

NEW VOICES

JURISDICTIONAL IMMUNITIES OF THE STATE: WHY THE ICJ GOT IT WRONG

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This article explores the decision in Jurisdictional Immunities of the State (Germany v Italy: Greece Intervening) regarding the relationship between State immunities and jus cogens norms. It focuses on three assertions in the case, regarding the criminal/civil distinction, the procedural/substantive distinction and the pronouncement that the gravity of the crime is irrelevant when assessing the claim for State immunity. The article picks apart the three assertions in turn, which leads to the conclusion that the analysis by the International Court of Justice (ICJ) was flawed. Ultimately, it is argued that Germany ought not to have been afforded State immunity for violations of jus cogens norms.

Keywords: ICJ, immunity, jus cogens, State immunity, peremptory norms

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I. INTRODUCTION

The International Court of Justice's (hereinafter 'ICJ' or 'the Court') ruling in *Jurisdictional Immunities of the State (Germany v Italy: Greece intervening)*¹ was the result of a series of Italian national judgments denying immunity to Germany for acts committed during the Second World War.² While reaching a conventional decision, there was no assessment of the relationship between *jus cogens* and State immunities. This essay will take apart the assertions made in the judgment, and analyse the relationship between State immunities and *jus cogens* norms, as well as the consequences flowing from this relationship.

The dissenting opinion of Judge Trindade acknowledged the growing importance and 'primacy of *jus cogens*'.³ This essay will use the ideas and questions raised in this dissent, and answer and clarify them using international law developments. While Trindade's dissent rests on the need for access to justice, this essay, however, will engage in a more doctrinal analysis.

This essay will firstly outline the decision of the Court in *Jurisdictional Immunities*, and the main reasoning for the application of the conservative relationship. Subsequently, it will refute three contentions of the judges, namely the criminal/civil distinction, the procedural/substantive distinction, and the assertion that the gravity of the crime has no impact on immunities. It is proposed that had the judges engaged in a critical analysis of the relationship between *jus cogens* norms and State immunities, in the light of developments in international law, Germany ought not to have been afforded immunity.

II. THE JUDGMENT IN *JURISDICTIONAL IMMUNITIES*

The facts of the case are as follows: in September 1943, Italy declared war on Germany, following Mussolini's removal from power. Between October 1943

¹ *Jurisdictional Immunities of the State (Germany v Italy: Greece intervening)* (Judgment) [2012] ICJ Rep 99.

² Most notably, *Ferrini v Germany* [2004] 128 ILR 658.

³ *Jurisdictional Immunities of the State (Germany v Italy: Greece intervening)* [2012] ICJ Rep 99 (Dissenting Opinion of Judge Trindade) para 6.

and the end of the Second World War, German forces engaged in massacres of civilians in Italian territory and in the deportation of civilians who were subjected to forced labour. Additionally, German forces imprisoned several hundred thousand members of the Italian armed forces and denied them the status of prisoner of war.⁴ They were instead deported to 'German-occupied territories for use as forced labour'.⁵

In 1998, Ferrini, an Italian national deported to Germany in 1944, instituted proceedings before Italian courts against the Federal Republic of Germany for his detention and forced labour. The case reached the Italian Court of Cassation, which 'held that Italian courts had jurisdiction over the claims for compensation brought against Germany by [...] Ferrini on the ground that immunity does not apply in circumstances in which the act complained of constitutes an international crime'.⁶

Following *Ferrini*, similar claims were filed against Germany. Germany subsequently requested the ICJ's intervention, claiming that Italy had violated its right to State immunities by allowing civil claims to be brought in Italian national courts.⁷ Italy maintained that it had jurisdiction with regard to Germany's crimes under international law.

The ICJ rejected Italy's arguments on multiple grounds. This essay will focus on the arguments regarding the relationship between *jus cogens* norms and State immunities. It will engage in a doctrinal analysis of three assertions of the judges, highlight the weaknesses of these assertions, and suggest an alternative interpretation of the relationship between *jus cogens* norms and State immunities.

First, the ICJ distinguished between civil and criminal proceedings. While cases in national legal proceedings have found immunity to be non-applicable, these 'concerned the immunity of a former Head of State from the criminal jurisdiction of another State, not the immunity of the State itself in proceedings designed to establish its liability to damages'.⁸ The ICJ also

⁴ *Jurisdictional Immunities* (n 1) para 21.

⁵ *ibid.*

⁶ *ibid* para 27.

⁷ *ibid* para 37.

⁸ *ibid* para 87.

referred to Lord Bingham's clarification of the UK's earlier case law, in *Jones v. Saudi Arabia*,⁹ which stated that the 'distinction between criminal and civil proceedings [was] "fundamental to [the] decision" [in *Pinochet*]' to not grant immunity to the former Head of State of Chile.¹⁰ Whilst *Pinochet* was a criminal proceeding, *Jurisdictional Immunities* was a civil proceeding, and the ICJ deemed this to differentiate the two and confer a stronger claim of State immunity on Germany.

