is that, through these rulings, Italy incurs international responsibility for the unlawful denial to Germany of state immunity in respect of acts *jure imperii*.¹³⁷ The case is complicated by the fact that most of the acts impugned in the relevant national proceedings were committed, on the one hand, on Italian territory but, on the other, by the German armed forces in, what is more, the course of armed conflict. The case is nonetheless likely to oblige the ICJ to confront the international lawfulness of the denial of state immunity by the forum state to the defendant state in cases implicating breaches by the latter, whether alleged or uncontested, of international humanitarian law and the like.

Even leaving aside speculative influences such as the national backgrounds of most of the judges in states unlikely to favor "human rights" cases in foreign courts, it is extremely hard to picture a majority of the Court backing—in the absence of consistent and representative state practice and *opinio juris* (not to mention logically cogent arguments) in support of the proposition, and given the potential of such a decision to lead to antagonism between states—a

137. *Jurisdictional Immunities of the State* (Ger. v. It.), Application Instituting Proceedings, at 4, 17–18 paras. 13–14 (Dec. 23, 2008), <http://www.icj-cij.org/docket/files/143/14923.pdf>.

customary international rule to the effect that state immunity is unavailable as a bar to domestic civil proceedings alleging the violation by the defendant foreign state of rules, even those of a preemptory character, of international law. And were the ICJ, as is not unlikely, to come down categorically against such a rule, even if only in terms of customary international law “as it presently stands” and subject to an impassioned dissent by Judge Cançado Trindade, the chances that future national courts (or legislatures) would reopen the matter are close to zero.

Indeed, it may be that the proceedings initiated by Germany and foreshadowed for some time beforehand are already have a chilling effect on judicial adventurism in this regard, at least in the Italian courts. In its preliminary order on jurisdiction of February 25, 2009 in *United States v. Tissino*, the Court of Cassation—although easily distinguishing *Ferrini* (which it affirmed) on the facts, with the consequence that no in-depth discussion of the case was necessary¹³⁸—went to surprising and almost masochistic lengths to detail the national and ECtHR case law contrary to its own jurisprudence and to highlight, by reference to “more than one decision,” including “among others” *Arrest Warrant of 11 April 2000* and *Armed Activities on the Territory of the Congo (New Application: 2002)*, how the ICJ had excluded the possibility “that a violation of *jus cogens* might be sufficient to grant jurisdiction over a State.”¹³⁹

2. Obstacles to the Legislative Abrogation of Immunity from Proceedings

The considerations outlined above (with the exception of the current statutory embodiment of state immunity in many jurisdictions) are likely also to militate against the unilateral passage of national legislation to deny state immunity in the type of case at issue here. Indeed, it is distinctly arguable that national governments, with their more direct interest in the conduct of the state’s international relations, are even less likely than national courts to blaze a trail on this front. It is no secret, for example, that the Italian government is nonplussed by the Court of Cassation’s decisions in *Ferrini* and subsequent cases.¹⁴⁰ Additionally, just as

138. See *United States v. Tissino*, Cass., sez. un., 25 febbraio 2009, n. 4461 (It.), translated in I.L.D.C. 1262, para. 20 (2009).

139. See *id.* paras. 17–19 (quote at para. 19 (author’s translation)).

140. See for example the view expressed by the Italian government in the joint declaration issued in Trieste on November 18, 2008 at the conclusion of German–Italian governmental consultations on the matter quoted in *Jurisdictional Immunities of the State* (Ger. v. It.), Application Instituting Proceedings, *supra* note 137, at 4 n.2. (noting in relevant part: “Italy respects Germany’s decision to have recourse to the International Court of Justice for a pronouncement on the principle of State immunity.

formerly with the unilateral statutory denial of state and other internationally mandated immunities in Belgian criminal cases involving international crimes, other governments will certainly take note of where the unilateral denial of state immunity in civil cases of the present sort ends up, namely under the diplomatic hammer and in the ICJ. In short, we are unlikely to see Belgium's civil counterpart any time soon.¹⁴¹ This being so, there is little point in pressing governments to legislate to abrogate state immunity in "human rights" cases.

