Vilnius University Faculty of Law
Department of Private Law

Oleksandra Vasylenko,
II study year, International and European Law Programme Student

Master's Thesis

State Immunity and Accountability for International Crimes: Navigating Challenges in the Case of Russian Aggression Toward Ukraine
Valstybės imunitetas ir atsakomybė už tarptautinius nusikaltimus Rusijos agresijos prieš Ukrainą kontekste

Supervisor: senior lecturer. dr. Inga Martinkutė
Reviewer: lect. Lina Urbaitė

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ABSTRACT AND KEY WORDS

This work examines the interplay between state immunity and accountability, particularly in cases of *jus cogens* norms breaches. Using the Russia-Ukraine conflict as a case study, this thesis underscores a growing need to reevaluate the universal approach toward state immunity, setting valuable precedents. The research proposes potential reforms that would reconcile immunity and justice.

Key words: state immunity, *jus cogens* norms, accountability, Russia-Ukraine conflict, aggression, sovereignty.

Šiame darbe nagrinėjama valstybės imuniteto ir atsakomybės sąveika, ypač tais atvejais, kai pažeidžiamos *jus cogens*normos. Rusijos ir Ukrainos konfliktas naudojamas kaip atvejo analizė, pabrėžiant visuotinio požiūrio į valstybės imunitetą peržiūros būtinybę bei svarbių precedentų nustatymą. Tyrime siūlomos galimos reformos, kurios suderintų imunitetą ir teisingumą.

Pagrindiniai žodžiai: valstybės imunitetas, *jus cogens* normos, atsakomybė, Rusijos ir Ukrainos konfliktas, agresija, suverenitetas.

TABLE OF CONTENTS

INTRODUCTION

State immunity is the core principle of international law that protects state sovereignty and equality. Still, its absolute nature breeds significant issues for accountability, especially in cases of gruesome violations of international norms. Even though some exceptions to state immunity have been incorporated into the general practice, the current framework lacks the implications of immunity application to *jus cogens* violations and international crimes. Russia's invasion of Ukraine has brought up the contradiction between immunity and accountability in the light, setting valuable precedents and demonstrating a growing necessity for change. Due to the war, a chance to reevaluate the established approach and reform the current standards for state immunity in international law appeared and became more relevant than ever. The research topic is especially interesting in the context of violations of peremptory norms, which are considered prevailing over other principles and demand compliance from the international community as a whole.

This thesis aims to analyze the complex relationship between the state immunity doctrine and the imperative of accountability, particularly in cases involving *jus cogens* breaches, and introduce potential reforms that would balance sovereignty with the need for justice within the framework of international law. To achieve this aim, the research will address the following objectives:

1. To examine the legal basis and historical background of state immunity and its shift from an absolute toward a restrictive approach.
2. To analyze the connection between *jus cogens* norms and state immunity through case law, underscoring whether armed aggression could be a reason for limiting immunity.
3. To assess the role of third-party states and domestic courts in ensuring accountability for *jus cogens* violations, especially in the context of the Russia-Ukraine conflict.
4. To evaluate the precedents set by Russia's invasion of Ukraine and suggest legal reforms to balance state immunity and accountability in international law.

This thesis combines doctrinal, comparative, case study, and normative legal methods.

1. The doctrinal legal method was used to analyze international treaties, domestic legislation, and other jurisprudence to evaluate the theoretical foundations of state immunity and its current position in international law.
2. The comparative method was used to assess the differences in approaches to state immunity and its application to cases involving *jus cogens* breaches.
3. Case law was examined in order to study judicial reasonings and the scope of exceptions to immunity, underscoring the evolving nature of the issue in question.
4. The normative method was used to reveal and analyze existing gaps in international legislation, indicating the need for potential reforms that would ensure accountability.

This research is built on the Russia-Ukraine conflict as a case study; therefore, it applies to the real-world context, highlighting the precedents set. The novelty of this thesis lies in current perspectives on limiting state immunity in cases of serious international law breaches. The various methods of legal research used connect the empirical findings with practical applications in promoting accountability. Besides, since the thesis explores domestic legislation and judicial rulings, state practice, and international bodies' approaches, it underscores the gaps in existing frameworks. Besides, the thesis offers potential reforms in the current international system that would allow the prioritization of *jus cogens* norms over state immunity and strengthen the actual enforcement mechanisms. Last but not least, the research indicates possible shortcomings of this approach.

This thesis is structured as follows:

1. Part I covers the evolution of state immunity throughout history, exploring its transition from an absolute doctrine to a restrictive one.
2. Part II analyses *jus cogens* norms and their impact on state immunity, particularly with a focus on armed aggression.
3. Part III assesses the role of domestic courts and third-party states in promoting accountability and limiting state immunity.
4. Part IV highlights the lessons learned from the Russia-Ukraine conflict and considers the future of state immunity in international law, proposing legal reforms to fill the gaps in the current framework.

For this thesis, a variety of sources was used to provide a comprehensive and profound analysis of state immunity and accountability. First of all, multiple international

treaties were analyzed, namely the UN Convention on Jurisdictional Immunities of States and Their Property, the Rome Statute of the International Criminal Court, the Charter of the United Nations, the Vienna Convention on the Law of Treaties, the Statute of the International Court of Justice etc. The research study also included specific cases and their rulings related to the topic. For example, key cases such as the Arrest Warrant case, the Schooner Exchange case, Ferrini v. Germany, and the ICJ's decision on Germany v. Italy were used to demonstrate the judicial application of state immunity principles. The UN General Assembly resolutions, as well as the ICC reports, were examined to define the current international framework. The analysis of the Ukrainian Supreme Court decisions, the Special Economic Measures Act, and the Asset Seizure for Ukraine Reconstruction helped to illustrate domestic approaches to state immunity and accountability. The academic works and articles of scholars from throughout the globe were also used for the thesis. Thus, the publications of such researchers as Xiodong Yang and Yoram Dinstein were used to study the state immunity doctrine and its limitations, and the works of Riccardo Pavoni and Christian Tomuschat offered valuable insights into the interplay between the immunity and *jus cogens* norms. Overall, these sources provided a foundation for a deep analysis of the topic, supporting both the theoretical basis and practical indications of the study.

PART I. LEGAL FOUNDATIONS AND EVOLVING LIMITATIONS OF STATE IMMUNITY

1.1 Origins of state immunity: sovereign equality and absolute immunity

The doctrine of state immunity has its origins in the principle of sovereign equality which is based on the Latin adage '*par in parem non habet imperium*'. This maxima can be translated as 'an equal has no power over an equal' and underlines the idea that a state cannot exercise jurisdiction over another state without its consent [D. Yoram, *Par in Parem Non Habet Imperium*. Israel Law Review, 1966].

"Accordingly, most writers view immunity of states as a genuine rule of positive customary law" [R. Jennings, A. Watts, Oppenheim's International Law].

The principle of sovereign equality emerged from the Peace of Westphalia in 1648 when the non-interference in internal affairs and mutual respect for sovereignty were agreed on between the parties. However, throughout history, we could observe cases where this fundamental principle was breached. Thus, during the period of colonisation, European states every now and then violated par in *parem non habet* imperium by conquering weaker nations and establishing their authorities on those territories [B. Van Schaak *Par in Parem Imperium Non Habet*: Complementarity and the crime of aggression].

At the beginning of state immunity evolution, immunity was considered to be absolute. "It means that a sovereign or sovereign State was absolutely immune from legal proceedings in foreign national courts, whatever the character of the legal relationship involved, and whatever the type and nature of the legal proceedings" [X. Yang, State Immunity in International Law].

It is important to highlight that back then, states were identified with their sovereign rulers. Therefore, any legal action against a state was considered an attack on the ruler's dignity and independence. The idea of absolute immunity was closely tied to the principle of *rex non potest peccare*, meaning "the king can do no wrong"; the ruler is above the law. This approach ensured that states could not be held accountable in foreign courts, neither for commercial nor non-sovereign actions.

One of the earliest and the most significant cases that recognised the principle of absolute sovereignty was The Schooner Exchange v. McFaddon (1812). In this case, two

US citizens claimed possession of a French warship, the Exchange, which was docked in Philadelphia. They tried to seize the Exchange on the grounds that it was taken from them unlawfully. The U.S. Supreme Court, which was presided over by Chief Justice John Marshall, ruled that the French warship was immune. The Court put an emphasis on the fact that neither foreign states nor their property must not be subjected to the jurisdiction of domestic courts on the grounds of respect for sovereignty [The Founders' Constitution Volume 3, Article 1, Section 8, Clause 10, Document 7].

