

## Struggle between State Immunity and Jus Cogens at the International Court of Justice

*Prof. Heybatollah Najandi-Manesh*  
*Dept of International Law at Islamic Azad University,*  
*Science and Research Branch of Isfahan, Iran.*

*Abdollah Abedini*

*Ph. D Candidate in International Law, Faculty of Law and Politics, Tehran University.*  
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One of the controversial issues at the international courts, particularly at International Court of Justice (ICJ), is the relationship between State immunity and the norms of jus cogens nature. State, enjoying of immunity *ratione materiae*, is a legal person who has a binding legal obligation to respect jus cogens norms. State immunity is among the oldest rules of international law. It is the immunity that a State enjoys in respect of itself (jurisdictional immunity) and its property (enforcement immunity) from the jurisdiction of the courts of another State (Art. 5 United Nations Convention on State Immunity, 2004). This immunity concerns to the status of a State as an international legal entity. State immunity is based on the fundamental principles of equality of states and non-intervention. A State has to do her acts within the limitations of the jus Cogens norms. While the primarily beneficiary of the state immunity is the state itself, the beneficiary of the norms of jus Cogens nature is the international community as a whole. Jus Cogens norm, in the words of the Vienna Convention on Law of Treaties (1969), “is 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” (Art. 53). Accordingly, as to the jus cogens states are not permitted to depart under any circumstances. International Courts, regionally or globally, have dealt with the cases involving the notions of State immunity and jus cogens. The matter has been dealt with by the ICJ in International Jurisdictional Immunity case toward the relationship between these two concepts. Although it has reached, based on contemporary situation in international law, to sound result, some critiques in achieving to that conclusion are considerable.

**Keywords:** Immunity, State, International Court of Justice (ICJ), Jus Cogens.

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# STRUGGLE BETWEEN STATE IMMUNITY AND JUS COGENS AT THE INTERNATIONAL COURT OF JUSTICE

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*HEYBATOLLAH NAJANDI-MANESH\**  
*ABDOLLAH ABEDINI\*\**

## 1. INTRODUCTION

The term “immunity” (from Latin *immunitas*, deriving from *immunis*) goes back to the mid-thirteenth century. The word was used, from then onwards, to refer to the condition of someone exempted from taxes, or from any charges or duties. Towards the end of the nineteenth century, the term “immunity” was introduced into the glossary of constitutional law (in relation to parliamentarians) and international

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\* Assistant Professor of International Law at Islamic Azad University, Science and Research Branch of Isfahan. (L.L.B, Ph. D from Allameh Tabataba’I University), (stephn.summer@gmail.com).

\*\* Ph. D Candidate in International Law, Tehran University, Faculty of Law and Politics, (s\_abedinin\_a@yahoo.com).

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law (in terms of diplomats).<sup>1</sup> Historical evolution of the term “immunity” implies that the term denoted “to refer to something wholly exceptional, an exemption from jurisdiction or from execution.”<sup>2</sup>

State immunity, protecting a State and its property from jurisdiction of another State, includes jurisdictional immunity (administrative, civil, and criminal proceedings) and enforcement immunity. It has a close link to diplomatic immunity and immunity of heads of States. It is also distinct from these two latter immunities.<sup>3</sup> It has been affected by the developments occurred with regards to other areas of international law. Among others, one may refer to the transformations in the area of international human rights and also the developments relating to the status of some rules of international law, namely the rules of *jus cogens* nature. *Jus Cogens* norm, in the words of the Vienna Convention on Law of Treaties (1969), “is 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.”<sup>4</sup> Accordingly, there are some rules of general international law which has a higher position than the ordinary rules of international law. States are not permitted to depart under any circumstances from a *jus cogens* norm. A State has to do her acts

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1. J. A. Simpson and E. S. C. Weiner, *The Oxford English Dictionary*, 2nd ed., Vol. VII, (Oxford: Clarendon Press, 1989) 691 and C. T. Onions *et al.*, *The Oxford Dictionary of English Etymology*, (Oxford: Clarendon Press, 1966) 463.

2. Dissenting Opinion of Judge Trindade, *Jurisdictional Immunities of the State* of 3 February 2012 (Germany v. Italy: Greece Intervining), at 166. For historical evolution of immunity as a rule in international law, see, Hazel Fox, *The Law of State Immunity*, 2<sup>th</sup> ed. (New York: Oxford University Press, 2008) 11-25; and study of philosophical roots of this rule, see, Erbest K. Bankas, *The State Immunity Controversy in International Law*, (Germany: Springer, 2005) 2- 11.

3. Peter-Tobias Stoll, “State Immunity” (2011) *Max Plank Encyclopedia of Public International Law* Para. 13; Fox, *supra* note 2, 667-715.

4. Vienna Convention on the Law of Treaties, United Nations, Treaty Series, Vol. 1155, p. 331. Art. 53.

within the limitations of the *jus Cogens* norms.<sup>1</sup> While the primary beneficiary of the state immunity is the state itself, the beneficiary of the norms of *jus Cogens* nature is the international community/ society as a whole.<sup>2</sup> That is why there are special provisions in terms of “international responsibility which is entailed by a serious breach by a State of an obligation arising under a peremptory norm of general international law”, i.e. *jus cogens* nom.<sup>3</sup>

International courts, whether globally or regionally, have dealt with the cases involving the notions of State immunity and *jus cogens*. Among them is the recent case between Germany and Italy, dealt with by the International Court of Justice (hereinafter ICJ). The main point, which shall be discussed, is the position of the international judicial bodies, e.g. ICJ and European Court of Human Rights (hereinafter ECtHR), toward the relationship between these two concepts. One of the controversial issues at the international courts is the relationship between State immunity and the norms of *jus cogens* nature. State, enjoying of immunity *ratione materiae*, is a legal person who has a binding legal obligation to respect *jus cogens* norms. Six years before the adoption of the UN Convention on State Immunity and their

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1. On the historical evolution of *jus cogens* see, Vedross, A., “Forbidden Treaties in International Law” (1937) p. 31 American Journal of International Law, pp. 571-577; Schwarzenberger, G., A Manual of International Law, (London: Stevens & Sons, 1967) 29-30; Vedross, A., “Jus Dispositivium and Jus Cogens in International Law” in International Law in Twentieth Century, (Washington D.C.: American Society of International Law, 1969); Cassese, A., International Law, (New York: Oxford University Press, 2002) p. 450.

2. As it has been upheld ‘the terminological uncertainty in relation to the concept ‘international community’ has not prevented positive law from incorporating it as a point of reference in certain areas.’ In this regard see, Anne-Laure Vaurs-Chaumette, “The International Community as a Whole” in James Crawford and et la. Ed., The Law of International Responsibility, (New York: Oxford University Press, 2010) pp. 1024-1028; Hermann MOSLER, International Society and International Legal Community, Recueil des cours 140, 1974; Bruno SIMMA, From Bilateralism to Community Interest in International Law, Recueil des cours 250, 1994; Georges ABI-SAAB, “Whither the International Community?”, (1999) 9 European Journal of International Law pp. 248-265.

3. International Law Commission Draft Articles on State Responsibility for Internationally Wrongful Acts, Adopted by the International Law Commission on 9 August 2001, A/56/10, Art. 40.

