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"Article 6 of the European Convention on Human Rights and State Immunity"

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In memory of my mum

Hajra Prohić, Attorney at Law

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LIST OF ABBREVIATIONS

ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
UNCSI	United Nations Convention on Jurisdictional Immunities of States and Their Property
ECSI	European Convention on State Immunity
UDHR	Universal Declaration of Human Rights
EU Charter	Charter of Fundamental Rights of the European Union
UN Charter	The Charter of the United Nations
VCLT	Vienna Convention on the Law of Treaties
PCIJ	Permanent Court of International Justice
FSIA	Foreign Sovereign Immunities Act
SIA	State Immunity Act
JASTA	Justice Against Sponsors of Terrorism Act
ILC	United Nations International Law Commission

1 Introduction

1.1 Opening remarks- Individual's right to access to justice and potential limitations

Protection of fundamental human rights in the 21st century cannot be set in function properly without stressing the importance of the right to access to justice, endowed with character of fundamental human right, belonging to every individual. Right to access to justice is not just a matter of domestic law and human rights protection on a domestic level by domestic courts, it is also something that has been addressed and protected on an international level, as a matter of International Law. A good illustration of the scope of this right can be explained as follows: «In a general manner it is employed to signify the possibility for the individual to bring claim before a court and have a court adjudicate it. In a more qualified meaning access to justice is used to signify the right of an individual not only to enter the court of law, but to have his or her case heard and adjudicated in accordance with substantive standards of fairness and justice. In this second meaning it provides a standard of review of the administration of justice in the state where the infringement of a right has been occurred»¹. On the other hand, the theory and practice has developed the scope of access to justice, although sometimes with some controversy, but still, there is no universal definition of the wording “access to justice”. Nevertheless, this shouldn't cause much astonishment, as “justice” is still work in progress.

However, acknowledgement and protection of this right in practice consequently even goes beyond the individual case and individual protection. Unquestionably, it is linked also with the rule of law, a required characteristic and prerogative of every democratic society. As stated by the Venice Commission², right to access to justice is one of five benchmarks³ and it consists of «independence and impartiality, fair trial, constitutional justice if applicable»⁴

¹ F. FRANCIONI, *The Right of Access to Justice under Customary International Law*, in *Access to justice as Human Right*, Collected courses of the Academy of European Law, V.XVI/4 New York, Oxford University Press, 2007, p.1

² *The European Commission for Democracy through Law*, Council of Europe's advisory body on constitutional matters, «The Commission has 61 member states: the 46 Council of Europe member states and 15 other countries (Algeria, Brazil, Canada, Chile, Costa Rica, Israel, Kazakhstan, the Republic of Korea, Kosovo, Kyrgyzstan, Morocco, Mexico, Peru, Tunisia and the USA). Argentina, Japan, the Holy See and Uruguay are observers, Belarus has a status of an associate member state (suspended). South Africa and the Palestinian National Authority have a special cooperation status. The Commission also cooperates closely with the European Union, OSCE/ODIHR and the Organisation of American States (OAS).», <https://www.venice.coe.int/>, visit on 27th April 2022

³ CDL-AD(2016)007-e, *Rule of Law Checklist*, adopted by the Venice Commission at its 106th Plenary Session in Venice, Italy, 11-12 March 2016, *ibid* 11-

⁴ *Ibid*, para. 20-28

Having said some introductory words on access to justice, I would like to make a reference to another important matter- the role and position of individuals in international law. Undoubtedly, an individual is an active factor nowadays in international law with a voice that has to be heard when it comes to violation of his rights or exercising those rights. Not purely perceived anymore as just an object. Complementary to this, we could illustrate a circle with strong causation: individuals- domestic law and order - international law- human rights as a part both of individual and domestic law- state responsibility and state obligation to ensure application of both domestic and international rules- rule of law- democracy. An individual is empowered with his rights articulated in various treaties on the protection of human rights, nevertheless, those rights are sometimes subject of limitations. As a focal point in this thesis, the focus will be, on one hand on the right to access to justice deriving from Article 6 of the European Convention on Human Rights, and on the other hand, on the limitation by the virtue of concept of State immunity as a part of customary law. Thus, my main preoccupation will be on this international human rights instrument, in conjunction with other sources of international law: customary international law but also other treaties with the reference to State immunity.

ECHR is undoubtedly not the first⁵, nor the only⁶ international instrument adopted with such a provision which provides an individual with the possibility to seek judicial protection,. To that extent, doctrine of state immunity is also not the only restriction to Article 6. However, this thesis is aiming to demonstrate that state immunity is maybe the most complex restriction, where admittedly ECHR jurisprudence is not deviating, at least up to today, from a narrower interpretation even when it comes to *jus cogens* norms that have been violated. Although some degree of different approach can be found in some domestic courts. This will be closely examined later on in the chapters dedicated to case-law.

In short, the State has an obligation to ensure protection and the possibility to exercise those rights in order to comply with the requirement of rule of law and an individual is empowered with tools to “activate” protection of his rights, *a contrario* to principles contained in *The Object Theory of the Individual in International Law* as explained «As first formulated and as

⁵ See article 8 of Universal Declaration of Human Rights, adopted by General Assembly of the United Nations as Resolution 217 A (III), in Paris, France on 10 December 1948

⁶ See article 25 of American Convention on Human Rights, adopted in San José, Costa Rica on 22 November 1969 (1144 UNTS 123); article 7 of the African Charter on Human and Peoples' Rights, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982) adopted in Nairobi on 27 June 1981; see also article 47 of Charter of Fundamental Rights of the European Union, *Official Journal of the European Union* C83, vol. 53, European Union, 2010, p. 403., declared in 2000, and came into force in December 2009 along with the Treaty of Lisbon.

commonly understood, the object theory of the individual in international law predicates, first, that the individual is not a subject or person of this law; that he has no rights and duties whatsoever under it or that he cannot invoke it for his protection nor violate its rule.»⁷ And yet, the right to access to justice is not an absolute right, some restrictions do apply if they fulfil conditions of legitimate aim and proportionality, which will be explained later on in this thesis. State immunity is one of them, and should be examined always in order to determine whether this restriction, in a particular case, pursues a legitimate aim and whether the measure is taken according to the proportionality demand.

1.2 Defining the scope of the research

With my opening remarks, my intention was to glance over a really big and important topic of individuals' right to access to justice as set in various international instruments and the right of every individual to invoke that right, however in a view of a specific limitation- State immunity. To that extent, I will focus on a specific instrument and a specific doctrine. The central theme, as stated, will be Article 6 of ECHR and State immunity. The thesis would address legal questions such as: relation of human rights protection set up in ECHR, in particular right to access to court and justice and existing procedural bar of State immunity; possible exceptions to the State immunity; question of serious violations of rules of International law (peremptory character) and State immunity (i.e. in respect of civil claims for damages in a case of alleged torture committed outside of the forum State); question of distinction between procedural and substantive law in the ECtHR case law regarding State immunity; is there a departure from traditional international law to ensure effectiveness of Article 6 when it comes to State immunity matters; potential current challenges and developments in international law regarding State immunity and possible relation with Article 6. Additionally, this thesis will also discuss the approach and use, by the Strasbourg Court and domestic courts to that extent, of the UN Convention on State immunity.

⁷ G.MANNER, «The Object Theory of the Individual in International Law», *The American Journal of International Law*, Vol. 46, No. 3, Jul., 1952, Published by: Cambridge University Press, pp. 428-449 (22 pages, spéc.p.1)

1.3 Methodology and Material

The methodology that will be used in this thesis will be legal- dogmatic research⁸. Used materials are primarily international legal instruments, concept and doctrines developed over time both with rules of customary international law, explained by various authors. Complementary to this, I will be using joint work of the European Union and Council of Europe in the form of a Handbook on a specific issue of right to access to justice, as well as the Guide on Article 6 of the European Convention on Human Rights published by ECtHR. The last part will be dedicated to the analysis of the ECtHR case law regarding Article 6 and State immunity, especially in some cases regarding concurring and dissenting opinions some judges. Domestic law will also have a saying in this matter and shall be analysed consequently.

2 Access to justice in International Human Rights Law and European Human Rights Law

«To no one will we sell, to no one deny or delay right or justice»⁹

2.1 Effective access to justice

In light of the introductory words on access to justice, some definitions have already been given. As access to justice can itself be subject of great research, in order to keep the focus in this thesis on one specific provision of a specific international instrument, and further, in view of specific limit related to the question of State immunity, I will not go deeper into historical developments of this right. However, I would like to point out that changes have occurred over the years. As explained by professor Francesco Francioni: «If, under the customary law on the treatment of aliens, access to justice as individual right is limited to the domestic remedies of the territorial state, a limited capacity of the individual to access international remedies has developed since the beginning of the twentieth century in relations to several specific areas of international law that deserve a brief examination»¹⁰. The author is referring to «establishment of regional or sub-regional organizations endowed with a dispute machinery»¹¹. After those

⁸ «Legal-dogmatic research concerns researching current positive law as laid down in written and unwritten European or (inter)national rules, principles, concepts, doctrines, case law and annotations in the literature», Jan Vranken, 'Exciting Times for Legal Scholarship', *LaM* 2012, DOI: 10.5553/ReM/221225082012002002004

⁹ Clause 40, Magna Carta Libertatum, granted by King John on June 15, 1215, reissues on 1216, 1217 and 1225

¹⁰ F.FRANCIONI, *op.cit.*, note 1, p.15

¹¹ *Ibid*, p.16

developments at the beginning of the last century, in the 1970s and 1980s some other trends and developments took place in the access to justice movement, where the access to justice was defined, by some authors, as: « The words "access to justice" are admittedly not easily defined, but they serve to focus on two basic purposes of -the legal system-the system by which people may vindicate their rights and/or resolve their disputes under the general auspices of the state. First, the system must be equally accessible to all; second, it must lead to results that are individually and socially just. Our focus here will be primarily on the first component, access, but we will necessarily bear in mind the second. Indeed, a basic premise will be that social justice, as sought by our modern societies, presupposes effective access»¹².

In other words, developments in access to justice as a fundamental human right where happening both in international law, by developing the paths and remedies through international or regional human rights mechanisms, in order to recognize individuals their right to redress their claims and to seek justice on international level, or regional level, putting them now in a spot of active player in international law, but also changes occurred in domestic legal systems as seeking for a justice and protection of human rights still first and foremost holds its position on the domestic level.

To that end, effective access to justice as a *sine qua non* of democracy and rule of law nowadays means, «According to international and European human rights law, the notion of access to justice obliges states to guarantee each individual's right to go to court – or, in some circumstances, an alternative dispute resolution body – to obtain a remedy if it is found that the individual's rights have been violated. It is thus also an enabling right that helps individuals enforce other rights».¹³ Or to put it like this: « Access to justice is both a process and a goal...»¹⁴. State is the one called to ensure that this requirements are met and that right is recognized and guaranteed domestically¹⁵, however in the breach of this obligation, individual has a possibility to seek his protection in a terms of international human rights mechanism.

¹² M. CAPPELLETTI M. and B. GARTH, B., *Access to justice: the newest wave in the worldwide movement to make rights effective*, 27 Buffalo Law Review, 2007, ppp. 181-292, spéc.p. 182

¹³ European Union Agency for Fundamental Rights and Council of Europe, *Handbook on European law relating to access to justice*, Luxembourg, 2016. p.16

¹⁴ *Ibid.*

¹⁵ F. FRANCIONI, F., *opt. cit.*, note 1, p. 8: «First we need to distinguish between domestic and international remedies, recognizing that the individual right of access to justice must primarily be ensured within the domestic legal system where the violation of human rights has occurred.»

Thus, even the individuals do not exactly enjoy the same status as states in the international law arena when it comes to the possibility to have their claims in front of every international court or tribunal¹⁶, their position improved and they hold significant and visible position. This will be seen further in the next chapters thoroughly in conjunction with Article 6 of ECHR.

2.2 Access to justice in different human rights instruments- comparative view

To strengthen the position that in present-time access to justice means, in broad substratum, the same in various international instruments as both as in domestic legal orders, despite the fact that different wording or structure have been used, it could be useful to illustrate this through comparison of some of the provisions recognizing this fundamental human right. In its substance, all human right instruments simply refer firstly to the state obligation to ensure existence of competent impartial national tribunal, or administrative authority where the claim could be brought and could be heard, and secondly to the existence of either effective remedy, effective recourse, prompt recourse or within a reasonable time frame. Some instruments go even further and grant redress to a further “instance” if specific mechanism is set in place, after and beyond domestic level, when and if, of course, domestic remedies have been exhausted.

2.2.1 International human rights instruments

Article 8 of the Universal Declaration of Human Rights¹⁷:

Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law.

Article 2 (3) of International Covenant on Civil and Political Rights¹⁸:

...

3. Each State Party to the present Covenant undertakes:

(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;

¹⁶ See the Statute of the International Court of justice, article 34 (1); see also Guide to proceedings before the International Tribunal for the law of the Sea, p. 4

¹⁷ *Op.cit*, note 5

¹⁸ International Covenant on Civil and Political Rights, adopted by General Assembly of the United Nations as Resolution 2200A (XXI), in New York, on 16 December 1966

(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.

Article 2 of Optional Protocol to the International Covenant on Civil and Political Rights¹⁹:

Subject to the provisions of article 1, individuals who claim that any of their rights enumerated in the Covenant have been violated and who have exhausted all available domestic remedies may submit a written communication to the Committee for consideration.

2.2.2 Regional human rights instruments

Article 25 of American Convention on Human Rights²⁰:

RIGHT TO JUDICIAL PROTECTION

1. Everyone has the right to simple and prompt recourse, or any other effective recourse, to a competent court or tribunal for protection against acts that violate his fundamental rights recognized by the constitution or laws of the state concerned or by this Convention, even though such violation may have been committed by persons acting in the course of their official duties.

2. The States Parties undertake:

a. To ensure that any person claiming such remedy shall have his rights determined by the competent authority provided for by the legal system of the state;

b. To develop the possibilities of judicial remedy; and

c. To ensure that the competent authorities shall enforce such remedies when granted.

Article 7 of African Charter on Human and Peoples' Rights²¹:

Every individual shall have the right to have his cause heard. This comprises:

¹⁹ Optional Protocol to the International Covenant on Civil and Political Rights, adopted by General Assembly of the United Nations as Resolution 2200A (XXI), in New York, on 16 December 1966

²⁰ *op.cit*, note 6

²¹ *Ibid*.

The right to an appeal to competent national organs against acts of violating his fundamental rights as recognized and guaranteed by conventions, laws, regulations and customs in force;

Article 6 and 13 of European Convention on Human Rights²²:

Article 6 - Right to a fair trial

1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

...

Article 13- Right to an effective remedy

Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.

Article 47 of EU Charter²³:

Right to an effective remedy and to a fair trial

Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article.

Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented.

Legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice.

²² European Convention on Human Rights, formally: Convention for the Protection of Human Rights and Fundamental Freedoms, Council of Europe, Treaty Series 005, Strasbourg, 4 November 1950; ECHR has been amended by Protocols 11, 14 and 15, and 7 other protocols: the Additional Protocol (called 'Protocol No. 1') and Protocols Nos. 4, 6, 7, 12, 13 and 16.

²³ *Op.cit.*, note 6

3 European Convention on Human Rights: Article 6

3.1 Applicability

In view of what was previously mentioned, ECHR is a regional human rights instrument, among other rights, dealing with the fundamental right to access to justice. As explained, there is no exact wording of “to access to justice” in the text of the ECHR, same as there is no such wording in other international human rights instruments. It is proven, however, when it comes to ECHR that this right has been covered through Article 6 and Article 13 of the Convention. Article 13 deals with a subcategory of consuming one’s right to access the justice: effective remedy before a national authority, whenever there is a violation of rights and freedoms set up in the ECHR. Hence, as the main research question in this thesis is access to court and fair trial versus state immunity, the focus will be kept on Article 6(1) of the Convention.

If we look at the narrative of Article 6, we will notice immediately that the protection guaranteed by this provision is aimed in two directions, offering protection concerning human rights violations in the civil limb and another in the criminal limb. As the collision in the protection of rights of individual, when it comes to access to court and bringing a claim against the State, appears when accommodating State immunity legal doctrine, with its repercussion of being a procedural bar, thus we will discuss it in the civil limb.

The general principle of Article 6(1), that a right of access to a court implicates right to a fair hearing, has been developed by the ECtHR’s case law, and it has been made understood, among others, in case which will be examined later on in details, *Case of Cudak v. Lithuania* : « The Court reiterates that the right to a fair hearing, as guaranteed by Article 6 § 1 of the Convention, must be construed in the light of the principle of the rule of law, which requires that all litigants should have an effective judicial remedy enabling them to assert their civil rights (see *Běleš and Others v. the Czech Republic*, no. 47273/99, § 49, ECHR 2002-IX). Everyone has the right to have any claim relating to his civil rights and obligations brought before a court or tribunal. In this way, Article 6 § 1 embodies the “right to a court”, of which the right of access, that is, the right to institute proceedings before courts in civil matters, constitutes one aspect only (see *Golder v. the United Kingdom*, 21 February 1975, § 36, Series A no. 18, and *Prince Hans-Adam II of Liechtenstein v. Germany [GC]*, no. 42527/98, § 43,

ECHR 2001-VIII).²⁴ The Court also described how access to justice must be, with few crucial adjectives, in *Case of Zubac v. Croatia*²⁵ in conjunction with some other previous cases: «practical and effective» and not «theoretical or illusory». Accordingly, in this conclusion made by the Court, we can see that ability to present ones case in front of the court, or as put by the Court, right to a fair hearing, protected by this provision, must be determined in a way to fit in an essential requirement of every democratic society- rule of law. This was also mentioned in the introductory part of this thesis. As a result, ECHR and case law of the ECtHR on article 6(1) played a great role in the rule of law, as illustratively explained: «As a “pop- corn provision”, Article 6(1) ECHR has continued to puff up and grow over time, expanding the applicability of the fair trial guarantees to a broader range of case types. As the case- law developed, the governments lost more and more battles and were ordered to enforce fair trial guarantees with respect to a large number of disputes. Looking back on more than 50 years of case- law of the ECtHR, it might be fair to argue that Article 6(1) ECHR is the provision that contributed the most to the advancement of the rule of law and individual justice in Europe»²⁶.

