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Human rights and the "commercial activity exception" to diplomatic immunity in employment claims: the Judgment of the UK Supreme Court in *Reyes v Al-Malki*•

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ABSTRACT: The link between human trafficking and diplomatic immunity, enjoyed by diplomatic agents under the Vienna Convention on Diplomatic Relations, has been analyzed in-depth by the Judgment of the UK Supreme Court in Reyes v Al-Malki, which will most likely have a remarkable impact on the evolving law of diplomatic immunity in respect of serious human rights violations suffered by domestic workers in diplomatic households. To this effect, the hope is that the decision could contribute to disclose a new course in the definition of the rule of diplomatic immunity, through the interpretation of its exceptions. In particular, though Lord Sumption pursued a strict approach in the interpretation of the "commercial activity exception" under Article 31(1)(c) of the Vienna Convention, three other Judges showed their perplexity about such approach which excludes that the employment of a domestic servant by a diplomatic agent in assumed conditions of modern slavery amounts to a professional or commercial activity exercised by him; furthermore, in so far as the construction of Article 39(2) of the Convention is concerned, the interpretation offered by the Court brings the abuse alleged by a domestic worker out of the domain of the "residual" immunity for official acts enjoyed by diplomats who are no longer in post. This article, adopting a view of "balancing" between public and private interests, proposes a series of arguments in order to offer an interpretation of the "commercial activity exception" as encompassing grave human rights violations suffered by workers employed by diplomats. It also considers some critical issues related to the counterposition of substantive jus cogens rules to procedural immunity rules which has been used in the judicial practice to grant immunity in respect of serious violations of fundamental human rights in breach of jus cogens.

SUMMARY: 1. The circumstances of the case and the legal framework – 2. The construction of Article 39(2) and Article 31(1)(c) of the Vienna Convention on Diplomatic Relations – 3. Serious violations of human rights and reflections for a different interpretation of the "commercial activity exception" of Article 31 (1)(c) of the 1961 Convention – 4. The counterposition of substantive jus cogens rules to procedural immunity rules. Critical issues – 5. Conclusions. A balanced view.

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1. *The circumstances of the case and the legal framework*

The relationship between human rights and diplomatic immunity is hard to be defined in its contours. Nevertheless, the hidden conflict which ensues therefrom has been highlighted in recent cases concerning employment claims brought by ill-treated workers in diplomatic households, thus stressing the need to take into account the effects and legal consequences of such conflict.

Within this context, the link between human trafficking and diplomatic immunity has been analyzed in-depth by the recent Judgment *Reyes v Al-Malki* delivered by the Supreme Court in the UK[1].

The circumstances regarding this particular case can be summed up as follows. Ms Reyes, a Philippine national, was employed by Mr and Mrs Al-Malki as a domestic servant in their residence in London for two months, with duties ranging from cleaning to helping in the kitchen and to looking after the children. Mr Al-Malki was a member of the diplomatic staff of the Saudi Arabia embassy in London.

The proceedings brought by Ms Reyes against Mr and Mrs Al-Malki have been conducted on the assumption that the allegations of the claimant were true. According to these allegations, the Al-Malkis had ill-treated their employee, as they required her to work excessive hours and did not give her proper accommodation; moreover, they prevented her from leaving the house or communicating with others and paid her nothing until Ms Reyes eventually escaped. Given the facts alleged by the claimant, the Supreme Court assumed that the employment of Ms Reyes could have amounted to «trafficking in persons» within the meaning of Article 3(a) of the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (Palermo, 2000), supplementing the United Nations Convention against Transnational Organized Crime[2]; however, the Judges stressed that this point was much in dispute.

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[1] For a comment, see P. WEBB, *The Limits of Diplomatic Immunity in the Age of Human Trafficking: The Supreme Court in Reyes v Al-Malki*, available on the website: *www.ejiltalk.org.* See also, for a general discussion examining diplomatic immunity and human trafficking of domestic workers, ID., *The Immunity of States, Diplomats and International Organizations in Employment Disputes: The New Human Rights Dilemma*?, in *European Journal of International Law*, vol. 27, No. 3, 2016, p. 745 ff.; M. E. VANDENBERG and A. F. LEVY, *Human Trafficking and Diplomatic Immunity: Impunity No More?*, in *Intercultural Human Rights Law Review*, vol. 7, 2012, p. 77 ff.; M. E. VANDENBERG and S. BESSELL, *Diplomatic Immunity and the Abuse of Domestic Workers: Criminal and Civil Remedies in the United States*, in *Duke Journal of* C*omparative* & I*nternational* L*aw*, vol. 26, 2016, p. 595 ff.

[2] Article 3(a) of the *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime*, defines «Trafficking in persons» as «the recruitment, transportation, transfer, harboring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the

In so far as the legal framework is concerned, beside the aforementioned Protocol, the relevant materials are offered by the Vienna Convention on Diplomatic Relations, concluded at Vienna on 18 April 1961 ("The Vienna Convention"), which codifies the rules for exchange of embassies among States[3], conferring privileges and immunities both on the diplomat and on the sending State relative to its mission.

Article 31 of the Vienna Convention, specifically, confers immunity on a diplomatic agent while he is in post, concerning both private and official acts, while his family is entitled to a derivative immunity under Article 37(1). Article 39(2) of the Vienna Convention, under which diplomats who are no longer in post retain limited immunity *rationae materiae* for official acts[4], provides: «when the functions of a person enjoying privileges and immunities have come to an end, such privileges and immunities shall normally cease at the moment when he leaves the country, or on expiry of a reasonable period in which to do so, but shall subsist until that time, even in case of armed conflict. However, with respect to acts performed by such a person in the exercise of his functions as a member of the mission, immunity shall continue to subsist».