This decision set a clear precedent; however, Chief Justice Marshall pointed out potential exceptions, stating: "It may safely be affirmed that there is a manifest distinction between the private property of the person who happens to be a prince, and that military force which supports the sovereign power, and maintains the dignity and the independence of a nation. A prince, by acquiring private property in a foreign country, may possibly be considered as subjecting that property to the territorial jurisdiction; he may be considered as so far laying down the prince and assuming the character of a private individual; but this he cannot be presumed to do, with respect to any portion of that armed force which upholds his crown, and the nation he is entrusted to govern" [D. H. N. Johnson, The puzzle of sovereign immunity].

Basically, throughout the 19th and early 20th centuries, "states enjoyed immunity even in respect of commercial or other private law dealings, and their property, even if used exclusively for commercial purposes, was not subject to judicial enforcement measures" [X. Yang, State Immunity in International Law].

Back then, domestic courts adhered to the absolute immunity doctrine, holding that any legal proceedings against the state would be in breach of principles of sovereignty and non-interference. We could observe this devotion to absolute immunity through the British case of Mighell v. Sultan of Johore 1894, in which the claim was dismissed due to the fact that the Sultan of Johore was a sovereign [E. Suy, Immunity of States Before Belgian Courts and Tribunals].

However, the absolute nature of immunity has become questionable as states were becoming more engaged in economic and other non-sovereign activities, and a strong need to find a balanced approach that would combine sovereignty protection with justice for private parties appeared.

1.2 The transition from absolute to restrictive immunity

As I mentioned above, the concept of absolute immunity has had a dominant position in international law practice and theory for a long time. However, as states expanded their participation in global trade and commercial ventures, a notable shift from the traditional doctrine of absolute immunity occurred. Thus, a restrictive approach to state immunity is emerging.

It holds that when a state exercises sovereign authority - *acta de jure imperii* - its immunity is applicable, whereas when there are acts performed in a private capacity - a*cta jure gestionis* - immunity is revoked.

"Since its first appearance as a rule implying absolute immunity from any legal claims, the scope *ratione materiae* of immunity has shrunk to some extent, particularly with regard to commercial activities. But its continued applicability to activities *jure imperii* remains unchallenged" [C. Tomuschat, The International Law of State Immunity and Its Development by National Institutions]. This concept permitted courts to establish a balance between respect for state sovereignty and ensuring accountability while engaging in commercial activities.

The changeover for America's approach was the issuance of the Tate Letter in 1952. "In that letter, the Legal Adviser of the Department of State announced that the United States would henceforth depart from the former doctrine of absolute immunity, restricting demands of foreign governments for granting immunity through a suggestion to the courts charged with the matter, to disputes involving truly sovereign acts, accordingly excluding any business activities" [C. Tomuschat, The International Law of State Immunity and Its Development by National Institutions]. The Letter marked only a formal policy shift, and in 1976, the restrictive approach was confirmed by the Foreign Sovereign Immunities Act.

The Constitutional Court of the Federal Republic of Germany, in a judgment on April 30, 1963, found that the absolute doctrine of immunity lost its general applicability as a universal norm and was to be replaced by the restrictive theory [BVerfG Federal Constitutional Court Apr. 30, 1963, 16].

It is important to highlight that the German Federal Constitutional Court not only upheld the restrictive theory but also derived notable implications from it regarding the fundamental issue at the heart of the modern theory of immunity: the distinction between

acts undertaken in *jure imperii* and acts conducted in *jure gestionis* [E. Suy, Immunity of States Before Belgian Courts and Tribunals].

International treaties and conventions enacted a further shift to the restrictive immunity concept. Thus, the European Convention on State Immunity and Additional Protocol were opened for signature in 1972. "The European Convention adopts the concept of relative immunity, but does so by means of setting out a catalogue of cases (Articles 1 to 14) in which immunity cannot be claimed and by specifying in Article 15 the residual rule of absolute immunity" [D. H. N. Johnson, The puzzle of sovereign immunity].

The UN Convention on Jurisdictional Immunities of States and Their Property was adopted in 2004. While the Convention maintains the general rule of immunity, as articulated in Article 5, it also provides a number of exceptions, as outlined in Articles 10-17 [UN Convention on Jurisdictional Immunities, supra note 60].

It is important to mention that these treaties remain mostly ineffective. The UN Convention has not reached the required number of ratifications so far, and the European Convention is actually in force, but only eight states ratified it.

The shift from absolute doctrine to restrictive was indeed a turnover for reconciling state sovereignty with accountability. Undoubtedly, this transition adjusted recognition of the particular exceptions to state immunity, which will be further discussed.

1.3 Modern exceptions to state immunity: balancing sovereignty and justice

Over time, some specific exceptions were carved out to balance immunity and accountability with justice and fairness. These exceptions identified the shift from absolute immunity to a restrictive one.

The first and most recognizable exception is the one previously discussed, namely, the one involving commercial activities. We have concluded that if a state is engaged in business, it acts as a private entity rather than a sovereign. Hence, it cannot claim immunity.

This provision is embodied in Article 10 of the UN Convention on Jurisdictional Immunities of States and Their Property and in Section 3 of the State Immunity Act 1978. This exception was used for judgment in the Trendtex Trading Corporation v. Central Bank of Nigeria case. Lord Denning, M. R., stated that they prefer to rest their decision

on the ground that there is no immunity in respect of commercial transactions, even for a government department [D. H. N. Johnson, The puzzle of sovereign immunity].

The next exception that is of interest to us is the territorial clause. Article 12 of the UN Convention asserts that immunity cannot be claimed: “If the act or omission occurred in whole or in part in the territory of that other state and if the author of that act or omission was present in that territory at the time of the act or omission” [C. Tomuschat, The International Law of State Immunity and Its Development by National Institutions].

A similar provision is also contained in the European Convention on State Immunity, namely, Article 11. It is worth mentioning that this exception addresses cases of insurable risks, traffic accidents in particular. However, it is important to stress that this provision is not applicable to the consequences of armed conflict. The territorial clause was used for ruling in the case De Letelier v. Chile. It involved the assassination of the former Chilean Defense Minister of the Allende government in the capital of the United States, Washington, D.C. The victim’s family initiated a reparation action in a U. S. court. The judges found the action to be within their jurisdiction as defined by the territorial clause of the Foreign Sovereign Immunities Act.

Another significant exception applies to the state’s ability to waive its immunity. A sovereign state is free to determine the manner in which it conducts its affairs, even submitting to the jurisdiction of another state if it chooses to do so. Such waive could be done in two ways: either explicitly or implicitly. “A waiver may be expressed in an international agreement, a written contract or an arbitration agreement, an ad hoc declaration before the court or by a written communication after a dispute between the parties has arisen” [Schreuer, C. H., Review: State Immunity: Some Recent Developments].

Implicit waive suggests the state’s appearance in court and participation in proceedings without invoking its immunity defense. Article 7 of the UN Convention on Immunity implies an expression of consent as a ground for excluding immunity. In the case of Princz v. Federal Republic of Germany, Judge Wald of the U.S. Court of Appeals wrote that a state committing grave violations of human rights thereby implicitly renounces its immunity [Princz v. Federal Republic of Germany, 26 F.3d 1166, 1178].

It should be underscored that under the UN Convention, namely Articles 11 and 13, there are two more exceptions: contracts of employment and ownership and the

possession and use of property exception. These exceptions can be regarded as a distinction between exercises of sovereign authority and acts of a private law character.

Benkharbouche v. Embassy of Sudan is a key case that demonstrates the application of the employment contracts exception. In its judgment, the U.K. Supreme Court examined state immunity and held that Sudan could not invoke it since the employee's role is not directly related to the sovereign functions of the state [Benkharbouche v. Embassy of Sudan & Anor, 2017].

These exceptions shape the traditional concept of immunity, underscoring the necessity of holding states accountable for their wrongful non-sovereign acts. On the one hand, the state immunity doctrine serves as an instrument that helps maintain the integrity of international law. Thus, immunity ensures sovereign equality between states and non-interference in internal affairs. It also minimizes the risk of politically motivated litigation that could cause tension between states, encouraging dialogue and other diplomatic dispute resolutions. On the other hand, absolute immunity has a number of shortcomings for the international community and law. An absolute approach diminishes the credibility of international law by impunity in cases of severe violations of international norms, let alone for unlawful non-sovereign activities. Besides, the application of absolute immunity can be a push for states to abuse their powers, acknowledging their protection from legal consequences. Therefore, developing and establishing these grounds for limiting immunity reflects a transition from an absolute to a restrictive approach, promoting legal certainty in international law.