With that being said, it needs to be elucidated that determining what is a civil right in order to enjoy protection under Article 6(1) is not so straightforward as it may seem at first glance. There is often a complex division, or better to say distinction what would be classified as a case of private law opposite to public law. It is important to emphasize that the Court considers²⁷ that Convention is «a living instrument», and when interpreting the ECHR, it has to be done «in light of present-day conditions». What will be considered as a civil right doesn't derive necessarily from the domestic interpretation of civil limb, or from the nature of the domestic procedure or authority foreseen to deal with specific case. Instead ECtHR examines it according to its own criteria, based on the doctrine of the autonomous concept²⁸. To illustrate this, the Court clearly formulated that in: «The Court reiterates that for Article 6 § 1 in its “civil” limb to be applicable, there must be a dispute (“contestation” in the French text) over a “right” which can be said, at least on arguable grounds, to be recognised under domestic law, irrespective of

²⁴ ECHR, CASE OF CUDAK v. LITHUANIA, application no. 15869/02, judgment of 23 March 2010, §54

²⁵ ECHR, CASE OF ZUBAC v. CROATIA, application no. 40160/12, judgment of 5 April 2018, §77, but also see CASE OF CUDAK v. LITHUANIA, §58

²⁶ C. TELEKI, «Due Process and Fair Trial in EU Competition Law», series: Nijhoff Studies in European Union Law, Volume: 18, Brill, Brill | Nijhoff, 2021, p.101

²⁷ ECtHRECHR, CASE OF FERRAZZINI v. ITALY, application no. 44759/98, judgement of 12 July 2001, §26

²⁸ See ECtHR, CASE OF ENGEL AND OTHERS v. THE NETHERLANDS, application no. 5100/71; 5101/71; 5102/71; 5354/72; 5370/72, judgment of 8 June 1976

whether that right is protected under the Convention. The dispute must be genuine and serious; it may relate not only to the actual existence of a right but also to its scope and the manner of its exercise; and, finally, the result of the proceedings must be directly decisive for the right in question, mere tenuous connections or remote consequences not being sufficient to bring Article 6 § 1 into play»²⁹. Moreover, the Court concluded as follows: «In this regard, the character of the legislation which governs how the matter is to be determined (civil, commercial, administrative law, and so on) and that of the authority which is invested with jurisdiction in the matter (ordinary court, administrative body, and so forth) are not of decisive consequence»³⁰.

To summarise, the determining criteria, in order for article 6 (1) to be applicable in a concrete case, and to be classified under the civil limb, would be as follows: existence of a dispute³¹ over some right of the individual, that is, secondly, acknowledged in domestic law, regardless if that right is namely recognized under ECHR, however the dispute has to be «at least on arguable grounds»³². Domestic “classification” of tribunals or authorities to decide on the matter is not (solely) a decisive element. ECtHR had developed, its own path in interpretation through already mentioned autonomous concept, and explained it quite clear by: «This is what the adjective 'autonomous' stands for: the autonomous concepts of the Convention enjoy a

²⁹ ECtHR, CASE OF BOCHAN v. UKRAINE (No. 2), application no. 22251/08, judgment of 5 February 2015, rectified on 11 March 2015, §42

³⁰ *Ibid.*, §43

³¹ See ECtHRECHtR, CASE OF LE COMPTE, VAN LEUVEN AND DE MEYERE v. BELGIUM, application no. 6878/75; 7238/75, judgment of 23 June 1981, §45 «*In the present case, a preliminary point needs to be resolved: can it be said that there was a veritable "contestation" (dispute), in the sense of "two conflicting claims or applications" (oral submissions of counsel for the Government)?* Conformity with the spirit of the Convention requires that this word should not be construed too technically and that it should be given a substantive rather than a formal meaning; besides, it has no counterpart in the English text of Article 6 par. 1 (art. 6-1) ("In the determination of his civil rights and obligations"; cf. Article 49 (art. 49): "dispute"). Even if the use of the French word "contestation" implies the existence of a disagreement, the evidence clearly shows that there was one in this case.»; for more see also CASE MOREIRA DE AZEVEDO V. PORTUGAL, Application no. 11296/84), judgment of 23 October 1990, § 66; and CASE MIESEN V. BELGIUM, requête no 31517/12), arrêt du 18 octobre 2016, § 43 word should not be construed too technically and that it should be given a substantive rather than a formal meaning; besides, it has no counterpart in the English text of Article 6 par. 1 (art. 6-1) ("In the determination of his civil rights and obligations"; cf. Article 49 (art. 49): "dispute"). Even if the use of the French word "contestation" implies the existence of a disagreement, the evidence clearly shows that there was one in this case.»; for more see also CASE MOREIRA DE AZEVEDO V. PORTUGAL, Application no. 11296/84), judgment of 23 October 1990, § 66; and CASE MIESEN V. BELGIUM, requête no 31517/12), arrêt du 18 octobre 2016, § 43

³² Among others see ECtHRECHtR, CASE OF BOULOIS v. LUXEMBOURG , application no. 37575/04, judgment of 3 April 2012, §90

status of semantic independence: their meaning is not to be equated with the meaning that these very same concepts possess in domestic law»³³.

On the other hand, we have to have in mind also a conclusion made by the Court in *Case of Ferrazzini v. Italy*: «The principle according to which the autonomous concepts contained in the Convention must be interpreted in the light of present-day conditions in democratic societies does not give the Court power to interpret Article 6 § 1 as though the adjective “civil” (with the restriction that that adjective necessarily places on the category of “rights and obligations” to which that Article applies) were not present in the text»³⁴.

Finally, Article 6 (1) should be extended also to the part of the execution of judgments, which has been clearly emphasized by the ECtHR as follows: «...that right would be illusory if a Contracting State’s domestic legal system allowed a final, binding judicial decision to remain inoperative to the detriment of one party. It would be inconceivable that Article 6 para. 1 (art. 6-1) should describe in detail procedural guarantees afforded to litigants - proceedings that are fair, public and expeditious - without protecting the implementation of judicial decisions»³⁵.

3.2 Limitations to Article 6 of ECHR and its interpretation in harmony with International Law

So far, the importance of access to justice and right to a fair trial, especially in a light of article 6 ECHR has been discussed, however, it was also mentioned that there are existing limits to this. Hence this is not recognized as an absolute right, as examined by ECtHR in 1975: «Since the impediment to access to the courts, mentioned in paragraph 26 above, affected a right guaranteed by Article 6 para. 1 (art. 6-1), it remains to determine whether it was nonetheless justifiable by virtue of some legitimate limitation on the enjoyment or exercise of that right»³⁶. The court continued by concluding as follows: «The Court considers, accepting the views of

³³ G.LETSAS, «*The Truth in Autonomous Concepts: How To Interpret the ECHR*», *European Journal of International Law*, Vol.15 No.2, 2002, pp.279 à 305, spéc. p. 282

³⁴ *Ibid*, note 27, § 30

³⁵ ECtHR, CASE OF HORNSBY v. GREECE, application no. 18357/91, judgment of 19 March 1997, § 38

³⁶ ECtHR, CASE OF GOLDER v. THE UNITED KINGDOM, application no. 4451/70, judgment of 21 February 1975, § 37

the Commission and the alternative submission of the Government, that the right of access to the courts is not absolute».³⁷

In international law we can easily find limitations to access to justice, illustratively rather than exhaustively, related to the doctrine of immunities, situations that require compliance with measures adopted under the UN Charter, derogation clause found in treaties in times of emergency³⁸. Nevertheless, in the recent years one specific threat brought to attention this restriction in a situation of emergency: terrorism. However, regardless to all other limitations, this thesis is focused solely on State immunity.

When it comes to ECHR, it does not give any examples of what could be a barrier to access to court in Article 6. Nevertheless, the focal point of this thesis - State immunity, that will be scrutinized in the next chapter, is a limitation in this matter as a principle of international customary law, and this position is quite strong when it comes to ECtHR. Since ECHR has its important place in international law and international legal order as a regional human rights instrument, it has to be interpreted in light of the Vienna Convention on the Law of Treaties³⁹. Further, VCLT is a codification of customary international law, which was noted by ECtHR in 1975, before VCLT entering into force, as: « The submissions made to the Court were in the first place directed to the manner in which the Convention, and particularly Article 6 para. 1 (art. 6-1), should be interpreted. The Court is prepared to consider, as do the Government and the Commission, that it should be guided by Articles 31 to 33 of the Vienna Convention of 23 May 1969 on the Law of Treaties. That Convention has not yet entered into force and it specifies, at Article 4, that it will not be retroactive, but its Articles 31 to 33 enunciate in essence generally accepted principles of international law to which the Court has already referred on occasion. In this respect, for the interpretation of the European Convention account is to be taken of those Articles subject, where appropriate, to "any relevant rules of the organization" - the Council of Europe - within which it has been adopted (Article 5 of the Vienna Convention)»⁴⁰. More on this will be seen later on in the part dedicated to ECtHR case law on Article 6 and State immunity.

To turn back to the limitations, as stated, access to court is not an absolute right at all. However, limiting fundamental human rights comes with great cautiousness, thus making the Court's role

³⁷ *Ibid*, § 38

³⁸ F.FRANCIONI, *op. cit.*, note 1, p. 43

³⁹ Vienna Convention on the Law of Treaties, United Nations, Treaty Series 1155, p.331, in Vienna, on 23 May 1969; entered into force on 27 January 1980

⁴⁰ See, ECtHR, CASE OF GOLDER v. THE UNITED KINGDOM, *op. cit.* 36, § 29

even more important. Consequently, ECtHR relies on strict examining of existence of following conditions: is there a legitimate aim and is the proportionality achieved, to suggest that limitation would be permissible: «Furthermore, a limitation will not be compatible with Article 6 para. 1 (art. 6-1) if it does not pursue a legitimate aim and if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be achieved»⁴¹. This has been reiterated by ECtHR in numerous cases afterword⁴².

4 State immunity-rationale, doctrine and sources

4.1 General introduction on State immunity-rationale and nature of state immunity

I would like to open this chapter with some general observations on immunities of the states. Therefore, maybe to start with defining the state immunity. I believe that a good, short and clear legal definition, given by Professor James Crawford, would be: «State immunity is a rule of international law aimed at facilitating the performance of State functions by preventing the State from being sued in foreign courts»⁴³. While doing a research for this thesis, numerous of authors, opinions, and wordings were subject of that research. Words are powerful in a legal world. Consequently, in devising this chapter I was really interested in how the immunities, or to be exact state immunity, were perceived in general, besides that what we know the international law says on immunities of course. Thus, one sentence came to my attention when analysing the wording: «At the international level, immunity is a tool that protects the sovereignty and independence of States by preventing them or their agents from being prosecuted before foreign courts»⁴⁴. The wording «tool» is maybe not usual legal wording, however it does explain in a most simple way what would be purpose of immunity, or to be more precise, State immunity. The golden standard in a relationship between two states is *par*

⁴¹ ECtHREctHR, CASE OF ASHINGDANE v. THE UNITED KINGDOM, application no. 8225/78, judgment of 28 May 1985, § 57

⁴² See more recent ECtHR, CASE OF NAÏT-LIMAN v. SWITZERLAND, application no. 51357/07, judgment of 15 march 2018, § 114: «...That being stated, those limitations must not restrict or reduce a person's access in such a way or to such an extent that the very essence of the right is impaired...» and § 115: «In addition, such limitations will not be compatible with Article 6 § 1 if they do not pursue a legitimate aim or if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be achieved...»

⁴³ X. YANG, «*State Immunity in International Law*», Cambridge Studies in International and Comparative Law, New York, Cambridge University Press, 2012, see more in *Foreword* given by professor James Crawford, ad XVI

⁴⁴ See *The Practical Guide to Humanitarian Law: Immunity*, <https://guide-humanitarian-law.org/content/article/3/immunity/>, visit on 4 May 2022

in parem non habet imperium, which was concluded also by ECtHR in Case of Fogarty v. The United Kingdom: «It notes in this connection that sovereign immunity is a concept of international law, developed out of the principle *par in parem non habet imperium*, by virtue of which one State shall not be subject to the jurisdiction of another State. The Court considers 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»⁴⁵, and again reiterated in Case of Al-Adsani v. The United Kingdom on a same date⁴⁶. So how can we keep this standard alive if we do not have a «tool». On the other hand, if we use more appropriate legal expression, discussing on State immunity doctrine, we will refer to it as a procedural bar, something that judges have to take into account *in limine* when they have a case in a front of them, although having definitely a procedural character does not mean that there will not be meeting points with the substantive part of the law, quite often and sometimes with very vague edges. However, from a point of view of an individual who would like to bring a civil claim against another state, State immunity, with no doubt, is something perceived as a barrier while trying to benefit his right to access to justice, or namely here to access to court, in a way Article 6 (1) provides for. In extent, this would be the right time to mention that State immunity goes in two directions for the beneficiary State, meaning besides immunity from jurisdiction, State enjoys also an immunity for it belongings not to be a subject to any measure of constraint- immunity from execution, thus those two immunities are differentiated based on a stage of the process of the court case. However, is State immunity, as the international law recognizes it as in the present day, really an obstacle to justice? This thesis will try to give an answer to that question .

4.2 Doctrine of State immunity- developments over time

4.2.1 Historical developments up to 20th century

Doctrine on State immunity as we have it today was a result of interesting process through the history. Going very back in the past, it is captivating that State was not recognized as the one to be protected, nor the sovereign ruling the State. However, diplomatic state agents enjoyed

⁴⁵ ECtHR, CASE OF FOGARTY v. THE UNITED KINGDOM, application no. 37112/97, judgement of 21 November 2001, § 34

⁴⁶ See also, ECtHR, CASE OF AL-ADSANI v. THE UNITED KINGDOM, application no. 35763/97, judgment of 21 November 2001, § 54

the protection⁴⁷. Later on, the State held somehow a different position in this matter, helped by the French monarchy and French kings ruling during that time and until the French revolution, however this was not just way or ruling in exclusively France, but in a way it has been summed by this famous sentence made by Louis XIV: «L'état c'est moi»⁴⁸, where the personification of the State was the King. In times that followed, particularly in the 19th century, developments led to something called - absolute immunity, as explained: «Basically, 'absolute immunity' means that States enjoyed immunity before foreign courts with regard to any subject matter...»⁴⁹, so the interconnection with some specific state activity or relation State has been involved in, was not a decisive element at all. State simply enjoyed immunity in every situation in front of domestic courts of a foreign state, because «Absolute immunity was granted in an age when the distinction between sovereign and non-sovereign activities was less manifest, given that State functions were at that time confined to the traditional spheres of, say, legislation, administration, national defence, and the conduct of State-to-State political relations...»⁵⁰. Historically speaking, there is one case that needs to be emphasized when referring to beginning of State doctrine, as «The first case on State immunity is universally agreed to be *The Schooner Exchange*...»⁵¹. On the other hand, State could waive its immunity in a way of giving its consent in a procedure against it, so the conclusion is that absolute is not quite absolute as the word can suggest⁵². This possibility stood up to today.

4.2.2 Moving from absolute immunity to restrictive immunity

To go a bit further with the developments in the State immunity doctrine, it is really very difficult to say what would be the year or even decade when the transition from absolute immunity to restrictive immunity had occurred. However, it is necessary, firstly, to notice where the distinction can be found, as those are completely two different doctrines now.

⁴⁷ See C.J. LEWIS, «*State and Diplomatic Immunity*», 3rd ed., London, Lloyd's of London on Press Ltd, p.15: «*The doctrine of sovereign immunity found its earliest manifestation in the protection afforded to diplomatic agents. The immunity of the sovereign himself in his own person was not at first a recognized principle...*»

⁴⁸ *Ibid.*, «*The theoretical basis of the rule of sovereign immunity can be traced to a time when most States were ruled by person who, in a very real sense, personified the state ('L'état c'est moi')*».

⁴⁹ See, X. YANG, *op.cit.*, note 43, p.7

⁵⁰ *Ibid.*, p.8

⁵¹ *Ibid.*

⁵² *Ibid.*, p.10

Restrictive immunity implies acknowledging the difference in the type of relationship State has been engaged in, meaning State will not enjoy immunity for every action it took. This was a consequence of the fact that over the years activities of states have changed. States became more and more active in some other areas than just dealing with or executing state responsibilities. To illustrate, one can name increased involvement of the states in commercial activities⁵³ or industrial activities, concluding all range of contracts, offering also financial service etc. It can be concluded that states are now involved parallel in some activities as the other market players, so a logical basis to limit the scope of state immunity only to official act is more that obvious. Ultimately, it means that restrictive theory is based on the differentiation of *acta iure gestionis*, activity that hasn't been strictly reserved for the State only, even not always with a clear border limit when the state activity is in question As a result, this led to limiting state immunity, as remarked in: «...State is not immune from the jurisdiction of the forum State with respect to 'commercial activity' or 'commercial transaction', but the definition of this term is far from settled or uniform»⁵⁴. On the contrary immunity should be granted when it comes to: «...acts jure imperii, which includes only acts carried out by the foreign state under its public law as a sovereign authority and excludes all acts that a private person can carry out under private law, regardless of the motivation or the ultimate purpose of such acts undertaken by the foreign state»⁵⁵.

Given the above, when it comes to State involvement in some activities, it can be hard to make a straightforward conclusion is it *acta iure gestionis* or *acta iure imperii*, this can be the case when concluding various types of contracts. So, how to determine a difference, dissimilar approaches arose over the time in a form of: nature approach, purpose approach and thirdly, the context approach. The first one, the one also used in Belgian jurisprudence, and observed as «The predominant position in the current law and practice on State immunity»⁵⁶ relies on the nature (as the name of the approach suggests) of the act in question «even if that act might have served some sovereign or public purpose»⁵⁷. While referring, *in concreto*, to Belgian jurisprudence I would also like to add that even if this approach is mainly used, theory and

⁵³ See more, *ibid.*, p.76-79

⁵⁴ *Ibid.*, p. 76

⁵⁵ G.M. BADR, «Recent Developments in the Dynamics of Sovereign Immunity», *The American Journal of Comparative Law*, Vol. 30, Oxford University Press ,No. 4 , Autumn,1982, pp. 678-683, spéc.p.679

⁵⁶ See, X. YANG,, *op. cit.*, note 43, p.86

⁵⁷ *Ibid.*

practice sometimes do not face same problems⁵⁸, nevertheless, some deviation from this in practice is to be expected.

Second approach: the purpose approach, the one that can be found in Italy's case-law on State immunity⁵⁹ suggests that in order to clarify is the act conducted by a State a sovereign act, one should have to examine what would be the purpose of that act- «if it serves a sovereign 'purpose'». Thus, even if it is not a predominant one, it is still alive today, even to an extension that it can be found, in some form, in the United Nations Convention on Jurisdictional Immunities of States and Their Property⁶⁰, but this will be seen in the coming part dedicated to sources of State immunity. The last approach, known as the context approach, of course literally means that whole context should be relevant when examining the matter, therefore it is not wrong to surmise that it both takes into an account what was said for previous two approaches. This approach is rather prevailing in the United Kingdom and Ireland⁶¹ but also in Swedish jurisprudence⁶² and when talking outside of European continent there are references to case law in Australia, Israel, Malaysia and New Zealand⁶³.

