Torture as Jus Cogens Norm

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Abstract: Article analyzes the *jus cogens* norms and the legal effects produced by those. Its importance lies in the fact that international crimes that rise to the level of *jus cogens* constitute obligation *erga omnes* which are inderogable from the all word countries. This study aims to contribute to earlier studies dedicated to the *jus cogens* norm. This paper is based on the author's research about torture as *jus cogens* norm as part of the PhD thesis. In order to achieve better results the analysis is based on the following methods: observation, comparison and case-law. The study may be of special interest to the members of the judiciary, researchers and academics because of solution of torture protection in universal way without exception. Its main contribution lies in identification of competent authority to identify *jus cogens* norms.

Keywords: protection of human dignity; peremptory norm; criminal law

1. Introduction

In article 53 Vienna Convention, a peremptory norm of general international law (*jus cogens*) is defined as a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.

Art. 64 of Vienna Convention provides that if a new peremptory norm of general international law emerges, any existing treaty which is in conflict with that norm becomes void and terminates.

An important question arise from analize of the *jus cogens* norm, who is the competent authority to identify these norms? We could also envisage the creation of *jus cogens* via acts of international organizations, including in particular by resolutions of their political organs. The ICJ has expressed such opinion in its

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advisory opinion on the Reservations to the Convention on the Prevention and Punishment of Genocide[1].

The way of adopting of article 53 led some authors to the conclusion that the concept of *jus cogens* would never acquire the status of customary law unless the Vienna Convention would gain universal acceptance (Jerzy, 1974, p. 204; Reuter, 1972, pp. 138-143).

Another author remarked in connection with the retroactivity clause of the Vienna Convention that it was introduced during the Conference as Art.4 in order to avoid the retroactive effect of certain provisions of the Convention, including article 53 and article 64. This shows that both stipulations amounted to progressive development of international law (Rozakis, 1976, p. 39).

In case of a dispute among the parties to the Convention as to the interpretation of art.53 and art. 64 any of the parties concerned can refer that dispute to the ICJ or arbitration (Tomuschat et al., 2006, p. 86).

International crimes that rise to the level of *jus cogens* constitute *obligation erga omnes* which are inderogable. Legal obligations which arise from the higher status of such crimes include the duty to prosecute or extradite, the non applicability of statutes of limitations for such crimes, the non-applicability of any immunities up to and including Heads of State, the non-applicability of the defense of "obedience to superior orders" (save as mitigation of sentence), the universal application of these obligations whether in time of peace or war, their non-derogation under "states of emergency," and universal jurisdiction over perpetrators of such crimes. The implications of *jus cogens* are those of a duty and not of optional rights; otherwise *jus cogens* would not constitute a peremptory norm of international law. Consequently, these obligations are non-derogable in times of war as well as peace (Bassiouni, 1996, pp. 63-66).

Articles of the International Law Commission identified as *jus cogens* the prohibitions of aggression and the illegal use of force, the prohibitions against slavery and the slave trade, genocide and racial discrimination and apartheid, the prohibition against torture, the basic rules of international humanitarian law and the right of self-determination. The following norms have been added to these: the prohibition of cruel, inhuman or degrading treatment and crimes against humanity,

[1]Internal Court of Justice Reports 1951, viewed, Retrieved from http://www.icj-cij.org/docket/files/12/4283.pdf.

the prohibition of piracy, and the principle of permanent sovereignty over natural resources. The German Constitutional Court considered even the basic rules for the protection of the environment as forming part of *jus cogens* (Tomuschat et al., 2006, pp. 99-100).

Positive International Criminal Law does not contain such an explicit norm as to the effect of characterizing a certain crime as part of *jus cogens*. Furthermore, the practice of states does not conform to the scholarly writings that espouse these views. The practice of the states evidences that, more often than not, impunity has been allowed for *jus cogens* crimes, the theory of universality has been far from being universally recognized and applied, and the duty to prosecute or extradite is more inchoate than established, other than when it arises out of specific treaty obligations.