The most sensible and desirable way for governments to proceed in the event that they were minded to abrogate state immunity in civil claims in respect of death or personal injury allegedly occasioned by the defendant state's violation of relevant international law would be to conclude a multilateral international agreement on the matter, maybe in the form of an optional protocol to the UN Convention on Jurisdictional Immunities of States and Their Property.¹⁴² But the idea is a pie in the sky. The perhaps unpalatable truth is that the great majority of states were content with the *status quo* before the rise of "human rights" claims in national courts against foreign states. The grant of state immunity in cases of this sort before their own courts avoids unwanted diplomatic discomfort, while the recognition of the same in foreign courts stands surety for their interests as potential defendants. (It is little wonder, for example, that Germany is suing Italy in the ICJ, given the estimated 250 civil actions in respect of the Second World War pending against it in twenty-four regional *Tribunali* and two appellate courts in Italy at the date of institution of proceedings.)¹⁴³ This being so, even if any government were to prove responsive to encouragement to conclude a

. . . [I]t considers that a pronouncement by the International Court on State immunity will be useful in clarifying a complex question." (author's translation).

141. It is true that the United States, which was so opposed to Belgium's abrogation of state immunity in the context of international crimes, passed statutes that dispensed in a limited range of civil claims with the immunity from proceedings otherwise owed to those foreign states designated as state sponsors of terrorism. See 28 U.S.C. § 1605(a)(7) (2006) (current version at 28 U.S.C. § 1605A (2008)). But U.S. international legal exceptionalism is precisely that.

142. See, e.g., Hall, *supra* note 6; McGregor, *supra* note 6, at 445.

143. Jurisdictional Immunities of the State (Ger. v. It.), Application Instituting Proceedings, *supra* note 137, at 16 para. 12. The paragraph continues:

It stands to reason that Germany is thus involved in a continual confrontation which requires a huge amount of financial and intellectual expenditure. A special task force of lawyers had to be set up to follow the developments with their manifold ramifications. Having to observe the judicial practice of the Italian judges in the relevant cases, and to respond to it in an appropriate manner, has grown into a serious stumbling block adversely affecting the bilateral relationships between the two nations.

Id.

multilateral agreement to the effect contemplated here, and even were it to find other, like-minded governments with which to conclude it, the resulting agreement would be next-to-useless and, indeed, a potential source of diplomatic ruction, given both the extreme unlikelihood of the participation in it of states most likely to be defendants to the sorts of foreign proceedings in question and the *pacta tertiis* rule of the law of treaties.¹⁴⁴

3. Obstacles to Redress Even Absent Immunity from Proceedings

Last but not least, it must always be borne in mind that the availability to the defendant state of immunity from proceedings is only the first hurdle faced by a plaintiff in a civil action in respect of death or personal injury allegedly resulting from a foreign state's breach of international law. Even in the event that the defendant state's immunity from proceedings is sidestepped, there remains a host of challenges, at least some of which threaten to render the circumvention a hollow victory.

To begin with, and even leaving aside problems of proof and questions of domestic and international law going to the merits, there exist further obstacles to securing a favorable judgment. In most, if not all jurisdictions, there will be issues of private international law, such as the court's underlying jurisdiction over extraterritorial conduct, the doctrine of *forum non conveniens* and the possible application of the *lex loci delicti commissi*. In addition, in jurisdictions such as the United States, the United Kingdom, Australia, and others, the act of state doctrine and cognate principles of non-justiciability may prevent the court from adjudicating on the impugned acts of the foreign state, although relevant exceptions may apply in certain places and cases.