Finally, coming back to the question when exactly the restrictive immunity arose, we can conclude that the domestic case law played a great role in forming this legal concept of State immunity in general. Hence, the law philosophy of restrictive immunity had its foothold in the «Western European States»⁶⁴. Ultimately, even if we can conclude that the case law in different domestic legal systems followed its own speed in developments, it is hard to conclude when this happened predominantly. However, I believe that we can roughly say this was something starting to gain acknowledgment by/around the mid of the last century, even though some domestic case law was quite ahead of the time- Belgian and Italian at the end of 19th century⁶⁵.

⁵⁸ See E. ERIK SUY, *27 ZEITSCHRIFT FUER AUSLAENDISCHES OEFFENTLICHES RECHT*, p. 660-692, spéc.p.677, 1957, https://www.zaoerv.de/27_1967/vol27.cfm, visit on 10 May 2022

⁵⁹ See, X. YANG, *opt.cit.*, note 43, «The Italian practice provides another example of the 'purpose' approach...», p.100,

⁶⁰ See United Nations Convention on Jurisdictional Immunities of States and Their Property, New York, 2 December 2004, not in force yet, Article 2 (2)

https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=III-13&chapter=3&clang=en, visit on 5 May 2022

⁶¹ See, X. YANG, *op.cit.*, p. 103-106

⁶² See, *ibid*, p.107

⁶³ See, *ibid*, p. 106

⁶⁴ See, I.M.SINCLAIR, «The European Convention on State Immunity», *The International and Comparative Law Quarterly*, Vol. 22, No. 2, Cambridge University Press on behalf of the British Institute of International and Comparative Law, April 1973, p. 254-283, spéc.p.262 and 263

⁶⁵ See, X. YANG, *op. cit.*, note 43, p. 60 and 61

However, State immunity was a topic to be discussed and codified through International Law Commission, and even before that, under the umbrella of League of Nations, but also debated through the work of different Law Associations at the middle of last century, where the recurrent idea was to narrow the scope of State immunity with reference to commercial affairs of the States.⁶⁶

4.3 Sources

Regarding the matter of State immunity, the part that really brings lots of questions and shows the complexity of the *materia*, is noticeable when it comes to sources. With this being said, I would like to explain that that State immunity is not something questionable *per se* in the sources, however, because of the absence of some more universal document in force, there has been a place for lots of diversity in approach of different state practice. This is quite visible when it comes to exceptions to State immunity, which will be demonstrated latter in the text. Nevertheless, it will be demonstrated through the part dedicated to ECtHR case law, as the sources, e.g. applicable law, will be examined through the cases.

4.3.1 Customary international law

State immunity has been partly codified, nevertheless primarily it is a concept with a source in customary international law, as a part of international law «based not on written laws but on consistent state practice along with states' belief that they are acting in accordance with a binding norm»⁶⁷, however, endowed with binding character. Two fundamental features needed for a rule to be classified as international customary law are: consistent practice and *opinio juris*. Consistent practice indeed requires consistent application of some rule, nevertheless while sensing or believing that practice is legal necessity (*opinio juris*) or legally obliged way for State to conduct in a specific situation. With this being said, customary international law is quite complex, or one way to be described, «... a feat it rests not on a rock-solid natural law basis of divine principles, but on a fabric woven through a multiplicity of relations over time»⁶⁸.

⁶⁶ See, I.M.SINCLAIR, *op. cit.*, note 62, p. 261 and 262

⁶⁷ See, *Customary international law*, <https://www.ecchr.eu/en/glossary/customary-international-law/>, visit on 5 May 2022

⁶⁸ G. NORMAN and J.P. TRACHTMAN, «The Customary International Law Game», *The American Journal of International Law*, Vol. 99, No. 3, Jul.,2005, pp. 541-580, spéc. p. 541

For this reason, it is useful to mention that concept of customary law was clearly described in *Lotus judgment*, by Permanent Court of International Justice, as follows: «The rules of law binding upon States therefore emanate from their own free will as expressed in conventions or by usages generally accepted as expressing principles of law and established in order to regulate the relations between these co-existing independent communities»⁶⁹

As referred in brief history part of the thesis, State immunity, and to that extant restrictive State immunity concept we have today, has derived from national jurisprudence or case law of domestic courts, who, on the other hand felt obliged to respect the rule of granting immunity to a foreign State when being suit in a front of them. Admittedly, domestic case law was, and still is in a light of contemporal debates in a matter of State immunity, very important.

4.3.2 Treaty law

Treaty law as a source is, beyond any doubt, something that hasn't been put "in action" as a tool in a whole capacity in this scope of International Public law, in order which makes State immunity quite interesting, and leaving lots of room for international customary law to take over. Despite that, there are some treaties with referencing in some provision to the matter in question, however the two treaties will be mentioned in this thesis, through analysing some provisions, important in correlation with the last chapter of this work, dedicated to the case-law of ECtHR.

The European Convention on State Immunity

I would like to start with the older treaty, The European Convention on State Immunity⁷⁰, international instrument concluded under the umbrella of Council of Europe in 1972, with the possibility to be open also for the non-members States. It entered into force in 1976, after first 3 ratifications made by Austria (1974), Belgium (1975) and Cyprus (1976). Followed by the ratifications of United Kingdom (1979), Switzerland (1982), Netherlands (1985), Luxembourg (1986) and Germany (1990), with their different respective dates of entry into force after the

⁶⁹ PCIJ, THE CASE OF THE S.S. "LOTUS", judgment No. 9 of 7 September 1927, P.C.I.J., Series A, No. 10, p. 18

⁷⁰ *The European Convention on State Immunity*, Council of Europe, ETS No. 074, Basel, 16 May 1972; see also Protocol, ETS no. 074A

ratification. Portugal was a signatory State, however it never proceeded to the ratification. Accordingly, having in mind that only 8 States are parties to this treaty, it is safe to say that it hasn't reached such a big success. On the other hand, one has to have in mind that at that time not all the Council of Europe member States have adopted restrictive State immunity concept, and in a way this was a pioneering instrument. Hence, this has been reflected in its Preamble: «Considering that the aim of the Council of Europe is to achieve a greater unity between its members; Taking into account the fact that there is in international law a tendency to restrict the cases in which a State may claim immunity before foreign courts»⁷¹. The main objective wanted to be reached was, as stated further: «...to establish in their mutual relations common rules relating to the scope of the immunity of one State from the jurisdiction of the courts of another State, and designed to ensure compliance with judgments given against another State; Considering that the adoption of such rules will tend to advance the work of harmonisation undertaken by the member States of the Council of Europe in the legal field»⁷²

In order to see how this concept was imagined, I believe that it is important to first look into one important provision, acknowledging the fact of the complexity of the subject, leaving some margin of appreciation to different potential developments in the future:

...

Article 33

Nothing in the present Convention shall affect existing or future international agreements in special fields which relate to matters dealt with in the present Convention.

...

This provision will serve one day to actually give the other treaty this thesis will analyse, a position of *lex posteriori*, once when it enters into force. I am of course referring to United Nations Convention on Jurisdictional Immunities of States and Their Property, which will be discussed in a moment. However, of course without the prejudice to and other instrument which may occur in this matter.

When it comes to the legal architecture of ECSI, it is visible that it is built in a way to offer a list of specific situations where the immunity from jurisdiction must not be recognized, enshrined in articles 1 to 14, where articles 4 to 14 relate to situations qualified as non *acta iure imperii*. When it comes to question of immunity from execution, ECSI provided unusual

⁷¹ *Ibid.*, see Preamble

⁷² *Ibid.*

solution, not reflecting international customary law, moreover introducing some form of compromise⁷³, as decided by:

...

Article 23

No measures of execution or preventive measures against the property of a Contracting State may be taken in the territory of another Contracting State except where and to the extent that the State has expressly consented thereto in writing in any particular case.

...

To continue, concerning the obligation of foreign State to actively participate in the procedure, or better to say to have its presence in front of forum court, in order to benefit from immunity, as concluded in some legal observations⁷⁴, as State immunity is a norm of international law, set as a postulate, thus, courts have to take it into account *ex officio*. This is also something suggested by provisions of ECSI, more concretely:

...

Article 15

A Contracting State shall be entitled to immunity from the jurisdiction of the courts of another Contracting State if the proceedings do not fall within Articles 1 to 14; the court shall decline to entertain such proceedings even if the State does not appear.

...

Further on, one interesting provision or regime, that is coming to my observance, would be article 24, namely paragraph 1, under Chapter IV -Optional provisions, as explained in a clear manner: «This optional regime was included because certain States already applying the rule of relative immunity were afraid that some acts *jure gestionis* might fall outside the catalogue of cases of non-immunity, thereby restricting the jurisdiction of their court»⁷⁵, hence, this seems to aim encompassing the difference between States at that time:

Article 24

1 Notwithstanding the provisions of Article 15, any State may, when signing this Convention or depositing its instrument of ratification, acceptance or accession, or at any later date, by

⁷³ See more, *Explanatory Report to the European Convention on State Immunity*, Council of Europe, European Treaty Series - No. 74, Basel, 16 May 1972, 92., § 92: «In some States the rule which prohibits execution against the property of a foreign State is regarded as a rule of international law ; in other States, execution against the property of a foreign State is considered permissible under strictly defined conditions. As already explained it is one of the objectives of the present Convention to protect the rights of individuals. The Convention system therefore represents a compromise in that it combines an obligation on States to give effect to judgments (the obligation being controlled by judicial safeguards) with a rule permitting no execution...»

⁷⁴ See, X. YANG,., *op. cit.*, note 43, p. 34

⁷⁵ See, I.M.SINCLAIR, *op. cit.*, note 64, p.268

notification addressed to the Secretary General of the Council of Europe, declare that, in cases not falling within Articles 1 to 13, its courts shall be entitled to entertain proceedings against another Contracting State to the extent that its courts are entitled to entertain proceedings against States not party to the present Convention. Such a declaration shall be without prejudice to the immunity from jurisdiction which foreign States enjoy in respect of acts performed in the exercise of sovereign authority (acta jure imperii).

...

Not to go too extensively in analysing ECSI, as this instrument, and its relevance today, can be itself a theme for deeper research, I would just like to emphasize 3 other provisions, which will be relevant for the case law covered by this thesis. For this reason, I would like to start with an exception of employment contracts, contained in:

Article 5

1 A Contracting State cannot claim immunity from the jurisdiction of a court of another Contracting State if the proceedings relate to a contract of employment between the State and an individual where the work has to be performed on the territory of the State of the forum.

However, this is in conjunction with nationality of the individual and in a fact with accessibility to a court⁷⁶, as explained further in that article:

2 Paragraph 1 shall not apply where:

- a the individual is a national of the employing State at the time when the proceedings are brought;*
- b at the time when the contract was entered into the individual was neither a national of the State of the forum nor habitually resident in that State; or*
- c the parties to the contract have otherwise agreed in writing, unless, in accordance with the law of the State of the forum, the courts of that State have exclusive jurisdiction by reason of the subject-matter.*

...

With this being said, I would only like to draw attention that ECSI is making a differentiation

⁷⁶ Explanatory Report to the European Convention on State Immunity, *op.cit.*, note 73, § 30

between employment contracts and other contracts governed by virtue of Article 4, however, the Explanatory report⁷⁷ gave very clear guidance: « In principle, immunity should not be granted to a State with respect to any contracts it has concluded» although, exceptions are possible and listed in paragraph 2, where I would like to emphasize circumstances described *ad (c)* which makes reference to *acta iure imperii*:

...

Paragraph 1 shall not apply:

- a in the case of a contract concluded between States;*
- b if the parties to the contract have otherwise agreed in writing;*
- c if the State is party to a contract concluded on its territory and the obligation of the State is governed by its administrative law.*

...

To continue further with ECSI, it is important to point out territorial tort exception, which can be found in the case-law on State immunity, but also in UNCSI, which will be examined after, as UNCSI refers to pecuniary compensation in a case of death or injury, damage or loss of tangible property, occurred in whole **or in a part** on the territory of forum state, but attributable to State wanting to invoke immunity however, however, the wording in ECSI is as follows⁷⁸:

...

Article 11

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

...

Lastly, I would refer here also to an exception of exception, generally perceived as part of international customary law, which I will discuss later on in the subchapter on contemporary conclusions, reflecting to one of the cornerstone decisions of ICJ on jurisdictional immunities: *Germany v. Italy* in 2012⁷⁹, although it is also to be found in this treaty:

⁷⁷ *ibid.*, § 26-29

⁷⁸ See, *op. cit.*, note 71, § 47: «This article has been drafted on the lines of Article 10 (4) of the Hague Convention of 1 February 1971 on the Recognition and Enforcement of Foreign judgments in Civil and Commercial Matters.»

⁷⁹ See, ICJ, JURISDICTIONAL IMMUNITIES OF THE STATE: *GERMANY v. ITALY: GREECE* intervening, case number 2012/2, merits, judgment of 3 February 2012, <https://www.icj-cij.org/>

...

Article 31

Nothing in this Convention shall affect any immunities or privileges enjoyed by a Contracting State in respect of anything done or omitted to be done by, or in relation to, its armed forces when on the territory of another Contracting State.

...

This article, enables benefiting State immunity, even in a situation of something usually falling into scope of territory tort, as death or injury, damage or loss of tangible property, if occurring in a situation of armed conflicts.

Finally, to conclude with this international instrument on State immunity, I would like to emphasize, even though the effort is visible, especially taking into consideration the time when it was concluded and existing differences between members states of Council of Europe regarding State immunity, however, it did not attract some significant number of states, and sometimes used some compromising solutions, not completely reflecting international customary law, adding that it can be seen as something outdated in a way today, however it is a source of international law that we have to have in mind.

United Nations Convention on Jurisdictional Immunities of States and Their Property

Further research in this area demands discussing this specific instrument of international law. First to be said, this convention hasn't entered in force yet, however it is widely used by the courts, not only domestic, but ICJ and ECtHR, as this thesis will demonstrate. Up to the date of writing this thesis, there are 28 signatories and 22 parties; the day of entering into force shall be: «...the thirtieth day following the date of deposit of the thirtieth instrument of ratification, acceptance, approval or accession with the Secretary-General of the United Nations...»⁸⁰. However, I would like to briefly address when this idea to establish such an instrument emerged. The main role was played by the United Nations International Law Commission⁸¹, responsible for two important tasks; first to develop, through drafts, international law; second to make a codification of well-established rules and practice of international customary law, as

⁸⁰ See, Article 30, UNCSI ,*op. cit.*, note 60

⁸¹ See more, <https://legal.un.org/ilc/>, visit on 7 May 2022: «The International Law Commission was established by the General Assembly, in 1947, to undertake the mandate of the Assembly, under article 13 (1) (a) of the Charter of the United Nations to "initiate studies and make recommendations for the purpose of ... encouraging the progressive development of international law and its codification»

suggested by a Statute of ILC⁸². As can be seen, work on State immunity started very early, at the beginning of the foundation of ILC, in the middle of 20th century, however it was a work in progress that lasted several decades⁸³. Drafts of UNCSI were finally presented, in a concluding (third) report in 2004 and have been adopted by the General Assembly of United States at the end of that year, on 2 December 2004⁸⁴. To be said in this introduction, criminal proceedings, both as pecuniary compensations that could be raised as a result of armed conflicts, were not a part of the scope of work regarding State immunity designed by ILC, however, they haven't been explicitly omitted with a special provision, as in article 31 of ESCI regarding armed forces, as earlier mentioned⁸⁵.

With this being said, I would like, in my further observation on UNCSI, to address some specific provisions or exceptions, as referring to all of the provisions would be redundant in the end, considering the main subject of the thesis. Therefore articles relevant for the case-law that is mentioned in this thesis, will be emphasised.

First, as seen while discussing on ESCI, I would like to start with the main motives behind this ILC work and principles that were the guiding star in this Draft. Pursuant to Preambles⁸⁶, key principles are acknowledging that there has been a development in State practices regarding State immunity; now jurisdictional immunity of the State and immunity of their property is something generally accepted in customary international law, hence, everything not settled with this Convention, will be resolved according the rules of customary international law. Finally, there was also a reference to rule of law and legal certainty that has been aimed to enhance with UNCSI provisions (importance of the rule of law was discussed at the begging of this thesis). Moreover, at the very beginning of the Convention text, one can notice that UNCSI does not adopt and approach of distinction in *acta iure imperii* and *acta iure gestionis*,

⁸² See *Statute of the International Law Commission* 1947, Adopted by the General Assembly in resolution 174 (II) of 21 November 1947, as amended by resolutions 485 (V) of 12 December 1950, 984 (X) of 3 December 1955, 985 (X) of 3 December 1955 and 36/39 of 18 November 1981, <https://legal.un.org/ilc/texts/instruments/english/statute/statute.pdf>, visit on 7 May 2022

⁸³ See more, , X. YANG,, *op.cit.*, note 42, p.446- 453

⁸⁴ See, Resolution 59/38 of General Assembly on United Nations Convention on Jurisdictional Immunities of States and Their Property, A/RES/59/38 of 2 December 2004, available on https://legal.un.org/ilc/texts/instruments/english/conventions/4_1_2004_resolution.pdf

⁸⁵ see more, R. O'KEEFE, « The 'General Understadings'», in «*The United Nations Convention on Jurisdictional Immunities of States and Their Property: A Commentary*», Edited by R.O'KEEFE, C. J. TAMS, A.TZANAKOPOULS (Assistant Editor), Oxford, Oxford Press, 2013, p.19-27

⁸⁶ See, United Nations Convention on Jurisdictional Immunities of States and Their Property, *op. cit.*, note 60, Preambles

although, it has not been granting immunity in the activities of commercial nature, positioning it in a scope of private international law; making commercial transactions an exception from State immunity; hence accommodating the idea that State immunity is a principle, norm of international law, with some explicit exceptions. To illustrate, this approach is deriving, first from the wording of:

...

Article 1

Scope of the present Convention The present Convention applies to the immunity of a State and its property from the jurisdiction of the courts of another State.

...

Moreover, this approach is clearly supported by introducing an exception of commercial transactions⁸⁷ articulated by:

...

Article 10

Commercial transactions

1. If a State engages in a commercial transaction with a foreign natural or juridical person and, by virtue of the applicable rules of private international law, differences relating to the commercial transaction fall within the jurisdiction of a court of another State, the State cannot invoke immunity from that jurisdiction in a proceeding arising out of that commercial transaction.