Properties in 2004, the Working Group of the International Law Commission surmised that the interaction between immunity and *jus cogens* norms ‘did not seem to be ripe enough for the Working Group to engage in a codification exercise over it’.<sup>1</sup>

International courts, in particular International Court of Justice and European Court of Human Rights, in several cases, considering the issue of State Immunity, explored the relationship between State immunity and rules of *jus cogens* nature. Reviewing, particularly, the case-law of the ICJ, the article continues with a critical approach to this case-law. Having been investigating the developments of international law, it also shall have a look in horizons ahead in terms of interaction between State immunity and *jus cogens* rules. The main issues relating to the interaction of these sets of rules would be considered in a critical manner.

Generally speaking, the critical issues in the light of the case-law of international courts are related to the lack of any conflict between rule of State immunity and rule or rules of *jus cogens*, *rational* of State immunity, and an emerging exception to State immunity. Reviewing these critical issues, the article will be concluded by drawing some remarks.

#### STATE IMMUNITY AND JUS COGENS: ICJ'S CASE-LAW

Two leading judgments of the ICJ pertaining immunities of State officials and the State immunity are to be mentioned. The first was rendered in the Arrest Warrant case (A)<sup>2</sup> and the second in the Case concerning Jurisdictional Immunity of State (B).<sup>3</sup>

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1. General Assembly, Convention on Jurisdictional Immunities of States and their Property: Report of the Chairman of the Working Group, A/C.6/54/L.12 (12 Nov. 1999) at para. 47.

2. Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium).

3. Jurisdictional Immunities of the State of 3 February 2012 (Germany v. Italy: Greece Intervining).

## 2. ARREST WARRANT CASE

The case concerned an international arrest warrant issued by an investigating judge of the Brussels against the incumbent Minister for Foreign Affairs of the Republic of Congo, Mr. Abdulaye Yerodia Ndombasi. The Congo in its Application contended that Belgium had violated the "principle that a State may not exercise its authority on the territory of another State", the "principle of sovereign equality among all Members of the United Nations, as laid down in Article 2, paragraph 1, of the Charter of the United Nations", as well as "the diplomatic immunity of the Minister for Foreign Affairs of a sovereign State, as recognized by the jurisprudence of the Court and following from Article 41, paragraph 2, of the Vienna Convention of 18 April 1961 on Diplomatic Relations".<sup>1</sup>

### 2-1. THE RATIONAL AND NATURE OF IMMUNITIES OF HEAD OF STATES AND MINISTERS FOR FOREIGN AFFAIRS

According to the Court, it is established firmly in international law that "[...] certain holders of high-ranking office in a State, such as the Head of State, Head of Government and Minister for Foreign Affairs, enjoy immunities from jurisdiction in other States, both civil and criminal."<sup>2</sup>

It is clear that state immunity (*ratione personae*) is distinct from diplomatic immunity and the immunities of heads of states, though have close links. "These latter two provide for immunity *ratione materiae*, e.g. in a functional context. It is understood that diplomatic immunity will prevail over State immunity, as *lex specialis*, if both are applicable".<sup>3</sup>

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1. Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium), para. 1.

2. Supra note 13 at 51.

3. Stoll, supra note 5 para, 13.

The purpose of diplomatic privileges and immunities is "to ensure the efficient performance of the functions of diplomatic missions as representing States".<sup>1</sup> According to Article 32 of the Vienna Convention, which reflects customary international law, only the sending State may waive such immunity.<sup>2</sup>

In customary international law, the immunities accorded to Ministers for Foreign Affairs are granted to ensure the effective performance of their functions on behalf of their respective States.<sup>3</sup> So, Minister for Foreign Affairs, because of his/her functions, enjoys full immunity from criminal jurisdiction and inviolability when he or she is abroad. By these immunity and inviolability, the individual concerned is protected against any act of authority of another State.<sup>4</sup> Therefore foreign states may not hinder his or her duties.

All acts of Minister for Foreign Affairs, whether in an "official" capacity or whether in a "private capacity", or, whether "before the person concerned" took office as Minister for Foreign Affairs" or, whether, "during the period of office", are immune from criminal and civil jurisdiction by another State, whether receiving State or a third State. The reason, according to the Court, is that, if a Minister for Foreign Affairs is arrested in a foreign State on the ground of a criminal accusation, he or she is clearly thereby not able to exercise his or her functions. The Court continues that: "The consequences of such impediment to the exercise of those official functions are equally serious, regardless of whether the Minister for Foreign Affairs was, at the time of arrest, present in the territory of the arresting State on an "official" visit or a "private" visit, regardless of whether the arrest

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1. Preamble of the Vienna Convention on Diplomatic Relations of 18 April 1961.

2. *supra* note 13 at 52.

The same applies to the corresponding provisions of the Vienna Convention on Consular Relations of 24 April 1963.

3. *supra* note 13 at 53.

4. *supra* note 13 at 54.

relates to acts allegedly performed before the person became the Minister for Foreign Affairs or to acts performed while in office, and regardless of whether the arrest relates to alleged acts performed in an "official" capacity or a "private" capacity".<sup>1</sup> This is the case also when a Minister for Foreign Affairs by travelling to or transiting another State might be exposing himself or herself to legal proceedings which could deter the Minister from travelling internationally when it is necessary for the purposes of the performance of his or her official functions.<sup>2</sup>

The court, examining State practice, including national legislation and few decisions of national higher courts, such as the House of Lords or the French Court of Cassation, was "unable to deduce from this 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".<sup>3</sup>

The Court has also examined the rules concerning the immunity or criminal responsibility of persons having an official capacity contained in the legal instruments creating international criminal tribunals, and which are specifically applicable by them.<sup>4</sup> According to the finding of the Court, under these instruments it was not able to conclude that customary international law contained any such an exception in regard to national courts. Finally, none of the decisions of the international criminal courts considered the question of the

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1. *supra* note 13 at 55.

2. *Ibid.*

3. *supra* note 13 at 58.

4. These instruments include the Charter of the International Military Tribunal of Nuremberg, Art. 7; Charter of the International Military Tribunal of Tokyo, Art. 6; Statute of the International Criminal Tribunal for the former Yugoslavia, Art. 7, para. 2; Statute of the International Criminal Tribunal for Rwanda, Art. 6, para. 2; Statute of the International Criminal Court, Art. 27.

immunities of incumbent Ministers for Foreign Affairs before national courts where they are accused of having committed war crimes or crimes against humanity.<sup>1</sup>

## **2-2. DISTINGUISHING RULES GOVERNING THE JURISDICTION OF NATIONAL COURTS FROM THOSE GOVERNING JURISDICTIONAL IMMUNITIES**

In its judgment in Arrest Warrant Case, the ICJ noted that “the rules governing the jurisdiction of national courts must be carefully distinguished from those governing jurisdictional immunities: jurisdiction does not imply absence of immunity, while absence of immunity does not imply jurisdiction. Thus, although 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.”<sup>2</sup>

Two distinct questions are to be considered separately. The first is that any national court deals with a case concerning a foreign Minister for Foreign Affairs, first of all, has to consider the question of his or her immunities. In our understanding the question of jurisdiction must be distinguished from that of admissibility. A foreign court may have jurisdiction to deal with an alleged war crime but the case may be inadmissible for the accused enjoys immunity.

The second is that immunity is not equal to impunity. The Court, accordingly, emphasizes that the immunity from jurisdiction enjoyed

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1. *supra* note 13 at 58.