All in all, the doctrine of state immunity has undergone a significant evolution, shifting from its absolute nature to a restrictive one. The doctrine, which is rooted in the principle of sovereign equality, now distinguishes between *acta jure imperi*i and *acta jure gestionis*. That means that while states remain immune to their sovereign acts, they can be held accountable for their commercial activities, which promotes justice and fairness. Besides, exceptions to state immunity for torts, employment disputes, and property are recognized and demonstrate a balanced approach to protecting sovereignty and delivering accountability.

PART II. *JUS COGENS* NORMS AND ARMED AGGRESSION AS CHALLENGES TO STATE IMMUNITY

2.1 *Jus cogens* norms: definition and legal authority

Another problem that is of interest to us is breaches of *jus cogens* norms and their relation to state immunity.

"*Jus cogens* norms, sometimes called peremptory norms, are rules of international law that are 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" [S. D. Murphy, Principles of International Law]. The above definition emphasizes the binding and unique core of *jus cogens* norms and helps comprehend the scope of the concept. Peremptory norms found their reflection in the 1969 Vienna Convention on the Law of Treaties in Article 53.

The impossibility of amending or abolishing *jus cogens* norms, as well as their obligatory observance and implementation, underscores their special status within international law. These provisions impose obligations on the entire international community; hence, *jus cogens* expresses the idea of the existence of an international lex superior [UN Doc A/71/10, p. 299].

The International Law Commission, in its Conclusions, stated that "a rule of international law may be superior to other rules on account of the importance of its content as well as the universal acceptance of its superiority. This is the case of peremptory norms of international law (*jus cogens*)". So, the special status mentioned above stems from two grounds: particularly important content for the international community as a whole and universal recognition of the superiority of the norm.

Based on this, *jus cogens* norms give rise to the obligations of each member of the international community as a whole - e*rga omnes*[1]. All peremptory norms create obligations *erga omnes*. However, not all obligations result from *jus cogens* [Ch. Tams, Enforcing Obligations Erga Omnes in International Law].

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[1] In general legal theory the concept "erga omnes" (Latin: "in relation to everyone") is used to describe obligations or rights towards all.

It is also worth mentioning that, according to Article 64 of the Vienna Convention on the Law of Treaties, in case of the emergence of a new peremptory norm, any existing treaty in conflict with it should be considered void. Furthermore, all newly adopted norms must comply with *jus cogens* norms. Hence, peremptory norms have greater legal force in comparison to other international norms and, therefore, have a longer process of creation [S. Afanasenko, *Jus Cogens* Norms].

"There is a general agreement accepted by the international community which could list the *jus cogens* norms as the following: the prohibition of genocide, prohibition of torture, prohibition of slavery and slave trade, the prohibition of war of aggression or crimes against humanity; prohibition of piracy; prohibition of racial discrimination, denial of the right to self-determination"[Q. Qerimi, International Law and International Law of Human Rights].

In view of the above, taking the prohibition of genocide as an example, which has *jus cogens* nature according to the Convention on the Prevention and Punishment of the Crime of Genocide (1948), it applies to all subjects of international law, whether they are states, international organizations, insurrectional or national liberation movements, corporations or individuals. No norm of ordinary international law will offer any valid excuse for not complying with the prohibition of genocide, regardless of its source and regardless of the particular circumstances. In any situation of conflict between the prohibition of genocide and a norm of ordinary international law, for example, the prohibition of genocide shall prevail [U. Linderfalk, Understanding *Jus Cogens* in International Law and International Legal Discourse].

The *jus cogens* concept received remarkable attention from international scholars as well as appeared in rulings and advisory opinions of such bodies as the International Court of Justice, international criminal courts[2], the European Court of Human Rights, the UN Human Rights Committee etc. While these judicial bodies acknowledge the supremacy and binding nature of peremptory norms, the contradiction with immunity protection becomes evident.

In this context, an interesting statement from the International Court of Justice draws attention. The ICJ attests that a sovereign state that has committed or is alleged to have committed, grave violations of the rules with which it is bound to comply still

[2] namely the International Criminal tribunal for the former Yugoslavia (ICTY)

remains a sovereign state with all of its attributes. It does not forfeit its sovereign rights through such conduct [M. Ruffert, Special Jurisdiction of the ICJ in the Case of Infringements of Fundamental Rules of the International Legal Order].

This raises a new problem that is yet not properly regulated by the law - the relationship between state immunity and peremptory norms.

2.2 State immunity vs. *jus cogens*: key jurisprudential developments

As concluded, *jus cogens* norms are legally binding and non-derogable, hence enforceable against all states as a whole. However, peremptory norms lack enforcement mechanisms, which causes a contradiction between the principle of sovereignty (application of state immunity) and the strong need for states to be accountable for serious violations of these norms.

As has been stated in the previous part, state immunity has its exceptions in the case of *jure gestionis* acts. But we have no consensus among scholars and international as well as national bodies on whether such an exception can be made on the grounds of peremptory norms. In fact, there was an attempt to include an exception for civil claims for serious human rights violations in the UN Convention on Immunity, but still, it was not adopted.

Noting that "some criticism has been leveled at the Convention on the ground that it does not remove immunity in cases involving claims for civil damages against States for serious violations of human rights," the Chairman of the Working Group of the ILC explained that because "there was no clearly established pattern by States in this regard...any attempt to include such a provision would, almost certainly jeopardize the conclusion of the Convention" [State Immunity and the New UN Convention: Transcripts and Summaries of Presentations and Discussions, 2005][3].

It is traditionally accepted that state immunity is a procedural rule while *jus cogens* norms are regarded as substantive rules. "Substantive rules of *jus cogens* generally leave procedural rules unaffected and do not automatically override such rules, maintaining the

[3] Gerhard Hafner, former Chairman of the U.N. Committees on negotiation of the new Convention, Remarks at the Chatham House "State Immunity and the New U.N. Convention" Conference (Oct. 5, 2005)

substantive-procedural distinction in international law" [S. Talmon, *Jus Cogens* after Germany v. Italy: Substantive and Procedural Rules Distinguished].

The Arrest Warrant case (Democratic Republic of the Congo v. Belgium) is a key case that examines the conflict between *jus cogens* norms and state immunity. Belgium issued an arrest warrant for the foreign minister of Congo on allegations of crimes against humanity and upheld the significance of *jus cogens* principles concerning the enforcement of the customary rule that prohibits governments from permitting criminal proceedings against the head of state, head of government, or foreign minister of another state [Arrest Warrant of 1 April 2000 (Democratic Republic of the Congo v Belgium), Judgment of 14 February 2002].

The Democratic Republic of the Congo, in turn, challenged the warrant on the grounds of the minister's immunity as defined by international law. The ICJ affirmed the minister's immunity, prioritizing procedural regulations above substantive *jus cogens* obligations. The case underscored the conflict between immunity and accountability as well as highlighted their difference in nature.

This distinction was also upheld by The International Court of Justice in the case of Germany v. Italy when it found that peremptory norms do not override sovereign immunity. "Assuming for this purpose that the rules of the law of armed conflict, which prohibit the murder of civilians in occupied territory, the deportation of civilian inhabitants to slave labour, and the deportation of prisoners of war to slave labour are rules of *jus cogens*, there is no conflict between those rules and the rules on State immunity. The two sets of rules 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. For the same reason, recognizing the immunity of a foreign State in accordance with customary international law does not amount to recognizing as lawful a situation created by the breach of a *jus cogens* rule or rendering aid and assistance in maintaining that situation, and so cannot contravene the principle in Article 41 of the International Law Commission's Articles on State Responsibility" [International Court of Justice. (2012). Jurisdictional immunities of the state (Germany v. Italy: Greece intervening), judgment].

The relation between state immunity and *jus cogens* norms was thoroughly reviewed in the case of Al-Adsani vs. the United Kingdom by the European Court of Human Rights. Despite the fact that the Court concluded that breach of the peremptory norms could not invoke an exception to state immunity in civil proceedings[4], in a joint dissenting opinion, six judges agreed that *jus cogens* principles prevail over standard international norms, among them those related to state immunity [R. Alebeek, The Immunity of States and Their Officials in International Criminal Law and International Human Rights Law].

The case law discussed shows that sovereign immunity seems to prevail. However, as the Working Group on Jurisdictional Immunities of States and Their Property noted in its Report, national courts have increasingly considered the argument that immunity should be denied in cases of death and personal injury caused by a state's action in violation of *jus cogens* norms. Based on this, I can presume that the concept of immunity domination might change in the future.