It is proposed that cases concerning the immunity of a former Head of State can inform the development of State immunity. The 'legal existence of a State manifests itself only in the acts of individuals': thus, the actions of a Head of State are also, often, the actions of a State.¹¹ These are two 'expression[s] of a single principle' of sovereignty, and, for that reason, this essay will use cases concerning the functional immunity of a former Head of State to explore the legal development of the law of immunities, which includes State immunity.¹²

Secondly, the ICJ noted:

Since *jus cogens* rules always prevail over any inconsistent rule of international law [...] and since the rule which accords one State immunity before the courts of another does not have the status of *jus cogens*, the rule of immunity must give way.¹³

However, *jus cogens* rules do not prevail in *Jurisdictional Immunities*. The Court formulated a requirement for a 'conflict of laws' between *jus cogens* and State immunity, and concluded that the two rules never clash in such a way that one has to give way to another.¹⁴ In the Court's words, '[t]he rules of State immunity are procedural in character and are confined to determining

⁹ *Jones v Saudi Arabia* [2006] UKHL 26 para 32.

¹⁰ *Jurisdictional Immunities* (n 1) para 87.

¹¹ Hans Kelsen, 'Collective and Individual Responsibility in International Law with Particular Regard to the Punishment of War Criminals' (1943) 31 CLR 530, 540.

¹² Pasquale De Sena and Francesca De Vittor. 'State Immunity and Human Rights: The Italian Supreme Court Decision on the *Ferrini* Case' (2005) 16 EJIL 89, 110; Jerrold Mallory, 'Resolving the Confusion over Head of State Immunity: The Defined Rights of Kings' (1986) 86 CLR 169, 170; Andrea Bianchi, '*Ferrini v. Federal Republic of Germany*' (2005) 99 AJIL 242, 247.

¹³ *Jurisdictional Immunities* (n 1) para 92.

¹⁴ *ibid* para 93.

whether or not the courts of one State may exercise jurisdiction in respect of another State'.¹⁵ Nonetheless, it is proposed that the judgment was flawed in assuming that there is no conflict of laws, instead 'present[ing] the decision as the automatic consequence of a rigid *a priori* substance/procedure distinction, rather than the outcome of weighing competing values'.¹⁶ This makes the reasoning behind the decision unconvincing, insofar as the judges failed to analyse the issues.

Finally, the ICJ pronounced that entitlement to immunity is not dependent on the gravity of a situation:

Customary international law does not treat a State's entitlement to immunity as dependent upon the gravity of the act of which it is accused or the peremptory nature of the rule which it is alleged to have violated.¹⁷

Thus, the ICJ decided the *jus cogens* nature of the rule violated had no bearing on Germany's entitlement to immunity. However, this goes against the case law of other courts which did not grant immunity due to the gravity of the violation.¹⁸ Moreover, it disregards the nature of *jus cogens* itself, and is dissonant with the Court's claim that '*jus cogens* rules always prevail over any inconsistent rule of international law'.¹⁹

III. REVISITING THE RELATIONSHIP BETWEEN STATE IMMUNITIES AND *JUS COGENS* NORMS IN THE *JURISDICTIONAL IMMUNITIES* JUDGMENT

This section will evaluate the decision in *Jurisdictional Immunities* and contend that *jus cogens* norms ought to have superseded immunities. Three pronouncements by the majority in *Jurisdictional Immunities* will be explored.

¹⁵ *ibid.*

¹⁶ Kimberley Trapp and Alex Mills, 'Smooth Runs the Water where the Brook is Deep: The Obscured Complexities of *Germany v Italy*' (2012) 1 CJICL 153, 163.

¹⁷ *Jurisdictional Immunities* (n 1) para 84.

¹⁸ *Attorney-General of the Government of Israel v Eichmann* (1962) 36 ILR 277, 308; *Ferrini* (n 2); *Prefecture of Voiotia v Federal Republic of Germany* (2000) 129 ILR 513 (though the Special Supreme Court of Greece, in *Margellos v Federal Republic of Germany* (2002), later noted that in the current state of international law, Germany had immunity and could not be sued).

¹⁹ *Jurisdictional Immunities* (n 1) para 92.

First, it will be argued that the distinction between criminal and civil proceedings is arbitrary when considering *jus cogens* violations.²⁰ Secondly, the distinction between procedural and substantive law will be explored, and shown to also be arbitrary.²¹ Thirdly, this section will seek to refute the assertion that immunity is not dependent on the gravity of the violation.²²

1. The Criminal/Civil Distinction

In *Jurisdictional Immunities*, the Court differentiated between criminal and civil proceedings. It stated that the earlier decisions concerning immunities for grave violations of international law, such as *Pinochet*, were not relevant, as these concerned criminal jurisdiction, not a civil claim for damages.²³ It reasserted that the distinction between criminal and civil proceedings was fundamental to the *Pinochet* decision.²⁴ However, it will be demonstrated that the distinction is arbitrary and the nature of the proceedings has no effect when deciding on *jus cogens* violations.

Jurisdictional Immunities relied on the pronouncement in *Jones v. Saudi Arabia*, in which Lord Bingham stated that the distinction between criminal and civil proceedings was 'fundamental' to the decision in *Pinochet*.²⁵ However, no real justification is provided for this assertion. On the contrary:

While the distinctions between civil and criminal proceedings should certainly not be ignored, they should not necessarily erase the fundamental message of *Pinochet*: some acts are not part of the official behavior that immunity is intended to protect.²⁶

It will, first, be argued that criminal and civil proceedings are not antithetical, but complementary concepts. Secondly, the ICJ ignored previous State practice, in which States accepted civil proceedings for *jus cogens* violations. Finally, it is proposed that the distinction is arbitrary. Thus, in contrast to the

²⁰ *Jurisdictional Immunities* (n 1) para 87.

