

**IS THERE AN EMERGING EXCEPTION IN
INTERNATIONAL LAW TO FOREIGN
STATE IMMUNITY IN RESPECT OF
VIOLATIONS OF *JUS COGENS* NORMS?**

**GUSTAV DANIEL LANYI
LLB (Monash) BCom (Deakin)**

**A thesis submitted for the degree of Master of
Laws of the University of New England – LS599**

SUPERVISOR: DR IMTIAZ OMAR

February 2006

Is there an emerging exception in international law to foreign state immunity in respect of violations of *jus cogens* norms?

DECLARATION OF AUTHORSHIP

I, Gustav Daniel Lanyi, declare that I am the sole author of the attached work. This work has not previously been submitted for a degree or diploma in any university. To the best of my knowledge and belief, the thesis contains no material previously published or written by another person except where due reference is made in the thesis itself.

[Redacted signature block]

Is there an emerging exception in international law to foreign state immunity in respect of violations of *jus cogens* norms?

ABSTRACT

The aim of this thesis is to examine the question of whether there is an emerging exception in international law to the principle of foreign state immunity in respect of violations of *jus cogens* norms. The scope of the thesis is limited to immunity from jurisdiction.

Chapter 1 will examine the nature of the concept of foreign state immunity (also known as sovereign immunity) by contrasting it with other, similar doctrines. The chapter then analyses different types of sovereign immunity, namely, absolute immunity and restrictive immunity, and immunity *ratione materiae* and immunity *ratione personae*.

Chapter 2 will analyse in considerable detail the subjects and scope of foreign state immunity by examining the definition of the 'foreign state' for immunity purposes and the recognised exceptions to immunity.

Chapter 3 will consider the nature of the concept of *jus cogens* with its origins in the law of treaties, and investigate the application of the concept to unilateral acts, such as the assertion of foreign state immunity by an individual State. Examples of *jus cogens* norms are also identified.

Chapter 4 analyses five key criminal cases in which the issue of foreign state immunity and allegations of *jus cogens* violations have arisen, drawing distinctions that explain the result in each case.

Chapter 5 examines the key civil cases in which questions of the interaction between sovereign immunity and *jus cogens* violations have arisen, and compares the approaches taken and the exceptions applied.

Finally, in Chapter 6, the factors for and against the recognition of a *jus cogens* exception to foreign state immunity are analysed. Features arising out of both the civil and criminal cases upon which the decisions on immunity depended are examined. Conclusions will be reached as to whether at the start of the twenty-first century, contraventions of the *jus cogens* may be said to constitute an exception in international law to foreign state immunity.

Is there an emerging exception in international law to foreign state immunity in respect of violations of *jus cogens* norms?

ACKNOWLEDGEMENTS

I would like to thank in particular my supervisor for this thesis, Dr. Imtiaz Omar, of the School of Law at the University of New England for his constructive criticism on draft chapters and the focus of my research. The improvements he suggested to the structure and style of the thesis have been of considerable assistance to me.

I would also like to acknowledge the invaluable encouragement and contributions of my mother, Mrs. Agnes Lanyi, in photocopying and helping to collate copies of my thesis for submission.

Is there an emerging exception in international law to foreign state immunity in respect of violations of *jus cogens* norms?

CONTENTS

Declaration of Authorship.....	i
Abstract.....	ii
Acknowledgements.....	iii
 <u>Introduction</u>	 1
 <u>Chapter 1</u> Nature and types of foreign state immunity	 4
1.1 Foreign state immunity contrasted with similar doctrines.....	4
1.2 Absolute immunity and restrictive immunity.....	7
1.3 Immunity <i>ratione materiae</i> vs immunity <i>ratione personae</i> : an analysis in the context of Heads of State.....	11
 <u>Chapter 2</u> The subjects and scope of foreign state immunity	 19
2.1 Definition of the 'foreign state'.....	19
2.1.1 International texts.....	20
2.1.2 National statutes.....	25
2.1.3 State agencies.....	29
2.1.4 Regional treaties.....	34
2.2 The exceptions to immunity.....	36
 <u>Chapter 3</u> Nature and application of the concept of <i>jus cogens</i>	 41
3.1 The concept of <i>jus cogens</i>	41
3.2 Examples of <i>jus cogens</i> norms.....	45
3.3 Application of <i>jus cogens</i> concept beyond the law of treaties.....	48

