



THE IMPLICATIONS OF JURISDICTIONAL IMMUNITY IN THE ENFORCEMENT OF STATE RESPONSIBILITY FOR VIOLATIONS OF *JUS COGENS* NORMS

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Abstract

This study examines the evolving relationship between Jurisdictional Immunity and violations of Jus Cogens norms. While Jurisdictional Immunity traditionally shields states from foreign lawsuits, this research posits that such immunity cannot be absolute in the face of Jus Cogens breaches (e.g., torture, genocide), especially considering obligatio erga omnes principles. Through a normative legal analysis, this study proposes that Jus Cogens violations by acte jure imperii should not result in impunity. Current

international practice indicates a growing consensus that state immunity should not protect grave peremptory norm violations. Exceptions to absolute immunity are emerging through customary international law and domestic jurisprudence, driven by human rights protection and victim access to justice. The current fragmentation in these exceptions necessitates a binding international convention to standardize accountability and reparations. Recodification of international law and strengthened international institutions are crucial for integrating humanitarian exceptions and universal jurisdiction, thereby upholding the supremacy of international law and ensuring substantive justice.

I. Introduction

International law functions within a system of sovereign equality among states, wherein the principle of Jurisdictional Immunity has long served as a shield protecting states from being subjected to the jurisdiction of foreign courts without their explicit consent (Crawford, 2019: 717). This principle, originally grounded in the doctrine of absolute immunity, has evolved into the modern concept of restrictive immunity, which differentiates between acts performed in the exercise of sovereign authority (*acta jure imperii*) and those of a private or commercial nature (*acta jure gestionis*) (Meng, 2022: 16–17). However, the application of this immunity faces significant challenges when sovereign acts violate norms of *Jus Cogens*, fundamental, non-derogable principles of international law such as the prohibitions against torture and genocide.

The conflict between Jurisdictional Immunity and the enforcement of *Jus Cogens* norms raises fundamental questions about state accountability and the right of victims of serious human rights violations to access justice. On one hand, Jurisdictional Immunity aims to preserve international comity and the sovereign equality of states. On the other, *Jus Cogens* norms reflect peremptory values of the international legal order that must not be compromised. The tension becomes especially acute when states accused of committing international crimes invoke immunity to avoid judicial scrutiny. While the International Court of Justice (ICJ) in *Germany v. Italy* (2012) adopted a formalistic approach by drawing a distinction between procedural immunity and substantive violations of *Jus Cogens*, various domestic courts have exhibited a growing tendency to override Jurisdictional Immunity in cases involving egregious breaches of human rights (Karnaukh, 2022: 165–175). This inconsistency highlights the urgent need for legal analysis concerning the implications of, and potential exceptions to, Jurisdictional Immunity in the context of violations of *Jus Cogens* norms.

In light of the foregoing, this writing seeks to answer the following legal question: What are the implications of the principle of Jurisdictional Immunity for a state in cases involving violations of *Jus Cogens* norms?

The findings of this research are intended to contribute to the ongoing discourse on the scope and limits of Jurisdictional Immunity, its relationship to the universal obligations of states under international law, and to offer practical insight for international legal

practitioners confronting legal dilemmas involving exceptions to immunity in the face of *Jus Cogens* violations.

II. Analysis: The Implications of Jurisdictional Immunity in Violations of *Jus Cogens* Norms

A. Legal Status of *Jurisdictional Immunity*

Historically, states generally enjoyed absolute Jurisdictional Immunity from the jurisdiction of foreign courts (Ekpo, 2017: 152). However, developments in the 20th century, particularly the rise in international commerce and the growing participation of states in commercial activities, led many jurisdictions to adopt a more restrictive approach to immunity. This shift was intended to ensure access to justice for private parties engaging with states in commercial transactions. While this trend suggests a move towards limiting state immunity, to date there is no universally binding international legal instrument that comprehensively governs the matter. As a result, the principle of Jurisdictional Immunity continues to rely heavily on recognition under customary international law or incorporation through treaty law.

1. Customary International Law

Customary international law is formed by general and consistent state practice accompanied by *opinio juris*, a belief that such practice is legally obligatory (Dixon, 2013: 16–17). The emergence of restrictive immunity in countries like Italy (1882) and Belgium (1879) represents an organic response to the demands of modern commercial life and the need to maintain fairness and stability in global markets (Higgins, 1982: 271; Rossi, 2022: 44). However, uniformity in state practice concerning restrictive immunity remains abstract. States with dualist legal systems (such as Australia, Canada, the United Kingdom, and the United States) often address issues of immunity through domestic legislation, typically incorporating exceptions such as the commercial activity exception and the territorial tort exception (Fox, 2002: 124–125). In contrast, monist states tend to limit immunity through judicial practice, deriving authority directly from international norms.

