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A human rights-based challenge: the key to unlock the UN's immunity problem?*

Um desafio baseado nos direitos humanos: a chave para desbloquear o problema de imunidade da ONU?

Héloïse Guichardaz**

Abstract

The idea of a human rights challenge to UN immunities has made its way into the doctrine over the years, particularly as more scandals involving the UN came to light. From the lead poisoning of a UN-led camp in Kosovo to the cholera epidemic in Haiti started by infected Nepalese Peacekeepers, the discourse around the extensive immunities international organisations benefit from has led to many discussions around the possible solutions to the plight of the victims. Regarding human rights, it is the right of access to justice that has been identified as a one of the strongest concepts to rally around. Widely recognised in many international and regional texts, and – in theory – defended by human rights court, the right of access to justice has however not been able to truly materialize as a challenger to immunities. Even further analysis based on its potential status as a *jus cogens* norm has not had much success. The status is still heavily disputed, and the very strength of *jus cogens* norms in general against immunity has not found unanimity in courts. However, while an overview of the jurisprudence shows a general rejection of a human rights-based challenge of the UN's immunities, this article refuses to end on a pessimistic conclusion. From doctrinal analyses to dissenting opinions and even some court cases, the recognition of the right of access to justice – whether as a *jus cogens* norm or not – is starting to make its way in the human rights discourse around the UN's immunities. While not yet a fully-fledged trend, a pattern of resistance is forming against the majority of the jurisprudence on the issue.

Keywords: immunity; human rights; right of access to justice; *jus cogens*.

Resumo

A ideia de um desafio dos direitos humanos às imunidades da ONU fez seu caminho para a doutrina ao longo dos anos, especialmente à medida que mais escândalos envolvendo a ONU vieram à tona. Desde o envenenamento por chumbo em um campo liderado pela ONU em Kosovo até a epidemia de cólera no Haiti iniciada por soldados da paz nepaleses infectados, o discurso em torno das extensas imunidades das quais organizações internacionais se beneficiam tem levado a muitas discussões sobre as possíveis soluções para o sofrimento das vítimas. Em relação aos direitos humanos,

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é o direito de acesso à justiça que foi identificado como um dos conceitos mais fortes a serem defendidos. Amplamente reconhecido em muitos textos internacionais e regionais, e - em teoria - defendido por tribunais de direitos humanos, o direito de acesso à justiça não tem sido capaz de se materializar verdadeiramente como um desafiante às imunidades. Mesmo uma análise mais aprofundada com base em seu status potencial como norma jus cogens não teve muito sucesso. O status ainda é fortemente disputado, e a própria força das normas de jus cogens em geral contra a imunidade não encontrou unanimidade nos tribunais. No entanto, embora uma visão geral da jurisprudência mostre uma rejeição geral de um desafio baseado nos direitos humanos das imunidades da ONU, este artigo se recusa a terminar com uma conclusão pessimista. De análises doutrinárias a opiniões divergentes e até mesmo alguns processos judiciais, o reconhecimento do direito de acesso à justiça - seja como uma norma jus cogens ou não - está começando a fazer seu caminho no discurso dos direitos humanos em torno das imunidades da ONU. Embora ainda não seja uma tendência totalmente desenvolvida, um padrão de resistência está se formando contra a maioria da jurisprudência sobre o assunto.

Palavras-chave: imunidade - Direitos Humanos - direito de acesso à justiça - jus cogens

is an interesting layer of this complex issue, especially when opposed to a well-established rule of international law – immunities of international organisations, and, to a certain extent, of States – which is consistently defended and upheld in court.

A brief glance at the existing jurisprudence may make one think that this is a lost cause. As of time of writing, there is no real possibility in the courts of the right of access to justice, whether recognised as a *jus cogens* norm or not, to bypass immunities of international organisations or States. This paper will look into the contemporary doctrine on the right of access to justice and jus cogens, but also into recent national and regional cases – including dissenting opinions - in order to get a fuller picture of the discourse on immunities and human rights. Through these observations, one can paint a much fuller picture than what the current jurisprudence shows, from a handful of opposing decisions to judgements won by a paper-thin majority. The aim of this paper is to map out the current jurisprudence on immunity as well as the opposing viewpoints: is the idea of a human rights-based challenge truly obsolete?

The focus will be mostly on the UN, but State immunity will also be considered as a useful anchor point and a basis for comparison, as there are few decisions involving the UN directly past the ones revolving around the scandals. This paper does not intend to be a compilation and a full analysis of all of the courts' decisions on immunity[3]. It is instead a snapshot of the most important development regarding immunity and the right of access to justice, with the UN's scandals as a backdrop. The first part will delve into said scandals, highlighting the severity of the situation. Then, in turn, the paper will examine the discourse on the right of access to justice and *jus cogens*.

1 Introduction

> One of the most obvious human rights problems that arise from broad immunity of international organizations and their officials is the denial of the fundamental right of access to a court guaranteed to all persons.[1]

The right of access to justice is systematically brought up as an argument against the immunity of international organisations in the many decisions of national, regional, and international courts that have had to deal with the issue. This argument is also brought up in cases regarding State immunity, examples of which will be used illustratively and comparatively. The more recent idea of the right of access to justice as a *jus cogens* norm[2]

[1] WERZER, J. The UN Human Rights Obligations and Immunity: an Oxymoron Casting a Shadow on the Transitional Administrations in Kosovo and East Timor. *Nordic Journal of International Law*, v. 77, n. 105. P. 123.

[2] Also known as peremptory norms of international law. See Vienna Convention on the Law of Treaties (adopted on 22 May 1969, entered into force on 27 January 1980) 1155 UNTS 331 art 53.

[3] For a more complete but less recent assessment of court decisions on immunities, see Di Filippo Marcello, 'Immunity from Suit in International Organizations Versus Individual Right of Access to Justice: An Overview of Recent Domestic and International Case Law'.

2 The consequences of the UN's extensive immunity: a series of scandals bringing the idea of a human rights-based challenge to the forefront

2.1 The UN's *de facto* absolute immunity

The legal basis for the UN's immunity can be found in its founding text, the Charter of the United Nations (1945), though the extent of the privileges and immunities at this point appears to be restricted by considerations of necessity. Indeed, Article 105, paragraph 1 of the UN Charter seemingly presents a functional basis for the organisation's privileges and immunities: "The Organization shall enjoy in the territory of each of its members such privileges and immunities as are necessary for the fulfilment of its purposes"[4]. The privileges and immunities are only to be enjoyed as far as they are necessary, a position quite different from absolute immunity. And yet, they are now widely considered to be applied absolutely, despite the wording of the Charter.

How did it get to this point? Paragraph 3 of the same Article states that "The General Assembly may make recommendations with a view to determining the details of the applications of paragraph 1 and 2 of this Article or may propose conventions to the Members of the United Nations for this purpose"[5]. It did exactly that just a few months later, leading to the adoption of the Convention on the Privileges and Immunities of the United Nations (thereafter the General Convention).

The General Convention granted the UN a wider range of privileges and immunities than initially envisaged by the UN Charter. Its Section 2 states that

> The United Nations, its property and assets wherever located and by whomsoever held, shall enjoy immunity from every form of legal process except insofar as in any particular case it has expressively waived its immunity. It is, however, understood that no waiver of immunity shall extend to any measure of execution.[6]

To further consolidate this change, this *de facto* absolute immunity has also been recognised and upheld by various national and regional courts, including in proceedings related to the high-profile scandals in Haiti and Srebrenica[7].

It is important to mention however that while Section 2 does grant absolute immunity to the UN, two caveats to this were built into the body of the General Convention. The first is the fact that the UN can waive its immunity, although notably it has not done so in any of the scandals hereinafter described. The second caveat is Section 29 of the General Convention, which states that

> The United Nations shall make provisions for appropriate modes of settlement of
>
> Disputes arising out of contracts or other disputes of a private law character to which the United Nations is a party
>
> Disputes involving any official of the United Nations who by reason if his official position enjoys immunity, if immunity has not been waived by the Secretary-General[8]

But once again, this caveat has its limits. The term 'disputes of a private law character' is extremely vague and prone to change, and the decision of whether a dispute is indeed 'of a private law character' is made by the Secretary General, on the advice of the Office of Legal Affairs, with a notable lack of transparency. In other words, this caveat is a caveat only to the extent that the UN itself allows it to be.

