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No Longer Turning a Blind Eye to International Atrocities: Reframing Foreign Officials' Functional Immunity as a Breach of States' International Legal Obligations to Effectively Prohibit Derogations from Peremptory Norms

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Introduction

On January 29, 2020, an Israeli air strike proved fatal, taking the lives of an entire family, a twelve-year-old child the youngest among them.[2] The airstrike was carried out as part of Israel's military operation, Operation Protective Edge, in the Gaza Strip, and despite the deaths of numerous civilians, the State of Israel alleged that the strike was committed in pursuance of official duties.[3] Ismail Zeyada, whose mother, brothers, sister-in-law, and nephew all perished in the airstrike,[4] initiated a civil suit in the Netherlands against the two former Israeli military officials involved. In a devastating blow to the victims and their families, the District Court of the Hague dismissed the civil proceeding brought against the former Israeli officers.[5] The Court cited the doctrine of functional immunity as the basis for this decision.[6] The functional immunity, or *immunity ratione materiae*, of these officials bars the prosecution of

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[2] Mike Corder, Dutch court throws out case against Israeli military chiefs, AP News (Jan. 29, 2020), https://apnews.com/1b1b9235be71f752d2baa8c43239d4e4.

[3] The bombing occurred during the 2014 Gaza War as part of Israel's Operation Protective Edge. Rechtbank Den Haag 29 januari 2020, ECLI:NL:RBDHA:2020:667, ¶ 2.2 (Neth.) (hereinafter "Air Strike") (noting the claimant alleges that the air strike was committed in accordance with a national policy to target civilian homes and the State of Israel confirmed in a diplomatic memo that the Defendants, former military officials, did act pursuant to their official duties in carrying out the strike); Loes Witschge, Dutch court dismisses case against former Israeli generals, Aljazeera (Jan. 29, 2020), https://www.aljazeera.com/news/2020/01/dutch-court-dismisses-case-israeli-generals-200129130045920.html.

[4] Ismail Zeyada reported that the individuals killed were "[m]y mother, Muftia Zeyada, who was 70 years old at the time of her death. My eldest brother Jamil and his precious wife Bayan. Their 12-year-old son Shaban. My two other brothers, Youssef and Omar." Mike Corder, Dutch court throws out case against Israeli military chiefs, AP News (Jan. 29, 2020), https://apnews.com/1b1b9235be71f752d2baa8c43239d4e4.

[5] The Court considered the Israeli Courts able to fairly adjudicate the claim, even though the Plaintiff cited evidence that a fair adjudication may not be possible. Air Strike, ECLI:NL:RBDHA:2020:667 at ¶¶ 2.3, 4.55, 4.60-4.61; Mike Corder, Dutch court throws out case against Israeli military chiefs, AP News (Jan. 29, 2020), https://apnews.com/1b1b9235be71f752d2baa8c43239d4e4; Dutch court throws out slain family damages case against Israeli military chiefs, The Times of Israel (Jan. 29, 2020), https://www.timesofisrael.com/dutch-court-throws-out-slain-family-damages-case-against-israeli-military-chiefs/; https://www.ejiltalk.org/functional-immunity-of-foreign-state-officials-in-respect-of-international-crimes-before-the-hague-district-court-a-regressive-interpretation-of-progressive-international-law/; Cedric Ryngaert, Functional Immunity of foreign State officials in respect of international crimes before the Hague District Court: A regressive interpretation of progressive international law, EJIL: Talk! (March 2, 2020), https://www.ejiltalk.org/functional-immunity-of-foreign-state-officials-in-respect-of-international-crimes-before-the-hague-district-court-a-regressive-interpretation-of-progressive-international-law/.

[6] Air Strike, ECLI:NL:RBDHA:2020:667 at ¶ 4.61.

them in any state besides Israel, absent a waiver by the Israeli government.[7] As such, the victims of the airstrike, an act that might amount to a war crime,[8] is not one for which victims are being offered redress. Although domestic prosecution of the case before Israeli courts is theoretically possible and is not precluded by the District Court of the Hague's dismissal, domestic prosecution is neither likely to occur nor likely to result in fair redress for the victims of this atrocity.[9] This is not the justice these victims deserve.[10] And it is not the justice that international law assures them.

This Article argues that when domestic courts grant functional immunity to state officials, they violate States' obligations to effectively prohibit derogations from peremptory norms in international law, otherwise known as *jus cogens* norms. This analysis is based on case law deeming amnesty laws incompatible with States' obligations not to derogate from *jus cogens* norms. As such, this Article seeks to extend the rationale surrounding amnesty laws to argue that foreign national courts' invocation of functional immunity amounts to a breach of States' obligations owed to the international community to prosecute particularly grave and universally condemned international crimes. Applied to Ismail Zeyada's civil complaint against the former Israeli military officials for the airstrike that destroyed his family, this argument would mandate finding that the District Court of the Hague erroneously dismissed the action on the basis of functional immunity.

Part I explains the facts and procedural history of the District Court of the Hague's recent dismissal of Zeyada's complaint. Part II provides an overview of the development of *jus cogens* norms, fundamental norms of international law of a peremptory nature, and the implication of the prohibitions of certain international crimes that have achieved this universal status. In addition, Part II provides background on the rationales behind enabling foreign officials to be immune from prosecution before foreign national courts, and the efforts to codify exceptions to immunity for allegations of international crimes. Part III examines how peremptory norms impart the positive obligation on States to effectively prohibit derogations through prosecution, as supported by reference to case law holding amnesty provisions incompatible with the duty to prohibit derogations from *jus cogens* norms. Subsequently, Part III argues that the grant of functional immunity is incompatible with certain States' obligations *erga omnes* (Latin for "towards all," i.e. obligations owed to the entire international community to prosecute derogations from *jus cogens* norms). Part III concludes with the argument that the District Court of the Hague's recent recognition of the former Israeli military officials' functional immunity is incompatible with the state's international legal obligation to prohibit derogations from *jus cogens* norms, especially the prohibition on war crimes, and as such, the state should be held internationally responsible.

PART 1: CONTINUED RECOGNITION OF FUNCTIONAL IMMUNITY BEFORE FOREIGN NATIONAL COURTS: THE DISTRICT COURT OF THE HAGUE'S DISMISSAL

As previously discussed, following a 2014 military air strike in the Gaza Strip, Ismail Zeyada instituted civil proceedings before the District Court of the Hague to hold two state officials liable for the deaths of his family members.[11] As a Palestinian man with Dutch citizenship,[12] Zeyada chose to bring this civil suit in the

[7] An explicit waiver from the Israeli government that consents to the jurisdiction of a foreign court to try these former military officials is not likely since Israel has already confirmed in a diplomatic memo that the officials acted per their official duties when carrying out the airstrike. Id. ¶ 2.

[8] See generally Rome Statute of the International Criminal Court art. 8, Jul. 17, 1998.

[9] The Plaintiff cited evidence that an adjudication before Israeli courts, even if attainable, may not be fair. Air Strike, ECLI:NL:RBDHA:2020:667 at ¶¶ 2.3, 4.60. He is quoted, saying: "[a]s a Palestinian, Israelis can kill us can destroy our houses, they can confiscate our lands, they made us refugees and there are no consequences." Loes Witschge, Dutch court dismisses case against former Israeli generals, ALJAZEERA (Jan. 29, 2020), https://www.aljazeera.com/news/2020/01/dutch-court-dismisses-case-israeli-generals-200129130045920.html.

[10] Zeyada has publicly said he intended to donate any damages secured from the suit to charities; as such, his motive for bringing the suit is reflected in the following statement: "I owe it to all the Palestinians who have suffered and continue to suffer the same fate, to continue this struggle to achieve what is denied to them: access to independent justice and accountability for the unspeakable crimes committed against them." Mike Corder, Dutch court throws out case against Israeli military chiefs, AP NEWS (Jan. 29, 2020), https://apnews.com/1b1b9235be71f752d2baa8c43239d4e4.

[11] Air Strike, ECLI:NL:RBDHA:2020:667 at ¶¶ 2.2, 4.5.

[12] Id. ¶ 2.3 (noting that the court's jurisdiction is premised on the claimant having Dutch citizenship and living in the Netherlands with his wife and children).

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Netherlands, hereinafter referred to in this Article as the *Air Strike* case, against the two former Israeli military officers involved in the strike.[13] On the day of the air strike, July 20, 2014, the two Defendants had "supreme command of the Israeli army and the Israeli air force as Chief of General Staff and Air Force Chief . . . . "[14] The air strike was part of an official military operation, Operation Protective Edge (OPE), and the State of Israel confirmed that the Defendants acted within their official capacities.[15] By instituting proceedings, Zeyada attempted to hold the Defendants "responsible for both the air strike and the policy . . . of the Israeli armed forces to target civil residences during OPE."[16] In his suit, Zeyada did not attempt to hold the state of Israel liable for the deaths of his family members; rather, he invoked the individual responsibility of the former officers.[17]

The District Court of the Hague analyzed whether it could properly assert jurisdiction over the matter through the application of Dutch domestic law, which provides that the jurisdiction of the court can be limited by "exceptions recognized in international law."[18] As such, the court evaluated whether the customary international law norm granting foreign officials' immunity from prosecution[19] could pose such an exception to the court's jurisdiction.[20] The court analyzed the concept of individual responsibility—the responsibility of individuals for certain international crimes such as war crimes, crimes against humanity, and genocide.[21] The court concluded that individual responsibility provides an exception to immunity before international courts.[22] The court referenced the case of Charles Taylor—a sitting head of state at the time of his indictment by the prosecutor of the Special Court for Sierra Leone (SCSL)—in which the SCSL held that a sitting head of state could be indicted, notwithstanding the recognized immunity of foreign heads of state.[23] The District Court of the Hague distinguished Taylor from Zeyada's civil proceeding by emphasizing that the premise of the SCSL's decision rested on the understanding that international courts do not function horizontally, and as such, the principle of equality of States did not apply.[24] The court concluded that "[u]nlike for international courts, functional immunity from jurisdiction is the starting point for national courts"[25] because "national courts are organs of the state."[26]

Furthermore, the court referenced the case of *Arrest Warrant* of 11 April 2000 (Democratic Republic of Congo v. Belgium), specifically the ICJ's assertion that the immunity of foreign officials before foreign national courts does not entail perpetrators of atrocities will benefit from impunity.[27] The District Court of the Hague noted Zeyada's claims that he did not have access to fair redress in Israel but nevertheless asserted that its holding would not result in the alleged perpetrators evading accountability.[28] In addition, the court emphasized that, in accordance with Article 6 of the European Convention on Human Rights, the right to a fair trial and access to a court are subject to limitations.[29]

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[13] Id. ¶¶ 2.2, 4.5.

[14] Id.

[15] Id. (noting that Israel has confirmed in a diplomatic memo dated October 18, 2018, to the Dutch Ministry of Foreign Affairs that the air strike was "performed exclusively in [the Defendants'] official capacity . . . and in accordance with their authority under Israeli law").

[16] Id.

[17] Id. ¶ 3.4.

[18] Id. ¶ 4.3.

[19] Infra notes 121-130 and accompanying text.

[20] Air Strike, ECLI:NL:RBDHA:2020:667 at ¶ 4.3.

[21] Id. ¶ 4.22 (noting that individual responsibility is enshrined in Article 25 of the Rome Statute of the International Criminal Court).

[22] Id.

[23] Infra notes 112-120 and accompanying text.

[24] Prosecutor v. Taylor, Case No. SCSL-2003-01-I, Decision on Immunity from Jurisdiction ¶ 51 (May 31, 2004).

[25] Air Strike, ECLI:NL:RBDHA:2020:667 at ¶ 4.35.

[26] Id. ¶ 4.25

[27] Id. ¶ 4.29; Arrest Warrant, Judgement, 2002 I.C.J. 3 (February 2002).

[28] Zeyada asserted that he is unable to institute proceedings in Israel because "Israeli law, as applied by the Israeli courts, raises all sorts of legal and practice obstacles to Palestinians from the Gaza Strip." Air Strike, ECLI:NL:RBDHA:2020:667 at ¶ 2.3.