²¹ *ibid* para 93.

²² *ibid* para 84.

²³ *ibid* para 87.

²⁴ *ibid*.

²⁵ *ibid*; *Jones* (n 9) para 32.

²⁶ Stacy Humes-Schulz, 'Limiting Sovereign Immunity in the Age of Human Rights' (2008) 21 *Harv.Hum.Rts.J.* 105, 118.

assertion of the judges in *Jurisdictional Immunities*, the criminal/civil distinction does not affect the relationship between immunities and *jus cogens* norms.

A. Complementarity

Humes-Schulz, in her discussion of criminal and civil liability, notes that the 'two forms of liability work together and reinforce each other frequently'.²⁷ Thus, criminal and civil proceedings are not irreconcilable. Criminal and civil liability are complementary to each other: while criminal liability provides a mechanism by which to punish wrongdoers, civil liability shifts the focus to the victim and provides reparations in order to counterbalance the wrongful act.²⁸ Thus, Humes-Schulz views criminal sanctions as the result of a violation of an obligation to the State, and civil sanctions as the result of a violation of an obligation to the victim.

Building on this framework, criminal and civil proceedings can be seen as two parts of a whole. When a crime has been committed, both the community and the individual are harmed. Thus, while criminal liability redresses the harm to the community, civil liability redresses the harm to the individual. In this way, the wrongdoing has, as far as possible, been wholly redressed. Therefore, it is proposed that criminal and civil proceedings are not disparate, but complementary to each other. Thus, it is difficult to see, firstly, why the decision in *Pinchet* allegedly depended on this distinction and, secondly, why the nature of the proceedings should affect the relationship between *jus cogens* norms and immunities.

B. State Practice

Moreover, the ICJ in *Jurisdictional Immunities* failed to note that civil jurisdiction had been exercised for serious international crimes. For example, the United States has, for many years, exercised universal jurisdiction in civil proceedings for serious violations of international law, and this has not been challenged by other States.²⁹ Further, the Committee against Torture has

²⁷ *ibid.*

²⁸ *ibid.*

²⁹ *ibid.*; Lori Fisler Damrosch, 'Enforcing International Law through Non-Forcible Measures' (1997) 269 *Collected Courses of The Hague Academy of International Law*

concluded that there is a need for civil redress, even when there is the obstacle of State immunity.³⁰ Finally, there is case law, especially from Canada, USA, Italy and Greece, to show State practice for courts allowing civil proceedings against a State.³¹

The ICJ relied on UK case law, which has mainly concerned criminal proceedings, yet disregarded civil proceedings concerning violations of peremptory norms in other jurisdictions. Thus, the contention in *Jurisdictional Immunities* that an assessment of immunities in relation to *jus cogens* violations can only occur in criminal proceedings is not unequivocally shared by current State practice.

C. Arbitrary Distinction

Looking at the nature of *jus cogens* norms, the minority in *Al-Adsani* observed that:

The distinction [...] between civil and criminal proceedings [...] is not consonant with the very essence of [...] *jus cogens* rules. 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.³²

Jus cogens norms are, by their very nature, hierarchically higher than other rules of international law and thus supersede the latter. The minority noted that immunities are a hierarchically lower rule, as they can be waived, contracted out of, or renounced.³³ Therefore, the distinction between

9, 161-167; Elina Steinerte and Rebecca Wallace, 'Case Report: *Jones v. Ministry of the Interior of the Kingdom of Saudi Arabia*' (2006) 100 AJIL 901, 905; John Murphy, 'Civil Liability for the Commission of International Crimes as an Alternative to Criminal Prosecution' (1999) 12 Harv. Hum. Rts. J 1, 32.

³⁰ Committee against Torture 'Conclusions and Recommendations of the Committee Against Torture: Canada' (7 May-1 June 2012) UN Doc. CAT/C/CAN/CO/6, Art 15.

³¹ Damrosch (n 29) 168; Steinerte (n 29) 905-906; Sevrine Knuchel, 'State Immunity and the Promise of *Jus Cogens*' (2011) 9 Northwestern Journal of International Human Rights 149, 155; *Siderman de Blake v. Argentina* (1992) 965 F. 2d 699; *Ferrini* (n 2); *Prefecture of Voiotia* (n 18).

³² *Al-Adsani v United Kingdom* App No 35763/97 (ECHR, 21 November 2001) (Joint Dissenting Opinion) 31.

³³ *ibid* 30.

criminal and civil proceedings is arbitrary in this context as peremptory norms would supersede immunities regardless of whether the proceedings were of a criminal or civil nature.