The justification behind the UN's generous privileges and immunities is rooted in the concept of functional necessity[9]. Essentially, this is the idea that the UN needs these privileges and immunities in order to properly function, as they are the bastion against petty lawsuits by States opposing the UN's actions. Evidently, this justification does make *prima facie* sense, as the UN could not efficiently fulfil its purposes while constantly burdened by legal actions. The other side of this coin

[4] Charter of the United Nations (signed on 26 June 1945, entered into force on 24 October 1945) 1 UNTS XVI (UN Charter) art 105.
[5] Charter of the United Nations (signed on 26 June 1945, entered into force on 24 October 1945) 1 UNTS XVI (UN Charter) art 105.
[6] Convention on the Privileges and Immunities of the United Nations (adopted on 13 February 1946, entered into force 17 September 1946) 1 UNTS 15 (General Convention) section 2.
[7] For details see Section III.
[8] Convention on the Privileges and Immunities of the United Nations (adopted on 13 February 1946, entered into force 17 September 1946) 1 UNTS 15 (General Convention) section 29.
[9] See BOON, K. E. Immunities of the United Nations and Specialised Agencies. *In:* RUYS, T.; ANGELET, N.; FERRO, L. (ed.). *The Cambridge Handbook of Immunities and International Law*. Cambridge University Press, 2019. and BLOKKER, N. International Organisations: the Untouchables?. *International Organisations Law Review*, n. 259.

is that, if courts were to follow this reasoning – as they have consistently done so – the outcome for the victims amounts to what can be considered a denial of justice[10]. Such a denial of justice is apparent, and particularly jarring, in cases involving mass claims, such as the scandals of Haiti, Kosovo and Srebrenica, summaries of which are presented in the following section.

2.2 A brief summary of the recent scandals involving the UN and the right of access to justice

Over the last thirty years, scandals involving peacekeeping missions in Haiti, Kosovo and Srebrenica have brought to light the consequences of such a broad system of immunities.

2.2.1 Haiti

Following the 2010 earthquake which led to the deaths of hundreds of thousands of people, including Peacekeepers already on the territory as part of the MINUSTAH[11] operation following a 2004 Security Council resolution[12], the UN decided to increase the capacity of the operation to help rebuild the country. In October 2010, a contingent of approximately four hundred Nepalese Peacekeepers was dispatched to Haiti and hosted at the MINUSTAH camp of Mirabelais[13]. Soon after, cases of cholera were observed in the locality, seemingly originating from a source very close to the camp, then spread following the path of the main river of the region, the Artibonite. Cholera, a disease most commonly spread by contaminated water, can usually be treated rather quickly via antibiotics and fluids. However, most of the infrastructure of the country had been destroyed in the earthquake and had yet to be rebuilt. Without any running water available, the inhabitants had no other choice but to use and drink the water from the Artibonite. The result was predictably and devastatingly deadly. As of 2020, the cholera epidemic has caused more than ten thousand deaths. The victims and their relatives attempted to claim reparations from the UN, culminating in a clear refusal in the US courts to entertain this. This was the case of *Delama Georges v. United Nations*[14], subsequently referred to as *Georges*.

2.2.2 Kosovo

In a similar but smaller scale incident to the Haiti cholera outbreak, the UN also had to deal with the Kosovo lead poisoning case, where a few hundred displaced people were installed in an UN-run camp. This camp was built on contaminated soil, and the inhabitants unknowingly drank contaminated water, leading to health consequences such as high blood pressure, stillbirths, and physical and mental developmental problems in children. This case is significant as it involves a large number of victims who had no previous links with the organisation, and so was a third-party claim. However. beyond the refusal to grant reparations, there was no court case to speak of. Regardless, it would not be difficult to predict the results if there has been one based on the failure of similar claims.

2.2.3 Srebrenica

The final major scandal relevant to this issue is the massacre of Srebrenica, which caused approximately eight thousand deaths during the Bosnian War. Following the massacre, widely believed to have been at least partly the fault of the inaction of the Dutch contingent of Peacekeepers present in the region at this time, an association called the Mothers of Srebrenica was created. Consisting of the families of the people (mostly men) who died, this association attempted to sue both the Netherlands and the UN in front of various courts. Their case was repeatedly dismissed by various Dutch courts until it was eventually heard by the European Court of Human Rights (ECtHR) in 2013, in the case *Stichting Mothers and Srebrenica and Others v. Netherlands*[15], subsequently referred to as *Mothers of Srebrenica*. Unfortunately, the Court's decision did not overturn those of the Dutch courts. Particularly, it rejected the argument that the UN's immunity led to a denial of the association's

[10] BOON, K. E. Immunities of the United Nations and Specialised Agencies. *In:* RUYS, T.; ANGELET, N.; FERRO, L. (ed.). *The Cambridge Handbook of Immunities and International Law*. Cambridge University Press, 2019. p. 213 "decisions by IOs not to grant a forum for claims, or not to abide by recommendations for internal review processes, are now being discussed as a denial of justice issue".

[11] Mission des Nations Unies pour la stabilisation en Haïti (United Nations Stabilization Mission in Haiti)

[12] UNSC. *Res 1542*. 30 apr. 2004. UN Doc S/Res/1542.

[13] UNGA. *Report of the Special Rapporteur on extreme poverty and human rights*. 26 aug. 2016. UN doc A/71/367. para 14.

[14] *Delama Georges v. United Nations*. 834 F 3d 88. 2nd Cir. 2016.

[15] *Stichting Mothers of Srebrenica and Others v Netherlands*, 2013. 57 EHRR SE10.

right to have access to justice, which will be explored in detail in the following section.

From a disease leading to thousands of deaths, to a massacre considered to one of the deadliest of the Bosnian war, these three scandals have many notable similarities. They are all third-party claims against the UN, that is, claims by victims that do not have a previous link with the organisation. These scandals have also had a huge impact on the UN's overall reputation, particularly in Haiti where massive demonstrations took place when it was revealed that the cholera outbreak was almost certainly caused by UN Peacekeepers[16]. The final, and perhaps most relevant to this article, similarity is that the UN's response to each of them was identical. The UN's position was that its immunity should prevail, and it should not – and could not – be compelled to grant any reparations to the victims. This response only added to the backlash, but at the time of writing, the UN has not changed its position on any of these scandals.

The lack of accountability in court for the UN has prompted many papers pondering possible solutions to what has become quite the conundrum: how can one reconcile a rule enshrined in a convention and consistently upheld by every national and regional court with the sheer scale of human suffering and accusations of denial of justice? The idea of a human rights-based challenge to immunities, especially one based on the right of access to justice, quickly cemented itself as one of the strongest potential solution to the problem.

3 The right of access to justice

The International Law Association describes the immunity of international organisations from domestic jurisdictions as a "decisive barrier to remedial action for non-State claimants"[17]. This "barrier" can even be identified as a denial of justice[18]. More specifically in the context of this article, it is gradually being recognised as a potential violation of the right of access to justice, which can be defined as the "effective access to an independent dispute resolution mechanism coupled with other related issues, such as the availability of legal aid and adequate redress"[19].

The right of access to justice has been recognised in many regional and international conventions, such as the American Convention on Human Rights[20] and the International Covenant for Civil and Political Rights[21]. It is also contained in Article 6 of the European Convention on Human Rights (ECHR), taken in conjunction with the 1975 case of *Golder v United Kingdom*[22]. While Article 6 states that "everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law"[23], it was not until *Golder* that the European Court of Human Rights added that "the fair, public and expeditious characteristics of judicial proceedings are of no value at all if there are no judicial proceeding"[24]. From that point on, Article 6 has been considered by the European Court of Human Rights to also encompass the access to judicial proceedings.

As seen through the scandals summarized above, there are tensions between the right of access to justice and the *de facto* absolute immunity that most international organisations, and the UN in particular, benefit from. In fact, they are polar opposites to one another; as one should guarantee that a person can have access to judicial proceedings lest there is denial of justice, while the other guarantees that the UN "shall be immune from every form of legal process"[25]. Coupled with

[16] CARROLL, R. Protesters in Haiti attack UN peacekeepers in cholera backlash. *The Guardian*, London, 16 nov. 2010. Disponível em: https://www.theguardian.com/world/2010/nov/16/protestors-haiti-un-peacekeepers-cholera. Acesso em: 28 set. 2020.

[17] INTERNATIONAL LAW ASSOCIATION. *Berlin Conference,* 2004. Accountability of International Organizations: Final Report. 2004. p. 41.

