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SOVEREIGNTY UNDER SIEGE: HUMANITARIAN INTERVENTION, ACCOUNTABILITY NORMS, AND THE GRADUAL EROSION OF STATE IMMUNITY IN CONTEMPORARY INTERNATIONAL LAW

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ABSTRACT

The doctrine of sovereign immunity, once treated as an almost inviolable corollary of state equality under international law, has been subjected to sustained pressure from at least three directions over the past four decades. The first is the humanitarian intervention tradition, reconstituted in the early 2000s as the Responsibility to Protect, which premises the legitimacy of intervention on a state's compliance with minimum duties of care toward its own population. The second is the emergence of a body of peremptory norms, commonly described as jus cogens, whose hierarchically superior status in international law has been invoked by domestic courts to override the procedural shield of state immunity in civil proceedings for torture and war crimes. The third is the growth of international criminal jurisdiction, culminating in the Rome Statute's explicit rejection of official capacity as a ground for immunity before the International Criminal Court. This article examines each of these pressures in turn, drawing on the principal decisions of the International Court of Justice, the European Court of Human Rights, and domestic courts across multiple jurisdictions. The article concludes by identifying the principal lacunae in the current framework and offering proposals for a more principled resolution of the immunity-accountability conflict.

Keywords: *Sovereign Immunity; Humanitarian Intervention; Responsibility to Protect; Jus Cogens; International Criminal Court; Non-Intervention; State Accountability*

I. INTRODUCTION

Sovereignty, in the Westphalian tradition, is the quality that places a state beyond external command. It is both descriptive and normative: it describes the structure of the international order as one composed of formally equal entities, and it prescribes a correlative duty of non-interference in the internal affairs of those entities. The United Nations Charter gave this tradition its most authoritative modern expression.[12] Article 2(1) declares the sovereign equality of all member states. Article 2(7) prohibits the United Nations itself from intervening in matters essentially within the domestic jurisdiction of any state. Article 2(4) prohibits the threat or use of force against the territorial integrity or political independence of any state.[3]

These provisions were not drafted in ignorance of the relationship between state power and human suffering. They were drafted precisely by men and women who had witnessed what sovereign states could do to their own populations when left to their own devices. And yet the Charter's framers resolved the tension between sovereignty and human rights primarily in favour of the former, trusting the Security Council to manage the exceptions. That resolution has not held. Over the seventy-five years since San Francisco, a series of developments, doctrinal, institutional, and political, has chipped away at the immunity that sovereignty was once thought to confer.

This article examines those developments through three lenses. Part II analyses the normative architecture of non-intervention and the conditions under which exceptions to it have been recognised or asserted. Part III turns to state immunity from civil jurisdiction, focusing on the jus cogens exception and the debates generated by the International Court of Justice's decision in *Jurisdictional Immunities of the State*. Part IV examines the immunity question as it arises in international criminal law, with particular attention to the Rome Statute and the Al-Bashir prosecution. Part V draws out the comparative threads through tables of instruments and cases. Part VI offers a critical assessment and constructive proposals. Part VII concludes.

II. THE NON-INTERVENTION NORM AND THE GROWTH OF EXCEPTIONS

A. The Classical Doctrine and its Charter Expression

The non-intervention principle has roots that predate the United Nations Charter by several centuries, but it received its most comprehensive articulation in the post-1945 period. In the

[1]UN Charter (adopted 26 June 1945, entered into force 24 October 1945) 1 UNTS XVI, art 2(1).
[2]ibid, art 2(7).
[3]ibid, art 2(4).

Nicaragua case, the International Court of Justice held that the principle of non-intervention in the internal or external affairs of other states is part of customary international law, independent of and complementary to the Charter prohibition on the use of force.[4] The Court defined intervention as a dictatorial act: one that deprives a state of the freedom to act in accordance with its own judgment on matters within its reserved domain.[5] Armed assistance to rebels in another state was held to violate both the non-use-of-force rule and the non-intervention norm.