This inconsistency in both practice and interpretation, such as the divergence between the “nature test” (U.S.) and the “purpose test” (France) in defining commercial acts, undermines the argument that state immunity is fully protected under customary international law. Richard Garnett even observed that it is almost impossible to speak meaningfully of ‘customary international law’ in the context of foreign state immunity,

given the sharp divergences in state practice. State immunity now resembles a branch of domestic law peculiar to each legal system (Garnett, 1999: 175).

The *opinio juris* element is also difficult to ascertain, whether states extend immunity out of a belief in a binding international legal obligation, or merely as a gesture of diplomatic comity or for the sake of interstate relations. In *North Sea Continental Shelf* (1969), the International Court of Justice (ICJ) emphasized that frequent or habitual practice alone is insufficient, there must be a belief in legal obligation. If *opinio juris* consistently supports immunity for a particular category of claims, then even a large number of contrary judicial decisions should be regarded as violations of immunity, rather than evidence of a normative shift.

The *Arrest Warrant* case (DRC v. Belgium, 2002) illustrates how political pressure from powerful states can shape or even override domestic legal developments on immunity, sometimes resulting in the creation of new statutory norms. The doctrine of the persistent objector also allows a state to reject the binding force of a customary norm from the outset, as exemplified in the *Asylum* case (1950) (Green, 2016: 25, 91).

Therefore, the principle of Jurisdictional Immunity no longer enjoys robust legitimacy in contemporary international law, particularly when juxtaposed against violations of Jus Cogens norms. The lack of consistent state practice and the fragility of universal *opinio juris* weaken its normative standing. Substantively and normatively, there is no universal obligation requiring states to grant immunity in the face of serious breaches of international law.

2. Treaty Law

Before the *United Nations Convention on Jurisdictional Immunities of States and Their Property* (UNCIS) was opened for signature in 2005, only a limited number of international treaties comprehensively addressed the issue of state immunity. One of the earliest multilateral efforts was the *European Convention on State Immunity* (Basle Convention, 1972), which set forth exceptions to immunity for commercial acts and tortious conduct. Although the structure and approach of the Basle Convention served as a reference

point for several states in crafting domestic legislation, the Convention was ratified by only eight countries, reflecting a lack of universal support.

The UNCSI represents the culmination of decades-long negotiations aimed at achieving international consensus (Pavoni, 2016: 1). Nevertheless, it remains fraught with ambiguities. A primary point of contention lies in its expansive definition of “State,” which includes “representatives of the State acting in an official capacity” but notably excludes diplomats and heads of State. In practice, however, international law subjects States as entities and their officials to distinct immunity regimes. The attempt to extend the scope of State immunity to include individual officials, particularly in the context of serious international crimes, risks conflicting with prevailing principles and practices of international law. Additionally, Article 12 of the UNCSI, which limits immunity in cases of personal injury or property damage, applies only when the act occurs “wholly or partly in the territory of the forum State” and requires the presence of the alleged perpetrator. This restriction, in effect, severely limits victims’ access to justice for grave violations committed extraterritorially, such as torture or war crimes occurring in conflict zones.

Although the *International Law Commission* (ILC) has acknowledged the intersection of State immunity and *Jus Cogens* norms as a subject warranting further exploration, the UNCSI has not been regarded as the appropriate venue for substantive discussion, given that the issue remains in a state of legal evolution.

Critically, the UNCSI has yet to enter into force, having failed to meet the ratification threshold of thirty States as stipulated in Article 30(1). This delay is largely attributable to States’ concerns that applying the Convention to criminal matters may give rise to conflict between the obligation to prosecute perpetrators of international crimes and the principle of immunity for State officials. As a result, the regulation of State immunity remains highly dependent on domestic legal systems and may vary significantly across jurisdictions. While some national courts, such as those in the United Kingdom and France, have acknowledged the UNCSI as reflective of customary international law, and even the *European Court of Human Rights* (ECHR) has recognized certain of its provisions as customary in nature, the Convention’s formal non-implementation underscores the fragmentation in its application and the absence of a uniform global standard.

