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The power of *jus cogens* in the shadow of procedural obstacles. Legal dilemmas in international cases concerning severe human rights violations, special regards to the Ukraine–Russia War

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Abstract

Jurisdictional immunity of foreign states remains a rule under international law, even in cases involving violations of peremptory norms of international law (*jus cogens*). Therefore, the assumption that the primacy view of *jus cogens* can resolve the dilemma over the relationship between serious human rights violations and state sovereignty is misleading and does not always prevail in practical application. This paper first outlines the “evergreen” dilemma of *jus cogens* versus state immunity, followed by an illustration of how procedural issues are addressed in pivotal international cases. In this regard, the paper primarily focuses on criminal proceedings submitted to the International Criminal Court (ICC) and the International Court of Justice (ICJ) to explore the issue more thoroughly. Finally, considering the unresolved nature of the central issue and the international climate, the study extends the nucleus of the problem to the ongoing Russia-Ukraine war.

Keywords

jus cogens; absolute human rights; ICC; ICJ; Ukraine–Russia war

1. Introduction

After the horrendous events of World War II, the international community articulated fundamental human rights, and following the Cold War, the principle

of ‘respect for human rights’ became an internationally recognized doctrine. This resulted in the generally accepted notion that no state can reject any criticism regarding human rights violations claiming it being an internal matter only. To put it differently, sovereignty should no longer be an obstacle to the international system for the protection of human rights holding torture and other *jus cogens* human rights violations to account. Humanitarian catastrophes of the recent decades, including those in Bosnia, Rwanda, Kosovo and Darfur have further reinforced the conviction of the international community to redefine the notion of sovereignty in light of severe and mass human rights violations, as well as crimes against humanity, war crimes, ethnic cleansings and genocide.¹ This is the concept of responsibility to protect,² meaning if a state is unwilling or unable to protect its citizens from severe human rights violations, the international community has an obligation to act via the United Nations. We also need to consider, that a rule of general international law can become an international *jus cogens*, or part of the *erga omnes* without the explicit consent of a state, that is, treaties can shape up an objective system of *erga omnes*, thus diverging from the classical norm of *tertius nec nocent nec prosunt*.³

These ideas seem to be facing a number of different procedural obstacles in practical application,⁴ and the legal consequences of peremptory norms of general international law are not quite clear either. One of the reasons for this is particularly the immunity from jurisdiction before a court of another State due to sovereign equality. So the doctrine of foreign sovereign immunity represents a potentially dispositive motion, a valid form of defence to the litigation of severe human rights violations against foreign states or state officials.⁵ This is why legal scholars⁶ argue that – based on the theory of normative hierarchy – immunity of foreign states or senior state officials has to be denied automatically in cases regarding severe *jus*

¹ G. Kardos, *Az államok szuverén egyenlősége*, [in:] A. Jakab, B. Fekete (ed.), *Internetes Jogtudományi Enciklopédia*, <https://szakcikkadatbazis.hu/doc/4067336> [accessed: 25.07.2023].

² *Responsibility to protect*, see: A. Szalai, *A védelmi felelősség koncepciója, avagy van-e új a nap alatt?*, “Pro Futuro” 2013, (1), pp. 67–78.

³ *Ibidem*, A.A., Cancade Trindade, *Jus Cogens: The Determination and the Gradual Expansion of Its Material Content in Contemporary International Case-Law*, “Revista do Instituto Brasileiro de Direitos Humanos” 2009, 9(9).

⁴ This concept has been referred to in the Security Council resolutions, e.g. on Libya and Yemen (among others), but has also been applied by the General Assembly in the context of the situation in Syria. A. Szalai, *op. cit.*, pp. 73–77.

⁵ S. Knuchel, *State Immunity and the Promise of Jus Cogens*, “Northwestern Journal of International Human Rights” 2011, (2), p. 177.

⁶ Y. Xiaodong, *Jus Cogens and State Immunity*, “New Zealand Yearbook of International Law” 2006, (3), p. 131; Y. Xiaodong, *State Immunity in International Law*, Cambridge 2012; S. Knuchel, *op. cit.*; C. Tomuschat, J.M. Thouvenin (ed.), *The Fundamental Rules of the International Legal Order: Jus Cogens and Obligations Erga Omnes*, Leiden, Boston 2006.

cogens violations, for only such – or a similar – legal instrument could ensure the legal principle of respecting universal human rights, the concept of responsibility to protect, as well as the normative significance of *jus cogens*. So, a norm from which no derogation is permitted would serve the purpose of changing the state-centric nature⁷ of international law and could finally provide an effective practical solution to hold all perpetrators accountable in trials involving serious violations of human rights.

Present paper outlines the nucleus of the legal problem, followed by an illustration on how the theoretical and procedural dilemmas mentioned before are addressed in pivotal international cases. In addition, the international cases presented illustrate the complexity of the issue, as well as the moral challenges involved.⁸ Finally, it outlines the trend the international community can expect on the issues involved.

As the category of *jus cogens* contains a broader range of violations than absolute human rights, and because the breach of particular absolute human rights (e.g. prohibition of torture) constitutes severe international crimes, I am primarily focusing on criminal proceedings submitted to the International Criminal Court (ICC) and the International Court of Justice (ICJ) in order to explore the issue more thoroughly.

It is important to add that the rapid development of international criminal law brought new concepts into the legal discourse, which correspond to the development of international human rights law. This is no accident: both legal bodies were created with the intention of ensuring nothing similar to the horrors of World War II are to happen ever again; furthermore, their only, common goal is accountability, that is ending impunity.⁹ We can thus agree with the statement claiming general international law has quite evidently become human rights-centered in the second half of the 20th century.¹⁰

Considering the unresolved state of the central issue, the international climate, the war currently waged between Russia and Ukraine, this topic has particular relevance. This is why the paper is examining the dilemma, and the possibilities of accountability of involved Russian state officials in light of the Russian-Ukrainian conflict. As commonly known, the ICC issued an arrest warrant for alleged responsibility for war crimes on 17 March 2023 against Russian President Vladimir

⁷ “Many human rights advocates and legal scholars view the granting of immunity to a state or its representatives from proceedings arising out of serious human rights violations as »artificial, unjust, and archaic.«” S. Knuchel, *op. cit.*, p. 149.

⁸ See: H. Fox, QC, P. Webb, *The Law of State Immunity*, Oxford 2015.

⁹ T. Ádány, *A Nemzetközi Büntetőbíróság joghatósága*, Budapest 2014, p. 201.