2. Judgments of National Courts and Torture

Bouzari sued the Islamic Republic of Iran in the Ontario Superior Court under Canada's State Immunity Act 1985 (SIA), claiming damages for torture. Bouzari, of course, had nowhere else to bring a civil action. As with most victims of torture, it was impossible for Bouzari to return to the scene of the crime in order to lodge a claim against the state. Sovereign states are presumptively immune from suit in Canada unless the case meets one or more exceptions contained in the SIA. Bouzari argued for the application of three exceptions to immunity; the section 18 exception for criminal proceedings; the tort exception found in section 6 which provides that a foreign state is not immune from the jurisdiction of a court in any proceedings that relate to (a) any death or personal or bodily injury, or (b) any damage to or loss of property; and the section 5 commercial activity exception. Bouzari also claimed that the SIA must be read in conformity with Canada's international legal obligations and that, both by treaty and peremptory norms of customary international law, Canada is bound to permit a civil remedy against a foreign state for torture abroad. Specificaly Bouzari contended that article 14 of the Convention against Torture required Canada to provide him with the opportunity to seek redress from his torturers. Article 14 provides that "*Each State Party shall ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation including the means for as full rehabilitation as possible. In the event of the death of the victim as a result of an act of torture, his dependants shall be entitled to compensation*".

Nothing in this article shall affect any right of the victim or other person to compensation which many exist under national law. In the Ontario Superior Court, Swinton J. expressed sympathy for Bouzari's plight but found that his case did not fall within one of the enumerated exceptions of Canada's State Immunity Act. The Court found that despite the plea for punitive damages, the statute is civil, not criminal, in nature; that the commercial activity exception was inapplicable because the activity giving rise to the case was imprisonment by agents of the foreign state and acts of torture performed by them in a state prison; and that the tort exception does not apply to injuries which occur outside Canada. The Superior Court also refused to import a new exception for torture committed outside Canada into the Act and found that the SIA is consistent with Canada's international obligations, including the Convention against Torture. The Ontario Court of Appeal affirmed the lower court's dismissal, holding that Canadian law precludes claims against foreign sovereigns for acts not enumerated in the statute, including torture. Goudge J.A declared that the wording of the SIA must be taken as a complete answer to this argument. Section 3(1) could not be clearer. To reiterate, it says: "(1) Except as provided by this Act, a foreign state is immune from the jurisdiction of any court in Canada." The plain and ordinary meaning of these words is that they codify the law of sovereign immunity. In sum, the Court of Appeal concluded that the SIA occupies the field in this area and that it provides no exception for torture. Like the Superior Court, the Court of Appeal agreed that the prohibition against torture constitutes a rule of *jus cogens*, but held that the norm does not encompass the civil remedy sought by Bouzari. The Superior Court evaluated expert testimony on the subject and concluded that while the law may be moving in this direction, neither emerging state practice nor article 14 of the Convention Against Torture requires it to take civil jurisdiction over a foreign state for acts committed outside the forum state. When the Supreme Court of Canada refused Bouzari's request for leave to appeal, his domestic remedies were effectively exhausted. In May 2005, however, the UN Committee against Torture (CAT), the international body tasked with monitoring implementation of the treaty, expressed concern at Canada's failure to provide a civil remedy through the domestic judiciary for all victims of torture. In its concluding observations, the CAT noted the absence of effective measures to provide civil compensation to victims of torture in all cases, and recommended that Canada review its position under article 14 of the Convention to ensure the provision of compensation through its civil jurisdiction to all victims of torture (Novogrodsk, 2008, p. 492).

The facts of Ferrini are unfortunately typical of the situation arising in Italy during the German occupation during the latter part of World War II. On 4 August 1944, the applicant, Luigi Ferrini, was captured by German troops in the province of Arezzo and deported to Germany where he was forced to work for the war industry until 20 April1945. On 23 September 1998, Ferrini petitioned the Court of Arezzo for reparation from Germany for physical and psychological harm due to the inhuman treatment he was subject to while imprisoned. However, the Court of First Instance applied the international norm guaranteeing foreign state immunity for all acts carried out by states in the exercise of their sovereign powers. Thus, the Court held that the Italian courts had no jurisdiction in this matter. To this end, the Court considered that, even though the treatment inflicted on Ferrini could be considered a war crime in accordance with the international law of the time, the German acts were of a sovereign nature. Ferrini turned to the Court of Appeal in Florence, which upheld the findings of the Court of First Instance. The appellant's case was then brought before the Supreme Court, which drew a conclusion which was exactly the opposite of the previous decisions. Thus, the Supreme Court asserted that a foreign state cannot enjoy immunity for sovereign acts which can be classified as international crimes at the same time. The Court reached such conclusion by strictly focusing on the four arguments proposed by Ferrini, which need to be briefly examined (Sena et al., 2005, p. 93).

