Northwestern Journal of International Human Rights

Volume 9 | Issue 2 Article 2

Spring 2011

State Immunity And The Promise Of Jus Cogens

Sevrine Knuchel

Northwestern Journal of International Human Rights

Volume 9, Number 2 (Spring 2011)

State Immunity and the Promise of *Jus Cogens*

Sévrine Knuchel*

I. INTRODUCTION

¶1 On June 1, 2010, the Supreme Court of the United States held in *Samantar v. Yousuf*, that the U.S. statute governing the sovereign immunity of foreign states, the Foreign Sovereign Immunities Act of 1976 (FSIA), does not cover the immunity claims of individual foreign officials.[1] In this case, five natives of Somalia were seeking damages from Mohamed Ali Samantar, who served as former Minister of Defense, First Vice President, and Prime Minister of the Democratic Republic of Somalia, and whom they claimed was responsible for the acts of torture, rape, arbitrary detention, and extrajudicial killing that were inflicted on them or their family members in Somalia during the 1980s.

¶2 The Supreme Court's decision comes as the jurisdictional immunity of states and their officials before the courts of foreign states in cases involving human rights violations has increasingly been called into question. Many human rights advocates and legal scholars view the granting of immunity to a state or its representatives from proceedings arising out of serious human rights violations as "artificial, unjust, and archaic,"[2] and a number of recent decisions from domestic courts indicate that this practice might begin to change.[3] One argument frequently raised to that effect postulates that the rules on sovereign immunity are defeated when the violations amount to the breach of a peremptory norm of international law, or "*jus cogens*." This claim is featured prominently in several of the *amicus curiae* briefs submitted in *Samantar*, where the petitioner had allegedly violated a rule of peremptory character—namely the prohibition of torture.[4] In its decision, the Supreme Court did not reach the question of whether

---

* Lic. Jur. Université de Lausanne (2005), LL.M. Boston College Law School (2009), Candidate for Ph.D. in International Law, Fribourg University, Switzerland; 2010-2011 Swiss National Science Foundation Fellow and Visiting Scholar at Boston College Law School, Newton, MA, USA (sevrine.knuchel@unifr.ch). I am grateful to Professor Samantha Besson for her helpful comments on the earlier versions of this article.

[1] Samantar v. Yousuf, 130 S. Ct. 2278 (2010).

[2] Adam C. Belsky et al., *Implied Waiver Under The FSIA: A Proposed Exception To Immunity For Violations Of Peremptory Norms Of International Law*, 77 CAL. L. REV. 365 (1989) (quoting Hersch Lauterpacht, *The Problem of Jurisdictional Immunities of Foreign States*, 28 BRIT. Y.B. INT'L L. 220, 221 (1951)).

[3] See, *e.g.*, Pinochet (No. 3) R. v. Bow Street Metropolitan Stipendiary Magistrate, *ex parte* Pinochet Ugarte (Amnesty International Intervening) (No. 3) [2000] AC 147; [1999] 2 WLR 827; [1999] 2 All ER 97; 119 ILR 135 (U.K.) [hereinafter *Pinochet*]; Ferrini v. Federal Republic of Germany, Italian Court of Cassation, Decision No. 5044/2004, 11 March 2004, registered 11 March 2005, *translated in* 128 ILR 658 (It.).

[4] Brief of *Amici Curiae* Dolly Filártiga, Sister Dianna Ortiz, and Other Torture Survivors and Their Family

granting immunity to the petitioner would be consistent with international law, let alone *jus cogens*. However, the issue is likely to resurface in later proceedings when the district court will have to determine on remand whether Samantar is entitled to immunity.

¶3 This article seeks to analyze the impact of peremptory norms of international law on immunity assertions. Does the breach of a *jus cogens* norm, *i.e*., a norm "accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted" result in the loss of immunity of the state or its representative alleged to have violated the norm?[5] This article will first outline the doctrine of foreign sovereign immunity and the notion of *jus cogens*. Next, it will consider whether, under international law, an exception to the immunity of foreign states or foreign officials has emerged in cases involving *jus cogens* violations, and examine the arguments commonly raised to that effect. Finally, it will undertake an analysis of relevant U.S. case law involving *jus cogens* and foreign sovereign immunity, in an effort to explore how domestic courts have dealt with the issue in the U.S. and which trends can be expected in light of *Samantar*.

II. THE DOCTRINE OF FOREIGN SOVEREIGN IMMUNITY

¶4 When the courts of one state assume jurisdiction over another state or its representatives, the authority of the forum state to adjudicate the dispute conflicts with the principle of state equality, often expressed by the maxim "*par in parem non habet imperium.*"[6] Over time, a number of customary rules barring domestic courts from adjudicating disputes involving another state have emerged under international law. These rules are commonly justified by the need to avoid interference with the exercise of its sovereign prerogatives by the foreign state and to allow its representatives to perform their official duties without undue impairment. The International Law Commission (ILC) explained that customary international law on state immunity has grown "principally and essentially out of the judicial practice of States on the matter, although in actual practice other branches of the government, namely, the executive and the legislature, have had their share in the progressive evolution of rules of international law."[7]

¶5 Identifying the international rules governing state immunity proves to be a difficult task for several reasons. First, as noted by the ILC, "[t]he sources of international law on

---

Members, Human Rights Organizations, Religious Organizations, and Torture Survivors Support Organizations in Support of the Respondents at 24, Samantar, 130 S. Ct. 2278 (2010) (No. 08-1555); Brief for *Amicus Curiae* The Anti-Defamation League, Supporting Neither Side at 5-6, Samantar, 130 S. Ct. 2278 (2010) (No. 08-1555); *Amicus Curiae* Brief of the American Jewish Congress in Support of Petitioner at 30-33, Samantar, 130 S. Ct. 2278 (2010) (No. 08-1555) (concluding that the argument should be rejected); Brief of *Amici Curiae* Martin Weiss, Gerald Rosenstein, Progressive Jewish Alliance, Association Of Humanistic Rabbis, Jews Against Genocide, Stop Genocide Now, Save Darfur Coalition, Darfur and Beyond, Defend Darfur Dallas, Texans Against Genocide, San Francisco Bay Area Darfur Coalition, and Massachusetts Coalition To Save Darfur in Support of Respondents at 8-16, Samantar, 130 S. Ct. 2278 (2010) (No. 08-1555).

[5] *See* the definition of peremptory norms of international law provided under Article 53 of the Vienna Convention on the Law of Treaties, *opened for signature* May 23, 1969, U.N.T.S. Regis. No. 18, 232, U.N. Doc. A/CONF.39/27 (1969).

[6] "An equal has no power over an equal." Doctrinal contributions on foreign sovereign immunity are abundant. For a recent analysis, *see* HAZEL FOX, THE LAW OF STATE IMMUNITY (2d ed. 2008).

[7] Special Rapporteur, *Preliminary Report on Jurisdictional Immunities of States and Their Property*, ¶ 23, U.N. Doc. A/CN.4/323, *reprinted in* 2 Y.B. INT'L L. COMM'N 231 (1979).

the subject of State immunities appear to be more widely scattered than normally expected in the search for rules of international law on any other topic."[8] Moreover, the practice of states on the matter is not uniform. As of today, it seems generally accepted that the immunity of states is no longer absolute: a foreign state will be accorded immunity only for claims arising out of sovereign acts (*acta jure imperii*), as opposed to the claims arising out of its commercial transactions or "private law" activities (*acta jure gestionis*). However, the exact scope of this so-called "restrictive" doctrine of state immunity remains unclear. If, over time, most countries have similarly extended their courts' reach over foreign states' activities, international consensus on the matter "exists only at a rather high level of abstraction," and the details of the international law of state immunity are not always certain.[9] The opacity of state practice is also due to the sensitivity of the questions at stake: often, legal decisions regarding state immunity yield to considerations of foreign relations and policy, so as to maintain friendly relations with the foreign sovereign.

¶6 Against this backdrop, the adoption, in 2004, of the United Nations Convention on Jurisdictional Immunities of States and Their Property (JISP Convention) appeared as a major step towards enhanced legal certainty in this area of law. Designed to achieve "the codification and development of international law and the harmonization of practice in this area," the JISP Convention embraces the restrictive approach to state immunity. While it has not yet entered into force, it seems likely that the 30 ratifications necessary to bring it into effect will soon be achieved.[10] The support already demonstrated for this instrument by states which traditionally favored absolute immunity in the past, such as Russia and China, indicates how custom has evolved in this area and demonstrates that the JISP Convention can be expected to establish a universal standard for the treatment of state immunity by individual national legal systems.

¶7 With respect to individual officials, under international law "[a] distinction is usually drawn between two types of immunity …: immunity *ratione personae* and immunity *ratione materiae*."[11] The former, also known as personal immunity, is enjoyed solely by foreign officials occupying senior or high-level government posts, such as heads of state.[12] This type of immunity attaches to the status of the individual official, thus covering both official and private conduct, irrespective of whether the action was carried out before or during time of agency. Personal immunity, whose purpose is to ensure that high ranking officials may "act freely on the inter-State level without unwarranted interference" ends when they complete their service.[13] Subsequently, they are entitled to immunity *ratione materiae*, also called "functional immunity," which is the same type of immunity as the one enjoyed by all foreign officials regardless of rank. This

---

[8] *Id*. ¶ 22.

[9] Joseph W. Dellapenna, *Foreign State Immunity in Europe*, 5 N.Y. INT'L L. REV. 51, 61 (1992).

[10] *See* the Preamble of the United Nations Convention on Jurisdictional Immunities of States and their Property, *opened for signature* Jan. 17, 2005, *reprinted in* 44 ILM 803 (2005) [hereinafter *JISP Convention*]. As of June 2011, 28 states have signed it and 11 have ratified it.

[11] Special Rapporteur, *Preliminary Report on Immunity of State Officials from Foreign Criminal Jurisdiction*, ¶ 78, UN Doc. A/CN.4/601, *reprinted in* 2 Y.B. INT'L L. COMM'N 37 (2008).

[12] International law further confers extensive immunities to members of diplomatic missions and consular posts. Regulated by a distinct legal regime, the so-called diplomatic and consular immunities are outside of the scope of this article.

[13] Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium), 2002 I.C.J. 3, ¶¶74-75 (Feb. 14) (Joint Sep. Op. of Judges Higgins, Kooijmans and Burgenthal) [hereinafter *Arrest Warrant Case*]

type of immunity does not extend to the acts performed in a private capacity, but covers solely the acts performed in an official capacity. However, functional immunity does not cease when the official leaves government service. Former state officials continue to enjoy immunity *ratione materiae* for the acts performed while serving in an official capacity.

¶8 The distinction between immunity *ratione personae* and immunity *ratione materiae* is expressly mentioned in the JISP Convention: under Article 3.2, it is specified that the personal immunity enjoyed by heads of state is excluded from the scope of that instrument.[14] However, the provisions of the JISP Convention are relevant in determining the scope of the functional immunity of all state officials, since these are assimilated to the state when "acting in that capacity" (that is, when they act in their official capacity).[15]

III. *JUS COGENS* VERSUS FOREIGN SOVEREIGN IMMUNITY IN INTERNATIONAL LAW

¶9 This Section examines whether, under international law, sovereign immunity remains a valid defense against allegations of *jus cogens* violations. It first introduces the conflict arising between sovereign immunity and the protection of human rights, and then reviews whether an exception has emerged under customary international law. Finally, it analyses the arguments brought forward to that effect.

A. The Protection of Human Rights as a New Challenge to the Immunity of States and their Officials

¶10 The individual's position under international law has evolved considerably in the past several decades. The law has recognized individuals as persons entitled to a number of fundamental rights and remedies for violations of those rights. At the same time, the prospect of international enforcement of these rights remains uncertain, as the development of adjudication mechanisms is still at an embryonic stage. As a result, victims of international human rights violations have begun to explore other avenues for obtaining reparation, notably by turning to civil actions in national courts. However, it is specifically at the national level that their efforts to obtain redress for the violation of international law are likely to encounter the obstacle of the doctrine of sovereign immunity.

¶11 Building on the recognition of the enhanced status of the individual, increasing pressure has been placed on states to lift the hurdles preventing victims from obtaining reparation. Non-binding instruments which stress the duty of states to afford remedies for victims of violations of international law have multiplied, outlining a new "victim-oriented perspective" to be adopted by the international community.[16] In 2002, the entry

---

[14] Although the usefulness of the analytical distinction between functional and personal immunity is widely recognized, it must be noted that the ICJ did not refer to the categorization of immunity "*ratione personae*" and "*ratione materiae*" in ruling on the scope of immunity accruing to state officials. The ICJ considered whether the acts of state representatives had been performed in an official capacity or in a private capacity, while in service or out of office, without using this specific denomination. See, *e.g.*, *Arrest Warrant Case*, *supra* note 13.

[15] *See* JISP Convention, *supra* note 10, art. 2.1 (b) (iv).

[16] *See* the Preamble of G.A. Res. 60/147, U.N. Doc. A/RES/60/147 (Dec. 16, 2005) (adopting "Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law").

into force of the Rome Statute of the International Criminal Court reaffirmed that individuals can be held criminally responsible for international crimes. To "put an end to impunity," the Rome Statute stresses that the official status as state representative will in no case "exempt [the perpetrators of these crimes] from criminal responsibility," nor "bar the Court from exercising its jurisdiction."[17] Moreover, the Rome Statute includes the notable innovation of allowing victims to participate in the proceedings and obtain some form of reparation for their suffering.

¶12 Along with these developments, the perception has grown that immunity is an unjust bar to remedies for violations of international law, eclipsing its significance as necessary attribute of the equality of states. This perception was further nourished by the progressive recognition of the superior status of a number of international norms deemed to possess a greater normative weight. These norms, known as peremptory norms of international law or *jus cogens*, serve as a check on the actions of states, which must adhere to them in all circumstances. As discussed below, their higher rank in the emerging hierarchy of international rules was put forward as another reason for lifting sovereign immunity in claims arising from their alleged violation.

B. Jus Cogens Violations: A New Exception to the Sovereign Immunity of Foreign States and their Officials under Customary International Law?