¹⁰ N. Papp, *Az államfők nemzetközi büntetőjogi felelősségre vonásának mai keretei*, “Debreceni Jogi Műhely” 2016, (3–4).

Putin and Maria Alekseyevna Lvova-Belova, the Russian Presidential Commissioner for Children's Rights.

1.1. Challenges to procedural law

As I have mentioned, the international community established fundamental human rights following the tragic events of World War II. Therefore, the primary objective of the period following the Cold War is thus to ensure the vindication of absolute human rights standards under all circumstances, and effectively provide their protection in practice.¹¹ Today absolute human rights are protected with no exception by power of the peremptory norms of general international law, a norm from which no derogation is permitted (*jus cogens*), thus it guarantees the legal universality required for their safeguarding as well. This universality would theoretically result in it having precedence even over the traditional concept of state sovereignty.¹²

Let us not forget however, that this paradigm shift notwithstanding, public international law is based on the principle of sovereign equality of states. Respect for the sovereignty of an individual state and the immunity thereof from proceedings before foreign national courts is a pivotal part of international law. And the other hand though, guaranteeing human rights is still primarily a state matter, furthermore, states are now bound by treaties to enforce said rights. Thus, the personal and functional immunities (*ratione personae et materiae*) of foreign states (*acta iure imperii*) or foreign officials are just as relevant to cases of violation of *jus cogens* human rights.

The biggest problem stems from the latter, for, as already mentioned, sovereign immunity under international law continues to be a valid defence, even in case of accusations regarding severe human rights violations. Therefore, the assumption regarding the primacy view of *jus cogens* being able to answer the dilemma over the relationship between human rights and state sovereignty is misleading and does not always prevail in practical application.

In light of the overlap between *jus cogens* and human rights, it is not difficult to state that the dilemma concerning the imperative norms has an adverse effect on the protection of absolute human rights and the values contained therein. The heart of the matter stems from several sources. For example, the vague status of *jus cogens* rules¹³ does not provide any guidance as to the legal ramifications of their violation. It also

¹¹ Cf. P. Zenovic, *Human rights enforcement via peremptory norms – a challenge to state sovereignty*, “RGS Research Papers” 2012, (6), pp. 1–65.

¹² *Ibidem*.

¹³ Zs. Csapó: “(...) és amelyet csak a nemzetközi jognak az ugyanilyen jellegű későbbi szabályával lehet megváltoztatni.” *Az 1969. évi bécsi egyezmény és a ius cogens módosíthatósága*,

remains obscure what exactly is meant by the term “the international community as a whole”¹⁴ in the text of the Vienna Convention (Vienna Convention on the Law of Treaties). And, as Koskenniemi pointed it out, although that formulation itself is not free from controversy, the problem of identifying *jus cogens* is not easy to solve in abstracto. Further, the issue is not only that *jus cogens* norms are not included in a single, authoritative list,¹⁵ there is also no consensus on the criteria to the inclusion in this list.¹⁶

But even if we put aside the ambiguous status of *jus cogens* and the criteria for it to become a norm, the key difficulty with *jus cogens* still prevails. The problem arises from the fact no procedural rule can be deduced from the *jus cogens* norm, which means there is no rule of customary international law that would deny sovereign immunity in case *jus cogens* human rights norms are violated outside the forum state. Without this, however, there is no collision between the substantive imperative norm and the procedural rules on immunity, because these are two totally different rulesets. This is the real reason of the higher status of *jus cogens* in the hierarchy of legal sources not being able to directly regulate the denial of immunity.¹⁷ It seems this dilemma will remain unresolved until there is a procedural rule next to the substantive imperative rule which would also specify that “a State infringing *jus cogens* cannot enjoy the privilege of immunity before foreign national courts.”¹⁸

My initial argument is, if the concept of *jus cogens* has been able to rewrite the primacy of the supreme value of state sovereignty as a result of a sophisticated

“Állam- És Jogtudomány” 2020, (1), p. 26; V. Lamm, *Adalékok a Rule of Law érvényesüléséről a nemzetközi jogban*, “Jog – Állam – Politika” 2009, (2), p. 9.

¹⁴ See Article 53. of the Vienna Convention on the Law of Treaties: “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.” https://legal.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf [accessed: 1.01.2024].

¹⁵ Non-exhaustive list of *jus cogens*: The prohibition of aggression; The prohibition of genocide; The prohibition of crimes against humanity; The basic rules of international humanitarian law; The prohibition of racial discrimination and apartheid; The prohibition of slavery; The prohibition of torture; The right of self-determination, <https://legal.un.org/ilc/reports/2019/english/chp5.pdf> [accessed: 1.01.2024], p. 147.

¹⁶ M. Koskenniemi, *Fragmentation of international law: Difficulties arising from the diversification and expansion of international law. Report of the Study Group of the International Law Commission*, 2006, [HTTPS://LEGAL.UN.ORG/ILC/DOCUMENTATION/ENGLISH/A_CN4_L702.PDF](https://legal.un.org/ilc/documentation/english/A_CN4_L702.PDF) [accessed: 25.07.2023].

¹⁷ Cf. X. Yang, *Jus Cogens and State Immunity*, “New Zealand Yearbook of International Law” 2006, (3), pp. 131–179; S. Knuchel, *op. cit.*; C. Tomusschat, J.M. Thouvenin, *op. cit.*

¹⁸ *Ibidem*.

development of international law, *jus cogens* should also provide an effective legal instrument for the enforcement of absolute human rights outside the boundaries of state sovereignty.¹⁹ This can be admitted to primarily by examining the international cases to find out what exact legal consequences imperative norms have in practice and how the procedural odiums mentioned above can be overcome, i.e. how can the *jus cogens* substantive norm break through the defences of state sovereignty.

1.2. *Ius cogens and immunity*

1.2.1. *Acta iure imperii*

Indicating the severity of the paramount problem of immunity, on 3 February 2021 the US Supreme Court upheld the ICJ's 2012 ruling in *Germany v. Italy: Greece intervening*,²⁰ according to which "a State is not deprived of immunity by reason of the fact that it is accused of serious violations of international human rights law."²¹

In 2008, Germany instituted proceedings against Italy before the ICJ in the *Jurisdictional Immunities of the State* case (*Germany v. Italy: Greece intervening*), arguing that the Italian courts have ignored Germany's jurisdictional immunity as a sovereign state. Italy in turn argued that the acts on which the previous proceedings were based constituted a violation of *jus cogens* norms, thus Germany not entitled to immunity.²² The court however found that Italy had violated Germany's sovereign immunity. Furthermore, the court pointed out – thus highlighting the biggest problem regarding *jus cogens* – that in this particular case there could not even be a conflict between the (substantive) imperative norm and the (procedural) immunity rules.