[29] The court recognized that the right to a fair trial is subject to limitations when a limitation has a legitimate purpose such as promoting good relations. Id. ¶¶ 4.56-4.58. Although the Court did support the assertion that Zeyada does have access to legal

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Finally, the District Court of the Hague concluded that, as international law presently stands, it is still a rule of customary international law for foreign national courts to accord functional immunity to former foreign officials with respect to acts taken in their official capacities.[30] Therefore, the District Court of the Hague declared itself incompetent to exercise jurisdiction over the Defendants because they were deemed to benefit from functional immunity. In accordance with Dutch law, Zeyada was ordered to pay the costs, even though he had already paid the highest price: the loss of his family members.[31]

PART II. CONCEPTUAL OVERVIEW OF *JUS COGENS* NORMS AND IMMUNITIES

As a foundation for an analysis of States' obligations concerning *jus cogens* norms, it is useful to understand the development of *jus cogens* norms and the application of immunities from prosecution in cases alleging grave international crimes. The following sections explain the nature of *jus cogens* norms, the rationales behind established immunities from prosecution, and how past case law has considered the interaction between *jus cogens* norms and foreign officials' immunities before national and international courts. Part I demonstrates that *jus cogens* norms preempt both conflicting customary international law and States' treaty obligations, reflecting the universal affirmation that *jus cogens* norms occupy the highest status in the hierarchy of international law. Whether foreign officials' immunities can continue to be recognized notwithstanding the alleged commission of grave international crimes is an area of international law currently in flux.

JUS COGENS NORMS: PEREMPTORY AND NON-DEROGABLE

As previously mentioned, *jus cogens* norms are norms of international law of a peremptory nature, from which there cannot be derogation.[32] For instance, the prohibition on torture is a universal prohibition among international States that has attained peremptory status; as such, all States must universally condemn the commission of torture, without exception.[33] Although *jus cogens* norms "represent fundamental rights in international law,"[34] a standard method for identifying which norms of international law have reached the status of *jus cogens* does not exist.[35] Nevertheless, the determination of whether a norm is considered a *jus cogens* norm is not a subjective determination; instead, scholars have proposed that consideration of the international community's degree of

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redress in Israel, the Court recognized that, for finding a violation of article 6, the absence of alternative legal proceedings is not required. Id. ¶ 4.60.

[30] Id. ¶ 4.55.

[31] Id. ¶¶ 4.61-4.62, 4.51-4.52 (holding Zeyada to pay the costs, amounting to 7,763 euros).

[32] Vienna Convention on the Law of Treaties, art 53, May 23, 1969, U.N. Doc. A/Conf. 39/27, 8 I.L.M. 679; see also S. I. Strong, Can International Law Trump Trump's Immigration Agenda: Protecting Individual Rights through Procedural Jus Cogens, 2018 UNIVERSITY OF ILLINOIS L. REV. ONLINE 272, 273 (2018) ("The 'norms are considered peremptory in the sense that they are mandatory, do not admit derogation, and can be modified only by general international norms of equivalent authority.'").

[33] Although the Convention Against Torture obligates state parties to the Convention to follow additional requirements, the prohibition of torture is a peremptory norm; therefore, even states not party to the Convention are legally bound to condemn the practice of torture. See Winston P. Nagan & Joshua L. Root, The Emerging Restrictions on Sovereign Immunity: Peremptory Norms of International Law, the U.N. Charter, and the Application of Modern Communications Theory, UNIVERSITY OF FLORIDA LAW PUBLICATIONS 375, 403 (2013); Strong, supra note 31, at 273-274 (listing the prohibition of torture as one of several *jus cogens* norms). Nevertheless, the scope of the obligations arising from the peremptory status of the international norm condemning torture is debated. See generally Leila Nadya Sadat, Exile, Amnesty and International Law, 81 NOTRE DAME L. REV. 955, 970 (2006) (explaining that the theory of *jus cogens* continues to be widely debated).

[34] Nagan et al., supra note 32, at 402.

[35] Mia Swart, Breaking the Silence: The Treatment of Ius Cogens in Zimbabwe Torture Docket and Al-Bashir, 9 CONSTITUTIONAL COURT REVIEW 537, 547 (2019) (recognizing that the point where a norm of international law attains the status of a *jus cogens* norm is unclear). But see Strong, supra note 31, at 274 (recognizing the determination of what norms are considered *jus cogens* norms is a challenging task, but reaffirming a test "devised by Evan Criddle and Evan Fox-Decent . . . that a particular procedure 'will count as *jus cogens* if respect for it is indispensable to the state's ability to secure legality for the benefit of all'").

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consensus is relevant.[36] However, in contrast to the establishment of rules of customary international law, which require widespread state practice and *opinio juris*,[37] *jus cogens* norms do not necessarily require the consensus of all the States who are to be bound.[38] The prohibitions of various international crimes widely considered to have achieved *jus cogens* status[39] include the prohibitions on torture,[40] genocide,[41] war crimes,[42] and forced disappearances.[43]

As the Vienna Convention on the Law of Treaties (VCLT) recognizes, no derogation is allowed for peremptory norms and only a new peremptory norm can displace a former one.[44] As originally formulated in the VCLT, *jus cogens* norms necessarily invalidate conflicting treaties.[45] Although the VCLT did not consider whether *jus cogens* norms similarly supersede conflicting rules of customary international law, it has since been generally accepted that *jus cogens* norms occupy the highest status of international law—preempting both rules of customary international law and treaties.[46]

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[36] Mia Swart, supra note 34, at 547 ("[T]he determination of ius cogens is not as subjective as being merely a matter of consulting one's conscience. There is a substantial measure of consensus on a number of ius cogens norms."); Sadat, supra note 32, at 973 (referencing Cherif Bassiouni's suggestion that the main consideration when determining a *jus cogens* norm are: "the historical evolution of the crime, the number of states that have incorporated the crime into their national laws, and the number of international and national prosecutions for the crime in question and how they have been incorporated.") (footnotes omitted).

[37] Allan Mukuki, The Sacrosanct? The Challenge in Holding the United Nations Responsible for the Failure to Prevent Genocide, 4 STRATHMORE L. J. 109, 122 (2020) (explaining that, for a new rule of customary international law to crystallize, the elements of state practice and *opinio juris* must be satisfied, with *opino juris* indicating that "states exercise this practice out of a legal obligation").

[38] See Swart, supra note 34, at 547 ("[*J*]*us cogens* is binding regardless of consent."); Rebecca Zaman, Playing the Ace – Jus Cogens Crimes and Functional Immunity in National Courts, 17 Australian Int'l L. Rev. 53, 73 (2010) ("There is an intrinsically non-consensual element to a *jus cogens* norm, in that once a rule is established to be of that status it binds all states absolute, even persistent objectors.").

[39] Restatement (Third) of the Foreign Relations Law of the United States § 702 cmt. n. (1987) (citing genocide, slavery, murder or causing the disappearance of individuals, torture or other cruel inhumane, or degrading treatment or punishment, prolonged arbitrary detention, systematic racial discrimination, or a consistent pattern of gross violations of an internationally recognized human rights as peremptory norms); M. Cherif Bassiouni, International Crimes: *Jus Cogens* and *Obligatio Erga Omnes*, 59 L. & CONTEMPORARY PROBLEMS 63, 68 (1996) ("The legal literature discloses that the following international crimes are *jus cogens* [norms]*:* aggression, genocide, crimes against humanity, war crimes, piracy, slavery and slave-related practices, and torture.") (emphasis omitted).

[40] Al-Adsani v. United Kingdom, App. No. 35763/97 Eur. Ct. H.R. 1, ¶ 61 (2001) (recognizing that the prohibition of torture is a *jus cogens* norm); Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Art 2, 5 Dec. 10, 1984 (documenting that the prohibition of torture has achieved *jus cogens* status).

[41] Convention on the Prevention and Punishment of the Crime of Genocide, art. I, IV, VI, Dec. 9, 1948 (referencing that the prohibition of genocide is a *jus cogens* norm). But see Reservations to the Convention on the Prevention and Punishment of Genocide, Advisory Opinion, 1951 I.C.J. 15, 23 (May 28) (highlighting that "the principles underlying the [Genocide] Convention are . . . recognized by civilized nations as binding on States, even without any conventional obligations," signifying that the principles are binding without a treaty, but not necessarily that they are anything other than rules of customary international law).

[42] International Law Commission, Peremptory Norms of General International Law (*Jus Cogens*), Draft Conclusions, A/CN.4/L.936, Draft Conclusion 23 and Annex (2019) (listing the "basic rules of international humanitarian law" as part of a "non-exhaustive list of norms that the International Law Commission has previously referred to as having [a peremptory] status").

[43] Goiburu v. Paraguay, Merits, Reparations, and Costs, Judgement, Inter-Am. Ct. H.R. (ser. C) No. 153, ¶ 84 (Sept. 22, 2006) (recognizing the prohibition of forced disappearances of persons as a *jus cogens* norm).

[44] Vienna Convention on the Law of Treaties, art 53, May 23, 1969, U.N. Doc. A/Conf. 39/27, 8 I.L.M. 679.

[45] Id. (outlining that all treaties in conflict with peremptory norms are void); Princz v. Federal Republic of Germany 26 F.3d 1166 (D.C. Cir. 1994) (citing Restatement (Third) § 102, cmt. k) (referencing that *jus cogens* norms preempt conflicting treaties and customary international law); Jurisdictional Immunities, 2012 I.C.J. 99, ¶ 92 (noting that *jus cogens* norms always prevail over any inconsistent rule of international law, whether in treaty or customary international law).

[46] See Prosecutor v. Furundzija, IT-95-17/1-T, Judgement, ¶ 153 (Int'l Crim. Trib. for the Former Yugoslavia Dec. 10, 1998) (referencing that *jus cogens* norms "enjoy a higher rank in the international hierarchy than treaty law and even 'ordinary'

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Furthermore, the peremptory status of prohibitions of certain international crimes as *jus cogens* norms of international law[47] endow States with the right to investigate, prosecute, and punish derogations. The International Criminal Tribunal for the Former Yugoslavia (ICTY), in Prosecutor v. Furundjiza[48] highlights that the character of the crime of torture, the prohibition of which has attained the universal status as a peremptory norm, "vests in every State the authority to try and punish those who participated in their commission."[49] *Furundzija* concerns the torture and degrading treatment of a Muslim woman who was subjected to multiple rapes and physical beatings by uniformed soldiers for the purposes of obtaining information.[50] In analyzing the condemnation of torture in international law, the ICTY reasoned that

> "the mere fact of keeping in force or passing legislation contrary to the international prohibition of torture generates international State responsibility. The value of freedom from torture is so great that it becomes imperative to preclude any national legislative act authorizing or condoning torture or at any rate capable of bringing about this effect."[51]

The ICTY recognized that peremptory norms "restrict the normally unfettered treaty-making power of sovereign States," and subsequently occupy the top position in the "international hierarchy."[52] As such, "it would be inconsistent on the one hand to prohibit torture to such an extent . . . and on the other hand bar States from prosecuting and punishing those torturers who have engaged in this odious practice."[53] Consequently, the ICTY characterized the *jus cogens* norm prohibiting torture to impart on States the authority to "investigate, prosecute and punish or extradite individuals accused of torture."[54] Nevertheless, the right to investigate, prosecute, and punishment is ostensibly different from an obligation to do so.[55]

Additionally, universal jurisdiction reflects the universal nature of the prohibitions of particular international crimes that "shock[ ] the conscience of nations."[56] Universal jurisdiction allows for the extraterritorial criminal jurisdiction of national and international courts to try "grave offences against the law of nations itself."[57] While the jurisdiction of national courts is generally limited to acts committed on a state's territory or by a state's national,[58] universal jurisdiction reflects the understanding that particularly grave offenses amounting to *jus cogens* norms

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customary rules"); see also Eveylon Corrie Westbrook Mack, Does Customary International Law Obligate States to Extradite or Prosecute Individuals Accused of Committing Crimes Against Humanity?, 24 MINN. J. INT'L L. 73, 92 (2015) ("To be a *jus cogens,* or peremptory, norm is to hold the highest hierarchical position among other norms and means that no derogation would ever be permitted.").

[47] Attorney General v. Eichmann, District Court of Jerusalem, No. 40/61 ¶¶ 12, 30 (Dec. 11, 1961) ("These crimes which offended the whole of mankind and shocked the conscience of nations are grave offences against the law of nations itself . . . The jurisdiction to try crimes under international law is universal."); Bassiouni, supra note 38, at 63.

[48] Prosecutor v. Furundzija, IT-95-17/1-T, Judgement (Int'l Crim. Trib. for the Former Yugoslavia Dec. 10, 1998).

[49] Id. ¶ 156.

[50] Id. ¶¶ 122, 124-26, 128.

[51] Id. ¶ 150.

[52] Id. ¶¶ 153, 156.