2. *The construction of Article 39(2) and Article 31(1)(c) of the Vienna Convention on Diplomatic Relations*

As Mr Al-Malki terminated his office in London and left the United Kingdom, Lord Sumption (with whom Lord Neuberger agreed) relied on the latter provision; thus, defining a diplomatic agent's official functions as «those which he performs for or on behalf of the sending state», the Judge argued that «The employment and maltreatment of Ms Reyes were not acts performed by Mr Al-Malki in the exercise of his diplomatic functions» (para. 4) and «Mr Al-Malki's official functions cannot have extended to the employment of domestic staff to do the cleaning, help in the kitchen and look after his children» (para. 48)[5].

Consequently, the Court held that Mr and Mrs Al-Malki were not entitled to the "residual" immunity under Article 39(2) neither to any immunity at all.

The interpretation of Article 39(2), in my view, is of great value as it brings the abuse alleged by a domestic worker outside the diplomat's official functions and, therefore, out of the domain of the residual immunity. This jurisprudential construction, which is consistent with the practice of the US and UK courts in interpreting Article 39(2)[6], was set out in the *Swarna v. Al-Awadi*[7]case, whose

prostitution of others or other forms of sexual exploitation, forced labor or services, slavery or practices similar to slavery, servitude or the removal of organs».

[3] See generally, for a full analysis of the Vienna Convention on Diplomatic Relations, E. DENZA, *Diplomatic Law, Commentary on the Vienna Convention on Diplomatic Relations*, 3rd edn, Oxford: Oxford University Press, 2008.

[4] See H. FOX and P. WEBB, *The Law of State Immunity*, 3rd edn, Oxford, 2013, p. 583 ff., esp. p. 586.

[5] Cf. Article 3 of the Vienna Convention on Diplomatic Relations which defines the functions of a diplomatic mission.

[6] See M. E. VANDENBERG and A. F. LEVY, op. cit. (supra, fn. 1), esp. p. 88 ff.; cf. also P. WEBB, The Limits, cit.; The Immunity of States, cit., esp. p. 754 ff. (supra fn. 1).

[7] *Swarna v. Al-Awadi*, 622 F.3d 123 (2010).

factual background is almost similar to that of *Reyes*, concerning allegations of a domestic worker employed by a Kuwaiti diplomat and his wife, as a nanny and housekeeper, held in slavery-like conditions. Indeed, the Judgment delivered in *Swarna* has been regarded as to have «heralded a new era of diplomatic accountability», requiring the employees to be patient, waiting for the end of the diplomatic office until re-filing their suit[8].

Nowadays, however, in the matter of diplomatic immunity facing serious violations of human rights, there could be space for fostering a further evolution, in the light of the ultimate goal of the realization of justice for the victims.

In this regard, attention is to be turned to the interpretation of the words «commercial activity exercised by the diplomatic agent in the receiving State outside his official functions» as embodied in Article 31(1)(c) of the 1961 Convention, which contains one of the three exceptions to the rule of immunity conferred upon a diplomat in post[9].

Indeed, the present Judgment clearly demonstrates the relevance of the point at issue: though Mr Al-Malki was no longer in post and, therefore, the proper construction of Article 31(1)(c) did not arise on the conclusions reached by the Supreme Court[10], nevertheless, Judges dwelt much upon it[11], then pursuing a strict approach in the interpretation of the "commercial activity" under Article 31(1)(c). Lord Sumption, in fact, held that a judicial action against a foreign diplomat in the UK by his former domestic servant brought to the UK to work in his home in assumed conditions of modern slavery, does not amount to any "commercial activity" within the meaning of the aforesaid Article 31(1)(c). To this effect, it has been considered not relevant the fact that the employment and treatment of Ms Reyes may have come about as a result of human trafficking[12]; hence, in the view of the Lords, if Mr Al-Malki's activity had been within the scope of the diplomatic agent's official functions, Mr and Mrs Al-Malki would have been immune.

As the Judges reported, the proposed strict interpretation of Article 31 (1)(c) is present in the case-law of federal courts of the United States. The leading case is *Tabion v Mufti*[13] in which the Judges read as a whole the words contained in Article 31 (1)(c), pointing out that day to day living services such as domestic help or cleaning are not to be treated as "commercial" and are not outside a diplomat's official functions[14].

[8] See M. E. VANDENBERG and A. F. LEVY**,** op. cit. (supra, fn. 1), p. 91.

[9] See generally, E. DENZA, op. cit. (supra, fn. 3), p. 301 ff.

[10] Cf. para. 51 and para. 69 of the present Judgment.

[11] The Supreme Court, focusing on the point in the text, dealt with the issues that were argued in the Court of Appeal, which, in fact, held that the Employment Tribunal had no jurisdiction as Mr Al-Malki was entitled to diplomatic immunity under Article 31 of the Vienna Convention on Diplomatic Relations and Mrs Al-Malki was entitled to a derivative immunity under Article 37(1) as a member of his family.

[12] Lord Sumption (para. 45 of the present Judgment) added that «In such a case, the employer may incur criminal or civil liability along with the other participants who brought the victim to his door. But his liability would be for the trafficking».

[13] *Tabion v. Mufti*, 73 F.3d 535 (4th Cir. 1996).

[14] Cf. E. DENZA, op. cit. (supra, fn. 3), p. 307.