2. *supra* note 13 at 59.

by incumbent Ministers for Foreign Affairs does not mean that they enjoy *impunity* (the emphasis is of the Court) in respect of any crimes they might have committed, irrespective of their gravity. Immunity from criminal jurisdiction and individual criminal responsibility are quite separate concepts.<sup>1</sup> For the first time the court dealt with relationship between the issues of immunities and *jus cogens* norms and declared “jurisdictional immunity is procedural in nature, [but] criminal responsibility is a question of substantive law.”<sup>2</sup> By this finding the Court found that there is no conflict between a jurisdictional rule and a *jus cogens* substantive rule, as each rule belongs to two distinct categories: procedural category and substantive category. So jurisdictional immunity cannot release the person to whom it applies from all criminal responsibility. It only may exclude prosecution for a certain period or for certain offences.<sup>3</sup>

Incumbent or former Ministers for Foreign Affairs, enjoying immunities, may be criminally prosecuted in certain circumstances as follow:<sup>4</sup>

A) They do not enjoy criminal immunity under international law in their own national jurisdictions. Their national State’s courts, so, are competent to try them in accordance with the relevant rules of domestic law.

B) They will be deprived of immunity from foreign jurisdiction if and when the State which they represent or have represented decides to waive that immunity.

C) After a person ceases to hold the office of Minister for Foreign Affairs, he or she will no longer enjoy all of the immunities accorded by international law in other States. A court of a foreign State, having

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1. *supra* note 13 at 60.

2. *Ibid.*

3. *Ibid.*

4. *supra* note 13 at 61.

jurisdiction under international law, may prosecute and try a former Minister for Foreign Affairs of another State in respect of acts committed prior or subsequent to his or her period of office, as well as with regard to acts committed during that period of office in a private capacity.

D) An incumbent or former Minister for Foreign Affairs may be tried by certain international criminal courts, including the International Criminal Tribunal for the former Yugoslavia (1993), the International Criminal Tribunal for Rwanda (1994)<sup>1</sup> and the International Criminal Court (1998)<sup>2</sup> - provided that they have jurisdiction. Article 27, paragraph 2, of the ICC's Statute states that "[i]mmunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person".

The Arrest Warrant Case is the first ICJ decision on the International Law of privileges and immunities and it *prima facie* supports *the Schooner Exchange*<sup>3</sup>. The forgotten question in the case-law of the Courts is the contribution of immunity to impunity.<sup>4</sup> It is true that immunity does not mean impunity. Immunity, for whatever purpose and even "for a certain period", contributes to impunity.

### 3. CASE CONCERNING JURISDICTIONAL IMMUNITY OF STATE

This case, brought by Germany against Italy, is concerned to the question whether Germany is legally entitled to immunity before the

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1. These two Tribunals have been established pursuant to Security Council resolutions under Chapter VII of the United Nations Charter.

2. The Court has been created by the 1998 Rome Statute.

3. *The Schooner Exchange*, 11 U.S. (7 Cranch) 116, 136 (1812). For analyzing this case see Bankas, *supra* note 4 at 15.

4. Lorna McGregor, "Torture and State Immunity: Deflecting Impunity, Distorting Sovereignty", (2008) 18 *European Journal of International Law* 903–919, at 907.

Italian domestic courts with respect to the conduct of its armed forces in the course of the armed conflict. So the main question is not the dispute between two sovereign States, but is that of interaction between two relevant rules of international law: Jurisdictional Immunity of State and *jus cogens* norm. The Court, in its judgment in the case concerning jurisdictional Immunity of State, dealt with different issues of international law, *inter alia*, those of States immunity and *jus cogens* norms and their interaction.

The main findings of the court may be summarized as follow:

- a) There is a rule of international law according which a state is entitled to sovereign immunity for the acts committed by its armed forces in another state, since such acts constitute as *acta jure imperii*.
- b) No exception to this general rule of immunity applies.
- c) There is no conflict between a rule, or rules, of *jus cogens*, and the rule of customary law which requires one State to accord immunity to another. The two sets of rules address different matters.
- d) This finding does not preclude the Parties from entering into negotiations to resolve issues which arose in the course of the present proceedings.

#### **4. CRITIQUE OF THE CASE- LAW**

In this section, it should be noted that the major issues regarding the relationship between State immunity and *jus cogens* have been raised in the case law of the international courts. These are as follow:

- a) Rational of State immunity
- b) Lack of any conflict between rule of State immunity and rule or rules of *jus cogens*
- c) An emerging exception to State immunity?

#### **4-1. THE RATIONAL BASIS FOR STATE IMMUNITY: A CRITIQUE OF EXISTING APPROACHES**

Two leading rationales explain the rational basis for State Immunity. One asserts that state immunity is a fundamental state right by virtue of the principle of sovereign equality.<sup>(1)</sup> The other regards state immunity as evolving from an exception to the principle of state jurisdiction, i.e., when the forum state suspends its right of adjudicatory jurisdiction as a practical courtesy to facilitate interstate relations. (2) These two rationales find themselves in deep conflict. Moreover, each gives rise to vastly different ramifications for the nature and application of the doctrine of foreign state immunity.<sup>1</sup>

##### **4-1-1. STATE IMMUNITY AS A FUNDAMENTAL RIGHT**

The view that foreign state immunity is a fundamental state right is based on the maxim *par in parem non habet imperium*, meaning “An equal has no power over an equal.”<sup>2</sup> The maxim has its historical origins in the classic period of international law, when the state was generally understood as a juristic entity possessing a distinct personality and entitled to specific fundamental rights, including the rights of absolute sovereignty, complete and exclusive territorial jurisdiction, absolute independence and legal equality within the family of nations.<sup>3</sup> From such attributes it was logically to conclude

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1. Lee M. Caplan, *State Immunity, Jus Cogens and Human Rights: A Critique of Normative Hierarchy Theory*, (2003) 97 *American Journal of International Law*, p. 748.

2. An alternative formulation is *Par in parem imperium non habet*. see, Aaron X. Fellmeth and Maurice Horwitz, *Guide to Latin in International Law*, Oxford University Press, 2009, 214; *Black’s Law Dictionary*, p. 673.

3. This expression is used by Brierly on the small relations between some states in sixteenth century when the rules such as immunity has its origination in that era and as Brierly said ‘the human affairs were more wisely ordered, and if men were clearer-sighted that they are in seeming their own interests, it might be that this interdependence of nations would lead to a strengthening of their feeling of community.’ see, James Brierly, *Law of Nations: An Introduction to the Role of International Law in International Relations*, 5th ed. (Oxford: Clarendon Press, 1955), pp. 42-44.

that because of equality of all sovereign states in law, no single state should be subjected to the jurisdiction of another state.<sup>1</sup> Thus, according to the “fundamental right” rationale, state immunity is simply a specific application of the general principle of sovereign equality.<sup>2</sup> This rationale has been endorsed by scholars<sup>3</sup> and judicial decisions.<sup>4</sup> This approach, if correct, offers significant obstacles to human rights litigation, as plaintiffs must contend with and overcome a state right to immunity, perhaps even of a fundamental nature.<sup>5</sup>

#### **4-1-2. STATE IMMUNITY AS AN EXCEPTION TO TERRITORIAL JURISDICTION**

According to this view, state immunity is constituted as an exception to the principle of state jurisdiction. State jurisdiction is “defined as the power to prescribe rules and to enforce these rules.”<sup>6</sup> The main issue of jurisdiction which is relevant to the immunity is whether there are any limitations on the exercise of jurisdiction.<sup>7</sup>

According to this theory, state immunity is “practical necessity or convenience and particularly the desire to promote good will and

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1. Caplan, *supra* note 34 at 748; Theodore R. Giuttari, *The American Law of Sovereignty of Sovereign Immunity: An Analysis of Legal Interpretation*, (Praeger, 1970) at 5.