[18] BOON, K. E. Immunities of the United Nations and Specialised Agencies. *In:* RUYS, T.; ANGELET, N.; FERRO, L. (ed.). *The Cambridge Handbook of Immunities and International Law*. Cambridge University Press, 2019. P. 213. See footnote 8.

[19] EUROPEAN UNION AGENCY FOR FUNDAMENTAL RIGHTS. *Access to justice in Europe:* an overview of challenges and opportunities. 2011. p. 9. For the purpose of this article, the expression «right of access to justice» will be used as an all-encompassing term to include the right to a remedy and the right of access to a court. The mention «right to due process» has also been used, specifically in the Dire Tladi reports.

[20] AMERICAN CONVENTION ON HUMAN RIGHTS. *Pact of San José, Costa Rica*. Adopted on 22 November 1969, entered into force on 18 July 1978. 1144 UNTS 123. art. 8.

[21] INTERNATIONAL COVENANT FOR CIVIL AND POLITICAL RIGHTS. Adopted on 16 December 1966, entered into force on 23 March 1976. 999 UNTS 171. art. 14.

[22] *Golder v United Kingdom*, 1975. 1 EHRR 524.

[23] Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR, as amended) art 6.

[24] *Golder v United Kingdom*, 1975. 1 EHRR 524. para 35.

[25] CONVENTION ON THE PRIVILEGES AND IMMUNITIES OF THE UNITED NATIONS. Adopted on 13 February

the extent of the UN's 'functional' immunity – it is essentially absolute – and the weakness of the Section 29 caveat regarding 'disputes of a private law character' in particular, the outcomes of the claims in the aforementioned scandals were sadly predictable. Claims regarding both Haiti and Srebrenica were heard by courts but did not succeed in compelling the UN to pay reparations, and their arguments regarding the right of access to a court were rejected. The Kosovo scandal, on the other hand, did not result in a claim being heard before a court, national or otherwise; however, it is very likely that the conclusion would have been the same.

The claims regarding Haiti and Srebrenica were respectively decided by the United States Court of Appeals for the Second Circuit, and by the European Court of Human Rights. Although the latter of these courts has a distinct focus on human rights, and even recognises the right of access to justice, first in Article 6 ECHR implicitly, then clearly in *Golder*, the decision remained the same in both courts. The UN's immunity was upheld, and, as a consequence, no proper remedy could be given to the victims.

In the case of *Georges*, the court dismissed "the constitutional rights [of the parties] to access the federal courts"[26] by stating that this "does little more than 'question why immunities in general should exist'"[27], using a precedent established in a sexual harassment case also involving the UN, *Brzak*[28]. It is a relatively straight-forward, if not frustrating explanation, and one that is, with regards to the right of access to justice, consistent with other decisions by US courts – *Brzak* of course, but also *Boimah v United Nations*[29] and *Mendaro v World Bank*[30]. The reasoning itself is questionable, but the US courts were not human rights courts. While it can be expected of the courts to uphold those human rights, they do not make their decisions in a system explicitly created for the defence of human rights.

This is however not the case for *Mothers of Srebrenica*, and, to its credit, the ECtHR does give a more detailed reasoning behind its finding of no violation of the right of access to a court.

The ECtHR has had to deal with many cases regarding Article 6 in conjunction with *Golder* in the context of the immunity of an international organisation. However, the first thing that must be mentioned here is that those cases are more often than not related to employment disputes, typically an employee or a former employee of an organisation seeking remedies after an alleged unfair dismissal. The method that the court deployed over the years is therefore based on this very specific collection of cases, which makes its use regarding third-party claims such as *Mothers of Srebrenica* (the most famous example of a third party claim regarding immunities in front of the ECtHR) rather awkward.

Regardless, the ECtHR did develop a three-part test in *Ashingdane v UK*[31] to discern whether or not the rights of Article 6 (including the right of access to judicial proceedings, per *Golder*) had been violated, set out as follow. The limitation must have a legitimate aim; this legitimate aim should be proportional to the means employed; and the alleged limitation to Article 6 should 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"[32]. The very idea of 'limitations' to the right of access to justice has been criticized by those considering that Article 6 should not accept any limitations[33]. However, even if one were to accept the three-part test, it is very obvious that while it is held up as a way to check for and prevent violations, evidence shows that it has been reduced to nothing but empty prose, including in the *Mothers of Srebrenica* case.

For instance, the ECtHR has struggled to reconcile the 'legitimate aim' condition with functional necessity, the very basis of international organisations' immunity. In practice, this basis for immunities alone is held to be as a legitimate aim, rendering this prong of the test moot in any such case. This is made particularly clear in both *Beer and Regan* and *Waite and Kennedy*, two of the most well-known ECtHR cases relating to immunities and the right of access to justice, where we can read that, according to the Court "the attribution of privileges and immunities to international organisations is

1946, entered into force 17 September 1946. 1 UNTS 15 (General Convention). section 2.

[26] *Delama Georges v. United Nations*. 834 F 3d 88. 2nd Cir. 2016. p. 21.

[27] *Delama Georges v. United Nations*. 834 F 3d 88. 2nd Cir. 2016. p. 21.

[28] *Brzak v. United Nations*. 597 F 3d 107. 2nd Cir. 2010.

[29] *Boimah v. United Nations*. 664 F Supp 69. E.D.N.Y. 1987.

[30] *Mendaro v. World Bank*. 717 F 2d 610. D.C. Cir. 1983.

[31] *Ashingdane v United Kingdom*, 1985. 7 EHRR 528.

[32] *Ashingdane v United Kingdom*, 1985. 7 EHRR 528. para 57. More recently, the three-pronged test was reiterated (and used) in *Waite and Kennedy v Germany*, 1999. 30 EHRR 261. para 59 and *Beer and Reagan v Germany*, 1999. 33 EHRR 19. para 49.

[33] JURISDICTIONAL IMMUNITIES OF THE STATE. *Germany v. Italy*: Greece intervening. Judgement [2012] ICJ Rep 99. para 216.

an essential means of ensuring the proper functioning of such organizations free from unilateral interference by individual governments"[34] and that the practice of granting immunities to international organisations is "established in the interest of the good working of the good working of those organizations"[35]. The protection of international organisations from interference via immunities is recognised by the court as enough to fulfil the legitimate aim condition, adding that the importance of this practice of immunities "is enhanced by a trend towards extending and strengthening international cooperation in all domains of modern society"[36]. The Court's conclusion is that a limitation on the rights of Article 6 does fit under the qualification of a 'legitimate aim', for the same reason those immunities are there in the first place. This justification of functional necessity being something that the Court explicitly agrees with, it is not surprising that the conclusion on legitimate aim is that there will always be one, and it leaves little wiggle room for any other conclusion on the legitimate aim condition[37]. In a strange symmetry, questioning the legitimate aim as the Court presents would, in the words of the US court in *Georges*, *Brzak* and many others, do "little more than 'question why immunities in general should exist".[38]

As for the proportionality condition, it was considered fulfilled if the applicants "had available to them reasonable alternative means to protect effectively their right under the Convention"[39]. In the cases of *Beer and Regan* and *Waite and Kennedy*, this translated into the possibility of having access to the ESA Appeals Board. In the case of *Mothers of Srebrenica*, this is a little bit more confusing. The ECtHR does refer to its previous rulings of *Beer and Regan* and *Waite and Kennedy*, but it also states that the absence of an alternative remedy (which the Court does recognise as no claims commission was ever put in place, in Srebrenica or elsewhere) is *not* "constitutive of a violation of the right of access to a court"[40]. The Court adds that the previous judgements of *Waite* and *Beer* "cannot be interpreted in such absolute terms either"[41]. Acknowledging the lack of alternative means of remedy set up by the United Nations, the Court simply explains that "this state of affairs is not imputable to the Netherlands"[42], avoiding the question of the lack of alternative means altogether. This allows the court to conclude that the legitimate aim was proportional to the means employed, thus denying that the association's Article 6 rights had been violated.

And finally, the 'very essence of the right being impaired' condition "is only routinely repeated in the list of conditions to be assessed, but it has never been closely scrutinized"[43], despite still being presented as a distinct prong of the test. Based on this analysis of all three prongs of the *Ashingdane* test, it is no wonder that the conclusion is foregone.

The apparent conclusion is that the right of access to a court, while being at least paid lip service to by the ECtHR, is not a secure guarantee against the denial of the right of access to a court for the victims of scandals such as those discussed. The right may be in the European Convention of Human Rights, but this only guarantees that the question will be examined; *not* that the violation will be recognised. Further, as seen throughout this section, the *Ashingdane* test itself has substantial flaws. The legitimate aim is simply fulfilled by the same arguments for the granting of immunities to IOs in the first place; the proportionality test was given little weight in the *Mothers of Srebrenica* case, despite the lack of alternative means; and the impairment condition is barely considered.