[A]ssuming that the rules of the law of armed conflict which prohibited murder, deportation and slave labour were rules of *jus cogens*, there was no conflict between those rules and the rules on State immunity. The two sets of rules addressed different matters. The rules

¹⁹ Cf. P. Zenovic, *op. cit.*

²⁰ ICJ, *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)*, Judgment of 3 February 2012, ICJ Reports, 2012 quoted by C. Focarelli, *State Immunity and Serious Violations of Human Rights: Judgment No. 238 of 2014 of the Italian Constitutional Court Seven Years On*, "The Italian Review of International And Comparative Law" 2021, (1), pp. 29–30; P. Mora, *Jurisdictional Immunities of the State for Serious Violations of International Human Rights Law or the Law of Armed Conflict*, "Canadian Yearbook of International Law" 2013, (50), pp. 243–287.

²¹ C. Focarelli, *State Immunity and...*, *op. cit.*, pp. 29–58; P. Rossi, *Italian courts and the evolution of the law of State immunity: A reassessment of Judgment no 238/2014*, "QIL. Zoom-in" 2022, (94), pp. 41–57.

²² *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)*, <https://www.internationalcrimesdatabase.org/Case/1231#p1> (25.07.2023).

of State immunity were confined to determining whether or not the courts of one State could exercise jurisdiction in respect of another State. They did not bear upon the question whether or not the conduct in respect of which the proceedings were brought was lawful or unlawful.²³

The same issue emerged in the *Democratic Republic of the Congo v. Rwanda*²⁴ case. The Democratic Republic of Congo (DRC) brought proceedings against Rwanda before the ICJ for *mass, gross and flagrant violations of human rights and international humanitarian law*. The argument was that the Court's jurisdiction with regards to human rights derives from the primacy of the imperative norms, which are reflected in certain international treaties and conventions. Furthermore, in relation to the breach of *jus cogens* and the establishment of jurisdiction, the ICJ stated that "the fact that a dispute relates to compliance with a norm having such a character (...) cannot of itself provide a basis for the jurisdiction of the Court to entertain that dispute. Under the Court's statute, that jurisdiction is always based on consent of the parties (...)." ²⁵ Such cases principally therefore do not concern criminal liability, only immunity from the jurisdiction of a particular court.

Based on the arguments outlined above, it would seem *prima facie* that the jurisdictional immunity of the foreign state in respect of acts committed while exercising sovereign power (*acta jure imperii*) remains the rule under international law, even if these acts are committed in violation of *jus cogens* human rights norms.²⁶ Consequently, it is easy to conclude that the recognition of the imperative nature of a norm imposing an *ipso facto* obligation on states to enforce said norm under all circumstances is by no means automatically guaranteed.²⁷

Also, we can conclude that, as a result, the *jus cogens* norms do not ultimately prevail over rules of general international law on state immunity in any of the cases. Customary international law does not recognise exceptions to immunity, neither for absolute human rights rules nor for alleged violations of the law of armed conflict.²⁸ Thus, the number of cases in which the decision on jurisdictional issues clearly points towards a development path showing *jus cogens* violations could override state immunity from sovereign equality in all cases is still sporadic.²⁹

²³ Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening), <https://www.icj-cij.org/case/143> [accessed: 30.08.2023].

²⁴ S. Knuchel, *op. cit.*, p. 157.

²⁵ *Ibidem*, p. 162.

²⁶ *Ibidem*, p. 154.

²⁷ *Ibidem*, pp. 162–163.

²⁸ P. Mora, *op. cit.*, pp. 243–287.

²⁹ In case of Syria, for example, the ICC has been unable to act when there was an international demand for it to do so. This inability had two reasons. (1) the ICC had no jurisdiction because Syria is not a member of the ICC, and (2) the Security Council could not refer the case because of the Russian

1.2.2. Immunity *ratione personae* and immunity *ratione materiae*

The issue is more nuanced in case of foreign officials. Though the rules regarding the position of heads of state under international law apply to a very narrow range of legal subjects, the problem is all the more significant in these cases and can more clearly point out the barriers to the legal effects of *jus cogens*. The establishment of the ICC can be seen as one of the most important steps in the field of international legal accountability of heads of state.³⁰ “The ICC is designed to ensure that no leader, no state, no insurgent government or military body anywhere in the world can violate human rights with impunity”³¹, stated Kofi Annan. It should therefore be considered absurd nowadays that a representative of a state could hide behind his official status in an attempt to evade responsibility for serious human rights violations or crimes that are internationally prosecutable.

Nevertheless, the procedural obstacles against former heads of state accused of serious human rights violations and crimes are the greatest dilemma in international law in our times: since it is still unclear how far the immunity of former and present heads of state extends. And it seems therefore that the breakthrough of the doctrine of absolute immunity – which has been all but set in stone since the Nuremberg trials – has not opened the possibility for heads of state and foreign ministers to be prosecuted.³²

With respect to individual officials, customary international law postulates two types of immunity: *ratione personae*, i.e. personal immunity, and *ratione materiae*, the so-called functional immunity. The latter only covers official acts attributable to the state, which means immunity is being determined by the nature of the act, not the person.³³

veto. The international community thus created the so-called Syria Mechanism with the task to collect evidence of crimes committed and document them so that they can be used in criminal proceedings before a national or possibly international forum. R. Varga, *Orosz–ukrán konfliktus 3: a háború alapvető szabálya*, <https://www.ludovika.hu/blogok/ot-perc-europa-blog/2022/03/02/orosz-ukran-konfliktus-3-a-haboru-alapveto-szabalyai/> [accessed: 12.07.2023].

³⁰ N. Papp, *op. cit.*

³¹ *Ibidem.*

³² Cf. N. Papp, *op. cit.*; T. Ádány, *op. cit.*, pp. 40–52; S. Knuchel, *op. cit.*; P. Kovács, *Bevezetés a Nemzetközi Büntetőbíróság joggyakorlatába*, Budapest 2020.

³³ See in cases like, e.g. Functional immunity of state officials, *Prosecutor v. Blaskic*-, *Pinochet case*, <https://cld.irmct.org/notions/show/376/functional-immunity-of-state-officials#> [accessed: 26.08.2023]; N. Ezennia, *Application of the State Immunity Rule in the International Criminal Justice System: Problems Arising and a Critique of Legal Response Mechanisms*. LLM thesis. Dalhousie University 2014, pp. 55–58.

