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Doctoral thesis entitled:

STATE IMMUNITY AND HUMAN RIGHTS VIOLATIONS

Summary

I. Introduction

The subject-matter of the dissertation is state immunity in the context of human rights violations. State immunity occupies a special place in international law, constituting the outcome of the interaction between international and domestic factors. In general, it is claimed that originally the immunity guaranteed the state an absolute protection from foreign jurisdiction. However, a unique character of state immunity as a rule of customary international law applied at national level by domestic organs contributed to its constant evolution. Initially, state immunity had evolved within the case-law of national courts. The shift in its perception resulted from a longstanding state practice gaining gradual acceptance among them. States were not eager, though, to assume treaty obligations regarding state immunity and even if they did it, it was caused by practical reasons related to maritime shipping. The intensification of activities having an impact on the scope of state immunity began in the 1970s. At that time a convention on state immunity was adopted and, in addition, some states codified the issue of state immunity within their national legal systems. Finally, increasing complexity of cases triggered the development of national jurisprudence.

Nowadays, though foreign states’ entitlement to immunity in the proceedings before national courts is not contested, the problem of the scope of state immunity arises, mainly in the context of human rights violations. State immunity influences the availability of an individual’s procedural remedy, eliminating the possibility of seeking redress against a foreign state before national courts. It results in restriction on the right of access to court. If effective alternative means are not available, state immunity additionally equals to lack of redress. With dynamic development of human rights after the Second World War and of the mechanisms of their enforcement, a question therefore arises whether the application of state immunity is justified in a situation of serious human rights violations. The answer to this
question is not obvious, among others due to the lack of clear treaty provisions regulating the issue. It means that customary international law remains the main source of state immunity and that the burden of the establishment of its current scope rests with national courts. They faced a difficult task of balancing the interests of states with the interests of individuals, gaining importance in the international legal system. The question about the admissibility of the denial of state immunity in cases of human rights violations has occurred in several states’ practice, arousing controversies and provoking discussions in many legal professions. It is a complicated process of choosing between state immunity and the individual’s rights. One of the undisputed difficulties in the assessment of state’s entitlement to immunity in the context of human rights violations is the compatibility of the new concepts with current theoretical assumptions regarding state immunity. The assessment conducted in the case-law of the European Court of Human Rights (hereinafter: ECHR) and of the International Court of Justice (hereinafter: ICJ) in the case of *jurisdictional immunities of the state* has been for various reasons subjected to criticism by a significant part of the representatives of international law doctrine. Furthermore, the application of state immunity compatible with the interpretation of the ICJ’s judgment has encountered an obstacle at national level. Therefore, the question whether a state should enjoy immunity in case of human rights violations cannot be regarded as a dilemma of a purely doctrinal nature.

II. The aims of the thesis

The thesis aims at proving that state immunity, as a rule of customary international law, has been evolving in pursuance of human rights protection in proceedings before national courts. Accepted in international and to some extent in national case-law practice of reducing its role in international law to a procedural bar (procedural plea) has a significant influence on this process. It contributes to the conclusion that the lifting of state immunity in cases regarding serious human rights violations is inadmissible. However, the application of state immunity in the situation of serious human rights violations lacks a convincing reasoning, especially if alternative means of redress are not available.

In order to prove the aforesaid arguments it is necessary to examine current legal status related to state immunity. As a consequence, it is essential to analyse the scope of state immunity prescribed by treaty norms contained in universal and regional agreements. Furthermore, research material encompasses non-binding documents prepared on governmental and non-governmental fora, national legal acts, relevant domestic judicial practice and international case-law. Simultaneously, state immunity characteristics in national
and international jurisprudence, as well as its connection with the outcome of the proceedings is examined. An in-depth analysis of the methods of legal reasoning is conducted with a view to establishing the courts’ position towards the situation of individuals, particularly in the situation of lack of other means of redress. Moreover, it is important to identify certain contentious issues having an impact on the assessment of the admissibility of the denial of state immunity in cases of serious human rights violations. Finally, the demonstration of state immunity evolution in pursuance of human rights protection requires the examination of legal perspectives of state immunity development.

III. Structure

The thesis consists of eight chapters divided into three parts. The first part of the thesis, the first chapter in particular, comprises introductory issues such as the notion of state immunity, non-justiciability and the act of state doctrine, characteristics of selected immunities having their source in international law and the rationale for state immunity in international law. The second chapter is dedicated to the evolution of state immunity in international law from the perspective of selected states’ practice.