[53] Id. ¶ 156. Regarding the ICTY's reasoning, it can be argued that, as an international criminal tribunal, the ICTY only intended its reasoning to apply to foreign criminal prosecutions, not civil. Id. ¶ 156 (citing the criminal prosecution of Adolf Eichmann before the District Court of Jerusalem under universal jurisdiction to emphasize the universal nature of the alleged crimes). However, as discussed below, the distinction between civil and criminal adjudications, especially when considering alleged derogations from *jus cogens* norms, is superficial. See infra note 130.

[54] Furundzija, IT-95-17/1-T, Judgement at ¶ 156.

[55] Kazemi Estate v. Iran, [2014] 3 S.C.R. 176, ¶ 228 (Can.) (recognizing that customary international law does not require state officials alleged to have committed torture to be granted *immunity ratione materiae*).

[56] Attorney General v. Eichmann, District Court of Jerusalem, No. 40/61 ¶ 12 (Dec. 11, 1961).

[57] Id.; see Sevrine Knuchel, State Immunity and the Promise of *Jus Cogens*, 9 NORTHWESTERN J. INT'L HUMAN RIGHTS 149, 169-70 (2011) ("[E]"very state is equally entitled to entitled to exercise jurisdiction over the violation, because of its universal condemnation. In these circumstances, the principle that one state will not intervene in the internal affairs of another becomes defeated by the prevailing interest of the community.").

[58] Thomas Weatherall, *Jus Cogens* and Sovereign Immunity: Reconciling Divergence in Contemporary Jurisprudence, 46 GEORGETOWN J. INT'L L. 1151, 1155 (2015) (explaining that the traditional bases of jurisdiction are territory, nationality, protection and passive personality, and that universal jurisdiction constitutes an additional basis of jurisdiction to cover *jus cogens* violations); Ingrid Wuerth, International Law in the Post-Human Rights Era, 96 TEXAS L. REV. 279, 293 (2017) [hereinafter

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should allow for the extraterritorial extension of courts' jurisdictions to aid in the universal condemnation of such heinous crimes.[59]

Although the scope of obligations arising from the status of international norms as peremptory continues to be in a state of flux,[60] several court decisions appear to signify that the universal condemnation of certain crimes, such as torture and genocide, impart positive obligations on States.[61] Therefore, certain mechanisms, such as amnesty provisions, in preventing the prosecution of perpetrators, have been held invalid.[62] For instance, although *Furundzija* did not involve facts concerning an amnesty law, the ICTY reasoned that amnesties constitute national measures that are inconsistent with the fundamental prohibition of torture.[63] The ICTY reasoned that "[i]t 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 . . . and then be unmindful of a State say, taking national measures authorizing or condoning torture or absolving its perpetrators through an amnesty law."[64] Therefore, national measures that either condone or absolve perpetrators of grave international crimes, the prohibition of which are *jus cogens* norms, are fundamentally invalid. The invalidation of amnesty provisions necessarily results from the understanding that *jus cogens* norms impart the positive obligations on States to effectively prohibit derogations, and the Inter-American Court of Human Rights remains the judicial body that has gone the farthest in this interpretation of *jus cogens* norms.

The Inter-American Court of Human Rights has held in multiple cases that *jus cogens* norms impart positive obligations on States, invalidating conflicting amnesty laws and requiring that States take certain measures to ensure the prosecution of derogations.[65] The Inter-American Court of Human Rights is a regional judicial body whose jurisdiction is premised on state parties' ratification of the American Convention.[66] As such, the court's decisions are often narrowly read in accordance with the obligations enshrined in the Convention.[67] Nevertheless, the Inter-

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Wuerth, Post-Human Rights] (demonstrating that universal jurisdiction allows States to exercise prescriptive jurisdiction in the absence of a traditional basis of jurisdiction).

[59] Both the criminal trial of Adolf Eichmann before the District Court of Jerusalem for crimes committed during the Nazi regime and the criminal prosecution of Augusto Pinochet before the U.K. House of Lords were premised on the exercise of universal jurisdiction. See generally Regina v. Bartle and the Commission of Police for the Metropolis, Ex Parte Pinochet [1999] (no. 3) (H.L.) (appeal taken from a Divisional Court of the Queen's Bench Division) (hereinafter "Pinochet") (Lorde Browne-Wilkinson); Attorney General v. Eichmann, District Court of Jerusalem, No. 40/61 ¶¶ 12, 30 (Dec. 11, 1961).

[60] Scholars have argued that *jus cogens* norms implicate obligations *erga omnes* to punish, prosecute, and prohibit. See Mukuki, supra note 36, at 125 (defining *erga omnes* obligations as "specifically determined obligations of which states have a legal interest in protecting towards the international community as a whole"). Compare Nagan et al., supra note 32, at 404-05 (arguing that "[w]hen a norm attains the character of *jus cogens*, an obligation of *erga omnes* is imposed on states as a whole") and Weatherall, supra note 57, at 1155 (arguing that a legal effect of *jus cogens* norms is the automatic provision of universal jurisdiction over international crimes "pursuant to obligations *erga omnes* of States that require punishment of individual violators of *jus cogens* by prosecution or extradition"), with Knuchel, supra note 56, at 174 (arguing that *jus cogens* norms do not, in and of themselves, require the absence of state immunity before another state's national courts, and as such, *jus cogens* norms' "superior rank in the emerging hierarchy of international rules does not secure an automatic access to justice to enforce their prohibitions or automatically void any procedural obstacles to adjudication").

[61] The nature of *erga omnes* obligations resulting from *jus cogens* norms has been disputed. See Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia), Judgement on Preliminary Objections, ICJ Reports (1996) (explicating that the obligations enshrined in the Genocide Convention are obligations *erga omnes* and are thus not territorially limited); Bassiouni, supra note 38, at 63 (arguing that international crimes, the prohibition of which have attained a status of *jus cogens* norms, impart obligation *erga omnes* that place upon States the obligation to not grant impunity to perpetrators of such crimes).

[62] See generally La Cantuta v. Peru, Merits, Reparations and Costs, Inter-Am. Ct. H.R. (ser. C) No. 162 (Nov. 29, 2006); Almonacid Arellano y otros v. Chile, Preliminary Objections, Merits, Reparations and Costs, Inter-Am. Ct. H.R. (ser. C) No. 154 (Sept. 26, 2006); Barrios Altos v. Peru, Merits, Judgement, Inter-Am. Ct. H.R. (ser. C) No. 75 (Mar. 14, 2001).

[63] Prosecutor v. Furundzija, IT-95-17/1-T, Judgement, ¶ 155 (Int'l Crim. Trib. for the Former Yugoslavia Dec. 10, 1998).

[64] Id. ¶ 155.

[65] See generally La Cantuta, Inter-Am. Ct. H.R. (ser. C) No. 162; Almonacid Arellano, Inter-Am. Ct. H.R. (ser. C) No. 154; Barrios Altos, Inter-Am. Ct. H.R. (ser. C) No. 75.

[66] Organization of American States (OAS), American Convention on Human Rights, "Pact of San Jose," Costa Rica, 22 November 1969.

[67] Much of the jurisprudence of the Inter-American Court of Human Rights turns on the interpretation of Article 1 of the American Convention, which obligates state parties "to ensure to all persons subject to their jurisdiction the free and full exercise

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American Court of Human Rights has continued to expand the scope of its rationales to include understandings of international law beyond the scope of the Convention.

The interpretations of *jus cogens* norms and their corresponding obligations by the Inter-American Court of Human Rights are leading examples of how to concretely conceptualize States' obligations to never derogate from *jus cogens* norms. For instance, in Barrios Altos v. Peru,[68] the Inter-American Court of Human Rights held that amnesty provisions "designed to eliminate responsibility are inadmissible, because they are intended to prevent the investigation and punishment of those responsible for serious human rights violations such as torture . . . and forced disappearance, all of them prohibited because they violate non-derogable rights . . . ."[69] *Barrios Altos* concerned the brutal massacre of fifteen individuals at the hands of "the Peruvian Army who were acting on behalf of the 'death squadron' known as the 'Colina Group.'"[70] Following the initiation of investigative proceedings, Peru's Congress adopted an amnesty law "which exonerated members of the army, police force and also civilians who had violated human rights or taken part in such violations from 1980 to 1995 from responsibility."[71] Thereafter, Peru's Congress adopted an additional amnesty law, declaring that the "amnesty could not be 'revised' by judicial instance and that its application was obligatory" and "expand[ing] the scope of [the previous amnesty] . . . to all military, police or civilian officials who might be the subject of indictments for human rights violations . . . even though they had not been charged."[72] The Inter-American Court considered the alleged "torture, extrajudicial summary or arbitrary execution and forced disappearance" to be "serious human rights violations" because "they violate non-derogable rights recognized by international human rights law."[73] Although the Inter-American Court did not specify that the prohibitions of the alleged crimes were presently *jus cogens* norms, the language of the court, in referencing that the alleged crimes "violate non-derogable rights," indicates that the court considered the prohibitions of the alleged crimes to be so fundamental that derogations were impermissible.[74] Consequently, the national amnesty laws in Peru were held to be invalid.[75] *Barrios Altos* set a precedent that national amnesty provisions inherently conflict with international human rights law "if they eliminate individuals' responsibility for non-derogable rights."[76] The Inter-American Court recognized that the non-derogable status of certain international crimes reflects a universal condemnation that cannot be evaded through national amnesty laws.[77] Although the *Barrios Altos* decision can be read to have been narrowly based on the obligations enshrined in the American Convention, to which the defendant state was a party, the reasoning of the judges rests on the understanding that certain rights are non-derogable, signifying that national and international measures that eliminate individuals' responsibility are unacceptable.[78]

Additionally, in La Cantuta v. Peru,[79] the Inter American Court of Human Rights assessed the Peruvian amnesty laws that had yet to be repealed following the *Barrios Altos* decision as they related to the illegal and arbitrary detention, torture, and extralegal executions and disappearances of multiple students and a professor from La

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of the rights and freedoms, without any discrimination for reasons of race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition." Organization of American States (OAS), American Convention on Human Rights, "Pact of San Jose," Costa Rica, art. 1, 22 November 1969.

[68] Barrios Altos v. Peru, Merits, Judgement, Inter-Am. Ct. H.R. (ser. C) No. 75 (Mar. 14, 2001).

[69] Id. ¶ 41.

[70] Id. ¶ 2.

[71] Id.

[72] Id.

[73] Id.

[74] See Id. (J., A.A. Cancado Trindade) (specifying that the non-derogable rights involved in the court's discussion "belong to the domain of *jus cogens*").

[75] Id.

[76] Id. ¶ 41 (majority opinion) ("[A]ll amnesty provisions . . . designed to eliminate responsibility are inadmissible, because they are intended to prevent the investigation and punishment of those responsible for serious human rights violations . . . all of them prohibited because they violate non-derogable rights . . . ."); see generally La Cantuta v. Peru, Merits, Reparations and Costs, Inter-Am. Ct. H.R. (ser. C) No. 162 (Nov. 29, 2006); Almonacid Arellano y otros v. Chile, Preliminary Objections, Merits, Reparations and Costs, Inter-Am. Ct. H.R. (ser. C) No. 154 (Sept. 26, 2006).

[77] Barrios Altos, Inter-Am. Ct. H.R. (ser. C) No. 75, ¶ 41.

[78] Id. (J., A.A. Cancado Trindade) ("This being so, the laws of self-amnesty, besides being manifestly incompatible with the American Convention . . . have no legal validity at all in the light of the norms of international law of human rights.").

[79] Merits, Reparations and Costs, Inter-Am. Ct. H.R. (ser. C) No. 162 (Nov. 29, 2006).