1. Background: the Notion of *Jus Cogens*

¶13 Under international law, a norm having the character of *jus cogens* is a norm from which states are not allowed to depart under any circumstances. Unlike other international legal norms, states cannot choose to reverse these norms by either treaty or practice. This notion was codified in the Vienna Convention on the Law of Treaties, which defines a peremptory norm of international law as "a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character."[18] The practice of states and international jurisdictions has identified many rules of international law as having a peremptory character, such as the prohibition of the use of force enunciated in the U.N. Charter, the prohibition of torture, piracy, and the prohibition of genocide.[19] Peremptory norms impose material constraints on states for the protection of values deemed important to the international community. As stated by the ILC, "[a] feature common to [*jus cogens* norms], or to a great many of them, evidently is that they involve not only legal rules but considerations of morals and of international good order."[20]

---

[17] Rome Statute of the International Criminal Court, *adopted* July 17, 1998, 2187 U.N.T.S. 90, *reprinted in* 37 ILM 1002 (1998), pmbl. and art. 27.

[18] *See* Vienna Convention on the Law of Treaties, *supra* note 5, art. 53.

[19] In its commentaries to the 2001 Draft Articles on Responsibility of States for Internationally Wrongful Acts, the ILC gave as examples of *jus cogens* norms the prohibition of aggression, slavery and slave trade, genocide, racial discrimination and apartheid, torture, the basic rules of international humanitarian law applicable in armed conflict and the principle of self-determination. Draft Articles on Responsibility of States for Internationally Wrongful Acts, Commentaries, Art. 40, ¶¶ 4-6, *in Report of the International Law Commission on the Work of Its Fifty-third Session*, U.N. GAOR, 56th Sess., Supp. No. 10, U.N. Doc. A/56/10 (2001).

[20] Special Rapporteur *Third Report on Law of Treaties*, Commentary on art. 17, ¶76, U.N. Doc. A/CN.4/SER.A/1958/Add.l., *reprinted in* 2 Y.B. INT'L L. COMM'N 41 (1958).

¶14 The operation of peremptory norms is not restricted to the law of treaties. As an internationally wrongful act, the violation of a *jus cogens* rule involves the responsibility of the state itself (this point was made clear in the ILC's Draft Articles on Responsibility of States for Internationally Wrongful Acts adopted by a resolution of the U.N. General Assembly in 2001), as well as the individual responsibility of the perpetrator.[21] Moreover, because the violation of peremptory norms offends the interests of the community as a whole, the principle that states can extend their jurisdiction over such violations even when they have been committed extraterritorially has come to be affirmed by both international instruments and national legislatures.[22]

2. Immunity of the Foreign State

¶15 Under international law, foreign state immunity with respect to acts committed in the exercise of sovereign authority (*acta jure imperii*) seems to remain the rule, even when these acts are committed in violation of a norm which has the character of *jus cogens*.

¶16 Although the question of "the existence or non-existence of immunity in the case of violation by a State of *jus cogens* norms of international law" was considered during the elaboration of the JISP Convention, the issue did "not seem to be ripe enough for the Working Group to engage in a codification exercise over it."[23] Noting that "[s]ome criticism has been leveled at the Convention on the ground that it does not remove immunity in cases involving claims for civil damages against States for serious violations of human rights," the Chairman of the Working Group of the ILC explained that because "there was no clearly established pattern by States in this regard…any attempt to include such a provision would, almost certainly jeopardize the conclusion of the Convention."[24]

¶17 However, one cannot infer from the JISP Convention's silence that the issue is a settled one. On the contrary, the Working Group cautioned that recent developments in this regard "should not be ignored."[25] Even if "in most cases, the plea of sovereign immunity has succeeded," the Working Group also observed that national courts had shown "some sympathy" for "the argument increasingly put forward that immunity should be denied in the case of death or personal injury resulting from acts of a State in violation of human rights norms having the character of *jus cogens*, particularly the prohibition on torture."[26] This nascent trend toward a new exception to state immunity

---

[21] Draft Articles on Responsibility of States for Internationally Wrongful Acts, *supra* note 19, art. 26 and pt. 2, ch. III (on "Serious breaches of obligations under peremptory norms of general international law.").
[22] See, *e.g.*, Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment (CAT) arts. 5, 7, Dec. 10, 1984, 1456 U.N.T.S. 85; Geneva Convention Relative to the Treatment of Prisoners of War, arts. 49, 50, 129, 146, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135; in the U.S., the Torture Victim Protection Act is an example of national legislation providing such form of extraterritorial jurisdiction (*see infra*, Section IV.B).
[23] Chairman of the Working Group, *Report: Convention on Jurisdictional Immunities of States and their Property*, ¶¶ 46-47, U.N. Doc. A/C.6/54/L.12 (Nov. 12, 1999).
[24] Gerhard Hafner, former Chairman of the U.N. Committees on negotiation of the new Convention, Remarks at the Chatham House "State Immunity and the New U.N. Convention" Conference (Oct. 5, 2005) (transcript available in Chatham House, *State Immunity and the New UN Convention: Transcripts and Summaries of Presentations and Discussions*).
[25] Report of the Working Group on Jurisdictional Immunities of States and Their Property, U.N. Doc. A/CN.4/SER.A/1999/Add.1 (Part 2), *reprinted in* 2 Y.B. INT'L L. COMM'N, 149,172 (1999).
[26] *Id*.

might expand so as to become, in the long run, a general practice supported by *opinio juris* and crystallize in a new rule of customary international law. This possibility is acknowledged in the declarations made by three states when they ratified the JISP Convention, stressing that this instrument was "without prejudice to any future international development in the protection of human rights."[27]

¶18 As for now, the practice of withdrawing state immunity in cases of a breach of peremptory norms or other human rights violations remains sparse. In 1996, the U.S. passed an amendment to the FSIA in order to deny 'state sponsors of terrorism' immunity in civil proceedings for terrorism related offenses.[28] However, outside of the scope of this exception, U.S. courts have largely rejected claims that a foreign state should be denied immunity because of its alleged violation of a human rights norm (including those of a *jus cogens* character).[29] As for other jurisdictions, two decisions handed down by national supreme courts that dealt with violations of the humanitarian laws of war during World War II are often cited in support of a new "human rights" exception to state immunity. In 2000, the Greek Supreme Court, faced with a civil claim for damages arising from crimes committed against the civilian population of a Greek village by a German SS unit rejected Germany's plea of immunity.[30] Four years later, in the *Ferrini* case, the Italian Court of Cassation denied Germany immunity in a civil claim for damages filed by an Italian civilian who had unsuccessfully tried to obtain compensation in German courts for his deportation to a forced labor camp in Germany.[31] However, courts in Canada, England and France have upheld immunity in respect of civil claims for damages brought against foreign states for serious human rights violations, even when the infringed norms were part of the *jus cogens* catalogue.[32]

---

[27] Declaration made by Norway. Sweden and Switzerland made similar declarations. These declarations are available at http://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=III-13&chapter=3&lang=en#EndDec.

[28] *See* 28 U.S.C. §§ 1330, 1605A(5).

[29] U.S. case law is addressed in details under Section IV.B *infra*.

[30] For the Court, the acts committed by the SS unit violated preemptory rules of international law; *see* Prefecture of Voiotia v. Federal Republic of Germany, Case No. 11/2000, Areios Pagos (Hellenic Supreme Court) May 4, 2000, 129 ILR 513, 514. For a commentary, *see, e.g*, Maria Gavouneli & Ilias Bantekas, *Case Report: Prefecture of Voiotia v. Federal Republic of Germany*, 95 AM. J. INT'L L. 198 (2001); Elena Vournas, *Prefecture of Voiotia v. Federal Republic of Germany: Sovereign Immunity and the Exception for Jus Cogens Violations*, 21 N.Y.L. SCH. J. INT'L & COMP. L. 629, 648 (2002). This decision was eventually reversed on Sept. 17, 2002 by a Special Supreme Court adjudicating disputes relating to international law. An English translation of the Special Supreme Court's decision is available at 56 RHDI 199 (2003). The Special Supreme Court concluded that "the foreign state is still enjoying the privilege of immunity, when sued for actions that took place in the territory of the forum and in which its armed forces were in anyway implicated, without a further distinction as to whether these acts violate *jus cogens* […]." *See* 56 RHDI 199, 204 (2003).

[31] The Court accepted the defendant's contention that deportation and forced labor are international crimes belonging to *jus cogens*; *see Ferrini*, Decision No. 5044/2004, at 660. The Italian Supreme Court reaffirmed its decision in a series of decisions delivered on 29 May 2008 and in a further judgment of 21 October 2008. For a commentary, *see*, *e.g.* Carlo Focarelli, *Federal Republic of Germany v. Giovanni Mantelli and Others, Order No. 14201*, 103 AM. J. INT'L L. 122 (2009).

[32] *See* Bouzari v. Iran, 114 A.C.W.S. 3d 57 (Ont. Super. Ct. Justice 2002), aff'd 71 O.R.3d 675 (Ont. Ct. App. 2004), 128 ILR 586, 587-590*;* Al-Adsani v. Government of Kuwait and Others, CA,,12 March 1996, 107 ILR 536, 537; Jones v. Ministry of Interior of the Kingdom of Saudi Arabia, [2006] UKHL 26 (June 14, 2006) [hereinafter *Jones*]; Bucheron v. Federal Republic of Germany, Cass. 1e civ., Dec. 16, 2003, Bull. civ. 02-45961.

¶19 In 2008, Germany instituted proceedings before the International Court of Justice (ICJ) to determine whether, by denying its immunity in civil claims based on violations of international humanitarian law during World War II in the *Ferrini* line of cases, Italy infringed its obligations under international law.[33] In light of the paucity of judicial support existing to date for an exception to state immunity for gross human rights violations, an ICJ ruling to that effect seems rather unlikely. So far, the European Court of Human Rights (ECHR), the only international court to have dealt with the issue, has rejected the view that a grant of immunity to the respondent state in a damage claim for acts of torture violated the individual's right of access to a court guaranteed by the European Convention on Human Rights.[34] In a later case, the ECHR confirmed this holding with respect to the immunity of the foreign state from measures of execution.[35]

3. Immunity of the Foreign Official

¶20 The scope of immunity enjoyed by state officials has been dramatically reduced with the development of international criminal jurisdiction: the rule that the official status of the perpetrator does not constitute a defense to the commission of international crimes is now generally applicable before international criminal courts.[36] However, with respect to proceedings before domestic courts, the picture appears more nuanced and the answer varies depending on the type of immunity enjoyed by the state official.

i) Personal immunity (immunity ratione personae)

¶21 As to the personal immunity enjoyed by certain high ranking officials during their time in office, absolute immunity from civil and criminal proceedings in national courts continues to be the rule in practice.[37] As highlighted by the ICJ in the *Arrest Warrant* case, "in international law it is firmly established that…certain holders of high-ranking office in a State, such as the Head of State, the Head of Government and Minister for Foreign Affairs, enjoy immunities from jurisdiction in other States, both civil and criminal."[38] In that case, the ICJ found itself unable to deduce from state practice "that there exists under customary international law any form of exception to the rule according immunity from criminal jurisdiction and inviolability to incumbent Ministers for Foreign Affairs, where they are suspected of having committed war crimes or crimes against humanity."[39] The "full immunity from criminal jurisdiction and inviolability" of an incumbent head of state before the courts of another state was later reaffirmed by the ICJ in *Djibouti v. France*.[40]

---

[33] *See* Press Release, Int'l Court of Justice, Germany Institutes Proceedings Against Italy for Failing to Respect its Jurisdictional Immunity as a Sovereign State, I.C.J. Press Release No. 2008/44 (December 23, 2008).
[34] Al-Adsani v. United Kingdom, 2001-XI Eur. Ct. H.R. 79.
[35] Kalogeropoulou v. Greece, App. No. 59021/00 (Eur. Ct. H.R. Dec. 12, 2002) (admissibility).
[36] *See*, *e.g.*, Rome Statute of the International Criminal Court, *supra* note 17, art. 27; Updated Statute of the International Criminal Tribunal for the Former Yugoslavia, *adopted by* S.C. Res. 827, S/RES/827 (May 25, 1993), art. 7 (2).
[37] *See*, *e.g.*, International Law Commission, *Immunity of State Officials from Foreign Criminal Jurisdiction*: *Memorandum by the Secretariat*, U.N. Doc. A/CN.4/596 (March 31, 2008), ¶ 99; Fox, *supra* note 6, at 686.
[38] *Arrest Warrant Case*, *supra* note 13, ¶ 51.
[39] *Id.* ¶ 58.
[40] Certain Questions of Mutual Assistance in Criminal Matters (Djib. v. Fr.), 2008 I.C.J. 177, 236, 237

ii) Functional immunity (immunity ratione materiae)

¶22 For the ICJ, there are only four circumstances in which the personal immunity of a high ranking official would not represent a bar to criminal prosecution: (1) when the individual is prosecuted in his or her own country; (2) when the state which the individual represented decides to waive immunity; (3) when the individual is no longer in office and the foreign court's prosecution pertains to acts committed prior or subsequent to his or her period in service, or to acts committed while in service, but in a private capacity; and (4) when the individual is subject to criminal proceedings before certain international criminal courts, where they have jurisdiction.[41]

¶23 This *obiter dictum* from the *Arrest Warrant* case has been widely criticized in the literature, as well as in some of the separate opinions filed by other judges in the case.[42] Most of the criticisms are directed at part (3) of the *obiter dictum*, which addresses the scope of immunity of a senior state official who is no longer in office. As explained under Section II, when a high-ranking official leaves his or her post, his or her personal immunity ceases. From this point, he or she is entitled, like any other state official, to functional immunity, which covers the acts committed in an official capacity even after the official has left service. With this kind of immunity, the practice of national courts seems to have evolved: domestic authorities have increasingly considered that functional immunity was not applicable to crimes under international law rising to the level of *jus cogens*, such as genocide, crimes against humanity, war crimes and torture. For example, in the *Pinochet* (No. 3) case, the British House of Lords rejected former Chilean President Augusto Pinochet's claim that he was entitled to immunity from arrest with respect to the acts of torture he allegedly committed during his presidency.[43] Courts in the U.S., Italy, Spain, and recently, the Committee of African Jurists established by the African Union to examine the question of the prosecution of Hissène Habré, among others, have also considered that state officials do not enjoy immunity from proceedings arising from these crimes.[44] Such an exception has further been endorsed by the Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia (ICTY), which held that "those responsible for such crimes cannot invoke immunity from national or international jurisdiction even if they perpetrated such crimes while acting in their official capacity."[45]

(June 4).