<u>Chapter 4</u>	Criminal prosecutions.....	50
4.1	<i>Nuremberg</i> – the <i>ex post facto</i> enforcement of international criminal law against state officials.....	50
4.2	<i>Pinochet</i> – the immunity of a former head of state before the English House of Lords.....	52
4.3	<i>Ghaddafi</i> – French trial of a serving head of state <i>in absentia</i>	53
4.4	<i>Arrest Warrant</i> decision – immunity of a serving foreign minister <i>in absentia</i>	54
4.5	<i>Sharon</i> – Belgian trial of a serving head of state <i>in absentia</i>	57
4.6	A postscript.....	58
4.7	Conclusion.....	59
<u>Chapter 5</u>	Civil actions.....	60
5.1	Cases in which immunity was upheld.....	60
5.2	Cases in which immunity was denied.....	66
5.3	Waiver of immunity.....	70
5.4	Conclusion.....	72
<u>Chapter 6</u>	Conclusions.....	73
6.1	Support for recognition of an exception to immunity in relation to <i>jus cogens</i> violations.....	73
6.2	Factors militating against recognition of a <i>jus cogens</i> exception to immunity.....	76
6.3	Availability of foreign state immunity as a defence in a criminal prosecution for <i>jus cogens</i> violations.....	79
6.4	Availability of foreign state immunity as a defence to civil actions involving <i>jus cogens</i> violations.....	80

6.5	Summary.....	83
-----	--------------	----

	Bibliography.....	85
--	--------------------------	-----------

1.	International conventions and other international texts.....	85
----	--	----

2.	Regional treaties.....	86
----	------------------------	----

3.	National statutes.....	86
----	------------------------	----

4.	Cases.....	87
----	------------	----

5.	Articles and books.....	89
----	-------------------------	----

Introduction

The topic of this thesis is the question of whether there is an emerging exception in international law to the principle of foreign state immunity in respect of violations of *jus cogens* norms. Immunities from seizure, attachment, arrest, execution and other enforcement measures relating to the property of foreign states,¹ are outside the scope of this thesis, the focus of which is on immunity from *jurisdiction*. This reflects the distinction that is drawn in the majority of national case law and most national and international legislative texts.²

Chapter 1 will examine the nature and types of foreign state immunity (also known as sovereign immunity). Foreign state immunity is to be contrasted with other, similar doctrines, such as the extraterritoriality, applicability of laws and 'act of state' doctrines. Different types of foreign state immunity will then be analysed. Firstly, the historical development and application of the doctrines of absolute immunity and restrictive immunity is to be reviewed and critiqued. Secondly, a detailed analysis is undertaken of the relevance of the contrasting doctrines of immunity *ratione materiae* and immunity *ratione personae* to the positions of Heads of State. In this context, the key judgments of the House of Lords in the celebrated *Pinochet (No 3)* case³ will be considered in some detail.

Chapter 2 will analyse the subjects and scope of foreign state immunity. The chapter commences by examining at length the threshold issue of how the 'foreign state' is defined for immunity purposes by various forms of legislation. Firstly, the definitions adopted in the international texts are to be compared and contrasted with extensive references to relevant *travaux préparatoires*. Secondly, the definitions in the national statutes on foreign state immunity will be outlined and compared with references to relevant case law and *travaux préparatoires*. Thirdly, the legislative treatment of state agencies in both the national and international texts on foreign state immunity is analysed with references to pertinent case law. Fourthly, the approaches to defining the 'State' for foreign state immunity purposes adopted in the two regional treaties are to be analysed. Next, the chapter proceeds to examine the recognised exceptions to immunity in the national, international and regional texts, with a particular emphasis on the 'tort' exception, and draws relevant conclusions.

