

Review Paper

The Legal Basis of Excluding International *Jus Cogens* Norms from the Jurisdictional States' Immunity: A Review

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Abstract

The purpose of this article is to address the problem of whether the jurisdictional immunity of the States should indeed be suspended if a case was brought before national courts against a foreign country for civil compensation for violations of international *jus cogens* norms? Here, important questions are raised which the article will seek to address and answer: Is it conceivable that there is a contradiction between the jurisdictional immunity of the State and the peremptory international *jus cogens* norms? Does the norm of *jus cogens* prevail over the norm of judicial immunity of a State in the event of conflict? This article is based on several hypotheses that it sought to prove and to substantiate their authenticity in the light of the current state of international law which has become a functional concept of State sovereignty and makes human rights and freedoms one of its fundamental pillars.

Keywords: International law; *jus cogens* norms, States' immunity; universal civil jurisdiction; international crimes; gross violations of human rights

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Introduction

Many international law scholars are increasingly concerned about granting States judicial immunity, particularly in cases of serious or gross violations of human rights and of international *jus cogens* norms. One of the legal arguments and pretexts they advocate in this context is that the jurisdictional immunity of a State must be suspended when there is a violation of an international law norm in the interest of international public law and for the preservation of the dignity and rights of individuals. It is established in international law treaties that norm a *jus cogens* norm is a norm of general international law "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". This definition is set out in article 53 of the 1969 Vienna Convention on the Law of Treaties, Which stated that a treaty is considered invalid in case it violates international *jus cogens* norms. Since Article 53 establishes the consequence for violation of *jus cogens* norms within the scope of international law treaties, a questioned arises on whether the effects should only be applied on international treaties or could it be withdrawn outside the scope of (article 53) to include other areas such as the jurisdictional immunity of a State as a customary norm of international law?

In other words, the scope of the current study is to examine the relationship between international *jus cogens* norms and the jurisdictional immunity of a State, particularly in cases where the operation of jurisdictional immunity would result in the loss of the protection established by the international peremptory or *jus cogens* norms. Here, important questions are raised which the article will seek to address and answer: Is it conceivable that there is a contradiction between the jurisdictional immunity of the State and the peremptory international *jus cogens* norms? Does the norm of *jus cogens* prevail over the norm of judicial immunity of a State in the event of conflict? Also, does granting jurisdictional immunity to States in case of a violation of an international *jus cogens* norm contradicts the obligation of States to not to recognize situations that contravene international norms — in accordance with the law of international responsibility. Finally, is not the international *jus cogens* norm has a dynamic character in the contemporary

international legal system, making it a way of guiding and modifying state practice, including those relating to the jurisdictional immunity of the state and not merely norms of conflict as stated in article 53 of the Vienna Convention on the Law of Treaties?

If it is true to say from the standpoint of traditional trends in international law that when national courts exercise jurisdiction over a foreign State that it has conducted a contrary act to the equality of States and contradict its sovereignty, the contemporary international law trends consider that the jurisdictional immunity of a State is a well-established customary principle, but modern international law does not contain customary norms defining the content, scope and permissible exceptions to such immunity. They add that such scope and exceptions should be determined in the light of developments within the international legal system, notably the evolution of international protection of human rights and the theory of international peremptory norms. This article is based on several hypotheses that it sought to prove and to substantiate their authenticity in the light of the current state of international law which has become a functional concept of State sovereignty and makes human rights and freedoms one of its fundamental pillars. The article is based on the premise that, while the jurisdictional immunity of a State is a part of the customary international law, its scope and endorsed exceptions are not yet defined in customary international law, and the notion of absolute immunity is no longer found in contemporary international law because it was the secretion and consequences of the traditional international law in which the State, its sovereignty and interests were the pole while this is no longer the case in the contemporary international law, especially with the recognition of common values and ideals that transcend the personal interests of States and constitute together a general international system, protected by a set of international norms defined as jus cogens norms.

While the idea of jurisdictional immunity of a State was consistent and stable in international law, contemporary practice regarding its limits, scope and exceptions was neither uniform nor systematic. It seems to be accepted today and generally; the jurisdictional immunity of the State is no longer considered absolute, but rather the contrary, contemporary international law introduces a restrictive notion of such immunity. This is a trend that was clearly enshrined in 2004 by the United Nations Convention on Jurisdictional Immunities of States and their properties, which has a restrictive concept of immunity.

The purpose of this article is to address the problem of whether the jurisdictional immunity of the States should indeed be suspended if a case was brought before national courts against a foreign country for civil compensation for violations of international jus cogens norms?

Based on the foregoing, the structure and results of this study have been presented in a way to reflect its basic problem and hypotheses as mentioned, thus the article will address the following points: the relationship between jus cogens norms protecting human rights and jurisdictional immunity of the State, the withdrawal of sovereign privilege excluding the jurisdictional immunity of a State as a result of a conduct involving the violation of international jus cogens norm and, finally, the exclusion of jus cogens as a protector of the contemporary international legal law from that immunity, especially that the International Law Commission had emphasized that one of the common features of international jus cogens norms was that it is not only concerned with the legal norms in their sheer sense but also considers their ethical-side and the requirements of international public law, as its work is not only limited to the law of treaties because its violation entails the establishment of civil State responsibility and the individual's criminal responsibility, as the breach is an international crime.

Violations of Jus Cogens Human Rights Norms Should Suspend States' Jurisdictional Immunity

Due to the internationalization of the legal protection of human rights the contemporary international law was subjected to many structural changes and developments, and many norms of international human rights law have become international norms of jus cogens, since it is linked to fundamental and pivotal values of the contemporary international community which in return, led to an increasingly important trend that calls for the disruption of the jurisdictional immunity of the State to the detriment of those peremptory norms of humanity. This trend has also been reinforced by the fact that contemporary customary international law does not contain any norm prohibiting the disruption of the jurisdictional immunity of a State when it commits violations of fundamental human rights. The below is an analysis of the impact of these two issues on the relationship between international jus cogens norms and the jurisdictional immunity of the State.

An Increasing Trend to Disrupt the Jurisdictional immunity of the State to The Detriment of Fundamental Human Rights

One of the recent theories of many scholars and practitioners of international law to justify the need to disrupt the jurisdictional immunity of the State to the detriment of international jus cogens is the theory that binds this to the existence of gross violations of human rights, thus the norms on the jurisdictional immunity of States must be discontinued by national and international courts when there is a violation of a jus cogen norm of international human rights law.¹ In theory, if the courts of a state exercised jurisdiction over a foreign State, this act contradicts the principle of the sovereign equality of States. However, the evolution of customary international

¹ Sevrine Knuchel, "State Immunity and the Promise of Jus Cogens", *Northwestern Journal of International Human rights Law*, vol.9, 2011, no.2, pp.152ss.

law and the emergence of public norms (an argument for all) in several areas, foremost among them human rights, require that the jurisdictional immunity of a State not be absolute. The principle of absolute jurisdictional immunity has long been replaced by the principle of restricted jurisdictional immunity and has been adopted by the United Nations Convention on the Jurisdictional Immunities of States and their properties in 2004 but not in jus cogens but in relation to business and employment contracts.