Although the nature of criminal and civil proceedings is indeed different, this fact does not affect the legal responsibility or the relationship between *jus cogens* and immunities. The decision in *Jurisdictional Immunities* treated this distinction as completely altering the claim for immunities. However, as Judge Loucaides stated in his dissenting opinion in *Al-Adsani*:

The rationale behind the principle of international law that those responsible for atrocious acts of torture must be accountable is not based solely on the objectives of criminal law. It is equally valid in relation to any legal liability whatsoever.³⁴

Judge Loucaides' dissenting opinion in *Al-Adsani* convincingly argued that the distinction between criminal and civil proceedings, in a case concerning the determination of immunity for *jus cogens* violations, is arbitrary. The dissent noted that once a violation of a *jus cogens* rule is established, no 'immunity can be invoked in respect of any judicial proceedings whose object is the attribution of legal responsibility'.³⁵ Thus, it is irrelevant whether this responsibility is decided in a criminal or civil context. This is a factor regarding the nature of legal proceedings which the majorities in *Al-Adsani* and *Jurisdictional Immunities* did not consider. Therefore, it does not matter whether the proceeding is of a civil or criminal nature. The rules relating to *jus cogens* apply regardless of the nature of the claim, and, for this reason, the distinction made by the judges in *Jurisdictional Immunities* is arbitrary.

As a final note, Cassese argued that civil jurisdiction is less intrusive than criminal jurisdiction.³⁶ For example, when it is exercised over a State official, there is no possibility of imprisonment and consequent disruption to the State. Thus, it is questionable why *Jurisdictional Immunities* expressly forbade

³⁴ *Al-Adsani v United Kingdom* App No 35763/97 (ECHR, 21 November 2001) (Dissenting Opinion of Judge Loucaides) 34.

³⁵ *ibid.*

³⁶ Antonio Cassese, 'When May Senior State Officials Be Tried for International Crimes? Some Comments on the *Congo v. Belgium* Case' (2002) 13 EJIL 853, 859.

civil jurisdiction whilst not disputing the criminal jurisdiction exercised in *Pinochet*.

Summarily, there does not seem to be a need or a justification for the distinction in *Jurisdictional Immunities* between criminal and civil proceedings. Nor did the majority in this case provide a convincing reason as to why immunities can cease for *jus cogens* violations only in criminal proceedings. This decision disregarded the nature of *jus cogens* and also hyperbolised the distinction between criminal and civil proceedings. This section has shown, through an assessment of the aims of civil and criminal proceedings, State practice, and the nature of *jus cogens* norms, that the decision in *Jurisdictional Immunities* is unconvincing in its differentiation of civil and criminal proceedings, and that the above differentiation should have no effect on the relationship between *jus cogens* norms and State immunities.

2. *The Procedural/Substantive Law Distinction*

In *Jurisdictional Immunities*, the ICJ stated that although the rule of immunity must give way to the hierarchically higher rule of *jus cogens*, this may only happen if there is a conflict of laws.³⁷ However, the judges deemed the 'rules of State immunity [to be] procedural in character and [...] confined to determining whether or not the courts of one State may exercise jurisdiction in respect of another State'.³⁸ *Jus cogens* rules, on the other hand, are substantive in nature.³⁹ Thus, it was argued that the rule of immunity and the rule of *jus cogens* never clashed, as they are different in character and the 'two sets of rules address different matters'.⁴⁰

This section will firstly argue that the distinction between procedural and substantive law is arbitrary when addressing *jus cogens* violations. In the alternative, it will contend that, even if accepting the distinction between procedural and substantive law, the judgment was flawed in assuming that *jus cogens* could only be substantive law, and immunities a matter of procedural law. It will be argued that there is indeed a conflict of laws. This, in turn, leads

³⁷ *Jurisdictional Immunities* (n 1) paras 92-93.

³⁸ *ibid* para 93.

³⁹ *ibid* para 95.

⁴⁰ *ibid* para 93.

to *jus cogens* norms superseding the law of State immunity when such conflict occurs.

A. Arbitrary Distinction

First, the nature of *jus cogens* rules means that they supersede any other legal norm.⁴¹ Thus, it is irrelevant whether that norm is a procedural or substantive rule. When any other legal rule comes into contact with a *jus cogens* rule, it must give way. This was the view of the minority in *Al-Adsani*, who stated that 'the procedural bar of State immunity is automatically lifted, [...] as they conflict with a hierarchically higher rule, [so] do not produce any legal effect'.⁴²

Furthermore, Judge Trindade, in his dissenting opinion in *Jurisdictional Immunities*, criticised the majority for failing to provide reasoning for the alleged distinction between procedural and substantive law.⁴³ This 'formalistic' lack of conflict between State immunities and *jus cogens* norms seems to be an arbitrary, constructed distinction in order to avoid the contentious question of whether *jus cogens* norms can now deprive sovereign States of immunity.⁴⁴

Charles Chamberlayne, in his book *A Treatise on the Modern Law of Evidence*, argued that the 'distinction between procedural and substantive law is artificial'.⁴⁵ For example, in *Pinochet*, substance and procedure were linked, as 'the substantive prohibition on torture entailed procedural consequences,

⁴¹ Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331, Art 64.

⁴² *Al-Adsani*, Joint Dissenting Opinion (n 32) 30.

⁴³ Trindade (n 3) para 298.

⁴⁴ *ibid* para 315; This has been described as a 'conflict avoidance technique' Philippa Webb, 'Human Rights and the Immunities of State Officials' in Erika de Wet and Jure Vidmar (eds), *Hierarchy in International Law: The Place of Human Rights* (OUP 2012) 147.