B. The Practice of Applying Jurisdictional Immunity in Cases Involving

Violations of *Jus Cogens* Norms

Jurisdictional Immunity is a principle of international law that prevents states and their representatives from being subjected to the jurisdiction of foreign courts. It originates from the concept of sovereign equality among states. This principle bars the courts of the forum state from exercising jurisdiction and enforcement powers in certain categories of cases where a foreign state is a party (Crawford, 2019: 717). However, tensions arise when this principle is invoked in cases involving violations of *Jus Cogens* norms, such as gross human rights violations. While *Jus Cogens* norms are peremptory and non-derogable, international courts have often prioritized the application of Jurisdictional Immunity, even where such immunity would shield conduct that violates these fundamental norms (Knuchel, 2011: 153–156). This results in a normative conflict between procedural norms (immunity) and substantive norms (*Jus Cogens*).

The International Court of Justice (ICJ) addressed this issue most definitively in its judgment in the *Jurisdictional Immunities of the State (Germany v. Italy, 2012)* case. The Court held that the rules governing Jurisdictional Immunity are procedural in nature, concerning only the jurisdictional competence of the court, and that the violation of *Jus Cogens* norms is a matter of substantive law unrelated to the question of jurisdiction. The ICJ also rejected the argument that a state's immunity should be conditioned upon the availability of alternative remedies. This view has drawn criticism for artificially separating substance and procedure, potentially undermining human rights protections and fostering impunity (Pavoni, 2012: 75). The ICJ's reliance on the absence of a *Jus Cogens* exception in domestic practice and in the *United Nations Convention on Jurisdictional Immunities of States and Their Property* (UNCIS) remains a central point of contention.

The legal dispute did not end with the ICJ's 2012 judgment. The Italian Constitutional Court, in *Decision No. 238/2014*, introduced the concept of a "humanitarian exception" to state immunity in cases involving serious human rights violations. Despite contradicting the ICJ's earlier decision, the Italian Court allowed individual claims against Germany, prompting Germany to initiate a new proceeding before the ICJ in 2022 (*Germany v. Italy, 2022*). Although Italy subsequently established a national compensation fund as an alternative remedy for victims, its Constitutional Court maintained, as a matter of principle, its rejection of state immunity in cases of *delicta imperii*, serious violations of human rights, thus keeping the potential for further litigation before the ICJ open (Rossi,

2022: 54; Pavoni, 2022: 19–40).

Several domestic court decisions have diverged from the ICJ's reasoning, challenging its doctrinal framework. For instance, in *Al-Adsani v. United Kingdom* (2001), the European Court of Human Rights (ECtHR), by a narrow majority of 9 to 8, held that a *Jus Cogens* violation (torture) did not justify an exception to state immunity in civil proceedings. However, a strong dissent by six judges argued that *Jus Cogens* norms should prevail over customary international law rules such as state immunity, thereby supporting a theory of normative hierarchy (Caplan, 2003: 741).

In *Ferrini v. Federal Republic of Germany* (2004), the Italian Supreme Court denied Germany's claim to immunity in relation to Nazi crimes committed during World War II. The court reasoned that the protection of human rights, as a *Jus Cogens* norm, takes precedence over state immunity, which does not enjoy *Jus Cogens* status. The judgment affirmed the right of individuals to access justice in cases involving egregious violations of peremptory norms. Similarly, in the *Changri-La case* (Brazil, 2021), the Brazilian Supreme Federal Court held that a foreign state could not invoke immunity for acts constituting human rights violations. The Court rejected the ICJ precedent from *Germany v. Italy* and grounded its reasoning in Brazil's constitutional principle of the "prevalence of human rights" (Article 4(II) of the Brazilian Constitution), reflecting an emerging judicial tendency to relativize state immunity in the face of *Jus Cogens* violations, even if not yet sufficient to crystallize into settled international practice (Saliba, Tuffi, & Lima, 2021: 52–54).

The most recent development is seen in *Russia v. Ukraine* (Ukraine, 2022), where the Supreme Court of Ukraine disregarded Russia's claim to Jurisdictional Immunity in a lawsuit filed by war victims. The Court reasoned that granting immunity would violate the applicants' rights to effective legal protection and invoked the territorial tort principle. Explicitly departing from the ICJ's stance, the Ukrainian Supreme Court held that extending immunity under such circumstances would infringe upon the victims' right to access justice and obtain effective legal remedies (Karnaukh, 2022: 165–175).

This analysis suggests that while Jurisdictional Immunity is rooted in the principle of state sovereignty, its absolute application appears increasingly untenable when confronted with grave breaches of *Jus Cogens* norms. The peremptory character of *Jus Cogens* demands accountability from states, and an unyielding adherence to immunity in such cases constitutes a regressive approach that runs counter to the evolution of modern

international law, one that increasingly values the protection of human rights and the pursuit of substantive justice.