2.3 Armed aggression: implications for state immunity in the context of Russia-Ukraine war

Today, aggression is recognized as the most serious form of use of force by one state against another. Since the Treaty of Westphalia in 1648 and the establishment of State sovereignty, aggression is regarded as the gravest crime, jeopardizing the existence of the State, the integrity of its territory, and the fundamental principles of international law.

Article 2(4) of the UN Charter stipulates that "all Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the Purposes of the United Nations".

The United Nations approved a definition of aggression in 1974. Resolution 3314 of the UN General Assembly defines aggression as "the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or any other manner inconsistent with the Charter of the United Nations." It is important to highlight that any act must satisfy three requirements in order to be considered

[4] The decision was made by a slight 9-to-8 majority of the judges.

“aggression”. Thus, according to the UN Security Council, the act must be performed by a state, including the use of armed force, and attain an extent of sufficient severity.

The International Criminal Court also contributed to establishing the framework for addressing state-led aggression. The Rome Statute of the ICC initially lacked a term for the crime of aggression and did not specify the conditions under which the Court may have jurisdiction over such crimes. For an extended period, the Court possessed only a theoretical jurisdiction over the crime of aggression since States Parties failed to achieve consensus on its definition.

However, in 2010, on the first Review Conference of the Rome Statute, the Assembly of State Parties ratified a resolution that provided a definition of the crime of aggression and established a framework for the Court’s jurisdiction over this offense. Newly added Article 8bis defines aggression as “the planning, preparation, initiation or execution, by a person in a position effectively to exercise control over or to direct the political or military action of a State, of an act of aggression which, by its character, gravity, and scale, constitutes a manifest violation of the Charter of the United Nations”.

The notion of aggression is elucidated and refined in many rulings of the International Court of Justice, as well as by regional intergovernmental entities like the Organization of American States and the African Union. These innovations delineated and organized the right to self-defense and international collective security institutions while also addressing the accountability of the State before international or regional courts [A. Camu, Calling things by the wrong name adds to the affliction of the world].

In light of the recent Russian invasion of Ukraine, the contradiction between state immunity and violation of the prohibition of aggression - *jus cogens* norm - arose once again. What is interesting is that Russian acts have finally been condemned as acts of aggression in 2022. Initially, in 2014, the UN General Assembly did not utilize the term “aggression” in its resolution (A/RES/68/262) concerning the partial invasion and subsequent “annexation” of Crimea by the Russian Federation; instead, it addressed the violation of Ukraine’s territorial integrity and urged all States to abstain from actions that would exacerbate this violation and to seek an immediate peaceful resolution regarding Ukraine.

On the contrary, in its 2022 resolution (A/RES/ES-11/1), the Assembly employed significantly more forceful language, explicitly utilizing the term aggression and identifying the Russian Federation in its demand to immediately halt its use of force

against Ukraine and to abstain from any additional unlawful threats or uses of force against any Member State[5]. Through this resolution, the UN General Assembly sought to affirm a moral stance against the invasion while also initiating possible political and legal repercussions for Russia and its officials concerning state responsibilities and individual criminal accountability. Thus, these resolutions established the foundation for accountability mechanisms, particularly a damage register to record the effects of Russian aggression.

The ICC has initiated investigations into possible war crimes and acts of aggression perpetrated in Ukraine. It is notable that although sovereign immunity often protects officials from foreign judicial actions, the ICC's jurisdiction permits the prosecution of individuals, omitting conventional immunity standards. Hence, Russian leaders, such as President Vladimir Putin, may face prosecution for acts of aggression if deemed accountable under the Rome Statute.

Ukraine filed a suit against the Russian Federation at the International Court of Justice (ICJ), claiming breaches of the Genocide Convention. The case primarily addresses genocide. However, it underscores wider concerns over Russia's activities in Ukraine and the possibility of holding states accountable for *jus cogens* violations. Once again, the case highlights the ongoing controversy over the ability of states to invoke immunity when charged with breaching fundamental principles of international law.

It is worth mentioning that in Germany v. Italy (Greece intervening) ruling, the ICJ determined that the principle of state immunity from the jurisdiction of foreign domestic courts and enforcement remains applicable, even when armed forces carry out the actions in question during an armed conflict. The Court's approach stresses the distinction between the procedural and substantive nature of state immunity and *jus cogens* norms accordingly. However, the Ukraine v. Russia suit poses a potential for a change in such an approach. The first reason for this shift is a worldwide condemnation of Russia's actions toward Ukraine, which were recognized as *jus cogens* violations. Thus, the ally states and international bodies might impose pressure on the ICJ to reevaluate its approach and prioritize accountability over immunity. The next catalyst lies in dynamic state practice,

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[5] The General Assembly intervened in 2022 after an emergency special session (S/RES/2623(2022)) was convened under the "Uniting for Peace" resolution due to the Russian Federation's veto power obstructing the UNSC from adopting a resolution regarding the situation in Ukraine. "This represented the first time in four decades that the UNSC has adopted such a "Uniting for Peace" resolution" [A. Camu, Calling things by the wrong name adds to the affliction of the world].

particularly in limiting state immunity for violations of peremptory norms. This signals a growing consensus among jurisdictions on the prevailing accountability over impunity. Apart from that, restricting state immunity in cases of aggression could establish a significant precedent that may be applied against other aggressor states in future conflicts.

To conclude, the connection between *jus cogens* norms and state immunity is quite controversial. *Jus cogens* norms, recognized as peremptory principles, contest conventional immunity frameworks by emphasizing accountability for grave violations, including genocide and aggression. The Arrest Warrant case demonstrates an increasing acknowledgment of the exceptions, highlighting the prioritization of justice over sovereignty. State immunity and armed aggression contradiction is a keystone that critically arose in the light of recent Russian actions towards Ukraine. Although it is commonly recognized that immunity overrides violations of *jus cogens* norms, including the prohibition of aggression, I strongly believe that the Ukrainian case set compelling grounds for reassessment of this prevailing.

PART III. DOMESTIC COURTS AND THIRD-PARTY STATES IN LIMITING STATE IMMUNITY

3.1 Domestic courts as drivers of accountability

Not only did international bodies such as the International Court of Justice and the European Court of Human Rights contribute to mitigating state immunity and accountability, but domestic courts also played their part. As we can see, it is generally accepted that state immunity even prevails over violations of peremptory norms related to human rights. Still, several domestic courts made quite progressive decisions - they have increasingly narrowed the scope of the state immunity principle to underscore accountability and justice for victims.

The landmark of the issue in question was the Pinochet (№3) case. “The decision of the Appellate Committee of the House of Lords confirms, by the impressive vote of six to one, the earlier majority ruling that a former head of state enjoys no immunity in extradition or criminal proceedings brought in the United Kingdom in respect of the international crime of torture” [C. Warbrick, & D. McGoldrick, Current developments: Public international law]. Thus, the judgment stressed that the violation of the prohibition of torture as a peremptory norm excludes immunity protection.

In the Ferrini v. Germany case, national Italian courts permitted claims against Germany for alleged breaches of *jus cogens* norms during World War II despite Germany’s claim of foreign state immunity. The ICJ dismissed the claim in its Germany v. Italy (2012) ruling, “finding that customary international law recognized no such exception and that there was, in any event, no conflict between foreign state immunity, which is a procedural rule, and *jus cogens* norms, which are substantive” [C. A. Whytock, Foreign State Immunity and the Right to Court Access]. However, despite the ICJ ruling favoring the immunity principle, this case is a significant example of prevailing human rights over state immunity by national courts.

Another interesting example of domestic courts prioritizing *jus cogens* norms over state immunity is the Changi-La case. It draws attention to the fact that the lower courts of Brazil acknowledged state immunity from jurisdiction in their rulings on the grounds of the well-established principle of application of state immunity to *jure imperii* acts.

However, the Brazilian Supreme Court[6] ruled that immunity from jurisdiction ceases when faced with unlawful acts connected to human rights violations. The decision of STF is based on the dominance of the constitution; therefore, the prevalence of human rights is being prioritized over the foreign state immunity principle. It is noteworthy that the Supreme Court dismissed the ICJ's decision on the Germany v. Italy case, arguing that Article 59 of the International Court's Statute sets forth that judgments are only binding between the disputing parties. Therefore, a state could ignore ICJ's arguments[7] [L.C Lima, A. T. Saliba, The Immunity Saga Reaches Latin America. The Changri-la Case].

The case law discussed is particularly important in the context of the Russian invasion of Ukraine, as it could indeed set a precedent for potential judicial proceedings against Russia.

