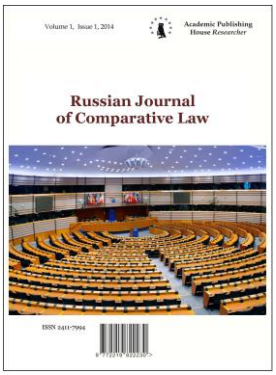

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On Effect of a State Officer's Immunity in Case of Violation of Discrete Categories of International Law Norms

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Abstract

The article examines the legal basis on effect of a state officer's immunity in case of violation of discrete categories of international law norms. An opinion that the state immunity has effect only in respect of sovereign acts and that international crimes in no way can be considered as sovereign acts, particularly so when violation of *jus cogens* norms in question has a wide prevalence. Particularly often this argument is employed when a state immunity is denied in the process of civil proceedings. Also the article deals with the possibility to extend the *ratione materiae* immunity to an officer accused in an international crime perpetration. Immunity is spread only on sovereign actions, i. e. acts committed by the state authority, neither states nor their officers can insulate themselves from another state's jurisdiction if the case in hand is an international crime because such crimes for the most part represent violations of *jus cogens* norms and therefore cannot be sovereign acts.

Keywords: international crimes, immunity, officer, *jus cogens*, state authority, crime, international law.

Introduction

Some authors argue that it is impossible to extend the *ratione materiae* immunity to an officer accused in an international crime perpetration [1. P. 629; 2. C. 109]. In defense of this assertion it is said that, first of all, immunity is spread only on sovereign actions, i.e. acts committed by the state authority, neither states nor their officers can insulate themselves from another state's jurisdiction if the case in hand is an international crime because such crimes for the most part represent violations of *jus cogens* norms and therefore cannot be sovereign acts. Secondly, since the *ratione materiae* immunity can be referred to only if violations are perpetrated in forms of official acts adoption the acts that constitute international crimes cannot be qualified as official acts. Thirdly, it is argued that since norms of *jus cogens* have priority over all other norms they overcome all norms of international law that are tangent to immunity issue and incompatible with norms of *jus cogens*.

Materials and methods

The principal sources for this article writing are as follows: the most important treaties that define the fundamentals of international relations; documents of various international and regional courts. National laws of many states and judgments of national courts are also used. In the process of research general scientific methods of cognition as well as private law methods (technical, systemic historical methods and method of comparative jurisprudence) were used.

Discussion

An opinion that the state immunity has effect only in respect of sovereign acts and that international crimes in no way can be considered as sovereign acts, particularly so when violation of *jus cogens* norms in question has a wide prevalence. Article 53 of Vienna Convention on law of international treaties runs: "The peremptory norm of international common law is a norm which is accepted and recognized by the international community of states as a whole and deviation from this norm is inadmissible. The norm can be modified only with a subsequent norm of international common law of the same character".

Particularly often this argument is employed when a state immunity is denied in the process of civil proceedings. For instance, A. Bianchi writes: "Difficult violations of human rights cannot be qualified as sovereign acts: international law does not acknowledge as legally acceptable those acts of sovereign authority that not only violate international law but are aimed at destruction of its very basics and fundamental values" [3. P. 265].

It is real that availability of system of norms which states have no right to violate means that if a state acts in violation of such norm its actions cannot be considered a sovereign act. When performing such action a state deprives itself of international law protection in the form of the state sovereignty principle and certainly cannot qualify for immunity.

This argument has been mentioned over and over again in national courts. So the case of *Viotia prefecture* dealt with civil claim for reparations for atrocities the German troops committed in Greek village Diostomo (these acts brought about death of 200 civilians) [4. P. 595].

The court of first instance in Greece made the ruling which later on was supported by the Supreme Court of Greece [5] which adjudged reparation in amount of approximately $ 30 mln on the following ground: actions of German troops were a violation of *jus cogens* norms and could not have been considered as a sovereign act. Germany actually waived its immunity by perpetrating these actions.

However there is no unanimity among national courts. Applicants in the case of *Viotia* tried to achieve execution of the Greek court ruling in Germany but the Supreme Court of Germany did not permit that and declared that arguments of the Supreme Court of Greece are not the effective international law [6].

In a later consideration of massacre in Distomo the Supreme Court of Greece by majority of votes made the decision that a state immunity was generally recognized and generally accepted norm of international law and this norm forbade indemnification measure for crimes including torture perpetrated by foreign troops [7].

According to the Court, there was no sufficient homogeneous and wide-spread practice which could demonstrate availability of exception from the state immunity norm.

