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Aikaterini Stavridou, Fotios
R.N.: 7340202301024

'The prohibition of torture as a jus cogens norm: identification, legal consequences and contemporary challenges'

Supervisors:
Professor Linos-Alexander Sicilianos
Dr. Maria-Louiza Deftou
Assistant Professor Anastasios Gourgourinis

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LIST OF ABBREVIATIONS:

ACHR: American Convention on Human Rights

ARSIWA: Articles on the Responsibility of States for Internationally Wrongful Acts

CAT: Committee Against Torture

CIDT: Cruel, Inhuman or Degrading Treatment

CPT: European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment

CPW: Circumstances Precluding Wrongfulness

ECHR: European Convention on Human Rights

ECtHR: European Court of Human Rights

EU: European Union

HRC: Human Rights Committee

IACtHR: Inter-American Court of Human Rights

ICCPR: International Covenant on Civil and Political Rights

ICERD: International Convention on the Elimination of All Forms of Racial Discrimination

ICJ: International Court of Justice

ICTY: International Criminal Tribunal for the former Yugoslavia

ILC: International Law Commission

OAS: Organization of American States

UDHR: Universal Declaration of Human Rights

UN: United Nations

UNCAT: United Nations Convention Against Torture

UNGA: United Nations General Assembly

VCLT: Vienna Convention on the Law of Treaties

Introduction

The specific LL.M. Thesis concerns the prohibition of torture as a jus cogens norm. Its aim is to identify torture as a norm of jus cogens, examining its legal consequences and enforcement mechanisms, as well as the contemporary challenges in the international legal order. In contemporary societies, unfortunately, we are still witnesses of acts of torture committed throughout the world. Hence, it is of cardinal importance to be acquainted with its legal status as a peremptory norm of international law, understanding its legal consequences and examining certain challenges that emerge and necessitate our attention.

To begin with, in the introductory part, a brief analysis of the concept of jus cogens is provided, demarcating its conceptual framework, pinpointing simultaneously, the criteria that should be met for its identification. In the introductory part is also provided a brief overview of the gradual codification of the prohibition of torture in various legal instruments, as well as of its gradual recognition as a jus cogens norm, through the issue of judicial decisions. Further, in the first chapter a definition of torture is given, explaining its cardinal importance in the international legal order, pinpointing the elements of its definition, through a look into the relevant legal instruments and the relevant judicial practice at a regional, as well as at an international level. Additionally, in the specific chapter, an analysis of certain conceptual challenges is offered. In detail, after the examination of the necessary elements for the definition of torture, emphasis is given to the distinction between ill-treatment and torture from the european and international approach, providing a comparative analysis. Certain judicial decisions, such as the case *Ireland v. United Kingdom* have been used as tools. The specific chapter illustrates also the difference between jus cogens norms and non-derogable norms, although the two concepts are closely related to each other.

The second chapter of the specific LL.M. Thesis deals with the legal consequences deriving from the recognition of the prohibition of torture as a jus cogens norm, using mostly as tool article 53 of the VCLT and the ILC Draft Conclusions. The focus is primarily established on the *erga omnes* obligations, the case of conflict with treaty or customary law, as well as on the consequence of universal jurisdiction. The need for the establishment of mechanisms to combat torture is obvious. They are examined in the third chapter of the LL.M. Thesis at hand, along with a brief evaluation of their role. More specifically the monitoring and enforcement mechanisms are examined at an international level, focusing on the role of UNCAT Committee, in conjunction with the reports of the UN Special Rapporteur, as well as at a regional level, with emphasis to the European approach. Reference will also be made to the role of the relevant judicial decisions, as mechanisms to combat torture, through the issue of legally binding decisions.

Chapter four focuses on certain challenges in our contemporary world, that are highly connected with the prohibition of torture as a jus cogens norm. The specific challenges concern, firstly, the issue of state immunity and its relation with the prohibition of torture as a jus cogens norm. Indeed, certain questions arise through the examination of the specific issue, such as whether exists a conflict between state immunity and jus cogens norms (and subsequently with the prohibition of torture) and whether state immunity can in practice lead to state impunity; is there a need for balance? Subsequently, apart from the aforementioned challenge which is timeless, it is crucial to shed light to a new challenge that has emerged, which encourages the protection of fundamental human rights, namely the public interest litigation based on the erga omnes partes concept; the

question that arises is whether public interest litigation can function in such a way, so as to further promote and protect the absolute prohibition of torture. Towards that direction, illustrative are certain judicial decisions. At the end, concluding remarks are provided.

Before examining the prohibition of torture as a jus cogens norm, it is essential to delve into the general conceptual framework of jus cogens, attempting to provide their definition. Indeed, towards that direction, the reports of the Special Rapporteur D. Tladi and the ILC Draft Conclusions should be used as our research tools. Undeniably, the recognition of certain norms as jus cogens norms gains the support of human rights defenders, as it fosters the protection of fundamental human rights against states that might use their powers against individuals, infringing their rights. Simultaneously, the *legal positivists* that prioritize state sovereignty could probably be more skeptical towards the concept of jus cogens.[1] Arguably, after the World War II, the need to secure fundamental human rights against repressive states was more imperative than ever, in an attempt to prevent atrocities at a global scale. It has also been supported that the emergence and the subsequent, constant development of jus cogens norms can be attributed to the shift of our focus on human rights; the fundamental rights of individuals seem to be at the core of the interests in the international legal world.[2] It should also be noted that the emergence of jus cogens norms involves the recognition of individuals, apart from states, as subjects of international law.[3] In other words, it could be supported that the progressive development of jus cogens norms indicates simultaneously a shift from a state-oriented legal order, to a humanization of our international legal system. Indeed, after the end of the World War II, the concept of jus cogens norms started to emerge and progressively being developed initially, through the work of the International Law Commission (hereinafter referred to as *ILC*), which later on found its codification on the VCLT. [4]

Indeed, the concept of jus cogens found its unanimous acceptance and codification in the VCLT (articles 53,64) and prior to their codification jus cogens norms were also regarded as part of customary international law.[5] In fact, article 53 of the VCLT is considered to provide the general definition of jus cogens norms in the various academic works.[6] Jus cogens norms also achieved their codification in various UNGA Resolutions, which although not legally binding carry significant legal weight. Towards that direction, the role of the ICJ is of cardinal importance. In fact, the ICJ, as the United Nations' most prestigious judicial body, has contributed significantly to the progressive development of jus cogens norms in the international legal order, through the issue of advisory opinions and judgments, such as *The Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*[7] and the *Barcelona Traction* case[8], respectively.

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[1] Maarten den Heijer and Harmen van der Wilt (eds), *Netherlands Yearbook of International Law 2015: Jus Cogens: Quo Vadis?* (TMC Asser Press, 2016), page 5
[2] Ibid, page 5
[3] Den Heijer, der Wilt, *Netherlands Yearbook* (no1) page 5
[4] Erika de Wet, Invoking obligations *erga omnes* in the twenty-first century: progressive developments since *Barcelona Traction,* (2013) 37 SAYIL, < Invoking Obligations Erga Omnes in the Twenty-First Century: Progressive Developments Since Barcelona Traction by Erika De Wet :: SSRN > accessed 28 August 2024 pages 5-6
[5] Maria-Louiza Deftou, *Exporting the European Convention on Human Rights* (2022), 1st edn, *Hart Publishing <Bloomsbury Collections - Exporting the European Convention on Human Rights>* accessed 25 August 2024, pages 179-180
[6] International Law Commission, 'Draft conclusions on peremptory norms of general international law (jus cogens) (2019) UN Doc A/74/10, ch 5, page 149
[7] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, I.C.J. Reports 2004, p. 136
[8] *Barcelona Traction, Light and Power Company*, *Limited* (5 February 1970) ICJ

More specifically, the *Barcelona Traction* judgment (1970)[9] was the first judicial decision, introducing the concept of *erga omnes* obligations that emanates from the character of certain norms as jus cogens. In the specific case, the court distinguished between obligations owed to the international community of states as a whole and obligations towards other states. In essence, the concept of *erga omnes* obligations means that there are certain obligations which are owed to the international community of states as a whole. In fact, the specific concept implies that all states, at a global level, maintain a legal interest for the protection of fundamental human rights recognized as jus cogens norms.[10] It should also be noted that, quite often, the courts establish their rulings on the works of other bodies in order to draw their conclusions, as is the case in the *Prosecutor v. Furundžija*, where the ICTY pinpointed the jus cogens character of the prohibition of torture, based on the observations of the Inter-American Commission of Human Rights, on the work of the HRC as well as on a report of the Special Rapporteur.[11]

Given that the prohibition of torture constitutes a peremptory norm of general international law, a brief examination of the criteria for the identification of peremptory norms is essential because it enables us simultaneously, to better understand the nature of the prohibition of torture as a jus cogens norm. More specifically, for the identification of peremptory norms of general international law, the draft conclusions adopted by the ILC in 2022 provide the necessary guidelines in our attempt for such identification[12]. Hence, they will be used as our tools in order to reach to certain conclusions in our research. To begin with, regarding the nature of peremptory norms, it is uncontestable that, given that they secure fundamental values of the international legal order, they are *hierarchically superior* compared to other norms and they are legally binding at a universal level.[13] Draft conclusion 3[14] identifies jus cogens norms as a norm widely accepted

'by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character'.