3. *Serious violations of human rights and reflections for a different interpretation of the "commercial activity exception" of Article 31 (1)(c) of the 1961 Convention*

What is remarkable is that, as indicated above, the Supreme Court in *Reyes* case did not accept this last point, thus paving the way to the application of Article 39(2); in addition, three other Judges, namely Lord Wilson, Lady Hale and Lord Clarke showed their perplexity about the given interpretation of Article 31 (1)(c).

Thus, as a change occurred in the jurisprudential construction of Article 39(2), consequently a reasonable and balanced interpretation of the "commercial activity" under Article 31 (1)(c) of the Vienna Convention actually could encompass grave human rights violations suffered by workers employed by diplomats[15].

In support of the proposed construction, a series of arguments may be put forward.

An appropriate starting-point could begin with the interaction that exists between diplomatic immunity and State immunity, by virtue of which the evolution from absolute immunity to relative immunity occurred for the latter, could exert some influence on the former.

In fact, there certainly can be no doubt about the differences between State immunity and diplomatic immunity, regarding the sources, the juridical basis or the scope and exceptions[16]. Indeed such differences serve to clarify why diplomatic immunity does operate (not only in employment claims) as a stronger bar to jurisdiction than State immunity[17].

Likewise, however, as stressed in the literature, «the relationship between diplomatic and State immunity is an intricate one (…)», showing, besides the differences, some similarities, which are also listed by Lord Sumption in the present Judgment (para. 27). In this regard, it has been explained that immunity granted to a diplomatic agent for acts performed in the exercise of his functions is the immunity of the sending State, rather than a personal immunity[18].

Some Authors came then to refuse the traditional view according to which principles of State immunity do not apply when a diplomat *personally* enters into a contract of employment and, therefore, the defendant is not a foreign State; hence they proposed that at least in civil claims, State and diplomatic immunity should be merged, in order to avoid what appears as an illogical discrimination between employees virtually engaged for the same job as a domestic servant[19]. In a similar line of concern, the existence of the three exceptions to immunity under Article 31 of the

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[15] Cf. P. WEBB, *The Immunity of States*, cit., (supra fn. 1), p. 757, who, adopting «an approach grounded in interpretation rather than in reconstruction of the existing legal order proposing», proposes «to frame human rights violations as employment/commercial claims in order to fit within existing exceptions to immunity».

[16] See H. FOX and P. WEBB, op. cit. (supra, fn. 4), p. 582 ff. Cf. also *Reyes v. Al-Malki*, [2015] EWCA Civ 32, para. 74.

[17] Cf. E. DENZA, op. cit. (supra, fn. 3), pp. 8, 441, 443, who, given the more restricted rules of State immunity in comparison with diplomatic immunity, considers the importance to sue the individual diplomat and in the same proceedings also the sending State, particularly where there may be some doubt as to the accountability.

[18] H. FOX and P. WEBB, op. cit. (supra, fn. 4), esp. p. 582 and p. 589.

[19] For this report, see R. GARNETT, *State Immunity in Employment Matters*, in *International and Comparative Law Quarterly*, 1997, p. 103 ff., esp. p. 104

Vienna Convention has been exploited for attempts to extend the application of the restrictive doctrine of State immunity thus introducing wider exceptions to diplomatic immunity[20].

As a matter of fact, the relevant jurisprudential developments, confirmed by the present case, show the advocates for domestic workers who attempt (in vain) to overcome the obstacle of immunity by contending that the employment of domestic workers by diplomats fall within the "commercial activity exception" under Article 31(1)(c). For this purpose, indeed, Mr Otty, who appeared for Ms Reyes, relied on the functional analogies between State and diplomatic immunity to argue that any act done by a diplomat in a private capacity has to be regarded as "commercial". However, Lord Sumption refused this argument, on the main assumption of the different treatment of acts of a private law under the two categories of immunity. In his own words, «immunity of a diplomat in post, unlike that of a state, unquestionably extends to some transactions which are outside his official functions, and therefore almost inevitably of a private law character» (para. 30).

In respect of this point addressed by the Court, however, it seems that specific aspects of the matter at issue cannot be disregarded, especially in the light of the interpretation of Article 31 (1)(c) proposed in this article. To this effect, in the event of human trafficking covered by diplomatic status, trafficking may well be regarded as a commercial activity to which an employer takes part in by employing and exploiting the victim. Attention should be drawn, then, to «another rational view», pursued by Lord Wilson (with whom Lady Hale and Lord Clarke agreed), which induces one to consider the trafficking, rather than the employment, as the relevant commercial "activity" (para. 62); according to this construction, the "personal profit", as objective of a commercial activity in breach of a diplomatic agent's duties under Article 42 of the Vienna Convention[21], may be found in the circumstance that a diplomat pays his domestic servant not properly or nothing at all[22].

In this regard, the matter draws parallels with the technique of interpretation as envisaged by the Vienna Convention on the Law of Treaties, concluded at Vienna on 23 May 1969. The reference involves in particular Article 31(3)(c), which requires for the purpose of the interpretation of a treaty, to take into account «any relevant rules of international law applicable in the relations between the parties».

[20] H. FOX and P. WEBB (op. cit., supra, fn. 4, p. 586) make reference to the point in the text.

[21] Article 42 of the Vienna Convention on Diplomatic Relations provides: «A diplomatic agent shall not in the receiving State practise for personal profit any professional or commercial activity».