The architecture of the Charter was designed to channel collective responses to threats to the peace through the Security Council. Article 39 vests in the Council the power to determine the existence of a threat to the peace, breach of the peace, or act of aggression.[6] Article 51 preserves the inherent right of individual and collective self-defence. Outside those two exceptions, the framework was intended to be comprehensive. State practice, however, has never been fully contained within those channels.[7]

B. Humanitarian Intervention: From Doctrine to Practice

The claim that states have a right, or even a duty, to intervene militarily to prevent or stop mass atrocities in another state has been advanced in various forms since at least the nineteenth century. The 1999 NATO intervention in Kosovo brought the claim to the centre of international legal debate. The intervention was undertaken without Security Council authorisation, in direct tension with Article 2(4) of the Charter, but was justified by NATO members on humanitarian grounds: the scale of human rights violations in Kosovo was said to deprive Serbia of any claim to the protective shield of sovereignty.

The Independent International Commission on Kosovo, in its post-intervention report, famously described the intervention as illegal but legitimate, meaning that it violated the letter of international law while being morally justified by the circumstances.[8] That formulation has not been accepted as a matter of law. The ICJ has consistently declined to recognise a customary right of unilateral humanitarian intervention, and the Charter framework has not been formally amended. But the Kosovo precedent left a mark on the normative landscape that could not simply be erased.

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[4] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)* (Merits) [1986] ICJ Rep 14.
[5] ibid, paras 202-209.
[6] ibid, art 39.
[7] ibid, art 51.
[8] Malcolm N Shaw, *International Law* (9th edn, Cambridge University Press 2021) 767.

C. Responsibility to Protect: Codification of a Conditional Sovereignty

The International Commission on Intervention and State Sovereignty, convened in response to the Kosovo debate, published its report on the Responsibility to Protect in 2001. The report reframed the question. Instead of asking whether external actors have a right to intervene, it asked what obligations sovereignty entails for the state itself. Its answer was that sovereignty carries with it a responsibility to protect a state's own population from genocide, war crimes, ethnic cleansing, and crimes against humanity. When a state manifestly fails to discharge that responsibility, the international community acquires a residual authority to act.[9]

The 2005 World Summit Outcome document, adopted by the United Nations General Assembly, endorsed a version of the Responsibility to Protect in paragraphs 138 and 139. The language is carefully hedged. The primary responsibility to protect populations from the four specified crimes rests with the individual state. The international community's responsibility is complementary and collective, and any enforcement action must be authorised by the Security Council under Chapter VII.[10] The R2P norm is therefore not a licence for unilateral action; it is a restatement of the collective security framework in the moral vocabulary of protection.[11]

The first practical invocation of R2P in Security Council authorisation practice came with Libya in 2011. Resolution 1970 referred the situation to the International Criminal Court and demanded an immediate ceasefire.[12] Resolution 1973 authorised member states to take all necessary measures to protect civilians, including through a no-fly zone.[13] The subsequent NATO campaign, which went well beyond civilian protection to achieve regime change, provoked strong reactions from China and Russia and cast a long shadow over subsequent Council practice. R2P has not been invoked by the Council to authorise enforcement action in Syria, Yemen, or Myanmar, precisely because the Libyan experience deepened the mistrust of the major powers whose consent would be required.[14]

The legal status of R2P therefore remains deeply uncertain. It has influenced the vocabulary of Security Council resolutions and has shaped the framing of political arguments about mass

[9]International Commission on Intervention and State Sovereignty (ICISS), *The Responsibility to Protect* (International Development Research Centre 2001) xi.
[10]UNGA Res 60/1 (24 October 2005) (2005 World Summit Outcome) paras 138-139.
[11]Alex J Bellamy, *Responsibility to Protect: A Defense* (Oxford University Press 2015) 122.
[12]UNSC Res 1970 (26 February 2011) UN Doc S/RES/1970.
[13]UNSC Res 1973 (17 March 2011) UN Doc S/RES/1973.
[14]ibid, 145.

atrocity situations, but it has not generated a new legal exception to Article 2(4), and its invocation has become more contested rather than less since 2011.[15]

III. STATE IMMUNITY FROM CIVIL JURISDICTION: THE JUS COGENS DEBATE

A. The Classical Rule and the Move to Restrictive Immunity

State immunity from the jurisdiction of foreign courts was, until the mid-twentieth century, treated as near-absolute. It rested on the twin foundations of sovereign equality, par in parem non habet imperium (an equal has no authority over an equal), and the practical need for comity between states.[16] The Permanent Court of Arbitration affirmed in the *Island of Palmas* case that territorial sovereignty implies exclusive competence and independence from other states.[17] From that principle, absolute immunity followed almost automatically: if a state's acts within its own territory are its own business, a foreign court that purports to judge them is trespassing on that sovereignty.