144. Note, in this connection, that the formulation of the *pacta tertiis* rule articulated in Article 34 of the Vienna Convention on the Law of Treaties is an inadequate reflection of customary international law. It is not just that a treaty may not create obligations or rights for third states without their consent. Vienna Convention on the Law of Treaties art. 34, May 23, 1969, 1155 U.N.T.S. 331 (entered into force Jan. 30, 1980). It is also the case that a treaty cannot infringe the legal rights of third states. See, e.g., *Island of Palmas* (Neth./U.S.), 2 R.I.A.A. 829, 842 (1928); para. (2) of the commentary to draft art. 30 of the ILC's Draft Articles on the Law of Treaties, Rep. of the Int'l Law Comm'n, 18th Sess., May 4–July 19, 1966, U.N. Doc. A/6309/Rev.1 (1966), reprinted in [1966] 2 Y.B. Int'l L. Comm'n 226, U.N. Doc. A/CN.4/SER.A/1966 ("nor modify in any way their legal rights without their consent"); ARNOLD DUNCAN MCNAIR, *THE LAW OF TREATIES* 321 (1961). What this means is that a state party to any treaty provision which provides for an exception to state immunity in a manner not in accordance with customary international law may not, consistently with international law, apply that exception to a state not party to the treaty.

Secondly, even where the plaintiff obtains a favorable judgment, there remains the very real difficulty of enforcing it, whether in the forum state or another state.

In terms of enforcement against assets of the defendant state within the forum state, there is the pitfall posed by the fact that, under the restrictive doctrine of state immunity, immunity from proceedings and immunity from post-judgment measures of constraint (*viz* execution and attachment in aid of execution) do not march side by side.¹⁴⁵ Rather, as a general rule, any property of a foreign state within the forum state's territory which is not used for commercial purposes will be immune from such post-judgment measures, regardless of whether the judgment was obtained in proceedings from which the defendant state was not entitled to immunity.¹⁴⁶ The chequered history of attempts in the United States, to enforce judgments obtained against designated state sponsors of terrorism—which by virtue of legislation do not enjoy immunity from proceedings in U.S. courts as regards claims for damages in respect of death or personal injury caused to certain classes of plaintiffs by certain acts¹⁴⁷—speaks to the challenges that this limitation on enforcement throws up.¹⁴⁸ Attempts to enforce judgments obtained in the Italian courts in relation to German violations of international humanitarian law during the Second World War provide a similar object lesson. Germany, in addition to its grievances over the denial of immunity from proceedings, is currently suing Italy in the ICJ for the imposition by the Italian judicial authorities of post-judgment measures of constraint on a German-Italian cultural center in

145. See generally BROWNLIE, *supra* note 16, at 342–43; FOX, STATE IMMUNITY, *supra* note 16, at 8, 34–35, 599–662; Stoll, *supra* note 16, paras 49–76.

146. Note that the situation is different in certain jurisdictions when it comes to enforcement against the property of what are known as separate entities or agencies and instrumentalities of a state. But this is unlikely, by and large, to be of great use to judgment creditors on the facts of the sorts of cases under discussion here.

147. 28 U.S.C. §§ 1605A, 1610(a)(7) (2006).

148. Although, by way of 28 U.S.C. § 1610(a)(7), Congress has provided an exception in relation to judgments obtained pursuant to 28 U.S.C. § 1605(a)(7) (current version at 28 U.S.C. § 1605A (2006)) to the immunity from post-judgment measures of constraint from which property in the United States belonging to designated state sponsors of terrorism would otherwise benefit, regardless of whether the property is or was involved in the act on which the claim is based, this exception applies only if, in accordance with the chapeau to 28 U.S.C. § 1610(a) (2006), the property is used for commercial activity in the United States. See ELSEA, *supra* note 89 (summarizing a complicated history of attempts to enforce judgments obtained by virtue of the “state sponsor of terrorism” exception to state immunity). Note that 28 U.S.C. § 1611(b) (2006) exempts from 28 U.S.C. § 1610's exceptions to immunity from post-judgment measures of constraint any property of a foreign central bank or monetary authority held for its own account (except where this immunity has been waived) and certain military-related property.

Italy.¹⁴⁹ Against this backdrop, one might add, it seems unlikely in the extreme that the government of any state would pass legislation to abrogate immunity from post-judgment measures of constraint in “human rights” cases.