The second part of the dissertation deals with state immunity from international and national perspective, constituting presentation of legal situation regarding this issue. The third chapter is devoted to a detailed analysis of treaty norms, in particular to the European Convention on State Immunity of 1972 (hereinafter: Basel Convention of 1972) and to the United Nations Convention on Jurisdictional Immunities of States and Their Property of 2004 (hereinafter: UN Convention of 2004). In addition, various documents prepared within international governmental organisations and on non-governmental fora are presented. The fourth chapter contains an overview of national legal acts regarding state immunity, encompassing states belonging to diverse legal systems. It is focused on similarities and differences between domestic legislative solutions. In the fifth chapter selected national case-law dealing with admissibility of the lifting of state immunity in case of serious human rights violations, such as deportation, forced labour, torture and extrajudicial killings, is examined. The sixth chapter concentrates on international case-law related to state immunity. Firstly, it presents the ICJ’s judgment in the leading case of jurisdictional immunities of the state. Subsequently, an analysis of the case-law of the ECHR is conducted in the context of the alleged violations of the Convention for the Protection of Human Rights and Fundamental Freedoms, mainly the right of access to court.
The third part of the thesis draws attention to the main dilemmas regarding state immunity. In the seventh chapter the issues constituting the core of the dispute about state immunity in the context of serious human rights violations are identified. Reflections refer to controversies about constitutive elements of state immunity and admissibility criteria of the denial of state immunity. The eighth chapter, closing the third part, deals with perspectives on the development of state immunity in international law. It presents the factors at international and national level indicating at possible changes.

**IV. Conclusions**

The analysis carried out in the thesis allowed for reaching the following conclusions.

State immunity in customary international law, which is its main source, is shaped primarily through domestic case-law and national legislation of the states of the so-called “Western civilisation”: the United States of America, Canada, European countries, Australia and New Zealand. Within that domestic practice some states have departed from traditional assumptions of restricted immunity theory, based on distinction of public and private acts of the state. It refers to a narrow scope of claims arising from injury to the person or damage to tangible property caused by a foreign state on the territory of the *forum* state, as well as from terrorist activity. Within that legal framework certain attempts have been made to seek redress against foreign states for serious human rights violations. In addition, since the 1980s efforts have been made before domestic courts to deny state immunity through application of national legal provisions, as well as through various theories and concepts. Their most frequent common elements are interpretation of state immunity in relation to other norms of international law and reference to the position of an individual in the international legal system. It means a departure from the perspective of bilateral relations between states, expressed in the principle of equality of states, which is identified with a Latin legal maxim *par in parem non habet imperium*.

The above attitude met with disapproval in the case-law of the ICJ and of the ECHR. It seems though, that the ICJ did not reason its decision convincingly, which undoubtedly weakens the judgment’s impact. A similar approach towards state immunity in cases of serious human rights violations was taken in the European system of human rights protection of the Council of Europe. However, as in the case of the ICJ’s judgment, the legal reasoning adopted by the ECHR might be subjected to criticism in some respects.

A common element, occurring frequently in national and international case-law, is a description of state immunity as a procedural bar or a procedural plea. Reducing the role
of state immunity in international law to a mechanism which – from the perspective of national proceedings – precludes judgment on the merits is a handy tool facilitating legal reasoning behind the decision to grant state immunity. It is often accompanied by an argument that state immunity only diverts any breach to a different method of settlement. In times of the development of human rights and of their enforcement mechanisms such an approach is not convincing. It is particularly evident in the situation of the lack of effective, alternative methods of seeking redress. In this case, state immunity deprives an individual not only of a remedy, but also of a reparation.

The process of determination of the scope of state immunity in the context of serious human rights violations has not been completed with the delivery of the ICJ’s judgment. Possible changes are reflected in the European states’ interpretative declarations to the UN Convention of 2004. The most recent judicial practice in Italy, as well as national legislation denying immunity of state sponsors of terrorism, constitute other important indications of possible future development.

Changes in state practice should be accompanied by the evolution of procedures to allow groups of victims to seek redress, particularly in case of massive human rights violations. Furthermore, it is important to prepare or improve mechanisms making it possible to distinguish between cases having a connection with the state of the forum and cases for which a different forum is appropriate. Undoubtedly, the problem relates to the situation when a case has no connection with other forum than domestic courts of the state against which a redress is sought. Similar difficulty occurs if the connection with other forum arises after the event giving rise to the claim had taken place and, in addition, presenting claims before domestic courts of the state, which allegedly had violated an individual’s rights, cannot be regarded as an effective remedy. The answer to the dilemmas might be a reference to subsidiarity, though the above issues concern not state immunity question, but jurisdiction. Moreover, a reparation should be considered from a broader perspective, as one of the components of justice for the victims of serious human rights violations, occurring next to putting the perpetrators of these violations on trial. Such comprehensive mechanisms have already been created within the proceedings before the International Criminal Court.

Poland’s contribution to the state immunity development in international law is very limited. It is neither a state party to the Basel Convention of 1972 nor a state party to the UN Convention of 2004. Furthermore, no domestic legal act regulating the issue of state immunity has been adopted so far in Poland. Coupled with lack of civil procedure provisions relating directly to state immunity, it constitutes a serious difficulty in Polish judicial practice.
Poland’s accession to the UN Convention of 2004 and/or the adoption of relevant domestic act would certainly facilitate domestic courts in dealing with problems of state immunity. In addition, it would increase legal consciousness of state immunity separate status from diplomatic and consular immunities.

In other words, certain symptoms indicate at initial phase of creation of customary international law state immunity rule permitting to lift state immunity in case of serious human rights violations. The process includes changes of practice and of *opinio juris* in states of the so-called “Western civilisation”. Experience to date has shown that rejection of human rights priority due to state immunity, without convincing legal reasoning of this decision, results in uncoordinated activities undertaken within national practice. Moreover, it enhances the sense of injustice, which in a situation of lack of other means of redress is perceived as “double injustice”.