1.3 The special nature of human rights

In this sub-section the issue of hierarchy of international obligations is discussed. In particular, we discuss how different jurisdictions use the notion of jus cogens (peremptory norms of international law) as a way to confer priority of these obligations over other international obligations of the state, in cases of conflict between obligations. The Universal Declaration of Human Rights has the status of jus cogens in international law.

The notion of *Jus cogens*

A **peremptory norm** (also called *jus cogens* or *ius cogens*, Latin for "compelling law") according to the article 53 of The Vienna Convention on the Law of Treaties "is a norm that can be 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". It is therefore a norm referring to certain fundamental, overriding international law principles. This "peremptory norm" or "jus cogens" will also apply with regards to customary rules so that States cannot seek deviation on grounds of local customs. Jus cogens enjoys a higher status than treaty law or customary law because the law has become a fundamental standard. This marks a key distinction between jus cogens and customary international law: whilst all jus cogens are considered customary international law (in that they are grounded in customs widely accepted and followed at the international level), not all customary international laws rise to the level of jus cogens. Similarly, a treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. I.e. a treaty becomes void if it is in violation of a jus cogens norm. The whole concept of "jus cogens" is based on the simple principle of acceptance and recognition of certain superior and fundamental values.

Based on the aforementioned, one cannot overstate the importance of having the status of jus cogens, embedded in the human rights. Jus cogens inadvertently draws power or can draw power from the concept of legitimacy in conjunction with the concept of the binding power of the act of ratification. There is power behind the simple fact that nations of the world have collectively agreed that certain freedoms need to be safeguarded. That in itself gives a 'mandatory compliance' to these rights. Furthermore, from the status of jus cogens, we can understand why human rights cannot be subject to derogation. What gives legitimacy and a degree of sovereignty to human rights is the 'importance of the values it protects...' Jus cogens and its status with human rights has helped understand that for any right to evolve into a mandatory peremptory norm the values it protects must be of uttermost importance which can be accepted by the international community. Thus, it is fair to say that the status of the jus cogens and its application to human rights is largely dependent on the following criteria: 1. the degree of importance applied to a particular right and its violation 2. the collective agreement of the 'international community' to this degree of importance. So jus cogens and its role in human rights gives authority to acts of the international community against states or individuals that abuse the human rights.

A number of consequences and obligations, for both the State and the individual, follow from recognition of a norm as being peremptory in nature. A conspicuous consequence of this is that States cannot seek a derogation from the principle at issue through either international treaties or local or special customs or even general customary rules not endowed with the same normative force. Secondly, peremptory norms impose obligations erga omnes, that is to say that every member of the international

community is considered to be affected by a violation, and these violations are therefore subject to universal jurisdiction. Accordingly, every State is entitled to investigate, prosecute and punish or extradite individuals accused of violating rules designated jus cogens, who are present in a territory under its jurisdiction. Indeed, there exists the positive obligation of aut dedere aut punire (extradite or punish) for States who discover suspected perpetrators within their jurisdiction. Thirdly, when peremptory norms are violated, the violation may not be covered by a statute of limitations, and the perpetrator may not be exempted from extradition.

The *Jus cogens* nature of the prohibition against torture articulates the fact that the prohibition has become one of the most fundamental standards of the international community. Furthermore, this prohibition is designed to produce a deterrent effect, in that it signals to all members of the international community and the individuals over whom they wield authority that the prohibition of torture is an absolute value from which nobody must deviate. Indeed, this as well as the erga omnes status of the prohibition against torture results in the individual torturer being held responsible as well, regardless of whether or not the state where the perpetration occurred has granted that person an amnesty. Even though erga omnes relates to jus cogens, it is important to know that it is conceptually different. A state has obligations to all states, because the norm has a fundamental nature. ^ The number of peremptory norms is considered limited but not exclusively classified or by categories. As a general rule, they could be prohibitions on committing war crimes, crimes against humanity, maritime piracy, genocide, apartheid, slavery, torture, enforced disappearances, illegal recruitment of children, among others of equal significance and consideration.

Although, it might appear difficult to force states with limited resources to enforce Jus Cogens international law throughout territory over which they may exert limited control, many (notably recognized in the 2003 Bruges resolution on humanitarian assistance by the Institut de Driot International) consider states to be obliged by the International Covenant on Economic, Social and Cultural Rights to seek aid when necessary. Given the fact that many cases are brought against states by other states, and that compliance with Jus cogens international law can be considered erga omnes, we may assume that such aid in most cases be readily available. Nonetheless (especially when considering issues of national sovereignty) perhaps there should be some human rights, the ones considered "core" that are really human rights norms, but in a way they can be accomplished by states and therefore enforced effectively by the international community to do so. Otherwise, it may seem utopic.

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1. What list of consequences have been attached to the status of human rights norms as part of jus cogens ?

   Basically, we can talk about internal consequences and external consequences. The first ones are related to the individual duties -- of every citizen of every party State -- to fulfill every legal device about human rights adopted by the International Custom -- and obviously by the UN -- as jus cogens; so, every State party has the duty -- and it implies State responsibility before other States parties and the UN-- of promoting every one of such devices to guarantee its fulfillment -- both prevention and Ius Puniendi application --.

   The second one are related to the international co-operation for guaranteeing the fulfillment of the human rights. It implies an international jurisdiction erga omnes and also Convenants between States for both protection and the application of justice -- verbi gratia extradition or asylum -- and the possibility of demanding justice before international courts.

2. Are these consequences attached to all human rights norms, or only to a sub-category of human

rights?

It applies to the civil and political rights, but not to the economic and social rights because of their special nature. Economic and social rights are conceived of as progressive goals- though not less important than civil and political rights.

3. Would it be acceptable to consider that, while some of the consequences you identified attach to all human rights norms, some other consequences attach only to a sub-part of them?

   Yes, because as we saw, economic and social rights are incompatible with an "instant enforcement". And this makes a difference in civil and political rights cases.