It must be mentioned that the Supreme Court of Ukraine has already allowed victims to sue the Russian Federation, departing from the rule recognized by the ICJ by which states are immune from the jurisdiction of foreign domestic courts and from enforcement even where the actions in question are committed by armed forces in the context of an armed conflict. In its decisions, the Supreme Court ruled that Russia's sovereign immunity has to be revoked [E. Badanova, Jurisdictional Immunities v Grave Crimes: Reflections on New Developments from Ukraine].

The decisions were based on four major arguments. The first argument concerned the violation of the right to effective judicial protection as defined in Article 6(1) of the European Convention on Human Rights and Article 55 of the Ukrainian Constitution in case of presuming Russia's immunity. The second argument is based on territorial tort exemption from state immunity established by Article 12 of the UN Convention on Jurisdictional Immunities of States and Their Property and Article 11 of the European Convention on State Immunity. In applying this exception, the Supreme Court determined, among other factors, that the complaint concerned compensation for moral damage sustained by Ukrainian citizens, that the injury happened in Ukraine, and that it was caused by the actions of Russian agents. Furthermore, the Court highlighted that maintaining Russia's immunity would breach the provisions of the Council of Europe Convention on the Prevention of Terrorism and the International Convention for the

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[6] Supremo Tribunal Federal, STF

[7] "in any case, the decision of the International Court of Justice is a decision that has no *erga omnes* and binding effect [to other States], as provided for in article 59 of its own Statute (…). As recognized in article 38 of its Statute, decisions are a subsidiary means to determine the rules of law" [pp. 22-23].

Suppression of the Financing of Terrorism, namely Article 8. The Supreme Court concluded that actions of military aggression against Ukraine's sovereignty and territorial integrity, in breach of the UN Charter, do not qualify as acta juri imperii.

In the ruling, the Court stressed that "the essential condition for the respect of the sovereign immunity principle is the mutual recognition of sovereignty by States, which means that when Russia denies Ukraine's sovereignty and wages the war of aggression against it, no obligation to respect and give way to the former's sovereignty remains" [the Supreme Court of Ukraine. (2022, May 18). Ruling in case No. 760/17232/20].

As practice shows, the rulings of the national courts are more exceptional than common. However, the Russia-Ukraine conflict provides grounds for a potential change in the States' and their national courts' approaches to sovereign immunity.

It should be mentioned that, to my mind, at this time, appealing to domestic courts is the best option for suing Russia for its illegal actions towards Ukraine. Usually, Russia's prosecution is discussed in the context of claims to international judicial bodies. But as practice shows, international courts may not have jurisdiction over such claims, or applicants just won't be able to afford them. Besides, in order for judgments to be enforceable, Russia must comply with them voluntarily, but we could presume that it has no intention of complying. Hence, even if Ukraine wins the cases against Russia in the European Court of Human Rights or the Genocide Case in the International Court Of Justice, it will be hardly possible to hold Russia accountable for its doings.

On the other hand, there is an option to submit investor-state claims against Russia to arbitration under the Ukraine-Russia Bilateral Investment Treaty. However, the tribunals may reject their jurisdiction on a couple of grounds. The first problem is that the majority of losses and impairments to Ukrainian enterprises were caused by active military actions on Ukrainian territory that was not occupied by Russia and over which it has no practical authority. Furthermore, customary international law affirms that states are not typically liable for any private losses incurred by military acts [O. Marchenko, Shattered Immunities of Aggressor: How Courts Make Russia Pay for Its War].

It must be noted that allowing suits against Russia and deciding in judgments that the Russian Federation's immunity has to be denied is not enough in this case. Ukraine has to implement legislation to deny Russia immunities from any legal proceedings associated with its armed aggression. This law should explicitly permit Ukrainian courts to adjudicate any lawsuits against Russia, freeze Russian assets, and enact court decisions

by compulsory selling of Russian property. For this matter, Ukraine should also take into account the adoption of special contemporary procedural mechanisms for its citizens for more effective lawful reclamation of losses from the Russian invasion, such as collective claims, asset freezing, and compelled sales, as described above. Ukraine should also follow the practice of English courts, such as implementing procedural rules enabling domestic courts to issue global freezing orders against Russian property.

3.2 Enforcement mechanisms through third-party states

Third-party states play an important role in promoting accountability, especially in cases of human rights violations and acts of aggression that contradict the sovereign immunity principle. They have adopted different enforcement techniques, including seizing frozen assets, legal measures, international cooperation and sanctions, and support of international tribunals. Such techniques are considered countermeasures taken against the state that breaches peremptory norms.

At first glance, it might seem that such mechanisms may violate the sovereign immunity principle. However, in accordance with the Articles on State Responsibility for Internationally Wrongful Acts, actions taken as countermeasures, even if they appear to breach international law, are justified.

One of the mechanisms for limiting immunity and enforcing judgments is the seizure of state assets located abroad. According to customary international law as well as conventional international law[8] specific state assets, namely diplomatic property, are enjoying immunity from enforcement. On the contrary commercial property is liable for seizure when associated with commercial activities.

The application of this principle can be traced in the NML Capital Ltd v. Argentina case when the U.S. courts approved seizing Argentine assets stressing the *acta jure gestionis* exception to immunity. Although this case is not related to *jus cogens* violations, its ruling is still relevant in the context of the potential model to follow for peremptory norms violation proceedings.

We should also look into collective measures against Iraq as similar measures are being explored in response to Russia's unlawful actions against Ukraine.

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[8] Here it means treaties, namely the UN Convention on Jurisdictional Immunities of States and Their Property

Iraqi armed forces invaded and occupied Kuwait on August 2, 1990. The invasion was swiftly condemned by the UN Security Council. Trade embargoes were imposed by European Community members and the United States. Besides, it was decided to freeze Iraqi assets in direct response to the invasion. Additionally, the UN Security Council reaffirmed the general duty to make reparation, finding that Iraq was "liable, under international law, for any direct loss, damage, including environmental damage and the depletion of natural resources, or injury to foreign Governments, nationals, and corporations, as a result of Iraq's unlawful invasion and occupation of Kuwait" [UNSC Resolution 687, 3 April 1991, para. 16]. The countermeasures undertaken by the international community against Iraq set a precedent for the Russia-Ukraine conflict and proved the potential for holding states accountable for violating international law.

However, it is essential to point out the possible challenge of asset seizure. Domestic legislation in most jurisdictions implies only the freezing of foreign assets, but not their confiscation. Thus, for instance, in the USA, the International Emergency Economic Powers Act authorizes the executive to freeze foreign-owned assets, including properties of foreign states, but prohibits the change of ownership unless the country is involved in armed conflict with that foreign state [International Emergency Economic Powers Act 1977, §1702(a)(1)(C).]. And since the USA has not declared itself at war with Russia, the restriction does not allow the United States to seize Russian assets.

Nevertheless, some states adopted or introduced special laws to permit the confiscation of Russian assets[9]. As evidence, In Canada, "the Special Economic Measures Act 1992 was amended after Russia's aggression to assign the executive power to order the seizure of property located in Canada that is owned by a foreign government or any person or entity from that country, as well as any citizen of a given country which is not a resident of Canada. The Act contains due process protections. The current scheme under the Special Economic Measures Act allows for the seizure and repurposing through Courts, such that state immunity would apply. As a result, a Canadian Bill allowing more for an (executive) legal mechanism to seize and repurpose assets belonging to states that have breached international peace and security has been put forward and has received a

[9] The Rebuilding Economic Prosperity and Opportunity for Ukrainians (REPO) Act, the Asset Seizure for Ukraine Reconstruction Act (USA), the Seizure of Russian Assets and Support for Ukraine Bill (UK)

second reading in the Canadian Senate" [Ph. Webb, Legal options for confiscation of Russian state assets to support the reconstruction of Ukraine].

The European Union has also taken some steps to freeze Russian assets in response to its invasion of Ukraine. Even though the European Commission has expressed interest in such measure, the European Central Bank and various EU Member States "have shown hesitancy and concerns about the potential global consequences of weakening the rule of law to permit confiscation in the present circumstances" [Jaeger, The Implications of Using Frozen Russian Assets].

For instance, Germany outlines its concerns regarding limiting immunity through seizing foreign funds as it could establish a "trend" that may evoke disputes related to World War II. However, the Lead Council of Reparations Study Group, Dr. Thomas Grant, argued that the confiscation of Russian assets would not establish a harmful precedent, as corresponding actions can only be implemented under the "most limited circumstances" and are entirely justified by the severity of Russia's offenses.

Another enforcement mechanism suggests support from domestic legislation in limiting immunity, particularly in cases of human rights breaches, terrorism, acts of aggression, and commercial disputes. As an example, we should mention the U.S. Foreign Sovereign Immunity Act and the UK State Immunity Act. These laws establish frameworks for domestic judicial bodies to adjudicate lawsuits against foreign states.