[41] *See Arrest Warrant Case*, *supra* note 13, ¶ 61 (*obiter dictum*).

[42] *See*, *e.g.*, Antonio Cassese, *When May Senior State Officials Be Tried for International Crimes? Some Comments on the Congo v. Belgium Case*, 13 EUR. J. INT'L L. 853 (2002); *see also*, *e.g.*, *Arrest Warrant case*, *supra* note 13, Dissenting Opinion of Judge Van den Wyngaert, at 153, ¶ 27 (finding a "fundamental problem" in the Court's approach "that disregards the whole recent movement in modern international criminal law towards recognition of the principle of individual accountability for international core crimes").

[43] Pinochet (No. 3) R., *ex parte* Pinochet Ugarte (Amnesty International Intervening) (No. 3) [2000] AC 147.

[44] *See*, *e.g.*, (U.S.) Xuncax v. Gramajo, 886 F. Supp. 162, 176 (D. Mass. 1995); (Italy) Court of Cassation, *Ferrini*, Decision No. 5044/2004, at 674, ¶ 11; (Spain) Request for extradition delivered on 3 November 1998, *Auto de solicitud de extradición de Pinochet*, [Request for the Extradition of Pinochet], Madrid, ¶ 4, (Nov. 3, 1998), 3 November 1998 (*reproduced at* in http://www.ua.es/up/pinochet/documentos/auto-03-11-98/auto24.htm), ¶ 4, 5 (d); (African Union) Report of the Committee of Eminent African Jurists on the case of Hissène Habré, submitted to the Summit of the African Union in July 2006, ¶ 13, *available at* http://www.hrw.org/justice/habre/CEJA_Repor0506.pdfhttp://www.hrw.org/en/habre-case.

[45] Prosecutor v. Blaškić (Case No. IT-95-14), Appeals Chamber, Judgment on the Request of the Republic of Croatia for the Review of the Decision of Trial Chamber II of 18 July 1997, ¶ 41 (Oct. 29, 1997).

¶24 However, national authorities are not uniform in the practice of denying functional immunity to foreign officials accused of crimes under international law. For example, the immunity of the former U.S. Secretary of Defense Donald Rumsfeld in a criminal procedure involving allegations of acts amounting to crimes under international law was recognized by the District Prosecutor of Paris.[46] Moreover, so far, apart from some decisions rendered by U.S. courts in the context of human rights litigation (*see* Section IV.B *infra*), the removal of immunity of state officials tends to be exercised only in criminal, as opposed to civil proceedings.[47] For example, in the *Jones* case, the House of Lords, unlike its decision in the criminal proceedings against Augusto Pinochet, granted immunity from civil jurisdiction to Saudi Arabian officials for alleged acts of torture.[48] The need for such distinction is often justified by the position of the foreign state in each proceeding: as under international law, a state cannot be held *criminally* responsible, it cannot be directly impleaded by *criminal* proceedings against its officials, whereas a *civil* claim for damages against a state official could potentially give rise to a similar claim against the state itself.[49] The latter situation would therefore constitute a more direct exercise of jurisdiction over the other state.

¶25 The *obiter dictum* of the ICJ in the *Arrest Warrant* case seems to indicate that the Court is of the view that an exception to functional immunity for international crimes has not even matured in the context of criminal proceedings. As a former minister for foreign affairs may be prosecuted only for the acts committed during office "in a private capacity," the ICJ's *obiter dictum* can be interpreted as denying the right of a foreign state to prosecute him or her for crimes under international law allegedly committed while in service.[50] This position seems to run counter to the recent developments mentioned earlier. After reviewing the practice of national courts, the Institute of International Law concluded, in its 2009 Resolution "on the Immunity from Jurisdiction of the State and of Persons Who Act on Behalf of the State in case of International Crimes," that such crimes were excluded from the scope of functional immunity enjoyed by individuals acting on behalf of a state.[51] The International Law Association asserted the same conclusion.[52] The ICJ has yet to address this issue in *ratio decidendi*.

---

[46] Letter from Paris Prosecutor Jean-Claude Marin to filing attorney Patrick Baudouin (Nov. 16, 1997) dated 16 November 2007, *available at* http://www.fidh.org/IMG/pdf/reponseproc23nov07.pdf.

[47] *See* FOX, *supra* note 6, at 699.

[48] *Jones*, *supra* note 32.

[49] *See*, *e.g.*, *id.* at 31 (Lord Bingham of Cornhill).

[50] *Arrest Warrant Case*, *supra* note 13, ¶ 61 (*obiter dictum*).

[51] Institute of International law, *Résolution sur l'immunité de juridiction de l'Etat et de ses agents en cas de crimes internationaux [Resolution on the Immunity from Jurisdiction of the State and of Persons Who Act on Behalf of the State in Ccase of International Crimes]*, (Naples, 2009), Art. III, *available at* http://www.idi-iil.org/idiE/resolutionsE/2009_naples_01_en.pdf. The Institute had already stated in a Resolution adopted in 2001 that former heads of state were not immune for international crimes committed during their time in office; *see Les immunités de juridiction et d'exécution du chef d'Etat et de gouvernement en droit international* [*Resolution on Immunities from Jurisdiction and Execution of Heads of State and Heads of Government in International Law]*, (Vancouver, 2001), Art. 13, *available at* http://www.idi-iil.org/idiE/resolutionsE//2001_van_02_en.PDF.

[52] International Law Association, "*Final Report on the Exercise of Universal Jurisdiction in Respect of Gross Human Rights Offences,*" 69 INT'L L. ASSOC. REP. CONF. 403, 423 (London, July 25-29, 2000) (Conclusions and recommendations, No. 4: "No immunities in respect of gross human rights offences subject to universal jurisdiction shall apply on the grounds that crimes were perpetrated in an official capacity").

C. Arguments in Favor of a Jus Cogens Exception to the Doctrine of Foreign Sovereign Immunity

¶26 Because of the special status of *jus cogens*, many human rights advocates and legal scholars argue that breaches of peremptory norms imply that foreign states or foreign officials must be denied immunity in proceedings arising out of such violations. Various lines of reasoning have been followed in support of that claim, each of which will now be addressed in turn.

1. The Normative Hierarchy Argument

> *"[A] jus cogens rule…overrides any other rule which does not have the same status."*[53]

¶27 One argument, derived from the concept of a normative hierarchy within international law, postulates that because the rules governing the immunity of states and their officials are not part of the *jus cogens* catalogue, they rank lower in the hierarchy of international rules. Consequently, *jus cogens* should trump the rules on foreign sovereign immunity. This contention figures prominently in the case of *Al-Adsani v. United Kingdom* decided by the ECHR in 2001.[54] In this case, the Court, by a bare 9-to-8 majority of the Judges, rejected the view that the violation of the peremptory norm of international law on the prohibition of torture compelled denial of state immunity in civil suits. However, in a joint dissenting opinion, six Judges agreed that *jus cogens* norms superseded ordinary international rules, including the rules on state immunity:

> "For the basic characteristic of a *jus cogens* rule is that, as a source of law in the now vertical international legal system, it overrides any other rule which does not have the same status. In the event of a conflict between a *jus cogens* rule and any other rule of international law, the former prevails. The consequence of such prevalence is that the conflicting rule is null and void, or, in any event, does not produce legal effects which are in contradiction with the content of the peremptory rule."[55]

This reasoning has far-reaching implications. Judge Pellonpää noted in particular that if the *jus cogens* nature of the prohibition of torture prevailed over all other obligations of a lower hierarchical status, it would also have to prevail over the rules concerning immunity from execution.[56] In that scenario, states would have to allow attachment and execution against public property of respondent states (including embassy buildings), at

---

[53] Al-Adsani v. U.K., 2001-XI Eur. Ct. H.R. 79, 111-112 (Rozakis & Caflisch, J.J., dissenting, joined by Judges Wildhaber, Costa, Cabral Barreto and Vajić) [hereinafter *Diss. Op. of Judge Rozakis et al.*].
[54] *Id.*
[55] *Id*. at 111, 112 (Diss. Op. of Judge Rozakis et al.).
[56] *Id*. at 108 (Concurring Op. of Judge Pellonpää, J., joined by Judge Sir Nicola Bratza, J., concurring) Under international law, a foreign state's immunity from execution against its property in use for government purposes remains the rule; see, *e.g*., FOX, *supra* note 6, at 599-662.

the risk of jeopardizing the "basic framework" sustaining the conduct of international relations.[57]

¶28 This observation about the rules on immunity from execution is illustrative of the major concern arising with the argument sustained by the minority in *Al-Adsani*. As highlighted by one commentator, "[t]alk of any sort of ordering amongst legal rules makes sense only if those rules are in conflict at the level of substance."[58] But there is no actual conflict between the *jus cogens* prohibition of torture and the rules on state immunity from jurisdiction (or, as in the concurring opinion of Judge Pellonpää, the rules on state immunity from execution). A conflict would occur between state immunity and a secondary rule according to which states were required to assume civil jurisdiction over other states with respect to allegations of torture. However, the prohibition of torture is a primary norm, which solely aims at outlawing the practice of torture; as such, it does not stipulate anything about the ways in which the rule must be enforced.[59] For the normative hierarchy argument to prevail, it would be necessary to show that another *jus cogens* norm has emerged under international law that obliges the forum state to provide victims with civil remedies for acts committed abroad by the foreign state. However, the existence, under customary international law or treaty, let alone the peremptory status of such a norm, is dubious.[60]

¶29 In order to circumvent this difficulty, some supporters of the normative hierarchy argument contend that a procedural *jus cogens* rule can be derived from the peremptory character of the substantive rule.[61] As peremptory norms prohibit certain conduct for the sake of the entire international community, their superior status would imply superior means of enforcement. Accordingly, they conclude that "[t]he material *jus cogens* rule also contains a procedural *jus cogens* rule prohibiting certain limits to its enforcement."[62]

---

[57] Al-Adsani v. U.K., 2001-XI Eur. Ct. H.R. 79, 108.
[58] Emmanuel Voyiakis, *Access to Court v. State Immunity*, 52 INT'L & COMP. L.Q. 297, 320 (2003).
[59] *Id*. at 321; *see also*, Lee M. Caplan, *State Immunity, Human Rights and Jus Cogens: A Critique of the Normative Hierarchy Theory*, 97 AM. J. INT'L L. 741, 772 (2003); FOX, *supra* note 6, at 151; Thomas Giegerich, *Do Damages Claims Arising from Jus Cogens Violations Override State Immunity from the Jurisdiction of Foreign Courts?*, *in* Tomuschat and Thouvenin (eds.), THE FUNDAMENTAL RULES OF THE INTERNATIONAL LEGAL ORDER: JUS COGENS AND OBLIGATIONS ERGA OMNES 227 (Christian Tomuschat & Jean-Marc Thouvenin eds., 2006); Christian Tomuschat, *L'immunité des États en cas de violation grave des droits de l'homme*, 2005 RGDIP 51, 57, 58 (2005); Xiaodong Yang, *Jus Cogens and State Immunity*, 3 N.Z. Y.B. INT'L L. 131, 148-49 (2006).
[60] While the language of Art. 14 of the Convention against Torture provides some support for that interpretation, whether or not the CAT requires state parties to provide civil remedies for acts of torture committed beyond the forum state's territory is disputed. *See*, *e.g*., Andrew Byrnes, *Civil Remedies for Torture Committed abroad: An Obligation under the Convention Against Torture?*, *in* TORTURE AS TORT: COMPARATIVE PERSPECTIVES ON THE DEVELOPMENT OF TRANSNATIONAL HUMAN RIGHTS LITIGATION (Craig M. Scott ed., 2001) 539, 540; Donald F. Donovan & Anthea Roberts, 'The Emerging Recognition of Universal Jurisdiction', 100 AM. J. INT'L L. 142, 148 (2006); Alexander Orakhelashvili, *State Immunity and Hierarchy of Norms: Why the House of Lords Got It Wrong*, 18 EUR. J. INT'L L. 955, 960-963 (2007).
[61] *See*, *e.g.* Alexander Orakhelashvili, *State Immunity and International Public Order*, 45 GERMAN Y.B. INT'L L. 227, 258 (2002); Kerstin Bartsch & Björn Elberling, *Jus Cogens vs. State Immunity, Round Two: The Decision of the European Court of Human Rights in the Kalogeropoulou et al. v. Greece and Germany Decision*, 4 GERMAN L. J. 477, 486-488 (2003).
[62] Bartsch & Elberling, *supra* note 61, at 487. The argument was rejected by the House of Lord in the *Jones* case; *see Jones*, *supra* note 32, ¶ 45 (Lord Hoffmann); Bucheron v. Federal Republic of Germany, Cass. 1e civ., Dec. 16, 2003, Bull. civ. 02-45961.]