It is commonly known that the doctrine of absolute immunity was overturned after World War II by the principle of irrelevance of official capacity,³⁴ which is part of the Nuremberg Principles, and has since been incorporated in Article 27 of the Rome Statute, *inter alia*. According to this, anyone can or must be held responsible for the commission of a *delictum juris gentium*, regardless of their position.³⁵

A logical consequence of this principle would be that natural persons committing serious *jus cogens* human rights violations can always be held liable. In present times, the ICC has the required authority on an international level if the case meets the criteria of jurisdiction and admissibility. It is known that, although universal jurisdiction was previously applied to prosecute Nazi criminals – Eichmann case – this was reassessed by the second half of the 20th century, thus, the ICC's jurisdiction has not become universal either.³⁶ It exists primarily on a territorial or personal basis when the act is committed in the territory of a state party or by a citizen thereof. More precisely, the ICC's jurisdiction is automatic only if *ratione temporis, materiae, loci et personae* applies.³⁷

In addition, however, the ICC's position is made difficult by a number of issues, which also point to further dilemmas concerning the imperative norm. On the one hand, the international court does not have an executive body – there is no world court, world police force, and so forth³⁸ – the detention of suspects is therefore always depending on the cooperation of states. On the other hand, public officials continuing to enjoy absolute immunity from civil and criminal proceedings before national courts during their term of office is an aggravating circumstance in cases of *ratione personae*. Additionally, complementarity and the *ne bis in idem* principle results in proceedings once brought before national courts not to be acceptable by the ICC. Only if it can be proved beyond reasonable doubt that the proceedings of the national court in question were unlawful, a farce, or did not comply with the

³⁴ Article 7, United Nations, *Charter of the International Military Tribunal - Annex to the Agreement for the prosecution and punishment of the major war criminals of the European Axis* ("London Agreement"), 8 August 1945, <https://www.refworld.org/docid/3ae6b39614.html> [accessed: 14.01.2024].

³⁵ Zs. Csapó, *Az állam- és kormányfői immunitás versus a hivatali minőség irrelevanciájának elve a felelősségre vonáskor. Az Afrikai Unió kezdeményezése tanácsadó vélemény kérésére a Nemzetközi Bíróságtól*, "Állam- és Jogtudomány" 2019, (1), p. 20.

³⁶ Cf. International Criminal Court, *Rome Statute of the International Criminal Court*, Hague 2021, <https://www.icc-cpi.int/sites/default/files/2024-05/Rome-Statute-eng.pdf> [accessed: 14.01.2024].

³⁷ P. Kovács, *Bevezetés a Nemzetközi...*, *op. cit.*, p. 130; P. Kovács, *A Római Statútum és a nem részes államok*, "Állam- és Jogtudomány" 2022, (4), pp. 64–90 and T. Ádány, *op. cit.*, p. 185.

³⁸ Cf. E. Kirs, *A legitimitás és elismertség problémakörei a volt jugoszláv területeken elkövetett emberiség elleni bűntetteket vizsgáló törvényszék esetében*, "Publicationes Universitatis Miskolcensis Series Juridica et Politica" 2006, (24), pp. 246–247.

principle of impartiality, or if any of the conditions listed in Article 17 of the Rome Statute were met, can the ICC's supplementary jurisdiction be invoked. Proving any of the above is not without its own challenges either, however.³⁹

Just as it is not difficult to recognize the paradox in the situation, if the violation of *jus cogens* is committed with the consent of the state or by an official acting on its behalf, it is the state itself – the very same that, in some way, contributed to the commission of the offense – that ought to be obliged to address the illegal practices or hold the person accountable.⁴⁰

In addition, further difficulties in prosecuting someone committing a serious human rights violation arise from the fact that, though Article 27(2)⁴¹ of the Rome Statute effectively removes the immunity of individuals accused of international crimes with respect to court proceedings, Article 98(1)⁴² prohibits a request for cooperation from a state party where such a request would lead to a breach of international obligation under common law owed by the defendant to a third country. One of the greatest complications is therefore caused by the Rome Statute itself because of the ambiguous and problematic immunity provisions detailed in Articles 27 and 98.⁴³ The case of *Omar Hassan Ahmad Al Bashir* is an obvious example of this inherent inconsistency.

The Sudanese President has been accused – among others – of war crimes, crimes against humanity and three counts of genocide for the events in Darfur be-

³⁹ Regarding this issue, see: N. Papp, *op. cit.*; E. Kirs, *op. cit.*, p. 247.

⁴⁰ I. Takács, *A kínzás tilalma mint abszolút jog*, "Jogtudományi Közlöny" 2022, (6), p. 240; A. Szalai, *op. cit.*, p. 69.

⁴¹ **"Article 27 Irrelevance of official capacity** (1) 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 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. (2) 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." UN General Assembly, *Rome Statute of the International Criminal Court (last amended 2010)*, 17 July 1998, <https://www.refworld.org/docid/3ae6b3a84.html> [accessed: 12.01.2024].

⁴² **Article 98 Cooperation with respect to waiver of immunity and consent to surrender** (1) 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 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. UN General Assembly, *Rome Statute of the International Criminal Court (last amended 2010)*, 17 July 1998, <https://www.refworld.org/docid/3ae6b3a84.html> [accessed: 12.01.2024].

⁴³ Zs. Csapó, *Az állam- és kormányfői...*, *op. cit.*, pp. 19–35; M. Pesci, *A Nemzetközi Büntetőbíróság joghatósága az államfői immunitás tükrében – Különös tekintettel az Al Bashir esetre*, "Külvügyi Műhely" 2020, (2), pp. 83–103; H. King, *Immunities and Bilateral Immunity Agreements: Issues Arising from Articles 27 and 98 of the Rome Statute*, "New Zealand Journal of Public and International Law" 2016, (2), pp. 269–310.

tween 2003 and 2008.⁴⁴ But even the African Union – although most of its member states are State parties to the Rome Statute⁴⁵ – has refused to extradite him, citing the rule of general international law that senior state officials are entitled to immunity while being abroad.⁴⁶

It would be important to mention the case of the Congolese foreign minister (*Yerodia case*) here, where we can also encounter the issue of immunity and the dilemma it raises.⁴⁷ This latter case is interesting because it does not only concern the issue of individual responsibility but highlights how the responsibility of the state and the individual are intertwined. To summarise: on 11 April 2000, an investigating judge of the Brussels Tribunal of First Instance issued an arrest warrant *in absentia* for Abdulaye Yerodia Ndobasi, the acting Foreign Minister of the DRC, accused of inciting racial hatred in the DRC in August 1998 during various speeches, which contributed to the massacre of hundreds of people.⁴⁸ Among its many findings, the ICJ eventually concluded that “Belgium failed to respect, and infringed, Mr Yerodia’s immunity as Minister for Foreign Affairs and the inviolability enjoyed by him under international law.”⁴⁹ The Court has thus required Belgium to withdraw the arrest warrant.

