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**HUMAN RIGHTS AND JUS COGENS: QUESTIONING THE USE OF
NORMATIVE HIERARCHY THEORY IN HUMAN RIGHTS LAW**

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I hereby declare that I have read and understood the regulation governing the submission of dissertations, including those relating to length and plagiarism, as contained in the rules of this University, and that this dissertation conforms to those regulations.

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Dedication

The thesis is dedicated to my wife, Lorraine Mayua, for her unwavering patience and support during the long months that I worked on my LL.M. May this work also serve as a motivating factor to my young daughter Justine Banzambe Mayua for whom I wish the best of success in all her future academic endeavours. And to my big brother Arsene Yungwa Bamolona: thank you for holding my hand throughout my academic travails – from infancy to adulthood. You are greatly loved and valued.

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List of abbreviations

ICJ	International Court of Justice
ICCESC	International Covenant on Economic, Social and Cultural Rights
ICCPR	International Covenant on Civil and Political Rights
ILC	International Law Commission
ACHR	American Convention on Human Rights
ECHR	European Court of Human Rights
ICTY	International Criminal Tribunal on Yugoslavia
USA	United States of America
UK	United Kingdom
UN	United Nations
UDHR	Universal Declaration of Human Rights

Chapter I: Introduction

1.1 Background

A *Jus cogens* is a hierarchically superior norm 'from which no derogation is permitted'.¹ This peremptory norm suggests that there is a hierarchy among rules relating to international law. As such the recent trend of placing human rights norms in the catalogue of *jus cogens* has had a significant impact on both domestic and international law. For instance, in *Barcelona Traction, Light and power Co, Ltd (Belgium v Spain)*,² the International Court of Justice (ICJ), when making a distinction between the obligation of states towards the international community as whole and those arising vis-à-vis another state, held that the former are obligation *erga omnes* in view of their importance.³

In *Prosecutor v Anto Furundzija*,⁴ the court held: 'Because of the importance of the values it protects, [the prohibition of 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.'⁵ Also, in *Ex Parte Pinochet*,⁶ the House of Lords had to decide whether to recognise criminal jurisdictional immunity for the former President of Chile, General Augusto Pinochet Ugarte.⁷ The Lords decided that the international legal system could not confer immunity *ratione materiae* on heads of state regarding criminal jurisdiction for official acts of torture,⁸ since it is precisely these acts that it intends to criminalize as violations of fundamental norms of the international community.⁹ The *Pinochet case*

¹ Article 53 of the Vienna Convention of the Law of Treaties (1969).

² *Barcelona Traction, Light and Power Co, Ltd* (new application: 1962) (*Belgium v Spain*).

³ *Ibid.*

⁴ *Prosecutor v Anto Furundzija* (Trial Judgment). IT-95-17/1-T. International Criminal Tribunal for the former Yugoslavia (ICTY). 10 December 1998.

⁵ *Ibid.*

⁶ *Regina v Bow street Metropolitan Stipendiary Magistrate, Ex Parte Pinochet Ugarte* (Hereinafter *Pinochet case*) (1999).

⁷ *Ibid.*

⁸ The difference between *ratione personae* immunity and *ratione materiae* immunity is also present in diplomatic immunities, as can be seen in the Vienna Convention on Diplomatic Relations, opened for signature 18 April 1961, 500 UNTS 95, and art 39(2) (entered into force 24 April 1964).

⁹ For further details on Pinochet see Günther Handl 'The *Pinochet Case*, Foreign State Immunity and the Changing Constitution of the International Community' in Wolfgang Benedek, Hubert Isak and Renate Kicker (eds), *Development and Developing International and European Law: Essays in Honour of Konrad Ginther on the Occasion of His 65th Birthday* (1999) 79.

demonstrated that it was not possible to grant jurisdictional immunity to a head of state who had allegedly violated the *jus cogens* norm of torture.

In *Prefecture of Voitiotia v Federal Republic of Germany*,¹⁰ which concerned reparations for atrocities and destruction of private property committed by the German occupation forces in the village of Distomo during the Second World War, the Hellenic Supreme Court decided that when a state breaches a peremptory norm it waives its entitlement to sovereign immunity for those breaches.¹¹

In 1994, the Federal Government (Federal Council) of Switzerland declared that the refugee right to non-refoulement had acquired the status of a *jus cogens* norm.¹² Consequently, states are under an obligation to refrain from extraditing persons to a country where they may face cruel and degrading treatment. In *Al-Adsani v United Kingdom*, the dissenting judges rejected the view of state immunity as a bar, and held that the *jus cogens* norm of prohibition of torture prevailed over state immunity.¹³ In this connection, Kuwait, the defendant state, could not hide behind hierarchically lower rules to avoid the consequences of its actions. The examples above demonstrate the attitude of the international community towards human rights rules of *jus cogens*.

The notion of *jus cogens* in international law is founded in the Vienna Convention of the Law of Treaty.¹⁴ Article 53 of this instrument stipulates that a treaty is void if it conflicts with a peremptory norm of general international law. According to the Vienna Convention, ‘a peremptory norm of international law is a norm accepted and recognized by the international community as 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’.¹⁵

¹⁰ *Prefecture of Voitiotia v Federal Republic of Germany*, case no 11/2000 Areijos Pagos (Hellenic, Supreme Court) 4TH May 2000.

¹¹ Ibid.

¹² Both Chambers of the Federal Parliament declared the People’s Initiatives Invalid. See Erika de Wet ‘The Prohibition of Torture as an International Norm of *Jus Cogens* and its Implications for National and Customary Law’ (2004) 15 (1) *European Journal of International Law* 97-121.

¹³ Dissenting Opinion of Judges Rozakis, Caflisch, Costa, Cabral Barreto, and Vajic.

¹⁴ Ibid.

¹⁵ Vienna Convention article 53.

It must be said that the hierarchy theory seeks to establish cohesion in international law in order to ‘avoid any subsequent conflict of norms’.¹⁶ In fact, the effectiveness of any legal system depends on its coherence. Thus, any legal order is characterized by ‘general and individual rules and by the existence of a ranking order of characters’.¹⁷ As a result, a norm that assumes the status of *jus cogens* takes precedence over others. Therefore, where a conflict occurs between a peremptory norm and an ordinary norm, the former prevails. *Jus cogens* can also be described as norms ‘accepted by the international community as whole’,¹⁸ and by extension, a norm elevated to *jus cogens* becomes universally accepted.

However, as human rights are defined as indivisible, interrelated and interdependent, one would be hard pressed to justify such a theory. Indeed, the indivisibility of human rights renders the use of the normative hierarchy theory contentious in the field of human rights law. The International Covenant on Economic, Social and Cultural rights (ICCESC)¹⁹ and the International Covenant on Civil and Political Rights (ICCPR)²⁰ each recognise the importance of their counterpart in the preamble.

Even more clearly, the First World Conference on Human Rights in Teheran (1968) proclaimed that ‘human rights and fundamental freedoms are indivisible.’ It is common cause that the realisation of each human right requires other human rights and, in this sense, all human rights are indivisible. This notion has been strengthened, for instance by article 6 of the Declaration on Right to Development (1986) and paragraph 5 of the Vienna Declaration and Programme of Action (1993) adopted at the second World Conference on Human rights.

The indivisibility of human rights means that none of the rights that are considered to be fundamental human rights is more important than others, more specifically; they

¹⁶ Langhmani ‘Le *Jus Cogens* et la Coherence de L’ordre Juridique International’ in Les Droits de L’homme: Une Nouvelle pour le Droit International ? ‘ VII Colloque de Tunis (2007) 12 *Tunisian Journal International Law* 23-45.

¹⁷ Ibid.

¹⁸ Article 53 Vienna Convention of the Law of Treaties.

¹⁹ G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 49, U.N. Doc. A/6316 (1966), 993 U.N.T.S. 3, *entered into force* Jan. 3, 1976.

²⁰ G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, *entered into force* Mar. 23, 1976.

are inter-related.²¹ Put differently, the indivisibility of human rights does not admit that ‘specific human rights’ can have hierarchical status and particular human rights norms may be selected, as more important than others. In this vein, the concept of indivisibility and interdependence ‘appears to be incompatible with any notion of hierarchy’.²² In addition, the idea of indivisibility of human rights complies with ‘the traditional international spirit of respect for diverse cultural values by avoiding priorities in the domain of human rights norms’.²³ Consequently, while international practice increasingly recognizes emerging hierarchies, traditional human rights principles seem to be inconsistent with the new trend.

1.2 Research question

This study seeks to discuss whether it is possible to apply the normative hierarchy theory in human rights. More precisely, do the traditional principles of human rights admit the use of normative theory in human rights law? If so how do *jus cogens* influence human rights?

1.3 Research methodology

This is a desktop-based research project. A critical analysis using literature and case studies will be employed.

1.4 Literature review

Many scholars have discussed the use of the normative hierarchy theory in relation to human rights. Seiderman, for instance, concedes, in his ‘Hierarchy in International law, the Human Rights Dimension’, that although human rights purport to be indivisible, interdependent, and interrelated, and by implication, normatively equal, an appraisal of the variable priorities accorded to certain rights and more precisely to humanitarian norms in international law calls into the question this unitary paradigm.²⁴ Further, Seideman argues that although most states have not accepted all obligations stemming from human rights and humanitarian law, international practice

²¹ Bunch and Frost ‘Women’s Human Rights: An Introduction’ in *the Routledge international Encyclopedia of Women global Women’s issues and Knowledge* Eds (2000).

²² Koji Teraya ‘Emerging Hierarchy in International Human Rights and Beyond: From the Perspective of Non-derogable Rights’ (2001) 12 *European Journal of International Law* 918.

²³ Ibid.

²⁴ Seiderman *Hierarchy in International law. The Human rights Dimension*. Eds Intersentia –Hart (2001) pp54.

has demonstrated that the strength of those norms vary according to the value attached to the corresponding norm.

Teraya Koji agrees that most human rights studies do not recognize the use of the normative hierarchy theory because of their focus on the indivisibility of human rights.²⁵ Nevertheless, Koji acknowledges the existence of a possible hierarchy in human rights from the perspective of non-derogable rights. Similarly, Theodor Meron argues that the march towards ranking of certain human rights as hierarchically superior may be justified by the fact that there is a proliferation of human rights instruments, sometimes of poor quality and uncertain legal value.²⁶

Therefore, it is important that attempts are made to upgrade other rights by giving them various quality labels on the assumption that the authority of the higher right will not be impugned. Furthermore, Meron notes that the hierarchy theory is also used to categorise rights into so-called first generation (civil and political rights), second generation (economic, social and cultural rights) and third generation (solidarity rights, right to peace, development and protected environment).

1.5 Limitations of the study

The normative hierarchy theory is a diverse concept encompassing a wide range of areas. The study, therefore, will focus on well-known jurisprudence in international law where *jus cogens* and ordinary norms conflict. However, in assessing the compatibility of ordinary norms with peremptory norms it may not be possible to exhaustively deal with all matters. Hence, although the study will assess the jurisprudence, it will mainly focus on the use of the normative theory in human rights. Furthermore, the thesis will discuss how application of the hierarchy impacts on human rights law.

1.6 Overview of chapters

²⁵ Teraya (see footnote 22) p 917.

²⁶ Meron 'On a Hierarchy of International Human Rights' (1986) 80 *American Journal of International Law* 1.

Chapter one highlights the basis and structure of the entire study. Chapter two presents a brief historical evolution as well as conceptual framework of the *jus cogens* theory. Chapter three focuses on the international practice and jurisprudence of international law with regard to issues raised by the application of *jus cogens* norms. This chapter will also analyze in particular the issues raised by the use of the normative hierarchy theory in human rights and whether such issues may lead to the rejection or admission of *jus cogens* in human rights. It will also discuss how *jus cogens* influence national law. Chapter four focuses on the normative theory and human rights. This chapter will demonstrate how the normative hierarchy theory is important in a legal system. More precisely, how the theory influences human rights. Chapter five concludes the study and makes recommendations.

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Chapter II: Meaning and nature of *jus cogens*

2.1 Introduction

Jus cogens, which literally means ‘compelling law’ has for centuries been recognized in international relations although it started receiving more attention after the inception of the 1969 Vienna Convention of the Law of Treaties (Vienna Convention). This is despite the controversy surrounding its sources and the current common view that ‘certain overriding principles of international law exist’ which form *jus cogens*.²⁷ The Vienna Convention does not precisely say how an ordinary norm may acquire the status of *jus cogens*.

Nevertheless, article 53 of the Vienna Conventions enumerates certain elements which may lead to the identification of peremptory norms. Despite controversies related to its definition, sources and identification; its function of limiting the autonomy of states from contracting out of certain rules of law is significant in international law. The following points will be analyzed in detail: the history of the concept of peremptory norms; definition of *jus cogens*; sources of *jus cogens*; and how one can identify a peremptory norm or elements of *jus cogens* norms, *jus cogens* and related concepts; and the function of *jus cogens*.