When it comes to assets of the defendant state held in the territory of the defendant state or a third state, there is the problem of the necessary reliance for the enforcement of any favorable judgment on the courts of that other state. Those courts may simply refuse to give effect to a foreign judgment obtained in what they view to be violation of the applicable international rules on state immunity. The German *Bundesgerichtshof* did precisely this in *Greek Citizens* in relation to the judgment of the Livadia court in the *Distomo Massacre* case.¹⁵⁰

B. *Misdirected in Terms of Fairness*

The current strategic focus on state immunity on the part of advocates for redress for those killed or physically injured through international wrongs by states is misdirected as a matter of basic fairness.

At present, victim’s advocates place the onus to afford a remedy for an alleged international wrong on the courts of a state which played no part in that wrong and, indeed, which risks an international wrong by denying immunity from proceedings to the defendant state. In cases framed around the international human right of access to a court, the legal contention is even that it would be internationally wrongful for the forum state to accord such immunity. In the activist and occasionally the academic discourse, the idea that the courts of the forum state should act in a manner which, according to the orthodox positivist view, is actually required of that state by

149. See *Jurisdictional Immunities of the State* (Ger. v. It.), Application Instituting Proceedings, *supra* note 137, at 1 para. 11. As for the Greek proceedings in the *Distomo Massacre* case, it will be recalled that the Greek Minister of Justice refused to enforce the first-instance judgment of the Livadia court even when this was upheld by the Greek Supreme Court, believing it to have been obtained in violation of the international rules on immunity from proceedings. His refusal was eventually upheld by the European Court of Human Rights in *Kalogeropoulou* as consonant with Article 6(1) of the Convention for the Protection of Human Rights. ECHR, *supra* note 12, art. 6(1); *Kalogeropoulou v. Greece*, 129 I.L.R. 537 (Eur. Ct. H.R. 2002). On a different but related note, for the argument in the ECHR context that treating immunity from proceedings as contrary to Article 6(1) would necessitate treating immunity from enforcement the same way (thereby surmounting the problem of enforcement highlighted above), see *Al-Adsani v. United Kingdom*, 123 I.L.R. 24, 46–48 (Eur. Ct. H.R. 2001) (Pellonpää & Bratza, JJ., concurring) (warning on this account against ruling that immunity from proceedings was incompatible with Article 6(1)).

150. See *Greek Citizens v. Federal Republic of Germany* (*Distomo Massacre*), *Bundesgerichtshof* [BGH] [Federal Court of Justice] June 26, 2003 (Ger.), *translated in* 129 I.L.R. 556.

international law, *viz* to grant immunity from proceedings, is treated as faintly scandalous. The same goes, *mutatis mutandis*, for the less frequent calls on governments to legislate to abrogate state immunity in "human rights" cases.

But this legal strategy and discourse have their bad guys, so to speak, confused. The chief villain of the piece in such cases—in the event, that is, that the victim's allegations are well founded—is the state which kills or physically injures the victim in the first place through its violation of international human rights law or international humanitarian law or the like and which then denies the victim or next-of-kin redress, whether by way of *ex gratia* compensation or judicial remedy.¹⁵¹ To the extent that the government of the victim's state of nationality, which in many but not all cases will be the forum state, has refused without good cause to make genuine and sufficient diplomatic representations on behalf of the victim with a view to securing redress from the responsible state, that government is also worthy of condemnation. It is towards these parties alone and only for these reasons that any legal strategy for redress in "human rights" cases and any moral opprobrium ought to be directed. It is unfair to lay the blame at the feet of the forum state's courts, and it is unfair to blame that state's government for not statutorily abrogating the defendant state's immunity from domestic civil proceedings in respect of such cases. As either course of action seriously risks breaching international law, neither can seriously be considered within the forum state's discretion. Even more skewed is the suggestion that the grant of state immunity by the forum state could constitute a breach by that state of international human rights law.