The ECtHR and the US courts have not been the only ones making such decisions on the relation between the right of access to justice and immunities. Other courts have consistently ruled in favour of the immunity of international organisations. One such instance is the consideration of the right of access to

[34] *Waite and Kennedy v Germany*, 1999. 30 EHRR 261. para 63 and *Beer and Reagan v Germany*, 1999. 33 EHRR 19. para 53.

[35] *Waite and Kennedy v Germany*, 1999. 30 EHRR 261. para 63 and *Beer and Reagan v Germany*, 1999. 33 EHRR 19. para 53.

[36] *Waite and Kennedy v Germany*, 1999. 30 EHRR 261. para 6 and *Beer and Reagan v Germany*, 1999. 33 EHRR 19. para 5.

[37] This ruling was also used in the Mothers of Srebrenica case, in an identical manner. See *Stichting Mothers of Srebrenica and Others v Netherlands*, 2013. 57 EHRR SE10. para 139(c).

[38] See footnote 26.

[39] *Waite and Kennedy v Germany*, 1999. 30 EHRR 261. para 68 and *Beer and Reagan v Germany*, 1999. 33 EHRR 19. para 58.

[40] *Stichting Mothers of Srebrenica and Others v Netherlands*, 2013. 57 EHRR SE10. para 164.

[41] *Stichting Mothers of Srebrenica and Others v Netherlands*, 2013. 57 EHRR SE10. para 164.

[42] *Stichting Mothers of Srebrenica and Others v Netherlands*, 2013. 57 EHRR SE10. para 165.

[43] PAPA, M. I. The Mothers of Srebrenica case before the European Court of Human Rights: United Nations Immunity versus Rights of Access to a Court. *Journal of International Criminal Justice*, v. 14, n. 893. p. 899.

a court in Canada in the wrongful dismissal case of *Amaratunga v Northwest Atlantic Fisheries Organization and Canadian Civil Liberties Association*[44]. In the eyes of the Canadian Supreme Court, the right of access to justice is merely procedural, and thus should be given even less weight than in the ECHR system – and as we saw earlier, even the weight of Article 6 is not enough for the ECtHR to make a decision in favour of the victims. This led the Court to reject the argument brought forward by the appellant of a violation of his right of access to justice. Indeed, in his arguments that the lack of proper forum to air his grievances constituted a violation, the appellant attempted to use the ECtHR case law on denial of justice, only for his argument to be swiftly rejected by the Court:

> Furthermore, the European cases upon which the intervener relies arose in a different legal context, namely that of the Convention for the Protection of Human Rights and Fundamental Freedoms, 213 U.N.T.S. 221 [ECHR]. As for the Canadian Bill of Rights, the "right to a fair hearing in accordance with the principles of fundamental justice for the determination of rights and obligations" recognised in s. 2(e) does not create a substantive right to make a claim […] Section 2(e) is the source of a procedural right, not of a substantive right[45].

The Canadian Supreme Court, through this paragraph, gave even less consideration to the right of access to justice that the ECtHR did, rejecting the idea of a violation on the basis of this right being procedural, rather than substantive.

A seemingly sensible conclusion here would be to dismiss the very idea of the right of access to justice as a possible solution against international organisation immunities. Indeed, it was rejected as an argument in the two major scandals involving the UN in recent years that made it to a court, including in a system designed to protect and defend human rights, and more rejections occurred in other national courts that dealt with the immunities of international organisations. However, these are not the only cases to have dealt with the right of access to justice and immunity, even if it was the immunity of a State rather than that of an international organisation.

Indeed, there has been some push back against the general trend of upholding absolute immunities to the detriment of the right of access to justice. In one such instance, the Italian Constitutional Court[46] gave a controversial answer to the ICJ's decision in favour of Germany in the Jurisdictional Immunities case[47]. Following this loss, Italian legislation was enacted in an attempt to comply with the ICJ judgement, but the Italian Constitutional Court was soon faced with a request by the Tribunal of Florence to evaluate whether or not those measures were constitutionally sound[48]. In particular, the Court looked at potential violations of Article 2 and 24 of the Italian Constitution, which, combined, ensure the right of access to justice by the norms adopted by the Italian legislation to comply with the ICJ judgement.

The decision was unequivocal:

> the absolute sacrifice of the right of judicial protection of fundamental rights – one of the supreme principles of the Italian legal order, enshrined in the combination of Articles 2 and 24 of the republican Constitution – resulting from the immunity from Italian jurisdiction granted to the foreign State, cannot be justified and accepted insofar as immunity protects the unlawful exercise of governmental powers of the foreign State, as in the case of acts considered war crimes and crimes against humanity, in breach of inviolable human rights.[49]

The overall conclusion of the case was to declare unconstitutional Article 3 of the Law No. 5 of 14 January 2013, as well as Article 1 of Law No. 848 of 17 August 1957 (Execution of the United Nations Char-

[44] *Tissa Amaratunga v. Northwest Atlantic Fisheries Oragnization*. [2013] 3 SCR 866.

[45] *Tissa Amaratunga v. Northwest Atlantic Fisheries Oragnization*. [2013] 3 SCR 866. at 892.

[46] Corte Cost, 22 October 2014, 238.

[47] Where the ICJ decided against Italy in the dispute relating to the immunities of Germany relating to acts committed during World War II. See JURISDICTIONAL IMMUNITIES OF THE STATE. *Germany v. Italy*: Greece intervening. Judgement [2012] ICJ Rep 99. The decision was criticized (See Judge Cançado Trindade's dissenting opinion: "In cases of international crimes, of delicta imperii, what cannot be waived, in my understanding, is the individual's right of access to justice, encompassing the right to reparation for the grave violations of the rights inherent to him as a human being. Without that right, there is no credible legal system at all, at national or international levels."), but no other decisions by the ICJ have refuted it.

[48] Corte Cost, 22 October 2014, 238 para 1: "The Tribunal of Florence raises the question of constitutionality… of Article 1 (recte Article 3) of Law No. 5 of 14 of January 2013… insofar as it obliges the national judge to comply with the Judgement of the ICJ, even when it established the duty of Italian courts to deny their jurisdiction in the examination of actions for damages for crimes against humanity, committed jure imperii by the Third Reich in Italian territory, in relation to Article 2 and 24 of the Constitution".

[49] Corte Cost, 22 October 2014, 238 para 5.1.

ter) so far as it concerns the execution of Article 94, as it forces the Italian courts "to deny their jurisdiction in case of acts of a foreign State constituting war crimes and crimes against humanity, in breach of inviolable human rights"[50]. In effect, this decision represents a commitment by the Italian Constitutional Court to protect the right of access to justice as it is recognised in its Constitution, even if it means positioning itself in clear disagreement with the ICJ on the matter.

The decision even contains an indirect mention of the immunities granted to the United Nations and their relation to the Italian constitution:

> The ICJ was established (Article 7) as the United Nations Organization's principal judicial organ (Article 92), whose decisions are binding on each Member State in any case to which it is a party (Article 94). This binding force produces effects in the domestic legal order through the Special Law of Adaptation (authorization to ratification and execution order). It constitutes one of the cases of limitation of sovereignty the Italian State agreed to in order to favour those international organizations, such as the UN, that aim to ensure peace and justice among the Nations (Article 11 of the Constitution), always within the limits, however, of respect for the fundamental principles and inviolable rights protected by the Constitution (Judgment No. 73/2001).[51]

As of the time of writing, no decision by the Italian Constitutional Court have involved a primary decision on the UN's immunities in relation to the constitutionally recognised right of access to justice. The Court making the same decision as it did in 2014 in a case similar to the claims regarding Haiti or Srebrenica is, for now, just speculation. But as the quote above shows, it is not out of the realm of possibilities that this hypothetical decision by the Italian Constitutional Court – or, in fact, by other Italian courts – might be modelled after their original decision on Germany.

This case provoked academic opinions that it could be seen as a possible beginning of a different perspective on State immunity, particularly regarding gross violations of fundamental human rights. Natalino Ronzitti urges us to acknowledge that the decision "constitutes an attempt to curb the conservative interpretation of the ICJ and of other national courts"[52] while Benedetto Conforti recognises that it was a "courageous" judgment that protects "the fundamental values of the state community"[53].