2. Caplan, *Ibid.*

3. Lassa Oppenheim, *International Law*, (Longmans, 1947) 239–41; Sompong Sucharitkul, “Immunity of States”, in Mohammed Bedjaoui, ed., *International Law: Achievements and Prospects*, (The Netherlands: Martinus Nijhoff, 1991) at 327; Stefan A. Riesenfeld, *Sovereign Immunity in Perspective*, (1986) 19 *Vanderbilt Journal of Transnational Law* at 1.

4. According to the Italian Corte di cassazione, for example, state immunity is “based on the customary principle *par in parem non habet jurisdictionem*, that has received universal acceptance.” *Special Representative of the Vatican v. Pieciukiewicz*, Cass., jt. sess., 5 July 1982, n.4005, 1983. The Polish Supreme Court found that “the basis of the immunity of foreign States is the democratic principle of their equality, whatever their size and power, which results in excluding the jurisdiction of one State over another (*par in parem non habet iudicium*).” *S. v. Brit. Treasury*, PAS TWO I PRAWO, NO. 4, 1949, at 119 (Pol. Sup. Ct. Dec. 14, 1948), translated in 24 *ILR* 223, 224–25.

5. Caplan, *supra* note 34 at 749)

6. Bankas, *supra* note 4 rt 210

7. *Ibid.*, at 211.

reciprocal courtesies among nations.”<sup>1</sup> Clearly, this aim largely influenced Justice Marshall’s opinion in *The Schooner Exchange v. McFaddon*, where he recognized that:

*This perfect equality and absolute independence of sovereigns, and this common interest impelling them to mutual intercourse, and an exchange of good offices with each other, have given rise to a class of cases in which every sovereign is understood to waive the exercise of a part of that complete exclusive territorial jurisdiction, which has been stated to be the attribute of every nation.*<sup>2</sup>

For Justice Marshall “[a]ll exceptions to the full and complete power of a nation within its own territories” is based on “the consent of the nation itself.”<sup>3</sup> Only this consent- and not any other legitimate source- can generate these exceptions.<sup>4</sup> This view is supported by, among others, Ian Sinclair<sup>5</sup>, Sir Robert Jennings<sup>6</sup>. Accordingly, under this theory, “no norm of international law, not even the principle of sovereign equality, is capable of derogating a state’s jurisdictional authority as exercised legitimately by its own courts, except in cases where the forum state has agreed to waive this right.”<sup>7</sup>

Considering that the rule of State immunity has “an important place in international law and international relations”, the Court states the rule

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1. Caplan, *supra* note 34 at 749.

2. *The Schooner Exchange*, 11 U.S. (7 Cranch) 116, 136 (1812).

3. *The Schooner Exchange*, 11 U.S. at 136.

4. *Ibid.*

5. Commenting on *The Schooner Exchange*, he described the “true foundation” of foreign state immunity as its “operation by way of exception to the dominating principle of territorial jurisdiction.” Ian Sinclair, *The Law of Sovereign Immunity: Recent Developments*, 167 *RECUEIL DES COURS* 113, 215 (1980 II).

6. According to him “territorial jurisdiction is the dominating principle.” Robert Jennings, *The Place of the Jurisdictional Immunity of States in International and Municipal Law* 19, No. 108, 1987.

7. Caplan, *supra* note 34 at 751.

“derives from the principle of sovereign equality of States.” This principle “is one of the fundamental principles of the international legal order.” This principle has to be viewed together with the principle that each State has sovereignty over its own territory and that there flows from that sovereignty the jurisdiction of the State over events and persons within that territory. Exceptions to the immunity of the State represent a departure from the principle of sovereign equality. Immunity may represent a departure from the principle of territorial sovereignty and the jurisdiction which flows from it.<sup>1</sup> It appears that while accepting that State immunity is based on the principle of sovereign equality, the Court does not like to displace the State immunity as an exception to the territorial jurisdiction. According to Caplan, the sole *raison d’être* for state immunity under customary international law is so that states can perform their public functions effectively and ensure that international relations are conducted in an orderly fashion.<sup>2</sup>

If one accepts this basic premise, then conduct of a foreign state that does not conform to the development of beneficial interstate relations falls outside the state immunity “agreement” and thus is not immune by virtue of international custom. The most obvious example excludes foreign state conduct that does significant harm to the vital interests of the forum state, such as the commission of human rights abuses against the forum state’s nationals. Accordingly, the basic test for distinguishing between immune and nonimmune transactions should not be whether the state conduct is public or private, as the theory of restrictive immunity requires, but whether such conduct would substantially harm the vital interests of the forum state. This test is also criticized because the human rights or humanitarian rights may be fortified in the favour of the relations of States.

According to the current international law, where *acta jure*

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1. Jurisdictional Immunities of the State, para. 57.

2. Caplan, *supra note* 34 at 777.

*imperii* violated jus cogens, e.g. German atrocities, the executive of the state directly affected must take up the case, and demand reparation from the state responsible for the international delict.<sup>1</sup> When the forum State's jurisdiction to adjudicate the facts presented to its courts is established does the question arise whether its exercise is precluded by the sovereign immunity of the respondent State. The conflict is between territoriality principle (as the rule) and immunity principle (as the exception).

Traditionally, precedence has been given to the sovereignty of the respondent State by international law unless one of the few counter exceptions to the sovereign immunity exception applies.<sup>2</sup> In the light of developments of international law, especially in the field of international human rights law, the precedence should be given to territorial principle, if and when the act of the respondent State is described as *acta contra jus cogens*. The reason is that the *jus cogens* rule, in principal, creates *erga omnes* obligations, which are owed, *inter alia*, by the forum state towards the international community as a whole.

#### **4-2. ANY CONFLICT BETWEEN RULE OF STATE IMMUNITY AND A RULE OF JUS COGENS?**

The second strand in Italy's argument emphasizes the *jus cogens* status of the rules which were violated by Germany during the period 1943-1945. This argument is based on "the premise that there is a conflict between *jus cogens* rules forming part of the law of armed conflict and according

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1. See the Chorzow Factory Case; The United States diplomatic and consular staff in Tehran (1980) ICJ Reports 3 at 44, and the Corfu Channel Case 1949 ICJ Reports 4, Merits and 1949 ICJ Reports 44, (Compensation). 238 26 F 3d 1 1 16 (DC Cir. 1994): 1 166-1 176.

2. Thomas Giegerich, "Do Damages Claims Arising from Jus Cogens Violations Override State Immunity from the Jurisdiction of Foreign Courts?" in C. Tomuschat and J.-M. Thouvenin, eds., *The Fundamental Rules of the International Legal Order*, (The Netherlands: Koninklijke Brill NV, 2006) 203-238, at 210.

immunity to Germany.”<sup>1</sup> According to the Court, this argument is subjected to the existence of a conflict between a peremptory norm of general international law (rule of *jus cogens*), and the customary international law rule “which requires one State to accord immunity to another.”<sup>2</sup> The Court considers that “no such conflict exists.”<sup>3</sup> In the opinion of the Court, “the rules of the law of armed conflict which prohibit the murder of civilians in occupied territory, the deportation of civilian inhabitants to slave labour and the deportation of prisoners of war to slave labour are rules of *jus cogens*”.<sup>4</sup> “The rules of State immunity are procedural in character and are confined to determining whether or not the courts of one State may exercise jurisdiction in respect of another State. They do not bear upon the question whether or not the conduct in respect of which the proceedings are brought was lawful or unlawful.” It also holds that “[t]he two sets of rules address different matters.” Accordingly, the Court is of the view that, “there is no conflict between

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1. Jurisdictional Immunities of the State, para. 92.

