

# Michigan Journal of International Law

---

Volume 16 | Issue 2

---

1995

## Sovereign Immunity and Violations of International *Jus Cogens* - Some Critical Remarks

Andreas Zimmermann

*Max-Planck-Institute of Comparative Public and Public International Law*

Follow this and additional works at: <https://repository.law.umich.edu/mjil>



Part of the [Courts Commons](#), [Human Rights Law Commons](#), [International Law Commons](#), and the [Legal Remedies Commons](#)

---

### Recommended Citation

Andreas Zimmermann, *Sovereign Immunity and Violations of International Jus Cogens - Some Critical Remarks*, 16 MICH. J. INT'L L. 433 (1995).

Available at: <https://repository.law.umich.edu/mjil/vol16/iss2/4>

This Article is brought to you for free and open access by the Michigan Journal of International Law at University of Michigan Law School Scholarship Repository. It has been accepted for inclusion in Michigan Journal of International Law by an authorized editor of University of Michigan Law School Scholarship Repository. For more information, please contact [mLaw.repository@umich.edu](mailto:mLaw.repository@umich.edu).

# SOVEREIGN IMMUNITY AND VIOLATIONS OF INTERNATIONAL *JUS COGENS* — SOME CRITICAL REMARKS

Andreas Zimmermann\*

## INTRODUCTION

Is it time to deny immunity to foreign sovereigns for violations of international *jus cogens*? The decision of the U.S. District Court<sup>1</sup> and the dissent in the U.S. Court of Appeals for the D.C. Circuit<sup>2</sup> in the case of *Princz v. Federal Republic of Germany* seem to indicate that already, as a matter of law, sovereign immunity should be denied for such violations, while Mathias Reimann<sup>3</sup> argues elsewhere in this issue that at least normatively this should be the appropriate solution. The following brief remarks are an attempt to demonstrate that any such denial of immunity through an amendment to U.S. statutes eliminating the granting of sovereign immunity in cases of purported violations of international human rights<sup>4</sup> would be both illegal under current public international law and politically unwise. Such should be avoided.

The scope of this article, like the one to which it responds, is limited. It does not purport to resolve any question relating to the municipal law of the United States, such as the interpretation of the Foreign Sovereign Immunities Act.<sup>5</sup> Instead, it considers the problem from a purely international law perspective. Furthermore, it does not indulge in a complete description of attempts made by the Federal Republic of Germany<sup>6</sup> to pay compensation — as far as feasible<sup>7</sup> — for all the

---

\* Max-Planck-Institute of Comparative Public and Public International Law, Heidelberg, Germany. Dr. jur., Heidelberg (1994); LL.M., Harvard University (1989). This article represents the personal opinion of the author.

1. *Princz v. F. R. G.*, 813 F. Supp. 22 (D.D.C. 1992).
2. *Princz v. F. R. G.*, 26 F.3d 1166 (D.C. Cir. 1994), *cert. denied*, 115 S. Ct. 923 (1995).
3. Mathias Reimann, *A Human Rights Exception to Sovereign Immunity: Some Thoughts on Princz v. Federal Republic of Germany* (in this issue).
4. For the text of such a proposal see H.R. 934, 103d Cong., 2d Sess. (1994) (relating to jurisdictional immunities of the Federal Republic of Germany).
5. Foreign Sovereign Immunities Act (FSIA), 28 U.S.C. § 1330, 1602–11 (1976).
6. Until 1990 the former German Democratic Republic denied any responsibility for the holocaust. But see the declarations made by the first freely elected East German parliament on April 12, 1990 and by the East German government on May 8, 1990, by which the GDR acknowledged responsibility for the crimes of the past. See G. Schuster, *Völkerrechtliche Praxis der Bundesrepublik Deutschland im Jahre 1990*, 52 ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT 828 (1992).

blatant human rights violations committed by Nazi Germany in the period 1933–1945.<sup>8</sup>

