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THE IMMUNITY OF STATES IN CONTEMPORARY INTERNATIONAL LAW

Abstract

The contemporary law of state immunity deals with the human rights exception in a limited and cautious way, if it does at all. The UN Convention on Jurisdictional Immunity of States and their Property was adopted in 2004 and to date is the only general convention in this field but is not in force. It did not include an exception that a state will not be immune when human rights violations are involved. This study aims to determine whether such an exception should be included and what are the odds of that happening. To test a hypothesis that such an exception will not be accepted, we analyzed the relevant conventions and the doctrinal studies. The results show that it is necessary to include it, but not in the form of a protocol, as some authors suggested. On this basis, future research in the International Law Commission should be conducted.
Key words: state immunity, contemporary international law, human rights violations.

1. INTRODUCTION

J. Craig Barker wrote that the issue of immunities from jurisdiction is one of the most controversial in contemporary international law for many

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reasons, including the advances in new and expanding areas of international law, such as human rights and international criminal law in the context of which the law relating to immunities from jurisdiction is increasingly challenged.[1] This specific context of immunity will be the central part of this paper. The research question that is trying to be answered here is whether there should be an exception included based on human rights violations. Given that the UN Convention on the Jurisdictional Immunities of States and their Property was adopted 17 years ago, but yet not in force, the question remains: did the topic of immunity of states mature enough for the international community to accept it? To find an answer, we must inspect the concept of state jurisdiction, the codification attempts in the past, the work of the International Law Commission and its reception in the international community. The focus of this paper is whether and how the human rights violations exception should be implemented.

2. THE CONCEPT OF STATE IMMUNITY

The immunity of states has always been one of the most important topics of public international law. Its importance comes from different factors. First of all, the principle of equality of states. The Charter of the United Nations in Article 2 enumerates the principles on which it is based, and one of them is equality.[2] In order to demonstrate that equality, it was necessary to establish a rule on which no foreign state can adjudicate against another state without its acceptance. One way to accomplish that was the negative territorial jurisdiction, upon which the state cannot use its jurisdiction on the territory of another state. The immunity is sort of a natural border for the internal jurisdiction of the state.[3] Secondly, the sovereignty of states had an essential influence on establishing this rule. Sovereignty is one of the three commonly recognised features of the state. The Montevideo Convention has established a rule saying that a state is based on its territory, population, government and capacity to enter into relations with other states in Article 1.[4] Sovereignty means that every state is independent, and no

[1] J. C. Barker, “Shared foundations and conceptual differentiation in immunities from jurisdiction”, A. Orakhelashvili (Ed.) *Research Handbook on Jurisdiction and Immunities in International Law*, Edward Elgar Publishing, Cheltenham, UK, 2015, 185.
[2] Charter of the United Nations, San Francisco, 1945, https://treaties.un.org/doc/publication/ctc/uncharter.pdf, 17.3.2021.
[3] Б. Милисављевић, М. Новаковић, *Имунитети у међународном праву*, Правни факултет Универзитета у Београду, Београд, 2020, 19.
[4] Montevideo Convention on the Rights and Duties of States, Montevideo, 1933, https://www.jus.uio.no/english/services/library/treaties/01/1-02/rights-duties-states.xml, 17.3.2021.

other state can influence her in any way. That being said, the Latin maxim *par in parem non habet imperium* can be understood in a way that justifies state immunity – no force can be used between the equals. An even better one would be *par in parem non habet jurisdictionem*, meaning that an equal has no power over an equal, or "legal persons of equal standing cannot have their cases decided in the court of one of them".[5]