The idea of restricted immunity had become the idea of international law, although there was disagreement about the scope of such derogation. Many practitioners of international law propose the incorporation of human rights jus cogens norms into the limitations of the jurisdictional immunity of the State. Human rights have become international rights. Victims of gross violations of human rights have initiated recourse to national courts to prosecute foreign states for such violations. International human rights law obligates States to provide redress to victims of violations wherever they are committed. This is putting pressure on states to remove obstacles to their national courts, which gives the impression that contemporary international law tends to consider the jurisdictional immunity of a state as an unacceptable impediment to violations of human rights and, in, to grave breaches of international norms. International practice has shown that several legal norms relating to human rights have become jus cogens.

The trend of human rights as a basis for restricting the jurisdictional immunity of the State suggests that the function of contemporary jus cogens in international law is not only confined to the laws of treaties, especially as they relate to ethical considerations and the requirements of international public law². For this reason, the violation of peremptory norms of international law calls for the responsibility of the State and for it to be civilly sued. In addition, of course, to the criminal accountability of the individual or individuals who committed the violation? Because the breach of peremptory international norms impinges on the interests of the international community; rather than the personal interests of the State, the principle of universality in these violations, both civil responsibility and criminal liability, have been emphasized in various human rights conventions.

The United Nations on jurisdictional immunities of States and their properties did not include a provision removing jurisdictional immunity of the State in civil compensation cases against States that have committed serious human rights violations. The Convention had been criticized for that reason, although the Working group established by the International Law Commission of the United Nations for the preparation of the Convention indicated that it had not included such an exception because it had failed to find a systematic and uniform pattern of behavior among States in that area³. Thus, referencing to the discretion of the convention, can we say that the issue had been settled in international law?

It is not easy to affirmatively answer that question, especially since the above mentioned Working group has referred to current developments and is significant and should not be overlooked. It is also noted that some national courts have shown a positive attitude towards the cessation of the jurisdictional immunity of the State in the event of a person dying or being severely harmed by actions caused by a state which involves a breach of international human rights that have the characteristic of jus cogens, such as: prohibition of torture, racial discrimination and genocide.

This trend, which is an increasing and growing trend in international practice, may lead to general, systematic and uniform behavior supported by States by being obligatory as law, thus creating a global customary norm. In ratifying the United Nations Convention on Jurisdictional Immunities of States, several States had kept the opportunity open for such possibility when they emphasized that the Convention would not affect or detract from any future development that might fall within the international legal system of human rights protection.⁴

The suspension of immunity in favor of human rights is based on two jurisprudence of national courts in Greece and Italy. In 2000, the Supreme Court of Greece considered a civil claim for damages arising because of the commission of Crimes against a civilian population by German soldiers in a Greek village during the Second World War. The court dismissed the jurisdictional immunity of the German state because German soldiers had committed violations of international norms which protected several fundamental human rights.⁵ The second case is the case (*Ferrini*) of the Italian Court of Cassation in 2004, in which the Court refused to act on State immunity in relation to the claim for damages suffered by an Italian civilian because he was deported to labor camp in Germany. What prompted the aggrieved to resort to Italian courts as he failed to obtain compensation from the German court? In its judgment, the Italian Court of Cassation made it clear that deportation and forced labor constituted gross violations of human rights, which were international crimes involving a breach of international norms.⁶ In this context, it should be noted that in 2008 Germany initiated proceedings against Italy before the ICJ because of the judgment in the *Ferrini* case. The court had ruled in the case in 2012 and had

² Special Rapporteur, 3d Report on Law of Treaties, Commentary on art. 17, U.N. Doc. A/CN.4/SER.A/1958/Add.1.

³ Report of Working Group on Jurisdictional Immunities of States and their Properties, U.N. Doc. A/CN.4/SER.A/1999/Add.1.

⁴ These States are : Sweden, Norway, Switzerland. See http://treaties.un.org/pages/viewDetails.aspx?Src=TREATY&mtdsg_no=III-13&chapter=3&Lang=en#End Dec.

⁵ *Prefecture of Voiotia v. Federal Republic of Germany*, Case no. 11/2000, *Aerios Pagos*, (Hellenic Supreme Court) , 4/5/2000, 129 ILR, p.514. Maria Gavourelis and Elias Bantekas, Case Report : *Prefecture of Voiotia v. FRG*, AJIL, vol.95, 2001, p.198ss

⁶ Carlo Focarelli, *Federal Republic of Germany v. Giovanni Mantelli and Others*, Order no.14201, AJIL, vol.103, 2009, p.122.

held Italy responsible for that judgment because its national courts had breached the principle of German judicial immunity. It cannot be said that the court's ruling contravenes the idea of excluding peremptory norms protecting number of human rights from the scope of immunity, because they relied on the absence of a real conflict between substantive and procedural norms and did not envisage conflict between them. The ruling of the International Court of Justice had been criticized very much, and it had been seen that the court had evaded the determination of the problem by stating that immunity as a procedural norm prevented consideration of the subject of the dispute as a starting point, and thus did not consider the conflict between gross violations of human rights as violations of international norms and State immunity. In its judgment, the court appears to have contravened the current state of customary international law.

Absence of a General Customary Norm Requiring Immunity to be served when Fundamental Human Rights Are Violated

Some scholars and specialists affirm the existence of a regular, unified and universal international practice that reinforces the assertion that there is a general customary norm that requires respect for the jurisdictional immunity of the State. While, other questions this and are collecting evidences that there is no systematic and uniform behavior in this area.⁷ Those sceptics of the existence of a customary norm of jurisdictional immunity of States sees that it is difficult and perhaps impossible to form a customary international law of State immunity because of the lack of a systematic and uniform practice by States, especially as the jurisdictional immunity of a State has become one of the subjects regulated by the National law of States and there is no consensus among States on the exceptions they may face.⁸

Some may be surprised of the fact that there is no customary norm in contemporary international law, especially since there is a common idea that is echoed by many diplomats and politicians that the jurisdictional immunity of the State is sacrosanct and that it is one of the foundations and pillars of the international law. The misunderstanding of this issue is due to the confusion in their minds between the traditional era of international law and the contemporary era. In the traditional era, the dominant understanding of the jurisdictional immunity of the State was that it was absolute, and there was no doubt about the general customary character of this principle. It is in line with the idea of the sanctity of sovereignty that dominated traditional international law; unfortunately, it still seems to be the dominant understanding in the minds of number of diplomats, jurists and politicians in our Arab countries. But this is not the case in contemporary international law. The jurisdictional immunity of the State is no longer absolute and the concept of sovereignty has become functional and not absolute; which must be reflected in the customary character of the principle of the jurisdictional immunity of the State, especially since that the contemporary international law has not yet come up with a clearly defined and guaranteed alternative norm.⁹

We cannot invoke the national laws governing the jurisdictional immunity of the State to say that there is a general customary norm. National laws are not intended to entrench what is inherently a sovereign act but aim to fortify what the national legislator decides to fortify. National laws on the jurisdictional immunity of a foreign State prevent national courts to express its opinion on how the topic should be regulated under contemporary international law, which would lead to an act and a law that would make it difficult to rely on the conduct of national courts to determine the role of contemporary international law on the jurisdictional immunity of the State.

