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Immunities of State Officials, International Crimes and Foreign Domestic Courts: A Rejoinder to Alexander Orakhelashvili

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1 Introduction

We are grateful to Alexander Orakhelashvili for engaging with the points we make in our recent *EJIL* article on immunity and international crimes.[1] He has written widely on this issue and his view that international law immunities are not available in judicial proceedings for violations of *jus cogens* norms is well known. In our article, we disagree with that view and show why that understanding of the relationship between *jus cogens* norms and international law immunities is untenable. However, it would be wrong to say, as he says, that we 'attack' his views (or indeed those of others who share that same perspective). There is, we believe, a reasonable disagreement of view. As is well known, international law provides two types of immunity for state officials from the jurisdiction of foreign states. The first type are 'status' immunities ('personal' immunities or immunities *ratione personae*) and the second is an 'official act' immunity ('functional' immunity or immunity *ratione materiae*). In our view, international law confers two types of 'status' immunity: the first type is limited to foreign heads of state and heads of government; it is absolute and applies even in cases alleging international crimes and even where the individual is abroad on private visit. The second type of immunity *ratione personae* applies only to those abroad on special mission (and

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[1] Akande and Shah, 'Immunities of State Officials, International Crimes and Foreign Domestic Courts', 21 *EJIL* (2010) 815.

therefore in the host state with its consent) and only for the duration of such mission. This special mission immunity is also applicable in cases concerning international crimes. However, we argue that the immunity *ratione materiae* which international law confers on those who perform official acts on behalf of the state will not be available in cases where the act amounts to an international law crime. This is not because international crimes may not be official acts, or indeed because of any conflict with *jus cogens* norms, but rather because of a different type of conflict of norms. There will be no immunity in these cases because international law rules and practice confer extra-territorial jurisdiction over such acts of state officials that are co-extensive with the immunity, or, alternatively, the rules conferring jurisdiction contemplate jurisdiction over official conduct.

As Dr Orakhelashvili acknowledges, the results we reach are in some cases the same as those he would reach based on the theory of normative hierarchy of *jus cogens* over immunity. Nonetheless, there are significant differences both in method and result. As we explain in our article, our own views reject the idea that international law immunities are in conflict with *jus cogens* norms[2] and we show how such a perceived conflict is false. Furthermore, though we argue that there is no immunity *ratione materiae* in foreign domestic proceedings in which state officials are charged with international crimes, we explain why international law continues to confer immunity *ratione personae* in cases alleging international crimes. Were the normative hierarchy theory correct there would be no type of immunity in any case alleging violations of *jus cogens* norms. It is plain that judicial practice and state practice do not bear out that theory since the practice of according immunity *ratione personae* to certain state officials, even in cases alleging violations of *jus cogens* norms, is extensive.[3] Also, were the normative hierarchy theory correct there would be no immunity for the state itself where a violation of peremptory norms is alleged. Only a small minority of national courts have taken this view.[4]

In this piece we will not seek to restate our views *in extenso* but will, instead, focus on responding to the points made by Dr Orakhelashvili.

2 The Scope of Immunities

In his response to our article, Dr Orakhelashvili takes issue with our argument that where the act of a government official is 'done for reasons associated with the policies of the state as opposed to reasons which are purely those of the individual, and [was] carried out using state apparatus, i.e., under colour of law, then those acts should be considered official acts.'[5] He says this conclusion is 'straightforwardly false' and that to rely on the fact that the acts in question are acts of the state for the purpose of state responsibility reveals a structural confusion and will lead to a collapse of the restrictive

2 *Ibid.*, 832 *ff.*

3 See cases referred to in *ibid.*, at n. 16 and in Part 2B.

4 See discussion in *ibid.*, at 828–830.

5 Ibid., at 832.

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immunity doctrine as anything imputable to the state would be immunized. However, it seems that Dr Orakhelashvili has failed to distinguish between two related, but separate, points. The first is the question whether an act is a sovereign act, with the result that the state would be immune. The second is whether the act of a particular person is an official act, with the result that the person who performed the act is immune from foreign exercise of jurisdiction. The arguments Dr Orakhelashvili criticizes deal with the second point (and not the first). That particular argument is about establishing when an individual official or agent is immune and not about whether the act is sovereign or non-sovereign.[6] Thus, it is not about restrictive immunity at all. As we argue,[7] and as state practice suggests,[8] immunity of officials *ratione materiae* is broader than the immunity of the state and may be available even in relation to non-sovereign acts. This is because one purpose of such immunity is to assert that individual officials are not responsible for acts that are in reality the act of the state.

With regard to the distinction between sovereign and non-sovereign acts, our point is that it is highly problematic to rely on the gross illegality of the act in order to argue that these are acts outside the sphere of sovereign conduct. Sovereign does not mean legal nor does it mean within a sphere of permitted acts. If it were the case that immunity was only available for lawful or permitted acts there would be no need for the concept of immunity.