¶30 But which limits does it prohibit? In other words, what is the scope of this procedural peremptory rule that the substantive rule carries with it? In the absence of a centralized mechanism for the enforcement of international norms, there remains little guidance to answer this question. Are states obliged to secure the enforcement of the norm at the international level, or is it suitable for them to enforce the norm before their domestic authorities? And how far would the overriding effect of such a procedural norm go? It is suggested in the literature that "not every limit to the judicial enforcement of a *jus cogens* norm can be prohibited under this concept," and that "[l]imits resulting from the very nature of a court trial…would of course still be valid."[63] Nevertheless, the precise implications of this ancillary peremptory procedural obligation remain obscure. In *Bouzari v. Iran*, the Court of Appeal for Ontario denied its existence in categorical terms: "The peremptory norm of prohibition against torture does not encompass the civil remedy contended for by the appellant."[64]

¶31 If, in practice, the operation of *jus cogens* had admittedly extended beyond the law of treaties to areas such as state responsibility, the contention that "'[t]he whole cluster of legal standards' emanating from a peremptory norm and supporting its enforcement should be considered peremptory as well," seems to gather little support.[65] In *A. v. Secretary of State,* the British House of Lords stated that the peremptory status of the prohibition of torture "requires member states to do more than eschew the practice of torture."[66] As a result, the House of Lords refused to admit evidence obtained abroad through torture as valid evidence before English courts. However, the "duty of states" to "reject the fruits of torture inflicted in breach of international law" was not deemed peremptory: such duty was considered to exist "save perhaps in limited and exceptional circumstances, as where immediately necessary to protect a person from unlawful violence or property from destruction."[67]

¶32 Some international tribunals have considered that the consequences of the violation of *jus cogens* were extensive, by holding notably that amnesties granted for the violation of a peremptory norm had no legal effect.[68] For example, in the *Furundžija* case, the Trial Chamber of the ICTY stated that:

> "The fact that torture is prohibited by a peremptory norm of international law has other effects at the inter-state and individual levels. At the inter-state level, it serves to internationally de-legitimize any legislative, administrative or judicial act authorizing torture. It would be senseless to argue, on the one hand, that on account of the *jus cogens* value of the prohibition against torture, treaties or customary rules would be null and void *ab initio* and then be unmindful of a State say, taking national measures authorizing or condoning torture or absolving its perpetrators through an amnesty law. If such a situation were to arise, the national

[63] Bartsch & Elberling, *supra* note 61, at 487, n. 69.
[64] Bouzari v. Iran, 114 A.C.W.S. 3d 57 ¶ 94.
[65] Orakhelashvili, *supra* note 61, at 258.
[66] A (FC) and others (FC) v. Secretary of State [2005] UKHL 71, ¶ 34 (Lord Bingham of Cornhill).
[67] *Id.*
[68] *See*, *e.g.*, Prosecutor v. Morris Kallon & Brimma Bazzy Kamara, SCSL-2004-15-AR72(E) & SCSL-2004-16-AR72(E), Decision on Challenge to Jurisdiction: Amnesty Provided by the Lomé Accord, of 13 March 2004, ¶ 71 (Mar. 13, 2004).

> measures, violating the general principle and any treaty provision, would produce the legal effects discussed above and in addition would not be accorded international legal recognition. Proceedings could be initiated by potential victims if they had *locus standi* before a competent international or national judicial body with a view to asking it to hold the national measure to be internationally unlawful; or the victim could bring a civil suit for damage in a foreign court which would therefore be asked *inter alia* to disregard the legal value of the national authorizing act."[69]

However, it is significant to observe that the Trial Chamber considered that if victims of torture could bring a civil suit in foreign courts, they had no absolute right to do so: the necessary condition was for them to have *locus standi*. Similarly, in discussing the relationship between the *jus cogens* prohibition of genocide and the establishment of its jurisdiction, the ICJ held that "the fact that a dispute relates to compliance with a norm having such a character…cannot of itself provide a basis for the jurisdiction of the Court to entertain that dispute. Under the Court's statute, that jurisdiction is always based on consent of the parties."[70] Admittedly, and as also underscored by the ICJ, jurisdiction and immunity are two distinct questions.[71] However, these findings highlight that it is by no means established that the recognition of the peremptory character of a norm gives rise *ipso facto* to an obligation on states to enforce this norm under any circumstance.

¶33 The need to keep the effect of *jus cogens* "within its proper limits" is acknowledged even by those defending the view that such effect is indiscriminate.[72] If the *jus cogens* prohibition of torture or genocide, for example, was to entail a procedural rule overriding any obstacles to its enforcement, the immunity of incumbent high-ranking officials would be defeated as well. As a way to avoid "undue harassment for serving heads of State and foreign ministers," it was suggested that in this context, "the postponement of accountability" could sometimes be compatible with the peremptory duty to prosecute prompted by the violation of substantive *jus cogens*.[73] This remark implies that the overriding effects of the procedural ancillary rule would be variable: they could be suspended in certain (unspecified) circumstances. Such a suggestion, as well as the imposition of an implied procedural obligation whose exact features remain unclear, seem too far remote from the definition of the notion of *jus cogens* as "a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted."[74]

¶34 This conclusion might appear difficult to reconcile with the international community's absolute condemnation of the acts prohibited by *jus cogens* norms. As a result, and in order to affirm the "consequential profile" of *jus cogens*, some argue that the problem should be viewed in terms of the objective sought by peremptory norms,

---

[69] *See* Prosecutor v. Furundžija, No. IT-95-17/1-T, (Dec. 10, 1998), ¶ 155, *reprinted in* 38 ILM 317 (1999), ¶ 155.
[70] Armed Activities in the Territory of the Congo (Democratic Republic of the Congo v. Rwanda), Jurisdiction and Admissibility, Judgment, 2006 I.C.J. 6, (Jurisdiction and Admissibility, Judgment of Feb. 3), at ¶ 6432 (Feb. 3, 2006).
[71] *Arrest Warrant Case*, *supra* note 13, at 20, ¶ 46.
[72] Orakhelashvili, *supra* note 61, at 265.
[73] *Id*.
[74] *See* Vienna Convention on the Law of Treaties, *supra* note 5, Art. 53.

which is arguably broader: "[t]he function of peremptory norms in the field here under consideration is preventing impunity for serious breaches of human rights and humanitarian law."[75] Again, even if the prohibition of torture or genocide were to have that function, it is not clear how such an assertion suffices to endow it with peremptory status. This is not to say that a peremptory norm that prohibits impunity for serious breaches of human rights and humanitarian law could not arise independently, under the Vienna Convention's definition of *jus cogens*. However, in the current state of international law, where the development of mechanisms sanctioning the commission of international crimes is not yet generalized, such a norm does not seem to have emerged. In the *Arrest Warrant* case, Judge Al-Khasawneh maintained in his dissenting opinion that "the effective combating of grave crimes" had now "arguably assumed a *jus cogens* character," but this contention was made without further elaboration.[76]

2. The "Complicity" Argument

> *"The recognition of immunity for an act contrary to peremptory international law would amount to complicity of the national court to the promotion of an act strongly condemned by the international public order."*[77]

¶35 Another argument in support of lifting the immunity of states and their officials builds on the consequences attached to the violation of *jus cogens* in the law of state responsibility.[78] The reasoning goes as follows: since the ILC's Draft Articles on Responsibility of States for Internationally Wrongful Acts highlight the duty of states not to recognize breaches of peremptory norms and not to assist the breaching state,[79] granting immunity would amount to complicity with the *jus cogens* violation and engage the responsibility of the forum state. The Italian Court of Cassation made a note of this point in support of its decision to deny Germany's immunity for crimes committed during World War II.[80] Similarly, in *Prefecture of Voiotia*, the Greek Court of First Instance asserted that "the recognition of immunity for an act contrary to peremptory international law would amount to complicity of the national court to the promotion of an act strongly condemned by the international public order."[81]

¶36 This argument is not without problems. The Draft Articles on State Responsibility stipulate that a state is internationally responsible when it aids, assists, directs, controls or

---

[75] Orakhelashvili, *supra* note 60, at 970, 964.
[76] *Arrest Warrant Case*, *supra* note 13, at 98, ¶ 7 (Diss. Op. of Judge Al-Khasawneh, J., dissenting).
[77] (Greece) Prefecture of Voiotia v. Federal Republic of Germany, No. 137/1997 (Ct. 1st Inst. Levadia, Oct. 30, 1997), *translated in* Maria Gavouneli, *War Reparation Claims and State Immunity*, 50 RHDI 595, 599 (1997).
[78] On this argument, *see*, *e.g.*, Giegerich, *supra* note 59, at 226; Caplan, *supra* note 59, at 775, 776; Orakhelashvili, *supra* note 61, at 967.
[79] Draft Articles on Responsibility of States for Internationally Wrongful Acts, *supra* note 19, art. 40, ¶¶ 4-6.
[80] *Ferrini*, Decision No. 5044/2004, at 669, ¶ 9; *see also*, Pasquale De Sena & Francesca De Vittor, *State Immunity and Human Rights: The Italian Supreme Court Decision on the* Ferrini *Case*, 16 EUR. J. INT'L L. 89, 100 (2005).
[81] Prefecture of Voiotia v. Federal Republic of Germany, No. 137/1997 (Ct. 1st Inst. Levadia, Oct. 30, 1997).

coerces another state into committing an internationally wrongful act, on the condition that it does so "with knowledge of the circumstances of the internationally wrongful act."[82] A subsequent decision on adjudication, however, can hardly be considered an active participation in that wrongful act. In case of "serious breach by a State of an obligation arising under a peremptory norm of general international law," the Draft Articles on State Responsibility also emphasize the particular duty of states to not "recognize as lawful" the situation created by such a breach.[83] But the grant of immunity by the forum state does not amount to recognizing that the alleged acts were lawful: state immunity is a procedural rule, with no prejudice as to the determination of the substantive legal questions.[84] Alternative judicial or political arenas remain open to establish whether a breach of *jus cogens* has occurred and recognize the responsibility of the perpetrator state. The following statement by Lord Hoffmann in the *Jones* case accurately reflects these points: "the United Kingdom, in according state immunity to the Kingdom [of Saudi Arabia], is not proposing to torture anyone. Nor is the Kingdom, in claiming immunity, justifying the use of torture. It is objecting in limine to the jurisdiction of the English court to decide whether it used torture or not."[85]

3. The "Qualification" Argument

> *"Acts of the state in breach of peremptory international law cannot qualify as sovereign acts of state."*[86]

¶37 Another claim that immunity should be denied in case of *jus cogens* violations relates to the conditions governing the grant of refusal of state immunity. It is often maintained that violations of *jus cogens* cannot be recognized as sovereign acts, since the violating state disregarded the one set of norms established by the community of states as a whole to safeguard its interests. State actions violating *jus cogens* would fall outside the category of state conduct protected by immunity (*acta jure imperii*); therefore, states ought not be granted immunity, as is the case with commercial transactions, for example.[87]

¶38 This reasoning seems difficult to reconcile with the current categorizations governing the grant of immunity. When a state is impleaded before a foreign court, this court has to examine whether the state acted in the exercise of its sovereign powers (*jure imperii*) or like an ordinary legal person (*jure gestionis*): only the former category of acts are immune under international law. However, the abuse of sovereign prerogatives, as when the state violates *jus cogens*, "does not in itself transform sovereign acts into *acta*

---

[82] Draft Articles on Responsibility of States for Internationally Wrongful Acts, *supra* note 19, arts. 16-18.
[83] *Id*. arts. 40, 41.
[84] This point was acknowledged by the ICJ in the context of the state officials' immunity: "Immunity from criminal jurisdiction and individual criminal responsibility are quite separate concepts. While jurisdictional immunity is procedural in nature, criminal responsibility is a question of substantive law." *Arrest Warrant* Case, *supra* note 13, ¶ 60.
[85] *Jones*, *supra* note 32, ¶¶ 44, 45 (Lord Hoffmann).
[86] Prefecture of Voiotia v. Federal Republic of Germany, No. 137/1997 (Ct. 1st Inst. Levadia, Oct. 30, 1997).
[87] On this argument, see, *e.g*., Belsky et al., *supra* note 2, at 378; Caplan, *supra* note 59, at 774-75; Orakhelashvili, *supra* note 61, at 236.

jure gestionis."[88] Such abuse is still performed in pursuance of the state's governmental authority. The ILC's Draft Articles on Responsibility of States for Internationally Wrongful Acts state it clearly: "The conduct of an organ of a State or of a person or entity empowered to exercise elements of the governmental authority shall be considered an act of the State under international law if the organ, person or entity acts in that capacity, *even if it exceeds its authority or contravenes instructions*."[89] Moreover, the approach that considers international crimes as "private acts" would eviscerate the responsibility of states for the crimes committed by their organs. The prohibition of torture illustrates this point: holding that the commission of torture cannot be considered as a sovereign act results in a contradiction, since like most human rights, the very definition of torture requires that the act be undertaken on behalf of or with the consent of the state.[90]

¶39 The claim that *jus cogens* violations are by nature excluded from the category of immune conduct was also made with regard to the individual immunity of state officials: since these crimes can never be part of "normal state functions," they would not qualify as "official" acts for the purpose of immunity *ratione materiae*.[91] A number of national courts appear to endorse this argument. For example, in a case against a former Nazi officer involving war crimes and crimes against humanity, the Supreme Court of Israel held that because "such odious acts…are completely outside the 'sovereign jurisdiction' of the State that ordered or ratified their commission…those who participated in such acts must personally account for them and cannot shelter behind the official character of their task or mission, or behind the 'Laws' of the State by virtue of which they purported to act."[92] In the *Pinochet* case, two of the Law Lords supported this position.[93] For example, Lord Hutton stated that "the commission of acts of torture is not a function of head of State, and therefore in this case the immunity to which Senator Pinochet is entitled as a former head of State does not arise in relation to, and does not attach to, acts of torture."[94] Some U.S. courts, in particular, tend to regard violations of peremptory norms and other serious human rights abuses as outside the scope of the official's authority.[95]

¶40 An earlier analysis of the immunity of states applies here as well: it is difficult to maintain that non-official conduct, which under the effect of the law of immunity's categorizations amounts by default to "private" conduct, still violates international law. To circumvent this problem, several U.S. courts have held that "[a]n official *acting under*

---

[88] Giegerich, *supra* note 59, at 224. The point was recognized by the U.S. Supreme Court in Saudi Arabia v. Nelson, 507 U.S. 349 (1993).

[89] Draft Articles on Responsibility of States for Internationally Wrongful Acts, *supra* note 19, art. 7 (emphasis added).

[90] *See* the definition of torture entailed in CAT, *supra* note 22, art. 1.

[91] *Arrest Warrant Case*, *supra* note 13, at 227, 228, ¶¶ 85 (Joint Sep. Op. of Judges Higgins et al.), quoting Andrea Bianchi, *Denying State Immunity to Violators of Human Rights*, 45 AUSTRIAN JOURNAL OF PUB. AND INT'L L. 195, 227-228 (1994).

[92] Attorney General v. Eichmann, Attorney-General of the Government of Israel v. Adolf Eichmann, Judgment of 29 May 1962, *reproduced in* 36 INT'L L. REP. 277, 310 (Sup. Ct. Israel 1962).

[93] *See* the opinions of Lord Hutton, Lord Browne-Wilkinson. Pinochet (No. 3) R., *ex parte* Pinochet Ugarte (Amnesty International Intervening) (No. 3) [2000] AC 147.

[94] *Id*.