Jus cogens in the practice of domestic and international courts

Here we summarize the six decisions mentioned as illustrations -- in section 1.3.2 -- of the use, by different international and domestic courts, of *jus cogens* human rights norms. What consequences have these different courts drawn from the finding that a given human rights obligation had a *jus cogens* character? Do these consequences attach to all human rights obligations, or just a few? Would it be acceptable to attach some of these consequences to all human rights, while drawing certain consequences only with respect to a sub-set of human rights?

Example 1. The international crime of torture before international criminal courts

This case, taken from the International Criminal Tribunal for the former Yugoslavia (ICTY), highlights the prominent status granted to torture within the growing body of international law. States are obligated not merely to prohibit and prosecute torture, but also the failure to adopt the national measures necessary for implementing the prohibition and the maintenance in force or passage of laws which are contrary to the prohibition. **It has acquired *jus cogens* status, making it a peremptory norm, elevating it to a higher status within the international community. It cannot be supplanted or modified by any subsequent agreement between states or domestically.**. The decision also points out that state's responsibility emerges from the fact that there are legislative norms that violate the jus cogens, so this abstract fact is able to generate international responsibility. These norms include not only norms that allow torture, inhuman or degrading treatment or punishment or even order them, but also the absence of norms which prohibit these actions, deter perpetrators from committing them (e.g. criminal law norms) and sufficiently prevent their occurrence. The aim of the prohibition is to create an effective prevention mechanism against the occurrence of any kind of torture, inhuman or degrading treatment or punishment, be it war cruelty, ill-treatment of prisoners or detainees, but also forced medical interventions, inhuman or degrading treatment of patients in health care facilities or social care homes or various criminal investigation techniques in the fight against terrorism justified by their effectivity. The goal is to protect the people in the whole world against any kind of such treatment. Special attention is devoted to the subject of amnesties. The message is clear: amnesties go against a state's obligations to address torture (both reactively and proactively); an individual's right to seek effective remedy for torture is paramount. Finally, it's worth noting that perpetrators of torture can be held criminally responsible in any foreign state. Torture is a violation of international norms, as a result of its *erga omnes* status, and therefore the international community and any State within it can seek redress. The example is given of the trial of Adolf Eichmann. Here, the Supreme Court of Israel held a high ranking Nazi official criminally responsible for his actions facilitating the Holocaust. One of Eichmann's legal arguments was that Israel did not have jurisdiction to try him criminally. The court stated, ‘it is the universal character of the crimes in question i.e. international crimes which vests in every State the authority to try and punish those who participated in their commission’ **the *erga omnes* status explicitly allows international bodies (such as the International Court of Justice) to**

determine whether a State is fulfilling its international obligations or not, bearing in mind its scope set above. This case, taken from the International Criminal Tribunal for the former Yugoslavia (ICTY), highlights the prominent status granted to torture within the growing body of international law. States are obligated not merely to prohibit and prosecute torture, but also the failure to adopt the national measures necessary for implementing the prohibition and the maintenance in force or passage of laws which are contrary to the prohibition. **It has acquired *jus cogens* status, making it a peremptory norm, elevating it to a higher status within the international community. It cannot be supplanted or modified by any subsequent agreement between states or domestically.** Thus, a key consequence of torture acquiring the jus cogens status is that states can be held responsible not only for directly violating the right to freedom from torture, but also from failing to prevent torture from occurring by other parties (within or outside of their jurisdiction), when it is within their power to do so (for example, in the case of extradition when it is known that the person who will be extradited will suffer from torture as a result). This case, taken from the International Criminal Tribunal for the former Yugoslavia (ICTY), highlights the prominent status granted to torture within the growing body of international law. States are obligated not merely to prohibit and prosecute torture, but also the failure to adopt the national measures necessary for implementing the prohibition and the maintenance in force or passage of laws which are contrary to the prohibition. **It has acquired *jus cogens* status, making it a peremptory norm, elevating it to a higher status within the international community. It cannot be supplanted or modified by any subsequent agreement between states or domestically.**. Thus, a key consequence of torture acquiring the jus cogens status is that states can be held responsible not only for directly violating the right to freedom from torture, but also from failing to prevent torture from occurring by other parties (within or outside of their jurisdiction), when it is within their power to do so (for example, in the case of extradition when it is known that the person who will be extradited will suffer from torture as a result). +

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As pointed out by ICTY, human rights norms such as the prohibition against torture, as outlined by in Prosecutor v. Anto Furundzija, is in effect not only a prohibition against the act of torture, but, also pointed out by the court, that International rules prohibit even the failure to implement the prohibition and prohibit the State from maintaining och passing laws that are contrary to prohibiting of the practice of torture. It is therefore seen crucial that countries legislatures are not able to pass laws that allow or condemn torture. The consequence of the prohibition against torture being a jus cogens principle is that it enjoys a higher status in International law than treaty or customary law, which it triumphs over. It is furthermore meant to deter States from engaging in acts of torture. Amnesty laws are therefore incompatible with the obligation of States act against acts of torture. The general character of the individual crime of torture creates an inherent universal jurisdiction.

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In conclusion, International Criminal Tribunal for former Yugoslavia (ICTY) recognized the prohibition of torture as a peremptory norm or jus cogens, that is, a norm that enjoys a higher rank in the international hierarchy than treaty law and even "ordinary" customary rules, and applicable "erga omnes". Therefore, the prohibition of torture doesn't allow the exclusion or alteration of its content. So, any contrary act is null. Consequently, contrary to the typical state requirements, in this premptive norm, states are obliged not only to prohibit and punish torture but also to forestall its occurrence by effective prevention of its occurence and protectrion of all its residents agints it. because the prohibition has now become one of the most fundamental standards of the international community. It's an absolute value from which nobody must deviate. Furthermore, the prohibition of torture imposes upon States obligations erga omnes, that is, obligations owed towards all the other members of the interational community, each of which then has a correlative right.

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On the other hand, there is no clear agreement regarding precisely which norms are jus cogens, but it's generally accepted that jus cogens includes the prohibition of genocide, crimes against humanity, war crimes, apartheid, torture, slavery including slave trade. So, the consequences mentioned are attached

to these human rights norms.