### THE DECISIONS IN THE *PRINZ* CASE AND THEIR BACKGROUND

Although one cannot but deplore the claimant's fate during the German occupation of Czechoslovakia and the fact that several members of his family were killed during the holocaust, there are still some points that must be raised when considering his claim. First it is important to note that up to now, the Federal Republic of Germany has compensated approximately 2 million victims of the holocaust, granting on the whole approximately \$80 billion dollars.<sup>9</sup> It is true that — under a general scheme agreed upon in 1953 by the state of Israel, the Jewish Claims Conference,<sup>10</sup> and the Federal Republic of Germany<sup>11</sup> — the claimant was originally precluded from compensation because he had not previously been a resident of Germany within its borders as they stood in 1937. But one has also to take into consideration — when considering the original exclusion of certain groups of claimants — the dramatic economic situation of the Federal Republic of Germany at the time, only two years after its coming into existence, still largely destroyed by the war and flooded with refugees of German origin from Eastern Europe, the former German territories, and from East Germany. In 1965, howev-

---

7. Any financial compensation scheme — whatever the amount involved — would, of course, never be able to undo all the atrocities committed, and in any event could only serve two main purposes: to help the surviving victims live a decent life, and to serve as a gesture acknowledging responsibility for what has happened.

8. A detailed overview of the different compensation laws of the Federal Republic of Germany can be found in *BERICHT DER BUNDESREGIERUNG ÜBER WIEDERGUTMACHUNG UND ENTSCHÄDIGUNG FÜR NAZIONALSOZIALISTISCHES UNRECHT SOWIE ÜBER DIE LAGE DER SINTI, ROMA UND VERWANDTER GRUPPEN*, Deutscher Bundestag, 10 Wahlperiode, Drucksache 10/6287 of October 31, 1986.

9. See, e.g., *Study Concerning the Right to Restitution, Compensation and Rehabilitation for Victims of Gross Violations of Human Rights and Fundamental Freedoms*, Sub-Commission on Prevention of Discrimination and Protection of Minorities, 44th Sess., Item 4, ECOSOC, E/CN.4/Sub.2/1993/8 (July 2, 1993), which states: "107. The most comprehensive and systematic precedent of reparation by a Government to groups of victims for the redress of wrongs suffered is provided by the Federal Republic of Germany to the victims of Nazi persecution."

10. The Jewish Claims Conference is a non-profit umbrella corporation representing 24 Jewish organizations. It was largely responsible for distributing compensation to Jewish victims of Nazi persecution.

11. Agreement between the Federal Republic of Germany and the State of Israel, 1953 BGBl.II 37; Protocol No. 1 drawn up by representatives of the Government of the FRG and of the Conference on Jewish Material Claims against Germany, 1953 BGBl.II 85; Protocol No. 2, 1953 BGBl.II 94. The text of the protocols can also be found in the Brief for the Respondent in Opposition to the Petition for Certiorari in the Supreme Court of the United States at 19a, *Prinz v. F. R. G.*, cert. denied, 115 S. Ct. 923 (1995) (No. 94-909) (on file with the author).

er, the respective German laws and regulations providing for compensation were amended in order to also cover claimants in a situation like that of Hugo Princz. He accordingly became eligible for compensation at that time. This fact and the relevant deadline of December 1969 were widely published, and appeared in newspapers in the United States. Still, Mr. Princz never applied for such compensation.

It is also important to note that already in 1954 the three Western Allied Powers — the United States, the United Kingdom, and France — concluded an agreement terminating most of their occupation rights and settling matters arising out of the war and the occupation.<sup>12</sup> Chapter Four of this treaty deals with compensation for victims of Nazi persecution. Moreover, the Federal Republic of Germany again acknowledged its general obligation to compensate these victims. The treaty contains, however, the obligation that the compensation provided by the German authorities should be no less favorable than the one then currently afforded by the legislation of the *Länder* constrained within the United States occupation zone.<sup>13</sup> The same treaty further expressly stipulated that “the capacity to pay of the Federal Republic of Germany may be taken into consideration in determining the time and method of compensation payments . . . and in providing adequate funds . . . .” In this context it is also important to note that upon the termination of all still-existing rights of the Western Allied Powers at the time of German reunification, the United States, France, and the United Kingdom in 1990 insisted that those provisions in the treaty dealing with compensation by the Federal Republic of Germany — including all its limitations — should remain in force.<sup>14</sup>

Even today the claimant still has the right to claim compensation under existing German legislation. According to Article 2 of the Agreement Implementing and Interpreting the Treaty of German Unification,<sup>15</sup> the Federal Republic of Germany and the former German Democratic Republic agreed to provide a fund from which victims of the Nazi regime that had not yet received adequate compensation would be paid. In accordance with Article 2 of the treaty, the Federal Government

---

12. Convention on the Settlement of Matters Arising out of the War and the Occupation, Oct. 23, 1954, 1955 BGBl.II 405.

13. *Id.* Ch. 4, para. 2, (a),(b).