[95] *See*, *e.g.*, Hilao v. Estate of Ferdinand Marcos, 25 F.3d 1467 (9th Cir. 1994), where the Ninth Circuit found that acts of torture, summary execution, and disappearance could not be qualified as acts taken within an official mandate. Almost all cases against foreign states involving such violations, however, remain barred by immunity as a result of the U.S. codification governing foreign sovereign immunity. An analysis of *jus cogens* and foreign sovereign immunity in U.S. case law is provided below, at Section IV.C.

color of authority, but not within an official mandate, can violate international law and not be entitled to immunity..."[96] But what happens when the state itself indicates that the unlawful acts were indeed performed in pursuance of an official mandate? The issue is not hypothetical: in the U.S., for instance, foreign states sometimes intervened on behalf of their officials to assert that the alleged actions had been carried out in an official capacity.[97] A suitable answer is probably that international law does not allow *jus cogens* violations to be part of any official mandate, since these violations are by definition illegal. But an act "does not have to be lawful to attract immunity."[98] Immunity covers acts committed in pursuit of sovereign authority irrespective of their legality, as its rationale is to prevent other states from sitting in judgment over the acts of the other sovereign. As a result, "[i]f unlawful or criminal acts were considered, as a matter of principle, to be 'non-official' for purposes of immunity *ratione materiae*, the very notion of 'immunity' would be deprived of much of its content."[99]

4. The "Implied Waiver" Argument

> *"When a state is in breach of peremptory rules of international law, it cannot lawfully expect to be granted the right of immunity. Consequently, it is deemed to have tacitly waived such right."*[100]

¶41 A variant of the reasoning that immunity should not be granted because *jus cogens* violations cannot be considered as sovereign acts maintains that states in breach of peremptory norms of international law have tacitly waived their right to immunity for such acts. Under international law, a state may make such an implied waiver if its intent is clearly discernable. Consequently, and as reflected by the JISP Convention, the existence of an implied waiver is made conditional upon some uncontroversial conduct, such as initiation or intervention in the proceedings.[101] In case of *jus cogens* violations, the implied waiver argument can be described as follows:

> "The existence of a system of rules that states may not violate implies that when a state acts in violation of such a rule, the act is not recognized as a

---

[96] Hilao v. Estate of Ferdinand Marcos, 25 F.3d 1472 (citing Filartiga v. Pena-Irala, 630 F2d 876 (2d Cir 1980)) (emphasis added); *see also In re* Estate of Marcos Human Rights Litig. (Trajano v. Marcos), 978 F.2d 493, 502 (9th Cir. 1992).

[97] In *Samantar*, 130 S. Ct. 2278 (2010), the Deputy Prime Minister of the Transitional Federal Government of Somalia (TGF) wrote a letter to the U.S. Secretary of State "reaffirming Samantar's entitlement to immunity and 'indicat[ing] that the actions attributed to Mr. Samantar in the lawsuit in connection with the quelling of the insurgencies from 1981 to 1989 would have been taken by Mr. Samantar in his official capacit[y]' on behalf of Somalia." A second letter by the TGF Prime Minister reiterating these points was sent again to the U.S. Secretary of State in April 2007. *See* Brief of Petitioner, *Samantar v. Yousuf et al*., 2008 U.S. Briefs 1555 (U.S. Nov. 30, 2009). For another example, see, *e.g*., Belhas v. Moshe Ya'Alon, 515 F.3d 1279, 1282 (D.D.C. 2008).

[98] Pinochet (No. 3) R., *ex parte* Pinochet Ugarte (Amnesty International Intervening) (No. 3) [2000] AC 147.

[99] *Immunity of State Officials from Foreign Criminal Jurisdiction*, Memorandum, *supra* note 37, ¶ 160.

[100] Prefecture of Voiotia v. Federal Republic of Germany, No. 137/1997 (Ct. 1st Inst. Levadia, Oct. 30, 1997).

[101] JISP Covention, *supra* note 10, arts. 7(2), 8, 9.

> sovereign act. When a state act is no longer recognized as sovereign, the state is no longer entitled to invoke the defense of sovereign immunity. Thus, in recognizing a group of peremptory norms, states are implicitly consenting to waive their immunity when they violate one of these norms."[102]

This reasoning has been upheld by the Greek Supreme Court in *Prefecture of Voiotia*.[103] However, the Italian Court of Cassation rejected it in the *Ferrini* case. For the Italian Court, this construction did not allow for an accurate interpretation of the state's intention: "a renunciation [to immunity] cannot be construed on the basis of abstract conjecture, but must be based on concrete, ascertained facts which disclose a definite intention to 'renounce.'"[104] Far from being unequivocal, the Court found that, on the part of a state committing a serious breach of the law, such intention would be "improbable."[105] Moreover, in that case, the defending state had entered a plea of immunity: this manifestation of will patently undermines the validity of the legal fiction that immunity had been waived at the time of the breach.

¶42 The fiction that a state implicitly waives its entitlement to immunity when it violates *jus cogens* has been asserted repeatedly before U.S. courts. However, as explained further *infra*, this theory was uniformly rejected on the grounds that the implied waiver provision in the statute governing foreign sovereign immunity had to be narrowly construed and required "strong evidence" of the state's intention to waive its immunity, which could not be satisfied by the act of violation alone.[106] As highlighted by the Italian Supreme Court in *Ferrini*, establishing a state's willingness to waive its immunity in this context seems unworkable because it is difficult to conceive that a state which violates fundamental norms of international law would later indicate an intention to be sued for its crimes. A state's acknowledgment of its wrongdoing does not imply its willingness to stand trial either. In a U.S. civil action, for instance, Libya conceded for the purpose of its appeal that its alleged participation in the bombing of a passenger aircraft would be a violation of *jus cogens*, but disputed the conclusion that such violation demonstrated an implied waiver of its immunity.[107]

¶43 Beyond *jus cogens*, the implied waiver argument has also been sustained in relation to international treaties protecting human rights. Some commentators have argued that a state's ratification of a human rights treaty with an obligation to provide for effective

---

[102] Belsky et al., *supra* note 2, at 394. On this argument, *see also*, *e.g.*, Giegriech, *supra* note 134 at 230; Magdalani Karagiannakis, *State Immunity and Fundamental Human Rights*, 11 Leiden J. INT'L L. 9, 20, 21 (1998); JÉRÔME CANDRIAN, L'IMMUNITÉ DES ETATS FACE AUX DROITS DE L'HOMME ET À LA PROTECTION DES BIENS CULTURELS 721 (Schultess 2005); Caplan, *supra* note 59, at 755 (denying the existence of an implied waiver because "a foreign state's entitlement to immunity for human rights violations is not derived from international law, so a foreign state cannot lose its right to immunity by violating international law").

[103] Prefecture of Voiotia v. Federal Republic of Germany, No. 137/1997 521 (Ct. 1st Inst. Levadia, Oct. 30, 1997); *see also* Gavouneli & Bantekas, *supra* note 30, at 200.

[104] *See* Ferrini, Decision No. 5044/2004, at 668, ¶ 8.2; *see also* De Sena & De Vittor, *supra* note 80, at 101, 102.

[105] Ferrini, Decision No. 5044/2004, at 668, ¶ 8.2.

[106] *See*, *e.g.*, Sampson v. Federal Republic of Germany, 250 F.3d 1145, 1150 (7th Cir. 2001). A more detailed analysis of *jus cogens* and the implied waiver provision of the FSIA can be found under Section IV.C of this article.

[107] *See*, *e.g.*, Smith v. Socialist People's Libyan Arab Jamahiriya, 101 F.3d 239, 242 (2d Cir. 1996).

remedies would amount to an implied waiver of immunity before domestic courts, as the state has agreed to be bound by the legal standards set forth in the treaty.[108] This reasoning seems implausible, since the obligation to provide effective remedies is usually limited to the state's domestic court system only. It is therefore difficult to read in the state's accession to such treaty the intention to allow foreign states courts to hear suits brought by private litigants. After a U.S. appellate court endorsed this argument, the Supreme Court rejected it when it specified that a state would waive its immunity by signing an international agreement only if that agreement would mention a waiver of immunity to suits in the U.S. or the availability of a cause of action.[109]

¶44 The implied waiver theory was also disavowed with respect to a state's acceptance of an instrument implicating that state officials could be subject to criminal proceedings in another jurisdiction. By acceding to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), each state agrees that other state parties exercise jurisdiction over alleged official torturers found within their territories, by extraditing them or referring them to their own appropriate authorities for prosecution.[110] However, in the *Pinochet* case, the majority of the Law Lords denied that this was a case of implied waiver.[111] For example, Lord Millet found that because under Article 1 of the CAT, torture "can be committed *only* by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity," … "there was no immunity to be waived [because t]he offence is one which could only be committed in circumstances which would normally give rise to the immunity."[112] Conversely, other Law Lords took the view that since torture could not be considered an official act, immunity *ratione materiae* was not available in the first place. Consequently, an immunity waiver was not applicable.[113] In his opinion, Lord Goff of Chieveley highlighted one of the main concerns at issue with the theory of implied waiver: "there could well be international chaos as the courts of different state parties to a treaty reach different conclusions on the question whether a waiver of immunity was to be implied."[114]

---

[108] *See* Bianchi, *supra* note 91, at 213, 214; Jordan J. Paust, *Draft Brief Concerning Claims to Foreign Sovereign Immunity and Human Rights: Non-immunity for Violations of International Law Under the FSIA*, 8 HOUS. J. INT'L L. 40, 65, 66 (1985).

[109] *See* Von Dardel v. Union of Soviet Socialist Republics, 736 F. Supp. 1, 176 (D.D.C. 1990), *quoting* Argentine Republic v. Amerada Hess Shipping Corp., 488 U.S. 428, 441-42.

[110] *See* CAT, *supra* note 22, arts. 5, 7.

[111] Of the seven Law Lords, Lord Saville of Newdigate was the only one holding that the ratification of the CAT amounted to a waiver of immunity. In his view, this waiver was express. *See* Pinochet (No. 3) R., *ex parte* Pinochet Ugarte (Amnesty International Intervening) (No. 3) [2000] AC 147.

[112] *Id.* (Lord Millet). For a similar argument, *see also* the opinion of Lord Phillips of Worth Matravers. *Id*. at 924.

[113] *See* the opinion of Lord Hutton in Pinochet (No. 3) R., *ex parte* Pinochet Ugarte (Amnesty International Intervening) (No. 3) [2000] AC 147; for a similar argument, *see also* the opinion of Lord Browne-Wilkinson. *Id*. at 846, 847.

[114] Pinochet (No. 3) R., *ex parte* Pinochet Ugarte (Amnesty International Intervening) (No. 3) [2000] AC 147 (Lord Goff of Chieveley).

5. The "Universal Jurisdiction" Argument

"Once extra-territorial jurisdiction is established, it makes no sense to exclude from it acts done in an official capacity."[115]

¶45 State immunity has also come to be challenged on the grounds that it is incompatible with the principle of universal jurisdiction associated with *jus cogens* violations.[116] As peremptory norms are a matter of concern to all states, every state has an interest in repressing their violations. Therefore, international law has come to recognize that states could lawfully exercise jurisdiction over these violations even without territorial or nationality linkage.[117] Historically, states relied on this notion to assert jurisdiction over crimes like piracy which occur on the high sea.[118] For the safeguard of the interests of the international community, it is argued that states should be able to exercise the prerogative of universal jurisdiction over breaches of *jus cogens* committed by another state or its officials.

¶46 The conflict between the establishment of universal jurisdiction and the assertion of immunity was underlined by several of the Law Lords in the *Pinochet* case. As the CAT requires state parties to ensure either that they are in a position to prosecute cases of torture wherever they may have occurred, or to extradite alleged offenders to other states having jurisdiction over them, some of the Law Lords reasoned that the immunity *ratione materiae* of a former head of state was abrogated by that regime.[119] For example, Lord Browne-Wilkinson stated that if immunity *ratione materiae* would be recognized for state officials, "…the whole elaborate structure of universal jurisdiction over torture committed by officials [would be] rendered abortive and one of the main objectives of the Torture Convention—to provide a system under which there is no safe haven for torturers—[would be] frustrated."[120] Similarly, for Lord Phillips of Worth Matravers, "[i]nternational crimes and extra-territorial jurisdiction in relation to them are both new arrivals in the field of public international law. I do not believe that state immunity *ratione materiae* can co-exist with them."[121]

¶47 The argument that immunity is incompatible with the states' entitlement to extend their jurisdiction over the crimes threatening the international community's interests is compelling. The "underlying idea" of universal jurisdiction can be defined as "a common endeavor in the face of atrocities."[122] To fulfill this commitment, every state is equally entitled to exercise jurisdiction over the violation, because of its universal condemnation.

---

[115] *Id*. at 924 (Lord Phillips of Worth Matravers).
[116] On this argument, see, *e.g*., Dapo Akande, *International Law Immunities and the International Criminal Court*, 98 AM. J. INT'L L. 407, 415 (2004); Orakhelashvili, *supra* note 60, at 960-64; International Law Association, *supra* note 52, at 416.
[117] *See*, *e.g*., Donovan & Roberts, *supra* note 60, at 143.
[118] This customary principle was later codified in international conventions. *See*, *e.g*., art. 19 of the Geneva Convention on the High Seas, Apr. 29, 1958, 13 UST 2312, 450 UNTS 82; art. 105 of the United Nations Convention on the Law of the Sea of 10 December 1982, 21 ILM 1261.
[119] *See* Pinochet (No. 3) R., *ex parte* Pinochet Ugarte (Amnesty International Intervening) (No. 3) [2000] AC 147 (opinions of Lord Browne-Wilkinson, Lord Phillips of Worth Matravers, Lord Hope of Craighead, and Lord Saville of Newdigate).
[120] *Id.* at 847-48 (Lord Browne-Wilkinson).
[121] *Id*. at 924 (Lord Phillips of Worth Matravers).
[122] *Arrest Warrant case*, *supra* note 13, ¶ 51 (Joint Sep. Op. of Judge Higgins et al.).