The reasons that the above mentioned crimes are subject to jus cogens norms is that they affect the most basic of human rights, life. A breach of said human right offends all of mankind, and as such must be punished accordingly. This of course does not diminish the importance of any other human rights.

The International Criminal Tribunal for former Yugoslavia clearly sets appart a group of human rights that have aquired a particulary high status - a fundamental status, and only to these rights does it attribute the rank of peremptory norms. The evolution of these rights is based on the universal revulsion against their breaches and the importance that States have attached to the prevention of such breaches.

In addition, one can summarily point out the following facts as regards to example 1: • The term "an enemy of all mankind" gives the notion of torture as an issue of international concern. Thus, with the aforementioned one begins to imagine that the act of torture and its prohibition can already begin to bear the status of jus cogens, as it concerns the international realm and violates the tenets of the Universal Human Rights. • The very strong relationship of torture with the fundamental human rights qualifies it to take on the principle of jus cogens in its application. The simple fact that certain features of torture can be linked with the principles guiding the human rights allows it the opportunity to be a mandatory norm that cannot be easily evaded by the state.

Example 2. The international crime of torture before domestic courts

This case is about the question of whether or not the former President of Chile, Pinochet, could be extradited from the UK to Spain in respect of charges of torture committed in Chile. The defence argued that these acts were committed as part of the then president's official capacity and hence he enjoyed immunity. This was rejected on the basis of torture being an international crime with jus cogens status. The case shown as an example here is against Senator Pinochet and the question whether he could be extradited to Spain in order to stand trial for acts which were considered criminal in the United Kingdom at the time when they were commited. It is important because of the decision of the Law Lords after the defence of Senator Pinochet submitted an argument that, as a former head of State, the Senator enjoyed immunity from the criminal prosecution in the United Kingdom. However, the United Kingdom did not not grant him this immunity. Instead, they reaffirmed the stance that torture was a peremptory norm and as such it could not be avoided by invoking immunity.

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Immunity from prosecution *is a doctrine of international law that allows an accused to avoid prosecution for criminal offences. It is connected to the notion of the sovereignty of the state and is granted basically to the officials of the state. There are two types of the immunity. 1.* ***Functional immunity****, or immunity* ***ratione materiae****. This is an immunity granted to people who perform certain functions of state. 2.* ***Personal immunity****, or immunity* ***ratione personae****. This is an immunity granted to certain officials because of the office they hold.* ***Functional immunity*** *arises from customary international law and treaty law and confers immunities on any person who in performing an act of state commits a criminal offence and is enjoyed by that person even after he/she ceases to perform acts of the state. However, the moment accused leaves office, they are liable to be prosecuted for crimes*

committed before or after their term in office, or for crimes committed whilst in office in a personal capacity. ***Personal immunity*** *arises from customary international law and confers immunity on people holding a particular office. This immunity is extended to diplomatic agents and their families while posted abroad. Personal immunities also cover personal activities of an official, including immunity from arrest and detention, immunity from criminal jurisdiction, immunity from the civil and administrative jurisdiction of the host state. Personal immunity is not designed to serve the official's personal benefit but is based on the need for states to function effectively and hence not be deprived of their most important officials.*

Now, there are two kinds of relatively recent developments in international law regarding functional immunities. a) Immunity itself is being eroded (Case of the indictment of Charls Tailor of Siera Leone in 2004) *b) while it reamins firmly a rule for local or domestic crimes or civil liability, is not a defence to an international crime - war crimes, crimes against humanity, genocide, torture (as established by ICTY in the cases of Milosevice, Karadzic, Furundzija etc). Arguments for why this immunity is not available for international crimes are quite simple and straight forward: (1) genocide, war crimes and crimes against humanity are not acts of state. Criminal acts of the type in question are committed by human actors, not states; (2) international crimes are crimes of the jus cogens nature, a non-derogable norms, and allowing immunities with regard to them would mean undermining the very nature of a peremptory norm.*

In this case the importance of universal jurisdiction is highlighted and in the leading judgement by Lord Browne-Wilkinson he states the importance of the Torture Convention, especially Article 5(1) states do not choose to seek extradition or to prosecute the offender, other states must do so. He further emphasizes that the intent of the Convention was to establish the principle aut dedere aut punire - either you extradite or you punish, meaning that if a State chooses not to extradite a person for which there is considerable suspicion that he/she commited crimes subject to a ius cogens norm, then said person should stand trial before the courts of the State which does not wish to extradite him/her. In effect, the jus cogens nature of the crime thus "outranked" the international conventions regarding diplomatic and state immunity. A head of state enjoys immunity for acts done in performance of his functions whilst in office. However, as it was noted in the case, organization of state torture shall not be considered as official functions for immunity purposes. An action cannot be an official function if international law itself prohibits and criminalizes it. Moreover, international law provides universal jurisdiction in respect of the crime of torture so that there is no safe heaven for tortures that try to avoid accountability moving to another country. If the jus cogens nature of the crime does not outrank the immunity rules, then one of the main objectives of the Torture Convention will be frustrated. In effect, crimes which have a jus cogens nature are excepted from international conventions regarding diplomatic and state immunity. A head of state enjoys immunity for acts done in performance of his official functions whilst in office. However, if the head of state breaches an international convention by committing a crime with a jus cogens nature, such as torture, he is exempted from immunity for that act. This is became a crime with a jus cogens nature cannot be an official act. An action cannot be an official function if international law itself prohibits and criminalizes it. As it was noted in the case, organization of state torture shall not be considered as official functions for immunity purposes.

The extradit or punish provision is equally crucial. Torture is a crime for which there is universal jurisdiction under the CAT. The CAT provides for universal jurisdiction because of the gravity of the crime of torture. One of the CAT's goals is to prevent torturers from escaping punishment by fleeing their country. If the jus cogens nature of the crime does not outrank the immunity rules, then one of the main objectives of the Torture Convention will be frustrated.