Another relevant factor is the competence of the state and its jurisdiction. A jurisdiction is a tool that a state uses to demonstrate its sovereignty. It allows the state to prescribe and enforce laws on its territory and its population. The immunity is a shield for enforcing the competence of one state upon another. It protects her from being sued. Also, the principle of non-intervention guarantees no intervention of another state in the internal affairs when it comes to public functions. Another argument for immunity is that it is one of the mechanisms that the state uses to obtain friendly relations with other states and prevent disputes. Hazel Fox says that there are "three main grounds that are given for the grant of immunity to foreign states: first, that the national court has no power of enforcement of its judgments against a foreign state; secondly, that the independence and equality of states prevent the exercise of jurisdiction by the courts of one state over the person, acts or property of another state, and finally, that foreign states ought properly to enjoy similar immunity to that accorded by national courts to their forum state". Additionally, justifications can be found in the territoriality of the jurisdiction of the courts of the receiving state and on reciprocity and international comity, as Rousseau had written.[6]

However, the history of state immunity predates the 14th century. A Latin quote, *rex gratia Dei*, meaning king by God's grace, described the importance of the ruler of the state, and it was used even during the feudal system. The king carried its title in God's name and was perceived as a personification of a state. Another quote, more important for this paper, was *rex non potest pecare*. It means that the king can do no wrong.[7] We could say that it is the perfect description of the rule of state immunity. Kings, emperors or any other rulers were seen as impeccable and could not be sued. This quote and the explanation are now known as the origin of the absolute theory of state immunity.

[5] A. Kumar, "Scope of Sovereign Immunity in International Law", *Romanian Journal of International Law*, 14-15, 2012, 107.
[6] H. Fox, *The Law of State Immunity*, Oxford University Press, New York, 2008, 55.
[7] C. Shortell, *Rights, Remedies and Impact of State Sovereignty*, State University of New York Press, Albany, New York, 2008, 13.

Nevertheless, the communication between the states in the Middle age was limited. It was not until the Renaissance period that the state immunity rules began to evolve. Above all, the main reasons for state immunity lie in the economy. In the centuries that followed, states have realised that cooperation with other states is necessary, especially in trade and economy. The first shift in the direction of restricting state immunity occurred regarding state-owned vessels that were engaged in trade activities.[8] Slowly, the absolute theory of state immunity began to lose its supporters. Nevertheless, the transition period from absolute to restrictive theory was neither easy nor fast. Let us remind ourselves about the significance and distinction between these two.

As the name itself declares, the absolute theory is based on the premise that it is legally impossible to have authority upon the other state on its territory. The state itself is sovereign, and therefore no other state can disrupt its sovereignty. The absolute theory could only be used in reciprocity conditions and before interstate communication began to develop. As mentioned, the economic development and communication between states led to developing another theory – the restrictive one. Also, it is worth noting that in the 19th century, state immunity rules derived mainly from national courts' judicial practice. Another factor in the 20th century is the communist States and the fact that they applied the absolute theory. In practice, that meant that, since these states were involved in trading, if any dispute arose, these states and their trading corporations could rely on the state immunity, so victim countries could not find any remedy in national law. Therefore, it was necessary to establish a legal regime.[9] Its central premise is that the activities of the state can be diversified as the public and the private ones. The distinction is made between acts *de jure imperii* and *de jure gestonis*. The state is immune only to public acts. However, the problem comes with the criteria for diversification of the acts – how does one decide which act is private or public? In a general sense, the commercial acts of state are perceived as private ones, and those are the cases when the state does not enjoy immunity. It should also be pointed out that the vital element for the transition from the absolute to the restrictive doctrine was a modification of the key question. The maxim *par in parem non habet imperium* would protect a state from foreign jurisdiction only if the concrete act was an exercise of sovereignty.[10]

[8] G. M. Badr, *State Immunity, An Analytical and Prognostic View*, Springer Science Business Media, M. V., 1984, 41.
[9] A. Kumar, *op. cit*, 111.
[10] A. Orakhelashvili, “State immunity from jurisdiction between law, comity and ideology”, chapter in A. Orakhelashvili (Ed.) *Research Handbook on Jurisdiction Immunities in International Law*, Edward Elgar Publishing, Cheltenham, UK, 2015, 159.