C. State Sovereignty and the Principle of Non-Intervention

State sovereignty forms the foundation of international law and relations, under which each state is regarded as equal and autonomous, possessing exclusive jurisdiction over its own territory (Ronzitti, 2015: 1). The principle of sovereign equality, as enshrined in Article 2(1) of the UN Charter, UN General Assembly Resolution 2625 (1970), and the 1975 Helsinki Final Act, reaffirms the equal rights and obligations of all states. Likewise, the principle of non-intervention prohibits interference in the domestic affairs of another state (Ronzitti, 2015: 2). Nevertheless, sovereignty and non-intervention are not absolute, as reflected in Articles 2(1) and 2(7) of the Charter of the United Nations.

Following the Second World War, international law began to shift its focus toward human rights protection and accountability for international crimes. This shift materialized through key instruments such as the *Universal Declaration of Human Rights* and the 1966 UN Covenants. Sovereignty is now increasingly interpreted as a mandate to safeguard the rights of the people (Article 21(3), *Universal Declaration of Human Rights*), rendering the state accountable to the international community. Limitations on sovereignty are also found in customary international law and treaty obligations, such as the duty to respect the immunity of foreign states for *acta jure imperii* (Ronzitti, 2015: 3–4). Intervention is prohibited where it is “authoritarian” in nature, i.e., involving threats or use of force, yet expressions of concern or demands for human rights compliance are not deemed violations of the non-intervention principle (Kunig, 2008: 3–4).

Grave breaches of international humanitarian law or serious international crimes, such as genocide or war crimes, are no longer classified as purely domestic matters, but as concerns of the international community as a whole. In the *Barcelona Traction* case (1970), the ICJ articulated the concept of *obligations erga omnes*, referring to a state’s obligations owed toward the international community at large. These *erga omnes* obligations impose a universal duty on states to address violations of *Jus Cogens*, such as the prohibition of torture (Latipulhayat, 2021: 269–270). Every violation of a *Jus Cogens* norm gives rise to both rights and duties *erga omnes*, requiring all states to investigate and prosecute (Muhammadin, 2023: 85). These obligations are non-derogable (Wagiman & Anasthasya, 2016: 310) and, therefore, constrain traditional notions of sovereignty and non-intervention.

Contemporary developments in international law indicate a transformation in the doctrines of state sovereignty and non-intervention, principles that traditionally underpin Jurisdictional Immunity. The global emphasis on human rights and state responsibility for breaches of *Jus Cogens*, such as torture, crimes against humanity, and genocide, demands that Jurisdictional Immunity cannot serve as a shield for impunity, nor be used to undermine the supremacy of international law or the *obligatio erga omnes*. Sovereignty is now better understood as a responsibility to the international community. Consequently, to preserve Jurisdictional Immunity in absolute terms when confronted with violations of *Jus Cogens* is not only doctrinally inconsistent but constitutes a regressive step away from the modern trajectory of international legal development.

III. Conclusion

The principle of *Jurisdictional Immunity*, originally intended as a safeguard for state sovereignty and the doctrine of non-intervention in international relations, now faces significant challenges in the context of enforcing *Jus Cogens* norms. Although this principle continues to be recognized under various international legal instruments, both through *customary international law* and treaty law, its legitimacy and application can no longer be regarded as absolute. The inconsistency of state practice, the absence of a clear consensus on *opinio juris*, the low rate of ratification of relevant conventions, and the progressive development of the doctrine of *normative hierarchy* all indicate that state immunity cannot be invoked as a shield against accountability for grave violations of human rights, such as torture, genocide, slavery, and crimes against humanity.

The evolution of contemporary international law increasingly prioritizes the protection of human rights as a paramount normative imperative, as evidenced by the widespread recognition of the principle of *obligatio erga omnes*. Consequently, where a state commits violations of *Jus Cogens* norms, it may no longer legitimately invoke the doctrine of *Jurisdictional Immunity* to escape responsibility. Accountability to the international community as a whole demands that such obligations not be subject to compromise. Accordingly, the principles of sovereignty and state immunity must be interpreted dynamically and responsibly, lest they become obstacles to the supremacy of international law and the right of victims to access justice.

Given the persistent tension between the principle of *Jurisdictional Immunity* and the state's duty to respect and enforce *Jus Cogens* norms, there is an urgent need to

reformulate the international legal approach, both normatively and institutionally. Normatively, the international community must proactively promote the recodification or development of a new convention that explicitly delineates exceptions to state immunity in cases involving serious human rights violations. Such a convention must unequivocally incorporate the *humanitarian exception* as a norm consistent with *Jus Cogens*, ensuring that no state may continue to invoke immunity to shield itself from responsibility for international crimes.

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