⁴⁵ Charles Chamberlayne, *A Treatise on the Modern Law of Evidence* (Sweet & Maxwell Limited 1911) 217; Friedrich Karl von Savigny, *Private International Law. A Treatise on the Conflict of Laws: And the Limits of Their Operation in Respect of Place and Time* (T.&T. Clark 1869) 102; Walter Wheeler Cook, "'Substance" and "Procedure" in the Conflict of Laws' (1933) 42 YLJ 333, 355.

including an exception to State immunity'.⁴⁶ A further example is the exhaustion of local remedies, which has been interpreted as both a procedural and substantive rule.⁴⁷ This shows that there is overlap between substance and procedure, rather than a stark distinction. However, this was not acknowledged by the majority in *Jurisdictional Immunities*.

B. Conflict of Laws

In any case, even if there is a distinction between procedural and substantive law, the Court's judgment in *Jurisdictional Immunities* is premised on the assumption that conflict cannot exist between the rules of State immunity and *jus cogens*. First, the assertion that the procedural rule of immunities and the substantive law of *jus cogens* never clash is dismantled by the decision in *Pinochet*, in which there was a clash, as *jus cogens* superseded the claim for immunities. Secondly, the ruling in *Jurisdictional Immunities* failed to consider that *jus cogens* rules are not merely substantive, but can also have procedural elements; and immunities are not merely procedural rules, but can be construed as substantive.

A procedural rule will first be defined. Through this definition, it will be argued that immunities are not necessarily rules of procedure, but can also be of substantive nature. Secondly, it will be argued that *jus cogens* norms are not merely substantive rules, but can have procedural elements. Finally, the right to access of justice, an overarching theme in Judge Trindade's dissent, will be examined.

a. What Is a Procedural Rule?

Procedural rules have tended to relate to the jurisdiction of a court, and the admissibility of the case.⁴⁸ Issues of admissibility and jurisdiction are dealt with at the beginning of a case, before the substantive merits stage.⁴⁹ Whereas jurisdiction concerns whether the Court has the legal power to

⁴⁶ Trapp (n 16) 161.

⁴⁷ James Fawcett, 'The Exhaustion of Local Remedies: Substance or Procedure?' (1954) 31 BYBIL 452, 453.

⁴⁸ Hugh Thirlway, 'The Law and Procedure of the International Court of Justice 1960-1989' (2011) 82 BYBIL 1, 73.

⁴⁹ John Graham Merrills, *International Dispute Settlement* (CUP 2011) 119.

adjudicate, Yuval Shany defined admissibility as concerning whether the court should exercise its legal power to adjudicate.⁵⁰

In *Jurisdictional Immunities*, it was held that the 'rules of State immunity are procedural in character and [...] confined to determining whether [...] the courts of one State may exercise jurisdiction in respect of another'.⁵¹ However, it is contended that, in relation to *jus cogens* violations, the courts of one State may exercise jurisdiction over another State. Due to the *erga omnes* nature of *jus cogens* norms, all States have universal jurisdiction⁵² when they are breached.⁵³ For the purposes of this argument, jurisdiction will be limited to adjudicative jurisdiction, which is the power to subject a person or a State to judicial process.⁵⁴

As States have universal jurisdiction to adjudicate on *jus cogens* violations, the requirement of possessing the legal power to adjudicate is fulfilled. Further, under the Articles on the Responsibility of States for Internationally Wrongful Acts (ARSIWA), States have an obligation to recognise as unlawful a breach of a peremptory norm.⁵⁵ The wording of Article 41 ARSIWA is reiterated by the ICJ in *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*.⁵⁶ This implies a positive obligation

⁵⁰ Yuval Shany, *Assessing the Effectiveness of International Courts* (OUP 2014) 84; S.Gozie Ogbodo, 'An Overview of the Challenges Facing the International Court of Justice in the 21st Century' (2012) 18 *Ann.Surv.Int'l & Comp.L.* 93, 97.

⁵¹ *Jurisdictional Immunities* (n 1) 93.

⁵² As of September 2012, 147 out of 193 States have implemented national legislation providing universal jurisdiction for war crimes, crimes against humanity, genocide or torture (Amnesty International, *Universal Jurisdiction: A Preliminary Survey of Legislation Around the World – 2012 Update* (Amnesty International Publications 2012) 2). This portrays the extent to which universal jurisdiction, for these crimes, is accepted by the international community.

⁵³ Mary Robinson, *The Princeton Principles on Universal Jurisdiction* (Princeton University 2001); Tanaz Moghadam, 'Revitalizing Universal Jurisdiction: Lessons from Hybrid Tribunals Applied to the Case of Hissene Habre' (2008) 39 *Colum.Hum.Rts.L.Rev.* 471, 477.

⁵⁴ Anthony Colangelo, 'Jurisdiction, Immunity, Legality, and *Jus Cogens*' (2013) 14 *CJIL* 53, 55.

⁵⁵ UNGA Res 56/83 (28 January 2002) UN Doc A/RES/56/83 (ARSIWA), Art 41(2).

⁵⁶ *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion) [2004] ICJ Rep 136 paras 159-160.

to recognise as unlawful a breach of a peremptory norm, thus suggesting that courts ought to exercise their legal power to deem it unlawful: hence, the admissibility criterion, under Shany's definition, is also fulfilled.⁵⁷ Therefore, the procedural requirements are satisfied. This shows that immunities are not a procedural bar to adjudication.