This is the case with respect to judicial conduct and its relationship with the customary character of State immunity. Another evidence that could be relied upon was the international treaties on State immunity, such as the United Nations Convention on Jurisdictional Immunities of the State and the European Convention on State Immunity. Thus, do these treaties reveal a custom norm or have they contributed in the creation of a custom norm?

The basic criterion in answering this question is the behavior of States. It is apparent that the conventions in the mentioned question have not contributed to the emergence of a general or global norm till now. For a treaty to be valid for the formation of a general or universal customary norm, it must be widespread and there should be general and broad acceptance; which is not yet available for the United Nations Convention on Jurisdictional Immunities of the State, as the number of States parties is 36 till now. Whereas, The European Convention is a regional convention with a limited number of parties; 7 States parties to this moment.

If so, could it be said that states that had enacted national legislation governing the jurisdictional immunity of foreign States had done so in the belief that there was a customary international obligation on them?

There is no doubt that in some cases national legislators consider the requirements and obligations that international law imposes on their states. However, in the case of jurisdictional immunity of States, it was not easy to say so because the number of States that had adopted national legislation was much lower than those that had not enacted similar legislation which means that States are not bound by international law to do so, and that they have a uniform conviction or opinion juris regarding the obligation of that matter. It is

⁷ Xioadong Yang, "State Immunity in International Law", Cambridge: Cambridge University press, 2012, p.43; Rosalyn Higgins. "Problems and Process: International Law and How We Use It", Oxford ; Oxford University press, 1994, p. 81.

⁸ Alexander Orakhelashvili, "Peremptory Norms In International Law", Oxford : Oxford University Press, 2006,p,335.

⁹ *Ibid*, p.336.

concluded from the States attitude towards the theory of the jurisdictional immunity of a State that it is not uniform and that it has not yet unified on its scope and content, as each state determines for itself the limits of such immunity and its exceptions. States recognize the principle of immunity but do not agree with their viewpoints and the security of restrictions that may be found.¹⁰ Also, the absence of a particular norm of general international law requires States to recognize the jurisdictional immunity of the State in their national legal systems.

In legal terms, States grant immunity to foreign States for sovereign and private acts, but they do not do so in pursuant to a customary international obligation of immunity of the jurisdiction of the foreign State, but in the context of determining the jurisdiction of the State itself and based on specific considerations such as interest and reciprocity. In other words, when States recognize jurisdictional immunity for others, they proceed to defining the jurisdiction of their national courts rather than applying a customary international obligation. Under customary international law, States are not obliged to exercise jurisdiction which interfere with their international obligations, those arising from international jus cogens norms relating to fundamental human rights. Here we come to a delicate question in the context of our study which is the difficulty of finding justifications justifying state immunity for gross violations of peremptory norms of international human rights law, such as the prohibition of torture, the prohibition of Genocide and the prohibition of apartheid.

One may reply to the previous conclusion: the national courts of many States continue to take the immunity of the civil State in cases involving gross violations of human rights. The judgments of the Canadian, French and British courts may be cited in the following cases, respectively: *Bouzrai v. Iran*, *Biochron v. Germany*, *Jones v. Saudi Arabia* and *Al-adsani v. Kuwait*. As in the *Adasani v. Kuwait* case, the British court, and Canadian courts in the *Bouzari v. Iran* case, relied on the notion of jurisdictional immunity of the foreign State, and issued a judicial ruling justifying the absolute deprivation of the victims of torture in foreign states from any remedy, compensation. Contrary to these provisions, which may be adhered in response to our previous analysis, what we have achieved through this analysis has shown clearly that the current state of customary international law does not in any way support the trend adopted by the latter courts. It is not enough for the courts to speak of the existence of general customary norms but rather to establish their existence, which was not done by all the courts that had normd on the cases referred to. This finding is supported by the correlation of gross violations of the norms of international human rights law of a peremptory nature with universal jurisdiction.

Universal jurisdiction reinforces the exception of international jus cogens norms on human rights

One of the arguments underpinning the proponents of the exception of gross violations of human rights is the theory of universal jurisdiction. They say that, at the moment when the universal jurisdiction of national courts is held, there is no sense of excluding acts committed on the basis of official status from its scope. The jurisdictional immunity of a State is incompatible with the principle of universal jurisdiction over violations of peremptory norms of international law, including those relating to fundamental human rights.

Contemporary international law is based on the principle of universal jurisdiction over gross human rights violations in the absence of a territorial link or a link of nationality, in the interest of safeguarding the International law. Many of the justices of the House of Lords in the Pinochet judgement referred to this matter by affirming the difficulty of reconciling the jurisdictional immunity of the State with the principle of jurisdiction universality,¹¹ especially since the violation of jus cogens in general violates the interest of the entire international community and is compensated for and treated for the benefit of this whole international community as well.

The fact that the redress of human rights violations of jus cogens is linked to the public interest and not to the personal interests of States inevitably justifies the introduction of civil universal jurisdiction.¹² In addition, universal jurisdiction had to be seen as a universal jurisdiction for both civil and penal jurisdictions, unless a clear statement is provided. If the conduct is covered by the criminal universal jurisdiction, why is it not subject to civil universal jurisdiction?!

If we looked at the sources of international law realistically, we would find many international instruments and texts that support criminal universal jurisdiction that express the will of the international community as a whole, but we will not find the same size of international instruments and texts that support the introduction of civil universal jurisdiction. This does not preclude the assertion that sources of international law support this form of universal jurisdiction. In addition, there are sufficient cases in which the courts have confirmed the introduction of civil universal jurisdiction.

As in one case that the American judiciary has handled, the European Commission of the European Union (EU) as the plaintiff of the case clarified, unlike criminal universal jurisdiction, civil universal jurisdiction is not established in international law. In contrast, however, the Committee recognized that civil universal jurisdiction could be based on violations under the criminal universal jurisdiction. In such a case, its practice is subject to the same conditions, standards and controls that govern the practice of the validity

¹⁰ Xioadong Yong, *supra* note 8, p.340.

¹¹ Andrea Bianchi, "Immunity Versus Human Rights: The *Pinochet* Case", E.J.I.L, Vol. 10, 1999, no.2, p.253. www.ejil.org > pdfs.

¹² Michael Swan, "International Human Rights Torts and the Experience of US Courts", in Craig Scott (ed.), "Torture as Tort : Comparative Perspective on the Development of Transnational Human Rights Litigation", Hart Publishing, 2001, p.91.

of the criminal universal jurisdiction.¹³ Another case that may be referred to in this context is the previous judgement of the International Criminal Tribunal for the former Yugoslavia in the (*Furundzija*) case, where the court explained that the victims of torture were unable to obtain compensation in the country where they have been subjected to torture, but they are entitled by public international law to raise a case before a foreign court.¹⁴

There are several national courts that have confirmed this trend. In the *Flartiga* case, a federal Court of the United States condemned the torture committed by Paraguayan authorities against a Paraguayan citizen and granted compensation for the damage suffered. Other United States courts have also issued similar rulings confirming the customary and universal character of the prohibition of torture and have granted compensation to the victims of torture in foreign states despite the absence of any link between the United States and the cases. As, in both cases (*Marcos Jano*) and (*Hilao Marcos*), one of the United States Courts of Appeal considered the torture of the plaintiffs by a foreign State outside the American territory and described it as a conduct prohibited under international norms, and that, as a result, the Court was empowered to award civilian compensation to the victims. The court found that the United States Alien Tort Act did not include acts of torture unrelated to it but on the other hand, it relied on the peremptory status of the prohibition of torture to extend its civil universal jurisdiction over the two cases.¹⁵

In the above mentioned cases, the American courts relied on the peremptory, customary and universal character of the norms that had been violated. Moreover, in the *Flartiga* case, the court had argued that torture was the enemy of all humanity to establish civil responsibility in the same manner as in criminal cases of torture. Based on the practices we have dealt with above, it can be said — at least from our point of view — that the logical consequence of such practices is that, if the conduct is unlawful because of its incompatibility with a jus cogens norm, all States may extend their civil jurisdiction over that violation.