This judgment makes it evident that the international criminal liability of a natural person is always a problem when a state official violates a *jus cogens* norm in an official capacity. It is still easy for them to hide behind the immunity provided by their state function in such cases, as it is apparent from the previous case as well.

In addition, the current rules state the joint liability of natural persons and states may arise in the case of criminal prosecution of senior public officials.⁵⁰

⁴⁴ *The Prosecutor v. Omar Hassan Ahmad Al Bashir* (ICC-02/05-01/09), <https://www.icc-cpi.int/sites/default/files/CaseInformationSheets/AlBashirEng.pdf> [accessed: 25.07.2023].

⁴⁵ From 54 Member States of the African Union (‘AU’), 34 are currently States Parties to the Rome Statute. Africa is indeed the largest regional group in the Rome Statute system. For instance, regarding Al Bashir’s clandestine departure from the 25th AU summit in South Africa: Court ruled that the South African government’s failure to take necessary steps to arrest Al-Bashir was inconsistent with South Africa’s obligations in terms of the Rome Statute of the International Criminal Court and section 10 of the Implementation of the Rome Statute of the International Criminal Court Act 27 of 2002. M.T. Tessema, M. VesperGräske, *Africa, the African Union and the International Criminal Court: Irreparable Fissures?*, “FICHL Policy Brief Seris” 2016, (56), Torkel Opsahl Academic EPublisher.

⁴⁶ Zs. Csapó, *Az állam- és kormányfői...*, *op. cit.*, pp. 19–35; M. Pesci, *op. cit.*

⁴⁷ International Court of Justice, *Democratic Republic of the Congo v. Belgium*, <https://casebook.icrc.org/case-study/icj-democratic-republic-congo-v-belgium> [accessed: 25.07.2023].

⁴⁸ *Case concerning the Arrest Warrant of 11 April 2002*, <https://www.internationalcrimesdatabase.org/Case/3266/Case-concerning-the-Arrest-Warrant-of-11-April-2002-/> [accessed: 23.08.2023].

⁴⁹ International Court of Justice, *Judgment of 14 February 2002*, <https://www.icj-cij.org/node/103177> [accessed: 23.08.2023].

⁵⁰ G. Kajtár, *Betudás a nemzetközi jogban – A másodlagos normák szerepe a beruházásvédelemtől a humanitárius jogig*, Budapest, ORAC Kiadó Kft, 2022, pp. 32–55.

A detailed discussion of these issues is however beyond the scope of this paper, not to mention the fact that the investigation of such cases should also consider serious violations committed by non-state actors. Moreover, no international forum has presently jurisdiction over all three potential legal subjects; natural persons, the state and non-state actors.⁵¹ In cases where all three international legal subjects are simultaneously involved in the question of liability, cases are always dismissed solely on the grounds of jurisdiction.⁵² Thus, the division of responsibility between the different international legal subjects is another obstacle to holding perpetrators accountable.

1.2.3. *The problem in the context of the Russian–Ukrainian conflict*

As examples provided so far demonstrate, since rules on state immunity – a legal institution stemming from the principle of sovereign equality of states (*par in parem non habet imperium*) – that has existed since time immemorial, they still constitute a procedural barrier to the exercise of jurisdiction (procedural immunity). Although the latter never refers to whether a particular natural person or the state is responsible for committing a serious crime, only to whether the court has jurisdiction to hear the dispute, i.e. does not imply impunity in the substantive sense.

As Philippa Webb⁵³ has pointed out, the real challenge in the Russian–Ukrainian conflict is to hold the heads of state and government, as well as the foreign ministers, i.e. President Vladimir Putin, Prime Minister Mikhail Mishustin and Foreign Minister Sergei Lavrov accountable, for they enjoy a broader immunity while holding office, which applies not only to acts committed in their official capacity, but to private actions as well. Since this is still an absolute immunity, only the state in question is entitled to waive it⁵⁴ because it is intrinsically linked to it.⁵⁵

Although it is possible to prosecute high-ranking state officials before the ICC, since the ICC member states have agreed (ways of Article 27) that immunity can-

⁵¹ The issue is particularly relevant following the demise of the polarized world order after the 2001 terrorist attacks in New York. The attribution is not clear in these cases. G. Kajtár, *op. cit.*, pp. 106–107, and 161.

⁵² T. Ádány, *op. cit.*, p. 89.

⁵³ P. Webb, *From Russia With War*, <https://www.ejiltalk.org/ejil-the-podcast-episode-19-from-russia-with-war-part-deux/> [accessed: 10.07.2023].

⁵⁴ R.J. Hamilton, *Ukraine’s Push to Prosecute Aggression: Implications for Immunity Ratione Personae & the Crime of Aggression Case*, “Western Reserve Journal of International Law” 2023, (55), p. 45.

⁵⁵ M. Pesci, *op. cit.*, p. 94, see also: *Statement calling for the creation of a special tribunal for the punishment of the crime of aggression against Ukraine*, <https://gordonandsarahbrown.com/wp-content/uploads/2022/03/Combined-Statement-and-Declaration.pdf> [accessed: 12.05.2023].

not be invoked for war crimes, crimes against humanity and genocide (Article 5 of the Statute) (see previous section). However, the system of current international legal system demands – as a general regulation – no extradition obligation to be established, even in respect of a state party with regards to a state which is not party to the Rome Statute (Article 98), as is the case with Russia. The only exception could be an explicit resolution issued by the UN Security Council (UNSC), but since Russia has a veto power as a permanent member of the UNSC, there is no chance of the latter either.⁵⁶ *But what would happen if there were a regime change in Russia?*⁵⁷

In this case, President Putin, the Prime Minister and the Foreign Minister would no longer be covered by personal immunity, only their functional immunity, and would therefore not enjoy any immunity at all.⁵⁸ A similar situation occurred in the Pinochet trial, where a distinction was ultimately made between substantive and personal immunity, and the majority opinion of six judges held that the *ratione materiae* immunity – granted to the state, not to the individual – no longer covered the crime of torture attributed to Pinochet.⁵⁹

While the top three Russian officials (“troika”) are in office however, most avenues of prosecution are closed, and holding them accountable is a major undertaking, as they enjoy immunity from the jurisdiction of the courts of another State under state practice. This was the position of the ICJ in the Yerodia case, moreover, the current position of the International Law Commission (ILC)⁶⁰ reflects this customary law. Further, they (“troika”) would also have immunity before an *ad hoc* or special tribunal under international law – I will discuss in detail below –, because the latter is based on the coordination of national jurisdictions (the precondition for such a tribunal being an international treaty based on the consent of the states concerned⁶¹). And, according to several international lawyers, including Dapo Akande, member of the ILC,⁶² this cooperation with Russia would be extremely unlikely currently, or even in the event of a complete regime change, as would the acceptance of the ICC’s jurisdiction.

