

[SCHOOL OF LAW, QUEEN'S UNIVERSITY BELFAST]

The Human Rights Challenge to Immunity in International Law

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ABSTRACT

The aim in this Thesis is to present a detailed analysis of the immunity *versus* impunity debate within the framework of a human rights-based challenge to immunity. There are two essential interests in international law: preserving the immunity of States and those who represent them, such as Heads of State and diplomatic agents; and protecting fundamental human rights which fall within the scope of peremptory norms of general international law. Several cases which are recently before international and national courts demonstrate that the protection of fundamental human rights is a significant challenge to the immunities.

This Thesis focuses on the tension between the protection of fundamental human rights on the one hand, and the bestowal of immunity on the State and its representatives on the other. It examines the extent to which the tension affects the sovereign structure of the State, and seeks to ascertain how these immunities can be gradually eroded, if not fully abolished, in order to maintain full protection of fundamental human rights under international law. It argues that immunity should not equate to impunity when violations of fundamental human rights recognised as *jus cogens* norms are committed by States, Heads of State, or diplomatic agents. To make the case, this Thesis sets out the organic structures of the concepts of sovereignty and fundamental human rights. It then examines the human rights-based challenge to immunity in three instances: State immunity, Head of State immunity, and diplomatic immunity. This Thesis, in so doing, puts the notion of fundamental human rights at the centre of the immunity *versus* impunity debate; and, the transition from a State-centric system to a human-centric system under the microscope.

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1 INTRODUCTION AND GENERAL BACKGROUND

1.1 INTRODUCTION

The development of international human rights as a distinct and unique field within the boundaries of public international law has become the significant and notable battleground regarding challenges to jurisdictional immunities. These challenges have appeared within the areas of State immunity, Head of State immunity, and diplomatic immunity. This Thesis's title is formulated to evoke a main research question:

Research Question:

Does immunity equate to impunity when violations of fundamental human rights recognised as peremptory norms of general international law are committed by States, Heads of State, and diplomatic agents?

This Thesis is an enquiry into the tensions that exist between the protection of fundamental human rights on the one hand and the bestowal of immunities on States and their representatives on the other. A number of cases that are currently before international and national courts demonstrate that the protection of fundamental human rights is a remarkable challenge to State, Head of State, and diplomatic immunities. There is an inevitable and irrefutable tension between human rights protection and the defence of States, Heads of State, and diplomatic agents as a consequence of the propounding of jurisdictional immunity. This Thesis considers the extent to which this tension affects the sovereign structure of the State, and seeks

to ascertain how these immunities can be chipped away if not abolished in order to ensure a fuller protection of fundamental human rights under international law.

This Thesis argues that the immunities of States, Heads of State, and diplomatic agents should be rescinded when they interfere with respect for fundamental human rights recognised as peremptory norms of general international law. In this Thesis, those immunities will be carefully differentiated from those identified largely in the legal literature as “absolute immunity” or “limited immunity” in relation to the protection of human rights. Because of the sensitive nature of the contradictions arising from this tension, this Thesis analyses the human rights challenge to immunities. The focal point of the Thesis is the assertion that immunity should not equate to impunity when violations of fundamental human rights are at stake. Namely, while the doctrine of State immunity should be maintained, this doctrine should no longer extend to circumstances where there has been a violation of fundamental human rights guaranteed by a peremptory norm of general international law. Therefore, this Thesis aims to argue that the viability and validity of immunity should not imply impunity by systematically analysing and examining the theory of sovereignty; the concept of international and fundamental human rights; the theory of immunity; recent case law; and State practice concerning violations of fundamental human rights.

1.2 BACKGROUND

International human rights law has developed considerably since the Second World War. The dramatic plight of the Second World War affected the international system in terms of generating new methods of international human rights advocacy and

brought about irreversible consequences for the international community. As Paul Gordon Lauren has stated, within ‘an extremely short period of historical time, the world has experienced a dramatic and radical change’ in the area of international human rights that ‘profoundly affects us today and will affect us in the future’.¹

The extra-judicial actions of both State and non-State actors have led a great many people to be tortured, raped, and exposed to other atrocities, in violation of international human rights norms. However, because of political considerations, the perpetrators of these cases have mostly benefited from immunities.² Mario Bettati has emphasised that until the middle of the Twentieth Century, States and their agents ‘had succeeded in juridically protecting their free will; or more precisely, their free wilfulness’.³ However, in the contemporary world order, States and their representatives cannot ignore international human rights norms under the pretext of absolute or exclusive sovereignty. In fact, they neither completely reject international human rights norms nor precisely abide by international human rights law. As Jean Allain rightly states, at the international level, ‘the nature of the anarchic legal system allows states much more leeway to construct human rights in their image as opposed to those they are meant to protect—the individual’.⁴ Henry T. King, Jr. also

¹ Paul Gordon Lauren, ‘From Impunity to Accountability: Forces of Transformation and The Changing International Human Rights Context’ in Ramesh Chandra Thakur and Petrus Adrianus Maria Malcontent (eds), *From Sovereign Impunity to International Accountability: The Search for Justice in a World of States* (United Nations University Press 2004) 15.

² M Cherif Bassiouni, ‘Combating Impunity for International Crimes’ (2000) 71 *University of Colorado Law Review* 409.

³ Mario Bettati, ‘The International Community and Limitations of Sovereignty’ in Paul Ricoeur (ed), *Tolerance Between Intolerance and the Intolerable* (Berghahn Books 1996) 91.

⁴ Jean Allain, ‘International Human Rights Law in Theory and Practice’ in Koen De Feyter and George Pavlakos (eds), *The Tension Between Group Rights and Human Rights: A Multidisciplinary Approach*, vol 13 (Hart Publishing 2008) 271.

has stated that the ‘belief that sovereignty brings security is an illusion in today’s world’.⁵

There are two fundamental interests in international law: State interests and international human rights interests. Both State and international human rights interests have become crucial concepts in the international system. The relationship between State interests and international human rights interests has to be properly balanced. Jean Allain has noted that for ‘the international community of states, human rights were to be accorded as a type of a pressure-valve that could regulate the extent to which individuals might be protected from the abuse of states’.⁶ States became the primary actors in the international legal system. Louis Henkin notes that human rights ‘have revolutionized the international system and international law. The law now reflects human values in addition to state values, or allows human values to modify state values. We have seen a revolution in the content of international law to include a growing field directly relevant to the lives of five billion people, every one of them [sic] now a subject of international law’.⁷ Since immunity derives from the sovereign right of the State, there will inevitably be a conflict of interest between the State’s right to immunity and citizens’ right to claim or assert justice. In this sense, the concept of immunity becomes an important subject of analysis in the context of the aforementioned challenge.

Sovereign immunity, which derives from the sovereign rights of States, is based on a common law principle. It is derived from English jurisprudence which assumes that “the King can do no wrong”. Sovereign immunity appears to be the

⁵ Henry T Jr King, ‘The Limitations of Sovereignty from Nuremberg to Sarajevo’ (1994) 20 Canada – United States Law Journal 173.

⁶ Allain, ‘International Human Rights Law in Theory and Practice’ (n 4) 271.

⁷ Louis Henkin, ‘Human Rights and State Sovereignty’ (1996) 25 Georgia Journal of International and Comparative Law 31, 43–44.

exclusive jurisdiction of the State and its own territory; therefore, a foreign State needs an express licence to exercise its national jurisdiction.⁸ Sovereign immunity becomes a crucial interest for the State and its representatives.

International law is concerned both with protecting immunity from foreign jurisdiction and with preventing violations of fundamental human rights. Sovereign immunity is best read not as a particular rule of customary international law, but as a legally-binding principle. If States and their representatives are not bound by detailed obligations of treaties, they are free to frame and designate the range of immunity within their domestic law according to their interpretation of the ambits determined by principles of international law. Under the principle of immunity, international courts ‘may only scrutinize whether a state has violated the boundaries set by international law that a state must observe when balancing its territorial sovereignty and the sovereign independence of foreign states. These limits of international law restrict not only the freedom of states to grant, but also their freedom to deny, sovereign immunity to foreign states within their jurisdiction’.⁹

The principle of immunity is a considerable obstruction to the enforcement of international law. However, lately, there has been a growing inclination for a human rights-oriented approach in international law to question this fundamental element of statecraft. After the Second World War, one of the most important developments in international law was the leverage of human rights norms in approaching issues ‘traditionally dealt with through the principle of non-intervention in the domestic jurisdiction of states’.¹⁰ This evolution towards a human rights-oriented approach has

⁸ Ian Brownlie, *Principles of Public International Law* (7th edn, Oxford University Press 2008) 323.

⁹ Jasper Finke, ‘Sovereign Immunity: Rule, Comity or Something Else?’ (2010) 21 *European Journal of International Law* 853, 853.

¹⁰ RE Vinuesa, ‘Interface, Correspondence and Convergence of Human Rights and International Humanitarian Law’ (1998) 1 *Yearbook of International Humanitarian Law* 108.

been clearly emerging and marked out in the *Tadic* case by the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia, where it noted that a ‘State-sovereignty-oriented approach has been gradually supplanted by a human-being-oriented approach [...] the distinction between interstate wars and civil wars is losing its validity as far as human beings are concerned’.¹¹ Likewise Judge Antônio Cançado Trindade also emphasised that grave ‘breaches of human rights and of international humanitarian law, amounting to international crimes, are anti-juridical acts, are breaches of *jus cogens*, that cannot simply be removed or thrown into oblivion’ by reliance on immunities.¹²

1.3 FILLING THE GAP IN KNOWLEDGE

The issue of whether the protection of fundamental human rights recognised as *jus cogens*¹³ norm prevails over the State, Heads of State, and diplomatic immunities, still exists in the contemporary international order. As a matter of course, the relationship between human rights interests and State interests is quite contentious, and the tension between the two remains far from settled.

¹¹ *Prosecutor v Dusko Tadic (Appeal Judgement)* [1999] IT-94-1-A (International Criminal Tribunal for the former Yugoslavia).

¹² Judge Antônio Augusto Cançado Trindade, *The Construction of a Humanized International Law: A Collection of Individual Opinions (1991-2013)* (Brill Nijhoff and Hotei Publishing 2015) 1519.

¹³ For the concept of *jus cogens* see Section 5.2 of Chapter 2. *Jus cogens* norms are peremptory norms of general international law from which no derogation is allowed. Jean Allain states that: ‘In no circumstance may a State legally transgress the norms of *jus cogens*, for they are considered norms so essential to the international system that their breach places the very existence of *the international system* in question’. Jean Allain, ‘The Jus Cogens Nature of Non-Refoulement’ (2002) 13 *International Journal of Refugee Law* 533, 535 [emphasis added]. The concept of *jus cogens* norms was also well voiced by Jean Allain in *The Law and Slavery: Prohibiting Human Exploitation* as follows: ‘*jus cogens* is a norm which in a domestic setting would be considered as having strict liability; that is no justification can excuse a violation, and thus no derogation is permitted. A peremptory norm is a custom-based *norm* and requires through State practice and *opinio juris* not only that States recognise that a practice would be counter to a legal norm but also that the practice amounts to a legal norm for which no derogation is permitted’. Jean Allain, *The Law and Slavery: Prohibiting Human Exploitation* (BRILL 2015) 235 [emphasis added].

Although international society tends to favour the protection of human rights, the literature has emphasised in the main the procedural application of the principle of immunity, while the problem of the substantive application of the prohibition of fundamental human rights violations has not been adequately explored.

Further, the discussions over immunity *versus* impunity in cases of violations of fundamental human rights are not yet fully fledged, from the perspective of academic discourse. The issue of the superiority of fundamental human rights which are recognised as *jus cogens* norms over the procedural application of the immunity principle is still at an embryonic stage, since those fundamental human rights have an organic structure. Therefore, the relationship between State and human rights interests requires further study and a broader focus in order to drive the point home. In this sense, assessing the immunity principle and characterising the nature of human rights are critical conceptualisations for approaching this challenge. Therefore, this Thesis aims to present a detailed analysis of the immunity *versus* impunity debate within the framework of a human rights-based challenge to immunities. In achieving this aim, this Thesis delineates the organic structure of the concept of sovereignty and human rights. It then examines the human rights-based challenge from three perspectives: State immunity, Head of State immunity, and diplomatic immunity. In so doing, this study puts the concept of fundamental human rights at the centre of the immunity *versus* impunity debate; and, the transition from a State-centric system to a human-centric system under the microscope.

This Thesis draws from both international law and domestic case-law. In particular, it considers issue, of diplomatic immunity *versus* impunity for fundamental human rights violations primarily in reference to the decisions of

domestic courts. Domestic courts necessarily serve by default as agents of the international judicial order.¹⁴

With respect to the importance of their decisions, Lauterpacht underscored the foundational element of international law is the consent of States. Decisions of domestic courts thus assist by creating both *opinio juris* and State practice which establishes customary international law.¹⁵ Furthermore, the decisions of the domestic courts may be deemed important for future developments in international law. Domestic courts become an important part of the international legal system for developing or changing norms of international law as they are seemingly endowed with an international legal function and may be regarded as the natural or first-instance judges of international law.¹⁶ For example, in the case of *Germany v Italy*, the issue of respect due to State immunity originates in the decisions of Italian and Greek domestic courts to reject Germany's claim to State immunity for serious human rights violations during the Second World War.¹⁷ In this case, the International Court of Justice's decision contributes to the development of international law by offering 'an interpretation of the law contrary to that proffered by the Italian courts'.¹⁸ Therefore, it should be noted that domestic courts have a substantial mission in judicial evolution and development of international law.

¹⁴ Richard Falk, 'The Role of Domestic Courts in the International Legal Order' (1964) 39 *Indiana Law Journal* 429, 436.

¹⁵ Hersch Lauterpacht, 'Decisions of Municipal Courts as a Source of International Law' (1929) 10 *British Yearbook of International Law* 65, 80; see also Rosalyn Higgins, *Problems and Process: International Law and How We Use It* (Clarendon Press 1994) 205–218.

¹⁶ See Antonios Tzanakopoulos, 'Domestic Courts in International Law: The International Judicial Function of National Courts' (2011) 34 *Loyola of Los Angeles International and Comparative Law Review* 133, 159.

¹⁷ *Jurisdictional Immunities of the State (Germany v Italy: Greece Intervening)*, Judgment [2012] ICJ Rep. For an assessment of this case in relation to State immunity, see Chapter 4 Section 5.2. *Ferrini v Federal Republic of Germany*, Appeal Decision [2004] Supreme Court of Cassation 5044/4, IT 2004 [ILDC] 19. *Prefecture of Voiotia v Federal Republic of Germany (Distomo Massacre Case)* [2000] 129 ILR 513 (Greece - Court of Cassation).

¹⁸ Tzanakopoulos (n 16) 162.

With regards to the literature, this Thesis draws from and/or builds on the distinguished studies and works by Hazel Fox, Martti Koskenniemi, Richard Falk, James Crawford, Alexander Orakhelashvili and Antonio Cançado Trindade.

This Thesis builds upon the works of Fox, who, in the main, explains the sources of the law of State immunity and the contemporary international law on State immunity. Fox also provides comprehensive discussion of how the principle of State immunity is evaluated at both the international and the national level. In addition to the general concept of State immunity, Fox specifically dwells on Heads of State immunity and immunities of other recognised State representatives.¹⁹

Regarding the controversial sovereignty debates, Koskenniemi compares the approaches of Carl Schmitt and Hans Kelsen, with particular regard to the relationship between authority and law within the scope of State sovereignty. Schmitt's idea of political sovereignty and Kelsen's hierarchical perspective of legal order are described by Koskenniemi.²⁰ Additionally, Koskenniemi offers important insights in respect of the conceptualisations of sovereignty.²¹ Crawford, for his part, focuses on the legal value of sovereignty and specifically underscores both the defeasible and the protected character of sovereignty in the international system. Crawford finds the so-called "death of sovereignty" to be an exaggerated metaphor, because 'not only is the state free to exercise its sovereignty; the protection of its

¹⁹ Hazel Fox QC and Philippa Webb, *The Law of State Immunity* (3rd edn, Oxford University Press 2013); Hazel Fox, 'International Law and Restraints on the Exercise of Jurisdiction by National Courts of States' in Malcolm Evans (ed), *International Law* (3rd edn, Oxford University Press 2010).

²⁰ Martti Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (Cambridge University Press 2006); Martti Koskenniemi, 'Hierarchy in International Law: A Sketch' (1997) 8 *European Journal of International Law* 566; Martti Koskenniemi, 'The Politics of International Law' (1990) 1 *European Journal of International Law* 4.

²¹ Martti Koskenniemi, 'What Use for Sovereignty Today?' (2011) 1 *Asian Journal of International Law* 61; Martti Koskenniemi, 'The Future of Statehood' (1991) 32 *Harvard International Law Journal* 397; Martti Koskenniemi, 'The Wonderful Artificiality of States' (1994) 88 *Proceedings of the Annual Meeting (American Society of International Law)* 22; Martti Koskenniemi, 'International Law in the World of Ideas' in James Crawford and Martti Koskenniemi (eds), *The Cambridge Companion to International Law* (Cambridge University Press 2012).

interests practically requires it'.²² The works and assessments of Falk are relevant to this Thesis due to their engagement with the growing tension between human rights and State sovereignty. Falk explains the fundamental points of the Westphalian system. He also guides this research by casting light on the relationship between international human rights law and the sovereign rights of the State.²³ His work reveals the importance of analysing the evolution of the concept of sovereignty as a means of exploring the growing tension between State sovereignty and human rights. Doing so paves the way for a human rights-based challenge to immunities, since the norm of immunity is indeed derived from the concept of sovereignty.

Regarding the issue of human rights and *jus cogens* (peremptory) norms, most leading studies on *jus cogens* norms include various arguments and analyses of the hierarchical structure among human rights and *jus cogens* norms.²⁴ The leading

²² James Crawford, 'Sovereignty as a Legal Value' in James Crawford and Martti Koskenniemi (eds), *The Cambridge Companion to International Law* (Cambridge University Press 2012) 132.

²³ Richard Falk, 'The Post-Westphalia Enigma' in Björn Hettne and Bertil Odén (eds), *Global governance in the 21st century: alternative perspectives on world order* (Almqvist & Wiksell International 2002); Richard Falk, *Human Rights Horizons: The Pursuit of Justice in a Globalizing World* (Routledge 2000); Richard Falk, 'Revisiting Westphalia, Discovering Post-Westphalia' (2002) 6 *The Journal of Ethics* 311; Richard Falk, *Law in an Emerging Global Village: A Post-Westphalian Perspective* (Transnational Publishers 1998); Richard Falk, *Human Rights and State Sovereignty* (Holmes & Meier Publishers 1981). For a historical review of the concept of sovereignty under international law, see also Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge University Press 2007); Antony Anghie, 'Rethinking Sovereignty in International Law' (2009) 5 *Annual Review of Law and Social Science* 291.

²⁴ Michael Byers, 'Conceptualising the Relationship between Jus Cogens and Erga Omnes Rules' (1997) 66 *Nordic Journal of International Law* 211; Anthony D'Amato, 'It's a Bird, It's a Plane, It's Jus Cogens' (1990) 6 *Connecticut Journal of International Law* 1; Alfred Verdross, 'Jus Dispositivum and Jus Cogens in International Law' (1966) 60 *American Journal of International Law* 55; Erika De Wet, 'Jus Cogens and Obligations Erga Omnes' in Dinah Shelton (ed), *The Oxford Handbook of International Human Rights Law* (Oxford University Press 2013); Karen Parker and Lyn Beth Neylon, 'Jus Cogens: Compelling the Law of Human Rights' (1989) 12 *Hastings International and Comparative Law Review* 411; Christian Tomuschat, 'Reconceptualizing the Debate on Jus Cogens and Obligations Erga Omnes: Concluding Observations' in Christian Tomuschat and Jean Marc Thouvenin (eds), *The Fundamental Rules of the International Legal Order: Jus Cogens and Obligations Erga Omnes* (Martinus Nijhoff Publishers 2006); Christian J Tams, *Enforcing Obligations Erga Omnes in International Law* (Cambridge University Press 2005); Karl Zemanek, 'New Trends in the Enforcement of Erga Omnes Obligations' (2000) 4 *Max Planck Yearbook of United Nations Law* 1; Dinah Shelton, 'Normative Hierarchy in International Law' (2006) 100 *American Journal of International Law* 291; M Cherif Bassiouni, 'International Crimes: Jus Cogens and Obligatio Erga Omnes' (1996) 59 *Law and Contemporary Problems* 63; Andrea Bianchi, 'Human Rights and the Magic of Jus Cogens' (2008) 19 *European Journal of International Law* 491; Lee M Caplan, 'State Immunity, Human Rights, and Jus Cogens: A Critique of the Normative Hierarchy

studies and observations that concentrate on the superior nature of *jus cogens* norms and characterisation of fundamental human rights recognised as *jus cogens* norms are introduced by Crawford, Orakhelashvili, Lauri Hannikainen, Vera Gowlland-Debbas and Koskenniemi. Hannikainen provides an elaborate assessment of the scope and characterisation of peremptory norms of general international law. Hannikainen, Orakhelashvili and Gowlland-Debbas clarify the criteria for peremptory norms and how to determine which norms of general international law can be recognised as peremptory. They also evaluate the historic aspect and progress of *jus cogens* norms. Hannikainen particularly focuses on fundamental human rights which fall within the scope of peremptory norms of general international law and thus evaluates violations of fundamental human rights as part of *jus cogens* norms. Orakhelashvili additionally argues that violations of peremptory norms cannot be accepted as sovereign functions of States.

By analysing the legal effects of *jus cogens* norms, the works of Orakhelashvili assist this Thesis in its examination of the effect of *jus cogens* norms in the law of treaties. His works also guide this Thesis in its conception and identification of *jus cogens* norms. Gowlland-Debbas analyses violations of basic human rights which fall within the scope of *jus cogens* norms on the basis of milestone decisions and advisory opinions by international courts. Gowlland-Debbas also proposes that the concepts of *jus cogens* norms and *erga omnes* obligations do not derive from a particular and definite source, but from the recognition by the entire international community of their prevailing character.²⁵ Crawford and

Theory' (2003) 97 American Journal of International Law 741; Christine Chinkin, 'Jus Cogens, Article 103 of the UN Charter and Other Hierarchical Techniques of Conflict Solution' (2006) 17 Finnish Yearbook of International Law 63.

²⁵ Lauri Hannikainen, *Peremptory Norms (Jus Cogens) in International Law: Historical Development, Criteria, Present Status* (Finnish Lawyers' Publishing Company 1988); Alexander Orakhelashvili, *Peremptory Norms in International Law* (Oxford University Press 2006); Alexander Orakhelashvili,

Koskenniemi particularly discuss and assess a context-transcending conception of *jus cogens* beyond the Vienna Convention and thereby evaluate emergent and extant violations of fundamental human rights (duties and obligations) within the scope of obligations *erga omnes*.²⁶

From the juristic perspective, it must be noted that Cançado Trindade, in his opinions to case law, distinguishes between immunity and impunity in cases of transgressions of peremptory norms under general international law.²⁷

Although their contributions to the discussion are important, there is, as yet, little research that has assessed the relationship between immunity and impunity from the perspective of fundamental human rights protection, further, with respect to the protection of fundamental human rights against impunity current law is still vague and unsettled. Failure to assess this particular relationship engenders an inadequate and unbalanced examination of the human rights-based challenge to immunities. The works of Xiaodong Yang and Jürgen Bröhmer provide a comprehensive introduction to the law of State immunity and explore the history of State immunity with the development of restrictive immunity; the works of Jürgen

‘State Immunity and Hierarchy of Norms: Why the House of Lords Got It Wrong’ (2007) 18 *European Journal of International Law* 955; Alexander Orakhelashvili, ‘Immunities of State Officials, International Crimes, and Foreign Domestic Courts: A Reply to Dapo Akande and Sangeeta Shah’ (2011) 22 *European Journal of International Law* 849; Vera Gowlland-Debbas, ‘Judicial Insights into the Fundamental Values and Interests of the International Community’ in A Sam Muller, David Raič and JM Thuránszky (eds), *The International Court of Justice: Its Future Role After Fifty Years* (Martinus Nijhoff Publishers 1997); see also Giorgio Gaja, *Jus Cogens beyond the Vienna Convention*, vol 172 (Collected Courses of the Hague Academy of International Law 1981); Byers (n 24).

²⁶ James Crawford, *Multilateral Rights and Obligations in International Law*, vol 319 (Collected Courses of the Hague Academy of International Law 2006); James Crawford, *The International Law Commission’s Articles on State Responsibility: Introduction, Text and Commentaries* (Cambridge University Press 2002); United Nations General Assembly, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law: Report of the Study Group of the International Law Commission Finalized by Martti Koskenniemi* (2006).

²⁷ Trindade (n 12); Antônio Augusto Cançado Trindade, *International Law for Humankind: Towards a New Jus Gentium* (2nd edn, Martinus Nijhoff Publishers 2013); *Jurisdictional Immunities of the State (Germany v. Italy: Greece Intervening)*, Judgment (n 17) [Dissenting Opinion of Judge Trindade].

Bröhmer even specifically explore the relationship between immunities and human rights. Nevertheless, both authors fall short of explaining the *jus cogens* nature of human rights as a challenge to immunities and do not sufficiently highlight the distinction between immunity and impunity for transgressions of peremptory norms of general international law.²⁸ For example, from an international perspective, although Bröhmer's *State Immunity and the Violation of Human Rights*²⁹ is the first monograph on the issue of human rights and State immunity, because it does not provide a detailed analysis of diplomatic and Head of State immunity in cases of fundamental human rights violations and fails to explain the source of immunity or the *jus cogens* nature of human rights, it falls short of producing an assessment and discussion of the subject of human rights-based challenge to immunities. In her work, Naomi Roht-Arriaza addresses the tension between victims of human rights violations and the problem of impunity for the perpetrators of those violations.³⁰ However, Roht-Arriaza deals with this contentious issue from the standpoint of the transition from repressive regimes to relatively more democratic systems on the basis of State structures. Further, since her book is an edited volume containing the work of several contributors, it falls short of introducing an analytical platform for engaging with the stormy issue of impunity for perpetrators of human rights violations. In addition, these works do not specifically produce a normative analysis of the human rights challenge to immunities under general international law.

²⁸ Xiaodong Yang, *State Immunity in International Law* (Cambridge University Press 2012); Xiaodong Yang, 'State Immunity in the European Court of Human Rights: Reaffirmations and Misconceptions' (2004) 74 *British Yearbook of International Law* 333; Jürgen Bröhmer, *State Immunity and the Violation of Human Rights* (Martinus Nijhoff Publishers 1997); Jürgen Bröhmer, 'Diplomatic Immunity, Head of State Immunity, State Immunity: Misconceptions of a Notorious Human Rights Violator' (1999) 12 *Leiden Journal of International Law* 361; Jürgen Bröhmer, 'State Immunity and Sovereign Bonds' in Anne Peters and others (eds), *Immunities in the Age of Global Constitutionalism* (Brill/Martinus Nijhoff Publishers 2015).

²⁹ Bröhmer, *State Immunity and the Violation of Human Rights* (n 28).

³⁰ Naomi Roht-Arriaza (ed), *Impunity and Human Rights in International Law and Practice* (Oxford University Press 1995).

These inadequacies preclude detailed research on the subject of immunity *versus* impunity in cases of violations of fundamental human rights recognised as *jus cogens* norms. As was seen above, the literature is dominated by studies which discuss the relationship between *jus cogens* and human rights or immunity questions in relation to violations of human rights. However, there is a lack of any in-depth work which correlates a discussion of immunity *versus* impunity with a challenge to immunities based on human rights of a *jus cogens* nature.

There are few studies which deeply consider and examine the challenges posed to State, Head of State and diplomatic immunity, by those human rights which fall within the domain of *jus cogens* norms. This Thesis aims to address this deficiency in the literature by assessing various international and national case-law, legal reports, international conventions and related documents. It also fills this gap by focusing on the principal interests in international law: preserving the immunity of States and those who represent them and protecting fundamental human rights recognised as *jus cogens*. In so doing, this Thesis examines the distinction between immunity and impunity in terms of States, Heads of State, and diplomatic agents, when transgressions of peremptory norms are at stake. This Thesis therefore addresses the self-evident contradiction between the claim of absolute immunity by States, Heads of State, and diplomatic agents before a judicial body, and the claim of the *jus cogens* character of fundamental human rights by the victims of the implementation of that absolute immunity. To address this contradiction, this study applies Kelsen's understanding of the law as a hierarchical perspective of legal order in order to demonstrate the unquestioned superiority of peremptory norms of general international law over all other norms. This study therefore illustrates the contentious issue on immunity *versus* impunity when fundamental human rights which have *jus*

cogens character are transgressed. It seeks to differentiate between immunity and impunity and also to determine how the hierarchical framework can be established between *jus cogens* nature human rights and the principle of immunity.

1.4 STRUCTURE OF THE THESIS

This Thesis considers the tension between the bestowal of immunities and the protection of fundamental human rights by exploring the distinction between immunity and impunity in cases of violations of fundamental human rights. This Thesis is divided into the following chapters. After this Introduction, Chapter 2 explores the concept of State sovereignty. It further demonstrates how international law imposes on States the obligation to protect fundamental human rights, and how the State-oriented approach has gradually given way to a human rights-oriented approach. Furthermore, it examines fundamental human rights, which fall within the domain of peremptory norms of general international law. The main purpose of the Chapter is to provide a theoretical framework for immunities, as the immunity principle is derived from the concept of State supremacy and from the need to have effective functioning inter-State relations. Thus Chapter 2 provides and explains the link between State sovereignty, immunities, and fundamental human rights recognised as *jus cogens*.

Sovereignty has always been a controversial issue in international law, as it reflects the paradox of power to enact laws and the law which limits that power.³¹ Although State sovereignty is a contentious topic in international law and, as such, it

³¹ Graham Burchell, Colin Gordon and Peter Miller (eds), *The Foucault Effect: Studies in Governmentality* (1st edn, University of Chicago Press 1991) 87–104.

is often described in vague and conflicting terms, it nevertheless remains the main structure of, and the intellectual framework for, international law. Through analysis of the transition from Westphalian to post-Westphalian sovereignty, and by a reappraisal of the relationship between State sovereignty and human rights, Chapter 2 considers the contradictions between State sovereignty and international law and provides a theoretical framework for immunities. Noting that the principle of sovereign immunity is derived from the concept of State supremacy and the need for smooth-functioning inter-state relations,³² the Chapter also explores the question of how to protect human rights under international law as part of its analysis of the relationship between human rights and State sovereignty. To take this task in hand, this Chapter observes the evolution of the concept of State sovereignty, particularly in the post-World War II period, in parallel with the development of international human rights, and further examines *jus cogens* human rights.

Chapter 3 evaluates immunities within the framework of international law. Towards that end, the legal basis for the concept of immunity, and the distinction between immunity and impunity, are explained and analysed. The Chapter also explores the purpose of immunity under international law in terms of its role in international relations and seeks to determine why immunity is perceived as an inalienable right for States, Heads of State, and diplomatic agents. The aim of Chapter 3 is to argue that immunity does not always amount to impunity in international law. In other words, immunity from prosecution does not necessarily mean absolution from liability for violations of fundamental human rights. It should

³² McGregor states that if ‘immunity derives from sovereignty, its meaning, extent, and impact must also be contingent on the current scope of sovereignty. Yet, by simply restating the origins of immunity in sovereignty, courts have failed to acknowledge the restrictions on the scope of immunity caused by the evolution of sovereignty over time’. Lorna McGregor, ‘Torture and State Immunity: Deflecting Impunity, Distorting Sovereignty’ (2007) 18 *European Journal of International Law* 903, 916.

be noted, once more, that the doctrine of immunity should not be advocated if it leads to violations of fundamental human rights protected and guaranteed by a *jus cogens* norm.

Following the approach of the Chapter 3, the following chapters engage respectively with State immunity (Chapter 4), Head of State immunity (Chapter 5), and diplomatic immunity (Chapter 6). The central aim of these chapters is to examine the distinction between immunity and impunity based on the decisions of international and national courts in cases involving violations of fundamental human rights.

For its part, Chapter 4 explores the debate over State immunity *versus* State impunity in cases of violations of fundamental human rights. The concept of immunities has a long history under international law.³³ These immunities are required whenever a ruler or an organisation has been attributed a public duty under the requirements of international law. Even before ‘the establishment of modern sovereign States, it was recognised that if State-like entities were effectively to interact in commercial, diplomatic and other fields, there was a need for a formula ensuring their official representatives freedom from’³⁴ proceedings in the foreign State. Despite its deep roots in history and the legal or natural necessity for jurisdictional immunities, the law of State immunity is not settled under

³³ Linda S Frey and Marsha L Frey, *The History of Diplomatic Immunity* (Ohio State University Press 1999); Grant V McClanahan, *Diplomatic Immunity: Principles, Practices, Problems* (C Hurst & Co Publishers 1989); Montell Ogdon, *Juridical Bases of Diplomatic Immunity: A Study in the Origin, Growth and Purpose of the Law* (John Byrne & Co 1936).

³⁴ Ilias Bantekas and Susan Nash, *International Criminal Law* (2nd edn, Cavendish Publishing 2003) 165.

contemporary international law; in other words, the ‘law of State immunity is not static’.³⁵

Chapter 4 analyses State immunity with regard to customary international law. It conducts a general examination of State immunity under international law, charting its progress and explaining its rise within the international order and offers new considerations as to the basis of State immunity. Additionally, this Chapter explores the transition from absolute to restrictive immunity with reference to the increasing tension between State immunity and human rights.

States are vested with coercive powers and enjoy jurisdictional immunity in regard to their own property from the proceedings of other States’ courts³⁶; therefore, ‘a State cannot be impleaded in the courts of another State without its express consent’.³⁷ On this point, Bankas states that the ‘State is a means to an end, hence State immunity exists as a veritable consequence of sovereignty’.³⁸ Those consequences are found in the general principle of foreign State immunity, first expression in the *Schooner Exchange v McFaddon*³⁹ case of 1812. This historic decision of Chief Justice Marshall of the United States Supreme Court formulated sovereign immunity thus:

This perfect equality and absolute independence of sovereigns, and this common interest impelling them to mutual intercourse, and an exchange of good offices with each other, have given rise to a class of cases in which every sovereign is understood to waive the exercise of a part of that complete

³⁵ Fox QC and Webb (n 19) 3.

³⁶ Hersch Lauterpacht, *Recognition in International Law* (Cambridge University Press 2013).

³⁷ Ernest K Bankas, *The State Immunity Controversy in International Law: Private Suits Against Sovereign States in Domestic Courts* (Springer 2005) 37.

³⁸ *ibid.*

³⁹ *The Schooner Exchange v M’Faddon & Others* [1812] 11 US 116 3 L. Ed. 287 7 Cranch 116 (Supreme Court of the United States).

exclusive territorial jurisdiction, which has been stated to be the attribute of every nation.⁴⁰

The principle of State immunity creates an obstacle to suing foreign States in national courts.⁴¹ It finds its contemporary manifestation in the 2004 United Nations Convention on Jurisdictional Immunities of States and Their Property (Article 5), which states: ‘A State enjoys immunity, in respect of itself and its property, from the jurisdiction of the courts of another state’.⁴² The principle of State immunity is therefore crucial to the development of international law, because it applies to each nation State and therefore functions as a neutral way of ‘denying jurisdiction to States over the international administration of another State and diverting claims to settlement in the courts of that State’.⁴³

In considering the relationship between State sovereignty and State immunity, Chapter 4 introduces a different perspective on whether the concept of State sovereignty creates an obstacle to foreign investigation. In this context, an important question is what impact the clash between State interests and human rights has had on State immunity. To answer this question, this Chapter analysis both the human rights challenge to the State immunity, and re-examines the relationship between State sovereignty and State immunity.

Chapter 5 explores the tension between immunity and impunity, when violations of fundamental human rights are committed by Heads of State. With

⁴⁰ *ibid*; Biswanath Sen, *The Diplomat's Handbook of International Law and Practice* (3rd edn, Martinus Nijhoff Publishers 1965) 451.

⁴¹ Fox, ‘International Law and Restraints on the Exercise of Jurisdiction by National Courts of States’ (n 19).

⁴² Roger O’Keefe, Christian J Tams and Antonios Tzanakopoulos (eds), *The United Nations Convention on Jurisdictional Immunities of States and Their Property: A Commentary* (Oxford University Press 2013).

⁴³ Hazel Fox, ‘In Defence of State Immunity: Why the UN Convention on State Immunity Is Important’ (2006) 55 *International and Comparative Law Quarterly* 399, 405.

regard to jurisdictional immunity, a general rule of public international law is that ‘certain holders of high-ranking office in a State, such as the Head of State, Head of Government and Minister for Foreign Affairs, enjoy immunities from jurisdiction in other States, both civil and criminal’.⁴⁴ In international law, there is interest both in protecting the immunities of Heads of State from foreign jurisdictions, but also, in the protection of fundamental human rights. Giving Head of State immunity as a principle, international courts ‘may only scrutinize whether a [Head of] State has violated the boundaries set by international law that a [Head of] state must observe when balancing [the possessed] sovereignty and the sovereign independence of foreign States. These limits of international law restrict not only the freedom of States to grant, but also their freedom to deny head of state immunity’.⁴⁵

The development of international law has raised the question of whether Head of State immunity can prevail over protection of fundamental human rights. This question has been made a subject of litigation in the *Pinochet*⁴⁶ case before the United Kingdom House of Lords. This case not only raised the problem of Head of State immunity, but also embedded Head of State immunity in judicial and academic discourse. In the 1990s, the creation of *ad hoc* international criminal tribunals by the United Nations Security Council became a novel avenue for proceedings against a Head of State.

⁴⁴ *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium)* [2002] ICJ Rep [51].

⁴⁵ Jasper Finke, ‘Sovereign Immunity: Rule, Comity or Something Else?’ (2010) 21 *European Journal of International Law* 853, 877.

⁴⁶ *R v Bow Street Metropolitan Stipendiary Magistrate and Others, ex parte Pinochet Ugarte (No 1)* [1998] 4 All ER 897 (House of Lords); *R v Bow Street Metropolitan Stipendiary Magistrate and Others, ex parte Pinochet Ugarte (No 2)* [1999] 2 WLR 272 (House of Lords); *R v Bow Street Metropolitan Stipendiary Magistrate and Others, ex parte Pinochet Ugarte (No 3)* [2000] 1 AC 147 (House of Lords).

The political aspects of international society and the development process of international human rights have always influenced the implementation of Head of State immunity. As a consequence, Head of State immunity is a puzzling feature of international law. Chapter 5 traces the evolution of the concept of Head of State immunity as it applies under international law. Through analysis of statutes, treaties, and customary international law, the Chapter provides a background to, and rationale for, the practices of international courts. Additionally, it contributes to the debate over the extent to which international courts can interfere in immunities of Heads of States. Finally, Chapter 5 identifies and describes the legal basis of and rationale for Head of State immunity and considers the position of Head of State immunity in cases of violations of fundamental human rights.

Chapter 6, for its part, explores the question of whether the immunity of diplomatic agents leads to impunity when they are responsible for violations of fundamental human rights. Diplomatic immunity is traditionally deemed to be a fundamental principle of customary international law that ‘originated to protect representatives of foreign governments based abroad from retaliation in time of international conflicts’.⁴⁷ Furthermore, diplomatic immunity is a necessary principle in reinforcing and sustaining international relations. The International Court of Justice has emphasised its ‘cardinal importance for the maintenance of good relations between States in the interdependent world of today. There is no more fundamental prerequisite for the conduct of relations between States [...] than the inviolability of diplomatic envoys and embassies, so that throughout history nations of all creeds and

⁴⁷ Mitchell Ross, ‘Rethinking Diplomatic Immunity: A Review of Remedial Approaches to Address the Abuses of Diplomatic Privileges and Immunities’ (1989) 4 American University International Law Review 173, 173–174.

cultures have observed reciprocal obligations for that purpose'.⁴⁸ According to a study by Hazel Fox, diplomatic immunity is given '(i) as recognition of the sovereign independent status of the sending State and of the public nature of the acts which render them not subject to the jurisdiction of the receiving State; (ii) as protection to the diplomatic mission and staff to ensure their efficient performance of functions free from interference from the receiving State'.⁴⁹

The human rights challenge to diplomatic immunity is also discussed in Chapter 6. A brief overview of the concept of diplomacy serves as an introduction to a discussion of the immunities which diplomatic agents benefit from when abroad. The theoretical basis of diplomatic immunity, its historical development, and its codification process, will be considered in the context of an evaluation of diplomatic law.

Diplomatic law can be described as a bedrock of the modern international legal order.⁵⁰ So as to analyse contemporary issues regarding the relationship between diplomatic immunity and violations of fundamental human rights, the identification of diplomatic immunity under modern international law will be evaluated as well. By examining related cases and issues, Chapter 6 considers whether or not diplomatic immunities breach fundamental human rights. Abuses of such diplomatic immunities and privileges will also be discussed. Chapter 6 concludes by considering whether diplomatic immunity is superior to fundamental human rights in the event of a conflict between the two norms; and asserts that

⁴⁸ *Case Concerning United States Diplomatic and Consular Staff in Tehran (US v Iran)*, Judgment [1980] ICJ Rep [91].

⁴⁹ Fox QC and Webb (n 19) 580.

⁵⁰ Eileen Denza, *Diplomatic Law: Commentary on the Vienna Convention on Diplomatic Relations* (2nd edn, Oxford University Press 2004); see also, Kai Bruns, *A Cornerstone of Modern Diplomacy: Britain and the Negotiation of the 1961 Vienna Convention on Diplomatic Relations* (Bloomsbury Publishing 2014) 2–3.

absolute diplomatic immunity from legal proceedings is irreconcilable with international human rights law.

Finally, Chapter 7 brings together questions of jurisdictional immunity in relation to the protection of fundamental human rights, and summarises the argument that immunity does not equate to impunity when violations of fundamental human rights are at stake. As stated earlier, the doctrine of immunity should be kept. However, it should be no longer applied to situations where a violation of fundamental human rights recognised as a peremptory norm of general international law has occurred.

1.5 METHODOLOGY OF THE STUDY

The principal aim of this Thesis is to analyse contradictions between immunities and international human rights. The applied method of the study is doctrinal research, which involves analysis of both primary and secondary legislation / resources and reflection on their application and on relevant literature.⁵¹ Trischa Mann defined ‘doctrine’ as a ‘synthesis of various rules, principles, norms, interpretive guidelines and values. It explains, makes coherent or justifies a segment of the law as part of a larger system of law’.⁵² The term ‘doctrinal’ is correlated with the ‘doctrine of precedent - legal rules take on the quality of being doctrinal because they are not just casual or convenient norms, but because they are meant to be rules which apply consistently and which evolve organically’.⁵³ Therefore, doctrinal research is

⁵¹ P Chynoweth, ‘Legal Research’ in A Knight and L Ruddock (eds), *Advanced Research Methods in the Built Environment* (Wiley-Blackwell 2008).

⁵² Trischa Mann, *Australian Law Dictionary* (Oxford University Press 2010) 197.

⁵³ Terry Hutchinson and Nigel Duncan, ‘Defining and Describing What We Do: Doctrinal Legal Research’ (2012) 17 *Deakin Law Review* 83, 84–85.

‘research into the law and legal concepts’.⁵⁴ Doctrinal approaches or research can be identified as a research process that identifies, analyses and synthesises the content of the law. With respect to doctrinal research methods, fundamental features of case law or legislation are explored and examined critically, and related elements are synthesised to produce, arguably, correct and complete utterance of the law on the relevant subject.⁵⁵ An important feature of doctrinal research highlighted by Rob van Gestel and Hans-Wolfgang Micklitz is that in this type of research, ‘arguments are derived from authoritative sources, such as existing rules, principles, precedents, and scholarly publications’.⁵⁶

The study relies solely on library-based research. Documents have been gathered from print and electronic sources. In terms of print sources, books, law journals, legislation, treaties and legal encyclopaedias have been used. Numerous articles from reputable international journals were drawn upon for different aspects of the research. These proved helpful in presenting analyses of controversial issues.

Electronic resources consist of electronic journals, official reports, databases, online research guides and other relevant websites, such as LexisNexis, Westlaw, Heinonline and Wiley Online. The research will be mostly Internet-based and entirely conducted using Queen’s University Belfast’s electronic resources.

Cases from the International Criminal Court, the International Court of Justice, the Permanent Court of International Justice and the European Court of Human Rights, national court cases, official documents, reports and declarations

⁵⁴ *ibid* 85.

⁵⁵ Terry Hutchinson, ‘Doctrinal Research: Researching the Jury’ in Dawn Watkins and Mandy Burton (eds), *Research Methods in Law* (Routledge 2013) 9–10.

⁵⁶ Rob Van Gestel and Hans-Wolfgang Micklitz, ‘Revitalizing Doctrinal Legal Research in Europe: What About Methodology?’ [2011] European University Institute Working Papers Law 26; see also generally Robert Cryer and others, *Research Methodologies in EU and International Law* (Hart Publishing 2011).

(such as the Universal Declaration of Human Rights) and secondary literature have been extensively used, including those which are most up to date.

The research was partly conducted as a desk study of field-based secondary sources within the areas of law, political science and philosophy with relevance for forms of State sovereignty, human rights and jurisdictional immunity. Secondary sources are important for legal research as they allow the researcher a gateway to primary resources of law in such cases. Secondary resources also provide insights into current developments in relevant areas of law. In selecting secondary sources for this study, I aimed for a representative sample of the available literature that included conflicting views in order to fully explain the arguments on all sides of the issue, while making value judgements as to legal worth of such arguments.

2 TENSION BETWEEN STATE SOVEREIGNTY AND HUMAN RIGHTS: FROM A STATE-ORIENTED TO A HUMAN-ORIENTED APPROACH

2.1 INTRODUCTION

This Chapter analyses the question of whether international law chips away at the power of the State in cases of conflict between State sovereignty and fundamental human rights.

It charts the transition from Westphalian sovereignty to post-Westphalian sovereignty and explains how State sovereignty has evolved into its current manifestation. The meaning of classic sovereignty is considered and the new structure of State sovereignty is explained by emphasising a post-Westphalian sovereignty. This analysis forms the background against which to explain the inherent contradiction between State sovereignty and contemporary international law. Analysing this contradiction is important in allowing a consideration of the tension between fundamental human rights and State sovereignty. Furthermore, the main purpose in engaging with the concept of State sovereignty is to provide a theoretical framework for immunities, given that the principle of sovereign immunity is derived from the concept of State supremacy and is meant to ensure the smooth functioning of inter-State relations. This Chapter aims to evaluate how international law controls and limits State sovereignty.

It goes on to explore the growing tension between human rights and State sovereignty and examines the position of human rights under international law. This

serves as an important gateway into the issue of the human rights' challenge to immunities. Furthermore, the Chapter examines fundamental human rights recognised as peremptory norms of general international law in order to set the foundation for the discussion of immunity *versus* impunity.

Thus, this Chapter focuses on four issues: First, the evolution of the concept of State sovereignty in parallel with the concept of international human rights law. Second, the concept of State sovereignty under international law is considered. Third, the human rights-based challenge to the concept of State sovereignty is examined. Finally, a characterisation of fundamental human rights which fall within the scope of *jus cogens* norms is developed.

2.2 THE CONCEPT OF SOVEREIGNTY: FROM WESTPHALIAN SOVEREIGNTY TO POST-WESTPHALIAN SOVEREIGNTY

Sovereignty is a charming, controversial and provocative concept of social science, and as a phenomenon, it has dominated national and international relations of States over the course of the past five centuries. Sovereignty is the inclusive concept which combines the State's elements and qualifications: permanent population, defined territory, government, capacity to enter into relations with other States.⁵⁷ In addition, the State is the main actor of international relations and the main subject of international law. Sovereignty emerges, as the bedrock of the social construct which is the State, and is recognised as one of the most important and fundamental concepts of international law and political science.⁵⁸

⁵⁷ Malcolm N Shaw, *International Law* (7th edn, Cambridge University Press 2014) 144.

⁵⁸ Jens Bartelson, *A Genealogy of Sovereignty* (Cambridge University Press 1996) 23.

Sovereignty has a variety of meanings because of its relative context. As Robert Keohane states, since sovereignty's 'invention in sixteenth-century Europe, it has taken on a variety of denotations and connotations'.⁵⁹ There are two main reasons why there are many meanings, concepts and connotations of sovereignty: the circumstances of the period when sovereignty is conceptualised and the ideology and benefits of the person who conceptualises sovereignty. First, sovereignty has constantly been reconceptualised and reconceived over time because of changes in the context in which this takes place, and therefore is often dependent on the historical and environmental conditions. According to Stephen Krasner, Jean Bodin developed and defined the concept of absolute sovereignty in the context of religious wars in Europe that were destroying and changing the stability of the polity with regard to supreme power. Second, Carl Schmitt, for his part, stated, four centuries later, that of 'all juristic concepts, the concept of sovereignty is the one most governed by actual interests'.⁶⁰ Here then, we see the malleability of the concept of sovereignty; in the context of discussions about change and transformation of sovereignty, there are at least twenty conceptualisations of sovereignty in international law and international relations literatures, including Westphalian, absolute, popular, pooled, legal, political, *de facto* and *de jure*, among others. As there are many connotations of sovereignty, it follows that sovereignty itself is an organic concept, lacking a static structure or meaning.

For this Thesis, sovereignty has a settled core feature despite its many conceptualisations: Sovereignty is a supreme power. The reason for the continuous discussions about change and transformation of sovereignty is the influence and

⁵⁹ Robert Keohane, 'Ironies of Sovereignty: The European Union and the United States' (2002) 40 *Journal of Common Market Studies* 743, 743.

⁶⁰ Carl Schmitt, *Political Theology: Four Chapters on the Concept of Sovereignty* (University of Chicago Press 2005) 16.

dominance of Westphalian sovereignty on international law and international relations.

Jean Bodin, considered the father of the modern theory of sovereignty, states that 'sovereignty is that absolute and perpetual power vested in a commonwealth', and 'is the highest power of command'.⁶¹ For him, monarchy is the best form of sovereign power, and 'all the laws of nature point towards monarchy, whether we regard the microcosm of the body, all of whose members are subject to a single head on which depend will, motion, and feeling, or whether we regard the macrocosm of the world, subject to the one Almighty God. If we look at the heavens, we see only one sun'.⁶² Bodin conceptualised sovereignty as absolute and perpetual power, but at the same time he considered that it was not limitless, as sovereignty was subject to divine and natural law.⁶³ Likewise, Thomas Hobbes argued that sovereignty was absolute and perpetual.⁶⁴ However, for Hobbes, unlike Bodin, sovereignty was not subject to any kind of law.⁶⁵ Sovereignty as conceptualised by Bodin and Hobbes has been accepted as a classic conceptualisation of sovereignty in international law and international relations. From this perspective, classical sovereignty is to be understood in this Thesis as being the supreme, absolute, and perpetual authority⁶⁶ and as such is not subject to any worldly authority.⁶⁷ By considering Bodin and Hobbes, Emerich de Vattel turned his attention to the State, noting that 'every nation

⁶¹ Jean Bodin, *On Sovereignty: Four Chapters from the Six Books of the Commonwealth* (Julian H Franklin ed, Cambridge University Press 1992) 1.

⁶² Jean Bodin, *Six Books of the Commonwealth* (MJ Tooley ed, Alden Press 1955) 207.

⁶³ Bodin (n 61) 34.

⁶⁴ Thomas Hobbes, *Leviathan* (JCA Gaskin ed, Oxford University Press 1998) 138.

⁶⁵ *ibid* 116.

⁶⁶ Francis Harry Hinsley, *Sovereignty* (2nd edn, Cambridge University Press 1986) 36.

⁶⁷ Sir Robert Jennings and Sir Arthur Watts (eds), *Oppenheim's International Law - Vol I, Peace - Introduction and Part I* (9th edn, Longman 1992) 122.

that governs itself, without dependency on any foreign power, is a sovereign state'.⁶⁸

In addition, Georg Wilhelm Friedrich Hegel argued that States are independent entities in relation to other States, and the sovereign authority of the State is the absolute power on earth.⁶⁹

The 1791 French Constitution may be regarded as a prominent written source for this classic conceptualisation of sovereignty. After the French Revolution, which adopted 'popular' sovereignty as its main discourse, the French Constitution particularly emphasised the meaning of sovereignty as an exclusive power by specifying that power can only be exercised by the Nation. In 1791, the French Constitution explicitly stated that sovereignty is 'one, indivisible, inalienable, and imprescriptible: it belongs to the Nation: no section of the people nor any individual can attribute to himself the exercise thereof'.⁷⁰

Despite this classic understanding of sovereignty, the Twentieth Century has seen the concept challenged. Over the last 100 years, sovereignty has been re-conceptualised from three different perspectives. First, in its classic sense, sovereignty represents the absolute power of the State. Second, it is the absolute independence beyond the State. Third, it is one's absolute capacity, as a legal person, under international law. In some ways, the first two perspectives may appear necessarily unjust, as the State applies its power to exploit its citizens with impunity.

⁶⁸ Emer de Vattel, *The Law of Nations, Or, Principles of the Law of Nature, Applied to the Conduct and Affairs of Nations and Sovereigns* (Bela Kapossy and Richard Whatmore eds, Liberty Fund 2008) 83.

⁶⁹ GWF Hegel, *Elements of the Philosophy of Rights* (Allen W Wood ed, HB Nisbet tr, 8th edn, Cambridge University Press 2003) 366–67.

⁷⁰ 'French Constitution' (1791) [Title III Article 1 - Of the Public Powers].

Regarding the third perspective, *jus cogens* imperatives appear to challenge the very sovereign rights of the State.⁷¹ Let us consider these perspectives in more depth.

Using differing nomenclature and approaches, many authors have concluded that the concept of sovereignty represents the highest authority of the State. In this sense, sovereignty generally correlates with power and is considered absolute. Albert Venn Dicey, in *Law of the Constitution*, explains sovereignty as ‘the power of law-making unrestricted by any legal limit’.⁷² For Dicey, sovereign power is legally held by the possessor of a constitutional power to legislate, so long as the constitution imposes no restrictions on the implementation of the power in question. Hence, this power is held independently over certain territory and not subject to any restriction by a superior power.⁷³ In this context, Saul Newman, a contemporary political theorist, considers that sovereignty ‘is always the rule of One, the moment of unicity, indivisibility, absolutism and the singular exception’.⁷⁴ Such conceptions in respect of the absolute characteristic of sovereignty are based on Bodin’s sovereign theory. Such absolutism centres on the internal sovereignty of the State through which it has supreme power over the people and the political structure.⁷⁵

As for the second perspective, absolute independence beyond the State is referred to as external sovereignty and the relation between States. Christian Wolff, the Eighteenth Century German international jurist, argued that ‘no nation has the

⁷¹ Timothy Endicott, ‘The Logic of Freedom and Power’ in Samantha Besson and John Tasioulas (eds), *The Philosophy of International Law* (Oxford University Press 2010) 245–46.

⁷² Albert Venn Dicey, *Introduction to the Study of the Law of the Constitution* (Liberty Classics 1915) 27.

⁷³ Neil MacCormick, *Questioning Sovereignty: Law, State, and Nation in the European Commonwealth* (Oxford University Press 2001) 129; Neil MacCormick, ‘On Sovereignty and Post-Sovereignty: Questioning Sovereignty’ in Keith C Culver (ed), *Readings in the Philosophy of Law* (2nd edn, Broadview Press 2008) 418.

⁷⁴ Saul Newman, ‘Introduction: Re-Encountering Stirner’s Ghosts’ in Saul Newman (ed), *Max Stirner* (Palgrave Macmillan 2011) 6.

⁷⁵ Jacques Maritain, ‘The Concept of Sovereignty’ in WJ Stankiewicz (ed), *In defense of sovereignty* (Oxford University Press 1969) 62; Hinsley (n 66) 26.

right to any act which belongs to the exercise of the sovereignty of another nation, for sovereignty, as it exists in a people, or originally in a nation, is absolute'.⁷⁶ The concept of sovereignty often connotes external sovereignty in international law. External sovereignty is the State's freedom from outside influence upon its domestic policies and freedom of action by the State in relation to other States, also known as sovereign equality.⁷⁷

The third perspective related to the conceptualisation of sovereignty is a State's absolute capacity under international law. According to this perspective, the State's capacity is subject to framed limits by international law. In this sense, *jus cogens* norms (imperatives) become determining for the capacity of a State.

One of the most important reasons for the continuity of the sovereignty debate is the tension between political and legal aspects of sovereignty. On this point, there are two main commentaries about sovereignty: Hans Kelsen's hierarchical view of law, and Carl Schmitt's idea of political sovereignty. These commentaries may be applied to all three perspectives. Kelsen and Schmitt, as two leading political and legal theorists of the Twentieth Century, dealt with politics and international law through sovereignty; yet their conceptualisations of sovereignty remain far apart.

On the basis of his hierarchical view of the law (legal order), Kelsen underscores the idea of the State as the personification of a legal system, but it is not 'the total legal order that regulates the behaviour of all individuals living within its territorial sphere of validity'.⁷⁸ From the perspective of Kelsen, the sovereign competence of the State is the result of legal order; namely, the legal order 'pre-

⁷⁶ Christian Wolff, *The Laws of Nations Treated According to a Scientific Method* (Joseph Drake tr, Oxford University Press 1934) ch 2 at para 255.

⁷⁷ Stephen D Krasner, *Sovereignty: Organized Hypocrisy* (Princeton University Press 1999) 20–23.

⁷⁸ Hans Kelsen, *Pure Theory of Law* (Max Knight tr, The Lawbook Exchange, Ltd 2005) 293.

exists the sovereignty of the State and remains in control thereof'.⁷⁹ It follows that sovereignty is vested in the State, but it is legally limited. This situation is perhaps best voiced by Martti Koskenniemi, in *From Apology to Utopia*: 'The Prince cannot legitimize his action by referring to his sovereignty if this action conflicted with the law. [...] Even if Bodin did stress the scope of the Prince's authority, he did not give up the idea that such authority was derived from a normative code which remained controlling'.⁸⁰

Schmitt, however, approaches sovereignty from the political perspective. According to Schmitt, the political perspective enables independent discussion of concepts.⁸¹ From his ideal political perspective, the meaning of sovereign has never been read as an institution or person that has perpetual power. Rather, Schmitt stated famously that the sovereign 'is he who decides on the exception'. The exception, 'which is not codified in the existing legal order, can at best be characterized as a case of extreme peril, a danger to the existence of the state, or the like'.⁸² States adopt sovereignty, which basically is an indispensable feature of the State, to maintain territorial order.

The link between Kelsen and Schmitt is that while Schmitt considers that sovereignty is a 'matter of fact-description and law a normative consequence thereof', Kelsen insists that 'the law is normative and sovereignty [is] merely a descriptive shorthand for the rights, liberties and competences which the law has allocated to the State'.⁸³

⁷⁹ Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (n 20) 228.

⁸⁰ *ibid* 229.

⁸¹ Carl Schmitt, *The Concept of the Political* (George Schwab ed, University of Chicago Press 1996) 26.

⁸² Schmitt, *Political Theology* (n 60) 5–6.

⁸³ Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (n 20) 227.

From the foregoing review, it can be seen that there are different doctrinal concepts of sovereignty. Some authors describe sovereignty as perpetual power, while others describe it as the power necessary to protect human safety. An aim of this Chapter is to determine whether there is any contradiction between State sovereignty and the protection of human rights. In other words, the aim is to demonstrate whether sovereignty can constitute an impediment to human rights protection. As can be seen, the various conceptions of sovereignty mean that its meaning has never been fixed, and yet the concept of sovereignty endures. In this sense, sovereignty has two basic phases. The first, known as the Westphalian phase, refers to the international order of sovereign States which emerged after the Peace of Westphalia, ending the Thirty Years War in 1648. The second phase, which has emerged recently, is the post-Westphalian phase. The latter is increasingly concerned with international human rights and the ability of international law to trump Westphalian sovereignty.

2.2.1 WESTPHALIAN SOVEREIGNTY

The Peace of Westphalia (1648) has been considered a turning point indicating the end of an epoch and the start of another.⁸⁴ Westphalia is a historical fact, and also a concept and a phenomenon. The Peace of Westphalia is accepted as the main root of classical sovereignty, the modern State system and of the international order. This discourse is widely accepted as the orthodoxy in political science and international

⁸⁴ Leo Gross, 'The Peace of Westphalia: 1648-1948' (1948) 42 *The American Journal of International Law* 20, 28.

law. For this reason, despite some critics who speak of a “Westphalian Myth”, the Peace of Westphalia remains central to discussions of State sovereignty.⁸⁵

The Peace of Westphalia ended the Thirty Years’ War (1618-1648) by the treaties of Osnabrück and Münster. These two treaties gave birth to the modern States system.⁸⁶ Leo Gross, ‘the Homer of the Westphalian discourse’, states that the Peace of Westphalia ‘represents the majestic portal which leads from the old into the new world’.⁸⁷ As such, it is accepted as the starting point of sovereign equality and non-interference principles of contemporary international law.⁸⁸ The external and internal aspects are the main dynamics of Westphalian sovereignty.⁸⁹ For four centuries, most of the political theorists and jurists (Hugo Grotius, Samuel von Pufendorf, Jean Bodin, Thomas Hobbes, etc., as well as contemporary scholars) have discussed the character and concept of sovereignty in terms of its internal and external aspects.

Internal sovereignty refers to a State’s power or competence within its own territory, and this internal sovereignty confers upon the State a monopoly on authority to use coercive power within its territory.⁹⁰ Internal sovereignty refers to ‘the idea that a political authority or community has [an] undisputed right to determine the framework of rules, regulations and policies in a given territory and to

⁸⁵ Stéphane Beaulac, ‘The Westphalian Legal Orthodoxy–Myth or Reality?’ (2000) 2 *Journal of the History of International Law* 148; Andreas Osiander, ‘Sovereignty, International Relations, and the Westphalian Myth’ (2001) 55 *International Organization* 251; Stéphane Beaulac, ‘The Westphalian Model in Defining International Law: Challenging the Myth’ (2004) 8 *Australian Journal of Legal History* 181.

⁸⁶ Jeremy Larkins, *From Hierarchy to Anarchy: Territory and Politics before Westphalia* (Palgrave Macmillan 2009) 3.

⁸⁷ Gross (n 84) 28.

⁸⁸ Janice E Thomson, ‘State Sovereignty in International Relations: Bridging the Gap between Theory and Empirical Research’ (1995) 39 *International Studies Quarterly* 213, 227; Seyom Brown, *International Relations in a Changing Global System: Toward a Theory of the World Polity* (Westview Press 1995) 74.

⁸⁹ Peter Malanczuk, *Akehurst’s Modern Introduction to International Law* (7th edn, Routledge 1997) 17.

⁹⁰ Jack Donnelly, ‘State Sovereignty and International Human Rights’ (2014) 28 *Ethics & International Affairs* 225, 226.

govern accordingly'.⁹¹ With regard to the internal aspect of State sovereignty, the State ultimately is a legal entity which organises certain rules of public life; therefore, the purpose of the internal aspect of sovereignty is to protect the State's own interests. External sovereignty, on the other hand, refers to the independence of States in international relations, as sovereign equals.⁹² In this relationship, the State also endeavours to balance foreign affairs with other States.

Considerations of sovereignty are to be found in the constitution of the international system. Although Article 2(1)⁹³ of the 1945 United Nations Charter signals the sovereign equality principle of all States, in fact this principle of international law harks back to the Peace of Westphalia, by which 'the hierarchical system organized around the Church and the Holy Roman Empire was disbanded in preference to a horizontal system based on the recognition of the equality of nation states'.⁹⁴ On this point, the international jurist Vattel remarked that a 'dwarf is as much a man as a giant is; a small Republic is no less a sovereign state than the most powerful kingdom'.⁹⁵ In the legal sense, the principle of sovereign equality was clearly emphasised by Judge Shahabuddeen in the 1992 *Nauru* case: Whatever 'the debates relating to its precise content in other respects, the concept of equality of states has always applied as a fundamental principle to the position of states before the Court'.⁹⁶

⁹¹ David Held and Anthony McGrew, 'Globalization and the Liberal Democratic State' (1993) 28 *Government and Opposition* 261, 265.

⁹² Robert Owen Keohane, 'Sovereignty, Interdependence, and International Institutions' in Linda B Miller and Michael Joseph Smith (eds), *Ideas & Ideals: Essays on Politics in Honor of Stanley Hoffmann* (Westview Press 1993) 91–107; Donnelly (n 90) 226.

⁹³ 'The Organization is based on the principle of the sovereign equality of all its Members'.

⁹⁴ Gideon Boas, *Public International Law: Contemporary Principles and Perspectives* (Edward Elgar Publishing 2012) 159.

⁹⁵ Emer De Vattel, *The Law of Nations: Book I* (Liberty Fund 1758) s 18.

⁹⁶ *Certain Phosphate Lands in Nauru (Nauru v Australia), Preliminary Objections, Judgment* [1992] ICJ Rep [270–71].

For Benjamin Schiff, the Peace of Westphalia is ‘conventionally regarded by international relations theorists as the beginning of an international system based on collective acceptance by governments of the institution of sovereignty’.⁹⁷ In the modern international system, the term “nation State” arose after the signing of the Peace of Westphalia. As a result, nation States engaged in internal integration and organisation, through which they effectively created a monopoly, enhancing and improving their power over foreign affairs and external relations.⁹⁸

In terms of the external aspect of sovereignty, a number of cases have been heard before the Permanent Court of International Justice and the International Court of Justice. However, the 1928 *Island of Palmas* case is the source, and the most authoritative judgement on sovereignty disputes; as a result, most subsequent cases refer to it. Thus, what follows is a consideration of the *Island of Palmas* case, so as to better understand the external aspect of sovereignty.