Therefore, it is precisely important to emphasize the international character of torture's prohibition by which any kind of violation of this type could be charged independent of violation's localization,

torturer's nationality and political position. The prohibition to torture as jus cogens implies that this is a norm implicated for all international community and that this community is responsible to guarantee that each state is applying correctly the International Convention Against Torture. ^^^^^^^^^^^^^^^^^^^^^^^^^^^^ In effect, the jus cogens nature of the crime thus "outranked" the *national rules* regarding diplomatic and state immunity. A head of state enjoys immunity for acts done in performance of his functions whilst in office. However, as it was noted in the case, organization of state torture shall not be considered as official functions for immunity purposes. An action cannot be an official function if international law itself prohibits and criminalizes it. Moreover, international law provides universal jurisdiction in respect of the crime of torture so that there is no safe heaven for torturers that try to avoid accountability moving to another country. If the jus cogens nature of the crime does not outrank the immunity rules, then one of the main objectives of the Torture Convention will be frustrated. ^^^^^^^^^^^^^^^^

The basis for the extradition even being discussed was the "double criminality" rule, meaning that the acts of which the person to be extradited is accused must be considered criminal in the state he is held as well as the state requesting extradition.

The applicability of the "double criminality" rule was questioned in Lord Browne-Wilkinson's judgment. The vast majority of the offences Pinochet was sought to be extradited on occurred prior to the signing of the Torture Convention. In particular, the Convention was brought into effect in the United Kingdom through the enactment of section 134 of the Criminal Justice Act 1988 and there was no suggestion that this Act applied retrospectively. Ultimately, it was decided that despite a lack of "double criminality" a small number of the charges met criteria enabling extradition. It should be noted that it was decided that these were for the offences said to have occurred after 29 September 1988.

In contrast to, e.g., example 5, a claim is here made against a State by an individual (Pinochet) requesting immunity, but not reparations from the State. Example 5 shows that once reparations are asked for from a State for an alleged case of torture, the ruling changes somewhat in that a State - as an entity - cannot be subject to the jurisdiction of another State based on individual claims made in that state (pars in parem non habet imperium), whereas a State representative can be subject to international law if he or she as an individual - despite being a representative of state at the time - broke internationally accepted and ratified laws.

In terms of Pinochet's supposed immunity, Lord Browne-Wilkinson, in his judgment argues in terms of two forms of immunity: immunity rationae personae, and immunity rationae materiae, where the former is immunity from legal persecution based on the person's status as some representative of a state, e.g. an ambassador, a minister, or a head of state, as in Pinochet's case; and where the latter is immunity from legal persecution on the basis of the legal matter at hand. Lord Browne-Wilkinson concludes that while, yes, Pinochet did enjoy immunity rationae personae by virtue of his office, that immunity had expired with his loss of the office on March 11, 1998. Furthermore, the issue of immunity rationae materiae would still outweigh any insistence on Pinochet's part on his entitlement to immunity rationae personae--for the precise reason that the 'materiae' in question was not just any legal matter, but torture on a systematic scale. Thus, the court, in essence, strongly opposed the notion that Pinochet was entitled to any form of immunity being evoked in the ex-dictator's defense.

Moreover, a state cannot on one hand agree to obey international rules that prohibit torture, and on the other implement immunity rules so that the heads of operation leave unpunished. This could lead, as Lord Browne-Wilkinson remarks, to the danger of prosecuting the officials who tortured by order of the superior, while the latter goes unpunished. ^^^^^ + + ++

It would frustrate one of the main objectives of the Torture Convention to require that a state waive its right to its officials' immunity before a torture case could be successfully prosecuted outside the state's

boundaries, Lord Browne-Wilkinson said. The Torture Convention exists so that there is no safe haven for torturers.

In the case in Example 3, Al-Adsani v. United Kingdom, the European Court of Human Rights later made a distinction between allowing immunity for a state in criminal proceedings and allowing state immunity with respect to civil suits seeking damages for torture acts in that state. The European Court of Human Rights stressed that none of the provisions in the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights and the UN Convention related to civil proceedings. It concluded that the international community had not widely accepted the idea that states are not entitled to immunity with respect to civil claims for damages for alleged torture committed outside the forum states, distinguishing its case with the Pinochet case in Example 2.

The consequence of the jus cogens nature of the prohibition against torture the case of Pinochet is subject to universial jurisdiction, even if the crimes were not committed in the UK or Spain, and that he could not invoke immunity. Implementation of torture could not be seen as a state function. It in implicit that State sanctioned torture cannot mean that heads of State avoid liability and this goes against the intent of the prohibition. The extradition was therefore allowed. This would probably not be true of human rights norms that have not been determined as jus cogens.

In this case we must consider that there exist survivors of torture, if previously isn´t existed an authority that could prosecute the crime that had previously been victims not invalidate his right of justice if there if exist intention or law to back them up later. When was president and had the power over to the State for exercising of the decision and power that this torture was committed and he was against to the civil and political rights; his extradition was justified, and further having as antecedent trial of the crimes of the Nazis.

Despite the criminal prosecution of State officials envolved in the practice of torture is possible, the absence of independent mechanism for investigating the military configures the excepcionality of punishment on State officials.

Example 3. Torture and the duty of the State to provide access to remedies This case is about a dual British/Kuwaiti national that was the alleged victim of torture by a Sheikh and the State of Kuwait, after going to Kuwait as a pilot in the Kuwaiti Air Force in 1991.

After the Iraqi invasion he remained as a member of the resistance force and came into possession of sex videotapes involving the aformentioned Sheikh (a relative to the Emir of Kuwait), these videotapes were eventually released to the public. Later, on at least two occasions, the Sheikh and others abducted him at gun point while using a government owned car and allegedly beat and tortured him.

He first instituted civil proceedings in England, but the action failed because the court understood that Kuwait, as a sovereign foreign State, could claim immunity of jurisdiction under the State Immunity Act 1978. He then took the case to the European Court of Human Rights. The court found that while criminal prosecution for torture and violation of human rights was contemplated and part of the international norm, the 1972 Basle Convention preserved sovergin immunity for States in the area of civil liability. Civil damages against the State could only be imposed against the State if the imjury occurred in the territory of the State.
^^^ ^ He first instituted civil proceedings in England, but the action failed because the court understood that Kuwait, as a sovereign foreign State, could claim immunity of jurisdiction under the State Immunity Act 1978. He then took the case to the European Court of Human Rights. The court found that while criminal prosecution for torture and violation of human rights was contemplated and part of the international norm, the 1972 Basle Convention preserved sovereign immunity for States in the area of civil liability. Civil damages against the State could only be imposed against the State if the injury occurred in the territory of the State.