Being topsy-turvy in terms of fairness, such arguments lack the attractive rhetorical quality of intuitiveness. Indeed, the idea that the forum state should be blamed for a violation of human rights is positively counterintuitive. In turn, the arguments' lack of intuitive quality makes it more difficult to mobilize a broad-based consensus around them. From the point of view of wider civil society, including bar associations and the like, it is hard to get angry about a court or government's reluctance to risk violating its international legal obligations. From the point of view of those courts and governments, the moral, political, and attempted legal coercion to do so breeds antagonism towards campaigners for redress for victims.

Conversely, few would deny that it is morally incumbent on a state which is plausibly alleged to have killed or injured an individual

151. It should be stressed that the atypical case of the responsibility of the Federal Republic of Germany for the atrocities of the Third Reich, the subject over the years of international agreements and state-to-state payments, is a much more complicated matter from the point of view of fairness.

in breach of international law to submit the matter in good faith, in the event that it disputes the allegations, to some form of adjudication. Nor would there be much sympathy these days for the suggestion that a state whose nationals plausibly allege death or personal injury at the hands of another state in violation of some international rule on the humane treatment of individuals is morally at total liberty to refuse, for no persuasive reason, to make, in the first instance, bona fide diplomatic representations on behalf of those nationals to that other state with a view to securing adequate redress for the former and, failing a satisfactory response to these representations, perhaps even formally to espouse their nationals' claim at international law. In both instances, the matter is one over which the relevant state has complete discretion as a matter of public international law. That is, neither course of action could possibly be considered internationally wrongful. The only stumbling block is the necessary domestic political will. And it is on the lack of the necessary political will in relevant cases that any campaign for redress for the victims of violations of international law by foreign states should focus. In other words, it is on the aforementioned links in the chain of governmental decision making which comprise the factual background to any "human rights" case—namely the refusal of the allegedly responsible state to afford victims or their next-of-kin the possibility of a remedy and the refusal of the victim's state of nationality to take up their case with the allegedly responsible state, initially diplomatically and maybe ultimately by bringing an international claim on their behalf—that moral and political condemnation and, where possible, legal pressure should and might more persuasively, because more intuitively and sensibly, be brought to bear.

C. Misdirected in Terms of Ultimate Policy Objectives

Even were they to succeed in the fullest sense in individual cases, civil actions against foreign states in respect of internationally unlawful ill-treatment could only be a band-aid solution to the problem of civil impunity for violations of international rules on the humane treatment of individuals. Redress obtained through the courts of a state not party to the violation does nothing to foster the rule of law in the responsible state, contempt for which is what by and large leads in the first place to the violation in question and to the denial of local remedies for death or personal injury occasioned by it. Nor does the securing of such redress challenge what is often the culpable pusillanimity of the government of the victim's state of nationality, which, for commercial or other strategic reasons, may be unwilling to "offend" the putatively responsible state by pursuing with it credible allegations of torture, extrajudicial killing, arbitrary detention, or the like. Indeed, the judicial award of compensation in

the courts of states not involved in such violations, even where those states may be the states of nationality of the victims, lets the culprits off the hook, making it in practice unnecessary for the responsible state (especially when the relevant judgments are unenforceable) to reform its administration of justice to comply with international standards, and relieving the pressure on the government of the state of nationality to stand up for its citizens and for the global rule of international law. To this extent, the sorts of cases under discussion here can be criticized as defeatist and unwittingly compliant in the unacceptable *status quo*, forsaking what should be the ultimate policy objectives of those working towards the universal embrace of humane values for what is, at best, short-term gain.

Of course, this is all very easy to say when one has never been tortured. Individual victims and their advisors can hardly be criticized for taking what they can get. But the point here is that, on the whole, they cannot get even this. The promise of short-term gain through the denial of state immunity in "human rights" cases remains largely unfulfilled, and promises to remain so. In this light, the strategy of targeting state immunity in such cases looks even more unwise.