In these circumstances, the principle that one state will not intervene in the internal affairs of another becomes defeated by the prevailing interest of the community. Consequently, immunity loses its purpose. This view, however, was not adopted by the ICJ. In the *Arrest Warrant* case, the Court indicated that the rules governing jurisdiction and the ones governing immunity should be "carefully distinguished", and specified that:

> "[A]lthough various international conventions on the prevention and punishment of certain serious crimes impose on States' obligations of prosecution or extradition, thereby requiring them to extend their criminal jurisdiction, such extension of jurisdiction in no way affects immunities under customary international law, including those of Ministers for Foreign Affairs. These remain opposable before the courts of a foreign state, even where those courts exercise such a jurisdiction under these conventions."[123]

Admittedly, the Court only referred to universal jurisdiction authorized under treaty law. As these conventions do not expressly provide for the abrogation of immunity, the Court seemed to imply that drawing such a conclusion would overstretch the rules on treaty interpretation.[124] However, customary international law does not allow for such a conclusion either, at least in its present state. In the *Arrest Warrant* case, three Judges examined the practice of states with regard to the exercise of universal jurisdiction in their joint separate opinion. They concluded that such a practice was "neutral."[125] While nothing in the case law evidences an *opinio juris* on the illegality of such a jurisdiction, its exercise remains marginal. Because states have not generally asserted universal jurisdiction over international crimes, it would be premature to declare that state immunity has been rendered obsolete. This does not mean that the situation will not evolve. In their separate opinion, the Judges acknowledged the existence of "striking" contemporary trends toward the extension of jurisdiction based on the heinous nature of the alleged violation.[126] Notably, they observed that universal criminal jurisdiction for certain international crimes was "*clearly* not regarded as unlawful."[127] As for civil matters, they noted that the Alien Tort Statute, which allows U.S. courts to adjudicate violations of international law perpetrated by non-nationals overseas, marked "the beginnings of a very broad form of extraterritorial jurisdiction," even if so far this form of jurisdiction "has not attracted the approbation of States generally."[128]

---

[123] *Id.* ¶ 59.
[124] *See* Section 3 of the Vienna Convention on the Law of Treaties, *supra* note 5.
[125] *Arrest Warrant Case*, *supra* note 13, at 76, ¶ 45 (Joint Sep. Op. of Judge Higgins et al.); for a similar conclusion, *see also* the Separate Opinion of President Guillaume in the same case, *supra* note 12, at 40-42, ¶ 12.
[126] *Arrest Warrant Case*, *supra* note 13, at 76, ¶ 47 (Joint Sep. Op. of Judge Higgins et al.).
[127] *Id.* ¶ 46 (emphasis added).
[128] *Id*. at 77, ¶ 48. On the Alien Tort Statute, *see infra*, Section IV.B.

6. The "Pinochet" Argument

> *"The most significant use of jus cogens as a conflict norm has been by the British House of Lords in the Pinochet case."*[129]

¶48 This observation was made by the ILC in its report on the fragmentation of international law, which further underlines that "for the first time [in the *Pinochet* case] a local domestic court denied immunity to a former head of state on the grounds that there cannot be any immunity against prosecution for breach of *jus cogens*."[130] As mentioned above, *jus cogens* undoubtedly figures among the elements considered by the Law Lords, but several aspects cast doubt on whether its use as a conflict norm was the true *ratio decidendi* in the case.[131] The majority of the Law Lords held that immunity *ratione materiae* did not cover the acts of torture imputable to Augusto Pinochet committed after December 8, 1988, the date the United Kingdom ratified the CAT. For most of the Law Lords, the ratification of the CAT by all the relevant state parties in the case and the expansive regime of jurisdiction established by this instrument seem to have been conclusive, rather than *jus cogens* proper.[132] For instance, Lord Browne-Wilkinson expressly voiced his doubts as to "whether, before the coming into force of the Torture Convention, the existence of the international crime of torture as jus cogens was enough to justify the conclusion that the organization of state torture could not rank for immunity purposes as performance of an official function."[133] Noting the need for "an international *system* which could punish those who were guilty of torture and which did not permit the evasion of punishment by the torturer," he concluded that "[t]he Torture Convention did provide what was missing: a worldwide universal jurisdiction."[134]

¶49 Also, some of the Law Lords who acknowledged the peremptory nature of the prohibition of torture asserted at the same time that *serving* heads of state or state officials could still claim immunity if they were accused of such a crime.[135] Such contention is problematic: if the superior status of *jus cogens* as a conflict norm could override the immunity of state officials who had vacated office, why would it not override the immunity of an incumbent official?[136] Similarly, several Law Lords who

---

[129] Report of the Study Group of the ILC Int'l Law Comm'n on the Fragmentation of International Law, 58th sess, May 1-June 9, July 3-Aug.11, 2006, ¶ 370, 13 April 2006, U.N. Doc. A/CN.4/L.682, (Apr. 13, 2006).
[130] *Id.* ¶ 371.
[131] For an analysis and discussion of the case, *see, e.g*., Christine M. Chinkin, *United Kingdom House of Lords, (Spanish request for extradition). Regina v Bow Street Metropolitan Stipendiary Magistrate and Others, ex parte Pinochet Ugarte (No. 3). [1999] 2 WLR 827*, 93 AM. J. INT' L. 703 (1999); Andrea Bianchi, *Immunity versus Human Rights: The Pinochet Case,* 10 EUR. J. INT'L L. 237 (1999); Jean-Yves de Cara, *L'affaire Pinochet devant la Chambre des Lords*, (1999) 45 AFDI 72; Kerry C. O'Neill, *A New Customary Law of Head of State Immunity?: Hirohito and Pinochet*, 38 STAN J. INT'L L. 289 (2002).
[132] The state parties in the case were: Chile (state of nationality), Spain (state requesting Augusto Pinochet's extradition) and the United Kingdom (forum state).
[133] Pinochet (No. 3) R., *ex parte* Pinochet Ugarte (Amnesty International Intervening) (No. 3) [2000] AC 147(Lord Brown-Wilkinson); *see also, id*. at 881 (Lord Hope) ("But even in the field of such high crimes as have achieved the status of jus cogens under customary international law there is as yet no general agreement that they are outside the immunity to which former heads of state are entitled from the jurisdiction of foreign national courts."); *id*. at 911-913 (Lord Millet); *id*. at 899 (Lord Hutton).
[134] *Id*. at 841, 847 (Lord Brown-Wilkinson) (emphasis added).
[135] *See, id*. at 912 (Lord Millet); *id.* at 915, 916 (Lord Phillips of Worth Matravers).
[136] This position is difficult to sustain even when one holds that immunity was defeated as an effect of the

pointed out to the acts of torture as violating *jus cogens* made comments supporting state immunity in *civil* proceedings.[137] If the special nature of the prohibition of torture was able to defeat immunity, it is difficult to understand why this effect would be restricted to criminal proceedings only.

¶50 These observations are not directed against the holding in the case, nor do they intend to undermine the significance of the House of Lords' decision in the process of bringing those responsible for serious abuses to a court of law. Surely, the peremptory character of the prohibition of torture influenced the result reached by the Law Lords. But it does not seem to have done so as a conflict norm with the specific effect of defeating state immunity. Rather, the importance attached to the fact that the prohibition of torture is universally recognized as being fundamental for the international community appears to have been one reason, among others, compelling the deviation from regular practice toward carving a new exception in the rules governing immunity.

7. *Jus Cogens* and the Dynamics of International Law

> *"The recognition of immunity from jurisdiction for States responsible for such misdeeds …does not assist, but rather impedes, the protection of those norms and principles which are considered by the community of nations to be so essential as to justify mandatory measures in response to serious violations."*[138]

¶51 In a number of cases, *jus cogens* seems to provide courts with a basis for arguing against immunity for serious abuses committed by foreign states or their officials. The decision of the Italian Court of Cassation in *Ferrini* illustrates that approach. In that case, the Court appears to have relied on *jus cogens* not as a conflict rule, but rather as a means of highlighting the seriousness of the acts committed by the foreign state, so as to justify the denial of immunity.[139] After underlining the gravity of international crimes which "threaten the whole humanity and undermine the foundations of peaceful international relations," the Court went on to observe that "the recognition of immunity from jurisdiction for States responsible for such misdeeds…does not assist, but rather impedes, the protection of those norms which are considered by the community of nations to be so essential…"[140] For the Court, the characterization of *jus cogens* appears to be one element which supports "the priority status, which…now attaches to the protection of fundamental human rights over and above the protection of States interests through the recognition of immunity from foreign jurisdiction."[141] This echoes the *Pinochet* case,

---

CAT's regime. As the CAT criminalizes torture without distinguishing between current or former state officials, one does not see why the abrogation of immunity induced by its regime should make this distinction.

[137] Pinochet (No. 3) R., *ex parte* Pinochet Ugarte (Amnesty International Intervening) (No. 3) [2000] AC 147, at 891, 892 (Lord Hutton), at 916 (Lord Phillips of Worth Matravers), at 914 (Lord Millet).

[138] Ferrini, Decision No. 5044/2004, at 669, ¶ 9.1.

[139] *See also,* De Sena & De Vittor, *supra* note 80, at 102 (asserting that in *Ferrini*, the notion of *jus cogens* was "not used in strictly *normative* or *formal* terms").

[140] Ferrini, Decision No. 5044/2004, at 668-69, ¶ 9-9.1.

[141] *Id*. at 673, ¶10.2.

where the serious nature of the crime of torture and its universal condemnation seem to have been one strong factor, albeit among others, which led to the denial of immunity.

¶52 In these cases, courts appeal to the peremptory character of the norm infringed as a reason to justify the departure from the existing rules on foreign sovereign immunity. The significance of *jus cogens* for the international community is used to demonstrate the need for a change in the law. The denial of immunity is substantiated by the preeminence of the violated rule and its underlying values: the status of underogable norm is recited to legitimize the submission of the state or its official to the jurisdiction of another state. In this context, *jus cogens* contributes to a "custom-generation process."[142] The denial of immunity is not an effect elicited by the peremptory norm. Rather, *jus cogens* affords a ground on which to base that denial, which, if followed by future state practice, might transform into a new rule of customary international law.

¶53 The reliance on *jus cogens* to direct a change of practice with regard to sovereign immunity seems an admissible use of these norms. An evolution in the rules on sovereign immunity, this time to accommodate considerations derived from *jus cogens*, would be no unprecedented event. When states began to engage more frequently in business transactions, domestic courts carved the commercial activity exception so as to protect the rights of private parties. In response to the changing features of international relations, national courts reinterpreted the meaning of the longstanding maxim "*par in parem no habet imperium*" in light of the deeper engagement of states in private transactions. The sovereignty of states was not denied, but the effects flowing from this legal status were reappraised to give way to basic considerations of fairness.

¶54 This process indicates that the normative implications of sovereignty are not immutable. The sovereignty of states is no "brute fact," as some might conceive it.[143] Rather, sovereignty is more accurately defined as "a complex of various forms of power and independence…that a state needs *in order to be a good state*."[144] *Jus cogens* norms, as essential normative tenets recognized by the international community of states as a whole, are indicative of what count as "a good state." A good state serves the people of its territory without committing torture, for example. Peremptory norms (along with other considerations) contribute to the delineation of the forms of powers and independence that compose state sovereignty. Is the practice of immunizing a state and its officials from the jurisdiction of foreign courts a form of independence that is necessary for the state to be a good state? In case of proceedings arising from the violation of norms that are universally recognized as essential, the answer is far from a foregone conclusion. As early as 1951, a commentator expressed doubts on this point:

> "At a period in which in enlightened communities the securing of the rights of the individual, in all their aspects, against the state has become a matter of special and significant effort, there is no longer a disposition to tolerate the injustice which may arise whenever the state – our own state

---

[142] Carlo Focarelli, *Promotional* Jus Cogens*: A Critical Appraisal of* Jus Cogens' *Legal Effects,* 77 NORDIC J. OF INT'L L. 429, 457 (2008). I adopt Focarelli's term on a descriptive basis only, without endorsing the author's views on its consequences for *jus cogens* and the birth of international law.

[143] John Tasioulas, *In Defence of Relative Normativity: Communitarian values and the Nicaragua Case*, 16 OXFORD J. OF LEGAL STUD. 85, 120 (1996) (opposing different conceptions of sovereignty).

[144] Timothy Endicott, *The Logic of Freedom and Power*, *in* THE PHIL. OF INT'L L., 245, 252 (Samantha Besson & John Tasioulas eds., 2010).

> or a foreign state—screens itself behind the shield of immunity in order to defeat a legitimate claim."[145]

It is therefore not surprising for *jus cogens* to be invoked in the process of reshaping the scope of foreign sovereign immunity. Whether state practice will generally engage in this process is yet to be seen.

8. Overall Appraisal

¶55 Although *jus cogens* has often been invoked to defeat the shield of immunity, the foregoing analysis reveals that this notion does not itself demand that foreign states be denied immunity when brought before the courts of another state. The *jus cogens* norms usually invoked by victims, like the prohibition of torture, are substantive norms: they prohibit a definite type of conduct. Yet their superior rank in the emerging hierarchy of international rules does not secure an automatic access to justice to enforce their prohibitions or automatically void any procedural obstacles to their adjudication. This conclusion may seem puzzling. As one commentator asked, "Why should a norm be specific in nature because of embodying community interest and yet be unable to produce specific consequences to safeguard the integrity of that community interest?"[146] But *jus cogens*, as highlighted by the Vienna Convention, does produce a specific consequence by nonderogably "depriving any act or situation which is in conflict with it of legality."[147] To date, however, international law does not recognize a peremptory rule safeguarding the right of victims of *jus cogens* violations to a judicial remedy in the courts of another state. A direct conflict with the procedural bar of state immunity, therefore, has not occurred.

¶56 So far, the international rules on foreign sovereign immunity do not entail an exception for the violation of peremptory norms. But legal evolution in this area has not been foreclosed. *Jus cogens* may play a role in this evolution by buttressing the view that such an exception is necessary because it is in line with the values incorporated by the international community in a higher legal category. Using *jus cogens* to support the contention that immunity is not warranted for international crimes like torture is a permissible use of that notion. It seems more appropriate than the implied waiver construction, which relies on a legal fiction that is more clever than principled, and which comes close to a "straining of the truth."[148] It must also be distinguished from the use of *jus cogens* as a conflict norm, which, as explained above, is currently not triggered in the context of immunity. Finally, it is also different from the claim that violations of peremptory norms are not sovereign acts: as discussed above, that argument is untenable because such violations are, by definition, committed in the exercise of sovereign authority. This conclusion should not be read as depriving victims from a tool in their struggle to obtain reparation for their injuries. By admitting that the denial of immunity is not a direct consequence of *jus cogens*, but that peremptory norms provide a compelling

---

[145] Lauterpacht, *supra* note 2, at 235.
[146] Orakhelashvili, *supra* note 61, at 257.
[147] *Draft Articles on the Law of Treaties with Commentaries*, 2 Y.B. INT'L L. COMM'N, 1966 261, U.N. Doc. A/CN.4/SER.A/1966/Add.1.
[148] De Sena & De Vittor, *supra* note 80, at 102.

reason for states to depart from existing practice, one can frame a claim that is compatible with that normative category and therefore most likely to be adopted by courts.