The position of the American courts is not an isolated one. In the *Ferrini* case, the Italian Court of Cassation adopted the principle of civil universal jurisdiction in the event of acts involving a breach of jus cogens international norms.¹⁶ It is apparent that civil universal jurisdiction over violations of peremptory international norms relating to fundamental human rights is obligatory. This is evidenced by article 14 of the United Nations Convention against Torture and Other Cruel, inhuman or degrading Treatment or punishment. This article obliges States parties to ensure, in their national legal systems, a fair and effective remedy for victims of torture and their heirs in case of death. It should be noted that article 14 does not in itself establish a universal civil jurisdiction but includes an obligation to exercise that jurisdiction. It does not require that torture take place in the territory of the State which will conduct universal jurisdiction nor the existence of a link between them and the torture.

However, some scholars raised doubts to the basis of the holding of a universal civil jurisdiction under article 14, citing the article is not clear and does not contain precise details, as is the case with articles (5) and (7) of the United Nations Convention against Torture and Other Cruel, inhuman or degrading Treatment or punishment, which deal with the subject of criminal jurisdiction over torture on a territorial, personal and universal basis.¹⁷

It can be said that this criticism is not correct at the conceptual and practical levels. Conceptually, this criticism confuses the establishment and operation of civil universal jurisdiction with compensation, especially as the supporters of this opinion doubts about the acceptance of the Convention by the States parties under article 14 of judicial obligations including a provision for compensation by national authorities. That is why we have said that there is a conceptual confusion among the jurists of this criticism, because the obligation to establish or operate a civil universal jurisdiction does not impose a duty on the state and does not necessarily entail a commitment to provision of compensation for torture occurring outside the territorial jurisdiction of the State which recognizes that universal jurisdiction, as the compensation is the responsibility of the foreign State that committed the torture and not to any other state.

The bottom-line, article 14 of the Convention against Torture requires States to introduce civil universal jurisdiction and it is a fully consistent result with a pioneer interpretation of the article (interpretation in the light of the subject and purpose of the Convention against Torture). According to this interpretation, article 14 must be read with the purpose of the Convention: to eliminate immunity and to facilitate compensation for victims of torture, which requires that this article be interpreted broadly to encompass both criminal and civil universal jurisdiction. There is a lot of law cases which support this functional interpretation, where, for example, the German constitutional Court has made it clear that article 6 of the Convention on the Prevention and Punishment of the Crime of Genocide which provides territorial jurisdiction only, allows States parties to conduct universal jurisdiction by reference to the object

¹³ E. C. Amicus Curaie, “Brief in *Sosa v. Alvarez – Mochain*, 23 January 2004, paras. 17 and 21-22.

¹⁴ ICTY, IT-95-17/I-T, para. 155.

¹⁵ Alexander Orakhelashvili, “Peremptory Norms”, *supra* note 9, pp.342 *seq.*

¹⁶ De Sena and F. De Vittor, “State Immunity and Human Rights: The Italian Supreme Court Decision on *Ferrini* Case”, E.J.I.L, vol. 16, 2005, p.103.

¹⁷ Byrnes, “Civil Remedies for Torture Committed Abroad : An Obligation under the Convention against Torture?”, in Scott (ed.), “Torture as Tort”, *supra* note 13, p.542.

and purpose of the Convention, which is to ensure the prosecution of perpetrators, the removal of immunity and the prevention of impunity. If we apply the same approach to the United Nations Convention against Torture, the justification for civil universal jurisdiction in case of article 14 of the Convention is easier than in the case of article 6 of the Convention on the Prevention of the crime of genocide, because article 14 does not contain a specific limitation of the exercise of jurisdiction specifically, such as territorial competence, as is the case in article 6 of the Convention on the Prevention and Punishment of the Crime of genocide.

It seems that the Committee against Torture adopts the trend in favor of the inclusion of article 14 for both penal and civil universal jurisdiction, which has included the Committee's concerns in its concluding observations on the report of Canada, noting that it was disturbed by the absence of effective measures to ensure access to civil compensation for victims of torture in all cases, and Canada recommended that it should revise its actions with regard to article 14 in order to ensure provision of access to compensation through its national civil courts to all victims of torture where torture has occurred and regardless of their nationality Or the nationality of the perpetrators.¹⁸

It is not an offence that the Committee against Torture is in a better position than the individual States parties to determine the adoption of the provisions of the United Nations Convention against Torture, especially since this article is linked to an international norm, which is the prohibition of torture. The Association of a legal provision with an international norm would inevitably have an impact on the establishment of civil universal jurisdiction. As a result, the association of article 14 with an international norm would have a fundamental role to play in determining whether a jus cogens norm entailed civil universal jurisdiction over acts of torture. The same jus cogens norm (which is the prohibition of torture) confers civil universal civil jurisdiction. Any treaty provision relating to it must be interpreted in such a way as to promote the exercise of civil universal jurisdiction.

We conclude from the foregoing that article 14 of the United Nations Convention against Torture contains universal jurisdiction over acts of torture and not as it is said in many of the literature of international law as being restricted by territorial jurisdiction or involving the mere encouragement or authorization of States to exercise civil universal jurisdiction.¹⁹ This conclusion is fully consistent with the position of the Human Rights Committee (in charge of monitoring the implementation of the International Covenant on Civil and Political Rights), which stated on article 7 of the Covenant, that in cases of torture victims must have access to effective remedies, including the right to adequate and enforceable compensation.²⁰ The Committee did not require that torture actually take place within the State party's own jurisdiction, which would provide remedies and access to compensation.

Does The International Law of Responsibility Require the Removal of State immunity in The Interest of Fundamental Human Rights?
Another issue that favors the disruption of the jurisdictional immunity of the State is the obligations of States arising from the International law of responsibility. The Act of immunity may lead to the recognition of some illegal situations and contributing in consolidating them. The conducts which are contrary to international norms, specifically those governing fundamental human rights, are considered contrary to international public law and is subjected to the condemnation by the entire international community²¹.

This argument is based on the law of international responsibility, especially as the invocation of the consequences of a violation of peremptory international norms under the law of international responsibility is contrary to this law; The article 40 of The International Law Commission articles on responsibility of States for internationally wrongful acts makes it a serious breach for an obligation arising from an international norm by a State and establish its international responsibility,²² also it requires states in article (41/2) not to lawfully recognize any situation arising from this serious breach and to absolutely refrain from providing any help or assistance to maintain that situation.²³ Granting jurisdictional immunity to a State which has breached a peremptory norm of international law may lead to help in the participation or contribution of violating the same jus cogens norm by the donor State of immunity and, as a result, will entail its international responsibility.