2.2 History of *jus cogens* norms

2.2.1 Early conception of *jus cogens*

The origins of *jus cogens* can be traced back to the early part of the 20th century.²⁸ However, the concept was not used with any degree of consistency in the practice of states and by international tribunals before the adoption of the Vienna Convention. Some commentators have suggested that the ancient Roman law *jus strictum* (obligatory law) and *jus dispositum* (voluntary law)²⁹ and the maxim *jus publicum privatorum pactis mutari non potest*, were the precursors of the term *jus cogens*

²⁷ Nieto-Navia ‘International Peremptory Norms (*Jus Cogens*) and International Humanitarian Law ’ In *Man’s Inhumanity to Man: Essay of International Law in Honor of Antonion Cassese* edited by Lal Chand Vorhah et alii (2003) pp 28.

²⁸ Ragazzi *The Concept of International Obligations Erga Omnes* Oxford press (1997) pp 23.

²⁹ Frowein *Jus cogens*, in *MAX PLANCK Encyclopedia of Public international Law* vii at 327 (1984) pp 229.

although it was not itself apparently applied in ancient law.³⁰ Some natural law theorists of the 17th and 18th centuries emphasized the view that certain laws exist timelessly and beyond the will of states and that such law supersede and delimit any other laws which states might wish to adopt additionally.³¹

It is noteworthy that before the Vienna Convention a *jus cogens* norm was linked to natural law. Grotius and other classical writers held, for instance, the view that certain ‘principles’³² amounted to a *jus naturale necessarium* (necessary natural law). Wolff³³ and Vattel³⁴ stated that there existed ‘necessary law’ which was natural to all States and that all treaties and customs, which contravened this ‘necessary law’, were illegal. Founded on the basis of natural law, peremptory norms during this arena ignored conventional sources. Thus *jus cogens* were introduced as part of ‘positive’ laws accepted and recognized by the international community.³⁵

2.2.2 The recognition of *jus cogens* by Vienna Convention

Jus cogens is based on the prevailing view that ‘there existed within the international community overriding binding laws or principles, violation of which could render illegal the object of a particular treaty’.³⁶ It is important to note that the Vienna Convention’s version of this theory was conceived by the International Law Commission (ILC) and its rapporteurs³⁷ primarily to declare illegal any treaty conflicting with international norms.³⁸ Initially, this invalidity could only be pronounced by the International Court of Justice (ICJ) although Article 53 of the final text invokes invalidity of a treaty when ‘at the time of its conclusion conflicts with a peremptory norm of general international law’. Thus International community does not need the findings of the ICJ before declaring a treaty which does not comply with peremptory norms of general international law as a nullity. Fitzmaurice, one of

³⁰ Sinclair *The Vienna Convention of the Law of treaties (the Melland Schill Lectures (Unknown Binding)* (1973) pp 35.

³¹ Seiderman (footnote 24) pp36.

³² Knasas *Being and Some Twentieth-Century Thomists* Fordham University Press (2003).

³³ Wolff ‘*Jus gentium*’, Encyclopedia Britannica. Available at <http://www.britannica.com/EBchecked/topic/308663/Jus-gentium> (accessed 23 March 2009).

³⁴ Vattel ‘The Law of Nations’ (1758) *Encyclopædia Britannica*. Available at <http://www.britannica.com/EBchecked/topic/624086/Emmerich-de-Vattel>. (accessed 28 March 2009).

³⁵ Nieto-Navia (footnote 26) pp 5.

³⁶ Ibid.

³⁷ Seiderman (footnote 24) pp 41.

³⁸ Ibid.

the early rapporteurs, submits that ‘certain types of general international law’³⁹ have the effect of invalidating a treaty. These principles of general international law include ‘rules instituted for the protection of the individual, planning of wars of aggression, and agreements connected with piracy’.⁴⁰

2.3 Definition of *jus cogens* and difficulties arising from the concept

2.3.1 Definitions

The Vienna Convention does not explicitly define *jus cogens*. Article 53 of the Vienna Convention instead enumerates the conditions that norms should fill in order to qualify as peremptory norms. Article 53 reads:

A Treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by international community of states as 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.⁴¹

2.3.2 Difficulties arising from the concept

Seiderman argues that the textual reading of article 53 reveals a tautological construction.⁴² Accordingly ‘the principle of non-derogability’ might be defined by making ‘reference to its peremptory quality’.⁴³ Furthermore, he argues that article 53 is susceptible to criticism because it identifies peremptory norms by their legal effects rather than their object and quality. In my view the tautological construction of article 53 does not affect the definition of a peremptory norm; it rather strengthens its validity in international law. In other words, one can understand this concept by looking at the conditions enumerated in article 53.

³⁹ Ibid pp 42.

⁴⁰ Ibid.

⁴¹ Article 53 of the Vienna Convention of law of treaties (1969).

⁴² Seiderman (footnote 24) pp 40.

⁴³ Ibid.

Crucially, the ILC also acknowledges the difficulties associated with the concept. For example, it has submitted that '[t]he formulation of the article is not free from difficulty, since there is no simple criterion by which to identify a general rule of international law as having the character of *jus cogens*. In addition the majority of the general rules of international law do not have that character, and states may contract out of them by treaty'.⁴⁴

During the debate at the Vienna Conference, French delegate M. Hubert⁴⁵ was critical of article 53, arguing that 'his delegation was not prepared to take a leap in the dark and to accept a provision which, because it failed to establish sufficiently precise criteria, opened the door to doubt and compulsion'.⁴⁶

In spite of this criticism, the majority of states at the conference recognized the existence of *jus cogens* in international law and it was on this basis that article 53 of the Vienna Convention was adopted.⁴⁷ Since the adoption of the Vienna Convention, it is common cause that the international community as whole has continued to recognize the existence of these norms through agreement or unilaterally. As a consequence, it is important to note that the definition agreed upon at the Vienna Convention is probably more than simply valid for the purpose of the Convention and is rather valid as a definition of the concept for the general purpose of international law.⁴⁸

2.4 Sources of *jus cogens*

Scholars remain divided as to what constitutes a peremptory norm and how a given norm may rise to that level.⁴⁹ One of these differences is related to the sources of *jus cogens*. Certain commentators consider that treaties may be sources of *jus cogens*,⁵⁰ while others consider custom to be the source of *jus cogens*.⁵¹ In light of the different

⁴⁴ Vol. II, ILC *Yearbook* (1996), pp. 247-248.

⁴⁵ France eventually voted against the inclusion of final Article 53.

⁴⁶ A/CONF.39/11/Add.1, p. 95, no. 18

⁴⁷ Report of the Sixth Committee to the General Assembly during the eighteenth period of sessions (1963), UN Doc. A/5601.

⁴⁸ Nieto-Navia (footnote 26) pp 6.

⁴⁹ Bassiouni 'International Crimes *Jus Cogens* and *Obligation Erga Omnes*' (1996) 59 *Journal of Law and Contemporary Problems* 63, 65.

⁵⁰ Seiderman (footnote 24) pp 55.

⁵¹ *Ibid.*

views related to the sources of *jus cogens*, the ILC has stated that ‘it is not the form of general rule of international law but the particular nature of the subject matter with which it deals....[which] gives it the character of *jus cogens*’.⁵² Despite the absence of consensus, one can discern *jus cogens* norms from the following sources:

2.4.1 Treaties as sources of *jus cogens*

Treaty law is the chief source of positive international law. In fact, international law is governed by the principle of sovereignty of states thus norms expressly consented to may bind parties to them.⁵³ For instance, article 34 of the Vienna Convention stipulates that ‘a treaty does not create either obligation or rights for the third state without its consent’.

Considering the principle of states’ consent, treaties may not be considered as sources of *jus cogens*. This theory is supported by those who view treaties as lacking adherence. For example, Hannikainen argues that ‘treaties do not give rise to obligations of any kind, much less to those imperative natures, for states that are not parties thereto’.⁵⁴ Furthermore, he states that a state party to the convention may, in respect of certain treaties, denounce a prior acceptance.⁵⁵

Consequently, any denunciation of a treaty by a state party may automatically impact on *jus cogens*. This view is, however, not free from criticism. *Prima facie*, universal acceptance of a norm does not elevate it to the status of a peremptory norm. As Rozakis notes the non participation of a state in a particular convention does not mean that it has not accepted it.⁵⁶ Secondly, states cannot use their sovereignty to deny the binding nature of ‘conventions or treaties whose objects and purposes render them important’.⁵⁷ In fact, those conventions acquire the status of general international law. As previously held, general international law is binding on most, if

⁵² Report of the International Law Commission to the General Assembly A/CN.4/191, *Report of the of the International Law Commission on the ... 4 May - 19 July 1966*, Official Records of the *General Assembly* available at <http://www.untreaty.un.org/ilc/sessions/18/18docs.htm>. (accessed at 30 April 2009).

⁵³ The maxim *pacta tertiis nec nocent prosunt*, treaty does apply only between the parties to it.

⁵⁴ Hannikainen ‘Peremptory Norms in International Law: Historical Development, criteria, Present status’ (1988) *Melbourne Journal of International Law* 52-55.

⁵⁵ *Ibid.*

⁵⁶ Rozakis *The Concept of Jus Cogens in the Law of Treaties* North-Holland Pu.Co. (1976) pp 66-67.

⁵⁷ Nieto-Navia R(footnote 26) pp11.

not all, states. In this connection, a treaty rule may be elevated in status to a peremptory norm, if it satisfies the requirements of *jus cogens*.

2.4.2 Custom as source of *jus cogens*

Customary international law is constituted by rules of law ‘derived from the consistent conduct of states acting out of the belief that the law required them to act that way’.⁵⁸ It follows from this definition that customary law requires a ‘widespread repetition by states of similar international acts over time’.⁵⁹ It is imperative to underline that the acts must be taken by ‘a significant number of states and not be rejected by a significant number of states’.⁶⁰

From this definition one notices the resemblance between customary law and *jus cogens* in the sense that both require acceptance and recognition as rules of general law. Nevertheless, the only criterion distinguishing them is that *jus cogens* requires a ‘double consent’⁶¹: a rule must not only be recognized and accepted as general principle of international law, but must also be recognized as peremptory norm..

While some commentators support the view that customary law is more likely to be considered as a source of *jus cogens*, Rozaklis, however, postulates that customary law has inherent disabilities.⁶² He argues that customary law requires more time to be consolidated, contrary to conventional rules which become binding once the instrument comes into force. Consequently, it would be difficult for customary law to assist the international community when seized with an urgent need for a solution to a current problem.

The second objection, he emphasises that customary rules are often general and vague because their nature as unwritten law makes it difficult to resolve specific problems. However, although conventional law provides rules accepted by the majority of members of the international community in record time, it is often a drawback on present customary law. In other words, customary law contributes to the elaboration of conventional law.

⁵⁸ Janis and Noyes *International Law: Cases and Commentary* 3rd Ed. (2005) pp 148.

⁵⁹ *Ibid.*

⁶⁰ *Ibid.*

⁶¹ Seiderman (footnote 24) pp 52.

⁶² Rozaklis (footnote 55) pp 53.

2.4.3 General principle as sources of *jus cogens*

General principles of international law emanate from municipal law. Article 38(1) (c) of Statute of the ICJ, for example, speaks of general principles ‘recognised’ by states. An area that demonstrates the adoption of municipal approaches is the law applied to the relationship between international officials and their employing organisations, although today the principles are regarded as established international law.

Thus today, principles such as *pacta sunt servanda*, non-retroactivity of criminal law are considered as *jus cogens* norms. What is important to retain concerning general principles of international laws as sources of *jus cogens* is that the identified principle must be of a general scope or admitted as a general principle of international law. In fact general acceptance and recognition of a new peremptory norm is relevant for its very existence.

In this connection, it is instructive to note that the quest of determining sources of *jus cogens* does not appear impressive, for certain reasons. The first is that *jus cogens* come from different sources of law; it may be conventional, customary or general principles of international law. In other words, all of them may produce *jus cogens* norms.

Despite its natural law origins, *jus cogens* norms are part of positive law, today. The second reason concerns the interests of the international community as a whole. Thus a norm created by these different sources must deal with ‘a question of general interest for the international community’.⁶³ Another important observation is that *jus cogens* theory introduces a hierarchy of norms rather than a hierarchy of sources.

Consequently, there is no hierarchy of sources of peremptory norms. Thus a conventional *jus cogens* may be modified by a customary *jus cogens* or vice versa, as long as the new peremptory norm satisfies the requirements of article 53 of the Vienna Convention. However, all of these sources of peremptory norms concern the interests of the international community as whole.

2.5 Elements of *jus cogens* norms

⁶³ Rozakis (footnote 55) pp 60.