Hence, we can observe that the necessary elements for the identification are i) the need to constitute a norm of general international law that ii) is universally applicable and universally recognized as a non-derogable norm permitting its potential modification only in case of a new peremptory norm of the same character.[15] The specific elements constitute simultaneously the criteria for the identification of such norms and are in accordance with the definition as provided in article 53 of the VCLT. As far as the basis for the emergence and subsequent characterization of a norm as jus cogens the most usual basis is customary international law, although treaties and general principles of international law could also constitute the necessary basis.[16] Indeed, customary law constitutes the most common basis for a norm to emerge, as well as to be characterized as a jus cogens norm,

[9] Ibid, ICJ, para 33, page 32
[10] Erika de Wet, (no 4) page 2
[11] UN Doc A/74/10, page 173
[12] International Law Commission, 'Peremptory norms of general international law (jus cogens)' (2019) UN Doc A/74/10, ch 5
[13] International Law Commission, 'Draft conclusions on identification and legal consequences of peremptory norms of general international law (jus cogens)' (2022), UN Doc A/77/10, Conclusion 2
[14] Ibid, Conclusion 3
[15] ibid, Conclusion 4
[16] ibid, Conclusion 5

as indicated also in the case '*Questions relating to the Obligation to Prosecute or Extradite*'.[17] According to draft conclusions 6 and 7, the criterion of 'acceptance and recognition' of a norm as a non-derogable, jus cogens norm, has the meaning of acceptance and recognition by the vast majority of states and not, necessarily, by all states.[18] Subsequently, draft conclusion 8 provides, indicatively, various types of evidence for such identification, whereas draft conclusion 9 provides the subsidiary means; the decisions of international courts and tribunals are included, among others, in that category.[19]

But, is there a hierarchy in the international legal world?

Subsequently, a question that arises is whether there exists a hierarchy of human rights in our contemporary legal world. It could be supported that, given that certain norms have being characterized as non-derogable rights, rights from which no derogation is permitted even in cases of emergency, it could further be concluded that a hierarchy exists in the international legal order. Indeed, the existence of peremptory norms of international law reaffirms, simultaneously, the existence of a certain level of hierarchy in the international legal world.[20] The hierarchical superiority of jus cogens norms has also been recognized by various judicial organs, such as the ICTY, pinpointing that the prohibition of torture, as a jus cogens norm, is hierarchical superior compared to treaties and customary law.[21] More specifically, in the case *Prosecutor v. Furundzija*, the ICTY highlighted that, given the cardinal importance of the values being protected by the prohibition of torture, it has emerged into a jus cogens norm, hierarchically superior compared to treaty law and custom.[22] Similarly, the Inter-American Court of Human Rights has also recognized the hierarchical superiority of jus cogens norms[23] and the European Court of Human Rights (hereinafter referred to as ECtHR), in the *Al-Adsani* case [24] reaffirmed the hierarchical superiority of jus cogens norms compared to treaties and customary law. Such a superiority is also justified by the fact that jus cogens norms reflect and encompass a collective interest for which all states do have a presumed legal interest to maintain and protect, creating, thus, obligations *erga omnes*.[25] The hierarchical superiority of jus cogens norms, as recognized also in the ILC Draft Conclusions, constitutes simultaneously *a characteristic and a consequence* of them.[26]

The absolute prohibition of torture and other cruel, inhuman and degrading treatment or punishment has found its codification in various human rights instruments, particularly after the end of the World War II. Firstly, the prohibition of torture found its codification on article 5 of the

[17] *Questions relating to the Obligation to Prosecute or Extradite (00000 v. Senegal)*, Judgment, I.C.J. Reports 2012, p. 422, at p. 457, para. 99
[18] UN Doc A74/10, pages 164,165,168
[19] ibid, page 170
[20] Deftou, *(*no 5), page 180
[21] International Law Commission, 'Peremptory norms of general international law (jus cogens)' (2019) UN Doc A/74/10, ch 5, page 154
[22] David Kretzmer, '*Torture, Prohibition of'*, (last updated May 2022), *Max Planck Encyclopedia of Public International Law*, para 6 < Max Planck Encyclopedia of International Law: Torture, Prohibition of (oclc.org)> accessed 12 August 2024 / Prosecutor v. Furundzija para 153
[23] *García Lucero, et al. v. Chile* (2013), Inter-American Court of Human Rights, Series C, No. 267, para. 123, note 139
[24] *Al-Adsani v. the United Kingdom*, ECtHR (2001) para 60
[25] Erika de Wet, (no 4) page 9
[26] UN Doc A/74/10, ch 5 page 153

Universal Declaration of Human Rights (hereinafter referred to as UDHR), which although not legally binding, carries significant legal weight, being highly influential.[27] Subsequently, the prohibition of torture was codified at a regional level on article 3 of the ECHR[28], a legally binding treaty, as well as on article 7 of the ICCPR [29] and on article 1 of the UNCAT[30]. At a regional level, apart from the ECHR, the prohibition of torture was codified in various other legal instruments such as the American Convention on Human Rights (ACHR)[31], the African Charter on Human and Peoples' Rights[32] and the Inter-American Convention to Prevent and Punish Torture[33].

The prohibition of torture as a jus cogens norm has gradually emerged, developed and reaffirmed also by the judicial practice. Indeed, in the case *Prosecutor v. Furundzija*[34], the ICTY explicitly ruled that the prohibition of torture has acquired the status of jus cogens norm, highlighting its non-derogability. In the same vein, at a regional level, in the *Al-Adsani v. United Kingdom*[35] ruling, the ECtHR, recognized the prohibition of torture as a peremptory norm of general international law, examining its relationship with the doctrine of state immunities. In the most recent case *Belgium v. Senegal*, the ICJ reaffirmed the status of the prohibition of torture as a peremptory norm of international law, pinpointing that it constitutes simultaneously part of the customary law.[36] Further, according to the non-exhaustive list of the Draft Conclusions of the ILC(2022), the prohibition of torture has been recognized as a peremptory norm of general international law.[37] Additionally, the jus cogens nature of the prohibition of torture has also been reaffirmed by the General Comments issued by the UNCAT, which although not legally binding, bear significant legal influence in the international legal order.[38]

Hence, we can observe a gradual recognition and crystallization of the prohibition of torture as a peremptory norm of general international law. Such recognition is of cardinal importance, not only because it raises obligations towards the international community of states as a whole, to respect and protect the physical and mental integrity of individuals, imposing certain obligations on states to prevent and punish acts of torture, but also because it emphasizes the need to place the individuals at the centre of our attention (shift towards a humanization of international law), respecting their rights and needs.

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[27] UNGA, 'Universal Declaration of Human Rights' (1948), UN Doc A/Res/217 (III), art 5
[28] 'European Convention for the Protection of Human Rights and Fundamental Freedoms',(entered into force 3 September 1953) art 3
[29] UN General Assembly, *International Covenant on Civil and Political Rights*, United Nations, Treaty Series, vol. 999, p. 171, (16 December 1966), art 7
[30] 'United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment' (adopted 10 December 1984, entered into force 26 June 1987) 1465 UNTS 85, art 1
[31] 'American Convention on Human Rights' (22 November 1969), art 5(2)
[32] 'African Charter on Human and Peoples' Rights' (adopted 1981, entered into force 21 October 1986), 1520 UNTS 217**,** art 5
[33] 'Inter-American Convention to Prevent and Punish Torture' (adopted 1985), OASTS No 67
[34] *Prosecutor v. Anto Furundzija,* ICTY (1998), paras 144, 154
[35] *Al-Adsani v. the United Kingdom* (2001) para 30
[36] *Questions relating to the obligation to prosecute or extradite (Belgium v. Senegal),* ICJ (20 July 2012), page 424, 457 para 99
[37] ILC Draft Conclusions (2022, no13), Conclusion 23
[38] UNCAT, General Comment no 2 (2008) UN Doc CAT/C/GC/2, para 1 / HRC, 'General Comment No. 24: Issues relating to reservations made upon ratification or accession to the Covenant or the Optional Protocols thereto, or in relation to declarations under article 41 of the Covenant : . 04/11/94', para 10

CHAPTER 1: Conceptual Challenges

1.1. Defining Torture: An Examination of its Elements

To begin with, it is of cardinal importance to provide a definition of the prohibition of torture. Regarding its nature, the prohibition of torture constitutes an absolute norm. Indeed, article 2 paragraph 2 of the UNCAT highlights the absolute, non-derogable nature of the prohibition of torture, as under no conditions can a circumstance be invoked in order to justify an act of torture.[39] The specific position has also been reaffirmed at a regional level by the Strasbourg Court. For instance, in the case *Soering v. the UK*[40], the ECtHR pinpointed that no derogation or exception in case of war, or generally of other national emergency, is permitted to justify deviation from article 3 of the ECHR. In the specific case, the ECtHR characterized the prohibition of torture as an '*internationally accepted standard'*. Towards that direction, in the case *Chahal v. UK*[41], the ECtHR reaffirmed the specific absolute character, pinpointing that even in cases of a threat to national security, the prohibition of torture can not be subject to derogations; no limitations are permitted. Additionally, in the case *Saadi v. Italy*[42], the Court noted that even terrorism (as a threat to the national security), can not justify derogation from article 3 of the ECHR; absolute nature of the prohibition. The same reasoning was also followed in the case *Aydin v. Turkey*, as it was provided that no derogation from article 3 of the ECHR is permitted even in case of public emergency, including terrorist and other criminal acts.[43] The absolute, non-derogable nature of the prohibition of torture, as a jus cogens norm, has also been reaffirmed in various EU Resolutions and Directives, such as in the recent Resolution No 2528 (2024).[44] It should also be mentioned that the prohibition of torture apart from absolute, is also completely irrelevant to the conduct of the victim, as indicated in various judicial decisions.[45]

Although there are various international legal documents which clearly prohibit acts of torture, only few of them provide also its definition. It is generally accepted that the UNCAT (1984), in article 1, *provides the most widely accepted and recognized definition* of the prohibition of torture.[46] It is uncontestable that the ratification of the UN Convention against torture underpins the consensus of states to protect and secure fundamental human rights, such as the right to life, the right to liberty, the human dignity. In other words, it is strongly connected with the obligation

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[39] UNCAT (1984), article 2

[40] *Soering v. The United Kingdom*, 1/1989/161/217, Council of Europe: European Court of Human Rights, 7 July 1989 para 88