14. Vereinbarung vom 27/28 September 1990 zu dem Vertrag über die Beziehungen zwischen der Bundesrepublik Deutschland und den drei Mächten sowie zu dem Vertrag zur Regelung aus Krieg und Besatzung entstandener Fragen, 1990 BGBl.II 1386.

15. Vereinbarung zwischen der Bundesrepublik Deutschland und der Deutschen Demokratischen Republik zur Durchführung und Auslegung des am 31 August 1990 in Berlin unterzeichneten Vertrages zwischen der Bundesrepublik Deutschland und der Deutschen Demokratischen Republik über die Herstellung der Einheit Deutschlands, 1990 BGBl.II 1239.

entered into an additional agreement with the Jewish Claims Conference, pledging an additional \$609 million to be administered by the Jewish Claims Conference.<sup>16</sup> Under this scheme, Hugo Princz would be eligible to receive a lump sum payment of \$4500 plus monthly payments of approximately \$400, an offer which the claimant — unlike 70,000 other victims among whom 19,000 are U.S. citizens — refused to accept. If one considered, *arguendo*, that each and every one of those victims would receive the \$17 million Mr. Princz claims, the total amount would be \$19 billion, let alone other groups of victims which for other reasons have not yet received compensation.<sup>17</sup>

These arguments demonstrate that on the whole, the approach taken by the Federal Republic of Germany does not seem to be unreasonable. This is particularly true since the claimant — if he were successful in obtaining the amount he sues for — would be far better off than hundreds of thousands of other victims. This is supported by the fact that it would have been economically completely unfeasible to compensate all victims of the holocaust if one applied the standard Mr. Princz is now claiming.

Furthermore, any such denial of immunity would “punish” the Federal Republic of Germany for acknowledging its responsibility and considering itself responsible for the deeds of Nazi Germany. At the same time, other states — like the former German Democratic Republic until 1990<sup>18</sup> — which in similar situations deny any responsibility by arguing that as a successor state they cannot be held responsible for acts committed by the predecessor state, *which are prohibited under international law*.<sup>19</sup> But any decision to grant Mr. Princz the right to sue the Federal Republic of Germany in United States courts, be it by way of a court decision or an amendment to the Foreign Sovereign Immunities Act, would not only be politically unsound, but would also run counter to currently existing rules of public international law.

---

16. Agreement between the Federal Minister of Finance and the Conference on Jewish Material Claims against Germany, Oct. 9, 1992, Brief, *supra* note 11, at 48–53a.

17. For the very same reasons the amounts to be awarded by the United Nations Claims Commission, created by the Security Council to compensate victims of the Iraqi invasion of Kuwait, are also comparatively small: each family cannot receive more than \$10,000 in the case of a death of a family member. See Guidelines for the conduct of the work of the Governing Council of the United Nations Compensation Commission, 30 I.L.M. 1712, 1713 (1991).

18. See *supra* note 6.

19. See generally W. Czaplinski, *State Succession and State Responsibility*, 28 CAN. Y.B. INT'L L. 339 (1990); but see M. Volkovitsch, *Righting Wrongs: Towards a New Theory of State Succession to Responsibility for International Delicts*, 92 COL. L. REV. 2162 (1992).

### UPHOLDING SOVEREIGN IMMUNITY EVEN IN CASES OF VIOLATION OF BASIC HUMAN RIGHTS

Professor Reimann echoes Judge Wald's dissent to the decision of the D.C. Circuit,<sup>20</sup> arguing that the denial of sovereign immunity — although normally required by customary international law<sup>21</sup> — is legal under current custom<sup>22</sup> in situations like the *Princz* case where the respondent government has previously violated norms of *jus cogens*. In this context it must first be noted, however, that the notion of *jus cogens* has been developed only after World War II and has found its most important and significant expression in Article 53 of the Vienna Convention on the Law of Treaties of 1969.<sup>23</sup> Thus, at the time when Hugo Princz was exposed to the abhorrent violations of his basic human rights, it is per se impossible that these violations could at the same time amount to a violation of peremptory norms of international law.<sup>24</sup>