2. Jurisdictional Immunities of the State, para. 93.

3. Ibid.

4. The Court earlier in several cases has expressly mentioned to *jus cogens* norms. For example, in *Armed Activities on the Territory of the Congo* in respect to the relationship between peremptory norms of general international law (*jus cogens*) and the establishment of the Court’s jurisdiction upheld “the fact that a dispute relates to compliance with a norm having such a character, which is assuredly the case with regard to the prohibition of genocide, cannot of itself provide a basis for the jurisdiction of the Court to entertain that dispute.” see *Armed Activities on the Territory of the Congo (New Application 2002)*, (Democratic Republic of the Congo v. Rwanda), I.C.J. Reports 2006, 32 at 64. Moreover, in the *Genocide* case repeated the recognition of last year on the Genocide as a peremptory norm in international law. The Court maintained “[T]he Court reaffirmed the 1951 and 1996 statements in its Judgment of 3 February 2006 in the case concerning *Armed Activities on the Territory of the Congo (New Application 2002)* (Democratic Republic of the Congo v. Rwanda), paragraph 64, when it added that the norm prohibiting genocide was assuredly a peremptory norm of international law (*jus cogens*).” see *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, (Bosnia and Herzegovina v. Serbia and Montenegro) I.C.J. Reports 2007, 61 at 161. This position has been taken by the court in recent case in *Obligation to Prosecute or Extradite* case when it comes to indicate position of torture in international law. The court asserted “[I]n the Court’s opinion, the prohibition of torture is part of customary international law and it has become a peremptory norm (*jus cogens*).” see *Questions Relating to the Obligation to Prosecute or Extradite* (Belgium v. Senegal), 20 July 2012, para. 99.

those rules and the rules on State immunity.”<sup>1</sup> According to the Court, “recognizing the immunity of a foreign State in accordance with customary international law does not amount to recognizing as lawful a situation created by the breach of a *jus cogens* rule, or rendering aid and assistance in maintaining that situation, and so cannot contravene the principle in Article 41 of the International Law Commission’s Articles on State Responsibility.” In next section, the idea of the Court and its reasoning shall be evaluated. To this end, the meaning of substantive and procedural rules (A); distinctions between Substantive and Procedural Rules in international law (B); and the interrelation between the substantive rules of *jus cogens* and procedural rules (C). The later consists of two sub-sections: 1- lack of conflict between two sets of rules; and 2- the rules unimpaired by rules of *jus cogens*.

#### 4-2-1. THE MEANING OF ‘SUBSTANTIVE’ AND ‘PROCEDURAL’ RULES

The ICJ, in its case-law, speaks of ‘substantive law’ or ‘substantive rules’, on the one hand,<sup>2</sup> and of law and rules which are ‘procedural in nature’ or ‘procedural in character’, on the other.<sup>3</sup> This implies that the latter set of rules is not necessarily the same as procedural rules and is broader than procedural rules in the strict technical sense.

Substantive law means the law that governs the merits of a matter or transaction, as opposed to procedural law; for instance, laws relating to manslaughter are “substantive,” while laws pertaining to speedy trial, use of confessions, etc., are procedural.<sup>4</sup> Substantive rules determine –either directly or indirectly–whether a particular conduct or situation is lawful or unlawful.<sup>5</sup> These rules specify rights,

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1. Jurisdictional Immunities of the State, Ibid.

2. Jurisdictional Immunities of the State, paras. 58, 95, 100.

3. Ibid., paras. 58, 93. For use of the same terminology, see Arrest Warrant, ICJ Reports 2002, 3 at 25, para. 60.

4. Susan Ellis Wild (Editor), Webster’s New World Law Dictionary, (Wiley, 2006) at 246.

5. Jurisdictional Immunities of the State, para. 58.

obligations and standards of conduct, legal status, title and conditions. They also provide legal definitions and establish international criminal and State responsibility. Substantive rules include rules on attribution of conduct as well as rules for the drawing of baselines in the law of the sea.<sup>1</sup> They also include substantive rules of *jus cogens*.

Procedural rules,<sup>2</sup> or adjective law, may be defined as rules govern the interpretation, fulfillment and enforcement of substantive rules. Procedural rules govern the application of the substantive rules. These procedural rules are composed of “rules on the jurisdiction of courts and tribunals, including rules on the immunity from jurisdiction, rules on the admissibility of a claim or application, rules of procedure as well as rules on the implementation of the international responsibility of States and international organizations”. They also have close link to the question of remedies and reparation.

#### **4-2-2. DISTINCTIONS BETWEEN SUBSTANTIVE AND PROCEDURAL RULES IN INTERNATIONAL LAW**

The distinction between substantive and procedural rules seems to be a common issue. The ‘substantive –procedural’ distinction is one of the most fundamental concepts of legal interpretation both in domestic and international law. Some authors, however, have challenged the distinction in international law because of its consequences for what they consider to be the overriding force of *jus cogens*.<sup>3</sup> This distinction is also common in international law as a legal system.

The question which should be considered in the light of the case-law of the ICJ is that whether a distinction can be drawn between substantive and procedural rules of international law. It is worthy to

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1. Stefan Talmon, *Jus Cogens after Germany v. Italy: Substantive and Procedural Rules Distinguished*, (2012) 25 *Leiden Journal of International Law* at 4.

2. There are also procedural obligations/ rights. For more information see *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Judgment of 20 April 2011, paras. 67-158.

3. Talmon, *supra* note 64 at 6.

reconsider the answers of the concerned states in Jurisdictional Immunity of State Case. According to Greece, on the one hand, such a distinction ‘has no logical or, still less, legal relevance’,<sup>1</sup> on the other hand, both Italy and Germany based their argument on the distinction between procedural and substantive rules of international law.<sup>2</sup>

The ICJ based its decision on this distinction. It did not find it necessary to justify it or even to give any criteria for the separation of substantive and procedural rules. The Court assumed that public international law, like domestic law, knows of the distinction. Without such distinction it will be difficult to have better understanding of the function and operation of legal rules.

International law knows of numerous conceptual distinctions, including *jus cogens* and *jus dispositivum*, *jus strictum* and *jus aequum*,<sup>3</sup> primary and secondary obligations, direct and indirect obligations, obligations of result and obligations of conduct,<sup>4</sup> contractual and normative obligations, obligations *inter partes* and obligations *erga omnes*,<sup>5</sup> and the very distinction between substantive and procedural rules.<sup>6</sup> International law recognizes the general ‘substantive–procedural’ dichotomy, although it is not always an easy task to distinguish procedural rules from substantive rules.

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1. Jurisdictional Immunities of the State, Written Statement of the Hellenic Republic, 3 August 2011, para. 54; *ibid.*, CR 2011/19, 14 September 2011, 37, para. 102.

2. Jurisdictional Immunities of the State, Counter-Memorial of Italy, 22 December 2009, 54, para. 4.44; *ibid.*, Reply of the Federal Republic of Germany, 5 October 2010, 21, para. 37.

3. Georg Schwarzenberger, *International Law*, Vol. I, (Stevens, 1957) 52-54.

4. Cf. *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Request for the Indication of Provisional Measures, ICJ Reports 2006, 113 at 120, para. 32; *Ibid.*, Judgment of 20 April 2010, paras. 186-187.