Despite this glimmer of hope, there are a number of caveats regarding this decision by the Italian Constitutional Court. Firstly, it is a decision by a national court, rather than an international one. Hence, its influence is much smaller than a decision by the ICJ or by the ECtHR. Secondly, it concerns State immunity and war crimes, a context quite different from international organisations and scandals born mostly out of negligence. Thirdly, this decision is quite unique and, despite the doctrinal enthusiasm, remains rather isolated.

Nonetheless, it creates a precedent that other national courts may be able to rely on if they want to challenge the common understanding that the right of access to justice cannot challenge immunities. The doctrinal support is certainly there.

However, while this is a hopeful step towards a greater recognition of the strength of the right of access to justice, it remains, in its current form, entirely too weak to have an impact on a judicial decision regarding immunities. While most of the cases concern employment disputes, third-party claims have not had much success either, whether against the immunities of a State or the immunities of an international organisation. This lack of success is despite the gravity of the alleged wrongdoing, and in some cases also the lack of any other avenue for alternative remedies. All of this put together does not bode well for any future challenges of immunities based on the right of access to justice. Benjamin Brockman-Hawe sums the current position up perfectly in this passage, written before the *Mothers of Srebrenica* case was heard by, and dismissed by, the ECtHR:

> The Mothers of Srebrenica litigation is a rarity, in that it involves sympathetic plaintiffs with a legitimate legal complaint against the UN who have no other forums in which their claim would otherwise be brought. If a national court is unwilling to set aside the immunity of the UN under such circumstances, it is indeed difficult to imagine a situation in which the right of access *would* be great enough to justify setting aside the grant of immunity[54].

[50] Corte Cost, 22 October 2014, 238 para 4.1.

[51] Corte Cost, 22 October 2014, 238 para 4.1.

[52] RONZITTI, N. La Cour constitutionnelle italienne et l'immunité juridique des États. *Annuaire français du droit international*, v. 60, n. 3. p. 14.

[53] CONFORTI, B. La Cour constitutionnelle italienne et les droits de l'homme méconnus sur le plan international. *Revue générale de droit international public*, v. 119, n. 353. p. 354.

[54] BROCKMAN-HAWE, B. E. Questioning the UN's immunity in the Dutch Courts: Unresolved Issues in the Mothers of Srebrenica Litigation. *Washington University Global Studies Law Review*, v. 10, n. 727. p 747. This particular quote, written before the Mothers of Sre-

This seemingly impossible requirement to have the 'perfect' victims and the 'perfect' case severely limits the impact that the right of access to justice can practically have in a dispute involving immunities. Even with such conditions apparently met, the Article 6 challenge in *Mothers of Srebrenica* still failed.

This section has shown that despite some encouraging decisions in domestic courts, the balancing act between the right of access to justice and immunities is still leaning towards the latter in most cases. In the case of the UN in particular, courts almost inevitable argue their way out of prioritizing the right of access to justice, even it is specifically recognized in the instrument they were created to defend.

What, then, could create an obligation for the court to consider the right of access to justice, and not just dismiss it right away? What option is there left for the victims to enforce their right, especially as third-party claimants with no other alternatives?

The answer to these might yet be found in the use an interesting, although controversial, concept: peremptory norms of international law, or *jus cogens*.

4 A critical analysis of the idea of the right of access to justice as a *jus cogens* norm: a possible challenger to the rule of immunities?

As previous described, the argument of the right of access to justice, while a seemingly well-protected guarantee on paper, has failed to materialize in practice. It is either considered to be a simple procedural right (and therefore has little, if any, influence in eventual decisions) or it is considered more fully only to then be rejected. However, a potential recognition of the right of access to justice as a *jus cogens* norm[55] has been brought forward as a possible solution to this issue.

The status of a norm as *jus cogens* is not simply anecdotal. The criteria are rather strict, and based firstly on the recognition of very specific organs of the UN, namely the International Law Commission and the International Court of Justice, and secondly on evidence that it is also 'accepted and recognised by the international community of States as a whole'.[56]

The possibility of the right of access to justice being recognised as a *jus cogens* norm raises two separate but related issues relevant to the potential defeat of the UN or other international organisations' immunities. Firstly, is there sufficient evidence that this right is, or could be, recognised as a *jus cogens* norm? Secondly, would this elevation to *jus cogens* status be sufficient to overcome the rule of immunity as it stands today?

4.1 Can the right of access to justice be considered to be a *jus cogens* norm?

In 2019, a series of four reports regarding *jus cogens* norms was released by Special Rapporteur Dire Tladi, making it one of the most recent authoritative analyses of the subject. In the fourth of these reports, Special Rapporteur Tladi provided a list of norms that have been universally recognised as *jus cogens*, and a further list of other norms that do not benefit from the same support, but that have been argued to be *jus cogens* nonetheless. The result is a comprehensive list that, although it does not present itself as exhaustive, is an efficient snapshot of the opinion of the international community as a whole.

The report starts off with the more straightforward list to compile, the norms that have both been recognised as *jus cogens* by the ILC and/or the ICJ and that have garnered enough support within the international community to be decisively recognised as *jus cogens*. These include, *inter alia*, the prohibition of torture[57] and the prohibition of genocide[58].

brenica case even made it before the ECtHR, can now be expanded to the Haiti scandal, with the same bleak conclusion.

[55] which the Vienna Convention on the Law of Treaties defines 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 only be modified by a subsequent norm of general international law having the same character". See VIENNA CONVENTION ON THE LAW OF TREATIES. Adopted on 22 May 1969, entered into force on 27 January 1980. 1155 UNTS 331. art 53.

[56] ILC. *Fourth Report on peremptory norms of general international law (jus cogens).* By Dire Tladi, Special Rapporteur. UN Doc A/CN.4/727. para 55.

[57] QUESTIONS RELATING TO THE OBLIGATION TO PROSECUTE OR EXTRADITE. *Belgium v. Senegal.* Judgement [2012] ICJ Rep 422 para 99. para 99.

[58] RESERVATIONS TO THE CONVENTION ON THE PREVENTION AND PUNISHMENT OF THE CRIME OF GENOCIDE. Advisory Opinion [1951] ICJ Rep 15. p. 23 and ARMED ACTIVITIES ON THE TERRITORY OF THE CONGO. New Application: 2002. *Democratic Republic of the Congo v Rwanda.* Judge-

The right of access to 'due process', on the other hand, is mentioned in the category of rights "whose *jus cogens* status enjoys *some* support"[59]. Special Rapporteur Tladi is understandably very careful with his words here. The support does exist, but there is enough uncertainty about its status that no solid position can be taken. In particular, Special Rapporteur Tladi indicates that there is pushback against the idea of the right to due process being recognised as a *jus cogens* norm. The courts of Switzerland, which had to deal with a series of cases regarding the freezing of assets of private individuals following Security Council sanctions, have consistently ruled against recognizing the right of access to justice as a *jus cogens* norm. In one example, three different cases were treated by the Tribunal Fédéral Suisse against the State Secretariat for Economic Affairs and Federal Department of Economic Affairs[60]. In all three cases, an alleged denial of the right of access to justice, specifically, the right granted by Article 6 ECHR was claimed. The claimants argued that both Article 6 ECHR and Article 14 of the International Covenant on Civil and Political Rights were *jus cogens* norms. The Tribunal Fédéral disagreed, stating in all three cases that

> Contrary to what the claimant argues, neither the fundamental procedural guarantees nor the right to an effective remedy of Article 6 and 13 of the ECHR and Article 14 of the International Covenant on Civil and Political Rights take on the nature of peremptory norms of international law (*jus cogens*)[61].

In making that decision, the Tribunal Fédéral followed its own earlier judgement in the *Nada* case[62], also regarding Security Council sanctions.

However, there has been some progress regarding recognition of the right of access to justice as a *jus cogens* norm in one regional court. The Inter-American Court of Human Rights has so far recognised the right of access to justice to be a peremptory norm of international law in two cases, *Goiburú*[63] and *La Cantuta*[64]), holding that

> Access to justice is a peremptory norm of international law and, as such, gives rise to obligations *erga omnes* for the States to adopt all necessary measures to ensure that such violations do not remain unpunished, either by exercising their jurisdiction to apply their domestic law and international law to prosecute and, when applicable, punish those responsible, or by collaborating with other States that do so or attempt to do so[65].

Judge Cançado Trindade, one of the three judges who heard *Goiburú*, described the right of access to justice in a later dissenting opinion in the *Jurisdictional Immunities* ICJ case as "a true *droit au Droit*, a right to legal order which effectively protects the fundamental rights of the human person"[66] which puts it, in his opinion, "in the domain of *jus cogens*"[67].