3 Immunities, *Jus Cogens* and Extra-territorial Jurisdiction

In our article we begin our objection to the normative hierarchy theory by pointing out that not all rules setting out international crimes are *jus cogens* norms.[9] Dr Orakhelashvili says that this argument is not crucial. That may be so with regard to the methodological debate. But in practical terms the point is extremely important. Too often there is an assumption that international crimes are violations of *jus cogens* norms. Our point is that even if one were to accept the view that there is no immunity with respect to violations of *jus cogens* norms that would not mean there is no immunity in cases dealing with allegations of international crimes. Since it would be very hard to show that most rules prohibiting war crimes are expressions of *jus cogens* norms, accepting the normative hierarchy argument would still not lead to a lack of immunity in cases involving alleged war crimes.

Contrary to the position ascribed to us, we do not claim (or imply) that *jus cogens* norms are only confined to substantive rules or that they do not have secondary effects. Of course, a breach of peremptory norms has certain secondary effects. However, not all rules which are related to, and which aim to give effect to, peremptory norms are themselves peremptory. For example, there is an obligation on states

[6] We deal with the question whether international crimes should be considered as sovereign or not, for the purposes of restrictive immunity, *ibid.*, at 830–831.

[7] *Ibid.*, at 827.

[8] *Ibid.*, at 827, n. 54.

[9] *Ibid.*, at 833.

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to prevent genocide but as the International Court of Justice has recently pointed out that obligation is one to 'act within the limits permitted by international law' to prevent genocide.[10] In other words this rule, which is ancillary to the prohibition of genocide (a peremptory norm), does not override other rules and is therefore not itself a peremptory norm.

In the area of immunity and *jus cogens* violations, the key question is whether the effects of *jus cogens* norms include the conferral of universal jurisdiction and the denial of immunity, as is claimed by some. As we demonstrate in the article, conferral of universal jurisdiction does not follow from a breach of *jus cogens* norms.[11] To say that a violation of a peremptory norm has certain effects is not to assert that it has all the effects which would grant a remedy to the injured state or entity. Contrary to Dr Orakhelashvili's view, the duty on third states not to recognize, as lawful, situations created by violations of peremptory norms is not contrary to the conferral of immunity. Again, and this bears repeating over and over again, the granting of immunity is not a statement that an act is lawful. Rather, it is a declaration by the judicial authority concerned that it is not the appropriate forum for pronouncing on the legality or illegality of the act. Furthermore, because there may have been a violation of a peremptory norm does not mean all courts everywhere are bound to provide a remedy for that violation. As we point out,[12] even international tribunals are not obliged to create or recognize a remedy or indeed to accept jurisdiction, whenever it is alleged that there has been a violation of a *jus cogens* norm. If that is so, then Dr Orakhelashvili's argument that 'preventing, through immunity, the injured entity to claim remedies for the breach of *jus cogens* is therefore substantially more than erecting a procedural bar – it is essentially a denial of the normative status of the substantive rule that has been violated' does not carry much weight. Why is the denial of jurisdiction by international courts not of similar effect? To say that such courts have no jurisdiction on the matter in the first place and to contrast this with domestic courts is to assume (incorrectly) that as a matter of principle domestic courts have jurisdiction over the sovereign acts of other states (in particular when performed outside the forum state). Basic principles of sovereign equality suggest that this is not so, at least not as a matter of international law.

Dr Orakhelashvili says that our argument for denying immunity *ratione materiae* (set out in the introduction above) 'attempts to introduce an extra element in the normative hierarchy'. Actually the argument is not about a hierarchy of norms but is an old-fashioned way of resolving conflicts of rules. Basically, all we are saying is that where two norms are inconsistent with one another, the newer one prevails over the older. This is no more than Article 30 of the Vienna Convention on the Law of Treaties provides with respect to conflicting treaty provisions.

We say that there will be no immunity where international law confers extra-territorial jurisdiction over acts of state officials that is co-extensive with the immunity,

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[10] *Genocide Convention Case (Bosnia Herzegovina v. Serbia)* ICJ Reports (2007), at para. 430.

[11] Akande and Shah, *supra* note 1, at 836–837.

[12] *Ibid.*, 834–835.

or alternatively the rules conferring jurisdiction contemplate jurisdiction over official conduct. Put simply, a rule conferring extra-territorial jurisdiction is required because it is only where such a rule exists that there is a conflict with immunity. Unless international law confers jurisdiction on foreign domestic courts there is no rule that is in conflict with the immunity that international law otherwise requires foreign domestic courts to observe. The rule conferring extra-territorial jurisdiction displaces the immunity rule because both ask the domestic court to act in opposite ways and we say the latter in time rule should prevail. One does not need a hierarchy of norms to achieve this effect.

Dr Orakhelashvili points to the difference between the civil proceedings and criminal proceedings and asks what makes civil cases so special to prevent the primacy of *jus cogens* that obtains in criminal proceedings. Perhaps the perceived difference is not about primacy of peremptory norms at all but rather that it is more clearly established that international law confers extra-territorial jurisdiction in criminal proceedings than in civil proceedings. We argue in our conclusion that this distinction ought not to remain but the reasons for the reluctance by courts is explained by the clear conferral of jurisdiction in criminal proceedings.

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