It is notable that the U.S. Foreign Sovereign Immunity Act was amended in the past to address a newly arisen problem—state-sponsored terrorism. As I stated above, in light of Russia's unlawful actions toward Ukraine, some third-party states have also shown a willingness to amend or introduce new domestic laws to hold Russia accountable. Thus, the revocation of immunities by concerned states in exceptional circumstances, such as acts of aggression, represents a natural and progressive evolution of international and national laws.

In cases of legal proceedings against states being ineffective or impossible to realize, third-party states may resort to sanctions as an enforcement mechanism. Sanctions function to economically and politically isolate a state, exerting pressure without directly breaking the principle of state immunity. Generally, sanctions are enforced through national legislation or by international organizations. Thus, the United Nations Charter, namely Article 41, incorporates a broad range of enforcement options

that do not involve the use of armed force. States and local organizations frequently implement sanctions autonomously.

Since the beginning of the Russian invasion of Ukraine, the European Union has enacted massive and unprecedented sanctions against Russia. They include targeted restrictive measures (individual sanctions), economic sanctions such as embargoes, diplomatic measures, and visa restrictions.

International cooperation among states, judicial institutions, and international organizations is the key tool for holding states accountable, as coordinated efforts obviously promote the effectiveness of countermeasures.

As discussed above, the international community made collective efforts to freeze and reallocate Russian assets as well as impose sanctions on Russia's property and its oligarchs' fortunes. States jointly made inputs into the ICC's ongoing investigation of Russia's actions toward Ukraine. Therefore, a special joint investigation team was formed specifically for collecting and analyzing evidence of war crimes committed by Russia. Besides, international cooperation presupposes political, diplomatic, and legislative initiatives, as stated previously.

Since the present framework on state immunity does not suggest limiting immunity on the grounds of peremptory norm breaches, enforcement through third-party states significantly helps promote justice and fairness. Although there are some challenges in enforcing accountability, the precedent of the Russia-Ukraine conflict highlights the commitment of the international community to address severe violations of international law.

3.3 Legal pathways for Ukraine: national and international avenues

In view of Russia's full-scale invasion, Ukraine faces an enormous legal challenge to finally obtain justice, accountability, and reparations. Ukraine seeks to implement international and domestic legal strategies to address breaches of international law, seek redress, and punish the perpetrators.

At the international level, Ukraine has been actively engaged in seeking remedies through a number of international mechanisms. For instance, Ukraine has submitted claims against Russia in courts established under the Genocide Convention for the International Court of Justice. In this instance, Ukraine claims that Russia's reason for

why it launched the aggression in the first place, "an aim to stop the genocide in Eastern Ukraine," is a cover for its wrongful aggression. The ICJ also represents a vital venue for Ukraine to defend its sovereignty and for Russia to be condemned for its actions worldwide. On the other hand, the practical aspect of the implementation of ICJ rulings brings some shortcomings. It is a fact that compliance with the court's jurisdiction is dependent on the individual states, and this is where Russia's attitude towards disagreements results in real complications [J. Crawford, Brownlie's Principles of Public International Law].

In the same way, the International Criminal Court also serves as a key avenue towards resolving serious abuses of international law. Ukraine has accepted the ICC's jurisdiction to investigate allegations of war crimes. However, since Russia is not a signatory to the Rome Statute of the ICC, the Court cannot prosecute the crime of aggression in our case as it simply doesn't have jurisdiction. Moreover, additional complications are caused by the logistical challenges of obtaining and convicting top officials as they remain under Russian jurisdiction [W.A. Schabas, An Introduction to the International Criminal Court].

Besides, Ukraine has filed lawsuits against Russia to the European Court of Human Rights even though Russia is no longer a member of the Council of Europe. It's worth mentioning that the Court's judgments may actually set a precedent and keep track of Russian violations of international law provisions. But as previously stated, Russia has no intention of complying with these decisions.

On the contrary, an interesting initiative to establish a special tribunal for aggression was suggested. Two criteria must be satisfied for the tribunal to be considered international with regard to the non-applicability of sovereign immunities. First of all, the tribunal must be created in accordance with international law. Hence, the establishment must be based either on a treaty or through a decision made by a body of an international organization such as the UN, the EU, or, alternatively, the Council of Europe. Further, the tribunal must be sufficiently separated from domestic jurisdictions but, at the same time, properly reflect the common intent to prosecute crimes within customary international law [D. Akande, International Law and the Proposed Tribunal for Aggression Against Ukraine].

As noted earlier, Ukrainian domestic courts have begun prosecuting Russia for unlawful acts on Ukrainian territory based on the Supreme Court's ruling from May 18th,

2022. These trials underscore Ukraine's bold approach to state immunity from the jurisdiction of foreign domestic courts and from enforcement in cases of armed aggression. However, the Ukrainian position on state immunity contradicts the ICJ's ruling in the Germany v. Italy case, triggering legal uncertainty and posing a threat to the credibility of such decisions in the international arena. Furthermore, Ukraine should request ally states to change their laws, to the extent necessary, to permit the recognition and enforcement of the orders and judgments issued by Ukrainian courts for damages from Russia's armed aggression in Ukraine through freezing and a forced sale of any Russian assets, state-owned and private. Undoubtedly, it will be extremely challenging for Ukraine to convince third-party states to execute judgments and disregard Russia's sovereign immunity.

Due to the fact that Russia's use of veto powers in the UN Security Council blocks any effective resolution and its consistent non-compliance with international court and organization decisions, third-party countermeasures seem to be the only possible means of holding Russia accountable for its actions [M. Jackson, The Countermeasures of Others: When Can States Collaborate in the Taking of Countermeasures?]. Nevertheless, the enforcement mechanism through third parties is not a panacea and poses a few challenges as well. Thus, the possible issue can arise with classifying the assets and their reallocation, as most jurisdictions permit only freezing the funds, a gap in domestic legal frameworks, and, therefore, a lack of consensus among members of the international community.

In other words, the avenues suggested by international and domestic enforcement mechanisms have the potential to bring justice and hold Russia accountable for its violations. However, as stated above, Ukraine, together with its partners, must overcome a number of challenges to address Russia's aggression and its consequences.

In summary, the position of national courts and third-party states regarding the limitation of state immunity, particularly in cases of serious human rights abuses and armed aggression, has greatly developed and evolved. The domestic judgments in Pinochet (№3) and Ferrini v. Germany cases illustrate the prioritization of *jus cogens* principles over state immunity and, therefore, commitment to promoting accountability. Ukraine shows a similar opinion on ensuring justice for victims of aggression and *jus*

cogens violations. The role of third-state parties in addressing state-led aggression is also significant despite all the legal challenges and obstacles that arise. The enforcement mechanisms implemented help to advance accountability and shape subsequent approaches to the tension between state immunity and justice.

PART IV. THE FUTURE OF STATE IMMUNITY IN INTERNATIONAL LAW

4.1 Lessons and precedents from the Russia-Ukraine conflict

Russia's full-scale invasion of Ukraine gave rise to ongoing debates on the application of the state immunity principle in cases of serious violations of *jus cogens* norms. The war exposed the weaknesses of conventional doctrines and established frameworks on sovereignty, the use of force, state accountability, and immunity, underscoring the strong need for legal reforms. Therefore, the Russia-Ukraine conflict set a number of precedents valuable for future cases.

Russian unlawful actions significantly challenged the fundamental principle of international law, the prohibition of the use of force as underlying Article 2(4) of the UN Charter. As stated before, Russia tried to justify its invasion by claiming a necessity to avert genocide in Eastern Ukraine. This excuse has been widely condemned as baseless and deceptive. Moreover, it could set a negative precedent for future breaches of the sovereignty principle since the improper use of provisions jeopardizes the validity of the prohibition against aggression.

Nonetheless, the UN General Assembly adopted Resolution ES-11/1, 2022, which denounced Russia's invasion of Ukraine and upheld Ukraine's sovereignty, territorial integrity, and independence. The Resolution received huge support among member states, indicating that the international community will not tolerate or normalize aggression. This resolution actually has a moral and political weight, but to my mind, it clearly lacks accountability mechanisms.

However, the fact that Russia has a veto right in the UN Security Council makes it impossible to adopt further resolutions that may have binding enforcement authority. So another issue that emerges is the international community's potential to react effectively to breaches of international law when powerful states are involved is limited due to the dependence on consensus within the Security Council regarding enforcement measures.