The identification of *jus cogens* remains complex as noted in the final commentary of the ILC draft that ‘the formulation of the article is not free from difficulty since there is no criterion by which to identify a general rule of international law as having the character of *jus cogens*...’.⁶⁴

Despite such a controversy, the elements identifying *jus cogens* norms may be drawn from article 53 of the Vienna Convention. Hence, from this article three conditions can be discerned as constituting the status of *jus cogens* norm:

2.5.1. The norm must be a norm of general international law

A *jus cogens* must be a norm of general international, in the sense that general international law is ‘binding on most, if not all, states’.⁶⁵ Nonetheless, this rule is not exclusive to *jus cogens* only. Other norms of international law are also predicated on the general international law requirement for their existence. For instance, customary law rule should be a general rule of international law for it to be recognized in international law.

Nevertheless, this can be distinguished from both regional law, which is only binding upon states from an identified geographical region and particular traits of international law that is only binding on a few states. Even here, the controversy persists. This is because the practice of states demonstrates that regional communities have the power to elevate an ordinary norm to a *jus cogens* norms. For instance, the right to a name is considered as *jus cogens* in the American system, while certain regions do not recognize it as such.⁶⁶

Schwarzenberg, considered the possibility of the existence of *jus cogens inter partes*, that is, norms of *jus cogens* having a limited effect only between identified or signatory parties.⁶⁷ Such a notion was based upon the requirement that ‘every treaty in force is binding upon the parties to it and must be performed by them in good faith

⁶⁴ Ibid.

⁶⁵ *Neto-Navia* (footnote 26) pp 10.

⁶⁶ *Seiderman* (footnote 24) pp 6.

⁶⁷ Ibid.

(*pacta sunt servanda*)'.⁶⁸ However, such a norm is limited only between states parties to it.

Despite the fact that not all norms of general international law have the character of *jus cogens*, 'the criterion for the rules of *jus cogens* consists in the fact that they do not exist to satisfy the need of individuals states but the higher interest of the whole international community'.⁶⁹ More importantly, the difference between a customary norm and *jus cogens* is underlined by the fact that the former does not bind states without their consent, while *jus cogens* bind member states without their consent.

2.5.2. The norm must be accepted and recognized by international community of states as whole.

A norm must be accepted and recognized by the international community as a whole. The term 'as whole' is significant, in the sense that it avoids 'a situation whereby one state could effectively veto a decision to designate a norm as peremptory'.⁷⁰ As Yasseen, the Chairman of the Drafting committee at the Vienna Conference, observed:

...there was no question of requiring a rule to be accepted and recognized as peremptory by all States. It would be enough if a very large majority did so; that would mean that, if one State in isolation refused to accept the peremptory character of a rule, or if that State was supported by a very small number of States, the acceptance and recognition of the peremptory character of the rule by the international community as a whole would not be affected.⁷¹

In practice, this entails that the will of the majority prevails over the minority. Thus the requirement is satisfied once a large number of states accept and recognize a rule as a peremptory norm. However, 'recognition by the international community is not

⁶⁸ Article 26 of the Vienna Convention on the Law of the Treaties.

⁶⁹ *Neto-Navia* (footnote26) pp 10.

⁷⁰ *Ibid.*

⁷¹ *Ibid.*

merely the mechanism whereby an ordinary norm becomes a peremptory norm, but also the mechanism whereby even general rules of international law are made'.⁷²

Crucially, the minority of states or 'some subjects of international law, acting alone or in conjunction with others'⁷³ cannot establish a *jus cogens* norm and impose their construction upon the majority of states. Consequently, the minority of member states of international community 'cannot in theory veto a decision taken by a majority of states'.⁷⁴ Therefore, a norm 'accepted and recognized by the international community as a whole' acquires the status of a non-derivable right.⁷⁵

2.5.3. The norm must be one from which non-derogation is permitted

Having considered the definition of *jus cogens*, it seems to me that this is the main character of a norm of *jus cogens*. As previously mentioned, a *jus cogens* norm encompasses the notion of a peremptory norm. Even though, this statement may not be free from criticism, it is established that most of *jus cogens* norms, if not all, are non-derogable rights. Thus the following norms do not permit derogation: the right to life, the prohibition of torture, the prohibition of cruel and degrading treatment, apartheid and the non-retroactivity of criminal law. However, it is always easier to 'illustrate these rules than define them':⁷⁶ the reason may be that apart from its definition *jus cogens* remain a controversial notion. This may also be because *jus cogens* norms come from different sources which are not considered to be at par in international law.

2.6 *Jus cogens* and related concepts

2.6.1 *Jus cogens* and obligation *erga omnes*

The *erga omnes* and *jus cogens* concepts are often presented as two sides of the same coin. In the absence of a clear definition, scholars have often sought to define *erga omnes* by making reference to the notion of peremptory norms, *jus cogens*.⁷⁷ The term *erga omnes* means 'flowing to all', and so obligations deriving from *jus cogens*

⁷² Weil 'Towards Relative Normativity in International Law?' (1983) 77 *American Journal of International Law* 413.

⁷³ *Neto-Navia* (footnote 26) pp 11.

⁷⁴ *Ibid.*

⁷⁵ *Barcelona Traction Case* (footnote 2).

⁷⁶ *Ibid.*

⁷⁷ Tams *Enforcing Obligations Erga Omnes in International Law* (2005) pp 34.

are presumably *erga omnes*.⁷⁸ Indeed, legal logic supports the proposition that what is ‘compelling law’ must necessarily engender an obligation ‘flowing to all’.⁷⁹

The problem with such a simplistic formulation is that it is circular. What ‘flows to all’ means obligation *erga omnes* is ‘compelling’ like *jus cogens*. The difficulty is apparent in the senses that if all *jus cogens* norms are *erga omnes*, are all *erga omnes* norms *jus cogens*. The answer to this question seems to be in the negative. In fact, there are certain norms generally recognized and accepted by the international community as a whole but which are not elevated to the status of *jus cogens* norms. This is the case with general principles of diplomatic immunity and the principle of sovereignty of states in international agreements although the list is not exhaustive.

The relationship between *jus cogens* and *obligation erga omnes* was never clearly articulated by the PCIJ and the ICJ, nor did the jurisprudence of either court explicitly articulate how a given norm becomes *jus cogens*, or why and when it becomes *erga omnes* and what consequences derive from this. Obviously, a *jus cogens* norm rises to that level when the principle ‘it embodies has been universally accepted, through consistent practice accompanied by the necessary *opinio juris*, by most states’.⁸⁰

It is imperative to mention that all *jus cogens* norms are *erga omnes*, but not all *erga omnes* norms are *jus cogens*. *Jus cogens* concerns the value of norms, while *erga omnes* describe the scope or extent of such norms.

2.6.2 *Jus cogens* and non derogable rights

There is a common understanding that human rights are interdependent, interrelated and indivisible. The Vienna Declaration and Programme of Action of 1993 affirmed this basic characteristic of human rights.⁸¹ For effective realisation of human rights,

⁷⁸ Randall ‘Universal Jurisdiction under International Law’ (1989) 1 *Journal of International Law* 729; Reydams ‘Universal Jurisdiction over Atrocities in Rwanda: Theory and Practice’ (1996) 1 *Journal of International Criminal Justice* pp 785.

⁷⁹ Bassiouni (footnote 48) pp3.

⁸⁰ In *Right of Passage Over Indian Territory (Portugal v. India)*, 1960 I.C.J. 123, 135 (Apr. 12) (Fernandes, J. dissenting).

⁸¹ Distr. GENERAL A/CONF.157/23 12 July 1993 Vienna Declaration and Programme of Action 1993.

all rights should be protected on an equal footing. However, in a state of emergency most rights can be suspended for the same purpose of protecting the nation.⁸²

The International Covenant on Political and Civil Rights (ICCPR),⁸³ the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR)⁸⁴ and the American Convention on Human Rights (ACHR)⁸⁵ each contain provisions allowing states parties to derogate from their obligations in respect of specified rights during declared states of emergency. At the same time, these instruments provide that a select group of enumerated rights may never be suspended or limited, even during such times of national emergency.

The ICCPR, for instance provides a limited number of non-derogable rights namely: the right to life (article 6), freedom from torture, or cruel, inhuman or degrading treatment or punishment (article 7), freedom from slavery and servitude (article 8), freedom from imprisonment merely on the ground of inability to fulfill a contractual obligation (article 11), freedom from retroactive criminal liability (*nullum crimen sine lege*) (article 15), the right to recognition as a person before the law (article 16), and the right to freedom of thought, conscience and religion(article 18).

On the face of it, non-derogable rights like *jus cogens* do not admit of derogations. Nonetheless, all non-derogable rights are recognized as the residuum in the wake of a states declaration of the intention to suspend identified human rights norms.⁸⁶ On the other hand, certain *jus cogens* norms are derogable in times of emergency. The *jus cogens* right to non-retroactivity of penal law, for instance, may be placed in abeyance in times of national or international emergencies. This also applies to the *jus cogens* norm of non-refoulement or the right to a name.

2.7 Function of *jus cogens*

The function of *jus cogens* norms in the field of law of treaties is founded in article 53 of the Vienna Convention. This article provides that ‘a treaty is void if, at the

⁸² O Gross ‘Once More unto the Breach’: The Systemic Failure of Applying the European Convention on Human Rights to Entrenched Emergencies’ (1998) 23 *Yale Journal of International Law* 437.

⁸³ ICCPR *supra*.

⁸⁴ Adopted Nov. 4, 1950, 213 U.N.T.S. 221.

⁸⁵ Adopted Jan. 7, 1970, reprinted in 9 I.L.M., 673 (1970).

⁸⁶ Teraya (footnote 22)923.

time of its conclusion, it conflicts with a peremptory norm of general international law’.

2.7.1 Invalidation of treaty

The specific function of *jus cogens* norms in the law of treaties ‘is to prevent violations of the substantive provisions of norms having a peremptory character’,⁸⁷ by invalidating any treaty inconsistent with it. In others words, *jus cogens* norms in the law of treaties has the ability to prevent and to invalidate any conduct contrary to substantive provisions. Thus where peremptory norms of general international law are violated, the treaty conflicting with it is void and incapable of creating any legal effects.

However, certain commentators express the view that a ‘peremptory norm does not function only with respect to treaties’,⁸⁸ but it also concerns unilateral acts of states. In fact, this view signifies that *jus cogens* have the power to bar or invalidate any act of state which is inconsistent with a peremptory norm of general international law.

As I will discuss later, this opinion emerged from the International Criminal Tribunal for Yugoslavia (ICTY) in the *Furundzija case*. The court held that ‘the fact that torture is prohibited by a peremptory norm of international law has effects at the inter-state and individual levels.’⁸⁹ At the inter-state level, it serves to internationally delegitimise any legislative, administrative or judicial act authorizing torture’.⁹⁰ My view is that where a peremptory norm is universally accepted and recognized; states may not invoke their internal affairs or territorial sovereignty to avoid its binding effects.

2.7.2 Limitation of the will of states

Traditional international law was governed by the principle of freedom of states to consent to any particular treaty. States were free to contract out of general rules of law through other valid or binding arrangements. The introduction of *jus cogens* to the law of treaties precipitated significant changes in the way states contract. In the

⁸⁷ Rozakis (footnote 55) pp 11.

⁸⁸ Ibid pp 17.

⁸⁹ *Furundzija Case* (footnote 4).

⁹⁰ Ibid .

first place, the consent of states was limited, especially in the field of peremptory norms of general international law. In other words, members of the international community are proscribed from using their sovereignty to sidestep recognized peremptory norms. It appears that the major change that *jus cogens* introduced to the field of law of treaties is the limitation of states' will.

In the case concerning the imposition of the death penalty on juveniles in the United States, the Inter-American Commission held that the prohibition of juveniles' execution had attained the status of a *jus cogens* norm, and that this status was recognized by all states in the inter-American system, including the United States.⁹¹ Despite the fact that United States did not expressly recognize this rule, the Commission condemned the United States because the peremptory norm proscribing the use of the death penalty compelled the United States to contract out of it.

Thus the notion of peremptory norms in international law encompasses the limitation of states sovereignty. Here, it is important to mention that within traditional international law, the effects of treaty law bound only states parties to it, through the principle of *pacta sunt servanda*. In the case of *jus cogens* norms, a peremptory norm of general international law binds all members of the international community: It does not differentiate between those who consent or not to the convention.

2.7.3 Hierarchy of norms rather than sources

The third effect of *jus cogens* norms is the recognition of the existence of superior norms over ordinary norms in international law. Thus the acceptance by the international community of the existence of a normative hierarchy theory in the international order is significant. International law was characterized by a hierarchy of sources rather than norms. Thus the recognition of a priority of certain norms over others is a revolution from 'the traditional principle of mutual flexibility between the sources, whereby treaty and customary law could derogate from one another'.⁹² *Jus cogens* norms have introduced an important change in the law of treaties, by

⁹¹ Resolution No. 3/87, case 9647, [1987] The United States is not a party to the American Convention on Human Rights, so petitioners were constrained to argue that the American Declaration was binding on the United States as customary law.

⁹² Bianchi 'Human Rights and the Magic of *Jus Cogens*' (2008) 19(3) *European Journal of International Law* 491-508.