[41] *Chahal v. The United Kingdom*, 70/1995/576/662, Council of Europe: European Court of Human Rights, 15 November 1996, para 80

[42] *Saadi v. Italy*, Appl No 37201/06, ECtHR, (28 February 2008), para 37

[43] *Aydin v. Turkey*, 57/1996/676/866, Council of Europe: European Court of Human Rights, 25 September 1997, para 81

[44] Parliamentary Assembly of the Council of Europe, 'Allegations of systemic torture and inhuman or degrading treatment or punishment in places of detention in Europe' (2024) No 2528 (2024) < https://pace.coe.int/en/files/33339/html> accessed 4 August 2024

[45] Linos-Alexander Sicilianos, *Interpretation of Articles of the European Convention for the Protection of Human Rights and Fundamental Freedoms* (Nomiki Vivliothiki, 2nd edition 2017), page 121/ Λίνος- Αλέξανδρος Σισιλιάνος, *Ευρωπαϊκή Σύμβαση Δικαιωμάτων του Ανθρώπου, Ερμηνεία κατ΄άρθρο, Δικαιώματα- Παραδεκτό- Δίκαιη Ικανοποίηση- Εκτέλεση* (Νομική Βιβλιοθήκη, 2η έκδοση 2017) ; *Saadi v. Italy*, Appl No 37201/06, ECtHR, (28 February 2008) para 127

[46] 'United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment' , article 1

to respect the human dignity and the physical and mental integrity of each individual.[47] According to this article, the definition of torture is formulated as:

'*any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person..*'

for a certain purpose, precisely being described in the specific article. Hence, it could be supported that for the definition of torture, four are the essential elements, the element of severe pain or suffering, the intent criterion, the purposive element and fourthly the state involvement, '*at least by acquiescence'*. It has also been supported that for the identification of an act as torture relevant is the element of *injury*. However, it has been argued that the specific statement is not correct, as, although it could be considered as an aggravating circumstance, we ought to distinguish between the definition of torture and its consequences (injury as a subsequent consequence and not an element of the act of torture).[48] In fact, the ECtHR has pinpointed the *purpose*, as an essential element of the definition of torture, without further clarifying the specific content of the purposive element. The specific element could provide evidence as to whether the act in question constitutes an act of torture or of ill-treatment, as will be argued below. Indeed, in the case *Akkoç v. Turkey*, the ECtHR pinpointed that the purposive element constitutes one of the characteristics of the definition of torture, leading simultaneously to its distinction from other forms of ill-treatment. [49] Towards that direction, the IACtHR has also ruled that the purposive element constitutes one of the necessary elements for defining torture.[50] According to the UN Special Rapporteur, the extraction of a confession constitutes the most usual purpose for the commitment of acts of torture.[51] Besides, as the ECtHR has already pinpointed, the definition of torture constitutes a dynamic concept which evolves over time in the sense that acts defined in the past as inhuman treatment, may nowadays be defined as torture (constant development of legal terms through the years).[52] It is notable that the european jurisprudence has also indicated that mental suffering could also amount to torture.[53]

According to the definition of the UNCAT, its provisions are only applied to acts of torture committed by state actors or by non-state actors subjected to the directions and approval of a state official.[54] Additionally, according to the General Comment no.2 of the Committee against Torture, the provisions of the UNCAT apply to persons who act *de facto* or *de jure* according to state orders.[55] However, according to the Special Rapporteur on Torture, article 1 of the UNCAT should be interpreted as to include also acts committed by private actors, due to the state's failure to

[47] UN Human Rights Committee (HRC), CCPR General Comment No. 20: Article 7 (Prohibition of Torture, or Other Cruel, Inhuman or Degrading Treatment or Punishment), 10 March 1992, para 2
[48] UNGA, 'Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Manfred Nowak' (9 February 2010) UN Doc /A/HRC/13/39 < A/HRC/13/39 (undocs.org)> accessed 20 July 2024, pages 11,12
[49] *Akkoç v. Turkey* ECtHR (1998) para 115
[50] *Lysias Fleury and others v. Haiti* IACtHR (2011) para 72
[51] (9 February 2010) UN Doc /A/HRC/13/39, page 18, para 70
[52] Kretzmer, (no 22) para 18 / Selmouni v. France ECtHR (1999) para 101
[53] Chris Inglese'The UN Committee against Torture, An Assessment', *Kluwer Law International* (2001), ; ECtHR, Ireland v the United Kingdom (1978) page 66
[54] UNCAT, art 1
[55] UN Committee against Torture, 'General Comment No.2: Implementation of article 2 by States Parties (24 January 2008), UN Doc CAT/C/GC/2, para 7

protect those individuals under its jurisdiction. The HRC has also pinpointed that 'under the ICCPR, acts committed by non-state actors may also constitute torture'.[56]

At an EU level, for an act to constitute a prohibited act under article 3 of the ECHR, a *minimun level of severity* is required.[57] The assessment and classification of a certain act depends on various factors, namely the factual background of each case, the duration, the physical and mental consequences being inflicted on the victim.[58] Further, article 3 of the ECHR establishes a dual obligation on Member States; a substantive, as well as a procedural one. The substantive concerns not only the negative duty of states to refrain from ill-treating individuals under their jurisdiction, but also the positive obligation of states to undertake the necessary measures to prevent individuals from experiencing inhuman or degrading treatment (even from private actors); special concern is given to individuals in vulnerable position, such as the detainees.[59] The procedural aspect concerns the obligation of states to properly investigate such incidents.[60] The relevant jurisprudence of the ECtHR indicates that the absolute prohibition of torture protects also individuals from acts committed by private actors.[61]

1.2. Distinction between Torture and Ill-Treatment from the European and International Perspective: A Comparative Approach

At this point, an issue that is worth examining, concerns the conceptual relationship between torture and ill treatment or other cruel, inhuman or degrading treatment or punishment. In general, torture and ill-treatment constitute two non-derogable prohibitions [62] and we often come across the two terms in the same framework and context, as they are interrelated, interdependent and overlap with each other[63], although differences can be observed in their substance. The present chapter constitutes an attempt, among others, to further clarify and distinguish the specific concepts, through their examination at an international, as well as at a european level.

The European Perspective

Initially, at an EU level, according to the European Commission, the concept of torture was composed of certain elements including: an act constituting degrading and inhuman treatment and, secondly, an aggravated form of such inhuman treatment, aiming at a specific purpose.[64] The ECtHR pinpoints in various of its rulings that torture differs from ill-treatment in terms of severity; in other words, it can be characterized as an *aggravated form* of ill-treatment.[65] A look into the

[56] UN Human Rights Committee (HRC), CCPR General Comment No. 20: Article 7 (Prohibition of Torture, or Other Cruel, Inhuman or Degrading Treatment or Punishment), (10 March 1992), para 2 < https://www.refworld.org/legal/general/hrc/1992/en/11086> accessed 18 August 2024
[57] Sicilianos (no 45) page 121
[58] ibid pages 121-122
[59] ibid page 121
[60] ibid
[61] Ibid pages 122-123 ; *O'Keeffe v Ireland* (2014) 59 EHRR 1
[62] A/HRC/13/39, para 60
[63] UN CAT, 'General Comment No 2' (2008), para 3
[64] Nigel Rodley, Matt Pollard, 'The Treatment of Prisoners under International Law' (2011 3rd edn) ch 3, pages 86-88
[65] ibid page 87

relevant European jurisprudence would be quite illustrative. Firstly, in the *Greek Case*, the Commission on the one hand highlighted that the severity requirement constitutes the distinguishing criterion between inhuman (torture included) and other (degrading) treatment, whereas the purposive element contributes further to the distinction between torture and inhuman treatment.[66] It could further be argued, based on the aforementioned, that acts of torture constitute simultaneously inhuman and ill-treatment, whereas not all acts of inhuman and ill-treatment constitute torture. In an attempt to further define and examine torture, the Commission opined, in the Northern Ireland case [67], that the certain techniques, combined together, such as the deprivation of sleep and food and the *wall-standing* for the purpose of obtaining information, constituted acts of torture. However, the ECtHR ruled that the five techniques used do not constitute torture, but rather should be regarded as inhuman and degrading treatment, although it agreed with the Commission that the purpose of the acts was the acquirement of information and confessions. The Court, in the specific case, underlined again that the distinction between the concepts is established on the level of '*intensity of the suffering inflicted'*, concluding in a violation of article 3 of the ECHR, on the grounds of inhuman and degrading treatment; according to the Court the acts did not reach the necessary intensity and cruelty level so as to be characterized as torture.[68] Hence, in the case at hand, we can observe a quite different approach between the European Commission and the Court, as the Court judged that the severity/intensity element was the decisive criterion, whereas the Commission opined that the purposive element constituted the decisive criterion.[69] To establish its ruling, the Court invoked article 1 of the 1975 Declaration where torture was defined as '*an aggravated and deliberate form of cruel, inhuman or degrading treatment*'.[70]

In order for an act to be regarded as inhuman or degrading treatment, the level of pain or suffering should exceed the anticipated level of suffering emanating from the imposition of a legally justified punishment and treatment.[71] For instance, the deprivation of the liberty of the suspect, as a legitimate punishment, provokes the inevitable level of suffering and thus can not be regarded as ill-treatment.[72] However, in case that the proportionality principle is not being respected, then the aforementioned punishment could be regarded as inhuman treatment, violating article 3 of the ECHR.[73] In the case *Aksoy v. Turkey*, the Court ruled that the level of severity (*Palestinian hanging*) of the ill-treatment committed against the applicant, combined with the deliberate infliction of pain, constituted an act of torture, reaffirming its approach as expressed in the *Ireland v. UK* case.[74] Further, in the case *Saadi v. Italy*, the Court underlined that ill-treatment can be characterized by a *minimum level of severity.* In the same vein, in order for an act to be qualified as torture, it could be a form of ill-treatment, but with that additional level of severity, so as to provoke a significant amount of suffering.[75] Towards the same direction, in the case *Aydin v. Turkey*

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[66] Manfred Nowak, Moritz Birk, Giuliana Monina, *The United Nations Convention against Torture and its Optional Protocol, A Commentary* (2019) 2nd edt *Oxford University Press,* pages 42,43 ; Opinion of the Commission of 5 November 1969 in the Greek Case (1969((n 89) 186

[67] *Ireland v. United Kingdom* (no 18/01/1978) (1978) ECtHR, Series A no. 25

[68] ibid, para 167

[69] Nowak, Birk, Monina, (no 66), page 43

[70] UNGA, 'Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment' (1975), UN Doc A/RES/3452(XXX), art 1

[71] Sicilianos, (no 45), page 126

[72] *Ilaşcu and others v Moldova and Russia* App no.48787/99 ECtHR (8 July 2004) para 428

[73] Sicilianos, (no 45), page 126

[74] Sicilianos, (no 45) page 125 ; *Aksoy v. Turkey* App no. 21987/93 ECtHR (18 December 1997) para 64

[75] *Saadi v. Italy* (2008) ECtHR, paras 134-136

[76], the ECtHR referred to the distinction between torture and inhuman or degrading treatment, based again on the severity level, as codified in article 3 of the ECHR.