Instead, Anthony Colangelo, in his work 'Jurisdiction, Immunity, Legality, and *Jus Cogens*', argued that 'immunity is a substantive defense from liability, not a jurisdictional defense about the appropriate forum'.⁵⁸ Immunities operate to afford protection regardless of the substantive merits of the case – if a *jus cogens* violation is found, immunities serve to provide a substantive defense from liability.

For example, in *Arrest Warrant*, the ICJ stated that 'immunity from jurisdiction [...] does not mean [...] impunity in respect of any crimes [...] committed'.⁵⁹ If immunity was a procedural defence, the case would not proceed, and there would be no determination of legal responsibility, which in turn would lead to impunity. However, if immunity were a substantive defense from liability, the merits could first be examined. In order to ensure that immunity does not mean impunity, immunity must necessarily be a substantive defence from liability. Though the ICJ was not referring to an exercise of jurisdiction over another State, but cited other methods through which an individual could be prosecuted, such as by the court of their nationality or through a waiver of immunity. Judge Van den Wyngaert, in her dissent, noted that, in practice, 'immunity leads to *de facto* impunity'.⁶⁰ Thus, it is necessary that foreign courts exercise their universal jurisdiction, and possible to do so as immunity is necessarily a substantive, rather than procedural, defence.

⁵⁷ Shany (n 50) 84.

⁵⁸ Colangelo (n 54) 57.

⁵⁹ *Arrest Warrant of 11 April 2000 (Democratic Republic of Congo v Belgium)* (Judgment) [2002] ICJ Rep 3 para 60.

⁶⁰ *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium)* ICJ Rep 3 (Dissenting Opinion of Judge Van den Wyngaert) para 34.

Hence, it is questionable whether immunities are procedural in nature. If they are, indeed, a substantive defence, then there would be a 'conflict of laws' with the substantive rule of *jus cogens*.

b. Are Jus Cogens Norms Purely Substantive?

In *Jurisdictional Immunities*, *jus cogens* norms were deemed to be substantive rules which 'determine[d] whether [certain] conduct is lawful or unlawful'.⁶¹ However, it will be argued that *jus cogens* norms are not solely substantive rules. Firstly, their purpose is to 'impact on the legal consequences of [a peremptory] breach'.⁶² Therefore, it does not make sense to define them as purely substantive, as they impact any legal breach. Secondly, it will be argued that *jus cogens* norms are not purely substantive as they have procedural elements.

Bartsch and Elberling propose a convincing argument that 'every *jus cogens* rule contains or presupposes a procedural rule which guarantees its judicial enforcement'.⁶³ They argue that because all *jus cogens* norms are *erga omnes*, they must presuppose a superior means of enforcement.⁶⁴ It could also be argued, building on this argument, that the application of *jus cogens* necessitates a procedural rule of judicial enforcement. If there were no means of enforcement, peremptory norms, whilst being a higher source of international law, would also be impotent.

However, *jus cogens* norms are enforced. In *Jurisdictional Immunities*, it was noted that '*jus cogens* rules always prevail over any inconsistent rule of international law'.⁶⁵ Hence, the hierarchical superiority of *jus cogens* norms would, theoretically, ensure enforceability over other rules of international law. Thus, it seems logical to conclude that 'every *jus cogens* rule *ipso facto*

⁶¹ *Jurisdictional Immunities* (n 1) 58.

⁶² Alexander Orakhelashvili, 'State Immunity and Hierarchy of Norms: Why the House of Lords Got It Wrong' (2007) 18 EJIL 955, 969.

⁶³ Kerstin Bartsch and Björn Elberling, '*Jus Cogens* vs. State Immunity, Round Two: The Decision of the European Court of Human Rights in the *Kalogeropoulou et al. v. Greece and Germany* Decision' (2003) 4 GLJ 477, 486.

⁶⁴ *ibid* 487.

⁶⁵ *Jurisdictional Immunities* (n 1) para 92.

contains a procedural element' of enforcement.⁶⁶ This means that there is a conflict of laws between the procedural enforcement of *jus cogens* and the procedural rule of immunities. When such conflict occurs, the rule relating to *jus cogens* would supersede the rule of immunities.

The procedural/substantive distinction is advocated by Stefan Talmon in his exploration of *jus cogens* after *Jurisdictional Immunities*. Talmon defined procedural rules as: 'rules governing the judicial and non-judicial interpretation, implementation, and enforcement of substantive rules'.⁶⁷ This definition of a 'procedural rule', which Talmon used to justify the decision of the Court, instead serves to reinforce the argument that *jus cogens* rules have a procedural, as well as substantive, element. The substantive rule of *jus cogens* requires interpretation, implementation, and enforcement. Thus, at these three stages, *jus cogens* is a procedural rule. Therefore, at the interpretation, implementation, and enforcement stage of a *jus cogens* rule, there is a conflict of laws.

Alternatively, the determination of a rule as *jus cogens* is procedural, as courts must determine the rule violated and whether the violation provides jurisdiction. In *Questions Relating to the Obligation to Prosecute or Extradite*, the ICJ stated that 'the performance by the State of its obligation to establish the universal jurisdiction of its courts over the crime of torture, [a *jus cogens* norm,] is a necessary condition' to enable proceedings to be brought.⁶⁸ In order for universal jurisdiction to be established, a serious crime under international law, such as a *jus cogens* violation, must be committed.⁶⁹ Therefore, the procedural process of assessing jurisdiction necessitates the inspection of the violated rule.