In the *Island of Palmas (United States of America v Netherlands)* case, the United States, as a successor to Spain’s rights over the Philippines,⁹⁹ claimed that Spain had discovered the Islands. Therefore, the United States as a successor State had sovereign title over the territory. For the other side, the Netherlands argued that the claim that Spain had discovered the Island of Palmas was not effectively established, and so Spain never had sovereign title over the territory. The Arbitrator, Max Huber, stated that the Netherlands Government’s ‘main argument endeavours to show that the Netherlands, represented for this purpose in the first period of

⁹⁷ Benjamin N Schiff, ‘Universalism Meets Sovereignty at the International Criminal Court’ in Noha Shawki and Michaelene Cox (eds), *Negotiating Sovereignty and Human Rights: Actors and Issues in Contemporary Human Rights Politics* (Ashgate Publishing, Ltd 2009) 59.

⁹⁸ Tom Lansford, ‘Post-Westphalian Europe? Sovereignty and the Modern Nation-State’ (2000) 37 *International Studies* 1, 2–4.

⁹⁹ By the ‘Treaty of December 10th, 1898, Spain ceded the Philippines to the United States’. *Islands of Palmas Case, United States v Netherlands* [1928] 2 UN Reports of International Arbitral Awards 829 (Permanent Court of Arbitration) 837.

colonisation by the East India Company, have possessed and exercised rights of sovereignty from 1677, or probably from a date prior even to 1648, to the present day'. Max Huber considered that 'there were unchallenged acts of peaceful display of Netherlands sovereignty in the period from 1700 to 1906, and which [...] may be regarded as sufficiently proving the existence of Netherlands sovereignty'.¹⁰⁰ Max Huber went on to state that 'sovereignty in the relations between States signifies independence. Independence [...] is right to exercise to the exclusion of any other state'.¹⁰¹ In his arbitral award, Max Huber observed that the right to exercise in question is the other face of the absolute character of the territorial aspect of sovereignty. Therefore, Max Huber held that the Island of Palmas had belonged to the Netherlands. This case demonstrates that sovereignty over a territory can only be held by an effective power which can both protect the rights of the inhabitants of that territory and ensure that the interests of other States will not be infringed. Hence, this becomes an exemplar case for the external aspect of sovereignty by showing the conflict between States in relation to their sovereign rights over territory.

In his 2002 study *The Post-Westphalia Enigma*, Falk refers briefly to the fundamental features of the Westphalian system as follows:

[the] Westphalia rubric is ambiguous as it serves both as shorthand to designate a state-centric, sovereignty-oriented, territorially bounded global order, and to identify a hierarchically structured world order shaped and managed by dominant or hegemonic political actors. In effect, the term *Westphalia* contains an inevitable degree of incoherence by

¹⁰⁰ *ibid* 870–871.

¹⁰¹ *ibid* 838.

combining the territorial/juridical logic of equality with the geopolitical/hegemonic logic of inequality.¹⁰²

The relation between Nation and State is the most important element of the Westphalian system, as Falk has highlighted: ‘The invention of militant nationalism in the 18th century served to consolidate state power, enhancing its mobilising capacity, as well as accentuating the contrasts between inside and outside, between citizen and alien, and even between civilised and barbaric’.¹⁰³ Since the rise of the State following the Peace of Westphalia, the concept of sovereignty has been shaped according to the relationship between States. Namely, the sovereignty notion becomes significant only when other States exist in the international order. As Janice Thomson has observed, sovereignty ‘is not an attribute of the state but it is attributed to the state by other states or state rulers’.¹⁰⁴ In other words, State sovereignty derives from other States in the modern world system. On this point, Hedley Bull rightly observed that sovereignty principles have international bases: ‘the rule of non-intervention, the rule of the equality of states in respect of their basic rights, and the rights of states to domestic jurisdiction’.¹⁰⁵

Westphalian Sovereignty ultimately is an institutional organisation allowing States to adapt to a new political life. As such, sovereignty is based on two principles, namely ‘territoriality and the exclusion of external actors from domestic authority structures’; and, Westphalian sovereignty is contravened when external actors impact on, or determine, internal authority structures.¹⁰⁶ However, the

¹⁰² Falk, ‘The Post-Westphalia Enigma’ (n 23) 147.

¹⁰³ Falk, ‘Revisiting Westphalia, Discovering Post-Westphalia’ (n 23) 319–320.

¹⁰⁴ Thomson (n 88) 219.

¹⁰⁵ Hedley Bull, *The Anarchical Society: A Study of Order in World Politics* (Columbia University Press 1977) 37.

¹⁰⁶ Krasner (n 77) 20.

increasing influence of international law on domestic authorities has come to challenge the very meaning of Westphalian sovereignty.

2.2.2 POST-WESTPHALIAN SOVEREIGNTY

Every new age and every new epoch in the coexistence of peoples, empires, and countries, of rulers and power formations of every sort, is founded on new spatial divisions, new enclosures, and new spatial orders of the earth.¹⁰⁷

The term “post-Westphalian sovereignty” can evoke certain attitudes which are best avoided. Towards this end, the words of political scientist Wendy Brown are worth noting:

To speak of a post-Westphalian order is not to imply an era in which nation-state sovereignty is either finished or irrelevant. Rather, the prefix *post* signifies a formation that is *temporally after but not over* that to which it is affixed. *Post* indicates a very particular condition of afterness in which what is past is not left behind, but, on the contrary, relentlessly conditions, even dominates a present that nevertheless also breaks in some way with this past.¹⁰⁸

The post-Westphalian sovereignty should not be considered as substitution for Westphalian sovereignty. It can be read as a re-conceptualisation of sovereignty when the concept of Westphalian sovereignty remains inadequate to interpret contemporary affairs. For instance, the concept of Westphalian sovereignty falls

¹⁰⁷ Carl Schmitt, *The Nomos of the Earth in the International Law of the Jus Publicum Europaeum* (Telos Press Publishing 2003) 79.

¹⁰⁸ Wendy Brown, *Walled States, Waning Sovereignty* (MIT Press 2010) 21.

short when discussing violations of fundamental human rights because of the characteristics attributed to States by the Westphalian sovereignty. Under these circumstances, a new conceptualisation of sovereignty is required by international society.

The post-Westphalian model of sovereignty is better attuned to address the requirements of the contemporary world order. It must be underscored that post-Westphalian order does not mark the end of State sovereignty; rather, it is an inception which holds traces of the past. Namely, the post-Westphalian order does not fully abolish the concept of State sovereignty, but this order offers a new understanding for State sovereignty as this section will now explain.

The Westphalian system has always had an important place in the international order; however, continued challenges to the Westphalian system demonstrate that the world order is transitioning to a post-Westphalian system, which tends to ignore the claims of States to perpetual sovereignty in an anarchical world. In this sense, it is likely that increasing responsibility for, and violations of, fundamental human rights will change the structure of the Westphalian system. Accordingly, Falk emphasises that the Twenty-First Century will be ‘characterized by the challenge of institutionalizing responsibility for serious abuses of human rights by leaders and others in positions of authority’. As a consequence, this situation ‘erodes the Westphalian image of a world of territorial sovereign states by insisting that even adherence to the superior orders of the state does not override the most solemn humanitarian obligations of international law’.¹⁰⁹

Michael Keating charts the evolution of sovereignty from a perspective critical of classic sovereignty and finds it to be intellectually problematic. Instead, he

¹⁰⁹ Falk, *Human Rights Horizons* (n 23) 9.

propounds the term “post-sovereignty”, which indicates the expiration of ultimate State authority.¹¹⁰ Keating also observes that classic sovereignty is an inadmissible method of regulating and understanding the current world order and a system which is incompatible with the modern world.¹¹¹

Increasing concerns related to international human rights issues may be said to have prompted review of the sovereign power of the State. The world system has shifted from state-centric to international human rights-centric. Since the end of the Cold War in 1989, the influence of international organisations, non-governmental organisations, and international courts over the domestic and foreign affairs of States has increased. Hence, this period can be called the era of post-Westphalian sovereignty. According to Bjorn Hettne, post-Westphalian rationality implies that the State ‘has lost its historical usefulness, and the new solutions to problems of security and welfare therefore must be found increasingly in transnational, multilateral or [...] regional structures’.¹¹² In other words, the State keeps its place in the international arena but, qualitatively, its role has changed from the perspective of the principle of State sovereignty in the post-Westphalian system.

Sovereignty is a script whose prominent line is that a State bears the legitimate right to apply its authority. An international intervention in a State decreases its legitimate rights; however, global issues, such as universal human

¹¹⁰ Michael Keating, *Plurinational Democracy: Stateless Nations in a Post-Sovereignty Era* (Oxford University Press 2001) 27.

¹¹¹ cf. Falk, *Human Rights Horizons* (n 23) 69. Falk mounts a counter-argument to Keating, stating that for ‘all its complexities, sovereignty continues to provide the agreed basis for political order in international life, as it has for several centuries. For better or worse, sovereignty, as a matter of rights and obligations, is universally affirmed as an unconditional pillar of contemporary world order’. For Keating’s statement see Keating (n 110) 27.

¹¹² Bjorn Hettne, ‘The Fate of Citizenship in Post-Westphalia’ (2000) 4 *Citizenship Studies* 35, 38.

rights, force the State to criticise and revisit its sovereign authority.¹¹³ Human rights issues become the main dissipating influence over sovereignty.

Wendy Brown has summed up how the system works in a post-Westphalian order and thereby makes a rational distinction between the Westphalian and post-Westphalian. Brown remarked that in a post-Westphalian system, sovereign States ‘no longer exclusively define the field of global political relations or monopolize many of the powers organizing that field, yet states remain significant actors in that field, as well as symbols of national identification’.¹¹⁴ The traditional concept of sovereignty is no longer a viable concept for considering the State either as an actor of international relations or as a principle of internal affairs. Sir Francis Jacobs explains the ineffectuality of the traditional concept of sovereignty as follows. In terms of international politics, the concept of sovereignty is not feasible; no State can act independently in today’s world. The concept is not viable in a legal sense, either, because all States willingly or unwillingly accept and obey the restrictions of international law.¹¹⁵

Regarding the internal aspect, Jacobs underscores that the traditional concept of sovereignty is defunct; politically, ‘it has been replaced by some form of the

¹¹³ Stephen D Krasner, ‘Problematic Sovereignty’ in Stephen D Krasner (ed), *Problematic Sovereignty: Contested Rules and Political Possibilities* (Columbia University Press 2001) 6.

¹¹⁴ Brown, *Walled States, Waning Sovereignty* (n 108) 24.

¹¹⁵ Francis G Jacobs, *The Sovereignty of Law: The European Way* (Cambridge University Press 2007) 4–5. At the High-Level Panel on Threats, Challenges and Change, it was declared that in ‘signing the Charter of the United Nations, States not only benefit from the privileges of sovereignty but also accept its responsibilities. Whatever perceptions may have prevailed when the Westphalian system first gave rise to the notion of State sovereignty, today it clearly carries with it the obligation of a State to protect the welfare of its own peoples and meet its obligations to the wider international community. But history teaches us all too clearly that it cannot be assumed that every State will always be able, or willing, to meet its responsibilities to protect its own people and avoid harming its neighbors. And in those circumstances, the principles of collective security mean that some portion of those responsibilities should be taken up by the international community, acting in accordance with the Charter of the United Nations and the Universal Declaration of Human Rights, to help build the necessary capacity or supply the necessary protection’. United Nations General Assembly, ‘A More Secure World: Our Shared Responsibility. Report of the High-Level Panel on Threats, Challenges and Change’ (2004) A/59/565 para 29.

separation of powers, often divided between legislature, executive and judiciary. Legally, it is difficult, if not impossible, to identify today a State in which a sovereign legislature is not subject to legal limitations on the exercise of its powers'.¹¹⁶

Thus, sovereignty is essential in that it confers on the State the authority to maintain the existing system within its territory; however, the State does not embody power. In other words, sovereignty means that 'the State is treated as the entity that represents a group of people in relation to each other and in relation to other States. Sovereignty is a matter of authority, not control'.¹¹⁷ Ultimately, in the contemporary world, each State's purpose is to protect its own interests and its intention is to rule its own territory without being exposed to foreign intervention. States naturally resist giving up their own sovereign rights, but they also desire to be regarded as legitimate actors on the international stage. In such circumstances, States' interests could conflict with each other, leading to chaos in the international arena.

2.3 STATE SOVEREIGNTY UNDER INTERNATIONAL LAW

Since the end of the Cold War, international scholars have raised the question of whether State sovereignty has diminished in an interdependent world.¹¹⁸ In the sense of contemporary international law, sovereignty may be conceptualised as 'the basic international legal status of a state that is not subject, within its territorial jurisdiction,

¹¹⁶ Jacobs (n 115) 5.

¹¹⁷ Gus Van Harten, 'The Public—Private Distinction in the International Arbitration of Individual Claims against the State' (2007) 56 *International and Comparative Law Quarterly* 371, 376.

¹¹⁸ See Anghie, 'Rethinking Sovereignty in International Law' (n 23); Christoph Schreuer, 'The Waning of the Sovereign State: Towards a New Paradigm for International Law?' (1993) 4 *European Journal of International Law* 447.

to the governmental, executive, legislative, or judicial jurisdiction of a foreign state or to foreign law other than public international law'.¹¹⁹

State sovereignty becomes one of the principal pillars of international law. States are the essential actors in the international order 'where they seek to maximize power and/or security, and to pursue their interests in competition with other states'.¹²⁰ The fundamental part of the world system consists of sovereign States; thus international law has been created and developed thanks to sovereign States. Rene Provost argues that 'being a system based on the formal equality and sovereignty of states, [it] has arisen largely out of the exchange of reciprocal rights and duties between states'.¹²¹ That said, sovereignty has always been a controversial issue in international law.

Even though State sovereignty appears to be a contentious subject in international law and is demonstrably so in an indeterminate and fluctuating manner, the sovereign State is a basic structure and an intellectual framework of international law. That international order is ruled by States, international law is based on the relationship between States, diplomacy has a meaning as long as states exist, and international organisations and international courts fulfil their role in the State system; therefore, the sovereign State is the crucial component of the international organism.¹²²

Provost states that despite 'some inroads over the last few decades, the whole edifice of international law remains built on and around the state. Considerations of

¹¹⁹ Helmut Steinberger, 'Sovereignty' in Rudolf Dolzer and others (eds), *Encyclopedia of Public International Law: States: Responsibility of States: International Law and Municipal Law*, vol 10 (North-Holland Publishing Company 1987) 414.

¹²⁰ Thomas W Smith, *History and International Relations* (Taylor & Francis 2005) 34.

¹²¹ René Provost, *International Human Rights and Humanitarian Law* (Cambridge University Press 2004) 121.

¹²² Schreuer (n 118) 447; Robert McCorquodale, 'The Individual and the International Legal System' in Malcolm D Evans (ed), *International Law* (Oxford University Press 2006) 321.

state sovereignty mean that each state may make a preliminary appreciation for itself of any situation of fact or law in all areas of international law, including human rights'.¹²³ The State appears at the very centre of the international system and it can be taken that international law is an invention of sovereign States.

Koskenniemi has emphasised that the most 'universally acclaimed principles of international law continue to be those of sovereignty, self-determination, territorial integrity, non-intervention, and consent, each of which is a reaffirmation of statehood as the law's creative centre'.¹²⁴ The field of interest of international law has grown in conjunction with recent international problems, such as fundamental human rights violations; however, international law continues to exist as law which is applicable between States. That said, even though the concept of sovereignty has been evolving, and is no longer unlimited; nevertheless, its core remains intact.

There is a tension between State sovereignty and international law. Regarding this tension, Hans Kelsen claims that the sovereignty of the State 'is not in conflict with international law because international law is valid for the state only if recognized by this state, and hence is not superior to the state, is quite compatible with the fact that a state, in recognizing international law by virtue of its sovereignty [...] restricts its sovereignty'.¹²⁵

However, there is a structural tension between State sovereignty and international law and its obligations. This tension is evident especially in the case of major national and international concerns, such as protecting State governance over the domestic legal system and avoiding external pressures in respect of international affairs. Accordingly, this tension is revealed when preventing fundamental human

¹²³ Provost (n 121) 277.

¹²⁴ Koskenniemi, 'The Future of Statehood' (n 21) 406.

¹²⁵ Hans Kelsen, 'Sovereignty and International Law' (1960) 48 *Georgetown Law Journal* 627, 637.

rights violations and prosecuting the perpetrators of those violations. In this sense, fundamental human rights become a critical point between State sovereignty and international law.

The 1923 *Wimbledon*¹²⁶ case provides an important illustration of how international law prevails over State sovereignty. In that case, the German government refused, on 21 March 1921, to allow a British steamship, *The Wimbledon*, which was chartered by a French company, to travel through the Kiel Canal. The Canal is in German territory and the German government chose to be neutral in an armed conflict and avoid supporting either side. For this reason, the government refused to allow the *S.S. Wimbledon* to traverse the Canal. The plaintiffs (the French, British, Japanese and Italian governments) claimed that the German government had violated Article 380 of the Treaty of Versailles: ‘The Kiel Canal and its approaches shall be maintained free and open to the vessels of commerce and of war of all nations at peace with Germany on terms of entire equality’.

According to the majority decision of the Permanent Court, article 380 unambiguously obligated Germany to allow free passage to all vessels without distinguishing between vessels of commerce and war vessels, with a condition that the vessels in question must be at the disposal of States at peace with Germany.¹²⁷ The Permanent Court also considered that the ‘terms of article 380 are categorical and give rise to no doubt’.¹²⁸

¹²⁶ *SS ‘Wimbledon’ - United Kingdom, France, Italy & Japan v Germany* [1923] Permanent Court of International Justice III.I., (ser. A) No. 1.

¹²⁷ *ibid* 22.

¹²⁸ *ibid*.

The Permanent Court held that ‘the German authorities on March 21st, 1921, were wrong in refusing access to the Kiel Canal to the S.S. Wimbledon’.¹²⁹ *The Wimbledon* case reveals some limitations on State sovereignty by deciding that the German government violated international law. Ultimately, this case demonstrates that international law prevails over State sovereignty. Pleadings of the German government were taken to remark that ‘the abandonment [...] of a personal and imprescriptible right, which forms an essential part of [State] sovereignty and which [State] neither could nor intended to renounce by anticipation’.¹³⁰ In response to this argument, the Permanent Court stated that

The Court declines to see in the conclusion of any Treaty by which a State undertakes to perform or refrain from performing a particular act an abandonment of its sovereignty. No doubt any convention creating an obligation of this kind places a restriction upon the exercise of the sovereign rights of the State, in the sense that it requires them to be exercised in a certain way. But the right of entering into international engagements is an attribute of State sovereignty.¹³¹

The Permanent Court, in this case, consented to handle the case on the ground of the concept of sovereignty by stating that any convention brings an obligation and such an obligation requires a restriction of sovereign rights. The Court furthermore stated that consenting to international law is not loss of sovereignty, but rather it is an attribute of State sovereignty; it is a manifestation of that very sovereignty.

The Court therefore rejected the conclusion that placing restrictions on State’s autonomy violates sovereign rights. This decision was also restated by the

¹²⁹ *ibid* 33.

¹³⁰ *ibid* 25.

¹³¹ *ibid*.

Permanent Court in the case on *Jurisdiction of the European Danube Commission between Galatz and Braila*, in which the Court stated that ‘restrictions on the exercise of sovereign rights accepted by treaty by the State concerned cannot be considered as an infringement of sovereignty’.¹³²

In *The Wimbledon* case, the Permanent Court also referred to restrictive interpretation and stated that

[T]he fact remains that Germany has to submit to an important limitation of the exercise of the sovereign rights which no one disputes that she possesses over the Kiel Canal. This fact constitutes a sufficient reason for the restrictive interpretation, in case of doubt, of the clause which produces such a limitation. But the Court feels obliged to stop at the point where the so-called restrictive interpretation would be contrary to the plain terms of the article and would destroy what has been clearly granted.¹³³

Placing restrictions on the sovereign rights of a State is a characteristic of State sovereignty due to States’ consent to rules of international law. It follows that entering into international agreements or engagements does not imply the relinquishment of sovereignty. This relationship between the concept of sovereignty and international law was underscored by Judge Weiss, in his dissenting opinion to the 1927 *Lotus* case: ‘If States were not sovereign, no international law would be possible, since the purpose of this law precisely is to harmonize and reconcile the different sovereignties over which it exercises its sway’.¹³⁴

¹³² *Jurisdiction of the European Danube Commission between Galatz and Braila* [1927] (Series B) No 14 (Permanent Court of International Justice) 36.

¹³³ *S.S. ‘Wimbledon’ - United Kingdom, France, Italy & Japan v. Germany* (n 126) 24–25.

¹³⁴ *Case of the SS Lotus* [1927] (Ser. A) No. 9 (Permanent Court of International Justice) 44 [Dissenting Opinion of Judge Weiss].

Sovereignty, from a legal perspective, is distinguished by ‘an uneasy tension between an effort legally to define, and therefore limit, the powers of the person or body who claims to be sovereign, and that sovereign’s [...] efforts to evade the control exerted by legal rules [...] or change the law according to his interests’.¹³⁵ Sovereign States always claim or decline their sovereign rights in the case of political crisis, war, civil war and party controversies. Nevertheless, sovereignty plays an important role in international legal and contemporary constitutional theory as well as in politics.

The contradictions of sovereignty are an important facet of the ‘very discipline of international law, which is confronted by the analogous problem of how the omnipotent sovereign that creates the law can be simultaneously constrained by that law’.¹³⁶ International law and State sovereignty are co-constitutive; in other words, ‘international law accords the recognition, standing and rules of behaviour for sovereign states; sovereign states are a key source of international law’.¹³⁷ At the same time, international law restrains and conducts State sovereignty.

2.4 GROWING TENSION BETWEEN HUMAN RIGHTS AND STATE SOVEREIGNTY

Because it is impossible to avoid sparking a debate with regards to the challenge presented by human rights to State sovereignty, it is best to start with Louis Henkin’s conceptualisation of sovereignty and his description of the ideal relationship between

¹³⁵ Bardo Fassbender, ‘Sovereignty and Constitutionalism in International Law’ in Neil Walker (ed), *Sovereignty in Transition* (Hart Publishing 2006) 115–116.

¹³⁶ Anghie, ‘Rethinking Sovereignty in International Law’ (n 23) 306.

¹³⁷ Jean L Cohen, ‘Whose Sovereignty? Empire Versus International Law’ (2004) 18 *Ethics & International Affairs* 1, 15.

human rights and sovereignty. The discussion which follows should be read with reference to Henkin's assertion that sovereignty

should not mean isolationism. It should not mean resistance to cooperation. It should not mean indifference to, or forfeiture of responsibility for, what happens elsewhere. It should not mean refusal to assume obligations. It should not mean failure to comply with obligations we have assumed. Sovereign states, one has to remind governments, can adhere to human rights treaties, and they can do so without reservations. And they can cancel reservations they have entered.¹³⁸

International law can be distinguished from intra-organisational legal orders by the deficiency of central administration authority, the significance of which comes to light in the field of fundamental human rights protection. Sovereignty of states 'is being identified as the major factor responsible for such a lamentable state of affairs with regard to the internationally controlled implementation of human rights'.¹³⁹

Sovereign States have a role in creating the international norms that serve to protect human rights; however, whether or not they decide individually to consent to those norms depends entirely on their sovereign will; it is therefore evident that there is a tension between international protection of human rights and State sovereignty.¹⁴⁰ This tension is significant because any international intervention in the affairs of a State is fundamentally at odds with the concept of State sovereignty.

¹³⁸ Louis Henkin, 'That S Word: Sovereignty, and Globalization, and Human Rights, Et Cetera' (1999) 68 Fordham Law Review 1, 12.

¹³⁹ Jost Delbrueck, 'International Protection of Human Rights and State Sovereignty' in Frederick E Snyder and Surakiart Sathirathai (eds), *Third World Attitudes Toward International Law: An Introduction* (Martinus Nijhoff Publishers 1987) 263.

¹⁴⁰ Richard Falk states that 'without the emergence of a new system of world order, not based on sovereign nation states, international protection of human rights is bound to remain weak or marginal'. Richard Falk, 'Responding to Severe Violations' in Jorge I Domínguez (ed), *Enhancing global human rights* (McGraw-Hill 1979) 245; see also Donnelly (n 90) 228.

For those who see international human rights norms as universal values, human rights constitute a serious and critical challenge to State sovereignty, because the obligation to protect fundamental human rights would present a significant obstacle for the State in the exercise of its political and legal authority.

The steady advance of human rights as a shared value is challenging the concept of State sovereignty. In this sense, it is possible to say that international obligations to protect human rights have chipped away at State sovereignty. As Louis Henkin states, ‘an international law of human rights has penetrated the once-impermeable state entity and now addresses the condition of human rights within every state’.¹⁴¹

State sovereignty and human rights may not be in sharp contrast to each other; however, it is obvious that there is a serious tension between these two norms. Human rights have been used to challenge sovereign States by those who would assert that ‘the construct of a world community which rises above the sovereign states system is necessary to emancipate humankind’.¹⁴² Adapting the sovereign structure of the State may be the most convenient method of decreasing the negative effects of this problematical issue. Despite Jack Donnelly’s contention that ‘over the past two decades, dominant understandings of sovereignty have become less absolutist and more human rights-friendly’,¹⁴³ a decrease in the absolute power of State sovereignty does not always indicate that the human rights situation within the State will improve.

While the sovereignty principle is deemed a basic norm of international society, international human rights norms are regarded as a compensatory

¹⁴¹ Henkin (n 7) 33.

¹⁴² Robert Jackson, *Sovereignty: The Evolution of an Idea* (Polity 2007) 114.

¹⁴³ Donnelly (n 90) 225.

international system which aims to restrict and prevent human rights violations by sovereign authorities. International human rights norms ‘place limits on how states can treat their peoples, compromising sovereignty in the name of universal standards of legitimate state conduct’.¹⁴⁴

Given the increasing impact of human rights on sovereign powers, the approach of the political philosopher John Rawls provides an important lens through which to reflect on the tension between human rights and State sovereignty. He interprets the transformation of State sovereignty from the perspective of human beings. According to Rawls, human beings, as opposed to States, have become an essential, determinant, element with respect to the changing sovereign structure.¹⁴⁵ According to Allen Buchanan, ‘Rawls stresses that his Law of Peoples departs from the Westphalian paradigm by recognizing that sovereignty is limited by the need to respect basic human rights’.¹⁴⁶

In today’s world, there are increasing concerns over the international human rights challenge to the sovereign structure of the State. International human rights and State sovereignty are mostly ‘considered separate, mutually contradictory regimes in international society’.¹⁴⁷ Kathryn Sikkink clearly highlights the conflict between State sovereignty and international human rights: The ‘debate over human rights forms part of a more fundamental debate over the changing nature of sovereignty, since the doctrine of internationally protected human rights offers one of the most powerful critiques of sovereignty as the concept is currently understood,

¹⁴⁴ Christian Reus-Smit, ‘Human Rights and the Social Construction of Sovereignty’ (2001) 27 *Review of International Studies* 519, 519.

¹⁴⁵ John Rawls, *The Law of Peoples; with 'The Idea of Public Reason Revisited'* (Harvard University Press 2001).

¹⁴⁶ Allen Buchanan, ‘Rawls’s Law of Peoples: Rules for a Vanished Westphalian World’ in Chandran Kukathas (ed), *John Rawls: Political Liberalism and the Law of Peoples* (Routledge 2003) 259.

¹⁴⁷ Reus-Smit (n 144) 519.

and the practices of human rights law offer concrete examples of shifting understandings of the limits of sovereignty'.¹⁴⁸ International human rights should be enshrined as much as State sovereignty in international law.

Neither creating a challenge to nor decreasing the effect of State sovereignty is enough to enshrine human rights. Given that the abuse of sovereign rights may lead to violations of internationally recognised human rights, State sovereignty may present a challenge to human rights.

In the Twentieth Century, the concept of sovereignty was both justified and criticised depending on whether or not the State was viewed as an appropriate guarantor of fundamental human rights and fundamental freedoms, 'supplanting the politically impotent legitimating principle of divine rights'.¹⁴⁹ International human rights norms, beyond their embryonic stage, became highly effective in increasing the role of the new sovereign States in the development of a new world order. This modern sovereign system is best explained by Robert Jackson: The new sovereignty concept is 'complicated by the emergence of a cosmopolitan regime which seeks to establish the legal status of humans in international relations against [...] the sovereign Leviathan. This norm [...] is a reaction to [classical sovereignty]: human rights are intended to curb sovereign rights'.¹⁵⁰

Over the last two decades, the immunity that States once enjoyed in relation to their treatment of their own people has been chipped away by the increasing legitimisation of human rights and the growing discourse on the importance of

¹⁴⁸ Kathryn Sikkink, 'The Power of Principled Ideas: Human Rights Policies in the United States and Western Europe' in Judith Goldstein and Robert Owen Keohane (eds), *Ideas and Foreign Policy: Beliefs, Institutions, and Political Change* (Cornell University Press 1993) 141.

¹⁴⁹ Reus-Smit (n 144) 520.

¹⁵⁰ Robert H Jackson, *Quasi-States: Sovereignty, International Relations and the Third World* (Cambridge University Press 1993) 44–45.

international human rights norms. On this point, Reisman notes that international law is 'still concerned with the protection of sovereignty, but, in its modern sense, the object of protection is not the power base of the tyrant who rules directly by naked power or through the apparatus of a totalitarian political order, but the continuing capacity of a population freely to express and effect choices about the identities and policies of its governors'.¹⁵¹ In response to increasing emphasis on human rights values, the concept of sovereignty has begun to evolve. Although sovereign power is still held by the State, it is the people of that State who designate an executive unit to exercise that power. Thus, it is clear that sovereignty has never disappeared under international law, but rather it has been relocated and applied elsewhere.¹⁵²

For many centuries, the principle of State sovereignty was considered to be both preeminent and unconditional under international law. States trumped 'any attempts to limit or even question the absolutism of their sovereign power'.¹⁵³ However, the increasing number of human rights violations obliged the international community to conceive a form of sovereignty which no longer alienates, but rather integrates, the concept of human rights. Following such integration, the State would be unable to exercise absolute sovereignty unless it acknowledges its obligation to protect its people's rights.

¹⁵¹ Referring to Article 21(3) of the Universal Declaration of Human Rights, Reisman observed that the State no longer has a monopoly on sovereign power. Article 21(3) declares that the 'will of the people shall be the basis of the authority of government; this will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures'. According to Reisman, the 'significance of this statement in the Universal Declaration was that it was now expressed in a fundamental international constitutive legal document. In international law, the sovereign had finally been dethroned'. W Michael Reisman, 'Sovereignty and Human Rights in Contemporary International Law' (1990) 84 *American Journal of International Law* 866, 868–872.

¹⁵² Invented terms and concepts somewhat survive in international law; the manner in which these terms and concepts are applied reflects the modern international order. On this point, Oliver Wendell Holmes highlights that a 'word is not a crystal, transparent and unchanged; it is the skin of a living thought and may vary greatly in colour and content according to the circumstances and the time in which it is used'. *Towne v Eisner* [1918] 245 US 418 (Supreme Court of United States) 425.

¹⁵³ Vesselin Popovski, 'Sovereignty as Duty to Protect Human Rights' (2004) 41 *UN Chronicle* 16.

States, the United Nations, and all other inter-governmental organisations are therefore faced with a complicated and thorny question: namely, how to balance two sensitive issues, human rights and State sovereignty. In this regard, Stanley Hoffmann has remarked that the State that asserts its sovereignty ‘deserves respect only as long as it protects’ human rights. When the State attempts to violate them, ‘the presumption of fit between the government and the governed’ disappears.¹⁵⁴

As the importance of human rights has evolved and developed, the perception of State sovereignty no longer correlates with the right of kings, governments, presidents or sheikhs to govern; their sovereign rights depend, in part, on whether they respect human rights in the performance of their duties.¹⁵⁵ Reflecting on this point, John Rawls argues that it is wrong that sovereign power vests a State with absolute autonomy when dealing with its own people. Rawls claims that ‘a government as the political organisation of its people is not, as it were, the author of all of its own powers. The war powers of governments, whatever they might be, are only those acceptable within a reasonable Law of Peoples’; it is necessary to ‘reformulate the powers of sovereignty in light of a reasonable Law of Peoples and deny to states the traditional rights to war and to unrestricted internal autonomy’.¹⁵⁶

The sovereign right of the State can no longer be defined as an absolute power exercised within a certain territory. Instead this right has become a complicated, legal obligation to exercise power ethically. Although State-centric discourse still continues, international law is more liberal and non-restrictive concerning cross-border considerations for protecting fundamental human rights.

¹⁵⁴ Stanley Hoffmann, *World Disorders: Troubled Peace in the Post-Cold War Era* (Rowman & Littlefield Publishers 1998) 159.

¹⁵⁵ Popovski (n 153) 17.

¹⁵⁶ Rawls (n 145) 25–27.

The inviolable and inalienable principle of State sovereignty has been gradually challenged by the increasing power of the rules designed to protect human rights. Although some developments in the name of human rights have arisen previously in the international order, the sovereignty principle of the State has taken precedence over human rights. However, reconceptualising State sovereignty has led to a new understanding of the relationship between human rights and State sovereignty. Kofi Annan described this new conceptualisation as follows:

State sovereignty, in its most basic sense, is being redefined – not least by the forces of globalisation and international co-operation. States are now widely understood to be instruments at the service of their peoples, and not vice versa. At the same time individual sovereignty – by which I mean the fundamental freedom of each individual, enshrined in the Charter of the UN and subsequent international treaties – has been enhanced by a renewed and spreading consciousness of individual rights. When we read the Charter today, we are more than ever conscious that its aim is to protect individual human beings, not to protect those who abuse them.¹⁵⁷

The focus of academic discourse in this field has evolved from clarifying the conflict between human rights and State sovereignty, to indicating that human rights movements play a crucial role in the evolution of the concept of State sovereignty. This evolution can be observed when fundamental human rights recognised as *jus cogens* norms are at stake. The next section examines *jus cogens* human rights.

¹⁵⁷ Kofi Annan, 'Two Concepts of Sovereignty' (1999) 352 (8137) *The Economist* 49.

2.5 FUNDAMENTAL HUMAN RIGHTS RECOGNISED AS *JUS*

COGENS

This section introduces an analysis of fundamental human rights that are recognised as peremptory norms of general international law. Since this Thesis focuses on the human rights-based challenge to immunities, it is necessary to extract these challenging and contentious human rights from customary international law, national law, legal sources or international/legal authorities. To this end, the concept of human rights and its international legal aspects are explicated in this section. Then, the notion of *jus cogens* or peremptory norms of general international law is examined by paving the way for identifying those human rights that are recognised as *jus cogens* norms.

2.5.1 EVOLVING HUMAN RIGHTS TO INTERNATIONAL LEGAL DIMENSION

Human rights may be best understood as the rights one possesses because one is a human being.¹⁵⁸ Human rights have some agreed upon characteristics. First, human rights are based on respect for human dignity. Second, human rights are inalienable, meaning that they cannot be given away because they are bound up with the very fact of human existence and are therefore inherent to all humankind. Though inalienable, they may be limited in particular conditions. For instance, the right to liberty can be restricted when one is found guilty of a crime by a court of law. Third, human rights are universal and based on equality; in other words, they appertain equally to all human beings everywhere in the world, and are not subject to any time limit. As

¹⁵⁸ Jack Donnelly, *Universal Human Rights in Theory and Practice* (3rd edn, Cornell University Press 2013) 10.

Article 2 of the 1948 Universal Declaration of Human Rights states, every human is entitled to benefit from her or his human rights ‘without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status’. Fourth, human rights are indivisible, interrelated and interdependent, meaning that various human rights are intrinsically dependent on each other.¹⁵⁹

Article 55(c) of the 1945 United Nations Charter also states that:

With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, the United Nations shall promote [...] universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.

The international community witnessed a further significant step forward in respect of international human rights in the form of the 1993 Vienna World Conference on Human Rights. The first major international conference in the field of human rights after the collapse of the Eastern Bloc, the Conference hosted an important debate on the status of human rights around the world. The Vienna Declaration and Programme of Action (hereafter referred to as “the 1993 Vienna Declaration”) adopted at this Conference identified human rights as universal norms and emphasised that all human rights are indivisible, interrelated and interdependent. The 1993 Vienna Declaration, by reaffirming the commitment to the purpose and principles of the

¹⁵⁹ United Nations, ‘Human Rights for All’ <<http://www.un.org/en/globalissues/briefingpapers/humanrights/>> accessed 26 December 2015; Council of Europe, ‘What Are Human Rights?’ <<http://www.coe.int/en/web/compass/what-are-human-rights->> accessed 26 December 2015; Donnelly (n 158); James Griffin, *On Human Rights* (Oxford University Press 2009).

United Nations Charter and Universal Declaration of Human Rights, recognised and affirmed that:

[A]ll human rights derive from the dignity and worth inherent in the human person, and that the human person is the central subject of human rights and fundamental freedoms, and consequently should be the principal beneficiary and should participate actively in the realization of these rights and freedoms.

As a matter of course, at the centre of those provisions or statements is a human being. Accordingly, the concept and scope of human rights have an organic character. This concept covers a broad spectrum of issues. The notion of human rights is not only a moral and political concept but also a legal one. Human rights, not surprisingly, have been the subject of an ever expanding body of jurisprudential literature. Since the United Nations Charter was adopted, a new academic discourse has emerged around the argument that international law favours the rights of individuals over those of the State and its recognised representatives. A plethora of international conventions, covenants, treaties and United Nations resolutions can be put forward as manifestations of this idea.¹⁶⁰

While the concept of human rights is deeply rooted in history,¹⁶¹ the idea of international human rights is much more recent. In the past, international law was perceived to be concerned with governing and ruling relations among States exclusively; in other words, only States were seen as subjects of international law.

¹⁶⁰ Anthony D'Amato, 'The Concept of Human Rights in International Law' (1982) 82 Columbia Law Review 1110, 1110. The 1969 American Convention on Human Rights, the 1966 International Covenant on Civil and Political Rights, the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms, the 1993 Vienna Declaration and Programme of Action and the 1984 Convention Against Torture are some of those human rights documents.

¹⁶¹ 'The Code of Hammurabi in Babylonia (Iraq, c. 2000 BCE) was the first written legal code'; its stated purpose was to 'make justice reign in the kingdom, to destroy the wicked and violent, to prevent the strong from oppressing the weak [...] to enlighten the country and promote the good of the people'. Council of Europe (n 159).

Before the Second World War, human beings or individuals had not been regarded as having international legal rights; in fact, they were deemed objects rather than subjects of international law. Furthermore, the idea of universal human rights appeared only as an embryonic statement in customary international law and international treaties.¹⁶² The systematic codification of universal human rights ‘at the international level has largely, though not exclusively, been a twentieth century development’.¹⁶³

The Second World War therefore may be considered a milestone with regards to the development of human rights doctrines at which the concept of human rights took on an international dimension. Thereafter, human rights issues were no longer considered only a national or domestic issue. International human rights are recognised as an essential component of public international law. As a matter of fact, there is a plausible argument for human rights ‘being considered as a distinct branch of international law as respect for human rights is not primarily a characteristic of inter-state obligations, but rather a reflection of the state’s undertakings in respect of its population’.¹⁶⁴

The horrors of the Second World War, the establishment and development of the United Nations, and the rules of the UN Charter and subsequent international covenants, conventions and treaties have brought human rights to the fore in the international arena and made them the foremost values for the international community. Indeed, the UN Charter was the first to consider fundamental

¹⁶² For further details see Thomas Buergenthal, Dinah L Shelton and David P Stewart, *International Human Rights in a Nutshell* (4th edn, West Publishing Company 2009); Brian D Lepard, ‘International Law and Human Rights’ in Thomas Cushman (ed), *Handbook of Human Rights* (Routledge 2014).

¹⁶³ Reus-Smit (n 144) 521.

¹⁶⁴ Rhona KM Smith, ‘Human Rights in International Law’ in Michael Goodhart (ed), *Human Rights: Politics and Practice* (2nd edn, Oxford University Press 2013) 59.

international human rights as subjects of international law. Issued in 1945, the Preamble to the UN Charter expresses a resolution ‘to reaffirm faith in fundamental human rights’. Highlighting the problem of inadequate protection of human rights, the United Nations declared that ‘promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion’¹⁶⁵ was one of its primary purposes.

One of the remarkable breakthroughs in international law during the post-War period has been the development of international human rights values outlined in the 1948 Universal Declaration of Human Rights and other international instruments. Modern international human rights law was leveraged when the United Nations General Assembly adopted the Universal Declaration of Human Rights in 1948. Since then, a set of international human rights treaties and other instruments have conferred legal structures on inherent human rights. The bulk of human rights protection has therefore emerged through a number of treaties and other instruments in international law.¹⁶⁶ The organic nature of the concept of international human rights both shapes and is shaped by the contemporary international order, as has been shown. As Julie Cassidy has pointed out, the Declaration ‘creates an expectation that certain international standards will be maintained and with the passage of time and the establishment of state practice has become recognised as laying down rules binding upon the States. In this way, it has provided evidence of, and helped

¹⁶⁵ ‘Charter of the United Nations’ art 1(3).

¹⁶⁶ See generally Philip Alston and Ryan Goodman, *International Human Rights: The Successor to International Human Rights in Context: Law, Politics and Morals* (Oxford University Press 2013); United Nations, ‘Human Rights for All’ (n 159).

crystallise, emerging principles of customary international law recognising individual human rights in international law'.¹⁶⁷

Anthony D'Amato has argued that 'if human rights norms are part of international law, they take the form of universally-held entitlements'.¹⁶⁸ In other words, international human rights law is an organic reaction of international law against violations of internationally recognised human rights whose aim is to provide legal protection and effective remedy. International human rights law lays down duties and obligations that States are bound to respect. By assenting or becoming parties to international human rights instruments (i.e. covenants, conventions or treaties), States undertake and commit to duties and obligations under international law to respect, protect and fulfil human rights. The obligation to respect requires States to abstain from preventing or curtailing the enjoyment of human rights. The obligation to protect requires States to protect people and groups against violations of human rights. The obligation to fulfil requires States to take positive courses of action to enable the enjoyment of basic human rights.¹⁶⁹

Although human rights law has been developed chiefly through the use of covenants, treaties and other instruments of international law, different perspectives on the position of human rights can be found in international law. There has been much debate over whether fundamental human rights have a higher status than other rights because they are regarded as essential to the protection human life, welfare, and dignity and therefore should be accepted as fundamental and universal. In this sense, it must be noted that while any violation of recognised human rights

¹⁶⁷ Julie Cassidy, 'Emergence of the Individual as an International Juristic Entity: Enforcement of International Human Rights' (2004) 9 Deakin Law Review 533, 555.

¹⁶⁸ D'Amato (n 160) 1112.

¹⁶⁹ United Nations, 'The Foundation of International Human Rights Law' <<http://www.un.org/en/sections/universal-declaration/foundation-international-human-rights-law/index.html>> accessed 30 December 2015.

necessitates legal enforcements with regards to effective reparation or redress, taking legal action against violations of fundamental human rights becomes highly important for the purpose of ending impunity and paying compensation or providing remedies.¹⁷⁰

Section 1.2 of the previous chapter highlighted the two fundamental interests in international law: States' interests and the interests of individuals' human rights. The contradiction between these interests occurs in the most obvious manner when fundamental human rights are violated by a State, or yet are sought to be side-lined through State immunity, Head of State immunity and diplomatic immunity.

This Thesis focuses on the human rights-based challenge to such immunities; it covers the subject of violations of those human rights that are recognised as *jus cogens* norms under international law and customary international law. Owing to the concept of *jus cogens* norms, fundamental human rights are endowed in international law with superiority in terms of their position in the hierarchy of rights; by virtue of these norms, they also are endowed with an internationally recognised character and a non-derogable nature. The peremptory character of *jus cogens* norms under international law is now examined to provide a foundation for characterising the prohibition of actions which violate fundamental human rights as *jus cogens* norms.

2.5.2 THE CONCEPT OF *JUS COGENS* NORMS

Applying a distinction established by Roman law, the principles of international law can be divided into two classes depending on whether their character is peremptory and non-derogable or not. Those without such characteristics (*jus dispositivum*) are

¹⁷⁰ Theo van Boven, 'Categories of Rights' in Daniel Moeckli, Sangeeta Shah and Sandesh Sivakumaran (eds), *International Human Rights Law* (2nd edn, Oxford University Press 2014).

‘laws from which States may deviate, that is, there may be situations where States, although violating an international obligation, may claim circumstances which preclude their wrongfulness’.¹⁷¹ *Jus cogens* norms, by contrast, do not permit for such deviation. Such norms are accepted as compelling laws and any violation of them is prohibited.

The concept of *jus cogens* has a peremptory nature, and no derogation is permitted from norms of this type. *Jus cogens* norms render void any non-peremptory principles or rules that come into conflict with them.¹⁷² Hans Kelsen’s approach to international law summarises the peremptory nature of *jus cogens* norms. He notes that:

[the] power of the state to conclude treaties under general international law is in principle unlimited. States are competent to make treaties on whatever matter they please. But the content of the treaty must not conflict with a norm of general international law which has the character of *jus cogens*.¹⁷³

The concept of *jus cogens* arose specifically as a limitation on international freedom of contract and was often cited by scholars before the Second World War.¹⁷⁴ Indeed, Judge Schücking, in his Separate Opinion to the 1934 *Oscar Chinn* case, employed

¹⁷¹ Allain, ‘The Jus Cogens Nature of Non-Refoulement’ (n 13) 534–35. For further reading on this subject, see Verdross (n 24).

¹⁷² Hans Kelsen, *Principles of International Law* (Rinehart 1952); Verdross (n 24); Jerzy Sztucki, *Jus Cogens and the Vienna Convention on the Law of Treaties: A Critical Appraisal* (Springer-Verlag 1974); Gaja (n 25) 279; Oscar Schachter, *International Law in Theory and Practice: General Course in Public International Law*, vol 178 (Collected Courses of the Hague Academy of International Law 1982); Sir Ian McTaggart Sinclair, *The Vienna Convention on the Law of Treaties* (2nd edn, Manchester University Press 1984) 203–241; Hannikainen (n 25) 716–723. Gerald Fitzmaurice takes the nature of *jus cogens* as irreducible obligations of law and underscores its imperative manner. Gerald Fitzmaurice, *The General Principles of International Law Considered from the Standpoint of the Rule of Law*, vol 92 (Collected Courses of The Hague Academy of International Law 1957) 125–26.

¹⁷³ Kelsen, *Principles of International Law* (n 172) 322–23.

¹⁷⁴ For further details, see Shelton (n 24) 297–99. For details of the historical process of *jus cogens*, see George D Haimbaugh, ‘Jus Cogens: Root & Branch (An Inventory)’ (1987) 3 *Touro Law Review* 203.

the term *jus cogens*, the effect of which being that ‘once States have agreed on certain rules of law, and have also given an undertaking that these rules may not be altered by some only of their number, any act adopted in contravention of that undertaking would be automatically void’.¹⁷⁵ This individual opinion of Judge Schücking appears to be the first reference to both the peremptory norms of general international law and hierarchically supreme status of those norms to be voiced in an international legal context.¹⁷⁶

Alfred Verdross brought the concept of *jus cogens* into academic discourse, and his influence can be seen in the 1969 Vienna Convention on the Law of Treaties (hereafter referred to as “the 1969 Vienna Convention”). Verdross states that a *jus cogens* norm:

consists of the general principle prohibiting states from concluding treaties *contra bonos mores*. This prohibition [...] is the consequence of the fact that every judicial order regulates the rational and moral coexistence of the members of a community. No juridical order can, therefore, admit treaties between juridical subjects, which are obviously in contradiction to the ethics of a certain community.¹⁷⁷

Indeed, in 1966 the International Law Commission introduced the concept of the peremptory norm in Articles 50 and 61 of the final draft of the law of treaties.¹⁷⁸ This

¹⁷⁵ *Oscar Chinn (United Kingdom v Belgium)* [1934] Series A/B, no 63 (Permanent Court of International Justice) 149 [Separate Opinion of Judge Schücking].

¹⁷⁶ For further details, see Antonios Tzanakopoulos, ‘The Permanent Court of International Justice and the “International Community”’ in Christian J Tams and Malgosia Fitzmaurice (eds), *Legacies of the Permanent Court of International Justice* (Martinus Nijhoff Publishers 2013) 352.

¹⁷⁷ Alfred Verdross, ‘Forbidden Treaties in International Law’ (1937) 31 *American Journal of International Law* 571, 572; Verdross (n 24) 56.

¹⁷⁸ Article 50 reads: ‘A treaty is void if it conflicts with a peremptory norm of general international law from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character’. Article 61 reads: ‘If a new peremptory norm of general international law of the kind referred to in Article 50 is established, any existing treaty which

concept eventually came to the forefront of international law through the 1969 Vienna Convention. Article 53 of the Vienna Convention reads as follows:

A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.

Article 64 of the 1969 Vienna Convention reflects the prevailing nature of the concept of *jus cogens* by stating that: 'If a new peremptory norm of general international law emerges, any existing treaty which is in conflict with that norm becomes void and terminates'.

In 2001, the International Law Commission also remarked that the concept of 'peremptory norms of general international law is recognised in international practice, in the jurisprudence of international and national courts and tribunals and in legal doctrine'.¹⁷⁹

These provisions demonstrate that any treaty can be invalidated if its content is found to conflict with a peremptory norm of general international law, because a peremptory norm has a non-derogable nature and is recognised and accepted by the international community. On this point, Allain states that the 'incorporation of the notion of peremptory norms into the Vienna Convention acknowledged the fact that

is in conflict with that norm becomes void and terminates'. United Nations General Assembly, *Yearbook of the International Law Commission: Draft Articles on the Law of Treaties with Commentaries*, vol II (1966) 247–261.

¹⁷⁹ United Nations General Assembly, *Yearbook of the International Law Commission: Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries* (2001) 112.

there were such principles which States could not simply legislate away, or agree amongst themselves to abrogate'.¹⁸⁰

In its Report (2006), the International Law Commission under the guidance of Martti Koskenniemi articulated three types of conflict scenario in which a *jus cogens* norm may become a party to that conflict. This conflict might arise in the context of a regular treaty, a rule of customary international law and/or with another norm of equal rank to *jus cogens* norms. In the first scenario, any emergent or extant conflict of a treaty with *jus cogens* norms renders that treaty or a separable clause thereof invalid, regardless of whether the treaty is multilateral or bilateral. In the second scenario, the same logical track can be addressed to a conflict between customary law and *jus cogens* norms. This conflict renders the former invalid.¹⁸¹ This scenario may be best voiced by Lord Millett in the case of *Pinochet No 3* before the UK House of Lords: 'International law cannot be supposed to have established a crime having the character of a *jus cogens* and at the same time to have provided an immunity which is coextensive with the obligation it seeks to impose'.¹⁸² In relation to the third scenario, the International Law Commission emphasises that no hierarchy can be established between *jus cogens* norms *inter se*.¹⁸³ It follows that *jus cogens* norms are at the top of the hierarchical structure.

¹⁸⁰ Allain, 'The Jus Cogens Nature of Non-Refoulement' (n 13) 535. Allain also notes that the concept of *jus cogens* 'is not limited to the Vienna Convention, but is of general application. It is not simply a matter of States finding their treaty obligations invalidated, as being in conflict with *jus cogens*; on the contrary, any action which falls within the domain of *jus cogens*, be it a unilateral, bilateral, or multilateral act is, by definition, prohibited as being illegal' (ibid).

¹⁸¹ United Nations General Assembly, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law: Report of the Study Group of the International Law Commission Finalized by Martti Koskenniemi* (n 26) 367; *North Sea Continental Shelf (Federal Republic of Germany/Denmark)* [1969] ICJ Rep 248 [Dissenting Opinion of Judge Sorensen].

¹⁸² *R v. Bow Street Metropolitan Stipendiary Magistrate and Others, ex parte Pinochet Ugarte (No. 3)* (n 46) 278.

¹⁸³ United Nations General Assembly, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law: Report of the Study Group of the International Law Commission Finalized by Martti Koskenniemi* (n 26) 367.

Given that *jus cogens* norms are at the apex of the international legal hierarchy, they acquire supreme authority by standing for the values of the international community and by prevailing over State sovereignty. Article 53 of the 1969 Vienna Convention establishes a norm under general international law and obligates the entire international community of States to recognise that derogation from those norms is impermissible. That said, while this recognition ‘precludes an individual state from vetoing the emergence of a peremptory norm, it sets a high threshold for identifying such a norm and bases the identification squarely in state consent’.¹⁸⁴

In practice, *jus cogens* norms have been recognised by a number of international bodies. The International Court of Justice,¹⁸⁵ the Inter-American Court of Human Rights,¹⁸⁶ the Inter-American Commission on Human Rights¹⁸⁷ and the

¹⁸⁴ Shelton (n 24) 300.

¹⁸⁵ *Case Concerning the Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v United States of America)*, Merits [1986] ICJ Rep (International Court of Justice) [190]; see also following separate opinions delivered to the ICJ *Oil Platforms (Islamic Republic of Iran v United States of America)* [2003] ICJ Rep [23] [Separate Opinion of Judge Buerghenthal]; *Case Concerning the Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States of America)*, Merits 153 [Separate opinion of President Nagendra Singh]; *ibid* 199 [Separate opinion of Judge Sette-Camara]; *Oscar Chinn (United Kingdom v. Belgium)* (n 175) 149 [Separate Opinion of Judge Schücking]; *Barcelona Traction, Light and Power Company, Limited (Belgium v Spain)*, Second Phase [1970] ICJ Rep (International Court of Justice) 304–312 [Separate Opinion of Judge Ammoun]; *North Sea Continental Shelf (Federal Republic of Germany/Netherlands)* [1969] ICJ Rep 97 [Separate Opinion of Judge Padilla Nervo]; *Case Concerning the Application of the Convention of 1902 Governing the Guardianship of Infants (Netherlands v Sweden)* [1958] ICJ Rep 106–107 [Separate Opinion of Judge Moreno Quintana]. The 2006 Report of the International Law Commission noted that ‘the Court only mentions the words *jus cogens* by quoting (although apparently with approval) the ILC and the representatives of both parties to the dispute – it never picked up the vocabulary as part of its own language’. United Nations General Assembly, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law: Report of the Study Group of the International Law Commission Finalized by Martti Koskenniemi* (n 26) 378.

¹⁸⁶ *Río Negro Massacres v Guatemala* [2012] (Inter-American Court of Human Rights) at para. 227; *Case of Goiburú et al v Paraguay* [2006] Serie C No. 153 (Inter-American Court of Human Rights) [Separate Opinion of Judge A.A. Cançado Trindade]; *Aloeboetoe et al v Suriname* [1993] Series C no 15 (Inter-American Court of Human Rights) at para. 57.

¹⁸⁷ *Coard et Al v United States* [1999] Report N. 109/99-Case 10.951 (Inter-American Commission on Human Rights) at para. 39; *Victims of the Tugboat ‘13 de Marzo’ v Cuba* [1996] Report N. 47/96 (Inter-American Commission on Human Rights) at para. 79.

International Criminal Tribunal for the Former Yugoslavia¹⁸⁸ are leading authoritative bodies which have recognised the subsistence and superiority of *jus cogens* norms. Those norms have also been recognised by several domestic courts.¹⁸⁹ Because of their nature, *jus cogens* have a superior legal authority among the principles of international law. As Francisco Martin has observed, in contrast to the rules of customary international law, States do not have to consent to *jus cogens* norms to be legally bound by them.¹⁹⁰ This point is underscored by the International Criminal Tribunal for the Former Yugoslavia, which, in relation to the prohibition of torture, summarised the nature, effects, and international normative order of *jus cogens* norms as follows:

Because of the importance of the values it protects, [the prohibition of torture] has evolved into a peremptory norm or *jus cogens*, that is, a norm that enjoys a higher rank in the international hierarchy than treaty law and even “ordinary” customary rules. The most conspicuous consequence of this higher rank is that the principle at issue cannot be derogated from by States through international

¹⁸⁸ *Prosecutor v Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic (Trial Judgment)* [2001] IT-96-23-T & IT-96-23/1-T (International Criminal Tribunal for the former Yugoslavia) at para. 466; *Prosecutor v Kupreskic et al (Trial Judgment)* [2000] IT-95-16-T (International Criminal Tribunal for the former Yugoslavia) at para. 520; *Prosecutor v Anto Furundzija (Trial Judgment)* [1998] IT-95-17/1-T (International Tribunal for the former Yugoslavia) at paras. 153, 154, and 155; *Prosecutor v Zdravko Mucic aka ‘Pavo’, Hazim Delic, Esad Landzo aka ‘Zenga’, Zejnil Delalic (Trial Judgment)* [1998] IT-96-21-T (International Tribunal for the former Yugoslavia) at para. 454.

¹⁸⁹ *Belhaj v Straw* [2014] EWCA Civ 1394 (United Kingdom: Court of Appeal (England and Wales)) at para. 116; *R v Tang* (2008) [2008] HCA 39 (High Court of Australia) at para. 111; *The Queen v Tang* [2008] 39 (High Court of Australia); Opinion of Lord Hoffmann in *Jones v Saudi Arabia* [2006] UKHL 26 (UK House of Lords) at para. 44; *A and others v Secretary of State for the Home Department (No 2)* (2005) [2006] 2 AC 221 (UK House of Lords) at para. 33; *Attorney-General v Zaoui and Others (No 2)* (2004) [2005] 1 NZLR 690 (New Zealand: Court of Appeal) at para. 35; *Suresh v Canada (Minister of Citizenship and Immigration)* [2002] 1 SCR 3, 2002 SCC 1 (Canada: Supreme Court) at para. 61; *Committee of United States Citizens Living in Nicaragua v Reagan* [1988] 859 F2d 929 (District of Columbia Circuit); *R v. Bow Street Metropolitan Stipendiary Magistrate and Others, ex parte Pinochet Ugarte (No. 3)* (n 46).

¹⁹⁰ Francisco Forrest Martin and others, *International Human Rights and Humanitarian Law: Treaties, Cases and Analysis* (Cambridge University Press 2006) 33.

treaties or local or special customs or even general customary rules not endowed with the same normative force.¹⁹¹

The foregoing analysis of the peremptory nature of *jus cogens* norms sheds light on the concept of fundamental human rights that take place in the sphere of *jus cogens* norms. However, before investigating those fundamental human rights, the next section examines the hierarchy among human rights in terms of the *jus cogens* concept.

2.5.3 HIERARCHY AMONG HUMAN RIGHTS WITH RESPECT TO *JUS COGENS*

Both State interests and human rights interests are fundamental in international law; however, a hierarchy would be required in order to adjudicate cases where there was a contradiction between the interests in question. *Jus cogens*, as explained above, is a set of principles or rules from which a State may not derogate; it follows that the right to immunity may not be claimed when the State act in question transgresses those rules. Since the immunity of a State and its agents cannot be regarded as a peremptory norm when that immunity is invoked to exempt it from punishment for violations of law, a hierarchy may be established to protect fundamental human rights recognised as *jus cogens*.

This emerging contradiction gives rise to the issue of whether a hierarchy can be established among human rights, and if so, how the apex of human rights can be identified. In *Basic Rights*, Henry Shue argues that basic rights are the ‘morality of

¹⁹¹ *Prosecutor v. Anto Furundzija (Trial Judgement)* (n 188) at para. 153.

depths. They specify the line beneath which no one is to be allowed to sink'.¹⁹² For Shue, basic rights are a shield against loss of subsistence and loss of security. With these words Shue implies that there is a hierarchy among human rights. Furthermore, he argues that 'if a right is basic, [then] other, non-basic rights may be sacrificed, if necessary, in order to secure the basic right. But the protection of a basic right may not be sacrificed in order to secure the enjoyment of a non-basic right'.¹⁹³

Accordingly, a limited series of fundamental rights, which are internationally accepted and recognised, non-derogable and of superior character among the principles of international law, is found within a number of international treaties, legal documents and law reports. These fundamental human rights may be interpreted as having a *jus cogens* character.

Fundamental human rights, which are attributed to *jus cogens* norms, are placed at the apex in this hierarchy. There is a quasi-intrinsic relationship between human rights and *jus cogens* norms. *Jus cogens* norms are mainly associated with human rights protections.¹⁹⁴ Considering international human rights as components of the ethical values that inform the law, Antonio Cançado Trindade evaluates the declaration of *jus cogens* in contemporary international law as the fulfilment of the minimum requirement of the international legal order that the juridical and ethical pillars of the international legal order be merged.¹⁹⁵ Most of the cases regarding *jus*

¹⁹² Henry Shue, *Basic Rights: Subsistence, Affluence, and U.S. Foreign Policy* (2nd edn, Princeton University Press 1996) 18.

¹⁹³ *ibid.*

¹⁹⁴ See further Chinkin (n 24) 68. Andrea Bianchi reads the idea of inherent connection between human rights and *jus cogens* norms as a 'natural intellectual reflex'. Bianchi, 'Human Rights and the Magic of Jus Cogens' (n 24) 495.

¹⁹⁵ Trindade (n 27) 292. For an understanding of human rights as ethical values, see Francesca Klug, 'Rights and Righteousness: Friends or Foes?' in Geoff Gilbert, Françoise Hampson and Clara Sandoval (eds), *Strategic Visions for Human Rights: Essays in Honour of Professor Kevin Boyle* (Routledge 2011) 72–74.

cogens are ‘cases where the position of the individual is involved’.¹⁹⁶ Human rights principles protect the interests of human beings, not the individual interests of a State; it follows that those interests that are protected by human rights principles neither are at the disposal of States nor can be disrupted by reciprocal non-compliance or retaliations.¹⁹⁷ In other words, human rights arguments are accepted as the foundation for the creation *jus cogens* norms in international law. Those norms institute the legal protection for human beings against any other norms that run the risk of violating those particular human rights.

Although *jus cogens* norms, because of their legal supremacy and prevalence over any incompatible norm, obviously cannot encompass every human right, in 1966, Judge Tanaka, in his Dissenting Opinion in the *South West Africa* case, argued for the quasi-intrinsic relationship between human rights and *jus cogens* as follows:

If we can introduce in the international field a category of law, namely *jus cogens*, recently examined by the International Law Commission, a kind of imperative law which constitutes the contrast to the *jus dispositivum*, capable of being changed by way of agreement between States, surely the law concerning the protection of human rights may be considered to belong to the *jus cogens*.¹⁹⁸

Alfred Verdross took a quite similar position when he stated that most *jus cogens* norms are the rules of general international law; they are invented for and grounded

¹⁹⁶ Gerald Fitzmaurice, ‘Third Report on the Law of Treaties’ (UN Yearbook of the International Law Commission 1958) UN Doc A/CN.4/115 vol II 40 <http://legal.un.org/ilc/documentation/english/a_cn4_115.pdf> accessed 4 March 2016.

¹⁹⁷ See Orakhelashvili, *Peremptory Norms in International Law* (n 25) 53. See also G Barile, ‘The Protection of Human Rights in Article 60, Paragraph 5 of the Vienna Convention on the Law of Treaties’, *International Law at the Time of Its Codification: Essays in Honour of Roberto Ago*, vol 2 (Giuffrè 1987) 3–4.

¹⁹⁸ *South West Africa (Liberia v South Africa)*, Second Phase, Judgment [1966] ICJ Rep 298 [Dissenting Opinion of Judge Tanaka].

on humanitarian arguments. Most conventions and treaties under international law, such as the Genocide Convention, are created in the higher interest of human rights, not to protect and defend the interests of individual States.¹⁹⁹ As McDougal highlighted, ‘many of the policies about human rights would appear to be so intensely demanded that they are acquiring [...] not merely the status of international concern, but in addition that of *jus cogens* or of a global bill of rights’.²⁰⁰ In academic discourse, there has been a trend towards considering fundamental human rights as *jus cogens* norms; as a result it follows that ‘the great bulk of the contemporary human rights prescriptions [is] clearly identifiable as *jus cogens*’.²⁰¹

This Thesis, for its part, considers this quasi-intrinsic relationship between human rights and *jus cogens* norms as a reflection of the organic nature of the context and domain of *jus cogens* norms rather than considering that all human rights are recognised as *jus cogens* norms.

Ultimately, the nature of *jus cogens* incorporates elements that are fundamentally important for the international community and those elements become more important than State consent, which confirms the validity of norms in international law.²⁰² Therefore, any transgression of *jus cogens* norms may be said to breach the principles of general international law, including State sovereignty, immunity and the protection of human rights. It follows that the concept of peremptory norms *per se* may be regarded as protecting the State and its representatives rather than chipping away at its rights. *Jus cogens* norms, therefore,

¹⁹⁹ Verdross (n 24).

²⁰⁰ Myres S McDougal, Harold D Lasswell and Lung-chu Chen, *Human Rights and World Public Order: The Basic Policies of an International Law of Human Dignity* (Yale University Press 1980) 185.

²⁰¹ Lung-Chu Chen, *An Introduction to Contemporary International Law: A Policy-Oriented Perspective* (3rd edn, Oxford University Press 2015) 256.

²⁰² *Advisory Opinion on the Juridical Condition and Rights of Undocumented Migrants* [2003] OC-18/03 (Inter-American Court of Human Rights) 32.

should be recognised as a fundamental and inevitable principle for the international community as a whole.

2.5.4 DIFFERENTIATION OF *JUS COGENS* HUMAN RIGHTS FROM NON-DEROGABILITY

Although the 1969 Vienna Convention does not provide a set of *jus cogens* norms, Article 53 of that document outlines four prerequisites for establishing a norm which bears a peremptory character. They are: (1) the norm must belong to general international law; (2) it must be accepted and recognised by the international community; (3) it must have a non-derogable nature; and (4) the norm may be modified or altered only by a subsequent norm which bears the same nature.