Notwithstanding this first issue, one must also cope with the problem of whether, as Reimann puts it, "*jus cogens* has a higher rank than plain customary international law."<sup>25</sup> This argument implies a hierarchy of norms between different rules of customary international law and thus goes beyond the traditional concept of *jus cogens* as enshrined in the Vienna Convention on the Law of Treaties.<sup>26</sup> Under both Articles 53 and

---

20. See Reimann, *supra* note 3 at n.86.

21. See, e.g., RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES [hereinafter RESTATEMENT (THIRD)] Introductory Note to ch. 5, subch. A ("The immunity of a state from the jurisdiction of the courts of another state is an undisputed principle of customary international law.")

22. As to the situation from the standpoint of the municipal law of the United States, see Reimann, *supra* note 3.

23. Vienna Convention on the Law of Treaties, *Opened for Signature* May 23, 1969, 1155 U.N.T.S. 331, 8 I.L.M. 679 (1969). Even during the preparatory work of the Vienna Convention on the Law of Treaties, some states, such as France, questioned the existence of the notion of *jus cogens*.

24. This fact is acknowledged by Reimann, *supra* note 3 at 20, n.66; see also Judge Ginsburg's dissent in the *Princz* case, where it is assumed that the notion of *jus cogens* already existed in 1942. 26 F.3d at 1174.

25. Reimann, *supra* note 3, at 422.

26. His view is shared, however, by some leading commentators. See, e.g., by MARK W. JANIS, AN INTRODUCTION TO INTERNATIONAL LAW 53 (1988). Janis states: "*Jus cogens* is capable of invalidating not only conflicting rules drawn from treaties but also rules that would otherwise be part of customary international law." See also RESTATEMENT (THIRD) § 102, cmt. k. During the proceedings before the I.C.J. in the *Genocide* case (*Bosnia-Herzegovina v. Yugoslavia [Serbia-Montenegro]*), Bosnia argued that the relevant resolutions of the Security Council imposing an arms embargo violate *jus cogens* and are thus null and void. See Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Further Request for the Indication of Provisional Measures), 1993 I.C.J. 325 (Order of Sept. 1993), 441 (Sep. Op. Lauterpacht).

64 of the Convention, the emergence or existence of a rule having the character of *jus cogens* has the sole effect of invalidating incompatible treaties. During the preparatory discussion of the International Law Commission leading to the Vienna Convention, on the Law of Treaties, no attempts were made to extend this notion to also render conflicting rules of customary international law void.<sup>27</sup> Furthermore, all the rules of *jus cogens* themselves form part of customary international law. This is so only if and to the extent that the claimed rule of *jus cogens* — here the prohibition of torture and inhuman treatment and punishment — relates to the very same question as the other “regular” rules of customary international law involved — here the rules on state immunity — can it then invalidate these other norms as being *lex specialis*. In our context, while it seems to be beyond doubt that the prohibition of torture nowadays forms part of international *jus cogens*,<sup>28</sup> it cannot be argued that this prohibition necessarily encompasses the further *jus cogens* rule — thus overriding the general principle of state immunity — to grant the forum state the right to deny state immunity to the respondent state. To the contrary, it seems to be more appropriate to consider both issues as involving two different sets of rules which do not interact with each other. Thus, the recently proposed bill in the U.S. Congress<sup>29</sup> which would limit the realm of state immunity of the Federal Republic of Germany represents a significant departure from the internationally accepted doctrine of sovereign immunity.

Upholding immunity in such cases would not leave the victims without protection. The respective home government could exercise diplomatic protection on their behalf and request appropriate compensation. Moreover, any limitation of state immunity as proposed by Reimann would also be unacceptable policy-wise. This entails the clear risk that other countries would follow the example of the United States and modify their laws respectively. They might even go further and not limit these exceptions to violations of *jus cogens* but to any kind of human rights violation, with the result that the United States could be sued in foreign courts for acts which the U.S. Government has taken in

---

27. For the work of the International Law Commission, see generally F. Vallat, *International Law Commission*, 9 ENCL. PUB. INT'L L. 183 (R. Bernhardt ed., 1986).