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Cantuta University,[80] In June of 1992, the Peruvian army forcefully entered the residences of several students and that of a professor.[81] The Peruvian amnesty that was in force at the time was the same amnesty invalidated in *Barrios Altos*,[82] granting amnesty to "any military and police office and civilians, whether subjected to report proceedings, inquiry, formal investigation, criminal proceedings or conviction of an ordinary offence, under either civil or military jurisdiction."[83] Identifying access to justice as a *jus cogens* norm, the court interpreted there to be a corresponding *erga omnes* obligation "to adopt all such measures as are necessary to prevent such violations from going unpunished."[84] Therefore, the court reaffirmed the judgement in *Barrios Altos* that the Peruvian amnesty laws was invalid.[85]

Similarly, in Almonacid-Arellano y otros v. Chile,[86] the Inter-American Court of Human Rights considered the failure of Chile to investigate and punish the perpetrators of an extra-legal execution in accordance with Chile's amnesty law.[87] The facts presented by the case establish that a military coup overthrew the President Salvador Allende's government in September 1973 and commenced "[w]idespread repression against alleged opponents to the regime . . . until the end of the military rule."[88] Extra-legal and arbitrary executions, torture, and forced disappearances were characteristic of the repressive regime.[89] Arrested at his house, Mr. Almonacid-Arellano was shot by the individuals who captured him before placing him into a police truck and transporting him to a hospital where he died the following day.[90] The de facto government of Chile issued an amnesty to "all individuals who performed illegal acts, whether as perpetrators, accomplices or accessories after the fact" and "individuals who . . . have been sentenced by military courts."[91] The Inter-American Court considered the prohibition of crimes against humanity to be a *jus cogens* norm; therefore, the extra-legal execution of Mr. Almonacid-Arellano, an execution by state agents amidst a pattern of violence against the civilian populous, was a universally prohibited crime.[92] The court referenced the holding of *Barrios Altos* that all amnesty provisions designed to eliminate responsibility are without legal effect, and consequently held that "States cannot neglect their duty to investigate, identify, and punish those persons responsible for crimes against humanity by enforcing amnesty laws or any other similar domestic provisions. Consequently, crimes against humanity are crimes which cannot be susceptible of amnesty."[93] In analyzing the obligations of the American Convention, the Court specifically held that the Chilean amnesty laws perpetuated impunity and were "overtly incompatible with the spirit of the American Convention."[94] However, the court additionally held that the extra-legal execution is a crime against humanity, and thus "cannot be susceptible of amnesty pursuant to the basic rules of international law."[95] The court concluded that the Chilean amnesty was inadmissible since "crimes against humanity are intolerable in the eyes of the international community."[96]

Furthermore, in Goiburu v. Paraguay,[97] the Inter-American Court of Human Rights emphasized the obligations that arise from *jus cogens* norms.[98] *Goiburu* concerned the "systematic practice of arbitrary detention, prolonged imprisonment without trial, torture and cruel, inhuman and degrading treatment, death during torture, and the political assassination of individuals who were said to be 'subversive' or against [General Alfredo Stroessner's dictatorship]."[99] The forced disappearances, torture, and killings of Augustin Goiburu Gimenez,

[80] Id. ¶ 80(10)-(14).
[81] Id. ¶ 80(12)-(14).
[82] Id. ¶ 80(62).
[83] Id. ¶ 80(59).
[84] Id. ¶ 160.
[85] Id. ¶ 186.
[86] Preliminary Objections, Merits, Reparations and Costs, Inter-Am. Ct. H.R. (ser. C) No. 154 (Sept. 26, 2006).
[87] Id. ¶¶ 3, 82(2).
[88] Id. ¶¶ 82(3)-(4).
[89] Id. ¶ 82(4).
[90] Id. ¶ 82(8).
[91] Id. ¶ 82(11).
[92] Id. ¶¶ 99, 104.
[93] Id. ¶ 114.
[94] Id. ¶ 119.
[95] Id. ¶ 129.
[96] Id. ¶ 152.
[97] Merits, Reparations, and Costs, Judgement, Inter-Am. Ct. H.R. (ser. C) No. 153 (Sept. 22, 2006).
[98] Id. ¶ 61(3).
[99] Id. ¶¶ 61(1), 61(3).

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Carlos Jose Mancuello Barreiro, Rodolfo Ramirez Villalba, and Benjamin Ramirez Villalba all occurred during Stroessner's regime and were subsequently considered by the Inter-American Court of Human Rights in one court proceeding.[100] Following in the footsteps of *Barrios Altos*, the court held that the "committed acts were considered violations of *jus cogens* and held to entail the activation of national and international measures, instruments, and mechanisms to ensure their effective prosecution and sanction."[101] The Court held that the obligations *erga omnes* resulting from *jus cogens* norms have a broad scope and "States are obliged to investigate human rights violations and prosecute and punish those responsible."[102] *Goiburu* represents yet another case in the Inter-American Court of Human Rights jurisprudence where the Court went beyond analysis of the American Convention to comment on the scope of obligations arising from the peremptory nature of *jus cogens* norms.

In contrast to the approach of the Inter-American Court of Human Rights, the International Court of Justice in Questions Relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal),[103] limited the duty to institute prosecutions of alleged acts of torture to those that occurred once the Convention Against Torture came into force.[104] As demonstrated, the nature of obligations arising out of *jus cogens* norms have yet to be uniformly determined; as such, *jus cogens* norms remain potentially powerful norms of international law whose application to other established mechanisms and rules of international law still need to be determined if *jus cogens* norms are to be fully realized as universal condemnations fundamental to the international community.

STATE IMMUNITY AND FOREIGN OFFICIALS' IMMUNITIES: RATIONALES AND LIMITATIONS

A dominant rationale for the immunity of sovereign States is that it operates to ensure respect for sovereign States and to promote good relations among them.[105] The immunity of States from the jurisdiction of foreign courts derives from the principle "*par in parem non habet imperium*," meaning "equals have no sovereignty over each other."[106] As such, States cannot assert jurisdiction over the affairs of other States without their consent.[107] State immunity has been previously interpreted to be absolute in nature; however, most countries now recognize a more restrictive approach to state immunity.[108] Although limited exceptions to state immunity have been recognized

[100] Id. ¶ 61(4).

[101] Id. ¶ 128 (emphasis added).

[102] Id. ¶¶ 129, 131 (holding, in particular, that access to justice is a peremptory norm of international law, and thus, States are under an obligation "to adopt all necessary measures to ensure that such violations do not remain unpunished, either by exercising their jurisdiction to apply their domestic law and international law to prosecute and, when applicable, punish those responsible, or by collaborating with other States that do so or attempt to do so").

[103] Judgement, 2012 I.C.J. 423 (July 20).

[104] Id. ¶ 99 (holding that the Convention Against Torture does not reflect an intention to criminalize acts of torture prior to its enactment).

[105] See Nagan et al., supra note 32, at 376-77 (clarifying that the customary international law principle of state immunity "has its roots in treaties, domestic statutes, state practice, and writing of juris consults"); Weatherall, supra note 57, at 1156-57 (explaining that state immunity is derived from customary international law); Wuerth, Post Human Rights supra note 57, at 290-91 (identifying the goal of state immunity "is to ensure the peaceful coexistence of states and to minimize interstate friction").

[106] Jones v. United Kingdom, App nos. 34356/06 and 40528/06 Eur. Ct. H.R. 1, ¶ 188 (2014); Al-Adsani v. United Kingdom, App. No. 35763/97 Eur. Ct. H.R. 1, ¶ 54 (2001); see also United Nations Charter, Art. 2(1) (recognizing the fundamental importance of the equal sovereignty of States); Weatherall, supra note 57, at 1152 (explaining that the effect of state immunity is to shield a state from other foreign States' exercise of jurisdiction).

[107] Regina v. Bartle and the Commission of Police for the Metropolis, Ex Parte Pinochet [1999] (no. 3) (H.L.) (appeal taken from a Divisional Court of the Queen's Bench Division) (Lord Goff) (explicating that the principle *par in parem non habit imperium* is a Latin maxim applied such that sovereign States do not "adjudicate on the conduct of another"); see Sandra Ekpo, Jurisdictional Immunities of the State (Germany v. Italy): The Debate over State Immunity and Jus Cogens Norms, 8 QUEEN MARY L. J. 151, 153 (2017) ("States have the privilege of choosing to submit or waive their immunity to a foreign jurisdiction.").

[108] Paul David Mora, The Immunities of State Officials in Civil Proceedings Involving Allegations of Torture, 23 AUSTRALIAN INT'L L. J. 21, 24 (2017) (recognizing that state immunity was "once absolute and provided States with a complete exemption to foreign legal process," but "under the [current] restrictive doctrine is only granted in respect of sovereign acts. States remain amenable in civils suits involving acts performed a commercial or private capacity"); Selman Ozdan, Immunity vs. Impunity in International Law: A Human Rights Approach, 4 BAKU STATE U. L. REV. 36, 41 (2018).

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regarding commercial transactions and in certain employment contexts,[109] the immunity of States from foreign courts continues to be upheld as a norm of customary international law in cases where States allegedly derogate from peremptory norms.[110]

Although the immunity of foreign officials from national jurisdiction derives from state immunity, foreign officials' immunities are distinct from the immunity of a state.[111] Nevertheless, States can explicitly waive the immunities of their officials.[112] *Immunity ratione personae* and *immunity ratione materiae* are the two forms of immunity from which foreign officials can benefit.[113]

First, the personal immunity of state officials, *immunity ratione personae*, is a status-based immunity that precludes the prosecution of sitting heads of state, heads of government, and foreign ministers.[114] Accordingly, during their tenure in office, certain senior state officials cannot be prosecuted before foreign national courts.[115] *Immunity ratione personae* is considered a status-based immunity because it attaches to the status of the official as a high ranking officer.[116] One rationale for this attachment of immunity is that the official status of the individual "directly and automatically assigns them the function of representing the state in its international relations."[117] Accordingly, senior officials "hold positions symbolically personifying the State" and thus require an extensive immunity akin to that of the state.[118] The personal immunity of sitting heads of state is virtually absolute, covering both their personal and official acts.[119] Consequently, *immunity ratione personae* is a broad immunity, applicable "to all actions of the official, regardless of whether they were carried out in connection with his/her official duties and

[109] See Jurisdictional Immunities of the State (Germany v. Italy: Greece Intervening), Judgement, 2012 I.C.J. 99, ¶¶ 57-58 (February 2012) (explaining that, in the case of the United States, the foreign sovereign immunities act details several exceptions for when state immunity is waived or inapplicable); Princz v. Federal Republic of Germany, 26 F.3d 1166, 1169 (D.C. Cir. 1994) (noting that, in the United States, state immunity does not apply for States' commercial activities or those done in private capacities).

[110] Knuchel, supra note 56, at 155 (recognizing there is not widespread withdrawal of state immunity in cases of breaches of peremptory norms); Ingrid Wuerth, International Law in Domestic Courts and the Jurisdictional Immunities of the State Case, 13 MELBOURNE J. INT'L L. 819, 829 (2012) [hereinafter Wuerth, Domestic Courts] (discussing that state immunity has been "firmly supported . . . as a requirement of customary international law even in cases alleging egregious human rights violations"); see generally Ekpo, supra note 106, at 164 ("The acceptance of a human rights exception in certain employment cases poses a further question, namely: why has this exemption not been recognized in severe *jus cogens* cases? Surely the gravity of these crimes should ensure redress to all victims.").

[111] Pinochet, (no. 3) (H.L.) (Lord Goff) ("This principle [of state immunity] applies as between states, and the head of state is entitled to the same immunity as the state itself, as are the diplomatic representatives of the state.").

[112] Although States can waive their officials' immunities, this waiver must be "clearly deduced from the wording of a treaty and unequivocally demonstrate that the right to immunity has been forfeited." Compare Mora, supra note 107, at 37, with Arrest Warrant, 2002 I.C.J. 3, ¶ 61 (February 2002) and Jacques Hartmann, The Gillon Affair, 54 INT'L & COMPARATIVE L. QUARTERLY 745, 753 (2005) (explaining that the ICJ implied in Arrest Warrant that *immunity ratione personae* could be expressly waived by treaty or implicitly "in such a way that it leaves no other possible interpretation").

[113] John Dugard, Immunity, human rights and international crimes, J. SOUTH AFR. L. 482, 484 (2005).

[114] Arrest Warrant, 2002 I.C.J. 3, ¶¶ 53-54 (February 2002) (holding that, in addition to heads of state, ministers of foreign affairs similarly benefit from *immunity ratione materiae* because they are often representatives of their state in international negotiations and they benefit from the presumption that they have full powers to act on behalf of their state); Dugard, supra note 112, at 484 ("*Immunity ratione personae* attaches to senior state officials, such as heads of state or government or ministers of foreign affairs, while they are in office. This immunity applies even to international crimes . . . . ").

[115] Weatherall, supra note 57 at 1172. Although officials benefitting from *immunity ratione personae* cannot be prosecuted before another state's national courts during their tenure in office, they are not immune from prosecution before their home-country's national courts. Anthony J. Colangelo, Jurisdiction, Immunity, Legality, and Jus Cogens, 14 CHI. J. INT'L L. 53, 72 (2013).

[116] Colangelo, supra note 114, at 58.

[117] Ismayil Mahmudov, Immunity as a Main Obstacle on the Way of National Prosecution of International Crimes, 5 BAKU STATE U. L. REV. 83, 85-86 (2019).