In the more recent case *Cestaro v Italy*, one of the issues that emerged, concerned the misunderstanding that the criterion of the *prohibited purpose* constituted the only criterion for the distinction between torture and ill-treatment.[77] As it has already been illustrated , the European Commission on Human Rights pinpointed in the *Greek case* that the 'extra' element of a specific purpose, such as the acquirement of information/confessions, constitutes the distinguishing criterion between torture and other forms of ill-treatment. In addition to that, the ECtHR tends to avoid the characterization of an act as torture in case that the purpose criterion is not being fulfilled. Further, it has been argued by some scholars that, taking into consideration the 'drafting history' of the UNCAT as well as the 'travaux preparatoires', it could be concluded that the purposive element constitutes the only distinguishing criterion, although the specific position is not accurate.[78] In fact, in the *Cestaro v. Italy* ruling, the Court noted that the *prohibited purpose* element, although an essential, does not constitute the sole criterion for the distinction between torture and other forms of ill-treatment.[79] It continued by pinpointing that there are several other criteria for the classification of an act as torture. Further, the Court also linked an act of torture to the *special stigma* inflicted to the victim, emanating from the cruel suffering and the purposeful causing of such suffering.[80] Additionally, in the *Gäfgen* case, the Court, after taking into consideration various elements, such as the duration of the acts in question, the intent and purpose, as well as the consequences on the physical and mental health of the suspect, ruled that the act in question didn't constitute torture, as the criterion of *cruelty* has not been met.[81]

The International Perspective

At an international scale, initially, the UNGA Resolution 3452 (XXX) (1975), provided that torture *'constitutes an aggravated and deliberate form of cruel, inhuman or degrading treatment or punishment'*.[82] Hence, in the specific Resolution the level of severity seems to be the distinguishing criterion between torture and other forms of ill-treatment. However, the UNCAT did not include the aforementioned definition in its provisions, which as it has been argued, indicates that is more in favor with the opinion as expressed by the European Commission, that the purposive element constitutes the crucial element for the distinction.[83] Through the examination of article 1 of the UNCAT, we can observe that the level of severity constitutes an element necessary for the identification of an act as torture (and for its subsequent distinction from other forms of inhuman treatment), but is not the exclusive one; for its further identification and distinction from ill-treatment the purposive element seems to play a crucial role.[84] In fact, the purposive element leads

[76] *Aydin v. Turkey (*1997) ECtHR, para 82
[77] Christina Kosin, 'The Cestaro v. Italy case and the prohibited purpose requirement of torture' (20 April 2015, *Strasbourg Observers*) < The Cestaro v. Italy Case and the "Prohibited Purpose" Requirement of Torture - Strasbourg Observers> accessed 18 September 2024
[78] ibid
[79] ibid ; *Cestaro v Italy* App no 6884/11, ECtHR (7 April 2015), paras 171-174, 176
[80] *Cestaro v Italy* App no 6884/11, ECtHR (7 April 2015), para 171
[81] ibid para 176
[82] UN Doc Res No. 3452 of 9 Dec 1975, art 1 para 2
[83] Nowak, Birk, Monina, (no 66), page 44
[84] ibid 44-45

us to the further distinction between justifiable and unjustifiable acts. The Committee in the individual applications procedure seeks to indicate also the specific purposive element that led it to the conclusion that a certain act constituted or not an act of torture, as indicated for instance in the case *Patrice Gahungu v. Burundi*, where the CAT Committee concluded to torture, mainly by pinpointing the aim of a possible extraction of a confession.[85] However, this is not always the case, as in *Sergei Kirsanov v Russian Federation* the Committee predominantly examined the severity criterion which led it to the conclusion that the act didn't constitute torture but rather cruel, inhuman or degrading treatment or punishment under article 16, because the severity criterion hasn't been met.[86]

In its General Comment No 2 the Committee clearly states that the severity element constitutes a necessary requirement for the distinction, while the purposive element ('*impermissible purposes*') does not hold a pivotal role.[87] However, according to some scholars, the aforementioned position of the Committee remains open for further interpretation.[88] More specifically, some scholars argue that it is not crystal clear whether the severity requirement mentioned in paragraph 10 of the specific General Comment, attempts solely to highlight the lower standards required for the definition of ill-treatment, or is further introducing a distinction between the two concepts.[89] The two elements, namely the severity of suffering and the intent have also found their codification in the UN Convention, as well as in the Rome Statute.[90] However, as it has been argued, there is no explicit mention, neither in the UNCAT, nor in the Rome Statute, or in the OAS Torture Convention that specifically torture constitutes an '*aggravated form of ill-treatment*'.[91] By examining together the General Comments of the UNCAT, as well as the individual applications procedure, we can draw the conclusion that the Committee insists in the severity requirement for the distinction between torture and ill-treatment, but also, in practice, takes into consideration the purposive element. To my point of view, it seems that the severity requirement remains the core distinguishing criterion, whereas the purposive element constitutes the extra distinguishing requirement for the characterization of a certain act as torture.

It is notable, that, initially, the Human Rights Committee clearly expressed in its General Comment No 20 (1992) that a clear distinction between torture and other forms of (inhuman) treatment is not necessary to be given, pinpointing that such a distinction depends on various factors, such as the nature, purpose and severity of the act in question.[92] The Special Rapporteur Manfred Nowak, has already indicated that, in accordance with the UNCAT provisions, torture is characterized by a '*special stigma*', encompassing the element of severe pain or suffering. According to the Special Rapporteur, the decisive elements that distinguish torture from cruel, inhuman or degrading treatment or punishment are the purpose, the intention, as well as the victim's status of vulnerability.[93] The distinction based on the elements of purpose and intention leads us to the

[85] Ibid page 45 ; CAT, *Patrice Gahungu v. Burundi* (2015) No 514/2012, UN Doc CAT/C/55/D/522/2012, paras 7.2, 7.3
[86] CAT, Sergei Kirsanov v Russian Federation (2014), No 478/2011, UN Doc CAT/C/52/D/478/2011, para 11.2
[87] UNCAT, General Comment No 2, para 10
[88] Nowak, Birk, Monina, (no 66), page 46
[89] Rodley, Pollard,(no 64) pages 87-88,112
[90] ibid page 87
[91] 'ibid, page 87
[92] HRC, 'General Comment No 20' (1992), para 4
[93] UNGA, UN Doc A/HRC/13/39 < Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Manfred Nowak> accessed 2 September 2024, para 60

further distinction between justifiable and non-justifiable acts.[94] Further, the Special Rapporteur pinpointed that the severity criterion is what distinguishes torture and other forms of ill-treatment from degrading treatment or punishment; for the latter to be established the humiliation of the victim is the crucial element, although the level of intensity of suffering could meet the minimum level required.[95]

The intent concerns the achievement of a specific purpose. An indicative example provided concerns a detained individual, being forgotten by the public officials, experiencing severe suffering (lack of food); the aforementioned act does not amount to torture, whereas if the intent was the extraction of information, then it would be characterized as torture. In an attempt to further define the concept, the ill-treatment of individuals, during captivity, through acts such as psychological manipulations and *humiliating treatment* could indeed amount to torture, given the severity of the pain, mental and physical, being inflicted.[96] The list of purposes enumerated in article 1 of the UNCAT is only indicative.[97] In the case *Giri v. Nepal*, the HRC not only stated that is in line with the definition of torture as provided by the UNCAT, but also that, according to its perspective, the crucial distinguishing element between torture and other forms of (inhuman) treatment is the purposive element.[98] Hence, the distinguishing criterion between torture and CIDT is the purpose, in line with the approach adopted by the European Commission on Human Rights.[99] It has been argued that the Human Rights Committee, under the ICCPR, seems to establish a lower threshold for the identification of an act as torture and that it also evaluates the element of *permanent or lasting damage*, although the specific element should not be characterized as an exclusive or even necessary one[100].