2. Paragraph 1 does not apply:

(a) in the case of a commercial transaction between States; or

(b) if the parties to the commercial transaction have expressly agreed otherwise.

3. Where a State enterprise or other entity established by a State which has an independent legal personality and is capable of:

(a) suing or being sued; and

(b) acquiring, owning or possessing and disposing of property, including property which that State has authorized it to operate or manage, is involved in a proceeding which relates to a commercial transaction in which that entity is engaged, the immunity from jurisdiction enjoyed by that State shall not be affected.

⁸⁷ For more detailed about meaning and the scope of commercial transactions, in a light of UNCIS, see, S. WITTICH, «The 'Article 2 (1)(c) and (2) and (3)», in «*The United Nations Convention on Jurisdictional Immunities of States and Their Property: A Commentary*», Edited by R.O'KEEFE, C. J. TAMS, A.TZANAKOPOULS (Assistant Editor), Oxford, Oxford Press, 2013, p.54-72

...

To continue further with UNCSI analysis, a starting point of the ILC approach, related to the matter of a distinction between immunity from jurisdiction and immunity from execution, it is would be deep-rooted at the begging of the text, in:

...

Article 5

State immunity

A State enjoys immunity, in respect of itself and its property, from the jurisdiction of the courts of another State subject to the provisions of the present Convention.

...

My first observation on this provision was that the State is a beneficiary itself; its property is not singled out as a beneficiary of separate entitlement in a different part of procedure-executional part; however, this doesn't mean that forum state can take measures of constraint, as later on in the text, there are several provisions on this matter, first of all, provision of:

...

Article 19

State immunity from post-judgment measures of constraint

No post-judgment measures of constraint, such as attachment, arrest or execution, against property of a State may be taken in connection with a proceeding before a court of another State unless and except to the extent that:

(a) the State has expressly consented to the taking of such measures as indicated:

(i) by international agreement;

(ii) by an arbitration agreement or in a written contract; or

(iii) by a declaration before the court or by a written communication after a dispute between the parties has arisen; or

(b) the State has allocated or earmarked property for the satisfaction of the claim which is the object of that proceeding; or

(c) it has been established that the property is specifically in use or intended for use by the State for other than government non-commercial purposes and is in the territory of the State of the forum, provided that post-judgment measures of constraint may only be taken against property that has a connection with the entity against which the proceeding was directed.

...

To this extend, the UNCSI is also defining a list of special categories of property, as a presumption that property in question is in use only for the governmental purposes:

...

Article 21

Specific categories of property

1. *The following categories, in particular, of property of a State shall not be considered as property specifically in use or intended for use by the State for other than government non-commercial purposes under article 19, subparagraph (c):*

(a) property, including any bank account, which is used or intended for use in the performance of the functions of the diplomatic mission of the State or its consular posts, special missions, missions to international organizations or delegations to organs of international organizations or to international conferences;

(b) property of a military character or used or intended for use in the performance of military functions;

(c) property of the central bank or other monetary authority of the State;

(d) property forming part of the cultural heritage of the State or part of its archives and not placed or intended to be placed on sale;

(e) property forming part of an exhibition of objects of scientific, cultural or historical interest and not placed or intended to be placed on sale.

2. *Paragraph 1 is without prejudice to article 18 and article 19, subparagraphs (a) and (b).*

Given the above on State property, I believe there is some vagueness to this, especially if we read again more carefully wording in Article 1: «... the immunity of a State and its property...», and on the other hand expression in Article 5: « A State enjoys immunity, **in respect** of itself and its property...». However, this is explained quite clear by the authors Rodger O’Keefe and Christian J. Tams, that referred to this as: «...the reference in Article 1 to the immunity of the State property is no more than functional. A State property itself may well enjoy no international legal entitlements under the Convention, but it does not alter the fact that the forum State is not permitted, for example, to take judicial measures of constraint against the property»⁸⁸, it can be concluded that: «It would certainly have been preferable had the Convention conceived and spoken at all times of the immunity of the State, in respect of itself and its property...». Yet, to this extent, in the end one can say that UNCSI takes approach that

⁸⁸ See, R. O’KEEFE and C.J.TAMS « PART I: INTRODUCTION; Article I», «*The United Nations Convention on Jurisdictional Immunities of States and Their Property: A Commentary*», Edited by R.O’KEEFE, C. J. TAMS, A.TZANAKOPOULS (Assistant Editor), Oxford, Oxford Press, 2013, p. 35-39, *spéc.* p. 37

immunity from jurisdiction is one part and immunity from execution another to be discussed separately.

To continue with the observations on the UNCSI Draft there, is something to be found, similarly as stressed in Article 15 of the ECSI, concerning the court's obligation to take notice on the existence of State immunity and withhold from the jurisdiction; ultimately immunity of the foreign State in a front of court of forum State is a norm of international law. However, courts may find existing exceptions as defined the Draft, where State immunity will then not apply. But the wording of that provision in paragraph 1 again suggests that court will act *ex proprio motu*. To that extent, ILC made it clear in given commentary on UNCSI Draft, that the court is obliged to determine its well-founded authority of jurisdiction to begin with, under domestic rules of the forum State, and then proceed questioning, *ex proprio motu*, State immunity, or better to say existence of exceptions of the international rule⁸⁹. To that extent, in paragraph 2 UNCSI is even providing with the further answer what shall be considered as a proceeding instituted «against other state»:

Article 6

Modalities for giving effect to State immunity

1. A State shall give effect to State immunity under article 5 by refraining from exercising jurisdiction in a proceeding before its courts against another State and to that end shall ensure that its courts determine on their own initiative that the immunity of that other State under article 5 is respected.
2. A proceeding before a court of a State shall be considered to have been instituted against

⁸⁹ See, «Draft articles on Jurisdictional Immunities of States and Their Property, with commentaries», Text adopted by the International Law Commission at its forty-third session, in 1991, and submitted to the General Assembly as a part of the Commission's report covering the work of that session (A/46/10, at para. 28). The report, which also contains commentaries on the draft articles, appears in the Yearbook of the International Law Commission, 1991, vol. II, Part Two. 1991, draft article 6, paragraph 4: «It is easy to overlook the question concerning jurisdiction and to proceed to decide the issue of immunity without ascertaining first the existence of jurisdiction if contested on other grounds. The court should be satisfied that it is competent before proceedings to examine the plea of jurisdictional immunity. In actual practice, there is no established order of priority for the court in its examination of jurisdictional questions raised by parties. There is often no rule requiring the court to exhaust its consideration of other pleas or objections to jurisdiction before deciding the question of jurisdictional immunity»; and also paragraph 5: «The second part of paragraph 1 reading "and to that end shall ensure that its courts determine on their own initiative that the immunity of that other State under article 5 is respected" has been added to the text as adopted on first reading. Its purpose was to define and strengthen the obligation set forth in the first part of the provision. Respect for State immunity would be ensured all the more if the courts of the State of the forum, instead of simply acting on the basis of a declaration by the other State, took the initiative in determining whether the proceedings were really directed against that State, and whether the State was entitled to invoke immunity.», https://legal.un.org/ilc/texts/instruments/english/commentaries/4_1_1991.pdf, visit on 8 May 2022

another State if that other State:

(a) is named as a party to that proceeding; or

(b) is not named as a party to the proceeding but the proceeding in effect seeks to affect the property, rights, interests or activities of that other State.

...

In addition, I would like to point out another important provision with reference to foreign State renunciation of an immunity in a form of express consent to submit under the jurisdiction of the forum State, in a form of participation in a proceeding in front of forum State and moreover, in a form of bringing the counterclaims. Therefore the provisions on waiver can be found in Articles 7, 8 and 9. However, I would like to emphasise Article 7, and the necessity of being unambiguously expressed, hence, this is something very clearly explained by the ICL comments⁹⁰, and is required element of State consent as suggested by:

...

Article 7

Express consent to exercise of jurisdiction

1. A State cannot invoke immunity from jurisdiction in a proceeding before a court of another State with regard to a matter or case if it has expressly consented to the exercise of jurisdiction by the court with regard to the matter or case:

(a) by international agreement;

(b) in a written contract; or

(c) by a declaration before the court or by a written communication in a specific proceeding.

2. Agreement by a State for the application of the law of another State shall not be interpreted as consent to the exercise of jurisdiction by the courts of that other State.

...

In order to conclude on UNCSI in respect with the thesis subject matter, it is necessary to point out also two more provisions, as an extension to exception already mentioned under Article 10- Commercial transactions, as the UNCSI draft also recognizes other departures from the international norm of State immunity. For this reason, it is important to mention some situations relating to contracts of employment, and to pay attention to Article 11, its ratio and structure in paragraph 1, and on the other hand also circumstances when this will not be applicable:

...

Article 11

⁹⁰ See, *ibid.*, article 7, § 2-6

Contracts of employment

1. Unless otherwise agreed between the States concerned, a State cannot invoke immunity from jurisdiction before a court of another State which is otherwise competent in a proceeding which relates to a contract of employment between the State and an individual for work performed or to be performed, in whole or in part, in the territory of that other State.

2. Paragraph 1 does not apply if:

(a) the employee has been recruited to perform particular functions in the exercise of governmental authority;

(b) the employee is:

(i) a diplomatic agent, as defined in the Vienna Convention on Diplomatic Relations of 1961;

(ii) a consular officer, as defined in the Vienna Convention on Consular Relations of 1963;

(iii) a member of the diplomatic staff of a permanent mission to an international organization or of a special mission, or is recruited to represent a State at an international conference; or

(iv) any other person enjoying diplomatic immunity;

(c) the subject-matter of the proceeding is the recruitment, renewal of employment or reinstatement of an individual;

(d) the subject-matter of the proceeding is the dismissal or termination of employment of an individual and, as determined by the head of State, the head of Government or the Minister for Foreign Affairs of the employer State, such a proceeding would interfere with the security interests of that State;

(e) the employee is a national of the employer State at the time when the proceeding is instituted, unless this person has the permanent residence in the State of the forum; or

(f) the employer State and the employee have otherwise agreed in writing, subject to any considerations of public policy conferring on the courts of the State of the forum exclusive jurisdiction by reason of the subject-matter of the proceeding

...

For the purpose of this thesis, it is necessary to stress that it would be hard to conclude if the provisions of Article mirroring customary international law, yet this has been concluded as such in ECtHR case-law, as this thesis will demonstrate in the last chapter. At the beginning, we can see that this provision is suggesting no State immunity to be recognized in cases related to contracts of employment, with the extension - unless agreed in a different manner.

Nevertheless we can notice that both Article 5 of ECSI, previously analysed, and Article 11 of UNCSI offer some exceptions, yet with some differences. However, first I would like to state, that architecture of Article 5 ECSI, in the first sentence, refers that »work has to be performed on the territory of the State of the forum«, but Article 11 of the UNCSI, as seen above, allude to « work performed or to be performed, in whole or in part, in the territory of that other State».

While it comes to some similarities in paragraphs 2, as said, both ECSI and UNCSI deal with the exceptions in paragraphs 2, where element of nationality is something brought up both by the two instruments. Consequently, already mentioned reasoning behind Article 5 of ECSI, paragraph 2, *ad* (a), was explained through the connection with foreign State where the individual will be having easier access to justice, while the ILC commentary makes a conclusion that «Without the link of nationality or habitual residence, the State of the forum lacks the essential ground for claiming priority for the exercise of its applicable labour law and jurisdiction in the face of a foreign employer State, in spite of the territorial connection in respect of place of recruitment of the employee and place of performance of services under the contract»⁹¹. Not to be excluded, both instruments offer a possibility for the employer State and the employee to arrange otherwise, allowing the forum State court to exercise jurisdiction in that circumstance only.

But to go further in comparison, however, not to deviate too far from the exceptions that will be scrutinized in the last chapter through the ECtHR case-law, I will mention just briefly some noticeable differences, as UNCSI offers broader scope of exceptions than the ECSI. To illustrate, one can notice that there is no exception regarding diplomatic, consular personnel, persons enjoying diplomatic or consular immunity by a virtue of a special international instruments⁹², nor, for this purpose, the exception listed *ad* (c) of UNCSI « the subject-matter of the proceeding is the recruitment, renewal of employment or reinstatement of an individual»

The very last exception that it will be mention comes by the virtue of Article 12 of UNCSI:

...

⁹¹ See, *ibid.*, Article 11, § 11

⁹² See, Vienna Convention on Diplomatic Relations 1961, Vienna on 18 April 1961. entered into force on 24 April 1964. United Nations, Treaty Series, vol. 500; and Vienna Convention on Consular Relations 1963, Vienna on 24 April 1963. entered into force on 19 March 1967.,United Nations, Treaty Series, vol. 596

Article 12

Personal injuries and damage to property

Unless otherwise agreed between the States concerned, a State cannot invoke immunity from jurisdiction before a court of another State which is otherwise competent in a proceeding which relates to pecuniary compensation for death or injury to the person, or damage to or loss of tangible property, caused by an act or omission which is alleged to be attributable to the State, if the act or omission occurred in whole or in part in the territory of that other State and if the author of the act or omission was present in that territory at the time of the act or omission.

...

This provision (also existing in the ECSI explained previously in the text of this thesis) is introduced to: « provide relief or possibility of recourse to justice for individuals who suffer personal injury, death or physical damage to or loss of property caused by an act or omission which might be intentional, accidental or caused by negligence attributable to a foreign State. Since the damaging act or omission has occurred in the territory of the State of the forum, the applicable law is clearly the *lex loci delicti commissi* and the most convenient court is that of the State where the delict was committed. A court foreign to the scene of the delict might be considered as a *forum non conveniens*»⁹³.

In an effort to conclude with the UNCSI, and in so far with the treaty law on State immunity, I would like to pursue with several observations. First, even though UNCSI is still not in force, it is attracting lots of attention of both domestic courts and ECtHR. At the time being using it to “get inspired” in which way to proceed while ruling on this complicated matter as one has to have in mind that not all States have adopted their own legislation on State immunity, nonetheless, some States actually have domestic acts with some rather debatable solutions in terms of customary international law. The clarification on State immunity offered by the UNCSI in its provision, or better to say, its approach, will be beyond any doubt the one that State parties should use when it enters into force. However, beyond that, even something to be considered by the states still not expressing interest to join the instrument, as it has been understood as codification of current customary international law. That is the main duty of ILC to begin with. Even so, this treaty is really quite captivating, especially as still for some provisions, they could be seen a bit speculative in a way do they really express the rules of customary international law. However one can conclude that this instrument has been an

⁹³ See, Commentaries on UNCSI, *op. cit.*, note 89, Article 12, § 3

exceptional job, not just because of the time that has been put in this, debates that have been conducted, opposing opinions of the members of the ICL that needed to be reconciled, but because of the intention to finally round up State immunity in its all complexity. Last, but not least, it did finally set restrictive immunity as a contemporary approach, despite maybe the approach principle set by Article 5 and not clearly expressing the difference between *acta iure imperii* and *acta iure gestionis*. However, introducing the exceptions to State immunity, for example contained in Article 10 regarding commercial transactions or Article 11, paragraph 2 (a) regarding contract of employment to perform tasks in order to exercise governmental authority, it abandons out dated approach of absolute State immunity. With this being said, this thesis does not suggest that UNCSI is unburdening international law from all the problems when it comes to State immunity, far from that because the best example is the question of violation of *ius cogens* norms that has not been addressed by it. This only suggests that international law is a very complex matter, where State immunity has been shown to be the best example.

4.3.3 Domestic legislation

Even though the primary source of State immunity is customary international law, treaty law in this matter is still a bit problematic, or universally non-defined as explained previously, domestic law has to be mentioned as a source, firstly and traditionally in countries with common law system⁹⁴, where national courts rely on its national acts, which is actually more straightforward for the domestic courts. To this extent, it is necessary to mention Foreign Sovereign Immunities act (1976)⁹⁵ and State Immunity Act (1978)⁹⁶.

However, this should not be anything causing particular difficulty, as national law is supposed to be harmonised with international law, on the contrary we do witness some inconsistency

⁹⁴ See, J. DAINOW, *The American Journal of Comparative Law*, Oxford University Press, 1966 - 1967, Vol. 15, No. 3 (1966 -1967), pp. 419-435, spéc.p. 423: «In both the "law" and "equity" branches of the common law, the established body of legal rules came essentially from judicial decisions. According to the declarative (or customary) theory, these decisions were merely the concrete expression or evidence of the common law which, so to speak, had a permanent and universal existence. According to the creative (or judicial) theory, the modern and more frank position is to recognize that the decided cases were the very source and the essence of the law»

⁹⁵ Foreign Sovereign Immunities Act, U.S. Government Publishing Office, 94th Congress, 2nd Session, 1976, Volume 90, Stat. 2891, Date Approved October 21, 1976, <https://www.govinfo.gov/app/details/STATUTE-90/STATUTE-90-Pg2891>, visit on 6 May 2022

⁹⁶ *State Immunity Act 1978*, UK Public General Acts 1978 c. 33, <https://www.legislation.gov.uk/ukpga/1978/33>, visit on 6 May 2022

here. When it comes to opening this *Pandora's box*, we do have to point out that some provisions in domestic legislation of United State of America, namely FSIA, are not something reflecting neither UNCSI nor international customary law. Accordingly, example would be FSIA's exception concerning foreign State immunity when it comes to expropriation in violation of international law, as written: « 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»⁹⁷. Concerning this exception, there was a case *Rukoro v. Federal Republic of Germany* in a front of domestic courts in United States, finally ruled by a United States Court of Appeals 2 for the Second Circuit⁹⁸, that there is no doubt that United States District Court for the Southern 6 District of New York took into account the provision in question, however, concluding that « the district court ultimately correctly concluded that no FSIA exception applied, leaving it without subject matter jurisdiction» but also « We affirm, although we part ways from the district court on its tracing analysis...». As a conclusion, even if the State immunity was recognized in this case, the reason behind that is that analysis in the case had shown that the conditions referred to in exception are not met⁹⁹, however courts of United State do not obviously question this exception to begin with. But one thing is also very interesting in this judgment, it is actually showing something that has been emphasized already in this thesis, that there is somewhat a blur border line between the fact that State immunity is a procedural question, sometimes courts do enter a bit into beyond that, while analysing the facts in order to make a decision on this procedural bar.