IV. SHIFTING THE STRATEGIC FOCUS

Given the likely futility of "human rights" claims of the above sort, as well as their skewed sense of where the blame rightly lies and their counterproductivity in the grand scheme of things, it is submitted that efforts to secure redress for the victims of ill-treatment abroad in breach of international law should be directed away from attacking the grant of state immunity by forum states' courts towards targeting both the failure of allegedly responsible states to afford victims the opportunity for a remedy and the failure of victims' states of nationality to do enough to defend their nationals' interests.¹⁵²

Turning first to action directed towards the state of nationality of the victim, which of the two possible target states is probably the more likely to yield results, pressure should be exerted on that state's government initially to provide conscientious consular assistance, where requested, to the victim's efforts to secure such effective local remedies as may be available, especially by helping to navigate the

152. As stated *supra*, much of what is suggested here chimes with campaigns already undertaken by some interested pressure groups. For example, regarding the conduct and policies of the United Kingdom in the areas of consular and diplomatic protection, see REDRESS, IMMUNITY V. ACCOUNTABILITY, *supra* note 7 and REDRESS, PROTECTION OF BRITISH NATIONALS, *supra* note 7.

rocky shoals of civil litigation in the foreign state. Next, as may prove necessary in the not unlikely event that effective local remedies prove unavailable, the government of the victim's state of nationality should be put under concerted pressure to make *bona fide* and strenuous diplomatic efforts to encourage the state against which *prima facie* reasonable allegations of internationally unlawful ill-treatment are made to engage seriously with the need to concede responsibility and provide reparation, whether *ex gratia* or through its domestic courts, or, if it contests the allegations, to submit them to some form of adjudication, be it in its own courts or in an appropriate international forum. Failing a satisfactory response on the part of the allegedly responsible state, the victim's national government should be pressured to present the former with an international legal claim in diplomatic protection. Such pressure might be case-specific, but it might also take the form of a prominent public campaign to highlight the scandal of a government's frequent refusal (perhaps constructive) to make sincere and thorough diplomatic representations on behalf of nationals injured in specific states.¹⁵³ It is, of course, axiomatic that public international law recognizes no obligation on the part of a state to espouse its nationals' claims on the international plane,¹⁵⁴ with the result that one potential rhetorical angle is denied to victims and their supporters. At the same time, for what it is worth (which in formal terms is admittedly little), Article 19(a) and (b) respectively of the ILC's Articles on Diplomatic Protection provide that a state entitled to do so should "[g]ive due consideration to the possibility of exercising diplomatic protection, especially when a significant injury has occurred," and should "[t]ake into account, wherever feasible, the views of injured persons with regard to resort to diplomatic protection and the reparation to be sought."¹⁵⁵ Linked to such a campaign, even if not necessarily in the courts of all states, might be formal legal action at the domestic level with a view to challenging the government's inaction on behalf of nationals allegedly injured at the hands of a foreign state. In the English courts, a relevant chink in the armor of the separation of powers was prised open in the case of *Abbasi*, where the Court of Appeal—while maintaining, in line with international and established domestic law, that the UK government was not obliged as a matter of domestic law to intervene

153. A paradigm case is the extreme reluctance of successive UK governments adequately to represent the interests of injured UK nationals *vis-à-vis* Saudi Arabia.

154. See, e.g., *Barcelona Traction, Light and Power Company, Limited (Belg. v. Spain)*, 1970 I.C.J. 3, 44 para. 78 (Feb. 5); see also para. (2) of the ILC's commentary to what became art. 2 of its Articles on Diplomatic Protection, Rep. of the Int'l Law Comm'n, 58th Sess., May 1–June 9, July 3–Aug. 11, 2006, U.N. Doc. A/61/10; GAOR, 61st Sess., Supp. No. 10 (2006).

155. Diplomatic Protection, G.A. Res. 62/67, Annex, art. 19(a)–(b), U.N. Doc A/RES/62/67 (Dec. 6, 2007).

diplomatically, let alone by way of a formal claim in diplomatic protection, on behalf of a national alleging injury abroad at the hands of another state—held that the government was at least obliged to consider making representations.¹⁵⁶ The same has since been held to be the case in South Africa by the Constitutional Court.¹⁵⁷

Perhaps more promising as regards certain states of nationality might be a public campaign focusing on the chariness of the government's formal policy for espousing the claims of its nationals at the international level. It may be that a government can be shamed into amending its policy to circumscribe its discretion, at least to a reasonable degree, in "human rights" cases. Where no policy of this sort exists, a government may at the very least prove amenable to arguments that some such document would be desirable in the interests of transparency. The drafting of a formal policy would in turn represent an opportune moment for public and private lobbying with a view to improving prospects for diplomatic intervention in support of nationals killed or physically injured by foreign states in violation of international law.