3. THE CODIFICATION PROCESS

When it comes to the codification process of state immunity, several attempts were successful to a certain degree. The sources of state immunity laws are legislation of states, international treaties, bilateral agreements, case law and doctrine. Case law, especially in the common law countries, is very abundant, but it exceeds this paper's limits to pay more attention to it. Several states have implemented in their legislative acts specifically dedicated to this topic. These are United States, United Kingdom, Singapore, South Africa and Canada. As for international treaties, the 2004 UN Convention on the Jurisdictional Immunities of States and their Property was the first general convention in this field. The 1972 European Convention on State Immunity came into force in 1976 and had only eight state parties. It was adopted by the Council of Europe and the committee that it had founded. This one was significant because it was the first attempt to codify state immunity law based on the restrictive doctrine. Fox sees the reason for its failure to be ratified by a more significant number in its complexity, its requirement that the specified activities which enjoy no immunity be intricately linked to the forum state and its cautious optional regime for the execution of judgments.[11] It is the only international convention that is now in force. Nonetheless, let us take a brief look back to the start of the codification.

The first-ever project was taken by the Institute de Droit international at the end of the 19th century, in 1891. Even in that resolution, also known as Hamburg Resolution, three exceptions to immunity were proposed. The second resolution was in 1954, and it, among others, separated states that apply the absolute and restrictive theory. The third and final one by the Institute de Droit international was adopted in 1991. The International Law Association researched in 1926. In that year, the Brussels Convention relating to the Immunity of State-Owned Vessels was adopted as the first one. It provided that state-owned or operated ships and their cargoes engaged in trade shall be subject to the operation of such vessels and the carriage of cargoes to the same jurisdiction of national courts as the private ones.[12] At the time, this was a revolutionary instrument. The ratification process was time-consuming and unsatisfactory, which led to adopting the Additional Protocol in 1934. It was the first to attempt to establish non-immunity in certain aspects of the trade, but it was thought that it was too complex. This convention had only 29 state parties and limited effect, but it had significant influence. Harvard Research was published in 1932. It was a report

[11] H. Fox, *op. cit*, 187.
[12] *Ibid*, 185.

on the "Competence of Courts in regard to the Foreign States", it advocated a restrictive approach to state immunity, and it had liberal rules. The International Bar Association held a symposium in 1956, which resulted in a resolution in 1960. The International Law Association also adopted a Convention at the Montreal Conference in 1982, and amendments to the text were adopted in 1994 at Buenos Aires Conference.

Given that state practice, immunity is so diverse and customary international law is the primary source, and the next logical step was to codify. Nevertheless, codification is not enough, but progressive development is also required. The main body at the United Nations that bears this task is the International Law Commission. It began its work on this topic back in 1977 when General Assembly decided to include it. Even though this paper's focal point is not the codification process, several aspects are worth mentioning. There were two Special Rapporteurs: professors Sompong Sucharitklul and Motoo Ogiso. In 1991 the draft articles were adopted by the International Law Commission and submitted to General Assembly. The Convention itself accepted the restrictive approach, even though it was not the generally accepted theory at the codification process.[13] After several years of discussion in working groups, in 2004, the Sixth Committee shared its view that the Convention should be adopted. Fox points that in the years around 2004, there were several proceedings about conflicting assertations of jurisdiction by national courts and that if the international agreement was not reached, the uncertainty would arise and risk of erosion of the existing law of immunity.[14] The UN Convention on Jurisdictional Immunities of States and their Property was adopted by resolution 59/38 of the General Assembly on 2 December 2004.[15] The Convention was open for signature from January 2005 until January 2007. It will come into force on the thirtieth day following the date of deposit of the thirtieth instrument of ratification, approval, acceptance or accession with the Secretary-General of the United Nations.[16] The Convention is not in force, and there are 28 signatories. David Stewart, a professor from Georgetown University who has written continually about immunity, wrote that he believed that there will be a rapid adaption by the

[13] B. Milisavljević, „Imunitet države u međunarodnom pravu – osvrt na rad Komisije za međunarodno pravo“, *NBP – Žurnal za kriminalistiku i pravo*, Beograd, 2014, 24.
[14] H. Fox, *op. cit*, 379.
[15] General Assembly Resolution 59/38, “Official Records of the General Assembly, Fifty-ninth Session, Supplement No. 49”, A/59/49.
[16] United Nations Convention on Jurisdictional Immunities of States and their Property - Convention, Article 30, https://legal.un.org/ilc/texts/instruments/english/conventions/4_1_2004.pdf, 10.3.2021.

considerable number of states that still do not have national legislation acts dedicated to sovereign immunity.[17] Soon it showed that he was wrong.