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The court recognized that the prohibition against torture was the international norm, for example, the ruling concerning the International Criminal Court for the Former Yugoslavia in which the court found that torture was an international criminal act that overrode claims of immunity against prosecution for such actions, however, the court found that it was unable to conclude that international law had removed such immunity in the face of civil lawsuits. In fact, as the court pointed out, the ruling in the Pinochet case expressly concluded that its ruling did not affect the immunity of foregin soverign states from civil claims. Thus the court found that while criminal actions against foreign States were the norm under international law and overrode claims of soverign immunity, the rights of individuals to sue foreign states under civil law is subordinate to claims of soverign immunity. ^^^ ^^^ The court recognized that the prohibition against torture was the international norm, for example, the ruling concerning the International Criminal Court for the Former Yugoslavia in which the court found that torture was an international criminal act that overrode claims of immunity against prosecution for such actions, however, the court found that it was unable to conclude that international law had removed such immunity in the face of civil lawsuits. In fact, as the court pointed out, the ruling in the Pinochet case expressly concluded that its ruling did not affect the immunity of foregin soverign states from civil claims. Thus the court found that while criminal actions against foreign States were the norm under international law and overrode claims of sovereign immunity, the rights of individuals to sue foreign states under civil law is subordinate to claims of sovereign immunity. ^^^^ ^^^^

The fact that the human rights norm has obtained a jus cogens status does not infer that civil liablity claims for damages can override the States claim of sovereign immunity. The court states decides that the prohibition of torture has not been established in International law to enable a person to bring a claim for civil damages outside the forum State where the injury occurred. By this conclusion, one might infere that this might be the case in future by the expansion of the jus cogens concept by national and international courts. ^^ The fact that the human rights norm has obtained a jus cogens status does not infer that civil liablity claims for damages can override the States claim of sovereign immunity. The court states decides that the prohibition of torture has not been established in International law to enable a person to bring a claim for civil damages outside the forum State where the injury occurred. By this conclusion, one might infer that this might be the case in future by the expansion of the jus cogens concept by national and international courts. ^^

This case was decided by a narrow margin, 9 to 8. The dissenting opinion by Misters Rozakis and Caflisch (joined by 4 others) argued that, given the *jus cogens* nature of the rule on torture, that consideration should prevail over claims of State immunity, in the event of a conflict between the two.

> "By accepting that the rule on prohibition of torture is a rule of *jus cogens* the majority recognise that it is hierarchically higher than any other rule of international law, ... with the exception, of course, of other *jus cogens* norms....In the event of a conflict between a *jus cogens* rule and any other rule of international law, the former prevails....The Court's majority do not seem, on the other hand, to deny that the rules on State immunity; customary or conventional, do not belong to the category of *jus cogens*; and rightly so, because it is clear that the rules of State immunity, deriving from both customary and conventional international law, have never been considered by the international community as rules with a hierarchically higher status....The majority, while accepting that the rule on the prohibition of torture is a *jus cogens* norm, refuse to draw the consequences of such acceptance."

This case illustrates the difficulty with being a case of first impression, as this case appears to have

been. The published dissent, in the sentence quoted above are the majority refusing to draw the consequences of such acceptance of the prohibition against torture being a peremptory, or "jus cogens" norm, can be seen as an example of jurists who are unwilling to rule without precendent, or prior legal authority. By failing to recognize the consequences of the effects of a "jus cogens" principle, the majority in effect has denied that the prohibition against torture actually is a peremptory norm, since the majority has permitted other, general principles of international law to limit the application of this prohibition. Ab initio, to hold primacy in the hierarchy of laws means that no other laws can limit or create a derogation from the primary law.

In Al-Adsani case, the European Court for human rights examined, if UK violated Article 3 (Prohibition of torture) and Article 6 (Right to a fair trial) of the European Convention on Human Rights (ECHR).

In Al-Adsani case, the European Court for human rights examined, if UK violated Article 3 (Prohibition of torture) and Article 6 (Right to a fair trial) of the European Convention on Human Rights (ECHR). A large focus of the Al-Adsani v. United Kingdom case was concerned with the claims of State immunity on the basis of territory, rather than individual criminality for committing acts of torture.

The Court concluded that there was **no violation of Article 3 ECHR**, since obligations from this article do not extend to violations that have been committed outside jurisdiction of United Kingdom. Regarding Article 6 ECHR the court said, that the right of access to a court is not absolute and may be limited (see Golder v UK) if this limitation pursues a legitimate aim and is proportionate. The court confirmed, that international prohibition against torture has a character of jus cogens and no immunity can be claimed by a torturer from criminal jurisdiction (see example 1 and 2), but stressed, that this does not extend to immunity for civil proceedings of foreign States. The court further specified that Pinochet case concerned immunity ratione materiae from criminal jurisdiction of a former head of state and not immunity ratione personae of foreign state from the civil jurisdiction (as in Al-Adsani case). Consequently it could not establish that States are not entitled to immunity in respect of civil claims. Moreover the Pinoched judgment made it clear that it does not affect the immunity ratione personae of foreign States from civil jurisdiction. The court concluded that limitation was legitimate and proportionate; therefore **no violation of Article 6 was found.** The court recognized the hierarchically higher status of prohibition of torture (jus cogens) in criminal procedures regarding immunity ratione materiae, but not in the civil proceeding regarding immunity ratione personae.

It is important to note that Other areas of public international law bear witness to a growing recognition of the overriding importance of the prohibition of torture. Thus, torture is forbidden by Article 5 of the Universal Declaration of Human Rights and Article 7 of the International Covenant on Civil and Political Rights....the International Criminal Tribunal for the Former Yugoslavia referred, inter alia, to the foregoing body of treaty rules and held that ‘[b]ecause of the importance of the values it protects, this principle [proscribing torture] has evolved into a peremptory norm or jus cogens, that is, a norm that enjoys a higher rank in the international hierarchy than treaty law and even “ordinary” customary rules’.