The first of these arguments involved the application to this case of the 1968 Brussels Convention on jurisdiction and the enforcement of judgments in civil and commercial matters (today replaced, except for Denmark, by Council Regulation 44/10 of22 December 2000). The appellant argued that the Convention's provisions prevailed over the customary rule on state immunity. Without analyzing the merits of this issue, the Court wholly rejected this argument, pointing out that the Convention is not applicable to suits relating to sovereign acts, in line with consistent jurisprudence of the European Court of Justice. On this basis the Court rejected the connected third argument proposed by the applicant, according to which the Court should refer the case to the European Court of Justice (Sena et al., 2005, p. 93).

The second argument was based upon questioning the customary nature of the state immunity rule, and its subsequent application in Italian law by virtue of article10 of the Italian Constitution. This argument was also rejected by the Court, which asserted that there could be no doubt concerning the existence of a customary norm of international law obliging States to abstain from exercising jurisdiction against

foreign States. Nonetheless, the Court went on to affirm that this norm, which initially was 'absolute in nature, in that it granted foreign State full immunity, has become, and continues to become, gradually limited (Sena et al., 2005, p. 94).

The latter consideration is particularly significant, as on this basis the Supreme Court discussed the fourth and main argument proposed by the appellant, namely, whether the immunity principle must apply even here. In this regard, the Court began by citing a number of precedents in Italian and foreign jurisprudence, where the principle of immunity of foreign sovereign activities, and especially of those activities strictly connected to warfare, had been applied. The Court was underlined some legally relevant elements used to justify the opposite solution adopted in the Ferrini case. One of these elements was the fact that the event took place in Italy, on the territory of the forum state. According to the Court, the existence of such an exception is further justified in the light of individual responsibility provided for by international law relating to state officials committing international crimes while carrying out official duties. Given that such responsibility constitutes an exception to the traditional rule of functional immunity, and the latter rule is an expression of the general principle of state sovereignty, this exception would necessarily extend – in the Court's view – even to state immunity per se, which would equally represent no more than a corollary of this general principle. Nevertheless, the Court observed that the general norms of international law which protect the freedom and dignity of the person as fundamental rights, and which recognize as international crimes such behaviour as would seriously damage the integrity of these values are an integral part of Italian law. These norms are therefore fully able to set legal parameters for the injury arising from an intentional or negligent act. In other words, in the Italian legal system, the violation of these norms would imply the violation of a legal right, even with respect to individuals. Furthermore the Court pointed out that the non-justiciable nature of carrying out the administration of the State at the highest level is not an obstacle to the verification of any individual crime committed during the exercise of such power, and the assessment of responsibility, either in criminal or civil jurisdiction. In the Court's opinion, the norms on state immunity, like all the other norms of international law, have to be interpreted in a systematic way, in accordance with other principles of the same legal system. It follows that for consistency's sake, further exceptions to immunity, different from those so far established and codified, may be recognized. One of these exceptions results from the need to give priority to hierarchically superior norms, (*jus cogens*), because in this case, recognizing immunity would hinder the

protection of values whose safeguard is to be considered essential to the whole international community. It would seem that the stages of the judgment examined here illustrate clearly that the notion of *jus cogens* is not used in strictly normative or formal terms. Rather, as we have just shown, the Supreme Court felt the need to specify that the refusal to grant Germany immunity from jurisdiction was based on the need to emphasize substantial values of international law, such as those regarding respect for the human person. In other words, in the Ferrini case, there seems to be a balancing of two fundamental principles of international law: i.e., the principle of sovereign equality of states (implying the recognition of sovereign immunity) and that of the respect of inviolable human rights (which forms the background of the legal regime of international crimes) (Sena et al., 2005, pp. 94-103).

The Greek Supreme Court (Areopag) in 2000 denied State immunity for sovereign acts taken in violation of international *jus cogens*. The Areopag was faced with civil claim for damages based on atrocities against the civilian population which a German SS unit had committed in 1944 during the German occupation of Greece (the Distomo village massacre). It based itself essentially on three grounds for denying Germany immunity. Firstly, as the outrages constituted violations of *jus cogens* they could not be qualified as sovereign acts (*acta jure imperii*). Moreover to the so-called foreign tort exception, which was part of customary international law, Germany could not claim immunity for torts which its agents had committed in the territory of Greece as the forum State. The consent of the Greek minister of justice, required for the execution of the decision, was refused, and this refusal was upheld by the Greek courts and the European Court of Human Rights. The Areopag decision was rendered at least partially obsolete by a decision to the contrary of 17 September 2002 in parallel case that handed down by the Greek Supreme Special Court which has the competence to resolve differences between the various branches of the Greek judiciary (Tomuschat et al., 2006, p. 220).