The move from absolute to restrictive immunity, which gathered pace from the 1970s onwards, drew a distinction between acts performed in a sovereign capacity, known as acts jure imperii, and acts performed in a commercial or private capacity, known as acts jure gestionis. Foreign courts began to assert jurisdiction over the latter category. This development was codified in the United Kingdom in the State Immunity Act 1978[18] and in the United States in the Foreign Sovereign Immunities Act 1976.[19] The United Nations Convention on Jurisdictional Immunities of States and Their Property, adopted by the General Assembly in 2004, represents the most recent attempt at universal codification, though it has not yet entered into force.[20]

B. The Jus Cogens Exception: Domestic Courts and the ICJ

The question whether state immunity must yield when the acts alleged amount to violations of peremptory norms has generated some of the most significant and divisive case law in modern international law. The argument takes the following form: certain rules of international law

[15]Tom Dannenbaum, 'Why Have We Criminalized Aggressive War?' (2017) 126 *Yale Law Journal* 1242, 1269.

[16]Lassa Oppenheim, *International Law: A Treatise* (2nd edn, Longmans Green 1912) vol I, 366.

[17]*Island of Palmas Case (Netherlands v United States of America)* (1928) 2 RIAA 829, 838 (Permanent Court of Arbitration).

[18]State Immunity Act 1978 (UK), s 1.

[19]Foreign Sovereign Immunities Act 1976 (US), 28 USC ss 1602-1611.

[20]United Nations Convention on Jurisdictional Immunities of States and Their Property (adopted 2 December 2004, not yet in force) UN Doc A/59/508.

have a hierarchically superior status that admits no derogation; torture and crimes against humanity are among them; therefore, no rule of lesser normative status, including the procedural rule of state immunity, can shield the commission of such acts from scrutiny.

The Italian Court of Cassation accepted this reasoning in *Ferrini v Federal Republic of Germany* in 2004, holding that Germany could not invoke immunity in civil proceedings brought by Italian nationals who had been subjected to forced labour during the Second World War.[21] The Greek Supreme Court reached a similar conclusion in the *Prefecture of Voiotia* case.[22]

The International Court of Justice addressed the question directly in *Jurisdictional Immunities of the State (Germany v Italy: Greece Intervening)* in 2012. The Court held, by twelve votes to three, that Italy had violated Germany's right to state immunity by allowing civil proceedings arising from acts of the German armed forces during the Second World War to proceed in Italian courts.[23] The Court's reasoning is worth examining carefully. It distinguished between the substantive illegality of the acts in question, which it did not dispute, and the procedural question of whether those acts attracted immunity from foreign civil jurisdiction. The two questions operate on different planes, the Court reasoned: the rule of state immunity is procedural in character and does not bear upon the legality of the acts in respect of which it is invoked.[24] Even if the underlying acts violated jus cogens, that did not automatically displace immunity, because the jus cogens rule and the immunity rule address different matters.[25]

That reasoning has been criticised on several grounds. Critics point out that the procedural/substantive distinction is difficult to maintain when the effect of upholding immunity is to leave victims of the gravest international crimes without any avenue of civil redress.[26] The European Court of Human Rights had reached a different conclusion at the margins: in *Al-Adsani v United Kingdom*, the Grand Chamber held, by nine votes to eight, that granting Kuwait immunity in a civil torture claim did not violate Article 6 of the European

[21] *Ferrini v Federal Republic of Germany* (Corte di Cassazione, 11 March 2004) [2004] 128 *Rivista di Diritto Internazionale* 539.
[22] *Prefecture of Voiotia v Federal Republic of Germany* (Areios Pagos, 4 May 2000), cited in *Jurisdictional Immunities* (n 28) para 30.
[23] *Jurisdictional Immunities of the State (Germany v Italy: Greece Intervening)* [2012] ICJ Rep 99.
[24] ibid, paras 91-97.
[25] ibid, para 82.
[26] Jean Allain, 'The Jus Cogens Nature of Non-Refoulement' (2002) 13 *International Journal of Refugee Law* 533, 540.