As has been shown, non-derogability is one of the recognised pillars on which to establish *jus cogens* norms under Article 53 of the 1969 Vienna Convention. Fundamental human rights, of which no derogation is permitted even in the event of a public emergency or in time of war, can be found in various international human rights documents.²⁰³ Nevertheless, it should be noted that the domain of human rights recognised as *jus cogens* cannot be limited to some human rights which are nominated as non-derogable rights on the basis of human rights conventions, treaties or covenants. Under the provisions of those human rights instruments, appointed non-derogable human rights may be deemed as a reference point for the designation of the ambit of *jus cogens* norms in the field of human rights; however, the *jus cogens* norms in question cannot be framed or limited by those human rights instruments. In this sense, derogation under human rights instruments and derogation

²⁰³ See American Convention on Human Rights 1969 Article 27; 'International Covenant on Civil and Political Rights' (United Nations Treaty Series 1966) 999 Article 4; 'European Convention for the Protection of Human Rights and Fundamental Freedoms' (Council of Europe 1950) Article 15.

under the 1969 Vienna Convention convey quite different meanings. On the one hand, derogation under human rights instruments transpires within the system; in other words, this derogation does not affect the nature and continuity of the given human rights. On the other hand, derogation under Article 53 of the Vienna Convention is an attempt to invalidate a *jus cogens* norm among others.²⁰⁴ At this point, General Comment 29 of the UN Human Rights Committee emphasises that the scope of *jus cogens* in human rights is neither limited by nor entirely similar to a set of human rights designated as non-derogable under the International Covenant on Civil and Political Rights:

The enumeration of non-derogable provisions in article 4 is related to, but not identical with, the question whether certain human rights obligations bear the nature of peremptory norms of international law. [...] [T]he category of peremptory norms extends beyond the list of non-derogable provisions as given in article 4, paragraph 2. State parties may in no circumstances invoke article 4 of the Covenant as justification for acting in violation of humanitarian law or peremptory norms of international law, for instance by taking hostages, by imposing collective punishments, through arbitrary deprivations of liberty or by deviating from fundamental principles of fair trial, including the presumption of innocence.²⁰⁵

In this Thesis, the particular human rights in question are considered not only in relation to whether they bear a non-derogable nature or not; the question of whether these human rights fall into the scope of *jus cogens* or *jus dispositivum* is also considered. To put it another way, the peremptory character of human rights

²⁰⁴ See Orakhelashvili, *Peremptory Norms in International Law* (n 25) 58–59.

²⁰⁵ ‘CCPR General Comment No 29: art 4: Derogations during a State of Emergency’ (UN Human Rights Committee 2001) UN Doc CCPR/C/21/Rev.1/Add.11 at para 11.

transcends the non-derogable nature of human rights. In this respect, the concept of *jus cogens* norms is organic and therefore there is no fixed list of particular human rights that have a *jus cogens* character. In this regard, the *Advisory Opinion on the Juridical Condition and Rights of Undocumented Migrants* maintains that:

There is no finite list of *jus cogens* norms, because, there appear to be no criteria that allow them to be identified. It is the courts that determine whether a norm can be considered *jus cogens*, for the purpose of invalidating a treaty. Such norms establish limits to the will of States; consequently, they create an international public order (*ordre public*), and thus become norms of enforceability *erga omnes*.²⁰⁶

As Lauri Hannikainen has observed, the ‘clarification of the *domain and the concept of the jus cogens norms* in international law is advancing, but is still far from being completed’.²⁰⁷ In fact, this process is organic and ongoing, as was noted in the case of *Suresh v Canada* before the Canadian Supreme Court, in which it was held that ‘Peremptory norms develop over time and by general consensus of the international community’.²⁰⁸

The following section aims to identify those human rights that have been established as *jus cogens* under the law as a foundation for the discussion of the human rights based challenge to immunities.

²⁰⁶ *Advisory Opinion on the Juridical Condition and Rights of Undocumented Migrants* (n 202) 80 [the Inter-American Institute of Human Rights as amici curiae].

²⁰⁷ Hannikainen (n 25) 723 [Emphasis Added].

²⁰⁸ *Suresh v. Canada (Minister of Citizenship and Immigration)* (n 189) [61].

2.5.5 HUMAN RIGHTS RECOGNISED AS *JUS COGENS*

In its final draft of the Law of Treaties, the International Law Commission did not provide definite examples of rules that fall within the domain of *jus cogens* since ‘there is no simple criterion by which to identify a general rule of international law as having the character of *jus cogens*’.²⁰⁹ On this point, Lord McNair stated famously that ‘it is easier to illustrate these rules than to define them’.²¹⁰ In this sense, it is better to identify particular human rights recognised as *jus cogens* by following the method adopted by the International Law Commission:

The Commission considered the right course to be to provide in general terms that a treaty is void if it conflicts with a rule of *jus cogens* and to leave the full content of this rule to be worked out in State practice and in the jurisprudence of international tribunals.²¹¹

I will now draw from international and domestic case law, legal reports, other jurisprudential sources and the work of internationally acknowledged scholars in order to clarify those human rights that are recognised as *jus cogens* into view.²¹² As stated earlier, this Thesis views the relationship between *jus cogens* norms and human rights as a reflection of the organic nature of the sphere and framework of *jus cogens* norms rather than asserting that all human rights are accepted as *jus cogens* norms. Since the notion of *jus cogens* norms has an organic nature, an agreed and fixed list of human rights that have a *jus cogens* nature may not be feasible.

²⁰⁹ United Nations General Assembly, *Yearbook of the International Law Commission: Draft Articles on the Law of Treaties with Commentaries* (n 178) 247–248; see also United Nations General Assembly, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law: Report of the Study Group of the International Law Commission Finalized by Martti Koskenniemi* (n 26) 374.

²¹⁰ Lord Arnold Duncan McNair, *The Law of Treaties* (Clarendon Press 1961) 215.

²¹¹ United Nations General Assembly, *Yearbook of the International Law Commission: Draft Articles on the Law of Treaties with Commentaries* (n 178) 248.

²¹² See further Gowlland-Debbas (n 25); Hannikainen (n 25).

Such human rights can be found in judicial practice since the concept of *jus cogens* was first advanced by legal sources, international case law and law reports. The *jus cogens* character of fundamental human rights has been reflected and upheld in legal practice. In this way, a set of human rights recognised as peremptory under general international law may be introduced.

According to the Inter-American Court of Human Rights, the prohibition of torture should be placed within the domain of *jus cogens*.²¹³ Additionally, the Inter-American Court, in the cases of *Cantoral Benavides v Peru* (2000), *Maritza Urrutia v Guatemala* (2003), *Gomez-Paquiyaui Brohers v Peru* (2004), *Tibi v Ecuador* (2004), and *Fermin Ramirez v Guatemala* (2005), stated that torture (in all its forms, including physical and psychological) and other inhuman, cruel and degrading treatment or punishment together with extra-legal executions are regarded as violations of *jus cogens* norms.²¹⁴ Article 5 of the American Convention on Human Rights also recognises the prohibition of torture and cruel, inhuman or degrading punishment or treatment as non-derogable. Moreover, recognition of this prohibition has been approached as a peremptory norm in international case law.²¹⁵ The Inter-

²¹³ *Case of Goiburú et al. v. Paraguay* (n 186) [84, 93, and 128].

²¹⁴ *Fermin Ramirez v Guatemala* [2005] Series C No. 126 (Inter-American Court of Human Rights) [117]; *Tibi v Ecuador* [2004] Series C No. 114 (Inter-American Court of Human Rights) [143]; *Gómez-Paquiyaui Brothers v Peru* [2004] Series C No. 110 (Inter-American Court of Human Right) [76, 112, and 128]; *Maritza Urrutia v Guatemala* [2003] Series C No. 103 (Inter-American Court of Human Rights) [92]; *Cantoral Benavides v Peru* [2000] Series C No. 69 (Inter-American Court of Human Rights) [95]; see also *Myrna Mack Chang v Guatemala* [2003] Series C No. 101 (Inter-American Court of Human Rights) [Reasoned Concurring Opinion of Judge Garcia-Ramirez at para. 49]; *Advisory Opinion on the Rights and Guarantees of Children in the Context of Migration and/or in Need of International Protection* [2014] OC-21/14 (Inter-American Court of Human Rights) [224]; *Bayarri v Argentina* [2008] Series C No. 187 (Inter-American Court of Human Rights) [81]. See also Manfred Nowak and Walter Suntinger, 'International Mechanisms for the Prevention of Torture' in Arie Bloed and others (eds), *Monitoring Human Rights in Europe: Comparing International Procedures and Mechanisms* (Martinus Nijhoff Publishers 1993) 145–168.

²¹⁵ *The Massacres of El Mozote and nearby places v El Salvador* [2012] Series C No. 252 (Inter-American Court of Human Rights) [147]; *Barrios Family v Venezuela* [2011] Series C No. 237 (Inter-American Court of Human Rights) [50]; *Torres Millacura et al v Argentina* [2011] Series C No. 229 (Inter-American Court of Human Rights) [84]; *Ximenes-Lopes v Brazil* [2006] Series C No. 149 (Inter-American Court of Human Rights) [126]; *Caesar v Trinidad and Tobago* [2005] Series C No. 123 (Inter-American Court of Human Rights) [59 and 100].

American Court, in the cases of *Baldeon-Garcia v Peru* (2006) and *Garcia-Asto and Ramirez-Rojas v Peru*, stated that the prohibition against torture constitutes a form of peremptory norm and as such is strictly forbidden by international human rights law.²¹⁶

Yet another principle that has attained the status of a *jus cogens* norm is the principle of *non-refoulement* in the ambit of the International Law of Refugees.²¹⁷ This principle was enshrined in Article 33 of the 1951 Geneva Convention relating to the Status of Refugees. Furthermore, the *jus cogens* character of the principle of *non-refoulement* has been both stated by international case law and sustained by international scholars. The Inter-American Court, in *Advisory Opinion on the Rights and Guarantees of Children in the Context of Migration and/or in Need of International Protection* (2014), asserted that the principle of *non-refoulement* is associated with the prohibition of torture. The Court added that since ‘it is an obligation derived from the prohibition of torture, the principle of *non-refoulement* in this area is absolute and also becomes a peremptory norm of customary international law; in other words, of *jus cogens*’.²¹⁸ Additionally, Judge Pinto de Albuquerque, in his Concurring Opinion to a decision of the European Court of Human Rights in the case of *Hirsi Jamaa and Others v. Italy*, remarked that ‘the prohibition of *non-refoulement* is a principle of customary international law, binding on all States, and

²¹⁶ *Baldeón-García v Perú* [2006] Series C No. 147 (Inter-American Court of Human Rights) [117]; *García-Asto and Ramírez-Rojas v Peru* [2005] Series C No. 137 (Inter-American Court of Human Rights) [222].

²¹⁷ Allain, ‘The Jus Cogens Nature of Non-Refoulement’ (n 13); Trindade (n 27) 298.

²¹⁸ *Advisory Opinion on the Rights and Guarantees of Children in the Context of Migration and/or in Need of International Protection* (n 214) [225]; Parker and Neylon (n 24) 435–436; Erika De Wet, ‘The Prohibition of Torture as an International Norm of Jus Cogens and Its Implications for National and Customary Law’ (2004) 15 *European Journal of International Law* 97, 101.

also it falls within the sphere of *jus cogens* norms since no derogation is allowed and no reservations to it are admitted'.²¹⁹

As discussed in the previous section (2.5.4), article 53 of the 1969 Vienna Convention outlines stringent criteria for recognising a norm as a peremptory norm of general international law. As Special Rapporteur James Crawford indicated, the number of recognised peremptory norms is, so far, relatively few; however, various international and national tribunals have endorsed and affirmed that the scope of *jus cogens* norms is not limited to the terms outlined in the law of treaties. Thus there are extant and emerging prohibitions, including those of torture, racial discrimination, genocide and slavery, which are recognised and accepted as peremptory norms of general international law.²²⁰

The concept of *jus cogens* has also emerged in the law governing the international responsibilities of States; therefore, it reaches the very foundations of the international legal order and general international law.²²¹ Indeed, Judge Cançado Trindade, in one of his separate opinions, stated that although Articles 53 and 64 of the 1969 Vienna Convention establish the function of *jus cogens*:

[I]n the domain proper to the law of treaties, it is an ineluctable consequence of the existence itself of *imperative* norms of international law that these latter are not limited to the violations resulting from treaties, and that they encompass every and any violation, including those resulting from every and any action and any unilateral acts of the States. To the *objective* international

²¹⁹ *Hirsi Jamaa and Others v Italy* [2012] Application no. 27765/09 (European Court of Human Rights) 67 [Concurring Opinion of Judge Pinto de Albuquerque] [Emphasis Added].

²²⁰ Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries* (n 26) 188. See for example case *R v. Bow Street Metropolitan Stipendiary Magistrate and Others, ex parte Pinochet Ugarte (No. 3)* (n 46); *Prosecutor v. Anto Furundzija (Trial Judgement)* (n 188).

²²¹ Trindade (n 27) 292–297; *Advisory Opinion on the Juridical Condition and Rights of Undocumented Migrants* (n 202) [99].

responsibility of the States corresponds necessarily the notion of objective *illegality* (one of the elements underlying the concept of *jus cogens*).²²²

It is now widely recognised that *jus cogens* norms effectively bring forth obligations *erga omnes* which engender a general right of standing among whole States subject to the obligation to make a claim if those obligations are violated.²²³ The resemblance between *jus cogens* norms and *erga omnes* obligations is not vague; indeed, James Crawford states that *erga omnes* obligations and *jus cogens* norms are virtually coextensive. Crawford also describes *jus cogens* norms and obligations *erga omnes* as *super-norms* in general international law, by which he means ‘substantive rules of international law which are said to have some additional force or effect, over and above the effect that a *normal* rule of customary international law would have’.²²⁴ Crawford goes on to argue that ‘if a particular obligation can be set aside or displaced as between two States, it is hard to see how that obligation is owed to the international community as a whole’.²²⁵ However, this resemblance does not imply that two concepts are interchangeable. This truth was clearly laid out by the International Law Commission:

While peremptory norms of general international law focus on the scope and priority to be given to a certain number of fundamental obligations, the focus of obligations to the international community as a whole is essentially on the legal interest of all States in compliance – i.e. in terms of the present articles, in being entitled to invoke the responsibility of any State in breach. Consistently with the difference in their focus, it is appropriate to reflect the consequences

²²² *Blake v Guatemala* [1998] Series C No 36 (Inter-American Court of Human Rights) [Separate Opinion of Judge Trindade at para 25].

²²³ See Byers (n 24); Tams (n 24); Trindade (n 27) 312.

²²⁴ Crawford, *Multilateral Rights and Obligations in International Law* (n 26) 452.

²²⁵ James Crawford, ‘Third Report on State Responsibility’ (2000) UN Doc A/CN.4/507 para 106(a).

of the two concepts in two distinct ways. First, serious breaches of obligations arising under peremptory norms of general international law can attract additional consequences, not only for the responsible State but for all other States. Secondly, all States are entitled to invoke responsibility for breaches of obligations to the international community as a whole.²²⁶

Although *jus cogens* norms always engender obligations *erga omnes*, not all of those obligations are engendered by *jus cogens* norms; nevertheless the two conceptions are inextricably entwined.²²⁷ Given that *jus cogens* norms generate obligations *erga omnes*, those norms endow them with a necessarily objective character that encompasses all those to whom obligations *erga omnes* are addressed.²²⁸ Obligations *erga omnes* include fundamental values and interests. Obedience to those obligations binds all States and the entire international community.

An explanation of the concept and term of *erga omnes* was offered in the 1970 *Barcelona Traction* case by the International Court of Justice. In this case, the Court stated that

[A]n essential distinction should be drawn between the obligations of a State towards the international community as a whole, and those arising *vis-à-vis* another State [...] By their very nature the former are the concern of all States. In view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations *erga omnes*.

²²⁶ Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries* (n 26) 244–245. The International Criminal Tribunal for the Former Yugoslavia also pointed out that ‘While the *erga omnes* nature just mentioned appertains to the area of international enforcement (*lato sensu*), the other major feature of the principle proscribing torture relates to the hierarchy of rules in the international normative order’. *Prosecutor v. Anto Furundzija (Trial Judgement)* (n 188) [153].

²²⁷ For further analysis, see Trindade (n 27) 312–326; Bruno Simma, *From Bilateralism to Community Interest in International Law*, vol 250 (Collected Courses of the Hague Academy of International Law 1994) 300–301; Byers (n 24) 229–238; Zemanek (n 24) 6–8.

²²⁸ Trindade (n 27) 326.

Such obligations derive, for example, in contemporary international law, from the outlawing of acts of aggression, and of genocide, as also from the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination.²²⁹

The International Court of Justice has considered obligations *erga omnes* with regards to the fundamental nature of humanity. In the 1949 *Corfu Channel Case*, the Court stated that the obligations of States are not necessarily based on the nature of the convention; those obligations may be also based on ‘certain general and well-recognized principles, namely: elementary considerations of humanity’.²³⁰ The Court, in an advisory opinion on the 1996 *Legality of the Threat or Use of Nuclear Weapons*, recalling the ‘elementary considerations’ mentioned in the 1949 *Corfu Channel Case*, referred to ‘intransgressible principles of international customary law’.²³¹ In an advisory opinion from 2004, the Court reiterated the term ‘intransgressible principles’ and stated that these principles ‘incorporate obligations which are essentially of an *erga omnes* character’.²³² These statements of the Court of Justice and the logic through which the obligations *erga omnes* were established in the *Barcelona Traction* case demonstrate that the Court has endeavoured to underline the actual subsistence of particularly important norms of general international law.²³³

The prohibitions enumerated in the 1970 *Barcelona Traction* case are obligations *erga omnes*. Indeed, those *erga omnes* obligations, which apply to the

²²⁹ *Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain), Second Phase* (n 185) [33–34].

²³⁰ *Corfu Channel (United Kingdom of Great Britain and Northern Ireland v Albania), Merits* [1949] ICJ Rep 22.

²³¹ *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion* [1996] ICJ Rep [79].

²³² *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion* [2004] ICJ Rep [157].

²³³ For further details, see United Nations General Assembly, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law: Report of the Study Group of the International Law Commission Finalized by Martti Koskenniemi* (n 26) 379.

international community as a whole, have been endorsed by the 2001 International Law Commission's Articles on State Responsibility. As Jean Allain has observed, the notion of State Responsibility has moved away from the concept of "international crimes"²³⁴ towards drawing a distinction between obligations owed to an individual or injured State and those due to the international community as a whole.²³⁵ In this regard, in 2001 the International Law Commission, under the direction of the Special Rapporteur James Crawford, adopted articles in relation to serious breaches of fundamental obligations to the international community under *jus cogens* norms and the specific, legal consequences of those breaches.²³⁶

Furthermore, Article 42(b) of the 2001 International Law Commission Articles on State Responsibility indicates that any transgression from these prohibitions entitles an injured State to invoke the principle of State Responsibility. The aforementioned statement of the International Court of Justice, in *Barcelona Traction*, demonstrates that for 'the purposes of State Responsibility certain obligations are owed to the international community as a whole, and that by reason of "the importance of the rights involved" all States have a legal interest in their protection'.²³⁷ Such references to the adoption by International Law Commission of articles regarding serious breaches of obligations *erga omnes* to the international community as a whole clearly indicate that the domain and concept of *jus cogens* have firmly moved beyond the law of treaties. On this point, Peter Malanczuk has emphasised that *erga omnes* obligations are concerned with the enforceability of *jus*

²³⁴ Article 19(2) of the 1996 Draft Articles on State Responsibility states: 'An internationally wrongful act which results from the breach by a State of an international obligation so essential for the protection of fundamental interests of the international community that its breach is recognized as a crime by that community as a whole constitutes an international crime'.

²³⁵ Allain, 'The Jus Cogens Nature of Non-Refoulement' (n 13) 536.

²³⁶ Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries* (n 26) 242–253.

²³⁷ *ibid* 242.

cogens norms, the transgression of which affects not only the individual State or States, but all members of the international community.²³⁸

In summary, regarding human rights, the domain of *jus cogens* norms should not be seen as a closed legal category, and therefore should not be limited to those norms currently recognised as *jus cogens*. This view is reflected in the judgment of the Inter-American Court in *Cantoral Benavides v Peru*:

[C]ertain acts that were classified in the past as inhuman or degrading treatment, but not as torture, may be classified differently in the future, that is, as torture, since the growing demand for the protection of fundamental rights and freedoms must be accompanied by a more vigorous response in dealing with infractions of the basic values of democratic societies.²³⁹

This gradual expansion of the domain of *jus cogens* necessitates careful analysis of those human rights violations recognised as transgressions of peremptory norms of general international law.

Returning to the case of *Barcelona Traction*, the outlawed acts enumerated as obligations *erga omnes* also bear the character of *jus cogens*.²⁴⁰ Evidence of this expansion of the sphere of human rights violations that are deemed to be violations of *jus cogens* norms can be found in international and domestic case law, law reports, other legal materials and the works of internationally recognised scholars as well. For example, according to the Report of International Law Commission, the obligations of States to outlaw and protect individuals from slavery and the slave trade, by virtue

²³⁸ Peter Malanczuk, 'Countermeasures and Self-Defence as Circumstances Precluding Wrongfulness in the International Law Commission's Draft Articles on State Responsibility' (1983) 43 *Heidelberg Journal of International Law* 705, 742–747.

²³⁹ *Cantoral Benavides v. Peru* (n 214) [99].

²⁴⁰ Byers (n 24) 230.

of establishing obligation *erga omnes*, are recognised as *jus cogens* norms.²⁴¹ This perspective was also affirmed in the High Court of Australia by Kirby J in 2008 in *The Queen v Tang* case as follows:

*In conformity with the jus cogens norms, slavery is prohibited as a peremptory norm from which no derogation is permitted. This further reinforces the seriousness of slavery and hence the need to define it very carefully and precisely.*²⁴²

The peremptory character of the prohibition of slavery has been supported by academic writers.²⁴³ Jean Allain, in *Slavery in International Law: Of Human Exploitation and Trafficking*, states that:

[S]lavery has attained the level of a *jus cogens* norm [...] [This] means that when violations transpire, they carry with them what in domestic law might be termed strict liability. That is to say that no justification could preclude State Responsibility for a breach of an obligation tied to slavery. One further manifestation of slavery as a *super-norm* is recognised, this time in international human rights treaties where – and leading on from its *jus cogens* nature – slavery is deemed to be a non-derogable right, wherein the prohibition against slavery is exempt from being suspended in times of war or national emergency.²⁴⁴

²⁴¹ United Nations General Assembly, *Yearbook of the International Law Commission: Draft Articles on the Law of Treaties with Commentaries* (n 178) 248.

²⁴² *The Queen v Tang* (n 189) 49–50 [Emphasis Added].

²⁴³ Allain, *The Law and Slavery* (n 13); Jean Allain, *Slavery in International Law: Of Human Exploitation and Trafficking* (Martinus Nijhoff Publishers 2013); Hannikainen (n 25) 445–446.

²⁴⁴ Allain, *Slavery in International Law* (n 243) 110.

In its Commentary on the Draft Articles on State Responsibility in 2001, the International Law Commission listed a number of prohibitions recognised as *jus cogens* norms, including slavery, genocide, and torture.²⁴⁵

Numerous decisions of the International Criminal Tribunal for the Former Yugoslavia in the Trial Chambers, for example in *Prosecutor v Radislav Krstic*, *Prosecutor v Dragoljub Kunarac*, *Prosecutor v Kupreskic et al.* and *Prosecutor v Goran Jelusic*, recognised torture and genocide as transgressions of *jus cogens* norms.²⁴⁶ The Tribunal, in the *Prosecutor v Anto Furundzija* case, further identified torture as both a *jus cogens* norm and an obligation *erga omnes*. The Tribunal stated that ‘the prohibition of torture imposes upon States obligations *erga omnes*, that is, obligations owed towards all other members of the international community, each of which then has a correlative right’. An important characteristic of the principle of prohibition of torture ‘relates to the hierarchy of rules in the international normative order. Because of the importance of the values it protects, this principle has evolved into a peremptory norm or *jus cogens* [...]’.²⁴⁷

Furthermore, the Tribunal, in *Prosecutor v Milan Simic*, in the Trial Chamber II, recapitulated its position that the protection from torture is recognised in conventional and customary international law as a *jus cogens* norm. In the cases of *Prosecutor v. Radoslav Brdjanin* and *Prosecutor v. Milomir Stakic*, the Trial

²⁴⁵ United Nations General Assembly, *Yearbook of the International Law Commission: Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries* (n 179) 85.

²⁴⁶ *Prosecutor v Radislav Krstic (Trial Judgement)* [2001] IT-98-33-T (International Criminal Tribunal for the former Yugoslavia) [541]; *Prosecutor v. Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic (Trial Judgement)* (n 188) [466]; *Prosecutor v. Kupreskic et al. (Trial Judgement)* (n 188) [520]; *Prosecutor v Goran Jelusic (Trial Judgement)* [1999] IT-95-10-T (International Criminal Tribunal for the former Yugoslavia) [60].

²⁴⁷ *Prosecutor v. Anto Furundzija (Trial Judgement)* (n 188) [151–153].

Chambers II also reiterated that the prohibition of genocide falls within the domain of *jus cogens* norms.²⁴⁸

The *Pinochet No 3* case before the UK House of Lords is the most significant case to reflect the superiority of *jus cogens* norms over the principle of immunity. In that case, the Lords held that the *jus cogens* character of torture ‘justifies states in taking universal jurisdiction over torture wherever committed’.²⁴⁹ The Lords also stated that the prohibition of torture has the character of *jus cogens* or obligation *erga omnes* under international law.²⁵⁰ Furthermore, the Canadian Supreme Court, in the 2002 *Suresh v Canada* case, stated that the prohibition of torture becomes an emerging *jus cogens* norm of general international law from which derogation is simply impossible.²⁵¹ The Canadian Supreme Court also indicated that there are three convincing indicia that the prohibition of torture is a norm of *jus cogens*. The first of these is the great set of multilateral instruments which uncomplicatedly outlaw torture.²⁵² Second, no State has legalised torture in its domestic law and no State appears to be willing to admit that the act of torture becomes a method of its administrative practice.²⁵³ Third, as already noted, a set of international authorities (including international courts, legal reports and international scholars) have

²⁴⁸ *Prosecutor v Milan Simic (Sentencing Judgement)* [2002] IT-95-9/2-S (International Criminal Tribunal for the former Yugoslavia) [34]; *Prosecutor v Radoslav Brdjanin (Trial Judgement)* [2004] IT-99-36-T (International Criminal Tribunal for the former Yugoslavia) [680]; *Prosecutor v Milomir Stakic (Trial Judgement)* [2003] IT-97-24-T (International Criminal Tribunal for the former Yugoslavia) [500].

²⁴⁹ *R v. Bow Street Metropolitan Stipendiary Magistrate and Others, ex parte Pinochet Ugarte (No. 3)* (n 46) 198.

²⁵⁰ *ibid* 174.

²⁵¹ *Suresh v. Canada (Minister of Citizenship and Immigration)* (n 189) 4.

²⁵² See *The Geneva Conventions of 12 August 1949* (International Committee of the Red Cross 2012) <<https://www.icrc.org/eng/assets/files/publications/icrc-002-0173.pdf>> accessed 20 January 2016; United Nations General Assembly, *Universal Declaration of Human Rights*, G.A. Res. 217A (III) (1948) Article 5; United Nations General Assembly, *Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, G.A. Res. 3452 (XXX) (1975); ‘International Covenant on Civil and Political Rights’ (n 203) Article 7; ‘European Convention for the Protection of Human Rights and Fundamental Freedoms’ (n 203) Article 3; American Convention on Human Rights (n 203) Article 5.

²⁵³ See also Hannikainen (n 25) 502–503.

explicitly or implicitly manifested that the prohibition on torture is an established norm that falls within the species of *jus cogens*.²⁵⁴

Concerning the prohibition of genocide as an obligation *erga omnes*, the International Court of Justice stated that ‘the contracting States do not have any interests of their own; they merely have, one and all, a common interest, namely, the accomplishment of those high purposes which are the *raison d’être* of the convention’, and in such a convention, ‘one cannot speak of individual advantages or disadvantages to States, or of the maintenance of a perfect contractual balance between rights and duties’.²⁵⁵ The Court of Justice, at the preliminary objections stage of the *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, also stated that the rights and obligations articulated in that Convention were ‘rights and obligations *erga omnes*’.²⁵⁶ The Court, in a judgment in the 2007 *Genocide Convention Case*, provided that the norm prohibiting genocide is assuredly a *jus cogens* norm.²⁵⁷

There are also other violations of international human rights such as forced or compulsory labour, which highlight the tension between fundamental human rights and diplomatic immunity. In 2007, the International Labour Organisation Committee of Experts on the Application of Conventions and Recommendations stated that the ‘prohibition of the use of forced or compulsory labour in all its forms is considered

²⁵⁴ For details of all three indicia mentioned above, see *Suresh v. Canada (Minister of Citizenship and Immigration)* (n 189) [62, 63, and 64].

²⁵⁵ *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion* [1951] ICJ Rep 23. See also *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v. Rwanda), Jurisdiction and Admissibility, Judgment* [2006] ICJ Rep [64].

²⁵⁶ *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), Preliminary Objections* [1996] ICJ Rep 595 [31].

²⁵⁷ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), Judgment* [2007] ICJ Rep [161].

[...] as a peremptory norm of modern international law on human rights'.²⁵⁸ It was then determined that the use of any form of forced or compulsory labour falling within the domain of the Forced Labour Convention 'could no longer be justified by invoking observance of the transitional provisions [Article 1, paragraph 2, and Articles 3-24], since this would contradict the spirit of the Convention'.²⁵⁹ Although the adoption of the 2014 Protocol to the Forced Labour Convention, 1930, stated that 'the transitional period provided for in the Convention has expired, and the [transitional provisions] are no longer applicable', the conventional definition of forced labour, as Jean Allain underscored, is 'of fundamental importance in contemporary debates, as they set the normative basis for understanding' what this term means in law.²⁶⁰ The 1930 Forced Labour Convention set out that 'forced or compulsory labour shall mean all work or service which is exacted under menace of any penalty for its non-performance and for which the worker concerned does not offer himself voluntarily'.²⁶¹ As it can be observed from the legislative background of the 1930 Forced Labour Convention, contemporary debates in respect of forced labour centre on the issue of whether forced labour falls within the scope of peremptory norms of general international law (*jus cogens* norms).²⁶² The International Labour Organisation has reiterated the *jus cogens* nature of forced labour; for instance, the Report of the Commission of Inquiry considered forced

²⁵⁸ 'International Labour Conference, 96th Session, Third Item, Report of the Committee of Experts on the Application of Conventions and Recommendations, Eradication of Forced Labour, General Survey Concerning the Forced Labour Convention, 1930 (No. 29), and the Abolition of Forced Labour Convention, 1957 (No. 105)' (International Labour Office 2007) Report III (Part 1B) xi.

²⁵⁹ Jean Allain, 'The Implications of Preparatory Works for the Debate Regarding Slavery, Servitude and Forced Labour' in Adelle Blackett and Anne Trebilcock (eds), *Research Handbook on Transnational Labour Law* (Edward Elgar Publishing 2015) 524–525.

²⁶⁰ *ibid* 525.

²⁶¹ Allain, *The Law and Slavery* (n 13) 370; Allain, 'The Implications of Preparatory Works for the Debate Regarding Slavery, Servitude and Forced Labour' (n 259) 532; see 'International Labour Organization, Forced Labour Convention, C29' (1930) Article 2(1).

²⁶² Allain, 'The Implications of Preparatory Works for the Debate Regarding Slavery, Servitude and Forced Labour' (n 259) 532.

labour as a peremptory norm and accordingly declared that ‘there exists now in international law a peremptory norm prohibiting any recourse to forced labour and that the rights not to be compelled to perform forced or compulsory labour is one of the basic human rights’.²⁶³ However, a number of exceptions to the application of the Forced Labour Convention are found in the Article 2(2) of the Convention.²⁶⁴ The existence of these exceptions constitutes an impediment to approaching forced labour as a peremptory norm of general international law. In this context, Allain rightly remarks that if ‘these exceptions to the concept of forced or compulsory labour were abandoned, this would allow for this norm to establish itself both in fact and in law as a true peremptory norm of international law which would be absolutely binding on States and from which no derogation would be permitted’.²⁶⁵ Ultimately, considering the legislative history of the 1930 Forced Labour Convention, while it has been argued that forced or compulsory labour has attained the threshold of *jus cogens* norms, at the very least, as set out in Article 5 of the 1926 Slavery Convention, States had to take ‘all necessary measures to prevent compulsory or forced labour from developing into conditions analogous to slavery’.²⁶⁶

The Restatement (Third) of the Foreign Relations Law of the United States should also be noted, as it lists a number of acts which, if practiced, encouraged or condoned by a State as a matter of State policy, violate the rules of general international law. These forbidden acts include genocide; slavery or slave trade; torture or other cruel, inhuman or degrading treatment or punishment; systematic

²⁶³ ‘Report of the Commission of Inquiry Appointed under Article 26 of the Constitution of the International Labour Organization to Examine the Observance by Myanmar of the Forced Labour Convention, 1930 (No. 29)’ (1998) at para 203.

²⁶⁴ See generally for exceptions Allain, *The Law and Slavery* (n 13) 371.

²⁶⁵ Allain, ‘The Implications of Preparatory Works for the Debate Regarding Slavery, Servitude and Forced Labour’ (n 259) 534.

²⁶⁶ See generally Allain, *Slavery in International Law* (n 243) 246–254; Allain, *The Law and Slavery* (n 13) 345, 396, and 517; Slavery Convention 1926 Article 5.

racial discrimination or a consistent pattern of serious violations of internationally recognised human rights.²⁶⁷ This proscriptive list of principles of customary international law can now be deemed as existing within the domain of *jus cogens* norms on the grounds that any international agreement or policy which constitutes a violation of any of the prohibited acts listed above would be null and void under international law.

States and their agents cannot, in any way, seek legal justification when they violate fundamental human rights as long as the protection of those rights has attained the normative value of *jus cogens*.²⁶⁸ Ultimately, this Thesis, for its part, considers *jus cogens* norms as a declaration to secure the absolute protection of fundamental rights for all human beings. Finally, regarding the language of this Thesis, when the phrase violation(s) of (fundamental) human rights or (fundamental) human right(s) is used, it signifies or reads as *jus cogens* human rights.

2.6 CONCLUSION

This Chapter provides an important discussion regarding the human rights challenge to immunities as it focuses on the tension between human rights and State sovereignty. According to some theorists, State sovereignty is being eroded by the promulgation of human rights. For example, David Hirsh has stated that

Human rights are instruments that seek to limit the scope of state sovereignty
[...] state [...] sovereignty is not the source of human rights. It is a
fundamental strand of the cosmopolitan argument that the incorporation and

²⁶⁷ 'The Restatement (Third) of the Foreign Relations Law of the United States' (1987) § 702.

²⁶⁸ See J Allain's comment on *jus cogens* norms in Allain, 'The Jus Cogens Nature of Non-Refoulement' (n 13).

enforcement of human rights is not something that states may choose to do but is something that they are obligated to respect.²⁶⁹

Following the Second World War, growing interest in and concern for the protection of human rights compelled an examination of the sovereign structure of the State. As Henkin has explained, ‘1945 saw a small but clear, firm, bold step from state values toward human values, a small but clear derogation from state sovereignty [...] the international system [...] has moved beyond state values towards human values and towards commitment to human welfare broadly conceived’.²⁷⁰ Sovereignty may not have a self-adjusting system for adapting to the requirements of each century; however, inadequate human rights protections and fundamental human rights violations definitely strengthen the power of international law to restrict the ultimate sovereign power of the State. With regards to the protection and endorsement of human rights, the sovereign structure of States no longer embraces the notion of absolute power.

The mummification of the structure of absolute sovereignty intrinsically hinders the development of human rights. It cannot be forgotten that if the concept of sovereignty is misapplied, it may protect perpetrators who are responsible for fundamental human rights violations. Hierarchically, it is certainly difficult to determine the dominant principle between State sovereignty and international human rights norms, because sovereignty is the ‘supreme authority to create and enforce

²⁶⁹ David Hirsh, *Law Against Genocide: Cosmopolitan Trials* (Glasshouse Press and Cavendish 2004)

3.

²⁷⁰ Henkin (n 7) 32–34.

laws within a given territory' and the State technically holds the supreme power in its own territory.²⁷¹ Reflecting on this issue, Oppenheim remarks that from:

the foregoing sketch of the history of the conception of sovereignty it becomes apparent that there is not, and never was, unanimity regarding this conception. [...] It is a fact that sovereignty is a term used without any well-recognised meaning except that of supreme authority. Under these circumstances those who do not want to interfere in a mere scholastic controversy must cling to the facts of life and the practical, though abnormal and illogical, condition of affairs.²⁷²

Observed from the three very different perspectives which have been considered in this Chapter, a clear shift in the balance between State sovereignty and the safeguarding and promotion of international human rights is evident. First, some States are willing to waive their right to take decisions on which States do not have a conclusive supremacy. These critical decisions can be taken by international organisations such as the United Nations and the European Union. Secondly, States allow their own citizens to appeal to international or regional institutions which have superior jurisdiction in the matter of human rights; and third, States have relinquished²⁷³ their sovereign power in order to safeguard people from human rights violations, in effect allowing international or foreign bodies to encroach on what previously had been deemed exclusive domestic affairs.²⁷⁴ Ultimately, it can be

²⁷¹ J Samuel Barkin and Bruce Cronin, 'The State and The Nation: Changing Norms and The Rules of Sovereignty in International Relations' (1994) 48 *International Organization* 107, 109.

²⁷² Lassa Oppenheim, *International Law: A Treatise - Peace*, vol 1 (Ronald F Roxburgh ed, 3rd edn, The Lawbook Exchange 2008) 133.

²⁷³ States do not fully relinquish their sovereign power. Sovereign power is only breached by foreign intervention.

²⁷⁴ Masahiro Miyoshi, 'Sovereignty and International Law' (The State of Sovereignty: 20th Anniversary Conference of the International Boundaries Research Unit, Durham, 1 April 2009).

observed that considering human rights as determinant over the international system has exerted considerable influence on international law.

Louis Henkin maintains that the ‘law now reflects human values in addition to state values, or allows human values to modify state values’; however, while there has been considerable development with regards to the position of human rights in international law, these changes have encountered significant resistance in the international arena.²⁷⁵ Such resistance is mostly found in the field of international immunities. International immunities derived from the sovereign right of the State stand in significant opposition to international human rights.

Against the backdrop of this resistance, the fundamental tension between immunity and human rights recognised as *jus cogens* norms is inevitable. In the normative hierarchy theory, the prohibition of fundamental human rights violations as peremptory norms under international law should trump the plea of immunity by States, Heads of State and diplomatic agents. It would be difficult to argue that the immunity of States, Heads of State or diplomatic agents, prevails over peremptory norms of general international law in the case of violation of *jus cogens* rights. In this sense, in contrast with the substantive character of *jus cogens* norms, the procedural nature is attributed to the jurisdictional immunity.²⁷⁶

²⁷⁵ Henkin (n 7) 44. The following criticism by Henkin also demonstrates how difficult it is to chip away at the sovereign structure of the State: ‘The banner of sovereignty still waves ominously over all human rights issues; the mantra of sovereignty is still intoned against human rights. Sovereign states accept international human rights standards, if they wish to, when they wish to, to the extent they wish to. They submit to monitoring, to judgment by international human rights courts and commissions, if they wish, to the extent they wish [...] state sovereignty [...] can be summarized as: Sovereignty means leave us alone. Sovereignty is: We will engage in a minimal amount of cooperation, if we as sovereign states consent. Sovereignty is subject to some creeping international human rights, to the extent sovereign nations consent. In general [...] sovereignty [...] is alive and well’. Henkin (n 138) 5.

²⁷⁶ See further Cezary Mik, ‘Jus Cogens in Contemporary International Law’ (2013) 33 Polish Yearbook of International Law 27; Lorna McGregor, ‘State Immunity and Jus Cogens’ (2006) 55 International and Comparative Law Quarterly 437; Xiaodong Yang, ‘Jus Cogens and State Immunity’ (2006) 3 New Zealand Yearbook of International Law 131, 142–145; Emmanuel Voyiakis, ‘Access to Court v State Immunity’ (2003) 52 International and Comparative Law Quarterly 297.

This procedural nature of immunity was stated by the International Court of Justice: ‘there is no conflict between *the jus cogens norms and the rules of immunity since they address different matters*. The rules of State immunity are procedural in character and are confined to determining whether or not the courts of one State may exercise jurisdiction in respect of another State. They do not bear upon the question of whether or not the conduct in respect of which the proceedings are brought was lawful or unlawful’.²⁷⁷ Fox also highlighted that the immunity principle is a ‘procedural rule going to the jurisdiction of national court. It does not go to substantive law [...] there is no substantive content in the procedural plea of State immunity upon which a *jus cogens* mandate can bite’.²⁷⁸ Considering the normative hierarchy theory, the tension between immunities and *jus cogens* human rights should be dealt with in favour of the latter. With respect to this fundamental tension, Chapters 4, 5, and 6 engage respectively with State, Head of State and diplomatic immunities, in cases of *jus cogens* human rights violations. However, before going any further with this issue, Chapter 3 analyses the distinction between immunity and impunity and argues that immunity does not equate to impunity when *jus cogens* norms are breached. Before moving on to Chapter 3, it should be stated here that the immunity principle should be preserved if it does not extend to situations where there has been a violation of fundamental human rights guaranteed by a peremptory norm of general international law.

²⁷⁷ *Jurisdictional Immunities of the State (Germany v. Italy: Greece Intervening)*, Judgment (n 17) [93] [emphasis added].

²⁷⁸ Hazel Fox, *The Law of State Immunity* (Oxford University Press 2002) 525.

3 HUMAN RIGHTS BASED CHALLENGE: IMMUNITY OR IMPUNITY

3.1 INTRODUCTION

This chapter serves as a guide to the concepts of immunity and impunity, offering a descriptive analysis of both terms and the distinctive features of each. It is concerned mainly with the argument that immunity does not always amount to impunity in international law. It offers an in-depth discussion of the difference between immunity and impunity. The analysis developed in this chapter sits at the centre of this research, in that it both clarifies the previous chapter and informs subsequent chapters which concern the human rights challenge to State, Head of State and diplomatic immunity.

The chapter is organised as follows. A short introduction of sovereign immunity is provided in Section 3.2, which also seeks to explain the need for sovereign immunity from criminal prosecution, to provide an overview of the history of immunities under international law and to review legal and social descriptions of immunity and the origin of international immunities. Section 3.3 clarifies the relevant international immunities within the frame of this Thesis. Section 3.4 explores the question of why impunity should be differentiated from immunity, and analyses the reasons to resist such impunity. This section also provides a brief review of the literature on impunity, and particularly the “culture of impunity”, and elucidates the notion of impunity from both social and legal perspectives. Section 3.5 summarises the most pertinent struggles of international criminal justice to end impunity for

those who violate international law. Specifically, the contributions of the International Criminal Tribunals for Rwanda and for the Former Yugoslavia and the International Criminal Court are briefly explained. Section 3.6 interprets the implications for human rights when impunity is tolerated, and underscores the importance of distinguishing between immunity and impunity. Finally, Section 3.7 concludes by re-evaluating the concept of impunity and the consequences of tolerating impunity. The central aim of Chapter 3 is to explicate that immunity does not always amount to impunity in international law.

3.2 SOVEREIGN IMMUNITY: A SHORT INTRODUCTION

3.2.1 IMMUNITY IN INTERNATIONAL LAW

International law has launched an instrument which is able to cope with undesirable incompatibilities of jurisdiction: in legal terms, this instrument is known as *immunity*.²⁷⁹ In order to facilitate international relations, the State, its high-ranking representatives and other high-ranking officials who are charged with diplomatic duties and relations, are provided with immunities and privileges under international law. Robert Cryer describes the origins of immunity as follows:

In order to maintain channels of communication and thereby prevent and resolve conflicts, societies needed to have confidence that their envoys could have safe passage, particularly in times when emotions and distrust were at their highest. Domestic and international law developed to provide for

²⁷⁹ Bruno Simma and Andreas T Muller, 'Exercise and Limits of Jurisdiction' in James Crawford and Martti Koskeniemi (eds), *The Cambridge Companion to International Law* (Cambridge University Press 2012) 151.

inviolability of a foreign State's representatives and immunities from the exercise of jurisdiction over those representatives.²⁸⁰

The question of immunity derives from the sovereignty-oriented approach of international law and provides legal protection for the State and its highest-ranking officials from investigation by foreign governments. The application of foreign State jurisdiction is interrupted by immunities. The jurisdiction is able to be reactivated only if the State that is endowed with immunity rights is willing to waive its immunity. Because of this, immunity has become one of the most remarkable and functional factors in limiting jurisdiction under international law.²⁸¹

International immunities are customarily vested in particular institutions or bodies which are permitted, by law, in order to defend them from foreign intervention and to ensure that foreign governments can perform their duties and effectively maintain international relations. To this end, two forms of immunity, which will be discussed and analysed in further detail in subsequent chapters, must be briefly mentioned here. They are *immunity ratione materiae* and *immunity ratione personae*. *Immunity ratione materiae*, or functional immunity, applies to those activities performed by representatives of the State in their official capacity. *Immunity ratione personae*, or personal immunity, applies to all activities which are carried out during the period of their official duties by State representatives acting in their official capacity.²⁸²

²⁸⁰ Robert Cryer and others, *An Introduction to International Criminal Law and Procedure* (2nd edn, Cambridge University Press 2010) 531.

²⁸¹ Simma and Muller (n 279); Ramona Pedretti, *Immunity of Heads of State and State Officials for International Crimes* (Martinus Nijhoff Publishers 2014).

²⁸² For further details see Jacques Fomerand, *Historical Dictionary of Human Rights* (Rowman & Littlefield 2014). The proposition that a high-ranking State official is not entitled to *immunity ratione personae* or *immunity ratione materiae* is enshrined in the statutes of the International Criminal Tribunal for the former Yugoslavia, International Criminal Tribunals for Rwanda and the Special

3.2.2 SOVEREIGN IMMUNITY

Immunity, as a legal term, establishes a right for a sovereign State. This right provides an ‘exemption from the exercise of the power to adjudicate as well as to the non-exercise of all other administrative and executive powers by whatever measures or procedures by another sovereign State’.²⁸³ It may be said that sovereign immunity means that ‘the sovereign or government is immune from lawsuits or other legal actions except when it consents to them’.²⁸⁴ In this sense, sovereign immunity can be deemed as legal immunity; in other words, it provides, as a judicial doctrine, legal protection for certain entities and people in specific circumstances. Sovereign immunity fundamentally shields those who benefit from it from legal proceedings. The sovereign equality doctrine has been regarded as one of the essential principles of international law, as a consequence of which ‘one sovereign cannot exercise authority over another. The practical application of the doctrine means that the many activities carried out by a foreign state cannot be the subject of’ municipal court proceedings.²⁸⁵ This doctrine stems from the premise on which ancient English law is based, that “the King can do no wrong”.²⁸⁶

There are two basic categories of legal immunity: international and national. While the first category includes those immunities which are designed to enable representatives of States to carry out their commitments under international law, the

Court for Sierra Leone; it also is emphasised in Article 27 of the International Criminal Court Rome Statute.

²⁸³ Sompong Sucharitkul, ‘Preliminary Report on the Topic of Jurisdictional Immunities of States and Their Property’ (UN Yearbook of the International Law Commission 1979) A/CN.4/323 II(1) 238 <http://legal.un.org/ilc/documentation/english/a_cn4_323.pdf> accessed 4 March 2016; O’Keefe, Tams and Tzanakopoulos (n 42) 38.

²⁸⁴ Legal Information Institute, Cornell University Law School (CULS), ‘Sovereign Immunity’ <http://www.law.cornell.edu/wex/sovereign_immunity> accessed 15 December 2014. See also Henry Campbell Black, *Black’s Law Dictionary: Definitions of the Terms and Phrases of American and English Jurisprudence, Ancient and Modern* (6th edn, West Publishing Company 1990).

²⁸⁵ Tim Hillier, *Sourcebook on Public International Law* (Cavendish Publishing Ltd 1998) 222.

²⁸⁶ James Fitzjames Stephen, *A History of the Criminal Law of England*, vol II (Cambridge University Press 2014).

second category includes such immunities which are vested in *de jure* (lawful) institutions or people at a national level. State immunity, diplomatic immunity, Head of State immunity and immunity of international organisations, are recognised as international immunities under public international law. Immunities of judges, police, member of parliaments etc. are identified as domestic immunities.²⁸⁷ As stated in Chapter 1, the focus of this Thesis is on international immunities, and specifically cases in which human rights have been used to challenge State immunity as well as Head of State immunity and diplomatic immunity, under public international law.

The legal basis of these forms of immunity lies deep in human history, emerging whenever a ruler has been assigned a duty to rule in accordance with international law. Even before the invention of the modern States, it was recognised that if State-like institutions were to communicate effectively in diplomatic, commercial, political and other fields, it would be necessary to create a settlement bestowing freedom from suit or arrest on their representatives in the hosting State. Although reciprocal in nature, the bestowing of sovereign immunity can be read as both limiting the sovereign rights of the granting State and conferring an advantage on the receiving State in terms of its foreign relations.²⁸⁸

Immunities are ‘exceptions to a state’s jurisdiction by virtue of which international law acknowledges the primordial interests of another state to deal with the matter in question’.²⁸⁹ Sovereign immunity, in international law, is customarily recognised as a demand to be exempted from any restrictions embraced by a foreign

²⁸⁷ Matthias Kloth, *Immunities and the Right of Access to Court Under Article 6 of the European Convention on Human Rights* (Martinus Nijhoff Publishers 2010).

²⁸⁸ Ilias Bantekas and Susan Nash, *International Criminal Law* (3rd edn, Routledge-Cavendish 2007); Cryer and others (n 280); Frey and Frey (n 33).

²⁸⁹ Simma and Muller (n 279) 151.

State.²⁹⁰ Consequently, it is seen as a kind of armour plating that protects the State and certain of its representatives from scrutiny by foreign authorities. The main purpose of this protection is to create a suitable environment for the development of relations between States and their representatives, within legal and reasonable bounds. Indeed, sovereign immunity exists to endorse and reinforce strong relationships between States and to promote non-intervention by States in other States' affairs.²⁹¹

The origin of the concept of absolute immunity can be found in the principle of *par in parem non habet imperium* (equals do not have authority over one another). According to the Oxford Dictionary of Law, this Latin phrase implies that in public international law 'one sovereign power cannot exercise jurisdiction over another sovereign power. It is the basis of the act of state doctrine and sovereign immunity'.²⁹² Considered in light of this principle, the importance of the words of Lord Wilberforce in the decision of the House of Lords *I Congreso del Partido* becomes clear: 'The basis upon which one state is considered to be immune from the territorial jurisdiction of the courts of another state is that of *par in parem* which effectively means that the sovereign or governmental acts of one state are not matters upon which the courts of other state will adjudicate'.²⁹³

²⁹⁰ Pedretti (n 281).

²⁹¹ Sean D Murphy, 'Does International Law Obligate States to Open Their National Courts to Persons for the Invocation of Treaty Norms That Protect or Benefit Persons?' in David Sloss (ed), *The Role of Domestic Courts in Treaty Enforcement: A Comparative Study* (Cambridge University Press 2009).

²⁹² Elizabeth A Martin, *A Dictionary of Law* (Oxford University Press 2009).

²⁹³ *I Congreso del Partido* [1983] 1 AC 244 (House of Lords) 262; Elihu Lauterpacht and CJ Greenwood, *International Law Reports*, vol 64 (Cambridge University Press 1983) 313.

3.3 RELEVANT INTERNATIONAL IMMUNITIES

International immunities have not evolved for the benefit of any particular person or group of people. International immunities are vested only for the benefit of the State or its representatives such as presidents, foreign ministers, or diplomats in the international arena.²⁹⁴ Three types of immunity have been subject to human rights challenges to date; they are: State immunity, Head of State immunity and diplomatic immunity.

State immunity imbues ‘the legal person of the state as well as its property with immunity (according to the venerable principle of *par in parem non habet jurisdictionem*)’.²⁹⁵ Almost all major countries adopt a form of restrictive immunity with regard to other States.²⁹⁶ That is, on the one hand, the doctrine allows the assertion of immunity in respect of the actions of those serving in the capacity of sovereign authority (*jure imperii*); on the other hand, the doctrine does not prevent a State from being brought before a foreign State’s court if commercial transactions are involved (*jure gestionis*).²⁹⁷

The second configuration of immunities that presents a challenge to international human rights is the immunity enjoyed by Heads of State. Individuals in this critical position enjoy absolute immunity as long as they remain in office. When they leave office, their immunity endures only in relation to official acts.²⁹⁸ The

²⁹⁴ Chanaka Wickremasinghe, ‘Immunities Enjoyed by Officials of States and International Organizations’ in Malcolm D Evans (ed), *International Law* (2nd edn, Oxford University Press 2006).

²⁹⁵ Simma and Muller (n 279) 151.

²⁹⁶ China is exceptional in this regard, in that China has reservations about applying a restrictive doctrine in respect of State immunity. For further details see Sompong Sucharitkul, ‘Jurisdictional Immunities in Contemporary International Law from Asian Perspectives’ (2005) 4 *Chinese Journal of International Law* 1.

²⁹⁷ Fox QC and Webb (n 19).

²⁹⁸ However, in recent cases, ‘while the general principle of granting immunity to states and their high-ranking representatives is uncontroversial, there is an ongoing debate on the precise limits of

debate over whether State officials who violate fundamental human rights should be held responsible and liable to punishment in public international law is informed ‘by the basic tension that exists between the desire to protect human rights and calls to respect state sovereignty’.²⁹⁹

The third configuration is comprised of the legal immunities of consular and diplomatic representatives, in other words, diplomatic immunities; which continue even after the diplomatic agent’s duty in office ends, as it relates to official acts.³⁰⁰

Adopted on 18 April 1961, the Vienna Convention on Diplomatic Relations, which came into force after 24 April 1964, was mentioned by the International Court of Justice in the *United States Diplomatic and Consular Staff in Tehran* case, stating that the Vienna Conventions, ‘codify the law of diplomatic and consular relations, state principles and rules essential for the maintenance of peaceful relations between States and [is] accepted throughout the world by nations of all creeds, cultures and political complexions’.³⁰¹ The principle of immunity, as enshrined and set out in the 1963 Vienna Convention on Consular Relations and the 1961 Vienna Convention on Diplomatic Relations, is a demonstration of the sovereign equality of States, and this principle enables States and their representatives to embark on international relations.³⁰²

such immunities, notably with respect to gross violations of human rights’. Simma and Muller (n 279) 152.

²⁹⁹ Dapo Akande, ‘The Application of International Law Immunities in Prosecutions for International Crimes’ in Michael Milde, Richard Vernon, and Joanna Harrington (eds), *Bringing Power to Justice?: The Prospects of the International Criminal Court* (McGill-Queen’s University Press 2006) 47.

³⁰⁰ Simma and Muller (n 279).

³⁰¹ *Case Concerning United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran)*, Judgment (n 48) [45].

³⁰² Fomerand (n 282).

3.4 REASONS TO COMBAT IMPUNITY: WHY A DISTINCTION SHOULD BE MADE BETWEEN IMMUNITY AND IMPUNITY

Immunity is a general rule of international law whereby certain State officials are deemed to be endowed with immunity from criminal prosecution and civil suits initiated in foreign States.³⁰³ Impunity can be described as exemption from penalty or punishment. When the sovereign immunity principle is applied to the practice of sovereign impunity, individuals, who have administrated and participated in fundamental human rights violations, are often beyond the capacity of the law to provide a remedy.³⁰⁴

Fundamentally, impunity alludes to a situation where perpetrators circumvent punishment for violations that inflicted suffering upon someone and, a failure to bring such perpetrators of human rights violations to justice.³⁰⁵

Raul Molina Mejia and Patrice McSherry identify three different types of impunity: structural impunity, strategic impunity, and political or psychological impunity.³⁰⁶ Structural impunity includes institutional and legal mechanisms which aim to protect individuals who abuse the power of the State. The second method, strategic impunity, applies to ‘the active measures taken by state officials at specific moments, including laws, decrees, amnesties, or pardons to derail processes of, or demands for, truth and justice’.³⁰⁷ The main purpose of these kinds of specific action is to protect people from punishment for the crimes already committed. For this

³⁰³ *ibid.*

³⁰⁴ Kingsley Chiedu Moghalu, ‘Reconciling Fractured Societies: An African Perspective on the Role of Judicial Prosecutions’ in Ramesh Chandra Thakur and Petrus Adrianus Maria Malcontent (eds), *From Sovereign Impunity to International Accountability: The Search for Justice in a World of States* (United Nations University Press 2004).

³⁰⁵ Fomerand (n 282).

³⁰⁶ J Patrice McSherry and Raúl Molina Mejía, ‘Confronting the Question of Justice in Guatemala’ (1992) 19 *Social Justice* 1.

³⁰⁷ Raúl Molina Mejía, ‘The Struggle Against Impunity in Guatemala’ (1999) 26 *Social Justice* 55, 58.

reason, the Belfast Guidelines state that ‘rather than protecting human rights, the impunity created by amnesties may embolden beneficiaries to commit further crimes and destabilise efforts to achieve sustainable peace’.³⁰⁸ Diane Orentlicher contends that:

we would do well to resist the tendency to address the wisdom of amnesties in terms of stark dichotomies, such as ‘punish or pardon’ and ‘amnesty or accountability’. These dichotomies present unduly narrow options, detracting from more constructive efforts to balance the demands of justice against those of reconciliation and, ultimately, to promote reconciliation within a framework of accountability.³⁰⁹

Finally, political or psychological impunity emanates from the fear and manipulation generated by actors who violate international law. This form of impunity can cause eternal terror.³¹⁰

By ending impunity, a significant enabling element of fundamental human rights violations can be notably chipped away. According to a 1997 report of the former UN Sub-commission of Human Rights on Impunity by El Hadji Guisse, impunity means ‘the absence or inadequacy of penalties and/or compensation for massive and grave violations of the human rights of individuals or groups of individuals’.³¹¹ Immunity has been proven ‘to be not only a living anachronism, but

³⁰⁸ ‘The Belfast Guidelines on Amnesty and Accountability with Explanatory Guidance’ (Transitional Justice Institute at the University of Ulster 2013) 26
<http://peacemaker.un.org/sites/peacemaker.un.org/files/BelfastGuidelines_TJI2014.pdf>
accessed 20 October 2016.

³⁰⁹ Diane F Orentlicher, ‘Swapping Amnesty for Peace and the Duty to Prosecute Human Rights Crimes’ (1997) 3 *ILSA Journal of International & Comparative Law* 713, 714.

³¹⁰ Mejia (n 307).

³¹¹ Special Rapporteur Mr. El Hadji Guissé, ‘Final Report on the Question of the Impunity of Perpetrators of Human Rights Violations (Economic, Social and Cultural Rights) pursuant to Sub-Commission Resolution 1996/24’ (Equipo Nizkor and Derechos Human Rights 1997) E/CN.4/Sub.2/1997/8 para 20 and 21.

one which often leads to impunity for the worst kinds of rights violations. It was precisely real and feared impunity that led to changes in the way in which state immunity was understood and applied'.³¹² It is for this reason that the international society requires that a distinction be drawn between impunity and immunity.

Impunity transpires when perpetrators of violations of human rights are exempted from punishment for their deeds. According to the *Brussels Principles against Impunity and for International Justice*, impunity results from 'failing to investigate, prosecute and try natural and legal persons guilty of serious violations of human rights and international humanitarian law'. The Brussels Principles emphasised that impunity has disastrous consequences in that it allows the perpetrators to believe that their actions are not subject to legal challenge. Also, according to the Brussels Principles, impunity 'ignores the distress of the victims and serves to perpetuate crime. Impunity also weakens state institutions; it denies human values and debases the whole of humanity'.³¹³

The most authoritative definition of impunity has been provided by the UN Sub-Commission on Human Rights: impunity makes it impossible, either practically or legally (*de facto* or *de jure*), to call the people who perpetrate human rights violations to account, 'whether in criminal, civil, administrative or disciplinary proceedings, *because they cannot be held accountable to any investigation which might conduce to detention, allegation, trial, conviction with appropriate penalties*

³¹² Greta L Rios and Edward P Flaherty, 'Mr Ban - Tear Down the UN's Wall of Immunity/Impunity (Before a National Court Does)!!' (2012) 18 ILSA Journal of International and Comparative Law 439, 439.

³¹³ Brussels Group for International Justice, 'Brussels Principles against Impunity and for International Justice, Adopted Following on from the Colloquium "The Fights Against Impunity: Stakes and Perspectives"' <https://www.iccnw.org/documents/BrusselsPrinciples6Nov02_En.pdf> accessed 26 October 2015.

or reparations to victims’.³¹⁴ With regards to *de facto* impunity, Nigel Rodley states that *de facto* impunity ‘is the usual form: the state’s judicial machinery is simply manipulated to ignore the crime’. By contrast, in regard to *de jure* impunity, Rodley notes that it is ‘the more notorious form: the state adopts formal legal means of exempting those concerned from legal liability, for example, through an amnesty’.³¹⁵

Impunity, therefore, leads to a social and political environment in which laws established to preclude human rights violations are either brushed aside or inadequately redressed by the State. Two types of impunity can be identified in the literature. The first is legal impunity (*de jure* impunity), which occurs when regulations or laws bestowing immunity create a legal bar to bringing perpetrators to justice and prosecuting them for human rights violations or abuses. The second kind of impunity is functional (*de facto* impunity) and occurs when the failure to prosecute or investigate is deliberate; when the law does not apply any sanction or when a legal regime is incapable of meeting its commitments to investigate and prosecute.³¹⁶ *De facto* impunity arises from weaknesses in the legal system and from the actions of officials which prevent the course of justice. Both types of impunity conduce toward more violations of human rights and erode confidence in the

³¹⁴ United Nations Commission on Human Rights, ‘The Administration of Justice and the Human Rights of Detainees, Question of the Impunity of Perpetrators of Human Rights Violations (Civil and Political) Revised Final Report Prepared by Mr. Joinet pursuant to Sub-Commission Decision 1996/119’ (1997) UN Doc. E/CN.4/Sub.2/1997/20/Rev.1 [emphasis added].

³¹⁵ Nigel S Rodley, ‘Breaking the Cycle of Impunity for Gross Violations of Human Rights: The Pinochet Case in Perspective’ (2000) 69 Nordic Journal of International Law 11, 14.

³¹⁶ M Cherif Bassiouni, ‘The Permanent International Criminal Court’ in Mark Lattimer and Philippe Sands (eds), *Justice for Crimes Against Humanity* (Hart Publishing 2003); M Cherif Bassiouni, ‘Searching for Peace and Achieving Justice: The Need for Accountability’ (1996) 59 Law and Contemporary Problems 9; M Cherif Bassiouni, *Introduction to International Criminal Law* (2nd Revised, Martinus Nijhoff Publishers 2012).

government; *de jure* impunity conveys a negative message to victims about State apathy and connivance in their suffering.³¹⁷

The updated version of the United Nations Commission on Human Rights Report on the *Promotion and Protection of Human Rights*³¹⁸ released in 2005 outlines a clear mission for States with regards to their essential responsibilities and the steps that they must take to combat impunity. Principle 19 of this Report establishes a decisive and explicit framework for action. It points out that States have an obligation to ‘undertake prompt, thorough, independent and impartial investigations of violations of human rights and international humanitarian law and take appropriate measures in respect of the perpetrators, particularly in the area of criminal justice, by ensuring that those responsible for serious crimes under international law are prosecuted, tried and duly punished’.³¹⁹ The Report also notes that when States fail to comply with their obligations to investigate infringements and to develop proper policies or take measures to punish the perpetrators, impunity occurs in both the domestic and the international realm. The Preamble to the UN Report of 2005 includes an unequivocal expectation that States accept ‘that the duty of every State under international law to respect and to secure respect for human rights requires that effective measures should be taken to combat impunity’.³²⁰ Immunity and impunity, therefore, should be distinguished. While immunity is a necessary instrument to maintaining smooth international, social, political and legal

³¹⁷ Human Rights Watch (Organization), “‘Everyone Lives in Fear’: Patterns of Impunity in Jammu and Kashmir” (2006) 18.

³¹⁸ United Nations Commission on Human Rights, ‘Promotion and Protection of Human Rights: Impunity - Report of the Independent Expert to Update the Set of Principles to Combat Impunity by Diane Orentlicher: Addendum - Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity’ (2005) E/CN.4/2005/102/Add.1.

³¹⁹ *ibid* [Principle 19].

³²⁰ *ibid* [Preamble].

relations, impunity may enable perpetrators who violate fundamental human rights to escape punishment.