5. See *Barcelona Traction, Light and Power Company, Limited*, ICJ Reports 1970, 3 at 32, para. 33.

6. Quoted with footnotes from Talmon, *supra* note 64 at 7.

#### **4-2-3. INTERRELATION BETWEEN THE SUBSTANTIVE RULES OF JUS COGENS AND PROCEDURAL RULES**

The approach taken by the ICJ and European Court of Human Rights as to the rules pertaining to the state immunity and rules of jus cogens, among others, raise two main questions: (1) Is there any conflict between these two sets of rules? (2) Do *jus cogens* rules impair the procedural rules? The next sub-sections will answer these questions.

#### **4-2-4. LACK OF CONFLICT BETWEEN SUBSTANTIVE RULES OF JUS COGENS AND PROCEDURAL RULES?**

Do the substantive rules of *jus cogens* and procedural rules belong to the same category, or, as the Court stated, they, are not *ejusdem generis*? These two sets of rules, by definition, are not *ejusdem generis*. This legal principal, literally meaning “Of the same category”, states “that a general phrase following a list of specific items refers to an item of the same type as those in the list.”<sup>1</sup> Accordingly, the two sets of rules address different matters.<sup>2</sup> The substantive rules, as mentioned above, address the question of the lawfulness of a situation or conduct, procedural rules deal with rule interpretation, implementation and enforcement. There may be indirect and occasional *collisions* between the two, but there is no logical *conflict* between these two sets of rules. This is true for both the relationship between ordinary substantive and procedural rules and for the relationship between substantive rules of a jus cogens character and procedural rules.<sup>3</sup> *Jus cogens* as a preemptory norm of general international law is a norm which is “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

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1. Webster’s New World Law Dictionary, *supra* note 62 at 246.

2. Jurisdictional Immunities of the State, para. 93.

3. Talmon, *supra* note 64 at 10.

norm of general international law having the same character.”<sup>1</sup> Although some authors believe that “the application of a procedural rule does not amount to derogation from substantive rules of *jus cogens*”<sup>2</sup>, in our idea, by applying the rule of immunity, there is an implied agreement between states to suspend the application of a *jus cogens* rule.

Moreover, another distinction is necessary. We must distinguish a procedural rule of a *jus cogens* character from an ordinary procedural rule. The former is a procedural rule which is provided for invoking a substantive *jus cogens* rule. For example, “whether the *jus cogens* prohibition of torture had generated an ancillary procedural rule of a *jus cogens* character which entitled or perhaps required States to assume civil jurisdiction over other States in cases in which torture was alleged.”<sup>3</sup> Although a substantive rule and a procedural rule are not *ejusdem generis*, but a *jus cogens* substantive rule and a procedural rule of *jus cogens* nature originates from the same cause. The special status of a substantive *jus cogens* rule entails an effective and special remedial procedural law; otherwise the substantive *jus cogens* rule is nothing just some letters on the paper. It is accepted that some procedural rules of a *jus cogens* character have been developed which could negate ordinary procedural rules.<sup>4</sup>

#### **4-2-5. PROCEDURAL RULES UNIMPAIRED BY SUBSTANTIVE RULES OF JUS COGENS**

There are several procedural rules which are not affected by Substantive rules of a *jus cogens* nature. The following procedural

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1. Vienna Convention on the Law of Treaties. United Nations, Treaty Series, Vol. 1155, p. 331. Art. 53.

2. Talmon, *supra* note 64 at 10.

3. Jones v. Ministry of Interior of the Kingdom of Saudi Arabia, [2007] 1 AC 270, paras. 45 et seq. (per Lord Hoffmann).

4. Dissenting Opinion of Judge Yusuf, Jurisdictional Immunities of The State, para. 57.

rules may be qualified as good examples.<sup>1</sup>

a) Rules concerning the establishment and composition of a court or tribunal

Establishment and composition of courts or tribunals are governed by several procedural rules. Even in cases of a violation of *jus cogens* such rules cannot be displaced. Violation of a rule of *jus cogens* does not change the procedural rules governing the appointment of judges and arbitrators, their disqualification and dispensation from sitting, the appointment of ad hoc judges and quorum requirements. For example, such violation cannot reduce the required quorum of nine judges constituting the ICJ bench.<sup>2</sup> Any change in terms of required quorum requires the change in the relevant procedural rule.

b) Rules governing the jurisdiction of a court or tribunal

Any court or tribunal is bound to the relevant rules governing its jurisdiction (*ratione personae*, *ratione materiae* or *ratione temporis*). These rules are of procedural nature.<sup>3</sup> ICJ, for example, is open to States for contentious cases.<sup>4</sup> An international organization may not bring an action against a state even in the case of genocide.<sup>5</sup> Another example is Article 35 (1) of the ICJ's Statute which limits the jurisdiction of the court "the states parties to the present Statute." According to the case-law of ICJ the Court is not open to a State not party to the Statute even if the case involves the violation of a substantive rule of *jus cogens* such as genocide.<sup>6</sup> It has been accepted by the ICJ that "the mere fact that [...] peremptory norms of general international law (*jus cogens*) are at issue in a dispute cannot in itself

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1. Talmon, *supra note* 64 at 11.

2. See ICJ Statute, Art. 25(1) and (3), Art. 41; and ICJ Rules of Court, Art. 74(2) and (3).

3. Armed Activities, ICJ Reports 2006, 6 at 24, para. 34; Jurisdictional Immunities of the State, para. 95.

4. ICJ Statute, art. 34 (1).

5. Bringing an action against member State (s) is different.

6. Legality of Use of Force (Serbia and Montenegro v. Germany), Preliminary Objections, ICJ Reports 2004, at 720 .

constitute an exception to the principle that its jurisdiction always depends on the consent of the parties.”<sup>1</sup>

This is the case even with regard to the International Criminal Court (ICC). The jurisdiction of the ICC is limited, among others, to crime of Genocide.<sup>2</sup> Suppose a seventeen year old person committed genocide. The national State, ratified the ICC’s Statute in a due manner, asks the ICC to prosecute the crime. What happen? Does the Court have jurisdiction the deal with genocide? Certainly, YES!<sup>3</sup> Is it able, under its Statute, to exercise its jurisdiction over natural persons? Certainly, YES!<sup>4</sup> Shall the Court have jurisdiction over any person who was under under the age of 18 at the time of the alleged commission of a crime? Certainly, No!<sup>5</sup> Yes, there is some immunity for natural persons under the age of 18, whatever the nature of the crime they commit.

Even in national law, the tribunals and courts are bound to the procedural rules on their jurisdiction. A case concerning mass killing cannot be dealt with by a tribunal whose jurisdiction is limited to family matters, whatever the seriousness of the mass killing. The lack of jurisdiction does not alter the nature of the crime. Genocide is genocide even the available court or tribunal has no jurisdiction to decide about it.<sup>6</sup>

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1. Armed Activities, ICJ Reports 2006, 6 at 52, para. 125. See also, Ibid., 32, para. 64. In this respect. see Matthias RUFFERT, “Special Jurisdiction of the ICJ in the Case of Infringements of Fundamental Rules of the International Legal Order?”, in Christian Tomuschat and Jean-Mac Thouvenin, eds., *The Fundamental Rules of the International Legal Order*, (The Netherlands: Martinus Nijhoff Publishers, 2006). The rule of exhaustion of local remedies is another example that indicates importance of procedural matters in order to enter into merit of a case as a jurisdictional rule. See *Elettronica Sicula S.p.A. (ELSI)*, (United States of America v. Italy), ICJ Reports, 1989, para. 59.

2. Rome Statute of the International Criminal Court, Rome, 17 July 1998, United Nations, Treaty Series, vol. 2187, p. 3, Art. 5.