[118] Mora, supra note 107, at 25.

[119] Pinochet [1999] (no. 3) (H.L.) (appeal taken from a Divisional Court of the Queen's Bench Division) (Lorde Browne Wilkinson) ("This immunity enjoyed by a head of state in power and an ambassador in post is a complete immunity attached to the person of the head of state or ambassador and rendering him immune from all actions or prosecutions . . . ."); Arrest Warrant, 2002 I.C.J. 3, ¶ 58 (February 2002) ("It has been unable to deduce from this practice that there exists under customary

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regardless of whether he/she held a public office at the time of committing such actions."[120] The contemporary justification for *immunity ratione personae* is that virtually absolute immunity is essential for senior state officials to carry out their official duties.[121] Therefore, *immunity ratione personae* is temporally limited and ceases to apply once that individual leaves office.[122]

On the other hand, the functional immunity of state officials, *immunity ratione materiae*,[123] is a limited form of immunity that does not cover the acts of foreign officials committed in their personal capacities.[124] In addition to being the immunity that attaches to lower-ranked officials engaged in official acts, *immunity ratione materiae* is the immunity that persists after senior-level officials leave office.[125] However, in contrast to the status-based immunity senior level officials benefit from by virtue of their official position in a state, functional immunity attaches to individuals' actions.[126] Sometimes referred to as conduct-based immunity, *immunity ratione materiae* attaches to the official's conduct as part of his/her/their official duties.[127] One rationale for *immunity ratione materiae* is that it covers an individual's official acts "since these actions are the actions of the state itself, in whose service they act."[128] It has been explained that, since official acts are attributable to the state, "the state is entitled to claim such acts as its own, so that the individual organ may not be held accountable for those acts."[129] Furthermore, certain rationales support functional immunity for fear of courts bypassing the immunity of state through the prosecution of its officers.[130] Although immunity cannot "*always* protect[] state agents and former officials from suit in other States' courts,"[131] the scope and applicability of functional immunity have yet to be uniformly defined.[132]

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international law any form of exception to the rule according immunity from criminal jurisdiction and inviolability to incumbent Ministers for Foreign Affairs, where they are suspected of having committed war crimes or crimes against humanity.").

[120] Mahmudov, supra note 116, at 85-86.

[121] Arrest Warrant, 2002 I.C.J. at ¶ 53 (holding that *immunity ratione personae* is necessary for senior state officials such as heads of state and foreign ministers "to ensure the effective performance of their functions on behalf of their respective states").

[122] Ozdan, supra note 107, at 41 (explaining that once senior officials leave office, they no longer benefit from such a sweeping immunity and instead only benefit from immunity covering their official acts—*immunity ratione materiae*).

[123] Prosecutor v. Blaskic, IT-95-14, Judgement on the Request of the Republic of Croatia for Review of the Decision of Trial, ¶ 38 (Int'l Crim. Trib. for the Former Yugoslavia Oct. 29, 1997) (referencing that functional immunity "is a well-established rule of customary international law going back to the eighteenth and nineteenth centuries, restated many times since").

[124] Dapo Akande & Sangeeta Shah, Immunities of State Officials, International Crimes, and Foreign Domestic Court, 21 EUROP. J. INT'L L. 815, 825 (2010) ("As this type of immunity attaches to the official act rather than the status of the official, it may be relied on by all who have acted on behalf of the state with respect to their official acts.") (emphasis added).

[125] Pinochet [1999] (no. 3) (H.L.) (appeal taken from a Divisional Court of the Queen's Bench Division) (Lorde Browne Wilkinson) ("The continuing partial immunity of the ambassador after leaving post is of a different kind from that enjoyed duration personal while he was in post. Since he is no longer the representative of the foreign state he merits no particular privileges or immunities as a person . . . . This limited *immunity ratione materiae*, is to be contrasted with the former *immunity ratione personae* which gave complete immunity to all activities whether public or private."); Akande et al., supra note 123, at 815.

[126] Mahmudov, supra note 116, at 86 ("[Officials] possess [*immunity ratione materie*], since these actions are the actions of the state itself, in whose service they act. This extends to all official actions performed on behalf of the state, in the performance of his/her official duties . . . .").

[127] Colangelo, supra note 114, at 58. Accordingly, a preliminary matter in determining whether an official benefits from *immunity ratione materiae* is an assessment of whether the act was carried out in an official capacity. Mora, supra note 107, at 28 (clarifying that determining whether an act was official is evaluated on a "case-by-case basis," including examination of "the circumstances surrounding and manner in which the act was carried out"); Daniela Rosca, The Exceptions to Immunity of State Officials from Foreign Criminal Jurisdiction between the Legal Desideratum and Reality of the International Community, 21 ROMANIAN J. INT'L L. 77, 78 (2019).

[128] Mahmudov, supra note 116, at 86.

[129] Weatherall, supra note 57, at 1176.

[130] Weatherall, supra note 57, at 1199.

[131] Colangelo, supra note 114, at 84; Riccardo Pisillo Mazzeschi, The functional immunity of State officials from foreign jurisdiction: A critique of the traditional theories, 2 QUESTIONS OF INT'L L. J. 3, 17-18 (2015) (identifying state practice demonstrating foreign national courts' willingness to deny functional immunity in criminal cases).

[132] Several domestic courts have considered functional immunity inapplicable to criminal adjudications of crimes prohibited by *jus cogens* norms in accordance with the rationale that criminal proceedings do not directly implead the state. Knuchel, supra note 56, at 157-58. Nevertheless, the superficial distinction between civil and criminal adjudications does not hold the same salience as it relates to prosecutions for derogations from jus cogens norms. Kazemi Estate v. Iran, [2014] 3 S.C.R.

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MAPPING THE INTERACTION BETWEEN *JUS COGENS* NORMS AND IMMUNITIES: PROPOSED EXCEPTIONS TO STATE AND FOREIGN OFFICIALS' IMMUNITIES BEFORE NATIONAL AND INTERNATIONAL COURTS

Although state immunity and foreign officials' immunities from prosecution are well-established norms of customary international law, exceptions to such immunities continue to be heavily advocated for, particularly in cases concerning alleged derogations from *jus cogens* norms.[133] For example, some have argued that States whose officials violate *jus cogens* norms "implicitly waive" the officials' immunity.[134] The implicit waiver theory builds on the ICJ's statement in *Arrest Warrant* that foreign officials' immunities could be waived.[135] The dissent in Princz v. Federal Republic of Germany[136] applied the implicit waiver theory in its determination that Germany waived its state immunity when it violated the *jus cogens* norms prohibiting genocide and slavery.[137] The claimant's central argument was that Germany waived its immunity in accordance with the commercial activity exception under the Foreign Sovereign Immunities Act (FSIA), and, in the alternative, waived its immunity by engaging in gravely reprehensible acts.[138] Although the majority in *Princz* did not explicitly rely on the implicit waiver theory, the court suggested it would support an implicit waiver.[139]

Although there are multiple arguments for and conceptualizations of limitations of state immunity, attempts to limit the immunity of States have generally proven unsuccessful. For instance, in Al-Adsani v. United Kingdom,[140] the claimant instituted civil proceedings for compensation against the Sheikh and State of Kuwait for the physical and mental injury he suffered from the torture inflicted on him in Kuwait and the threats to his life that he received upon relocating to England.[141] The claimant was a pilot in Kuwait when three individuals entered his home, forced him at gun point to come with them, falsely imprisoned him, and subjected him to various forms of torture from which he suffered a severe form of post-traumatic stress disorder.[142] The European Court of Human Rights (ECHR) recognized that the alleged torture amounted to a serious international crime; nevertheless, it deemed itself unable to hold that there was sufficient state practice or judicial authority to conclude that States do not enjoy immunity from suit for alleged acts of torture.[143] Similarly, in Jurisdictional Immunities of the State (Germany v. Italy: Greece Intervening),[144] the ICJ concluded that the alleged violations of *jus cogens* norms did not

176 , ¶¶ 209-10 (Can.) (arguing that the treatment of immunity for civil claims should not be different from that before criminal courts and that this understanding is "reinforced by the fact that many jurisdictions permit civil recovery against perpetrators in the context of criminal proceedings").

[133] See generally Nagan et al., supra note 32, at 467 ("At the very core of the immunities discourse is the fact that grave harms have been done, and states must be held accountable."); Zaman, supra note 37, at 68 (citing the normative hierarchy theory, which asserts that immunity cannot be claimed or granted without violating *jus cogens*).

[134] The implicit waiver theory is premised on the assertion that *jus cogens* violations are not official sovereign acts and "as soon as states engage in such violations they implicitly waive any immunity under international law as to that conduct." Colangelo, supra note 114, at 78; Knuchel, supra note 56, at 166 ("States in breach of peremptory norms of international law have tacitly waived their right to immunity.").

[135] Arrest Warrant, 2002 I.C.J. 3, ¶ 61 (February 2002); Hartmann, supra note 17, at 753.

[136] 26 F.3d 1166 (D.C. Cir. 1994).

[137] Id. (Wald, J., dissenting).

[138] Nagan et al., supra note 32, at 434.

[139] Nagan et al., supra note 32, at 434 (noting, however, that Princz was overturned only two years later on the basis that there was insufficient evidence that Germany had demonstrated a willingness to waive its immunity).

[140] App. No. 35763/97 Eur. Ct. H.R. 1 (2001).

[141] Id. ¶¶ 10-14.

[142] Id. (noting that the claimant's head was repeatedly held underwater with human corpses and fire was set to mattresses, resulting in 25% of his body being covered in severe burns).

[143] Id. ¶¶ 61, 66 ("The court, while noting the growing recognition of the overriding importance of the prohibition of torture, does not accordingly find it established that there is yet acceptance in international law of the proposition that states are not entitled to immunity in respect of civil claims for damages for alleged torture committed outside the forum state."); see also Andrea Bianchi, Human Rights and the Magic of *Jus Cogens*, 19 EUROP. J. INT'L L. 491, 501 (2008) (noting that the minority of judges in the ECHR supported the argument that the status of the prohibition of torture as a peremptory norm of international law indicated that it should "trump the conflicting rule of immunity").

[144] Judgement, 2012 I.C.J. 99 (February 2012) (hereinafter "Jurisdictional Immunities").

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affect the applicability of the rule of customary international law governing state immunity.[145] In addition, the ECHR, in Jones v. United Kingdom,[146] held that there was not an established exception in international law to state immunity for Saudi Arabian officials sued for alleged acts of torture.[147] State immunity, as a fundamental principle of international law, has proven itself unamenable to limitation in cases alleging even the most serious of international crimes.[148]

In contrast to state immunity, foreign officials' immunities have been subject to certain limitations. For example, several court decisions and statutes of international tribunals have recognized that neither *immunity ratione personae* nor *immunity ratione materiae* can bar prosecutions before international tribunals.[149] The immunities of foreign officials have been limited before international tribunals because international tribunals are not organs of any particular State, and as such, their exercise of jurisdiction does not challenge the equal sovereignty of States.[150]

In contrast, proposed limitations to *immunity ratione personae* before foreign national courts have been generally unsuccessful.[151] The reasoning of the ICJ in *Arrest Warrant*[152] reflects the rationale that subjecting officers who benefit from *immunity ratione personae* to legal proceedings would interfere with their official duties.[153] As such, the ICJ pronounced that *immunity ratione personae* cannot be limited in cases of alleged *jus cogens* violations before foreign national courts.[154] *Arrest Warrant* concerned a complaint by the Democratic Republic of the Congo (DRC) that Belgium violated the sovereign equality of States in issuing an arrest warrant for a sitting Minister for Foreign Affairs on charges of crimes against humanity and offenses that breached the Geneva Conventions of 1949.[155] In assessing the immunity of the DRC's foreign minister, the ICJ explained that immunities are accorded to foreign ministers because they "occupy a position such that, like the Head of State or the Head of Government, he or she is recognized under international law as representative of the State solely by virtue of his or her office" and require immunity "to ensure the effective performance of their functions on behalf of their respective States," not "for their personal benefit."[156] Therefore, the ICJ accorded Ministers for Foreign Affairs *immunity ratione personae* since proceedings against them would impede the exercise of their official functions.[157]

In concluding that foreign ministers benefit from *immunity ratione personae*, the ICJ emphasized that "immunity from jurisdiction . . . does not mean that [Ministers for Foreign Affairs] enjoy impunity in respect of

[145] Id. ¶ 99.