It is believed that the adoption of the Convention is a diplomatic achievement since it took 27 years of work in the General Assembly and its bodies. This is an instrument designed to unify a much-disputed area of international law and to produce a universally applicable legal regime on state immunity, a matter which is certainly of growing importance.[18] On the other hand, there are too little states that showed their support. "These numbers fall far short of what is typically considered reliable evidence that a treaty reflects customary international law binding on non-parties to the treaty," noted Lori Fisler Damrosch.[19]

4. THE HUMAN RIGHTS VIOLATIONS EXCEPTION

Nowadays, the doctrine of immunity has been challenged on the grounds of protection of the individual. In contemporary international law, when the law of state immunity is discussed, it is usually about protecting human rights. It is of the utmost importance for a court or a judge to know how to determine whether acts *de jure imperii* of a state involve international crimes or, concretely, whether a court can decide not to exercise its jurisdiction because of a state's sovereignty. This can also bar victims from receiving their reparation and satisfaction.[20] "Under customary international law as it presently stands, a State is not deprived of immunity because it is accused of serious violations of international human rights law or the international law of armed conflict" is how the present condition is described.[21] Namely, one of the postmodern world's main pillars is the protection and respect of human rights. Human rights law began to develop in the aftermath of World War II and even more after the Cold War, and nowadays, it is one of the most challenging and expanding fields of public international law. It has come a long way from being soft law and in the form of declaratory principles to becoming part of the *jus cogens*. So, the most challenging question

[17] L. F. Damrosch, "Changing the International Law of Sovereign Immunity through National Decisions", *Vanderbilt Journal of Transnational Law*, Vol. 44, 2011, 1189.
[18] State Immunity and the new UN Convention, Chatham House, 5 October 2005, 9, https://www.chathamhouse.org/sites/default/files/public/Research/International%20Law/ilpstateimmunity.pdf, 10.3.2021.
[19] L. F. Damrosch, *op. cit*, 1190.
[20] O. Bakircioglu, "*Germany v Italy*: The Triumph of Sovereign Immunity over Human Rights Law", *International Human Rights Law Review*, 1, Martinus Nijhoff Publishers, 2012, 105.
[21] *Ibid*, 105.

regarding state immunity today is whether an exception in cases of violations of human rights should exist. This tension between state immunity and human rights is not yet resolved, but instead, it reinforced the policy argument for reconsidering the scope of application of the immunity rules in respect to violations of *jus cogens* norms.[22]

When it comes to the relationship between the state immunity and human rights violations of *jus cogens*, there are two schools of thought that are based on the question if the state can be considered to have immunity from national court's jurisdiction and the other school, whether a state is immune when it comes to liability for breach of the *jus cogens* and human rights. Usually, it is perceived that state immunity and *jus cogens* norms are competing. So, giving the fact that the UN Convention on Jurisdictional Immunities of States and their Property is created in a way that it gives us legislative exceptions of when a state cannot hold its immunity, the question arises: Should there be a human rights exception to state immunity in cases when a state had violated human rights? Furthermore, if so, should there be a human rights protocol? Reasons for this are preventing impunity, ensuring responsibility and redress for the victims, respecting the *jus cogens* norms and hierarchy of norms in the international legal system. Since the states responsible for the violations have failed to investigate and prosecute on their own, it enables and spreads impunity. In order to change that the legislative reform is required. The UN Convention on Jurisdictional Immunities of States and their Property is not yet in force, so the United Nations should recognise a human rights exception to state immunity when there is a *jus cogens* violation through legislation in this Convention is the opinion of some of the authors.[23]