Example 4. War Crimes and Crimes against Humanity as part of Jus Cogens

The Case is about whether Belgium violated International Law against The Democratic Republic of Congo (DRC). On 11 April 2000, The DRC filed an application with the Internation Court of Justice (ICJ) after Belgium investigative judge issued an international arrest warrant for the then Minister for Foreign Affairs of the Democratic Republic of Congo, Mr.Adbulaye Yerodia Ndombasi. The application stated that Belgium violated:

- **Article 2, paragraph 1, of the Charter of the United Nations: principle that a State may**

not exercise its authoriy on the territory of another State', the 'principle of sovereign equality among all Members of the United Nations

- **Article 41, paragraph 2, of the Vienna Convention of 18 April 1961 on Diplomatic Relations: the diplomatic immunity of the Minister for Foreign Affairs of a sovereign State**

The arrest warrant issued by Belgian Court charged Ndombasi as a 'perpetrator or co-perpetrator, with offences constituting grave breaches of the Geneva Conventions of 1949 and of the Additional Protocols thereto, and with crimes against humanity.'

Ndombasi's crimes were punishable in Belgium under **the Law of 16 June 1993 concerning the Punishment of Grave Breaches of the International Geneva Conventions of 12 August 1949 and of Protocols I and II of 8 June 1977 Additional Thereto, as amended by the Law of 10 February 1999 concerning the Punishment of Serious Violations of International Humanitarian Law.** This provided Belgium courts with jurisdiction to presecute Ndombasi. ^^^ Ndombasi's crimes were punishable in Belgium under **'the Law of 16 June 1993 concerning the Punishment of Grave Breaches of the International Geneva Conventions of 12 August 1949 and of Protocols I and II of 8 June 1977 Additional Thereto, as amended by the Law of 10 February 1999 concerning the Punishment of Serious Violations of International Humanitarian Law.** This provided Belgium courts with jurisdiction to presecute Ndombasi. ^^^^

The **ICJ ruled** (with 13 votes to three) that **Belgium** violated its legal obligation against the DRC, in that they **'failed to respect the immunity from criminal jurisdiction and the inviolability which the incumbent Minister for Foreign Affairs of the Democratic Republic of the Congo enjoyed under international law.'** --- ^^^^^^^^^ The **ICJ ruled** (with 13 votes to three) that **Belgium** violated its legal obligation against the DRC, in that they' **failed to respect the immunity from criminal jurisdiction and the inviolability which the incumbent Minister for Foreign Affairs of the Democratic Republic of the Congo enjoyed under international law.'** ^^^^^^^^^^^^

Leaving the issue of extraterritoriality aside, the main difficulty faced by ICJ was if the international immunity, which the Minister was granted according to Vienna Convention on Diplomatic Relations of 1961, was "stronger" than every allegation that could be levelled against the Foreign Minister.

Moreover, the ICJ does not consider the right of Belgian courts to prosecute certain international crimes according to the Punishment of Serious Violations of International Humanitarian Law.

The ICJ stated that the Kingdom of Belgium had failed to fulfil its obligation toward the Democratic Republic of Congo, and so that the immunity was of higher importance than the crime the Minister was accused of, thus priveleging the Convention on Diplomatic Relations over Belgium's Human Rights law, and denying the jus cogens of Human Rights Law. ^^^^^^^^ The ICJ stated that the Kingdom of Belgium had failed to fulfil its obligation toward the Democratic Republic of Congo, and so that the immunity was of higher importance than the crime the Minister was accused of, thus priveleging the Convention on Diplomatic Relations over Belgium's Human Rights law, and denies the jus cogens of Human Rights Law. ^^^^^^^

The case seems inconsistent as crimes against humanity is a human rights norm that is considered jus cogens, but the International Court of Justice makes the distinction that the Minister for Foreign affairs was still in office and henceforth can enjoy immunity. It is unclear would have been if he was out of office, like in the case of Pinochet, and if this would have made a difference. It also unclear if the outcome would have been the same in a different court. It is also unclear if the outcome will be different if the crime committed was graver in nature. ^^ The case seems inconsistent as crimes against humanity is a human rights norm that is considered jus cogens, but the International Court of Justice makes the distinction that the Minister for Foreign affairs was still in office and henceforth can enjoy immunity. It is unclear would have been if he was out of office, like in the case of Pinochet, and if this

would have made a difference. It also unclear if the outcome would have been the same in a different court. It is also unclear if the outcome will be different if the crime committed would be graver in nature. ^^^^^^^

While in office, an individual serving as a foreign minister or other diplomat is granted with immunity protecting them from other States' actions that would "hinder him/her in the performance of his or her duties"; diplomatic immunity allows these individuals to maintain government relations, particularly in times of conflict. While diplomatic immunity can be waived by the individual's home country, this did not happen in Ndombasi's case.

Later, the Judge Van den Wyngaert provided a dissenting opinion. He explains that the court established with its decision a hierarchy between the rules of immunity and the rules on international accountability. In his dissent, he explains why he does not agree with this hierarchy, including an enumeration of essential questions not addressed by the Court (mainly concerning principles of international accountability).

The judge claims that the Court failed to check if there were antecedents in the jurisprudence stating the jus cogens status of Human Rights infringed through War Crimes and Crimes Against Humanity. There were plenty of procedures, such as the Pinochet case and the European Court of Human Rights in the Al-Adsani case, actually stating the unavoidability of protection of such rights for any possible reason, thus implying the jus cogens status of Human Rights against International Diplomatic Immunity, and putting into doubt the recognition of this same status to international immunities.

Judge Van den Wyngaert's dissenting opinion brings up several questions that remain unanswered by the majority ruling, such as the fact that previous rulings and literature on international customary law have considered war crimes to be considered jus cogens crimes. Numerous writings and scholarship suggest that a larger gulf may exist between gratuitous war crimes and the respect of the immunity of incumbent government officials. Judge Van den Wyngaert asserts that whether war crimes and crimes against humanity are in fact jus cogens crimes, this would illuminate the idea that protecting suspects on the ground of immunities for incumbent Foreign Ministers is probably not part of jus cogens, and thus not an international peremptory norm accepted by the global community.

