

## SOVEREIGN IMMUNITY AND ITS IMPLICATIONS ON VICTIMS OF HUMAN RIGHTS

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### Abstract

*It is time for the shield of sovereign immunity to shatter as victims of human rights are given a chance to seek justice across borders. Sovereign immunity is a legal concept that protects a state or its entities from being sued in foreign courts thereby preserving state sovereignty and diplomatic relations. This concept originated to protect rulers in ancient times and evolved into a legal principle to protect state sovereignty. The act of state doctrine is a related principle that dates to the 19<sup>th</sup> century which implies that domestic courts should not review the validity of acts performed by a foreign state within its own territory. In recent times, sovereign immunity and the act of state doctrine continue to be significant legal principles in international law. The Universal Declaration of Human Rights is a foundational document adopted by the United Nations in 1948 asserting fundamental rights and freedoms inherent to all individuals without discrimination. However, efforts are being made to restrict absolute immunity in cases involving human rights violations. Sovereign immunities and acts of state doctrine pose a number of challenges for victims of human rights violations. The researcher attempts to explore the exceptions to these doctrines that allow these victims to seek redress.*

**Keywords:** International law, sovereign immunities, Act of state doctrine, human rights victims and access to justice

### Introduction

It has been decided that lawsuits against leaders who are accused of violating the human rights of their citizens are barred by sovereign immunity. Sovereign immunity prohibits courts from hearing cases involving crimes carried out by leaders, both past and present. Such immunity is often trusted by the States of different jurisdictions to claim a right over the suing party that it does not have jurisdiction over. It also prevents any judgment from being enforced against its beneficiaries. In simpler terms, State immunity is a part of international law. Therefore, state immunity should always be a focal point of consideration between foreign states and entities in their relations with each other.

The field of international law bears witness to the ongoing development of legal theories in reaction to the intricacies of diplomatic dealings and relations between states. The idea of sovereign immunity, a foundational principle with centuries of historical development and significant implications for state sovereignty and individual rights, is at the centre of this complex legal system. This study examines the complex aspects of sovereign immunity and how it affects those who have been violated of their human rights.

### Origins of sovereign immunity in customary law

With centuries of progress in addressing diplomatic issues and interstate relations, the

idea of sovereign immunity has a long history in international law. The idea that leaders and diplomats should be exempted from arrest or prosecution while on foreign soil has its roots in customary international law and gained popularity in 1648 with the signing of the Peace of Westphalia. The “absolute theory,” which maintained that a sovereign could not be sued in its own courts without permission, was established and developed by British courts in the 19th century. Famous cases like the Lotus Case (1927)<sup>680</sup> and the Paraguay Case (1878)<sup>681</sup> bolstered the idea that foreign sovereigns are exempt from the jurisdiction of other courts.

Customary international law was shaped by efforts at codification through treaties such as the 1926 Convention on Jurisdictional Immunities and subsequent developments following World War II, such as the Nuremberg Trials<sup>682</sup>. A major framework that clarified the parameters of immunity, exceptions, and the guiding principles of state immunity was established in 1972 with the Vienna Convention on State Immunity. Article 31 of the Vienna Convention explicitly states that diplomatic agents enjoy sovereign immunity from the criminal jurisdiction of the courts. This immunity is not absolute in nature and only persists while the said individual is the representative of the sovereign state. However, persistent issues like individual accountability for international crimes and human rights considerations continue to influence and muddle the application of sovereign immunity in modern international law.

The Act of State Doctrine and the fundamental principles of Sovereign immunity first emerged in the case of Underhill v. Hernandez<sup>683</sup> which held in a unanimous ruling that US courts were prohibited from evaluating the legality of a foreign government's official

actions within its own borders by the act of state doctrine. The Court reasoned that since Hernandez issued the promissory note in his official capacity as a representative of Venezuela, it was an official act, and U.S. courts were not authorized to consider, let alone rule on, the legality of official acts. It is crucial to remember that, since the Underhill case, the act of state doctrine has changed and exceptions to it have been acknowledged. These exceptions have been seen most frequently in situations where mandatory principles of international law have been violated.