¹ That these immunities are different to and separate from jurisdictional immunities was recognised in the commentaries to the *Draft Articles on Jurisdictional Immunities of States and Their Property*, Report of the International Law Commission on the work of its 43rd session, 29 April to 19 July 1991 ("*ILC Report*"), where it is noted (at p.36) that "States are not automatically exposed to a measure of seizure, attachment and execution in respect of their property once a judgement which may adversely affect them has been rendered or obtained." Doc.A/46/10, 1991, ch. II, *YbILC*, 1991, v.II(2).

² As noted in by the Australian Law Reform Commission, Report No. 24, "Foreign State Immunity" (1984) ("*ALRC Report*"), most national and international texts, as well as the practice of courts in the majority of jurisdictions where the point has arisen distinguishes between immunity from jurisdiction and immunity from execution. There are also sound practical reasons for treating them separately. See *ALRC Report*, para. 66.

³ *Regina v Bartle and the Commissioner of Police for the Metropolis and Ors; ex parte Pinochet* (1999) 38 ILM 581.

Chapter 3 will consider the nature and application of the concept of *jus cogens*. Firstly, the concept of *jus cogens* is analysed with reference to its origins in the 1969 *Vienna Convention on the Law of Treaties* ("Vienna Convention"), the extensive academic commentary on the subject, as well as case law, and the views of members of the International Law Commission ("ILC") involved in the drafting of the relevant Articles of the Vienna Convention. Secondly, the extent of agreement on the examples of *jus cogens* norms is considered, and lists of these norms are compiled from the writings of the ILC, academic commentators and the courts. Thirdly, the chapter proceeds to consider the application of the *jus cogens* concept beyond the law of treaties, drawing on the views of authors, ILC commentary and practice, and international case law to establish the relevance of the concept to the unilateral acts of States also.

Chapter 4 analyses five key criminal cases in which the issue of foreign state immunity and allegations of *jus cogens* violations have arisen: the *Nuremberg Judgment*,⁴ the *Pinochet* cases,⁵ the French *Ghaddafi* case⁶, the *Arrest Warrant* decision of the International Court of Justice,⁷ and the Belgian *Sharon* case⁸. The chapter reaches conclusions as to the approaches taken in each case in terms of:

- (i) the adoption of a hierarchical approach to the superior notion of *jus cogens* norms vis-à-vis the mere ordinary rules of foreign state immunity;
- (ii) the differing treatment of serving and former heads of State;
- (iii) the impact of trial *in absentia* versus trial in the presence of the defendant; and
- (iv) the jurisprudential trend towards the restriction of foreign state immunity.

An update on recent amendments made to the Belgian statute the subject of the *Arrest Warrant* and *Sharon* decisions is also included in this chapter.

Chapter 5 examines the key civil cases in which questions of the interaction between sovereign immunity and *jus cogens* violations have arisen and categorises these into cases in which immunity was upheld, cases in which immunity was denied, and cases involving waiver of immunity. The cases analysed in the first category include: the seminal decision of the Supreme Court of the United States in *Argentine Republic v Amerada Hess*,⁹ the US judgments in *Siderman de Blake v Argentina*¹⁰ and *Princz v Germany*,¹¹ the significant European Court of Human Rights judgment in *Al-Adsani v United*

⁴ *Nuremberg International Military Tribunal (Judgment)* (1947) 41 *AJIL* 172.

⁵ *Pinochet (No 1)* (1998) 37 *ILM* 1302; *Pinochet (No 3)* (1999) 38 *ILM* 581.