The Italian Court of Cassation has taken this trend to justify its failure to act on the jurisdictional immunity of Germany for crimes committed by German forces during the Second World War as well as in its decision in the *Ferrini* case.²⁴ A Greek Court adopted a similar attitude in the case of (*prefecture Voiotia*) and declared that the introduction of jurisdictional immunity of the State against a conduct that is contrary to an international norm which protects one of the fundamental human rights reaches for the assistance of a

¹⁸ CAT/C/CO/34/CAN, paras. 4/g and 5 / f.

¹⁹ Byrnes, *supra* note 18 , pp.548 – 549.

²⁰ Paragraph (1) of General Comment no. 7 (article 7) 1982, Hrlibrary.umn.edu

²¹ Ct. 1st Inst. *Levadia v. Federal Republic of Germany*, Case no. 137/1997, 30 October 1997, Revue Universelle des Droits de l'Homme, 1997, vol.50,pp.599.

²² See the Articles on Responsibility of States for Internationally Wrongful Acts on: Legal.un.org >ilc >english >commentaries

²³ Article 41/2 of the Articles on Responsibility of States for Internationally Wrongful Acts stipulates that : “ *No State shall recognize as lawful a situation created by a serious breach within the meaning of article 40, nor render aid or assistance in maintaining that situation*”.

²⁴ P.De Sena and F. De Vittor, *supra* note 17 , p.100

national court by devoting an act that seriously contravenes the requirements of international public law.²⁵ As a result, the responsibility of the State to which that court belongs to will be held.

It seems to me that the stated trend is neither solid nor legally stable to justify the disruption of judicial immunity in favor of basic human rights and the foundations and the evidence that we have presented in the three preceding sections of this research are much stronger than the trend. As the arguments based on the law of international responsibility do not conform to the requirements of article 16 (a) of the articles on the responsibility of States which stipulated the following for the establishment of a State responsibility "A State which aids or assists another State in the commission of an internationally wrongful act by the latter is internationally responsible for doing so if : that State does so with knowledge of the circumstances of the internationally wrongful act". For this reason, it cannot be said that the non-functioning of judicial immunity amounts to effective assistance in the internationally wrongful act. In any case, international norms, including those governing fundamental human rights, remain peremptory.

Evidences and corroboration do not stand for suspending judicial immunity in favor of international jus cogens in the confines of fundamental human rights, in its abstract sense, it also includes the notion that the violation peremptory norms of international law are not regarded as acts of sovereignty or of the public acts of the state as sovereign, but as ordinary acts which are not covered by the immunity.

Violation of Peremptory International Norms Is Not A Sovereign Act

Other grounds on which the jurisdictional immunity of a State may be suspended in case of a breach of peremptory international norms is that the State enjoys such immunity only for its public acts as the sovereign (sovereign acts) and not for its normal conducts as an ordinary entity. In this context, the doctrine has adopted two approaches: the first is a functional approach to the effect that a state's conduct involving the breach of a norm is not to be adapted as a sovereign act. The second was based on the idea that such conduct is constituted as an implicit waiver by the state of its immunity because it was difficult to reconcile with its sovereignty.

Immunity Is a Functional Tool That Includes Only the Sovereign Acts of the State

The notion of judicial immunity in international law is rooted in the principle of sovereign equality. The concept of sovereignty in the contemporary international legal law has undergone substantial changes; it has become more narrow and restrictive, which made the jurisdictional immunity of the State more narrow than that of conventional international law. This is an important issue that must be carefully identified and analyzed, especially since several lawyers and diplomats in our Arab countries continue to confuse the traditional concept of State jurisdictional immunity with its contemporary concept. Through its March, international law had moved from the introduction of an absolute concept of jurisdictional immunity to a restrictive concept, and the courts had embarked on a distinction between sovereign acts (conduct of the State in its capacity as a sovereign (and the ordinary conduct of the State); In the latter, the State does not act under its sovereignty but as an ordinary entity. In this context, the British House of Lords has affirmed that the conduct of a state is not a sovereign act nor does it bring jurisdictional immunity if it acts as a private law person.²⁶

According to this trend, sovereign acts should be viewed from a broader angle than the notion of the acts with sovereign power and must be understood as acts that are inherently outside the prerogatives of the state. This brings immunity to the State and other actions and acts that are not covered by it. The enactment of a state's legislation, the conclusion of a treaty, the Declaration of war or the expropriation of property — irrespective of its legality or illegality under international law — are all acts that fall within the sovereign power of the State. Whereas, if the state has committed torture, supported terrorism and terrorists, committed unlawful murder, or slavery, rape or racial discrimination, or the violation of such acts, shall not be regarded as acts falling within their sovereign power. It has no jurisdictional immunity before foreign courts in such cases.

From the foregoing analysis it is inferred that the criterion in determining the subordination of conduct to jurisdictional immunity is not that it is prohibited or permissible in international law; it is the fact that the act by its nature falls within the sovereign prerogatives of the State, such as enacting legislation or expropriation. Unlawful acts may bring jurisdictional immunity to the State before foreign courts if it falls within its sovereign powers, and a state may expropriate a property illegally however, it is covered by jurisdictional immunity because by its very nature it falls within its sovereign powers. Conversely, the violation of an international norm such as the prohibition of terrorism or torture is not a sovereign act because it cannot be excluded by the parties as defined by jus cogens norms; As a result if a state breached a norm, it would encroach on the will of the international community as a whole and in such situation it cannot be said that it is acting under its sovereign powers. This was confirmed by a United States Court of Appeal in the *De Blake* case, which recognized in its judgment that the international law did not recognize any conduct or behavior that violated an international norm as a sovereign act. The State which had committed a violation of an international norm prohibiting torture or terrorism cannot be protected with its judicial immunity before foreign courts. The court added that there could be no contradiction with this finding,²⁷ because jus cogens is a set of norms that could not be disagreed upon. As the act of a state that violates an

²⁵ Ct 1st Inst., *Levadia Case*, *supra* note 22, para.87.

²⁶ R. Higgins, *supra* note 8, p.84.