⁵⁶ M. Pesci, *op. cit.*, p. 94.

⁵⁷ The ICC’s jurisdiction is complementary, so only if Russia is unwilling or unable to act.

⁵⁸ R.J. Hamilton, *op. cit.*, p. 44.

⁵⁹ M. Koskenniemi, *op. cit.*, p. 76.

⁶⁰ Cf. *Immunity of State officials from Foreign Criminal Jurisdiction*, https://legal.un.org/ilc/summaries/4_2.shtml [accessed: 1.01.2024].

⁶¹ In case of Milošević, the ICTY was set up by a binding decision of the Security Council, yet it has provided a number of opportunities to attack its legitimacy. Regarding this, see E. Kirs, *op. cit.*, p. 239 and pp. 245–246.

⁶² P. Webb, *op. cit.*

So, the question is how to create a tribunal (e.g. tribunal for the crime of aggression⁶³) that is sufficiently international to ensure that leaders holding office do not enjoy personal immunity from prosecution by international courts. In the Yerodia case, the ICJ held that “an incumbent or former foreign minister may be subject to criminal proceedings before certain international criminal courts, where they have jurisdiction (...)”⁶⁴ The question to be examined is: what exactly would give such a court international jurisdiction, what characteristics would it need to have in order for *ratione personae* immunity not to be applicable?

The ICC Appeals Chamber held, and subsequently ruled in the Al-Bashir case that even in the absence of a Security Council resolution (under Chapter VII of the UN Charter), the head of state does not enjoy immunity before an international court. Doubts were raised as to whether this position was correct even at that stage.⁶⁵ In addition, the possibility of another court or a differently constituted ICC Appeals Chamber taking a different view cannot be ruled out.⁶⁶

Currently, only lower-ranking Russian officials, such as soldiers committing international crimes in their official capacity can be denied immunity from prosecution. This is because they can only invoke the doctrine of functional immunity, and would therefore not enjoy immunity before the ICC, national, *ad hoc* or special courts when they are prosecuted for acts that constitute international crimes.⁶⁷

With regards to jurisdictional issues, the relationship between Ukraine and the ICC should also be mentioned as, though Ukraine is not party to the Rome Statute either but has lodged two declarations accepting the jurisdiction of the ICC in 2014 and 2015, under Article 12(3) of the Statute. First for the period from 21 November 2013 to 22 February 2014⁶⁸, and then extended indefinitely for all crimes under the Statute committed from 20 February 2014 onwards, on the entire territory of the country.⁶⁹ There is therefore no obstacle to the ICC proceedings for

⁶³ Declaration on a Special Tribunal for the Punishment of the Crime of Aggression against Ukraine, <https://gordonandsarahbrown.com/wp-content/uploads/2022/03/Combined-Statement-and-Declaration.pdf> [accessed: 6.08.2023].

⁶⁴ International Court of Justice, *The Arrest Warrant Of 11 April 2000 – Democratic Republic Of The Congo V. Belgium*, <https://www.icj-cij.org/case/121> [accessed: 2.10.2023].

⁶⁵ D. Akande, *ICC Appeals Chamber Holds that Heads of State Have No Immunity Under Customary International Law Before International Tribunals*, <https://www.ejiltalk.org/icc-appeals-chamber-holds-that-heads-of-state-have-no-immunity-under-customary-international-law-before-international-tribunals/> [accessed: 23.07.2023].

⁶⁶ Cf.: P. Webb, *op. cit.*; R.J. Hamilton, *op. cit.*, pp. 42–43.

⁶⁷ *Ibidem*.

⁶⁸ Embassy of Ukraine, <https://www.icc-cpi.int/sites/default/files/itemsDocuments/997/declarationRecognitionJurisdiction09-04-2014.pdf> [accessed: 2.07.2023].

⁶⁹ Minister of Foreign Affairs of Ukraine, https://www.icc-cpi.int/sites/default/files/iccdocs/other/Ukraine_Art_12-3_declaration_08092015.pdf [accessed: 2.07.2023].

genocide, crimes against humanity or war crimes committed on the territory of Ukraine by citizens of Ukraine, Russia, or any other state – in theory. In practice, this could also mean that the ICC could request Ukraine to identify, seize, transfer evidence, or arrest individuals. In addition, disclosing the essential elements of a situation or case may even include the possibility of presenting what has happened in a currently non-party state.⁷⁰

On the other hand, the ICC cannot take action on aggression because of jurisdictional constraints, for aggression is only formally included in the Statute.⁷¹ *Nota bene*: aggression was added to the Statute after the Kampala amendments (*Amendments on the crime of aggression to the Rome Statute of the International Criminal Court*, 2010)⁷², but only 43 of the 123 States Parties have signed it, and a conjunctive condition requires the consent of two state parties. This is why the ICC's jurisdiction can only extend to aggression if it is committed by a state party to the Kampala Amendments on the territory of a state that signed the Amendments.⁷³ Therefore, if a formal prosecution were to be initiated against Russia for the crime of aggression, with the possibility of international prosecution of the Russian leaders involved,⁷⁴ this could be done solely through a newly established court.

Also considering the aforementioned *ad hoc* special tribunal models, three alternative forms of aggression tribunals are envisaged by the international legal community: “(1) the UN General Assembly model, established by agreement between Ukraine and UN General Assembly; (2) the Council of Europe model, established by agreement between Ukraine and the Council of Europe; or (3) the Nuremberg model, established by agreement between Ukraine and several willing states.”⁷⁵

Out of these, most would consider the first option to be the best. Or, to put it differently, the creation of a hybrid aggression tribunal, based on an international treaty between the Ukrainian government and the UN General Assembly, would

⁷⁰ Zs. Csapó, *Alternatívákban gondolkodhatunk? A Nemzetközi Büntetőbíróság lehetséges kiegészítői/kihívói – az orosz agresszió relációjában*, “Állam- és Jogtudomány” 2022, (4), p. 26; N. Béres, *Ukrajna esete a Nemzetközi Büntetőbírósággal*, “Állam- és Jogtudomány” 2022, (4); P. Kovács, *A Római Statútum...*, *op. cit.*, p. 85.