In 23.12.2008, Germany institutes proceedings against Italy for failing to respect its jurisdictional immunity as a sovereign State in front of International Court of Justice, case has not been completed until now[1].

[1]International Court of Justice, (Germany v Italy, 2008). Retrieved from http://www.icjcij.org/docket/files/143/14925.pdf?PHPSESSID=aa63cc7502721a986e89b737895a06a2.

On 10 June 1944, SS forces integrated into the German occupying troops in Greece shot some 200-300 of the inhabitants of the mountain village of Distomo, near Delphi in central Greece, in retaliation for an attack by Greek partisans. The victims of the massacre, among them the plaintiffs' parents, were mainly elderly persons, women and children who had not been involved in the partisan activities. The plaintiffs, children at the time of the incident, only survived the massacre because a German soldier warned them and urged them to hide. As a consequence of the incident, the plaintiffs suffered, inter alia, psychic damage as well as disadvantages regarding their personal and professional advancement (Rau, 2006, p. 702).

In September 1995, the plaintiffs brought action for declaratory judgment before the Landgericht (Regional Court) of Bonn claiming that Germany was liable to pay compensation for the incident. The Regional Court dismissed the action and the plaintiffs lodged a Berufung (appeal) with the Oberlandesgericht (OLG – Higher Regional Court) of Cologne, which upheld the lower court's decision. On 26 June 2003, the Bundesgerichtshof (BGH -Federal Court of Justice) rejected the plaintiffs application for Revision (appeal on points of law), arguing that neither international law nor domestic state liability law, as of 1944, provided a basis for the plaintiffs claims. Meanwhile, the plaintiffs also had participated in a claim for damages for the Distomo massacre before the District Court of Livadeia in Greece. The proceedings resulted, in October 1997, in a default judgment against Germany. This ruling was upheld by the Areopag (Greek Supreme Court) in a judgment of 4 May 2000. However, the Federal Court of Justice, in its decision of 26 June 2003, found that it could not give enforceable recognition to the judgment of the District Court of Livadeia because the acts at issue had been sovereign or public acts (*acta jure imperii*) for which Germany was immune from another state's jurisdiction. Against the German ordinary courts' decisions, the plaintiffs filed a Verfassungsbeschwerde (constitutional complaint) to the BVerfG, pursuant to article 93 para. 1 (4a) of the Grundgesetz (GG – Basic Law or Constitution) in conjunction with Sections 13(8), 90-95 of the Bundesverfassungsgerichtsgesetz (BVerfGG - Federal Constitutional Court Act) (Rau, 2006, pp. 703-704).

Before turning to the plaintiffs' arguments, the BVerfG addressed the issue of whether the refusal, by the Federal Court of Justice, to recognize the judgment of the District Court of Livadeia was in conformity with the Basic Law. Without going into much detail, the BVerfG found that, indeed, it was. According to current international law, the Court reasoned, a state could claim immunity from another

state's jurisdiction if and to the extent that acts of sovereign power (*acta jure imperii*) were at issue. As the SS unit involved in the Distomo incident had been integrated into the German occupying forces, its acts were to be classified as *acta jure imperii*, irrespective of whether or not they were to be considered legal under international law. Consequently, the Federal Court of Justice had been right in holding that the judgment of the District Court of Livadeia was not binding on the German courts. It is not fully clear why the BVerfG felt inclined to pronounce on this issue. The plaintiffs did not raise the question of *res judicata* before the Court. The BVerfG itself did not specify in any way how the decision of the Federal Court of Justice, refusing to recognize the judgment of the District Court of Livadeia, might have affected the plaintiffs' constitutional rights. Rather, the BVerfG confined itself to a more or less abstract constitutional review of the refusal of enforceable recognition without linking its examination to a particular provision of the Basic Law. By holding that the judgment of the District Court of Livadeia was not to be recognized by the Federal Court of Justice because it contravened the rules of state immunity, the BVerfG expressly adhered to the view that, under international law as it stands today, there is no exception to immunity from adjudication that allows for private suits against foreign states for violations of international law. Thus, the BVerfG's ruling adds another important precedent to the list of domestic and international decisions arguing against such an exception. One would have wished, however, that the Court, once it entered into the debate on the effect of the Greek decision, had discussed in some more depth the issue of state immunity for acts contrary to international law. Apart from a reference to the, albeit highly important, decision of the European Court of Human Rights (ECHR) in the Al-Adsani case, the BVerfG did not go any deeper into the existing jurisprudence and literature in that field (Rau, 2006, p. 702).