3. Ibid.

4. Ibid. Art. 25 (1)

5. Ibid. Art. 26.

6. The subject has been mentioned in Diallo case before the ICJ. The Court pointed out that it must be respected relevant domestic procedural matters regarding to expulsion of an alien: “[t]he expulsion of an alien lawfully in the territory of a State which is a party to these

### c) Rules Relating the Admissibility of a Claim or Application

“Rules on the admissibility of a claim, counter-claim or application, such as the rules on capacity to act, nationality of claims, the exhaustion of local remedies and other preliminary procedures before commencing proceedings, time limits, litispence and *res judicata* also qualify as rules of a procedural nature.”<sup>1</sup> A procedural rule governing the admissibility of a case before the ICC is the principle of complementarity.<sup>2</sup> According to this principle, the ICC can only act if national law-enforcement authorities are either unable or unwilling to carry out an investigation or prosecution. If the national courts are truly dealing with the case, the ICC is not able to intervene, unless it establishes that the requirements are met for its intervention.<sup>3</sup> The other issue of admissibility set out in Article 17(1)(c) of the Rome Statute, which prohibits trial in the event of double jeopardy or *res judicata*, also qualifies as a procedural rule unaffected by the *jus cogens* character of the substantive rules in question.<sup>4</sup>

Another example is the requirement that, in terms of torture, any application under the European Convention on Human Rights alleging an act of torture by a High Contracting Party must be brought within a period of six months from the date on which the final decision on the matter was taken by the organs of the High Contracting Party.<sup>5</sup> The statutes of the prohibition of torture as a norm of *jus cogens* nature cannot displace this requirement.

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[international] instruments can only be compatible with the international obligations of that State if it is decided in accordance with “the law”, in other words the domestic law applicable in that respect. Compliance with international law is to some extent dependent here on compliance with internal law...” see Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo), ICJ Reports 2010, para. 65.

1. Talmon, supra note 64 at 16.

2. Rome Statute of the ICC, Art. 17 (1) (a) and also Preamble, para. 10; Art .1.

3. In this regard, see recent decisions on the situations in Kenya and Libya at <<http://www.icc-cpi.int>>

4. Talmon, Ibid. 16.

5. Convention for the Protection of Human Rights and Fundamental Freedoms, Art. 35(1).

It follows, from what mentioned above, that there are some procedural rules which remain unaffected by violation of rule or rules of *jus cogens*. This fact, however, does not alter the nature of such violation(s). It also doesn't mean that there is no other means to give effect to a peremptory norm of general international law which has gained unique status in international law. What really distinguishes a *jus cogens* norm from ordinary norms of international law? There must be a difference between legal consequences of a *jus cogens* violation and the violation of non-peremptory norms. One can assume that *jus cogens* rules violation must have special legal consequences because otherwise the whole concept would not make sense at all.<sup>1</sup> International rule of law obliges any element of the international community; *inter alia*, the ICJ, to respect the law. This, however, must not be understood as the final step. As it should be shown below, international law, as a changing social phenomenon,<sup>2</sup> is subject to substantial developments, which are welcomed.

d) Interpretation of rule of immunity in light of rationale of Sovereignty

The main question here is about the main *rational* for sovereignty. The doctrine of sovereign immunity developed to protect the sovereignty and sovereign equality of States. Sovereign immunity accomplishes these aims by preventing one State from exercising jurisdiction over another without the latter's consent. To preserve sovereign equality among States, the doctrine holds that States are generally immune from suit for acts taken in exercise of their sovereign power.<sup>3</sup> It is well established that States are generally

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1. See generally, Stefan Kadelbach, "Jus Cogens, Obligation Erga Omnes and other Rules-The Identification of Fundamental Norms", in Christian Tomuschat and Jean-Mac Thouvenin, eds., *The Fundamental Rules of the International Legal Order*, (The Netherlands: Martinus Nijhoff Publishers, 2006).

2. Rosalyn Higgins, "International Law in a Changing International System" (1999) 58 *Cambridge Law Journal* 78.

3. Separate Opinion of Judge Koroma in *Jurisdictional Immunities Case*, para. 4.

entitled to immunity for *acta jure imperii*.<sup>1</sup> However, the original aim of state immunity law was to enhance, not jeopardize, relations between states.<sup>2</sup>

Finally, a more recent analysis is carried out by May, who nonetheless limits his theoretical inquiry to crimes against humanity.<sup>3</sup> He starts his analysis from the assumption that states must protect a basic minimum of individual rights. Thus, sovereignty can legitimately be breached by the entire international community if states commit international crimes, since these crimes are violations of this minimum protection provided under peremptory international law.<sup>4</sup> According to what he calls the ‘international harm’ principle,<sup>5</sup> the international community has a legal interest to react against crimes committed by states or targeting a whole social group. In particular, when such crimes are committed by states, sovereignty dissolves, and state organs can be prosecuted.

According to Judge Trindade “what jeopardizes or destabilizes the international legal order, are the international crimes, and not the individual suits for reparation in the search for justice. In my perception, what troubles the international legal order, are the cover-up of such international crimes accompanied by the impunity of the perpetrators, and not the victims’ search for justice.”<sup>6</sup> “Grave breaches of human rights and of international humanitarian law, amounting to international crimes, are not at all acts *jure imperii*”, they constitute, what we call, *acta contra jus cogens*. The State immunity, if used as a justification in terms of *acta contra jus cogens*, would block the access

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1. Ibid., para. 5.

2. Caplan, *supra* note 34 at 744.

3. L. May, *Crimes against Humanity: A Normative Account* (Cambridge: Cambridge University Press, 2005).

4. Ibid., pp. 68–71.

5. Ibid., pp. 80–95.

6. Dissenting Opinion of Judge Cancado Trindade, *supra* note 4 para. 129.

to justice, contribute to impunity, undermine international rule of law, destabilize international relations, and forfeit human beings in favour of sovereignty, which must be in the disposal of human beings. It is true that “[i]nternational law without states has no fruit and states without the advantage of international law have no root and individual rights would have to be adequately protected throughout the world in order to avoid global conflagration”,<sup>1</sup> but, without the individuals there will be no state.<sup>2</sup> Human being is the end and State is nothing but a means. This proposition is endorsed by the doctrine of “Responsibility to protect”. The doctrine, truly, translates the concept of the sovereignty.

### 5. ACTA CONTRA JUS COGENS: AN EMERGING EXCEPTION

The doctrine of foreign state immunity, like most legal doctrines, has evolved and changed over the last centuries, progressing through several distinct periods.<sup>3</sup> The first period, covering the eighteenth and nineteenth centuries, has been called the period of absolute immunity, because foreign states are said to have enjoyed complete immunity from domestic legal proceedings. The second period emerged during the early twentieth century, when Western nations adopted a restrictive approach to immunity in response to the increased participation of state governments in international trade. This period was marked by the development of the theoretical distinction between *acta jure imperii*, state conduct of a public or governmental nature for which immunity was granted, and *acta jure gestionis*, state conduct of a commercial or private nature for which it was not. This distinction

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1. Bankas *supra* note 4 at 298.

2. Hersch Lauterpacht, *The Function of Law in International Community*, (Oxford: Oxford University Press, 1933) 430-431. Theodor Meron, *The Humanization of International Law*, (The Netherlands: Martinus Nijhoff Publishers, 2006).