²⁷ *Siderman de Blake v. Argentina*, 103 ILR, p.474.

international norm is not seen as a sovereign act of the international community of states.²⁸ This explains why the courts that follows the jurisdictional immunity of States do not examine the nature of the conduct under consideration in case of violation of an international. In the *Adasani v. United Kingdom* case, the European Court of Human Rights justified the respondent State's attitude not to allow claimant who had been tortured in Kuwait to claim compensation from Kuwait in-front of the British courts, with the jurisdictional immunity of the State of Kuwait. However, it is noted, that the court was not very concerned in that matter; and took the immunity for granted, which reflected the fact that it believed that immunity of state jurisdiction is in international law, and its scope and effects were clear and not in need of elaboration and statement. The Court held that the jurisdictional immunity of a State was a concept of evolution as a result of the principle of State sovereignty and the inadmissibility of its subordination to the jurisdiction of any other State in civil matters, and the court promised that the granting of the jurisdictional immunity of a State in civil proceedings is due to the legitimate aim of fulfilling international law in order to promote friendly relations among States through respecting the sovereignty of each other.²⁹

In this case, the European Court of Human Rights did not distinct between sovereign and ordinary acts, nor did it address the question of if torture could be included in sovereign acts. If the court were to deal with those issues, it might be difficult for it to take the jurisdictional immunity of the State. But the court chose an easier path, relying on the absolute sovereign immunity of the State even in the face of torture. This was confirmed by one of Greece's first instance courts, which openly stated that the massacre of German troops in Greece during the Second World War was an act that contravened fundamental principles of international humanitarian law; As a result, they contradicted with international norms and were not sovereign acts and could in no way be subject to the sovereign immunity of the State.³⁰ This trend was upheld by the Supreme Court of Greece in the case of *Prefecture de Voiotia v. Germany*.³¹

The Greek judiciary's path was not accepted by the German Supreme Court in a case related to the same facts; the German Supreme Court refused to say that the property destructions and the huge amount of executions carried out by German forces in Greece are not sovereign acts and have argued that their sovereign character is not subjected to dispute and continued saying that the Greek judiciary's assertion in that regard was not convincing.³²

The German Supreme Court — according to many scholars and practitioners of international law — has not established a criterion for distinguishing between what is a sovereign act and what is not. Moreover, it has come to an unreasonable and legally inconceivable conclusion, to say that the commission of massacres and international crimes are Sovereign acts.

The reader must not conclude from the foregoing analysis that the functional approach has become the subject of acceptance by the other national courts and scholars of international law, as many scholars and specialists have expressed different criticisms of this approach. One such criticism is that when proceedings are heard against States, foreign courts distinguish between the conduct of a state as a sovereign and its conduct as an ordinary. Judicial immunity is granted for the first conduct, but the violation of a jus cogens norm does not in itself preclude sovereign act to normal act. That is, when cases are heard by the courts against foreign states, they do not make the international norm jus cogens the criterion for distinguishing between sovereign and ordinary conducts, but they examine the nature of the act or conduct it. For this reason, conduct that is contrary to an international norm is not necessarily covered by the jurisdictional immunity of the State.

The text of article 7 of the articles on responsibility of States for internationally wrongful acts states that: "*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.*"

Another criticism is that this approach is contrary to the concept of international crimes, since these crimes--which are inherently contrary to international norms--are impossible to adapt as regular acts, especially as it is committed by persons who have an official character, such as torture, apartheid and crimes against humanity.

The third criticism is that the State may acknowledge or declare that the conduct that is contrary to an international norm has occurred because of an official action. Is it possible to attribute the Sovereign act of conduct in this case?³³ It can be said that all the criticisms mentioned are not accurate in legal and practical terms. With regard to the second and third criticisms, the law does not permit and does not allow violations of jus cogens to be part of any official act, whether or not such violations affect international criminal

²⁸ Retta Fawzi, "Special International Criminal Tribunals between Sovereignty and Justice", Beirut : Al-Halaby Publisher, 2015, pp. 69 – 70.

²⁹ E.Ct. H.R., *Al-adsani v. Kuwait*, 34 EHRR, 2002, vol.11, p.289. para.54.

³⁰ Ct. 1st Instance, *Levadial Federal Republic of Germany*, *supra* note 22,p.599.

³¹ Maria Gavourelis and Ilias Bantekas, *supra* note 6, p.200.

³² Alexander Orakhelashvili, *supra* note 9, p.363.

³³ Anthony J. Colangelo, "Jurisdiction, Immunity, Legality and Jus Cogens", Chicago Journal of International Law, 2013, vol.14, no.1, pp.77seq.

peremptory norms. Such violations are illegal and do not envisage to be part of any official act or conduct for the basis of an official action. As to the first criticism, if it was correct to say that the courts did not take the form of *jus cogens* as a basis for determining whether the conduct of a State was a sovereign act, the conduct involving a breach of a norm of international law that departs from the functional concept of sovereignty; the latter is no longer an absolute advantage for the State, as it benefits the public interest and individuals at both the national and international levels.

Violation of Jus Cogens Is Tantamount to An Implied Waiver of Sovereign Immunity

Another aspect of the theory of the separation of sovereign acts from non-sovereign acts for the purposes of the jurisdictional immunity of a State is the link between a violation of an international *jus cogens* norm and a waiver by a state of its sovereign immunity.³⁴ According to this theory, the existence of a system of legal norms that cannot be excluded by States implies that when a state breaches one of those norms, its conduct cannot be described as a sovereign act. As a result, the state in such conduct is not considered a sovereign and has implicitly waived its sovereign immunity. As the state recognizes a number of peremptory international norms, it implicitly waives its jurisdictional immunity if it violated one of them. In this aspect, a question may be raised on the permissibility of a tacit waiver of jurisdictional immunity by the state, and can it be imagined that a state's waiver can be implicit?

In fact, nothing in international law precludes the idea of implicit waiver of immunity, in particular in the case of violation of peremptory international norms. This view is supported by the fact that there are applications for this idea within the framework of human rights conventions, where some scholars of international law have argued that if States have ratified a convention of Human rights, which includes an obligation to provide effective remedies amounting to a tacit waiver of immunity before national courts, including foreign ones.³⁵

Jus Cogens Is a Valuable System That Surrounds The International Legal Order and Excludes Any Norm That Is in Conflict with It

The third approach to the question of the relationship between State immunity and international peremptory norms is where the norms of *jus cogens* are considered higher than the norm of immunity of State jurisdiction either on the basis of the theory of progressivity or on the basis of the theory of International public law and the fundamental values shared by the international community.

The Primacy of Jus Cogens Norms over States' Immunity Norm According to The Theory of Normative Hierarchy

According to this theory, when an international norm is disputed with the norm of jurisdictional immunity of the State, the former is superior to the second because the norm of immunity is not part of the peremptory norms of international law. In the case *concerning the application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia)*, Judge Lauterpacht stated in his independent opinion that *jus cogens* was superior to the norms of general international law.³⁶ The International Criminal Tribunal for the former Yugoslavia has considered *jus cogens* to be superior to the general international law and relative international law.³⁷ It was also followed by the European Court of Human Rights in the *Adasani v. United Kingdom* case in its 2001 judgment, which rejected by 9 votes to 8, the view that a violation of a norm prohibiting torture would entail not to use the a state's immunity in civil cases. However, six judges of the Court expressed a common dissenting opinion in the case in which they agreed to the primacy of the peremptory international norm over other norms of international law including those related to State immunity, and stressed that one of the fundamental features of *jus cogens* was that it invalidated any other norm that was not contrary to it. The ordinary international norm that is incompatible with a *jus cogens* norm does not entail any legal effect that is contrary to the content of the latter.³⁸ The international norm of *jus cogens*, which prohibited torture, was superior to other obligations arising from ordinary international norms, which were not peremptory; including those relating to States' jurisdictional and executive immunity, and States should allow reserving and using the public funds of the respondent State, including the premises of its embassies.³⁹ This trend has been criticized on the proposition that the hierarchy between international legal norms is only conceivable when there is a conflict between the substantive provision in both conflicted norms but there was no conflict in the real sense between *jus cogens* norms and the norms on jurisdictional and executive immunity of the State⁴⁰. According to the International Court of Justice in the case of jurisdictional immunity of a state, *jus cogens* could not be conflicted with state immunity because the former was a substantive norm, and the States' jurisdictional immunity is a procedural norm⁴¹. The basic idea of this view is that the core of the international

³⁴ Anthony J. Colangelo, *supra* note 35, p.78.