3.5 THE EFFORTS BY THE INTERNATIONAL COURTS TO END THE CULTURE OF IMPUNITY

Before discussing the vital measures taken by the international community to combat impunity, a distinction should first be drawn between impunity and sovereign immunity. As Eli Rosenbaum, the Director of the United States Department of Justice Office of Special Investigation, has pointed out, the Twentieth Century

has been termed *The Age of Atrocity* and also *The Age of Impunity*. It isn't hard to see why. Between 1900 and 1987 alone, it is estimated that governments and government-like organizations murdered fully 169 million civilians. That deeply shocking statistics speaks volumes about the urgent need for systematic and aggressive law enforcement action to apprehend and bring to justice the perpetrators of *fundamental human rights violations*.³²¹

The international community has established a number of institutions/organisations for the purpose of ending impunity. The International Criminal Tribunal for Rwanda, the International Criminal Tribunal for the Former Yugoslavia and the International Criminal Court are prominent examples. Martha Minow states that it is difficult not to notice 'the enormous gap in time between the Nuremberg trials and any comparable effort to prosecute war crimes in international settings'.³²² This omission was addressed decisively in 1993, when the United Nations established the

³²¹ Eli M Rosenbaum, 'Remarks' (2006) 27 Cardozo Law Review 1667, 1667 [emphasis added].

³²² Martha Minow, *Between Vengeance and Forgiveness: Facing History After Genocide and Mass Violence* (Beacon Press 1998) 27.

International Criminal Tribunal for the Former Yugoslavia, and shortly thereafter the International Criminal Tribunal for Rwanda. These two *ad hoc* institutions and the ‘unspeakable tragedies that culminated in their creation, provided the necessary catalyst for the long-awaited’ creation of a permanent International Criminal Court.³²³ The establishment of international institutions such the International Criminal Court, the International Criminal Tribunal for Rwanda, and the International Criminal Tribunal for the Former Yugoslavia demonstrates that there is a commitment to putting an end to impunity for human rights violations which amount to war crimes.

Rwandan ambassador Manzi Bakuramutsa stated at a 1994 Security Council meeting, it is ‘impossible to build a state of law and arrive at true national reconciliation if we do not eradicate the culture of impunity which has characterized our society’.³²⁴ Likewise, the impact of the International Criminal Tribunal for the Former Yugoslavia on ending the culture of impunity should not be overlooked. The main objective of this Tribunal is to put an end to human rights violations by taking powerful measures to bring to justice perpetrators for having committed human rights violations with the aim of contributing to the maintenance and restoration of peace and discouraging possible perpetrators in the future.³²⁵

Most particularly, the adoption the Rome Statute of the International Criminal Court is accepted as a watershed moment in international law. Abolishing impunity

³²³ Mary Margaret Penrose, ‘Impunity - Inertia, Inaction, and Invalidity: A Literature Review’ (1999) 17 Boston University International Law Journal 269, 309.

³²⁴ United Nations Security Council, ‘The Situation Concerning Rwanda: Establishment of an International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Such Violations Committed in the Territory of Neighbouring States’ (1994) U.N. Doc. S/PV.3453 14.

³²⁵ Gabrielle Kirk McDonald, ‘Problems, Obstacles and Achievements of the ICTY’ (2004) 2 Journal of International Criminal Justice 558; Payam Akhavan, ‘Beyond Impunity: Can International Criminal Justice Prevent Future Atrocities?’ (2001) 95 American Journal of International Law 7.

for fundamental human rights violations which serve to contribute to the prevention of such violations, constitutes an act of collective willpower on the part of the international community.³²⁶

Kofi Annan, as UN Secretary-General, called the adoption of the Rome Statute of the International Criminal Court a crucial step forward. At the Diplomatic Conference in Rome in 1998, the Secretary-General highlighted that:

People all over the world want to know that humanity can strike back – that whatever and whenever genocide, war crimes or other such violations are committed, there is a court before which the criminal can be held to account; a court that puts an end to a global culture of impunity [...].³²⁷

Since the Second World War, the international community has had a growing tolerance for the impunity of those who commit human rights violations. It is believed that identifying the perpetrators of human rights violations not only helps to satisfy and solace victims, but also promotes reconciliation and the preservation of peace. Additionally, the abolition of impunity becomes a functional deterrence factor and prevents future violations.³²⁸

These advances reflect a growing awareness within the international community that there is a crucial distinction between immunity and impunity. The International Court of Justice, for example, distinguishes immunity from impunity as follows:

³²⁶ Robert C Johansen, 'Peace and Justice? The Contribution of International Judicial Processes to Peacebuilding' in Daniel Philpott and Gerard F Powers (eds), *Strategies of Peace: Transforming Conflict in a Violent World* (Oxford University Press 2010) 199.

³²⁷ Kofi Annan, 'United Nations Press Release' (1998) SG/SM/6597 L/2871.

³²⁸ See Mitsue Inazumi, *Universal Jurisdiction in Modern International Law: Expansion of National Jurisdiction for Prosecuting Serious Crimes under International Law* (Intersentia 2004) 21.

[T]he immunity from jurisdiction enjoyed by incumbent Ministers for Foreign Affairs does not mean that they enjoy impunity in respect of any crimes they might have committed, irrespective of their gravity [...] the immunities enjoyed under international law by an incumbent or former Minister for Foreign Affairs do not represent a bar to criminal prosecution in certain circumstances.³²⁹

In recent years, when human rights violations were at stake, jurisdictional immunities have been reviewed. Furthermore, the related law has been subject to significant re-examination and important revisions. What follows ‘therefore does not attempt to prescribe what the law ought to be, but simply seeks to describe the law as it is in its current stage of development’.³³⁰

Impunity can be described as ‘an act of violence’³³¹ and as ‘a recipe for continued violence and instability’.³³² Impunity emerges when persons who hold sovereign rights on behalf of the State are exempt from punishment for human rights violations. While the main purpose of immunity is to facilitate the activities of States, Heads of State and diplomatic agents, impunity functions to exempt those from punishment by very specific means. There is ultimately no possible sustainable resolution unless the concept of impunity is differentiated from immunity. This differentiation as a means of combating impunity can be seen as a vital step towards preventing fundamental human rights violations.

³²⁹ *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)* (n 44) [60 and 61].

³³⁰ Wickremasinghe (n 294) 413.

³³¹ Paz Rojas Baeza, ‘Breaking the Human Link: The Medico-Psychiatric View of Impunity’ in Charles Harper (ed), *Impunity: An Ethical Perspective: Six Case Studies from Latin America* (World Council of Churches Publications 1996).

³³² Akhavan (n 325) 30.

3.6 TOLERATING IMPUNITY: THE GREATEST THREAT TO THE FUTURE OF HUMAN RIGHTS

Living after genocide, mass atrocity, totalitarian terror [...] makes remembering and forgetting not just about dealing with the past. The treatment of the past through remembering and forgetting crucially shapes the present and future for individuals and entire societies.³³³

The impact of allowing perpetrators of human rights violations to have impunity has been articulated most strongly by Paz Rojas Baeza, who describes impunity as ‘a human decision, an intention to disguise and cover up, and even more, an obligation to reach oblivion. But oblivion is *unfeasible in the case of fundamental human rights violations, because these violations* will forever remain in the persons directly affected, and also in society, in the collective imagination, which will transmit them for generations’.³³⁴

One of the reasons that human rights violations occur is the prevalence of impunity. Impunity means exemption from punishment in the case of human rights violations, alleviating the perpetrators’ fear that they will face judgement. A legitimate mechanism developed by the State has sometimes been used by high-ranking representatives, and thus impunity constitutes the greatest impediment to the full realisation of human rights.³³⁵ Impunity has a significant impact on humanity and the international order because it ‘knows no territorial bounds and speaks no specific

³³³ Minow (n 322) 119.

³³⁴ Paz Rojas Baeza, ‘Impunity: An Impossible Reparation’ (2000) 69 *Nordic Journal of International Law* 27, 28 [emphasis added]. ‘Dr Paz Rojas Baeza is a Chilean psychiatrist who played a leading role in treating the victims of the massive violations committed during the Pinochet dictatorship in Chile.’

³³⁵ Penrose (n 323).

language. It is not unique to any religion or race, and is not limited to any particular geographical region. Impunity therefore remains a universal problem'.³³⁶

As is understood from the United Nations Report on impunity, the term signifies 'exemption or freedom from punishment and connotes the lack of effective remedies for victims of crimes'. In recognition of 'human rights law, impunity implies the lack of or failure to apply remedies for victims of human rights violations'.³³⁷ The absence of a remedy for a perpetrator's victims is considered an outcome of impunity, rather than a feature of impunity itself.³³⁸

As Director of Amnesty International UK, Kate Allen, emphasised the negative aspects of impunity within the context of human rights as follows: 'Impunity not only denies justice to victims of human rights abuses and their families, it sends out a message to others that they will not be brought to trial for some of the worst crimes known to humanity. Hence it leads to a climate in which more of these crimes are committed, and where the law is seen to protect the perpetrators of the crimes, not their victims'.³³⁹

The roll-back of impunity for perpetrators of human rights violations and the promotion of human rights are directly connected: these two acts share similar futures. There is a complicated relationship between the battle against impunity and the furtherance of human rights.³⁴⁰ Articles 91 and 60 of the Vienna Declaration and Programme of Action, adopted by the World Conference on Human Rights in 1993,

³³⁶ *ibid* 270.

³³⁷ Christopher C Joyner, 'Redressing Impunity for Human Rights Violations: The Universal Declaration and the Search for Accountability' (1998) 26 *Denver Journal of International Law and Policy* 591, 595-596.

³³⁸ Katherine Hooper, 'The Ending of Impunity and the Fight for Justice for Victims of Human Rights Violations: A Chasm Too Great to Be Crossed?' (2006) 9 *Flinders Journal of Law Reform* 181.

³³⁹ Kate Allen, 'Impunity - The Good News and The Bad' (*The Barrister*, 10 January 2003) <<http://www.barristermagazine.com/barrister/archivedsite/articles/issue18/impunity.htm>> accessed 18 January 2015.

³⁴⁰ Hooper (n 338).

address the impunity problem in relation to human rights. The World Conference viewed ‘with concern the issue of impunity of perpetrators of human rights violations’ and endorsed the view that ‘States should abrogate legislation leading to impunity for those responsible for grave violations of human rights such as torture and prosecute such violations, thereby providing a firm basis for the rule of law’.³⁴¹

The 2005 Human Rights Resolution on Impunity by the UN Commission on Human Rights acknowledges that impunity prompts violations of human rights. Impunity also encourages future abuses.³⁴² On this point, the Resolution states that ‘impunity for violations of human rights and international humanitarian law that constitute crimes encourages such violations and is a fundamental obstacle to the observance and full implementation without discrimination of any kind of human rights’.³⁴³ Principle 16 of the Resolution declares that:

policies to combat impunity that are based on broad consultation can contribute significantly to ensuring public accountability and hence in securing lasting justice [...] and exposing the truth regarding violations of human rights [...] and therefore encourages States to involve, as appropriate, all those concerned, including civil society, victims, human rights defenders and persons belonging to minorities and vulnerable groups.

³⁴¹ ‘World Conference on Human Rights, Vienna Declaration and Programme of Action’ (United Nations General Assembly 1993) A/CONF.157/23 Articles 91 & 60.

³⁴² The following statement was made by Corinne Dufka, Associate Director of Human Rights Watch: In ‘a quick bid to end the first brutal Liberian civil war and in the face of massive crimes committed against civilians, UN and West African leaders agreed to a peace plan that dispensed with justice and rushed an election that installed warlord Charles Taylor as president in 1997. Not surprisingly, within a short time, the country was back at war. The six years of repressive rule by President Charles Taylor that followed and the next war were characterized by the same egregious abuses against civilians as the earlier war and further set the country back’. ‘Combating War Crimes in Africa: Testimony of Corinne Dufka before the US House International Relations Committee, Africa Subcommittee’ (*Human Rights Watch*, 25 June 2004) <<http://www.hrw.org/news/2004/06/25/combating-war-crimes-africa>> accessed 26 October 2015.

³⁴³ See United Nations Commission on Human Rights, ‘Human Rights Resolution 2005/81: Impunity’ (2005) E/CN.4/RES/2005/81.

As Katherine Hooper has observed, when perpetrators can violate fundamental human rights of ‘their victims without fear of sanction, then those rights become little more than empty words of aspiration’. Any society that ‘wishes to overcome the horrors of past human rights abuses must confront them in the present’.³⁴⁴ Prosecution and punishment of perpetrators of human rights violations are essential for the prevention of future human rights violations. Deterrence is essential to the project of disabling possible future human rights violations.

Fundamental human rights violations while accepted as profoundly immoral, must also be accepted as unlawful. Perpetrators of such violations of the law should be subjected to judgment and not be exempted from punishment.

3.7 CONCLUSION

Louis Joinet summaries this unpleasant situation as follows:

From the origins of mankind until the present day, the history of impunity is one of perpetual conflict and strange paradox: conflict between the oppressed and the oppressor, civil society and the State, the human conscience and barbarism; the paradox of the oppressed who, released from their shackles, in turn take over the responsibility of the State and find themselves caught in the mechanism of national reconciliation, which moderates their initial commitment against impunity.³⁴⁵

³⁴⁴ Hooper (n 338) 181.

³⁴⁵ United Nations Commission on Human Rights, ‘The Administration of Justice and the Human Rights of Detainees, Question of the Impunity of Perpetrators of Human Rights Violations (Civil and Political) Revised Final Report Prepared by Mr. Joinet pursuant to Sub-Commission Decision 1996/119’ (n 314) 51.

Although the distinction between immunity and impunity still requires more concrete and unconditional resolution, there is a good and affirmative signal in the international order to put an end to impunity. The establishment of the Rome Statute of the International Criminal Court and the legal proceedings brought against Augusto Pinochet may be seen as proof of a significant movement in international society to abolish impunity by bringing persons responsible for human rights violations to justice.

Impunity always presents a challenge to those responsible for preventing violations of fundamental human rights and establishing a just society. When impunity is allowed, it may become a significant obstacle to justice and peace. While ‘immunities are valuable in preventing interference with representatives, and thereby maintaining the conduct of international relations, they can also frustrate prosecutions’ for human rights violations, unless a distinction is made between impunity and immunity.³⁴⁶

Punishing perpetrators helps to build public confidence that those who exploit the rights of others will not be exempt from punishment. Prosecution and punishment of perpetrators are of vital importance to ensuring the cycle of impunity is abolished.³⁴⁷ Triumphant over impunity is a prerequisite for enhancing human rights.

Abolishing impunity for perpetrators of fundamental human rights violations is a crucial step towards achieving justice and deterring prospective human rights violations. While the essential objective of ending impunity is to enable investigation of past crimes and the prosecution and punishment of perpetrators, the obligation to end impunity is also relevant for the future. Failure to meet legal obligations to

³⁴⁶ Cryer and others (n 280) 531.

³⁴⁷ Hooper (n 338).

investigate, prosecute and punish such criminals creates an environment in which an impunity culture takes root and thrives. Efforts to address human rights violations have two main objectives: First, the prevention of further human rights violations and second, provision of compensation for victims.

Impunity must be distinguished from immunity; the two terms must not be used interchangeably. Impunity is ‘the torturer’s most relished tool. It is the dictator’s greatest and most potent weapon. It is the victim’s ultimate injury. And, it is the international community’s most conspicuous failure’.³⁴⁸ The right to immunity enjoyed by States and their high-ranking representatives must not turn into impunity. Immunity can rightly create an obstacle to the prosecution of particular persons at a particular time and for particular violations. However, this right to immunity should not acquit such persons who have committed violations of fundamental human rights guaranteed by peremptory norms of general international law.

Showing tolerance toward impunity can perpetuate violence, both by implicitly allowing illegal acts and by creating a culture of vengeance and insecurity that may afterwards be manipulated by rulers or leaders intending to instigate violence for their own political ends. By contrast, ‘pursuing justice in the long run may help strengthen rule of law by enhancing domestic criminal enforcement mechanisms. Holding trials can help combat revisionist versions of events by those who seek to deny that crimes occurred’.³⁴⁹ An accurate adjustment of the meaning of immunity in both the legal and the political sense can positively influence the future. Analysing the tension between immunity and the protection of fundamental human rights is necessary to make the distinction between immunity and impunity. To this end, the

³⁴⁸ Penrose (n 323) 270.

³⁴⁹ Sara Darehshori, *Selling Justice Short: Why Accountability Matters for Peace* (Human Rights Watch 2009) 75.

central aim of Chapter 4 is to examine the human rights-based challenge to State immunity.



4 STATE IMMUNITY OR STATE IMPUNITY IN CASES OF VIOLATION OF FUNDAMENTAL HUMAN RIGHTS

4.1 INTRODUCTION

The issue of sovereign immunity dates back to the ancient credo that “the King can do no wrong”. Its origin is likely correlated to the concept of absolute sovereignty. Sovereignty has never vanished from international law, but its structure and meaning have been constantly evolving. The traditional concept of sovereignty has undergone ‘ceaseless modification and re-negotiation in the face of material forces in world politics, institution-building inter-disciplinary struggle and theoretical contestation’.³⁵⁰ If State immunity stems from State sovereignty, its denotation and effect must be connected with the current scope of State sovereignty. If *jus cogens* violations committed under international law are in question, the concept of State sovereignty and the principle of *par in parem non habet imperium* cannot create any obstacles to external investigation. These *jus cogens* violations become a more complicated issue than the extent to which they are consistent with the law of one State. In the last instance, these *jus cogens* violations bear upon the whole international community.³⁵¹

Historically, the essential purpose of vesting immunity in the ruler was to maintain the absolute sovereign structure of the State and to defend the State’s territory and domestic interests from foreign interventions. Before sovereign States

³⁵⁰ Gerry Simpson, *Great Powers and Outlaw States: Unequal Sovereigns in the International Legal Order* (Cambridge University Press 2004) 11.

³⁵¹ See generally McGregor, ‘Torture and State Immunity’ (n 32).

came into being, proto-States had been recognised as exceptional institutions which had special privileges that prevented them from facing prosecution by other quasi-State entities.³⁵² Despite its very old history and the legal or natural necessity for jurisdictional immunities, the law of State immunity has not settled under contemporary international law; in other words, the ‘law of State immunity is not static’.³⁵³

State immunity remains primarily a restriction placed on the jurisdictional competence of domestic courts by international law; it follows that these domestic courts remain unable to be involved in certain pleas that are directed at a foreign State. In this sense, State immunity will be a bar against exercising jurisdiction in particular cases.

As State immunity is a rule of customary international law it may be deduced that it is only an exception to the domestic jurisdiction of the State and the principle of territorial sovereignty. Be that as it may, the extent of State immunity has been undeniably eroded since the Second World War, to the extent that international law has transformed from a State-centric approach towards a human-centric approach which protects the fundamental values related to international human rights. The changing and expanding problems at both the national and international level have forced international community to probe the issue of State immunity. As a consequence, international law now incorporates and considers not only the interests embodied in the concept of State immunity but also the protection of fundamental human rights. Under international law, there are obviously two interests that directly affect the State. International law must pursue the balance between bestowing

³⁵² Bantekas and Nash (n 288) 96.

³⁵³ Fox QC and Webb (n 19) 3.

immunity on the State and protecting human rights. As recent cases demonstrate, however, this balance is mostly lost in favour of the State, and the granting of immunity remains a significant bar to justice and compensation for victims of violations of human rights. It can be deduced that immunity is an inalienable concept in international law designed to prevent abuses of inter-State relations; on the other hand, it removes the threat that a State will be forced to face justice for its sovereign acts as it relates to the most serious of human rights abuses. For these reasons, the granting of immunities to the State may lead to impunity from jurisdiction in cases in which fundamental human rights have been violated. Ultimately, the distinction between State immunity and State impunity must be made through an international legal order.

This Chapter examines the principle of State immunity and its origins. It looks at the controversial exceptions to State immunity and subsequently analyses the tension between the violation of fundamental human rights and the preservation of State immunity by considering a landmark judgment by the International Court of Justice (*Jurisdictional Immunities of the State – Germany v Italy*).³⁵⁴ At the heart of this chapter lies a significant argument: State immunity should not equate to State impunity when fundamental human rights norms are violated.

4.2 BASES OF STATE IMMUNITY

Considering the basis of jurisdictional immunities, State immunity cannot be grounded on only one principle or rule. Although State immunity can be based on a

³⁵⁴ *Jurisdictional Immunities of the State (Germany v. Italy: Greece Intervening)*, Judgment (n 17).

wide variety of factors, once immunity is established it is important to examine closely its specific basis to ensure it is justified in law.

A number of texts are important when analysing the sources from which State immunity is derived. Xiaodong Yang argues that immunity cannot be derived from the concept of sovereignty, nor does it originate from the principle of *par in parem non habet imperium* (an equal has no power over another equal), for two reasons. The first is that it is extremely difficult, if not impossible, to claim that ‘immunity stems from sovereignty, but not from independence, or equality, or dignity’.³⁵⁵ As evidence, Yang refers to the following statement by Lord Wilberforce in *I Congreso del Partido*:

To require a state to answer a claim based upon such [commercial or other private law] transactions does not involve a challenge to or inquiry into any act of sovereignty or governmental act of that state. It is, in accepted phrases, neither a threat to the dignity of that state, nor any interference with its sovereign functions.³⁵⁶

Yang also demonstrates that the principle of *par in parem non habet imperium* is indeed based on canon law and this principle was originally the basis for the relationship between successive rulers in different ages. Therefore, Yang asserts, the origin of this principle is not directly linked in any way to State immunity and international law. Yang believes that the developing body of case law and the decisions of international courts are crucial technical factors for the legal basis of immunity.³⁵⁷

³⁵⁵ Yang, *State Immunity in International Law* (n 28) 48.

³⁵⁶ *I Congreso del Partido* (n 293) 262.

³⁵⁷ Yang, *State Immunity in International Law* (n 28) 58.

Some scholars approach the sources of State immunity from another perspective, which concentrates overwhelmingly on the principle of sovereign equality. Jürgen Bröhmer emphasises that the sovereignty concept and the principle of State equality are the primary basis on which State immunity is established and developed. In this sense, Shaw pointed out that the rule of State immunity, which occupies an important place in international relations and is essential to ensure enforcement of customary international law, derives in fact from the principle of the sovereign equality of States, although questions of State immunity emerge most frequently in domestic courts.³⁵⁸

In the contemporary international order, 'the institution of sovereign immunity constitutes a consequence of the sovereignty, independence and equality of nations, whilst its aim is to avoid the disturbance of international relations'.³⁵⁹ The concept of State immunity is mainly interpreted as an important and inevitable privilege vested in foreign States by the forum State.³⁶⁰ That being the case, Lee Caplan designates the departure point for State immunity which provides privilege to States under necessary conditions as 'the forum state's waiver of adjudicatory jurisdiction with the aim of promoting mutually beneficial interstate relations'.³⁶¹ It follows that the principle of sovereign equality does not compel the State to claim immunity.

However, the practical basis of State immunity should be considered as well as its theoretical basis. While the latter reflects the history of State immunity and includes no significant exceptions, the practical basis reflects the legal aspects of State immunity that are derived from various technical points in case law.

³⁵⁸ See Bröhmer, *State Immunity and the Violation of Human Rights* (n 28) 14; Shaw (n 57) 509.

³⁵⁹ *Prefecture of Voiotia v. Federal Republic of Germany (Distomo Massacre Case)* (n 17) 516.

³⁶⁰ Fox, 'In Defence of State Immunity' (n 43) 403.

³⁶¹ Caplan (n 24) 755.

Furthermore, the practical basis for immunity reflects some exceptional situations arising out of contemporary international problems. These problems cannot be explained or resolved without reference to the theoretical basis of State immunity.

In theory, State immunity derives from State sovereignty, as explained in Chapter 2. State sovereignty becomes an important concept for the principle of *par in parem non habet imperium*, which in this context means one Sovereign cannot exercise his or her authority over another via its legal system. This principle informs the concept of sovereign equality, which Edwin DeWitt Dickinson states ‘means nothing more nor less than that each state may exercise equally with others all rights that are based upon its existence as a state in the international society’.³⁶² Considering the sovereign equality principle, Daniel O’Connell contends that:

all sovereigns being equal no one of them can be subjected to the jurisdiction of another without surrendering a fundamental right. This view reflects the doctrine which developed from Bodin through to Austin and Hegel that law is the creature of sovereignty and that between equals there can only be consensus, not subjection.³⁶³

The principle of *par in parem non habet imperium* is stated in the explanatory report of the Council of Europe with regard to State immunity: ‘State immunity is a concept of international law, which has developed out of the principle *par in parem non habet imperium*, by virtue of which one State is not subject to the jurisdiction of another State’.³⁶⁴

³⁶² Edwin DeWitt Dickinson, *The Equality of States in International Law* (Harvard University Press 1920) 106.

³⁶³ Daniel Patrick O’Connell, *International Law* (2nd edn, Stevens 1970) 842.

³⁶⁴ ‘European Convention on State Immunity, Explanatory Report’ (Council of Europe 1972) ETS No. 074 5. Subsequently, the European Court of Human Rights has highlighted this statement in various cases, ie *Al-Adsani v. The United Kingdom* [2001] 34 EHRR 11 (European Court of Human Rights)

In terms of its practical basis, State immunity can be understood on the basis of case law, customary international law and treaty law. The current play of State immunity has been established in large part as a result of the findings of domestic courts in proceedings against foreign States.³⁶⁵

[It is an] established principle of customary international law [that] a state or its instrumentality is, as a general rule, immune from the jurisdiction of the courts of another state. While a state may claim immunity from all forms of jurisdiction, immunity from judicial and enforcement jurisdiction has traditionally been considered of primary importance. Historically, sovereign immunity, first vested in the person of the monarch, was justified on the basis of perfect equality and absolute independence of sovereigns.³⁶⁶

On this basis, State immunity has evolved in both domestic and international courts. In 1812 *The Schooner Exchange*³⁶⁷ became the first reference point from a technical perspective for the practical basis of State immunity. *The Schooner Exchange* case also reflects the absolute aspect of State immunity, which will be discussed in further detail in Sections 4.3 and 4.3.1 of this chapter. In international legislation, State immunity is based on two specific treaties, the regional 1972 European Convention on State Immunity and the 2004 United Nations Convention on Jurisdictional Immunities of States and their Property; as well as customary international law. These conventions were established to provide direction to domestic courts.³⁶⁸ This is rather important as the principles and rules of State immunity have developed from

289; *Fogarty v United Kingdom* [2001] 34 EHRR 12 (European Court of Human Rights) 313; *McElhinney v Ireland* [2001] 34 EHRR 13 (European Court of Human Rights) 333; *Oleynikov v Russia* [2013] 57 EHRR 15 (European Court of Human Rights) 472.

³⁶⁵ Yang, *State Immunity in International Law* (n 28).

³⁶⁶ Boleslaw Adam Boczek, *International Law: A Dictionary* (Scarecrow Press 2005) 125.

³⁶⁷ *The Schooner Exchange v. M'Faddon & Others* (n 39).

³⁶⁸ Fox QC and Webb (n 19); Eileen Denza, 'The 2005 UN Convention on State Immunity in Perspective' (2006) 55 *International and Comparative Law Quarterly* 395.

‘within the States, not between them; that is, such rules are primarily the result of hundreds of cases decided by various domestic courts in their handling of claims brought against foreign States’.³⁶⁹

4.3 GENERAL CONCEPTION OF STATE IMMUNITY UNDER INTERNATIONAL LAW

In international law, State immunity refers to ‘the legal rules and principles determining the conditions under which a foreign state may claim freedom from the jurisdiction of another state’.³⁷⁰ The decisions of international and national courts in relation to State immunity are very important in crystallising issues of State immunity for the future. These decisions may raise some challenging points as well. Therefore, the law of State immunity should be clearly and deeply examined. Hazel Fox emphasises that the 2004 UN Convention on Jurisdictional Immunities of States and their Property is central to the law on State immunity. That said, international and national legislation on State immunity must be considered in reference to State practice.³⁷¹

State immunity is based on the common law principle that “the King can do no wrong”. Each State is vested with coercive powers and every State enjoys jurisdictional immunity on its own property from the proceedings of other States’ courts; it follows that a State cannot be sued in the courts of foreign States unless the State gives its express consent. State immunity appears as the exclusive jurisdiction

³⁶⁹ Yang, *State Immunity in International Law* (n 28) 26.

³⁷⁰ Malanczuk (n 89) 118; James Crawford, ‘International Law and Foreign Sovereigns: Distinguishing Immune Transactions’ (1984) 54 *British Yearbook of International Law* 75.

³⁷¹ See Fox QC and Webb (n 19). This UN Convention was adopted on 2 December 2004 but has not yet come into force.

of the State and its own territory; therefore, a forum State needs express licence to exercise its national jurisdiction. The adjudications of State immunity manage and govern the scope of a State which claims to be free from the jurisdiction of a court in another State. A distinction between immunity and jurisdictional immunity should be made at this point. Immunity from execution is different from jurisdictional immunity, as immunity from execution restrains a national court's enforcement authority, while jurisdictional immunity limits the adjudicatory power of the national court.³⁷²

State immunity protects a foreign State from being sued or being a party to legal proceedings, and therefore 'prevents the subjection of an independent State to proceedings in another country relating to a dispute about its exercise of governmental power'.³⁷³ Lord Browne-Wilkinson clarified the meaning of State immunity when he observed that it 'is a basic principle of international law that one sovereign state (the forum state) does not adjudicate on the conduct of a foreign state. The foreign state is entitled to procedural immunity from the processes of the forum state. This immunity extends to both criminal and civil liability'.³⁷⁴

The State immunity rules have been evident in the legal practice of individual States since the Nineteenth Century. Municipal courts played a crucial role in establishing the rules of State immunity, and American courts became the first place (in point of time) where the doctrine of State immunity began to be mapped out. The judgement of Chief Justice Marshall in *The Schooner Exchange v M'Faddon and Others* has been recognised as the first judicial statement of the absolute immunity

³⁷² See Lauterpacht, *Recognition in International Law* (n 36); Bankas (n 37); Malanczuk (n 89); Fox QC and Webb (n 19); Brownlie (n 8).

³⁷³ Fox QC and Webb (n 19) 11.

³⁷⁴ *R v. Bow Street Metropolitan Stipendiary Magistrate and Others, ex parte Pinochet Ugarte (No. 3)* (n 46) 201; see also Reed Brody and Michael Ratner (eds), *The Pinochet Papers: The Case of Augusto Pinochet Ugarte in Spain and Britain* (Kluwer Law International 2000) 269.

doctrine.³⁷⁵ The general principle of foreign State immunity is accordingly based on the *Schooner Exchange* case in 1812; this case became the ‘*locus classicus* of the doctrine of State immunity’.³⁷⁶

In the *Schooner Exchange* case, the US Supreme Court held that US courts had no jurisdiction over a vessel which belongs to another nationality in US ports. This decision was based on the State immunity principle.³⁷⁷ While the *Schooner Exchange* may be the point of origin of State immunity, the process through which State immunity has developed and its current position in international law cannot be understood by reference to the *Schooner Exchange* alone, because the circumstances in the Eighteenth Century were substantially different from those of present. Furthermore, in the *Schooner Exchange* case there was no legal basis for the vesting of State immunity, because there was no precedent set beforehand; in other words, there was no existing legal rule to apply.³⁷⁸

The historic decision of Chief Justice Marshall formulated State immunity as follows:

This perfect equality and absolute independence of sovereigns, and this common interest impelling them to mutual intercourse, and an exchange of good offices with each other, have given rise to a class of cases in which every sovereign is understood to waive the exercise of a part of that complete

³⁷⁵ *The Schooner Exchange v. M'Faddon & Others* (n 39); Gamal Moursi Badr, *State Immunity: An Analytical and Prognostic View* (Martinus Nijhoff Publishers 1984) 9–10.

³⁷⁶ Yang, *State Immunity in International Law* (n 28) 44.

³⁷⁷ The date of this case is relevant, because it happened during the War of 1812 between the USA and the British Empire. France was an ally of the USA.

³⁷⁸ Yang, *State Immunity in International Law* (n 28) 45.

exclusive territorial jurisdiction, which has been stated to be the attribute of every nation.³⁷⁹

State immunity is believed to have evolved in response to the requirements of both national and international systems. As part of the process which has transformed the concept and limitations of immunity, the protection it affords has transferred from the Prince to the State. Accordingly, the US Court of Appeals observed in 1964, that the doctrine of State immunity

originated in an era of personal sovereignty, when kings could theoretically do no wrong and when the exercise of authority by one sovereign over another indicated hostility or superiority. With the passing of that era, sovereign immunity has been retained by the courts chiefly to avoid possible embarrassment to those responsible for the conduct of the nation's foreign relations.³⁸⁰

Article 5 of the United Nations Convention on State Immunity states: 'A State enjoys immunity, in respect of itself and its property, from the jurisdiction of the courts of another State'.³⁸¹ The principle of State immunity thus acts as an obstacle to suing a foreign State in national courts. The principle of State immunity is a crucial concept for developing international law based on sovereign equality, because this principle applies to each State and therefore appears to be a neutral way of 'denying

³⁷⁹ *The Schooner Exchange v. M'Faddon & Others* (n 39) 137.

³⁸⁰ *Victory Transport Incorporated v Comisaria General de Abastecimientos y Transportes* [1964] US Court of Appeals Second Circuit 28636, 336 F 2d 354, No 338 357.

³⁸¹ United Nations General Assembly, 'United Nations Convention on Jurisdictional Immunities of States and Their Property' (2004) Article 5.

jurisdiction to States over the international administration of another State and diverting claims to settlement in the courts of that State'.³⁸²

4.3.1 ABSOLUTE IMMUNITY AND RESTRICTIVE IMMUNITY: THE RISE OF THE RESTRICTIVE THEORY OF SOVEREIGN IMMUNITY

A review of the law of State immunity uncovers the existing conflict between two concepts of sovereign immunity: one which holds it to be absolute and another which holds it to be limited. According to the absolute theory, a sovereign cannot be sued in the courts of another sovereign; by contrast, the restrictive theory maintains that sovereign immunity is vested for sovereign or public acts (*jure imperii*) of the State, but not vested for non-sovereign or private acts (*jure gestionis*) of the State.³⁸³

Until relatively recently, the concept of State sovereignty was considered as pertaining to a particular individual in a State rather than as an abstract demonstration of the State's power and existence. The Sovereign 'was a definable person, to whom allegiance was due'.³⁸⁴ Thereby, the sovereign State could not be subjected to the judicial procedure of his country; and accordingly, the sovereign State could not be brought to the justice before a foreign court.³⁸⁵

³⁸² Fox, 'International Law and Restraints on the Exercise of Jurisdiction by National Courts of States' (n 19) 369; Fox, 'In Defence of State Immunity' (n 43) 405.

³⁸³ 'Letter of Acting Legal Adviser, Jack B Tate, to Department of Justice, May 19, 1952'; quoted in Gary Born, *International Civil Litigation in United States Courts: Commentary & Materials* (3rd edn, Kluwer Law International 1996) 207.

³⁸⁴ Shaw (n 57) 507.

³⁸⁵ 'The idea of the personal sovereign would undoubtedly have been undermined had courts been able to exercise jurisdiction over foreign sovereigns. This personalization was gradually replaced by the abstract concept of state sovereignty [...] the independence and equality of states made it philosophically as well as practically difficult to permit municipal courts of one country to manifest their power over foreign sovereign states, without their consent'. *ibid.*

During the Eighteenth and Nineteenth Centuries, the concept of absolute immunity clearly emerged in international law. Absolute sovereign immunity means that the State, government or sovereign is ‘completely immune from foreign jurisdiction in all cases regardless of circumstances’.³⁸⁶ In the current international order, however, no form of State immunity is absolute, because of the many exceptions and derogations which apply. In fact, in 1963 the absolute doctrine of State immunity was criticised by the German Constitutional Court in the following terms:

In the period up to the First World War the clearly preponderant State practice was to grant unlimited immunity to foreign States [...] Since then, however, State immunity has been involved in a process of contraction [and] its history has become the history of the struggle over the number, nature and extent of the exceptions.³⁸⁷

As a consequence, the language of modern international law avoids the term “in all cases irrespective of circumstances” to explain when the State can be immune from foreign jurisdiction.

4.3.1.1 ABSOLUTE THEORY OF FOREIGN SOVEREIGN IMMUNITY³⁸⁸

Absolute sovereign immunity shields and ensures the immunity rights of the State before another State’s court in respect of both private and public acts of the State.

³⁸⁶ *ibid* 509; Kloth (n 287) 22.

³⁸⁷ *Claim Against the Empire of Iran* [1963] 45 ILR 57 (German Constitutional Court) 61; see also the section 7.2.2 titled ‘The Restrictive Theory’ in Stephen McCaffrey, Dinah Shelton and John Cerone, *Public International Law: Cases, Problems, and Texts* (LexisNexis 2010).

³⁸⁸ Absolute State immunity is a ‘theory of state immunity that does not differentiate between commercial (or “private”) and sovereign acts of states in extending immunity to them from the judicial process of foreign domestic courts’. John H Currie, *Public International Law* (2nd edn, Irwin Law Inc 2008) 575.

Absolute immunity also provides that a suit is unlikely to be brought against a sovereign State in a foreign court unless it gives consent and abdicates its sovereign rights. With regard to the functions of absolute immunity and considering the Westphalian concept of State sovereignty, in the Nineteenth Century, absolute sovereign immunity was a protective legal discourse ideally suited to sovereign States.³⁸⁹

As noted, the absolute or classical theory of foreign sovereign immunity was first propounded in *The Schooner Exchange* case. The absolute theory was grounded on the restricted role which sovereign States played at that time. The formulation of a general rule of sovereign immunity was originally founded on the absolute theory of State immunity whereby a foreign State or sovereign could not be prosecuted (i.e. brought before a foreign State's court) without consideration of the nature of the State's act (whether public or private) complained about.³⁹⁰ However, *The Schooner Exchange* case was decided in a period when the 'critical functions of governments [...] were geared essentially to political activities. Their concern was limited more or less exclusively to problems of internal administration or to the pursuit of diplomatic and military objectives'.³⁹¹ For this reason States were completely involved in governmental or political deeds, and therefore the doctrine of sovereign immunity

³⁸⁹ Absolute immunity 'was granted in an age when the distinction between sovereign and non-sovereign activities was less manifest, given that State functions were at that time confined to the traditional spheres of, say, legislation, administration, national defence, and the conduct of State-to-State political relations and that [...] it was possible and natural to regard "State" activities as synonymous with "sovereign" activities'. Yang, *State Immunity in International Law* (n 28) 8.

³⁹⁰ This approach was 'adhered to by the English courts and others until the 1970s'. Joanne Foakes, *The Position of Heads of State and Senior Officials in International Law* (Oxford University Press 2014) 16.

³⁹¹ Theodore R Giuttari, *The American Law of Sovereign Immunity: An Analysis of Legal Interpretation* (Praeger Publishers 1970) 3.

was invoked on all occasions involving foreign States.³⁹² Chief Justice Marshall established a legal principle that a foreign sovereign bears absolute immunity rights:

the jurisdiction of the nation within its own territory is necessarily exclusive and absolute. It is susceptible of no limitation not imposed by itself. Any restriction upon it deriving validity from an external source would imply a diminution of its sovereignty to the extent of the restriction [...] in that power which could impose such restriction. All exceptions, therefore, to the full and complete power of a nation within its own territories must be traced up to the consent of the nation itself. They can flow from no other sources.³⁹³

Immediately after this statement, Justice Marshall made reference to the doctrine of ‘perfect equality and absolute independence’³⁹⁴ between States, according to which all States should grant State immunity to each other. In this sense, it ‘has become an established rule that between two equals, one cannot exercise sovereign will or power over the other, *par in parem non habet imperium*’.³⁹⁵ Vested immunity rights to States cannot be ignored unless a State consents to waive its sovereign immunity rights.

The absolute doctrine was implied in English law by Lord Atkin, in 1938 in *The Cristina* case as follows:

The foundation for the application to set aside the writ and arrest of the ship is to be found in two propositions of international law engrafted into our domestic law which seems to me to be well established and to be beyond dispute. The

³⁹² Belsky, Merva and Roht-Arriaza, ‘Implied Waiver under the FSIA: A Proposed Exception to Immunity for Violations of Peremptory Norms of International Law,’ 379.

³⁹³ *The Schooner Exchange v. M’Faddon & Others* (n 39) 136.

³⁹⁴ *ibid* 137.

³⁹⁵ Sompong Sucharitkul, *Immunities of Foreign States before National Authorities*, vol 149 (Collected Courses of The Hague Academy of International Law 1976) 117.

first is that the courts of a country will not implead a foreign sovereign, that is, they will not by their process make him against his will a party to legal proceedings whether the proceedings involve process against his person or seek to recover from him specific property or damages. The second is that they will not by their process, whether the sovereign is a party to the proceedings or not, seize or detain property which is his or of which he is possession or control.³⁹⁶

Three essential points concerning the rule of absolute sovereign immunity arise from this statement: first, the connotation of the State as an entity symbolising a foreign sovereign which therefore cannot be directly impleaded; second, the connotation of ‘State property, because under the rule a State may not be indirectly impleaded by proceedings taken against its property’; and finally, the waiver doctrine, because sovereign immunity functions exclusively as an obstacle to the jurisdiction of a foreign court where proceedings are taken against the State’s will, and consent to the jurisdiction of the foreign court withdraws sovereign immunity. A fourth point might further be made: ‘the nature of the activity for which immunity is accorded to a State’, is not included in Lord Atkin’s statement. This missing point is of course a characterisation matter of the State with respect to sovereign (public) acts and non-sovereign (private) acts; it is on this point that a distinction is made between absolute and restrictive sovereign immunity, as is explained and analysed in the following section and Chapter 6 Section 7.2.³⁹⁷

Returning to the subject of Marshall’s decision in *The Schooner Exchange*, while he laid the foundations for the doctrine of absolute State immunity, he enumerated three exceptions to the exercise of full sovereignty. First, he underscored

³⁹⁶ *The Cristina* [1938] AC 485 (House of Lords) 490 – 491.

³⁹⁷ Fox QC and Webb (n 19) 137.

the exception of the person of the sovereign entity from arrest and detention within a territory of a foreign sovereign entity. With respect to this exception, Justice Marshall clearly explained that a ‘foreign sovereign is not understood as intending to subject himself to a jurisdiction incompatible with [the foreign sovereign’s] dignity, and the dignity of his nation, and it is to avoid this subjection that the license has been obtained’.

The second exception derives from the ‘immunity which all civilised nations allow to foreign ministers’. Justice Marshall actually signalled the vesting of sovereign immunity to high-ranking State officials. Although his statement literally included only foreign State ministers, it has been deemed the basis for bestowing foreign sovereign immunity on other high-ranking State officials such as Heads of State. Finally, Justice Marshall states that a ‘third case in which a sovereign is understood to cede a portion of his territorial jurisdiction is where he allows the troops of a foreign prince to pass through his dominions’.³⁹⁸ In other words, these three exceptional cases indicate that sovereign immunity rights became available both for visiting State officials who are tasked with international political and governmental acts, and State officials bestowed with legal responsibilities abroad in the international arena in the name of their sovereign State.³⁹⁹ Vesting these immunities to the State itself and its high-ranking officials requires that every sovereign State must stick to the principle of sovereign equality; wherein, every State, regardless of the degree of power (both political and legal) they command in the international arena, must be vested in the equal juridical approach.⁴⁰⁰

³⁹⁸ *The Schooner Exchange v. M’Faddon & Others* (n 39) 137, 138 and 139.

³⁹⁹ See generally Rosanne van Alebeek, *The Immunity of States and Their Officials in International Criminal Law and International Human Rights Law* (Oxford University Press 2008).

⁴⁰⁰ Bankas (n 37) 19.

It can be observed that *The Schooner Exchange*, as the first precedent, reveals the critical issue among States, crystallised into an absolute sovereign immunity from the territorial jurisdiction of a foreign State.⁴⁰¹ At the time of *The Schooner Exchange*, the sovereign immunity principle had been limited to issues between States such as governmental or political acts. However, increasingly interrelated business between sovereign States in the intervening years and developing disputes between trading countries expanded the range of situations in which sovereign immunity might apply. Consequently, a restrictive theory has been developed under international law. This theory reflects the variety of State acts and hence both produces more specific results and sets forth a clearer and more definitive characterisation of sovereign immunity than the discourse first propounded in *The Schooner Exchange*.

4.3.1.2 RISE OF THE RESTRICTIVE THEORY OF SOVEREIGN IMMUNITY⁴⁰²

During the Twentieth Century, the changing structure of State sovereignty and corresponding changes in the position of the State in the international arena has chipped away at the absolute theory of sovereign immunity. Growing commercial and trading activities between sovereign States have become the focus of proceedings among States.⁴⁰³ Consequently, it became necessary to distinguish

⁴⁰¹ Thora A Johnson, 'A Violation of Jus Cogens Norms as an Implicit Waiver of Immunity Under the Federal Sovereign Immunities Act' (1995) 19 Maryland Journal of International Law 259.

⁴⁰² Restrictive State immunity is a 'theory of state immunity that differentiates between commercial (or "private") and sovereign acts of states, extending immunity from the judicial process of foreign domestic courts in respect of the latter but not the former; contrast with absolute state immunity'. Currie (n 388) 589. The transition from absolute sovereign immunity to restrictive sovereign immunity did not occur at 'a sharply defined point of time' but rather wholly as a consequence of international practice. Yang, *State Immunity in International Law* (n 28) 11.

⁴⁰³ In this sense, the Tate Letter to Department of Justice in 1952 declared that 'the widespread and increasing practice on the part of governments of engaging in commercial activities makes necessary a

between the private acts and the public acts of a State in order to correctly interpret the circumstances under which sovereign immunity should be bestowed on a State in contemporary inter-State cases. On this point, Philip Jessup stated:

The state has more and more assumed the control of various activities which were formerly left to private initiative. The state operation of railways, telegraphs, radio and numerous other enterprises, as well as state monopolies such as those of tobacco, salt, matches and other common articles of commerce, have necessarily brought the state into commercial relationships with private individuals and have accordingly resulted in numerous litigations which have been brought before the courts of many states. [Domestic] courts have been slow to break away from the traditional conceptions of state sovereignty, independence and equality, but gradually the demands of justice and the necessities of the situation have been reflected in a growing tendency in the jurisprudence of many countries to emphasise exceptions to state immunity rather than to emphasise the basic rule itself.⁴⁰⁴

Increasing dissatisfaction with the implementation of the absolute theory of sovereign immunity, especially in relation to States' commercial acts, led many States to adopt a more restrictive form of sovereign immunity. The restrictive method allows jurisdiction to be implemented over States' acts which are not deemed sovereign.

practice which will enable persons doing business with them to have their rights determined in the courts. [Therefore,] it will hereafter be the Department's policy to follow the restrictive theory of sovereign immunity in the consideration of requests of foreign governments for a grant of sovereign immunity'. 'Letter of Acting Legal Adviser, Jack B. Tate, to Department of Justice, May 19, 1952' (n 383); quoted in Born (n 383) 208.

⁴⁰⁴ Harvard Law School Supplement: Research in International Law, Reporter Philip C Jessup, 'Competence of Courts in Regard to Foreign States' (1932) 26 The American Journal of International Law 451, 473.

In the 1975 case, *The Philippine Admiral*, Lord Cross of Chelsea described the evolving structure of State immunity after the Second World War as follows:

There is no doubt [...] that since the Second World War there has been both in the decisions of courts outside this country and in the views expressed by writers on international law a movement away from the absolute theory of sovereign immunity championed by Lord Atkin [...] in *The Cristina* towards a more restrictive theory. This restrictive theory seeks to draw a distinction between acts of a state which are done *jure imperii* and acts done by it *jure gestionis* and accords the foreign state no immunity either in actions *in personam* or in actions *in rem* in respect of transactions falling under the second head.⁴⁰⁵

In 1976, the *Foreign Sovereign Immunities Act* (FSIA) was passed by the United States Congress both to clarify and to codify the restrictive sovereign immunity theory in that country. The FSIA declares that subject ‘to existing international agreements to which the United States is a party at the time of [adoption] of this Act a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States [...]’.⁴⁰⁶ The FSIA, then, set out excepted categories that preclude foreign States from having the defence of sovereign immunity. Section 1605 of the FSIA states that:

a foreign State shall not be immune from the jurisdiction of courts of the United States in any case

(1) in which *there is an implicit or explicit waiver of immunity by the foreign State;*

⁴⁰⁵ *The Philippine Admiral* [1977] AC 373 (Privy Council) 397.

⁴⁰⁶ ‘Foreign Sovereign Immunities Act’ (1976) 28 USC § 1604.

(2) in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States;

(3) in which rights in property taken in violation of international law are in issue [...];

(4) in which rights in property in the United States [are] acquired by succession or gifts [...];

(5) not otherwise encompassed in paragraph (2) above, in which money damages are sought against a foreign state for personal injury or death [...] occurring in the United States and caused by the tortious act or omission of that foreign state or any official or employee of that foreign state [...];

(6) in which the action is brought, either to enforce an agreement made by the foreign state with or for the benefit of a private party to submit to arbitration [...];

(7) in which money damages are sought against a foreign state for personal injury or death that was caused by an act of torture, extrajudicial killing, aircraft sabotage, hostage taking, or the provision of material support or resources for such an act if such act or provision of material support of resources is engaged in by an official, employee, or agent of such foreign state while acting within the scope of his or her office, employment, or agency;

(8) in which a suit in admiralty is brought to enforce a maritime lien against a vessel or cargo of the foreign state, which maritime lien is based upon a commercial activity of the foreign state.⁴⁰⁷

Considering the restrictive theory of sovereign immunity in the case of the United States, the general legal principle put forward by *The Schooner Exchange* remains; namely, foreign States can benefit from sovereign immunity when governmental or political acts are at stake. However, according to the FSIA, the foreign State has a legal right to be vested with sovereign immunity unless it is involved in exceptional activities as set out in Sections 1605 and 1605A of the Act. In fact, imposing some limitations on granting State immunity to all States was considered when international commerce and inter-State economic activities began spreading through and affecting the world order. In this way a restrictive immunity doctrine has come to be widely accepted, with the exception of a few States (the former Soviet Union and China being the most notable).⁴⁰⁸ A restrictive approach ‘has since been taken – there are derogations from the immunity when a State engages in commercial or trading activities’.⁴⁰⁹

The restrictive theory of sovereign immunity makes a distinction between the private and public acts of a sovereign State. Through this distinction, sovereign immunity is considered for a foreign State defendant only where its public acts are at stake and since commercial activities are administered by private law, commercial

⁴⁰⁷ *ibid* 28 U.S.C. § 1605 and 1605A [emphasis added].

⁴⁰⁸ See the Singapore State Immunity Act (1979); the South African Foreign States Immunities Act (1981); the Pakistan State Immunity Ordinance (1981); the Canadian State Immunity Act (1982); the Australian Foreign States Immunities Act (1985); and the United Nations Convention on Jurisdictional Immunities of States and Their Property (2004) art 5, which does not apply to criminal proceedings because it is not in force yet; see Shaw (n 57) 513–514. For the China exception see Joanne Foakes, ‘State Immunity: Recent Developments and Prospects’ [2013] Chatham House Briefing Paper 4.

⁴⁰⁹ *Benkharbouche & Janah v Embassy of Sudan & Libya* [2015] EWCA Civ 33 [19]; *I Congreso del Partido* (n 293) 267.

transactions of a State fall outside of State sovereign authority.⁴¹⁰ This interpretation is mirrored in the UN Convention on Jurisdictional Immunities of States and Their Property as follows: ‘A state enjoys immunity in respect of itself and its property, from the jurisdiction of the courts of another state subject to the provisions of the present Convention’.⁴¹¹ Under the doctrine of restrictive foreign sovereign immunity, governmental ‘acts with regard to which immunity would be granted are termed acts *jure imperii* [...] while those relating to private or trade activity are termed acts *jure gestionis*’.⁴¹²

The restrictive approach to sovereign immunity makes a distinction between *acts jure imperii* and *acts jure gestionis*, and was highlighted by the Federal Republic of Germany in the *Distomo Massacre* case. The factual context of the *Distomo Massacre* case can be summarised as follows: On 10 June 1944, German armed forces committed a massacre in the Greek village of Distomo resulting in the deaths of many civilians. On 25 September 1997, a Greek Court of First Instance of Livadia delivered a judgement against Germany and awarded damages to relatives of the victims of the Distomo massacre. In 2000, though the Hellenic Supreme Court confirmed that judgement, it was not possible to uphold these two judgements because the Greek Minister for Justice had not granted the required authorisation to hold a judgement against a foreign State. The plaintiffs in the *Distomo Massacre* case later brought proceedings against Germany and Greece before the European Court of Human Rights. In 2002, the plaintiffs’ application was found inadmissible by invoking the principle of State immunity. Greek plaintiffs then sought to enforce

⁴¹⁰ Legislative acts, internal administrative acts, diplomatic activities, acts concerning the armed forces, public loans that are deemed political and public acts enjoy sovereign immunity under the restrictive theory of sovereign immunity. Shaw (n 57) 514.

⁴¹¹ United Nations General Assembly, ‘United Nations Convention on Jurisdictional Immunities of States and Their Property’ (n 381) Article 5.

⁴¹² Shaw (n 57) 509–510.

the judgements of the Greek courts in Italy and the Italian court held that the 1997 Greek judgement was enforceable in Italy.⁴¹³ The Court of Cassation in the *Distomo Massacre* case stated that:

It is now accepted by the international legal community that the immunity of foreign States does not cover all their actions (absolute immunity) but merely those actions which constitute an exercise of sovereign power in relation to third parties (*acta jure imperii*). It is not upheld for those acts which the foreign State carries out as a *fiscus* within the framework of its relations under private law (*acta jure gestionis*) [...] the criterion for making this distinction is the nature of the act of the foreign State, meaning whether the act itself involves the exercise of sovereign power.⁴¹⁴

As Fairman notes: 'All the rights which a state has abroad may be reduced to one: the right to respect in the exercise of its *imperium* within the limits recognised by international law'.⁴¹⁵ The absolute theory of State immunity, which is based on the maxim *par in parem non habet imperium*, becomes practicable only for inter-State relations; and ultimately, the restrictive theory erodes the premise of State immunity instituted in *The Schooner Exchange*.⁴¹⁶

4.4 CONTROVERSIAL EXCEPTIONS TO STATE IMMUNITY

Although the distinction between *acta jure imperii* and *acta jure gestionis* is now largely accepted, some further, controversial, exceptions are found in international

⁴¹³ *Jurisdictional Immunities of the State (Germany v. Italy: Greece Intervening)*, Judgment (n 17); *Prefecture of Voiotia v. Federal Republic of Germany (Distomo Massacre Case)* (n 17).

⁴¹⁴ *Prefecture of Voiotia v. Federal Republic of Germany (Distomo Massacre Case)* (n 17) 516.

⁴¹⁵ Charles Fairman, 'Some Disputed Applications of the Principle of State Immunity' (1928) 22 *American Journal of International Law* 566, 571.

⁴¹⁶ See Badr (n 375).

law. Within the scope of this Thesis, two exceptional situations are relevant, namely, the territorial tort exception and the contravention of peremptory norms (*jus cogens*). Beyond the restrictive doctrine of State immunity, these exceptions present considerable challenges in relation to international immunity under international law. As Bröhmer notes: ‘this is where the *terra cognita* ends and the twilight zone of international immunity law begins’.⁴¹⁷

The territorial tort exception concerns the actions of a foreign State in a forum State. Specifically, if an act by a foreign State occurs in the territory of a forum State and engenders physical injury, death or damaged to property, the territorial tort exception should apply. According to this exception, a State cannot claim immunity from jurisdiction before a foreign State’s court. Article 12 of the UN Convention on Jurisdictional Immunities of States and Their Property and Article 11 of the 1972 European Convention on State Immunity (Basel Convention)⁴¹⁸ established the tort exception as follows:

Unless otherwise agreed between the States concerned, a State cannot invoke immunity from jurisdiction before a court of another State which is otherwise competent in a proceeding which relates to pecuniary compensation for death or injury to the person, or damage to or loss of tangible property, caused by an act or omission which is alleged to be attributable to the State, if the act or omission occurred in whole or in part in the territory of that other State and if

⁴¹⁷ Bröhmer, *State Immunity and the Violation of Human Rights* (n 28) 139.

⁴¹⁸ European Convention on State Immunity was signed in Basel on 16 May 1972. The Convention ‘aims to establish common rules relating to the scope of the immunity of one Party from the jurisdiction of the courts of another Party’. See www.coe.int (Council of Europe).

the author of the act or omission was present in that territory at the time of the act or omission.⁴¹⁹

Although the territorial tort exception is codified under both the UN Convention and the European Convention on State Immunity, its extent and availability are still controversial, because many States assert that it breaches the rule that States can benefit from jurisdictional immunity for their sovereign acts (*acta jure imperii*). However, it is clear from the aforementioned instruments and from the FSIA that the territorial tort exception is exercised in the forum State, and that even the State's act from which the injury or death results is recognised as an inherently sovereign act.⁴²⁰

As for peremptory norms (*jus cogens*), those are a well-established principle of the international community which are meant to trump all incompatible and inconsistent lesser rules, acts or norms, regardless of their nature. Furthermore, as established in Article 53 of the 1969 Vienna Convention on the Law of Treaties, no derogation is permissible for such *jus cogens* norms.⁴²¹ Therefore, it can be stated that bestowing immunity on the State does not, in and of itself, establish a violation of peremptory norms unless this bestowal gives rise to a situation which breaches *jus cogens* norms.⁴²² In fact, there is a strong doctrinal perspective that the peremptory norms trump the jurisdictional immunity of the State before a national court; and, in this case, that the main purpose of the peremptory norms is to disrupt and deny any

⁴¹⁹ United Nations General Assembly, 'United Nations Convention on Jurisdictional Immunities of States and Their Property' (n 381) Article 12.; art 11; 'Foreign Sovereign Immunities Act' (n 406) 28 U.S. Code § 1605(a)(5).

⁴²⁰ Alebeek (n 399) 68–69; Roger O'Keefe, 'State Immunity and Human Rights: Heads and Walls, Hearts and Minds' (2011) 44 Vanderbilt Journal of Transnational Law 999, 1011; *Letelier v Chile* [1980] 488 F.Supp. 665 (United States District Court, DC); *Schreiber v Canada (Attorney General)* [2002] 3 S.C.R. 269 (Supreme Court of Canada).

⁴²¹ The International Criminal Tribunal for the former Yugoslavia and the Special Court for Sierra Leone have also endorsed the view that amnesties which are incompatible with peremptory norms cannot possess any legal effect. See *Prosecutor v. Anto Furundzija (Trial Judgement)* (n 188) [155]; *Prosecutor v Augustine Gbao* [2004] SCSL-2003-01-I (Special Court for Sierra Leone) [9]; Orakhelashvili, 'State Immunity and Hierarchy of Norms' (n 25) 963.

⁴²² Tomuschat (n 24) 433.

means by which impunity might be enjoyed by a State that violates certain human rights recognised as *jus cogens* norms.⁴²³ On this basis, the abolition of impunity in cases of violations of fundamental human rights becomes the basis of this Thesis.

The International Law Commission has characterised the prohibition of aggression, genocide, slavery, racial discrimination and torture as the *jus cogens* norms.⁴²⁴ The controversial question here is whether jurisdictional immunities apply to the State in cases of violations of those specific human rights. Also of importance is the issue of whether or not State immunity equates to State impunity when those human rights are violated by the State. This issue will be addressed in the following sections through analysis of the 2012 *Germany v Italy (Jurisdictional Immunities of the State)* and particularly the dissenting opinion of Judge Antônio Augusto Cançado Trindade. It must be noted that dissenting opinions are not legally binding but are morally authoritative; for this reason, they may serve as advisory opinions in the future and the minority argument may, in the future, become the majority argument.

4.5 TENSION BETWEEN STATE IMMUNITY AND VIOLATIONS OF *JUS COGENS* NORMS

The principle of State immunity has evolved over time as much as the concept of the sovereign State. As part of this evolution, new limitations have been imposed on the absolute power of the State. Accordingly, the restrictions imposed by *jus cogens* norms on the application of sovereign immunity of the State are now widely

⁴²³ See Orakhelashvili, 'State Immunity and Hierarchy of Norms' (n 25) 964; Fox QC and Webb (n 19) 39–40.

⁴²⁴ United Nations General Assembly, *Yearbook of the International Law Commission: Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries* (n 179) Article 26(5).

accepted. The impact of *jus cogens* norms has been limited, in that the principle of State immunity is considered compatible with international law obligations in relation to the implementation of *jus cogens* norms.⁴²⁵ This issue was the focus of the *Germany v Italy* case, in which the International Court of Justice refused to accept an Italian argument on the conflict between the violation of *jus cogens* norms and a bestowal of State immunity on Germany. Be that as it may, the rules of *jus cogens* unreservedly bind all State parties. According to Eric Suy, they belong to the

body of those general rules of law whose non-observance may affect the very essence of the legal system to which they belong to such an extent that the subjects of law may not, under pain of absolute nullity, depart from them by virtue of particular agreements [...] Thus, the *jus cogens* restricts the freedom of the parties.⁴²⁶

Jus cogens norms are so compelling that they are, hierarchically speaking, superior to all other norms. It follows that *jus cogens* norms will limit the freedom of the States in order to maintain international coexistence. The rules imposed by *jus cogens* therefore have vital importance for the international legal order.

4.5.1 THE CONFLICT BETWEEN STATE IMMUNITY AND FUNDAMENTAL HUMAN RIGHTS

The ever-changing nature of the international system has necessitated modification of the concept of State immunity. Increasing concerns in respect of international human rights issues and the changing dynamics of inter-State relations have become

⁴²⁵ See Fox, 'International Law and Restraints on the Exercise of Jurisdiction by National Courts of States' (n 19).

⁴²⁶ Eric Suy, 'The Concept of Jus Cogens in Public International Law', *Lagonissi Conference on International Law, Papers and Proceedings* (1967) 18.

principal factors in shaping the concept of State immunity in the contemporary international order.

Since the Second World War, the influence of inter-State relations on the evolution of international human rights has also been recognised. The decisions, policies, sanctions or implementations taken by States directly affect the notion of human rights; as a consequence, the impact of decisions taken or resolutions adopted by international courts on the future of international human rights is of more concern than the legitimacy and sustainability of States. The decisions and resolutions adopted by international courts and human rights organisations in respect of the problematic issue of defending international human rights always encounter resistance from proponents of State immunity. To date, States have tended to resist international efforts to defend human rights. This situation requires analysis of the issue of immunity and impunity in the context of inter-State relations.

International law is concerned with two important but conflicting interests: State immunity and international human rights. State immunity exists to ensure both that public functions will be carried out effectively by specified State officials and to maintain smooth relations with foreign States.⁴²⁷ International human rights norms function as a control mechanism, and therefore play an important role in restraining the State's power. These norms provide protection for individuals against the abuse of State power.⁴²⁸ Therefore, international human rights norms, in a sense, provide a check and balance system among State entities and between the government and its citizens. Although *jus cogens* norms ensure the superiority of the protection of fundamental human rights over the principle of State immunity, these two concepts

⁴²⁷ Fox QC and Webb (n 19) 1.

⁴²⁸ Malanczuk (n 89) 209.

have a disharmonious relationship which is not easily resolved under contemporary international law.

According to the normative hierarchy theory, *jus cogens* norms prevail over non-peremptory norms in international law. Fundamental human rights norms, which are considered one of the *jus cogens* norms, trump the principle of State immunity in theory. Therefore, the jurisdictional immunity of the State must be abandoned when the State breaches fundamental human rights which are considered *jus cogens*. It is widely maintained that States and high-ranking State officials cannot escape criminal proceedings before foreign courts when they breach *jus cogens* norms by claiming State immunity. In the hierarchy of international law norms, the principle of State immunity ranks below *jus cogens* norms, and therefore can be set aside.⁴²⁹

Yet human rights exceptions to State immunity are mostly addressed by reference to the principle of restrictive immunity.⁴³⁰ Increasing violations of fundamental human rights values result in a clash between granting State immunity and safeguarding human rights. And yet, by challenging the principle of State immunity, *Germany v Italy* makes a significant contribution to international case law. The clash between State immunity and human rights can be also seen in *Al-Adsani v the United Kingdom*, in which the European Court of Human Rights (ECtHR) decided unanimously that there was no violation of Article 3, and upheld by a narrow margin (9 votes to 8) that there was no violation of Article 6(1) of the European Convention on Human Rights in relation to the alleged acts of torture for which the State had claimed jurisdictional immunity; it follows that according to the European Court of Human Rights, State immunity claims do not establish a bar for the

⁴²⁹ Alebeek (n 399) 316; Caplan (n 24) 741–742.

⁴³⁰ Alebeek (n 399) 320.

fundamental protection of human rights.⁴³¹ The facts of *Al-Adsani* case can be summarised as follows: Al-Adsani, who holds joint British and Kuwaiti citizenship, went to Kuwait in the course of the Gulf War in 1991 and served as a pilot in the Kuwaiti Air Force. After the Iraqi invasion, he remained in Kuwait. During that time, he ‘came into possession of sexual video tapes involving Sheikh Jaber Al-Sabah Al-Saud Al-Sabah (“the Sheikh”), who is related to the Emir of Kuwait and is said to have an influential position in Kuwait’. Then, these video tapes ‘entered general circulation, for which the applicant was held responsible by the Sheikh’. After the expulsion of the Iraqi armed forces from Kuwait, on or around 2 May 1991, the Sheikh and two others allegedly ‘gained entry to the applicant’s house, beat him and took him at gunpoint in a government jeep to the Kuwaiti State Security Prison’ where he was falsely imprisoned and repeatedly beaten by security guards. On 5 May 1991, he was released, ‘having been forced to sign a false confession’.⁴³²

On or around 7 May 1991, the Sheikh kidnapped the applicant and took him to the palace of the Emir of Kuwait’s brother where he was repeatedly ‘held underwater in a swimming pool containing corpses, and he was then dragged into a small room where the Sheikh set fire to mattresses soaked in petrol, as a result of which the applicant was seriously burnt’. Al-Adsani was initially treated in a Kuwaiti hospital. On 17 May 1991, he returned to England and received treatment for six weeks. He further suffered ‘psychological damage and has been diagnosed as suffering from a severe form of post-traumatic stress disorder’. While he was in England, he received ‘threats warning him not to take action or give publicity to his plight’. On 29 August 1992, he instituted civil proceedings in England for

⁴³¹ *Al-Adsani v. The United Kingdom* (n 364).