Convention.[27] The bare majority indicates that the Strasbourg Court was itself divided on whether the immunity rule was compatible with the right of access to a court in cases of jus cogens violations. The domestic position in the United Kingdom was subsequently confirmed by the House of Lords in *Jones v Ministry of Interior of Saudi Arabia*, which followed the *Al-Adsani* approach and rejected a claim that the prohibition on torture had generated a customary exception to state immunity.[28]

C. Personal Immunity: The Pinochet Watershed

If the jus cogens exception to state immunity has been largely closed by the ICJ's 2012 decision, the parallel question of the personal immunity of individual state officials has produced a different trajectory. In *R v Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte (No 3)*, the House of Lords held that former President Pinochet of Chile could not claim immunity from extradition proceedings in the United Kingdom in respect of charges of torture.[29] The critical move in Lord Browne-Wilkinson's reasoning was the distinction between ratione personae immunity, which attaches to the office and lapses when the office-holder leaves office, and ratione materiae immunity, which attaches to acts performed in an official capacity and persists after leaving office.[30] Torture, the majority reasoned, cannot be an official function of a head of state, because the Convention Against Torture defines it as an act by a public official and international law has prohibited it as a crime. An act that international law designates as criminal can attract no immunity by virtue of having been performed in an official capacity.[31]

The ICJ qualified this picture in *Arrest Warrant of 11 April 2000 (Democratic Republic of Congo v Belgium)*, holding that an incumbent Foreign Minister enjoys full immunity from criminal proceedings in foreign courts.[32] The Court did not overrule *Pinochet*; it simply maintained the distinction between incumbent and former officials. The full immunity of incumbents applies ratione personae regardless of the gravity of the acts alleged. The result is

[27] *Al-Adsani v United Kingdom* (2002) 34 EHRR 11 (ECtHR Grand Chamber); ibid, para 61.

[28] *Jones v Ministry of Interior of Saudi Arabia* [2006] UKHL 16, [2007] 1 AC 270; ibid, para 45 (Lord Bingham).

[29] *Pinochet (No 3), R v Bow Street Metropolitan Stipendiary Magistrate and Others, ex parte Pinochet Ugarte* [2000] 1 AC 147 (HL).

[30] ibid, 179 (Lord Browne-Wilkinson).

[31] ibid, 205 (Lord Millett).

[32] *Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of Congo v Belgium)* [2002] ICJ Rep 3; ibid, para 51.

a temporal gap in accountability: international crimes committed by sitting heads of state and foreign ministers enjoy immunity until the official leaves office, at which point criminal responsibility could in principle be engaged in foreign domestic courts, but political reality often makes prosecution unlikely.

IV. INTERNATIONAL CRIMINAL JURISDICTION AND THE OFFICIAL CAPACITY QUESTION

A. The Rome Statute Framework

The Rome Statute of the International Criminal Court represents the most direct legislative assault on the protection that official capacity has historically afforded to perpetrators of international crimes. Article 27(1) provides in unequivocal terms that the Statute applies equally to all persons without any distinction based on official capacity, and that official capacity as a head of state or government, a member of a government or parliament, an elected representative or government official shall in no case exempt a person from criminal responsibility under the Statute.[33] Article 27(2) adds that immunities or special procedural rules that may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person.

Article 27 is in tension with Article 98(1), which provides that the Court may not proceed with a request for surrender that would require the requested state to act inconsistently with its obligations under international law with respect to the State or diplomatic immunity of a person of a third state, unless the Court can first obtain the cooperation of that third state.[34] This tension became acute in the proceedings against former Sudanese President Omar al-Bashir, who was indicted by the ICC in 2009 for genocide, crimes against humanity, and war crimes.[35] Sudan was not a party to the Rome Statute, and al-Bashir remained in office. When al-Bashir travelled to state parties, including Jordan, South Africa, and several African Union member states, those states declined to arrest and surrender him, citing his immunity as an incumbent Head of State under customary international law.