As underscored, the International Criminal Court does not have jurisdiction over the crime of aggression against Russia since this state is not a party to the Rome Statute. Therefore, another remarkable precedent can be established — the creation of a specialized tribunal for aggression. The tribunal's legal basis may stem from an agreement established by Ukraine with the UN, another organization, or other states

potentially supplemented by the implementation of mandatory laws in Ukraine. However, the tribunal's jurisdiction for prosecuting individuals for the crime of aggression will be based on Ukraine's domestic criminal jurisdiction. This presents challenging inquiries about immunity and the need to cooperate with the ad hoc tribunal. [O. Corten and V. Koutroulis, Tribunal for the Crime of Aggression Against Ukraine – A Legal Assessment].

Ukrainian domestic judgments against Russia encourage reevaluating the common approach to state immunity doctrine, especially in cases of serious violations of international law provisions. Ukraine attempts to hold Russia accountable in its national courts despite the generally accepted prevalence of state immunity. It is notable that the Ukrainian position is in line with the rising trend among some states and scholars calling for a more restrictive scope for sovereign immunity, especially in cases of *jus cogens* norms breaches. Thus, this approach may signify a potential shift to recognition of a new exception to immunity for state-led aggression if Ukraine's position draws greater international support.

As previously mentioned, third-party states broadly utilized different enforcement mechanisms in response to Russia's aggression. Measures such as asset seizure and sanctions challenge the traditional concept of sovereign immunity and protection of state property according to international law.

Two primary perspectives exist on the solution of challenges presented by the protection granted to foreign state assets by state immunity. A perspective endorsed by scholars such as Ruys and Wuerth argues that state immunity applies only to "measures of constraints related to court proceedings," consistent with the terminology of the United Nations Convention on Jurisdictional Immunities of States and Their Property. Consequently, from an alternative position, state immunity from execution encompasses all forms of restraint, regardless of their judicial, legislative, or administrative characteristics, thereby including asset freezing. The forfeiture of foreign state assets may be aligned with international law within the countermeasures framework. Thus, executive action allows to bypass the procedural restrictions established by the state immunity. The countermeasures against states that violate international law include such mechanisms as asset freezing, sanctions, and confiscation. Governments and international bodies may immediately execute such measures as they are not bound by procedural limitations, unlike the ones that limit judicial proceedings. As a real-world example of enforcing accountability and simultaneously preserving state immunity, we could cite the freezing

of Russian assets in response to its aggression against Ukraine. Therefore, these actions within the framework of countermeasures under international law are frequently seen as effective means to hold perpetrator states accountable without revoking state immunity.

The International Law Commission's Articles on the Responsibility of States for Internationally Wrongful Acts stipulate that the wrongfulness of actions that ostensibly violate international legal obligations may be eliminated if these actions are executed in reaction to previous violations of international law, aimed at compelling the offending State to adhere to its international obligations. Thus, actions taken as countermeasures, even if they appear to violate international law principles, are justified [D. Franchini, Seizure of Russian state assets: state immunity and countermeasures]. Attention must be drawn to the fact that some third-party states have already conducted some legislative reforms to confiscate Russian frozen assets and repurpose them for Ukraine's needs. This could indeed set a revolutionary precedent if this enforcement mechanism was successfully adopted worldwide.

Similarly, Ukraine proposes to use frozen assets for reparations. Following this approach would indicate that frozen assets are helpful for both enforcing compliance and providing victims of war and aggression with justice. When dealing with states that ignore international rulings or settlement grants, this precedent might alter how the international community handles reparations in future armed conflicts.

In sum, the Russia-Ukraine conflict has significantly altered the norms and legal frameworks surrounding state immunity. The conflict establishes the groundwork for a future international legal system that prioritizes accountability over sovereignty by challenging the legitimacy of functional and personal immunity to violence and encouraging new proposals for legal change.

4.2 Proposals for reform: reconciling immunity with accountability

The principle of state immunity is aimed at preserving sovereign equality and the peaceful coexistence of states. However, as practice shows, the application of immunity can provoke considerable difficulties in ensuring accountability and justice, particularly in serious international law violations. The Russia-Ukraine conflict illuminated a strong necessity to reevaluate state immunity and seek a balance between the fundamental

principle of sovereignty and accountability. It has brought the gaps in the current framework into focus.

Even though the restrictive approach to immunity, which is now generally accepted in most jurisdictions, implies revoking immunity in commercial disputes, the doctrine still needs to sufficiently tackle the growing issue of delivering justice for *jus cogens* norms violations. Despite acknowledging the significance of human rights protection, conflicts exist between sovereign immunity and *jus cogens* norms, which have sparked considerable controversy. Theoretically, it has been claimed that state immunity is highly formalistic and disconnected from the reality of human rights protection; furthermore, it has been asserted that it has detached substantive prohibitions from procedural obligations by establishing an unbridgeable line between them [R. Pavoni, Human Rights and the Immunities of Foreign States and International Organizations]. Therefore, a proposition for expanding the scope of exceptions to state immunity and formally codifying them arose.

The proposal covers an exception in case of *jus cogens* norms breaches, namely for international crimes like genocide, torture, and aggression. Establishing this exception can be done through treaty law and eventually through universal state practice. Thus, many scholars suggest amending the existing agreements, such as the UN Convention on Jurisdictional Immunities of States and Their Property [V. Alebeek, The Immunity of States and Their Officials in International Criminal Law and International Human Rights Law].

First and foremost, the amended UN Convention should contain a provision that would explicitly enshrine the non-derogability of peremptory norms and their supremacy over state immunity. This implication would finally solve the controversy between procedural rules and substantive obligations highlighted in previous parts. Needless to say, the following amendment should be an introduction of the exception to state immunity in cases of *jus cogens* violations. These two changes would reflect that international law prioritizes accountability for serious violations of fundamental principles over procedural safeguards, establishing a common standard across all jurisdictions.

Besides, it is widely discussed that the Rome Statute of the International Criminal Court should also be revised and modified. Even though the Statute in its Article 27 recognizes revoking personal immunities for state officials in cases of genocide, war

crimes, and crimes against humanity, it lacks the provision that would allow prosecuting perpetrators for crimes of aggression without any restrictions[10]. Thus, the Court has jurisdiction over crimes of aggression only if the guilty state is a party to the Rome Statute, gives its consent, or the Security Council refers the matter to the Court. Therefore, the prominent proposal for amending the Statute is to establish universal jurisdiction over aggression as similarly applied to other international crimes.

Additionally, there is a proposition to extend the framework under Article 27 to incorporate the exceptions to immunity not only regarding state officials but also the state itself. Similarly, Article 75 of the Rome Statute, which presupposes making orders against convicted persons to pay reparations to victims, needs to be amended to mandate reparations from states responsible for grave international crimes.

Alternatively, the international community could adopt a new multilateral treaty that would recognize the exception to state immunity involving *jus cogens* norms violations and international crimes. However, it is important to stress that the treaty's capacity to alter international law would rely on a substantial number of ratifications. Likewise, regional organizations like the European Union could implement a new legislative approach through treaties and protocols prioritizing accountability over state immunity.

In light of Russia's invasion of Ukraine, it was underscored that the current international legal mechanisms fail to fulfill their potential in promoting accountability and delivering justice for breaches of fundamental principles of international law. Therefore, the creation of a special tribunal for aggression is being considered. Carrie McDougall notes that a special tribunal is the most viable alternative for prosecuting a crime of aggression that falls beyond the jurisdiction of the International Criminal Court [C. McDougall, Why Creating a Special Tribunal for Aggression Against Ukraine is the Best Available Option: A Reply to Kevin Jon Heller and Other Critics].

As has already been stated, such a court must be established in obedience to international law. Hence, a few possible ways of its creation are discussed. First, the special tribunal could be established by the UN General Assembly resolution, similar to the creation of the International Impartial and Independent Mechanism for Syria. Another option is to base the tribunal's establishment on the multilateral treaty or agreement between the EU and Ukraine or Ukraine and ally states. The third way of formation

[10] As mentioned before, the Rome Statute provides a definition of the crime of aggression, but the Court's jurisdiction over aggression is still limited.

involves a hybrid international court: domestic specialized chambers integrated inside the Ukrainian legal framework, including international components. This approach seems to get more support from allied governments since it represents the path of least opposition for the first implementation and would presumably strengthen local ownership. This approach is seen to possess diminished legitimacy due to opposition from Ukraine and is acknowledged to have considerably weaker legal enforcement capabilities [P. Bradfield, Bridging the Gap of Accountability for Ukraine: A Special Tribunal for Aggression].