As for action directed towards what would otherwise be the defendant states to "human rights" claims in other states, there are two planks to any sensible campaign for redress in cases of death or personal injury in breach of international law. Both, however, go towards the same uncomplicated moral and political argument, namely that it is incumbent upon any state which contests plausible allegations against it of internationally unlawful ill-treatment to respond in good faith to the allegations. And despite begging the question to an extent,¹⁵⁸ the principle that every state is obliged to afford individuals a remedy for any violation by it of their internationally guaranteed human rights¹⁵⁹ (an obligation reiterated in the specific context of torture in Article 14 of the UN Convention Against Torture)¹⁶⁰ and the more general international legal axiom that every international wrong entails the obligation to make

156. See *Abassi v. Sec'y of State for Foreign & Commonwealth Affairs*, 126 I.L.R. 685, 718–25 paras. 80–106 (EWCA (Civ) 2002) (U.K.). The unstated upshot is that any decision not to make such representations would itself be liable to judicial review on the usual grounds of rationality and legitimate expectation.

157. See *Kaunda v. President of the Republic of South Africa*, 136 I.L.R. 452, 473–77 paras. 67–81 (CC S. Afr. 2004).

158. By this is meant that both are predicated on the assumption that the defendant state has committed an international wrong, whereas the whole point of any adjudication to which it is hoped the defendant state will submit is to establish whether the latter has committed an international wrong.

159. See ACHR, *supra* note 13, art. 25; International Covenant on Civil and Political Rights, *supra* note 9, art. 2(3); ECHR, *supra* note 12, art. 13.

160. See UN Convention Against Torture, *supra* note 31, art. 14.

reparation for injury caused thereby¹⁶¹ are appealingly uncomplicated rhetorical vehicles for the deployment of suasion and even outrage in this connection.

First, before or after any invocation of state immunity to fend off a “human rights” case in a foreign court, pressure should obviously be brought to bear on the putatively responsible state either to afford some domestic forum or to submit to some international means of binding dispute settlement for the adjudication of the legal and factual allegations against it, waiving, in the latter case, the procedural precondition of exhaustion of local remedies.¹⁶² The provision of alternative means of possible redress—alternative, that is, to “human rights” litigation in a foreign court—might usefully be explicitly and relentlessly portrayed, both to the state in question and more widely, as the quid pro quo for the availability of immunity from foreign judicial proceedings and measures of constraint in such cases. In this regard, an eye-catching standard under which to mobilize support might be the words of the ICJ in *Certain Matters of Mutual Assistance in Criminal Matters*, where the Court declared unambiguously that “the State notifying a foreign court that judicial process should not proceed, for reasons of immunity, against its State organs, is assuming responsibility for any internationally wrongful act in issue committed by such organs.”¹⁶³ Broadening the focus from specific cases to the more general unavailability in a given state of judicial or even quasi-judicial remedies for injury caused in breach of international law by that state’s public authorities, the same argument might be invoked to crystallize a consensus around a campaign for the repeal or amendment of any domestic laws that operate, either procedurally or substantively, to shield from private litigation the government or servants of that government. Examples include laws providing for civil amnesty for domestic public authorities, for unreasonably short limitation periods for the initiation of civil actions against such authorities or for the immunity of such authorities from suit *tout court*, as well as legal doctrines in accordance with which domestic public authorities are formally incapable of the commission of civil wrongs in the first place. Equally, the above argument could be relied on to muster support for the state’s acceptance of the right of individual communication (or, as the terminological case may be, petition or complaint) to any relevant international human rights organ—in the event, that is, that the

161. See Responsibility of States for Internationally Wrongful Acts, G.A. Res. 56/83, Annex, *supra* note 114, art. 31 (as consonant with customary international law).