### What is sovereign immunity?

A fundamental tenet of international law, sovereign immunity shields sovereign nations from the jurisdiction of courts and legal actions in other countries. This doctrine's core principle is that states should not be subject to the judicial authority of other countries without their express consent because they are equal and independent legal entities.

There are two primary types of sovereign immunity. They are as follows:

1. **Absolute Immunity:** This provides states and their governing bodies with broad defense against lawsuits brought before foreign courts. Historically, public and governmental acts of the state have been covered by absolute immunity. It represents a broad consensus that states ought to be protected from legal actions that could obstruct their ability to perform on the international scene.
2. **Restrictive Immunity:** On the other hand, restrictive immunity recognizes that sovereign immunity has some limitations, especially when it pertains to situations involving commercial activity. According to this method, states might even be forced to give their express consent to be sued in foreign courts for particular private or business actions. This acknowledges the need for accountability in some areas while

<sup>680</sup> Lotus Case (1927) P.C.I.J. (ser. A) No. 10

<sup>681</sup>Paraguay Case (1878) (ICJ), 9 June 1998, available at: <https://www.refworld.org/cases,ICJ,3ae6bd014.html> | last seen on 7/12/2023

<sup>682</sup> Nuremberg Trials available at <https://www.loc.gov/item/2011525463/> | last seen on 7/12/2023

<sup>683</sup> Underhill v. Hernandez, 42 L. Ed. 456 (1897)

maintaining state immunity in others. This also provides a sense of security for cross border transactions and international trade and business relations

One of the pillars of international law, sovereign immunity, requires careful consideration. States are protected from lawsuits in foreign courts, maintaining stability and sovereignty, but it can also turn into a sanctuary for those who violate human rights. Victims are left with limited options due to inconsistencies and limitations, even though there are exceptions for serious violations and commercial activities. International lawmakers need more debate, different avenues for justice, and more established exceptions to strike a balance. The ability of sovereign immunity to uphold both individual dignity and state authority will determine whether it continues to serve as a tool for justice for all or as a shield for the powerful.

### Act of State Doctrine

The act of state doctrine, entrenched in international law, revolves around the jurisdiction of domestic courts when assessing the validity of actions conducted by foreign states within their territories. A central tenet of this doctrine is the presumption that the official acts of foreign states within their own jurisdictions are inherently valid and lawful. Courts, guided by principles of comity and sovereign equality, typically exercise caution in scrutinizing the legitimacy of actions taken by foreign sovereigns within their borders. The quest of justice in international law is long shadowed by the act of state doctrine, a legal theory that looks like it is from a medieval source. Envision a dense veil concealing a state's actions on its own soil, stating that no foreign court can adjudicate them. The act of state doctrine is essentially a shield meant to preserve a state's sovereignty but frequently utilized to avoid accountability and scrutiny for blatant violations of human rights.

Fundamentally, the doctrine forbids judges from challenging the legality of a state's actions taken within its boundaries. Consider it a non-interference agreement between states, whereby they consent to ignore each other's domestic issues, even when they entail severe violations such as torture or disappearances. Although this agreement discourages baseless lawsuits and fosters global amity, victims may suffer greatly as a result, imprisoned in a maze of legal issues and unable to pursue justice. However, state doctrine is not an impenetrable issue. Exceptions are starting to appear, allowing rays of hope and light to peek through the shadows. The doctrine's absolute character is called into question by the increasing recognition that human rights are fundamental to every person and are universal.

Serious violations of human rights are one such exception. Imagine a court ruling that genocide or systematic torture is unacceptable. These crimes are so horrible that they go beyond national borders and call for responsibility. For victims seeking justice for the most horrifying atrocities, this exception which is still in the developmental phase, offers a ray of hope.