[33]Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNTS 90, art 27(1).

[34]ibid, art 98(1).

[35]*Prosecutor v Omar Hassan Ahmad Al Bashir* (Warrant of Arrest) ICC-02/05-01/09 (4 March 2009) (ICC Pre-Trial Chamber I).

The African Union's collective response to the al-Bashir situation was to issue a decision directing member states not to cooperate with the ICC arrest warrants, arguing that the Court's approach was incompatible with the customary immunities of serving heads of state.[36] This created a direct conflict not merely between the Rome Statute and customary international law, but between the ICC and one of the most important regional organisations, encompassing 55 states. The conflict has not been satisfactorily resolved. The ICC Pre-Trial Chambers have issued a series of inconsistent decisions on whether state parties to the Rome Statute are obliged to arrest al-Bashir, producing a body of jurisprudence that has been heavily criticised for its doctrinal incoherence.[37]

B. The Attribution of Immunity in a Multilateral System

The al-Bashir situation illustrates a more fundamental structural problem. The ICC's jurisdiction was established by a treaty binding on state parties. Non-parties, including Sudan, retain the immunities that customary international law recognises. When the Security Council refers a situation to the ICC under Resolution 1593, it triggers the Statute's jurisdiction with respect to that situation, but it is contested whether such a referral also suspends the customary immunities of the officials of the non-party state concerned.[38]

The ICJ's advisory opinion in *Questions of Immunities Relating to Special Procedures of the Human Rights Council*, delivered in 2022, adds a further dimension to this picture. The Court affirmed that immunities are not a privilege of the individual but a right of the state, and that they operate to facilitate the functioning of inter-state relations rather than to protect individuals from accountability. That framing reinforces the difficulty of using individual accountability norms to override state-conferred immunities: the immunity is the state's to waive, and absent waiver, no international criminal jurisdiction can automatically displace it.

V. COMPARATIVE OVERVIEW: INSTRUMENTS, CASES, AND TRENDS

The following tables draw together the principal doctrines, cases, and national legislative frameworks examined in this article, enabling a synoptic comparison of the positions across jurisdictions and institutions.

[36]African Union, 'Decision on the Meeting of African States Parties to the Rome Statute of the International Criminal Court' Assembly/AU/Dec.245(XIII) (July 2009).

[37]Dapo Akande, 'International Law Immunities and the International Criminal Court' (2004) 98 *American Journal of International Law* 407, 412.

[38]*Questions of Immunities Relating to Special Procedures of the Human Rights Council* (Advisory Opinion) [2022] ICJ Rep __ (delivered 29 July 2022), para 89.

Doctrine / Principle	Content	Legal Basis	Key Limitation
Restrictive immunity	Immunity applies to acts jure imperii (sovereign acts) not acts jure gestionis (commercial acts)	Customary international law; FSIA 1976; SIA 1978	Classification of acts as sovereign vs commercial is contested
Jus cogens exception	Immunity may not shield acts constituting peremptory norm violations (eg torture, genocide)	Proposed by domestic courts in Italy and Greece; contested at ICJ	ICJ rejected in Jurisdictional Immunities (2012); no international consensus
Functional immunity exception	Serving officials retain immunity; former officials lose immunity for private acts	Pinochet (No 3) [2000] HL; customary international law	Ratione personae immunity of Heads of State may still apply during office
Responsibility to Protect	State sovereignty carries protective duties; failure permits collective intervention	2001 ICISS Report; 2005 World Summit Outcome paras 138-139	No binding legal force; UNSC authorisation still required for enforcement
ICC jurisdiction over incumbents	Rome Statute art 27 removes immunity before ICC regardless of official capacity	Rome Statute art 27; Tadic (ICTY 1999)	Non-party states and customary law obligations under art 98 create tensions

Table 1: Doctrines Restricting Sovereign Immunity: Content, Basis, and Limitations