Generally, it has been supported and can be observed that there is a growing tendency in the international legal order to establish on the one hand, the purposive element as the main distinguishing criterion (shift from the severity element to the purposive one) and on the other hand, to find a *common threshold* of severity for establishing torture and other cruel or inhuman treatment.[101] Ultimately, it seems that both torture and ill-treatment (or other forms of inhuman treatment) presuppose the element of severe pain or suffering, whereas for ill-treatment to simultaneously constitute torture, the purposive element is essential, although the concrete enumeration of purposes is not yet crystal-clear.[102]

For the qualification of an act as degrading treatment or punishment, under article 16 of the UNCAT, the humiliation of the victim is the essential element and not necessarily the infliction of severe suffering.[103] According to the UN Special Rapporteur on Torture, the concept of cruel, inhuman or degrading treatment or punishment, could also include the excessive use of violence

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[94] ibid
[95] UNGA, 'Report of the Special Rapporteur..' (February 2010), UN Doc A/HRC/13/39, para 60
[96] Metin Başoğlu, MD, PhD; Maria Livanou, PhD; Cvetana Crnobaric´, MD, 'Torture vs Other Cruel, Inhuman and Degrading Treatment: Is the Distinction Real or Apparent?' (2007) *Archives of General Psychiatry* < Torture vs other cruel, inhuman, and degrading treatment: is the distinction real or apparent? - PubMed (nih.gov)> accessed 28 July 2024, page 277
[97] UNGA, A/HRC/13/39/Add.5 paras 34,35
[98] HRC, *Giri v. Nepal* (2011), No 1761/2008, UN Doc CCPR/C/101/D/1761/2008, para 7.5
[99] UNGA, A/HRC/13/39/Add.5 para 36
[100] Chris Ingelse, 'The UN Committee against Torture, An Assessment', *Kluwer Law International* (2001), page 60
[101] Nowak, Birk, Monina, (no 66), page 47
[102] ibid page 54 ; UNHR Council, 'Report of the Special Rapporteur M. Nowak' (14 January 2019) UN Doc A/HRC/10/44 para 60
[103]'Report of the Special Rapporteur', ibid, para 60

by the police authorities during demonstrations and the circumstances of detention and policy custody ipso facto.[104] Indeed, as an illustrative example, it was pinpointed that the conditions of detention as existed in the Republic of Moldova, amounted to ill-treatment.[105] Last but not least, taking into consideration the extended state responsibility that includes not only acts committed by public officials, but also acts committed by individuals, due to lack of proper intervention by state officials, acts of domestic violence and trafficking could also be characterized as torture.[106] To my point of view, from the above analysis, the distinction between torture and ill-treatment was initially quite vague; progressively, we can observe an attempt for crystallization of the distinguishing elements, with emphasis given to the purposive criterion.

1.3. Distinction between Jus Cogens Norms and Non-Derogable Norms

Another issue that necessitates our attention concerns the distinction between jus cogens and non-derogable norms. Indeed, all jus cogens norms, such as the prohibition of torture constitute non-derogable norms, but the opposite is now always the case. Undeniably, the nature of non-derogability of a norm is an essential characteristic and consequence in order for it to be qualified as jus cogens norm. As it has already been illustrated, the events occurred on 11 September 2001, gave to the Committee the opportunity to highlight the absolute and non-derogable character of certain provisions of the UNCAT, such as of articles 2,15 and 16.[107] However, a conceptual challenge emerges, which primarily concerns the distinction between jus cogens norms and the non-derogable character of such norms. In practice, it is quite often to refer to jus cogens and simultaneously to their non-derogability giving rise to the presumption that the specific two concepts are identical. In other words, it is a common misunderstanding to perceive all non-derogable norms, due to their normative hierarchy, as simultaneously jus cogens, creating obligations erga omnes.[108] However, in our contemporary legal world, it is crucial to distinguish among the 3 concepts: jus cogens norms, obligations erga omnes and non-derogability.[109]

In fact, the two concepts are tangent circles, in the sense that all jus cogens norms are simultaneously non-derogable norms (even in times of public emergency), whereas not all non-derogable norms are jus cogens norms, as they do not necessarily meet the criteria for their identification as peremptory norms of general international law. Jus cogens norms are characterized by their universal recognition and applicability, whereas non-derogable norms concern usually obligations emanating from a specific human rights treaty. Besides, not all human rights treaties contain the same list of non-derogable norms. For instance, at a regional level, the rights of a child have been recognized as non-derogable according to article 27(2) of the ACHR,

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[104] A/HRC/13/39, page 1
[105] UN Human Rights Council, *Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Manfred Nowak : mission to the Republic of Moldova*, UN doc A/HRC/10/44/Add.3 <Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Manfred Nowak : mission to the Republic of Moldova | Refworld> accessed 29 July 2024, page 2
[106] UNGA, A/HRC/13/39/Add.5 para 39
[107] UN Committee Against Torture, 'General Comment no 2: Implementation of article 2 by States parties' (24 January 2008) UN Doc CAT/C/GC/2, para 6
[108] Teraya Koji, 'Emerging Hierarchy in International Human Rights and Beyond: From the Perspective of Non-derogable Rights' 12(5) *EJIL* <CIAO: European Journal of International Law, 2001 (Volume 12 Issue 5) (columbia.edu)> accessed 1 September 2024, page 920
[109] ibid

whereas the ECHR does not explicitly recognize such a right as non-derogable. The same direction is also followed by the provisions of the ICCPR, according to articles 24 and 4(2). Moreover, the ICCPR enumerates in article 4(2) several rights which are non-derogable, such as the right to life, the freedom of thought, conscience and religion, the prohibition of torture[110]; among the aforementioned, non-derogable norms, only the prohibition of torture constitutes a peremptory norm of general international law. It has further been supported that the aforementioned rights are non-derogable rights simply and just by the fact that they are listed as such in the specific article.[111]

Article 15 of the European Convention on Human Rights, permits derogations from its provisions in case of *war or other public emergency'*, whereas at the same time it highlights the non-derogable nature of (indicatively) the right to life, the prohibition of torture, the prohibition of slavery and forced labor, even in cases of public emergency.[112] To my point of view, the non-derogable character of certain rights highlights its hierarchical superiority and fundamental importance in the international legal order, whereas their recognition as jus cogens norms offers to them an '*extra layer*', aiming to further secure the human dignity which is inherent to each individual. In that vein, as pinpointed by the HRC in its General Comment no. 29, the fact that certain norms have been recognized as non-derogable norms constitutes only an indication that they could also be jus cogens norms, but this is not always the case as the two concepts are not identical.[113] As it has been supported, to pronounce that a certain right constitutes simultaneously a non-derogable right would undeniably constitute a significant indication that it simultaneously constitutes a peremptory norm of international law. However, it should not be considered as the sole factor for such identification.[114]

Besides, non-derogable norms are based on treaty law, whereas jus cogens norms could also be established on customary law, as well as treaty law. Differences can also be observed when it comes to their legal consequences, in terms that in case of conflict of a treaty with a peremptory norm of general international law, the specific treaty becomes void and terminates (article 53 VCLT), whereas the legal consequence of non-derogable norms concerns the inability of a state to derogate from its provisions even in case of public emergency, but they do not necessarily terminate a treaty per se. At that point, we could use as an illustrative example the right to life, which according to the Special Rapporteur, is a supreme, non-derogable right, but not simultaneously a jus cogens norm.[115] There is no legal document that recognizes the right to life as a jus cogens norm, although its non-derogable nature has been reaffirmed by various international legal instruments, such as the General Comment No. 36.[116] Given that that the prohibition of torture has explicitly been recognized as a jus cogens norm, it simultaneously has acquired a non-derogable nature. From the above analysis, we can draw the conclusion that all jus cogens norms are simultaneously non-derogable norms, whereas not all non-derogable norms are jus cogens norms. They are two concepts distinct from each other, although there can, indeed, overlap with each other.

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[110] UNGA, *International Covenant on Civil and Political Rights*, United Nations, Treaty Series, vol. 999 (16 December 1966), art 4 para 2
[111] HRC,' General Comment No. 29 States of Emergency' (2001) para 7
[112] ECHR, art 15
[113] 'General Comment No. 29' para 11
[114] Deftou, (no 5), page 180
[115] UN Doc A/HRC/23/47 para 36, ICCPR art 6 and art 4(2)
[116] HRC, General Comment No. 36 (2019), UN Doc CCPR/C/GC/36, para 67

Chapter 2: *Capturing* the Legal Consequences of the Recognition of Torture as a Jus Cogens Norm: Article 53 of the VCLT and the ILC Draft Conclusions as Guidelines

Undeniably, the recognition of torture as jus cogens norm carries significant legal consequences. The aim of the specific chapter is to briefly analyze and outline the most significant -according to my perspective- legal consequences of such recognition. To achieve the specific purpose, we will mainly use as guidelines article 53 of the VCLT, as well as the ILC Draft Conclusions on the Identification and Legal Consequences of peremptory norms of general international law.

2.1. The *Erga Omnes* Obligations

To begin with, the recognition of the prohibition of torture as a jus cogens norm implies the recognition of obligations which are owed to the international community of states as a whole. In other words, the prohibition of torture (and subsequently of other forms of ill-treatment as an absolute norm) raises obligations *erga omnes*. The *erga omnes* character as a consequence of the recognition of the prohibition of torture as a peremptory norm of general international law is explicitly established on conclusion 17 of the ILC Draft Conclusions.[117] Each state has a legal interest to secure protection against acts of torture and, simultaneously, each state bears, among others, the legal obligation to investigate, prosecute, punish, or even extradite individuals who were deemed responsible for such acts.[118] Such legal interest permits each state to hold accountable the state perpetrator according to the ARSIWA rules, in case of an infringement.[119] In other words, in case of a violation of a jus cogens norm, the relevant rules of state responsibility (ARSIWA) for the commitment of international wrongful acts can be invoked.[120].