IV. FOREIGN SOVEREIGN IMMUNITY AND *JUS COGENS* VIOLATIONS BEFORE U.S. COURTS: WHICH PROSPECTS AFTER *SAMANTAR*?

¶57 This Section examines how U.S. courts have dealt with cases involving foreign sovereign immunity and *jus cogens* violations. It first introduces the legal framework of immunity law in the U.S. and highlights the issues raised by the litigation of cases involving human rights violations such as *Samantar*. It then reviews relevant case law where litigants have invoked *jus cogens* to defeat foreign sovereign immunity and discusses how such cases can be expected to fare after *Samantar*.

A. Foreign Sovereign Immunity under U.S. Law

¶58 Since 1976, the U.S. approach to state immunity has been governed by the Foreign Sovereign Immunities Act (FSIA), a statutory framework which provides "the sole basis for obtaining jurisdiction over a foreign state in the courts of this country."[149] This statute codifies into law the 'restrictive approach' to state immunity, which holds that no immunity will be recognized for the commercial or 'private law' activities of foreign states.

¶59 The FSIA postulates the immunity of the foreign state from jurisdiction as a general principle, except as otherwise provided in the statute or in an international agreement to which the United States is a party at the time of its enactment.[150] Section 1605 of the FSIA enumerates six exceptions to immunity: (1) cases where immunity has been waived by the state; (2) commercial activities; (3) non-commercial torts occurring in the U.S.; (4) maritime property *in rem*; (5) real property and estates; and (6) foreign expropriations (in certain circumstances).[151] In 1996, Congress added another exception for certain terrorist acts. This exception applies only to the suits brought by U.S. nationals against a state 'designated as a state sponsor of terrorism', or against officials of such state.[152] Regarding attachment and execution, the FSIA generally preserves the immunity of the foreign state's property, with a number of limited exceptions for state property in commercial use.[153]

¶60 On the international level, the U.S. participated actively in the development of the JISP Convention. Although it has not yet signed or ratified this instrument, the U.S. has described it as "a very substantial achievement in an increasingly important and rapidly developing area of international law and practice."[154] For the U.S., "[t]he text of the draft Convention reflect[s] an emerging global consensus that States and State enterprises [can] no longer claim absolute, unfettered immunity from the proper jurisdiction of

---

[149] Argentine Republic v. Amerada Hess Shipping Corp., 488 U.S. 428, 443 (1989).
[150] *See* 28 U.S.C. § 1604 (2011).
[151] Respectively, 28 U.S.C. §§ 1605(a)(1) (2011); 28 U.S.C. § 1605(a)(2) (2011); 28 U.S.C. § 1605(a)(5) (2011); 28 U.S.C. § 1605(b) (2011); 28 U.S.C. § 1605(a)(4) (2011); 28 U.S.C. § 1605(a)(3) (2011).
[152] *See* 28 U.S.C. § 1605A (2011).
[153] *See* 28 U.S.C. §§ 1609 (2011); 28 U.S.C. § 1610 (2011); 28 U.S.C. § 1611 (2011).
[154] *Statement of the Representative of the United States before the 6th Committee of the UNGA*, 24 October 2004, U.N. GAOR, 59th Sess., 13th mtg. at ¶ 58, U.N. Doc. A/C.6/59/SR.13 (Oct. 25, 2004).

foreign courts and agencies, especially for their commercial activities."[155] Despite concerns about the "insufficiently clear and precise wording of the text" in some places, or the "gaps, omissions, ambiguities and inconsistencies" entailed in certain articles, the U.S. nevertheless took the position that the JISP Convention "would provide a solid foundation on which all Member States could base their domestic law" and create "a greater measure of harmonization and compatibility between domestic law and practice."[156]

B. International Human Rights Litigation in U.S. Courts and the Hurdle of Foreign Sovereign Immunity

1. International Human Rights Litigation in U.S. Courts

¶61 Since the 1980s, numerous lawsuits involving human rights violations committed throughout the world have been filed in U.S. courts. These suits are usually based on the Alien Tort Statute (ATS) which enables non-U.S. citizens to sue in U.S. courts for torts "committed in violation of the law of nations or a treaty of the United States."[157] In 1991, after the U.S. had signed the CAT, Congress enacted another statutory basis for human rights litigation in U.S. courts: the Torture Victim Protection Act (TVPA).[158] This Act, which does not supplant the ATS, codifies a cause of action available to both citizens and non-citizens for torture and extrajudicial killing committed by foreign officials. However, in some respects, "the TVPA is more limited than the [ATS]": the TVPA allows suits against individual defendants only, and applies exclusively to torture and extrajudicial killings, whereas the ATS is not restricted to these torts and allows suits against individuals as well as states, corporations, and other legal entities.[159]

¶62 While many observers approved of human rights litigation as an additional avenue to give effect to human rights norms, others voiced concerns that this development might not be wholly positive or justified. For example, some feared that ATS litigation might be detrimental to U.S. foreign relations, as it "shifts responsibility for official condemnation and sanction of foreign governments away from elected political officials to private plaintiffs and their representatives" who "have neither the expertise nor the constitutional authority to determine US foreign policy."[160] This concern was shared by the Government, which warned of the "serious consequences for both the development and expression of the Nation's foreign policy" implicated by the recognition of a private right of action for international human rights violations under the ATS.[161] A number of commentators further

---

[155] *Id*.
[156] *Id*. ¶ 61.
[157] 28 U.S.C. § 1350 (2011).
[158] Pub. L. No. 102-256, 106 Stat. 73 (1992) (codified at 28 U.S.C. § 1350 (note) (2011)).
[159] Tom Lininger, *Overcoming Immunity Defenses to Human Rights Suits in U.S. Courts*, 7 HARV. HUM. RTS. J. 177, 182 (1994).
[160] Curtis A. Bradley, *The Costs of International Human Rights Litigation*, 2 CHI. J. INT'L L. 457, 460 (2001).
[161] *See* Brief for the United States as Respondent in Supporting of the Petitioner at 7, *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004) (No 03-339) (*quoting* Andrew Farrelly, *Foreign Policy in the Courts – The ATCA and In Re South African Apartheid Litigation: What Sosa Makes Courts Do*, 30 SETON HALL LEGIS. J. 437, 463 (2006)).

argued that international human rights litigation in U.S. courts was "illegitimate."[162] In their view, the ongoing ATS litigation rests on the false proposition that in the U.S., customary international law is automatically incorporated into federal law.[163] This "revisionist" argument was defeated when the Supreme Court, in its 2004 case *Sosa v. Alvarez-Machain*, confirmed that the ATS provided federal court jurisdiction over claims based on clearly defined customary international law norms.[164]

2. Foreign Sovereign Immunity as a Bar to Human Rights Litigation

¶63 The doctrine of foreign sovereign immunity creates a "potentially dispositive objection" to the litigation of human rights violations involving foreign states or foreign officials.[165] In the U.S., any human rights case against a foreign state must satisfy one of the FSIA's exceptions to immunity, since this statute provides the sole basis for obtaining jurisdiction over a foreign state. However, as highlighted above, the FSIA entails no specific exception for human rights cases. If a number of suits involving murders committed in the U.S. by agents of foreign governments were found admissible under the tort exception, that exception is not applicable to tortious activity occurring abroad.[166] Some plaintiffs attempted to use the commercial activity exception, but found little success.[167] To date, violations of human rights by foreign states are most likely to be adjudicated under the 'terrorism exception', which encompasses torture, extrajudicial killing, aircraft sabotage, hostage-taking, or the provision of material support or resources for such an act.[168] However, this exception will only apply to a limited number of cases, since the victim or claimant needs to be a U.S. national and the foreign state must be designated as a state sponsor of terrorism.[169]

¶64 In contrast to cases brought against foreign states, human rights cases against individual foreign officials do not have to fit within one of the FSIA's exceptions, because the statute is not applicable to their immunity claims. The Supreme Court held in the recent case of *Samantar* that foreign officials may be entitled to immunity from suits, but under the common law and not by way of the FSIA statute.[170] However, the Court did not specify the scope of the common law immunity of a former official accused of serious human rights violations, leaving the question to be addressed on remand by the district court. Before *Samantar*, a majority of Circuits had held that individual officials

---

[162] *See, e.g.*, Curtis A. Bradley & Jack L. Goldsmith, *The Current Illegitimacy Of International Human Rights Litigation*, 66 FORDHAM L. REV. 319 (1997-1998).
[163] *See id*. at 320-25.
[164] Sosa v. Alvarez-Machain, 542 U.S. 692 (2004).
[165] Curtis Bradley & Jack Goldsmith, *Foreign Sovereign Immunity, Individual Officials And Human Rights Litigation*, 13 GREEN BAG 9, 9 (2009).
[166] See, *e.g.*, Letelier v. Republic of Chile, 488 F. Supp. 665 (D.D.C 1980); Liu v. Republic of China, 892 F.2d 1419 (9th Cir. 1989).
[167] See, *e.g.*, Saudi Arabia v. Nelson, 507 U.S. 349 (1993) (where the Supreme Court rejected application of the commercial exception to a case involving allegations of torture committed abroad in retaliation for business related complaints by a plaintiff recruited in the U.S.).
[168] *See* 28 U.S.C. § 1605A.
[169] In 2010, four states were designated as such Cuba, Iran, Sudan and Syria; *see* http://www.state.gov/s/ct/c14151.htm
[170] "Even if a suit is not governed by the Act, it may still be barred by foreign sovereign immunity under the common law." Samantar, 560 U.S. at 2292 (2010).

were covered by the FSIA when acting in an official capacity.[171] Eventually, however, the same courts came to deny immunity in cases involving human rights violations on the grounds that such abuses were by nature excluded from the scope of official authority.[172] For example, in 1992 in *Trajano v. Marcos*, the following test of attribution was applied to the defendant accused of having authorized the kidnapping, torture and murder of the petitioner's son in the Philippines:

> The FSIA covers a foreign official acting in an official capacity, but that official is not entitled to immunity for acts which are not committed in an official capacity (such as selling personal property), and for acts beyond the scope of her authority (for example, doing something the sovereign has not empowered the official to do).[173]

In cases implicating heads of states, courts have traditionally deferred to the Executive Branch's judgment as to whether immunity should be granted. Under this common law regime, human rights cases against incumbent heads of state have all been dismissed consistent with executive suggestions, in order to "promote international comity and respect among sovereign nations by ensuring that leaders are free to perform their governmental duties…"[174]

C. Jus Cogens Versus Foreign Sovereign Immunity in U.S. Courts

¶65 *Jus cogens* has often been invoked in U.S. courts to contest assertions of foreign sovereign immunity. In suits against foreign states, the "normative hierarchy" argument (see *supra* Section III.C.1) was raised in *Siderman de Blake v. Republic of Argentina*, where the Court of Appeals for the Ninth Circuit recognized that "any state that engages in official torture violates *jus cogens*."[175] Although the court admitted that "[a]s a matter of international law, the [plaintiffs'] argument carries much force," it also emphasized that it could "not write on a clean slate" since it had to "deal not only with customary international law, but with an affirmative Act of Congress, the FSIA."[176] Because the Supreme Court had held in *Argentine Republic v Amerada Hess Shipping Corp.* that the FSIA did not entail an implied exception for claims alleging violations of international law, the court rejected the "normative hierarchy" argument.[177] The court's reasoning puts in stark relief issues related to the interaction between international and domestic law. If

---

[171] Chuidian v. Philippine Nat. Bank, 912 F.2d 1095, 1103 (9th Cir. 1990); *In re* Terrorist Attacks on September 11, 2001, 538 F.3d 71, 83 (2d Cir. 2008); Keller v. Central Bank of Nigeria, 277 F.3d 811, 815 (6th Cir. 2002); Byrd v. Corporacion Forestal y Industrial de Olancho S. A., 182 F.3d 380, 388 (5th Cir. 1999); El-Fadl v Central Bank of Jordan, 75 F.3d 668, 671 (D.C. Cir. 1996).

[172] See, *e.g.*, Hilao v. Marcos (*In re* Estate of Marcos), 25 F.3d 1467, 1472 (9th Cir. 1994); Xuncax v. Gramajo, 886 F. Supp. 162, 176 (D. Mass. 1995); Cabiri v. Assasie-Gyimah, 921 F. Supp. 1189, 1197, 1198 (S.D.N.Y. 1996).

[173] *In re* Estate of Marcos Human Rights Litig. (Trajano v. Marcos), 978 F.2d 493, 497 (9th Cir. 1992). In that case, the defendant was denied immunity: as she was in default, she was said to have admitted that she acted on her own authority and not on the authority of the Republic of the Philippines.

[174] See, *e.g.* Lafontant v. Aristide, 844 F. Supp. 128 (E.D.N.Y. 1994); Tachiona v. United States, 386 F.3d 205 (2d Cir. 2004).

[175] See, *e.g.*, Siderman de Blake v. Republic of Argentina, 965 F.2d 699, 717-19 (9th Cir. 1992) (torture).

[176] *Id*.

[177] *Id*. at 718; Argentine Republic v. Amerada Hess Shipping Corp., 488 U.S. 428, 435-36 (1989).

the requirements of the doctrine of state immunity are determined under international law, the decisions by national courts called upon to adjudicate claims against a foreign state or a foreign official are made within their individual national legal order. If the national legal system does not allow for the seamless integration of international rules, claims derived from the superior status of peremptory norms of international law may not carry their full force. In *Siderman*, the court gave precedence to its domestic law on foreign sovereign immunity, but the result might have been different if the court had been able to disregard the statute in favor of its interpretation of customary international law.