⁷¹ T. Hoffmann, *Túl a szélmalomharcon? A Nemzetközi Büntetőbíróság és az orosz ukrán konfliktus, előszó “a nemzetközi büntetőbíróság 20 éve” című tematikus számhoz*, “Állam- és Jogtudomány” 2022, (4), pp. 3–4.

⁷² Amendments on the crime of aggression to the Rome Statute of the International Criminal Court, https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-10-b&chapter=18&clang=en [accessed: 10.01.2024].

⁷³ T. Hoffmann, *op. cit.*, P. Kovács, *A Római Statútum...*, *op. cit.*, p. 66.

⁷⁴ There is no exception to the prohibition of violence between states Russia could invoke. Zs. Csapó, *Alternatívákban gondolkodhatunk?...*, *op. cit.*, p. 31.

⁷⁵ R.J. Hamilton, *op. cit.*, p. 52.

have a wider legitimacy than the other alternatives. The Special Court for Sierra Leone, established in 2000 by an agreement between the UN and the Government of Sierra Leone, is seen as a precedent for this.⁷⁶ As commonly known, this court acted as a hybrid, independent court, and was able to prosecute the then reigning Liberian President Charles Taylor. We need to remind ourselves however, that the establishment of the forum was proposed by the Security Council in its Resolution 1315 – although it did not refer to Chapter VII to justify its legal basis⁷⁷ – and, extraordinarily, Liberia cooperated with the court.⁷⁸

The UN is not condemned to absolute inaction regarding the Russian aggression, as the Charter does not prevent the General Assembly from taking part in establishing a special international criminal tribunal with the consent of the concerned state. Under present rules however, Russia would not be legally compelled to cooperate with such a forum. First because it would not be obliged by a Security Council resolution (under Chapter VII of the Charter) due to the veto – respect to its hybrid nature, a tribunal like that would be grounded on the domestic criminal jurisdiction of Ukraine. Second, Russia would definitely not agree to an international treaty obliging it to cooperate.⁷⁹

Considering however that the Russian veto means the Security Council is not able to carry out its duties in relation to the Russian-Ukrainian conflict, the UN General Assembly *may issue appropriate recommendations to UN members for collective measures*. This is based on UN Resolution 377 (V), *Uniting for Peace*.⁸⁰ The Resolution essentially states that if the Security Council cannot act upon its primary responsibility maintaining international peace and security because of the lack of consensus between permanent members, this role is taken over by the Special Assembly.⁸¹ As such, while discussing further alternatives, the following question may arise: under a broader interpretation of Resolution 377 (V) (in case there is majority support), could the UN Special Assembly – substituting the role of the Security Council, and as an exception – (1) be entitled to establish an international court where cooperation with the court would be mandatory for all UN member

⁷⁶ D.L.R. Tchobo, *Russia's Invasion of Ukraine: Creating a Special Tribunal for the Crime of Aggression Would Be a Danger to the Future of International Criminal Law* (March 11, 2022), <http://dx.doi.org/10.2139/ssrn.4078759> [accessed:10.10.2023], p. 10.

⁷⁷ S/RES/1315(2000), see also: Zs. Csapó, *Alternatívákban gondolkodhatunk?...*, *op. cit.*, p. 43.

⁷⁸ Liberia (as the third state) would have needed an explicit, written declaration of acceptance to be bound by the relevant provisions of the treaty. Meaning, Liberia cooperated with the court, even if *sensu stricto* had no legal obligation to do so. T. Ádány, *op. cit.*, p. 84.

⁷⁹ Cf. *Ibidem*, p. 39.

⁸⁰ A/RES/377. V. Lamm, *Az ukrajnai háború a nemzetközi jog tükrében*, "Magyar Tudomány" 2023, (9), pp. 1120–1129.

⁸¹ *Ibidem*, p. 1125.

states; or (2) refer a case to the ICC? In the latter case, moreover, no new tribunal needs to be created either.⁸²

The argument seems to be plausible at first sight, though, aside from being able to upset the balance of power within the UN, it is not feasible, because even if an international court were to be established by the adoption of the *Uniting for Peace* resolution of the General Assembly, it would still be a “recommendation” in terms of legal status, as the text of the resolution makes it clear.⁸³ Such an alternative would therefore presuppose a hazardously broad interpretation of the General Assembly’s powers under the aforementioned resolution to establish an international tribunal as an exception via a binding decree.⁸⁴ Such a scenario would result in the status of an *ad hoc* tribunal to be close to that of the ICTY and ICTR,⁸⁵ the difference being the basis for the establishment and jurisdiction of the tribunal would be a binding resolution of the UN General Assembly obliging all member states of the UN to cooperate with the tribunal and to waive immunity. But such a broad interpretation would be highly questionable in terms of legality and would be *ultra vires*, which could only be avoided by amending the UN Constitution.⁸⁶ The establishment of an international court dealing with the aggression against Ukraine under the present rules would thus be legally problematic in every case.

Let us also not forget the principal dilemma: holding a sitting head of state accountable can prove to be difficult in case of international courts as well, for, as we have seen above, both the ILC and the ICJ adamantly reject the exception to personal immunity on the basis of existing practice and *opinio juris*. The Russian President, Prime Minister and Foreign Minister are therefore legally protected by immunity while holding office.⁸⁷

Everything discussed above shows the issues of heads of state immunity for international crimes under customary international law, are at the stage of early development.⁸⁸ If however an international court of aggression were to be established, theoretically allowing the indictment of Putin, Mishustin or Lavrov while they are still holding office, i.e. attacking *ratione personae*, its very establishment

⁸² O. Corten, V. Koutroulis, *Tribunal for the crime of aggression against Ukraine – a legal assessment*. Policy Department, Directorate-General for External Policies, 2022, [https://www.europarl.europa.eu/RegData/etudes/IDAN/2022/702574/EXPO_IDA\(2022\)702574_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/IDAN/2022/702574/EXPO_IDA(2022)702574_EN.pdf) [accessed: 10.09.2023], p. 39; cf. Zs. Csapó, *Alternatívákban gondolkodhatunk?...*, *op. cit.*, p. 45.

⁸³ O. Corten, V. Koutroulis, *op. cit.*, p. 16.