Hence, the concept of *erga omnes* obligations (obligations owed to the international community of states as a whole), is closely related to the concept of international responsibility of states.[121] Although, in the framework of treaties, international obligations are imposed on certain member states, based on the element of their consent, jus cogens norms create obligations for the whole international community, as the notion firstly introduced in the *Barcelona Traction*[122] case. Further, the *erga omnes* nature of the prohibition of torture has been confirmed by the ICTY in the ruling *Prosecutor v. Anto Furundzija*.[123] Apart from that, the legal interest of states to protect the international community from acts of torture, extends to their obligation of cooperation, to their obligation to not provide their assistance in any way for the maintenance of the unlawful situation, as well as to their obligation of no recognition of unlawful acts.[124] Whereas there are not certain, universally accepted criteria for the identification of *erga omnes* rules, the examination of the

[117] ILC, 'Draft Conclusions on identification and legal consequences of peremptory norms of general international law (jus cogens)' (2022), page 5, conclusion 17
[118]ibid
[119] ibid, para 2
[120] 'Responsibility of States for Internationally Wrongful Acts' (ARSIWA, 2001) page 5, conclusion 17
[121] Dire Tladi, 'Ius Cogens' (last updated February 2024) *Max Planck Encyclopedia of Public International Law*, para 45 < Max Planck Encyclopedias of International Law: Ius cogens>accessed 17 August 2024
[122] *Barcelona Traction,* (5 February 1970) ICJ, para 33, page 32
[123] Katherine Reece Thomas and Joan Small 'HUMAN RIGHTS AND STATE IMMUNITY: IS THERE IMMUNITY FROM CIVIL LIABILITY FOR TORTURE?' (2003) *NILR,* < Human Rights and State Immunity: Is there Immunity from Civil Liability for Torture? | Netherlands International Law Review | Cambridge Core > accessed 20 August 2024, page 18 ; Prosecutor v. Anto Furundzija (Trial Judgement), IT-95-17/1-T, International Criminal Tribunal for the former Yugoslavia (ICTY) (10 December 1998), para 151
[124] ILC, Draft Conclusions, page 5, conclusion 19

relevant state practice, as well as of the relevant judicial decisions, serves as a significant indicator.[125] Further, although it is generally accepted that all jus cogens norms create *erga omnes* obligations, the opposite is not necessarily true.[126] Indeed, there is an overlap between the two concepts, although the concept of jus cogens is narrower compared to *erga omnes*.[127]

2.2. The Case of Conflict with a Treaty or Customary Law

Through the examination of the VCLT provisions, we can observe that articles 53 and 64 serve as the necessary guidelines in our attempt to draw the legal consequences of the prohibition of torture as a jus cogens norm; the provisions that apply to jus cogens norms apply simultaneously to the prohibition of torture. In detail, in case that the prohibition of torture conflicts with a treaty at the time of its conclusion (crucial is the time of the conclusion of the treaty), then the latter becomes void.[128] The same is also provided in conclusion No 10 (para. 1) of the ILC draft conclusions on identification and legal consequences of peremptory norms of general international law.[129] The specific draft conclusions, although not legally binding, carry significant legal weight and are highly influential, providing us the necessary guidelines for the better understanding of the concept of jus cogens.

Hence, at the moment the prohibition of torture emerges and crystallizes as a peremptory norm, any treaty which might be in conflict with the specific prohibition, should become void and terminate.[130] The reading of the two articles in conjunction highlights the non-retroactive character of the emergence of a new peremptory norm.[131] The separability of treaty provisions in case of conflict with a new peremptory norm is permitted under the preconditions as described in conclusion 11.[132] In the same vein, article 64 of the VCLT reaffirms the hierarchical superiority of jus cogens norms,as it pinpoints that in case of conflict of a newly emerged peremptory norm of international law with a treaty that already exists, the latter terminates.[133] Additionally, a reservation to a treaty provision which establishes a peremptory norm of general international law will be considered as having no legal effect.[134] For instance, a reservation to article 2 of the UNCAT, or to article 7 of the ICCPR, to article 3 of the ECHR or to article 5 of the ACHR, will be considered as producing no binding legal effect (absolute, non-derogable, jus cogens norm, hence no reservation permitted). In case of conflict of customary law with the prohibition of torture, the former does even emerge in the international legal order (hierarchical superiority of jus cogens norms), whereas the rules regarding the persistent objector do not apply when it comes to peremptory norms.[135] Further, in case of conflict of a jus cogens norm, such as the prohibition of torture with an already existing and crystallized custom (not of a peremptory character) the

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[125] CHRISTIAN TOMUSCHAT AND JEAN-MARC THOUVENIN (edts), 'THE FUNDAMENTAL RULES OF THE INTERNATIONAL LEGAL ORDER, Jus Cogens and Obligations Erga Omnes' (2006), *Martinus Nijhoff Publishers*, < The Fundamental Rules of the International Legal Order – Jus Cogens and Obligations Erga Omnes | Brill> accessed 20 August 2024 page 35
[126] ibid
[127]TOMUSCHAT and THOUVENIN, (no125), page 47
[128] UN, VCLT (adopted 1969), Treaty Series, vol.1155, art 53
[129] ILC, 'Draft Conclusions on identification and legal consequences of peremptory norms of general internationa law' (2022), UN Doc A/77/10 (2022) page 3
[130] VCLT, art 64
[131] UN, 'Draft Articles on the Law of Treaties with commentaries' (1966) , pages 247-249, 261
[132] ILC, Draft Conclusions, pages 3,4
[133] VCLT, art 64
[134] Ibid, page 4
[135] Ibid, page 4

latter ceases to exist.[136] The hierarchical superiority of the prohibition of torture, even compared to custom, can easily be observed. The prohibition of torture as a jus cogens norm, overrides also the resolutions and other acts of international organizations in case of conflict.[137]

Another interesting point, directly linked with state responsibility, concerns the circumstances precluding wrongfulness (hereinafter referred to as 'cpw'). Conclusion No 18 explicitly provides that the invocation of a cpw to justify an act not in conformity with jus cogens is impermissible; no cpw can actually excuse the commission of an act of torture or ill-treatment.[138] In the same vein, unilateral acts of states that are in conflict with the prohibition of torture or other jus cogens norms do not produce any legal effects and hence, no obligation emanates from such unilateral acts.[139] The above analysis indicates that both the VCLT provisions, as well as the ILC draft conclusions crystallize the legal consequences and provide the necessary guidelines to states, highlighting the cardinal importance of jus cogens norms and pinpointing the obligations of states under the aim of preserving our international legal order through the respect of peremptory norms.

2.3. The Establishment of Universal Jurisdiction

Another legal consequence of the recognition of torture as jus cogens norm, as prescribed in article 53 of the VCLT, is the establishment of the universal jurisdiction. The term universal jurisdiction concerns the possibility of a state at the territory of which the suspected torturer is located, to prosecute the latter for acts committed outside the territory of the specific state, even if the torturer or the victim is not linked with the specific state by nationality, or even due to sovereign interests.[140] The ratio behind the specific consequence is to secure that the perpetrator will be punished for the atrocities that he/she has committed, even if he/she escapes to another state.[141] The specific consequence highlights and reaffirms the absolute, non derogable character of the prohibition of torture as a jus cogens norm, as prescribed in article 53 of the VCLT.

Besides, the specific consequence seems totally reasonable, as the prohibition of torture aims to protect fundamental human rights, the dignity, the physical and mental integrity of individuals, raising obligations, as already explained, towards the whole international community, with no exception; the fear of investigation and prosecution continues to exist even if the perpetrator escapes to another country. However, it should be noted, taking also into consideration article 5 para.1 of the UNCAT, that the universal jurisdiction is not established *in absentia,* indicating that the perpetrator should be located in the territory of the specific state, in order for the state to establish universal jurisdiction, being able to initiate criminal proceedings against the torturer.[142] However, there are certain preconditions in order for a state to be able to institute criminal proceedings against the perpetrator; firstly and in accordance with article 4 of the UNCAT, torture

[136] Ibid, page 4 conclusion 14
[137] Ibid, page 5, conclusion 16
[138] Ibid, page 5 conclusion 18
[139] Ibid, pages 4,5 conclusion 15
[140] Lene Wendland, 'A Handbook on State Obligations under the UN Convention against Torture' (2002) <A Handbook on State Obligations under the UN Convention Against Torture (ethz.ch)> accessed 28 July 2024, page 63
[141] Ibid, page 63
[142] ibid, pages 63-64

must constitute a crime according to the domestic criminal law of the state.[143] Additionally and in accordance with article 5 of the UNCAT, the establishment of jurisdiction is another necessary precondition, including the territoriality and nationality link, as well as the case in which the offender is located in an area under the effective control of the state (universal jurisdiction).[144] The only case in which discretion is given, is when the victim is a national of the state.[145] After the establishment of jurisdiction in accordance with articles 4 and 5 of the UNCAT, states are obliged to exercise such jurisdiction.[146] Article 7 includes also the principle *aut dedere aut judicare,* meaning that the state should either extradite or prosecute the torturer.[147] Another issue that arises concerns the question whether states parties to UNCAT may establish jurisdiction, initiating criminal proceedings over nationals from non-states parties; considerable practice in international law indicates that this could also be permissible.[148]

Chapter 3: Securing the Absolute Prohibition: An Examination of the Mechanisms to Combat Torture

Taking into consideration the cardinal importance of human rights being protected by the absolute prohibition of torture, it is obvious that the establishment of the necessary monitoring and enforcement mechanisms is crucial. For the purposes of the specific LL.M. Thesis, the focus will primarily be on the mechanisms to combat torture, as established at a European, as well as at an International scale, while a brief mention will also be made to the inter-American level. Further, the present chapter will examine the role of judicial decisions as mechanisms combating torture.

3.1. At a Regional Level

Undeniably, at a European level, various human rights instruments, such as the ECHR[149], the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment[150] and the EU Charter of Fundamental Rights[151], play a crucial role in securing the absolute character of the prohibition of torture as a jus cogens norm.