Case	Forum / Year	Immunity Issue	Holding	Significance
Nicaragua v United States	ICJ, 1986	Legality of covert intervention; customary non-intervention	US military and paramilitary activities violated customary prohibition on use of force and non-intervention norm	Definitive statement of customary non-intervention rule
Pinochet (No 3)	UK HL, 2000	Personal immunity of former Head of State from extradition for torture	Ratione materiae immunity does not apply to torture; international crimes outside scope of official functions	Landmark erosion of personal immunity for jus cogens crimes
Arrest Warrant (Congo v Belgium)	ICJ, 2002	Immunity of incumbent Foreign Minister from Belgian arrest warrant	Serving Foreign Minister enjoys full ratione personae immunity; Belgian warrant invalid	Confirmed that ratione personae immunity survives even for international crimes while in office
Jurisdictional Immunities (Germany v Italy)	ICJ, 2012	State immunity from civil claims for jus cogens violations (WWII war crimes)	State immunity prevails even where acts constitute jus cogens violations; procedural/substantive distinction maintained	Closed the jus cogens exception door at ICJ level; reaffirmed absolute state

Case	Forum / Year	Immunity Issue	Holding	Significance
				immunity for sovereign acts
Al-Adsani v UK	ECtHR GC, 2002	Art 6 ECHR vs state immunity in torture civil claim against Kuwait	Granting Kuwait immunity did not violate Art 6; no sufficiently firm basis for a jus cogens exception to state immunity	No ECHR right of access to court overrides state immunity in civil proceedings
Al Bashir Warrant	ICC, 2009	Immunity of incumbent Head of State before ICC	Art 27 Rome Statute removes immunity; non-cooperation may engage UNSC referral	Created direct conflict between treaty obligation and customary Head of State immunity

Table 2: Key Case Law on Sovereign Immunity and State Accountability

Jurisdiction	Primary Instrument	Exceptions to Immunity	Position on Jus Cogens Exception
United Kingdom	State Immunity Act 1978	Commercial transactions; personal injury on UK territory; admiralty; employment	Not recognised; Jones v Saudi Arabia confirmed no jus cogens exception
United States	Foreign Sovereign Immunities Act 1976	Commercial activity; expropriation; personal injury; state-sponsored terrorism (28 USC s 1605A)	Terrorism exception (JASTA 2016) creates limited statutory carve-out; no general jus cogens exception
Italy	Customary international law (no codified statute)	Territorial tort; commercial acts; courts recognised jus cogens exception in Ferrini	Ferrini (2004) accepted jus cogens exception -- subsequently condemned by ICJ in 2012
Germany	Customary international law; GG art 25	Commercial acts; territorial tort	Rejected jus cogens exception; implemented ICJ Jurisdictional Immunities decision
UN Convention 2004	Not yet in force (15 ratifications of 30 required)	Commercial transactions; employment; personal injury; intellectual property	Silent on jus cogens; no exception for grave human rights violations

Table 3: Comparative National Legislation on State Immunity

Several themes emerge from these tables. First, the restrictive immunity doctrine has been broadly accepted across common law and civil law jurisdictions, but the commercial/sovereign act distinction creates persistent uncertainty at the margins. Second, the jus cogens exception has been accepted by some domestic courts but rejected by the ICJ, creating a fragmented landscape in which the availability of civil redress for victims of grave international crimes

depends heavily on the domestic jurisdiction in which they bring their claim. Third, the Rome Statute has created a normative framework for individual criminal accountability that explicitly rejects official capacity as a defence, but its practical reach is constrained by Article 98(1) and by the immunities recognised under customary international law for non-party states.[39]

VI. CRITICAL ASSESSMENT AND CONSTRUCTIVE PROPOSALS

The central tension in the contemporary law of sovereign immunity is not merely doctrinal. It reflects a deeper conflict of values between the functional requirements of inter-state relations, which demand that states be able to act through their officials without constant exposure to foreign adjudication, and the imperative of accountability for the gravest international crimes, which demands that perpetrators not be insulated from responsibility by the accident of holding office. Both values are legitimate; neither can be dismissed as merely instrumental. The difficulty is that international law has so far managed the tension through an unstable set of ad hoc doctrinal adjustments rather than through a coherent framework.