28. S. KADELBACH, ZWINGENDES VÖLKERRECHT 293 (1992), with further detailed references at n.550; L. HANNIKAINEN, PEREMPTORY NORMS (JUS COGENS) IN INTERNATIONAL LAW: HISTORICAL DEVELOPMENT, CRITERIA, PRESENT STATUS 504 (1988); J.A. Frowein & R. Kühner, *Drohende Folter als Asylgrund und Grenze für Auslieferung und Ausweisung*, ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT 537 (1983).

29. See Reimann, *supra* note 3, at n.77 and accompanying text.

the United States against foreign nationals.<sup>30</sup> But even if one limits the exception to violations of *jus cogens*, the broadness of the exception might be dangerous since the very notion of *jus cogens* is both ambiguous and ever more far-reaching. It is interesting to note that it was the European Court of Human Rights which held in 1990 that an extradition of a criminal to the United States would be illegal under Article 3 of the European Convention of Human Rights.<sup>31</sup> The Court argued that the fugitive, who was facing the death penalty in Virginia, would thereby be exposed to inhuman treatment and punishment. This example demonstrates that even the notion of torture and inhuman treatment and punishment — which is one of the essential components of the concept of *jus cogens* — is subject to different understandings and that it is accordingly not advisable to let the courts of one sovereign sit in judgement on the acts of another.

Furthermore, the United States government or other respondent governments might be facing even worse situations, where the courts of the forum state — unlike the ones in the United States and in other democratic societies — do not enjoy independence but to the contrary are de jure or de facto subject to the authority of the respective government. In such situations the national courts might then be induced to render judgments against the United States or other respondent governments purely according to the political situation prevailing between the countries in question.

Finally it would be only logical and in accordance with Professor Reimann's argument to also provide for the enforcement of any such judgment rendered against a foreign state,<sup>32</sup> since the claimant would be otherwise still without compensation. This would, however, involve an even further encroachment into the sovereign rights of the respondent state.

To sum up, one might say that denying foreign states sovereign immunity where a claimed violation of basic human rights is at stake — instead of solving the conflict through negotiations or another method for the settlement of disputes agreed upon by the parties — does not further the ends of international law. To the contrary, such a policy destroys the social fabric international law tends to secure, i.e. the

---

30. *Id.* 11–12.

31. *Soering v. United Kingdom*, 161 Eur. Ct. H.R. (ser.A) (1989). See also Stephan Breitenmoser & Gunter E. Wilms, *Human Rights v. Extradition: The Soering Case*, 11 MICH. J. INT'L L. 845 (1990) and R. Lillich, *The Soering-Case*, 85 AM. J. INT'L L. 128 (1991).

32. As for the principle that foreign states are immune to the enforcement of judgments rendered by United States courts, see RESTATEMENT (THIRD), *supra* note 25, 434, § 460.



maintenance of international relations where states interact with each other as sovereign nations in order to protect the rights of their citizens. While at first glance sovereign immunity seems to be nothing more than a pure technicality, it nevertheless enshrines a basic principle of international law: the principle of sovereign equality of states. Granting sovereign immunity to foreign states also forms a necessary requirement for states to be able to regulate their affairs among themselves as equal partners.<sup>33</sup> It is one of the fundamental principles underlying the system of as we know it without it, such intercourse would necessarily come to an end. But any such intercourse is especially important with those states which do commit serious violations of *jus cogens*, since otherwise the international community at large would no longer be able to influence their behavior.

Thus one cannot but express satisfaction with the decision of the U.S. Supreme Court to deny certiorari in the *Princz* case and thereby uphold the international rule of law. By the same token the U.S. Congress, too, should follow the advice of the U.S. State and Justice Departments<sup>34</sup> and defeat any proposal such as that proposed last term in H.R. 934.<sup>35</sup> Meanwhile, it might be hoped that Hugo Princz and the German government will still be able to reach a compromise in order to finally compensate the claimant for all the hardship he suffered more than fifty years ago.

---

33. See RESTATEMENT (THIRD), *supra* note 25, at 390, according to which the granting of immunity is "necessary for the effective conduct of international intercourse and the maintenance of friendly relations."

34. See the testimony of the representatives of the State and Justice Department before the Subcomm. on Courts and Administrative Practice of the Senate Judiciary Comm. with respect to S. 825, 103d Cong., 2d Sess. 11-12 (1994).

35. For the text of such a proposal see H.R. 934, 103d Cong., 2d Sess. 1 (1994), relating to jurisdictional immunities of the Federal Republic of Germany.