⁶ *Arret of the Cour de Cassation*, No. Z 00-87.215 FS-P+F, 13 March 2001, No. 1414, http://www.cap-office.net/_zfiles0/sos-attentats/8C785CD4C98141F2B2E4EC6E127389F5.pdf, accessed on 19.04.05.

⁷ *Arrest Warrant of 11 April 2000 (Democratic Republic of Congo v Belgium)*, http://www.icj-cij.org/icjwww/idocket/icoBE/icoBEjudgment/icoBE_ijudgment_20020214.PDF, accessed on 24.04.05

⁸ No. P.02.1139.F/1, Second Chamber of the Court of Cassation, Brussels, February 12, 2003.

⁹ 488 U.S. 428; 109 S. Ct. 683; 102 L. Ed. 2d 818; 1989 U.S. LEXIS 581; 57 U.S.L.W. 4121; 1989 AMC 501.

¹⁰ 965 F. 2d 699 (9th Cir. 1992).

¹¹ 307 U.S. App. D.C. 102; 26 F.3d 1166; 1994 U.S. App. LEXIS 16387.

*Kingdom*¹² and the recent English *Jones v Saudi Arabia* decision¹³. The cases belonging to the second category – all originating from the US - comprise the landmark *Letelier v Chile* decision,¹⁴ *Hilao v Marcos*¹⁵, *Xuncax v Gramajo*,¹⁶ *Jane Doe I v Liu Qi*,¹⁷ and the 'state-sponsored terrorism' exception cases of *Rein v Libya*¹⁸, *Price v Libya*¹⁹, *Salazar v Iran*²⁰ and *Dammarell v Iran*.²¹ The third category of civil cases examined – again all decided in the US - include the overlapping cases of *Siderman de Blake* and *Hilao*, *Cabiri v Assasie-Gyimah*,²² *Paul v Avril*,²³ *Smith v Libya*²⁴ and *Hwang Geum Joo v Japan*.²⁵ Finally, conclusions are drawn about the approaches taken in the three categories of civil cases.

The final chapter of the thesis, the Conclusions, is divided into five sub-chapters. In the first sub-chapter, the indications which support the existence of an exception to foreign state immunity for *jus cogens* violations will be collated. The next sub-chapter will review the factors which militate against the recognition of *jus cogens* exception to immunity. In the third sub-chapter, the implications of the two key distinctions peculiar to criminal actions in the context of the availability of foreign state immunity as a defence to *jus cogens* violations are to be considered. The fourth sub-chapter will evaluate the impact of six key factors on the availability of immunity as a defence in the civil cases involving *jus cogens* violations. The final sub-chapter of the Conclusions aims to draw together the conclusions arising from the previous sub-chapters and will conclude whether, at the start of the twenty-first century, a clear *jus cogens* exception to state immunity exists.

¹² (2002) 34 E.H.R.R. 11.

¹³ [2004] EWCA Civ 1394.

¹⁴ 488 F. Supp. 665; 1980 U.S. Dist. LEXIS 9246.

¹⁵ 25 F. 3d 1467 (9th Cir. 1994).

¹⁶ 886 F. Supp. 162; 1995 U.S. Dist. LEXIS 5307.

¹⁷ 349 F.Supp. 2d 1258; 2004 U.S. Dist. LEXIS 23743.

¹⁸ 162 F.3d 748; 1998 U.S. App. LEXIS 31223.

¹⁹ 363 U.S. App. D.C. 404; 389 F.3d 192; 2004 U.S. App. LEXIS 24357.

²⁰ 2005 U.S. Dist. LEXIS 4842.

²¹ 2005 U.S. Dist. LEXIS 5343.

²² 921 F. Supp. 1189; 1996 U.S. Dist. LEXIS 5238.

²³ 812 F. Supp. 207 (S.D. Fla. 1993).

²⁴ 101 F.3d 239; 1996 U.S. App. LEXIS 30611.

²⁵ 357 U.S. App. D.C. 26; 332 F.3d 679; 2003 U.S. App. LEXIS 13185.