An American court considered "*Princz v. Federal Republic of Germany*" case [8]. Princz who suffered from the Nazi regime claimed indemnification and maintained that Germany deprived itself of immunity through violation of *jus cogens* norms. Majority of judges repudiated the claim and declared that such renunciation might be considered effective if it was done in response to recognition of claim validity and a claim's rightfulness.

Some US courts shared the position [9].

The Supreme Court of Italy in its ruling in *Ferrini v. Reppublica Federale di Germania* case repudiated the argument that acts made in violation of *jus cogens* norms could not be considered sovereign acts or that in such case denial of immunity occurred [10].

Lord Hoffman in case *Jones v. Saudi Arabia* considered by the House of Lords stated: "The theory of implied immunity denial does not get support in courts' rulings" [11].

The same position is also found in a decision of court of Argentine [12].

Now let us consider the argument from theoretical standpoint. Acts of authority that are knowingly aimed at perpetration of an international crime cannot be considered as sovereign acts

or, to put it differently, such acts are not acts of a legitimate sovereign authority. Indubitable illegality of such acts invites the opinion that international law cannot attribute admissibility to these acts. That thesis seems to be logical. However at the stage of examination when the question of immunity arises illegality of these acts and actions is still undetermined and it is impossible to say for sure that a state acted unlawfully. Therefore at this stage it is impossible to maintain a state deliberately ran to denial of immunity. It is impossible to forget that the assumption of innocence operates in an international criminal proceeding.

Further on, the issue whether an act has character of sovereign act or not, that is whether the act in question is being effected *de jure imperii*, for purposes of the immunity recognition, depends not on lawfulness of a state's activity pursuant to the international law but on answer to the question whether the act or action is initiated by public authorities. But at this point we come across the issue of the act adoption context. Lord Wilberforce in case of "*Congress*" stated: "Arguing whether the state has immunity the court has to take account of the full context of charges brought against the state in order to ascertain whether the respective acts can be considered as lying within confines regulated by the private law or activity of the state has been extended beyond the range of private law but in the sphere of sovereign activity" [13].

In another case [14] Lord Hope stated that it was precisely the nature of an act that defines whether an act should be characterized as *de jure imperii* or as *de jure gestiones*. An act subject to characterization should be considered in its context. Lord Hope noticed in the case under consideration the context was of particular importance because the case concerned ensuring conditions for training of military personnel and these servicemen's family members at one of American military bases in foreign land. And maintenance and support of a military base welfare are the sovereign activities of the state.

International crimes perpetrated by states usually happen during use of military or police forces. It is obvious that this activity constitutes *de jure imperii* activity. In the ruling on "*Nelson v. Saudi Arabia*" [15] case the US Supreme Court stated: "Manifestations of the military power, however monstrous they could be, execution of police force might by a foreign state have been always regarded as the activity which is sovereign by its very nature". The Federal Constitutional Court of Germany has specified: "Deals connected with international ties of the state and its military power, with laws, police operations and effectuation of justice fall in this generally accepted sovereign sphere of activity" [16].

The intention (or goal) of immunity granting to a state is not abolition of consequences of a state's wrongful activities though that may have place. And the urge to implement immunity does not imply that a state ceases to bear responsibility pursuant to the international law. The international law has never presumed that immunity is applicable only when the executed actions have been lawful pursuant to the international law [17. P. 18]. On the contrary, the very intention of the norm of immunity granting lies in the fact that national courts are deprived of opportunity to establish lawfulness or unlawfulness of various actions of foreign states. Therefore it would be illogical to think that applicability of the rule depends on previous ascertainment of lawfulness or unlawfulness of an agent's behavior. To say that some action is sovereign one is not tantamount to saying that this action is legal pursuant to the international law.

When the UK House of Lords considered Pinochet case some members of the House maintained that an action of a state constituting a crime pursuant to the international law can be recognized as an official act of a particular state and therefore such act cannot be withdrawn from consideration due to application of *ratione materiae* immunity [41. P. 56–57].

However, as it was said above, character of an action committed by an officer does not depend on its rightfulness pursuant to international or national law. Criterion in this respect first can be a purpose for achievement of which an act has been passed or action has been committed as well as methods of an act adoption [18; 19].

If attainment of a purpose for which an act was passed coincides with purposes of a state policy, does not serve exclusively interests of individuals, and if an act was adopted with assistance of the state machine, i.e. the act in question was passed in a legal and lawful way, then such acts can be considered as official ones. Deeds that constitute international crimes are often adopted by individuals endowed with authority and usually are adopted in a state interests and not for individual ends. According to A. Barker's vivid expression, "to deny the official character of such acts is tantamount to flying away from reality" [20].

It is impossible to disagree with the International Law Commission that such acts are nothing but state acts and can be basis for initiation of proceedings in respect of a state responsibility [21].