³⁵ Ludovic Hennebel et Helene Tigroudja, "Traite de Droit International des Droits de l'Homme", Paris : Pedone, 2016, p.1290 and; Andrea Bianchi, *supra* note 12, p.257.

³⁶ Separate Opinion of Judge Lauterpacht, ICJ Rep. 1993, para.440.

³⁷ ICTY, *Furundzija* Case, IT – 95 – 17/1, 10/12/1999, para. 153. www.icty.org > cases > furundzija > tjug;

³⁸ E.Ct.H.R., *Al-adsani v. UK*, 2001 – XI, 79, paras. 111 – 112.

³⁹ *Al-adsani* Case, *Ibid*, para.108.

⁴⁰ Christian Tomushat, "l'immunité des Etats en cas de violation grave des droits de l'homme", RGDIP, 2005, PP.57-58; Simman and Alston, "The Sources of Human Rights and Jus Cogens : A Critique of the Normative Hierarchy Theory", AJIL, 2003, vol. 97, p.772.

⁴¹ ICJ, *Jurisdictional Immunities of the State (Germany v. Italy: Greece Intervention)*, 3/2/2012, Rep.2012 ,p.99.

norm of jus cogens and its application is two different issues. While peremptory international norms governed substantive conduct, immunities belonged to the category of procedural norms. Here, a question arises in response to this criticism that the peremptory character of an international norm does not in itself entail an obligation for the interested State by exercising its jurisdiction to provide or ensure a civil remedy for victims of a violation of the peremptory norm committed by a foreign State abroad?

It is established in international law that jus cogens has implications that are inherent to them, including those relating to State responsibility, compensation for violation and criminal prosecution of cases where the breach of the peremptory international norm constitutes an international crime. In other words, an international jus cogens norm is not only a substantive norm that contains fundamental grounds or behavioral prohibitions, but it also has legal effects that have the same status as jus cogens. This has been overlooked by the International Court of Justice in the case of *jurisdictional immunity of the State (Germany v. Italy)*.⁴²

Furtherly, it is noted that the criticism of this approach confuses the content of the peremptory norm and its enforcement. As to say that the jurisdictional immunity of a State must be respected in the event of a violation of jus cogens because it did not affect the subject matter of the norm but its enforcement, and that substance and enforcement were two different issues is not reasonable in legal terms, especially as it is a natural and inherent consequence of the violation of any international norm of the nature of the order to suspend the jurisdictional immunity of the State. Moreover, the introduction of such immunity would leave national courts incapable of enforcing the peremptory norm that had been violated by a foreign state. In other words, the international norm of jus cogens would be as if it did not exist for individuals in the courts of the State willing to exercise its power to confront a foreign State, although most peremptory international norms are aimed at protecting the rights of individuals.

Some national courts have rejected the earlier argument that international jus cogens norms contain the means of enforcing the content of the norm that is of a peremptory nature, such as the original norm. This was the opinion of the House of Lords in the (*Jones v. Saudi Arabi*) case,⁴³ and the Ontario Court of Appeal of Canada in a case (*Bouzari v. Iran*).⁴⁴

By subjecting these two decisions to analysis, they cannot be invoked to confirm the notion that there is no conflict between State immunity and jus cogens and that the latter does not entail procedural obligations to redress victims of a violation before foreign courts. In the (*Bouzari v. Iran*) case, the Canadian court relied on the Canadian State Immunity Act, which did not include the exclusion of torture from the jurisdictional immunity of the State. The Canadian court dealt with the issue of the effect of jus cogens on the jurisdictional immunity of the State through the relationship between national law and international law, and the fact that the conflict between State immunity and jus cogens is a conflict between the international law and Canadian law of immunity of the State and not as conflict between international norms, and has applied the Canadian law to the detriment of the norms of jus cogens pursuant to the primacy of national law over international law in accordance with the Canadian legal system.

In the *Jones v. Saudi Arabia Kingdom* case, the court did not confine to the British State Immunity Act and saying that it did not contain an exception of the jus cogens from the scope of its application but began to analyze the international law and its attitude on the conflict between State immunity and peremptory international norms. This means, in practice, that it has left open the point that such conflicts may be resolved in accordance with the norms of international law, and where the conflict between international and national law may not be in functional. The court also emphasized that civil jurisdictional immunity was a norm of international law. In the present case, the Court of Appeal relied on the distinction between the subject of jus cogens and the effects of its violation on the proposition that the enforcement of jus cogens is not necessarily peremptory. In fact it is a contrary to the established norms of international law and the well-established jurisprudence of national and international courts in this area, which emphasizes that the effects relating to the enforcement of jus cogens and its application are closely related and inherent to the content of jus cogens and therefore are jus cogens.

From the foregoing analysis, we conclude that the approach of the relationship between the jurisdictional immunity of a State and peremptory international norms from the perspective of incorporating international norms reinforces the trend to disrupt the functioning of State immunity in the interest of international jus cogens, which enjoys the supremacy of the hierarchy of international legal norms. This explains why the courts have in recent years emphasized that the peremptory character of the prohibition of torture — for example — calls for the state to refrain more from practicing of torture and, as a result, refused to accept evidence obtained through torture.⁴⁵ Some international courts have also arranged for the violation of international norms of jus cogens to have extensive additional effects, and have not recognized any legal effect of the amnesty granted for the violation of international norms. In the *Furunzidja* case, the International Criminal Tribunal for the former Yugoslavia has made it clear that the proscription of torture as jus cogens in international law has effects on the state and individuals. At the international level, it would result in the de-legitimization of

⁴² Alexander Orakhelashvili, “State Immunity and International Public Order “, German Y.B.Int.’L.L., 2002, vol.45, pp.227 – 228.

⁴³ House of Lords, *Jones v. Ministry of Interior Al-Al-Mamlka Al-Arabiya ASSaudiya*, 14 June 2006, UKHL 26, para.45.

<https://www.publications.parliament.uk>

⁴⁴ *Bouzari v. Iran*, 2004, Can LII871 (ONCA), 30 June 2004, para.94.

⁴⁵ *A (FC) and Others v. Secretary of State*, 2005, UKHL 71, para.34.

any legislative, executive or judicial action authorizing or tolerating torture. The court added that it would be futile to say that the effect of the prohibition of torture as an international norm was merely to invalidate the contrary norm. According to the result, it would be unjustified for States to take measures which allow torture or to grant immunity to the perpetrators through amnesty. The court added that if that was permissible, national measures would have no effect in international law and the victim would be able to initiate proceedings before an international or national court to challenge the illegality of national measures in accordance with the provisions of international law. He also can file a claim for compensation before a foreign court that would consider the legality of national measures in the light of international law.⁴⁶

Bottom-line, for the international norm of jus cogens to fulfil its hoped role in the international legal system its effect should not be only limited to the abrogation of treaties, but also have other legal effects outside the scope of the law of treaties, including the disruption of the jurisdictional immunity of the State. And they are effects derived from the supremacy of the international norm, which in return derived from the fact that it is not only superior to the will of States, but a tool to protect the fundamental and vital values of the international community, as it is not only a mean of basic gradient but it also has a protective function.