‘postulating a hierarchy of rules, rather than sources, on the basis of their content and underlying values’.⁹³

This raises questions on how to resolve conflicts between *jus cogens* stemming from two different sources. If two parties found their arguments on two conflicting peremptory norms of different sources, which one prevail? For instance, how to resolve the conflict between *jus cogens* stemming from customary law and another drawn from conventional law.

Therefore the postulate that ‘a norm which can be modified only by a subsequent norm of general international law is having the same character,⁹⁴ entails that peremptory norm modify each other. The Vienna Convention is silent on the superiority of sources of *jus cogens*. This is important because in traditional international law, article 38(1) of the ICJ Statute recognizes the graduation of sources of international law. Article 38(1) requires the Court to apply, among other things, (a) international conventions expressly recognized by the contesting states, and (b) international custom, as evidence of a general practice accepted as law.

To avoid the possibility of *non liquet*, sub-paragraph (c) added the requirement that the general principles applied by the Court must be ‘general principles of the law recognized by civilized nations’. sub-paragraph (d) acknowledges that the Court is entitled to refer to ‘judicial decisions’ and to the most highly qualified juristic writings ‘as subsidiary means for the determination of rules of law’. It seems that the peremptory norms theory does not recognize such a graduation of sources. Nevertheless, in practice this conflict often appears, as we will see in the chapter concerning the implementation of *jus cogens* norms.

2.7.4 The establishment of objective illegality in international law

The third significant change brought by the introduction of *jus cogens* norms is ‘the notion of objective illegality’⁹⁵ in international law. The term ‘objective illegality’ means that the international community agrees to invalidate any treaty or act contrary

⁹³ Ibid.

⁹⁴ Article 53 of the Vienna Convention of law of treaties (1969).

⁹⁵ Rozakis (footnote 55) pp 23.

to peremptory norms. This engenders the view that the international community may invalidate any act of sovereign states which conflicts with *jus cogens*. Thus illegality objective prevents states from invoking their sovereignty to justify violation of peremptory norms.

Although the concept of peremptory norms owes its existence to the Vienna Convention, legal history demonstrates that this concept has been in use for centuries.

2.8 Concluding remarks

Jus cogens norms may be defined as no-derogable rights of general international law. These norms originate from natural law and as such supersede other norms. It has been held that the principal function of peremptory norms is to establish a hierarchy of norms and limit the will of states upon certain rules regarded as non derogable by the international community. Those norms may stem from general convention, general customary law or general principles of international law. The focal point of a peremptory norm is that the norm must be generally accepted and recognized by the international community as a norm from which no derogation is permitted. The difference between peremptory norms and other norms of general international law is that peremptory norms bind members of the international law without their consent.

Chapter III: The international practice and issues raised by the implementation of peremptory human rights norms

3.1. Introduction

While the concept of peremptory norms in human rights is increasingly accepted, there still remain certain unresolved issues surrounding the application of *jus cogens*. This chapter will discuss certain, if not all, issues raised by the application of *jus cogens* in the field of human rights. It will first examine the principle of state immunity as an exception to binding norms of *jus cogens*. This first section will ask the question whether state immunity can be used to avoid the binding force of peremptory norms. The chapter will also discuss how peremptory human rights norms influence national law. After this it will examine the argument that the concept of *jus cogens* violates the traditional principles of indivisibility and interdependence of human rights. In other words, how can one rank human rights, while in principle all human rights are equal. Lastly, this chapter will discuss difficulties of implementing *jus cogens*.

3.2. State immunity and *jus cogens*

International practice demonstrates that state immunity is frequently invoked to escape liability for violations of peremptory human rights. This section will critically analyze the arguments preferred by supporters of the state immunity principle.

State immunity is an exception from which exonerates states from civil and criminal liability or the administrative jurisdiction of another state, by reasons of international legal norms, stemming from custom, practice, doctrine, jurisprudence and treaty. Traditionally, state immunity is regarded as a rule that a domestic court will not vindicate a foreign state without its consent.⁹⁶ This principle is founded in the maxim *in parem non habet imperium*, 'an equal has no power over an equal'.⁹⁷ Thus the sovereign equality of states is the focal point of the doctrine of state immunity.

⁹⁶ Rozakis (footnote 55) pp 25.

⁹⁷ *Black's Law Dictionary* 1673 7th ed. (1999).

However, the increasing participation of states in the private sectors ousted the possibility of considering state immunity without promoting injustice owing to contractual relationship between states and individuals or private entities. The reason is that states continued to invoke immunity in legal proceedings arising from their private activities.

As a result, the doctrine of relative state immunity⁹⁸ was born, which was restricted to actions relating to sovereign or public acts (*jus imperii*), and excluded civil actions concerning private or commercial acts (*jus gestionis*). As from the introduction of relative state immunity, states were prevented from invoking immunity to bar civil actions related to their private activities.

In 1991, the International Law Commission's Draft Articles on Jurisdictional Immunities of States and Their Property codified this change.⁹⁹ Article 5 of the draft provides that 'a State enjoys immunity, in respect of itself and its property, from the jurisdiction of the courts of another State subject to the provisions of the present articles'. Articles 10 to 17, then provide for 'proceedings in which State immunity cannot be invoked', establishing exceptions that confirm the relative state immunity theory.

One of the striking exceptions to state immunity which is also related to this study is that a foreign state may not invoke immunity from jurisdiction before local courts for lawsuits in which it is alleged to have committed a tort.¹⁰⁰ It is common cause that the granting of jurisdictional immunity to states which have allegedly violated fundamental human rights is no longer accepted in international law, due to the special characteristics of such rights.¹⁰¹ There are 'intangible' rights from which states may not derogate under any circumstances.¹⁰² These rights are peremptory or

⁹⁸Bankas *The state Immunity Controversy in International Law Private Suits Against Sovereign State in Domestic Court* (2005) pp 45.

⁹⁹ UN DOC A /46 /10 *The international Law Commission, Draft Article on Jurisdictional Immunities of states and their Property* Yearbook of International Law Commission 2 (2) (1991).

¹⁰⁰ Ress 'The Changing Relationship Between State Immunity and Human Rights' in Michelle de Salvia (ed) *The birth of European Human rights law: Studies in Honour of Carl Aage Norgaard* (1998) 174.

¹⁰¹ De Moll 'Case note: *Al-Adsani v UK-State Immunity and Denial of Justice with Respect to the Violations of Fundamental Human Rights*' (2002) 8 (4) *Melbourne Journal of International Law* 345.

¹⁰² Ibid.

jus cogens norms. All members of the international community may legitimately demand their observance and reparation for any violation thereof. It follows that nowadays, states may not use their immunity as a defence to violations of *jus cogens* norms.

In *Pinochet*, the House of Lords had to decide whether to recognise criminal jurisdictional immunity for the former President of Chile, General Augusto Pinochet Ugarte.¹⁰³ Pinochet was in the UK when the request for his extradition was issued by a judge in Spain, where he was facing prosecution for a series of criminal offences that constituted violations of human rights, committed during the time he governed Chile. The Lords decided, in their judgment of 24 March 1999,¹⁰⁴ that the international legal system could not confer immunity *ratione materiae* on heads of state regarding criminal jurisdiction for official acts of torture,¹⁰⁵ since it is precisely these acts that it intends to criminalize as violations of fundamental norms of the international community.¹⁰⁶ It has been argued that *Pinochet* ‘has emphasized the limits of immunity in respect of gross human rights violations by State officials’.¹⁰⁷ There can be no doubt that this case, and the widespread publicity it received, has generated support for the view that state officials should not be entitled to plead immunity for acts of torture committed in their own territories in both civil and criminal actions.¹⁰⁸ Quoting the *Furundzija case*, the court held that:

“Because of the importance of the values it protects, [the prohibition of 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. The most conspicuous consequence of this higher rank is that the principle at issue cannot be derogated from by states through international treaties or local or special customs or even general customary

¹⁰³ *The Pinochet case* (footnote 6).

¹⁰⁴ *Ibid.*

¹⁰⁵ The difference between *ratione personae* immunity and *ratione materiae* immunity is also present in diplomatic immunities, as can be seen in the *Vienna Convention on Diplomatic Relations*, opened for signature 18 April 1961, 500 UNTS 95, art 39(2) (entered into force 24 April 1964):

¹⁰⁶ For further details on Pinochet see Handl ‘The *Pinochet Case*, Foreign State Immunity and the Changing Constitution of the International Community’ in Benedek, Isak and Renate Kicker (eds) *Development and Developing International and European Law: Essays in Honour of Konrad Ginther on the Occasion of His 65th Birthday* (1999) 79.

¹⁰⁷ International Law Commission *Report of the Working Group*, VII, Supp 10, Appendix, [11].

¹⁰⁸ *Ibid.*

rules not endowed with the same normative force. . . . Clearly, the *jus cogens* nature of the prohibition against torture articulates the notion that the prohibition has now 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.”¹⁰⁹

The *jus cogens* nature of the prohibition against torture grants states the universal jurisdiction punish the crime wherever it has been committed. As common enemies of international community, the offenders of *jus cogens norms* may be punished by any state because all nations have an equal interest in their apprehension and prosecution.¹¹⁰ *The Pinochet and Furundzija* cases illustrated the new trend where states may not use state immunity as a defence with respect to *jus cogens* norms violations.

In *AL-Adsani case*, the European Court of Human Rights refused to follow the foundations laid down by *Pinochet* case with regards to the authority of *jus cogens* norms over ordinary norms of international law. In the court’s view the right of access to court is not absolute, but ‘may be subject to limitations’.¹¹¹ It held that any such limitation must only be imposed on the grounds that it ‘pursues a legitimate aim and there is proportionality between the means employed and the aim sought to be achieved’.¹¹² Furthermore, it is understood that the granting of jurisdictional immunity to Kuwait by the British courts in civil proceedings resulting from an act of torture pursued a legitimate aim, based on the international law rule *par in parem non habet imperium*.¹¹³

On the merits, although, the court recognized the prohibition of torture as a peremptory norm, it rejected the argument that the breach of such a norm prevails

¹⁰⁹ *Pinochet case* Op cit, see also *Furundzija case*.

¹¹⁰ Ibid.

¹¹¹ Ibid para 51.

¹¹² Ibid.

¹¹³ Ibid.

over denial of state immunity in civil suits.¹¹⁴ In the court's view, the acceptance of the hierarchy of a peremptory norm upon state immunity will entail a wide range of matters;¹¹⁵ consequently will alter the relationships between states. Thus there is no evidence that the denial of immunity of a perpetrator state causes serious damage between states. Even so, can one support the impunity of violations of peremptory norm of general international law in the light of preservation of bilateral or multi-lateral relations between states? Clearly the denial of immunity would 'have a preventive impact deterring the governments with assets abroad from torturing individuals'.¹¹⁶

It is worth noting that *Al-Adsani* could only get any remedy from the Kuwait through the English court. The ECHR by rejecting the applicant's claim on the ground of state immunity demonstrated that the fate of *Al-Adsani* depended on his perpetrator. In *Al-Adsani* case, the Court established the existence of violation of peremptory norm, but had failed to try the perpetrator because of its immunity.

The dissenting judges rejected the view that state immunity is a bar to prosecution, and held that the *jus cogens* norm prohibiting of torture prevailed over state immunity.¹¹⁷ Consequently Kuwait could not hide on hierarchically lower rules to avoid the consequences of its actions. One notices that the dissenting judgment was based on the theory of limitation of state immunity according to which a foreign state may not invoke immunity from jurisdiction before local courts for lawsuits in which it is alleged to have committed a tort.¹¹⁸ This theory means that state immunity can be pleaded for lawful acts of states complying with international law; any act of state which contravenes international law is not covered by state immunity.

This paper argues that the ECHR erred, in *Al-Adsani*, by taking the view that in terms of criminal proceedings, peremptory norm can have procedural effect, but not in civil proceedings. In this case the court did not demonstrate why the norm that can prevail over procedural norms in one field cannot achieve the same result in other fields. The majority did not consider that the nature of proceedings does not determine the

¹¹⁴ *Al-Adsani* para 61.

¹¹⁵ *Ibid.* Concurring opinion of judges Pellonpaa and Bratza.

¹¹⁶ Orakhelashvili 'State Immunity and Hierarchy of Norms: Why the House of Lords Got It Wrong' (2007) 18 *European Journal International Law* 955-970.

¹¹⁷ Dissenting Opinion of Judges Rozakis, Caflisch, Costa, Cabral Barreto, and Vajic.