3. Decisions of International Courts

In the Case of the Prosecutor v Anto Furundzija the International Criminal Tribunal for the former Yogoslavia (ICTY) suggested obiter dictum that the violation of a *jus cogens* norm, such as the prohibition against the torture, had direct legal consequences for the legal character of all official domestic actions relating to the violation (Wet, 2004, pp. 97-98).

On 17 October 2000 the Democratic Republic of the Congo filed in the Registry of the Court an Application instituting proceedings against the Kingdom of Belgium in respect of a dispute concerning an "international arrest warrant issued on 11 April 2000 by a Belgian investigating judge against the Minister for Foreign Affairs in office of the Democratic Republic of the Congo, Mr. Abdulaye Yerodia Ndombasi.

In that Application the Congo contended that Belgium had violated the "principle that a State may not exercise its authority on the territory of another State", the "principle of sovereign equality among all Members of the United Nations, as laid down in article 2, paragraph 1, of the Charter of the United Nations", as well as "the diplomatic immunity of the Minister for Foreign Affairs of a sovereign State, as recognized by the jurisprudence of the Court and following from article 41, paragraph 2, of the Vienna Convention of 18 April 1961 on Diplomatic Relations". On 11 April 2000 an investigating judge of the Brussels tribunal de première instance issued "an international arrest warrant in absentia" against Mr. Abdulaye Yerodia Ndombasi, charging him, as perpetrator or co-perpetrator, with offences constituting grave breaches of the Geneva Conventions of 1949 and of the Additional Protocols thereto, and with crimes against humanity. The arrest warrant was circulated internationally through Interpol. At the time when the arrest warrant was issued Mr. Yerodia was the Minister for Foreign Affairs of the Congo. The crimes with which Mr. Yerodia was charged were punishable in Belgium under the Law of 16 June 1993 concerning the Punishment of Grave Breaches of the International Geneva Conventions of 12 August 1949 and of Protocols I and II of 8 June 1977 Additional Thereto, as amended by the Law of 19 February 1999 concerning the Punishment of Serious Violations of International Humanitarian Law[1].

International Court of Justice, 14 February 2002 by thirteen votes to three, finds that the issue against Mr. Abdulaye Yerodia Ndombasi of the arrest warrant of 11 April 2000, and its international circulation, constituted violations of a legal obligation of the Kingdom of Belgium towards the Democratic Republic of the Congo, in that they failed to respect the immunity from criminal jurisdiction and the inviolability which the incumbent Minister for Foreign Affairs of the Democratic Republic of the Congo enjoyed under international law.

[1]International Court of Justice (Democratic Republic of the Congo v. Belgium, 2000). Retrieved from http://www.icjcij.org/docket/index.php?sum=591&code=cobe&p1=3&p2=3&case=121&k=36&p3=5

In case Al Adsani v. UK (2002) the question posed to the Grand Chamber of the European Court of Human Rights was whether Al-Adsani's right of access to a court under Art. 6 (1) of the ECHR with regard to his damage claim against Kuwait, whose officials had allegedly tortured the applicant, had been violated by the English courts granting of immunity to the respondent State. A bare 9:8 majority of the Grand Chamber denied this question, emphasizing that the right of the access to a court was not absolute but might be subject to limitations. Art. 6 (1) of the ECHR should so 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. Although the prohibition on torture had achieved the status of international law, to which it belongs, including those relating to the grant of State immunity. Although the prohibition on torture had achieved the status of international *jus cogens* the majority was unable to discern any firm basis in current State practice for concluding that a State no longer enjoyed immunity from civil claims in the courts of another State where acts of torture were alleged. However, the main dissenting opinion, supported by six judges, discovered a conflict between the higher-ranking prohibition on torture, as part of *jus cogens,* and the lower-ranking rule on State immunity and concluded that therefore the latter rule was superseded (Tomuschat et al., 2006, p. 218).

4. Conclusions

An important message in the application of absolute prohibitions of torture as *jus cogens* norm and other norms of *jus cogens* would give the International Court of Justice, considering that almost all countries are members of United Nations. Until now the International Court of Justice has given priority to the principle of state immunity. Limitation of principle of state immunity to the detriment of torture as a *jus cogens*norm, will make the official persons no longer to have any way to hide behind state immunity when commit acts of torture or other *jus cogens* violations of international law.

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