⁴³² *ibid* 277.

compensation against the Sheikh and the State of Kuwait in respect of injury to his mental and physical health caused by torture and threats against his life.⁴³³

Likewise, the UK House of Lords, in *Jones v Saudi Arabia*, ruled that Saudi Arabia can enjoy jurisdictional immunity for alleged acts of torture.⁴³⁴ In *Jones v Saudi Arabia*, four UK nationals (Ronald Jones, Sandy Mitchell, Leslie Walker, and William Sampson) were allegedly exposed to torture by Saudi Arabian agents in a Saudi Arabian prison. After they returned to the United Kingdom, they instituted a civil proceeding before United Kingdom domestic courts against both the Saudi Arabian agents and the State of Saudi Arabia. In the last instance, the case, however, was dismissed by the United Kingdom domestic courts as well as the Supreme Court on the grounds that both a foreign State and its agents enjoy immunity from the jurisdiction before domestic courts, even as to torture. Afterwards, the applicants filed an application with the European Court of Human Rights and argued that the United Kingdom, by upholding immunity, had wrongfully limited the right of access to a court which was laid down in Article 6 of the European Convention on Human Rights.⁴³⁵ In so doing the House of Lords implies that the hierarchy between norms does not impinge on jurisdictional immunities. It can be observed, through the decisions of the European Court of Human Rights and the House of Lords, that the State cannot be forced to submit to the jurisdiction of any mechanism merely on the basis of claims made in regard to fundamental human rights.⁴³⁶

The case of *Germany v Italy* reveals a problematic issue: whether States can benefit from jurisdictional immunity in cases of fundamental human rights

⁴³³ *ibid.*

⁴³⁴ *Jones v. Saudi Arabia* (n 189).

⁴³⁵ *ibid*; see Cedric Ryngaert, 'Jones v United Kingdom: The European Court of Human Rights Restricts Individual Accountability for Torture' (2014) 30 *Utrecht Journal of International and European Law* 47.

⁴³⁶ Orakhelashvili, 'State Immunity and Hierarchy of Norms' (n 25).

violations. The judgement in this case has great significance in that it shows the interaction between human rights and State immunity as played out before the International Court of Justice.⁴³⁷ When this case arose in 2012, the International Court of Justice assisted the cause of fundamental human rights by deciding that there was an exception to jurisdictional immunity when a State violates *jus cogens* norms; however, the majority of judges on the International Court of Justice took a stand against fundamental human rights norms and even reinforced the position of immunity from jurisdiction in cases of violations of peremptory norms. This case therefore demonstrates the tension between State immunity and fundamental human rights. It also highlights the debate over whether or not State immunity equates to State impunity even when *jus cogens* violations are at stake. On this point, the Dissenting Opinion of Cançado Trindade is particularly effective in distinguishing between State immunity and State impunity.

With respect to the tension between State immunity and fundamental human rights violations, International Human Rights Law has recognised some limits to avoiding immunity when a State is held responsible for fundamental human rights violations. In the *Janowiec v Russia (Katyn Forest Massacre case)*, whether there was a violation of Article 3 of the European Convention on Human Rights became an important issue before the European Court of Human Rights in the case of committed violations of fundamental human rights. In the Katyn Forest Massacre of 1940, after the Soviet Red Army's invasion of Poland during the Second World War, around 22,000 Polish military officers, prisoners of war and other civilians were disappeared and the victims' relatives and families and hundreds of thousands of Polish citizens were deported to the remote locations of the Soviet Union. For half

⁴³⁷ See Lorna McGregor, 'State Immunity and Human Rights: Is There a Future after Germany v Italy?' (2013) 11 *Journal of International Criminal Justice* 125.

century, the Katyn Forest Massacre was ‘subject to massive cover-up and obfuscation operations’.⁴³⁸ In 1942 and 1943, mass burials were discovered near the Katyn forest by the first Polish railroad workers and the German Army. An international commission was set up and conducted the exhumation works. The commission concluded that ‘the Soviet authorities had been responsible for the massacre’.⁴³⁹ Initially, the Soviet authorities blamed the Nazi Germany for the killings and massacre, claiming that ‘the killings took place in 1941 when the territory was in German hands’.⁴⁴⁰

However, on 3 March 1959, Alexander Shelepin, Chairman of the State Security Committee (KGB), stated that the documents related to the Polish prisoners’ execution during the war were destroyed. Shelepin declared, further, that ‘a total of 21,857 persons were shot, 4,421 of them in Katyn Forest [...] 3,820 in the Starobelsk camp near Kharkov, 6,311 in the Ostashkov camp and 7,305 in other camps and prisons in western Ukraine and Belorussia’.⁴⁴¹ Alexander Shelepin’s statement became public, and in 1990, the Russian Government admitted responsibility for the deaths. The country accepted that the executions had taken place in 1940 and were operated by the Soviet secret police.⁴⁴² In March and June 1990, Russian prosecutors opened a criminal investigation into the murder of 22,000 Polish prisoners and officers. However, in 2004, the Russian authorities discontinued the investigation on the grounds that the ‘persons allegedly responsible for the crime were already dead’.

⁴³⁸ Michael P Scharf and Maria Szonert-Binienda, ‘Katyn: Justice Delayed or Justice Denied?: Report of the Cleveland Experts’ Meeting’ (2012) 44 Case Western Reserve Journal of International Law 535, 536; see generally Beata Pasek, ‘Russia Opens Its Files on the Katyn Massacre’ [2010] *Time*.

⁴³⁹ *Janowiec v Russia* [2013] 58 EHRR 30 (European Court of Human Rights) 800–801.

⁴⁴⁰ *ibid* 801; Scharf and Szonert-Binienda (n 438) 536.

⁴⁴¹ *Janowiec v. Russia* (n 439) 801; Robert Gellately, *Stalin’s Curse: Battling for Communism in War and Cold War* (Alfred A Knopf 2013) 50–51.

⁴⁴² Scharf and Szonert-Binienda (n 438) 537; *Janowiec v. Russia* (n 439) 792.

Findings and records were classified as top-secret and ‘it appeared that the tragedy would once again be subject to *historical amnesia*’.⁴⁴³

Fifteen members of victims’ families have continued their struggle to find the truth about what happened in Katyn Forest, including Mr Jerzy-Roman Janowiec, the son of Mr Andrzej Janowiec who was a lieutenant in the Polish Army before the Second World War.⁴⁴⁴ This case was brought before the Grand Chamber of the European Court of Human Rights. The applicants, before the Court, complained that the prolonged refusal of historical fact and the withholding of information regarding their relatives, ‘together with the dismissive and contradictory replies by the Russian authorities to their requests for information, amounted to inhuman and degrading treatment’⁴⁴⁵ in violation of Article 3 of the European Convention on Human Rights which reads: ‘No one shall be subjected to torture or to inhuman or degrading treatment or punishment’. However, the Chamber distinguished between two groups of applicants applying to Article 3 on the basis of ‘the proximity of the family ties that linked them to the victims of the Katyn Massacre’. Applicants who were born before 1940 could claim to be victims of the alleged transgression of Article 3. On the other hand, however, Article 3 would not apply to applicants who were born in 1940 or later.⁴⁴⁶ The Court stated that the ‘applicants’ suffering did not reach a dimension and character distinct from the emotional distress regarded as inevitably caused to relatives of a serious human-rights violation. There had not been’ a transgression of Article 3.⁴⁴⁷

⁴⁴³ Scharf and Szonert-Binienda (n 438) 537; *Janowiec v. Russia* (n 439) 792.

⁴⁴⁴ *Janowiec v. Russia* (n 439) 802.

⁴⁴⁵ *ibid* 831–832.

⁴⁴⁶ *ibid* 832; Corina Heri, ‘Enforced Disappearance and the European Court of Human Rights’ *Ratione Temporis Jurisdiction: A Discussion of Temporal Elements in Janowiec and Others v. Russia*’ (2014) 12 *Journal of International Criminal Justice* 751, 765–766.

⁴⁴⁷ *Janowiec v. Russia* (n 439) 794–795.

These unexpected and disappointing decisions should not prevent exposure of the weaknesses in their reasoning. As Joost Pauwelyn has argued, the ‘presumption against conflict is a presumption in favour of continuity, not a prohibition of change. It ought not to lead to a restrictive interpretation of the new, allegedly conflicting, norm’.⁴⁴⁸

4.5.2 DOES STATE IMMUNITY EQUATE TO STATE IMPUNITY?

The main discussion point here is whether sovereign acts (*jure imperii*) of the State incorporate violations of fundamental human rights on the grounds that sovereign immunity may be claimed by States in order to escape from foreign justice. Although international law has evolved away from a State-oriented approach towards a community-based approach which seeks to protect the person, the absolute nature of *jus cogens* human rights is not yet universally recognised as a fundamental tenet of public international law and therefore lacks the power to erode, let alone abolish, the doctrine of State immunity. Because there is no sound footing for human rights protection under international law, as the majority opinion in *Germany v Italy* held, State immunity may be invoked even where fundamental human rights are violated by States. According to the majority decision of the Court, States that breach international human rights law are not exempt from claiming State immunity before the jurisdiction of a foreign State.⁴⁴⁹ Likewise, in *Al-Adsani*, the European Court of Human Rights, ‘while noting the growing recognition of the overriding importance of the prohibition of torture, [did] not find it established that there is yet acceptance

⁴⁴⁸ Joost Pauwelyn, *Conflict of Norms in Public International Law: How WTO Law Relates to Other Rules of International Law* (Cambridge University Press 2003) 242.

⁴⁴⁹ *Jurisdictional Immunities of the State (Germany v. Italy: Greece Intervening)*, Judgment (n 17); See Onder Bakircioglu, ‘Germany v Italy: The Triumph of Sovereign Immunity over Human Rights Law’ (2012) 1 International Human Rights Law Review 93; Sangeeta Shah, ‘Jurisdictional Immunities of the State: Germany v Italy’ (2012) 12 Human Rights Law Review 555.

in international law of the proposition that States are not entitled to immunity in respect of civil claims for damages for alleged torture committed outside of the forum State'.⁴⁵⁰

Returning to *Germany v Italy*, this case was brought before the International Court of Justice in 2008 by Germany, which claimed that its sovereign immunity was violated before Italian courts. Italy brought civil claims against Germany in the courts of Italy to seek compensation for damages and losses caused by violations committed by the German Reich during the Second World War. In response, Germany claimed that, by allowing the civil suit, Italy violated its obligation to respect the jurisdictional immunity which Germany enjoys under international law. Germany also claimed that Italy had breached Germany's immunity by taking measures of restriction against Villa Vigoni, a property in Italy that belongs to the German State.⁴⁵¹

Italy raised two main arguments with the International Court of Justice for lifting the State immunity of Germany. The first argument addressed the issue of the territorial tort principle; the second was comprised of three substantial sub-arguments that Germany's claim to State immunity should be rejected because of the nature of the actions of which it was accused by the Italian courts.⁴⁵² Although the Court refused all arguments brought forward by the Italian side, analysing those arguments and the Court's reasons for rejecting them underscores the difficulty of enforcing human rights and even those of a *jus cogens* nature against a backdrop of State immunity.

⁴⁵⁰ *Al-Adsani v. The United Kingdom* (n 364) 292.

⁴⁵¹ *Jurisdictional Immunities of the State (Germany v. Italy: Greece Intervening)*, Judgment (n 17) [37].

⁴⁵² *ibid* 62–104.

4.5.2.1 ITALIAN ARGUMENTS IN GERMANY v ITALY

Italy's first argument was that a State is no longer vested with sovereign immunity when its act leads to personal injury, death or damage to property on the forum State's territory regardless of whether the act was performed under the capacity of *jure imperii* or *jure gestionis*. Italy supported this argument by emphasising the adoption of Article 12 of the United Nations Convention and Article 11 of the European Convention on State Immunity. Pursuant to the Italian argument, the Court took guidance from the judgments of domestic courts concerning State immunity in respect to the acts of military forces. The Court held that when the State's armed forces commit such acts, State immunity is not removed by the territorial tort principle under international law; accordingly, State immunity for sovereign acts continue to extend to civil proceedings. Therefore, the Court found that the argument put forward by the Italian side for refusing State immunity cannot be justified on the grounds of the territorial tort principle.⁴⁵³

Italy's second argument consists of three strands in respect of the subject-matter and circumstances of its claims. The first strand concerns the proposition that international law either prevents or restricts a State's right to immunity when that State has violated fundamental human rights. Notably, that Germany committed fundamental human rights violations can be deduced from the fact that the Court introduced as evidence the deeds of the German armed forces and other organs of the German Reich and these were recognised as serious violations of humanitarian law, and therefore, by implication, international crimes. For this reason, Italy expected the Court to deny immunity to Germany in this case. However, the Court rejected this argument and declared that the gravity of violations of international humanitarian

⁴⁵³ For mentioned State practices, see *ibid* 72.

rules and human rights norms does not require that a foreign State be deprived of immunity.⁴⁵⁴ The Court also cross-referenced a study by the International Law Commission (1980) that adopted the rule of State immunity as a general rule of customary international law, declaring that ‘States generally proceed on the basis that there is a right to immunity under international law, together with a corresponding obligation on the part of other States to respect and give effect to that immunity’.⁴⁵⁵

The Court’s rejection of this first strand argument raises a question as to why the Court did not refer to the judgment in *Pinochet*.⁴⁵⁶ The Court did not apply the *Pinochet* judgment, but instead drew a distinction between the two cases, deciding that *Pinochet* was about the immunity of a Head of State from the criminal jurisdiction of foreign State rather than State immunity. It follows that the Court considered the issue of State immunity only in terms of its relevance to the jurisdiction of a foreign State’s court. Furthermore, the Court asserted that the rationale for the judgment differed, in that the *Pinochet* judgment was established on grounds specific to the UN Convention against Torture (1984) and no such torture claim was manifested in *Germany v Italy*.⁴⁵⁷

In the second strand of its argument, Italy insisted that Germany must be deprived of State immunity because all other steps to secure repayment for the victims had failed. The Court dismissed Italy’s contention and found ‘no basis in the State practice from which customary international law is derived that international law makes the entitlement of a State to immunity dependent upon the existence of

⁴⁵⁴ *ibid* 80, 81 and 91.

⁴⁵⁵ *ibid* 56.

⁴⁵⁶ See Chapter 5 Section 2.2. See *R v. Bow Street Metropolitan Stipendiary Magistrate and Others, ex parte Pinochet Ugarte (No. 3)* (n 46); see also generally Michael Byers, ‘The Law and Politics of the Pinochet Case’ (2000) 10 *Duke Journal of Comparative & International Law* 415; Andrea Bianchi, ‘Immunity versus Human Rights: The Pinochet Case’ (1999) 10 *European Journal of International Law* 237.

⁴⁵⁷ See *Jurisdictional Immunities of the State (Germany v. Italy: Greece Intervening)*, Judgment (n 17) [87 and 91].

effective alternative means of securing redress'. The Court therefore rejected Italy's argument that jurisdictional immunity should be removed from Germany although it was aware that the jurisdictional immunity of Germany as required by international law may rule out judicial redress for those Italian nationals who had claimed before their domestic courts.⁴⁵⁸

The third strand of the Italian argument queried the superiority of the doctrine of State immunity over *jus cogens* norms. The argument was that bestowing State immunity on Germany was at odds with the duty to honour *jus cogens* norms. Where the two are in conflict, *jus cogens* norms should always prevail over any international legal rule, regardless of its substance. It follows that, if endowing the State with immunity violates peremptory norms, then the State must be deprived of such immunity, as *jus cogens* norms are non-derogable and render void any non-peremptory norms that are at variance with them.⁴⁵⁹ Nevertheless, the International Court of Justice determined that there was no dispute between the rules of *jus cogens* which forbid particular acts and the State immunity doctrine.

The Court observed that none of the domestic legislation on State immunity has restricted immunity in cases where violations of peremptory norms are claimed. The State immunity principle points to 'the situation where the jurisdictional powers of the courts of the forum State are [...] neutralised by the operation of international law, in the sense that, even though the courts would have jurisdiction under normal circumstances, the fact that the defendant is a foreign State precludes the exercise of that jurisdiction'.⁴⁶⁰

⁴⁵⁸ *ibid* 98, 101, 103 and 104.

⁴⁵⁹ See 'Vienna Convention on the Law of Treaties' (1969) Article 53.

⁴⁶⁰ Yang, 'State Immunity in the European Court of Human Rights' (n 28) 340.

The Court also observed that the legal obligation of a State to make reparations for violations of *jus cogens* norms does not jar with the rule of State immunity; and the Court, by examining previous State practice, did not find any rule adopted by international law requiring the payment of full compensation to every victim. This raises the problematic issue of whether State immunity is a procedural or substantive matter when considering the contradiction between State immunity and *jus cogens* norms. However, the Court nipped this contradiction in the bud by dismissing the Italian argument and holding that there is no derogation from the rule of State immunity under customary international law for sovereign acts (*acta jure imperii*) that involve a violation of *jus cogens* norms.⁴⁶¹ Therefore, the Court followed Fox's argument, referenced in *Jones v Saudi Arabia*, that 'State immunity is a procedural rule going to the jurisdiction of a national court. It does not go to substantive law; it does not contradict a prohibition contained in a *jus cogens* norm but merely diverts any breach of it to a different method of settlement'.⁴⁶²

Ultimately, none of these three strands justified the Italian courts' action in the eyes of the International Court of Justice. Considering this judgment, the International Court of Justice expects and requires that before considering the merits of a case, national courts must determine, with priority, questions of State immunity in the proceedings. Finally, the majority of the Court found that Italy violated its obligation to respect the jurisdictional immunity of Germany for *acta jure imperii* by allowing the suit before the national courts.⁴⁶³

⁴⁶¹ See *Jurisdictional Immunities of the State (Germany v. Italy: Greece Intervening)*, Judgment (n 17) [92, 94 and 97]; see also Chile Eboe-Osuji, 'State Immunity, State Atrocities, and Civil Justice in the Modern Era of International Law' in Don M McRae (ed), *The Canadian Yearbook of International Law*, vol 45 (University of British Columbia Press 2007) 256.

⁴⁶² Fox, *The Law of State Immunity* (n 278) 525; *Jones v. Saudi Arabia* (n 189) [24 and 44].

⁴⁶³ *Jurisdictional Immunities of the State (Germany v. Italy: Greece Intervening)*, Judgment (n 17) [106, 107 and 108].

4.5.2.2 CRITICISM OF THE ICJ JUDGMENT: STATE IMMUNITY V STATE IMPUNITY IN RESPECT OF THE VIOLATIONS OF JUS COGENS NORMS

The International Court of Justice, in its Judgment on *Jurisdictional Immunities of the State*, reached its final decision by avoiding the matter of the enigmatic relationship between State immunity and violations of fundamental human rights; on the contrary, the holding of the Court focused narrowly and deliberately on the issue of the jurisdictional immunities of the State before foreign national courts. The Court did not accept Italian arguments that the right of victims of human rights violations to redress should be considered, or that the relationship between violations of peremptory norms and the doctrine of State immunity should be investigated. In this regard, the Court unequivocally upheld the submission of Germany and stated that the ‘decisions and measures infringing Germany’s jurisdictional immunities which are still in force must cease to have effect, and the effects which have already been produced by those decisions and measures must be reversed, in such a way that the situation which existed before the wrongful acts were committed is re-established’.⁴⁶⁴

Although Article 94 of the UN Charter closes all avenues of Italian argument against State immunity and impedes further examination by Italian courts, the issue of abolishing impunity when violations of fundamental human rights are at stake should once more be considered by raising dissenting opinions from the Judgment *Jurisdictional Immunities of the State*.⁴⁶⁵ In dissenting from the Judgment on

⁴⁶⁴ *ibid* 137.

⁴⁶⁵ According to Article 94 of the UN Charter, each member of the UN is bound ‘to comply with the decision of the International Court of Justice in any case to which it is a party. If any party to a case fails to perform the obligations incumbent upon it under a judgment rendered by the Court, the other party may have recourse to the Security Council, which may, if it deems necessary, make recommendations or decide upon measures to be taken to give effect to the judgment’. Article 59 of

Jurisdictional Immunities of the State, justice for victims of fundamental human rights violations were sought in the form of the right to access the courts for the purpose of seeking compensation from the perpetrators of violations of those human rights.⁴⁶⁶ Although these Dissenting Opinions did not affect the final decision of the Court, they should be considered valuable reference points when evaluating future conflicts between jurisdictional immunities and the violations of fundamental human rights.

In returning its judgment, the International Court of Justice approached this case by considering, at the very outset of the proceedings, the priority of the jurisdictional immunities of the State before foreign national courts. Be that as it may, the essential distinction between sovereign immunity and sovereign impunity should be taken into consideration as a gesture of explicit support for the protection of fundamental human rights and to underscore the superiority of *jus cogens* norms. Otherwise, there is no point in taking a stand against Germany's argument that Italy must comply with the principle of sovereign immunity, which precludes private parties from instituting proceedings against another State before the courts of the forum State and leaves Italy with no rationale for its noncompliance with the sovereign immunity that Germany enjoys. On this point, it is worth noting the Italian thesis, which reads as follows:

[T]he international legal order cannot, on the one hand, establish that there are some fundamental substantive rules, which cannot be derogated from and whose violation cannot be condoned, and on the other hand grant immunity to

the International Court of Justice Statute also states that the Court's decision 'has no binding force except between the parties and in respect of that particular case'.

⁴⁶⁶ See Andrea Bianchi, 'Gazing at the Crystal Ball (Again): State Immunity and Jus Cogens beyond Germany v Italy' (2013) 4 Journal of International Dispute Settlement 457.

the author of violations of these fundamental rules in situations in which it is clear that immunity substantially amounts to impunity.⁴⁶⁷

The Court, by cross-referencing Article 2 of the UN Charter, looked upon the principle of State immunity as a fundamental concept of international legal order. However, if the legal protection of individuals is adopted as normative, the fundamental norms of human rights are unlikely to breach the basic foundation of the international legal order, because violations of fundamental human rights norms are already deemed as *jus cogens*.⁴⁶⁸

Orakhelashvili, in this sense, implies that permitting immunity for violations of peremptory norms makes the applicable substantive peremptory norm non-functional as a norm. When ‘an ordinary rule of international law is breached, the injured entity can demand remedies; when a peremptory norm is breached, the injured entity can demand remedies even if that contradicts another legal rule’. The competence, in either case, to request remedies before a court which has jurisdiction is absolutely necessary if the violated rule functions as a peremptory norm. Impeding, via jurisdictional immunity, the ability of the injured entity to claim reparations for violations of peremptory norms thus becomes ‘substantially more than erecting a procedural bar – it is essentially a denial of the normative status of the substantive rule that has been violated’.⁴⁶⁹ Furthermore, as Articles 40 and 41 of the International Law Commission indicate, the State cannot recognise as lawful a

⁴⁶⁷ Quoted in Trindade (n 12) 1500 bk. 2 Chapter 7.

⁴⁶⁸ See Bianchi, ‘Gazing at the Crystal Ball (Again)’ (n 466).

⁴⁶⁹ Orakhelashvili, ‘Immunities of State Officials, International Crimes, and Foreign Domestic Courts’ (n 25) 852.

situation engendered by violations of peremptory norms; it follows that immunities cannot overrule that obligation of the State.⁴⁷⁰

It is a well-established rule that no derogation is permitted for *jus cogens* norms and also that *jus cogens* norms can only be altered or modified by a subsequent norm of equal status.⁴⁷¹ The joint Dissenting Opinion in the *Al-Adsani* case underscored this characteristic of *jus cogens* norms:

Jus cogens rule [...] overrides any other rule which does not have the same status. In the event of a conflict between a *jus cogens* rule and any other rule of international law, the former prevails. The consequence of such prevalence is that the conflicting rule is null and void, or, in any event, does not produce legal effects which are in contradiction with the content of the peremptory rule.⁴⁷²

Thus, international law assigns to the State responsibility for taking all necessary measures to prevent violations of *jus cogens* norms. Correspondingly, Article 2(2) of the 2009 Naples Resolution on *Immunity from Jurisdiction of the State and of Persons Who Act on Behalf of the State in Case of International Crimes* reads as follows: ‘States have an obligation to prevent and suppress international crimes. Immunities should not constitute an obstacle to the appropriate reparation to which victims of crimes addressed by this Resolution are entitled’. Subsequently, Article 2(3) of this Resolution declares that ‘States should consider waiving immunity where

⁴⁷⁰ See United Nations General Assembly, *Yearbook of the International Law Commission: Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries* (n 179) Articles 40 and 41.

⁴⁷¹ See for the discussion on peremptory norms Ulf Linderfalk, ‘The Effect of Jus Cogens Norms: Whoever Opened Pandora’s Box, Did You Ever Think About the Consequences?’ (2007) 18 *European Journal of International Law* 853.

⁴⁷² *Al-Adsani v. The United Kingdom* (n 364) 298 [Joint Dissenting Opinion].

international crimes are allegedly committed by their agents'.⁴⁷³ The State must refrain from actions that recognise and accept deeds leading to the violation of *jus cogens* norms in the context of various international legal relations. Failing that, bestowing immunity on the State may well infringe fundamental human rights if this bestowal leads to the recognition and consolidation of a situation established through the violation of a relevant *jus cogens* norm, even though vesting immunity in and of itself does not constitute a violation of *jus cogens* norms.⁴⁷⁴

It is obvious that *jus cogens* norms do not conflict with the jurisdictional immunities of the State. However, because of their non-derogable nature, *jus cogens* norms stipulate conditions that prohibit impunity for violations of fundamental human rights. Hence, tolerance for the bestowing of immunity on States which violate human rights that have *jus cogens* character leads to that State having absolute impunity.⁴⁷⁵ Because the prohibition of torture is consistent in nature with *jus cogens* norms, for example, it surpasses the principle of State immunity. The joint Dissenting Opinion in *Al-Adsani* rightly indicated this hierarchical relation: 'Kuwait cannot validly hide behind the rules on State immunity to avoid proceedings for a serious claim of torture made before a foreign jurisdiction; and the courts of [...] jurisdiction [of] the United Kingdom cannot accept a plea of immunity, or invoke it *ex officio*, to refuse an applicant adjudication of a torture case'.⁴⁷⁶ The imperative characteristic of *jus cogens* norms therefore requires that State immunity not be an obstacle to prosecution when the acts of a State fly in the face of peremptory norms.

⁴⁷³ Quoted in Fox QC and Webb (n 19) 130.

⁴⁷⁴ See for further discussion Tomuschat (n 24).

⁴⁷⁵ Orakhelashvili, 'State Immunity and Hierarchy of Norms' (n 25).

⁴⁷⁶ *Al-Adsani v. The United Kingdom* (n 364) 299 [Joint Dissenting Opinion]. The 'alleged superiority of *jus cogens* over the rules of State immunity and the projected clash between them rests on the hypothesis that peremptory norms have the all-encompassing effect of overriding all legal consequences which otherwise attach to a violation of a rule'. Helmut Philipp Aust, *Complicity and the Law of State Responsibility* (Cambridge University Press 2011) 37.

For this reason, the procedural obstacle of State immunity should be automatically defeated, because any rule that conflicts with a hierarchically higher rule cannot manifest or generate any legal effect.

Therefore, differentiating between immunity and impunity is an important issue. Once ‘the notion of State immunity has been clearly delimited, then, on the plane of international law at least, immunity becomes distinct from impunity, since impunity appears to be a possible consequence of immunity, rather than immunity itself’.⁴⁷⁷ Outside the context of violations of *jus cogens* norms, the State definitely bears and maintains its immunity before foreign jurisdiction. However, in the case of a violation of those norms, the State should lose its immunity from jurisdiction, thereby making it unlikely that impunity will be bestowed upon the State. Allowing the State to avoid jurisdiction for committed violations of fundamental human rights cannot be recognised as granting that State immunity; on the contrary, to do so provides absolute impunity to the State. As Cançado Trindade puts it, ‘State-planned and State-perpetrated crimes, engaging State responsibility, removed any bar to jurisdiction, at national and international levels, so as to avoid impunity’.⁴⁷⁸

The final decisions of the courts in relation to State immunity (e.g. *Jurisdictional Immunities of the State*, *Al-Adsani*, *Jones*), whether by a narrow margin or a strong majority, have taken a stand against individual rights; namely, the individuals in these cases who are victims of inhuman treatment such as torture or other *jus cogens* imperatives in general did not receive any compensation or redress, because the State immunity principle trumped the violations of *jus cogens*.

⁴⁷⁷ Yang, ‘State Immunity in the European Court of Human Rights’ (n 28) 345.

⁴⁷⁸ *Jurisdictional Immunities of the State (Germany v. Italy: Greece Intervening)*, Judgment (n 17) [49] [Dissenting Opinion of Judge Trindade].

Orakhelashvili rightly criticised the practice of granting immunity for violations of *jus cogens* by noting:

[T]he procedural character of the immunities cannot prevent criminal prosecution for *jus cogens* crimes. It is unclear why a procedural rule can achieve the result in civil proceedings which it cannot achieve in criminal proceedings. If a substantive peremptory norm cannot prevail over procedural immunities, then *Pinochet* would not have been decided the way it was.⁴⁷⁹

However, State immunity must be differentiated from State impunity. The two terms have unequivocally different connotations: while State impunity is a substantive subject, State immunity becomes a procedural subject. It follows that whether ‘a State should be exonerated from its international responsibility for violations of human rights is one thing, whether it should be held answerable for its conduct before a foreign domestic court is quite another’.⁴⁸⁰

It never is and never has been acceptable to allow the State to hide behind the shield of State immunity, even before *jus cogens* norms existed and before human rights became such a focus for concern. On this point, Cançado Trindade, in his Dissenting Opinion, emphasised that allowing State immunity ‘leads to impunity and manifest injustice. That goes against international law [...] It goes against the *recta ratio*, which lies in the foundations of the law of nations, today as in the past’.⁴⁸¹ In 1997, a Greek court sought to abolish Germany’s sovereign immunity in relation to breaches of *jus cogens* norms of humanitarian law arising from deeds committed by the Nazi troops in the period of the occupation of Greece. The Greek court

⁴⁷⁹ Orakhelashvili, ‘State Immunity and Hierarchy of Norms’ (n 25) 969.

⁴⁸⁰ Yang, ‘State Immunity in the European Court of Human Rights’ (n 28) 343.

⁴⁸¹ *Jurisdictional Immunities of the State (Germany v. Italy: Greece Intervening)*, Judgment (n 17) [16 and 58] [Dissenting Opinion of Judge Trindade].

established that hierarchy between norms and found that ‘the recognition of immunity for an act contrary to peremptory international law would amount to complicity of the national court to the promotion of an act strongly condemned by the international public order’.⁴⁸²

Although Italy asserted, in *Germany v Italy*, that international human rights and humanitarian law violations had occurred, the Court found that Italy had violated international law because it had not considered and respected the State immunity of Germany. In fact, this argument reiterated that a procedural rule cannot override a substantive rule; to allow it to do so is inconsistent with the essence of the substantive rule (*jus cogens*) and leads to State impunity.

Those international human rights and humanitarian law violations which are considered violations of peremptory norms of general international law cannot be justified as sovereign acts (*jure imperii*) because such violations are against the legal order. Accordingly, violations of *jus cogens* norms cannot straightforwardly be ‘thrown into oblivion by reliance on State immunity’.⁴⁸³ Determining the distinction between State immunity and State impunity is a very first step towards ensuring justice and reparation for victims. Violations of fundamental human rights constitute a far greater threat to world order than do individual claims for redress in pursuit of justice; by the same token, the greatest challenge for the international legal system is the bestowal of impunity on those who violate *jus cogens* norms rather than the search for justice by the victims of those violations.⁴⁸⁴

⁴⁸² *Multi-member Court of Levidia* [1997] 137/1997; quoted in Aust (n 476) 37.

⁴⁸³ *Jurisdictional Immunities of the State (Germany v. Italy: Greece Intervening)*, Judgment (n 17) [306] [Dissenting Opinion of Judge Trindade].

⁴⁸⁴ See Trindade (n 12) 2 Chapter 7.

4.6 CONCLUSION

Conducting a close critical analysis of the findings of the International Court of Justice in *Germany v Italy* would be advisable so that the strong Dissenting Opinions expressed may be given voice and applied effectively in the future.⁴⁸⁵ While the principle of State immunity is a major obstacle to the pursuit of justice for violations of fundamental human rights, it can be observed that the scope and limitations of State immunity have not been well-established in respect of the protection of fundamental human rights under customary international law. Abdulqawi Yusuf, in his Dissenting Opinion, reads this tangled issue as follows:

State immunity is, as a matter of fact, as full of holes as Swiss cheese. Thus, to the extent that customary norms of international law are to be found in the practice and *opinio juris* of States, such practice clearly attests to the fact that the scope and extent of State immunity, particularly in the area of violations of human rights [...], which is currently characterised by conflicting decisions of national courts in its interpretation and application, remains an uncertain and unsettled area of international custom, whose contours are ill-defined.⁴⁸⁶

Ultimately, there are two interests at stake in international law as was noted earlier in this chapter. On the one hand, State immunities cannot be declared null and void, because the rule of State immunity, as declared by the International Law Commission, had been ‘adopted as a general rule of customary international law

⁴⁸⁵ See McGregor, ‘State Immunity and Human Rights Is There a Future after *Germany v. Italy*?’ (n 437).

⁴⁸⁶ *Jurisdictional Immunities of the State (Germany v. Italy: Greece Intervening)*, Judgment (n 17) [26] [Dissenting Opinion of Judge Yusuf].

solidly rooted in the current practice of States’; on the other hand, the imperative nature of *jus cogens* norms supersedes any rule which contradicts it.⁴⁸⁷

Following the fear and trembling of the Second World War, there has been a movement in international law from a State-centric to a human-centric approach. As Cançado Trindade emphasised ‘State immunities are [...] a prerogative or a privilege, and they cannot keep on making abstraction of the evolution of international law, taking place nowadays in the light of fundamental human values’.⁴⁸⁸ Redressing the balance between those interests may become crucial to avoiding future conflict. Accordingly, when violations of fundamental human rights are perpetrated, State impunity from jurisdiction must be abolished so that justice for the victims may be served and in order to prevent repetition of those violations in the future. Violations of fundamental human rights ‘perpetrated by States are not acts *jure gestionis*, nor acts *jure imperii*; they are crimes, *delicta imperii*, for which there is no immunity’.⁴⁸⁹ It follows that violations of fundamental human rights should remove any obstacle to jurisdiction for the redress to the victims. Regarding the tension between State immunity and breaches of fundamental human rights, the removal of State immunity is not the principal question; rather, the removal of an individual’s right to access the court in pursuit of justice against the perpetrators is the crucial concern. In the case of fundamental human rights violations, it is out of the question that this right can be waived; because, ‘without that right, there is no credible legal system at all, at national or international levels’.⁴⁹⁰ Peremptory norms

⁴⁸⁷ *Yearbook of the International Law Commission*, vol II(2) (1980) 147; see Trindade (n 12) 1518 bk. 2 Chapter 7.

⁴⁸⁸ Trindade (n 12) 1413 bk. 2 Chapter 7.

⁴⁸⁹ *Jurisdictional Immunities of the State (Germany v. Italy: Greece Intervening)*, Judgment (n 17) [306] [Dissenting Opinion of Judge Trindade].

⁴⁹⁰ *ibid* 199 and 308 [Dissenting Opinion of Judge Trindade].

prevail over the principle of State immunity, necessitating the prohibition of impunity in cases of violations of fundamental human rights.

State immunity has a changeable character. Different interpretations and the evolution of State immunity prove its fluctuating and unsettled nature. State immunity is not a non-derogable attribute because it exists as a non-peremptory norm under international law. That said, when *jus cogens* norms are at stake and if they conflict with jurisdictional immunities, peremptory norms should take precedence.



5 IMMUNITY OR IMPUNITY FOR HEADS OF STATE AND THE VIOLATION OF FUNDAMENTAL HUMAN RIGHTS

5.1 INTRODUCTION

State officials have traditionally been immune from the jurisdiction of foreign States' courts when they would otherwise be required to account for the deeds they are accused of committing. However, this authoritative principle of international law becomes contentious in cases involving the violation of fundamental human rights, most strongly represented by the growth of international human rights law and the establishment of international tribunals and courts determined to end impunity for violations of fundamental human rights, irrespective of the perpetrators' official position.⁴⁹¹ Increasing concern for international human rights and greater international support for abolishing impunity for violators of fundamental human rights have led the international community to question the boundaries of Head of State immunity.

There were great expectations that international law would evolve in favour of international human rights after the Second World War. These expectations undoubtedly continue. It would be a fantasy to imagine that international law always works in favour of human rights; however, there is a definite trend within the international community to seek to enhance and support international human rights. Head of State immunity appears to be a considerable impediment to realising the

⁴⁹¹ Fox QC and Webb (n 19) 537.

expectation that international law can be used to challenge resistance to respect for human rights and to ending impunity.

This chapter examines the principle of Head of State immunity. It explains the various types of Head of State immunity and considers the developments under customary international law in respect of the rules regarding such immunity. This chapter subsequently discusses and analyses immunity and impunity for Heads of State when violations of fundamental human rights are perpetrated. To engage with this discussion, the chapter concentrates on the *Pinochet* Judgment for customary international law and the judgement of the International Court of Justice in *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium)* so as to criticise the issue of immunity in question. Finally, the chapter considers the question of whether Head of State immunity, in effect, means Head of State impunity in cases involving the violation of fundamental human rights. Here, the central aim of Chapter 5 is to argue that Head of State immunity leads to *de facto* impunity in the case of violations of fundamental human rights.

5.2 IMMUNITY FOR HEADS OF STATE

5.2.1 IDENTIFICATION OF HEAD OF STATE

On the authority of international law, Heads of State are regarded as being able to act *ipso facto* as representatives of the State in respect of international relations.⁴⁹² In fact, Head of State immunity is based on the concept of sovereignty and State

⁴⁹² *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Preliminary Objections (n 256) [44].

immunity stems from the sovereign rights of States. In other words, the position of Heads of State in international law is derived from the international rights and duties of their States, and not as a consequence of their own individual entitlement. In accordance with international law, a Head of State is endowed with *jus repraesentationis omnimodae*: the right to represent the State on an international level in every respect and the competence to speak internationally on behalf of the State. In other words, as the highest delegated persons of the State, it is understood that Heads of State represent its State in international relations. A Head of State's deeds or transgressions when acting in an official capacity on behalf of the State are attributable to the State itself. If the Head of State fails to respect his or her State's international commitments, the State shoulders international responsibility for the acts of that individual.⁴⁹³ Head of State immunity applies to Heads of State as well as Heads of Government and Foreign Ministers since international relations are now conducted and performed by those authorities.⁴⁹⁴

In *Armed Activities on the Territory of the Congo – Democratic Republic of the Congo v Rwanda*, the International Court of Justice observed that it is a well-established rule of international law that the Heads of State 'are deemed to represent the State merely by virtue of exercising their functions, including for the performance, on behalf of the said State, of unilateral acts having the force of international commitments'.⁴⁹⁵ In addition to this statement, the International Court

⁴⁹³ See generally Sir Arthur Watts, 'Heads of State' (*Max Planck Encyclopedia of Public International Law*, October 2010) <<http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1418?rskey=DYWrPH&result=23&q=immunity&prd=EPIL>> accessed 1 November 2015.

⁴⁹⁴ See Joanne Foakes, 'Immunity for International Crimes? Developments in the Law on Prosecuting Heads of State in Foreign Courts' (*Chatham House*) <<http://www.chathamhouse.org/node/6374>> accessed 12 November 2014.

⁴⁹⁵ *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v. Rwanda)*, *Jurisdiction and Admissibility, Judgment* (n 255) [46] Jurisdiction of the Court

of Justice in the *Arrest Warrant* Judgment explained that a Head of State ‘responsible for the conduct of his or her State’s relations with all other States, [...] is recognised under international law as representative of the State solely by virtue of his or her office. He or she does not have to present letters of credence’.⁴⁹⁶

The Convention on Special Missions, which was adopted by the General Assembly of the United Nations on 8 December 1969, also declared that the Heads of State and ‘other persons of high rank, when they take part in a special mission of the sending State, shall enjoy in the receiving State or in a third State [...] the facilities, privileges and immunities accorded by international law’.⁴⁹⁷

5.2.2 HEAD OF STATE IMMUNITY

This recognition of a Head of State as the principal commissioned officer of his or her State provides the justification for official immunities before the domestic courts of other States.⁴⁹⁸ Brigitte Stern states that ‘the ancestor of all immunities of the head of state is *sovereign immunity*, which seems to have existed before the state came into existence, and was granted to the person of the sovereign – the King, the Emperor, the Chief’.⁴⁹⁹

The concept of Head of State immunity was explicitly and conceptually located in the 1987 *In re Grand Jury Proceedings, Doe No. 770*, in which the US

and Admissibility of the Application. The Court also noted that Heads of Government and Ministers for Foreign Affairs may be included when they represent their States.

⁴⁹⁶ *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)* (n 44) [53].

⁴⁹⁷ ‘Convention on Special Missions 1969’ art 21(2).

⁴⁹⁸ See *Case Concerning Certain Criminal Proceedings in France (Republic of the Congo v France)* [2003] ICJ Rep; see also Fox QC and Webb (n 19) 541.

⁴⁹⁹ Brigitte Stern, ‘Immunities for Heads of State: Where Do We Stand?’, in Mark Lattimer and Philippe Sands (eds), *Justice for Crimes Against Humanity*, (Oxford and Portland, Oregon: Hart Publishing, 2003), 76.

Court of Appeals for the Fourth Circuit stated that Head of State immunity ‘is a doctrine of customary international law. Generally speaking, the doctrine maintains that a head of state is immune from the jurisdiction of a foreign state’s courts, at least as to authorised official acts taken while the ruler is in power’.⁵⁰⁰

In international law, a number of prominent decisions have bearing on the tension between vesting immunity in the Head of State and the protection of fundamental human rights. The suit against the former President of Chile Augusto Pinochet by the UK House of Lords in 1998 and 1999 was a landmark in international law as Pinochet could not claim immunity for acts of torture for which he was responsible.

In analysing Head of State immunity in the context of human rights violations, the *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium)* case is also important, particularly in relation to the question of whether or not Head of State immunity equates to Head of State impunity in such cases. Heads of State sometimes enjoy considerable leeway to escape from proceedings in respect of human rights violations. In this sense, the concept of immunity is sometimes ‘wrongfully utilised to signify that a person benefits from impunity or is not prosecuted, for reasons other than the technical legal bar of immunity’.⁵⁰¹

⁵⁰⁰ *In re Grand Jury Proceedings* [1987] United States Court of Appeals, Fourth Circuit 700, 1108 817 F2d 1111. For a private visit to another State, Sir Arthur Watts stated that although ‘it may well be that a Head of State, when on a private visit to another State, still enjoys certain privileges and immunities, it is much less likely that the same is true of heads of governments and foreign ministers. Although they may be accorded certain special treatment by the host State, this is more likely to be a matter of courtesy and respect for the seniority of the visitor, than a reflection of any belief that such a treatment is required by international law’. Sir Arthur Watts, *The Legal Position in International Law of Heads of States, Heads of Governments and Foreign Ministers*, vol 247 (Martinus Nijhoff Publishers 1994) 109.

⁵⁰¹ Stern (n 499) 81.

International law regarding Head of State immunity has undergone a considerable and interesting evolution during the Twentieth and Twenty-first Centuries. However, to date, no agreement, covenant or treaty has been adopted to clarify or make alterations to the law of Head of State immunity, instead the law is rooted in international customary law.

Developments in the law with regard to Head of State immunity under international customary law are a particular concern to the future of international human rights. The question of whether or not international human rights create any exception to the customary international law of immunity *ratione materiae* remains open.⁵⁰² However, the issue of Head of State immunity in the *Pinochet* decision cannot be easily ignored. Therefore, it should be evaluated and considered for the future of Head of State immunity.

In 1973, Augusto Pinochet, the chief commander of the army in Chile, led the military *coup d'état* which overturned the elected government of President Salvador Guillermo Allende Gossens. Subsequently, the ruling military *junta* appointed Pinochet President of Chile. During the Pinochet administration, 'hundreds of thousands of people were detained for political reasons, and several thousand disappeared or were killed. Pinochet stepped down as President in 1990, but he remained head of the army until March 1998, when he was appointed Senator for Life'.⁵⁰³

⁵⁰² The exception for international human rights refers to rejections of immunity *ratione materiae* for claimed violations of *jus cogens* norms; therefore, any act that gives rise to the violation of these norms cannot be identified as a sovereign act for which the actor may claim immunity. See Ingrid Wuerth, 'Pinochet's Legacy Reassessed' (2012) 106 *The American Journal of International Law* 731.

⁵⁰³ Curtis A Bradley and Jack L Goldsmith, 'Pinochet and International Human Rights Litigation' (1999) 97 *Michigan Law Review* 2129, 2133.

Proceedings were instituted against Pinochet before the Spanish domestic court for human rights violations he allegedly committed during his presidency. On 17 October 1998, Pinochet was arrested in the United Kingdom while receiving medical treatment in London. The Spanish magistrate, Baltasar Garzon, requested Pinochet's extradition on the basis of a European Arrest Warrant from the United Kingdom so that he could stand trial for torture and other crimes against humanity; however, the United Kingdom Home Secretary, Jack Straw, decided that Pinochet should not be extradited to Spain, leaving him free to return to Chile. Criminal proceedings were initiated in England to determine whether he was entitled to Head of State immunity to avoid arrest and extradition, as Pinochet had claimed he was. The Divisional Court acknowledged Pinochet's claim and held that Pinochet was entitled to claim immunity *ratione materiae* even for human rights violations.⁵⁰⁴ The lawyers requested an appeal before the House of Lords and decisions of *Pinochet No 1*,⁵⁰⁵ *Pinochet No 2*⁵⁰⁶ and *Pinochet No 3*⁵⁰⁷ were held by the UK Law Lords.

On 25 November 1998 the UK House of Lords held that a former Head of State cannot enjoy immunity for violations of fundamental human rights, amounting to peremptory norms of general international law, committed while in office. Former General Pinochet therefore had no immunity from United Kingdom jurisdiction with

⁵⁰⁴ *R v Evans, ex parte Augusto Pinochet Ugarte* [1998] (Divisional Court); *R v Bow Street Metropolitan Stipendiary Magistrate and Others, ex parte Pinochet Ugarte (No. 1)* (n 46).

⁵⁰⁵ *R v Bow Street Metropolitan Stipendiary Magistrate and Others, ex parte Pinochet Ugarte (No. 1)* (n 46).

⁵⁰⁶ *R v. Bow Street Metropolitan Stipendiary Magistrate and Others, ex parte Pinochet Ugarte (No. 2)* (n 46).

⁵⁰⁷ *R v. Bow Street Metropolitan Stipendiary Magistrate and Others, ex parte Pinochet Ugarte (No. 3)* (n 46).

regard to his alleged crimes under international law, and hence he had no immunity from extradition.⁵⁰⁸ In *Pinochet No 1*, Lord Slynn and Lord Lloyd held that:

A claim to immunity by a head of state or a former head of state applied only to acts performed by him in the exercise of his functions as head of state. Although that referred to any of his functions as a head of state and not just those acts which had an international character, acts of torture and hostage-taking could not be regarded in any circumstances as a function of a head of state. It was a principle of international law, as shown by the Conventions against the Taking of Hostages and Torture, that hostage-taking and torture were not acceptable conduct on the part of anyone, including a head of state. It followed that since the acts of torture and hostage-taking with which the applicant was charged were offences under United Kingdom statute law, in respect of which the United Kingdom had taken extra-territorial jurisdiction, the applicant could not claim immunity from the criminal processes, including extradition, of the United Kingdom.⁵⁰⁹

Concerning *Pinochet No 1*, most of the Lords highlighted the fact that international law had evolved significantly since the Second World War. The most important aspect of this development was the identification of certain violations of human rights which deserve punishment and prosecution under international law. No act that may be seen as infringing on *jus cogens* can be regarded as a sovereign act with regard to issues of immunity. In *Pinochet No 1*, for example, Lord Nicholls of Birkenhead observed that ‘it hardly needs saying that torture of his own subjects or

⁵⁰⁸ *R v Bow Street Metropolitan Stipendiary Magistrate and Others, ex parte Pinochet Ugarte (No. 1)* (n 46).

⁵⁰⁹ *ibid* 898.

of aliens would not be regarded by international law as a function of a head of state’.

Lord Nicholls delivered a corresponding Opinion, which read in part:

International law recognises, of course, that the functions of a head of state may include activities which are wrongful, even illegal, by the law of his own state or by the laws of other states. But international law has made plain that certain types of conduct, including torture and hostage-taking, are not acceptable conduct on the part of anyone. This applies as much to heads of state or even more so, as it does to everyone else; the contrary conclusion would make a mockery of international law.⁵¹⁰

Lord Steyn, in a similar vein, stated that ‘it seems to me difficult to maintain that the commission of such high crimes may amount to acts performed in the exercise of the functions of a head of state’.⁵¹¹ By a majority decision (Lords Nicholls, Steyn and Hoffmann), the appeal was allowed owing to the fact that torture cannot be deemed as an official act of a Head of State. Accordingly, the Lords held that the decision of the Divisional Court was wrong.⁵¹²

After *Pinochet No 1*, the House of Lords uncovered a link between Lord Hoffmann, who had written the majority opinion that ruled to allow Pinochet’s extradition, and Amnesty International Charity Limited. Pinochet brought a petition to set aside an order made by the UK House of Lords on 25 November 1998, claiming that this link suggested that Lord Hoffmann was biased against him. The

⁵¹⁰ *ibid* 939–40.

⁵¹¹ *ibid* 945; see J Craig Barker, *International Law and International Relations* (Continuum 2000) 137–158; see also Andrea Birdsall, *The International Politics of Judicial Intervention: Creating a More Just Order* (Routledge 2009) 57–77; see generally Brody and Ratner (n 374).

⁵¹² *R v Bow Street Metropolitan Stipendiary Magistrate and Others, ex parte Pinochet Ugarte (No. 1)* (n 46) 947.

case therefore was reheard, with the result that the judgment of *Pinochet No 1* was set aside by *Pinochet No 2*⁵¹³ and the entire case as well as the ‘original issue of immunity’ was reheard before the House of Lords again as *Pinochet No 3*.⁵¹⁴

On 24 March 1999, at the final House of Lords hearing, the Appellate Committee decided that a former Head of State cannot enjoy immunity to perpetrate acts of torture or conspiracy, where such acts are manifestly included in the scope of violations of fundamental human rights and were perpetrated after 8 December 1998, the date on which the 1984 United Nations Convention against Torture was ratified by the United Kingdom.⁵¹⁵

The decision of the House of Lords in *Pinochet No 3* rendered on 24 March 1999 confirmed that a former Head of State cannot benefit from immunity in cases of extradition or criminal proceedings instituted in the United Kingdom in regard to the international crime of torture. In reaching this conclusion, most of the Lords in *Pinochet No 3* relied exclusively on the United Nations Convention Against Torture, from which they determined that Head of State immunity should be abrogated in cases involving that particular violation of *jus cogens* norm. According to these Lords, Head of State immunity is clearly incompatible with the Convention Against

⁵¹³ *R v. Bow Street Metropolitan Stipendiary Magistrate and Others, ex parte Pinochet Ugarte (No. 2)* (n 46).

⁵¹⁴ See Colin Warbrick, Dominic McGoldrick and Hazel Fox, ‘The Pinochet Case No. 3’ (1999) 48 *International and Comparative Law Quarterly* 687, 689.

⁵¹⁵ *R v Bow Street Metropolitan Stipendiary Magistrate and Others, ex parte Pinochet Ugarte (No. 1)* (n 46); for further analysis see Warbrick, McGoldrick and Fox (n 514); David S Weissbrodt and Connie de la Vega, *International Human Rights Law: An Introduction* (University of Pennsylvania Press 2007); Bianchi, ‘Immunity versus Human Rights’ (n 456); Byers (n 456).

Torture, because torture is a constituent component of the violation of fundamental human rights recognised as *jus cogens* norms.⁵¹⁶

The opinion of Lord Millett in *Pinochet No 3* has importance for future cases that highlight the contradiction between the protection of international human rights and the preservation of immunity for Heads of State. More comprehensively, Lord Millett endorsed the judgment that international human rights law is integral to the project of preventing human rights violations and, as such, should always triumph over Head of State immunity in cases involving such violations. Lord Millett, in *Pinochet No 3*, emphasised that the ‘very official or governmental character of the acts which is necessary to found a claim to immunity *ratione materiae*, and which still operates as a bar to the civil jurisdiction of national courts, was now to be the essential element which made the acts an international crime’.⁵¹⁷

Since the Second World War, international law has progressed at a staggering rate, and the emphasis on the protection of fundamental human rights is regarded as an essential factor in this development. Today, and in the future, any person who perpetrates injustice or violations against civil societies ‘must expect to be called to account if fundamental human rights are to be properly protected. In this context, the exalted rank of the accused can afford no defence’.⁵¹⁸

⁵¹⁶ See the opinions of Lord Browne-Wilkinson, Lord Goff of Chieveley, Lord Hope of Craighead, Lord Hutton and Lord Saville of Newdigate for a particular concern on the United Nations Convention against Torture in case of enjoying immunity for a Heads of State in the *Pinochet No 3 R v. Bow Street Metropolitan Stipendiary Magistrate and Others, ex parte Pinochet Ugarte (No. 3)* (n 46). It should be noted that there is ‘no doubt that the ingenuity of the majority in *Pinochet No 3* produced a result which both supporters and opponents could in some part accept’. Warbrick, McGoldrick and Fox (n 514) 687.

⁵¹⁷ *R v. Bow Street Metropolitan Stipendiary Magistrate and Others, ex parte Pinochet Ugarte (No. 3)* (n 46) 273; Brody and Ratner (n 374) 341.

⁵¹⁸ *R v. Bow Street Metropolitan Stipendiary Magistrate and Others, ex parte Pinochet Ugarte (No. 3)* (n 46) 279.

The opinions of the House of Lords in the *Pinochet No 3* case indicate that for all intents and purposes, violations of fundamental human rights should not be reckoned as sovereign official acts. The contradiction between granting immunities to Heads of State and the prohibition of human rights violations remains a complicated issue in international law. In fact, violations of fundamental human rights ‘cannot be regarded as official acts because they are neither normal State functions nor functions that a State alone (in contrast to an individual) can perform’.⁵¹⁹ An order by a Head of State, which gives rise to violations of fundamental human rights, should be interpreted as a private act and therefore cannot be read as a pretext to enjoy immunity.⁵²⁰ It follows that under no circumstances can violations of fundamental human rights be categorised as sovereign acts of a Head of State. On the whole, the frequent reference to *jus cogens* norms and obligations *erga omnes* ‘attests to the fact that the emerging notion of an international public order based on the primacy of certain values and common interests is making its way into the legal culture and common practice of municipal courts’.⁵²¹

It is surely beyond doubt that international law has made progress thanks to the resolution of the House of Lords regarding Augusto Pinochet. By limiting immunity, the House of Lords’ rulings ‘turned the world upside down and ushered in a new era of accountability for egregious violations of human rights’.⁵²² Although the perspective of the majority of Lords in the *Pinochet* Judgment constitutes a significant contribution to the effort to abolish impunity for the perpetrators of

⁵¹⁹ *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)* (n 44) [85] [Joint Separate Opinion of Judges Higgins, Kooijmans and Buerghenthal]; see also Andrea Bianchi, ‘Denying State Immunity to Violators of Human Rights’ (1994) 46 *Austrian Journal of Public and International Law* 195, 227–28.

⁵²⁰ See Fox QC and Webb (n 19) 554.

⁵²¹ Bianchi, ‘Immunity versus Human Rights’ (n 456) 248.

⁵²² Wuerth (n 502) 731; see also Ariel Dorfman, *Exorcising Terror: The Incredible Unending Trial of General Augusto Pinochet* (Seven Stories Press 2002).

fundamental human rights violations, it must be recalled that this development relates to a former Head of State.⁵²³ That is to say, a former Head of State can in no way enjoy his or her right to immunity if violations of fundamental human rights are at stake.

The conviction of Charles Ghankay Taylor might be referred to here for the sake of considering an appearance of a former president before an international court. This conviction is important because he is the ‘first former African president to have been indicted, fully tried, and then convicted by an international penal tribunal’.⁵²⁴ Charles Taylor was also the ‘first former head of state since Nuremberg to be indicted and subsequently tried and convicted for war crimes’ by an international criminal tribunal.⁵²⁵

Charles Taylor was elected as President of Liberia in 1997 and was Head of State until 2003. During Taylor’s indictment in 2003, he was President of Liberia. On 7 March 2003, the Special Court for Sierra Leone issued a sealed indictment against Charles Taylor and this indictment was unsealed when Taylor visited Ghana on 4 June 2003. On 31 May 2004, the Appeals Chamber rejected a motion brought on account of Charles Taylor which challenged this indictment by raising the claim of sovereign immunity and extraterritoriality. On 29 March 2006, Taylor was sent to the Special Court for Sierra Leone and then was transferred to the Hague on 30 June, 2006. Charles Taylor was found guilty of war crimes (outrages upon personal dignity, violence to health, life and mental or physical well-being of persons –

⁵²³ See Stern (n 499).

⁵²⁴ Charles Chernor Jalloh, ‘Prosecutor v. Taylor’ (2014) 108 *The American Journal of International Law* 58, 58.

⁵²⁵ ‘The Prosecutor vs. Charles Ghankay Taylor’ (*Special Court for Sierra Leone*) <<http://www.rscsl.org/Taylor.html>> accessed 27 October 2016; *The Prosecutor v Charles Ghankay Taylor* [2013] SCSL-03-01-A (Special Court for Sierra Leone).

murder or cruel treatment – and pillage). Under Article 6(1) of the Statute of the Special Court for Sierra Leone, the accused was found individually criminally responsible for aiding and abetting, and planning the commissions of the transgressions.⁵²⁶ The Trial Chamber issued a decision that Charles Taylor be sentenced to 50 years prison sentence on 30 May 2012.

The conviction of Hissene Habre (the former Chadian dictator) can also be adduced as a landmark case here. Hissene Habre was the former president of Chad from 1982 until he was discharged in 1990 by Idriss Deby.⁵²⁷ As an ousted leader, Habre went into exile in Senegal, ‘where he has kept a low profile’.⁵²⁸ Habre was indicted for transgressions of fundamental human rights, including war crimes and torture by the four investigating judges of the Extraordinary African Chambers on 2 July, 2013. After a nineteen months’ investigation, the judges found enough evidence for Hissene Habre to face charges of war crimes based on his command responsibility, and of torture as a member of a joint criminal enterprise. Habre was specifically charged with transgressions including torture and war crimes of murder, torture, illegitimate transfer and unlawful confinement, and violence to physical well-being and life.⁵²⁹ Habre was convicted of war crimes (and torture) by the Extraordinary African Chambers in the court system of Senegal and ultimately

⁵²⁶ ‘The Prosecutor v. Charles Ghankay Taylor’ (*International Crimes Database*) <<http://www.internationalcrimesdatabase.org/Case/1107>> accessed 27 October 2016; ‘The Prosecutor vs. Charles Ghankay Taylor’ (n 525); see for Article 6(1) of the Statute ‘Statute of the Special Court for Sierra Leone’ <<http://www.rscsl.org/Documents/scsl-statute.pdf>> accessed 27 October 2016; *The Prosecutor v. Charles Ghankay Taylor* (n 525).

⁵²⁷ ‘Q&A: The Case of Hissène Habré before the Extraordinary African Chambers in Senegal’ (*Human Rights Watch*, 3 May 2016) <<https://www.hrw.org/news/2016/05/03/qa-case-hissene-habre-extraordinary-african-chambers-senegal>> accessed 27 October 2016.

⁵²⁸ ‘Profile: Chad’s Hissene Habre’ (*BBC News*, 30 May 2016) <<http://www.bbc.com/news/world-africa-18927845>> accessed 27 October 2016.

⁵²⁹ ‘Q&A: The Case of Hissène Habré before the Extraordinary African Chambers in Senegal’ (n 527); Juan Pablo Pérez-León-Acevedo, ‘The Conviction of Hissène Habré by the Extraordinary African Chambers in the Senegalese Courts: Bringing Justice in Cases of Serious Human Rights Violations in Africa’ (30 June 2016) <<https://africlaw.com/tag/international-crimes/>> accessed 27 October 2016.

sentenced to life in prison on 30 May, 2016.⁵³⁰ During Hissene Habre's tenure as the president of Chad, his term was marked by 'large scale, systematic violations, including those involving murder of an estimated 40,000 people, widespread sexual violence [...] enforced disappearance, and torture'.⁵³¹ John Kerry, therefore, considered this ruling to be a 'landmark in the global fight against impunity for atrocities including war crimes'.⁵³²

The conviction of Hissene Habre and the trial of Habre before the Extraordinary African Chambers can be deemed as a significant and encouraging example of abolishing tolerance for impunity in Africa, for holding perpetrators of violations of fundamental human rights accountable, and bringing them to justice in order to prevent exemption from punishment.⁵³³ Ultimately, the protection of fundamental human rights that are deemed as *jus cogens* norms should always triumph over the assertion of immunity for a *former* Head of State whenever these principles conflict.⁵³⁴

⁵³⁰ 'Chad's Ex-Dictator Convicted of Atrocities' (*Human Rights Watch*, 30 May 2016) <<https://www.hrw.org/news/2016/05/30/chads-ex-dictator-convicted-atrocities>> accessed 27 October 2016.

⁵³¹ John Kerry, 'Conviction of Hissene Habre for War Crimes, Crimes Against Humanity, and Torture' (*U.S. Department of State*, 30 May 2016) <<http://www.state.gov/secretary/remarks/2016/05/257811.htm>> accessed 27 October 2016.

⁵³² *ibid.*

⁵³³ Pérez-León-Acevedo (n 529); Elise Keppler, 'This Is What the Conviction of Chad's Former Dictator Means for African Human Rights' *The Washington Post* (10 June 2016); 'Hissène Habré's Conviction the First Step on a Longer Road to Justice for Chad' *The Guardian* (3 June 2016) <<https://www.theguardian.com/global-development/2016/jun/03/hissene-habre-crimes-against-humanity-chad-justice>> accessed 27 October 2016.

⁵³⁴ Since the *jus cogens* norms are absolutely inderogable under international law, sovereign immunities can no longer be conceived as *jus cogens*. Specifically, sovereign immunities can be abrogated under the required conditions by international law. For example, a former head of State can on no account enjoy his/her immunity if he/she perpetrates violations of fundamental human rights. That is to say, any derogation from the enjoyment of Head of State immunity becomes an adequate reason to accept it outside of *jus cogens* norms. See Stern (n 499).

5.3 DEVELOPMENTS OF HEAD OF STATE IMMUNITY IN INTERNATIONAL COURTS AND TRIBUNALS

In simple terms, the principle of immunity has been instituted to protect a State and its senior officials from being sued before its courts and particularly foreign courts, so that they can carry out their activities abroad without impediment. Since immunity from prosecution and execution is based upon the sovereign equality principle of States, this principle does not prevent senior State officials from being indicted before an international court as long as this court is vested in jurisdiction over serving or former Heads of State.⁵³⁵

Prior to 1919, there was little discussion of immunity for Heads of State before international tribunals or courts, as the issue had been all but taboo with regard to any waiver of such immunity. However, the Versailles Treaty, which is generally accepted as the first indictment of a former Head of State before an international tribunal, is seen by many as breaking this taboo. On this point, Article 227 of the Treaty reads as follows:

The Allied and Associated Powers publicly arraign William II of Hohenzollern [The Kaiser], formerly German Emperor, for a supreme offence against international morality and the sanctity of treaties. A special tribunal will be constituted to try the accused, thereby assuring him the guarantees essential to the rights of defence. It will be composed of five judges, one appointed by each of the following powers: namely, the United States of America, Great Britain, France, Italy and Japan. In its decision the tribunal will be guided by the highest motives of international policy, with a view to vindicating the solemn

⁵³⁵ *ibid.*

obligations of international undertakings and the validity of international morality. It will be its duty to fix the punishment which it considers should be imposed. The Allied and Associated Powers will address a request to the Government of the Netherlands for the surrender to them of the ex-Emperor in order that he may be put on trial.⁵³⁶

However, the Kaiser was never tried. Before Armistice Day, the Kaiser fled to the Netherlands and asylum was granted to him by the Dutch government who refused to hand him over for trial.⁵³⁷ After the Treaty of Versailles, the issue of immunity for Heads of State was challenged through the Statutes of the Nuremberg and Tokyo international military tribunals. Article 7 of the Charter of the Nuremberg Tribunal declared that the ‘official position of defendants, whether heads of state or responsible officials in Government Departments, shall not be considered as freeing them from responsibility or mitigating punishment’.⁵³⁸ A number of significant developments in international law have taken place whose outcome has been to restrict Head of State immunity in the interest of securing and maintaining fundamental human rights. The Nuremberg Principles include the assertion that the ‘fact that a person who committed an act which constitutes a crime under international law acted as Head of State or responsible Government official does not relieve him from responsibility under international law’.⁵³⁹ In a similar vein, Article 6 of the Statute of the Tokyo Tribunal declared that:

⁵³⁶ ‘Peace Treaty of Versailles’ Article 227.