This is not the only example where US domestic law on State immunity takes another direction than the international customary law or even UNCSI, by narrowing the doctrine of State however, narrowing it domestically, not changing the existing international customary law, but having its national courts applying new exception, which was not in a line with current

⁹⁷ See, Foreign Sovereign Immunities Act., *op, cit.*, note 95, §1605. *General exceptions to the jurisdictional immunity of a foreign state; ad (a)3*,

⁹⁸ See, UNITED STATES COURT OF APPEALS 2 FOR THE SECOND CIRCUIT, 19-609-cv *Rukoro v. Federal Republic of Germany*, Docket No. 19-609, decision of September 24, 2020

⁹⁹ See more *ibid.*, p.2 and 3

international law. This has been made by adding article 1605A to FSIA in 1996, where legal proceeding in a US courts could be initiated against the «Countries determined by the Secretary of State to have repeatedly provided support for acts of international terrorism...»¹⁰⁰. However, this was not the end of it, in 2016 Justice Against Sponsors of Terrorism Act¹⁰¹ was introduced that provided for an terrorism exception to be even wider applicable, not only to the States declared as providing support to terrorism. To clarify, until 1996 in a case of terrorism only territorial tort exception could lift State immunity, however, with 1996 FSIA, State immunity from jurisdiction would not apply in regard with States fixed by the list according the decision of State Secretary no matter where the act occurred. However, already controversial exception related to the list became even more controversial with JASTA, as decided to deny immunity, according to this new framework, to any State proven to support terrorist also for terrorist acts outside the US soil, so, the States from the list are not the only ones to whom deny immunity as sponsoring terrorism, it can now be broader than that. Similar approach to 1996 FSIA has been enacted with the legislation in Canada: « A foreign state that is set out on the list referred to in subsection (2) is not immune from the jurisdiction of a court in proceedings against it for its support of terrorism on or after January 1, 1985»¹⁰², even though we see it was no so far reachable as it was in United States with JASTA. Despite maybe a noble intentions of the two States, to open the path for victims of the terrorist attacks, or other plaintiffs with legal interest in that situation, and to easy up access to justice for them, it still remains a controversial approach, as it represents a breach of current international law rules.

Nonetheless, the intention was not merely to criticiz not harmonizing domestic approach and domestic legislation of same States with current international law, or maybe to be precise, international customary law as a matter of fact, however I wanted to stress the importance of complying with existing international rules on State immunity. Of course, if through time more and more domestic legislation occurs with new path in approaching, for example, exceptions to State immunity, and therefore national courts act by it, maybe there some new *opinion juris* will be reached in order to change some current rules. However, this is still something not happening at the moment. Thus, not to forget to mention, there is also a possibility that this matter will be finally resolved by a treaty in force. In conclusion, I believe that all the beauty

¹⁰⁰ See, <https://www.state.gov/state-sponsors-of-terrorism/>, visit on 6 May 2022

¹⁰¹ Justice Against Sponsors of Terrorism Act , Public Law No: 114-222 of 28 September 2016

¹⁰² See article 6 (1) of State Immunity Act/Loi sur l'immunité des États, R.S.C., 1985, c. S-18, <https://laws-lois.justice.gc.ca/pdf/S-18.pdf>, visit on 6 May 2022

of international law lays in its complexity, although States have to act very attentive in this regard.

4.4 Contemporary conclusions and agreed principles on State immunity

This subchapter has been perceived to complete the part of the thesis on doctrine on State immunity, before passing the floor to case law of ECtHR, with concluding the common grounds as a result of everything discussed on rationale, nature and sources and domestic case law on the matter in question.

To draw some conclusions in order to set clear principles in State immunity doctrine, it is not always an easy straightforward process. One can say that this derives from the fact that concept of State immunity was developed from the various domestic case law and practice, has been governed by customary international law, and not so much from the treaty law, that has been explained previously. During that process some case law was, and still is, simply narrowing the margin of appreciation in cases relating to State immunity, interpreting it, or better say, introducing its own exemptions. However, we can stress several principles that have been widely acknowledged¹⁰³ by persistent state practice and opinion juris, and that can be said to reflect international customary law in this matter, so any other practice would be considered as deviating from those rules.

I Base line when it comes to agreed principles is undoubtedly *par in parem non habet imperium*. Existence of State of immunity *per se* is not a question at all today. It has been a presumption for a quite some time now, that foreign State cannot be sued in front of a forum State court, as sovereigns are equal. This results in limiting forum State jurisdiction, however it serves its purpose to keep the balance of equality between the States. State immunity as international norm derives first from customary international rules. Second, it can be found in a treaty law where two main international instruments were discussed already. And third, some domestic legislations are codifying the rule; in common law system it may be a tradition now, however this is not uncommon to find also in civil law States, as the purpose would be to give national court guidance, and for that purpose one cannot deny that it would be an easier path for the domestic courts, then relaying on complexity of the matter in question through international rules, that can be founded in different sources. In favour of this first agreed

¹⁰³ See more, X. YANG, *op. cit.*, note 43, p. 34

principle, State immunity was acknowledged in very important ruling given by the ICJ in *Jurisdictional Immunities of the (Germany v. Italy: Greece intervening)*: «The Court considers that the rule of State immunity occupies an important place in international law and international relations. It derives from the principle of sovereign equality of States, which, as Article 2, paragraph 1, of the Charter of the United Nations makes clear, is one of the fundamental principles of the international legal order. This principle has to be viewed together with the principle that each State possesses sovereignty over its own territory and that there flows from that sovereignty the jurisdiction of the State over events and persons within that territory»¹⁰⁴. Moreover, it has been also stated that there is no question on this matter among the parties, even if they diverge in the conclusion of the scope of that immunity.¹⁰⁵ Moreover, as being a norm of international law, domestic courts should raise this issue *ex proprio motu*. However, I would not conclude this is something stated in customary international law standing alone, because it is not quite clear, more being a consequence of this presumption of State immunity, and domestic courts obligation to act in accordance with international law. Although, raising the issue of State immunity *ex proprio motu* can be found in ECSI and UNCSI.

II With the first general rule being said, next step is to endow the first principle with more details. As so far concluded, State will enjoy its immunity for *acta iure imperii*, acts conducted as a part of governing, thus acting in public, governmental capacity. On the contrary, there is no immunity for *acta iure gestionis*. The distinction will be primarily decided based on domestic legislation. To that extent some States for example tend to put in their acts what would be a commercial activity¹⁰⁶. However, it is not always a straightforward task to *determine acta iure gestionis*, based even on the guidance given by the domestic act and domestic approach in such determination¹⁰⁷, more detailed¹⁰⁸, or less detailed.¹⁰⁹ ECSI is dealing with this separation, as

¹⁰⁴ See ICJ *Germany v. Italy*, *opt.cit.*, note 79, p.28, § 58

¹⁰⁵ *ibid.*, p. 29, , § 59

¹⁰⁶ See more, E.SUY, *opt.cit.*, note 58, p. 679: «In some States, like Belgium, commercial acts are clearly defined (Code de Commerce, Book 1, Title I, articles 2 and 3), and judges have sometimes referred to it to qualify an act performed by a foreign State (*Feldman v. State of Babia*, Pas. 1908, 11, 58; *Szczesniak v. Backer & cs*, Pas. 1957, 11, 40)»

¹⁰⁷ *ibid.*, p. 679 and 680: «However it would be erroneous to believe- as did the judge in the *Feldman* case - that all that does not fall within the compass of this definition automatically becomes an act of government, an act performed *iure imperii*; apart from acts of commerce there exist other acts performed *iure gestionis*. Moreover, there is surely an element of risk in qualifying an act performed by a foreign State in terms of internal law.»

¹⁰⁸ Foreign States Immunities Act 1985, No. 196, 1985, Compilation No. 5, Compilation date: February 2022 February 2022, Article 11, <https://www.legislation.gov.au/Details/C2022C00077>, visit on 11 May 2022

¹⁰⁹ See, *opt.cit.* 95, §1603 (d)

noticed, in Article 7 referring to those affairs: «in the same manner as a private person, in an industrial, commercial or financial activity»¹¹⁰. As for the UNCSI, the situation is similar; definition given in Article 11 does not say much, except that those transactions¹¹¹ are governed by the by virtue of the applicable rules of private international law,. However UNCSI in Article 2, paragraph 2 gives some guidance to use even the purpose approach, with nature approach, when needed if the parties involved in commercial activity agreed on that or purpose approach is relevant in the domestic practice of the forum State. In that order, guidance given both by domestic or international law are not sufficient for the courts to determine what kind of act is at stake, therefore, it would be good to mention two Belgian cases from more recent history, where the nature of act was quite something in between at the first glance, yet it was concluded that in the particular cases, it was a situation of nationalization conducted by the Netherlands, even if it seemed to be a commercial act. The approach that was used by the Belgian *Cour de cassation*¹¹² was to facilitate determination by turning to the context of the transaction, which is quite interesting because, as stated earlier Belgium is following the nature approach mainly. Once again, this approach found its way in latter Belgian case law¹¹³.

When discussing case law in State immunity matters, judgment given by the ICJ, as already mentioned, is very relevant to different extents. Hence, in terms of *acta iure gestions* I would like to mention it once again, affirming the acknowledgment of the States today in distinction between *acta iure imperii* and *acta iure gestionis*. ICJ stressed as follows: «The Parties also differ as to the scope and extent of the rule of State immunity. In that context, the Court notes that many States (including both Germany and Italy) now distinguish between *acta iure gestionis*, in respect of which they have limited the immunity which they claim for themselves and which they accord to others, and *acta iure imperii*. That approach has also been followed in the United Nations Convention and the European Convention (see also the draft Inter-American Convention on Jurisdictional Immunity of States drawn up by the Inter-American Juridical Committee of the Organization of American States in 1983 (ILM, Vol. 22, p.

¹¹⁰ See, ECSI, *opt.cit.*, note 70

¹¹¹ United Nations Convention on Jurisdictional Immunities of States and Their Property, *opt.cit.*, note 60, Article 11

¹¹² See more, J.-P. A. et consorts demandeurs en cassation c. défendeurs en cassation ROYAUME DES PAYS-BAS et DE NEDERLANDSCHE BANK, Cour de cassation, C.14.0322.F, l'arrêt de 23 octobre 2015

¹¹³ See more, FÉDÉRATION DE RUSSIE demanderesse en cassation c. défenderesse en cassation GODEAU FINANCES, Cour de cassation, 06 décembre 2019, C.18.0282.F, l'arrêt de 06 décembre 2019

292))»¹¹⁴. Finally, we can reach a conclusion that it is no question today among the States if there a difference in involving in activities as any other private or legal person. Only two States still follow absolute immunity concept; China and Hong Kong that actually did follow restrictive concept as British colony until 1997¹¹⁵. Yet, to put aside those two examples, ICJ correctly observed that many States follow this distinction, so we can say it is customary international law, while it is interesting that when it comes to treaty law, in light of two main instruments of international law ECSI and UNCSI, the reasoning was rather to state that States will enjoy immunity, unless listed exceptions occur. However, the final result is the same, there is no absolute State immunity.

III State immunity has two categories, depending on the phase of the proceedings. First immunity from jurisdiction-as a matter of international law principle already explained in details, where foreign State cannot be sued in a front of forum State court; unless the case falls under some of the exceptions. Second, immunity from execution- state property, in a forum State territory, enjoys immunity from the measures of constraint of the forum State. However, the correlation between those two is quite fascinating as ultimately deprivation of immunity from jurisdiction does not necessary mean deprivation of immunity from execution. Plaintiff may obtain a judgment against a foreign State, however there are situations where that judgment could not be executed in a form of measures of constraint. This was expressed again by the ICJ in case *Germany v. Italy (Jurisdictional immunities of the State)*: «Court observes that the immunity from enforcement enjoyed by States in regard to their property situated on foreign territory goes further than the jurisdictional immunity enjoyed by those same States before foreign courts. Even if a judgment has been lawfully rendered against a foreign State, in circumstances such that the latter could not claim immunity from jurisdiction, it does not follow ipso facto that the State against which judgment has been given can be the subject of measures of constraint on the territory of the forum State or on that of a third State, with a view to enforcing the judgment in question»¹¹⁶.

¹¹⁴ See ICJ *Germany v. Italy*, *op. cit.*, note 79, p. 29 i 30, § 59

¹¹⁵ See more Y.DING, «Absolute, Restrictive, or Something More: Did Beijing Choose the Right Type of Sovereign Immunity for Hong Kong?», 26 *Emory Int'l L. Rev.* 997, 2012, p. 997-1037, <https://scholarlycommons.law.emory.edu/eilr/vol26/iss2/15>

¹¹⁶ See ICJ *Germany v. Italy*, *op. cit.*, note 79, p.51, § 113

The approach that can be found when it comes to immunity from the execution, is also following the restrictive immunity concept; hence foreign State property that enjoys this immunity is the one used in official, governmental purposes. Both this principle, and the one referring that immunity from execution is separate from the previous stage in proceedings and immunity from jurisdiction, so it should be observed and examined separately, are contained in the text of UNCSI in Articles 19 and 21. Article 21 of the UNCSI is providing with the list of State property that shall be considered as for governmental purposes, thus enjoying immunity from the execution. List is stating *in concreto* property as central State bank accounts, bank accounts for use and performances of tasks of embassies, consular activities, special missions both as missions to international organizations, military property for military functions, property of cultural heritage of the foreign State or archives but not for sale, and also property which is in a function as an object of scientific, cultural or historical importance and is a part of exhibition, however also not for a purpose of sale. One can conclude that UNCSI is offering some guidance here. However, if we come back to Article 19, it is not clear to what extent that reflects customary international law, as stressed by the ICJ: «When the United Nations Convention was being drafted, these provisions gave rise to long and difficult discussions. The Court considers that it is unnecessary for purposes of the present case for it to decide whether all aspects of Article 19 reflect current customary international law»¹¹⁷, but as a conclusion ICJ notes: « Indeed, it suffices for the Court to find that there is at least one condition that has to be satisfied before any measure of constraint may be taken against property belonging to a foreign State: that the property in question must be in use for an activity not pursuing government non-commercial purposes, or that the State which owns the property has expressly consented to the taking of a measure of constraint, or that that State has allocated the property in question for the satisfaction of a judicial claim»¹¹⁸.

As the conclusions made by the ICJ in 2012 have a landmark significance and for sure give some explanation and guidance to domestic courts also, in the domestic case law around that time, and in year that came after, there was a trend domestically to introduce some changes, as happened after the *Yukos case* while execution arbitral award in various forum States courts¹¹⁹, which in the end led to some changes in some States as France and Belgium in order

¹¹⁷ *Ibid.*, p. 148, § 117

¹¹⁸ *Ibid.*, p. 148, § 118

¹¹⁹ See more, *Yukos Universal Limited (Isle of Man) v. The Russian Federation*, PCA Case No. 2005-04/AA227, <https://jusmundi.com/fr/document/decision/en-yukos-universal-limited-isle-of-man-v-the-russian-federation->

to harmonise with the rule that actually measures of constraint against the property of foreign State in forum State do not go automatically and that immunity of execution has to be observed separately. So, this approach is something in a line with the idea of UNCSI. However, not to deviate from the focal point of this thesis related to State immunity and rights of individuals under Article 6 (1) of ECHR, this work will not examine in details all those courts proceedings in *Yukos case*.

IV Last contemporal conclusion I would like to stress is that State may renounce from its right to immunity. Waiver is something that was a part of the developments in the doctrine of State immunity, and also it has been as such introduced through treaties, both in ECSI and UNCSI, although when reading article 7, 8 and 9 of the UNCSI, it is hard to say that everything reflect customary international law as written. It can be concluded though that nowadays it is something generally acknowledged. Finally, when it comes to State immunity from jurisdiction it can be explicit or implicit, however in order to renounce State immunity from execution, the rules are bit different: it cannot be implicit. In this regard, an interesting cases of attempt of measures of constraint, from the same claim of private fund against the property of Argentina, appeared both in France¹²⁰ and Belgium¹²¹ (along those cases some legislative changes were introduced but will not be discussed in further), in the proceeding, Argentina did not benefit from State immunity execution as there was also special waiver need in a light of immunity from execution regarding diplomatic property in the end.

4.5 Current challenges- *ius cogens*

Coming to the end of the part dedicated to doctrine of State immunity, examining all the fundamental features, and accordingly setting some generally accepted conclusions, ultimately one cannot ignore the fact that matter is not devoid of debates and contrary opinions nowadays among the scholars and judges. Even though the debated topics are numerous, in order to close the circle of access to justice, ECtHR and State immunity, there is one specific issue this work would like to address, which will finally be a good preface to the next and final chapter

[judgment-of-the-high-court-of-justice-of-england-and-wales-2021-ewhc-894-wednesday-14th-april-2021](#), visit on 11 May 2022

¹²⁰ See, Cour de cassation, civile, Chambre civile 1, 09-72.057, l'arrêt de 28 septembre 2011, <https://www.legifrance.gouv.fr/juri/id/JURITEXT000024617044>, visit on 11 May 2022

¹²¹ See, Cour de cassation, C.11.0688.F, l'arrêt de 22 novembre 2012, <https://juricaf.org/arret/BELGIQUE-COURDECASSATION-20121122-C110688F>, visit on 11 May 2022

dedicated to the case law of ECtHR on State immunity. With that being said, it can be perceived as a quite obvious that human rights debates are one of the vociferous criticism that arise out of the concept of State immunity. Even the access to justice is one of fundamental human rights, however not absolute, as not all are indeed, so it could not be an argument *per se*, however there has been something that stands out- violations of *ius cogens*. Further, this idea goes in two directions¹²², first that violations of *ius cogens* norms of human rights overrule State immunity as deriving from inferior norm of international law, and second that this kind of violations presents a waiver by itself, from jurisdiction of foreign forum State court. Although, criticism relating State immunity and *ius cogens* has been demonstrated through Italian jurisprudence and a position of Italian Constitutional Court¹²³, that set the path of Italian case law regarding also an approach towards the application of UNCSI on this matter. As said before, UNCSI does not recognize *ius cogens* exception, which is seen as failure¹²⁴ in eyes of some because not settling a question of human rights violations, to that extend also a question of access to court, in relation to State immunity concept, while it had an opportunity. Furthermore, this can be seen as provoking some ideas, to introduce the possible protocol on human rights that will address this issue¹²⁵. However, that approach, as same as Italian approach, and seen similarly in Korea's case law¹²⁶, it would be far away from concluding there is a general acceptance in this approach, yet it is something that initiates numerous

¹²² See X. Yang, *op.cit.*, note 43, p. 429

¹²³ See more, La Corte Costituzionale Sentenza n. 238/2014, 22 ottobre 2014 https://www.gazzettaufficiale.it/atto/corte_costituzionale/caricaDettaglioAtto/originario?atto.dataPubblicazioneGazzetta=2014-10-29&atto.codiceRedazionale=T-140238, visit on 12 May 2022

¹²⁴ See more, C.K. HALL, UN Convention on State Immunity: The Need for a Human Rights Protocol, *The International and Comparative Law Quarterly*, Cambridge University Press on behalf of the British Institute of International and Comparative Law, Vol. 55, No. 2 (Apr., 2006), pp. 411-426, spéc. p. 412: «However, the drafters had the opportunity, which they twice rejected, apart from a handful of possible narrow exceptions, to accept proposals reflecting developments in the field of human rights and international humanitarian law.5 As explained below, if the Convention were ratified, there is a serious risk that it could prevent victims of human rights violations committed outside the forum state in peace time, including genocide, crimes against humanity, extra-judicial executions, enforced disappearances and torture, from obtaining reparations. If such human rights violations were committed abroad in a situation involving an armed conflict, it might also prevent victims in that situation from obtaining reparations. In addition, the Convention could prevent victims and their families from obtaining reparations from the state or from its officials or agents for many violations of international humanitarian law committed outside the UK, including war crimes during international and non- international armed conflict. Immunity would become impunity from civil accountability. In addition, the Convention would restrict the scope of reparations in the rare case when they were obtainable against states, their officials and their agents to compensation. This restriction would be inconsistent with international law and standards guaranteeing victims of human rights violations their right to a remedy and their right of access to a court.»