[146] App. nos. 34356/06 and 40528/06, Eur. Ct. H.R. 1 (2014).

[147] Id. ¶ 215. But see Mack, supra note 45, at 86 (noting the ECHR judges did acknowledge "'some emerging support' in favor of an exception to immunity in civil cases involving claims of torture").

[148] See Mack, supra note 45, at 86 (referencing Jones as a demonstration of "how reluctant courts are to ignore State immunity in cases brought against current government officials, even in the case of the most egregious crimes").

[149] Rome Statute of the International Criminal Court art. 27(2), Jul. 17, 1998 (enshrining the principle that neither *immunity ratione materiae* nor *immunity ratione personae* precludes the International Criminal Court's jurisdiction); Prosecutor v. Al-Bashir, ICC-02/05-01/09 OA2, Judgement, ¶ 113 (May 6, 2019), https://www.icc-cpi.int/CourtRecords/CR2019_02593.PDF ("There is neither State practice nor *opinio juris* that would support the existence of Head of State immunity under customary international law vis-a-vis an international court. To the contrary, such immunity has never been recognized in international law as a bar to the jurisdiction of an international court."); Prosecutor v. Taylor, Case No. SCSL-2003-01-I, Decision on Immunity from Jurisdiction, ¶ 53 (May 31, 2004) (holding, for the first time, that a sitting head of state—Charles Taylor—was not immune from prosecution under *immunity ratione personae* before an international tribunal).

[150] Taylor, Case No. SCSL-2003-01-I at ¶ 51 (explicating that state immunity derives from the equal sovereignty of States and does not apply to international criminal tribunals which are not state organs); see Weatherall, supra note 57, at 1164-65 (explaining that "[p]rosecution[s] before international criminal organs do[] not implicate the same sovereignty concerns underlying the principle par in parem non habet imperium as does prosecution by the domestic courts of a foreign state").

[151] But see Pinochet [1999] (no. 3) (H.L.) (appeal taken from a Divisional Court of the Queen's Bench Division) (holding that the former head of state, Augusto Pinochet, did not benefit from functional immunity before the United Kingdom House of Lords).

[152] Arrest Warrant, 2002 I.C.J. 3 (February 2002).

[153] Id. ¶ 54.

[154] Id. ¶ 61 (leaving open the possibility of jurisdiction before "certain international tribunals").

[155] Id. ¶¶ 1, 12.

[156] Id. ¶¶ 12, 53.

[157] Id. ¶ 54 (citing that "even the mere risk that, by travelling to or transiting another State a Minister for Foreign Affairs might be exposing himself or herself to legal proceedings could deter the Minister from travelling internationally when required to do so for the purposes of the performance of his or her official functions").

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any crimes they might have committed, irrespective of their gravity."[158] The ICJ distinguished between immunity and impunity by highlighting the procedural nature of immunity from jurisdiction in contrast to the substantive nature of criminal responsibility.[159] The ICJ reasoned that foreign ministers will not benefit from impunity since they could be tried by their national courts or before "certain international tribunals."[160] In addition, foreign national courts could assert jurisdiction if the official's home state waives the individuals' immunity.[161] Furthermore, the court emphasized that *immunity ratione personae* ceases once the individual is out of office, at which point acts committed in a private capacity would be subject to jurisdiction.[162] Therefore, Belgium's issuance of a warrant for the foreign minister of DRC was held to violate Belgium's obligation to respect the immunity of the DRC's Minister for Foreign Affairs.[163] *Arrest Warrant* unequivocally reflected that *immunity ratione personae* is afforded to foreign ministers notwithstanding the gravity of the alleged crimes.

Although the ICJ foreclosed limitations to *immunity ratione personae* in *Arrest Warrant*, attempts to demonstrate exceptions to the applicability of foreign officials' *immunity ratione materiae* before foreign national courts when there are allegations of international crimes continue to be proposed. For instance, it has been reasoned that *immunity ratione materiae* cannot apply in cases of international crimes because international crimes are outside the scope of an individual's official duties.[164] And although *Jurisdictional Immunities* is often cited to support arguments that the immunities of States and their officials cannot be limited, even regarding the most vicious of international atrocities, the ICJ emphasized that its holding only concerned the immunities of the state.[165] The court did not address the immunities of foreign officials.[166] As such, the ICJ did not foreclose the possibility of limitations to foreign officials' immunities from arising.

Accordingly, in 2017, the ILC provisionally adopted Draft Article 7 on the immunity of state officials from foreign criminal jurisdiction, which attempts to demonstrate an exception to *immunity ratione materiae* for international crimes.[167] The proposed exceptions reads as follows:

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[158] Id. ¶ 60. But see Zaman, supra note 37, at 71 ("Permitting immunity as a procedural defen[s]e to torture implicitly establishes a hierarchy between the rules; it allows functional immunity to form a barrier tantamount to the acceptance of torture."); Ingrid Wuerth, Foreign Official Immunity: Invocation, Purpose, Exceptions, 23 SWISS REV. INT'L & EUROPEAN L. 207, 209 (2013) [hereinafter Wuerth, Foreign Official Immunity] ("Immunity does not absolve the defendant of wrongdoing, but by foreclosing suits in foreign national court it might effectively foreclose accountability entirely if there is no international forum available and if a defendant's home State refuses to prosecute and does not permit civil remedies. As a result of these limitations, civil and criminal cases brought in foreign national courts are often seen as critical to the effective enforcement of international human rights law and criminal law.").

[159] Arrest Warrant, 2002 I.C.J. at ¶ 60.

[160] Id. ¶ 61.

[161] Id.

[162] Id.

[163] Id. ¶ 71.

[164] Prosecutor v. Blaskic, IT-95-14, Judgement on the Request of the Republic of Croatia for Review of the Decision of Trial, ¶ 41 (Int'l Crim. Trib. for the Former Yugoslavia Oct. 29, 1997) (explicating that exceptions to the principle of immunity "arise from the norms of international criminal law prohibiting war crimes, crimes against humanity and genocide. Under these norms, those responsible for such crimes cannot invoke immunity from national or international jurisdiction even if they perpetrated such crimes while acting in their official capacity"); Kazemi Estate v. Iran, [2014] 3 S.C.R. 176, ¶ 229 (Can.) (arguing that "[t]he very nature of the prohibition [of torture] as a peremptory norm means that all states agree that torture cannot be condoned. Torture cannot, therefore, be an official state act for the purposes of *immunity ratione materiae*"); Air Strike, Rechtbank Den Haag 29 januari 2020, ECLI:NL:RBDHA:2020:667, fn. 65 (Neth.) (referencing the statements of the Dutch government that it does not believe the commission of international crimes can be official functions).

[165] Jurisdictional Immunities, 2012 I.C.J. 99, ¶ 91 ("The Court concludes that, under customary international law as it presently stands, *a State* is not deprived of immunity by reason of the fact that it is accused of serious violations of international human rights law or the international law of armed conflict. In reaching that conclusion, the Court must emphasize *that it is addressing only the immunity of the State itself* from the jurisdiction of the courts of other States; the question of whether, and if so to what extent, immunity might apply in criminal proceedings against an official of the State is not in issue in the present case.") (emphasis added).

[166] Id.

[167] Sean D. Murphy, Immunity Ratione Materiae of State Officials from Foreign Criminal Jurisdiction: Where is the State Practice in Support of Exceptions?, 112 AM. SOCIETY OF INT'L L. 4, 4 (2018); International Law Commission, Immunity of State Officials from Foreign Criminal Jurisdiction, Draft Articles, 7 A/72/10 fn. 756 (2017).

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> "(1) Immunity shall not apply in relation to the following crimes: (a) genocide, crimes against humanity, war crimes, torture and enforced disappearances; (b) crimes of corruption; (c) crimes that cause harm to persons, including death and serious injury, or to property, when such crimes are committed in the territory of the forum state and the state official is present in said territory at the time that such crimes are committed. (2) Paragraph 1 shall not apply to persons who enjoy *immunity ratione personae* during their term of office."[168]

The Commission supported its exception to *immunity ratione materiae* with reference to national laws that already provide for such an exception.[169] Numerous scholars have explained that, although commendable, the ILC's efforts do not reflect a new rule of customary international law.[170] Rather, the referenced trend of States increasingly denying foreign officials' *immunity ratione materiae* when they are alleged to have committed international crimes is a fortunate turn of events and an example of the ILC's progressive development of the law.[171] Although the ILC's Draft Article 7 is met with criticism and the proposed exception to *immunity ratione materiae* does not appear to be currently accepted as a rule of customary international law,[172] the ILC did cite limited state practice which reflects that the application of *immunity ratione materiae* is shifting. It might be that "it is only a question of time before courts adopt a more restrictive approach to sovereign immunity in respect of governmental acts constituting international crimes in violation of *jus cogens* norms;"[173] in the interim, it is necessary to explore other avenues of establishing the inapplicability of *immunity ratione materiae* for allegations of severe international crimes.

PART III. REFRAMING THE PEREMPTORY STATUS OF *JUS COGENS* NORMS AS FUNDAMENTALLY INCOMPATIBLE WITH FUNCTIONAL IMMUNITY BEFORE FOREIGN NATIONAL COURTS

This Article argues that granting functional immunity to foreign officials alleged to have violated a *jus cogens* norm is incompatible with the peremptory nature of the norm. Similar to impermissible amnesty provisions that allow perpetrators to evade accountability, officials who benefit from functional immunity currently evade prosecution, even for the gravest of international crimes. Therefore, the status of the universal condemnation of certain international crimes as *jus cogens* norms mandates the elimination of functional immunity before foreign national courts. Part A of this section argues that functional immunity is incompatible with States' duties to effectively prohibit derogations from *jus cogens* norms because foreign national courts' invocation of functional immunity operates similar to the amnesty provisions held invalid by the Inter-American Court of Human Rights. Subsequently, Part B

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[168] International Law Commission, Immunity of State Officials from Foreign Criminal Jurisdiction, Draft Articles, 7 A/72/10 fn. 756 (2017).

[169] Id.; Murphy, supra note 166, at 4-6 (highlighting that the ILC's support for an exception in respect to war crimes was six national laws that currently contain such an exception).

[170] Rosanne Van Alebeek, The International Crime Exception in the ILC Draft Articles on the Immunity of State Officials from Foreign Criminal Jurisdiction: Two Steps Back, 112 AJIL UNBOUND 27, 31-32 (2018). Rules of customary international law arise from widespread state practice and *opinio juris*. See Mack, supra note 45, at 99 ("[F]or an obligation to be one of customary international law, State practice must be consistent and widespread and must be motivated by a sense of *opinio juris*, not solely out of a desire to fulfill a treaty obligation or for any other reason, such as political considerations.").

[171] Air Strike, Rechtbank Den Haag 29 januari 2020, ECLI:NL:RBDHA:2020:667, ¶ 4.43 (Neth.) (citing that the trend demonstrated in the Draft Article to deny *immunity ratione materiae* in cases of international crimes does not reflect general state practice required for a rule to crystallize into customary international law); Murphy, supra note 166, at 8 (emphasizing that the state practice referenced in the ILC's draft article "is not widespread, representative, or consistent," and as such, "Draft Article 7 might be regarded as a proposal by the Commission for a new rule that could be embodied in a treaty, which states could choose to accept or reject. It cannot be regarded, however, as reflecting existing law"); Cedric Ryngaert, Functional Immunity of foreign State officials in respect of international crimes before the Hague District Court: A regressive interpretation of progressive international law, EJIL: TALK! (March 2, 2020), https://www.ejiltalk.org/functional-immunity-of-foreign-state-officials-in-respect-of-international-crimes-before-the-hague-district-court-a-regressive-interpretation-of-progressive-international-law/.

[172] Air Strike, ECLI:NL:RBDHA:2020:667 at ¶¶ 4.43, 4.55.

[173] See Dugard, supra note 112, at 487 (proposing that "it is only a question of time before courts adopt a more restrictive approach to sovereign immunity in respect of governmental acts constituting international crimes in violation of *jus cogens* norms" since "absolute immunity in respect of commercial transactions gave way to a restrictive approach to accord with international expectations and policy").

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applies this Article's thesis to the *Air Strike* case and stipulates that the District Court of the Hague erred in its invocation of functional immunity to bar Zeyada's civil suit for the wrongful killings of his family during a military operation in the Gaza Strip.