¶66 In order to circumvent the *Amerada Hess* ruling, litigants resorted to the "implied waiver argument" (see *supra* Section III.C.4) and asserted that the violation by a foreign state of a peremptory norm of international law amounted to an implied waiver under the FSIA. Although the argument was at times characterized as "appealing," courts have refused to expand the meaning of the FSIA's implied waiver so as to include violations of peremptory norms.[178] For example, in *Princz v. Germany*, where a Holocaust survivor brought suit against the Federal Republic of Germany to recover damages for injuries and slave labor in concentration camps, the Court of Appeals for the D.C. Circuit found the *jus cogens* theory of implied waiver incompatible with the intentionality requirement which must be read into the implied waiver provision of the FSIA.[179] Whereas one judge found in his dissent that "Germany implicitly waived its immunity by engaging in the barbaric conduct alleged in this case," the majority disagreed and found that an implied waiver under the FSIA required "that either the present government of Germany or the predecessor government of the Third Reich actually indicate…even implicitly, a willingness to waive immunity for actions arising out of the Nazi atrocities."[180] The implied waiver argument was also rejected by the Court of Appeals for the Second Circuit on the grounds that Congress had not contemplated *jus cogens* violations when it enacted the FSIA's implied waiver exception.[181] In a later case with a fact pattern similar to *Princz*, an *amicus* brief filed in support of the plaintiff argued that *jus cogens* violations should nevertheless be construed as an implied waiver under the FSIA because the statute had to be interpreted in conformity with international law.[182] However, the *Charming Betsy* principle that U.S. statutes should be interpreted if possible to avoid violation of international law did not allow for the "implied waiver" argument to succeed. In *Sampson v. Federal Republic of Germany*, the Court of Appeals for the Seventh Circuit considered that the *Charming Betsy* canon was not relevant to the case. For the court "since *jus cogens* norms do not require Congress (or any government) to create jurisdiction," a narrow interpretation of the implied waiver provision was not at risk to conflict with international law.[183] The court denied that the *Charming Betsy* canon required that the statute be interpreted in conformity with the content of international law, explaining in particular that such an expansive reading could interfere with the foreign policy decisions of the other branches of the government and create tensions since the

---

[178] Smith v. Socialist People's Libyan Arab Jamahiriya, 101 F.3d 239, 242 (2d Cir. 1996).
[179] 28 U.S.C. § 1605(a)(1) provides an exception to foreign state immunity where "the foreign state has waived its immunity…by implication." Princz v. Federal Republic of Germany, 26 F.3d 1166 (D.D.C. 1994). The same reasoning was made in *Doe v. State of Israel*. 400 F. Supp. 2d 86, 105 (D.D.C. 2005).
[180] Princz, 26 F.3d at 1179, 1173.
[181] Smith v. Socialist People's Libyan Arab Jamahiriya, 101 F.3d 239, 245 (2d Cir. 1996).
[182] Sampson v. Federal Republic of Germany, 250 F.3d 1145, 1151-52 (7th Cir. 2001).
[183] *Id*. at 1152.

case involved jurisdiction over a foreign sovereign.[184] Like *Siderman*, this case highlights the bearing which the issue of the reception of international law might have on courts' approach to cases involving *jus cogens* violations.

¶67 In the context of suits against foreign officials, some courts have endorsed the "qualification argument" (see *supra* Section III.C.3). They held that violations of peremptory norms of international law were beyond the scope of official authority since no state is ever allowed to derogate from *jus cogens*. In these cases, individual officials were denied immunity under the FSIA, which was deemed to extend to individuals only when they acted in an official capacity.[185] The flaws of the "qualification argument" however, were highlighted by the Supreme Court in a case involving the immunity of a foreign state. While the plaintiff contended that acts of torture committed in retaliation for business related complaints should fall under the commercial activity exception of the FSIA, the Court objected as follows:

> "[T]he intentional conduct alleged here (the Saudi Government's wrongful arrest, imprisonment and torture of the plaintiff) could not qualify as commercial under the restrictive theory [of foreign sovereign immunity]. The conduct boils down to abuse of the power of its police by the Saudi Government, and however monstrous such abuse undoubtedly may be, a foreign state's exercise of the power of its police has long been understood for purposes of the restrictive theory as peculiarly sovereign in nature."[186]

D. Prospects After Samantar

¶68 In *Samantar*, the Supreme Court held that the FSIA is not applicable to foreign officials: foreign officials' immunity claims have to be decided under the common law.[187] As for now, it is unclear whether the common law immunity of foreign officials will develop so as to sanction an exception in cases involving *jus cogens* violations. *Samantar* seemed to indicate that under the common law, individual determinations of immunity by the Executive Branch will be binding on courts.[188] According to the brief submitted by the Government as *amicus curiae* in *Samantar*, these determinations will be based on principles "informed by customary international law and practice," which include the recognition that "both current and former officials of a foreign state usually enjoy immunity for acts undertaken in their official capacity."[189]

---

[184] *Id*. at 1152-56.

[185] Next to *jus cogens*, serious human rights violations were also considered as beyond the scope of official authority. See, *e.g.*, Hilao v. Marcos (*In re* Estate of Marcos), 25 F.3d 1467, 1472 (9th Cir. 1994); Xuncax v. Gramajo, 886 F. Supp. 162, 176 (D. Mass. 1995); Cabiri v. Assasie-Gyimah, 921 F. Supp. 1189, 1197-98 (S.D.N.Y. 1996).

[186] Saudi Arabia v. Nelson, 507 U.S. 349, 361 (1993).

[187] Samantar, 130 S. Ct. at 2292-93.

[188] The Supreme Court was "given no reason to believe that Congress saw as problem, or wanted to eliminate, the State Department's role in determinations regarding individual official immunity." Samantar, 130 S. Ct. at 2291. Prior to the enactment of FSIA, executive suggestions of immunity had to be accepted by courts as conclusive. See, *e.g.*, Samantar, 130 S. Ct. at 2284.

[189] Brief for the United States as *Amicus Curiae* supporting affirmance, Samantar, 2008 U.S. Briefs 1555 (U.S. Nov. 30, 2009).

¶69 As anticipated by several *amici* in *Samantar*, future litigants will surely invoke *jus cogens* to justify an exception to the immunity of foreign officials under the common law.[190] The circumstances appear ideal: contrary to cases involving foreign states, the FSIA, which restricted the courts' ability to endorse such arguments (see *supra* Section IV.C) is no longer a factor. However, a case on head-of-state immunity suggests that immunity determinations by the Executive might similarly constrain courts' discretion. As mentioned above, in cases involving heads of states, courts have consistently deferred to individual determinations of immunity by the Executive, and this already before *Samantar*. In an ATS action where the State Department had asserted head-of-state immunity for the President of China, plaintiffs-appellants argued that "the Executive Branch has no power to immunize a head of state (or any person for that matter) for acts that violate *jus cogens* norms of international law."[191] The Seventh Circuit, however, rejected their claim, holding that determinations by the Executive Branch had to be accepted by the Judiciary "without reference to the underlying claims of a plaintiff."[192] Even in the particular class of cases involving *jus cogens*, the court considered itself "no more free to ignore the Executive Branch's determination than we are free to ignore a legislative determination concerning a foreign state [*i.e.*, the FSIA]."[193] This decision seems to indicate that it will fall to the Executive alone to carve out an exception to the immunity of foreign officials. As an *amicus* in *Samantar*, the Government recognized that the Executive's discretion in determining whether a foreign official should be granted immunity is framed by customary international law.[194] As highlighted above, customary international law does not currently entail an exception to the immunity of foreign officials in case of *jus cogens* violations, nor does *jus cogens*, *per se*, educe such an effect. In a manner comparable to a principle articulated in persuasive authority, *jus cogens* affords a reasoned basis to depart from the existing rules on foreign officials' immunity. Future cases will reveal whether the U.S. Executive Branch will be receptive to this justification and follow the path previously opened by some courts in denying immunity to foreign officials accused of *jus cogens* or other serious human rights violations.

V. CONCLUSION

¶70 The controversies around the issue of foreign sovereign immunity in cases involving serious human rights violations are far from settled. Despite the ICJ's assertion to the contrary in the *Arrest Warrant* case, experience has shown that immunity for international crimes all too often amounts to impunity, since victims generally have no access to the courts of the state in which the abuses took place, and their prospects to obtain redress at the international level remain limited due the lack of effective adjudication mechanisms.[195] In cases where abuses amount to a breach of a peremptory

---

[190] See *supra* note 4.
[191] Wei Ye v. Jiang Zemin, 383 F.3d 620, 625 (7th Cir. 2004).
[192] *Id*. at 626.
[193] *Id*. at 627.
[194] Brief for the United States, *supra* note 189, at 6.
[195] *Arrest Warrant Case*, *supra note* 13, at 25, ¶ 60: "The Court emphasizes, however, that the *immunity* of from jurisdiction enjoyed by incumbent Ministers for Foreign Affairs does not mean that they enjoy *impunity* with respect of any crimes they might have committed, irrespective of their gravity."

norm of international law, some have argued that the special status of these norms necessarily implies that foreign states or foreign officials be denied immunity in domestic courts. This article contends that *jus cogens*, *per se*, elicits no such effect. Instead, peremptory norms can have a bearing on foreign sovereign immunity to the extent that they indicate that the adjudication by foreign courts of cases involving abuses such as torture, slavery or genocide would be consistent with the values universally recognized as deserving of absolute protection. They stand for the proposition that such adjudications could constitute a reasonable limitation on the independence of states.

¶71 Other considerations, however, may also weigh on the doctrine's evolution. At a broader level, the issue of the scope of foreign sovereign immunity in the case of *jus cogens* and other international human rights violations relates to the search for a system of worldwide enforcement of human rights. "How can the world institute the global enforcement of fundamental human rights in a manner that is fair and accurate and that does not inflame international tensions?"[196] Is the expansion of national adjudication of *jus cogens* and human rights violations by national courts the preferable course or should such determinations be left to the international justice system? The matter is controversial, as reflected by some of the Judges' opinions in the *Arrest Warrant* case. Judges Higgins, Kooijmans and Burgenthal, in particular, wrote that they "reject the suggestion that the battle against impunity is 'made over' to international treaties and tribunals, with national courts having no competence in such matters."[197] In contrast, Judge Guillaume expressed his concern that the unrestrained exercise of jurisdiction over international crimes by the courts of every state in the world would "risk creating total judicial chaos" and "encourage the arbitrary for the benefit of the powerful, purportedly acting as agent for an ill-defined international community."[198] These questions are essential, since the real means for honoring the normative value of *jus cogens* norms will be achieved by building the enforcement system that will make them a tangible reality.

¶72 With regard to the U.S., an amendment to the FSIA would be required to statutorily grant jurisdiction over cases involving *jus cogens* violations committed by states in contexts other than terrorism. Although a number of amendments have been introduced to allow human rights suits against foreign states under certain conditions, none has yet been adopted.[199] Meanwhile, *Samantar* seems to have shifted responsibility for determining the scope of foreign officials' immunity from the Judiciary to the Executive. As for now, it is unclear whether the Executive Branch will follow the lead of Circuit Courts that have allowed damages to be awarded to the victims of *jus cogens* violations and other human rights abuses at the hands of foreign officials.

¶73 Because customary international rules on foreign sovereign immunity emerge primarily from the practice of individual states, the next round of U.S. cases in light of *Samantar* will be highly consequential in determining whether the nascent trend toward a new exception to foreign sovereign immunity persists or fades. In its brief submitted as

---

[196] Jamie Mayerfeld, *Who Shall Be Judge? The United States, the International Criminal Court and the Global Enforcement of Human Rights*, 25 HUM. RTS. Q. 93, 94 (2003).
[197] *Arrest Warrant Case*, *supra* note 13, at 78, 79, ¶ 51 (Sep. Op. of Judge Higgins et al.).
[198] *Id*., at 43, ¶ 15 (Sep. Op. of President Guillaume).
[199] An analysis of some of these bills can be found in, *e.g.*, David J. Bederman, *Dead Man's Hand: Reshuffling Foreign Sovereign Immunities in U.S. Human Rights Litigation*, 25 GA. J. INT'L & COMP. L. 255, 282-84 (1995-1996); Jennifer A. Gergen, *Human Rights and the Foreign Sovereign Immunities Act*, 36 VA. J. INT'L L.765, 794-98 (1995).

amicus curiae in *Samantar*, the Government stressed its condemnation of the grave human rights abuses alleged in the case, and its "strong foreign policy interest in promoting the protection of human rights."[200] At the same time, however, it also underscored the "significant implications" of foreign sovereign immunity "for the reciprocal treatment of United States officials and for our Nation's foreign relations."[201] If past actions are any indication, reciprocity concerns have weighed heavily on the Executive's stance in other contexts where it has confronted this issue. For example, while its courts were awarding damages to victims of human rights violations committed by foreign officials under the ATS, the U.S. opposed the inclusion of a human rights exception in the JISP Convention, asserting that the tort exception of the Convention "must be read in the light of established State practice to concern tortious acts or omissions of a private nature which were attributable to the State, while preserving immunity for those acts of a strictly sovereign or governmental nature."[202] For the U.S.,

> "extending that jurisdiction without regard to the accepted private/public distinction under international law would be contrary to the existing principles of international law and would generate more disagreements and conflicts in domestic courts which could be better resolved, as they currently were, through State-to-State mechanisms."[203]

The U.S. has not always been of this view, however. A generation ago, U.S. Supreme Court Justice Robert H. Jackson, who was serving as Chief Counsel at the Nuremberg Trials, sharply and famously rejected the application of foreign officials' immunity to the proceedings of the first international criminal tribunal, stating: "We do not accept the paradox that legal responsibility should be the least where power is the greatest."[204] This proposition undergirds the rule now uniformly applied before international criminal courts that the official status of the perpetrator does not constitute a defense to the commission of international crimes.

¶74 After *Samantar*, the breakthrough for the conflict between human rights litigation and foreign officials' immunity remains a potentiality which will only be confirmed if future Executive practice capitalizes on the latitude provided to it by the Supreme Court. Moreover, a decision from the ICJ is still awaited to indicate whether such development would be in line with the requirements of international law. Whether Jackson's stance will be reflected in this evolution, only future outcomes will tell.

---

[200] Brief for the United States, *supra* note 189, at 1.
[201] *Id*. at 1, 2.
[202] *Statement of the Representative of the United States before the 6th Committee of the UNGA*, 24 October 2004, *supra* note 154, ¶ 63.
[203] *Id*.
[204] Report by Justice Robert H. Jackson to the President on Atrocities and War Crimes; United States Department of State Bulletin, June 7, 1945, *available at* http://avalon.law.yale.edu/imt/imt_jack01.asp.