¹²⁵ See, *ibid.*, p. 425-426

¹²⁶ See more <https://kls.law.columbia.edu/content/lawsuits-brought-against-japan-former-korean-comfort-women>, visit on 12 May 2022

debates, even among some ECtHR judges as will be seen, yet this work will demonstrate that ECtHR is not in the same line with this idea.

In addition, also ICJ famous *Jurisdictional immunities of the State* judgment had its saying on State immunity and *ius cogens*, even of course acknowledging that: « Since jus cogens rules always prevail over any inconsistent rule of international law, whether contained in a treaty or in customary international law, so the argument runs...»¹²⁷, however ICJ turned to another important fact which has been missed by some: « This argument therefore depends upon the existence of a conflict between a rule, or rules, of jus cogens, and the rule of customary law which requires one State to accord immunity to another. In the opinion of the Court, however, no such conflict exists. Assuming for this purpose that the rules of the law of armed conflict which prohibit the murder of civilians in occupied territory, the deportation of civilian inhabitants to slave labour and the deportation of prisoners of war to slave labour are rules of jus cogens, there is no conflict between those rules and the rules on State immunity. The two sets of rules address different matters. The rules of State immunity are procedural in character and are confined to determining whether or not the courts of one State may exercise jurisdiction in respect of another State»¹²⁸.

5 The Case law of European Court of Human Rights – Interplay between State immunity and Article 6 (1) of European Convention on Human Rights

5.1 General remarks

It has been more than twenty years know from the delivery of first judgments on this matter by the ECtHR, so I believe it is safe to conclude that the Courts practice has been rendering a valuable contribution to the matter in question, providing guidance to Member States, but also contributing generally in the arena of international law to the clarity when it comes not only to State immunity but also the right to a fair trial. That being said, this work would like however, to demonstrate that it has not been an easy task and the ECtHR was not working and ruling in a bubble, without being touched by the debates going around the doctrine of State immunity.

¹²⁷ See, ICJ *Germany v. Italy*, *op.cit.*, note 79, p.140, § 92

¹²⁸ *Ibid.*, § 93

Correspondingly this will be exemplified by dissenting opinions of some judges given in some judgments that will be analysed. And hopefully, it will demonstrate that all the obstacles resulting from a complexity of the concept State immunity discussed earlier, appeared also in discussions among the honourable judges of the ECtHR, during the deliberations.

5.2 Case of Al- Adsani v. The United Kingdom

Case in question¹²⁹, where ECtHR was sitting in a Grand Chamber, was initiated by the application of Mr. Al-Adsani, British and Kuwaiti national, based on alleged violation of Articles 3, 6 (1) and 13 of the ECHR¹³⁰. The applicant was a pilot, during the Gulf War a member of Kuwaiti Air Force and afterwards a member of the resistance movement, while during that period he was in possession of compromising tapes of Sheikh Jaber Al- Sabah Al- Saud Al- Sabah, who was related with Emir of Kuwait, however those tapes got released to the public. As a result, according to the applicant, the Sheikh and two other men imprisoned him and tortured, so in the end, upon his return to England, he initiated a civil law suit against the Sheikh and the State of Kuwait, regarding the injuries suffered, both to physical and mental health. Finally, his claim was rejected by the Court of Appeal, granting the immunity to State of Kuwait¹³¹.

ECtHR, first turned to Article 3 of the ECHR, however as applicant did not argue that the alleged torture happened under the jurisdiction of the United Kingdom, or to that extent to be on some causal connection with it, thus the United Kingdom cannot be held as a responsible Party¹³² to the obligations under United Nations Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment, adopted on 10 December 1984¹³³. Finally, ECtHR turned to the question of violation of Article 6 (1) of the ECHR and stated that, actually there was a situation when Article 6 (1) could be applicable- if the foreign States waives the State immunity. This was clearly express in: « The proceedings which the applicant intended to pursue were for damages for personal injury, a cause of action well known to English law. The Court does not accept the Government's submission that the applicant's claim had no legal

¹²⁹ See, ECtHR CASE OF AL-ADSANI v. THE UNITED KINGDOM, *op. cit.* note 46

¹³⁰ See, ECHR, *optop.cit.*, note 22

¹³¹ See, ECtHR CASE OF AL-ADSANI v. THE UNITED KINGDOM, *op .cit.* note 46, § 17

¹³² *Ibid*, § 40 and 41

¹³³ Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, United Nations, Treaty Series , vol. 1465, p. 85., New York, 10 December 1984

basis in domestic law since any substantive right which might have existed was extinguished by operation of the doctrine of State immunity. It notes that an action against a State is not barred in limine: if the defendant State waives immunity, the action will proceed to a hearing and judgment. The grant of immunity is to be seen not as qualifying a substantive right but as a procedural bar on the national courts' power to determine the right»¹³⁴.

This being said, ECtHR turned further on the right of access to court, where it made clear that this right is not absolute and may be under some limitation, however it is crucial to determine: « that the limitations applied do not restrict or reduce the access left to the individual in such a way or to such an extent that the very essence of the right is impaired. Furthermore, a limitation will not be compatible with Article 6 § 1 if it does not pursue a legitimate aim and if there is no reasonable relationship of proportionality between the means employed and the aim sought to be achieved (see *Waite and Kennedy v. Germany* [GC], no. 26083/94, § 59, ECHR 1999-I)»¹³⁵. As described, ECtHR did determine that this limitation pursued a legitimate aim, as granting the State immunity is «complying with the international law to promote comity and good relations between States through the respect of another State's sovereignty»¹³⁶. Next, it had to examine whether the proportionality to the aim was satisfied, thus « It reiterates that the Convention has to be interpreted in the light of the rules set out in the Vienna Convention on the Law of Treaties of 23 May 1969, and that Article 31 § 3 (c) of that treaty indicates that account is to be taken of “any relevant rules of international law applicable in the relations between the parties”. The Convention, including Article 6, cannot be interpreted in a vacuum. The Court must be mindful of the Convention's special character as a human rights treaty, and it must also take the relevant rules of international law into account (see, *mutatis mutandis*, *Loizidou v. Turkey* (merits), judgment of 18 December 1996, Reports 1996-VI, p. 2231, § 43). The Convention should as far as possible be interpreted in harmony with other rules of international law of which it forms part, including those relating to the grant of State immunity»¹³⁷. Ultimately, ECtHR concluded that this limitation is not disproportionate, and it is in accordance with, in its own words: « generally recognised rules of public international law»¹³⁸.

¹³⁴ See, ECtHR CASE OF AL-ADSANI v. THE UNITED KINGDOM, *op. cit.*, note 46, § 48

¹³⁵ *Ibid*, § 53

¹³⁶ *Ibid*, § 54

¹³⁷ *Ibid*, § 55

¹³⁸ *Ibid*, § 56

And finally, last set of observations was made regarding the violation of *ius cogens* norm-prohibition of torture, where with no doubt this enjoys a special status by virtue of its special character. However, ECtHR deduced that «while noting the growing recognition of the overriding importance of the prohibition of torture, does not accordingly find it established that there is 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. The 1978 Act, which grants immunity to States in respect of personal injury claims unless the damage was caused within the United Kingdom, is not inconsistent with those limitations generally accepted by the community of nations as part of the doctrine of State immunity»¹³⁹

In this judgment, ECtHR presented not only the interpretation of the concept of State immunity in accordance with ECSI, nevertheless, it used also the conclusions made by the ILC while working on the UNCSI¹⁴⁰.

It can be concluded that regarding a violation of Article 3 decision was unanimous; regarding the violation of Article 6 (1) the ruling was also stating no violation, however nine votes to eight, indeed a tight decision. Therefore, it is needed to discuss on also the dissenting opinions. To that extent, as a backbone of expressing the opinion at variance with the reached majority, would be summarised in: « By accepting that the rule on prohibition of torture is a rule of *jus cogens*, the majority recognise that it is hierarchically higher than any other rule of international law, be it general or particular, customary or conventional, with the exception, of course, of other *jus cogens* norms»¹⁴¹, yet: « The majority, while accepting that the rule on the prohibition of torture is a *jus cogens* norm, refuse to draw the consequences of such acceptance. They contend that a distinction must be made between criminal proceedings, where apparently they accept that a *jus cogens* rule has the overriding force to deprive the rules of sovereign immunity from their legal effects, and civil proceedings, where, in the absence of authority, they consider that the same conclusion cannot be drawn»¹⁴². In my opinion, this dissenting conclusions, with all the respect of course as this heavy subject should be open to different views in order to be able to reach some common conclusion in the end, are throwing the ball too far, as the basic

¹³⁹ *Ibid*, § 66

¹⁴⁰ *Ibid*, § 23, 24, 62 and 63

¹⁴¹ *Ibid*, see *JOINT DISSENTING OPINION OF JUDGES ROZAKIS AND CAFLISCH JOINED BY JUDGES WILDHABER, COSTA, CABRAL BARRETO AND VAJIĆ*, § 2

¹⁴² *Ibid*, § 4

question is relation and proportionality of State immunity and access to justice, and the interpretation of those two different rules of international law, thus not interpretation of the rule of State immunity and the *ius cogens rule*- prohibition of torture. To go a bit further, dissenting opinion of Judge Loucaides¹⁴³ did a bit more on the argument part regarding balancing, however, looking into subject matter, as suggested to weigh the opposing interests, would risk addressing the merits of the case. However, addressing the merits, while determining on this procedural bar, can be seen as going too far (State immunity is procedural bar beyond any doubt). Nevertheless, this approach could also be seen as weighing between State immunity and *ius cogens* rule, which is not in question here.

As a conclusion, according to my view on the judgment in question, ECtHR did render a reasonable conclusion, however, I do see some points made in dissenting opinions, which could maybe in the end be different, if the Court explained a bit deeper or in more details on some conclusions; e.g. accepting the fact of different approaches on immunity taken in criminal procedures and civil claims, stated in its judgment in § 65, while referring to the acceptance of the outcome of *Pinochet (No.3 case)*¹⁴⁴.

As can be seen, case of *Al- Adsani v. The United Kingdom* clearly states several facts when it comes to concept of State immunity, first, this limitation is a procedural bar. Second, access to court is not an absolute right. Third, limitation of that right by recognising immunity in civil proceedings should be examined in a light pursuing the legitimate aim- to comply with the rules of international law aiming to secure respect of other State's sovereignty and fostering

¹⁴³ Ibid, see DISSENTING OPINION OF JUDGE LOUCAIDES :« Any form of blanket immunity, whether based on international law or national law, which is applied by a court in order to block completely the judicial determination of a civil right without balancing the competing interests, namely those connected with the particular immunity and those relating to the nature of the specific claim which is the subject matter of the relevant proceedings, is a disproportionate limitation on Article 6 § 1 of the Convention and for that reason it amounts to a violation of that Article. The courts should be in a position to weigh the competing interests in favour of upholding an immunity or allowing a judicial determination of a civil right, after looking into the subject matter of the proceedings. It is true that in the present case the absurd and unjust results of applying a blanket immunity without regard to any considerations connected with the specific proceedings are more evident because the immunity prevented accountability for a grave violation of an international peremptory norm, namely the prohibition of torture. However, this does not mean that the relevant immunities can only be found to be incompatible with Article 6 § 1 in a case like the present one. In my opinion, they are incompatible with Article 6 § 1 in all those cases where their application is automatic without a balancing of the competing interests as explained above.»

¹⁴⁴ See, *Bartle and the Commissioner of Police for the Metropolis and Others, Ex Parte Pinochet; R v. Evans and Another and the Commissioner of Police for the Metropolis and Others, Ex Parte Pinochet, R v. [1999] UKHL 17 (24th March, 1999)*, <https://www.bailii.org/uk/cases/UKHL/>, <https://www.bailii.org/uk/cases/UKHL/>, visit on 13 May 2022

good relations between the States. Fourth, the proportionality aim should be satisfied- ECtHR concluded that this limitation is generally recognised rule of public international law, hence, not disproportionate. Fifth, State immunity can be waived by the foreign State – this is approach also seen in the texts of the ECSI and UNCSI. And lastly, even though there is no doubt on importance of prohibition of torture with its character of *ius cogens* norm, however there is no acceptance in the international law that would avail the State immunity in civil claims for damages related to situations of alleged torture, that took place outside the forum State.

5.3 Case of Fogarty v. The United Kingdom

Another case¹⁴⁵ from year 2001, deliberated by the same Grand Chamber as in previous case, and as will be demonstrated, with the same outcome- no violation of Article 6 (1). Mrs. Fogarty, the applicant, was performing the tasks as an administrative assistant in the Foreign Broadcasting Information Service, at the United States Embassy in London, when being dismissed from her job in 1995. According to the applicant she was a victim of sexual harassment of her superior and to that extent she initiated a proceeding against the United States in front of a court in London as claiming her dismissal was a result of sex discrimination. While the proceedings were pending, the applicant was performing the tasks from 12 months fixed contract, also in the US Embassy, however after that contracted expired, she tried to apply for a new position, twice, yet with no success. The applicant decided, as a result of being refused, to file another law suit, stating this developments of events are immediate consequence of her first successful claim for sex discrimination, where the United States did not invoke immunity. However, in the latter case, the London court received a letter from the United States claiming the immunity. Given the above, application to the ECtHR has been lodged on a grounds of Article 6 § 1 and 14 of the Convention, with the final conclusion there is no violation of 6 (1) by six to one votes; however also no violation of Article 14 in conjunction with Article 6 (1) – unanimously.

The ECtHR, once again, confirmed that the right of access to court is not absolute and it can be under some limitations¹⁴⁶. Additionally, Court again examined on the legitimate aim of this limitation and the proportionality, finding as in previous case, «*par in parem non habet*

¹⁴⁵ See, ECtHR, CASE OF FOGARTY v. THE UNITED KINGDOM, *op.cit.*, note 454445

¹⁴⁶ *Ibid*, § 33

imperium, by virtue of which one State shall not be subject to the jurisdiction of another State¹⁴⁷, however also on the proportionality: «It follows that measures taken by a High Contracting Party which reflect generally recognised rules of public international law on State immunity cannot in principle be regarded as imposing a disproportionate restriction on the right of access to court as embodied in Article 6 § 1. Just as the right of access to court is an inherent part of the fair trial guarantee in that Article, 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 immunity¹⁴⁸

However, as this particular case was relating to an employment dispute, the Court immediately affirmed that there has been a tendency to limit State immunity¹⁴⁹, although continued with explaining that relating to employment in embassies, international practice goes both directions on this matter; if the approach taken is that State immunity applies, then another question arises- does it apply to disputes in respect to the contracts of all the staff or just some¹⁵⁰. Finally, ECtHR turns to the case in question, emphasising that this particular situation is related to the recruitment process, and discrimination in that regard, and not the rights rising from contractual relation¹⁵¹. Given the above, ECtHR concludes with: « The Court is not aware of any trend in international law towards a relaxation of the rule of State immunity as regards issues of recruitment to foreign missions. In this respect, the Court notes that it appears clearly from the materials referred to above (see paragraph 19) that the International Law Commission did not intend to exclude the application of State immunity where the subject of proceedings was recruitment, including recruitment to a diplomatic mission»¹⁵², thus, in order to find the answers, ECtHR once again turned to the Draft of the UNCSI and the ILC conclusions.

Before turning to next case, it is important to add that there was again a dissenting opinion by Judge Loucaides, however, again pointing out the blanket character of State immunity, which result that, in his own words, «access to court was blocked without any examination of the nature of the claim and therefore without a balancing of competing interest »¹⁵³. However, once again this could risk starting on the merits.

¹⁴⁷ *Ibid.*, § 34

¹⁴⁸ *Ibid.*, § 36

¹⁴⁹ *Ibid.*, § 37

¹⁵⁰ *Ibid.*

¹⁵¹ *Ibid.*, § 38

¹⁵² *Ibid.*

¹⁵³ *ibid*, DISSENTING OPINION OF JUDGE LOUCAIDES

5.4 Case of McElhinney v. Ireland

This third case, together with the previous two, certainly enjoys a status of a landmark case on the State immunity, therefore, it also calls for mentioning. Circumstances of the case in brief relied on a fact that the Applicant, a police officer while off-duty, crossed from Northern Ireland to Ireland's border without stopping, however accidentally as stated by the applicant. In the end he stopped the car after the border, when a soldier aimed a gun at him and pulled the trigger, nevertheless, the gun did not fire. Later on, the applicant brought a civil claim, however at the highest instance, the Supreme Court rendered its judgment, rejecting applicant's appeal stating «it was not established that, as a principle of public international law, immunity no longer applied in respect of personal injuries caused by the tortious act of a foreign State's servant or agent acting within the sphere of sovereign activity ("de jure imperii")»¹⁵⁴.

Finally, ECtHR, again recognized access to justice as a non -absolute right although: «It must be satisfied that the limitations applied do not restrict or reduce the access left to the individual in such a way or to such an extent that the very essence of the right is impaired. Furthermore, a limitation will not be compatible with Article 6 § 1 if it does not pursue a legitimate aim and if there is no reasonable relationship of proportionality between the means employed and the aim sought to be achieved (see *Waite and Kennedy v. Germany*, [GC], no. 26083/94, § 59, ECHR 1999-I)¹⁵⁵. Again, pursuing the legitimate aim was fulfilled- «complying with international law to promote comity and good relations between States through the respect of another State's sovereignty»¹⁵⁶, both as aim of proportionality- «It follows that measures taken by a High Contracting Party which reflect generally recognised rules of public international law on State immunity cannot in principle be regarded as imposing a disproportionate restriction on the right of access to court as embodied in Article 6 § 1. Just as the right of access to court is an inherent part of the fair trial guarantee in that Article, 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»¹⁵⁷.

