

The Jurisdictional Immunity of States for Gross Human Rights Violations

International Human Rights Law in Practice

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The Jurisdictional Immunity of States for Gross Human Rights Violations

By

Anna Facchinetti



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Editors' Preface

The content of customary international rules on State immunity from the jurisdiction of foreign courts is changing much more than the International Court of Justice has apprehended in its 2012 judgment on *Jurisdictional Immunities of the State* (Germany v. Italy; Greece intervening). In fact, the dissenting opinions of Judges Cançado Trindade, Yusuf and, although on a specific point, Gaja are much more convincing than the judgment itself. While it is almost always difficult to determine the precise date when a customary rule has changed, the orientation of the change is clear: it goes in the direction of giving weight to fundamental human rights and, consequently, of ensuring a reparation to the individual victims of gross human rights violations committed in the name of the State. This goes hand in hand with the *jus cogens* character granted to fundamental human rights by present international law.

How many exceptions do cancel a rule? There is no mathematical answer, let alone a legal one, to this question. In fact, it is astonishing to gauge how many exceptions have accumulated over the years in the practice of States and put in question the today seemingly staggering rule on State immunity – a rule “as full of holes as Swiss cheese”, to recall the evocative comparison made by Judge Yusuf in his dissenting opinion to the above-mentioned 2012 judgment. Looking at the 2004 United Nations Convention on Jurisdictional Immunities of States and Their Property, many exceptions to the rule can be listed, namely: commercial transactions, contracts of employment, personal injuries and damage to property (so-called forum tort exception), ownership, possession and use of property, intellectual and industrial property, participation in companies or other collective bodies, ships owned or operated by a State, and arbitration agreements.

More than one century ago, when it was discovered that States can also engage in trade, international rules on State immunity were adapted accordingly – what explains most of the listed exceptions. However, other holes may exist in the Swiss cheese. From the more recent discovery that States can also transform themselves into criminals – a sad discovery that waited to be made since immemorial time –, the consequence should be drawn that international rules on State immunity deserve to be adapted accordingly.

In her thorough study, Anna Facchinetti joins the enterprise aimed at digging holes in the Swiss cheese by chartering a new path aimed at carving out an exception in the name of protection against egregious human rights violations. The actual significance of the proposed exception is unquestionable and, in our view, deserves the full attention of scholars. It was also for this

reason that we advised the publisher to print this volume in dialogue with the peers that assessed the book proposal and with those who assessed the manuscript.

The *casus belli* of the proposed exception has something to do with the logical and historical weakness of the above-mentioned 2012 ICJ judgment. It lies in the fact that the International Court of Justice, having assumed that the rules which prohibit the murder of civilians in occupied territory and the deportation of civilians and prisoners of war to slave labour are rules of *jus cogens*, reached the contradictory conclusion that there was no conflict between these rules and the rules on State immunity. In the Court's view, the two sets of rules address different matters, having, respectively, a substantive and procedural character. In envisaging two completely separate orbits, where substantive and procedural rules rotate without any connection between them, the Court denied that the latter are made to ensure the implementation of the former and reached the undesirable result of giving a *jus cogens* character to a Swiss cheese rule.

After 2012, a number of national court decisions – in Brazil, Italy, the Republic of Korea, Ukraine – have followed the path of the seminal 2000 Greek *Areios Pagos* (Supreme Court) and Italian 2004 Court of Cassation judgments, seizing the proper hierarchy between mandatory and procedural rules. They have provided momentum for a further exception to the State immunity rule where violations of fundamental human rights have taken place, in full conformity with the logic of the present international law system.

These considerations are useful to understand the interest in Anna Facchinetti's work on *The Jurisdictional Immunity of States for Gross Human Rights Violations*. With full command of the relevant international practice and scholarly elaboration, the author builds on an enlarged forum tort exception, drawing inspiration from domestic conflict law rules on jurisdiction over torts. She places emphasis on a common aspect of both public and private international law, which is given by the importance for the exercise of jurisdiction of a territorial link between the forum State and the facts underlying the dispute or the nationality of the victim. This allows her to enlarge the forum State exception, currently understood in a restrictive way, and envisage an "extended forum tort exception", applying in cases where the conduct of the foreign State took place in the territory of the forum State or where the direct damage occurred in the territory of such State.

One does not need to share Anna Facchinetti's foundational idea of the common origin of both public and private international law, and can question the possibility of formulating "an argument for an exception to immunity that might be acceptable to States", as frankly stated by the author in the *Introduc-*

tion. Perhaps, instead of seeking what States could agree on, it would be sufficient to remark that the protection of fundamental human rights warrants *per se* granting an exception to the rule of State immunity, given their mandatory character, which compels any court to give them prompt, adequate, and effective consideration. That said, it remains that the effective protection of human rights proceeds through judicial enforcement and also through the internalization of a given norm in State practice. Hence, it is from this perspective that the constructive effort undertaken in this work might be taken as a realistic and convincingly articulated attempt to get us out of the deadlock where customary international law on State immunity is presently entangled. For all that, we can be grateful to Anna Facchinetti.

Andrea Carcano and Tullio Scovazzi
Modena – Milan
18 May 2026

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I wish to thank those persons in academia who have directly supported or otherwise encouraged my work on the subject of this book. The previous *caveat*, as to mistakes, also applies to them. I owe a special debt of gratitude to Professor Carola Ricci, my mentor, for introducing me to research and for creating opportunities that enabled me to remain in academia over the years. I am also thankful for her generous support in publishing this book. My sincere thanks go to Professor Nicolas Angelet for his friendship and advice, including on the ideas at the heart of this book. I am grateful to Professor Stéphane Beaulac for his thoughtful comments on earlier versions of the manuscript and his kind hospitality during my research stay at the *Université de Montréal*. My gratitude also goes to my peers in Italy and abroad, whom I have had the luck to meet and stay in touch with (apologies for not naming everyone). In particular, I take the occasion to express my gratitude to my international law colleagues, who have become dear friends, for the intellectual exchange and mutual support in navigating the precariousness of academic life, especially as early-career researchers: Silvia, Federica, and Aldo. To my colleagues at the Department of Political and Social Sciences of the University of Pavia, I extend my appreciation for the trust they have placed in me.

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Finally, I want to express my deepest gratitude and love to my husband, Mehdi: without his infinite support, empathy, and patience (including for working weekends and nights), this book would have never come into being. The book is dedicated to him and our children, Alba and Valerio Tamim.

Abbreviations

CAT	United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984)
ECHR	European Convention on Human Rights (1950)
ECSI	European Convention on State Immunity (1972)
FSIA	United States Foreign Sovereign Immunity Act (1976)
ICJ	International Court of Justice
ILC	International Law Commission
ILDC	Oxford Reports on International Law in Domestic Courts
JASTA	United States Justice Against Sponsors of Terrorism Act (2016)
OHADA	Organization for the Harmonization of Business Law in Africa
SIA	Canada State Immunity Act (1985)
SIA	United Kingdom State Immunity Act (1978)
UK	United Kingdom
UN	United Nations
UNCSI	United Nations Convention on the Jurisdictional Immunities of States and Their Property (2004)
US	United States of America
USA	United States of America
VCLT	Vienna Convention on the Law of Treaties (1969)
ZaöRV	Zeitschrift für ausländisches öffentliches Recht und Völkerrecht

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