However, this clear recognition is not given much consideration by Special Rapporteur Tladi. Indeed, both of those cases were not even mentioned in support of the recognition of the right of access to justice as a *jus cogens* norm. They are present in his fourth report, but not in the context of the right of access to justice. *Goiburú*, the most mentioned, is acknowledged only as a recognition of the prohibition of enforced disappearances as a *jus cogens* norm[68]. This can perhaps be explained by the presence of two main caveats. Firstly, it is generally recognised that the Inter-American Court and Commission of Human Rights "have more readily found the existence of norms of *jus cogens*"[69]. One can

ment [2006] ICJ Rep 6. para 64.

[59] ILC. *Fourth Report on peremptory norms of general international law (jus cogens)*. By Dire Tladi, Special Rapporteur. UN Doc A/CN.4/727. para 134.

[60] TF 2A 783/2006, 2A 784/2006 and 2A 785/2006 du 23 Janvier 2008.

[61] TF 2A 783/2006, 2A 784/2006 and 2A 785/2006 du 23 Janvier 2008 consid 8.4 : «contrairement à ce qu'affirme la recourante, ni les guaranties fondamentales de procédure, ni le droit de recours effectif des articles 6 et 13 et 14 Pacte ONU II, ne revètent pour eux-mêmes le caractère de normes impératives de droit international général (*jus cogens*)» (translation by the author).

[62] ATF 133 II 450 consid. 7.3.

[63] INTER-AMERICAN COURT OF HUMAN RIGHTS. *Case of Goiburú et al v. Paraguay*, Merits, Reparations and Costs, Inter-American Court of Human Rights Series C No 153. 22 sep. 2006.

[64] INTER-AMERICAN COURT OF HUMAN RIGHTS. *Case of La Cantuta v. Peru*, Merits, Reperations and Costs, Inter-American Court of Human Rights Series C No 162. 29 nov. 2006.

[65] INTER-AMERICAN COURT OF HUMAN RIGHTS. *Case of Goiburú et al v. Paraguay*, Merits, Reparations and Costs, Inter-American Court of Human Rights Series C No 153. 22 sep. 2006. para 131, INTER-AMERICAN COURT OF HUMAN RIGHTS. *Case of La Cantuta v. Peru*, Merits, Reperations and Costs, Inter-American Court of Human Rights Series C No 162. 29 nov. 2006. para 160.

[66] JURISDICTIONAL IMMUNITIES OF THE STATE. *Germany v. Italy*: Greece intervening. Judgement [2012] ICJ Rep 99. para 217.

[67] JURISDICTIONAL IMMUNITIES OF THE STATE. *Germany v. Italy*: Greece intervening. Judgement [2012] ICJ Rep 99. para 217.

[68] ILC. *Fourth Report on peremptory norms of general international law (jus cogens)*. By Dire Tladi, Special Rapporteur. UN Doc A/CN.4/727. para 126.

[69] ILC. *Fourth Report on peremptory norms of general international law (jus cogens)*. By Dire Tladi, Special Rapporteur. UN Doc A/CN.4/727. para 40.

argue that this is not exactly a solid argument – would the same criticism be levelled at the ECtHR had it made the same decision?[70] – but it does go against the idea of an internationally recognised *jus cogens* norm. Secondly, even when taking into consideration this eagerness to recognise peremptory norms of international law, those decisions have raised questions and criticisms. Prof Hélène Tigroudja has written that the recognition of the right of access to justice as *jus cogens* is "obscure" and made "without even any attempt to justify it"[71].

Additionally, those decisions were made regarding claims against States, and not an international organisation. There is no indication that the same decision would be taken in a claim against, for example, the UN.

Therefore, although the decisions of the Inter-American Court of Human Rights should be taken into account, the weight of such an assertion can reasonably be doubted, as it was not enough – and neither were the national courts' decisions mentioned in the report – to convince Special Rapporteur Tladi that the right of access to justice was globally recognised as a *jus cogens* norm.

However, this does not mean that there is no prospect of recognition as *jus cogens* in the near future. If a court were to decide that the right of access to justice is a *jus cogens* norm, it would at least have *some* support by national courts and the Inter-American Court of Human Rights. These decisions are not insignificant; and may yet be the first steps towards the right of access to justice being decisively recognised as a *jus cogens* norm in the years, or decades, to come. While these decisions are not enough to indicate a trend towards the recognition and acceptance of the right of access to justice as a *jus cogens* norm, they do form the beginning of a pattern of acceptance that could very well turn into a strong support for the recognition in the future. Moreover, the very decision by Tladi and Tigroudja to essentially cast aside the decisions by the Inter-American Court as they are too forward and progressive is itself questionable, and may not be shared by future courts.

[70] On the – often not as reconized as it should be – influence of the Inter-American Court of Human Rights on *jus cogens*, see CARDOSO, A. F. R.; SQUEFF, T.; ALMEIDA, R. M. Jus cogens: an european concept? An emancipatory conceptual review from the inter-american system of human rights. *Brazilian Journal of International Law*, v. 15, n. 124.

[71] TIGROUDJA, H. La Cour interaméricaine des droits de l'homme au service de "l'humanisation du droit international public". Propos autour des récents arrêts et avis. *Annuaire français de droit international*, v. 52, n. 617. p. 626-630. Original quote in French: «force est de constater que la manière dont le droit d'accès au juge a été érigé en norme impérative est obsure puisque c'est au détour d'une phrase que cette affirmation est posée, sans même tenter de la justifier comme la Cour l'avait fait dans son avis n°18 pour le principe de non-discrimination» (translation by the author).

4.2 The impact of a *jus cogens* norm on the rule of immunities

Despite the current lack of universal recognition and acceptance, it is worthy as an academic exercise to follow the *jus cogens* argument to its logical end. If the right of access to justice *were* to be considered a *jus cogens* norm, how would it fare as an argument against the immunity of a State or an international organisation?

While it might be tempting to entertain the idea that a *jus cogens* norm will, by its very definition, trump the rule of immunity, one should first wonder whether this is actually established practice. Since the right of access to justice is not recognised as *jus cogens*, we will have to turn our gaze towards other *jus cogens* norms – prohibitions of crimes against humanity or torture – that have been held up as arguments that might prevail against immunities. Additionally, we will have to focus exclusively on the immunities of States and heads of State. In researching this article, no cases directly involving the opposition of a universally recognised *jus cogens* norm and the immunities of an international organisations were found. This of course constitutes a built-in caveat to any conclusions reached; but if a trend emerges, we will be one decisive step closer to a human-rights based--challenge of international organisations immunities.

In the *Jurisdictional Immunities* case between Germany and Italy, Italy's second argument was centred around the alleged violation of *jus cogens* norms by Germany – in this case, war crimes and crimes against humanity[72]. The argument was summarised in the judgement as follows:

> 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, and since the rule which accords one State immunity before the courts of another does not have the status of *jus cogens*, the rule of immunity must give away[73].

The same argument was also raised in an ECtHR case, *Al-Adsani v UK*[74], where the applicant "contend[ed] that the prohibition of torture has acquired the status of a *jus cogens* norm in international law, taking precedence over treaty law and other rules of international law." [75]

However, both courts rejected the arguments brought forward on the basis of immunity. For the ICJ, the issue of State immunity is procedural in character and does not – and should not – concern itself with whether the conduct was lawful or not. The Court rejects entirely the existence of a conflict between the rules of State immunity and the rules of *jus cogens*, arguing that they "address different matters"[76]. The dissenting opinions in *Jurisdictional Immunities* reach different conclusions regarding this argument[77], but the decision remains the same.