It has been shown that the distinction between procedural and substantive rules does not apply when *jus cogens* norms are involved, firstly due to the nature of *jus cogens*, and secondly because *jus cogens* norms are not purely substantive rules; they have procedural elements which the Court failed to

⁶⁶ Bartsch (n 63) 488.

⁶⁷ Stefan Talmon, '*Jus Cogens* after *Germany v. Italy: Substantive and Procedural Rules Distinguished*' (2012) 25 LJIL 979, 982.

⁶⁸ *Questions relating to the Obligation to Prosecute or Extradite (Belgium v Senegal)* (Judgment) [2012] ICJ Rep 422 paras 74, 99.

⁶⁹ Princeton Principles (n 53) Art 2.

consider. It is this lack of analysis into the nature of *jus cogens* which makes the decision regarding the procedural/substantive distinction unconvincing.

C. Access to Justice

The argument concerning access to justice, in relation to the procedural/substantive divide, will briefly be explored. Judge Trindade's overarching concern in his dissent is the need for access to justice. He criticised the 'deconstruction' of *jus cogens* as a substantive rule, to the detriment of the victims.⁷⁰ It will now be examined whether access to justice does have any impact on the procedural/substantive distinction.

Judge Cassese deemed the right of access to justice to be a *jus cogens* norm.⁷¹ The right of access to justice concerns whether a Court should exercise its legal power to grant victims the possibility of legal redress, and thus is a matter of admissibility. Therefore, it is procedural in nature.

Using Cassese's reasoning, if access to justice were *jus cogens*, this would mean that there would be a conflict of laws with the procedural *jus cogens* rule and the allegedly procedural determination of State immunity. However, it is doubtful whether the right of access to justice is a *jus cogens* rule. Though Cassese referred to judicial decisions, it was conceded that 'there are few judicial pronouncements' elevating the right of access to justice to the rank of *jus cogens*.⁷² In fact, these pronouncements are mainly found in separate opinions, as opposed to judgments, of the Inter-American Court of Human

⁷⁰ Trindade (n 3) paras 296-297.

⁷¹ *In the Matter of El Sayed* (Order Assigning Matter to Pre-Trial Judge) STL CH/PRES/2010/01 (15 April 2010) para 29.

⁷² *ibid*; *Goiburú v Paraguay* (Judgment) Inter-American Court of Human Rights Series C No 153 (22 September 2006) para 131; *Pueblo Bello Massacre v Colombia* (Separate Opinion of Judge Trindade) Inter-American Court of Human Rights Series C No 140 (31 January 2006) para 63-65; *Baldeon-Garcia v Peru* (Separate Opinion of Judge Trindade) Inter-American Court of Human Rights Series C No 147 (6 April 2006) paras 9-10; *Dismissed Congressional Employees v Peru* (Separate Opinion of Judge Trindade) Inter-American Court of Human Rights Series C No 158 (24 November 2006) paras 4-7.

Rights.⁷³ On the other hand, the prohibition of torture, genocide, and war crimes is, firstly, found in judgments of both national and international courts and, secondly, codified in widely ratified treaties.⁷⁴ The right to access to justice is not. Therefore, there is insufficient support for the claim that the right of access to justice is a *jus cogens* norm. Thus, it has little impact on the procedure/substance distinction.

IV. THE GRAVITY OF VIOLATIONS

In *Jurisdictional Immunities*, the ICJ deemed there to be 'serious violations of the law of armed conflict' which amounted to *jus cogens* violations.⁷⁵ Nonetheless, the Court ruled that a State's entitlement to immunity does not depend on the gravity or peremptory nature of the crime committed.⁷⁶ This will be examined in the light of the growing prevalence of international human rights law and international criminal law, and the nature of *jus cogens* norms in themselves.

Jus cogens norms must be looked at in the wider context of international law.⁷⁷ International criminal law, in particular, has allowed for individuals, including high ranking officials, to be punished for the 'most serious crimes' in international law.

It would be paradoxical to allow the individuals who are [...] the most responsible for the crimes [...] to invoke the sovereignty of the State and to

⁷³ Rosa Freedman and Nicolas Lemay-Hebert, 'Towards an alternative interpretation of UN immunity: A human rights-based approach to the *Haiti Cholera Case*' (2015) 19 QIL 5, 16.

⁷⁴ Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 10 December 1984, entered into force 26 June 1987) 1465 UNTS 85; Convention on the Prevention and Punishment of the Crime of Genocide (adopted 9 December 1948, entered into force 12 January 1951) 78 UNTS 277; Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNTS 90.

⁷⁵ *Jurisdictional Immunities* (n 1) para 81.

⁷⁶ *ibid* para 84.

⁷⁷ Andrea Bianchi, 'Human Rights and the Magic of *Jus Cogens*' (2008) 19 EJIL 491, 494.

hide behind the immunity that is conferred on them by virtue of their positions.⁷⁸

This portrays a doctrinal and moral shift away from absolute immunity, with more of a focus being placed on the gravity of the crime committed and accountability for these crimes.⁷⁹ This is a relatively new approach in international law, brought about by international human rights and international criminal law developments. It is submitted, from a rereading of functionalism, that this approach takes into consideration the necessary functions required to perform a State's obligations, and recognises that *jus cogens* violations are not a necessary function.