¹¹⁸ Orakhelashvili (footnote 117) pp 955.

effects of *jus cogens* but its character as peremptory norms upon lower rules. As observed in the dissenting opinion that ‘projecting such distinction between criminal and civil proceedings is not consonant with the very essence of the operation of the *jus cogens* rules’.¹¹⁹ The joint dissenting opinion observed that:

It is not the nature of the proceedings which determines the effects that a *jus cogens* rule has upon another rule of international law, but the character of the rule as a peremptory norm and its interaction with a hierarchically lower rule. The prohibition of torture being a rule of *jus cogens*, acts in the international sphere and deprives the rule of sovereign immunity of all its legal effects in that sphere. The criminal or civil nature of domestic proceedings is immaterial. The jurisdictional bar is lifted by very interaction if the international rules involved, and the national judge cannot admit a plea of immunity.¹²⁰

This reasoning has been supported in certain national courts. Greek and Italian courts have recognized the primacy of *jus cogens* over immunities.¹²¹ In the *Voiotia case*¹²² which concerned the reparation of atrocities, including murder and destruction of private property committed by German occupation forces in the village of Distomo during the Second World War, the Hellenic Supreme Court decided that when a state breaches *jus cogens* norms waives its entitlement to sovereign immunity for those breaches.¹²³

The *Ferrini case*¹²⁴ concerned the reparations for the atrocities committed by German occupation forces in Italy in World War II. The appeal court in Florence, upheld the judgment of court of the first instance. However the Italian Supreme Court held that a foreign state cannot enjoy immunity for sovereign acts which can be classified as

¹¹⁹ Ibid pp 966.

¹²⁰ Joint dissenting opinion *Al-Adsani Case* para 4.

¹²¹ Prefecture of *voiotia v Federal Republic of Germany*, case no 11/2000 Areijos Pagos (Hellenic, Supreme Court), May 4, 2000. See *Ferrini v Republic of Germany*, Corte di Cassazione (Sezioni Unite), judgment No 5044 of 6 Nov. 2003, registered 11 Mar. 2004, 87 Rivistadiritto Internazionale (2004) 539.

¹²² Ibid.

¹²³ Ibid.

¹²⁴ De Sena and De Vitto ‘State Immunity and Human rights: The Italian Supreme Court Decision on the *Ferrini Case*’ (2005) 16 *European Journal of International Law* 89; Bianchi ‘case-note on *Ferrini*’ (2005) 99 *American Journal of International Law* 242.

international crimes of the same time.¹²⁵ Furthermore, the Court considered the denial of immunity as compliance with the provisions of ILC's article 4 not recognizing breaches of peremptory norms and not to assist the state that has committed such a breach.¹²⁶

Here, both courts examined the effects of a *jus cogens* norms on lower norms. It can be said that supporting immunity in the case of a breach of a peremptory norm would certainly mean supporting such a breach and assisting the wrongdoer state in consolidating that outcome.¹²⁷ For this reason, both Courts, given the prevalence of peremptory norms were obliged to deny immunity.

Furthermore, in *Al-Adsani case*, the Court did not address the issue of peremptory norms; all it did was to draw a distinction between substantive peremptory rules and the procedural rule of immunity.

It is the writer's view that the existence in international law of peremptory norms would not make sense, if some procedural rules such as state immunity can prevent the enforcement of these norms. A procedural rule may prevail over peremptory norm only if it protects an interest having equal or the same status with such a peremptory norm. Here it must be noted that state immunity has inferior status vis-à-vis peremptory norms. Therefore, if a court holds that it cannot enforce the violation of a *jus cogens* norm because of lower a rule of state immunity, it effectively holds that peremptory norms do not exist in international sphere.

Secondly, *jus cogens*, contrary to certain doctrinal arguments, are not limited to the substantive rule, but also aim to have an impact on the legal consequences of the breach of the relevant substantive peremptory norm.¹²⁸ Thus, article 53 and 71 of the Vienna Convention are not about the substantive requirements not to breach peremptory norms, but about the peremptory consequences applicable to the breach that has already happened.¹²⁹

¹²⁵ Ibid

¹²⁶ Orakhelashvili (footnote 117) pp 966.

¹²⁷ Ibid.

¹²⁸ Ibid.

¹²⁹ Ibid.

Finally, acts such as torture, crimes against humanity or war crimes cannot be protected by state immunity. Originally, state immunity was established to protect legitimate and legal acts of foreign states and did not cover illegal acts of foreign state thus escaping prosecution in foreign forums.

3.3. Peremptory norms in domestic law.

The concept of *jus cogens* has also been questioned in relation to those who believe that it limits the legislative process of states. According to its opponents, *jus cogens* should bind only parties to treaties but not acts of legislative, executive and judiciary. Their objection is based on the fact that peremptory norms should not prevent the functioning of national law. This section will explain how peremptory norms constrain national legal systems and whether this intervention or extension of *jus cogens* in national law complies with the spirit of the Vienna Convention. It will also examine whether such an extension of the legal effect of *jus cogens* has negative effects in the enforcement of human rights in national spheres.

Traditionally, the provisions of the Vienna Convention limited the application of peremptory norms to unlawful international agreements. In compliance with article 53, a treaty is null and void if it is inconsistent with a peremptory norm of general international law. And article 71 of the Vienna Convention states that states parties have to avoid entering into which conflict with peremptory norms, and should bring their agreements into conformity with peremptory norms.

However, international practice demonstrates that the application of *jus cogens* should not be limited only to international agreements but must extend to unilateral acts of member states. In *Furundzija* case¹³⁰, the ICTY decided that a peremptory norm of international law not only affects international agreements but also individual acts of states. Given the fact that torture is a peremptory norm of international law, the ICTY held that:

¹³⁰ *Furundzija Case* (footnote 4) para 155-157.

The fact that torture is prohibited by a peremptory norm of international law has effects at the inter-State and individual levels. At the inter-State level, it serves to internationally deligitimise any legislative, administrative or judicial act authorizing torture. It would be senseless to argue, on the one hand that on account of the *jus cogens* value of the prohibition against torture, treaties or customary rules providing for torture would be null and void *ab initio*, and then be unmindful of a state say, taking national measures authorizing or condoning torture or absolving its perpetrator through an amnesty law...Furthermore, at the individual level, that is, that of criminal liability, it would seem that one of the consequences of the *jus cogens* character bestowed by the international community upon the prohibition of torture is that every state is entitled to investigate, prosecute and punish or extradite individuals accused of torture, who are present in a territory under its jurisdiction.¹³¹

From *Furundzija* two methods of how peremptory norms may intervene in national law are discernible. Firstly, peremptory norms 'serve to internationally deligitimise any legislative, administrative or judicial act',¹³² authorizing violation of *jus cogens*. In other words, any unilateral act of state whether legislative, administrative or judicial would be null or void if it does not comply with peremptory norms of international law. This can be referred as active obligation of state not to act contrary to a peremptory norm. The reasoning in *Furundzija* has been supported by certain international courts as well as in national system such as in Switzerland's referendum and the ECHR in the *Soering v the United Kingdom*.

The invalidation of people's initiative in Swiss¹³³(Swiss referendum) is an interesting example where the application of *jus cogens* limits national law. In July 1992, the people's initiative had submitted to the federal Government of Switzerland a referendum in which they proposed that a constitutional clause determined that asylum seekers who enter the country illegally would be deported summarily and

¹³¹ Ibid.

¹³² Ibid.

¹³³ De Wet (footnote 12) pp 108.

without giving him or her chance to appeal.¹³⁴ In 1994, the Federal Government (federal Council) of Swiss informed the people that the refugee right to non-refoulement had reached the status of *jus cogens* norm.¹³⁵ Consequently, states are under obligation to refrain from extraditing persons to a country where they may face cruel and degrading treatment. This entails that states have obligations to investigate whether the deportation of a particular asylum seeker will have such effect.¹³⁶ While the constitutional amendment proposed by the people's initiative did not provide for such an investigation, such asylum seekers could be deported summarily. Thus, any person who fled his or her country for reasons of persecution would face refoulement to the state where he or she will be subject to cruel, inhumane and degrading treatment. This would have constituted a breach of the peremptory norm of non-refoulement which is incorporated in the Swiss constitution.

Additionally peremptory norms also influence national law especially criminal Court. This is in criminal liability. Thus when a peremptory norm has been violated 'every state is entitled to investigate, prosecute and punish or extradite individuals who are present in a territory under its jurisdiction'.¹³⁷ In this way, *jus cogens* introduce a passive obligation upon states. Consequently, states may not justify their passivity on the ground that they have not incorporated such infraction in their legal systems.

However, the decision in *Furundzija* does not limit the scope of article 53 only to treaties; it also concerns 'the execution of certain obligations under treaty'.¹³⁸ Thus for instance, a state may not extradite a person to a country where he may face a violation of his peremptory rights. The decision in *Soering v the United Kingdom*¹³⁹ may be a relevant example in this matter. The treaty of extradition between USA and UK did not violate the peremptory norm, but the execution of such treaty would have had such effect. This case involved the extradition of a German national to Virginia in the USA where he faced the death penalty.¹⁴⁰ The ECHR held that transferring

¹³⁴ Ibid.

¹³⁵ Ibid.

¹³⁶ Ibid.

¹³⁷ Ibid Para 155-157

¹³⁸ Ibid.

¹³⁹ *Soering v United Kingdom*, 7 July 1989, series A, No.161, 11EHRR 439,Para 88.

¹⁴⁰ Ibid.

Soering to a territory where he risked experiencing cruel and inhuman treatment was clearly in violation of article 3¹⁴¹, hence contrary to the spirit and intention of that article. In this case the treaty of extradition between the USA and UK remains intact and valid, but the execution of obligations of such treaty would violate peremptory norms.

The first justification for the extension of peremptory norms to unilateral acts of states is that imperative norms that are capable of nullifying treaties may also nullify national law. As said in *Soering*, violation of peremptory norm may occur by treaty as well as by a unilateral act of a state. Some commentators consider this approach as an extension of the role and purpose of the notion of *jus cogens*. This paper submits that such an approach is not pervasive, in the sense that a peremptory norm concerns the international community as whole, and it will be senseless to limit its scope only to treaties and leave the unilateral acts of state without regulation. It would be inconceivable that ‘these effects should not extend to any act or action having the character of the lower rank than rules’.¹⁴² Therefore, the rejection of the extension of the scope of *jus cogens* to unilateral acts of states is not justifiable.

3.4. *Jus cogens* and the principles of human rights

The question of the incompatibility of *jus cogens* with the indivisibility and interdependence of human rights¹⁴³ is often raised by certain human rights scholars. They contend that the interdependence and indivisibility of human rights makes the notion of hierarchy more contentious. The main question in this section is whether there is any hierarchy among human rights norms. Firstly, this section will define the concepts of indivisibility and interdependence and their recognition in international law. Secondly it will discuss the subdivision of human rights into generations, a sort of hierarchy. Lastly it will examine the core rights which are regarded as being superior human rights.

¹⁴¹ Article 3 of Convention for the Protection of Human Rights and Fundamental Freedoms, 213 U.N.T.S. 222, entered into force Sept. 3, 1953, as amended by Protocols Nos 3, 5, 8, and 11 which entered into force on 21 September 1970, 20 December 1971, 1 January 1990, and 1 November 1998 respectively.

¹⁴² Rozakis (footnote 55) pp 17.

¹⁴³ Donnelly *Universal Human Rights in Theory and Practice* 2nd ed. Library of congress (2003).

The indivisibility of human rights means that none of the rights that are considered to be more important than any of the others; all rights are inter-related.¹⁴⁴ In other words, the indivisibility of human rights debunks the notion that ‘specific human rights’ can have hierarchical status placing some rights above others. In this connection, the indivisibility and interdependence concepts appear to be incompatible with the notion of hierarchy.

International instruments recognize the indivisibility of human rights in their provisions. For example, the General Assembly of the UN recognizes that human rights are ‘interdependent and indivisible’.¹⁴⁵ The First World Conference on Human Rights in Teheran (1968) proclaimed that ‘human rights and fundamental freedoms are indivisible.’ It is common cause that the realisation of each human right requires other human rights and, in this sense, all human rights are indivisible. This notion has been strengthened, by article 6 of the Declaration on the Right to Development (1986) and paragraph 5 of the Vienna Declaration and Programme of Action (1993) adopted at the second World Conference on Human rights.

Despite the recognition of the principle of indivisibility, there is no agreement among nations and cultures as to the universality of human rights. Cultural diversity entails different views about what deserve to be recognized as human rights norms. Thus, what is wrong in one culture may not necessarily be wrong in another.

It is also important to observe that international instruments recognizing the indivisibility principle are soft law. Hence the indivisibility principle is ineffective in international law.

While peremptory norms of human rights are the concerns of the international community as a whole, no state may violate peremptory human rights on the basis of its cultures. Thus, the introduction of *jus cogens* in human rights will foster universal acceptance of human rights as core rights. This means that peremptory

¹⁴⁴ Bunch and Frost (footnote 21) pp 918.

¹⁴⁵ Alternative approaches and ways of and means within the United Nations system of improving the effective enjoyment of Human rights and fundamental freedoms, General Assembly Resolution A/RES/32/130 16 December 1997.

norms help to resolve the conflict between relativism and universalism application of human rights.

The classification of human rights norms in three generations introduces also a sort of hierarchy in the field of human rights. Thus it has become a habit to divide human rights in three generations. According to the current terminology, human rights of the first generation are ‘negative’ human rights, or civil liberties, which enjoin states to abstain from interfering with personal freedoms.¹⁴⁶ For instance, freedom and security of person or freedom of speech belong to the first generation¹⁴⁷ which are fundamentally civil and political in nature, and serve to protect the individual from the excesses of the state.