For the ECtHR, the reasoning is slightly different, although it yields the same results. The Court bases its decision on the absence, in all the documents and judgements brought forward by the applicant, of a globally accepted rule that a violation of a *jus cogens* norm trumps State immunity. The Court notes "the growing recognition of the overriding importance of the prohibition of torture"[78] and has even recognised that prohibition of torture is a *jus cogens* norm[79]. However, it "does not accordingly find established that there is yet acceptance in international law of the proposition that States are not entitled to immunity"[80] in cases of alleged acts of torture. In a confusing paragraph, the court argues that the cases cited by Al-Adsani refer to "the criminal liability of an individual for alleged acts of torture"[81], whereas the present case is about "the immunity of a State in a civil court for damages"[82]. It is unclear if there is in

[72] JURISDICTIONAL IMMUNITIES OF THE STATE. *Germany v. Italy*: Greece intervening. Judgement [2012] ICJ Rep 99. para 108.
[73] JURISDICTIONAL IMMUNITIES OF THE STATE. *Germany v. Italy*: Greece intervening. Judgement [2012] ICJ Rep 99. para 92.
[74] *Al-Adsani v United Kingdom*, 2001. 34 EHRR 11.
[75] *Al-Adsani v United Kingdom*, 2001. 34 EHRR 11. para 57.
[76] Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening) (Judgement) [2012] ICJ Rep 99 para 93.
[77] JURISDICTIONAL IMMUNITIES OF THE STATE. *Germany v. Italy*: Greece intervening. Judgement [2012] ICJ Rep 99. para 212: "In effect, to uphold State immunity in cases of the utmost gravity amounts to a travesty or a miscarriage of justice, from the perspective not only of the victims (and their relatives), but also of the social milieu concerned as a whole. The upholding of State immunity, making abstraction of the gravity of the wrongs at issue, amounts to a denial of justice to all the victims (including their relatives as indirect — or even direct — victims). Furthermore, it unduly impedes the legal order to react in due proportion to the harm done by the atrocities perpetrated, in pursuance of State policies.".
[78] *Al-Adsani v United Kingdom*, 2001. 34 EHRR 11. para 60.
[79] *Al-Adsani v United Kingdom*, 2001. 34 EHRR 11. para 61: "While the Court accepts, on the basis of these authorities, that the prohibition of torture has achieved the status of a peremptory norm in international law…".
[80] *Al-Adsani v United Kingdom*, 2001. 34 EHRR 11. para 61.
[81] *Al-Adsani v United Kingdom*, 2001. 34 EHRR 11. para 61.
[82] *Al-Adsani v United Kingdom*, 2001. 34 EHRR 11. para 61.

fact a difference here at all. If the immunity of a State could not be upheld, as the Court seems to tentatively hint at, in cases of alleged acts of torture, why should it suddenly be able to protect the State in civil proceedings born of those same allegations? This criticism was echoed by the dissenting opinion of some of the judges of the case. Indeed, despite the decision in Al-Adsani being ultimately in favour of the State of Kuwait, the matter of the violation of Article 6 was ruled on with a very slim majority – eight against nine. The aforementioned weak argument of a distinction of the effect of *jus cogens* in a criminal or in a civil proceeding was heavily criticized in the joint dissenting opinion of Judges Rozakis and Caflisch, joined by Judges Wildhaber, Costa, Cabral Barreto and Vajić, who argued that:

> "It is not the nature of the proceedings which determines the effects that a *jus cogens* rule has upon another rule of international law, but the character of the rule as a peremptory norm and its interaction with a hierarchically lower rule […] The criminal or civil nature of the domestic proceedings is immaterial. The jurisdictional bar is lifted by the very interaction of the international rules involved, and the national judge cannot admit a plea of immunity raised by the defendant State as an element preventing him from entering into the merits of the case and from dealing with the claim of the applicant for the alleged damages inflicted upon him."[83]

In the judgement in *Mothers of Srebrenica* case, which chronologically came after the Jurisdictional Immunities case, the ECtHR simply relied on the ICJ's paragraphs on the matter, instead of using the Al-Adsani jurisprudence:

> International law does not support the position that a civil claim should override immunity from suit for the sole reason that it is based on an allegation of a particularly grave violation of a norm of international law, even a norm of *ius cogens*. In respect of the sovereign immunity of foreign States this has been clearly stated by the ICJ in Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening), judgment of 3 February 2012, §§ 81-97. In the Court's opinion this also holds true as regards the immunity enjoyed by the United Nations[84].

This led to a clearer decision but, as we saw above in the Italian Constitutional Court decision, it is certainly not without valid criticism. Indeed, the argument used certainly ought to be criticized. The courts do not pretend that the rule of State immunity is a *jus cogens* norm. In order then to maintain that immunity, even faced with an actual *jus cogens* norm such as the prohibition of torture, the courts have to resort to the bizarre argument that the rules apply to different 'matters', that they simply *cannot* be compared. No valid explanation is given for the reasoning, but it has remained unchanged since the ICJ's 2012 decision.

This apparent refusal to entertain the idea of a jus cogens norm 'defeating' a rule of immunity extends even beyond State and international organizations immunity. Issues regarding immunities and *jus cogens* were also addressed in the high-profile Pinochet case before the UK courts. For the sake of simplicity in a rather convoluted case, we will focus here on the final judgement issued by the House of Lords in 1999, known as *R v Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte (No.3)*[85]. In this judgement, the Lords had to deal with the case of dictator and ex-head of State of Chile Augusto Pinochet. Specifically, the question was whether or not former heads of State could be held responsible for acts, such as torture, committed when they were still in post. In other words, could Pinochet benefit from immunity as a former head of State, despite the norms violated, widely considered to have been peremptory norms of international law?

The case was considerably more complex than presented here, where only the parts of the judgement regarding *jus cogens* will be considered. The final decision was that Pinochet should indeed be held responsible for acts of torture, but only those committed after the 8th December 1988, the date when all parties had ratified the UN Convention on Torture. While Lord Browne-Wilkinson, giving the lead opinion, did not recognise that the presence of a *jus cogens* norm alone could defeat Pinochet's immunity, Lord Millett's concurring opinion differed on precisely this point:

> In my opinion, crimes prohibited by international law attract universal jurisdiction under customary international law if two criteria are satisfied. First, they must be contrary to a peremptory norm of international law so as to infringe a *jus cogens*. Secondly, they must be so serious and on such a

[83] *Al-Adsani v United Kingdom*, 2001. 34 EHRR 11. (Joint dissenting opinion of Judges Rozakis and Caflisch, joined by Judges Wildhaber, Costa, Cabral Barreto and Vajić) para 4.

[84] *Stichting Mothers of Srebrenica and Others v Netherlands*, 2013. 57 EHRR SE10. para 158.

[85] R v. Bow Street Metropolitan Stipendiary Magistrate And Others, Ex Parte Pinochet Ugarte (No. 3) [2000] 1 AC 147 (HL).

> scale that they can justly be regarded as an attack on the international legal order.[86]

Lord Millett's dissent on this point shows an understanding – and a possible future usage – of *jus cogens* as a real challenger of immunities. This reasoning was praised by Prof Bianchi, who insisted that

> the characterization of the prohibition of torture and other egregious violations of human rights as *jus cogens* norms should have the consequence of trumping a plea of state immunity by states and state officials in civil proceedings as well. As a matter of international law, there is no doubt that *jus cogens* norms, because of their higher status must prevail over other international rules, including jurisdictional immunities[87].

But despite this dissenting opinion and the overall weakness of the arguments in favour of immunity resisting against a norm of *jus cogens*, the current jurisprudence is still consistent, in line with the ICJ and the ECtHR. With the relative rarity of cases involving immunity and *jus cogens* norms, and the overall acceptance from States that immunity should stay – which is not a particularly surprising notion, as States have a vested interest in their own immunity as well as that of IOs they are a member of – the discourse on immunity and *jus cogens* in international law has not been allowed to evolve much further.

In the absence of similar judgements involving the UN or other international organisations, these cases are the best indicator as to how such a claim might eventually be decided. It seems difficult to draw a conclusion other than that international organisations would receive the same generous treatment in such a claim that States have.

However, this does not mean that, in a Manichean way, a *jus cogens* norm will always 'lose' against State and international organisation immunity. Through Lord Millett's assessment or through the doctrine, there is a hope that future cases might follow this reasoning and reach a different conclusion. It may yet become the prevailing opinion that if the norm violated is a peremptory norm of international law, the violator should not be able to benefit from immunity. Of course, this will only be helpful for claimants such as those in Haiti or Srebrenica if the right to access to justice is ever recognised as a *jus cogens* norm – another battle to win.

In conclusion, the right of access to justice as a *jus cogens* norm was brought forward as a solution to the denial of justice resulting from national and international court undiscriminatingly upholding State and international organisation immunities. However, the idea of the right of access to justice as a norm of *jus cogens* itself has not yet been consistently recognised, despite some national and regional decisions in this direction. Additionally, even if the right of access to justice were to be recognised as a *jus cogens* norm, it would probably not have the desired effect of immediately trumping immunities. Regional and international judgements by both the ECtHR and the ICJ have solidified the perception that it is not yet accepted that a violation of a *jus cogens* norm should trump State immunity. The lack of relevant decisions on international organisations' immunity complicate the matter, as this article set out to question whether or not a human rights-based challenge would work against the absolute immunity given to the UN, an international organisation.