3. For a general overview of the development of the doctrine, see Gamal Moursi Badr, *State Immunity: An Analytical and Prognostic View*, (The Netherlands: Martinus Nijhoff, 1984) pp. 9-62.

rested on the growing notion that the exercise of jurisdiction over *acta jure gestionis* did not affront a state's sovereignty or dignity. Since applying the public/private distinction proved difficult for many courts,<sup>1</sup> some states, particularly the common-law countries, developed a functional variation on the restrictive approach in the 1970s and 1980s, replacing that hazy distinction with national immunity legislation.<sup>2</sup> Developments of international law imply a new distinction with regard to the acts of state. The first line was between the *acta jure imperii* and *acta jure gestionis*.<sup>3</sup> A new emerging exception to state immunity is the incompatibility of a sovereign act with *jus cogens* norms, which we call it *acta contra jus cogens*.

The question of burden of proof is of significance. In such cases, a triple stage burden of proof may be used: (a) the forum State would bear the burden of proof as to its claim of jurisdiction to adjudicate; (b) the respondent State would then bear the burden of proof in respect to its claim of sovereign immunity; and (c) the forum State would, again, bear the burden of proof with regard to its claim that in the particular case an exception to sovereign immunity, including *acta contra jus cogens*, applies.

This approach has been employed by the International Court of Justice in the Arrest Warrant (Yerodia) case. When confronting with the

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1. See, e.g., *Ibrantsen Tankers v. President of India*, 446 F.2d 1198, 1200 (2d Cir. 1971).

2. For example, the U.S. Foreign Sovereign Immunities Act of 1976, 28 U.S.C. §§1330, 1602–1611 (2000), and the UK State Immunity Act, 1978, were products of this movement.

3. Another exceptions as have stated in the United Nations Convention on Jurisdictional Immunities of States and Their Property (2004) are some of articles in the part II such as express consent to exercise of jurisdiction (Art. 7), effect of participation in a proceeding before a court (Art. 8), and generally, part III such as counterclaims (Art. 9), commercial transactions (Art. 10), contracts of employment (Art. 11). Some of these exceptions, of course, are not accepted as a customary international law rule. This position stated by the Court in recent case on the claim personal injuries and damage to property (Art. 12 of the UN Convention) that provoked by Italy in its first argument titled the territorial tort principle. In that regard, the Court considered “that customary international law continues to require that a State be accorded immunity in proceedings for torts allegedly committed on the territory of another State by its armed forces and other organs of State in the course of conducting an armed conflict...” see *Jurisdictional Immunities of the State*, para. 78.

question of whether the principle that foreign ministers enjoy personal immunity from the criminal jurisdiction of foreign courts during their term of office extended to charges of war crimes or crimes against humanity, the Court inquired into State practice as to whether it warranted the conclusion that an exception as to these kinds of crimes was accepted. The inquiry resulted in a negative reply and then the majority held that the foreign prosecution was incompatible with international law because it violated the basic rule of personal immunity.<sup>1</sup>

Existing State practice, including treaties in force, national legislations and judicial decisions, is insufficient to support the existence of a specific *jus cogens* exception to the jurisdictional immunity of States although this only proves that States do not recognize an obligation to make such an exception, and not necessarily that they do not consider themselves entitled to do so.<sup>2</sup> The emerging exception is endorsed by some interested national courts, although the ICJ didn't pay due attention to this point. In general, States do not stand behind a "veil of ignorance" when they participate in the international lawmaking process. Instead, they are keenly aware of the consequences in relation to their own interests which a certain legal rule might have. The ICJ, previously, took this into account when it held that for the purpose of finding a rule of customary international law, the *practice of States whose interests are specially affected is of particular importance*.<sup>3</sup>(emphasis added) Italy and Greece are the states *whose interests are specially affected*. Accordingly, their practice as to *acta contra jus cogens* exception to state immunity is of high importance. The Court in its Judgment in the Jurisdictional Immunity Case

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1. Case Concerning the Arrest Warrant of 11 April 2000, 536, at 56 et seq. As was already decided in the Asylum case, ICJ Reports 1950, p. 266 at 276: "The Party which relies on a custom ... must prove that this custom is established in such a manner that it has become binding on the other Party."

2. Thomas Giegerich, *supra* note 54 at 216.

3. North Sea Continental Shelf cases, ICJ Reports 1969, p. 3 at 74.

displaced this development.

It must be recalled that “The original aim of state immunity law was to enhance, not jeopardize, relations between states.”<sup>1</sup> Here another conflict exists. If a State commits an *acta contra jus cogens* and it is immune from jurisdiction of judicial means and there will be no competent international mechanism, the international legal order, including relations between states, shall be jeopardized. If the *acta*, depending on the case, is an international crime, it remains unpunished. By this way immunity contributes to impunity. Again, if national courts of other States try the *acta*, the foreign State immunity should be violated and relations between states may not be enhanced, but may be jeopardized. A balance need to be made. It is necessary to keep in mind that *jus cogens* rules “generate strong interpretative principles which will resolve all or more apparent conflict”.<sup>2</sup>

we like to finalize our debate here by the statement of the Permanent Court, in the Mavrommatis Palestine Concessions: “It is an elementary principle of international law that a State is entitles to protect its subjects, when injured by acts contrary to international law committed by another State, from whom they have been unable to obtain satisfaction through the ordinary channel.”<sup>3</sup> To this one may add the *rasin detere* of the doctrine of responsibility to protect. In the light of the current developments, the State is required to protect its subjects, namely not only its nationals but also other human people under her control.

## 6. CONCLUDING REMARKS

The Jurisdictional Immunities Case provided a good opportunity for the principal judicial organ of the UN to analyze the critical issues. These issues include the scope and extent of State immunity in

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1. Caplan, *supra* note 34 at 744.

2. International Law Commission Draft Articles on State Responsibility for Internationally Wrongful Acts, *supra* note 9 at 107.

3. Mavrommatis Palestine Concessions, 1924, P.C.I.J., Series A, No. 2, p. 12.

international law and the derogations that may be made from it; the exact meaning and scope of *jus cogens* rules and their effects on procedural rules; and the role of domestic courts in the identification and evolution of international customary norms, particularly in the area of State immunity.<sup>1</sup>

Considering the existing international rules, the international Courts, namely the European Court of Human Rights and International Court of Justice in the context of the present article, didn't find any conflict between a *jus cogens* rule of international law and rules regarding State immunity. The special status of *jus cogens* norms does not affect the jurisdictional rules governing the composition and jurisdiction of the courts. Lack of jurisdiction because of State immunity does not alter the nature of an unlawful act contrary to rule of *jus cogens* nature. The findings of the Courts show that there is no *jus cogens* exception to the rules of international law on State immunity. They also leave the room open for development of new rules on State immunity.

The historical evolution of international law forces us to reconsider our concepts of international law. In particular, two major points must be kept in mind: developments in the field of international human rights and the special status of *jus cogens* norms. The nature of rule of immunity has changed over time and no doubt will continue to change in the direction of a narrowing of immunity. State immunity must not be construed as becoming State impunity. Because of these considerations, in our idea a new exception to State immunity is emerging: *acta contra jus cogens*.

At the end, we need “[...] to ensure that the rules on State immunity do not lead to impunity for perpetrators of serious human rights violations”<sup>2</sup> and serious breaches of *jus cogens* rules. ❖

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1. See Dissenting Opinion of Judge Yusuf in the Jurisdictional Immunities Case, para. 3.

2. Secretary-General, “Follow-Up to the Secretary General’s reports under Article 52 ECHR on the question of secret detention and transport of detainees suspected of terrorist acts, notably by or at the instigation of foreign agencies” (SG/Inf (2006)5 and SG/Inf (2006)13) at para. 2