Apart from the aforementioned human rights instruments, the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT)[152], constitutes a mechanism of the Council of Europe, comprised of independent experts and established by the European Convention against Torture. [153] In essence, it functions as the necessary European monitoring mechanism against acts of torture, reinforcing the absolute prohibition of torture at a

[143] UNCAT, art 4
[144] Wendland (no140) page 64
[145] ibid, page 64
[146] UNCAT, art 7
[147] Wendland, (no140) page 64
[148] ibid, page 64
[149] ECHR (1953) art 3
[150] 'European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment' (1987)
[151] 'Charter of Fundamental Rights of the European Union (2012) OJ C326/391, art 4
[152] Council of Europe, 'European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment' < European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) - CPT> accessed 30 August 2024
[153] Didier Rouget, 'Preventing Torture, International and Regional Mechanisms to Combat Torture' (2000)<https://www.files.ethz.ch/isn/103007/Int_Reg_Mechanisms_combat_torture_eng.pdf > accessed 4 September 2024, pages 58,59

European level.[154] Its tasks concern, among others, the conduct of visits to places of detention, including social and mental health institutions under the jurisdiction of the states parties, communicating and protecting individuals who were deprived of their liberty by public officials, against acts of ill-treatment that are likely to be committed during their detention.[155] The principle of cooperation is of cardinal importance demarcating the relationship between the Committee and the relevant State Party.[156] The Committee is also entitled to issue reports after its visits including recommendations to the state concerned, aiming at the protection of individuals deprived of their liberty and the enhancement of the conditions of their detention. [157] The specific recommendations, although not legally, binding, ought to be taken into serious consideration by the states parties.

Additionally, the absolute prohibition of torture is reinforced through the issue of Resolutions, Directives and Regulations, such as the issue of the recent Resolution No 2528 (2024), which reaffirms the absolute, non-derogable character of the prohibition of torture and ill-treatment, expressing simultaneously its support for the work of the European Committee.[158] The Parliamentary Assembly pinpoints in the specific Resolution the obligation of states parties to properly implement the reports and recommendations of the Committee.[159] In fact, it observes that despite the absolute character of the prohibition, acts of torture and ill-treatment constitute a reality worldwide, in places where individuals have been deprived of their liberty. According to the Resolution, acts of torture and ill-treatment are being observed in member States of the Council of Europe, as well as in States Parties to the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment.[160] The specific observation raises serious concerns, as, although on a theoretical level various initiatives have been taken to combat acts of torture, in practice the specific phenomenon is still being observed even in member States of the Council of Europe and in States Parties to the European Convention for the Prevention of Torture. Hence, the question that arises is whether the issue of such Resolutions and the adoption of the necessary monitoring and enforcement mechanisms is in practice effective under the aim of combating torture.

In fact, the Parliamentary Assembly pinpoints in the specific Resolution that the *impunity culture* leads state authorities to neglect their obligations regarding the prevention and effective punishment of torture and ill-treatment and it highlights that cases of ill-treatment committed by state authorities are still being observed in various places such as in detention places.[161] The last observation indicates that States Parties do not respect in practice the recommendations of the CPT, although they may have incorporate them into their domestic legal systems. Besides, concerns have been expressed by the Parliamentary Assembly due to reports indicating that acts of torture and ill-treatment are still being observed in various states, including the Russian

[154] ibid
[155] ibid, page 59
[156] European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment(CPT) 'About the CPT' < About the CPT - CPT> accessed 20 August 2024
[157] ibid ; Council of Europe, 'European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment' (adopted 1987) ETS No. 126 < CETS 126 - European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (coe.int)> accessed 18 August 2024, article 10
[158] Parliamentary Assembly, 'Resolution 2528 (2024)' < Res. 2528 - Resolution - Adopted text> accessed 15 September 2024
[159] ibid para 3
[160] Ibid para 4
[161] Ibid paras 4,5

Federation, Türkiye and Azerbaijan.[162] The Assembly further highlights, among others, the incidents of torture and ill-treatment against Ukrainian prisoners that occur at the occupied regions of Ukraine, as well as in Russian detention places.[163] The situation in Azerbaijan has also raised serious concerns, as many detainees have been subjected to torture including blindfolding and rape and other forms of ill-treatment, resulting even to death; the purpose of torture was the extraction of confessions regarding treason.[164]

The reports concerning Turkiye pinpoint that there is a growing number of cases reporting acts of torture and ill-treatment committed in prison and by police authorities.[165] There is an explicit condemnation by the Assembly of acts of torture and other forms of inhuman treatment that take place in member States of the Council of Europe, as well as in the Russian Federation, pinpointing the need for effective measures to be taken aiming at the prevention and elimination of torture throughout Europe, so as the '*zero tolerance*' statement to be implemented also in practice.[166] Hence, the Parliamentary Assembly encourages member States, as well as States Parties to the European Convention on the Prevention of Torture and Inhuman or Degrading Treatment or Punishment to adopt the necessary measures in order to effectively combat acts of torture and other forms of ill-treatment.[167]

In addition to that, the Assembly calls particularly the States that have been deemed responsible for acts of torture and ill-treatment, including the Russian Federation, Azerbaijan and Türkiye, to undertake the necessary measures, holding the perpetrators accountable for their acts.[168] Moreover, the Assembly encourages States Parties to the European Convention on the Prevention of Torture and Inhuman or Degrading Treatment or Punishment to publish the CPT visit reports and implement the principle of cooperation in their relations with the CPT, ensuring the enforcement of the CPT's recommendations at a national level.[169] It is also notable that the Assembly suggests that the CPT and the Court should emphasize in their reports the acts of torture and ill-treatment that are systemic. In the specific Resolution the Assembly recognizes also the need for effective cooperation of the Council of Europe bodies in order to prevent and combat acts of systemic torture, encouraging the Committee on Legal Affairs and Human Rights to communicate with the countries in which systemic acts of torture (or ill-treatment) have been noticed. Such discussions should be based on the reports of the CPT, as well as on the Court's judgments.[170]

Additionally, in the effort to combat torture and secure its prohibition as a jus cogens norm, the EU has issued several guidelines, including the Guidelines to EU policy towards non-EU countries on torture and other cruel, inhuman or degrading treatment or punishment.[171] The specific Guidelines, although they are not mandatory and legally binding, as indicated in the introductory section where their purpose is being presented, they provide states with the necessary tool to

[162] Ibid para 6
[163] Ibid para 6.1
[164] Ibid para 6.2
[165] Ibid para 6.3
[166] Ibid para 7
[167] Ibid paras 8-8.18
[168] Ibid para 9
[169] Ibid paras 10, 10.1,10.2
[170] Ibid para 11
[171] EUR-Lex, 'EU Guidelines on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment' (2012) 6129/1/12 REV1 <EU guidelines on torture and other cruel treatment | EUR-Lex (europa.eu)> accessed 21 August 2024

encourage their efforts against acts of torture or ill-treatment.[172] In essence, the specific Guidelines serve as the necessary tool, regulating the relationship of the EU with non-EU countries under the aim of combating torture and other forms of ill-treatment and include, indicatively, governmental dialogues and strategies, collaboration aiming, among others, at supporting the role of NGOs and the adoption of the necessary measures, both by the EU and the non-EU countries, such as the establishment of mechanisms monitoring places of detention and the fight against impunity, securing the accountability of the perpetrators.[173] In the specific guidelines regarding the EU policy towards third countries on the issue of torture or (other) ill-treatment, it is also pinpointed that the EU Heads of Mission is entitled to provide in the periodic reports an assessment of the EU measures against torture along with a detailed examination of such incidents.[174]

The mutual recognition and respect between the various human rights bodies is of cardinal importance, as indicated in the specific Guidelines where the EU clearly express its support for the role of the other bodies, such as the Committee Against Torture, the Committee for the Prevention of Torture of the Council of Europe, the HRC.[175] In addition to that, the European Parliament, responsible for the monitoring of the enforcement of fundamental human rights, has issued the *Implementation of the EU guidelines on torture and other cruel, inhuman or degrading treatment or punishment*[176], which constitutes a study, analyzing the implementation of the *Guidelines to EU Policy Towards Third States* regarding the prohibition of torture. It is notable, that in the specific study it was pinpointed that acts of torture and ill-treatment constitute still a phenomenon in certain countries, although steps of moderate improvement have been marked. It has further been argued that such ill-treatment is due to an observed lack of necessary measures (preventive and punitive), unauthorized security authorities, as well as due to a lack of the necessary prison facilities and services. In addition to that, the application of the Guidelines still remains a challenging issue, due to the existence of ineffective governments and insufficient cooperation at an EU level.[177]

Within a brief overview, at an inter-American level, the prohibition of torture, as well as of other forms of ill-treatment was, firstly, prohibited by the American Convention on Human Rights (1978 entry into force), as pinpointed in article 5.[178] Further, the Inter-American Commission on Human Rights, established in 1959 and constituting a permanent organ of the Organisation of American States, is entitled, among others, to monitor the implementation of the American Convention on Human Rights.[179] The Commission is entitled to receive and investigate individual petitions in case of an infringement of the Convention (including a violation of the prohibition of torture and ill-treatment), submitted against states, as well to examine States communications (*optional*

[172] European Union, 'Guidelines to EU Policy Towards Third Countries on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment' (2001) < Guidelines to EU Policy Towards Third Countries on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment | Refworld> accessed 8 August 2024 ; Anna-Lena Svensson-McCarthy, Lawyer, Human Rights Consultant, OMCT, The implementation of the EU guidelines on torture and other cruel, inhuman or degrading treatment or punishment, European Union: European Parliament (2007) < The implementation of the EU guidelines on torture and other cruel, inhuman or degrading treatment or punishment | Refworld> accessed 8 September 2024
[173] ibid
[174] European External Action Service, 'EU Guidelines on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment' (7 March 2011) <20110307_tortureguidelines_en.pdf (europa.eu)> accessed 4 August 2024
[175] European Union, 'Guidelines to EU Policy Towards Third Countries on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment' (2001), page 3
[176] Svensson-McCarthy (no 172)
[177] Ibid, page 3
[178] 'American Convention on Human Rights' (adopted 22 November 1969) art 5
[179] Rouget, (no 153) page 73

jurisdiction) given that both the applicant and the respondent constitute parties to the Convention, having accepted the Commission's competence.[180] Given that the petition has been deemed admissible by the Commission and that no friendly settlement has in the meanwhile been concluded, the Commission then delivers a report to the states concerned, granting them a three month period to comply with it or to express their objection.[181]