Another prospect for reform is related to the principle of universal jurisdiction[11], namely, broadening its scope by including new exceptions to state immunity. International institutions are responsible for holding perpetrators accountable for international law violations; nevertheless, it is essential to recognize that domestic courts may also initiate prosecutions based on the concept of universal jurisdiction. The concept states that international crimes infringe against global standards due to the world community, hence granting any domestic state the authority to pursue such offenses.

In the context of the Russia-Ukraine war, a growing need to apply the universal jurisdiction principle to the crime of aggression occurred. Such expansion would provide an opportunity for domestic courts to hold states and their officials accountable for breaking the fundamental norms of international law and, at the same time, fill the jurisdictional gaps that currently help perpetrators omit responsibility. Thus, several states have started domestic criminal investigations into suspected international crimes perpetrated by Russia against Ukraine. Poland has initiated an investigation into the 'initiation of war of aggression' and several war crimes as outlined in the Polish Criminal Code. Germany has opened an investigation into alleged war crimes and crimes against humanity committed by Russian soldiers. Similar investigations have also been opened in Spain, Estonia, Lithuania, Slovakia, France, Norway, Latvia and Sweden [T.M.C. Asser Instituut: Accountability].

Consequently, this reform also implies amending domestic legislation. The key requirement for national laws is to contain a clause obliging domestic courts to prioritize universal jurisdiction in cases of *jus cogens* breaches. Apart from that, these laws should introduce provisions that would allow the revocation of immunity for peremptory norms

[11]Universal jurisdiction provides that national courts can investigate and prosecute a person suspected of committing a crime anywhere in the world regardless of the nationality of the accused or the victim or the absence of any links to the state where the court is located.

violations, especially for crimes of aggression, genocide, torture, and war crimes. Such an initiative would enable responsible states and their officials to be held accountable for grave *jus cogens* violations, aligning national legislation with international norms.

Moreover, the Russia-Ukraine conflict uncovered another gap in domestic laws regarding asset confiscation. As was indicated, current legislation in most jurisdictions only allows the freezing of the assets of a perpetrator state and not their redistribution. Basically, that approach should be reformed in the context of *jus cogens* breaches to ensure justice and culpability.

These reforms can potentially fill the gaps in the existing framework and ensure fairness and justice. Implementing these proposals could ultimately help balance state immunity and accountability.

All in all, the Russia-Ukraine war has revealed the growing need to reevaluate the current approach toward state immunity and set a number of precedents for the future of immunity in international law. Consequently, the ongoing conflict has encouraged new propositions for reforming state immunity, which include codifying exceptions for *jus cogens* breaches, expanding the scope of universal jurisdiction, creating special judicial bodies, and amending national legislation. These reforms could finally solve the controversy between state immunity and accountability, prioritizing justice to ensure that no state can avoid consequences for its unlawful acts, especially in cases of *jus cogens* violations.

CONCLUSIONS

1. The empirical analysis of the state immunity doctrine shows a significant evolution from its absolute to restrictive approach, reflecting the necessity to reconcile the principle of sovereign equality, the basis of immunity, with accountability. The application of the restrictive immunity doctrine has greatly expanded to address not only commercial activities but also *jus cogens* breaches. The analyzed case law demonstrates the shift of immunity from being absolute toward being more dependent on circumstances. This proves that state immunity is no longer static and can respond to legal challenges and changes.
2. The research underscores the practical prevalence of state immunity over *jus cogens* norms despite their theoretical supremacy. The tension between procedural immunity and substantive peremptory norms can be traced in numerous cases discussed, but at the same time, there is a potential for legal reforms that would prioritize accountability for *jus cogens* violations and ensure that procedural barriers can be omitted in cases of gruesome breaches of international law.
3. The thesis explores the impact of domestic court rulings on advancing accountability for serious international crimes. Thus, the Italian, Brazilian, and Ukrainian courts have exposed their willingness to revoke state immunity for *jus cogens* violations. Their decisions could set a valuable precedent for other states, encouraging filling the gap between the supremacy of peremptory norms and their practical enforcement to promote accountability, fairness, and justice.
4. As the research highlighted, third-party states significantly contribute to promoting accountability. Several enforcement strategies were used for this goal, including the confiscation of frozen assets, legal actions, international collaboration, penalties, and the endorsement of international courts. The current framework on state immunity does not restrict immunity due to violations of peremptory norms; hence, enforcement by third-party states substantially advances justice and culpability.
5. The extensive invasion of Ukraine by Russia has sparked continuing discussions over the enforcement of state immunity in cases of grave breaches of *jus cogens* principles. The conflict revealed the shortcomings of traditional doctrines and existing frameworks on sovereignty, the use of force, state accountability, and immunity, highlighting the urgent need for legal changes. The Russia-Ukraine war has

profoundly transformed governmental immunity's norms and legal structures. It lays the foundation for a future international legal framework emphasizing accountability over sovereignty by questioning the validity of functional and personal immunity to aggression and adapting innovative legal reforms to contemporary realities.

6. The thesis identifies a number of urgent legal reforms aimed at ensuring legal clarity, reducing weaknesses in current laws, and denying both state and personal immunity for the gravest international crimes. These reforms include codifying the exception for *jus cogens* violations, broadening the extent of universal jurisdiction, establishing specialized judicial bodies, and revising national law. Such measures may ultimately resolve the contradiction between state immunity and accountability, emphasizing justice to guarantee that no state may escape punishment for its wrongful actions, particularly in contexts of *jus cogens* breaches.
7. It is concluded that even though the principle of sovereignty, and hence state immunity, is fundamental, it cannot be an uncompromising obstacle to the pursuit of justice, especially in the face of peremptory norm violations. A balance between state immunity and accountability is a basis for a fair global order. Restitution for victims of serious breaches of *jus cogens*, prevention of future offenses, and the credibility of international law all depend on it.

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SUMMARY

State Immunity and Accountability for International Crimes: Navigating Challenges in the Case of Russian Aggression Toward Ukraine

Oleksandra Vasylenko

This master's thesis provides an analysis of the relation between state immunity and accountability for international crimes and *jus cogens* violations in particular. This topic is most relevant in light of Russia's recent invasion of Ukraine, which highlighted the contradiction between these two principles and the growing necessity for change. The research examines the legal and historical background of the principle of state immunity and its shift from an absolute concept to a restrictive one. It assesses the role of third-party states and domestic courts in limiting state immunity, underscoring potential legal pathways for Ukraine.

The findings of this thesis suggest that while state immunity remains a foundational principle of international law, its application must be reconsidered in light of the evolving international norms and the need for accountability for crimes of aggression and violations of human rights and *jus cogens*. The research suggests a number of legal reforms that would ensure legal clarity, fill the gaps in current legislation, and deny both state and personal immunity for the gravest international crimes. These reforms may ultimately resolve the conflict between state immunity and accountability, promoting justice for victims of state-led violations, particularly in contexts of *jus cogens* breaches.

SUMMARY (IN LITHUANIAN)

Valstybės imunitetas ir atsakomybė už tarptautinius nusikaltimus Rusijos agresijos prieš Ukrainą kontekste

Oleksandra Vasylenko

Šiame magistro darbe analizuojamas valstybės imuniteto ir atsakomybės už tarptautinius nusikaltimus, ypač *jus cogens* normų pažeidimus, santykis. Ši tema itin aktuali atsižvelgiant į pastarąją Rusijos invaziją į Ukrainą, kuri išryškino šių dviejų principų prieštaravimus ir augantį poreikį keisti nusistovėjusią tvarką. Tyrime nagrinėjamas valstybės imuniteto principo teisinis ir istorinis pagrindas bei jo raida nuo absoliutaus iki riboto koncepto. Taip pat vertinamas trečiųjų šalių valstybių ir nacionalinių teismų vaidmuo ribojant valstybės imunitetą, išskiriant galimus teisinius kelius Ukrainai.

Darbo išvados rodo, kad, nors valstybės imunitetas išlieka pagrindiniu tarptautinės teisės principu, jo taikymas turi būti peržiūrėtas atsižvelgiant į besikeičiančias tarptautines normas bei poreikį užtikrinti atsakomybę už agresijos nusikaltimus ir žmogaus teisių bei *jus cogens* normų pažeidimus. Tyrime siūlomos kelios teisinės reformos, kurios užtikrintų teisinį aiškumą, pašalintų esamas spragas teisės aktuose ir panaikintų tiek valstybės, tiek asmenų imunitetą už sunkiausius tarptautinius nusikaltimus. Šios reformos galėtų išspręsti valstybės imuniteto ir atsakomybės konfliktą, skatindamos teisingumą nukentėjusiems nuo valstybės vykdomų pažeidimų, ypač tais atvejais, kai pažeidžiamos *jus cogens* normos.