Second-generation rights are related to equality and began to be recognized by governments after World War I. They are fundamentally social, economic, and cultural in nature. They ensure different members of the citizenry enjoy equal conditions and treatment. Secondary rights would include a right to be employed; rights to housing and health care as well as social security and unemployment benefits. Like first-generation rights, they were also covered by the Universal Declaration of Human Rights (UDHR).

Third-generation rights go beyond the mere civil and social, as expressed in many progressive documents of international law including the 1972 Stockholm Declaration of the United Nations Conference on the Human Environment, the 1992 Rio Declaration on Environment and Development, and other pieces of generally aspirational “soft law”. Because of the principle of sovereignty and the intransigence of would-be offender nations, these rights have been hard to impliment in legally binding documents. The following rights are third generation rights:

- Group and collective rights
- Right to self-determination
- Right to economic and social development
- Right to a healthy environment
- Right to natural resources

¹⁴⁶ Tomuschat *Human Rights Between Idealism and Realism* 2nd edition Oxford (2008), pp 25.

¹⁴⁷ Ibid.

- Right to communicate and communication rights
- Right to participation cultural heritage

Thus it is important to note that the rights of the first two generations are included in international treaties. The third generation rights have been affirmed by the resolution of UN General Assembly and are included in African Charter on Human and People's Rights.¹⁴⁸ This distinction would appear to entail a hierarchy of human rights. Thus, the violations of the right to life, freedom from torture and violations constituting crimes of Genocide, crimes against humanity and war crimes tend to attract the sharpest scrutiny¹⁴⁹. While economic, social and cultural rights and some 'third generation' rights, such as the right to development, have received increased consideration within the human rights body and remain a priority among some developing countries, efforts aimed towards implementation of these rights remain slow-moving.¹⁵⁰

As argued previously, all peremptory norms are considered to be at the same level. Even if it stems from the first or third generation; the right stated differently is going to have the same status as other rights. In other terms, while traditional human rights acknowledge a hierarchy of generations, peremptory human rights norms do not permit such a status. Thus, *jus cogens* norms not only entail universal acceptance among human rights, but also prevent the creation of hierarchy of generations among them, as all peremptory norms are equal.

As mentioned above, there is a common understanding that human rights are independent, indivisible and interrelated. The effective realization of human rights requires that all rights should be protected in the same way. However, in times of emergency most rights can be suspended, and only non-derogable rights remain operational. Thus, the International Covenant on Civil and Political rights¹⁵¹ (ICCPR), European Convention for Protection of Human rights and Fundamental freedoms¹⁵², and the American Convention on Human rights¹⁵³ each contain

¹⁴⁸ African Charter on Human and People's Rights adopted June, 27, 1981, OAU Doc. CAB/LEG/67/3 rev.5, 21 I.L.M 58 (1982), entered into force Oct. 21, 1986.

¹⁴⁹ Seiderman (footnote 24) pp 4.

¹⁵⁰ Ibid pp 5.

¹⁵¹ ICCPR adopted 16 Dec 1966.

¹⁵² ECHR adopted 4 Nov 1950.

¹⁵³ ACHR adopted 7 Jan 1970.

provisions allowing states parties to derogate from specified rights during declared states of emergency. At the same time, these instruments provide that select groups of enumerated rights may never be suspended or limited, even during national emergencies. As such the right to life, freedom from slavery or servitude, freedom from torture, cruel and inhuman treatment or punishment and the non-retroactive application of criminal laws are considered as 'non-derogable' or 'core rights'.

This raises questions on whether indivisibility of human rights means that particular certain rights may be noted as non-derogable rights while others are considered as derogable. Furthermore, the difference between derogable and non-derogable rights creates a hierarchy among human rights? The response is affirmative, because non-derogable rights are considered as 'superior' to derogable rights. All peremptory human rights are considered as non-derogable. To conclude, the theory of normative hierarchy exists within traditional human rights law. Thus, one cannot support the view that *jus cogens* would appear to be incompatible with the notion of indivisibility and interdependence of human rights.

3.6. Conclusion

There is a trend of christening most human rights as *jus cogens*. Despite such a trend, there are certain issues surrounding the application of the peremptory theory in the realm of human rights. It is argued that state immunity is often invoked by states to avoid any liability stemming from the violations of peremptory norms. And, in most cases, courts grant immunity to such states. This chapter has argued that the reasons advanced for granting immunity are often unfounded. The hierarchy theory is also considered as incompatible with the indivisibility and interdependence principles of human rights. This chapter argues that the hierarchy theory cannot be considered as conflicting with human rights, because the hierarchy theory exists within human rights norms. Nevertheless, the absence of a precise definition, coupled with the absence of a precise list of peremptory norms, and the tendency of christening rules as peremptory, undermine the effectiveness of *jus cogens*.

Chapter IV: *Jus cogens*, normative hierarchy theory and Human rights

1. Introduction

As demonstrated in the preceding chapters, *jus cogens* norms introduce a hierarchy among rules rather than sources. This chapter will first discuss the theory of hierarchy. It will then examine the definition of the hierarchy theory and its relevance in international law. This chapter will also discuss the use of the normative theory in human rights law. In addition, it will focus on how *jus cogens* norms contribute to the effectiveness of human rights. In other words, how *jus cogens* norms influence human rights. Furthermore, this section of the thesis will contextualize the universal acceptance of human rights, the superiority of human rights and non-derogability of from human rights norms. Finally, the chapter will examine the rules of human rights which can be classified as *jus cogens* norms.

2. *Jus cogens* and the hierarchy theory

2.1 The definition of hierarchy

The term ‘hierarchy’ can be defined as ‘any system of persons or things ranked one above the other’.¹⁵⁴ It can also be defined as a system of levels according to which persons or things are organized. The theory of hierarchy may be defined as a theory according to which people or things are levelly organized.

In law, a hierarchy concerns the coherence of orderly organized norms. The theory also pre-supposes the existence of superior and inferior sources of norms. Slim Laghmani defines the hierarchy theory as ‘the most important mechanism to avoid conflicts of norms’.¹⁵⁵ Consequently, the hierarchy theory plays the role of placing norms in order with a view to preventing any subsequent conflicts between legal norms. In this sense, legal hierarchy entails ‘a particular distribution of power’¹⁵⁶ among legal norms.

¹⁵⁴ *Black Dictionary* (footnote 98).

¹⁵⁵ Laghmani (footnote 16) pp 14.

¹⁵⁶ Koskeniemi ‘Hierarchy in International Law: A Sketch’ (1997) 8 *European Journal of International Law* 566-582.

But since the adoption of the Vienna Convention, there is a trend towards defining hierarchy not from sources of norms but from the content or values of the norms. Lach, for instance, argues that ‘hierarchy determined by the content of the norm is acquiring greater significance’.¹⁵⁷ This value-oriented element of hierarchy is embedded in article 53 of the Vienna convention. This article refers to the international community as a whole and the *Barcelona Traction* case by using the words, ‘the importance of the rights involved’.¹⁵⁸ It seems that, nowadays, when one talks about a hierarchy of norms, one refers to a value-oriented element rather than sources of norms. Weil and Paulus recognized that a hierarchy of norms is shifted to a normative content of rules.¹⁵⁹ Thus the hierarchy of norms concept raises questions about: which rules ‘trump’ others and what values are more important. Therefore, a hierarchy of norms may be defined as a theory concerning the ordering of norms based on their values or content.

2.2 The effects of the hierarchy theory in the legal system

The effect of the hierarchy theory in any legal system is to establish cohesion in order to avoid any subsequent conflict of norms.¹⁶⁰ In fact, the effectiveness of any legal system depends on its coherence. Thus, any legal order is characterized by ‘general and individual rules and by the existence of ordering character’.¹⁶¹ It is important to note that this graduation is a necessary feature of any legal system which makes norms interpretation and application possible.

Thus, in the case of a conflict between two norms, the superior norms in terms of hierarchy will apply. *The Pinochet* case, for instance, seems to illustrate the hierarchy theory. In this case, the British law lords held that article 4(1) of the Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment¹⁶² provided that jurisdiction of the British House of Lords was available

¹⁵⁷Zimnenko and Butler *International Law and the Russian Legal System* Ed. Eleven International law (2007) pp293.

¹⁵⁸ *Barcelona Traction case*, ICJ Reports, 1970, p51.

¹⁵⁹Weiler and Paulus ‘the Structure of Change in International law or is There a Hierarchy of Norms in International Law?’ (1997) 8 *European Journal of International Law* 545-565.

¹⁶⁰ Langhmani (footnote 157) pp4.

¹⁶¹ Ibid.

¹⁶² Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. res. 39/46, [annex, 39 U.N. GAOR Supp. (No. 51) at 197, U.N. Doc. A/39/51 (1984)], entered into force June. 26, 1987.

even in cases concerning heads of state, for any act of torture. The attempts to balance the competing interests of immunity of head of state and peremptory norms lead to the prevalence of the latter. Hierarchy theory provides the cohesion within a legal system, in order to avoid ineffectiveness of norms. It is fair to say that the absence of a hierarchy of norms may lead to anarchy.

It is important to note that there are three features of hierarchy: The first character is that hierarchy entails the idea of value. A norm acquires a priority upon others because of its value. As previously mentioned, the *Barcelona Traction Case* when addressing the notion of *erga omnes* uses the phrase the importance of rights involved. The second feature of hierarchy is the function of norms. Compelling norms, for instance make the difference between ‘derogable rights and non-derogable rights’.¹⁶³ In this sense, one can argue that hierarchical norms appear as ‘result of accommodating competing values’.¹⁶⁴ The last character of hierarchy is that a superior norm is the result of community interests. Thus high-ranking norms represent the interests of an international community as whole.¹⁶⁵ These three elements once completed entail the elevation of norm in high-ranking status.

2.3. International law and the hierarchy of sources

Based on the hierarchy theory, this section tries to answer the question: what happens in international law if a rule that is derived from one source of international law conflicts with a rule derived from another source?

Article 38(1)¹⁶⁶ of Statute of the ICJ is generally recognised as a definitive statement of the sources of international law. It requires the ICJ to apply, among other things, (a) international conventions ‘expressly recognized by the contesting states’, and (b) ‘international custom, as evidence of a general practice accepted as law’. To avoid the possibility of *non liquet*, sub-paragraph (c) added the requirement that the general principles applied by the Court were those that were ‘the general principles of the law recognized by civilized nations’. As it is, states that by consent determine the content of international law, sub-paragraph (d) acknowledges that the Court is

¹⁶³ Teraya (footnote 22) pp 937.

¹⁶⁴ Ibid.

¹⁶⁵ Article 53 (footnote 1).

¹⁶⁶ Article 38(1) of statute of the ICJ.

entitled to refer to; judicial decisions' and the most highly qualified juristic writings 'as subsidiary means for the determination of rules of law'.

On the question of preference between sources of international law, rules established by treaty will take preference if such an instrument exists¹⁶⁷. It is also argued however that international treaties and international customs are sources of international law of equal validity; this is that 'new custom may supersede older treaties and new treaties may override older customs'.¹⁶⁸ It appears that since the main function of the general principles of law is to 'fill the gap of treaty law and customary law',¹⁶⁹ it would appear that treaties and customary rules prevail over general principles of law.

Nevertheless, apart from article 38 of Statute of the ICJ, which introduces hierarchy of norms, article 103 of Charter of United Nations provides that 'in the event of a conflict between the obligations of member states under the Charter and their obligations under any other international agreement, their obligations under the Charter shall prevail,' carries the hierarchical principle of general international law. This article establishes the supremacy of UN Charter over other international treaties.

In the sphere of international law, there are also certain international instruments that recognize hierarchical principles. The European system, for instance, recognizes the treaty establishing the European Community (treaty of Rome) as supreme law.¹⁷⁰ In the United Nations, Staff Rules promulgated by Secretary General are subordinated to resolutions of General Assembly and the latter are subordinated to the Charter.¹⁷¹

It is also possible, though less common, for a treaty to be modified by practices arising between the parties to that treaty. The other situation in which a rule would take precedence over a treaty provision would be where the rule has the special status of being part of the *jus cogens*. In such a manner that hierarchy is focused on values of norms rather than sources of norms. As previously seen, such a hierarchy theory has been introduced in international law by the Vienna Convention of the Law of

¹⁶⁷ Akehurst *A Modern Introduction to International Law* 6th Ed pp 40 (1987).

¹⁶⁸ Ibid.

¹⁶⁹ Ibid.

¹⁷⁰ The Treaty of Rome Establishing the European Economic Community, March 1957.

¹⁷¹ Ibid.

Treaties. And the introduction of *jus cogens norms* changes the foundation of international law which was based on the consent of its subject's members. Under article 53 of the Vienna Convention member states are not free to contract out of the peremptory norms of general international law.