⁵³⁷ See Gary D Solis, *The Law of Armed Conflict: International Humanitarian Law in War* (Cambridge University Press 2010) 74.

⁵³⁸ ‘Nuremberg Trial Proceedings Vol. 1 - Charter of the International Military Tribunal’ Article 7.

⁵³⁹ ‘Principles of International Law Recognized in the Charter of the Nuremberg Tribunal and in the Judgment of the Tribunal, 5 UN GAOR Supp. (No. 12) at 11, U.N. Doc. A/1316’ Principle 3.

Neither the official position, at any time, of an accused, nor the fact that an accused acted pursuant to order of his government or of a superior shall, of itself, be sufficient to free such accused from responsibility for any crime with which he is charged.⁵⁴⁰

In respect of both statements by international military tribunals, international law unequivocally protects State officials and provides immunity; however, in particular circumstances immunity for Heads of State cannot be invoked if his or her deeds constitute a violation of fundamental human rights. If violations of those human rights are at stake, the official position of a Head of State should not serve as a shield to avoid punishment. Immunity should apply only to sovereign acts; therefore, Heads of State should not enjoy functional immunity in relation to violations of fundamental human rights. Functional immunity provides protection for sovereign acts; however, acts which cause fundamental human rights violations should not be deemed as sovereign acts.⁵⁴¹

Concerning individual criminal responsibility, it is clear that the statutes of the International Criminal Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda are considered important developments in terms of clarifying the position of Head of State immunity in relation to international crimes that give rise to fundamental human rights violations. Both statutes emphasise that Heads of State should not benefit from immunity. Article 7(2) of the Statute of the International Criminal Tribunal for the Former Yugoslavia provides that the ‘official

⁵⁴⁰ ‘International Military Tribunal for the Far East Charter’ (1946) Article 6.

⁵⁴¹ RA Kolodkin, ‘Second Report on Immunity of State Officials from Foreign Criminal Jurisdiction, 62nd Session’ (International Law Commission 2010) UN Doc. A/CN.4/631 para 28, 29, 30 and 31; Dapo Akande and Sangeeta Shah, ‘Immunities of State Officials, International Crimes, and Foreign Domestic Courts’ (2010) 21 *European Journal of International Law* 815.

position of any accused person, whether as Head of State or Government or as a responsible Government official, shall not relieve such person of criminal responsibility nor mitigate punishment'.⁵⁴² Article 6(2) of the Statute of the International Criminal Tribunal for Rwanda reiterates this statement. In so doing, this provision acknowledges that perpetrators of human rights violations, regardless of their official position, cannot hide behind the shield of immunity; and that Heads of State enjoy no impunity. Furthermore, in the case of *Prosecutor v Blaskic*, the Appeal Chamber of the Yugoslavia Tribunal highlighted that:

The general rule under discussion is well established in international law and is based on the sovereign equality of States (*par in parem non habet imperium*). The few exceptions relate to one particular consequence of the rule. These exceptions arise from the norms of international criminal law prohibiting war crimes, crimes against humanity and genocide. Under these norms, those responsible for such crimes cannot invoke immunity from national or international jurisdiction even if they perpetrated such crimes while acting in their official capacity.⁵⁴³

In a similar vein, Article 27 of the Rome Statute embodies provisions which indicate that the Statute applies to all individuals regardless of their official position within a State:

This Statute shall apply equally to all persons without any distinction based on official capacity. In particular, official capacity as a Head of State or

⁵⁴² UN Security Council, Statute of the International Criminal Tribunal for the Former Yugoslavia, SC res. 827, UN SCOR 48th sess., 3217th mtg. at 1-2 1993 Article 7(2).

⁵⁴³ *Prosecutor v Tihomir Blaskic* [1997] 110 ILR 687 (International Criminal Tribunal for the Former Yugoslavia) 710.

Government, a member of a Government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility under this Statute, nor shall it, in and of itself, constitute a ground for reduction of sentence.

Immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person.⁵⁴⁴

The essential purpose of the incorporation of these provisions into the Rome Statute and *ad hoc* tribunals is to ensure individual criminal responsibility for all persons, and particularly Heads of State, who perpetrate violations of fundamental human rights which constitute international crimes. Furthermore, by ensuring individual criminal responsibility, those provisions prevent certain persons from using their official position as a shield against prosecution for those human rights violations.

Article 98(1) of the Statute of the International Criminal Court goes beyond States party to the Statute. Article 98(1), which is concerned with cooperation with respect to the waiver of immunity and consent to surrender, reads as follows:

The Court may not proceed with a request for surrender or assistance which would require the requested State to act inconsistently with its obligations under international law with respect to the State or diplomatic immunity of a

⁵⁴⁴ ‘Rome Statute of the International Criminal Court’ (UN General Assembly 2002) Article 27(1),(2).

person or property of a third State, unless the Court can first obtain the cooperation of that third State for the waiver of the immunity.⁵⁴⁵

Articles 27 and 98(1) of the Rome Statute might be seen as contradictory in that the former rejects immunities while the latter endorses immunities. However, article 98(1) addresses a particular situation in which a State party to the Statute is required to surrender a person who is jurisdictionally untouchable by virtue of the immunities granted by a third State. In this sense, this case can be described as an equation with three knowns (a State Party, the Statute, and a person endowed with immunities), although it would appear that the equation always produces a tangled outcome for the State to whom the request is made. Specifically, the State Party to the Statute either must breach its obligation to meet the requirements of the Court or must breach its commitment to abide by immunities of a State that is not party to the Statute. The interaction between Articles 27 and 98(1) of the Statute thereby establishes a system wherein the State Parties to the Statute consent to surrender all immunity rights in relation to the Court's requirements regarding their own State officials or representatives, while still abiding by the immunities of States that are not yet party to the Statute.⁵⁴⁶

Ultimately, Article 98(1) of the Statute implies three situations where the immunities bestowed on a person by a State that is not a party to the Statute can be trumped. First, if a State that is not a party to the Statute agrees to relinquish the immunity, the person can be prosecuted. Second, if the State official is no longer in

⁵⁴⁵ *ibid* Article 98(1).

⁵⁴⁶ See for detailed analyses on the interplay of Articles 27 and 98(1) of the International Criminal Court Statute Paola Gaeta, 'Official Capacity and Immunities' in Antonio Cassese, Paola Gaeta and John RWD Jones (eds), *The Rome Statute of the International Criminal Court: A Commentary*, vol I (Oxford University Press 2002); Dapo Akande, 'The Legal Nature of Security Council Referrals to the ICC and Its Impact on Al Bashir's Immunities' (2009) 7 *Journal of International Criminal Justice* 333.

office, the official's personal immunity ends (although functional immunity can still be enjoyed), thus enabling the official to be prosecuted for committed violations of human rights. Third, if the United Nations Security Council requests full participation under Chapter VII, the State which is not a party to the Statute automatically is deprived of its immunity rights, and must surrender the accused.⁵⁴⁷

5.4 THE PROBLEM OF HEAD OF STATE IMMUNITY IN RELATION TO VIOLATIONS OF FUNDAMENTAL HUMAN RIGHTS

Strictly speaking, in respect of international law, the decision of the House of Lords with regard to Augusto Pinochet can be seen as one of the most important cases of the Twentieth Century. Although it might have been ruled on narrow grounds, this important decision appears to have marked the end of immunity in cases involving violations of fundamental human rights by a former Head of State, even when those violations were committed while the Head of State was in office.⁵⁴⁸

That said, the perspective of the International Court of Justice for Mr Yerodia raises the issue of immunity or impunity for Heads of State when violations of fundamental human rights are perpetrated. In the *Arrest Warrant* case, Belgium argued that immunities accorded to incumbent Foreign Affairs Ministers cannot, under any circumstances, provide the minister with protection where he or she is

⁵⁴⁷ Cryer and others (n 280) 556. For the relationship between the International Criminal Court and UN Security Council with regards to the issue of waiving immunity, see Akande (n 546); Cryer and others (n 280) 549–557.

⁵⁴⁸ Michael Tunks, 'Diplomats or Defendants? Defining the Future of Head-of-State Immunity' (2002) 52 *Duke Law Journal* 651, 659; Wuerth (n 502); see Charles Pierson, 'Pinochet and the End of Immunity: England's House of Lords Holds That a Former Head of State Is Not Immune for Torture' (2000) 14 *Temple International and Comparative Law Journal* 263.

suspected of having perpetrated violations of fundamental human rights. Subsequently, Belgium touched upon the question of whether a person's high-level status within a State constitutes an impediment to prosecution. On this point, Belgium claimed that the official position of a person should not be an obstacle to applying jurisdiction. On 11 April 2000, an international arrest warrant was issued by a Belgian investigating judge of the Brussels Tribunal of First Instance against Abdulaye Yerodia Ndobasi, the Minister for Foreign Affairs of the Democratic Republic of the Congo (DRC), in respect of alleged crimes against humanity and violations of international humanitarian law. Mr Yerodia was accused of having made some speeches that incited racial hatred and occasioned the massacre of Tutsi civilians in 1998. Mr Yerodia was charged by the Belgian judge with grave breaches of the International Geneva Conventions of 1949 and of their Additional Protocols I and II of 1977. The arrest warrant for Mr Yerodia was transferred to the Democratic Republic of the Congo and concurrently circulated at the international level via Interpol. Ultimately, Belgian authorities brought a suit against Mr Yerodia based on the Belgian Law of 16 June 1993, concerning the punishment of grave breaches of the Geneva Conventions and their Additional Protocols, which provides a basis for universal jurisdiction in regard to such violations. Article 5(3) of the Belgian Law also provides that the immunity enjoyed by a person who acts in an official capacity does not create any obstacle to the application of the law.⁵⁴⁹

On 17 October 2000, the Democratic Republic of the Congo filed an application with the International Court of Justice instituting proceedings against the

⁵⁴⁹ See the Judgment of *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)* (n 44); See generally Matthias Goldmann, 'Arrest Warrant Case (Democratic Republic of the Congo v Belgium)', *Max Planck Encyclopedia of Public International Law (MPEPIL)* (Oxford University Press 2009); see for the mentioned article Belgium: Act of 1999 Concerning the Punishment of Grave Breaches of International Humanitarian Law 1999.

Belgian Kingdom in relation to the case involving this international arrest warrant. In making the Application, the Democratic Republic of the Congo relied on two legal grounds. First, the Democratic Republic of the Congo asserted that Belgium had violated its obligation to respect the immunity of the Minister of Foreign Affairs of a sovereign State. Second, the Democratic Republic of the Congo alleged that Belgium had breached the principle that a State cannot exercise its authority over another State's territory and the principle of sovereign equality of States. On this point, the Democratic Republic of the Congo claimed that the 'universal jurisdiction that the Belgian State attributes to itself under Article 7 of the law in question' does not comply with the principle of sovereign equality. The heart and soul of the argument of the Democratic Republic of the Congo concerned the violation of customary international rule in relation to the absolute immunity and inviolability of incumbent Foreign Ministers from criminal jurisdiction. Arguing that Belgium had infringed the sovereign equality principle of States, the Democratic Republic of the Congo requested that the International Court of Justice require Belgium to declare its international arrest warrant null and void.⁵⁵⁰ The Democratic Republic of the Congo insisted that Belgium had no jurisdiction under international law to issue and circulate an international arrest warrant, and that by doing so it had breached the rights of the Democratic Republic of the Congo to perform and conduct its foreign affairs through its foreign minister.⁵⁵¹

⁵⁵⁰ See *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)* (n 44) [1, 21, and 62]. Article 7 of the Act of 1999 Concerning the Punishment of Grave Breaches of International Humanitarian Law is about competence, applicable procedure and the execution of sentences. It states that the 'Belgian courts shall be competent to deal with breaches provided for in the present Act, irrespective of where such breaches have been committed'. Belgium: Act of 1999 Concerning the Punishment of Grave Breaches of International Humanitarian Law (n 549).

⁵⁵¹ *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)* (n 44); see also Alexander Orakhelashvili, 'Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)' (2002) 96 *American Journal of International Law* 677.

Belgium pointed to the decision rendered on 24 March 1999 by the House of Lords in the United Kingdom in relation to the former head of State of Chile, General Augusto Pinochet Duarte, which recognised and accepted an exception to the principle of immunity in respect of violations of fundamental human rights under international law.

According to Belgium, the holding in the *Pinochet No 3* case advanced the development of international law by acknowledging an important exception to the principle of immunity for Heads of State or Government.⁵⁵² Belgium accordingly referred to a statement by Lord Millett that international law ‘cannot be supposed to have established a crime having the character of a *jus cogens* and at the same time to have provided an immunity which is co-extensive with the obligation it seeks to impose’. Belgium also cited the words of Lord Phillips of Worth Matravers that ‘no established rule of international law requires state immunity *ratione materiae* to be accorded in respect of prosecution for an international crime’.⁵⁵³

The Democratic Republic of the Congo, following Belgium’s argument concerning the *Pinochet* decision, emphasised that according to international law as it currently stands, there was no basis for any exception to the principle of Head of State immunity from criminal jurisdiction for a standing Minister of Foreign Affairs where she or he is accused of having perpetrated fundamental human rights violations under international law. The Democratic Republic of the Congo, by cross-referencing the *Pinochet* decision, emphasised Lord Browne-Wilkinson’s statement that this ‘immunity enjoyed by a head of state in power and an ambassador in post is

⁵⁵² *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)* (n 44) [56].

⁵⁵³ *R v. Bow Street Metropolitan Stipendiary Magistrate and Others, ex parte Pinochet Ugarte (No. 3)* (n 46) 278 and 289; see also Brody and Ratner (n 374) 346.

a complete immunity attached to the person of the head of state or ambassador and rendering him immune from all actions or prosecutions whether or not they relate to matters done for the benefit of the state'.⁵⁵⁴ Here, the focus is on whether the accused is an incumbent or a former Head of State rather than the gravity of their alleged crimes. The Democratic Republic of the Congo argued that the immunity 'accorded to Ministers for Foreign Affairs when in office covers all their acts, including any committed before they took office, and that it is irrelevant whether the acts done whilst in office may be characterized or not as official acts'.⁵⁵⁵

The International Court of Justice examined the decision of the House of Lords in the *Pinochet* case but found that there was no applicable exception to the rule of Head of State immunity from criminal jurisdiction; moreover, it found that current Ministers of Foreign Affairs are particularly inviolable where they are suspected of having perpetrated violations of fundamental human rights. Accordingly, the Court rejected the Belgian argument in relation to the *Pinochet* decision by the House of Lords.⁵⁵⁶

Belgium's approach in the *Democratic Republic of the Congo v Belgium* case can be regarded as an important step towards the objective of abolishing impunity for perpetrators of fundamental human rights violations. On this point, Belgium pointed out that:

[W]hile Ministers for Foreign Affairs in office generally enjoy an immunity from jurisdiction before the courts of a foreign State, such immunity applies

⁵⁵⁴ *R v. Bow Street Metropolitan Stipendiary Magistrate and Others, ex parte Pinochet Ugarte* (No. 3) (n 46) 201–202.

⁵⁵⁵ *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)* (n 44) [47].

⁵⁵⁶ *ibid* 58–59.

only to acts carried out in the course of their official functions, and cannot protect such persons in respect of private acts or when acting otherwise than in the performance of their official functions.⁵⁵⁷

The International Court of Justice stated that it is bound ‘to find that, given the nature and purpose of the warrant, its mere issue violated the immunity which Mr Yerodia enjoyed as the [Democratic Republic of] the Congo’s incumbent Minister for Foreign Affairs’. The Court therefore decided that the warrant issue led to a violation of Belgium’s obligation towards the Democratic Republic of the Congo, in that Belgium failed to respect Head of State immunity. According to the Court, Belgium also breached the immunity from criminal jurisdiction under international law.⁵⁵⁸ It follows that the principle of immunity for an incumbent Head of State is still prevalent and alive, even in respect of violations of fundamental human rights prohibited under international law. In respect of the distinction between immunity and impunity bestowed on Heads of State, the International Court of Justice underscored that the immunity from jurisdiction enjoyed by Heads of State in power does not mean that they can benefit from impunity with reference to any violations they may have perpetrated, regardless of their seriousness. ‘Immunity from criminal jurisdiction and individual criminal responsibility are quite separate concepts. While jurisdictional immunity is procedural in nature, criminal responsibility is a question of substantive law’. The Court added that while jurisdictional immunity may become an obstacle to prosecution for definite offences or for a definite period, ‘it cannot exonerate the person to whom it applies from all criminal responsibility’.⁵⁵⁹

⁵⁵⁷ *ibid* 49.

⁵⁵⁸ *ibid* 70.

⁵⁵⁹ *ibid* 60.

The Court implied that the immunities provided by international law for a current or former Head of State do not constitute an impediment to criminal prosecution in particular circumstances. Subsequently, the Court observed four exceptional situations to Head of State immunity under international law. Although the judgment of the International Court of Justice implied that the immunity from jurisdiction enjoyed by Heads of State does not equate to impunity for international crimes, the exceptions to Head of State immunity outlined by the Court become insufficient to abolish impunity.

First, the Court stated that a Head of State does not enjoy immunity under international law from criminal proceedings in his/her own country's courts. Second, the Court held that Heads of State should be deprived of jurisdictional immunity before a foreign State's court if the State which they represent waives their immunity rights.⁵⁶⁰

Regarding the aforementioned two exceptional situations, prosecution requires 'a willingness of the State which appointed the person as a Foreign Minister to investigate and prosecute allegations against him domestically or to lift immunity in order to allow another State to do the same'.⁵⁶¹ Be that as it may, where domestic authorised bodies do not consent to open an investigation or start a prosecution, the committed violations of human rights will go unpunished. Such an outcome raises the issue of impunity.

The third exception the Court identified was that after a person's official position as a Minister for Foreign Affairs ends, he or she can no longer benefit from

⁵⁶⁰ *ibid* 61; for further analysis see Stern (n 499).

⁵⁶¹ *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)* (n 44) [35] [Dissenting Opinion of Judge Van den Wyngaert].

the immunities granted by international law in foreign States. ‘Provided that it has jurisdiction under international law, a court of one State may try a former Minister for Foreign Affairs of another State in respect of acts committed prior or subsequent to his or her period of office, as well as in respect of acts committed during that period of office in a private capacity’.⁵⁶²

The last exception identified by the Court was that neither former nor incumbent Heads of State enjoy immunity when that immunity has been limited by a treaty establishing an international court. Afterwards, the International Court of Justice listed the International Criminal Court as one such tribunal which may overturn the immunity of a Head of State provided that it has jurisdiction under international law.⁵⁶³ The jurisdiction of the Court arises from the authority vested by the contracting States in the Statute of the Court or via the United Nations Security Council. As Michael Tunks noted, ‘no other country has jurisdiction over a third party’s head of state, and, consequently, no two states may agree by treaty to waive the immunity of a third party’s head of state without that other nation’s consent’.⁵⁶⁴ It follows that the alleged jurisdiction of the court’s statute over a Head of State whose home State does not assent to the statute is not sufficient to rectify customary international law and protect fundamental human rights from Head of State impunity.

⁵⁶² *ibid* 61; see for comments on the third exception of the Court Antonio Cassese, ‘When May Senior State Officials Be Tried for International Crimes? Some Comments on the Congo v. Belgium Case’ (2002) 13 *European Journal of International Law* 853, 867–68.

⁵⁶³ *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)* (n 44) [61].

⁵⁶⁴ See Tunks (n 548) 665; see also generally Madeline Morris, ‘The Democratic Dilemma of the International Criminal Court’ (2002) 5 *Buffalo Criminal Law Review* 591; see generally Cassese (n 562). ‘The International Criminal Court will only be able to act if States which have jurisdiction are unwilling or unable genuinely to carry out investigation or prosecution’. *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)* (n 44) [37] [Dissenting Opinion of Judge Van den Wyngaert].

It would be untenable to claim that in the absence of the International Criminal Court, a Head of State who is suspected of having committed violations of human rights would be justiciable solely before his or her own State's courts.

5.5 PROTECTION OF FUNDAMENTAL HUMAN RIGHTS V HEAD OF STATE IMPUNITY

With respect to the *jus cogens* nature of fundamental human rights, the decision by the International Court of Justice offers no clear or plain solution to the tension between Head of State immunity and protection of fundamental human rights. The Judgment undermined the argument that the principle of protection of fundamental human rights becomes hierarchically superior to immunity norms; if it were, immunity would be obtainable neither by States nor by current or former Heads of State.⁵⁶⁵

In the *Democratic Republic of the Congo v Belgium* case, Judge *ad hoc* Van den Wyngaert, in her Dissenting Opinion, claimed that there were no grounds in positive international law for bestowing full immunity on incumbent Heads of State against foreign criminal jurisdiction. She emphasised that neither State practice nor *opinio juris* constitutes an international custom that affects the Court's decision.⁵⁶⁶ It follows that there is no treaty or legal opinion that supports the proposition of the Court. International law does not provide immunity to incumbent Heads of State from criminal proceedings when they perpetrate violations of fundamental human

⁵⁶⁵ See Wuerth (n 502) 741.

⁵⁶⁶ *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)* (n 44) [1, 10, and 23] [Dissenting Opinion of Judge Van den Wyngaert]; see also Petra Minnerop and others, *World Court Digest 2001 - 2005*, vol 4 (Springer Science & Business Media 2009).

rights. In this sense, Belgium's act might seem to be at odds with international comity; however that act did not breach an international legal obligation. Judge Wyngaert then stated that:

[T]he Court's conclusion is reached without regard to the general tendency toward the restriction of immunity of the State officials (including even Heads of State), not only in the field of private and commercial law where the *par in parem* principle has become more and more restricted and deprived of its mystique, but also in the field of criminal law, when there are allegations of serious international crimes.⁵⁶⁷

It must be noted that the international arrest warrant was issued by Belgium in respect of accusations of war crimes which the International Court of Justice failed to mention. It is important to ask what is required under international law and what international law permits States, as members of international society, to do when their officials are accused of violations of fundamental human rights. In this sense, two particular interests are reflected in contemporary international law: first, the demand for international accountability for having allegedly committed violations of fundamental human rights and second, the sovereign equality principle of States which is regarded as a prerequisite for immunities.⁵⁶⁸

Redressing the balance between these two particular interests is important for resolving the contradiction between Head of State immunity and protection of fundamental human rights. The Court, instead of redressing the balance, considered a very narrow question on the immunities of incumbent Ministers of Foreign Affairs.

⁵⁶⁷ *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)* (n 44) [23] [Dissenting Opinion of Judge Van den Wyngaert].

⁵⁶⁸ *ibid* 5 [Dissenting Opinion of Judge Van den Wyngaert].

By doing so, the Court ‘has missed an excellent opportunity to contribute to the development of modern international criminal law’.⁵⁶⁹

The International Court of Justice, in the *Arrest Warrant* case, recognised that a former and incumbent Foreign Affairs Minister ‘might be subject to criminal proceedings before certain international criminal courts where they have jurisdiction’.⁵⁷⁰ The Court specifically cited the International Criminal Court as an example.

This issue was indeed raised before the International Criminal Court in respect of an arrest warrant for the incumbent President of the Sudan, Omar Hassan Ahmad Al-Bashir. When, on 4 March 2009 and 12 July 2010, Pre-Trial Chamber I of the International Criminal Court issued two warrants of arrest for Omar al Bashir for crimes against humanity and war crimes, his arrest was required in accordance with the Rome Statute.⁵⁷¹ Omar Al-Bashir was suspected of being criminally responsible as an indirect violator, or co-perpetrator, for the liable person in respect of the crime of genocide.⁵⁷² Since the arrest warrants were issued, President Al-Bashir has travelled to several countries, including the Republic of Kenya, Djibouti, Malawi, the Republic of Chad, South Africa. Although those countries are State parties to the Rome Statute and hence were obligated to arrest him, he has never been arrested.⁵⁷³

⁵⁶⁹ *ibid* 6 [Dissenting Opinion of Judge Van den Wyngaert].

⁵⁷⁰ Fox QC and Webb (n 19) 558.

⁵⁷¹ *The Prosecutor v Al Bashir, First Arrest Warrant* [2009] ICC-02/05-01/09 (Pre-Trial Chamber I); *The Prosecutor v Al Bashir, Second Arrest Warrant* [2010] ICC-02/05-01/09-95 (Pre-Trial Chamber I); ‘Rome Statute of the International Criminal Court’ (n 544) Article 58(1)(b).

⁵⁷² *The Prosecutor v Al Bashir, Second Arrest Warrant* (n 571).

⁵⁷³ Some non-State parties to the Rome Statute were also welcomed Omar Al-Bashir: The Islamic Republic of Mauritania, the People’s Republic of China, People’s Democratic Republic of Algeria, and the Arab Republic of Egypt. See ‘Bashir-Watch’ <<http://bashirwatch.org/>> accessed 3 May 2016.

On 15 February 2013, Pre-Trial Chamber II of the Court ‘requested the Registry to send *Notes Verbales* to the Republic of Chad and the State of Libya, enquiring about said visit, and reminding the former of its obligations with respect to the arrest and surrender of Omar Al-Bashir to the Court’. Al Bashir travelled to Chad to attend a summit and departed from Chad; however, the Chadian Government took no measure to arrest him. The international community called on Chad to abide by the obligations decided upon by the Court regarding the arrest warrant for Al Bashir and the Government of Chad was required to provide information to the Chamber about Al Bashir’s alleged journey. On 26 March 2013, Pre-Trial Chamber II issued that Chad had failed to cooperate with the International Criminal Court and indicated the non-compliance of Chad to the obligations of the Security Council.⁵⁷⁴ Al-Bashir also attended the African Union summit scheduled from 7 to 15 June 2015 in South Africa. On 13 June 2015, Pre-Trial Chamber II asserted that the Republic of South Africa had an obligation to arrest and surrender Al-Bashir. South Africa failed to arrest him. On 15 October 2015, upon South Africa’s request, Pre-Trial Chamber II extended the deadline to submit a report regarding the failure of the South African Government to arrest Al-Bashir.⁵⁷⁵

In respect of the jurisdiction, the Pre-Trial Chamber declared that the official position of Al-Bashir as Head of State did not free him from appearing before the International Criminal Court. The Chamber proposed four considerations in reaching this decision. First, the Chamber emphasised that one of the crucial goals of the Rome Statute is to end impunity for perpetrators of violations of international crimes which amount to human rights violations. Second, the Chamber noted that Article 27

⁵⁷⁴ *The Prosecutor v Omar Al Bashir* [2013] ICC-02/05-01/09-151 (Pre-Trial Chamber II).

⁵⁷⁵ *The Prosecutor v Omar Al Bashir* [2015] ICC-02/05-01/09-242 (Pre-Trial Chamber II).

of the Statute must be applied to achieve this goal. This provision makes immunity non-applicable and enforces the criminal responsibility of all persons regardless of their official capacity in a State. Third, as required by Article 21 of the Rome Statute, other sources of law can be applied only if there is a gap in the Rome Statute that cannot be filled by interpreting the Vienna Convention on the Law of the Treaties with respect to internationally accepted human rights norms. Fourth, the United Nations Security Council has accepted that the investigation into the situation in Sudan and any prosecution generated therefrom will be compatible with the Statutory framework of the International Court of Justice.⁵⁷⁶ On this point, Dapo Akande stated that ‘the nature of the Charter as a sort of constitutional document, and [...] obligations under the Charter ought to be regarded as taking priority over the customary international law’.⁵⁷⁷

Sudan is not a state party to the Rome Statute; however, the United Nations Security Council, in referring the case in Darfur to the International Criminal Court, made reference to Article 13(b) of the Statute. Subsequently, the Council required that Sudan should co-operate with the Court.⁵⁷⁸ Under Chapter VII of the United Nations Charter, the Security Council possesses full authority to take measures in order to contribute to the maintenance of international peace and to maintain and restore international security. By becoming a member of the United Nations, the Sudanese Government gives implicit consent to the Security Council for the abolition of Head of State immunity, because Article 25 of the Charter requires Member States to accept and execute the decisions of the Council. It follows that immunity for Al-

⁵⁷⁶ See *The Prosecutor v Al Bashir, First Arrest Warrant* (n 571) at paras. 41, 42, 43, 44 and 45; see also Jessica Needham, ‘Protection or Prosecution for Omar Al Bashir? The Changing State of Immunity in International Criminal Law’ (2011) 17 Auckland University Law Review 219.

⁵⁷⁷ Akande (n 546) 348.

⁵⁷⁸ Needham (n 576) 247.

Bashir before the courts of foreign States has been implicitly abolished. It must be noted that abolishing immunity in relation to the accusations in the *Al-Bashir* case conforms with the Security Council's objective, which is to avoid absolute impunity for perpetrators of fundamental human rights violations that pose a threat to international security and peace.⁵⁷⁹

International law does not prohibit investigation of alleged violations of human rights; in fact, international law supports such inquiries, even if the accused perpetrator committed the crime as a State agent in a foreign State.⁵⁸⁰ This is evident in the history of international law, in which there are very significant codifications of the principle of individual accountability for violations of fundamental human rights. For example, the 1950 Nuremberg Principles highlighted that 'any person who commits an act which constitutes a crime under international law is responsible therefor and liable to punishment'.⁵⁸¹ Likewise, Article 4 of the Convention on the Prevention and Punishment of the Crime of Genocide reads as follows: 'Persons committing genocide or any of the other acts enumerated in Article 3 shall be punished, whether they are constitutionally responsible rulers, public officials or

⁵⁷⁹ See generally Sophie Papillon, 'Has the United Nations Security Council Implicitly Removed Al Bashir's Immunity?' (2010) 10(2) *International Criminal Law Review* 275. There is another perspective that claims that the implicit removal of immunity by the Security Council would be at odds with customary international law and treaty principles which provide immunity for serving heads of State. Be that as it may, Article 103 of the United Nations Charter reports that in 'the event of a conflict between the obligations of the Member of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail'. For a critique of the implicit removal of immunity by the Council see Paola Gaeta, 'Does President Al Bashir Enjoy Immunity from Arrest?' (2009) 7 *Journal of International Criminal Justice* 315.

⁵⁸⁰ *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)* (n 44) [Dissenting Opinion of Judge Van den Wyngaert].

⁵⁸¹ 'Principles of International Law Recognized in the Charter of the Nuremberg Tribunal and in the Judgment of the Tribunal, 5 UN GAOR Supp. (No. 12) at 11, U.N. Doc. A/1316' (n 539) Principle 1.

private individuals’.⁵⁸² Furthermore, official reports and resolutions can be found under the United Nations.⁵⁸³

Prioritising the immunities for Heads of State in cases involving violations of fundamental human rights produces a tension between the immunity principle and the protection of those human rights. That is to say, the prohibitions against certain violations of human rights⁵⁸⁴ are deemed as *jus cogens* in nature, and since *jus cogens* norms are in no case trumped by any other norm, the hierarchy should be established by considering the superiority of *jus cogens* norms. It follows that the protection of fundamental human rights takes priority under international law. On this point, it must be noted that where violations of fundamental human rights ‘are concerned, immunity cannot block investigations or prosecutions [of] such [violations], regardless of whether such proceedings are brought before national or before international courts’.⁵⁸⁵ To protect and improve the fundamental values and interests of human beings, the effective prohibition of certain violations of human rights has been recognised by the international community as having a *jus cogens* character. It follows that, if this hierarchically superior norm becomes at variance

⁵⁸² ‘Convention on the Prevention and Punishment of the Crime of Genocide Adopted by General Assembly of the United Nations’ (United Nations Treaty Series 1948) 78. The acts listed in Article 3 are genocide, conspiracy to commit genocide, direct and public incitement to commit genocide, attempt to commit genocide and complicity in genocide.

⁵⁸³ See for example United Nations Commission on Human Rights, ‘The Administration of Justice and the Human Rights of Detainees, Question of the Impunity of Perpetrators of Human Rights Violations (Civil and Political) Revised Final Report Prepared by Mr. Joinet pursuant to Sub-Commission Decision 1996/119’ (n 314); United Nations Commission on Human Rights, ‘Promotion and Protection of Human Rights: Impunity - Report of the Independent Expert to Update the Set of Principles to Combat Impunity by Diane Orentlicher: Addendum - Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity’ (n 318).

⁵⁸⁴ *Jus cogens* includes the prohibitions against slavery or slave trade; genocide; torture or other cruel, inhuman, or degrading treatment or punishment; murder or disappearance of individuals; systematic racial discrimination; prolonged arbitrary detention; and the principles of the United Nations Charter prohibiting the use of force. See *Yousuf v Samantar* [2012] 699 F 3d 763 (Court of Appeals, 4th Circuit) 775–76; Evan J Criddle and Evan Fox-Decent, ‘A Fiduciary Theory of Jus Cogens’ (2009) 34 *Yale Journal of International Law* 331. See Chapter 2 Section 5 of this Thesis for fundamental human rights recognised as *jus cogens* norms.

⁵⁸⁵ *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)* (n 44) [31] [Dissenting Opinion of Judge Van den Wyngaert].

with the principles guiding Head of State immunity, it should be trumped by those provisions which are designed to defend and maintain fundamental human rights.⁵⁸⁶

5.6 CONCLUSION

The maintenance of peaceful relations among States requires that Heads of State be granted appropriate immunities from jurisdiction before the courts of foreign States. For the sake of maintaining an environment in which Heads of State can carry out their international duties while visiting foreign countries, Head of State immunity should certainly afford protection from criminal responsibility. However, when Heads of State are suspected of having committed violations of fundamental human rights, they should not be exempt from punishment; in other words, immunity should not amount to impunity. At this point, it should be noted that while the doctrine of immunity should be maintained, this doctrine should no longer apply to situations in which transgression of fundamental human rights recognised as a peremptory norm of general international law has occurred.

Former United Nations Secretary General Kofi Annan reinforced the rationale behind Article 27 of the Rome Statute when he asserted that:

in the prospect of an international criminal court lies the promise of universal justice. That is the simple and soaring hope of this vision. We are close to its realisation. We will do our part to see it through till the end. We ask you to do yours in our struggle to ensure that no ruler, no State, no junta and no army

⁵⁸⁶ See generally *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)* (n 44) [Dissenting Opinion of Judge Al-Khasawneh].

anywhere can abuse human rights with impunity. Only then will the innocents of distant wars and conflicts know that they, too, may sleep under the cover of justice; that they, too, have rights, and that those who violate those rights will be punished.⁵⁸⁷

Head of State immunities are considered to be an essential element of international relations and international law. However, they are not *jus cogens* in nature. The protection of fundamental human rights should override these procedural immunities. Political concerns may not allow States to waive the immunity of their own high-ranking officials, but as Lauterpacht rightly noted, the ‘dignity of a foreign state may suffer more from an appeal to immunity than from a denial of it’.⁵⁸⁸ Immunity from jurisdiction should on no account be applicable to human rights violations under international law which meet the threshold of a *jus cogens* norm, neither before domestic courts nor before international courts. Heads of State should not be allowed to enjoy immunities when violations of such human rights have been committed.

⁵⁸⁷ ‘Establishment of an International Criminal Court: Overview’ (*Rome Statute of the International Criminal Court*, 1999) <<http://legal.un.org/icc/general/overview.htm>> accessed 13 April 2015.

⁵⁸⁸ H Lauterpacht, ‘The Problem of Jurisdictional Immunities of Foreign States’ (1951) 28 *British Yearbook of International Law* 220, 232.

6 THE DIPLOMATIC IMMUNITY QUESTION IN CASES OF HUMAN RIGHTS VIOLATIONS: DOES DIPLOMATIC IMMUNITY LEAD TO IMPUNITY?

6.1 INTRODUCTION

Diplomatic immunity is regarded as one of the most interesting elements in contemporary international law. Diplomatic law is a vital requirement for contemporary international relations. It maintains smooth diplomatic relations among States by bestowing immunities and privileges on diplomatic agents. Any misinterpretation of the extent of diplomatic privileges and immunities by diplomatic agents could well violate the principles of international law. It should be noted that a host (receiving) State may tolerate some abuses of diplomatic immunity unless such misconduct leads to violations of fundamental human rights. Said tolerance is shown by the international community and the host State towards diplomatic agents in order to maintain smooth diplomatic and international relations and also to allow for effective performance of diplomatic functions.

Granting diplomatic immunity and protecting fundamental human rights are important rules of international law. This begs the following question: Which rule of international law should prevail when such rules conflict? International human rights norms have a prominent status in the modern international system even though they are not historically as deeply rooted as the principle of diplomatic immunity. The question therefore becomes whether or not the protection of fundamental human rights should prevail over diplomatic immunity. Unless a hierarchy of these two

essential rules is established, conflict will be inevitable. Diplomatic immunity safeguards accredited diplomatic agents against local jurisdiction; in practice, this guarantee is at odds with the obligation to prevent and prosecute violations of fundamental human rights. Prohibiting fundamental human rights violations are norms that have been universally recognised as such through State practice and treaties. These human rights are those that have a non-derogable and peremptory nature. Such prohibitions against torture or slavery are peremptory human rights norms of general international law.⁵⁸⁹

This chapter considers whether principles of diplomatic immunity should be lifted, limited or amended when fundamental human rights violations are committed by diplomatic agents. In other words, diplomatic immunity should, on no account, mean impunity when fundamental human rights violations are committed by a diplomatic agent.

6.2 ON DIPLOMACY

Diplomacy is an essential instrument of international communication, a tool for managing regular or complex relations among States. It is an official conversation system, creating communications channels between States. Diplomacy, from a State's perspective, is an essential mechanism for implementing, formalising, and managing foreign policy.⁵⁹⁰ Diplomacy, as a communication technique, 'is an ancient

⁵⁸⁹ See Chapter 2, Section 5.5 of this Thesis.

⁵⁹⁰ For a definition of diplomacy, see GR Berridge and Lorna Lloyd, *The Palgrave Macmillan Dictionary of Diplomacy* (3rd edn, Palgrave Macmillan 2012) 97–98; see also RP Barston, *Modern Diplomacy* (4th edn, Routledge 2014).

institution and international legal provisions governing its manifestations are the result of centuries of state practice'.⁵⁹¹

The concept of diplomacy has always been accepted as crucial for the smooth functioning of inter-State relations. It is 'the application of intelligence and tact to the conduct of official relations between the governments of independent states [...] or more briefly, the conduct of business between states by peaceful means'.⁵⁹² States adopt various methods in order to carry out diplomacy with other States. Representation of the State at the highest level abroad is the most substantial task required of diplomacy. This function involves negotiating solutions to difficult international problems and facilitating inter-State affairs through embassies. It follows that the primary purpose of diplomacy is 'to enable states to secure the objectives of their foreign policies without resort to force, propaganda, or law'.⁵⁹³

Increasingly tangled issues between States, particularly in respect of human rights, and evolving systems in international relations, force States to consider and give weight to their diplomatic channels with other States. As a consequence, the role of diplomatic agents has become more important and their responsibilities have increased. In light of these developments, the international community has sought to draw a framework for diplomatic immunity and to adopt certain principles and rules for diplomatic agents, receiving States, and sending States. The following section analyses significant developments in the codification of diplomatic immunity.

⁵⁹¹ Shaw (n 57) 546.

⁵⁹² Ivor Roberts (ed), *Satow's Diplomatic Practice* (6th ed, Oxford University Press 2009) 3; see also Sir Ernest Satow, *A Guide to Diplomatic Practice* (Sir George Nevile Bland ed, 4th edn, Longmans, Green and Co 1957) 1.

⁵⁹³ GR Berridge, *Diplomacy: Theory and Practice* (4th edn, Palgrave Macmillan 2010) 1.

6.3 DEVELOPMENT AND CODIFICATION OF DIPLOMATIC IMMUNITY IN INTERNATIONAL LAW

6.3.1 EARLY DEVELOPMENTS OF DIPLOMATIC IMMUNITY

Principles and rules for managing and monitoring the many different features and details of diplomatic relations constitute one of the oldest formulations of international law. In international law, the official status of diplomatic agents has been acknowledged by the international community since ancient times.⁵⁹⁴ As Malcolm Shaw remarked, whenever ‘in history there has been a group of independent states co-existing, special customs have developed on how the ambassadors and other special representatives of other states were to be treated’.⁵⁹⁵

Strictly speaking, by 1961 it had been recognised that diplomatic agents must bear particular privileges and immunities from any domestic civil or criminal jurisdiction. This arrangement has been accepted as the fundamental rules of diplomatic law. These norms have been substantially developed through customary international law. The words of Emerich de Vattel within the 18th Century articulate the reasons for the immunities and privileges of diplomatic agents:

A minister is often charged with commissions that are disagreeable to the prince to whom he is sent. If that prince has any power over him, and especially on sovereign authority, how is it to be expected that the minister can execute his master’s orders with due fidelity, firmness, and freedom of mind? It

⁵⁹⁴ See generally Jonathan Brown, ‘Diplomatic Immunity: State Practice under the Vienna Convention on Diplomatic Relations’ (1988) 37 *International and Comparative Law Quarterly* 53.

⁵⁹⁵ Shaw (n 57) 545–46.

is a matter of no small importance that he have no snares to apprehend – that he be not liable to be diverted from his functions by any chicanery – that he have nothing to hope, nothing to fear, from the sovereign to whom he is sent. In order, therefore, to the success of his ministry, he must be independent of the sovereign authority and of the jurisdiction of the country, both in civil and criminal matters.⁵⁹⁶

It follows that diplomatic agents demand special and differential treatment under international law. Without it, those agents may encounter significant obstacles in performing their duties. Ernest Satow also emphasised that historically ‘embarrassing incidents, and the growing independence of the courts, made it necessary to enact national laws expressly providing for diplomats to enjoy immunity from civil suits and from execution against their property’.⁵⁹⁷

The need to provide immunity to diplomatic agents has forced the international community to establish and develop particular diplomatic immunities and privileges. For this purpose, some codifications regarding the rules of diplomatic law were enacted. The Havana Convention on Diplomatic Officers 1928 and the Harvard Research Draft Convention on Diplomatic Privileges and Immunities 1932 are regarded as early attempts at codifications. The Havana Convention, which was recognised by only fourteen Latin American States, described itself as a temporary instrument to be used only until more proper and absolute codification was formulated. The Harvard Draft Convention proved unable to modify and adjust the provisions of national law in compliance with diplomatic immunities and

⁵⁹⁶ Vattel (n 68) IV: 706.

⁵⁹⁷ Roberts (n 592) 97.

privileges.⁵⁹⁸ As a result, the international community felt the need for a more effective, universal and comprehensive system through which to regulate diplomatic functions and relations. This also corresponded with a move more generally within the United Nations to codify fundamental areas of international law.

6.3.2 VIENNA CONVENTION ON DIPLOMATIC RELATIONS 1961

If one considers the functions of diplomatic agents, it is easy to justify the granting of diplomatic privileges and immunities. However, a lack of constraint on these diplomatic privileges and immunities has allowed embassies to abuse their diplomatic rights. This Chapter addresses such acts and as a means of shaping the principles on diplomatic privileges and immunities, the United Nations International Law Commission adopted the Vienna Convention on Diplomatic Relations in 1961 and Vienna Convention on Consular Relations in 1963. The Vienna Convention on Diplomatic Relations, which came into force in 1964, codified and developed the customary international law of diplomacy. The Convention primarily consolidates State practice as it had developed until 1961. It clarified the customary law, ‘adjusted its content to modern conditions, and re-launched it in the more impressive form of a multilateral convention’.⁵⁹⁹ The 1961 Vienna Convention provides ‘a complete framework for the establishment, maintenance, and termination of diplomatic relations on the basis of consent between independent sovereign States’ and the Convention ‘has established itself as a cornerstone of modern international relations’.⁶⁰⁰ The 1963 Vienna Convention on Consular Relations includes a general

⁵⁹⁸ Roberts (n 592).

⁵⁹⁹ See Berridge (n 593) 110; see also Charles Chatterjee, *International Law and Diplomacy* (Routledge 2007) 247.

⁶⁰⁰ Eileen Denza, ‘Vienna Convention on Diplomatic Relations’ (*United Nations Audiovisual Library of International Law*) <<http://legal.un.org/avl/ha/vcdr/vcdr.html>> accessed 29 April 2016.

framework of minimal standards in respect of the conduct of consular relations. Both Vienna Conventions formalise the core of international diplomatic and consular law.⁶⁰¹

The formulation of the Vienna Convention on Diplomatic Relations was ‘largely a reaction to the unlimited immunity historically granted to diplomats’.⁶⁰² When the Vienna Convention was adopted on 16 April 1961, it was substantially accepted as codifying the rules of diplomatic law. The Convention was recognised as a milestone development in respect of regulating the principles of diplomatic relations. It was also deemed as a watershed of supreme importance in respect of the codification of international law. Unlike the Havana Convention or the Harvard Draft Convention, the Vienna Convention has been recognised by 190 State parties as of February 2016. The Vienna Convention therefore can be deemed as enjoying an overall consensus. It establishes contemporary international law pursuant to the immunities and privileges of diplomats.⁶⁰³

Jonathan Brown has remarked that the ‘Vienna Convention is without doubt one of the surest and most widely based multilateral regimes on the field of international relations’.⁶⁰⁴ Furthermore, Charles Lewis has remarked that the Vienna Convention’s ‘scope and success are impressive. It is almost universally regarded as

⁶⁰¹ See Jan Wouters, Sanderijn Duquet and Katrien Meuwissen, ‘The Vienna Convention on Diplomatic and Consular Relations’ in Andrew F Cooper, Jorge Heine and Thakur Ramesh (eds), *The Oxford Handbook of Modern Diplomacy* (Oxford University Press 2013); Juan Manuel Gómez-Robledo, ‘Vienna Convention on Consular Relations’ (*United Nations Audiovisual Library of International Law*) <<http://legal.un.org/avl/ha/vccr/vccr.html>> accessed 29 April 2016.

⁶⁰² Ross (n 47) 180.

⁶⁰³ See Satow (n 592); Geraldo Eulálio do Nascimento Silva, *Diplomacy in International Law* (Sijthoff 1972) 30; see also Denza, *Diplomatic Law* (n 50).

⁶⁰⁴ Brown, ‘Diplomatic Immunity’ (n 594) 54.

embodying binding international legal rules on diplomatic intercourse between States'.⁶⁰⁵

Indeed, in 1936, Montell Ogdon pointed to the need for the concept of diplomatic immunity to be framed and regulated under legal conditions, as he believed that there was increasing opposition to the absolute and limitless immunities held by the diplomatic agents. On this point Ogdon observed that:

The tide of world-wide revolt against special privilege has gone so far as to make itself felt in the channels of diplomacy and has begun to weaken the foundations of sand on which certain fictions of diplomatic immunity were built. The pressure for invasion of the sacred rights of diplomats may be observed from the Continent of North America to South Africa and from the Orient to Great Britain [...]. It is aimed primarily at the destruction of license and privilege, much of which grew out of a period of jealousy and fear between princes and kings who believed themselves to personify the State.⁶⁰⁶

Ogdon implies that there was a need to formulate effective diplomatic law. The adoption of the Vienna Convention on Diplomatic Relations assisted in systematising the practice of hosting diplomatic agents, the institution of diplomatic assignments and the rules of diplomatic immunity. The Convention designates and regulates certain duties of both sending and receiving States. It also designates the functions of diplomatic missions. The main purposes of the Convention are to maintain international peace and security and to promote friendly relations among States. The

⁶⁰⁵ Charles James Lewis, *State and Diplomatic Immunity* (2nd edn, Stevens & Sons Ltd 1985) 161.

⁶⁰⁶ Ogdon (n 33) vii.

Vienna Convention, in its Preamble, provides a rationale for granting immunities and privileges to diplomatic agents on the basis of functional needs. The Convention therefore is not intended to benefit the individual, in their individual capacity; on the contrary, its purpose is to provide and maintain well-ordered relations among States.⁶⁰⁷

The Vienna Convention outlines the responsibility of the receiving State for establishing a smooth environment in which diplomatic agents can carry out their duties. It states that the ‘person of a diplomatic agent shall be inviolable. He shall not be liable to any form of arrest or detention. The receiving State shall treat him with due respect and shall take all appropriate steps to prevent any attack on his person, freedom or dignity’.⁶⁰⁸ Given that the diplomatic agent is an official representative of his or her own State, all measures taken by the receiving State should be read as protective measures in respect to that diplomat’s official position. In light of the purposes of the Vienna Convention, three significant grounds are established for diplomatic immunity. Each is notable for its use as a justification for granting immunity to diplomatic agents abroad. The next section clarifies and criticises these grounds.

6.4 THEORETICAL GROUNDS FOR DIPLOMATIC IMMUNITY

Three significant theories have been put forward in order to justify the practice of bestowing immunity on diplomatic agents when performing official duties abroad:

⁶⁰⁷ See Preamble of the ‘Vienna Convention on Diplomatic Relations’ (United Nations 1961).

⁶⁰⁸ *ibid* Article 29.

these are: 1) Personal Representation, 2) Extraterritoriality and 3) Functional Necessity.⁶⁰⁹

Personal Representation was the first theory promulgated to justify diplomatic immunity. The representative's privileges 'are similar to those of the sovereign herself, and an insult to the ambassador is an insult to the dignity of the sovereign'.⁶¹⁰ Regarding this theory, Vattel emphasised that the 'respect which is due to sovereigns should redound to their representatives, and especially their ambassadors, as representing their master's person in the first degree'.⁶¹¹ In other words, according to this theory, a diplomatic agent embodies the sovereign ruler of his or her own State. It follows that any insult to the diplomatic agent constitutes an insult to that agent's sovereign.

L. J. Brett set out the theory of Personal Representation in *The Parlement Belge* case as follows. The immunity of a diplomatic agent 'from the jurisdiction of the Courts of the country to which he is accredited is based upon his being the representative of the independent sovereign or state which sends him, and which sends him upon the faith of his being admitted to be clothed with the same independence of and superiority to all adverse jurisdiction as the sovereign authority whom he represents would be'.⁶¹² However, a counterargument to the Personal Representation theory has been raised by some scholars who pointed out that the immunity of a diplomatic agent may not be equal to that of his or her own

⁶⁰⁹ David B Michaels, *International Privileges and Immunities: A Case for a Universal Statute* (Martinus Nijhoff Publishers 1971) 47; Chatterjee (n 599); Edwin Egede and Peter Sutch, *The Politics of International Law and International Justice* (Edinburgh University Press 2013); Frey and Frey (n 33); McClanahan (n 33).

⁶¹⁰ Leslie Shirin Farhangi, 'Insuring against Abuse of Diplomatic Immunity' (1985) 38 *Stanford Law Review* 1517, 1520.

⁶¹¹ Vattel (n 68) 696.

⁶¹² *The Parlement Belge* [1880] 5 PD 197 (Court of Appeal) 207–08.

sovereign.⁶¹³ In view of this counterargument, the personal representation theory might seem to be a weak foundation for diplomatic immunity. Nevertheless, this theory cannot be dismissed since diplomatic agents do represent their own sovereigns abroad. In fact, the theory has been reformulated to comply with contemporary international law.

The second theoretical ground for diplomatic immunity is Extraterritoriality. According to this theory, the territory that belongs to diplomatic agents is accepted as the sending State's territory in spite of the fact that the diplomatic agent lives in a foreign State. It follows that the diplomatic agent has no liability under the host State's law because technically the agent does not reside in the host State.⁶¹⁴ C. J. Jervis explained the Extraterritoriality theory as follows: the 'foundation of the privilege is that the ambassador is supposed to be in the country of his master'.⁶¹⁵

In relation to Extraterritoriality theory, Grotius stated that 'ambassadors were held to be outside of the limits of the country to which they were accredited. For this reason, they are not subject to the municipal law of the state within which they are living'.⁶¹⁶ From the perspective of this theory, diplomatic agents benefit from immunity in a foreign territory where they perform diplomatic relations on the behalf of their own States.

⁶¹³ See Clifton E Wilson, *Diplomatic Privileges and Immunities* (The University of Arizona Press 1967); Sen (n 40); Chesney Hill, 'Sanctions Constraining Diplomatic Representatives to Abide by the Local Law' (1931) 25 *The American Journal of International Law* 252.

⁶¹⁴ J Craig Barker, *The Abuse of Diplomatic Privileges and Immunities: A Necessary Evil?* (Ashgate 1996).

⁶¹⁵ *Taylor v Best, Drouet, Sperling, and Clarke* [1854] 139 ER 201 14 Common Bench Rep 487 517.

⁶¹⁶ Stephen C Neff (ed), *Hugo Grotius on the Law of War and Peace* (Cambridge University Press 2012) 263.

Ogdon claimed that the immunity from domestic jurisdiction that is granted to the diplomatic agent's personal property originates in the presumption that 'the domicile of the owner was still in his own country'. Because the diplomatic agent's 'personal effects were sometimes regarded as belonging to, or being closely associated with the domicile of the owner, the fiction was, therefore, extended to render' the diplomatic agent's personal property free from confiscation in the host State.⁶¹⁷

The final theoretical ground related to diplomatic immunity is that of Functional Necessity. This theory is accepted as the most viable justification for diplomatic immunity, and is the predominant theory in current international relations. According to this theory, diplomatic agents cannot be sued by applying the jurisdiction of domestic courts because if they were, their official functions would be impeded. The theory of Functional Necessity justifies diplomatic immunity for the sake of providing smooth diplomatic relations.⁶¹⁸

Diplomatic agents are considered vital to maintaining mutual relations among States; however, these agents cannot fulfil the object of their assignment unless they are vested with all the prerogatives they require to accomplish their official tasks successfully, securely and completely. While international conventions obligate us to admit diplomatic agents, they also explicitly bind us to recognise those agents in

⁶¹⁷ Ogdon (n 33) 81.

⁶¹⁸ Wilson (n 613). *cf.* 'The assertion that the diplomat cannot function efficiently without immunity implies that the diplomat must break the law of the receiving state in order to conduct international relations. Therefore, the current construction, providing diplomatic immunity to the individual, is inconsistent with the theoretical basis that accords protection only to the diplomatic process.' Ross (n 47) 179–80.

their entirety, including their personal effects, as possessing all the rights and prerogatives necessary for them to safely perform their official functions.⁶¹⁹

According to Functional Necessity Theory, from the moment diplomatic agents are admitted to the receiving State's territory, throughout the period of their residence and until their diplomatic duties end in that State, they are 'entitled to an entire exemption from the local jurisdiction, both civil and criminal'.⁶²⁰ Wheaton, referring to the functional necessity theory, argued in 1836 that the aforementioned exemption from domestic jurisdiction is based on mutual advantages stemming from the requirement that diplomatic agents 'should be entirely independent of the local authority' in order to perform their diplomatic duties.⁶²¹

The Vienna Convention indicates that diplomatic immunity is vested to ensure and maintain the efficiency of diplomatic functions and also to regulate the framework in which diplomatic immunities are implemented. Thus, the Convention stresses the functionality of the diplomatic immunity. If a diplomatic agent's deeds fall outside the remit of international relations and particularly diplomatic relations, the concept of diplomatic immunity inevitably becomes questionable. Having outlined the theoretical grounds for granting immunity to diplomatic agents in this section, the next section analyses the importance of diplomatic immunity for diplomatic agents and criticises the absolute nature of diplomatic immunity under the Vienna Convention.

⁶¹⁹ Vattel (n 68) 705–6.

⁶²⁰ Henry Wheaton, *Elements of International Law: With a Sketch of the History of the Science* (B Fellowes 1836) 272–73.

⁶²¹ *ibid* 273.

6.5 DIPLOMATIC IMMUNITY

Diplomatic relations involve the performance of the governmental functions of the sending State on the territory of the host State, with the authorisation of the latter. Crawford remarks that having agreed ‘to the establishment of diplomatic relations, the receiving state must enable the sending state to benefit from the content of’ the authorisation.⁶²² This directive has led to the development of a branch for immunities and privileges for diplomatic agents.

The roots of diplomatic law date back to ancient history; it is therefore seen as one of the earliest fields of international law. Diplomatic immunity also stems from the desire to protect envoys or attachés of foreign States in a host country from retaliation during a time of international dispute and to further and develop peaceful and courteous relations between sovereign States. Diplomatic immunity, in common law, first appeared as State immunity. The need to preserve the State’s independence and dignity abroad has raised the question of how to grant protection to the State’s diplomatic agents. Towards this end, it was accepted that diplomatic agents should be endowed with a level of immunity tantamount to that of the sovereign State.⁶²³

The certain privileges and immunities ‘related to diplomatic personnel of various kinds grew up partly as a consequence of sovereign immunity and the independence and equality of states, and partly as an essential requirement of an international system’.⁶²⁴ In this regard, Lord Talbot’s statement in the 1736 *Barbuit* case is an apt reference point: The ‘privilege of a public minister is to have his

⁶²² James Crawford, *Brownlie’s Principles of Public International Law* (8th edn, Oxford University Press 2012) 397.

⁶²³ Ogdon (n 33); Lewis (n 605). See for prehistory of diplomatic relations and diplomatic law Barker (n 614) 14–31.

⁶²⁴ Shaw (n 57) 546.

person sacred and free from arrest, not on his own account, but on account of those he represents; and this arises from the necessity of the thing, that nations may have intercourse with one another [...] the foundation of this privilege is for the sake of the prince by whom an ambassador is sent'.⁶²⁵

It is beyond doubt that the protection of diplomatic agents in the foreign country where they serve is regarded as an important function of diplomatic immunity. In this respect, the Vienna Convention confers upon the host State a special duty to take all appropriate measures to protect the premises of the mission against any type of intrusion, and to prevent any disruption to the diplomatic mission or impairment of its dignity.⁶²⁶ In this sense, the decision of the International Court of Justice on the 1980 *Tehran Hostages* case⁶²⁷ has been recognised as clearly demonstrating the importance of providing protection for diplomatic agents in relation to their official duties and positions.

In the *Tehran Hostages* case, a group of Iranian students overran the premises of the United States Embassy in Tehran and took more than sixty residents hostage on 4 November 1979. On this occasion, the International Court of Justice remarked that the students' act could be attributed to the State of Iran only if the students acted on the behalf of the State. Although Iran had a responsibility to protect the premises of the United States Embassy under the Article 22(2) of the Vienna Convention, it failed to take all necessary and appropriate measures to guard the embassy and residents. Therefore, the United States argued that Iran had breached the Vienna

⁶²⁵ *Barbuit's Case in Chancery* [1736] 25 ER 777 Cases Temp Talbot 281 (Court of Chancery).

⁶²⁶ 'Vienna Convention on Diplomatic Relations' (n 607) Article 22(2).

⁶²⁷ *Case Concerning United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran)*, Judgment (n 48).

Convention of 1961 and, furthermore, the Vienna Convention on Consular Relations of 1963. The Court ultimately decided on 4 November 1979 that the Iranian State and its authorities were unequivocally aware of their responsibilities under the Vienna Conventions of 1961 and 1963, but failed to take all necessary measures to safeguard the premises and diplomatic agents of the United States Embassy.⁶²⁸

In the *Tehran Hostages* case, Iran drew attention of the International Court of Justice to the ‘deep rootedness and the essential character of the Islamic Revolution of Iran’ and asserted that the ‘examination of the numerous repercussions of the revolution [...] is a matter essentially and directly within the national sovereignty of Iran’.⁶²⁹ However, as the International Court of Justice in its Order of 15 December 1979 stated, ‘a dispute which concerns diplomatic and consular premises and the detention of internationally protected persons, and involves the interpretation or application of multilateral conventions codifying the international law governing diplomatic and consular relations, is one which by its very nature falls within international jurisdiction’.⁶³⁰

The International Court of Justice stated that ‘Iran was placed under the most categorical obligations, as a receiving state, to take appropriate steps to ensure the protection of the United States Embassy and Consulates, their staffs, their archives, their means of communication and the free movement of the members of their

⁶²⁸ *ibid* at paras. 56-68.

⁶²⁹ *ibid* at para 34.

⁶³⁰ *Case Concerning United States Diplomatic and Consular Staff in Tehran (US v Iran)*, Order [1979] ICJ Rep at para 25; see for detailed analyses of the International Court of Justice’s Order for the Tehran Hostages case Leo Gross, ‘The Case Concerning United States Diplomatic and Consular Staff in Tehran: Phase of Provisional Measures’ (1980) 74 *American Journal of International Law* 395.

staffs’.⁶³¹ Ultimately, the Court found that Iran, by committing continuing violations of the international obligations laid down by the 1961 and 1963 Vienna Conventions and ‘applicable rules of general international law, has incurred responsibility towards the United States’, that Iran was under an obligation to pay reparation to the United States for the injury caused to the United States.⁶³² In its Order and Judgment, the Court pointed out that ‘the obligations laid on States by the two Vienna Conventions are of cardinal importance for the maintenance of good relations between States in the interdependent world of today’. The Court then stated that there ‘is no more fundamental prerequisite for the conduct of relations between States than the inviolability of diplomatic envoys and embassies, so that throughout history nations of all creeds and cultures have observed reciprocal obligations for that purpose’.⁶³³ The *Tehran Hostages* case therefore underscores the significance of the obligation to protect diplomatic agents in the foreign countries where they perform their official duties.

Five years later, the Vienna Convention was thrown into crisis by events that took place in London on 17 April 1984, when Libyan opponents of the Government of Colonel Qaddafi held an orderly demonstration opposite the Libyan Embassy. During the demonstration, shots were fired from a window of the Libyan Embassy that led to the death of Police Constable Yvonne Joyce Fletcher who was on duty in the area. Immediately after this event, the Libyan authorities were asked to order those diplomatic staff in the Embassy to leave the building to enable it to be

⁶³¹ *Case Concerning United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran)*, Judgment (n 48) at para. 61.

⁶³² *ibid* at paras 90 and 95.

⁶³³ *Case Concerning United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran)*, Order (n 630) at para 38; *Case Concerning United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran)*, Judgment (n 48) at para 91.

examined for explosives and weapons. The Libyans rejected this request; the British Embassy in Tripoli subsequently was targeted for antagonistic demonstrations and the Libyan authorities unjustifiably arrested and detained particular British citizens. Upon cessation of diplomatic relations between the United Kingdom and Libya, Libyan diplomatic officials, together with those allegedly responsible for the death of the police constable, were permitted to leave the United Kingdom.⁶³⁴

Rosalyn Higgins criticised diplomatic law and emphasised that many legislators were extremely disturbed and concerned that the current international law on diplomatic immunity evidently prevented the Libyan Embassy from being searched and those allegedly responsible for the shooting from being detained and arrested. Higgins added that ‘it was widely felt that diplomats acting in a way incompatible with their diplomatic status should not benefit from an immunity granted to assist the orderly conduct of diplomatic relations’.⁶³⁵ The general sentiment was that diplomatic premises which were a base for criminal deeds should not be accredited with inviolability. On this basis, Higgins remarked that ‘a proper interpretation of the Vienna Convention would support the view that immunity and inviolability fell away when diplomats and missions abused their positions’. Moreover, if the Convention cannot provide these recommendable outcomes, she argued, the content of the Convention should be amended and adapted in light of the increasing importance of international human rights.⁶³⁶ Diplomatic immunity under the Vienna Convention may be seen as a questionable principle of international law given the fact that the role of international human rights has been growing. Further

⁶³⁴ Foreign Affairs Committee, ‘The Abuse of Diplomatic Immunities and Privileges’ (1984) H.C. Paper 127 paras 73–77; see Rosalyn Higgins, ‘The Abuse of Diplomatic Privileges and Immunities: Recent United Kingdom Experience’ (1985) 79 *American Journal of International Law* 641, 644–45.

⁶³⁵ Higgins (n 634) 644.

⁶³⁶ *ibid* 644–45.

discussion of the principle of diplomatic immunity in cases of human rights violations is provided in Section 6.8. The following section explains the limitations to diplomatic immunity under the Vienna Convention.

6.6 EFFORTS TO LIMIT THE DIPLOMATIC IMMUNITIES PROVIDED BY THE VIENNA CONVENTION

According to the Vienna Convention, three possible measures can be taken by a State against a diplomatic agent who abuses his or her diplomatic immunity: (1) declaring that agent *persona non grata*, (2) the application of sending State jurisdiction and (3) waiving immunity. It must be noted that these limitations do not permit any possible redress or compensation for the injured party. The primary objective of these limitations is to deter States and their representatives from exploiting diplomatic immunities and privileges.⁶³⁷

First, Article 9 of the Vienna Convention of 1961 permits the host State to declare diplomatic agents *persona non grata* (an unwelcome or unacceptable person). It states that the ‘receiving State may at any time and without having to explain its decision, notify the sending State that the head of the mission or any member of the diplomatic staff of the mission is *persona non grata* or that any other member of the staff of the mission is not acceptable’.⁶³⁸

⁶³⁷ McClanahan (n 33) 126–137; Veronica L Maginnis, ‘Limiting Diplomatic Immunity: Lessons Learned from the 1946 Convention on the Privileges and Immunities of the United Nations’ (2003) 28 Brooklyn Journal of International Law 989, 1002–1004.

⁶³⁸ ‘Vienna Convention on Diplomatic Relations’ (n 607) Article 9(1).

Persona non grata can be viewed as an important step towards challenging the exploitation of diplomatic privileges and immunities by diplomatic agents. In fact, this measure has been applied very sparingly in response to gross abuses of diplomatic immunity. The declaration of *persona non grata* is generally issued to those who commit acts of terrorism, espionage or who engage in overt criminality. The provision of *persona non grata* under the Vienna Convention is accepted as a lawful limitation to absolute immunity of diplomatic agents.⁶³⁹

In 1958, the International Law Commission also noted that an ‘exception arises in the case of proceedings relating to a professional or commercial activity exercised by the diplomatic agent outside his official functions. It was urged that activities of these kinds are normally wholly inconsistent with the position of a diplomatic agent, and that one possible consequence of his engaging in them might be that he would be declared *persona non grata*.⁶⁴⁰

Second, the Vienna Convention on Diplomatic Relations states that the ‘immunity of a diplomatic agent from the jurisdiction of the receiving State does not exempt him from the jurisdiction of the sending State’.⁶⁴¹ It follows that a diplomatic agent may be subject to the jurisdiction of his or her national court for wrongdoings committed in the receiving State. Before the Vienna Convention was adopted, a rapporteur to the International Law Commission had argued that a ‘diplomatic agent shall be justiciable in the courts of the sending State. The competent tribunal shall be

⁶³⁹ See Denza, *Diplomatic Law* (n 50) 59–71; Maginnis (n 637).