Exclusion of the States' Jurisdictional Immunity in Favor of Peremptory Norms Is Imperative for The Protection of The Values of The International Community

In the *Al-Adasani v. United Kingdom* case, judges in conflict with the Court's judgment have adopted an important idea that the suspension of jurisdictional immunity of the State in case of conflict with an international norm (which is the prohibition of torture in this case) is a duty and imperative for the maintenance of the common values of the international community, that are usually protected by international norms. Therefore, they took a different and broader concept than the traditional concept of the dispute between jus cogens and other norms. While the traditional idea was to exclude the norm contrary to jus cogens, the broader concept was espoused by a number of judges of the European Court human Rights in their dissenting opinion which is based on the idea of disrupting all overlapping norms with the application of jus cogens and not just the norm directly conflicting with it. In this view, they went beyond the idea of formalism based on the basic hierarchy in favor of the broader idea that jus cogens was an "arc system" that was protective of the values of the international community and surrounded the general international legal order. International jus cogens norms do not override other norms of the international legal order simply because they are norms of status which have been agreed to be higher only,⁴⁷ but they constitute criteria for assessing the lawfulness of the conduct of subjects of international law on the basis of the fundamental values of the international community. For this reason, it is legally conceivable that a conflict between an international norm and the jurisdictional immunity of a State may occur when it is established to the enforcement of fundamental legal norms and procedures are conditions that will deprive international norms of jus cogens of their effectiveness. If it proves that jurisdictional immunity may result in the interruption or revocation of the legal protection of the values protected by the peremptory international norm, the conflict between immunity and peremptory international norms is, and is, achieved and existing.

We conclude from the foregoing that the association of jus cogens and its primacy with the fundamental values of the international community makes the conflict between these norms and the jurisdictional immunity of the State legally and conceivable. In our view, the conflicts between them should be examined on a case-by-case basis and based on balancing of their respective protected interests. It is essential that the vetting process should normally be conducted in the interest of peremptory international norms as constituting an arc or a shield of the international legal order and of its fundamental value. This was taken by the Supreme Court of Italy in the *Ferrini* case, where it emphasized that jus cogens was superior to other norms of conflict, including customary norms such as jurisdictional immunity. The Court considered that the inclusion of international legal norms was a balancing of different values and interests protected by those norms, and that the core values are protected by peremptory norms of international law and transcends the values of the individual sovereignty of the State protected by the norm of the jurisdictional immunity of the State. The Court further emphasized that judicial immunity must be interpreted in a systematic way, considering the relationship of this norm with other international norms. The norms of law are not interpreted in isolation and unilaterally and are not interpreted as being free from others and without the exception of the norms, as they complement each other and overlap in practical application. This overlap requires the recognition of exceptions to the norm of judicial immunity of the State, including the primacy of international norms that are protected by international public law and, of course, peremptory international norms.

Conclusion

This analysis examined the question of the scope of the jurisdictional immunity of a State in the contemporary international legal order, and whether it contained an exception in respect of cases of violation of peremptory international norms. The result of research and analysis shows us that the jurisdictional immunity of the State is no longer absolute, as was the case in conventional international law, where the personal interests of States have been the cornerstones of the international legal order and are the essential foundation for defining the contours of that legal system. Today, the international legal system is no longer exclusively based solely on the personal interests of States, but also on the interests and human rights of individuals; the scope of immunity is no longer the judicial

⁴⁶ ICYY, *Prosecutor v. Furundzija*, no. IT – 95 – 17 / 1 – T, 10 December 1998, para.155.

⁴⁷ Suleiman Abed Almajeed, "The General Theory of Jus Cogens in International Legal Order", Cairo : Dar Al-Nahda Alarabiya, pp.151 *seq.* , and Robert Kolb, "Theorie du Jus Cogens. Essai de relecture du Concept", Paris : PUF, 2001, pp.124 *seq.*

system of States at all as before, and the contemporary international legal system recognizes a number of exceptions and has moved from the idea of absolute jurisdictional immunity to restricted jurisdictional immunity. The scope of such immunity seemed to be shrinking to the detriment of the supreme values of the international community and the imperatives of international public law expressed through peremptory international norms.

The research also found that there was confusion among scholars, as well as diplomats and politicians, between the principle of the jurisdictional immunity of the State and the scope of that principle. For example, Arab jurists and diplomats have adhered to the "Jasta" law issued by the United States Congress in 2016 on the principle of the jurisdictional immunity of the State and that the law is contrary to this principle, which they called a well - established customary principle of international law and threatened the foundations of the international legal grievance and the sovereignty of States. Indeed, this understanding by some specialists, diplomats and politicians in the Arab countries about the mentioned law reflects a misunderstanding of the scope of the principle of the jurisdictional immunity of the State and of the whole nature of contemporary international law. It is based on a purely traditional understanding of State sovereignty and ignores important facts in the evolution of contemporary international law, foremost among which is the internationalization of the legal protection of human rights and fundamental freedoms. As has been evident in this article, the jurisdictional immunity of States is a well-established customary principle of international law, but its scope is not yet strictly defined in international law. Moreover, that scope had been absolute in conventional international law, but it had begun to be slowly narrow in contemporary international law by the evolution of international protection of human rights and norms of international public law.

One may say that there is no uniform practice in contemporary international law regarding the scope of jurisdictional immunity of the State, and that there are differences among States in this regard and that the opinions of the courts are contradictory. In this study, I have tried to prove that this difference is due to the very dynamic character of the principle of the jurisdictional immunity of the State, and that there is no actual conflict as much as the conflict between the traditional understanding of the jurisdictional immunity of a State and the contemporary understanding, and that there are jurisprudential, judicial and legal trends that are in favor of the exclusion of peremptory international norms from the scope of such immunity.

As to the judgment of the International Court of Justice in the case *concerning jurisdictional immunities of the State (Germany v. Italy. Intervention by Greece)*, the article revealed that it was the subject of severe criticism, and that it makes the notion of jus cogens meaningless and contravenes the paths of development in the international legal system that tend to protect the individuals' rights and strengthening of international public law. In the future, we may devote another research to analyze and respond to the Court's judgment. In any case, this judgment — as we have stated — does not reflect the current state of the contemporary international law.

The conclusion is that the modern international law tends to take the exception of peremptory international norms from the jurisdictional immunity of States, and that should be the case, especially since international jus cogens norms constitute the strength the contemporary international legal order with a set of legal norms protecting the international law values and aiming to safeguard the human dignity, security and life in the face of the arbitrariness of States and their violation of those values. Recognition of these values will have no legal value if we allow states to evade civil legal accountability in the name of jurisdictional immunity and under the wrong understanding for the sovereignty of States, the first consideration is no longer exclusive to this sovereignty, but there are human values that have become similar and perhaps even have greater value.

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