In literature it was repeatedly maintained that due to *jus cogens* norms superiority in the system of international law these norms have to prevail over norms that regulate granting of immunity [3. P. 265; 22. C. 11-14].

An Argentine court expressed the same position in its ruling on "*Siderman de Blake v. Republic of Argentine*" case. The ruling says that *jus cogens* norms have the superior status in international law and therefore *jus cogens* norms enjoy the highest legal validity and can delegitimize norms that contradict them; the sovereign immunity is also a principle of international law and so it is, as it were, enclosed with *jus cogens* norms. If a state violates any *jus cogens* norm, the immunity created by the international law is annulled and a state-violator can be subject to a court proceeding [23].

Roughly the same argument is presented in rulings of many courts from Germany, Italy, Greece and other countries. However, stringency of the argument is doubtful. First of all, though International Criminal Tribunal for the former Yugoslavia produced the following characterization: "The greater part of international humanitarian law norms, in particular, those that forbid war crimes, crimes against humanity and genocide, represents also the imperative norms of international law or *jus cogens* norms; there is no chance to maintain that all norms that forbid international crimes are put up to the *jus cogens* level [24].

Though bans of aggression [25. P. 392], genocide [26], and torture [27] undoubtedly fall into this category it is doubtful that other norms of international humanitarian law are norms of *jus cogens*. Keen discussions that are held around military reprisals (such reprisals are forbidden in principle by the international law though the limits of prohibition is not clear exactly [28. C. 124]) are, to some extent, a confirmation of the thesis put forward in the previous sentence. Many authors rightly point out that just some violations of international humanitarian law can be justified as military or armed reprisals [29. P. 43].

True, the First Additional Protocol to Geneva Conventions greatly expanded the ban on armed reprisals but it is impossible to qualify norms of this Protocol as norms of international common law, let alone attaching these norms to *jus cogens* norms. Rebuttals by a number of states including the USA, Great Britain, and France against inclusion of these stipulations in the Protocol should be taken into account [29. P. 43].

Further on, it is difficult to image how norms that regulate immunity of a state may collide with *jus cogens* norms [30]. The main purpose of these norms is to prevent court proceedings of a state's actions in courts of other states. Hypothetically, a conflict situation may arise when there is the obligation of third states, states different from the violator state, to punish crimes in their courts. And this obligation in itself is a norm of *jus cogens*.

There is no doubt that certain norms really impose on third states obligations to punish some international crimes, for instance, deeds that are the flagrant violations of Geneva Conventions as well as the tortures. However in other cases of military crimes or crimes against humanity there is no generally recognized and generally accepted norm which would impose on third states an obligation to carry on criminal prosecution though such right may exist [31. P. 111–112].

In the same way and despite numerous court rulings on civilian indemnification provision third states are not liable to provide means for such indemnification [32]. Sure, it would be strange if a violation of a *jus cogens* norm automatically grant jurisdiction to courts of foreign state in spite of norms on immunity, even though international courts do not acquire jurisdiction in case of *jus cogens* norms violation [33; 39].

Further on, even in a small number of cases when a real obligation to initiate a legal prosecution exists, it would be wrong to suppose that this obligation has the imperative character or *jus cogens* character. A norm of jus cogens is a prohibition of certain activities and not a prescription to initiate legal prosecution by third states. It is precisely the state that committed a respective action that is the violator of *jus cogens* norm and not the state that did not carry out legal prosecution or did not assign means for civilian indemnification. If the obligation to inquire into a crime had jus cogens character, it would prevail over other norms of international law. Then the obligation to investigate a case would exist even in a situation when investigation would violate rights of an individual or of other states.

An opinion that in case of a violation of any *jus cogens* norm, the right to carry on universal jurisdiction emerges in third states, it is often aired in literature and in practical activities. So one of decisions made by the Investigative Chamber of the International Criminal Tribunal for the former Yugoslavia reads: "It appears that one of consequences arising from *jus cogens* character which is attached to prohibition of torture by the international community is the power of every state to carry out investigation, prosecution and punishment or extradition of individuals accused in use of torture if such individuals are within confines of its jurisdiction" [34].

It is impossible to disagree with A. Orakhelashvili who writes: "If violations of *jus cogens* norms are peremptory recognized as crimes then the obligation to carry out legal prosecution in respect of a culprit or his extradition must be seen as the mandatory one. Pursuant to international law, peremptory norms that form the very essence of human rights prevail over non-peremptory norms that govern immunity of a sate. In case of international crimes forbidden by *jus cogens* norms as crimes against humanity, it must be acknowledged that principles of immunity do not have the peremptory status and that conflict between these two bodies of norms must be solved with structure of normative hierarchy which grants superiority to peremptory norms taken into due account" [35].