[22] Cf. Lord Wilson, para. 46 of the present Judgment: «the employer of the migrant is an integral part of the chain, who knowingly effects the "receipt" of the migrant and supplies the specified purpose, namely that of exploiting her, which drives the entire exercise from her recruitment onwards; (…) and that, in addition to the physical and emotional cruelty inherent in it, the employer's conduct contains a substantial commercial element of obtaining domestic assistance without paying for it properly or at all». Instead, with reference to the argument set out in the text, Lord Sumption (para 45) observed that «Doubtless, without customers professional traffickers would have no business, but that does not make the customers into practitioners of a commercial activity»; likewise, «the employment of a domestic servant to provide purely personal services cannot rationally be characterized as the exercise of a commercial activity if she is paid less than the going rate or the national minimum wage, but not if she is paid more».

As far as this point is concerned, the difficulty opposed by Lord Sumpsion was that the concept of «professional or commercial activity» would be illegitimately modified, by overcoming the limits provided by Article 31(3)(c) of the Convention on the Law of Treaties; indeed, in the view of the Judge, the concept at issue, far from being «ambulatory», represents instead «a fixed criterion for categorizing the facts, whose meaning and effect was extensively discussed during the drafting and negotiation of the text» (para. 43).

However, as pointed out by Lord Wilson, even if Article 31 of the 1961 Convention, does not by its terms foreshadow future developments of its meaning; this does not exclude an evolution of the same meaning according to the development of international law in the fight against human trafficking (para. 67)[23].

To this effect, it may be noted that after its codification, the 1961 Convention was the object of critical reflections on the grounds that in case of conflict with human rights and access to justice, immunity for diplomats would turn into abuse, so that it could no longer be justified and must be set aside[24]. In addition, keeping in mind the abovementioned similarities between State and diplomatic immunity, the movement of international law from absolute State immunity towards restrictive State immunity - which could prove to be useful in a human rights context – would prevent immunity being considered as an example of fossilization of the law[25].

Furthermore, the approach to refer the more restrictive lines of the doctrine of State immunity to diplomatic immunity is supported by the case law of both the UK Supreme Court and the European Court of Human Rights, in respect of employment disputes concerning staff of diplomatic missions.

As for the case law of the UK Supreme Court, it is well worth bearing in mind the Judgment by the Supreme Court in the *Benkharbouche v Secretary of State for Foreign & Commonwealth Affairs* case[26] delivered on the 18th October last, as in *Reyes*. Here, it suffices to say that, in its decision, the Court held that Sections 4(2)(b) and 16(1)(a) of the UK State Immunity Act 1978 are incompatible with Article 6 and Article 47 of the European Convention on Human Rights and that they therefore should be disapplied[27]. In particular, the Court found these provisions not consistent with the

[23] Lord Wilson, para. 60 of the present Judgment, expressly referred to the *Council of Europe Convention on Action against Trafficking in Human Beings*, adopted in Warsaw on 16 May 2005, whose purpose, as explained in its preamble, is to improve the protections afforded by the Palermo Protocol 2000. Cf. also P. WEBB, *The Limits of Diplomatic Immunity*, cit. (supra, fn. 1), referring to the UK Modern Slavery Act and leadership that brought together thirty-seven states in 'A Call to Action to end forced labour, modern slavery and human trafficking'.

[24] See E. DENZA, op. cit. (supra, fn. 3), esp. p. 7, 8.

[25] See *Jurisdictional Immunities of the State (Germany v. Italy: Greece Intervening)*, Judgment of 3 February 2012, *ICJ Reports* (2012), Dissenting Opinion of Judge Yusuf (para 35): «Immunity is not an immutable value in international law. Its adjustability to the evolution of the international society, and its flexibility, are evidenced by the number of exceptions built gradually into it over the past century, most of which reflect the growing normative weight attached to the protection of the rights of the individual against the State, be that as a private party to commercial transactions with the State or as a victim of tortious acts by State officials».

[26] *Benkharbouche v Secretary of State for Foreign* & *Commonwealth Affairs; Libya* **v** *Janah* [2017] *UKSC* 62.

[27] Sections 4(2)(b) renders a foreign State immune from the jurisdiction of a UK court in employment claims brought by individuals who are neither a UK national nor UK resident at the time of the contract; section 16(1)(a) extends State immunity to the claims of any employee of a foreign state's diplomatic mission, irrespective of the character of the employment or the nature of the acts of the State.

historical and accepted development of the restrictive doctrine of immunity, as they do not distinguish between acts of a private nature and acts of a sovereign nature. By contrast, the Court observed that, according to customary international law, a foreign State sued in employment claims is immune in respect of sovereign acts, whose categorization – in the great majority of cases - depends on the nature of the employer-employee relationship and then on the functions which the employee is employed to perform; to this effect, the Judges found it difficult «to conceive of cases where the employment of purely domestic staff of a diplomatic mission could be anything other than an act jure gestionis», adding then that «the employment of such staff is not inherently governmental. It is an act of a private law character (…)» (para. 55) [28].

As for the recent case law from the European Court of Human Rights (ECtHR), a similar approach is supported in claims concerning employees of diplomatic missions, such as in *Cudak v. Lithuania*[29], *Sabeh El Leil v. France*[30] and *Wallishauser v. Austria*[31] cases, respectively referred to a switchboard operator, an accountant and a photographer as employees.