162. See Diplomatic Protection, G.A. Res. 62/67, Annex, *supra* note 155, art. 15(e). (same).

163. *Certain Matters of Mutual Assistance in Criminal Matters (Djibouti v. Fr.)*, 2008 I.C.J. 177, 244 para. 196 (June 4).

state is even party to the international human rights instrument(s) in question. As specifically regards local judicial remedies and international arbitration, it might also pay to emphasize to potential defendant states that the provision of avenues for these can bar at least some “human rights” litigation in the U.S. courts.¹⁶⁴

In the event, *faute de mieux*, of the bringing of a “human rights” claim in the courts of another state, the moral and political argument ought to be aimed at shaming the defendant state—to the extent that it has not otherwise afforded the victim or victims a reasonable opportunity for redress—into waiving the state immunity, both from proceedings and execution, to which it would otherwise be entitled in respect of inherently sovereign acts.¹⁶⁵ While, needless to say, any such state would be perfectly entitled as a matter of both international and domestic law to insist on its immunity, the scandal of its doing so, insofar as it may not have otherwise provided an adequate forum for redress, is worth publicly playing up. One tactic for turning up the heat on such states might be by rhetorical analogy with a provision common to many conventions on the privileges and immunities of international organizations, including the privileges and immunities of the representatives of member states to those organizations, the archetype of which is Article IV, Section 14 of the Convention on the Privileges and Immunities of the United Nations,¹⁶⁶ which reads as follows:

Privileges and immunities are accorded to the representatives of Members not for the personal benefit of the individuals themselves, but in order to safeguard the independent exercise of their functions in connection with the United Nations. Consequently a Member not only has the right but is under a duty to waive the immunity of its representative in any case where in the opinion of the Member the immunity would impede the course of justice, and it can be waived without prejudice to the purpose for which the immunity is accorded.

Where a defendant state to a “human rights” claim in the courts of another state has denied reasonable opportunity for redress to those alleging death or personal injury as a result of its violation of international law, it is certainly arguable, and attractively so, that the defendant state’s insistence on state immunity as a bar to the proceedings “would impede the course of justice,” making it at least

164. As regards local remedies and civil actions under the Aliens Tort Claims Act, see for example, the majority view in *Sarei v. Rio Tinto, PLC*, 550 F.3d 822 (9th Cir. 2008) (en banc). See also Torture Victims Protection Act of 1991, §2(b), 28 U.S.C. § 1350 note (2006). As for international arbitration, see 28 U.S.C. § 1605A(a)(2)(A)(iii) (2006).

165. See UN Convention on Jurisdictional Immunities, *supra* note 16, arts. 7, 19(a)–(b).

166. Convention on the Privileges and Immunities of the United Nations art. IV § 14, Feb. 13, 1946, 1 U.N.T.S. 15.

morally incumbent on that state to submit to the jurisdiction of a foreign court to resolve the matter legally.

V. CONCLUSION

Proponents of the denial of state immunity to states sued in the courts of other states for death or personal injury allegedly caused by them in breach of international law are, by and large, metaphorically banging their heads against a brick wall. It may well be that, with hard enough heads and sufficient banging, the wall will come tumbling down. But this is unlikely. More probable is that the banging will lead only to pain and frustration. Nor is the current attack on the grant of state immunity in such cases ever likely to win sufficient hearts and minds, be it the hearts and minds of a wide enough swathe of civil society or even of the judiciary in the relevant forum states or, far more significantly in the long run, the hearts and minds of the governments of the victims' states of nationality or indeed of the states against which allegations of internationally wrongful ill-treatment are credibly levelled. The present approach blames the wrong guy, as it were, and gives the right guys too easy a ride. While no one can blame victims for seeking redress any which way they can, ultimately any answer to the problem of foreign states' civil impunity for internationally unlawful death and personal injury, if answer there be, is more likely and more justly to come through a change in strategy.