2.4. Human rights law and that hierarchy of norms

The hierarchy of human rights norms is influenced by the three features seen above. The first feature influencing the hierarchy of human rights is that human rights are used as direct expression of individual welfare. There is a hierarchy in human rights because 'any international value is supposed to be attributed to an individual',¹⁷² because a legal fictitious entity, especially such as the state, does not have a real existence. That is why scholars and international lawyers consider human rights norms to be high priority. Thus, in the *Barcelona Traction case*, the ICJ, by defining what the obligation *erga omnes* might contain, held that 'such an obligation derives, for example, in contemporary international law, from outlawing acts of aggression, and of genocide, as also from the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination'.¹⁷³ One can get an impression from the decision of the Court, that *jus cogens* norms are only constituted by human rights norms. Furthermore, one can notice that among human rights norms, non-derogable rights signify 'a more fundamental interest which often differs from other human rights norms'.¹⁷⁴ The superiority of non-derogable human rights is based on value-oriented identification. It is safe to conclude that the hierarchy theory among human rights norms is influenced by the value of the norm. Therefore, the value of a norm is the most important character of its hierarchy.

The second character that has an impact in the hierarchy of human rights is the function of norms. The good understanding of this feature is the example *jus cogens* norms, as seen in the definition, function in "the realm of validity".¹⁷⁵ In other words, peremptory norms or non-derogable norms deserve certain consideration in order to operate effectively. It is the case, for instance, of non-derogable rights in

¹⁷² Ibid.

¹⁷³ *Barcelona Traction Case* (footnote 2) pp 51.

¹⁷⁴ Teraya (footnote 22) 938.

¹⁷⁵ Ibid.

emergency situations. They remain non-derogable. This is what leads one to conclude that hierarchical norms appear as a ‘result of competing values’.

This character often links human rights and *jus cogens*, in the sense that among community interests, human rights rules are based on the interests of individuals¹⁷⁶. The collective interest of the international community is an important character of *jus cogens* norms. In early 1957, Fitzmaurice, one of the rapporteurs of the ILC, argued that *jus cogens* establishes an important obligation because ‘all rules of this particular character are intended not so much for the benefit of the states, as directly for the benefit of the individuals concerned, as human beings and humanitarian grounds’.¹⁷⁷ This is why certain commentators¹⁷⁸ hold that all human rights norms are *jus cogens*. Nevertheless, it is safe to argue that human rights norms play a significant role in the development of *jus cogens*, and the latter influence human rights norms. The next section examines how *jus cogens* norms affects human rights.

3. The scope of *jus cogens* in human rights

The trend of using *jus cogens* in the field of human rights becomes increasingly frequent. One can argue that there is ‘an intrinsic relationship between *jus cogens* and human rights’.¹⁷⁹ But the one who has a good understanding of the function of *jus cogens*, will argue that because *jus cogens* gives priority to human rights rules upon other rules. Thus the priority of norms leads to its validity over others. This leads to the claim that the application of peremptory norms in human rights leads to the validity of them. Consequently the validity of norms in the international sphere encompasses universal acceptance of such norms. However, when a norm acquires priority upon others and is universally accepted, it becomes a supreme value. Thus it may be said that *jus cogens* influences upon human rights in three aspects: supremacy, validity and universality.

3.1. Peremptory human rights as supreme values

¹⁷⁶ Ibid.

¹⁷⁷ Fitzmaurice ‘The General Principles of International Law: Considered from the Standpoint of the Rule of Law’ (1957) 92 (2) *Comparative Law Review* 125.

¹⁷⁸ Parker and Beth ‘*Jus Cogens*: Compelling the law of Human Rights’ (1988) 12 *Hastings International Law and Comparative Law Review* 57.

¹⁷⁹ Bianchi ‘Human Rights and the Magic of *Jus Cogens*’ (2008) 19 (3) *European Journal of International Law* pp 491-508.

The first section to underlie the implications of *jus cogens* will give “priority to those human rights which are common to different cultures among the candidate for *jus cogens*”¹⁸⁰. As human rights norms are inherent to human beings, no state would deprive its citizens the enjoyment of such rights. And article 53 of the Vienna Convention of the Law of the Treaties is clear on this fact, when it stipulates that ‘a norm from which no derogation is permitted’.

Despite the limitation of numbers, the implication of *jus cogens* renders effectively human rights superior norms. In the case, for instance, concerning the application of the death penalty to juveniles,¹⁸¹ in the USA, the Inter-American Commission on human rights had spelled out the principle of superiority of *jus cogens* norms upon others norms. In this case, Terry Roach and Jay Pink were convicted of murder committed at a time when they were juveniles.¹⁸² Each received a sentence of death and were executed in South Carolina and Texas. Before the Commission, the applicants had argued that the implementation of the death penalty would constitute a violation of the right to life under article 1 and a violation of the right to equality before the law under article II of the American Declaration of the right and duties of Man. The Commission held that the executions in fact breached both of these provisions.¹⁸³ The Commission insisted that the prohibition of juveniles’ execution attained the status of a *jus cogens* norm, and that this status was recognized by all of the states in the inter-American system, including the United States¹⁸⁴. What is relevant in this case is that, although the Commission recognized in accordance with the doctrine of ‘persistent objector’, according to it, if a state has maintained a continuous objection to a rule during its emergency as custom, that state is not bound by the rule once it has crystallized . In holding that the rule against juvenile execution is binding even upon “persistent objectors”, the Commission essentially decided that rule of peremptory human rights is superior, consequently nullifying the inconsistent rule.

¹⁸⁰ Teraraya (footnote 22) 929.

¹⁸¹ Resolution No. 3/87, Case 9647, (1987). The United States is not party to the American Convention on Human Rights, so the applicants were constrained to argue that the American Declaration was binding on the United States as Customary Law.

¹⁸² Ibid.

¹⁸³ Ibid.

¹⁸⁴ Ibid.

3.2. Peremptory human rights and validity of norms

The second point to emphasize on the content of *jus cogens* in human rights is that it renders them valid vis-à-vis other norms. This character is inherent to *jus cogens* norms. One only needs to read article 53 of the Vienna Convention of the law treaty. The first phrase of article 53 reads: a treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. This feature is very significant in the human rights field, since certain human rights instruments are considered non-binding. Once a norm of human rights is elevated to the status of *jus cogens* it acquires a binding character, no matter what its sources are.

One can observe that in traditional international law, norms are hierarchically ordered regarding their sources. Thus, using a human rights norm stemming from inferior sources may not be efficacy. In other words, applying a human rights norm originating from non-binding sources may be complicated. However, *jus cogens* norms do not consider such a theory. In the *jus cogens* regime all norms are equal regardless of their sources. Thus, a peremptory norm of human rights originating from a non-binding instrument, for instance, will have the same validity as it is a treaty, custom or general principles of law.

Another important point that deserves to be mentioned is that *jus cogens* human rights norms entail the idea of equality among human rights norms. While views differ concerning the equality of three generations of human rights, peremptory norms reconcile them. In a sense all *jus cogens* norms are equal. It is the case in inter-American system where a right to a name is elevated to *jus cogens* norm.¹⁸⁵ It is the case of self-determination considered in African system as *jus cogens* norms. Those norms considered as belonging to an inferior generation, elevated in *jus cogens*, they acquire the same validity as their corollary of first generation.

It is important to note that when a norm is christened on *jus cogens*, it becomes generally opposable. It follows that a state is bound by this *jus cogens* norm irrespective of whether or not it has expressed its consent to be bound. This will apply also when a state has not taken part in the formation of such a peremptory

¹⁸⁵ Seiderman (footnote 24) pp 56.

norm either or because during the process of formation the state in question did not exist or because it did not express its position on the emerging rule.¹⁸⁶

3.3. Peremptory human rights as rights universally accepted

As previously spelled out, peremptory human rights are a concern of the international community as whole. A particular state or a group of states may not violate such a norm in the pretext that they were not party to it. Universal acceptance leads to universal jurisdiction. Thus any state may raise the concern of *jus cogens* human rights violations.

It is the case wherein a prospective extraditee may seek to preempt extradition by raising the possibility of a *jus cogens* human rights violations involves by the prospective extraditing state looks to the *jus cogens* nature of violations by the prospective extradite. The authorities seeking extradition may contend, as did the Belgian authorities with respect to former foreign affairs ministry Yerodia Abdoulay Ndombasi , that the very nature of the extradition crimes at issue are of such gravity as to vitiate certain otherwise tenable defenses that might be invoked by the extradite.¹⁸⁷ In such circumstance, the question arises as to whether the *jus cogens* character of the violated norm overrides the principle of underlying the defense.

As mentioned above, there is a close correlation between the concept of *jus cogens* and the obligation *erga omnes*. While not all obligations *erga omnes* concern *jus cogens* norms, because they are recognized as peremptory by the international community as whole, necessarily give rise to obligation *erga omnes*. If these overlapping *jus cogens* norms and obligation *erga omnes* are indeed the concern of the international community, it would seem to follow that the enforcement of the positive law prohibiting the violation of a *jus cogens* rights, i.e. the redress of any such violation, falls within the competency of each and every state comprising that community. And where such violation constitutes an international crime and so give rise to international responsibility, each state should have jurisdiction to prosecute those who commit such a crime.

¹⁸⁶ Ragazzi (footnote 27) pp 60.

¹⁸⁷ *Arrest Warrant Case, (Democratic Republic of the Congo v Belgium)* February 2002, ICJ Reports 2002, 3.

It is relevant to argue at this point that the influence of *jus cogens* on human rights is that *jus cogens* human rights become an interest of the international community as whole. Consequently, the violation of such a norm is a concern of all states member of international community. Universal acceptance entails also that state may not reject the binding character of such a norm, on the ground that it was not party to it.

4. Rules of human rights that can be classified as *jus cogens*

As the subject of *jus cogens* is intimately linked with no-derogability, I have chosen to start from non-derogable rights provided by international instruments. It will be also possible to mention other *jus cogens* human rights which international instruments did not originally christening them as such. It is important to notice that international practice develops more and more *jus cogens* human rights norms. Thus this examination would not be an exhaustive one. I will discuss the non-derogable rights principally in the framework of the ICCPR, while also taking account the *jus cogens* human rights such as developed in international jurisprudences.

4.1. Non derogable rights as *jus cogens*,

The ICCPR¹⁸⁸ contains provisions allowing state parties to derogate from their full obligations in respect of specified rights during declared states of emergency. While, on the other hand, this instrument provides that a select group of enumerated rights may never be suspended or limited, even during such times of national emergency.

Article 4(1) of the ICCPR provides:

In the time of public emergency with threatens the life of the national and the existence of which is officially proclaimed, the state parties to the present Covenant may take measures derogating from their obligation under the present covenant to the extent strictly required under the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language or social origin.

¹⁸⁸ Adopted Dec. 16 1966 by GA. Res.2200,999 U.N.T.S. 171.

A state party must officially proclaim a state of emergency, in order to undertake lawfully a measure of emergency. The proclamation of state of emergency constitutes the first condition of derogation. In addition, the state party must notify other state parties as the provisions from which it is derogating and the reasons for which it is undertaking derogating measures.¹⁸⁹ The following rights may not be derogated by state member, under no circumstance: the right to life (article 6), freedom from torture or cruel, inhuman or degrading treatment or punishment (article 7), freedom from slavery and servitude (article 8(1 and 2)), freedom from imprisonment merely on the ground of inability to fulfill a contractual obligation (article 11), freedom from retroactive criminal liability (*nullum crimen sine lege*) (article 15), right to recognition as person before the law (article 16), and the right to freedom of thought, conscience and religion (article 18).

Apart from these non-derogable rights, the following rights are considered by international law and practice as *jus cogens*: genocide, slavery or slave trade, the murder or causing the disappearance of individuals, torture or other cruel, inhuman, or degrading treatment or punishment, prolonged arbitrary detention, systematic racial discrimination. I am not going to discuss one by one, but will try to give certain examples of application of *jus cogens* in international law case.

4.2 International case law and practice concerning violations of peremptory human rights rules

It is relevant to note that the violations of peremptory norms may be invoked in various forums. It may arise before the international forum as well as national forum. The international Court of Justice opened the doors to the idea of hierarchy in the *Barcelona Traction case*¹⁹⁰ by proposing that basic rights of the human person creates obligations *erga omnes*.¹⁹¹ The *Barcelona Traction case* concerned three States, Belgium, Canada and Spain. The Barcelona Traction, Light and Power Co. Ltd, was incorporated in Toronto where it has its base. The Company was declared bankrupt subsequent to proceedings company shareholders. The Belgian

¹⁸⁹ ICCPR article 4(3).

¹⁹⁰ *Barcelona Traction case* (footnote 2) para 32.