In its Judgments, the ECtHR found the immunity of the employer State to be an unjustified and not proportionate restriction of the right of access to a court under Article 6 § 1 of the European Convention of Human Rights (ECHR)[32]; to this effect, the Court expressly referred to the United Nations Convention on Jurisdictional Immunities of States and their Property 2004, Article 11, that, unlike the 1961 Convention, contains an employment exception to immunity, reflecting the adoption of the restrictive doctrine of State immunity regarding contracts of employment. In particular, the Court expressly made reference, *inter alia*, to the circumstance that the employer covered duties of a private nature, thus excluding the application of Article 11(2)(a), by virtue of

[28] See, generally, on the criteria considered in the judicial practice of States concerning claims by employees at diplomatic missions, with particular reference to the context or place of employment, R. GARNETT, op. cit. (*supra*, fn. 19), esp. p. 86 ff.

[29] *Cudak v. Lithuania*, Appl. no. 15869/02, Judgment of 23 March 2010.

[30] *Sabeh El Leil v. France*, Appl. no. 34869/05, Judgment of 29 June 2011.

[31] *Wallishauer v. Austria*, Appl. no. 156/04, Judgment of 17 July 2012.

[32] According to the *jurisprudence constante* of the ECtHR, the right of access to a court as embodied in Article 6 § 1 of the Convention is not absolute; thus, it may be subject to limitations, provided that such a limitation does not restrict or reduce the right of access in a way or to an extent that «the very essence of the right is impaired»; it «pursued a legitimate aim» and «was proportionate to the aim pursued»; in the view of the Court, consequently, «measures taken by a High Contracting Party which reflect generally recognized rules of public international law on State immunity cannot in principle be regarded as imposing a disproportionate restriction on the right of access to a court as embodied in Article 6 § 1. Just as the right of access to a court is an inherent part of the fair trial guarantee in that Article, so some restrictions on access must likewise be regarded as inherent, an example being those limitations generally accepted by the community of nations as part of the doctrine of State immunity» (see *Cudak v. Lithuania*, cit.). Cf. also, *inter alia*, ECtHR, *Sabeh El Leil v. France*, cit.; *Guadagnino v Italy and France*, Appl. No 2555/03, Judgment of 18 January 2011; *Fogarty v United Kingdom*, Appl. no. 37112/97, Judgment of 21 November 2001. For a general overview of the relationship between immunity and Article 6 § 1 of the ECHR, see M. KLOTH, *Immunities and the Right of Access to Court Under Article 6 of the European Convention on Human Rights*, Leiden 2010, p. 31 ff. Cf. also, for a discussion on the right to judicial protection in the case-law of the ECtHR, N. TROCKER, *Dal "giusto processo" all'effettività dei rimedi. L' "azione" nell'elaborazione della Corte europea dei diritti dell'uomo*, in V. COLESANTI, C. CONSOLO, G. GAJA, F. TOMMASEO, *Il diritto processuale civile nell'avvicinamento giuridico internazionale*, Padova, 2009, p. 453 ff.

which the employer State enjoys immunity when «the employee has been recruited to perform particular functions in the exercise of governmental authority».

4. *The counterposition of substantive jus cogens rules to procedural immunity rules. Critical issues*

The issue raised concerning the interpretation of the immunity exception under Article 31 (1)(c) of the 1961 Convention, makes it worthwhile focusing on the related aspect of the relationship between immunity and serious violations of human rights, particularly referring to human trafficking.

In fact, with reference to State immunity, the demand for redress concerning grave violations of the fundamental rights of the human person has brought legal scholars and advocates to follow several lines of reasoning in order to deny immunity in proceedings arising out of such violations: one of the proposed arguments is addressed as the "qualification" argument and it contends that acts of the State in breach of peremptory international law (*jus cogens*) fall outside the category of acta *jure imperii*, as in the case with commercial activities not protected by the privilege of immunity[33].

Similarly, another argument is addressed as "trumping o normative hierarchy"[34] and asserts that *jus cogens* rules, such as – in so far as it is relevant in the present case - those prohibiting forced and slave labour, rank higher than sovereign immunity rules in the hierarchy of international rules; as a result, in case of violation of *jus cogens* rules, these latter should trump the rules on foreign sovereign immunity.

This latter argument, however, was expressly rejected in the present case on the grounds that «Diplomatic immunity, like state immunity, is an immunity from jurisdiction and not from liability (…) There is therefore no conflict between a rule categorizing specified conduct as wrongful, and a

[33]For a complete account of the arguments in support of a *jus cogens* exception to the doctrine of sovereign immunity, see S. KNUCHEL, *State Immunity and the Promise of* Jus Cogens, in *Northwestern University Journal of International Human Rights*, 2011, p. 149 ff., esp. p. 159 ff., also with reference to the courts which endorsed and, conversely, rejected the arguments reported in the text (however, these arguments have been more recently challenged by the International Court of Justice in the case concerning the *Jurisdictional Immunities of the State*, mentioned below in the text).

[34] Cf., in this respect, A. ORAKHELASHVILI, *State Immunity and Hierarchy of Norms: Why the House of Lords Got it Wrong*, in *European Journal of International Law*, 2008, p. 955 ff.; B. NOVOGRODSKY, *Immunity for Torture: Lessons from Bouzari v. Iran*, id., 2005, p. 939 ff.; L. M. Caplan, *State Immunity, Human Rights and* Jus Cogens*: A Critique of the Normative Hierarchy Theory* , in *American journal of international law*, 2003, p. 741 ff. The argument referred in the text has been upheld by the the Dissenting Opinions of Judges Rozakis and Caflisch, joined by Judges Wildhaber, Costa, Cabral Barreto and Vajić (para 1) in the ECtHR *Al-Aldsani v. United Kingdom*, Judgment of November 2001: «due to the interplay of the *jus cogens* rule on prohibition of torture and the rules on State immunity, the procedural bar of State immunity is automatically lifted, because those rules, as they conflict with a hierarchically higher rule, do not produce any legal effect».

rule controlling the jurisdictions in which or the time at which it may properly be enforced» (para. 39)[35].