This case shows the problem of hierarchy of international accountability and the rules of immunity, specially the problem of balancing two international laws. Through the position of Judge Van den Wyngaert it can be defended that human rights as jus cogens laws should weight more than others international reconized laws.

Example 5. ICJ Wall Advisory Opinion - Self-determination as a jus cogens norm and the scope of State responsibility

The case of the legal consequences of the construction of a Wall in the Occupied Palestinian Territory is an appropriate example to show that even when certain Human Rights norms can be considered to have jus cogens status, in some instances they are not deliberately applied. According to the Court's opinion, the wall is a violation of the right to self-determination of the Palestinian people. Yet the international community, through the United Nations, wasn't able to stop the construction.

The advisory opinion of the ICJ itself has no binding effect, therefore cannot directly affect the existence of the wall. However the opinion is noteworthy—amongst other things—for its list of what states must and must not do in light of what the Court has characterized as an "illegal situation." In this list, we see an exploration of some of the legal obligations of states when they are facing a violation of jus cogens norms:

- States must not "recognize the illegal situation",

- States must not aid or assist in maintaining the situation;
- States must (without themselves violating international law) takes steps to remove impediments to the Palestinians' right of self-determination created by the construction of the wall;
- States who are parties to Fourth Geneva Convention must (also without violating international law), ensure Israel's compliance with that Convention.

While court itself never uses the terms "ius cogens" or "peremptory norm" in its opinion, its dicussion of the right of self-determination makes it clear that this right is extremely important, and that it is considered to be a generally accepted international norm. The Court found the right of self-determination to be a right *erga omnes*. The Court recalls the UN Charter, General Assembly resoultion 2625 (XXV):

> “Every State has the duty to refrain from any forcible action which deprives peoples referred to in the elaboration of the principle of equal rights and self-determination of their right to self-determination and freedom and independence.”

Since Isreal accepts the existence of Palestinians and their rights, the Court concluded that one of these rights is the the right of self-determination, therefore "Israel is bound to comply with its obligation torespect the right of the Palestinian people to self-determination". The jus cogens nature of self-determination is mentioned by Judge Koroma's separate opinion and further affirmed by other scholars and authorities (such as other GA resolutions, international treaties and the Courts previous decisions).

The Court also discusses the responsibilities of the UN General Assembly and Security Council in the face of the situation, and calls on both bodies to take further action to "end the illegal situation resulting from the construction of the wall and the associated regime".

We could also interpret this case, as the ICJ does not mention the ius cogens nature of the self-determination right, as an application of the classical law of responsability of the States. It would thus not be necessary that the respect of the right to self determination is a peremporty norm but only that it is an established right, that is established by the Court. Thus any action against it, or support to any such action or ommission to prevent or forbid any such action, will imply responsibility for the States acting or omitting to react. Israel should not build the wall further and if it did, the international community should condemn it by any mean, as an unlawful behaviour regarding the UN Charter, international law and international humanitarian law.

The list of steps States and the UN must take — and the fact that the court opines that all States have an obligation to respond — leads to the inference that the Court must consider self-determination to be a very important norm. Despite the fact that the Court never used the phrases "jus cogens" or "peremptory norm", it clearly recognize its value as jus cogens for all these reasons.

From a realist/political standpoint, this Advisory Opinion has made no real change to the situation (in contrast to some of the other opinions discussed on this page, which did have effects in the disputes in question). But from a theoretical standpoint, it does a good job making the point that when there is a violation of a norm that may be of a jus cogens nature, states and international organizations must both avoid continuing or abetting the violation and take steps to bring the violation to an end. And the obligation to address the violation rests upon the entire international community, and not just on the state that violated the norm.

We cannot in any way deny the majority who took treaty law as a Source of International Law. It is unthinkable to put side by side the soft norms that arise daily conventional power source and

Customary international law. Incidentally, it is important to check that Multilateral Treaties will play a certain role customary law, while the need for speed training and regulation of international bonds is " models " less solemn and less formal agreements are emerging as shaped simplified.

Customary rules integrated into international conventions, retain its status as customary law.

Customary international law still has a major importance in the formation of rules of jus cogens, ie the rules of mandatory law governing the relations between the subjects of our discipline. The art. 53 of the Vienna Convention defines the norm of jus cogens as "that which is accepted and recognized by the international community of States as a whole as a norm to which no derogation is permitted and which can be modified only by rule of international law of the same nature". Once a rule of customary international law becomes so widely accepted that its breach could be defined as an attack to mankind, it may fall into the jus cogens territory. While piracy was tradictionally recognized as the sole rule of jus cogens, some human rights principles have been included in recent years.

-- The opinion of the Court fixes a moral standard by which the actions taken towards the construction of a wall should be measured. The actions violate the principles on the United Nations were conceived and judgement of them should also be made in accordance with consideration of their compliance with the treaties on the subject. All of the States parties of the Geneva Convention have to take as an obligation a position that favours these principles. The opinion of the Court fixes a moral standard by which the actions taken towards the construction of a wall should be measured. The actions violate the principles on the United Nations were conceived and judgement of them should also be made in accordance with consideration of their compliance with the treaties on the subject. All of the States parties of the Geneva Convention have to take as an obligation a position that favours these principles. + The opinion of the Court fixes a moral stand by which the actions taken towards the construction of a wall that violates the principles the United Nations were conceived should be made also in accordance with the compliance of the treates on the subject. All of the States parties of the Geneva Convention have to take as an obligation a position that favours these principles.

Construction of a Wall in the Occupied Palestinian Territory is a perfect example of violation of human rights and disregard for international norms, including jus cogens norms. Unless these are binding on all States they were violated. Norms of jus cogens are fundamental to the international community, they can't be taken aside.