During the negotiation process, some states and organisations that deal with human rights have requested an exception based on human rights violations to be implemented in the Convection text. If not, then an Optional Protocol was requested. Both requests were rejected.[24] Even during the drafting process in the International Law Commission, the Working Group had recognised the importance of the question of existence or non-existence of jurisdictional immunity in actions arising out of violations of *jus cogens* norms in 1993. The Working Group had then concluded that the issue was not ready enough for the Working Group to discuss its codification. The question was referred to the Sixth

[22] S. Ekpo, "Jurisdictional Immunities of the State (Germany v. Italy): The Debate over State Immunity and Jus Cogens Norms, *Queen Mary Law Journal*, 8, 2017, 164.
[23] *Ibid*, 163.
[24] J. C. Barker, *op. cit*, 202.

Committee, but it never considered it.[25] "The failure of the Convention to expressly exclude *jus cogens* norms from its coverage could potentially result in regressive development of international law" is the view of one of the authors that shows us the diverse understanding of this topic.[26] When the UN Convention was adopted in 2004, several states, such as Finland and Norway, had made declarations in which they said that the Convention is without prejudice to any future international development in protecting human rights. These declarations practically means that the Convention will never be able to have a full-fledged effect. It shows us that there is no uniformity in the application of the Convention.[27]

If we look at how the UN Convention is written (by providing a general rule of immunity and enumerating the exceptions), we can assume that States will be immune when there are violations of *jus cogens* norms. The Convention should be interpreted to exclude criminal proceeding from the Ad Hoc Committee's understanding that the General Assembly supported. This might have a regressive effect on the development of international law as a whole. The reason for that is this would mean that immunity would be available in civil proceedings but not in criminal proceedings, even though they both deal with the violations of *jus cogens* norms. This approach is not consistent with the rationale of state immunity. The application of immunity was always decided based on the nature or the purpose of the act, not the type of proceeding involved.[28]

However, what are the *jus cogens* norms? The *jus cogens* norms are also known as the peremptory norms, and those are the norms that are important for the international community as a whole and the public order. Every state has got to respect and follow them. Among the others, the function of *jus cogens* norms is to prevent impunity for severe breaches of human rights. The primacy of *jus cogens* norms is now widely accepted.

On the other hand, some authors support the view that the *jus cogens* norms deal with the substantive issue, while the state immunity is based on procedural norms. The fact that a norm is peremptory does not mean that the forum state must provide the victim remedies and reparations for acts committed abroad and by the foreign state. Orakhelashvili is one of the authors who do not

[25] L. McGregor, "State Immunity and Jus Cogens", *The International and Comparative Law Quarterly*, Vol. 55, No. 2, 2006, 437.
[26] *Ibid.*
[27] A. Orakhelashvili, "Treaties on state immunity: the 1972 and 2004 Conventions", chapter in A. Orakhelashvili (Ed.) Research *Handbook on Jurisdiction Immunities in International Law*, Edward Elgar Publishing, Cheltenham, UK, 2015, 281.
[28] L. McGregor, *op. cit*, 444.

accept this kind of distinction to help this debate. One of the reasons is that international law does not recognise any clear distinction between procedural and substantive norms. There are no established criteria for distinction. The principal aim of the *jus cogens* norms is to impact the legal consequences of the breach of the specific peremptory norms; it is not limited to the substantive regulation. Also, immunity has a procedural character that does not prevent criminal proceedings for *jus cogens* crimes. It is accepted that it can prevent in civil, but not in criminal proceedings, but this solution's reasons are not clear. Many authors are supporters of the idea of spreading it on civil cases as well.