Such counterposition between procedural and substantive rules, already proposed in the literature[36] and then endorsed in the practice[37], has been recently exploited as a core issue by the well known Judgment delivered by the International Court of Justice on the case concerning the *Jurisdictional Immunities of the State*[38]; on this assumption, the Court held that Italy violated

[35] See H. FOX and P. WEBB, op. cit. (supra, fn. 4), p. 584, claiming that «Diplomatic immunity does not mean exemption from liability, but merely immunity from suit».

[36] See H. FOX, *The law of State immunity*, 2nd edn, Oxford, 2008, p. 33, considering jurisdictional immunity as «a procedural plea not an exemption from liability»; cf. also ID., *International law and restraints on the exercise of jurisdiction by national courts of States*, in M. D. EVANS (ed.), *International Law*, 2nd edn, Oxford, 2006, p. 363. The categorization of immunity as «a procedural exclusionary plea, where a procedural/substantive distinction is used to restrict the scope of immunity and its impact on questions of substantive law» has been implemented by H. Fox and P. Webb (op. cit., supra, fn. 4 esp. p. 44 ff.) in order to describe one of the Three Models (in particular the Third) used to analyse the evolution of the international principles of independence and equality and the consequent changes occurred in the extent of State immunity (the First Model and the Second Model are respectively referred to the absolute doctrine and the relative doctrine). However, the same Authors, with particular reference to the Judgment delivered by the ICJ in the case concerning *Jurisdictional Immunities of the State*, argue that «the procedural/substantive distinction may prove less impenetrable than the ICJ *Jurisdictional Immunities* judgment suggests», noting also that «its use justified as a clarification of the correct way to process a foreign State's claim, but serving to exclude the disposal of other awkward issues of substantive law» (op. cit., supra, fn. 4, esp. p. 48).

See also, for the position supporting the separation between procedural rules of immunity and substantive rules of *jus cogens*, A. GATTINI, *War Crimes and State Immunity in the Ferrini Decision*, in *Journal of International Criminal Justice*, 2005, p. 236, noting that «the assertation of the automatic prevalence of *jus cogens* over state immunity is a *non sequitur*, because the two sets of rules concern two different perspectives»; F. PERSANO, *Immunità statale dalla giurisdizione civile e violazione dei diritti fondamentali dell'individuo*, in *Resp. civ. e prev.*, 2008, esp. p. 2268; C. TOMUSCHAT, *L'immunite des etats en cas de violations graves des droits de l'homme*, in *Revue General de Droit International Public*, 2005, p. 51; cf. also M. SHAW, *International Law*, 5th edn, Cambridge, 2003, p. 623, stressing that «… immunity from jurisdiction does not mean exemption from the legal system of the territorial state in question»; F. DE VITTOR, *Immunità degli Stati dalla giurisdizione e tutela dei diritti umani fondamentali*, in *Riv. dir. int.*, 2002, p. 589; M. RAU, *After Pinochet: Foreign Sovereign Immunity in Respect of Serious Human Rights Violations - The Decision of the European Court of Human Rights in the Al-Adsani Case*, available on the website: *http://www.germanlawjournal.com*; M. TOMONORI, T*he individual as beneficiary of State immunity: problems of the attribution of ultra vires conduct*, in *Denver Journal of International Law and Policy*, 2001, p. 274, noting that «State immunity under international law is no more than immunity from legal proceedings before domestic courts, and it does not make states immune either from their own legal proceedings or from any sort of responsibility. In other words, to grant state immunity prescribed by international law does not mean the end of the rule of law»; A. ZIMMERMANN, *Sovereign Immunity and Violations of International* Jus Cogens – *Some Critical Remarks* , in *Michigan Journal of International Law* ,1995, p. 433.

[37] *Arrest Warrant* of 11 April 2000 (*Democratic Republic of Congo v. Belgium*), Judgment, I.C.J. Reports 2002, p. 3, paras. 58-61; *Jones v. Ministry of Interior of the Kingdom of Saudi Arabia*, [2006] *UKHL* 26 (June 14, 2006), Lord Bingham (para. 24) and Lord Hoffmann (para. 44).

[38] *Jurisdictional Immunities of the State*, cit. For a discussion of the implications of this case, see e.*g.*, D. MALTESE, *Azione civile di danno e immunità degli Stati. Considerazioni sulla sentenza 3 febbraio 2012 della Corte internazionale di giustizia*, in *Foro it., 2013, c. 392 ff.;* B. CONFORTI, *The Judgment of the International Court of Justice on the Immunity of Foreign States: a Missed Opportunity*, in *Italian Yearbook of International Law*, XXI, 2012, p. 135 ff.*;* C. CONSOLO and V. MORGANTE, *La corte dell'Aja accredita la Germania dell'immunità (che le Sezioni Unite avevano negato)*, in *Corr. giur.*, 2012, p. 597 ff.; J. CRAIG BARKER, I*nternational Court of Justice: Jurisdictional Immunities of the State (Germany v Italy) judgment of 3 February 2012*, in *International & Comparative Law Quarterly*, 2013, p. 741 ff.; K. N. TRAPP and A. MILLS, S*mooth runs the water where the brook is deep: the obscured complexities of Germany v*

Germany's jurisdictional immunity by allowing civil claims, concerning serious violations of human rights in breach of *jus cogens*, to be brought against that State in the Italian courts.