### Contemporary Provisions in Sovereign Immunities

Adopted by the UN General Assembly on December 2, 2004, the United Nations Convention on Jurisdictional Immunities of States and Their Property also referred to as the UN Immunities Convention is a significant international treaty. The complex topic of jurisdictional immunities that states and their property enjoy within the framework of international law is addressed by this convention. The development of a framework outlining the general idea that states are exempt from the jurisdiction of courts in other states is at the heart of its provisions. Nonetheless, the convention recognizes the necessity for exceptions and outlines particular situations in which immunity cannot be asserted, mainly in relation to contracts and

business dealings. The convention's recognition of states' ability to voluntarily relinquish their immunity, enabling them to submit to the jurisdiction of foreign courts under certain conditions, is noteworthy. The convention also makes a major contribution by acknowledging exceptions for environmental harm and human rights violations, which reflects a growing realization of the significance of accountability in situations involving serious violations. The convention aims to clarify how state assets are treated in foreign legal proceedings by offering guidelines on the immunity of state property. To harmonize immunity principles with broader spheres of international law, it also describes the convention's interactions with other international treaties. Even though it hasn't been ratified by everyone, the UN Immunities Convention is a noteworthy attempt to strike a balance between maintaining sovereign immunity and guaranteeing accountability, helping to shape international standards in this challenging legal area.

### Exceptions to Sovereign immunity

It is pertinent to note that Sovereign immunity is not absolute and has certain exceptions to it. Under such exceptional circumstances, Sovereign immunity can easily be disregarded. Some of these exceptions are as follows:

1. Commercial Activities and Contracts— States might not be exempt from lawsuits pertaining to business activities in foreign courts. A state may give up its immunity for matters directly connected to its commercial activities if it trades, invests, or conducts other commercial transactions. Contracts between states frequently expressly waive sovereign immunity. In commercial contracts, states sometimes include a provision waiving their sovereign immunity in relation to disputes arising out of the agreements. This offers a way to settle disputes over contracts in court or via arbitration.

2. Jus Cogens Violations:

In situations where there have been flagrant violations of the supreme standards of international law (jus cogens), sovereign immunity is typically not provided. Crimes against humanity, genocide, torture, and other serious transgressions are examples of these norms. For such actions, states are subject to accountability, and the pursuit of justice frequently results in the revocation of immunity. *Jones v. Republic of Sudan (2011)*<sup>684</sup> is one such case that expanded the torture exception, permitting suits for torture regardless of the victim's nationality or location when the torture occurred.

3. Human Rights Violations

*Pinochet v. Spain (1998)*<sup>685</sup> was a landmark case under customary international law that recognized a universal jurisdiction exception for certain human rights violations, allowing trials in national courts even if the crimes occurred elsewhere. States should not be shielded from lawsuits involving violations of human rights, as is becoming more widely acknowledged. Even when they occur on their own soil, states may be held liable for flagrant violations of human rights under international treaties, conventions, and customary international law.

4. Acts outside official capacity

Generally, acts carried out in an official capacity are covered by immunity. However, immunity might not apply and the official might face legal action if they perform private duties or participate in non-governmental activities. *Yousuf v. Chowdhury (2013)* was a Canadian case which acknowledged a human rights exception, permitting lawsuits against foreign states for their own or their

<sup>684</sup> Jones v. Republic of Sudan (2011) available at <https://www.jstor.org/stable/24761320> | last seen on 8/12/2023

<sup>685</sup> Pinochet v. Spain [1998] 3 WLR 1459

agents' human rights violations within their territories.

As the international community struggles to strike a balance between the necessity of holding states accountable for certain actions and the principle of state sovereignty, these exceptions reflect a dynamic and evolving aspect of international law. These exceptions may not always be applied uniformly, and international courts and tribunals may scrutinize legal interpretations.

### Impact on Human Rights Victims

People have rights just by virtue of being human. These rights are known as human rights. These rights are regarded as unalienable, universal rights that states, governments, and private parties must uphold. Generally speaking, different kinds of rights fall in this category which include but are not limited to civil and political rights, solidarity rights, and economic, social, and cultural rights. The norms have been clarified and enforcement strategies have been established as a result of the rights being codified in multiple international instruments.