THE INCOMPATIBILITY OF OFFICIALS' IMMUNITY FROM PROSECUTION WITH THE UNIVERSAL CONDEMNATION OF DEROGATIONS FROM *JUS COGENS* NORMS

As reflected by the jurisprudence of the Inter-American Court of Human Rights concerning amnesty provisions, *jus cogens* norms obligate States to effectively prohibit derogations, and therefore, invalidate conflicting rules that prevent the absolute prohibition of derogations.[174] The Inter-American Court of Human Rights has interpreted the non-derogable nature of *jus cogens* norms to necessitate the effective prosecution of perpetrators of grave international crimes that derogate from such norms because the status of *jus cogens* norms—the highest status in the hierarchy of the international legal order—would be meaningless if States did not have a corresponding obligation to ensure the effective prohibition of these crimes through prosecution and investigation.[175]

Jus cogens norms cannot be circumvented by conflicting mechanisms, norms, or rules that permit derogations from *jus cogens* norms from being sufficiently prohibited.[176] Similar to the amnesty provisions in *Barrios Altos*, *La Cantuta*, and *Almonacid-Arrellano*, state officials' *immunity ratione materiae* conflicts with *jus cogens* norms because it allows for individuals who are alleged to have committed crimes universally condemned by the international community to be shielded from prosecution.[177] As *Barrios Altos* emphasized, amnesty laws are fundamentally incompatible with *jus cogens* norms prohibiting certain international crimes precisely because they allow individuals to evade responsibility for derogations from peremptory norms of international law.[178] The amnesty laws in *Barrios Altos* and *La Cantuta* prevented the "investigation and punishment of those responsible for serious human rights violations such as torture . . . and forced disappearance, all of them prohibited because they violate non-derogable rights."[179] As compared with amnesty provisions that have been held to be without legal effect, functional

[174] See supra notes 67-77; see also Sadat, supra note 32, at 1021 ("Regional human rights courts and international human rights monitoring bodies have been unanimous in imposing an affirmative obligation on states to investigate human rights abuses.").

[175] See Goiburu v. Paraguay, Merits, Reparations, and Costs, Judgement, Inter-Am. Ct. H.R. (ser. C) No. 153, ¶¶ 84, 128 (Sept. 22, 2006); see also Prosecutor v. Furundzija, IT-95-17/1-T, Judgement, ¶ 155 (Int'l Crim. Trib. for the Former Yugoslavia Dec. 10, 1998 ("The fact that torture is prohibited by a peremptory norm of international law has other effects at the inter-state and individual levels. At the inter-state level, it serves to internationally de-legitimize 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 . . . and then be unmindful of a State say, taking national measures authorizing or condoning torture or absolving its perpetrators through an amnesty law. If such a situation were to arise, the national measures, violating the general principle and any relevant treaty provision, would produce the legal effects discussed above and in addition would not be accorded international legal recognition.") (footnotes omitted). But see Akande et al., supra note 123, at 835 (noting that there is no "recognized obligation on third states to institute criminal prosecutions, even if there may be a right to do so").

[176] See also Bassiouni, supra note 38, at 65-66 ("To this writer, the implications of *jus cogens* are those of a duty and not of optional rights; otherwise *jus cogens* would not constitute a peremptory norm of international law. Consequently, these obligations are non-derogable in times of war as well as peace. Thus, recognizing certain international crimes as *jus cogens* carries with it the duty to prosecute or extradite, the non- applicability of statutes of limitation for such crimes, and universality of jurisdiction over such crimes irrespective of where they were committed, by whom (including Heads of State), against what category of victims, and irrespective of the context of their occurrence (peace or war). Above all, the characterization of certain crimes as *jus cogens* places upon states the *obligatio erga omnes* not to grant impunity to the violators of such crimes.").

[177] Pinochet [1999] (no. 3) (H.L.) (appeal taken from a Divisional Court of the Queen's Bench Division) (Lord Millet) ("International law cannot be supposed to have established a crime having the character of a *jus cogens* and at the same time to have provided an immunity which is co-extensive with the obligation it seeks to impose."); Hartmann, supra note 111, at 754 (supporting, albeit cautiously, the argument that the *jus cogens* norm prohibiting torture "would necessarily trump any other rule of international law, even immunity").

[178] See supra notes 67-77 and accompanying text.

[179] Barrios Altos v. Peru, Merits, Judgement, Inter-Am. Ct. H.R. (ser. C) No. 75, ¶ 41 (Mar. 14, 2001); La Cantuta v. Peru, Merits, Reparations and Costs, Inter-Am. Ct. H.R. (ser. C) No. 162, ¶ 80(59) (Nov. 29, 2006).

immunity similarly operates as a bar to the criminal and civil jurisdiction of foreign national courts and allows individual perpetrators to evade accountability. The Peruvian amnesties in *Barrios Altos* and *La Cantuta* were held by the Inter-American Court of Human Rights to be invalid because they violated the obligations enshrined in the American Convention and were fundamentally inconsistent with the nature of *jus cogens* norms. Similarly, the Chilean amnesty in *Almonacid-Arellano* was deemed invalid because crimes against humanity, the prohibition of which was recognized as a *jus cogens* norm, "cannot be susceptible of amnesty" and "are intolerable in the eyes of the international community." In extending its rationale beyond the American Convention, the Inter-American Court emphasized that crimes against humanity are an affront to the international community "as a whole," not just state parties to the American Convention. Additionally, when explaining the nature of *jus cogens* norms, the Inter-American Court has repeatedly asserted that peremptory norms "give rise to obligations *erga omnes*,"[180] obligations that are owed to the entire international community, not just those who have ratified an international convention.[181] *Jus cogens* norms occupy the highest status in the hierarchy of international law, and as such, the prohibition of derogations from *jus cogens* norms cannot be circumvented by amnesty laws or functional immunity that would serve to erode the universal nature of the prohibitions of derogations.

Rather than institute national measures to ensure the effective prohibition of derogations from *jus cogens* norms, foreign national courts' continued recognition of foreign officials' *immunity ratione materiae* allows perpetrators to evade prosecution, and subsequently contributes to the erosion of the universal prohibition and condemnation of derogations from *jus cogens* norms.[182] As the Inter-American Court of Human Rights held in *Goiburu*, the peremptory status of *jus cogens* norms requires that effective prosecution and sanction are ensured through the activation of national and international measures.[183] The functional immunity of foreign officials operates to prevent the prosecution of foreign officials before foreign national courts. As such, the required prosecution of perpetrators of grave international crimes is prevented by such a procedural rule that allows perpetrators to evade prosecution simply due to their current or former positions as state officials. Such evasion of individuals' accountability amounts to States' abdication of responsibility in prohibiting derogations from *jus cogens* norms.[184]

Therefore, the continued recognition of functional immunity in cases alleging derogations from *jus cogens* norms can contribute to the situation of impunity[185] in allowing perpetrators to evade responsibility. Although the ICJ reasoned in *Arrest Warrant* that the grant of *immunity ratione personae* to foreign ministers before foreign national courts would not amount to foreign ministers' evasion of responsibility since they could be prosecuted in their country's own national courts and before "certain" international tribunals,[186] this line of reasoning is inconsistent with States' obligations to effectively prohibit derogations from *jus cogens*. Granting officials immunity on the assumption that other courts may be able to prosecute is an abdication of States' international responsibility to

[180] Goiburu, Inter-Am. Ct. H.R. (ser. C) No. 153, ¶¶ 128, 131.

[181] See supra notes 83-84, 100-101, and accompanying text.

[182] Restatement (Third) of the Foreign Relations Law of the United States § 702 cmt. b. (1987) ("A state violates international law if, as a matter of state policy, it practices, encourages, or condones (a) genocide, (b) slavery or slave trade, (c) the murder or causing the disappearance of individuals, (d) torture or other cruel, inhumane, or degrading treatment or punishment, (3) prolonged arbitrary detention, (f) systematic racial discrimination, or (g) a consistent pattern of gross violations of internationally recognized human rights." And a state can be held to have condoned such prohibited acts "if such acts, especially by its officials, have been repeated or notorious and no steps have been taken to prevent them or to punish the perpetrators." In addition, "[i]nternational law requires a state to outlaw genocide, slavery, and the slave trade, and the state would be responsible under this section if it failed to prohibit them or to enforce the prohibition.").

[183] Goiburu, Inter-Am. Ct. H.R. (ser. C) No. 153, ¶ 128.

[184] But see Akande et al., supra note 123, at 834 (arguing that state immunity does not actually conflict with *jus cogens* norms because it is not a *jus cogens* norm that states must prosecute derogations from *jus cogens* norms); Mack, supra note 45, at 96 (noting that *jus cogens* norms do not "preclude the application of another norm that may hinder enforcement of the *jus cogens* in the absence of a direct conflict between the two norms").

[185] Impunity can be defined as "exception from penalty or punishment." Ozdan, supra note 107, at 42 (referring to three types of immunity: strategic, structural, and political/psychological). The prevention of impunity has been interpreted to be a "crucial step towards achieving justice;" nevertheless, impunity is continues to be pervasive, and arguably, heightened by the continued recognition of immunities. Ozdan, supra note 107, at 52.

[186] Arrest Warrant, 2002 I.C.J. 3, ¶ 61 (February 2002).

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ensure derogations from *jus cogens* norms are not allowed.[187] In addition, in contrast to *immunity ratione personae*, which necessarily will cease to protect certain officials, *immunity ratione materiae* continues to protect officials from prosecution beyond their tenure in office.[188] Furthermore, the ICJ's reasoning in *Arrest Warrant* disregards the instances in which accountability is foreclosed by the refusal of the official's state to prosecute and the inability of an international tribunal to exercise jurisdiction.[189]

The reasoning of the Inter-American Court of the Human Rights in invalidating conflicting measures and rules of customary international law that allow for derogations from *jus cogens* norms to remain unpunished is applicable to the doctrine of functional immunity, which operates as a procedural bar to foreign national courts' jurisdiction. As *Furundzija* stipulated in its assessment of the prohibition of torture, "[i]t 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 . . . and then be unmindful of a State say, taking national measures authorizing or condoning torture or absolving its perpetrators through an amnesty law."[190] Similarly, it is illogical to understand peremptory norms as norms which occupy the highest status in the international hierarchical order and that necessarily preempt both conflicting treaty obligations and rules of customary international law and then allow, in cases alleging the very derogations from *jus cogens* norms supposedly universally prohibited, to evade prosecution on a sheer technicality. Because the prohibitions of war crimes, crimes against humanity, genocide, and torture are examples of *jus cogens* norms,[191] functional immunity is inapplicable in cases alleging the commission of such international crimes because States cannot abdicate their obligations to ensure derogations from *jus cogens* norms are universally and strictly prohibited.

APPLYING THE OBLIGATIONS TO EFFECTIVELY PROHIBIT DEROGATIONS FROM *JUS COGENS* NORMS TO THE DISTRICT COURT OF THE HAGUE'S DISMISSAL OF A CIVIL SUIT CONCERNING ALLEGED WAR CRIMES

In *Air Strike*, Zeyada claimed two former military officers carried out a military air strike in the Gaza strip that targeted civilian populations—an act that might amount to a war crime.[192] In applying this Article's thesis that functional immunity is incompatible with States' obligations to effectively prevent derogations from *jus cogens* norms to *Air Strike*, the District Court of the Hague has a positive obligation to effectively prohibit derogations from the peremptory norm of international law prohibiting the commission of war crimes.[193] As such, the District Court of the Hague erred in dismissing Zeyada's civil suit on grounds of the Defendants' functional immunity.

In establishing that functional immunity remains a norm of customary international law applicable to Zeyada's suit, the District Court of the Hague erroneously relied on cases upholding the immunity of States and overlooked the possibility that functional immunity could be negated by anything other than a new rule of customary international law. A large majority of the District Court of the Hague's analysis in *Air Strike* revolved around discussions of cases in which derogations from *jus cogens* norms were alleged and state immunity was nevertheless upheld. However, in referencing *Al-Adsani* and *Jurisdictional Immunities*, the District Court of the Hague addressed cases of state immunity, a norm of customary international law that operates distinctly from foreign officials'

[187] See Zaman, supra note 37, at 71 ("Permitting immunity as a procedural defen[s]e to torture implicitly establishes a hierarchy between the rules; it allows functional immunity to form a barrier tantamount to the acceptance of torture.").

[188] See supra notes 122-131 and accompanying text.