⁸⁴ *Ibidem*.

⁸⁵ ICTY: The International Criminal Tribunal for the Former Yugoslavia, <https://www.icty.org>; ICTR: International Criminal Tribunal for Rwanda, <https://unictr.irmct.org/en/tribunal> [accessed: 12.07.2023].

⁸⁶ Zs. Csapó, *Alternatívákban gondolkodhatunk?...*, *op. cit.*, p. 45.

⁸⁷ *Ibidem*; O. Corten, V. Koutroulis, *op. cit.*, p. 38.

⁸⁸ R.J. Hamilton, *op. cit.*, p. 58; S. Knuchel, *op. cit.*, p. 152.

would have a significant impact on the development of international law, regardless of whether the accused are arrested or tried.⁸⁹ So we could see this possibility as a tool for evolving international law.⁹⁰

Nota bene, regarding the Russian–Ukraine case, an unprecedented, united stand of the international community has already been experienced, which effectively removed a major procedural obstacle at the ICC, namely the need for a decision of the Pre-Trial Chamber before the Office of the Prosecutor authorising an investigation (in the case of a non-party), which is a prerequisite guarantee for proceedings (according to Article 15 of the Rome Statute) initiated under its own jurisdiction (*proprio motu*).⁹¹ 43 State Parties have referred the Russian-Ukrainian conflict to the Office of the Prosecutor without such a decision, essentially signifying that the international community has finally put an end to the culture of impunity⁹² and that “only” procedural obstacles remain to be dealt with.

2. Concluding remarks

As the above demonstrates, the primary constraint in cases involving *jus cogens* human rights violations is state immunity and the personal immunities stemming thereof. However, “[t]he function of peremptory norms is precisely preventing impunity for serious breaches of human rights and humanitarian law.”⁹³

Also, we can establish the problem ought to be traced back to the lack of clear distinction between primary rules – those protecting the fundamental values of the international community – and the secondary rules, which define the system of legal ramifications originating from a breach of such norms of conduct.⁹⁴ Current international law postulates no *jus cogens* norm can include an element of *jus cogens* procedural law, meaning the imperative nature of any *jus cogens* norm is not sufficient to derive denial or loss of immunity thereof, thus, no legal conflict arises therefore between *jus cogens* and the rules on state immunity from jurisdiction. This is why a serious breach of these norms does not automatically result in the denial of immunity for foreign states and officials in such proceedings. It would

⁸⁹ R.J. Hamilton, *op. cit.*, pp. 41–42.

⁹⁰ As Knuchel argue, that “*jus cogens* may play a role in this evolution by buttressing the view that such an exception is necessary because it is in line with the values incorporated by the international community in a higher legal category. Using *jus cogens* to support the contention that immunity is not warranted for international crimes like torture is a permissible use of that notion.” S. Knuchel, *op. cit.*, p. 174.

⁹¹ P. Kovács, *A Római Statútum...*, *op. cit.*, p. 86.

⁹² N. Béres, *op. cit.*, p. 9, and p. 13.

⁹³ S. Knuchel, *op. cit.*, p. 163.

⁹⁴ Cf. C. Tomuschat, J.M. Thouvenin, *op. cit.*

therefore seem plausible to establish them separately. In this case, a *jus cogens* procedural rule would exist denying jurisdictional immunity of the state, which the latter could directly conflict with. This is the only way to overcome obstacles of enforcement. Moreover, it could even render the immunity of high-ranking state officials void for serious international crimes.⁹⁵

The complexity of the problem does however not end there, for the tools of international adjudication – including international criminal justice – have particular limits for a reason. Exercising jurisdiction in these tribunals is subject to strict conditions. These rules can be considered the result of a continuous legal evolution and have been gradually integrated and turned into an integral part of the rules of classical international law, which is difficult to diverge from.⁹⁶ In addition, many fear (as is the case with universal jurisdiction) that the nature of an allegedly committed offence – especially as there is often disagreement as to the precise normative content of *jus cogens* – being deemed sufficient to deny *persona rationae* would provide room for misuse. In such a case, there would be no obstacle to politically motivated⁹⁷ or frivolous charges⁹⁸ being brought against any incumbent officials in the future. Such a solution would completely undermine the sovereign equality of states, which is what immunity was designed to avoid in the first place.⁹⁹

Nevertheless, I believe that the following issue is worth considering: as long as a dispute concerning a serious breaches of human rights cannot in itself constitute a basis for the jurisdiction of the court of justice, because it is based on the consent of the parties even in the most flagrant cases, which is undoubtedly a *jus cogens* violation, the present dilemma will not be resolved.¹⁰⁰ And, as such, the existence of *jus cogens* norms cannot achieve its ultimate goal:¹⁰¹ to provide effec-

⁹⁵ X. Yang, *op. cit.*, S. Knuchel, *op. cit.*, P. Zenovic, *op. cit.*

⁹⁶ T. Ádány, *op. cit.*, p. 93.

⁹⁷ Moreover, the Security Council is a politically motivated body in the first place. N. Béres, *A Biztonsági Tanács által a Nemzetközi Büntetőbíróság elé utalt helyzetek legfontosabb jogi problémái*. MFI Tudományos Közleményei (5). Mádl Ferenc Összehasonlító Jogi Intézet, Budapest 2021, p. 21; S. Knuchel, *op. cit.*, p. 151.

⁹⁸ Koskenniemi also noted something similar: “When criminal law and diplomacy meet the result is likely to be either undermining diplomatic freedom of action – or turning criminal justice into show trials”, M. Koskenniemi, P. Leino, *Fragmentation of International Law? Postmodern Anxieties*, “Leiden Journal of International Law” 2002, (15), <https://doi.org/10.1017/S0922156502000262>, p. 577.

⁹⁹ R.J. Hamilton, *op. cit.*, p. 53.

¹⁰⁰ Cf.: X. Yang, *Jus Cogens...*, *op. cit.*, S. Knuchel, *op. cit.*

¹⁰¹ As Erica de Wet noted: “Although one can no longer say that *jus cogens* is ‘[the] vehicle that hardly ever leaves the garage’, its excursions into the open have not yet resulted in a change of the rules of the road. But still questionable on whether recognition of human rights norms as peremptory norms in international law have enhanced their effective enforcement internationally and domestically.” E. De Wet, *Jus Cogens and Obligations Erga Omnes*, [in:] D. Shelton (ed), *The Oxford*

tive protection against serious human rights violations, an actions that shock the conscience of mankind, and hold the perpetrators, those responsible for such an acts, accountable at all times.

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