¹⁵⁴ See, ECtHR, *CASE OF McELHINNEY v. IRELAND*, application no. 31253/96, judgment of 21 November 2001

¹⁵⁵ *Ibid.*, §34

¹⁵⁶ *Ibid.*, § 35

¹⁵⁷ *Ibid.*, § 37

Ultimately, ECtHR concluded: «here appears to be a trend in international and comparative law towards limiting State immunity in respect of personal injury caused by an act or omission within the forum State, but that this practice is by no means universal. Further, it appears from the materials referred to above (see paragraph 19) that the trend may primarily refer to “insurable” personal injury, that is incidents arising out of ordinary road traffic accidents, rather than matters relating to the core area of State sovereignty such as the acts of a soldier on foreign territory which, of their very nature, may involve sensitive issues affecting diplomatic relations between States and national security. Certainly, it cannot be said that Ireland is alone in holding that immunity attaches to suits in respect of such torts committed by *acta jure imperii* or that, in affording this immunity, Ireland falls outside any currently accepted international standards»¹⁵⁸, and as a result there has not been overtaking a margin of appreciation in limiting access to court¹⁵⁹. Given the above, this part of the judgment is indeed open for discussion, therefore, I would like to point out the dissenting opinion given by the Judges Caflisch, Cabral Baretto and Vajić as follows: «The ILC, a subsidiary organ of the United Nations General Assembly entrusted with the progressive development of international law and its codification, and made up of eminent experts in that field, has, in turn, prepared a set of “Draft Articles on Jurisdictional Immunities of States and Their Property”. As is shown by the work of the Commission’s Special Rapporteurs, this Draft, which has been mentioned already, largely rests on the prevailing State and international practice. This is true, in particular, of its Article 12, entitled “Personal Injuries and Damage to Property”, which prescribes:

“Unless otherwise agreed between the States concerned, a State cannot invoke immunity from jurisdiction before a court of another State which is otherwise competent in a proceeding which relates to pecuniary compensation for death or injury to the person, or damage to or loss of tangible property, caused by an act or omission which is alleged to be attributable to the State, if the act or omission occurred in whole or in part in the territory or that other State and if the author of the act or omission was present in that territory at the time of the act or omission.”

The ILC’s commentary on this provision (Report of the ILC..., op. Cit., pp. 102-108) reveals: (i) that the exception it makes to the general principle of immunity, while mainly destined to encompass road and other accidents, i.e. insurable risks (judgment, § 19), it “is wide enough to cover also intentional physical harm such as assault and battery, malicious damage to property, arson or even homicide, including political assassination “ (ibid., p. 103); (ii) that that exception

¹⁵⁸ Ibid., § 38

¹⁵⁹ Ibid., § 40

only obtains where the forum State is the State on whose territory the act or omission complained of has taken place, because, if access to its courts were denied, the injured person would be without recourse to justice (ibid., p. 103); (iii) that the author of the act or omission must have been present in that State's territory at the relevant time, this condition being meant to rule out transboundary injuries which are more properly classified as State-to-State disputes (ibid., p. 104); and (iv) that no distinction shall be drawn between the torts resulting from the exercise of the *jus imperii* and those flowing from acts or omissions falling into the category of *jus gestionis* (ibid., p. 105)»¹⁶⁰.

On the example of this particular judgment, one can see how complex this matter is, taking into account that still some rules were/are under development. Even though the ECtHR relies on the ILC commentaries in some other cases, yet the majority in *McElhinney v. Ireland* did not take as relevant part of the commentaries stressing that the territorial tort, as an exception, is wide enough to cover also this particular case, and to that extent the ILC opinion on this issue with the reasoning that this would be a prevailing practice of the States, rather than concluding: « it cannot be said that Ireland is alone in holding that immunity attaches to suits in respect of such torts committed by *acta jure imperii*»¹⁶¹. To reflect on the sources, through the case law of the ECtHR, one can easily see how difficult it is sometimes to conclude as the doctrine on State immunity is just partly codified by the ECSI, with only 8 State parties, on the other hand UNCSI is still not into force, however presumed to be reflecting customary international law, that in the end majorly governs the issue. In *McElhinney v. Ireland* Court found there was no violation of Article 6, hence, State immunity was upheld, by the virtue of stated ruling. However, it would be interesting to see, if this case was on the ECtHR case list right now, what would be the ruling twenty years later¹⁶².

¹⁶⁰ Ibid, see, *DISSENTING OPINION OF JUDGES CAFLISCH, CABRAL BARRETO AND VAJIĆ*

¹⁶¹ Ibid, The Court's assessment: § 38

¹⁶² See more, S. SAWAH, Jurisdictional Immunity of States and Non-commercial Torts. In T. Ruys, N. Angelet, & L. Ferro (Eds.), *The Cambridge Handbook of Immunities and International Law*, Cambridge: Cambridge University Press., 2019, pp. 142-166, spéc.p.144-145: «It is, moreover, regularly emphasised that, contrary to the other exceptions included in the UNCSI, the distinction between acts *jure imperii* and *jure gestionis* does not apply to the non-commercial tort exception. For instance, the ILC Commentary explains that the exception was originally conceived to cover unintentional, insurable acts such as traffic accidents, but was in the end adopted with a much broader scope to cover different types of acts and omissions conducted either *jure imperii* or *jure gestionis*. This is, however, without prejudice to claims arising from the activities of the armed forces, which certain legislations expressly exclude from their scope of application (see also section II, 2B below). In other words, save for the armed forces reservation, even when the impugned act or omission was made in the exercise by the State of its sovereign activities, this would not preclude the forum State from adjudicating claims of pecuniary compensation for personal injuries or damage to property caused by such an actor omission. Certain national courts – from States with or without a codified immunity legislation– have expressly declared that the

5.5 Case Cudak v. Lithuania

In 2010, there was a judgment on the matter of State immunity, once again, in an employment case.¹⁶³ Mrs. Cudak was born and living in Lithuania, Vilnius and has been working as a secretary and switchboard operator in the Polish Embassy in Lithuania. Among other provisions, employment contract of Mrs. Cudak had a provision that in case of any dispute, Lithuanian law should be applicable. Under the circumstances of the case part of the judgment, there was a specific list of duties performed by the applicant during her job¹⁶⁴. After alleging the sexual harassment at work, Mrs. Cudak used her rights to a sick leave, however upon her return she was not authorised to enter the Embassy. Finally on the 2 December 1999, she was dismissed from her work, for the reason of not coming to work. Consequently, the Applicant initiated civil suit based on unlawful discharge from work, requesting a compensation. The Supreme Court in Lithuania in the end, examined the applicable law, stating that existing agreement at that time between the Lithuania and Poland does not address the issue of State immunity. Moreover there was no domestic legislation (there was one provision in some procedural domestic legislation¹⁶⁵, however indicating the absolute immunity, which was at that time out dated) and still no significant domestic case law to rely on (it was more case by case basis). Court concluded, it would be then advisable to turn to the ECSI, yet as this thesis already presented, nor Lithuania nor Poland were the Parties to this instrument. Nevertheless, it was a guidance as, according the Supreme Court, it could be seen as reflecting general principles of international law. Finally, the Supreme Court of Lithuania concludes as follows: «... there was no uniform international practice of States whereby the members of staff of foreign States' diplomatic missions who participated in the exercise of the public authority of the States they represented could be distinguished from other members of staff. As there were no legally binding international rules, it was for each State to take its own decisions in such matters»¹⁶⁶, and decided to grant immunity in this particular case.

application of the non- commercial tort exception is not dependent upon whether the act is jure imperii or jure gestionis in nature.»

¹⁶³ See, ECtHR, CASE OF CUDAK v. LITHUANIA, *op. cit.*, note 24

¹⁶⁴ *Ibid.*, § 12

¹⁶⁵ *Ibid.*, § 18

¹⁶⁶ *Ibid.*, § 24

Further on, when the case reached the ECtHR, the Court in its own analysis on the relevant law, stressed of course the ECSI, concluding, as previously mentioned, that Lithuania and Poland are not the Parties to the ECSI¹⁶⁷, and then, Court referred to ILC work where Lithuania never expressed negative comments on any provision¹⁶⁸ and the Article 11 of the Draft. In addition, ECtHR noted that the ILC commentaries emphasize that the rules in Article 11 do appear to be agreeing trend (growing) among numerous States¹⁶⁹, nevertheless, «One of the major issues that had arisen during the codification work by the ILC related to the exception from State immunity in so far as it related to employment contracts. The final version of Article 11, as set out in the Convention, reads as follows»¹⁷⁰

However, the position of the Lithuanian Government in this case was that «all persons employed in the diplomatic mission of a foreign State, including staff in administrative and technical departments, had to be regarded as contributing in one way or another to the performance of duties relating to sovereign acts of authority by the State concerned and therefore as serving the public interests of that State. The type of duties that the applicant performed at the Polish embassy in Vilnius justified the application of State immunity in her case. She had actually had direct access to all official documents and activities of the embassy. Therefore, she had been much more than simply a member of the service staff»¹⁷¹.

Nevertheless, ECtHR stressed on the Government position relating to the nature of her tasks, as follows: « It appears from the schedule to her employment contract that her duties at the Polish embassy consisted of operating the switchboard of the embassy and Consulate-General and of recording international telephone conversations; typing up texts in Lithuanian and Polish; sending and receiving faxes; providing information in Polish, Lithuanian and Russian; helping to organise small receptions and cocktail parties; and photocopying documents (see paragraph 12 above). In the Court's view, the performance of such duties can hardly give rise to "objective grounds [for exclusion] in the State's interest" within the meaning of the above-cited Vilho Eskelinen and Others judgment»¹⁷², hence, after concluding on that, lastly, the ECtHR examined this dispute on a civil right, concluding, as all the conditions are met,

¹⁶⁷ *Ibid.*, § 27

¹⁶⁸ *Ibid.*, § 28

¹⁶⁹ *Ibid.*, § 29

¹⁷⁰ *Ibid.*, § 30

¹⁷¹ *Ibid.*, § 40

¹⁷² *Ibid.*, § 44

«Article 6 § 1 of the Convention was therefore applicable to the proceedings before the Lithuanian courts»¹⁷³.

Given the above, ECtHR, in the assessment part of the judgment, emphasized on several points, first, the right coming out of Article 6 (1) was not an absolute right¹⁷⁴; second ECHR has to be interpreted in harmony with other rules of international law¹⁷⁵, hence, this means that «measures taken by a High Contracting Party which reflect generally recognised 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»¹⁷⁶.

Further, ECtHR reflected on the condition of pursuing the legitimate aim, as in all the previous cases in this work. However, it has been noted that there is a distinction between the *Fogarty case* and this particular one, as follows: « The Court notes that the present case can be distinguished from that of *Fogarty* in that it does not concern recruitment but rather the dismissal of a member of the local staff of an embassy. In spite of that difference, the Court takes the view that its finding that the restrictions in the *Fogarty* case pursued a legitimate aim similarly applies to the present case. It should therefore now be examined whether the impugned restriction to the applicant's right of access was proportionate to the aim pursued »¹⁷⁷. To this extent, court added that absolute immunity clearly lost its position over the years, so that work of the ILC was on codifying and developing on this matter¹⁷⁸. ECtHR concluded that no exceptions in Article 11 (2) from the rule in Article 11 (1), are applicable to the present case as her job task were not performed as exercising governmental functions of Poland¹⁷⁹. While examining were those tasks reflecting on security interest of Poland, court resolved by: «As to whether the duties in question were of importance for Poland's security interests – a criterion subsequently enshrined in Article 11 § 2 (d) of the 2004 United Nations Convention – the mere allegation that the applicant could have had access to certain documents or could have been privy to confidential telephone conversations in the course of her duties is not sufficient. On this point it should not be overlooked that the applicant's dismissal and the

¹⁷³ *Ibid.*, § 47

¹⁷⁴ *Ibid.*, § 55

¹⁷⁵ *Ibid.*, § 56

¹⁷⁶ *Ibid.*, § 57

¹⁷⁷ *Ibid.*, § 62

¹⁷⁸ *Ibid.*, § 64

¹⁷⁹ *Ibid.*, § 70

ensuing proceedings arose originally from acts of sexual harassment that had been established by the Lithuanian Equal Opportunities Ombudsman, with whom the applicant had filed her complaint. Such acts can hardly be regarded as undermining Poland's security interests»¹⁸⁰.

Ultimately in this particular case, according to ECtHR opinion, Lithuania crossed the margin of appreciation and did not fulfil the condition of maintaining the proportionality.

This case is surely another example how ECtHR relies on the UNCSI Draft, this was clearly stated in the paragraph 66, although, it is interesting how Judges Barreto, joined by Judge Popović, comment on this: «I agree with the majority on all the operative provisions of the judgment. However, as regards the reasoning, I am unable to endorse the findings in paragraph 66, “even if a State has not ratified a treaty, it may be bound by one of its provisions in so far as that provision reflects customary international law”, and in paragraph 67, “Article 11 of the ILC's [International Law Commission's] 1991 Draft Articles, on which the 2004 United Nations Convention was based, applies to the respondent State under customary international law”. In my opinion, a State can never be bound by the provisions of an international treaty that it has not ratified; ratification is necessary for those provisions to become binding. It is the customary international law that is binding, whether or not it has been codified»¹⁸¹.

5.6 Case Sabeh El Leil v. France

A year later after the *Cudak case*, there has been another decision on a really similar matter in Case Sabeh El Leil v. France¹⁸². Mr. Sabeh El Leil was an accountant in Kuwaiti Embassy in Paris, with duties described under the circumstances of the case¹⁸³. However, unofficially he was performing the role of the staff representative, with being involved in disputes settlement between the Embassy and the staff¹⁸⁴. Finally, his contract ended, relating to the financial reasons which led to initiating the proceeding in Paris by the Applicant, claiming for compensation. First instance Court in Paris ruled in favour of the Applicant, however, the State of Kuwait appealed on grounds of inadmissibility because of the jurisdictional immunity¹⁸⁵,

¹⁸⁰ *Ibid.*, § 72

¹⁸¹ *Ibid.*, see, *CONCURRING OPINION OF JUDGE CABRAL BARRETO JOINED BY JUDGE POPOVIĆ*

¹⁸² ECtHR, CASE OF SABEH EL LEIL v. FRANCE, application no. 34869/05, judgment of 29 June 2011

¹⁸³ *Ibid.*, § 7

¹⁸⁴ *Ibid.*, § 8

¹⁸⁵ *Ibid.*, §15

while the Applicant here, stated that the performance of his tasks was related to private-law and not exercising the governmental activity¹⁸⁶. Ultimately, at the last instance, Court of Cassation concluded that «in the context of the preliminary admissibility procedure for appeals on points of law, as provided for by Article L. 131-6 of the Code of Judicial Organisation, held that the ground of appeal was “not such as to warrant admitting the appeal on points of law”»¹⁸⁷.

The ECtHR while determining on relevant law, turned again to the Draft of UNCSI: «State immunity from jurisdiction is governed by customary international law, the codification of which is enshrined in the United Nations Convention on Jurisdictional Immunities of States and their Property of 2 December 2004 (“the 2004 Convention”). The principle is based on the distinction between acts of sovereignty or authority (*acte jure imperii*) and acts of commerce or administration (*acte jure gestionis*)»¹⁸⁸, and then more specific to the commentaries¹⁸⁹, finally pointing out that France was a signatory to the UNCSI, however, still in the process of ratification¹⁹⁰. Furthermore, ECtHR also concluded that Article 6 (1) of the ECHR is applicable (it is a civil right under domestic law and is about genuine and serious cause)¹⁹¹.

Regarding the compliance with the Article 6 (1) of the ECHR, ECtHR consistently emphasizes that access to court is not absolute, therefore it can be subject to some limitations, although, «It must be satisfied that the limitations applied do not restrict or reduce the access left to the individual in such a way or to such an extent that the very essence of the right is impaired»¹⁹² and « Furthermore, it should be remembered that the Convention is intended to guarantee not rights that are theoretical or illusory but rights that are practical and effective»¹⁹³.

Court reiterated on « principle *par in parem non habet imperium*»¹⁹⁴, nevertheless stated also that «State immunity has, for many years, clearly been eroded, in particular with the adoption of the Convention on Jurisdictional Immunities of States and their Property by the United

¹⁸⁶ *Ibid.*

¹⁸⁷ *Ibid.*, §17

¹⁸⁸ *Ibid.*, §18

¹⁸⁹ *Ibid.*, §21

¹⁹⁰ *Ibid.*, §22

¹⁹¹ *Ibid.*, see also § 36-42

¹⁹² *Ibid.*, §47

¹⁹³ *Ibid.*, §50

¹⁹⁴ *Ibid.*, §52

Nations General Assembly in 2004 (see Cudak, cited above, § 64)»¹⁹⁵. Similar as in *Cudak case*, the ECtHR concluded that « As the Court has pointed out (see paragraph 54 above), Article 11 of the International Law Commission's 1991 Draft Articles, as now enshrined in the 2004 Convention, applies under customary international law, even if the State in question has not ratified that convention, provided it has not opposed it either (see Cudak, cited above, §§ 66-67)»¹⁹⁶.

At the end ECtHR holds unanimously that there has been a violation of Article 6 (1) of the ECHR because of the following reasons. First, « the applicant, who was neither a diplomatic or consular agent of Kuwait, nor a national of that State, did not fall within any of the exceptions enumerated in Article 11 of the 2004 Convention. The Court observes that this Article enshrines the rule that a State has no jurisdictional immunity in respect of employment contracts, except in the situations exhaustively enumerated therein»¹⁹⁷. However, examining in more detailed way the fact pointed out by the Court of Cassation that the Applicant indeed had several extra responsibilities, ECtHR concludes that «The Court of Cassation did not give any more extensive reasoning on that point»¹⁹⁸, but also, same as the Court of Appeal, «failed to take into consideration the provisions of Article 11 of the 2004 Convention, in particular the exceptions enumerated therein that must be strictly interpreted»¹⁹⁹. Therefore, again in this case, as in *Cudak case*, proportionality aim has not been met.

Case Sabeh El Leil v. France shows again use of UNCSI in the ECtHR judgments, however also demonstrates, as far as it goes in this particular case, that French Courts even though France was signatory of the UNCSI, did not take into account provisions of the Article 11 as they are, both helped by the ICL commentary in some situations of vagueness, by the virtue of the idea that those provisions represent customary international law, according to the position of the ECtHR.