ICJ in the Wall Opinion makes clear that Human Rights are fundamental and universal (Israel sustains that Human Rights do not apply in time of peace). Furthermore, ICJ mention that there is no territorial jurisdiction of Israel, so the universal jurisdiction is implied and the ICCPR applies to the territory. ^^^

What the Internation Court of Justice wants to say is that the human right of self- determination is as important as other human rights, as these against torture, apartheid e.t.c., and that's the reason why its protection is jus cogens for all Member- States. The construction of a wall in the occupied Palestinian Territory is a severe breach of international human rights law and all Member-States should react in a way which will demonstrate their dissension.

This example poses a reasonable doubt whether it’s acceptable or not, to consider that all the consequences attached to universal human rights through the ius cogens are just applicable to certain rights, mainly the personal ones regarding the integrity of the human being or to collective human rights such as the self-determination right. Part of Literature, Jurisprudence and particular Court sentences (national & international) defend there is not such a point of distinction. Anyway one of the main characteristics of ius cogens applied to human rights it´s the legal basis for States’ Universal Jurisdiction over crimes such as torture. At this point, there is not such an agreement on Universal

Jurisdiction (not a States' interest-biased judgement) on crimes committed against people as political subjects (i.e. Western Sahara or Palestine). It's worldwide fully recognised that torture, slavery,... are crude attacks to the essence of a particular man or woman and to the humankind. From this point of view we may consider that some consequences attached to all human rights norms are only applied to a sub-part of them.

It is also interesting to note that the I.C.J. chose to apply the Geneva Convention, more specifically, the section pertaining to the Protection of Civilian Persons in Time of War, despite the fact that the Palestine-Israel conflict is considered exactly that, a conflict, and not a war.

Example 6. The scope of application ratione personae of the European Social Charter

The last case is a good example of a rational and effective interpretation of an international treaty in accordance with its object and purpose. The case examined by the European Committee of Social Rights, a non-judicial monitoring body on the fulfilment of the states' obligations under the European Social Charter, concerns the issue of foreign minors residing illegally in Belgium and their rights to social and legal protection. Belgium alleged, that according to the Charter text, the protection should cover only the nationals of other Parties lawfully resident or working regularly within the territory of the Party concerned. The Committee rejected this argument as not only contradictory to the object and purpose of the Charter itself, but also to the peremptory norms of general international law (jus cogens) in force concerning the protection of persons in need, especially minor children.

Specifically, the State is responsible for respecting and safeguarding each individuals' right to life and physical integrity and this is seen as a jus cogens principle or a peremptory norm. Therefore, the Revised European Social Charter cannot hold up to the jus cogens principle since that Charter denies minors who are asylum seekers or illegal residents certain vital rights. +

The essential point of the decision reads as follows: "the restriction of the personal scope included in the Appendix [of the Revised European Social Charter] should not be read in such a way as to deprive foreigners coming within the category of unlawfully present migrants of the protection of the most basic rights enshrined in the Charter or to impair their fundamental rights such as the right to life or to physical integrity or the right to human dignity."

In this decision, the Committee adopts a teleological interpretation, which sees the Charter "as a living instrument dedicated to the values of dignity, equality and solidarity" which shall "give life and meaning in Europe to the fundamental social rights of all human beings." An interpretation of its provisions should be "the most appropriate in order to realise the aim and achieve the object of this treaty, not that which would restrict the Parties' obligations to the greatest possible degree." No interpretation can be adopted that could "deny foreign minors unlawfully present in a country (whether accompanied or unaccompanied) the guarantee of their fundamental rights, including the right to preservation of their human dignity."

The Committee also takes into consideration other human rights treaties, as the UN Convention on the Rights of the Child ratified by all members of the Council of Europe, as interpreted by the Committee on the Rights of the Child, which sees the "best interest of the child" as the centre of all state policies involving children. A denial of any social or legal protection to children would be incompatible with the preservation of the best interest of any child. The Committee also identifies "rules requiring each state to respect and safeguard each individual's right to life and physical integrity" as a peremptory norm of general international law (jus cogens). This approach may be slightly innovative, in

comparison with the other examples above, but it serves the aim of effective protection of all people's rights under the Charter. ++++++++++++

In summary, this case is a relevant example of the erga omnes effect of some international human rights norms considered as jus cogens. The rights of children are part of this type of norms and it implies strict obligations to States related with the guarantee and protection of rights of special groups as children.

FURTHER INDIVIDUAL RESPONSES TO AN EXERCISE IN SECTION 1.3 SPECIAL NATURE OF HUMAN RIGHTS:

Example 5. The construction of the wall seriously undermines the exercise of the right of self-determination for Palestine, but Israel it must be obliged to respect it, because self-determination is considers a right Erga omnes, and customary international law, is a right that can not be violated by any state.

The serious consequence here is that because self-determination is considered a right erga omnes, then such rights lend to illegal actions as a result - in this circumstance, the construction of the wall. At the same time, due to the importance of the jus cogens, this self-determination by Palestine must be respected and not impeded by other States while these other States themselves refrain from contributing to the illegality. _____---

1- Considering the human rights norms as part of jus cogens , had meant that enjoying Human rights , and living by them and thus the sub-rights that comes out of them is a global right for every human on earth , and if anything occurred to prevent any human from practicing his right , his basic human rights, the whole international community is responsible to standup and clear this injustices, and take firm steps to ensure that every human get his basic human rights. 2- I think they are attached to a sub category of human rights, based on the special specifications of each region or nation, Nevertheless, keeping the spirit of human rights is substantial in each region, but the practices might take into consideration the nature of each nation and region. 3- Yes it would be accepted , but it should be in a manner where some basic human rights are substantial to maintain all over the world with clear processes to keep them , while other's processes might differ based on regional consideration.

On whether war crimes and crimes against humanity are part of jus cogens The dissenting judge has framed the question in the right perspective. From the momnet one accepts that crimes against humanity and war crimes are part of jus cogens, and therefore have a higher normative value than regular national principles, especially of procedure, jurisdiction and immunity from prosecution, the ckurt should have concluded that international accountability for such crimes flows from the first conclusion, and must be elevated to the same standards as the former.