¹⁹¹ *Ibid.*

stockholders could not sue in the international Court of justice, because the Court held that only the nationality of the corporation (the Canadians) can sue. The Belgium filed the case with the ICJ against Spain, on the ground of diplomatic protection. The protection of state nationals was thus in the central of this case. The ICJ in this case made an importance contribution by developing human rights, by 'drawing the distinction between a state's obligation towards another state and its obligations towards the international community'.¹⁹² The court reasoned:

In particular, an essential distinction should be drawn between the obligation of state towards the international community as whole, and those arising vis-à-vis another state in the field of diplomatic protection. By their nature the former are the concern of all states. In the view of the importance of the rights involved, all states can be held to have a legal interest in their protection; they are obligation *erga omnes*.¹⁹³

What is striking in this case is that the Court has found that the rules concerning the basic rights of person are the concern of all states. It follows from this statement that any state may seek vindication when another state is violating the basic rights of a person. Thus the perpetrator state may not bar the action of a claimant state as violation of principle of non-intervention in internal affairs. *Jus cogens* norms are thus the concern of all states and they may only derogated by a subsequent *jus cogens*.

In *South West Africa Cases*,¹⁹⁴ Ethiopia and Liberia instituted proceedings against South Africa before the International Court. The applicants' states alleged that South Africa, by practicing apartheid in South West Africa, had breached the obligations incumbent upon it, as mandatory, under article 22, paragraph 1, of the Covenant of the League of Nations and article 22, paragraph 2, of mandate¹⁹⁵. Article 22, paragraph 1, of the Covenant embodied the guiding principle of all mandates, namely; that well-being and development of the people living in a territory under a

¹⁹² Bedi S *The Developments of Human Rights Law by the Judges of the International Court of Justice* (2007) pp158.

¹⁹³ *Barcelona Traction case* (footnote 2) para 34.

¹⁹⁴ *South West Africa*, ICJ Reports, 1961, p13.

¹⁹⁵ *Ibid*.

mandate formed a 'sacred trust of civilization'. In execution of this principle, article 2, paragraph 2, of mandate for South West Africa provided that the mandatory "would promote the utmost the material and moral well-being and the social progress" of the people of South West Africa.

The applicant states contended again that an international custom of 'non-discrimination' or 'non-separation' had emerged and was universally accepted. It is interesting to note that applicant states held that a norm of 'non-discrimination' or 'non-separation' was opposable to all states, irrespective of any claim.

On the merits of the case, the ICJ did not pronounce on the elements such as the opposability of customary law binding on all states, and on the prohibition of genocide and protection from racial discrimination, in the sense supported by the applicant. In reality, the ICJ did not pronounce all merits because it found that the applicants did not have standing.¹⁹⁶

In his dissenting judgment, Judge Tanaka held that human rights derive from the concept of the human being as a person.¹⁹⁷ Thus, human rights exist independently of the will of states. Judge Tanaka supported his arguments by reference to the advisory opinion on genocide Convention¹⁹⁸ in which the ICJ had affirmed that the principle underlying the convention were binding on states 'even without any conventional obligation'. He then concluded that 'states which do not recognize this principle (i.e. the protection of human rights) or even deny its existence are nevertheless subject to its rule. In this case even though, there is no mention *expressis verbis* of *jus cogens* norms, however, expression such as 'binding all states', 'international community taken as whole' do appear to correspond to *jus cogens* norms. And Judge Tanaka in his conclusions underlined the opposability of prohibition of racial discrimination on all states.

¹⁹⁶ Ibid.

¹⁹⁷ The Dissenting judgment of Judge Tanaka para 262.

¹⁹⁸ The Convention on Prevention and Punishment of the Crime of Genocide, U.N.T.S 277, entered into force Jan. 12, 1951.

In the case concerning *Al-Adsani v United Kingdom*,¹⁹⁹ there was the tension between *jus cogens* norm of prohibition of torture and the principle of state immunity. The case arose from the allegation of Sulaiman Al-Adsani, a British and Kuwait national, was tortured in Kuwait by order of Kuwait Sheikh in 1991. Al-Adsani submitted a civil proceeding in United Kingdom²⁰⁰, for compensation against the Sheikh and the state of Kuwait. The British Court decided to grant immunity to Kuwait on the circumstances of the case not constituting an exception to the immunity principle under the terms of state immunity act 1978.²⁰¹ He then decided to appeal the decision to the English Court²⁰² of Appeal; the latter dismissed the appeal on the grounds of state Immunity.

Then, he decided to lodge an application with the European Court of Human rights (ECHR), on the grounds that his right to access to the court (article 6)²⁰³ was violated and The UK failed to protect his right not to be tortured.²⁰⁴ The ECHR, while recognizing the prohibition of torture is elevated to *jus cogens* status, the court rejected the view that violation of such a norm compels denial of state immunity in civil suits²⁰⁵. I prefer to **discuss** the decision of the ECHR in the following chapter, however it is important to mention decision raised opposing commentary within the court itself. On the hand, those who concurred with the judgement, such as judges Mattii Pellonpaa and Nocalas Bratza rejected the theory of *jus cogens* on certain grounds. They argued that if the theory were accepted as to jurisdictional immunities, it would be also, by logic extended to execution of judgements against foreign state defendants, since the laws regarding execution, like state immunity law, are not *jus cogens* either.²⁰⁶ Consequently, the acceptance of *jus cogens* theory will threaten international cooperation between states²⁰⁷. On the other hand, Judges Christos Rozakis, Lucius Caflisch, Luzius Wildhaber, Jean-Paul Costa, Ireneu Cabral Barreto, and Nina Vajic held that the decision should be based on the normative hierarchy theory. They argued “the acceptance of ...*jus cogens* nature of the prohibition of

¹⁹⁹ *Al-Adsani v United Kingdom* App No 35763/97 (2001).

²⁰⁰ *Al-Adsani v Kuwait* 103 ILR 420 (Q.B.1995).

²⁰¹ State Immunity Act of United Kingdom (1978).

²⁰² *Al-Adsani v Kuwait* 107 ILR 535 (C.A.1996).

²⁰³ Article 6 (footnote 141).

²⁰⁴ ECHR supra para 9-13.

²⁰⁵ Ibid para 61.

²⁰⁶ Ibid concurring Opinion of judges Pellonpaa and Bratza.

²⁰⁷ Ibid.

torture entails that a state allegedly violating it cannot invoke hierarchically lower rules, to avoid the consequences of the illegality of its action”.²⁰⁸ Furthermore, they concluded that ‘Kuwait could not hide behind the rules of state immunity to avoid proceedings for serious claim of torture made before a foreign jurisdiction.’²⁰⁹

I espouse the view of the dissenting opinions that Kuwait could not hide behind its sovereign immunity to avoid prosecution. And I believe that the procedural character of state immunity could not prevent criminal prosecution for violation of peremptory norms. In the light of *Pinochet*, the Court could decide in favour of Al-Adsani and rejected the pretension of UK that Kuwait was protecting by state immunity. I will develop deeply all these issues raised by the implementation of *jus cogens* in the next chapter.

In *Pinochet*, the House of Lords had to decide whether to recognize criminal jurisdictional immunity for the former President of Chile, General Augusto Pinochet Ugarte.²¹⁰ Pinochet was in the UK in that time, when the request for his extradition was issued by a judge in Spain, where he was facing prosecution for a series of criminal offences that constituted violations of human rights, committed during the time he governed Chile.²¹¹ The Lords decided, in their judgment of 24 March 1999, that the international legal system could not confer immunity *ratione materiae* on heads of state regarding criminal jurisdiction for official acts of torture, since it is precisely these acts that it intends to criminalize as violations of fundamental norms of the international community.²¹² Thus, in *Pinochet* case demonstrate that the battle peremptory norm prevailed over ordinary norms of jurisdictional immunity of head of state.

In the case of the Prosecutor v Anto Furundzija,²¹³ the International Criminal Tribunal for the former Yugoslavia (ICTY) suggested that the violation of a jus

²⁰⁸ Ibid dissenting Opinion of judges Rozakis, Caflisch, Wildhaber, Costa, Cabral Barreto, and Vajic.

²⁰⁹ Ibid.

²¹⁰ *United Kingdom House of Lords, Regina v Bartle and The Commissioner of the Police for the Metropolis and others Ex Parte Pinochet* (on Appeal from a Divisional Court of the Queen’s Bench Division).

²¹¹ Ibid.

²¹² Ibid.

²¹³ *Furundzija case* (footnote 4) para 54.

cogens norm, such as the prohibition of torture, had direct legal **consequences** for the legal character of all official domestic actions.²¹⁴

The fact that torture is prohibited by a peremptory norm of international law has effects at the inter-state and individuals levels. At the inter-state level, it serves to internationally delegitimise any legislative, administrative or judicial act authorizing torture...

Furthermore, at individual level, that is, that of criminal liability, it would seem that one of the consequence of the *jus cogens* character bestowed by international community upon the prohibition of torture is that every state is entitled to investigate, prosecute and punish or extradite individuals accused of torture, who are present in a territory under jurisdiction.

This view of the ICTY entails that the *jus cogens* norm is not only limited to treaty as provided by the Vienna Convention, but it concerns also any act of state within its territory. It is thus a large view of *jus cogens* which was only “confined only to unlawful international treaty”.²¹⁵ The second observation from the Furunzidja dictum is that violation of *jus cogens* concerns states as well as individuals.

5. Concluding observations

Normative hierarchy theory may be defined as mechanisms classifying legal rules according to their values, in order to avoid any conflict among of them. These mechanisms function differently from one system to another. In traditional international law, rules are classified according to their sources. Thus, the famous article 38 of status of ICJ hierarchically classifies the norms of international law according to their sources. The regime of *jus cogens* brings a change concerning the normative hierarchy theory. In the peremptory norms arena, rules are considered not according to their sources but, according to their content and their value. Thus, norms **which** are elevated as peremptory norms are accepted and recognized by international community as whole. It is admitted that human rights norms play a

²¹⁴ Ibid.

²¹⁵ De Wet ‘The prohibition of Torture as an International Norm of *Jus Cogens* and Its Implications for National and Customary Law’ (2004) 15 (1) *European Journal of International Law* 97-121.

significant role in the development of *jus cogens*, and the latter influences human rights norms. The introduction of normative hierarchy theory brings certain important aspects in human rights, namely the supremacy, validity and universal acceptance of peremptory human rights norms. However, the state practice and international law cases demonstrate that despite the impressive challenges raised, the implication of normative hierarchy theory continues unabatedly.

Chapter V: conclusions

The international community has increasingly used *jus cogens* norms to confirm that there are, in international law, certain norms from which no derogation is permitted²¹⁶ and which exist beyond the consent of states. Such norms degenerate obligations *erga omnes*. From this international practice, there is a trend of using normative hierarchy theory in human rights law. Such theory admits the existence of a hierarchical status of international rules.

The application of the normative hierarchy theory in human rights law has stimulated heated debates, given the fact that human rights law is governed by the principles of indivisibility, interdependence and interrelatedness. The indivisibility of human rights means that none of the rights are considered to be more important than others, more specifically they are interrelated. In this vein, the concept of indivisibility and interdependence appears to be incompatible with any notion of hierarchy.²¹⁷

This thesis has argued that although human rights norms reject hierarchy among them, the normative hierarchy theory is not new in human rights law. The classification, for instance, of human rights norms in three generations is a manifestation of the idea of hierarchy theory. Although such classification is only recognized by doctrine, it impacts in the practice of the international community. Thus for instance, the violations of the rights so-called first generation tend to attract the sharpest scrutiny.²¹⁸ While the second and the third generation rights have received consideration, their implementation remains slow-moving.²¹⁹ Another hierarchy theory among human rights norms can be found in the division between derogable and non-derogable rights. In this regard, the ICCPR, the ACHR and the ECHR contain provisions allowing states parties to derogate from specified rights during declared state of emergency. At the same time, these instruments provide that select groups of enumerated rights may not be suspended or limited, even during national emergency.

²¹⁶ *Barcelona Traction Case* (footnote 2).

²¹⁷ Teraya (footnote 22) pp 917.

²¹⁸ Seiderman (footnote 4) pp 4.

²¹⁹ *Ibid.*

This thesis, by trying to explore the application of *jus cogens* in human rights law has pointed that *jus cogens* norms play a significant role in the enforcement of human rights law. It argues that normative hierarchy theory seeks to establish cohesion in international human rights law in order to avoid any subsequent conflict of norms. Thus for instance, non-derogable rights²²⁰ take precedence over others human rights. This thesis has also argued that *jus cogens* norm entails universal acceptance of a norm elevated to the status of a peremptory norm. This may be justified by the fact that there is a proliferation of human rights instruments, some of which are very contestable. Therefore, an attempt to upgrade some of them and giving them various quality labels on the assumption that the authority of the higher will not be impugned.²²¹ Another justification is that there is a conflict between the universality and relativity of human rights. Therefore the elevation of certain norms to *jus cogens* status allows them to be universally accepted. In other words, *jus cogens* norms bind states beyond their consent. The Inter-American Commission emphasized the principle of universality of *jus cogens* in the *Death Penalty of Juveniles Case*²²² holding that even though the USA was not party to the American Convention on Human Rights, the prohibition of juveniles' execution had attained the status of *jus cogens* and the USA was bound by it.

²²⁰ ICCPR enumerates the list of non-derogable rights from article 4 to 18.

²²¹ Meron (footnote 26) pp 18.

²²² See footnote

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