5 Conclusion

After the various scandals the UN has had to face, and after recent decisions at every level of jurisdiction involving the right of access to justice, can it really be said that there has been much of a successful 'human rights-based challenge'?

Altogether, this snapshot of the current jurisprudence on the matter does not paint a hopeful picture. The right of access to justice is examined by courts but the result is almost always the same: a finding of no violation. The status of a norm as *jus cogens*, while gaining some popularity in the doctrine and in one regional court, is not globally accepted. Finally, in any case, the strength of a *jus cogens* norm itself against immunity is unclear. While there is some progress, the decisions made by the courts are still, in their large majority, in favour of immunity. Decisions by influential courts (the ICJ, but also the ECtHR) have so far brought the discourse to a halt, cementing – for now – the lack of credible challenge against immunity.

However, the jurisprudence is not the only place to look at if one wants to get a full picture of the human

[86] R v. Bow Street Metropolitan Stipendiary Magistrate And Others, Ex Parte Pinochet Ugarte (No. 3) [2000] 1 AC 147 (HL) at 275.
[87] BIANCHI, A. Immunity versus Human Rights: The Pinochet Case. *European Journal of International Law*, v. 10, n. 237. p. 265.

rights-based challenge. Though only really present in dissent and the doctrine, alongside a few national and regional cases, a pattern of resistance – not yet a trend – is nonetheless forming against the general acceptance of international organisations and State immunity; as a consequence, the discourse on immunity is not as static and definitive as the decisions taken in all of those cases might show.

Against the backdrop of the some of the most severe scandals the UN has had to face over the last few decades, combined with the push towards greater accountability of international organisations that we have seen recently, another case might just tip the balance in favour of human rights. While the jurisprudence is so far set in its way, it is not in a vacuum. The discourse around the right of access to justice, *jus cogens*, and more generally the idea of a human rights-based challenge against immunities is anything but a dead end.

References

Al-Adsani v United Kingdom, 2001. 34 EHRR 11.

AMERICAN CONVENTION ON HUMAN RIGHTS. *Pact of San José, Costa Rica*. Adopted on 22 November 1969, entered into force on 18 July 1978. 1144 UNTS 123.

ARMED ACTIVITIES ON THE TERRITORY OF THE CONGO. New Application: 2002. *Democratic Republic of the Congo v Rwanda*. Judgement [2006] ICJ Rep 6.

Ashingdane v United Kingdom, 1985. 7 EHRR 528.

Beer and Reagan v Germany, 1999. 33 EHRR 19.

BIANCHI, A. Immunity versus Human Rights: The Pinochet Case. *European Journal of International Law*, v. 10, n. 237.

BLOKKER, N. International Organisations: the Untouchables?. *International Organisations Law Review*, n. 259.

Boimah v. United Nations. 664 F Supp 69. E.D.N.Y. 1987.

BOON, K. E. Immunities of the United Nations and Specialised Agencies. *In:* RUYS, T.; ANGELET, N.; FERRO, L. (ed.). *The Cambridge Handbook of Immunities and International Law*. Cambridge University Press, 2019.

BROCKMAN-HAWE, B. E. Questioning the UN's immunity in the Dutch Courts: Unresolved Issues in the Mothers of Srebrenica Litigation. *Washington University Global Studies Law Review*, v. 10, n. 727.

Canada Tissa Amaratunga v. Northwest Atlantic Fisheries Oragnization, 2013. 3 SCR 866.

CARDOSO, A. F. R.; SQUEFF, T.; ALMEIDA, R. M. Jus cogens: an european concept? An emancipatory conceptual review from the inter-american system of human rights. *Brazilian Journal of International Law*, v. 15, n. 124.

CARROLL, R. Protesters in Haiti attack UN peacekeepers in cholera backlash. *The Guardian*, London, 16 nov. 2010. Disponível em: https://www.theguardian.com/world/2010/nov/16/protestors-haiti-un-peacekeepers-cholera. Acesso em: 28 set. 2020.

CHARTER OF THE UNITED NATIONS. Signed on 26 June 1945, entered into force on 24 October 1945. 1 UNTS XVI (UN Charter).

CONFORTI, B. La Cour constitutionnelle italienne et les droits de l'homme méconnus sur le plan international. *Revue générale de droit international public*, v. 119, n. 353.

CONVENTION FOR THE PROTECTION OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS. (ECHR, as amended).

CONVENTION ON THE PRIVILEGES AND IMMUNITIES OF THE UNITED NATIONS. Adopted on 13 February 1946, entered into force 17 September 1946. 1 UNTS 15 (General Convention).

Delama Georges v. United Nations. 834 F 3d 88. 2nd Cir. 2016.

Golder v United Kingdom, 1975. 1 EHRR 524.

ILC. *Fourth Report on peremptory norms of general international law (jus cogens)*. By Dire Tladi, Special Rapporteur. UN Doc A/CN.4/727.

INTER-AMERICAN COURT OF HUMAN RIGHTS. *Case of Goiburú et al v. Paraguay*, Merits, Reparations and Costs, Inter-American Court of Human Rights Series C No 153. 22 sep. 2006.

INTER-AMERICAN COURT OF HUMAN RIGHTS. *Case of La Cantuta v. Peru*, Merits, Reperations and Costs, Inter-American Court of Human Rights Series C No 162. 29 nov. 2006.

INTERNATIONAL COVENANT FOR CIVIL AND POLITICAL RIGHTS. Adopted on 16 December

1966, entered into force on 23 March 1976. 999 UNTS 171.

INTERNATIONAL LAW ASSOCIATION. *Berlin Conference,* 2004. Accountability of International Organizations: Final Report. 2004.

Italy Corte Cost, 22 oct. 2014, 238.

JURISDICTIONAL IMMUNITIES OF THE STATE. *Germany v. Italy*: Greece intervening. Judgement [2012] ICJ Rep 99.

Mendaro v. World Bank. 717 F 2d 610. D.C. Cir. 1983.

PAPA, M. I. The Mothers of Srebrenica case before the European Court of Human Rights: United Nations Immunity versus Rights of Access to a Court. *Journal of International Criminal Justice*, v. 14, n. 893.

QUESTIONS RELATING TO THE OBLIGATION TO PROSECUTE OR EXTRADITE. *Belgium v. Senegal*. Judgement [2012] ICJ Rep 422 para 99.

RESERVATIONS TO THE CONVENTION ON THE PREVENTION AND PUNISHMENT OF THE CRIME OF GENOCIDE. Advisory Opinion [1951] ICJ Rep 15.

RIGHTS, E. U. A. F. *Access to justice in Europe*: an overview of challenges and opportunities. 2011.

RONZITTI, N. La Cour constitutionnelle italienne et l'immunité juridique des États. *Annuaire français du droit international*, v. 60, n. 3.

Stichting Mothers of Srebrenica and Others v Netherlands, 2013. 57 EHRR SE10.

SWITZERLAND. *ATF 133 II 450*.

SWITZERLAND. *TF 2A 783/2006* du 23 Janvier 2008.

SWITZERLAND. *TF 2A 784/2006* du 23 Janvier 2008.

SWITZERLAND. *TF 2A 785/2006* du 23 Janvier 2008.

TIGROUDJA, H. La Cour interaméricaine des droits de l'homme au service de "l'humanisation du droit international public". Propos autour des récents arrêts et avis. *Annuaire français de droit international*, v. 52, n. 617.

UNGA. *Report of the Special Rapporteur on extreme poverty and human rights*. 26 aug. 2016. UN doc A/71/367.

United Kingdom R v. Bow Street Metropolitan Stipendiary Magistrate And Others. Ex Parte Pinochet Ugarte (No. 3) [2000] 1 AC 147 (HL).

United States of America Brzak v. United Nations. 597 F 3d 107. 2nd Cir. 2010.

UNSC. *Res 1542*. 30 apr. 2004. UN Doc S/Res/1542.

VIENNA CONVENTION ON THE LAW OF TREATIES. Adopted on 22 May 1969, entered into force on 27 January 1980. 1155 UNTS 331.

Waite and Kennedy v Germany, 1999. 30 EHRR 261.

WERZER, J. The UN Human Rights Obligations and Immunity: an Oxymoron Casting a Shadow on the Transitional Administrations in Kosovo and East Timor. *Nordic Journal of International Law*, v. 77, n. 105.