¹⁹⁵ *Ibid.*, §53

¹⁹⁶ *Ibid.*, §57

¹⁹⁷ *Ibid.*, §60, see also § 61

¹⁹⁸ *Ibid.*, §65

¹⁹⁹ *Ibid.*, §66

5.7 Case of Jones and others v. The United Kingdom

In 2014, the ECtHR ruled in another case, *Jones and others v. The United Kingdom*²⁰⁰. The factual part of this case relied on the alleged torture of the Applicants in the prison in Riyadh, Saudi Arabia. Upon their return to the United Kingdom, the Applicants tried to initiate a civil proceedings against four persons: two policemen, the deputy governor of that prison and the Minister of Interior of Saudi Arabia, under the prior condition of obtaining the permission to serve the claim out of the jurisdiction. Nevertheless, they were refused on all domestic instances. The Applicants then turned to the ECtHR, and this case was in conjunction with responsibilities of the State for internationally wrongful acts, as stated: « The ILC promulgated the Draft Articles on Responsibility of States for Internationally Wrongful Acts (“the Draft Articles on State Responsibility”) in 2001. Article 4 provides for the responsibility of the State for the conduct of its organs:

“1. The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central Government or of a territorial unit of the State.

2. An organ includes any person or entity which has that status in accordance with the internal law of the State.”»²⁰¹

The ECtHR in its assessment first examined the general principles on access to court relating to State immunity, reiterating that this right is not absolute, and referring to previous cases: « It must be satisfied that the limitations applied do not restrict or reduce the access left to the individual in such a way or to such an extent that the very essence of the right is impaired. Furthermore, a limitation will not be compatible with Article 6 § 1 if it does not pursue a legitimate aim and if there is no reasonable relationship of proportionality between the means employed and the aim sought to be achieved (see *Fogarty v. the United Kingdom* [GC], no. 37112/97, §§ 32-33, 21 November 2001; *McElhinney v. Ireland* [GC], no. 31253/96, §§ 33-34, 21 November 2001; *Al-Adsani*, cited above, §§ 52-53; *Kalogeropoulou and Others v.*

²⁰⁰ ECtHR, CASE OF JONES AND OTHERS v. THE UNITED KINGDOM, applications nos. 34356/06 and 40528/06, judgment final 2 June 2014

²⁰¹ *Ibid.*, §107

Greece and Germany (dec.), no. 59021/00, ECHR 2002-X; *Manoilescu and Dobrescu v. Romania and Russia* (dec.), no. 60861/00, §§ 66 and 68, ECHR 2005-VI; *Cudak v. Lithuania* [GC], no. 15869/02, §§ 54-55, ECHR 2010; and *Sabeh El Leil v. France* [GC], no. 34869/05, §§ 46-47, 29 June 2011).»²⁰².

Court additionally concluded that «sovereign immunity is a concept of international law, developed out of the principle *par in parem non habet imperium*, by virtue of which one State shall not be subject to the jurisdiction of another State. 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 (see *Fogarty*, § 34; *McElhinney*, § 35; *Al-Adsani*, § 54; *Kalogeropoulou and Others*; *Cudak*, § 60; and *Sabeh El Leil*, § 52, all cited above)»²⁰³, therefore, ECHR has to be interpreted in a harmony with other rules of international law²⁰⁴.

ECtHR also referred to previous cases, notably, *Al- Adsani*, but *also Kalogeropoulou and Others*, again concluding «Court found that it had not been established that there was as yet acceptance in international law of the proposition that States were not entitled to immunity in respect of civil claims for damages concerning alleged torture committed outside the forum State»²⁰⁵. As seen before, it was also noted that maybe future developments will show differently.

In this case, the ECtHR stayed on the same track as before, however, this was challenged by the Applicants who called for a different approach because the Grand Chamber then, according to them « had failed to conduct a substantive proportionality assessment, including an assessment of the circumstances and merits of the individual case, and in particular to consider whether alternative means of redress existed»²⁰⁶

Finally, Court stressed that even it is not « formally bound to follow its previous judgments, it is in the interests of legal certainty, foreseeability and equality before the law that it should not depart, without good reason, from precedents laid down in previous cases (see, for example,

²⁰² *Ibid.*, §186

²⁰³ *Ibid.*, §188

²⁰⁴ *Ibid.*, §189

²⁰⁵ *Ibid.*, §191

²⁰⁶ *Ibid.*, §193

Christine Goodwin v. the United Kingdom [GC], no. 28957/95, § 74, ECHR 2002-VI; Scoppola v. Italy (no. 2) [GC], no. 10249/03, § 104, 17 September 2009; and Sabri Güneş v. Turkey [GC], no. 27396/06, § 50, 29 June 2012). Where the precedent in question is a relatively recent and comprehensive judgment of the Grand Chamber, as in the present case, a Chamber which is not prepared to follow the established precedent should propose relinquishment of the case before it to the Grand Chamber. None of the parties to the present case has proposed relinquishment to the Grand Chamber and in any event it would remain for the Chamber to decide whether to act on any such request (see, for example, Hartman v. the Czech Republic, no. 53341/99, § 8 in fine, ECHR 2003-VIII, and Kuznetsova v. Russia, no. 67579/01, § 5, 7 June 2007)»²⁰⁷. In the end, as the Court did not find suitable to relinquish this particular case to the Grand Chamber, « The Court is therefore satisfied that the approach to proportionality set out by the Grand Chamber in *Al-Adsani* (see paragraph 194 above) ought to be followed»²⁰⁸, and voted no violation of Article 6 (1) in regard to State immunity but also regarding the immunity of State officials. In this case Court additionally examined whether there was some change in international standards regarding the prohibition of torture in relation with State immunity. However it relied on ICJ judgment in this matter, saying that « clearly establishes that, by February 2012, no *jus cogens* exception to State immunity had yet crystallised. The application by the English courts of the provisions of the 1978 Act to uphold the Kingdom of Saudi Arabia's claim to immunity in 2006 cannot therefore be said to have amounted to an unjustified restriction on the applicant's access to a court. It follows that there has been no violation of Article 6 § 1 of the Convention as regards the striking out of Mr Jones's complaint against the Kingdom of Saudi Arabia»²⁰⁹.

This judgment on the other hand again brought one dissenting opinion²¹⁰, which criticized the approach taken in *Al –Adsani*, as there was examination only of the issue of State immunity, however in this particular case, matter was also extended to State officials.

²⁰⁷ *Ibid.*, §193

²⁰⁸ *Ibid.*, §193

²⁰⁹ *Ibid.* §198

²¹⁰ *Ibid.*, see DISSENTING OPINION OF JUDGE KALAYDJIEVA

5.8 J.C. and Others v. Belgium

Quite recently, in 2021, there was another interesting case²¹¹, where the question of State immunity was at stake, relating to the Holy See. The case was about access to court, related to civil claim against the Holy See for sexual abuse allegations, with an outcome of no violation of the Article 6 (1). This case was significant as the first time that the matter of State immunity was brought regarding the Holy See, while the Belgian Court of Appeal ruled that that State immunity is applicable, so represented a procedural bar to entertain this claim. Nevertheless, the Applicants brought their case in front of ECtHR, considering this was a case of violation of *ius cogens* norm. In the end, ECtHR also acknowledged the State immunity when it comes to the Holy See, and ruled as followed: « Belgian courts’ refusal to assume jurisdiction to hear the civil liability claim brought by the applicants against the Holy See had not departed from the generally recognised principles of international law on State immunity, and the restriction on the right of access to a court could not therefore be regarded as disproportionate to the legitimate aims pursued»²¹².

5.9 Case Kalogeropoulou and others v. Greece and Germany

At the beginning of this work, it has been pointed out that Article 6 (1) of the ECHR covers also execution proceedings, therefore as previous cases in this thesis were related to the matter of jurisdictional immunity of States, this case is related to immunity from execution.

This particular case finally was concluded by a ECtHR decision, not a judgment, as it was decided that the application was inadmissible regarding violation of Article 6 (1). The reasons are given as follows: «The Court reiterates that it is not its task to take the place of the domestic courts. It is primarily for the national authorities, notably the courts, to resolve problems of interpretation of domestic legislation (see *Edificaciones March Gallego S.A. v. Spain*, judgment of 19 February 1998, Reports 1998-I, p. 290, § 33). This applies in particular to the interpretation by courts of rules of a procedural nature such as time-limits governing the filing of documents or lodging of appeals (see *Perez de Rada Cavanilles v. Spain*, judgment of 28 October 1998, Reports 1998-VIII, p. 3255, § 43). The Court’s role is confined to ascertaining

²¹¹ ECtHR, *J.C. and Others v. Belgium*, application 11625/17, judgment of 12 October 2021

²¹² *Ibid.*, para.14

whether the effects of such an interpretation are compatible with the Convention»²¹³, nevertheless, Court did clarify on some issues regarding State immunity from execution.

To start from the beginning, in a proceeding for damages against Germany, in front of the Greek Courts, the Applicants, 257 Greek nationals, claimed compensation for the pecuniary and non-pecuniary loss, which was awarded to them. Court of Cassation, deciding on Germany's appeal concluded that domestic legal system of Greece recognizes State immunity as it derives from customary international law, however there has been a trend of restrictive State immunity. Moreover, Court of Cassation stressed on existence of ECSI, nevertheless influencing also non State Parties to that Convention. To that extent, Court carried on with stressing that ECSI recognizes an exception in Article 11, even though ECSI did make exception of exception when it comes to military activities, but according to the Court it cannot be applied in a case of crimes against humanity, where the individuals were victims. Ultimately the Court of Cassation in Greece concluded that this particular situation was *ius cogens* violation, and the Germany's jurisdictional immunity cannot apply-the Court took approach that by those grave violations, Germany waived its immunity. This judgment came also with dissenting opinions of the President of the Court and 3 more judges²¹⁴.

Even though the Applicants here, did obtain judgment on their behalf, however in the enforcement procedure, there was a precondition in order to execute that judgment, there is consent needed from the Minister of Justice, which the Applicants did not acquire. Nevertheless, they continued with the enforcement. While the first instance court again ruled on their behalf in this matter, however upon the Germany's appeal, Court of Appeal set aside the first instance judgement stating: «limitation imposed by Article 923 of the Code of Civil Procedure pursued an aim that was in the public interest, namely to avoid disturbances in the country's international relations, and was proportionate to that aim. The provision in question did not affect the main kernel of the right to effective judicial protection because it did not provide for an absolute prohibition on enforcing a decision against a foreign State, but required – as a precondition – the prior approval of the Minister of Justice, and therefore of the Government, which was the sole body responsible for the country's foreign policy. If a private individual were able to have a judicial decision against a foreign State enforced without

²¹³ ECtHR, KALOGEROPOULOU AND OTHERS v. GREECE AND GERMANY, application 59021/00, decision of 12 December 2002

²¹⁴Ibid., see *Proceedings for damages*

obtaining the prior consent of the executive, the country's national interests would be compromised and its foreign policy placed in the hands of individuals. In any event, the right to enforcement could be exercised in another country or subsequently at a more appropriate time. The Court of Appeal held that the restriction imposed by Article 923 of the Code of Civil Procedure was contrary neither to Article 6 of the Convention nor to Article 2 § 3 of the International Covenant on Civil and Political Rights nor to Article 1 of Protocol No. 1 to the Convention (judgments nos. 6847/2001 and 6848/2001) »²¹⁵. After this judgment, the Applicants made their appeal to the Court of Cassation, where later on the first instance judgment was confirmed, with a reference to *Al-Adsani case*²¹⁶. However, in this phase there was also an issue with the President of the Court of Cassation, who was present as a judge in the matter while deciding on damages, and did not withdraw himself later in the execution proceeding.

Finally, this case came in a front of ECtHR, where it was pointed out that access to court is not an absolute right, continuing with stating that «a limitation will not be compatible with Article 6 § 1 if it does not pursue a legitimate aim and if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be achieved (see *Waite and Kennedy v. Germany* [GC], no. 26083/94, § 59, ECHR 1999-I)»²¹⁷. Regarding the legitimate aim, ECtHR referred, as expected, to *par in parem non habet imperium* and promoting good relationship between States²¹⁸. While examining the proportionality of the aim, ECtHR referred to interpretation of the ECHR in «harmony with other rules of international law»²¹⁹ and to that extent «It follows that measures taken by a High Contracting Party which reflect generally recognised rules of public international law on State immunity cannot generally be regarded as imposing a disproportionate restriction on the right of access to a court as embodied in Article 6 § 1. Just as the right of access to a court is an inherent part of the fair trial guarantee in that Article, 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 (see *Al-Adsani v. the United Kingdom* [GC], no. 35763/97, ECHR 2001-XI, §§ 52-56)»²²⁰.

²¹⁵ Ibid, see *Enforcement proceedings*, para. 5

²¹⁶ Ibid, see para. 8

²¹⁷ Ibid., *The Court assessment*, para. 2

²¹⁸ Ibid., para. 4

²¹⁹ Ibid., para. 5

²²⁰ Ibid., para. 6

It can be concluded that obtaining the judgement for damage, does not automatically mean that Greek State has to enforce that judgement, as that judgment was based on an idea that because of the crimes against humanity that have been in questions, and their character of *ius cogens*, this would give an advantage regarding all other rules and principles of international law²²¹. ECtHR referred additionally to *Al Adsani case*, stating that there has not been, so far, acceptance of that idea, resulting in holding back State immunity in those situations. Nevertheless, the Court did open a small window for possible future development, which will lead to a different conclusion by stating that this: « not preclude a development in customary international law in the future»²²².

6 Conclusion

The purpose of this work was to explore the meeting point between the rule of international law *par in parem non habet imperium*, which goes back in past as explained, embodied in the concept of State immunity on the one side, and fundamental human right to access to justice, particularly as guaranteed by the ECHR in the Article 6, on the other side. Both rules discussed come with their own aim and purpose, nevertheless, both rules are part of some general acceptance among the international community of States. However, the main question is, does State immunity represent a peril to individuals on their way to benefit from the right to a fair trial. With that being asked, one has to admit that the rule of State immunity without any doubt represents an obstacle for the plaintiffs desire to bring a proceeding against a foreign State in forum State court. However, this does not necessarily mean a violation of the human right to a fair trial. As demonstrated by the case law of the ECtHR, a tremendous burden has been placed on the courts when deciding, both domestic and international courts. To that extent, I would dare to conclude that domestic courts are the first line of defence of human rights to access to justice as set to be *condicio sine qua non* in every democratic society, although obligated to have their eyes open to any other rule of general international law. In the end, this is indeed a hard task when it comes to State immunity doctrine, and, as a result, domestic case law can be seen as quite variegated. Nevertheless, there is a general consensus that today State immunity

²²¹ *Ibid.*, para. 7

²²² *Ibid.*

is restricted to *acta iure imperii*, moreover that it goes in two directions, recognizing immunity from jurisdiction same as from execution. So what causes then the disturbance in this matter? This can be really easily answered: first, different points of view what would qualify under governmental activity and acts, *a contrario* to *acta iure gestions*. Second, divergence when it comes to territorial tort exception, correspondingly, challenges that came in the recent past concerning terrorist attacks that even led some domestic legislation maybe too far in their extraterritorial jurisdiction. Finally, I would like to address once again a question of *ius cogens* in this matter. And lastly, there is a tendency to restrict State immunity when it comes to employment relation, with a different point of view then in which situations exactly. Although, it is more than that, however, this could be seen quite often as a topic on a discussion agenda, both among the scholars and judges. While reflecting generally problems and challenges in international law nowadays, it is hard to find similar situation of dynamics and interplay of two rules, as seen in the right to access to court and State immunity norm. It has been asserted in this work that complexity lies partially also on the fact that State immunity has been governed by customary international law in great amount, thus, it is just partially codified. Success of the ECSI in terms of numbers of States participating in this legal instrument is rather questionable. Nevertheless, this Convention has its significance in the past when it had been concluded, because of clearly stating transition from absolute to restrictive State immunity. As demonstrated by analysing some provisions, it really did set the tone of the concept of State immunity at the time, affirming the idea of restrictive immunity. To that extent, it clearly stressed on the question of territorial tort, while making an exception from exception when it comes to acts of armed forces on the territory of another State. Lastly, it open a door for possible future developments through new agreements, without any prejudice. However, as being a treaty in force and a source to rely on when determining on the applicable rules in ECtHR cases, it has been in a way overshadowed by the work of ICL and the Draft of UNCSI. Although, an enormous amount of work has been carried by the ILC in attempt to codify State immunity on international level as a reflection of customary international law, yet this instrument is facing trouble in reaching its entry into force. In a way, it is quite clear why this hesitation when it comes to ratifications by some States. UNCSI is indeed a great effort, with perhaps a bit different approach that State does enjoy immunity, unless one of the enumerated exceptions occur, therefore, it does not explicitly mention distinction between *acta iure imperii* and *acta iure gestionis*. However, the intention to make a contrast between governmental and non-governmental acts is clear through the listed exceptions. Nevertheless, there is some vagueness around certain provisions, when it comes to a point to determine does it really reflect

customary law in every article. This instrument did not explicitly omit pecuniary compensations that could be raised as a result of armed conflicts on a forum State territory, with some special provision, nevertheless, the intention of ILC was to exclude this from territorial tort exception, but this has not been done very openly. UNSCI did not introduce possible *ius cogens* exception but this is quite reasonable, in light of explanation provided by the ICJ in the *Germany v. Italy*. Nevertheless, this provokes some calls for a Protocol which would deal with this issue. With all this being said, I would like to state that this should not necessarily be seen as a flaw, rather to emphasize the complexity of the matter, without the possibility to achieve perfection in this matter. On the other hand, one can still see great importance of this codification, even though it has not entered into force yet, it is a valuable source of inspiration and answers to the ECtHR. I have demonstrated that the Court relied in its case law to a great extent on the UNSCI, however, even sometimes interpreting it bit narrowly, as seen in *McElhinney v. Ireland*. Nevertheless, coming to an end of this work and turning to the question from the beginning, the work of ECtHR is significant in providing answers in general. State immunity is a limitation, procedural bar, however right to fair trial is not an absolute right, yet in order for this limitation to be justified, legitimate aim and the condition of proportionality should be met but the very essence of the right should not be impaired if those two conditions are fulfilled. Finally, for the time being there is no place for the deviations justified under the *ius cogens* norms, however, the ECtHR wisely left a margin of appreciation for the possible future developments in some other direction, as one can say that law, especially international law, is a quite growing and developing phenomenon. It can be concluded that the concept of State immunity on its own, and more over in conjunction with Article 6 of the ECHR, will be a subject of the further discussions.

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