⁶⁴⁰ United Nations General Assembly, *Yearbook of the International Law Commission: Draft Articles on Diplomatic Intercourse and Immunities with Commentaries*, vol II (United Nations - International Law Commission 1958) Article 29(7).

⁶⁴¹ ‘Vienna Convention on Diplomatic Relations’ (n 607) Article 31(4).

that of the seat of the Government of the sending State, unless some other is designated under the law of that State'.⁶⁴²

Denza indicated that civil proceedings against a diplomatic agent before the national courts of his or her own State 'do not usually provide a satisfactory remedy for a claimant in the receiving State'.⁶⁴³ It should be noted that a claimant can neither serve proceedings against the diplomatic agent nor may be able to finance the costs of having legal advice and instituting legal proceedings in the foreign State. In the furtherance of these difficulties, Sir Gerald Fitzmaurice, while at the International Law Commission, indicated that international law did not 'impose any positive obligation on States to allow their diplomatic agents to be sued before their own courts'.⁶⁴⁴ It follows that the jurisdiction of the sending State is unlikely to be deemed a feasible means through which to challenge the abuses of diplomatic immunity.

Third, the Vienna Convention states that the 'immunity from jurisdiction of diplomatic agents and of persons enjoying immunity under Article 37 may be waived by the sending State. Waiver must always be express'.⁶⁴⁵ In other words, a diplomatic agent may be subject to the jurisdiction of the national courts of the host State, provided that the sending State explicitly waives the diplomatic agent's immunity. On this point, Farhangi remarked that if 'the sending state waives its diplomat's immunity, the receiving state does not infringe upon any of the Vienna

⁶⁴² *Yearbook of the International Law Commission: Summary Records of the Ninth Session, A/CN.4/SER.A/1957*, vol 1 (UN 1957) para 29.

⁶⁴³ Denza, *Diplomatic Law* (n 50) 265–66.

⁶⁴⁴ *Yearbook of the International Law Commission: Summary Records of the Ninth Session, A/CN.4/SER.A/1957* (n 642) 105.

⁶⁴⁵ 'Vienna Convention on Diplomatic Relations' (n 607) Article 32(1) and (2); see for more analyses on Article 32 of the Vienna Convention Denza, *Diplomatic Law* (n 50) 273–288.

Convention's protections when the receiving state acts against the offending diplomat'.⁶⁴⁶ Waiver of immunity from jurisdiction on the subject of administrative or civil litigations is not to be taken to manifest waiver from immunity in the matter of the execution of the adjudication, which requires a separate waiver.⁶⁴⁷ The Bureau of Diplomatic Security of the United States Department of State has stressed that waiver of diplomatic and consular immunity does not belong to the individual interests; rather, such a waiver can be only realised for the benefit of the sending State.⁶⁴⁸

In the 1987 case of *Fayed v Al-Tajir*, it was noted that the sovereign State is accepted as having sole authority to waive the immunity of its diplomatic agents. Additionally, it was stated that 'the defendant's defence filed in the proceedings against him is not an appropriate vehicle for the manifestation of the sovereign's decision to waive the defendant's immunity'.⁶⁴⁹

The United States Bureau of Diplomatic Security has developed a protocol on diplomatic and consular immunity which is consistent with the Vienna Convention. The Protocol stipulates that the 'US Department of State will request a waiver of immunity in every case in which the prosecutor advises that he or she would prosecute but for immunity'.⁶⁵⁰ According to the Department of State's Foreign Affairs Manual, 'if a prosecutor informs the Department that, absent immunity, he would prosecute, [the Department will] request the sending state or international

⁶⁴⁶ Farhangi (n 610) 1526.

⁶⁴⁷ Shaw (n 57) 560.

⁶⁴⁸ Bureau of Diplomatic Security, *Diplomatic and Consular Immunity: Guidance for Law Enforcement and Judicial Authorities* (US Department of State 2011) 13.

⁶⁴⁹ *Fayed v Al-Tajir* [1987] QB 712 (Court of Appeal) 737.

⁶⁵⁰ Bureau of Diplomatic Security (n 648) 12.

organization in all cases to waive immunity so that all allegations may be fully adjudicated'.⁶⁵¹

Malcolm Foster noted that immunity can only be waived or claimed by the State and not by an individual. When the sending State decides to waive immunity of its diplomatic agent, the agent cannot invoke diplomatic immunity him/herself.⁶⁵² Let us now turn to consider some State practices for the application of waiving immunity from diplomatic agents.

On 3 January, 1997, Gueorgui Makharadze, who was the second highest-ranking diplomat at the Embassy of Georgia in Washington, D.C., was speeding and under the influence of alcohol when he crashed his car causing the death of a teenage girl, Joviane Waltrick, and injured four other persons. The United States attorney's office for the District of Columbia 'informed the Department of State that its initial review of the evidence indicated that Makharadze could be charged with negligent homicide, involuntary manslaughter, or second-degree murder'.⁶⁵³ Six days later, the Department of State requested the waiver of Makharadze's diplomatic immunity from criminal prosecution by the Georgian Embassy. On 14 February 1997, the Georgian Embassy transmitted a diplomatic note as follows:

The Government of Georgia has considered the request of the United States Department of State and according to Article 32 of the Vienna Convention on

⁶⁵¹ 'U.S. Department of State Foreign Affairs Manual Vol. 2' (16 December 2014) <<https://fam.state.gov/fam/02fam/02fam0230.html>> accessed 4 May 2016§ 233.3(a)(2).

⁶⁵² Sarah Left, 'The Untouchables' *The Guardian* (6 August 2004).

⁶⁵³ Sean D Murphy, *United States Practice in International Law - Vol 1: 1999-2001* (Cambridge University Press 2003) 86; *United States v Makharadze* [1997] No FB1446B97 (DC Super Ct); Michael Janofsky, 'Georgian Diplomat Pleads Guilty in Death of Teen-Age Girl' *The New York Times* (9 October 1997); Terry Atlas, 'Diplomatic Immunity Debated After Fatal Crash' *Chicago Tribune* (7 January 1997).

Diplomatic Relations has waived the diplomatic immunity for Mr George Makharadze, so he can be prosecuted in the United States, for the accident that took place on January 3, 1997, in Washington, DC.⁶⁵⁴

Subsequent to the waiver of his diplomatic immunity by the Georgian Government, George Makharadze was charged with causing the death of Waltrick and injuring four people before the Superior Court of the District Columbia on 20 February 1997.⁶⁵⁵ Makharadze then pleaded guilty and was sentenced to seven to twenty-one years in prison on 19 December 1997.⁶⁵⁶

In 2002, Soto-Mendoza, who was a secretary to the military attaché at the Colombian Embassy in London, was accused of the murder of Damian Broom who had robbed Soto-Mendoza's son. Soto-Mendoza was expected to be interrogated at the London police. He claimed diplomatic immunity to avoid interrogation. After Colombia's president-elect Alvaro Uribe and Prime Minister Tony Blair had held an official meeting over this diplomatic issue, Colombia announced that Soto-Mendoza's diplomatic immunity was waived for the trial. He was found not guilty of murdering Damian Broom and was acquitted at the Old Bailey.⁶⁵⁷

In 18 October 2004, the New Zealand Court of Appeal took into consideration the waiver of diplomatic immunity in the *R v X* case. The defendant, X, was a diplomatic agent. The plaintiff was a nanny working and living in X's house. The diplomatic agent, was charged with indecent assault, following an incident in

⁶⁵⁴ Murphy (n 653) 87.

⁶⁵⁵ *United States v. Makharadze* (n 653).

⁶⁵⁶ Bill Miller, 'Diplomat Sentenced in Teen's Death' *The Washington Post* (20 December 1997).

⁶⁵⁷ Sue Clough, 'Colombian Official Cleared of Murdering Son's Mugger' *The Telegraph* (23 July 2003); Nigel Rosser, 'Diplomat to Be Quizzed over Killing' *The Evening Standard* (27 September 2002).

which he entered the nanny's private room in the middle of the night and masturbated to ejaculation. She pretended to be asleep when the diplomatic agent was in her room. After he left her room, the nanny realised that she had semen in her hair. The nanny cut some of her hair off and placed it in a plastic bag for investigation. She made a complaint to the police and provided them with the sample. The police then laid charges against the diplomatic agent. The sending State waived the diplomat's immunity from prosecution.⁶⁵⁸ The diplomatic agent, in the District Court, asserted that the semen sample provided by the nanny was inadmissible, relying on Article 29 of the Vienna Convention, which declares that 'the person of a diplomatic agent shall be inviolable'.⁶⁵⁹ However, the Court dismissed this application. The Judge then ruled that 'the person of the diplomatic agent did not include bodily fluids which have been discarded by that person'.⁶⁶⁰ The case was appealed to the Court of Appeal; however, the Court held that the semen sample was admissible. Article 29 of the Vienna Convention was not breached, in that the hosting State 'had done nothing directly or through its agents to detain or arrest or constrain X in order to obtain the sample'.⁶⁶¹ Since the agent had abandoned his semen, the subsequent acts of the Courts or police in regard to the semen sample could not have violated Article 29. Furthermore, the Court held that the waiver of immunity by the sending State 'extended to all steps which were reasonably incidental to the prosecution of X, including leading evidence of the sample'. Therefore, the appeal was dismissed.⁶⁶²

⁶⁵⁸ *R v X* [2005] 2 NZLR 121 (Court of Appeal Wellington).

⁶⁵⁹ *ibid* 123.

⁶⁶⁰ *ibid*.

⁶⁶¹ *ibid* 121.

⁶⁶² *ibid*.

It must be noted that since diplomatic immunities are granted to maintain smooth diplomatic functions, only the State can claim or waive immunity. The purpose of bestowing immunity is not to benefit an individual. Diplomatic agents cannot claim immunity themselves. Aforementioned State practices show that if a diplomatic agent abuses his/her official duties set out by the international conventions, the sending State may waive the immunity of that agent.

6.7 IMMUNITY *RATIONE PERSONAE* AND IMMUNITY *RATIONE MATERIAE* FOR DIPLOMATIC AGENTS

Immunity is a prerogative of governments. Immunity should on no account be attributed to an individual. Given that the rationale for extending immunity to diplomatic agents is based on the theory of functional necessity, it is important to distinguish between personal (*ratione personae*) and functional (*ratione materiae*) immunities. This distinction helps to explain whether or not human rights violations committed by diplomatic agents abroad should be covered by diplomatic immunity.

In customary international law, two forms of immunity from jurisdiction are recognised with regard to State officials: immunity *ratione personae* and immunity *ratione materiae*. These two forms of immunity are distinct legal entities. Immunity ‘based on the nature of the act is sometime called *ratione materiae* while *ratione personae* is based on the status of the State that performs the act’.⁶⁶³

⁶⁶³ Fox QC and Webb (n 19) 537.

Immunity *ratione personae* is an absolute immunity in that it protects diplomatic agents from foreign jurisdiction in relation to both their official and private acts. Immunity *ratione materiae* concerns the official acts of diplomatic agents. The difference in the way these two immunities are treated may be attributed to their difference in purposes. In this respect, *ratione materiae* is conduct-based immunity, while *ratione personae* is unconnected to the claimed conduct. The main purpose of immunity *ratione personae* is to avoid any grounds for interference in the actions of a representative of the State; thereby, it both enables and facilitates international relations between potentially distrustful States. When considered from this perspective, immunity *ratione personae* cannot be rendered invalid without the assent of the sending State.⁶⁶⁴ The next two sections address these two types of immunities with regard to status- and conduct-based immunity in international law.

6.7.1 IMMUNITY *RATIONE PERSONAE* (PERSONAL IMMUNITY)

Diplomatic agents enjoy immunity *ratione personae* when they are accredited to the host State. Immunity *ratione personae* ‘is derived from the official’s status and the post occupied by him [or her] in government service and from the State functions which the official is required to perform in that post’.⁶⁶⁵

Immunity *ratione personae* provides complete immunity while a diplomatic agent is in office. Diplomatic agents require an atmosphere that is conducive to their official functions for the sake of maintaining inter-State relations; immunity *ratione personae* protects diplomatic agents from criminal proceedings that might impede

⁶⁶⁴ Cryer and others (n 280) 546.

⁶⁶⁵ RA Kolodkin, ‘Preliminary Report on Immunity of State Officials from Foreign Criminal Jurisdiction, 6th Session’ (International Law Commission 2008) UN Doc. A/CN.4/601 78.

their functions.⁶⁶⁶ The International Court of Justice has stated that there is ‘no more fundamental prerequisite for the conduct of relations between States than the inviolability of diplomatic envoys and embassies’.⁶⁶⁷ Immunity *ratione personae* protects diplomatic agents from foreign jurisdiction in relation to both official and private acts; it therefore provides absolute immunity. This immunity is conferred on diplomatic agents as long as they remain in office.⁶⁶⁸

6.7.2 IMMUNITY *RATIONE MATERIAE* (FUNCTIONAL IMMUNITY):

ACTA JURE IMPERII AND ACTA JURE GESTIONIS

Immunity *ratione materiae* is applicable to State officials in a third State irrespective of their official position in the hierarchy of the State.⁶⁶⁹ As has been noted, immunity *ratione personae* ‘serves to protect governmental acts of one State from being adjudicated before the courts of another and, therefore, only incidentally confers immunity on the individual’.⁶⁷⁰ All State officials in a third State are endowed with immunity from foreign jurisdiction with regard to functions, in their official capacity. In the context of immunity *ratione materiae*, by contrast, the nature of the acts in question is more of a determinative factor than the official who performed the acts. All State officials abroad, regardless of their status, are deemed to represent the State and are considered agents of State power. Immunity *ratione materiae* covers a more

⁶⁶⁶ Wickremasinghe (n 294).

⁶⁶⁷ *Case Concerning United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran)*, Judgment (n 48) [91].

⁶⁶⁸ See Roger O’Keefe, *International Criminal Law* (Oxford University Press 2015).

⁶⁶⁹ Fox QC and Webb (n 19) 565.

⁶⁷⁰ Bantekas and Nash (n 288) 101.

limited range of acts than immunity *ratione personae*, but it covers a broader range of actors and also potentially involves the official acts of diplomatic agents.⁶⁷¹

There are two justifications for bestowing immunity *ratione materiae*. The first is that immunity *ratione materiae* constitutes ‘a substantive defence, in that it indicates that the individual official is not to be held legally responsible for acts which are, in effect, those of the state’. Such acts are attributable solely to the State, and immunity *ratione materiae* is an entity that imputes liability to the State.⁶⁷² The International Court of Justice, in the *Difference Relating to the Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights* case, emphasised this point: ‘According to a well-established rule of international law, the conduct of any organ of a State must be regarded as an act of that State’.⁶⁷³ In the *Prosecutor v Blaskic* case, the Trial Chamber used this rationale in its determination that a subpoena could not be directed to the acts of State agents in their official authority, because such official agents are merely representatives of a State and their official deeds can be accredited solely to the State. The Chamber added that such agents cannot be punished for tortious deeds as these are not imputable to them individually but to the State on whose behalf they perform; therefore they enjoy immunity *ratione materiae*.⁶⁷⁴

The second justification is that, by vesting immunity in State officials, immunity *ratione materiae* precludes the circumvention of State immunity by way of

⁶⁷¹ Kolodkin (n 541) 21; Wickremasinghe (n 294).

⁶⁷² Akande and Shah (n 541) 826; Antonio Cassese and Paola Gaeta, *International Criminal Law* (2nd edn, Oxford University Press 2008) 304.

⁶⁷³ ‘Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights, Advisory Opinion ICJ Reports’ (1999) 87 at para 62.

⁶⁷⁴ *Prosecutor v. Tihomir Blaskic* (n 543) 707 at para. 38; Göran Sluiter and others, *International Criminal Procedure: Principles and Rules* (Oxford University Press 2013) 708.

legal proceedings brought against persons who act on behalf of the State.⁶⁷⁵ This rationale was mentioned by Judge Sir George Jessel in 1877 in the *Twycross v Dreyfus* case, in which he stated that ‘you cannot sue the agent in the absence of the principal, the principal is the Peruvian Government – you cannot sue the Peruvian Government at all, and, therefore, you cannot sue its agents. There is no question of trusteeship’.⁶⁷⁶

This rationale was also highlighted in *Zoernsch v Waldock* in 1964, as follows:

A foreign sovereign government, apart from personal sovereigns, can only act through agents, and the immunity to which it is entitled in respect of its acts would be illusory unless it extended also to its agents in respect of acts done by them on its behalf. To sue an envoy in respect of acts done in his official capacity would be, in effect, to sue his government irrespective of whether the envoy had ceased to be *en poste* at the date of the suit.⁶⁷⁷

Regarding the question of whether immunity *ratione materiae* should be lifted for fundamental human rights violations, the following issue should be considered. Immunity *ratione materiae* provides protection for official acts; however, arguments have emerged which state that violations of fundamental human rights may not be deemed as official acts.⁶⁷⁸ Therefore, in respect of immunity *ratione materiae*, there is a distinction between official acts (*acta jure imperii*) and private acts (*acta jure gestionis*). In general, if a diplomatic agent has carried out missions in relation to the governmental or sovereign deeds of the foreign sovereign State, then the courts of

⁶⁷⁵ Akande and Shah (n 541) 827; see also Fox QC and Webb (n 19).

⁶⁷⁶ *Twycross v Dreyfus* [1877] 5 Ch D 605 (Court of Appeal Chancery Division) 618.

⁶⁷⁷ *Zoernsch v Waldock and Another* [1964] 1 WLR 675 (Court of Appeal) 692.

⁶⁷⁸ Kolodkin (n 541) 28, 29, 30, and 31.

some European countries and some international courts will not exercise jurisdiction over the dispute.⁶⁷⁹ Richard Garnett also stated that ‘State practice, both in European countries and elsewhere, is now converging around the idea that State immunity should only be imposed where the employee is engaged in duties that implicate the foreign State’s sovereignty. Employees in routine and generic roles, by contrast, should be entitled to seek redress’.⁶⁸⁰

Diplomatic agents should benefit from diplomatic immunity only in respect of deeds which are regarded as part of their official duties. For that reason, any act that goes beyond the scope of diplomatic duties should be accepted as *acta jure gestionis* (private acts) in character. It follows that private acts can be subject to the host State’s jurisdiction. In this sense, the Vienna Convention on Diplomatic Relations outlines three exceptional situations to the immunity granted to a diplomatic agent in a receiving State:

- a) A real action relating to private immovable property situated in the territory of the receiving State, unless he holds it on behalf of the sending State for the purposes of the mission;
- b) An action relating to succession in which the diplomatic agent is involved as executor, administrator, heir or legatee as a private person and not on behalf of the sending State;

⁶⁷⁹ See generally ‘State Practice on Sovereign Immunity in Employment Disputes Involving Embassy and Consular Staff’ (Center for Global Legal Challenges - Yale Law School 2015) <https://www.law.yale.edu/system/files/state_immunity_in_employment_disputes.pdf> accessed 27 October 2016.

⁶⁸⁰ Richard Garnett, ‘State and Diplomatic Immunity and Employment Rights: European Law to the Rescue?’ (2015) 64 International and Comparative Law Quarterly 783, 785.

c) An action relating to any professional or commercial activity exercised by the diplomatic agent in the receiving State outside his official functions.⁶⁸¹

As fundamental human rights violations cannot be regarded as sovereign acts under international law, they are not listed among the official duties of diplomatic agents detailed in Article 3 of the Vienna Convention on Diplomatic Relations of 1961. Article 3 enumerates five functions regarded as diplomatic mission as follows: (1) representing the sending State in the hosting State; (2) protecting in the hosting State the interests of the sending State and of its nationals, within the limits allowed by international law; (3) conducting negotiations with the hosting State's Government; (4) ascertaining by all lawful means conditions and developments in the hosting State, and reporting thereon to the sending State's Government; and (5) promoting friendly relations between the hosting and receiving State, and developing their cultural, scientific, and economic relations. However, the Civil Court of Brussels in the 1982 *Portugal v Goncalves* held that Article 3 of the Convention, 'which determined the functions of a diplomatic mission, set out the general framework of those functions and was to be interpreted as including all incidental actions which were indispensable for the performance of the general functions listed there'.⁶⁸²

On the one hand, there is the vital question of whether all deeds of diplomatic agents can be considered to be sovereign acts given that such agents are commissioned by a sovereign State and also represent their own governments. On the other hand, fundamental human rights violations committed by diplomatic agents can

⁶⁸¹ 'Vienna Convention on Diplomatic Relations' (n 607) Article 31(1).

⁶⁸² E Lauterpacht and CJ Greenwood (eds), *International Law Reports*, vol 82 (Grotius Publications Ltd 1990) 115.

in no case be accepted as sovereign acts or indispensable to their performance because such acts are not official in nature and obviously do not fall within the scope of diplomatic functions framed under the Vienna Convention on Diplomatic Relations.

On this point, the position of the Labour Court of Brussels in the 1980 *Castanheira v Commercial Office of Portugal* is notable for reflecting the distinction between *acta jure gestionis* and *acta jure imperii*. The Court found that diplomatic immunity from jurisdiction is based on the sovereignty, independence and equality of States. What must be determined is whether the deeds performed by diplomatic agents are constituted *acta jure gestionis* or *acta jure imperii*. *Acta jure imperii* concern the foreign State's sovereignty and constitute official acts; by contrast, *acta jure gestionis* 'do not raise any question of the exercise of public power [...] [T]he question which must be decided is whether or not the foreign State acted as a private person or on the basis of its *imperium*'. The Court concluded that diplomatic agents are entitled to diplomatic immunity from local jurisdiction as long as they act in an official capacity.⁶⁸³

According to a 1984 House of Commons Foreign Affairs Committee Report in the wake of the Libyan Embassy incident, when diplomatic agents commit criminal activities, they forfeit their diplomatic position and accordingly fail to benefit from diplomatic immunity; in such cases they are not regarded as diplomatic agents at all. Given that fundamental human rights violations cannot be considered as a part of the diplomatic agents' official functions, it follows that when diplomatic

⁶⁸³ *ibid* 102.

agents violate those human rights, they can no longer be deemed to be diplomatic officials and therefore they should lose the benefit of diplomatic immunity.⁶⁸⁴

When diplomatic agents are suspected of having committed violations of fundamental human rights which are not regarded as sovereign functions of diplomatic agents, they should be held accountable for violations in question; for this reason, diplomatic immunity should not equate to diplomatic impunity. The following section elaborates on and analyses this position in the light of the issues discussed above.

6.8 DIPLOMATIC IMMUNITY OR DIPLOMATIC IMPUNITY IN CASES OF FUNDAMENTAL HUMAN RIGHTS VIOLATIONS

Before discussing the difference between diplomatic immunity and impunity any further, it must be noted that, for the sake of maintaining smooth functions of diplomatic relations among States, diplomatic agents should benefit from diplomatic privileges and immunities as long as their acts do not constitute any violation of fundamental human rights. As Tim Hillier pointed out, modern diplomatic agents should be 'able to move freely and be unhampered as they report to their governments'. These diplomatic agents also 'need to be able to report in confidence and to negotiate on behalf of their governments without fear of let or hindrance'.⁶⁸⁵

Notwithstanding that diplomatic immunity for diplomatic agents of foreign States is deemed to be an inalienable rule in international law, diplomatic immunities and

⁶⁸⁴ Foreign Affairs Committee (n 634); see generally Iain Cameron, 'First Report of the Foreign Affairs Committee of the House of Commons' (1985) 34 *International & Comparative Law Quarterly* 610; Francisco Orrego Vicuna, 'Diplomatic and Consular Immunities and Human Rights' (1991) 40 *International and Comparative Law Quarterly* 34.

⁶⁸⁵ Hillier (n 285) 315.

privileges have in the past been abused to avoid prosecution for committed human rights violations. This abuse makes diplomatic immunity in cases of violations of fundamental human rights incompatible with international law.

Despite the fact that the Vienna Convention on Diplomatic Relations does not distinguish between human rights violations committed by diplomatic agents in terms of their gravity, for the sake of proving the argument that diplomatic immunity does not equate to diplomatic impunity, the hierarchical relationship between prohibition of human rights violations and the right of diplomatic agents to certain immunities must be placed under the microscope. Any interruption of diplomatic immunity should be avoided unless this interference is in response to the violation of fundamental human rights. The principle of diplomatic immunity must be reassessed when those violations are at stake.

Although the theory of functional necessity has been put forward primarily as a justification for preventing all possible impediments to diplomatic functions, granting diplomatic immunity in cases of human rights violations is a controversial issue under international law. It is difficult to defend immunity for diplomatic agents on the grounds of functional necessity when agents are suspected of such violations. When those violations are at stake, diplomatic immunity should not be the primary focus of discussion. Cançado Trindade's crucial statement must be emphasised here and also applied to diplomatic agents. He rightly underscored that human rights violations are anti-juridical acts and those acts violate *jus cogens* norms.⁶⁸⁶

⁶⁸⁶ Trindade (n 12) 1519.

In 1929, Lord Hewart remarked that diplomatic officials ‘are not, in virtue of their privileges as such, immune from legal liability for any wrongful acts [...] Diplomatic privilege does not import immunity from legal liability, but only exemption from local jurisdiction’.⁶⁸⁷ This articulation of the law sounds unquestionable, and it should be applicable to any wrongful acts irrespective of their character.⁶⁸⁸ Diplomatic agents should forfeit the rights provided by diplomatic immunity when they commit violations of human rights. They should no longer be recognised as diplomatic agents. Diplomatic agents should be accountable for those violations, because diplomatic privileges and immunities should not engender impunity.

This position was underscored by the Tokyo Tribunal in the case of General Hiroshi Oshima, who was the Japanese Ambassador to Berlin. Ambassador Oshima was arrested in Japan for war crimes in 1945 and was tried and convicted by the Tokyo Tribunal for conspiring to wage aggressive war in 1948. Even though Oshima held a diplomatic position, the Tribunal found that he was ‘one of the principal conspirators and consistently supported and prompted the aims of the conspiracy’.⁶⁸⁹ Ambassador Oshima claimed that he had diplomatic immunity and therefore was exempt from prosecution in respect of his deeds in Germany.⁶⁹⁰ However, the Tribunal rejected this argument and stated that:

⁶⁸⁷ *Dickinson v Del Solar* [1930] 1 KB 376 (King’s Bench Division) 380.

⁶⁸⁸ Yoram Dinstein, ‘Diplomatic Immunity from Jurisdiction *Ratione Materiae*’ (1966) 15 *International and Comparative Law Quarterly* 76, 81.

⁶⁸⁹ Neil Boister and Robert Cryer (eds), *Documents on the Tokyo International Military Tribunal: Charter, Indictment, and Judgments* (Oxford University Press 2008) 615.

⁶⁹⁰ United Nations, *Historical Review of Developments Relating to Aggression*, vol 673 (United Nations Publication 2003) 213–14; see also Gabrielle Kirk McDonald and Olivia Swaak-Goldman (eds), *Substantive and Procedural Aspects of International Criminal Law: The Experience of International and National Courts: Materials*, vol 2 (Kluwer Law International 2000) 822.

Diplomatic privilege does not import immunity from legal liability, but only exemption from trial by the courts of the State to which an Ambassador is accredited. In any event this immunity has no relation to crimes against international law charged before a tribunal having jurisdiction. The Tribunal rejects this special defence.⁶⁹¹

It is undeniable that diplomatic immunity has always been regarded as vital for ensuring smooth relations between States; however, it must be noted that diplomatic immunity can be abused and consequently used as a shield to safeguard diplomatic agents from being subject to proceedings, and thus to be held to account.

Such abuse reveals itself particularly in respect of torture, slavery and the inhuman treatment of domestic workers by diplomatic or consular agents. Because these acts are breaches of *jus cogens* norms, an inevitable conflict arises between the diplomatic immunity and the prohibition of these acts under international law. *Jus cogens* norms cannot be set aside or abolished by any other rule or principle unless that rule or principle is of equal hierarchic status to *jus cogens* norms. Otherwise, diplomatic immunity leads to diplomatic impunity. The following section analyses the absolute nature of diplomatic immunity when diplomatic agents are accused of having committed violations of fundamental human rights.

⁶⁹¹ Bernard VA Röling and CF Rüter (eds), *The Tokyo Judgment: The International Military Tribunal for the Far East (IMTFE), 29 April 1946 - 12 November 1948* (APA - University Press Amsterdam 1977) 456.

6.8.1 DIPLOMATIC IMPUNITY V DIPLOMATIC IMMUNITY

Over the past two decades, the question of whether fundamental human rights violations, particularly violations related to the enslavement of domestic workers inside the premises of embassies or official residencies, falls within the scope of the commercial activities exceptions under the Vienna Convention on Diplomatic Relations, has become critically important. To ask the question in this manner is to answer it.

The residual (continuing) immunity principle has been used by domestic workers as a way to bring suit against former diplomatic agents. Residual immunity is justified by Article 39(2) the Vienna Convention of 1961 as follows:

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 [...] 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.⁶⁹²

Residual immunity has been seen as the sole means through which to bring a suit against diplomatic agents, because it does not apply to the private acts of former diplomatic agents. As the District Court of New York indicated, ‘the purpose of immunizing a diplomatic agent’s private acts is to ensure the efficient functioning of a diplomatic mission, not to benefit the private individual, and this purpose

⁶⁹² ‘Vienna Convention on Diplomatic Relations’ (n 607) Article 39(2).

terminates when the individual ceases to be a diplomatic agent'.⁶⁹³ Although it is not yet fully fledged, there has been a change in orientation from toleration of diplomatic impunity to diminishing diplomatic immunity. The two positions are analysed in the following sections.

6.8.1.1 LEGAL ATTITUDES IN FAVOUR OF DIPLOMATIC AGENTS

Although there is a movement towards diminishing the absolute nature of diplomatic immunity, there is a significant case that took a stance in favour of the diplomatic agent. In 1996, the United States Court of Appeals for the Fourth Circuit, in the *Tabion v Mufti* case, established that a diplomatic agent can rely on diplomatic immunity to avoid accountability when he or she violates the human rights of a domestic worker.⁶⁹⁴ This case has led to criticism of the exceptions to diplomatic immunity under Article 31 of the Vienna Convention of 1961.⁶⁹⁵

Corazon Tabion served as a domestic worker for Faris Mufti, a diplomatic agent at the Embassy of Jordan in Washington, D.C. Tabion alleged that Mufti confiscated her passport and menaced her with deportation. Tabion subsequently filed suit against Mufti and claimed that he had breached the Fair Labour Standards Act. Tabion claimed that the alleged mistreatment should fall within the scope of the

⁶⁹³ *Swarna v Al-Awadi* [2009] 607 F Supp 2d 509 (Dist Court) 517.

⁶⁹⁴ *Tabion v Mufti* [1995] 877 F Supp 285 (Dist Court); *Tabion v Mufti* [1996] 73 F 3d 535 (Court of Appeals, 4th Circuit).

⁶⁹⁵ Article 31(1) of the 1961 Vienna Convention on Diplomatic Relations reads: A diplomatic agent shall enjoy immunity from the criminal jurisdiction of the receiving State. He [or she] shall also enjoy immunity from its civil and administrative jurisdiction, except in the case of: (a) a real action relating to private immovable property situated in the territory of the receiving State, unless he holds it on behalf of the sending State for the purposes of the mission; (b) an action relating to succession in which the diplomatic agent is involved as executor, administrator, heir or legatee as a private person and not on behalf of the sending State; (c) an action relating to any professional or commercial activity exercised by the diplomatic agent in the receiving State outside his [or her] official functions.

commercial activities exception under the Vienna Convention of 1961.⁶⁹⁶ However, the Court of Appeals rejected Tabion's claims and dismissed the case based on diplomatic immunity.⁶⁹⁷ Based on the protection of diplomatic immunity, the Court stated, Mufti was safeguarded from the claims made by Tabion. However, the Court failed to take notice that the alleged inappropriate treatment of the domestic worker violated her fundamental human rights.

Recently, the United Kingdom Employment Appeal Tribunal delivered a judgment that further obstructs efforts to hold diplomatic agents accountable when they violate fundamental human rights. This decision was held in the case of *Reyes and Suryadi v Al-Malki and Al-Malki* heard before the Employment Appeal Tribunal on 5 February 2015. In 2011, a Saudi diplomatic agent employed Ms Reyes, a Philippine national, and Ms Suryadi, an Indonesian national, as domestic workers. The United Kingdom Visas and Immigration Tribunal 'has determined that both women are the victims of trafficking'. However, the Court decided that Ms Reyes and Ms Suryadi could not pursue their claims on the grounds that the diplomatic agent in question enjoys diplomatic immunity.⁶⁹⁸

Diplomatic immunity explicitly has given rise to inadequate protection for domestic workers who serve in diplomatic premises and are victims of human rights violations. The abuse of diplomatic immunity by diplomatic agents seeking to avoid prosecution before receiving States' courts also obstructs efforts to compensate victims. Decisions that favour diplomatic agents accused of violating fundamental

⁶⁹⁶ *Tabion v. Mufti* (n 694) 285–287.

⁶⁹⁷ *Tabion v. Mufti* (n 694) 538–539. For a similar decision, see *Sabbithi v Al Saleh* [2009] 605 F Supp 2d 122 (Dist Court) 126.

⁶⁹⁸ *Reyes and Suryadi v Al-Malki and Al-Malki* [2015] Court of Appeal (Civil Division) Case No A2/2013/3061, EWCA Civ 32 [1–3].

human rights reveal a conflict between the rules of diplomatic immunity and the protection of those human rights. As interest in international human rights has grown within the contemporary international system, the protection of fundamental human rights has presented a significant challenge to diplomatic immunity. This development begs the question of whether diplomatic agents can be held accountable for violating the human rights of their domestic workers.

There are many conventions and protocols prohibiting human trafficking and requiring compensation for victims of trafficking from perpetrators.⁶⁹⁹ Accordingly, on 7 January 2010, the European Court of Human Rights decided that human trafficking was not compatible with a modern democratic society and was inconsistent with the European Convention on Human Rights.⁷⁰⁰ It follows that any involvement by a diplomatic agent in human trafficking should fall outside the scope of diplomatic functions.

Such decisions (*Tabion v Mufti*, *Swarna v Al-Awadi* and *Reyes and Suryadi v Al-Malki and Al-Malki*) enable diplomatic agents to hide behind diplomatic immunity when they are accused of violating the fundamental rights. Moreover, these decisions are, obviously, disappointing for future victims of human rights violations and for those victims whose legal battles against their diplomat employers are still on-going. Be that as it may, there have been a number of decisions that are examined below which provide some hope that diplomatic impunity can be

⁶⁹⁹ See Article 5(3) of the European Union Charter, Articles 60-92 of the Office of the United Nations High Commissioner for Human Rights Report on Abolishing Slavery and its Contemporary Forms and Article 2 of The Palermo Protocol (2000). Furthermore, Article 15(3) of the Council of Europe Convention on Action against Trafficking in Human Beings (2005) requires that 'Each party shall provide, in its internal law, for the rights of victims to compensation from the perpetrators'.

⁷⁰⁰ *Rantsev v Cyprus and Russia* [2010] 51 EHRR 1 (European Court of Human Rights) [282].

challenged if not fully set aside when fundamental human rights violations are at stake.

6.8.1.2 LEGAL ATTITUDES IN FAVOUR OF VICTIMS OF HUMAN RIGHTS VIOLATIONS

Although diplomatic immunity shields diplomatic agents abroad from prosecution, there have been several cases which show that violations of human rights committed by diplomatic agents have become problematic issues for the application of diplomatic immunity. Accordingly, the protection of human rights is seen as a great challenge to diplomatic immunity by international society. In this sense, a sending State's waiver of its diplomatic agent's immunity from suit is an important step towards chipping away at the absolute nature of diplomatic immunity in the case of human rights violations committed abroad. This human rights' challenge to diplomatic immunity can be found in State practices. Let us now consider these State practices in greater depth.

A prominent and remarkable decision in respect of diminishing the absolute nature of diplomatic immunity was delivered by the Second Circuit of the United States Court of Appeals in *Swarna v Al-Awadi* on 24 September 2010.⁷⁰¹ Vishranthamma Swarna, a native of India, had been a domestic worker of Badar Al-Awadi who was a Kuwaiti diplomatic agent in New York City. Swarna had been persuaded that she would receive decent treatment in the United States and obtained several promises from the Kuwaiti diplomat regarding her working and living

⁷⁰¹ *Swarna v. Al-Awadi* (n 693); *Swarna v Al-Awadi* [2010] 622 F 3d 123 (Court of Appeals, 2nd Circuit).

conditions; however, Al-Awadi was accused of seriously abusing Ms Swarna in the Kuwaiti diplomatic premises.⁷⁰²

Ms Swarna was exposed to sexual slavery, involuntary servitude and forced labour.⁷⁰³ She was prohibited from making contact with anybody outside of the diplomatic premises and was not allowed to make telephone calls. Letters from her family were withheld. She was both physically and psychologically abused and assaulted. The following statement from the Court's report summarises her wretched situation. She 'was threatened to have her tongue cut out and was dragged by her collar on several occasions. The individual defendants referred to Swarna as *dog* or *donkey*, and forcibly cut her hair – which was an important part of Swarna's identity and sense of self – against her will. Swarna slept in the children's bedroom, she had no privacy and no place of quiet refuge, and she often cried herself to sleep'.⁷⁰⁴ Furthermore, Swarna was raped on several occasions and threatened with death if she informed anyone.⁷⁰⁵ It is obvious that the diplomatic agent violated Swarna's fundamental human rights.

Ms. Swarna managed to escape and eventually filed a motion for default judgment against Al-Awadi, his wife Al-Shaitan and Kuwait, once Al-Awadi had left his diplomatic post in the United States to continue his diplomatic duty in France.

⁷⁰² The Kuwaiti diplomatic agent Al-Awadi 'promised to pay Swarna \$2,000 per month; to provide Swarna an annual paid vacation to India to visit her family; and to allow her to take Sundays off to attend church'. *Swarna v. Al-Awadi* (n 701) 128.

⁷⁰³ See for further analysis regarding issues of slavery, servitude, and forced labour Allain, 'The Implications of Preparatory Works for the Debate Regarding Slavery, Servitude and Forced Labour' (n 259).

⁷⁰⁴ *Swarna v. Al-Awadi* (n 701) 129–130. Swarna's described her horrific situation in her statement to the Court: 'When I was working in the Al-Awadi's kitchen, I could look out the window and [...] often imagined escaping the Al-Awadi home so that I could jump in the river, drown myself, and end the misery of my life in the Al-Awadi home. It was only the enduring need of my sick husband and five children in India that kept me from doing so'. *ibid* 130.

⁷⁰⁵ *Swarna v. Al-Awadi* (n 701) 130.

Kuwait and Al-Awadi subsequently asserted that as Al-Awadi was a diplomatic agent, he was immune from domestic jurisdiction. The Court upheld the sovereign immunity of Kuwait under the Foreign Sovereign Immunity Act; however, it ruled against Al-Awadi and denied residual immunity of Al-Awadi and his wife, indicating that he no longer had diplomatic immunity under the Vienna Convention given that the diplomatic post of Al-Awadi to the United Nations had ended. Although Article 39(2) of the Vienna Convention enables residual immunity to former diplomatic agents, that immunity is limited to those acts performed within the scope of official diplomatic function; and that immunity applies only to a person who was a member of the mission.⁷⁰⁶

Al-Awadi argued that the aim of Ms Swarna's employment was to assist him in mission-related activities; therefore, he claimed that he had diplomatic protection under Article 39(2) of the Convention. The Court held that:

Ultimately, however, Al-Awadi's argument must be rejected, as it assumes a fact that is not supported by the record. The alleged facts clearly show that Swarna was employed to meet Al-Awadi's and his family's private needs and not any mission-related functions. Swarna worked an average of seventeen hours a day, seven days a week, cooking, cleaning, caring for Al-Awadi's children, and tending to the family's personal needs. Al-Awadi also allegedly raped Swarna. If Swarna's work for the family may not be considered part of

⁷⁰⁶ *Swarna v. Al-Awadi* (n 701). On this point, the District Court of New York stated that 'residual diplomatic immunity applies to official acts – because such acts are attributable to the Sending State – but does not apply to private acts – because the purpose of immunizing a diplomatic agent's private acts is to ensure the efficient functioning of a diplomatic mission, not to benefit the private individual, and this purpose terminates when the individual ceases to be a diplomatic agent'. *Swarna v. Al-Awadi* (n 693) 517.

any mission-related functions, surely enduring rape would not be part of those functions either.⁷⁰⁷

This decision has impeded the absolute impunity of diplomatic agents who are accused of such human rights violations of slavery. While the Court's decision has not removed all obstacles to the abolition of diplomatic impunity in cases of fundamental human rights violations, it has raised an important discussion regarding the lapse of diplomatic immunity and as a crucial step in challenging the current framework of diplomatic immunity.

Swarna v Al-Awadi demonstrated that former diplomatic agents can be held liable for the aforementioned violations, although incumbent diplomatic agents can still enjoy immunity from being subject to local jurisdiction. In fact, the Court's position establishes an important precedent in relation to future allegations against diplomatic agents and leaves the door open to diplomatic accountability for human rights violations.

The *Swarna* judgment is not the only one to rule in favour of victims of human rights violations. Further support for such victims is provided by the case of *Baoanan v Baja*, heard before the United States District Court of New York on 16 June 2009. Plaintiff Marichu Suarez Baoanan held a bachelor's degree in nursing and Norma Castro Baja was a former Philippine diplomatic agent accredited to the United States Mission to the United Nations from 2003 to 2007. Baja promised Baoanan work as a nurse in the United States, which convinced her to move from the

⁷⁰⁷ *Swarna v. Al-Awadi* (n 701) 137–138.

Philippines to the United States. When Baoanan arrived in New York City, however, Baja's driver took her directly to the Bajas' household at the Philippine Mission.⁷⁰⁸

Baoanan claimed that Baja and his family forced her to work as a domestic servant in the premises of the Philippine Embassy in New York City, having lured her from the Philippines with false promises of employment as a nurse in the United States. Baoanan's allegations that were reported by the Court laid her horrendous conditions in the premises of Philippine Embassy bare: 'During the time Baoanan was a domestic worker in the Bajas' household, she worked approximately 126 hours per week. The Bajas limited her meals to leftovers, forced her to sleep in the basement with only one sheet, prevented her from leaving the household unaccompanied, and verbally abused and denigrated her. [She was also restricted] from using the household telephone'.⁷⁰⁹ Ultimately, Baoanan claimed that she was exposed to negligent misrepresentation, conversion, fraud, conspiracy and trafficking with respect to slavery, forced labour and involuntary servitude.

Baja's term ceased on 21 February 2007, before Baoanan filed the suit against him on 24 June 2008. Consequently, the Court had to determine whether Baja's alleged actions constituted official acts or private acts in the subject of residual immunity. Baja sought the protection of diplomatic immunity by claiming that the mere act of employing a domestic worker constituted an official act; however, the Court rejected his argument. Having considered Baoanan's claims (forced labour, slavery and involuntary servitude), the Court held that those actions were performed neither as an official function of diplomatic mission nor in behalf of

⁷⁰⁸ *Baoanan v Baja* [2009] 627 F Supp 2d 155 (Dist Court).

⁷⁰⁹ *ibid* 159.

the sending State. Therefore, the Court rejected Baja's claim to residual immunity because the alleged acts were committed in private capacity.⁷¹⁰ The *Swarna* and *Baoanan* decisions, therefore, provide important support for victims of human rights violations.

Article 39(2) of the Vienna Convention clarifies the limitations in respect of the residual immunity. According to this article, immunity shall continue as long as the acts in question are carried out in the exercise of the diplomatic function. There is a clear distinction between 'functions performed as a member of the mission, and other functions performed by the individual diplomat in question whilst present in the receiving State. Since the immunity is no longer necessary to respect the diplomatic purpose of the mission once the diplomat has retired from that post, but continues by way only of a residual protection', this residual immunity, therefore, may be interpreted 'no more widely than the words require'.⁷¹¹

These decisions significantly advance the objective of eroding diplomatic impunity in cases of fundamental human rights violations. Protection of those human rights presents a great challenge to diplomatic immunity. When such violations of human rights are committed by diplomatic agents, diplomatic immunity is not fully withdrawn, but at least domestic workers who are exposed to those violations have an opportunity to maintain their claims after the agents in question leave their diplomatic posts.

⁷¹⁰ *ibid* 160–170.

⁷¹¹ *Abusabib & Anor v Taddese* [2013] ICR 603 (UK Employment Appeal Tribunal) at para 29.

Another important step on behalf of domestic workers who have been subjected to human rights violations was taken by the then Secretary of State Hillary Clinton in 2011. Her declaration on the commission of human trafficking by diplomatic agents focused attention on abuses of diplomatic immunity. Clinton remarked that:

We will [...] begin an annual briefing for visiting diplomats and their domestic workers as part of an ongoing effort [...] to protect domestic workers brought here by diplomats and raise awareness within the diplomatic community. Whether they are diplomats or national emissaries of whatever kind, we all must be accountable for the treatment of the people that we employ. We will also work with federal contractors to identify best practices for preventing trafficking, help them protect victims, and hold them accountable if they do not follow the federal government's anti-trafficking policies.⁷¹²

This statement meant that diplomatic agents can be held accountable when they violate the fundamental human rights of domestic workers who are employed in the embassies' premises. Therefore, Clinton implied her support for the idea of abolishing diplomatic impunity for fundamental human rights violations. Ultimately, absolute immunity should be granted where the employment dispute refers to sovereign deeds performed *jure imperii*; in contrast, absolute immunity may be

⁷¹² Hillary Rodham Clinton, 'Remarks at the President's Interagency Task Force to Monitor and Combat Trafficking in Persons' (U.S. Department of State, 1 February 2011) <<http://www.state.gov/secretary/20092013clinton/rm/2011/02/155831.htm>> accessed 7 June 2015. The 2005 Miami Declaration of Principles on Human Trafficking considers human trafficking as a contemporary form of slavery and recognises human trafficking as a violation of *jus cogens* norms. 'The Miami Declaration of Principles on Human Trafficking, 10 February 2005' (2006) 11 Intercultural Human Rights Law Review <<https://www1.umn.edu/humanrts/instree/miami-declaration2006.html>> accessed 19 February 2016.

excluded if the employment dispute concerns deeds performed *jure gestionis*, which do not fall within the scope of the sovereign exercise of power.

6.9 CONCLUSION

This recent legal victory of migrant domestic workers against their diplomat employers provides important grounds for justifying the claim that the protection of fundamental human rights should triumph over the diplomatic immunity when these principles conflict.

For future victims of fundamental human rights violations committed by diplomatic agents, these prominent cases are likely to be recognised as precedents. Furthermore, these decisions in favour of victims of human rights violations may deter diplomatic agents and entities from committing such crimes in future. The growing importance of international human rights in the contemporary world order clearly has had a strong influence on the debate over diplomatic immunity. Diplomatic law must still be revised and amended in respect of modern international law. Nevertheless, the aforementioned decisions in favour of domestic workers may be seen as a harbinger of a new period of diplomatic accountability.

Diplomatic immunity is one of the most recognised and incontestable subjects under international law. However, diplomatic immunity can be regarded as a double-edged sword. On the one hand, diplomatic immunity is an internationally accepted rule essential for maintaining international relations; on the other side, it provides certain contentious rights which tend to preclude victims from having a suit

heard against diplomatic agents even in cases of fundamental human rights violations. Diplomatic immunity should not be claimed when fundamental human rights violations are at play. Diplomatic immunity on no account equates to diplomatic impunity. The doctrine of immunity should be secured unless it brings about a transgression of fundamental human rights. When diplomatic agents violate fundamental human rights, they should be held accountable. They should not be allowed to hide behind the shield of immunity and to escape punishment; to do so would provide a basis for diplomatic impunity.

The protection of fundamental human rights has been recognised as an important challenge to the principle of diplomatic immunity, and accordingly it might be observed from case law that diplomatic agents who have committed certain crimes are being held accountable. However, the case law also has demonstrated that there is a strict adherence to absolute diplomatic immunity, particularly for incumbent diplomatic agents. This inconsistency shows that there is no settled system for restricting diplomatic immunity under the current legal framework. Current principles of diplomatic immunity should be re-evaluated and amended in compliance with contemporary international law and in recognition of the growing importance of international human rights. The distinction should be made between diplomatic immunity and diplomatic impunity to prevent the number of victims of human rights violations from rising as a consequence of abuses of diplomatic immunity. If diplomatic immunity is leveraged to cover up human rights violations, diplomatic immunity serves as impunity.

7 CONCLUSION

Fears over whether and how the protection of fundamental human rights recognised as *jus cogens* norms take priority over the immunity of States, Heads of State and diplomatic agents should be abandoned. The international community has shown a tendency to protect the principles of international human rights. Furthermore, there is an unequivocal need to distinguish between immunity and impunity in order to protect fundamental human rights, given that impunity is itself a violation of human rights.⁷¹³ In spite of the fact that immunity is used to shield those who commit violations of human rights, it must be recognised not only that there is considerable differentiation between immunity and impunity, but also that immunity becomes impunity when violations of human rights are at stake.

This Thesis has argued that in cases involving violations of fundamental human rights, immunity should on no account amount to impunity. There is as yet no settled conclusion to, or resolution of, the tension between immunity and fundamental human rights, but the unjust benefits of immunity should be abolished in order to maintain and enhance human rights. The tension between immunity and fundamental human rights cannot be resolved unless the distinction between immunity and impunity is clearly articulated.

There are two essential interests in international law at stake here: preserving the immunity of States and those who represent them and protecting human rights. Striking a balance between those interests does not mean providing equal conditions for States and their recognised agents and victims of human rights violations; on the contrary, this balance is achieved by pursuing a policy that prioritises the peremptory

⁷¹³ Trindade (n 12) 1589.

norms of general international law. It follows that finding and maintaining the balance between the interests in question will be helpful in abolishing impunity and promoting human rights. Unlike the use of immunity as a shield against prosecution for human rights violations, fundamental human rights are *jus cogens*, a distinction which highlights the difference between immunity and impunity. It is impossible to disregard those interests in international law; however, it is feasible to impose considerable restrictions on the use of immunity when violations of fundamental human rights are concerned. This issue was explored thoroughly in Chapter 2, which examined the origins of absolute and restrictive sovereignty. This examination provided the foundation for the analysis of absolute and restrictive immunity in subsequent chapters, as sovereign immunity is derived from the concept of sovereignty.

The non-derogable and peremptory nature of fundamental human rights was highlighted and the distinction between immunity and impunity underscored by the international community after the horrors of the Second World War. However, the implications of this distinction for the protection of human rights have not yet been subject to in-depth analysis by academics. This Thesis has engaged with that contentious issue and analysed the question of State, Head of State and diplomatic immunity in the case of violations of these human rights. This Thesis contends that immunity should not amount to impunity if violations of fundamental human rights are committed. It offers, for the first time, a thorough explication of the distinction between immunity and impunity in the context of *jus cogens* human rights protection. This Thesis has also aimed to expand knowledge and broaden

understanding of the distinction between immunity and impunity in light of increasing violations of human rights in the contemporary international order.

Immunity in international law is derived from the sovereign structure of a State; therefore, Chapter 2 described the transition from absolute sovereignty to restrictive sovereignty in parallel with increasing emphasis on human rights. Specifically, the chapter charted the evolution of sovereignty from a Westphalian to a post-Westphalian system, a transformation which reveals the impact of human rights discourse on the structure of absolute sovereignty. Thus, Chapter 2 explored the transition from a State-centric perspective to a human-centric perspective of international relations. This transition indicates an inescapable obligation to protect fundamental human rights by preventing States and their official representatives from abusing the immunity principle, whose origin lies in the need to preserve the smooth functioning of inter-State relations. This Chapter demonstrated the increasing importance of human rights in international law after the Second World War. Drawing on Article 53 of the Vienna Convention on the Law and Treaties, which states that if a treaty comes into conflict with a peremptory norm of general international law, it becomes void, Chapter 2 emphasised that fundamental human rights require absolute protection and respect. In doing so, Chapter 2 unveiled the tension between the protection of a peremptory nature human rights and absolute structure of sovereignty. This tension explains the human rights challenge to immunities. Noting that increasing concerns over human rights chip away at the absolute sovereign structure of the State, Chapter 2 argued that absolute sovereignty is incompatible with international human rights in the current international order. As

such, absolute sovereignty is an outmoded system that inherently limits the essence of what *jus cogens* human right requires: fundamental protection.

The concept of immunity does not imply protection for States, Heads of State, and diplomatic agents by any means; at its core, immunity is designed to facilitate the smooth functioning of relations among States, State organs, and their representatives. In other words, there is a difference between immunity and impunity. This distinction between immunity and impunity was explored in Chapter 3, with the aim of identifying the source of the tension between the protection of human rights and the bestowal of immunity on States, Heads of State and diplomatic agents. Although the international community has tended to abolish impunity in cases involving the violation of human rights, this movement is not yet fully fledged and the abolition of impunity is far from assured. Be that as it may, equating immunity with impunity in cases of fundamental human rights violations presents a major handicap against the establishment of justice and the promotion of human rights. Chapter 3 aimed to develop the distinction between immunity and impunity in terms of the adverse impact of impunity in respect of *jus cogens* human rights. Chapter 3 also aimed to demonstrate that tolerating impunity threatens the future and development of human rights; consequently, it argued that the contradiction between immunity and human rights cannot be resolved unless impunity and immunity are clearly differentiated.

Chapter 4 explored the tension between immunity and impunity in relation to the State itself. While noting the strong roots of the State immunity principle under international law, the Chapter underscored the understanding that the law of State immunity has never been static through the evolution of international law. Chapter 4

also considered the controversial exceptions to State immunity and focused on the human rights challenge. In doing so, it illuminated the evolution from a State-oriented approach towards a human-oriented approach to international relations which is finding voice in international law.

Chapter 4 aimed to set out the tension between the protection of fundamental human rights and the preservation of State immunity. It argued that State immunity should not equate to State impunity if violations of fundamental human rights are at stake. Chapter 4 explored two inescapable interests in international law: the bestowal of State immunity and the protection of human rights. It argued that violations of human rights do not fall within the scope of either acts *jure imperii* or acts *jure gestionis*, that such violations are incompatible with *jus cogens* norms and that the protection of those human rights takes precedence over the bestowal of State immunity. Therefore, immunity should not be used as a shield to cover up human rights violations; otherwise, State immunity becomes State impunity.

Chapter 5 presented an unspoken aspect of Head of State immunity, namely that such immunity is at odds with the expectation that international law should be applied to challenge resistance to and promote respect for human rights. Chapter 5 considered the question of whether Head of State immunity gives rise to *de facto* impunity in the case of violations of *jus cogens* human rights committed by such Heads of State. While Chapter 5 emphasised the critical role of Head of State immunity in the context of international relations, it argues that Heads of State should not exempt from punishment when violations of those fundamental human rights are at stake.

Bestowing diplomatic immunity on diplomatic agents abroad is a contentious issue when those agents are accused of having committed violations of human rights recognised as *jus cogens*. As such, Chapter 6 argued that under such circumstances, there should be no derogation of the prohibition against violations of human rights; to do so erodes the distinction between diplomatic immunity and diplomatic impunity. This Chapter analysed *acta jure imperii* and *acta jure gestionis* to support the argument that violations of human rights fall outside the scope of sovereign or public acts of a State; accordingly, such violations can in no case be deemed as diplomatic functions. Therefore, diplomatic agents should not be allowed to use immunity as a shield to avoid punishment for violations of human rights committed by them.

There is currently no agreed system in law for limiting diplomatic immunity, particularly for incumbent diplomatic agents. Accordingly, Chapter 6 asserts that diplomatic immunity equates to impunity as long as it is leveraged to conceal violations of fundamental human rights. With reference to a number of prominent cases that have favoured diplomatic agents involving violations of those human rights, Chapter 6 noted remarkable deficiencies in international law in terms of promoting human rights. The Chapter draws from examples of judgements that have found in favour of the victims of such violations, to support the argument that the protection of human rights triumphs over the principle of immunity for diplomatic agents, despite the fact that efforts to promote human rights are not yet fully fledged.

The ever-changing character of the international society has necessitated revision of the concept of immunity. Increasing unease over matters relating to fundamental human rights and the changing dynamics of relations between States

have contributed significantly to the formalisation of the concept of immunity in contemporary international law.

The transition from absolute immunity to restrictive immunity is a critical milestone in the campaign to challenge violations of human rights, particularly those committed by States, Heads of State and diplomatic agents. Part III of the United Nations Convention on Jurisdictional Immunities of States and their Property⁷¹⁴ is regarded as a crucial foundation of the principle of restrictive immunity. To display the tension between the bestowal of immunity and the protection of fundamental human rights and also to analyse the attitude of international law towards the tension in question, this Thesis adopted the logic of restrictive immunity outlined by the United Nations Convention. Given that a State is entitled to functional immunity if it engages in the types of activities that fall under the principle of State immunity, it follows that there are certain types of activities that fall outside the scope of the principle of State immunity. Therefore, it is necessary to identify the nature of a State's activities in order to determine whether or not immunity applies to that State and its official representatives. This Thesis contends that while immunity applies in cases of governmental, non-commercial, sovereign or public acts (*acts jure imperii*), non-governmental, commercial, non-sovereign or private acts (*acta jure gestionis*) fall outside the scope of activities covered by immunity.⁷¹⁵ This is an important distinction with regards to the transition from absolute sovereign immunity to restrictive sovereign immunity. Violations of fundamental human rights naturally fall

⁷¹⁴ Part III of the United Nations Convention describes proceedings in which State immunity cannot be invoked.

⁷¹⁵ O'Keefe, Tams and Tzanakopoulos (n 42) 153–55; Sucharitkul, 'Preliminary Report on the Topic of Jurisdictional Immunities of States and Their Property' (n 283); Hazel Fox, *State Immunity: The Absolute and Restrictive Doctrines and New Challenges* (Audiovisual Library of International Law 2011) <http://legal.un.org/avl/ls/Fox_H_S_video_1.html> accessed 25 November 2015.

outside the scope of official governmental or public activities and thereby no immunity should be available in respect of such acts for States or their representatives.

In the future, the tension between immunity and human rights may be reconciled. Whether or not this reconciliation takes place will surely depend on the initiative of international law, society and scholars. Sample case studies, effective dissenting opinions, the contributions of international scholars etc. will certainly play an important role in shaping the future of human rights. To what extent the tension between them is either maintained or resolved depends on whether immunity is differentiated from impunity in relation to violations of fundamental human rights. As expressed in Chapters 4, 5, and 6, the protection of human rights should triumph over vesting immunity in States, Heads of State, and diplomatic agents, when the two principles clash because immunity should in no case amount to impunity. Such an approach would promote human rights and resolve the conflict between immunity and human rights. Furthermore, asserting that immunity does not amount to impunity would help prevent abuses of immunity by the State or its representatives and thereby support and enhance international human rights.

The strong dissenting opinions, legal holdings, legal regulations and international conventions on behalf of human rights complement each other and are also powerful expressions of a movement not only to develop human rights but also to chip away at impunity. International public opinion thus far destabilised the tension between human rights and immunity. That being said, international law has provided no clear guidance for reconciling this tension. Inconsistent legal judgements prove that there is no fixed opinion on the relative weight of the bestowal of

immunity and the protection of *jus cogens* human rights. Differentiating between impunity and immunity is vital to ensure continued progress on human rights and to protect the true purpose of immunities.

Legal opinions in support of domestic workers against their diplomat employers, prominent cases involving Heads of State who were held responsible or were sued for committing human rights violations and triumphant dissenting opinions that stand against human rights violations committed by States or their official representatives provide important guidance and signal a willingness to end impunity and reinforce international human rights. Legal, social and political support for this position undermines not only the elevation of absolute sovereignty over human rights but also the culture of impunity in international society.

In summary, this Thesis asserts that immunity should not equate to impunity in cases involving violations of human rights recognised as peremptory norms of general international law. Here, it should be noted that while the doctrine of immunity should be preserved, this doctrine should no longer apply to circumstances in which there has been a transgression of fundamental human rights within the scope of *jus cogens* norms. Violations of human rights by States and State representatives that abuse their immunity rights can only be challenged from this position. Ultimately, the international community should adopt this approach in order to reconcile the competing principles of immunity and human rights and most particularly to develop and protect international human rights in the contemporary international order.