For the purposes at issue here, it is not possible neither pertinent to be exhaustive on the point that has just been addressed, which involves one of the most compelling research fields regarding the law of immunity, disclosing the tension which ensues from the nature of immunity and its impact on the relationship with human rights[39]. Nevertheless, it seems here appropriate to briefly refer to some critical reflections regarding the aforementioned separation between procedural and substantive law and the underlined distinction between "immunity" and "impunity" as arising in civil proceedings for damages against a foreign State[40].

Firstly, when it comes to serious violations of human rights in breach of *jus cogens*, immunity may be equated to impunity, wherever the consequence of granting the privilege of immunity would mean for the victims the deprivation of the only available remedy to obtain justice.

Indeed, as recently pointed out by the Italian Constitutional Court, «it would be difficult to identify how much is left of a right if it cannot be invoked before a judge in order to obtain effective protection»[41]. The view thus adopted led the Italian Court to argue that both the substantive provision embodied in Article 2 of the Italian Constitution - safeguarding the inviolability of fundamental human rights including human dignity – and the procedural provision under Article 24 of the Italian Constitution - which protects the right of access to justice - «share a common relevance in matters of constitutional compatibility of the norm of immunity of States from the civil jurisdiction of other States». As a consequence, the rigid counterposition of substance to procedure has been indirectly but firmly weakened[42].

Indeed, it seems that an argument by virtue of which immunity functions as a means to avoid compensation for grave violations of human rights cannot be rhetorical. In this regard, a further

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Italy, in *Cambridge Journal of International and Comparative Law,* 2012, p. 153 ff.; S. NEGRI, *L'arrêt de la Cour Internationale de Justice dans le différend des Immunités juridictionnelles de l'Etat (Allemagne c. Italie): une occasion manquée de rendre la justice aux victimes des crimes de guerre nazis,* in *L'Observateur des Nations Unies*, 2012, p. 277 ff.

[39] For a general discussion on the nature of State immunity and its implications in a civil claim, see C. CONSOLO, Jus Cogens *e* rationes *dell'immunità giurisdizionale civile degli stati stranieri e dei loro funzionari: tortuosità finemente argomentative (inglesi) in materia di "tortura governativa" (saudita)*, in *Il diritto processuale civile nell'avvicinamento giuridico internazionale*, cit., Padova, 2009, esp. 322 ff.

[40] For critical remarks on the counterposition of substantive rules to procedural rules, in addition to the observations of H. FOX and P. WEBB (op. cit., supra, fn. 4 e fn. 36), see K. N. TRAPP and A. MILLS, op. cit. (supra, fn. 38) esp. p. 160 ff., claiming that «the Court's Judgment sails over the smooth surface of the issues, leaving the depths unexplored»; A. NOLLKAEMPER, *International adjudication of global public goods: the intersection of substance and procedure*, in *European Journal of International Law*, 2012, p. 769 ff.; L. MCGREGOR, *Torture and State Immunity: Deflecting Impunity, Distorting Sovereignty,* in *The European Journal of International Law*, 2007, p. 905 ff.; R. O'KEEFE, *State Immunity and Human Rights: Heads and Walls, Hearts and Minds*, *ibid.*, p. 969 ff.; CONSOLO and V. MORGANTE, op. cit. (supra, fn. 38) esp. p. 603; E. FEOLA, *Immunità degli Stati stranieri della giurisdizione civile e gravi violazioni dei diritti umani: le sezioni unite rendono esecutiva in Italia la sentenza greca sull'eccidio di Distomo*, in *Dir. e giur*., 2009, p. 90.

[41] *Italian Constitutional Court* 22 ottobre 2014, n. 238, in *Foro it.*, 2015, I, c. 1152 ff.

[42] See D. GIRARDI, *Gli argini costituzionali alla norma sull'immunità degli Stati dalla giurisdizione civile*, in *Giur. it*., 2015, esp. p. 345, 346.

lesson can be learned by the words of Judge Cançado Trindade as set forth in his Dissenting Opinion in the case *Jurisdictional Immunities of the State*: «the separation between procedural and substantive law is not ontologically nor deontologically viable: *la forme conforme le fond*. Legal procedure is not an end in itself, it is a means to the realization of justice. And the application of substantive law is *finaliste*, it purports to have justice done»[43].

In this line of reasoning, it may be argued that in the event of a conflict between diplomatic immunity and human rights violated by the activity of human trafficking, if Article 39 (2) of the 1961 Convention had not been applied, the consequent granting of immunity would likely have acted as a form of impunity.

Furthermore, pursuing quite a different view, the aforementioned counterposition of substantive law to procedural law could be challenged on the grounds that the relevant distinction would not be between substantive *jus cogens* rules and procedural immunity rules. Indeed, as evoked in the literature, the real conflict seems to involve rules of immunity, on the one hand, and rules on access to justice and reparation, on the other hand[44]. As a result, the clash of international law norms would occur between two norms having the same procedural nature.

Apart from the difficulties arising from the addressed counterposition, from the procedural nature of immunity, as considered in the present case, the related practical consequences are to be welcomed. Among these, the Court expressly referred to the validity of an action brought against a person entitled to diplomatic immunity at the time when the proceedings had commenced; in its words, such a action «is merely liable to be dismissed» as «the procedural incidents of litigation normally fall to be determined by a court as at the time of the hearing»; thus, the underlying procedural nature of immunity is consistent with the effects of a waiver of immunity which indeed «after the commencement of proceedings would dispose of any diplomatic immunity which previously existed» (para. 49)[45]. As a result, although Mr and Mrs Al-Malki were entitled to immunity under Article 31(1) and 37(1) respectively at the time when the proceedings started, the fact that the defendant had ceased to be in post does not make the action brought against them by Ms Reyes, a nullity.