Additionally, it is widely accepted that torture, war crimes and similar conduct are not seen as acts *iure Imperii*, and therefore, the state is not immune when it comes to them. Finally, if this theory is accepted, then it will lead to impunity. All these arguments conclude that the perception of immunity as a procedural norm that is not affected by the substantive *jus cogens* norms is not consistent.[29]

The discussion about whether there should exist an exception on state immunity based on human rights comes from national litigation instances. There were several attempts made for national courts to interpret the national statutes so that they do not provide immunity for human rights violations. Under the restrictive theory, human rights violations cannot be perceived as sovereign act but as private acts. Therefore, Orakhelashvili concludes that "it is a methodologically false approach to specifically require the existence of a separate and discrete human rights exception concerning acts that the restrictive doctrine already considers not to be immune.”[30]

5. CONCLUSION

Several times in this paper, the outcome of the International Law Commission's work was pointed out. Some authors impose the question of the existence of a set of rules for this topic and are there any other solutions. Hazel Fox had proposed several alternatives to the present rule of the State immunity. First of all, there is total abolition proposed by Professor Falk in 1964, but the reasons he enumerated have been solved through either national legislation or the Convention. Apart from him, professor Lauterpacht believed that the plea of

[29] A. Orakhelashvili, “State Immunity and Hierarchy of Norms: Why the House of Lords Got it Wrong”, *The European Journal of International Law*, Vol. 18, No. 5, 2007, 963-970.
[30] A. Orakhelashvili (2015a), 167.

forum non-conveniens would be a more flexible approach than State immunity and Greig in the late 1980s also favoured this approach. The second alternative is abolition and substitution by special regimes of immunities, which exists in the field of diplomatic immunity, but it is believed that it would not be possible for state immunity. The third one is abolition and substitution by a rule of deference based on an act of state and non-justiciability doctrines, and the final one is retention with the adoption of the UN Convention. The final one is the one that is currently adopted.[31]

When it comes to the questions related to state immunity, the International Law Commission has finished its study on State officials' immunity from the criminal jurisdiction of the national courts of other state in February 2020. The Secretary-General has recommended that the Council of Europe take the lead in adopting an instrument that would establish exceptions to State immunity in cases of serious human rights abuses in 2006. Amnesty International and Redress have called for an additional protocol to the UN Convention which would permit States to adjudicate in civil proceedings against a State regarding international crimes, such as genocide, war crimes, crimes against humanity and torture.

We can conclude that the UN Convention on Jurisdictional Immunity of States and their Property has limited applicability. There are very few states that expressed their participation in this critical topic. Any uniform vision is absent to the content of the Convention, which is demonstrated by the lack of uniform use of it by the national and international courts and the writings of the academics. We have seen that there are different, opposed rules on the question of human rights violations exception. We must keep in mind that these questions are highly political and, in a way, sensitive to the states. The fact that state immunity is political is one of the main reasons for the lack of more state-parties, in our opinion.

On the other hand, even though the human rights exception has recently been discussed thoroughly, it is only a doctrinal view. The state practice is not uniform, so we cannot conclude that the customary international law is formed. Our opinion is that the matter of the human rights violations exception is of the utmost importance for contemporary international law. It would help in fighting impunity and help the victims in their reparation and satisfaction. We are aware that it is not easy to form an exception as such. Therefore, we would suggest that the International Law Commission takes this task as a separate one, which would, hopefully, result in adopting a set of rules.

[31] H. Fox, *op.cit.*, 737-740.

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ИМУНИТЕТ ДРЖАВА У САВРЕМЕНОМ МЕЂУНАРОДНОМ ПРАВУ

Резиме

Савремено међународно право питањем имунитета држава бави се, осим код права људских права, на ограничен и опрезан начин, ако се уопште и њиме и бави. Конвенција УН о судском имунитету држава и њихове имовине усвојена је 2004. године и до данас је једина општа конвенција у овој области, али још увек није ступила на снагу. Не садржи изузетак да држава неће имати имунитет уколико се ради о кршењу људских права. Овај рад има за циљ да утврди да ли би такав изузетак требало укључити и какви су изгледи да до тога дође. Како би се проверила хипотеза да такав изузетак за сада неће бити прихваћен, анализирали смо релевантне конвенције и студије које је представила доктрина. Резултати показују да је неопходно укључити питање имунитета држава, али не у форми протокола, како неки аутори предлажу. На основу овога, Комисија за међународно право би требало да у будућности омогући и спроведе истраживање овог комплексног питања.

Кључне речи: имунитет државе, савремено међународно право, кршење људских права