Judge Trindade placed *jus cogens* norms in the 'framework' of human rights and international criminal law developments.⁸⁰ This is important, because it is something the majority failed to do. Yet, it is only by placing *jus cogens* norms in their legal context that the extent of their application can be deduced. There has been a doctrinal shift in international law, and Heads of State and officials have increasingly been denied immunities for international crimes.⁸¹ From this, it is evident that *Jurisdictional Immunities* ought to have responded to these legal developments.

Furthermore, the nature of peremptory norms must be considered. The gravity of the crime must be looked at in order to determine whether there has indeed been a *jus cogens* violation. Torture, genocide and war crimes have all been deemed *jus cogens* violations by international courts: these crimes are,

⁷⁸ Trindade (n 3) para 56; 'Report of the International Law Commission on the Work of Its 48th Session (6 May-26 July 1996)' (1996) II UNYBILC I, 26-27.

⁷⁹ Daniel Singerman, 'It's Still Good to Be the King: An Argument for Maintaining the Status Quo in Foreign Head of State Immunity' (2007) 21 EILR 413, 430; Ingrid Wuerth, '*Pinochet's* Legacy Reassessed' (2012) 106 AJIL 731, 742.

⁸⁰ Trindade (n 3) para 61.

⁸¹ Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis Powers and Charter of the International Military Tribunal (adopted 8 August 1945, entered into force 8 August 1945) 82 UNTS 279, Art 7; Statute of the International Criminal Tribunal for the Former Yugoslavia (adopted 25 May 1993 by SC Resolution 827) Art 7(2); Statute of the International Criminal Tribunal for Rwanda (adopted 8 November 1994 by SC Resolution 955 Art 6(2); ICC (n 73) Art 27; *Regina v Bow Street Metropolitan Stipendiary Magistrate And Others, Ex Parte Pinochet Ugarte (No. 3)* [2000] 1 AC 147.

by their nature, grave and serious violations which 'shock the conscience of mankind'.⁸² It is thus argued that the majority's claim in *Jurisdictional Immunities*, namely that immunity is not dependent on the gravity or peremptory nature of the crime committed, is specious.⁸³

In *Jurisdictional Immunities*, the ICJ simultaneously decided that there was a *jus cogens* violation and that the gravity of the violation did not matter. These two assertions do not concur. A *jus cogens* violation is, by its very nature, a grave violation of international law. Its status as a *jus cogens* violation means that it is hierarchically higher than the rule of immunity and thus the 'jurisdictional bar is lifted by the very interaction of the international rules involved'.⁸⁴ Therefore, the nature of *jus cogens* means that the gravity of the violation is indeed relevant in determining a State's entitlement to immunity. The judgment in *Jurisdictional Immunities* did not address this, and thus did not explore the nature of *jus cogens* norms. Had the majority done so, it is proposed that the Court ought to have held that immunities were lifted as a result of a *jus cogens* violation.

Finally, it is important to note that State immunities are an exception to the rule of adjudicatory jurisdiction. Thus, they are not a rule but an exception to a rule. As Rosalyn Higgins noted in her work 'Certain Unresolved Aspects of the Law of State Immunity', 'it is very easy to elevate sovereign immunity into a superior principle of international law and to lose sight of the essential reality that it is an exception to the normal doctrine of jurisdiction'.⁸⁵ In *Jurisdictional Immunities*, State immunities ultimately trump *jus cogens* norms. They have somehow been elevated into a status above non-derogable norms, but this does not concur with their actual status in international law. It is, instead, claimed that the relationship between *jus cogens* norms and State immunities ought to have been interpreted in such a way so that Germany would not have been afforded immunity for war crimes.

⁸² *ibid* 288; *Prosecutor v Anto Furundzija* (Judgment) ICTY-95-17 (10 December 1998); Genocide Convention (n 74); *Jurisdictional Immunities* (n 1).

⁸³ *Jurisdictional Immunities* (n 1) para 84.

⁸⁴ *Al-Adsani*, Joint Dissenting Opinion (n 32) 31.

⁸⁵ Rosalyn Higgins, 'Certain Unresolved Aspects of the Law of State Immunity' (1982) 29 NILR 265, 271.

V. CONCLUSION

This essay has explored the decision in *Jurisdictional Immunities*, regarding the relationship between State immunities and *jus cogens* norms, in light of developments in international law. The judgment itself has been placed in context, as the result of a series of Italian judgments prosecuting Germany for crimes committed during World War II. It is these crimes that the ICJ regarded as *jus cogens* violations.

The Court relied on three assertions in granting State immunity for the *jus cogens* violation: (i) the distinction between criminal and civil proceedings is fundamental; (ii) the distinction between procedural and substantive law meant that there was no conflict of laws so immunities still applied; and (iii) the gravity of the violation is irrelevant to the assessment of immunities. These assertions have been looked at in turn, and shown to involve a lack of analysis as well as a prevalence of arbitrary distinctions. While Trindade's dissent focused on the need for access to justice and the importance of human rights, this essay has explored the Court's decision through a doctrinal analysis.

It is submitted that *Jurisdictional Immunities* required greater analysis of the nature of *jus cogens* in relation to State immunities. Had the majority properly analysed the nature of *jus cogens* norms and State immunities, no immunities for *jus cogens* violations ought to have been afforded.