If the right to implement universal jurisdiction arising from *jus cogens* norms is acknowledged then this right in itself is peremptory and prevails over those rights of states that do not correlate with the right of universal jurisdiction. However that is rather an exaggeration as it is rightly noted in the Draft of articles on states' responsibility made by International Law Commission in 2002. Firstly, it is doubtful that right of universal jurisdiction is automatically generated by the very fact of a *jus cogens* norm violation. Besides tortures and genocide, the peremptory ban in form of *jus cogens* norm is prohibition of aggression. Nevertheless there is no right of universal jurisdiction in respect of crime of aggression. International Law Commission has found out that some state had no competence to punish leaders of other states for committal of crime of aggression and that there was no practice of states that manifested existence of such right. As the Commission noted, many authors also thought that the right to self-determination had *jus cogens* character as well. However there are no sufficient opinion, reliably confirmed by the practice, that violation of such right affords ground for emergence of international criminal responsibility and that all states have a right to punish those who violate the right.

Assume that the right to carry our universal jurisdiction arises directly from the peremptory norm of some prohibition. Even in such case it does not result from such assumption that the right to carry out universal jurisdiction in itself has *jus cogens* character. Secondary, derived norms that arise in result of *jus cogens* norms violation do not necessarily have the effect of priority. For example, it is recognized that all states are obliged not to acknowledge situations created by violations of *jus cogens* norms as legitimate ones and that recognition is pointed out in the Draft of articles on responsibility of states. However the advisory opinion of the International Court on the case of Namibia states that these derived norms do not have peremptory effect and give way to humanitarian considerations that may arise if non-recognition causes a material damage to human rights [36]. This being said it will be necessary to demonstrate that a norm arising from another norm of *jus cogens* is perceived (in wording of Article 58 of Vienna convention on law of treaties) by the international community as the peremptory norm deviation from which is inadmissible.

Results

The argument that the immunity disappears in case of a *jus cogens* violation is repudiated by two international courts. The European Court of Human Rights in a number of cases maintained that violation of a *jus cogens* norm did not create priority over norms of a state immunity. In case of *Al-Adsani v. United Kingdom*, a narrow majority of the European Court (nine judges versus eight judges) decided that provision of state immunity in cases concerning tortures used by foreign authorities corresponds to the international law and therefore does not deny the right of access to a court. Admitting that prohibition of tortures is the peremptory norm of international law the European Court of Human Rights declared: "Notwithstanding the special character of prohibition of torture in international law, the Court is unable to find out and ascertain grounds in international documents, court rulings and other materials for conclusion that a state is deprived of its right to immunity from civil claims in courts of other state if torture is in question" [37].

This position has been repeatedly confirmed by the European Court of Human Rights in a number of other cases ever since [38; 40].

These cases dealt with a state immunity from civil claims. However if the European Court of Human Rights has accepted the theory of normative hierarchy and really thinks that prohibition of *jus cogens* character prevails over immunity in criminal cases, it is difficult to understand why such prohibition cannot overcome immunity in civil cases also.

Conclusion

Thus if a third state does not carry out prosecution or punishment of individuals who perpetrate international crime on the ground of these individuals' right to immunity that, in many instances, is not considered as a violation of international obligation. Moreover, even if a third state has obligation to carry out prosecution or punishment, this obligation does not have character of *jus cogens* norm. Therefore essentially there is no conflict between norm of immunity and prohibition of *jus cogens* character and such conflict is impossible.

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О действии иммунитета должностного лица государства в случае нарушения отдельных категорий норм международного права

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Аннотация. В статье рассматриваются вопросы действия иммунитета должностного лица государства в случае нарушения отдельных категорий норм международного права. Широко распространено мнение о том, что государственный иммунитет действует только в отношении суверенных актов и что международные преступления, особенно если речь идет о нарушении норм *jus cogens*, никак не могут считаться суверенными актами. Особенно часто этот аргумент применяется, когда отрицается иммунитет государства при рассмотрении гражданских дел. Так же в статье затрагивается дискуссионный вопрос о том, что иммунитет *ratione materiae* невозможно распространить на должностное лицо, обвиняемое в совершении международного преступления.

Иммунитет государства распространяется только на суверенные акты, то есть акты, совершаемые государственной властью, ни государства, ни их должностные лица не могут отгородиться иммунитетом от юрисдикции другого государства, если речь идет о международном преступлении, так как такие преступления по большей части представляют собой нарушения норм jus cogens, а потому не могут быть суверенными актами.

Ключевые слова: международные преступления, иммунитет, должностные лица, *jus cogens*, государство, суверенитет, преступление, международное право.