[189] Wuerth, Foreign Official Immunity supra note 157, at 209 ("Immunity does not absolve the defendant of wrongdoing, but by foreclosing suits in foreign national court it might effectively foreclose accountability entirely if there is no international forum available and if a defendant's home State refuses to prosecute and does not permit civil remedies. As a result of these limitations, civil and criminal cases brought in foreign national courts are often seen as critical to the effective enforcement of international human rights law and criminal law."). But see Dire Tiadi, Immunity in the Era of Criminalisation: The Africa Union, the ICC, and International Law, 58 JAPANESE YEARBOOK OF INT'L L. 17, 25 (2015) (recognizing that immunities can pose hurdles to combatting impunity and possibly contribute to impunity).

[190] Prosecutor v. Furundzija, IT-95-17/1-T, Judgement, ¶ 155 (Int'l Crim. Trib. for the Former Yugoslavia Dec. 10, 1998).

[191] See supra note 34.

[192] Air Strike, Rechtbank Den Haag 29 januari 2020, ECLI:NL:RBDHA:2020:667, ¶¶ 2.2, 4.5 (Neth.); Rome Statute of the International Criminal Court art. 8, Jul. 17, 1998.

[193] See supra notes 175-183 and accompanying text.

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immunities.[194] Furthermore, in reference to *Jones*, the District Court of the Hague focused on the inability of the ECHR to recognize a customary rule of international law that codifies an exception to *immunity ratione materiae*.[195] Nevertheless, as the ECHR itself recognized in *Jones* and the District Court of the Hague conceded, "state practice is in a state of flux with evidence of both the grant and refusal of *immunity ratione materiae*."[196] Additionally, the District Court of the Hague presupposed that *immunity ratione materiae* can only be limited by the development of a new rule of customary international law.[197] As such, the District Court of the Hague believed its interpretation of the ILC's proposed exception to *immunity ratione materiae* in Draft Article 7 as merely reflecting a progressive development of the law rather than the widespread state practice and *opinio juris* required for the development of a rule of customary international law to demonstrate that functional immunity remains an established norm.[198] Nevertheless, the condemnation of certain international crimes are of such a universal nature that even obligations willingly entered into by state parties through treaties are necessarily invalidated. As such, similar to the reasoning applied by the court in *Furundzija*,[199] it is illogical for certain prohibitions of crimes to be so universal while still allowing for measures and mechanisms to allow for their commission.[200]

Similar to the amnesties in *Barrios Altos*,[201] *La Cantuta*,[202] and *Almonacid-Arellano*,[203] the District Court of the Hague's invocation of functional immunity bars the prosecution of alleged perpetrators. In *Barrios Altos* and *La Cantuta*, Peru had granted perpetrators of a brutal massacre certain amnesties that precluded their prosecution before national courts.[204] Similarly, the invocation of functional immunity effectively operates to preclude the prosecution of alleged perpetrators of grave international crimes before foreign national courts. The Peruvian amnesties in *Barrios Altos* and *La Cantuta* were held impermissible precisely because they allowed perpetrators to evade accountability. By invoking the functional immunity of the defendant military officers, the District Court of the Hague similarly allowed perpetrators to evade responsibility for their alleged crimes.[205]

Additionally, the District Court of the Hague supported its dismissal with reference to the assertion in *Arrest Warrant* that the absence of jurisdiction before one court does not necessitate perpetrators of alleged crimes will benefit from impunity.[206] However, in allowing the perpetrators of grave international crimes to evade responsibility due to a procedural rule of immunity, the District Court of the Hague failed to appreciate the particularly grave nature of the alleged crimes, the commission of which is so universally prohibited that it has achieved the status of a *jus cogens* norm. The allowance of alleged perpetrators to evade prosecution on the assumption that other courts may be able to prosecute amounts to an abdication of the state's obligation to prohibit derogations from *jus cogens* norms.[207]

The District Court of the Hague essentially overlooked the grave nature of the alleged crime in *Air Strike* and allowed the invocation of functional immunity to bar Zeyada's prosecution of the defendant military officers who killed his family. The Inter-American Court of Human Rights has made strides in establishing that *jus cogens* norms necessarily invalidate national measures which allow derogations to be permitted and the perpetrators to

[194] But see Air Strike, ECLI:NL:RBDHA:2020:667 at ¶ 4.11 (framing functional immunity as a mechanism to prevent the circumvention of state immunity in the prosecution of state officials).

[195] Id. ¶ 4.14-4.15.

[196] Id. ¶ 4.15 (citing Jones v. United Kingdom, App. nos. 34356/06 and 40528/06, Eur. Ct. H.R. 1 (2014)).

[197] Id. ¶ 4.35.

[198] Id. ¶ 4.43.

[199] See also Sadat, supra note 32, at 1014-15 (explaining that, although the analysis of amnesties was not central to the case presented before the ICTY in Furundzija, the Trial Chamber reflected the understanding that amnesties are incompatible with the duty imposed on states to investigate torture due to the prohibition of torture being a *jus cogens* norms).

[200] Prosecutor v. Furundzija, IT-95-17/1-T, Judgement, ¶ 155 (Int'l Crim. Trib. for the Former Yugoslavia Dec. 10, 1998).

[201] See supra notes 70-71 and accompanying text.

[202] See supra note 82 and accompanying text.

[203] See supra note 90 and accompanying text.

[204] La Cantuta v. Peru, Merits, Reparations and Costs, Inter-Am. Ct. H.R. (ser. C) No. 162, ¶ 80(59) (Nov. 29, 2006); Barrios Altos v. Peru, Merits, Judgement, Inter-Am. Ct. H.R. (ser. C) No. 75, ¶ 2 (Mar. 14, 2001).

[205] Contra Mora, supra note 107, at 30 (arguing that immunity does not indicate that the act at issue is legal; rather, immunity merely "serves as a bar to violations of legal wrongs being enforced in the legal systems of foreign states").

[206] Air Strike, Rechtbank Den Haag 29 januari 2020, ECLI:NL:RBDHA:2020:667 ¶¶ 4.29-4.32 (Neth).

[207] But see Knuchel, supra note 56, at 164 (arguing that a court's recognition of immunity does not amount to active participation in the wrongful act at issue).

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evade accountability.[208] The analysis applied by the Inter-American Court to invalidate amnesty provisions similarly necessitates the denial of functional immunity in cases alleging derogations form *jus cogens* norms. Furthermore, the Inter-American Court of Human Rights held in *Goiburu* that impermissibility of derogations from *jus cogens* norms requires States to positively implement measures "to ensure that such violations do not remain unpunished."[209] Rather than implement measures to ensure the appropriate punishment of perpetrators who commit grave international crimes, the District Court of the Hague allowed functional immunity to operate as a norm which prevents the prohibition. In allowing Zeyada's suit to be dismissed, the District Court of the Hague allowed a norm of customary international law to operate similar to the Peruvian amnesties held legally invalid in *Barrios Altos* and *La Cantuta*. Consequently, the District Court of the Hague erred in dismissing Zeyada's complaint because the *immunity ratione materiae* of the Defendants as former military officials is inapplicable when the complaint alleges derogations from *jus cogens* norms.[210] The court's invocation of immunity for an alleged derogation from a *jus cogens* norm is incompatible with the Netherlands' international legal obligation to the international community to uphold the universal prohibition of war crimes.

LIMITATIONS AND RECOMMENDATIONS

First, this Article's argument only applies to *immunity ratione materiae* because the rationale for *immunity ratione personae* even in cases of alleged derogations from *jus cogens* continues to have some salience. Sitting high level officials like the head of state, head of government, and foreign minister must be capable of travelling and conducting their operations without the fear of prosecution—a fear that arguably subsides once they leave office. Furthermore, *immunity ratione personae* before foreign national courts, while admittedly slowing the wheels of justice, does not violate the obligation owed to the international community to effectively prohibit derogations from *jus cogens* because it is temporally limited.[211]

Furthermore, the breach of the obligation *erga omnes* to effectively prohibit derogations from peremptory norms is akin to the breach of a rule of customary international law and should be similarly remedied. Per the Restatement (Third) of the Foreign Relations Law of the United States, when a state violates a rule of customary international law, the state must immediately stop the violation, vow to not repeat the violation, and provide reparations if applicable.[212] Similarly, in the context of cases where functional immunity is raised, this *article* recommends that it be mandated upon States to deny the existence of foreign officials' functional immunity when a violation of *jus cogens* norms are alleged. Consequently, if *Air Strike* is appealed, the respective court should overrule the District Court of the Hague's dismissal of Zeyada's civil suit against former Israeli military officials on the basis of their functional immunity since Zeyada's complaint is premised on international crimes that could amount to war crimes,[213] the prohibition of which is a *jus cogens* norm.[214]

Lastly, this *article's* argument only applies to international crimes whose prohibitions have achieved *jus cogens* status and does not include crimes which have not achieved such a peremptory status. Therefore, it is necessary to continue to support the commendable work of the International Law Commission to establish that a general exception to *immunity ratione materiae* before foreign national courts has crystallized into a rule of customary international law for a wider range of international crimes.

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[208] See supra Section II.A.

[209] See supra note 182 and accompanying text.

[210] See generally Prosecutor v. Furundzija, IT-95-17/1-T, Judgement, ¶ 151 (Int'l Crim. Trib. for the Former Yugoslavia Dec. 10, 1998) (referencing that the violation of an obligation *erga omnes* "constitutes a breach of the correlative right of all members of the international community and gives rise to a claim for compliance accruing to each and every member, which then has the right to insist on fulfilment of the obligation or in any case to call for the breach to be discontinued").

[211] See supra notes 113-120 and accompanying text.

[212] Restatement (Third) of the Foreign Relations Law of the United States § 702 cmt. o (1987) ("Violations of the rules states in this section are violations of obligations to all other states and any state may invoke the ordinary remedies available to a state when its rights under customary law are violated.").

[213] Air Strike, Rechtbank Den Haag 29 januari 2020, ECLI:NL:RBDHA:2020:667, ¶ 2.2 (Neth.) (recognizing that Zeyada alleges that the death of his family members was a result of a military air strike and policy that involved the targeting of civilian populations).

[214] Bassiouni, supra note 38, at 66.

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CONCLUSION

Torture, genocide, and war crimes are among the abhorrent international crimes that the international community has agreed to universally condemn.[215] Consequently, States, in addition to being obligated to stand as a united front in the condemnation of derogations from the *jus cogens* norms prohibiting such crimes, are under the affirmative obligation *erga omnes* to effectively prohibit derogations.[216] *Jus cogens* norms are those from which the international community does not permit derogation.[217] As such, it is illogical for States to allow for certain procedural rules to effectively condone such derogations by allowing perpetrators to evade prosecution on technicalities.[218]

Foreign national courts' invocation of functional immunity bars the prosecution of individuals simply due to their positions as state officials, and is incompatible with the obligation to prohibit derogation from peremptory norms of international law because it allows for exceptions to the universal condemnation of particularly grave international crimes. Therefore, the grant of functional immunity by foreign national courts is incompatible with States' obligations to effectively prohibit derogations from *jus cogens* norms, and States should be held responsible for the breach of an international legal obligation owed to the international community as a whole.

Ismail Zeyada undoubtedly suffers from the devastating loss of family members—a loss that can never be fully alleviated. But, Zeyada additionally suffers in knowing that he is incapable of securing redress for the deaths of his family members. The District Court of the Hague, in dismissing Zeyada's civil suit, effectively signaled to Zeyada that he is without recourse. War crimes are particularly grave international crimes, the prohibition of which has attained the status of a *jus cogens* norm. Thus, the international community is under the obligation to ensure derogation from this universal prohibition of war crimes is not permitted. The District Court of the Hague dismissed Zeyada's suit because of the purported functional immunity of the Defendants as former military officials. In so doing, the Netherlands essentially permitted derogation from the universal prohibition of war crimes in allowing the perpetrators to escape trial simply due to their former positions as state officials. Allowing procedural norms of customary international law, such as functional immunity, to supersede the universal condemnation of derogations from *jus cogens* norms is incompatible with States' obligations and should no longer be permissible as a method for state officials to evade accountability.

[215] See supra Section II.C.

[216] But see Mack, supra note 45, at 94 (explaining that the majority of judges in Belgium v. Senegal did not believe that *jus cogens* norms give rise to specific state obligations).

[217] Vienna Convention on the Law of Treaties, art 53, May 23, 1969, U.N. Doc. A/Conf. 39/27, 8 I.L.M. 679; see supra Section II.A.

[218] Mack, supra note 45, at 86 ("It seems contradictory to, on the one hand, claim that crimes against humanity are so abhorrent to the International Community as a whole that all offenders should face justice for their acts and, on the other, to allow government officials to escape prosecution by virtue of their office. This is especially true for government officials, who are charged with working for and protecting citizens.").

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