Three specific proposals are advanced here. First, the United Nations should convene an intergovernmental process to consider whether the 2004 UN Convention on Jurisdictional Immunities should be supplemented by a protocol addressing the position of states accused of serious violations of peremptory norms. The ICJ's 2012 decision in *Jurisdictional Immunities* left open the possibility that the law might develop in the direction of a jus cogens exception if state practice and opinio juris converged on it. That convergence has not yet occurred, but a multilateral negotiation process could provide a legitimate forum for working through the competing considerations that the ICJ declined to resolve.[40]

Second, the Security Council should, in future referrals of situations to the ICC, expressly address the immunity question. The ambiguity of Resolution 1593 on this point has generated years of inconsistent jurisprudence and has undermined the Court's ability to exercise its jurisdiction effectively. An express statement that a referral suspends the customary immunities of incumbent officials of the referred state, at least for the purposes of cooperation with ICC processes, would provide a clear legal basis for the arrest obligations of state parties and would reduce the incoherence of the current position.

[39]Marko Milanovic, *Extraterritorial Application of Human Rights Treaties: Law, Principles, and Policy* (Oxford University Press 2011) 211; Antonio Cassese, *International Law* (2nd edn, Oxford University Press 2005) 110.

[40]*Jurisdictional Immunities of the State* (n 28) para 91.

Third, national courts should be encouraged, and where possible directed by legislation, to consider the availability of alternative civil remedies in respect of grave international crimes before invoking immunity as an absolute bar. The *Jurisdictional Immunities* decision acknowledged that compensation programmes and other alternative mechanisms may, in appropriate circumstances, constitute adequate alternatives to civil proceedings. Where such alternatives exist and are genuinely available, the case for upholding immunity is stronger. Where they do not, courts and legislators should consider whether the procedural/substantive distinction that the ICJ deployed so decisively in 2012 can withstand the normative pressure that the evolution of jus cogens creates.[41]

VII. CONCLUSION

The story of sovereign immunity over the past half-century is a story of doctrine under pressure. The pressure has come from multiple directions simultaneously: from the humanitarian tradition that insists atrocities are not a state's private affair, from the jus cogens framework that places certain prohibitions beyond the reach of derogatory state practice, and from the international criminal law movement that has built permanent institutional machinery for individual accountability. None of these pressures has succeeded in dismantling the structure of state immunity. The ICJ's 2012 decision confirmed that the structure is more robust than its critics had hoped. But none of these pressures has simply been absorbed without trace either. The legal landscape of 2025 is one in which sovereign immunity coexists, uneasily, with accountability norms that were not part of the Westphalian inheritance.

The doctrine of the Responsibility to Protect has altered the normative vocabulary of sovereignty without altering its legal architecture. It has made it politically harder to claim absolute domestic jurisdiction over mass atrocities, but it has not created a legally binding obligation to permit intervention. The jus cogens exception to state immunity has been accepted by some national courts and firmly rejected by the ICJ, leaving victims of grave international crimes in jurisdictions where the exception is not available without a civil remedy. The Rome Statute has removed official capacity as a defence before the ICC, but the Article 98 problem

[41] *East Timor Case (Portugal v Australia)* [1995] ICJ Rep 90, para 29.

means that the immunities of non-party state officials remain capable of obstructing the Court's work.[42]

What is needed is not the abolition of sovereign immunity. That doctrine serves real functional purposes in the conduct of inter-state relations, and its wholesale removal would create instability that would harm the very individuals it is invoked to protect. What is needed is a more principled framework for managing the conflict between immunity and accountability, one that takes both values seriously, provides clear and predictable rules for cases at the intersection, and ensures that the most egregious violations of peremptory norms are not left entirely without remedy. The proposals offered in Part VI are modest steps in that direction. Their modesty reflects not a lack of ambition but an honest assessment of what the current state of international legal consensus can sustain.

[42]*Bosnia and Herzegovina v Serbia and Montenegro (Application of the Convention on the Prevention and Punishment of the Crime of Genocide)* (Judgment) [2007] ICJ Rep 43; ibid, para 166; *Prosecutor v Tadic* (Appeals Chamber Judgment) IT-94-1-A (15 July 1999) (ICTY), para 120.