5. *Conclusions. A balanced view*

From all the aforementioned, it ensues that the Judgment delivered in *Reyes* case will most likely have a remarkable impact on the evolving law of diplomatic immunity in respect of serious

[43] ICJ, *Jurisdictional Immunities of the State*, cit., Dissenting Opinion of Judge Cançado Trindade, para. 295.

[44] See R. PISILLO MAZZESCHI, *Il rapporto fra norme di* ius cogens *e la regola sull'immunità degli Stati: alcune osservazioni critiche sulla sentenza della Corte internazionale di giustizia del 3 febbraio 2012*, in *Diritti umani e diritto internazionale*, 2012, p. 310 ff.

[45] Cf. H. FOX and P. Webb (op. cit., supra, fn. 4), p. 584, who, according to the treatment of immunity as a procedural bar, argue that «a claim brought against a diplomat entitled to diplomatic immunity, whilst of no effect, is not 'null and void' and if the immunity is waived by the diplomat's government or terminated on leaving his post, the claim may be validly proceeded with».

human rights violations. The hope is that it could contribute to disclose a new course in the interpretation of Article 31(1)(c)[46] of the 1961 Convention, so that the bar of diplomatic immunity does not operate as a means to avoid accountability for serious violations of human rights. To this effect, attention should be drawn to the circumstance that the UK Supreme Court did not answer in any binding form to the question concerning the meaning of Article 31(1)(c).

Thus, waiting for the "*jus cogens* exception" or "human rights exception" to immunity to be settled, which still needs to be well defined as far as the field of State immunity is concerned[47], the proposed change in the construction of Article 31(1)(c) would reveal, in my view, a balanced perspective.

The idea of balancing, indeed, underlies the historical erosion of absolute immunity in face of the need to find a fair compromise between public and private interests. In this view, the aforementioned Judgment in the *Benkharbouche* case can be appreciated: as stated in the same decision, «a key concern has been to balance the sovereignty of States with the interests of justice involved when an individual enters into a transaction with a State. One way of achieving this balance has been to stress a distinction between acts that are sovereign, public or governmental in character as against acts that are commercial or private in character» (emphasis added)[48]. In fact, Sections 4(2)(b) and 16(1)(a) of the UK State Immunity Act 1978, considered incompatible with Article 6 and Article 47 of the ECHR in the *Benkharbouche* case, have been regarded in the literature as tending to provide a form of absolute immunity: on the one hand, it has been argued that the employment exception under Section 4 contains «so many restrictions that only a limited class of State employees at the present time enjoys the benefit of this exception»[49]; on the other

[46] See Lord Wilson, para. 68 of the present Judgment: «So it would be a strong thing for this court to diverge from the US jurisprudence set out in the Tabion case (…) and to adopt the robust interpretation of Article 31(1) for which Ms Reyes contends. On the other hand it is difficult for this court to forsake what it perceives to be a legally respectable solution and instead to favour a conclusion that its system cannot provide redress for an apparently serious case of domestic servitude here in our capital city. In the event my colleagues and I are not put to that test today. Far preferable would it be for the International Law Commission, mid-wife to the 1961 Convention, to be invited, through the mechanism of Article 17 of the statute which created it, to consider, and to consult and to report upon, the international acceptability of an amendment of Article 31 which would put beyond doubt the exclusion of immunity in a case such as that of Ms Reyes»; see also, Lady Hale and Lord Clarke, para. 69, claiming that if the proper construction of Article 31(1)(c) had arisen, «we would associate ourselves with the doubts expressed by Lord Wilson as to whether the construction adopted by Lord Sumption in this particular context is correct especially in the light of what we would regard as desirable developments in this area of the law».

[47] See P. WEBB, *The Immunity of States*, cit. (supra, fn. 1) esp. p. 746 ff., claiming that «even though the door may be closed (for now) on lifting state immunity for human rights violations on the basis of a *jus cogens* exception, I hold some hope that the employment/commercial exception to immunity might open up possibilities for relief».

[48] Cf. ECtHR, *Al-Adsani* vs. *United Kingdom,* cit., Dissenting Opinion of Judge Loucaides: «Any form of blanket immunity, whether based on international law or national law, which is applied by a court in order to block completely the judicial determination of a civil right without balancing the competing interests, namely those connected with the particular immunity and those relating to the nature of the specific claim which is the subject matter of the relevant proceedings, is a disproportionate limitation on Article 6 § 1 of the Convention and for that reason it amounts to a violation of that Article».

[49] See H. FOX and P. Webb (op. cit., supra, fn. 4), p. 198.

hand, it has been stressed that «the intention behind section 16(1)(a) is to create a form of absolute immunity (…)[50]».

Indeed, such concept of balance draws parallels and fits in well with the employment claims. As observed in the literature, in fact, employment law show a dual face, encompassing both public and private interests[51]; what is more, the latter concerns an individual who is especially in need of protection and easily subject to violations of his/her human rights. Hence employment claims can well be regarded as a fruitful field in which a new interpretation of the "commercial activity exception" to diplomatic immunity may flourish, with respect to exploitation of domestic workers by foreign diplomats; so that immunity does not amount to impunity.

[50] See R. GARNETT, op. cit. (*supra*, fn. 19), p. 88.
[51] See P. WEBB, *The Immunity of States*, cit. (*supra*, fn. 1), esp. p. 367.