For victims of violations of such human rights, sovereign immunity acts as a legal shield that safeguards states from lawsuits in foreign courts which can become dangerous. Its presence is overwhelming, making it difficult to pursue justice and trapping victims thereby causing immense suffering and helplessness. Sovereign immunity has a complex effect on victims of human rights as it breaches and presents serious problems for the field of international law. Sovereign immunity, which is primarily intended to protect states from lawsuits in foreign courts, can make it more difficult for victims of human rights abuses to seek justice. It also gives the human rights abusers the power to escape their unjust or wrongful acts. Sometimes these victims may be the very staff involved in the service of the individuals exercising their immunities on foreign land. Limited access to justice is one of the most prominent effects of sovereign immunity since this principle frequently

prevents people from filing lawsuits against foreign governments or their representatives in other countries' courts.

Additionally, it makes it more difficult to pursue damages and prevents judgments against states found to be at fault for these kinds of violations from being enforced. Sovereign immunity may make it difficult to seek redress in the domestic legal systems where the violations took place, therefore the impact even goes there. Decisions about sovereign immunity are frequently influenced by political factors, which can affect how willing foreign courts or international organizations are to hear cases involving violations of human rights. Even though there are exceptions to sovereign immunity, their reach is limited, and there will always be difficulties because international law in this area is constantly changing. The lack of codification and consistency in the international legal system also causes a lot of chaos in this area due to which sovereign immunity and even its exceptions can be easily misinterpreted and misused. International human rights treaties place a strong emphasis on the right to an effective remedy; however, sovereign immunity frequently prevents this right from being practically achieved. To overcome these obstacles, proponents of legal reform push for broader immunity exceptions, particularly in situations involving violations of human rights. The international legal discussions are still shaped by the conflict between the need to hold states accountable for human rights violations and the need to protect state interests. The discourse surrounding sovereign immunity and its consequences for human rights victims is constantly changing due to ongoing developments in international law, such as modifications to customary norms and the introduction of new treaties. While this is a dynamic and upcoming area of international law, it still poses a threat to the victims of humanitarian law to prove such clients across various courts and jurisdictions even when such immunity has been lifted.

There is also a lack of resources that needs to be considered. It often becomes very difficult for victims to reach out to various countries to invoke their jurisdiction or seek their permissions to invoke a jurisdiction for a trial for human rights committed by sovereign states within their own boundaries. Several such gross human rights violations have been committed in the Israel Hamas war on a large scale in recent times. It is extremely disheartening that the power and authority of such sovereign states often causes such cruelty and distress to the victims of some of the most heinous crimes in the world.

### Conclusion

As aforementioned, the criticism of sovereign immunity has persisted over the years. The debates surrounding this topic are not only complex but also differ from the jurisdiction of one state to another. In the words of Abraham Lincoln, "It is as much the duty of the government to render prompt justice against itself in favor of citizens as it is to administer the same private individuals". New questions have surfaced in subsequent litigation, including whether sovereign immunity blocks legal action, whether nonstate actors are subject to international legal liability, and whether this activity could potentially interfere with the executive branch by jeopardizing diplomatic relations.

In the context of human rights violations, the ropes around sovereign immunity need to be loosened as they have time and again posed a serious problem to the victims of these human rights violations. The recent conflict in Hamas which involved the bombing of ambulances, and hospitals and harm to women and children are some of the most gruesome forms of human rights violations in recent times. Moreover, with the development of technology and the introduction of artificial intelligence, even the concept of cyber crimes such as unethical hacking and invasion of privacy could fall under the realm of basic human rights violations that need to be taken into

consideration at the time of formulating a legal framework concerning the exceptions to sovereign immunities in light of human rights violations.

In conclusion, sovereign immunity in international law continues to be a double edged sword. On one hand, it protects the stability and sovereignty of the state, while on the other hand, it can also turn into a sanctuary for human rights violators. This legal principle's development is still being shaped by the intricate interactions between preserving individual dignity and upholding state authority. In order to achieve a balance, the international community will need to have meaningful discussions, investigate various paths for justice, and create stronger exceptions in the future. Whether sovereign immunity remains an instrument of justice or a weapon for the powerful will depend on its capacity to protect both state authority and individual rights.