8 BIBLIOGRAPHY

- Akande D, 'The Application of International Law Immunities in Prosecutions for International Crimes' in Michael Milde, Richard Vernon and Joanna Harrington (eds), *Bringing Power to Justice?: The Prospects of the International Criminal Court* (McGill-Queen's University Press 2006)
- , 'The Legal Nature of Security Council Referrals to the ICC and Its Impact on Al Bashir's Immunities' (2009) 7 *Journal of International Criminal Justice* 333
- Akande D and Shah S, 'Immunities of State Officials, International Crimes, and Foreign Domestic Courts' (2010) 21 *European Journal of International Law* 815
- Akhavan P, 'Beyond Impunity: Can International Criminal Justice Prevent Future Atrocities?' (2001) 95 *American Journal of International Law* 7
- Alebeek R van, *The Immunity of States and Their Officials in International Criminal Law and International Human Rights Law* (Oxford University Press 2008)
- Allain J, 'The Jus Cogens Nature of Non-Refoulement' (2002) 13 *International Journal of Refugee Law* 533
- , 'International Human Rights Law in Theory and Practice' in Koen De Feyter and George Pavlakos (eds), *The Tension Between Group Rights and Human Rights: A Multidisciplinary Approach*, vol 13 (Hart Publishing 2008)
- , *Slavery in International Law: Of Human Exploitation and Trafficking* (Martinus Nijhoff Publishers 2013)
- , 'The Implications of Preparatory Works for the Debate Regarding Slavery, Servitude and Forced Labour' in Adelle Blackett and Anne Trebilcock (eds), *Research Handbook on Transnational Labour Law* (Edward Elgar Publishing 2015)
- , *The Law and Slavery: Prohibiting Human Exploitation* (BRILL 2015)

- Allen K, 'Impunity - The Good News and The Bad' (*The Barrister*, 10 January 2003) <<http://www.barristermagazine.com/barrister/archivedsite/articles/issue18/impunity.htm>> accessed 18 January 2015
- Alston P and Goodman R, *International Human Rights: The Successor to International Human Rights in Context: Law, Politics and Morals* (Oxford University Press 2013)
- Anghie A, *Imperialism, Sovereignty and the Making of International Law* (Cambridge University Press 2007)
- , 'Rethinking Sovereignty in International Law' (2009) 5 *Annual Review of Law and Social Science* 291
- Annan K, 'United Nations Press Release' (1998) SG/SM/6597 L/2871
- , 'Two Concepts of Sovereignty' (1999) 352 (8137) *The Economist* 49
- Atlas T, 'Diplomatic Immunity Debated After Fatal Crash' *Chicago Tribune* (7 January 1997)
- Aust HP, *Complicity and the Law of State Responsibility* (Cambridge University Press 2011)
- Badr GM, *State Immunity: An Analytical and Prognostic View* (Martinus Nijhoff Publishers 1984)
- Baeza PR, 'Breaking the Human Link: The Medico-Psychiatric View of Impunity' in Charles Harper (ed), *Impunity: An Ethical Perspective: Six Case Studies from Latin America* (World Council of Churches Publications 1996)
- , 'Impunity: An Impossible Reparation' (2000) 69 *Nordic Journal of International Law* 27
- Bakircioglu O, 'Germany v Italy: The Triumph of Sovereign Immunity over Human Rights Law' (2012) 1 *International Human Rights Law Review* 93
- Bankas EK, *The State Immunity Controversy in International Law: Private Suits Against Sovereign States in Domestic Courts* (Springer 2005)

Bantekas I and Nash S, *International Criminal Law* (2nd edn, Cavendish Publishing 2003)

——, *International Criminal Law* (3rd edn, Routledge-Cavendish 2007)

Barile G, ‘The Protection of Human Rights in Article 60, Paragraph 5 of the Vienna Convention on the Law of Treaties’, *International Law at the Time of Its Codification: Essays in Honour of Roberto Ago*, vol 2 (Giuffrè 1987)

Barker JC, *The Abuse of Diplomatic Privileges and Immunities: A Necessary Evil?* (Ashgate 1996)

——, *International Law and International Relations* (Continuum 2000)

Barkin JS and Cronin B, ‘The State and The Nation: Changing Norms and The Rules of Sovereignty in International Relations’ (1994) 48 *International Organization* 107

Barston RP, *Modern Diplomacy* (4th. edn, Routledge 2014)

Bartelson J, *A Genealogy of Sovereignty* (Cambridge University Press 1996)

Bassiouni MC, ‘International Crimes: Jus Cogens and Obligatio Erga Omnes’ (1996) 59 *Law and Contemporary Problems* 63

——, ‘Searching for Peace and Achieving Justice: The Need for Accountability’ (1996) 59 *Law and Contemporary Problems* 9

——, ‘Combating Impunity for International Crimes’ (2000) 71 *University of Colorado Law Review* 409

Bassiouni MC, ‘The Permanent International Criminal Court’ in Mark Lattimer and Philippe Sands (eds), *Justice for Crimes Against Humanity* (Hart Publishing 2003)

Bassiouni MC, *Introduction to International Criminal Law* (2nd Revised, Martinus Nijhoff Publishers 2012)

- Beaulac S, 'The Westphalian Legal Orthodoxy—Myth or Reality?' (2000) 2 *Journal of the History of International Law* 148
- , 'The Westphalian Model in Defining International Law: Challenging the Myth' (2004) 8 *Australian Journal of Legal History* 181
- Belsky AC, Merva M and Roht-Arriaza N, 'Implied Waiver under the FSIA: A Proposed Exception to Immunity for Violations of Peremptory Norms of International Law' (1989) 77 *California Law Review* 365
- Berridge GR, *Diplomacy: Theory and Practice* (4th. edn, Palgrave Macmillan 2010)
- Berridge GR and Lloyd L, *The Palgrave Macmillan Dictionary of Diplomacy* (3rd. edn, Palgrave Macmillan 2012)
- Bettati M, 'The International Community and Limitations of Sovereignty' in Paul Ricoeur (ed), *Tolerance Between Intolerance and the Intolerable* (Berghahn Books 1996)
- Bianchi A, 'Denying State Immunity to Violators of Human Rights' (1994) 46 *Austrian Journal of Public and International Law* 195
- , 'Immunity versus Human Rights: The Pinochet Case' (1999) 10 *European Journal of International Law* 237
- , 'Human Rights and the Magic of Jus Cogens' (2008) 19 *European Journal of International Law* 491
- , 'Gazing at the Crystal Ball (again): State Immunity and Jus Cogens beyond Germany v Italy' (2013) 4 *Journal of International Dispute Settlement* 457
- Birdsall A, *The International Politics of Judicial Intervention: Creating a More Just Order* (Routledge 2009)
- Black HC, *Black's Law Dictionary: Definitions of the Terms and Phrases of American and English Jurisprudence, Ancient and Modern* (6th. edn, West Publishing Company 1990)

- Boas G, *Public International Law: Contemporary Principles and Perspectives* (Edward Elgar Publishing 2012)
- Boczek BA, *International Law: A Dictionary* (Scarecrow Press 2005)
- Bodin J, *Six Books of the Commonwealth* (MJ Tooley ed, Alden Press 1955)
- , *On Sovereignty: Four Chapters from the Six Books of the Commonwealth* (Julian H Franklin ed, Cambridge University Press 1992)
- Boister N and Cryer R (eds), *Documents on the Tokyo International Military Tribunal: Charter, Indictment, and Judgments* (Oxford University Press 2008)
- Born G, *International Civil Litigation in United States Courts: Commentary & Materials* (3rd. edn, Kluwer Law International 1996)
- Boven T van, 'Categories of Rights' in Daniel Moeckli, Sangeeta Shah and Sandesh Sivakumaran (eds), *International Human Rights Law* (2nd edn, Oxford University Press 2014)
- Bradley CA and Goldsmith JL, 'Pinochet and International Human Rights Litigation' (1999) 97 Michigan Law Review 2129
- Brody R and Ratner M (eds), *The Pinochet Papers: The Case of Augusto Pinochet Ugarte in Spain and Britain* (Kluwer Law International 2000)
- Bröhmer J, *State Immunity and the Violation of Human Rights* (Martinus Nijhoff Publishers 1997)
- , 'Diplomatic Immunity, Head of State Immunity, State Immunity: Misconceptions of a Notorious Human Rights Violator' (1999) 12 Leiden Journal of International Law 361
- , 'State Immunity and Sovereign Bonds' in Anne Peters and others (eds), *Immunities in the Age of Global Constitutionalism* (Brill/Martinus Nijhoff Publishers 2015)

- Brown J, 'Diplomatic Immunity: State Practice under the Vienna Convention on Diplomatic Relations' (1988) 37 *International and Comparative Law Quarterly* 53
- Brown S, *International Relations in a Changing Global System: Toward a Theory of the World Polity* (Westview Press 1995)
- Brown W, *Walled States, Waning Sovereignty* (MIT Press 2010)
- Brownlie I, *Principles of Public International Law* (7th edn, Oxford University Press 2008)
- Bruns K, *A Cornerstone of Modern Diplomacy: Britain and the Negotiation of the 1961 Vienna Convention on Diplomatic Relations* (Bloomsbury Publishing 2014)
- Buchanan A, 'Rawls's Law of Peoples: Rules for a Vanished Westphalian World' in Chandran Kukathas (ed), *John Rawls: Political Liberalism and the Law of Peoples* (Routledge 2003)
- Buergenthal T, Shelton DL and Stewart DP, *International Human Rights in a Nutshell* (4th edn, West Publishing Company 2009)
- Bull H, *The Anarchical Society: A Study of Order in World Politics* (Columbia University Press 1977)
- Burchell G, Gordon C and Miller P (eds), *The Foucault Effect: Studies in Governmentality* (1st edn, University Of Chicago Press 1991)
- Byers M, 'Conceptualising the Relationship between Jus Cogens and Erga Omnes Rules' (1997) 66 *Nordic Journal of International Law* 211
- , 'The Law and Politics of the Pinochet Case' (2000) 10 *Duke Journal of Comparative & International Law* 415
- Cameron I, 'First Report of the Foreign Affairs Committee of the House of Commons' (1985) 34 *International & Comparative Law Quarterly* 610

- Caplan LM, 'State Immunity, Human Rights, and Jus Cogens: A Critique of the Normative Hierarchy Theory' (2003) 97 *American Journal of International Law* 741
- Cassese A, 'When May Senior State Officials Be Tried for International Crimes? Some Comments on the Congo v. Belgium Case' (2002) 13 *European Journal of International Law* 853
- Cassese A and Gaeta P, *International Criminal Law* (2nd edn, Oxford University Press 2008)
- Cassidy J, 'Emergence of the Individual as an International Juristic Entity: Enforcement of International Human Rights' (2004) 9 *Deakin Law Review* 533
- Chatterjee C, *International Law and Diplomacy* (Routledge 2007)
- Chen L-C, *An Introduction to Contemporary International Law: A Policy-Oriented Perspective* (3rd. edn, Oxford University Press 2015)
- Chinkin C, 'Jus Cogens, Article 103 of the UN Charter and Other Hierarchical Techniques of Conflict Solution' (2006) 17 *Finnish Yearbook of International Law* 63
- Clough S, 'Colombian Official Cleared of Murdering Son's Mugger' *The Telegraph* (23 July 2003)
- Cohen JL, 'Whose Sovereignty? Empire Versus International Law' (2004) 18 *Ethics & International Affairs* 1
- Crawford J, 'International Law and Foreign Sovereigns: Distinguishing Immune Transactions' (1984) 54 *British Yearbook of International Law* 75
- , 'Third Report on State Responsibility' (2000) UN Doc. A/CN.4/507
- , *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries* (Cambridge University Press 2002)

- , *Multilateral Rights and Obligations in International Law*, vol 319 (Collected Courses of the Hague Academy of International Law 2006)
- , ‘Sovereignty as a Legal Value’ in James Crawford and Martti Koskenniemi (eds), *The Cambridge Companion to International Law* (Cambridge University Press 2012)
- , *Brownlie’s Principles of Public International Law* (8th edn, Oxford University Press 2012)
- Criddle EJ and Fox-Decent E, ‘A Fiduciary Theory of Jus Cogens’ (2009) 34 *Yale Journal of International Law* 331
- Cryer R and others, *An Introduction to International Criminal Law and Procedure* (2nd edn, Cambridge University Press 2010)
- Cryer R and others, *Research Methodologies in EU and International Law* (Hart Publishing 2011)
- Currie JH, *Public International Law* (2nd. edn, Irwin Law Inc 2008)
- D’Amato A, ‘The Concept of Human Rights in International Law’ (1982) 82 *Columbia Law Review* 1110
- , ‘It’s a Bird, It’s a Plane, It’s Jus Cogens’ (1990) 6 *Connecticut Journal of International Law* 1
- Darehshori S, *Selling Justice Short: Why Accountability Matters for Peace* (Human Rights Watch 2009)
- Delbrueck J, ‘International Protection of Human Rights and State Sovereignty’ in Frederick E Snyder and Surakiart Sathirathai (eds), *Third World Attitudes Toward International Law: An Introduction* (Martinus Nijhoff Publishers 1987)
- Denza E, *Diplomatic Law: Commentary on the Vienna Convention on Diplomatic Relations* (2nd. edn, Oxford University Press 2004)

- , ‘The 2005 UN Convention on State Immunity in Perspective’ (2006) 55 *International and Comparative Law Quarterly* 395
- , ‘Vienna Convention on Diplomatic Relations’ (*United Nations Audiovisual Library of International Law*) <<http://legal.un.org/avl/ha/vcdr/vcdr.html>> accessed 29 April 2016
- De Wet E, ‘The Prohibition of Torture as an International Norm of Jus Cogens and Its Implications for National and Customary Law’ (2004) 15 *European Journal of International Law* 97
- , ‘Jus Cogens and Obligations Erga Omnes’ in Dinah Shelton (ed), *The Oxford Handbook of International Human Rights Law* (Oxford University Press 2013)
- Dicey AV, *Introduction to the Study of the Law of the Constitution* (Liberty Classics 1915)
- Dickinson ED, *The Equality of States in International Law* (Harvard University Press 1920)
- Dinstein Y, ‘Diplomatic Immunity From Jurisdiction Ratione Materiae’ (1966) 15 *International and Comparative Law Quarterly* 76
- Donnelly J, *Universal Human Rights in Theory and Practice* (3rd edn, Cornell University Press 2013)
- , ‘State Sovereignty and International Human Rights’ (2014) 28 *Ethics & International Affairs* 225
- Dorfman A, *Exorcising Terror: The Incredible Unending Trial of General Augusto Pinochet* (Seven Stories Press 2002)
- Eboe-Osuji C, ‘State Immunity, State Atrocities, and Civil Justice in the Modern Era of International Law’ in Don M McRae (ed), *The Canadian Yearbook of International Law*, vol 45 (University of British Columbia Press 2007)

- Egede E and Sutch P, *The Politics of International Law and International Justice* (Edinburgh University Press 2013)
- Endicott T, 'The Logic of Freedom and Power' in Samantha Besson and John Tasioulas (eds), *The Philosophy of International Law* (Oxford University Press 2010)
- Fairman C, 'Some Disputed Applications of the Principle of State Immunity' (1928) 22 *American Journal of International Law* 566
- Falk R, 'The Role of Domestic Courts in the International Legal Order' (1964) 39 *Indiana Law Journal* 429
- , 'Responding to Severe Violations' in Jorge I Domínguez (ed), *Enhancing global human rights* (McGraw-Hill 1979)
- , *Human Rights and State Sovereignty* (Holmes & Meier Publishers 1981)
- , *Law in an Emerging Global Village: A Post-Westphalian Perspective* (Transnational Publishers 1998)
- , *Human Rights Horizons: The Pursuit of Justice in a Globalizing World* (Routledge 2000)
- , 'Revisiting Westphalia, Discovering Post-Westphalia' (2002) 6 *The Journal of Ethics* 311
- , 'The Post-Westphalia Enigma' in Björn Hettne and Bertil Odén (eds), *Global governance in the 21st century: alternative perspectives on world order* (Almqvist & Wiksell International 2002)
- Farhangi LS, 'Insuring against Abuse of Diplomatic Immunity' (1985) 38 *Stanford Law Review* 1517
- Fassbender B, 'Sovereignty and Constitutionalism in International Law' in Neil Walker (ed), *Sovereignty in Transition* (Hart Publishing 2006)
- Finke J, 'Sovereign Immunity: Rule, Comity or Something Else?' (2010) 21 *European Journal of International Law* 853

——, ‘Sovereign Immunity: Rule, Comity or Something Else?’ (2010) 21 *European Journal of International Law* 853

Fitzmaurice G, *The General Principles of International Law Considered from the Standpoint of the Rule of Law*, vol 92 (Collected Courses of the Hague Academy of International Law 1957)

——, ‘Third Report on the Law of Treaties’ (UN Yearbook of the International Law Commission 1958) UN Doc. A/CN.4/115 vol. II <http://legal.un.org/ilc/documentation/english/a_cn4_115.pdf> accessed 4 March 2016

Foakes J, ‘State Immunity: Recent Developments and Prospects’ [2013] Chatham House Briefing Paper

——, *The Position of Heads of State and Senior Officials in International Law* (Oxford University Press 2014)

——, ‘Immunity for International Crimes? Developments in the Law on Prosecuting Heads of State in Foreign Courts’ (*Chatham House*) <<http://www.chathamhouse.org/node/6374>> accessed 12 November 2014

Fomerand J, *Historical Dictionary of Human Rights* (Rowman & Littlefield 2014)

Fox H, *The Law of State Immunity* (Oxford University Press 2002)

——, ‘In Defence of State Immunity: Why the UN: Convention on State Immunity Is Important’ (2006) 55 *International and Comparative Law Quarterly* 399

——, ‘International Law and Restraints on the Exercise of Jurisdiction by National Courts of States’ in Malcolm Evans (ed), *International Law* (3rd edn, Oxford University Press 2010)

——, *State Immunity: The Absolute and Restrictive Doctrines and New Challenges* (Audiovisual Library of International Law 2011) <http://legal.un.org/avl/ls/Fox_H_S_video_1.html> accessed 25 November 2015

- Fox QC H and Webb P, *The Law of State Immunity* (3rd edn, Oxford University Press 2013)
- Frey LS and Frey ML, *The History of Diplomatic Immunity* (Ohio State University Press 1999)
- Gaeta P, 'Official Capacity and Immunities' in Antonio Cassese, Paola Gaeta and John RWD Jones (eds), *The Rome Statute of the International Criminal Court: A Commentary*, vol I (Oxford University Press 2002)
- , 'Does President Al Bashir Enjoy Immunity from Arrest?' (2009) 7 *Journal of International Criminal Justice* 315
- Gaja G, *Jus Cogens beyond the Vienna Convention*, vol 172 (Collected Courses of the Hague Academy of International Law 1981)
- Garnett R, 'State and Diplomatic Immunity and Employment Rights: European Law to the Rescue?' (2015) 64 *International and Comparative Law Quarterly* 783
- Gellately R, *Stalin's Curse: Battling for Communism in War and Cold War* (Alfred A Knopf 2013)
- Giuttari TR, *The American Law of Sovereign Immunity: An Analysis of Legal Interpretation* (Praeger Publishers 1970)
- Goldmann M, 'Arrest Warrant Case (Democratic Republic of the Congo v Belgium)', *Max Planck Encyclopedia of Public International Law (MPEPIL)* (Oxford University Press 2009)
- Gómez-Robledo JM, 'Vienna Convention on Consular Relations' (*United Nations Audiovisual Library of International Law*) <<http://legal.un.org/avl/ha/vccr/vccr.html>> accessed 29 April 2016
- Gowlland-Debbas V, 'Judicial Insights into the Fundamental Values and Interests of the International Community' in A Sam Muller, David Raič and JM Thuránszky (eds), *The International Court of Justice: Its Future Role After Fifty Years* (Martinus Nijhoff Publishers 1997)

Griffin J, *On Human Rights* (Oxford University Press 2009)

Gross L, 'The Peace of Westphalia: 1648-1948' (1948) 42 *The American Journal of International Law* 20

——, 'The Case Concerning United States Diplomatic and Consular Staff in Tehran: Phase of Provisional Measures' (1980) 74 *American Journal of International Law* 395

Guissé El-H, 'Final Report on the Question of the Impunity of Perpetrators of Human Rights Violations (Economic, Social and Cultural Rights) pursuant to Sub-Commission Resolution 1996/24' (Equipo Nizkor and Derechos Human Rights 1997) E/CN.4/Sub.2/1997/8

Haimbaugh GD, 'Jus Cogens: Root & Branch (An Inventory)' (1987) 3 *Touro Law Review* 203

Hannikainen L, *Peremptory Norms (Jus Cogens) in International Law: Historical Development, Criteria, Present Status* (Finnish Lawyers' Publishing Company 1988)

Harvard Law School Supplement: Research in International Law, Reporter Philip C Jessup, 'Competence of Courts in Regard to Foreign States' (1932) 26 *The American Journal of International Law* 451

Hegel GWF, *Elements of the Philosophy of Rights* (Allen W Wood ed, HB Nisbet tr, 8th edn, Cambridge University Press 2003)

Held D and McGrew A, 'Globalization and the Liberal Democratic State' (1993) 28 *Government and Opposition* 261

Henkin L, 'Human Rights and State Sovereignty' (1996) 25 *Georgia Journal of International and Comparative Law* 31

——, 'That S Word: Sovereignty, and Globalization, and Human Rights, Et Cetera' (1999) 68 *Fordham Law Review* 1

- Heri C, 'Enforced Disappearance and the European Court of Human Rights' *Ratione Temporis Jurisdiction: A Discussion of Temporal Elements in Janowiec and Others v. Russia* (2014) 12 *Journal of International Criminal Justice* 751
- Hettne B, 'The Fate of Citizenship in Post-Westphalia' (2000) 4 *Citizenship Studies* 35
- Higgins R, 'The Abuse of Diplomatic Privileges and Immunities: Recent United Kingdom Experience' (1985) 79 *American Journal of International Law* 641
- , *Problems and Process: International Law and How We Use It* (Clarendon Press 1994)
- Hill C, 'Sanctions Constraining Diplomatic Representatives to Abide by the Local Law' (1931) 25 *The American Journal of International Law* 252
- Hillier T, *Sourcebook on Public International Law* (Cavendish Publishing Ltd 1998)
- Hinsley FH, *Sovereignty* (2nd edn, Cambridge University Press 1986)
- Hirsh D, *Law Against Genocide: Cosmopolitan Trials* (Glasshouse Press and Cavendish 2004)
- Hobbes T, *Leviathan* (JCA Gaskin ed, Oxford University Press 1998)
- Hoffmann S, *World Disorders: Troubled Peace in the PostDCold War Era* (Rowman & Littlefield Publishers 1998)
- Hooper K, 'The Ending of Impunity and the Fight for Justice for Victims of Human Rights Violations: A Chasm Too Great To Be Crossed?' (2006) 9 *Flinders Journal of Law Reform* 181
- Hutchinson T, 'Doctrinal Research: Researching the Jury' in Dawn Watkins and Mandy Burton (eds), *Research Methods in Law* (Routledge 2013)
- Hutchinson T and Duncan N, 'Defining and Describing What We Do: Doctrinal Legal Research' (2012) 17 *Deakin Law Review* 83

- Inazumi M, *Universal Jurisdiction in Modern International Law: Expansion of National Jurisdiction for Prosecuting Serious Crimes under International Law* (Intersentia 2004)
- Jackson R, *Sovereignty: The Evolution of an Idea* (Polity 2007)
- Jackson RH, *Quasi-States: Sovereignty, International Relations and the Third World* (Cambridge University Press 1993)
- Jacobs FG, *The Sovereignty of Law: The European Way* (Cambridge University Press 2007)
- Jalloh CC, 'Prosecutor v. Taylor' (2014) 108 *The American Journal of International Law* 58
- Janofsky M, 'Georgian Diplomat Pleads Guilty in Death of Teen-Age Girl' *The New York Times* (9 October 1997)
- Jennings SR and Watts SA (eds), *Oppenheim's International Law - Vol. I, Peace - Introduction and Part I* (9th edn, Longman 1992)
- Johansen RC, 'Peace and Justice? The Contribution of International Judicial Processes to Peacebuilding' in Daniel Philpott and Gerard F Powers (eds), *Strategies of Peace: Transforming Conflict in a Violent World* (Oxford University Press 2010)
- Johnson TA, 'A Violation of Jus Cogens Norms as an Implicit Waiver of Immunity Under the Federal Sovereign Immunities Act' (1995) 19 *Maryland Journal of International Law* 259
- Joyner CC, 'Redressing Impunity for Human Rights Violations: The Universal Declaration and the Search for Accountability' (1998) 26 *Denver Journal of International Law and Policy* 591
- Keating M, *Plurinational Democracy: Stateless Nations in a Post-Sovereignty Era* (Oxford University Press 2001)
- Kelsen H, *Principles of International Law* (Rinehart 1952)

- , ‘Sovereignty and International Law’ (1960) 48 *Georgetown Law Journal* 627
- , *Pure Theory of Law* (Max Knight tr, The Lawbook Exchange, Ltd 2005)
- Keohane R, ‘Ironies of Sovereignty: The European Union and the United States’ (2002) 40 *Journal of Common Market Studies* 743
- Keohane RO, ‘Sovereignty, Interdependence, and International Institutions’ in Linda B Miller and Michael Joseph Smith (eds), *Ideas & Ideals: Essays on Politics in Honor of Stanley Hoffmann* (Westview Press 1993)
- Keppler E, ‘This Is What the Conviction of Chad’s Former Dictator Means for African Human Rights’ *The Washington Post* (10 June 2016)
- Kerry J, ‘Conviction of Hissene Habre for War Crimes, Crimes Against Humanity, and Torture’ (*U.S. Department of State*, 30 May 2016)
<<http://www.state.gov/secretary/remarks/2016/05/257811.htm>> accessed 27 October 2016
- King HTJ, ‘The Limitations of Sovereignty from Nuremberg to Sarajevo’ (1994) 20 *Canada – United States Law Journal*
- Kloth M, *Immunities and the Right of Access to Court Under Article 6 of the European Convention on Human Rights* (Martinus Nijhoff Publishers 2010)
- Klug F, ‘Rights and Righteousness: Friends or Foes?’ in Geoff Gilbert, Françoise Hampson and Clara Sandoval (eds), *Strategic Visions for Human Rights: Essays in Honour of Professor Kevin Boyle* (Routledge 2011)
- Kolodkin RA, ‘Preliminary Report on Immunity of State Officials from Foreign Criminal Jurisdiction, 6th Session’ (International Law Commission 2008) UN Doc. A/CN.4/601
- , ‘Second Report on Immunity of State Officials from Foreign Criminal Jurisdiction, 62nd Session’ (International Law Commission 2010) UN Doc. A/CN.4/631

- Koskenniemi M, 'The Politics of International Law' (1990) 1 *European Journal of International Law* 4
- , 'The Future of Statehood' (1991) 32 *Harvard International Law Journal* 397
- , 'The Wonderful Artificiality of States' (1994) 88 *Proceedings of the Annual Meeting (American Society of International Law)* 22
- , 'Hierarchy in International Law: A Sketch' (1997) 8 *European Journal of International Law* 566
- , *From Apology to Utopia: The Structure of International Legal Argument* (Cambridge University Press 2006)
- , 'What Use for Sovereignty Today?' (2011) 1 *Asian Journal of International Law* 61
- , 'International Law in the World of Ideas' in James Crawford and Martti Koskenniemi (eds), *The Cambridge Companion to International Law* (Cambridge University Press 2012)
- Krasner SD, *Sovereignty: Organized Hypocrisy* (Princeton University Press 1999)
- , 'Problematic Sovereignty' in Stephen D Krasner (ed), *Problematic Sovereignty: Contested Rules and Political Possibilities* (Columbia University Press 2001)
- Lansford T, 'Post-Westphalian Europe? Sovereignty and the Modern Nation-State' (2000) 37 *International Studies* 1
- Larkins J, *From Hierarchy to Anarchy: Territory and Politics before Westphalia* (Palgrave Macmillan 2009)
- Lauren PG, 'From Impunity to Accountability: Forces of Transformation and The Changing International Human Rights Context' in Ramesh Chandra Thakur and Petrus Adrianus Maria Malcontent (eds), *From Sovereign Impunity to International Accountability: The Search for Justice in a World of States* (United Nations University Press 2004)

- Lauterpacht E and Greenwood CJ, *International Law Reports*, vol 64 (Cambridge University Press 1983)
- Lauterpacht E and Greenwood CJ (eds), *International Law Reports*, vol 82 (Grotius Publications Ltd 1990)
- Lauterpacht H, 'Decisions of Municipal Courts as a Source of International Law' (1929) 10 *British Yearbook of International Law* 65
- Lauterpacht H, 'The Problem of Jurisdictional Immunities of Foreign States' (1951) 28 *British Year Book of International Law* 220
- Lauterpacht H, *Recognition in International Law* (Cambridge University Press 2013)
- Left S, 'The Untouchables' *The Guardian* (6 August 2004)
- Lepard BD, 'International Law and Human Rights' in Thomas Cushman (ed), *Handbook of Human Rights* (Routledge 2014)
- Lewis CJ, *State and Diplomatic Immunity* (2nd. edn, Stevens & Sons Ltd 1985)
- Linderfalk U, 'The Effect of Jus Cogens Norms: Whoever Opened Pandora's Box, Did You Ever Think About the Consequences?' (2007) 18 *European Journal of International Law* 853
- MacCormick N, *Questioning Sovereignty: Law, State, and Nation in the European Commonwealth* (Oxford University Press 2001)
- , 'On Sovereignty and Post-Sovereignty: Questioning Sovereignty' in Keith C Culver (ed), *Readings in the Philosophy of Law* (2nd edn, Broadview Press 2008)
- Maginnis VL, 'Limiting Diplomatic Immunity: Lessons Learned from the 1946 Convention on the Privileges and Immunities of the United Nations' (2003) 28 *Brooklyn Journal of International Law* 989
- Malanczuk P, 'Countermeasures and Self-Defence as Circumstances Precluding Wrongfulness in the International Law Commission's Draft Articles on State Responsibility' (1983) 43 *Heidelberg Journal of International Law* 705

- , *Akehurst's Modern Introduction to International Law* (7th edn, Routledge 1997)
- Mann T, *Australian Law Dictionary* (Oxford University Press 2010)
- Maritain J, 'The Concept of Sovereignty' in WJ Stankiewicz (ed), *In defense of sovereignty* (Oxford University Press 1969)
- Martin EA, *A Dictionary of Law* (Oxford University Press 2009)
- Martin FF and others, *International Human Rights and Humanitarian Law: Treaties, Cases and Analysis* (Cambridge University Press 2006)
- McCaffrey S, Shelton D and Cerone J, *Public International Law: Cases, Problems, and Texts* (LexisNexis 2010)
- McClanahan GV, *Diplomatic Immunity: Principles, Practices, Problems* (C Hurst & Co Publishers 1989)
- McCorquodale R, 'The Individual and the International Legal System' in Malcolm D Evans (ed), *International Law* (Oxford University Press 2006)
- McDonald GK, 'Problems, Obstacles and Achievements of the ICTY' (2004) 2 *Journal of International Criminal Justice* 558
- McDonald GK and Swaak-Goldman O (eds), *Substantive and Procedural Aspects of International Criminal Law: The Experience of International and National Courts: Materials*, vol 2 (Kluwer Law International 2000)
- McDougal MS, Lasswell HD and Chen L, *Human Rights and World Public Order: The Basic Policies of an International Law of Human Dignity* (Yale University Press 1980)
- McGregor L, 'State Immunity and Jus Cogens' (2006) 55 *International and Comparative Law Quarterly* 437
- , 'Torture and State Immunity: Deflecting Impunity, Distorting Sovereignty' (2007) 18 *European Journal of International Law* 903

——, ‘State Immunity and Human Rights Is There a Future after Germany v. Italy?’ (2013) 11 Journal of International Criminal Justice 125

McNair LAD, *The Law of Treaties* (Clarendon Press 1961)

McSherry JP and Mejía RM, ‘Confronting the Question of Justice in Guatemala’ (1992) 19 Social Justice 1

Mejía RM, ‘The Struggle Against Impunity in Guatemala’ (1999) 26 Social Justice 55

Michaels DB, *International Privileges And Immunities: A Case for a Universal Statute* (Martinus Nijhoff Publishers 1971)

Mik C, ‘Jus Cogens in Contemporary International Law’ (2013) 33 Polish Yearbook of International Law 27

Miller B, ‘Diplomat Sentenced in Teen’s Death’ *The Washington Post* (20 December 1997)

Minnerop P and others, *World Court Digest 2001 - 2005*, vol 4 (Springer Science & Business Media 2009)

Minow M, *Between Vengeance and Forgiveness: Facing History After Genocide and Mass Violence* (Beacon Press 1998)

Miyoshi M, ‘Sovereignty and International Law’ (The State of Sovereignty: 20th Anniversary Conference of the International Boundaries Research Unit, Durham, 1 April 2009)

Moghalu KC, ‘Reconciling Fractured Societies: An African Perspective on the Role of Judicial Prosecutions’ in Ramesh Chandra Thakur and Petrus Adrianus Maria Malcontent (eds), *From Sovereign Impunity to International Accountability: The Search for Justice in a World of States* (United Nations University Press 2004)

Morris M, ‘The Democratic Dilemma of the International Criminal Court’ (2002) 5 Buffalo Criminal Law Review 591

- Murphy SD, *United States Practice in International Law - Vol. 1: 1999-2001* (Cambridge University Press 2003)
- , ‘Does International Law Obligate States to Open Their National Courts to Persons for the Invocation of Treaty Norms That Protect or Benefit Persons?’ in David Sloss (ed), *The Role of Domestic Courts in Treaty Enforcement: A Comparative Study* (Cambridge University Press 2009)
- Needham J, ‘Protection or Prosecution for Omar Al Bashir? The Changing State of Immunity in International Criminal Law’ (2011) 17 *Auckland University Law Review* 219
- Neff SC (ed), *Hugo Grotius on the Law of War and Peace* (Cambridge University Press 2012)
- Newman S, ‘Introduction: Re- Encountering Stirner’s Ghosts’ in Saul Newman (ed), *Max Stirner* (Palgrave Macmillan 2011)
- Nowak M and Suntinger W, ‘International Mechanisms for the Prevention of Torture’ in Arie Bloed and others (eds), *Monitoring Human Rights in Europe: Comparing International Procedures and Mechanisms* (Martinus Nijhoff Publishers 1993)
- O’Connell DP, *International Law* (2nd. edn, Stevens 1970)
- Ogdon M, *Juridical Bases of Diplomatic Immunity: A Study in the Origin, Growth and Purpose of the Law* (John Byrne & Co 1936)
- O’Keefe R, ‘State Immunity and Human Rights: Heads and Walls, Hearts and Minds’ (2011) 44 *Vanderbilt Journal of Transnational Law* 999
- , *International Criminal Law* (Oxford University Press 2015)
- O’Keefe R, Tams CJ and Tzanakopoulos A (eds), *The United Nations Convention on Jurisdictional Immunities of States and Their Property: A Commentary* (Oxford University Press 2013)

- Oppenheim L, *International Law: A Treatise - Peace*, vol 1 (Ronald F Roxburgh ed, 3rd edn, The Lawbook Exchange 2008)
- Orakhelashvili A, 'Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)' (2002) 96 *American Journal of International Law* 677
- , *Peremptory Norms in International Law* (Oxford University Press 2006)
- , 'State Immunity and Hierarchy of Norms: Why the House of Lords Got It Wrong' (2007) 18 *European Journal of International Law* 955
- , 'Immunities of State Officials, International Crimes, and Foreign Domestic Courts: A Reply to Dapo Akande and Sangeeta Shah' (2011) 22 *European Journal of International Law* 849
- Orentlicher DF, 'Swapping Amnesty for Peace and the Duty to Prosecute Human Rights Crimes' (1997) 3 *ILSA Journal of International & Comparative Law* 713
- Papillon S, 'Has the United Nations Security Council Implicitly Removed Al Bashir's Immunity?' (2010) 10 *International Criminal Law Review* 275
- Parker K and Neylon LB, 'Jus Cogens: Compelling the Law of Human Rights' (1989) 12 *Hastings International and Comparative Law Review* 411
- Pasek B, 'Russia Opens Its Files on the Katyn Massacre' [2010] *Time*
- Pauwelyn J, *Conflict of Norms in Public International Law: How WTO Law Relates to Other Rules of International Law* (Cambridge University Press 2003)
- Pedretti R, *Immunity of Heads of State and State Officials for International Crimes* (Martinus Nijhoff Publishers 2014)
- Penrose MM, 'Impunity - Inertia, Inaction, and Invalidity: A Literature Review' (1999) 17 *Boston University International Law Journal* 269
- Pérez-León-Acevedo JP, 'The Conviction of Hissène Habré by the Extraordinary African Chambers in the Senegalese Courts: Bringing Justice in Cases of

Serious Human Rights Violations in Africa' (30 June 2016)

<<https://africlaw.com/tag/international-crimes/>> accessed 27 October 2016

Pierson C, 'Pinochet and the End of Immunity: England's House of Lords Holds That a Former Head of State Is Not Immune for Torture' (2000) 14 Temple International and Comparative Law Journal 263

Popovski V, 'Sovereignty as Duty to Protect Human Rights' (2004) 41 UN Chronicle

Provost R, *International Human Rights and Humanitarian Law* (Cambridge University Press 2004)

Rawls J, *The Law of Peoples: With, The Idea of Public Reason Revisited* (Harvard University Press 2001)

Reisman WM, 'Sovereignty and Human Rights in Contemporary International Law' (1990) 84 American Journal of International Law 866

Reus-Smit C, 'Human Rights and the Social Construction of Sovereignty' (2001) 27 Review of International Studies 519

Rios GL and Flaherty EP, 'Mr. Ban - Tear Down the U.N.'s Wall of Immunity/Impunity (Before a National Court Does)!!' (2012) 18 ILSA Journal of International and Comparative Law 439

Roberts I (ed), *Satow's Diplomatic Practice* (6th ed, Oxford University Press 2009)

Rodham Clinton H, 'Remarks at the President's Interagency Task Force to Monitor and Combat Trafficking in Persons' (*U.S. Department of State*, 1 February 2011)

<<http://www.state.gov/secretary/20092013clinton/rm/2011/02/155831.htm>>

accessed 7 June 2015

Rodley NS, 'Breaking the Cycle of Impunity for Gross Violations of Human Rights: The Pinochet Case in Perspective' (2000) 69 Nordic Journal of International Law 11

- Roht-Arriaza N (ed), *Impunity and Human Rights in International Law and Practice* (Oxford University Press 1995)
- Röling BVA and Rüter CF (eds), *The Tokyo Judgment: The International Military Tribunal for the Far East (I.M.T.F.E.), 29 April 1946 - 12 November 1948* (APA - University Press Amsterdam 1977)
- Rosenbaum EM, 'Remarks' (2006) 27 Cardozo Law Review 1667
- Rosser N, 'Diplomat to Be Quizzed over Killing' *The Evening Standard* (27 September 2002)
- Ross M, 'Rethinking Diplomatic Immunity: A Review of Remedial Approaches to Address the Abuses of Diplomatic Privileges and Immunities' (1989) 4 American University International Law Review 173
- Ryngaert C, 'Jones v United Kingdom: The European Court of Human Rights Restricts Individual Accountability for Torture' (2014) 30 Utrecht Journal of International and European Law 47
- Satow SE, *A Guide to Diplomatic Practice* (Sir George Nevile Bland ed, 4th. edn, Longmans, Green and Co 1957)
- Schachter O, *International Law in Theory and Practice: General Course in Public International Law*, vol 178 (Collected Courses of the Hague Academy of International Law 1982)
- Scharf MP and Szonert-Binienda M, 'Katyn: Justice Delayed or Justice Denied?: Report of the Cleveland Experts' Meeting' (2012) 44 Case Western Reserve Journal of International Law 535
- Schiff BN, 'Universalism Meets Sovereignty at the International Criminal Court' in Noha Shawki and Michaelene Cox (eds), *Negotiating Sovereignty and Human Rights: Actors and Issues in Contemporary Human Rights Politics* (Ashgate Publishing, Ltd 2009)
- Schmitt C, *The Concept of the Political* (George Schwab ed, University of Chicago Press 1996)

- , *The Nomos of the Earth in the International Law of the Jus Publicum Europaeum* (Telos Press Publishing 2003)
- , *Political Theology: Four Chapters on the Concept of Sovereignty* (University of Chicago Press 2005)
- Schreuer C, 'The Waning of the Sovereign State: Towards a New Paradigm for International Law?' (1993) 4 *European Journal of International Law* 447
- Sen B, *The Diplomat's Handbook of International Law and Practice* (3rd edn, Martinus Nijhoff Publishers 1965)
- Shah S, 'Jurisdictional Immunities of the State: Germany v Italy' (2012) 12 *Human Rights Law Review* 555
- Shaw MN, *International Law* (7th. edn, Cambridge University Press 2014)
- Shelton D, 'Normative Hierarchy in International Law' (2006) 100 *American Journal of International Law* 291
- Shue H, *Basic Rights: Subsistence, Affluence, and U.S. Foreign Policy* (2nd edn, Princeton University Press 1996)
- Sikkink K, 'The Power of Principled Ideas: Human Rights Policies in the United States and Western Europe' in Judith Goldstein and Robert Owen Keohane (eds), *Ideas and Foreign Policy: Beliefs, Institutions, and Political Change* (Cornell University Press 1993)
- Silva GE do N, *Diplomacy in International Law* (Sijthoff 1972)
- Simma B, *From Bilateralism to Community Interest in International Law*, vol 250 (Collected Courses of the Hague Academy of International Law 1994)
- Simma B and Muller AT, 'Exercise and Limits of Jurisdiction' in James Crawford and Martti Koskeniemi (eds), *The Cambridge Companion to International Law* (Cambridge University Press 2012)
- Simpson G, *Great Powers and Outlaw States: Unequal Sovereigns in the International Legal Order* (Cambridge University Press 2004)

- Sinclair SIM, *The Vienna Convention on the Law of Treaties* (2nd edn, Manchester University Press 1984)
- Sluiter G and others, *International Criminal Procedure: Principles and Rules* (Oxford University Press 2013)
- Smith RKM, 'Human Rights in International Law' in Michael Goodhart (ed), *Human Rights: Politics and Practice* (2nd edn, Oxford University Press 2013)
- Smith TW, *History and International Relations* (Taylor & Francis 2005)
- Solis GD, *The Law of Armed Conflict: International Humanitarian Law in War* (Cambridge University Press 2010)
- Steinberger H, 'Sovereignty' in Rudolf Dolzer and others (eds), *Encyclopedia of Public International Law: States: Responsibility of States: International Law and Municipal Law*, vol 10 (North-Holland Publishing Company 1987)
- Stephen JF, *A History of the Criminal Law of England*, vol II (Cambridge University Press 2014)
- Stern B, 'Immunities for Heads of State: Where Do We Stand?' in Mark Lattimer and Philippe Sands (eds), *Justice for Crimes Against Humanity* (Hart Publishing 2003)
- Sucharitkul S, *Immunities of Foreign States before National Authorities*, vol 149 (Collected Courses of the Hague Academy of International Law 1976)
- , 'Preliminary Report on the Topic of Jurisdictional Immunities of States and Their Property' (UN Yearbook of the International Law Commission 1979) A/CN.4/323 vol. II(1) <http://legal.un.org/ilc/documentation/english/a_cn4_323.pdf> accessed 4 March 2016
- , 'Jurisdictional Immunities in Contemporary International Law from Asian Perspectives' (2005) 4 Chinese Journal of International Law 1

- Suy E, 'The Concept of Jus Cogens in Public International Law', *Lagonissi Conference on International Law, Papers and Proceedings* (1967)
- Sztucki J, *Jus Cogens and the Vienna Convention on the Law of Treaties: A Critical Appraisal* (Springer-Verlag 1974)
- Tams CJ, *Enforcing Obligations Erga Omnes in International Law* (Cambridge University Press 2005)
- Thomson JE, 'State Sovereignty in International Relations: Bridging the Gap between Theory and Empirical Research' (1995) 39 *International Studies Quarterly* 213
- Tomuschat C, 'Reconceptualizing the Debate on Jus Cogens and Obligations Erga Omnes: Concluding Observations' in Christian Tomuschat and Jean Marc Thouvenin (eds), *The Fundamental Rules of the International Legal Order: Jus Cogens and Obligations Erga Omnes* (Martinus Nijhoff Publishers 2006)
- Trindade AAC, *International Law for Humankind: Towards a New Jus Gentium* (2nd edn, Martinus Nijhoff Publishers 2013)
- Trindade AAC, *The Construction of a Humanized International Law: A Collection of Individual Opinions (1991-2013)* (Brill Nijhoff and Hotei Publishing 2015)
- Tunks M, 'Diplomats or Defendants? Defining the Future of Head-of-State Immunity' (2002) 52 *Duke Law Journal* 651
- Tzanakopoulos A, 'Domestic Courts in International Law: The International Judicial Function of National Courts' (2011) 34 *Loyola of Los Angeles International and Comparative Law Review* 133
- , 'The Permanent Court of International Justice and the "International Community"' in Christian J Tams and Malgosia Fitzmaurice (eds), *Legacies of the Permanent Court of International Justice* (Martinus Nijhoff Publishers 2013)

- Van Gestel R and Micklitz H-W, 'Revitalizing Doctrinal Legal Research in Europe: What About Methodology?' [2011] European University Institute Working Papers Law
- Van Harten G, 'The Public—Private Distinction in the International Arbitration of Individual Claims against the State' (2007) 56 *International and Comparative Law Quarterly* 371
- Vattel E de, *The Law of Nations, Or, Principles of the Law of Nature, Applied to the Conduct and Affairs of Nations and Sovereigns* (Bela Kapossy and Richard Whatmore eds, Liberty Fund 2008)
- Vattel ED, *The Law of Nations: Book I* (Liberty Fund 1758)
- Verdross A, 'Forbidden Treaties in International Law' (1937) 31 *American Journal of International Law* 571
- , 'Jus Dispositivum and Jus Cogens in International Law' (1966) 60 *American Journal of International Law* 55
- Vicuna FO, 'Diplomatic and Consular Immunities and Human Rights' (1991) 40 *International and Comparative Law Quarterly* 34
- Vinuesa RE, 'Interface, Correspondence and Convergence of Human Rights and International Humanitarian Law' (1998) 1 *Yearbook of International Humanitarian Law*
- Voyiakis E, 'Access to Court v State Immunity' (2003) 52 *International and Comparative Law Quarterly* 297
- Warbrick C, McGoldrick D and Fox H, 'The Pinochet Case No. 3' (1999) 48 *International and Comparative Law Quarterly* 687
- Watts SA, *The Legal Position in International Law of Heads of States, Heads of Governments and Foreign Ministers*, vol 247 (Martinus Nijhoff Publishers 1994)

- , ‘Heads of State’ (*Max Planck Encyclopedia of Public International Law*, October 2010)
<http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1418?rskey=DYWrPH&result=23&q=immunity&prd=EPIL> accessed 1 November 2015
- Weissbrodt DS and Vega C de la, *International Human Rights Law: An Introduction* (University of Pennsylvania Press 2007)
- Wheaton H, *Elements of International Law: With a Sketch of the History of the Science* (B Fellowes 1836)
- Wickremasinghe C, ‘Immunities Enjoyed by Officials of States and International Organizations’ in Malcolm D Evans (ed), *International Law* (2nd edn, Oxford University Press 2006)
- Wilson CE, *Diplomatic Privileges and Immunities* (The University of Arizona Press 1967)
- Wolff C, *The Laws of Nations Treated According to a Scientific Method* (Joseph Drake tr, Oxford University Press 1934)
- Wouters J, Duquet S and Meuwissen K, ‘The Vienna Convention on Diplomatic and Consular Relations’ in Andrew F Cooper, Jorge Heine and Thakur Ramesh (eds), *The Oxford Handbook of Modern Diplomacy* (Oxford University Press 2013)
- Wuerth I, ‘Pinochet’s Legacy Reassessed’ (2012) 106 *The American Journal of International Law* 731
- Yang X, ‘State Immunity in the European Court of Human Rights: Reaffirmations and Misconceptions’ (2004) 74 *British Yearbook of International Law* 333
- , ‘Jus Cogens and State Immunity’ (2006) 3 *New Zealand Yearbook of International Law* 131
- , *State Immunity in International Law* (Cambridge University Press 2012)

Zemanek K, 'New Trends in the Enforcement of Erga Omnes Obligations' (2000) 4
Max Planck Yearbook of United Nations Law 1

CASES

A and others v Secretary of State for the Home Department (No 2) (2005) [2006] 2
AC 221 (UK House of Lords)

Abusabib & Anor v Taddese [2013] ICR 603 (UK Employment Appeal Tribunal)

Advisory Opinion on the Juridical Condition and Rights of Undocumented Migrants
[2003] OC-18/03 (Inter-American Court of Human Rights)

*Advisory Opinion on the Rights and Guarantees of Children in the Context of
Migration and/or in Need of International Protection* [2014] OC-21/14
(Inter-American Court of Human Rights)

Al-Adsani v The United Kingdom [2001] 34 EHRR 11 (European Court of Human
Rights)

Aloeboetoe et al v Suriname [1993] Series C no 15 (Inter-American Court of Human
Rights)

*Application of the Convention on the Prevention and Punishment of the Crime of
Genocide (Bosnia and Herzegovina v Serbia and Montenegro), Judgment*
[2007] ICJ Reports

*Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic
Republic of the Congo v Rwanda), Jurisdiction and Admissibility, Judgment*
[2006] I.C.J. Reports

Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium)
[2002] I.C.J. Reports

Attorney-General v Zaoui and Others (No 2) (2004) [2005] 1 NZLR 690 (New
Zealand: Court of Appeal)

Baldeón-García v Perú [2006] Series C No. 147 (Inter-American Court of Human Rights)

Baoanan v Baja [2009] 627 F Supp 2d 155 (Dist Court)

Barbuit's Case in Chancery [1736] 25 E.R. 777 Cases Temp Talbot 281 (Court of Chancery)

Barcelona Traction, Light and Power Company, Limited (Belgium v Spain), Second Phase [1970] I.C.J. Reports (International Court of Justice)

Barrios Family v Venezuela [2011] Series C No. 237 (Inter-American Court of Human Rights)

Bayarri v Argentina [2008] Series C No. 187 (Inter-American Court of Human Rights)

Belhaj v Straw [2014] EWCA Civ 1394 (United Kingdom: Court of Appeal (England and Wales))

Benkharbouche & Janah v Embassy of Sudan & Libya [2015] EWCA Civ 33 (UK Court of Appeal)

Blake v Guatemala [1998] Series C No. 36 (Inter-American Court of Human Rights)

Caesar v Trinidad and Tobago [2005] Series C No. 123 (Inter-American Court of Human Rights)

Cantoral Benavides v Peru [2000] Series C No. 69 (Inter-American Court of Human Rights)

Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro), Preliminary Objections [1996] ICJ Reports 595

Case Concerning Certain Criminal Proceedings in France (Republic of the Congo v France) [2003] ICJ Reports

Case Concerning the Application of the Convention of 1902 Governing the Guardianship of Infants (Netherlands v Sweden) [1958] ICJ Reports

Case Concerning the Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v United States of America), Merits [1986] ICJ Reports (International Court of Justice)

Case Concerning United States Diplomatic and Consular Staff in Tehran (US v Iran), Judgment [1980] ICJ Reports

Case Concerning United States Diplomatic and Consular Staff in Tehran (US v Iran), Order [1979] ICJ Reports

Case of Goiburú et al v Paraguay [2006] Serie C No. 153 (Inter-American Court of Human Rights)

Case of the SS Lotus [1927] (Ser. A) No. 9 (Permanent Court of International Justice)

Certain Phosphate Lands in Nauru (Nauru v Australia), Preliminary Objections, Judgment [1992] ICJ Reports

Claim Against the Empire of Iran [1963] 45 ILR 57 (German Constitutional Court)

Coard et Al v United States [1999] Report N. 109/99 - Case 10.951 (Inter-American Commission on Human Rights)

Committee of United States Citizens Living in Nicaragua v Reagan [1988] 859 F2d 929 (District of Columbia Circuit)

Corfu Channel (United Kingdom of Great Britain and Northern Ireland v Albania), Merits [1949] ICJ Reports

Dickinson v Del Solar [1930] 1 KB 376 (King's Bench Division)

Fayed v Al-Tajir [1987] QB 712 (Court of Appeal)

Fermín Ramírez v Guatemala [2005] Series C No. 126 (Inter-American Court of Human Rights)

Ferrini v Federal Republic of Germany, Appeal Decision [2004] Supreme Court of Cassation 5044/4, IT 2004 ILDC 19

Fogarty v United Kingdom [2001] 34 EHRR 12 (European Court of Human Rights)

García-Asto and Ramírez-Rojas v Peru [2005] Series C No. 137 (Inter-American Court of Human Rights)

Gómez-Paquiyaury Brothers v Peru [2004] Series C No. 110 (Inter-American Court of Human Right)

Hirsi Jamaa and Others v Italy [2012] Application no. 27765/09 (European Court of Human Rights)

I Congreso del Partido [1983] 1 AC 244 (House of Lords)

In re Grand Jury Proceedings [1987] United States Court of Appeals, Fourth Circuit 700, 1108 817 F2d

Islands of Palmas Case, United States v Netherlands [1928] 2 U.N. Reports of International Arbitral Awards 829 (Permanent Court of Arbitration)

Janowiec v Russia [2013] 58 EHRR 30 (European Court of Human Rights)

Jones v Saudi Arabia [2006] UKHL 26 (UK House of Lords)

Jurisdictional Immunities of the State (Germany v Italy: Greece Intervening), Judgment [2012] ICJ Reports

Jurisdiction of the European Danube Commission between Galatz and Braila [1927] (Ser. B) No. 14 (Permanent Court of International Justice)

Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion [2004] ICJ Reports

Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion [1996] ICJ Reports

Letelier v Chile [1980] 488 F.Supp. 665 (United States District Court, DC)

Maritza Urrutia v Guatemala [2003] Series C No. 103 (Inter-American Court of Human Rights)

McElhinney v Ireland [2001] 34 EHRR 13 (European Court of Human Rights)

Multi-member Court of Levadia [1997] 137/1997

Myrna Mack Chang v Guatemala [2003] Series C No. 101 (Inter-American Court of Human Rights)

North Sea Continental Shelf (Federal Republic of Germany/Denmark) [1969] ICJ Reports

North Sea Continental Shelf (Federal Republic of Germany/Netherlands) [1969] ICJ Reports

Oil Platforms (Islamic Republic of Iran v United States of America) [2003] ICJ Reports

Oleynikov v Russia [2013] 57 EHRR 15 (European Court of Human Rights)

Oscar Chinn (United Kingdom v Belgium) [1934] Ser. A/B, n. 63 (Permanent Court of International Justice)

Prefecture of Voiotia v Federal Republic of Germany (Distomo Massacre Case) [2000] 129 ILR 513 (Greece - Court of Cassation)

Prosecutor v Anto Furundzija (Trial Judgement) [1998] IT-95-17/1-T (International Tribunal for the former Yugoslavia)

Prosecutor v Augustine Gbao [2004] SCSL-2003-01-I (Special Court for Sierra Leone)

Prosecutor v Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic (Trial Judgment) [2001] IT-96-23-T & IT-96-23/1-T (International Criminal Tribunal for the former Yugoslavia)

Prosecutor v Dusko Tadic (Appeal Judgement) [1999] IT-94-1-A (International Criminal Tribunal for the former Yugoslavia)

Prosecutor v Goran Jelusic (Trial Judgement) [1999] IT-95-10-T (International Criminal Tribunal for the former Yugoslavia)

Prosecutor v Kupreskic et al (Trial Judgement) [2000] IT-95-16-T (International Criminal Tribunal for the former Yugoslavia)

Prosecutor v Milan Simic (Sentencing Judgement) [2002] IT-95-9/2-S (International Criminal Tribunal for the former Yugoslavia)

Prosecutor v Milomir Stakic (Trial Judgement) [2003] IT-97-24-T (International Criminal Tribunal for the former Yugoslavia)

Prosecutor v Radislav Krstic (Trial Judgement) [2001] IT-98-33-T (International Criminal Tribunal for the former Yugoslavia)

Prosecutor v Radoslav Brdjanin (Trial Judgement) [2004] IT-99-36-T (International Criminal Tribunal for the former Yugoslavia)

Prosecutor v Tihomir Blaskic [1997] 110 ILR 687 (International Criminal Tribunal for the Former Yugoslavia)

Prosecutor v Zdravko Mucic aka 'Pavo', Hazim Delic, Esad Landzo aka 'Zenga', Zejnil Delalic (Trial Judgement) [1998] IT-96-21-T (International Tribunal for the former Yugoslavia)

Rantsev v Cyprus and Russia [2010] 51 EHRR 1 (European Court of Human Rights)

Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion [1951] ICJ Reports

Reyes and Suryadi v Al-Malki and Al-Malki [2015] Court of Appeal (Civil Division)
Case No: A2/2013/3061, EWCA Civ 32

Río Negro Massacres v Guatemala [2012] (Inter-American Court of Human Rights)

R v Bow Street Metropolitan Stipendiary Magistrate and Others, ex parte Pinochet Ugarte (No 1) [1998] 4 All ER (House of Lords)

R v Bow Street Metropolitan Stipendiary Magistrate and Others, ex parte Pinochet Ugarte (No 2) [1999] 2 WLR 272 (House of Lords)

R v Bow Street Metropolitan Stipendiary Magistrate and Others, ex parte Pinochet Ugarte (No 3) [2000] 1 AC 147 (House of Lords)

R v Evans, ex parte Augusto Pinochet Ugarte [1998] (Divisional Court)

R v Tang (2008) [2008] HCA 39 (High Court of Australia)

R v X [2005] 2 NZLR 121 (Court of Appeal Wellington)

Sabbithi v Al Saleh [2009] 605 F Supp 2d 122 (Dist Court)

Schreiber v Canada (Attorney General) [2002] 3 S.C.R. 269 (Supreme Court of Canada)

South West Africa (Liberia v South Africa), Second Phase, Judgment [1966] ICJ Reports

SS 'Wimbledon' - United Kingdom, France, Italy & Japan v Germany [1923] Permanent Court of International Justice III.I., (ser. A) No. 1

Suresh v Canada (Minister of Citizenship and Immigration) [2002] 1 SCR 3, 2002 SCC 1 (Canada: Supreme Court)

Swarna v Al-Awadi [2009] 607 F Supp 2d 509 (Dist Court)

Swarna v Al-Awadi [2010] 622 F 3d 123 (Court of Appeals, 2nd Circuit)

Tabion v Mufti [1995] 877 F Supp 285 (Dist Court)

Tabion v Mufti [1996] 73 F 3d 535 (Court of Appeals, 4th Circuit)

Taylor v Best, Drouet, Sperling, and Clarke [1854] 139 ER 201 14 Common Bench Rep 487

The Cristina [1938] AC 485 (House of Lords)

The Massacres of El Mozote and nearby places v El Salvador [2012] Series C No. 252 (Inter-American Court of Human Rights)

The Parlement Belge [1880] 5 PD 197 (Court of Appeal)

The Philippine Admiral [1977] AC 373 (Privy Council)

The Prosecutor v Al Bashir, First Arrest Warrant [2009] ICC-02/05-01/09 (Pre-Trial Chamber I)

The Prosecutor v Al Bashir, Second Arrest Warrant [2010] ICC- 02/05-01/09-95 (Pre-Trial Chamber I)

The Prosecutor v Charles Ghankay Taylor [2013] SCSL-03-01-A (Special Court for Sierra Leone)

The Prosecutor v Omar Al Bashir [2013] ICC-02/05-01/09-151 (Pre-Trial Chamber II)

The Prosecutor v Omar Al Bashir [2015] ICC-02/05-01/09-242 (Pre-Trial Chamber II)

The Queen v Tang [2008] 39 (High Court of Australia)

The Schooner Exchange v M'Faddon & Others [1812] 11 US 116 3 L. Ed. 287 7 Cranch 116 (Supreme Court of the United States)

Tibi v Ecuador [2004] Series C No. 114 (Inter-American Court of Human Rights)

Torres Millacura et al v Argentina [2011] Series C No. 229 (Inter-American Court of Human Rights)

Towne v Eisner [1918] 245 US 418 (Supreme Court of United States)

Twycross v Dreyfus [1877] 5 Ch D 605 (Court of Appeal Chancery Division)

United States v Makharadze [1997] No. FB1446B97 (DC Super Ct)

Victims of the Tugboat '13 de Marzo' v Cuba [1996] Report N. 47/96 (Inter-American Commission on Human Rights)

Victory Transport Incorporated v Comisaria General de Abastecimientos y Transportes [1964] US Court of Appeals Second Circuit 28636, 336 F.2d 354, No. 338

Ximenes-Lopes v Brazil [2006] Series C No. 149 (Inter-American Court of Human Rights)

Yousuf v Samantar [2012] 699 F 3d 763 (Court of Appeals, 4th Circuit)

Zoernsch v Waldock and Another [1964] 1 WLR 675 (Court of Appeal)

INTERNATIONAL INSTRUMENTS AND OTHER OFFICIAL DOCUMENTS

American Convention on Human Rights 1969

Belgium: Act of 1999 Concerning the Punishment of Grave Breaches of International Humanitarian Law 1999

CCPR General Comment No. 29: Article 4: Derogations during a State of Emergency (UN Human Rights Committee 2001) UN. Doc. CCPR/C/21/Rev.1/Add.11

Charter of the United Nations 1945

Convention on Special Missions 1969

Convention on the Prevention and Punishment of the Crime of Genocide Adopted by General Assembly of the United Nations (United Nations Treaty Series 1948) vol. 78

Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights, Advisory Opinion I.C.J. Reports (1999)

European Convention for the Protection of Human Rights and Fundamental Freedoms (Council of Europe 1950)

European Convention on State Immunity, Explanatory Report (Council of Europe 1972) ETS No. 074

Foreign Affairs Committee, 'The Abuse of Diplomatic Immunities and Privileges' (1984) H.C. Paper 127

Foreign Sovereign Immunities Act (1976)

French Constitution (1791)

International Covenant on Civil and Political Rights (United Nations Treaty Series 1966) vol. 999

International Labour Conference, 96th Session, Third Item, Report of the Committee of Experts on the Application of Conventions and Recommendations, Eradication of Forced Labour, General Survey Concerning the Forced Labour Convention, 1930 (No. 29), and the Abolition of Forced Labour Convention, 1957 (No. 105) (International Labour Office 2007) Report III (Part 1B)

International Labour Organization, Forced Labour Convention, C29 (1930)

International Military Tribunal for the Far East Charter (1946)

Nuremberg Trial Proceedings Vol. 1 - Charter of the International Military Tribunal

Peace Treaty of Versailles 1919

Principles of International Law Recognized in the Charter of the Nuremberg Tribunal and in the Judgment of the Tribunal, 5 UN GAOR Supp. (No. 12) at 11, U.N. Doc. A/1316

Report of the Commission of Inquiry Appointed under Article 26 of the Constitution of the International Labour Organization to Examine the Observance by Myanmar of the Forced Labour Convention, 1930 (No. 29) (1998)

Rome Statute of the International Criminal Court (UN General Assembly 2002)

Slavery Convention 1926

Statute of the Special Court for Sierra Leone <<http://www.rscsl.org/Documents/scsl-statute.pdf>> accessed 27 October 2016

The Belfast Guidelines on Amnesty and Accountability with Explanatory Guidance (Transitional Justice Institute at the University of Ulster 2013)
<http://peacemaker.un.org/sites/peacemaker.un.org/files/BelfastGuidelines_TJI2014.pdf.pdf> accessed 20 October 2016

The Restatement (Third) of the Foreign Relations Law of the United States (1987)

United Nations, Convention Against Torture (1984)

United Nations, Historical Review of Developments Relating to Aggression, vol 673 (United Nations Publication 2003)

United Nations, Human Rights for All
<<http://www.un.org/en/globalissues/briefingpapers/humanrights/>> accessed 26 December 2015

United Nations, The Foundation of International Human Rights Law
<<http://www.un.org/en/sections/universal-declaration/foundation-international-human-rights-law/index.html>> accessed 30 December 2015

United Nations Commission on Human Rights, ‘The Administration of Justice and the Human Rights of Detainees, Question of the Impunity of Perpetrators of Human Rights Violations (Civil and Political) Revised Final Report Prepared by Mr. Joinet pursuant to Sub-Commission Decision 1996/119’ (1997) UN Doc. E/CN.4/Sub.2/1997/20/Rev.1

United Nations Commission on Human Rights, ‘Promotion and Protection of Human Rights: Impunity - Report of the Independent Expert to Update the Set of Principles to Combat Impunity by Diane Orentlicher: Addendum - Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity’ (2005) E/CN.4/2005/102/Add.1

United Nations Commission on Human Rights, ‘Human Rights Resolution 2005/81: Impunity’ (2005) E/CN.4/RES/2005/81

United Nations General Assembly, United Nations Convention on Jurisdictional Immunities of States and Their Property (2004)

United Nations General Assembly, Universal Declaration of Human Rights, G.A. Res. 217A (III) (1948)

United Nations General Assembly, Yearbook of the International Law Commission: Draft Articles on Diplomatic Intercourse and Immunities with Commentaries, vol II (United Nations - International Law Commission 1958)

United Nations General Assembly, Yearbook of the International Law Commission: Draft Articles on the Law of Treaties with Commentaries, vol II (1966)

United Nations General Assembly, Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 3452 (XXX) (1975)

United Nations General Assembly, Yearbook of the International Law Commission: Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries (2001)

United Nations General Assembly, A More Secure World: Our Shared Responsibility. Report of the High-Level Panel on Threats, Challenges and Change (2004) A/59/565

United Nations General Assembly, Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law: Report of the Study Group of the International Law Commission Finalized by Martti Koskenniemi (2006)

United Nations Security Council, 'The Situation Concerning Rwanda: Establishment of an International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Such Violations Committed in the Territory of Neighbouring States' (1994) U.N. Doc. S/PV.3453

United Nations Security Council, Statute of the International Criminal Tribunal for the Former Yugoslavia, SC res. 827, UN SCOR 48th sess., 3217th mtg. at 1-2 1993

Vienna Convention on Diplomatic Relations (1961)

Vienna Convention on the Law of Treaties (1969)

World Conference on Human Rights, Vienna Declaration and Programme of Action (United Nations General Assembly 1993) A/CONF.157/23

Yearbook of the International Law Commission, vol II(2) (1980)

Yearbook of the International Law Commission: Summary Records of the Ninth Session, A/CN.4/SER.A/1957, vol 1 (United Nations 1957)

ONLINE RESOURCES AND OTHER DOCUMENTS

‘Bashir-Watch’ <<http://bashirwatch.org/>> accessed 3 May 2016

Brussels Group for International Justice, ‘Brussels Principles against Impunity and for International Justice, Adopted Following on from the Colloquium “The Fights Against Impunity: Stakes and Perspectives”’ <https://www.iccnw.org/documents/BrusselsPrinciples6Nov02_En.pdf> accessed 26 October 2015

‘Chad’s Ex-Dictator Convicted of Atrocities’ (*Human Rights Watch*, 30 May 2016) <<https://www.hrw.org/news/2016/05/30/chads-ex-dictator-convicted-atrocities>> accessed 27 October 2016

‘Combating War Crimes in Africa: Testimony of Corinne Dufka before the U.S. House International Relations Committee, Africa Subcommittee’ (*Human Rights Watch*, 25 June 2004) <<http://www.hrw.org/news/2004/06/25/combating-war-crimes-africa>> accessed 26 October 2015

Cornell University Law School Legal Information Institute, 'Sovereign Immunity'
<http://www.law.cornell.edu/wex/sovereign_immunity> accessed 15
December 2014

Council of Europe, 'What Are Human Rights?'
<<http://www.coe.int/en/web/compass/what-are-human-rights->> accessed 26
December 2015

'Establishment of an International Criminal Court: Overview' (Rome Statute of the
International Criminal Court, 1999)
<<http://legal.un.org/icc/general/overview.htm>> accessed 13 April 2015

'Hissène Habré's Conviction the First Step on a Longer Road to Justice for Chad'
The Guardian (3 June 2016) <<https://www.theguardian.com/global-development/2016/jun/03/hissene-habre-crimes-against-humanity-chad-justice>> accessed 27 October 2016

Human Rights Watch, "'Everyone Lives in Fear': Patterns of Impunity in Jammu
and Kashmir' (2006) 18

'Letter of Acting Legal Adviser, Jack B. Tate, to Department of Justice, May 19,
1952'

'Profile: Chad's Hissene Habre' (*BBC News*, 30 May 2016)
<<http://www.bbc.com/news/world-africa-18927845>> accessed 27 October
2016

'Q&A: The Case of Hissène Habré before the Extraordinary African Chambers in
Senegal' (*Human Rights Watch*, 3 May 2016)
<<https://www.hrw.org/news/2016/05/03/qa-case-hissene-habre-extraordinary-african-chambers-senegal>> accessed 27 October 2016

'State Practice on Sovereign Immunity in Employment Disputes Involving Embassy
and Consular Staff' (Center for Global Legal Challenges - Yale Law School
2015)
<https://www.law.yale.edu/system/files/state_immunity_in_employment_disputes.pdf> accessed 27 October 2016

The Geneva Conventions of 12 August 1949 (International Committee of the Red Cross 2012) <<https://www.icrc.org/eng/assets/files/publications/icrc-002-0173.pdf>> accessed 20 January 2016

‘The Miami Declaration of Principles on Human Trafficking, 10 February 2005’ (2006) 11 Intercultural Human Rights Law Review <<https://www1.umn.edu/humanrts/instree/miami-declaration2006.html>> accessed 19 February 2016

‘The Prosecutor v. Charles Ghankay Taylor’ (*International Crimes Database*) <<http://www.internationalcrimesdatabase.org/Case/1107>> accessed 27 October 2016

‘The Prosecutor vs. Charles Ghankay Taylor’ (*Special Court for Sierra Leone*) <<http://www.rscsl.org/Taylor.html>> accessed 27 October 2016

United States Department of State Bureau of Diplomatic Security, Diplomatic and Consular Immunity: Guidance for Law Enforcement and Judicial Authorities (Department of State Publication 2011)

‘U.S. Department of State Foreign Affairs Manual Vol. 2’ (16 December 2014) <<https://fam.state.gov/fam/02fam/02fam0230.html>> accessed 4 May 2016