Of cardinal importance is also the possibility given to the Commission or to the relevant States to submit the specific case, during this three month period, to the Inter-American Court of Human Rights.[182] In addition, under the Inter-American Torture Convention, States Parties ought to present a report to the Inter-American Commission regarding the measures that they have implemented for the effective application of the Torture Convention.[183] Subsequently, the Inter-American Commission, entitled to monitor compliance of states with fundamental human rights, including the absolute prohibition of torture, incorporates into its annual report a presentation of the current situation regarding the measures implemented by the member states to prevent and punish torture within their domestic legal systems.[184]

3.2. At an International Level

At an international scale, the various UN Conventions, such as the ICCPR[185], the UNCAT[186] and the ICERD[187] 'establish' certain Committees which are entitled to observe compliance with the obligations emanating from the aforementioned treaties.[188] In general, the monitoring process of the Committees usually involves the examination of reports submitted to them by the state parties, or even the examination of individual or state communications.[189]

Precisely, for the effective implementation of the obligations arising from the prohibition of torture, the UNCAT has established the Committee Against Torture (hereinafter referred to as 'CAT Committee'), according to article 17 of the UNCAT, constituting one of the UN human rights monitoring bodies. It should also be noted that, due to the fact that the prohibition of torture was protected also by other international instruments such as the ICCPR, it had, initially, been argued by certain states that the HRC could also be entitled to monitor the implementation of the UNCAT.[190] The CAT Committee constitutes a body of independent experts, which are elected by the states parties.[191] Article 19 describes the procedure through which the CAT Committee secures the effective implementation by the states parties of their obligations under the Convention. The

[180] Ibid, page 77
[181] ibid
[182] Ibid pages 77,78
[183] Rouget, (no 153), page 79
[184] 'Inter-American Convention to Prevent and Punish Torture' (adopted 9 December 1985) OASTS No. 67, Article 17 para 2
[185] ICCPR, art 28
[186] UNCAT (1984), art 17
[187] UNGA, 'International Convention on the Elimination of All Forms of Racial Discrimination' Res 2106(XX) (21 December 1965), art 8
[188] Rouget, (no 153), page 25
[189] ibid
[190] Manfred Nowak, Giuliana Monina, 'United Nations Committee against Torture (CAT)' (September 2018), *Max Planck Encyclopedia of Public International Law*, < Max Planck Encyclopedias of International Law: United Nations Committee against Torture (CAT)> accessed 2 August 2024, para 4
[191] UNCAT (1984) art 17

procedure includes the submission of (supplementary) reports by the states to the Committee, in which the new measures undertaken to secure the implementation of the provisions of the UNCAT are being described. Subsequently, the CAT Committee is entitled to issue General Comments on the specific reports and each state party is entitled to make its observations on the specific comments.[192] After the relevant States Parties have recognized the Committee's competence (a necessary prerequisite), then the alleged victims of the crime of torture are entitled to submit for examination their communications (individual communication proceedings) to the Committee. Then, the alleged state perpetrator shall submit to the Committee within a certain period of time the relevant explanations. Certain requirements mostly of procedural character are being described in paragraph 4 of the specific article.[193] It is notable that a significant number of communications being received by the CAT Committee concern the violation by states of the principle of non-refoulement.[194] In a brief analysis, the principle of non-refoulement linked with the prohibition of torture, concerns the obligation of states to not expel, return or extradite an individual to a territory where there are substantial concerns that the specific individual may be exposed to acts of torture.[195] The mere suspicion does not suffice.[196] The risk should be '*foreseeable, personal, present and real'* according to the CAT Committee.[197] In order to conclude in a violation of the principle of non-refoulement, the result of being torture is not necessary to exist; the element of risk suffices.[198]

The inter-state communication procedure and the dispute settlement constitute two other optional mechanisms prescribed in the UNCAT.[199] The inter-state communication procedure has never been used, whereas the dispute settlement mechanism has been invoked in the case *Belgium v. Senegal*.[200] It has been supported that the fact that the specific mechanisms have rarely been used in practice could probably indicate that they are not efficient enough compared to the other procedures established in the UNCAT.[201] It has also been argued that in practice, States Parties resort to such mechanisms when their own nationals or state interests are being threatened.[202] From the examination of the relevant provisions of the UNCAT, it can be observed that the state reporting under article 19 constitutes the only mandatory proceeding, whereas the other procedures (such as the individual communication proceeding and the inter-state communication procedure) are optional. The CAT Committee is also entitled to issue general comments providing the necessary

[192] ibid, art 19
[193] Ibid, art 22
[194]Kretzmer, (no 22) para 43
[195] Ibid, para 38
[196] Anette Faye Jacobsen (edt) 'Human Rights Monitoring A Field Mission Manual' (2008) ch4 *Martinus Nijhoff Publishers* < Human Rights Monitoring – A Field Mission Manual | Brill (oclc.org)> accessed 6 September 2024, page 98
[197] UN Committee against Torture, 'General Comment No. 4 (2017) on the implementation of article 3 of the Convention in the context of article 22', (9 February 2018) < General Comment No. 4 (2017) on the implementation of article 3 of the Convention in the context of article 22 | Refworld> accessed 20 August 2024, para 11
[198] *Iksandarov v. Russia* ECtHR (Final 21 February 2011), para 132
[199] UNCAT art 21,30
[200] Nowak, Monina (no 190), para 41
[201] Ibid, para 41
[202]Ibid, paras 39-41

guidelines and encouraging the proper implementation of its provisions.[203] In total, the CAT Committee has issued four General Comments.[204]

From the aforementioned, we can observe at a first glance that there is an established, robust system with certain, well-described mechanisms aiming at the proper investigation and deterrence from the commitment of acts of torture. However, there are certain problems, which in practice impede the work of the CAT Committee, including the inadequate interest and participation of the States Parties to the reporting process[205], in conjunction with the non-binding character of the General Comments issued by the Committee. Taking also into consideration the recognition of the status of the prohibition of torture as a jus cogens norm, we can easily conclude that the aforementioned mechanisms are not sufficient enough to effectively deter individuals from committing such acts.

Of cardinal importance is also the establishment of the Optional Protocol to the Convention against Torture (hereinafter referred to as 'Optional Protocol'), the aim of which is the prevention from acts of torture and other cruel, inhuman or degrading treatment or punishment, through the establishment of (international and national) visiting bodies to places where individuals were detained.[206] In the same vein, the establishment of the Special Sub-Committee is essential. The specific UN treaty body mainly maintains an advisory role, through visits on places of detention, as well as through the issue of recommendations on state parties and on the national visiting bodies, aiming at the prevention of torture.[207]

The HRC constitutes a monitoring body, observing compliance of states parties with the ICCPR and more specifically, in relation with their obligation to prohibit (and prevent) torture, through the establishment of the reports mechanism.[208] Alleged victims are being permitted to submit communications to the HRC.[209] In an effort to further protect individuals of member states against acts of torture, the UN Commission on HR appointed a Special Rapporteur on torture, who is entitled to monitor compliance of states parties with the specific jus cogens norm, through his visits in states and through the issue of recommendations and reports, which although not legally binding ought to be taken into serious consideration by states.[210] Additionally, the UN General Assembly is entitled to adopt recommendations aiming at the protection of detained individuals, such as the *Code of Conduct for Law Enforcement Officials* (1979), *the Body of Principles for the Protection of All Persons Under Any Form of Detention or Imprisonment* (1988) and the *Standard Minimum Rules for the Treatment of Prisoners (Mandela Rules 2015)*[211] which although they do not create legally binding effect, they are highly important, providing the necessary guidelines to states for the protection of detainees against acts of torture.[212]

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[203] ibid, paras 42-43
[204] Ibid para 43
[205] ibid, para 45
[206] ibid, para 44
[207] OHCHR, *Introduction to the Committee* < Subcommittee on prevention of torture | OHCHR> accessed 2 September 2024
[208] Nowak, Monina (no 190) para 45
[209] ibid
[210] ibid
[211] UNGA, 'United Nations Standard Minimum Rules for the Treatment of Prisoners' (the Mandela Rules): note/by the Secretariat (2015) UN Doc A/C.3/70/L.3
<https://www.refworld.org/reference/themreport/unga/2015/en/107512> accessed 5 September 2024
[212] Rouget (no 153) page 25-26

Through the above examination, we can clearly observe that there are intensified efforts, at a universal level, to protect, through every possible means, the individuals against the atrocity of torture. However, as it has also been supported by several academics, the challenge is to bridge the gap among the theoretical, absolute prohibition of torture and its practical application.[213] In fact, through a look into the reports of the UN Special Rapporteur on Torture, as well as on the observations of treaty bodies, we can observe that, despite its absolute prohibition, torture is still being committed universally, at the same time when governmental authorities remain inactive. The UN Special Rapporteur's findings during his visit to many countries, show that impunity constitutes a reality for most of them, mostly due to their inadequate criminalization system.[214] It is quite concerning the fact that a significant number of countries that are responsible for the accused act of torture, do not even offer to their victims the necessary effective remedies and other forms of rehabilitation.[215] In his report, the UN Special Rapporteur has highlighted certain recommendations towards the states, the most significant of which, to my perspective, concern the obligation of all states to ratify the UNCAT, as well as its Optional Protocol; the obligation of establishment of the necessary preventive mechanisms as well as effective judicial systems ensuring the proper protection against acts of torture.[216] Among others, the UN Special Rapporteur proposes the establishment of a 'global fund', aiming at the improvement of domestic judicial systems, as well as the drafting of a legally binding treaty aiming at the codification and clarification, at a universal level, of the rights of the individuals deprived of their liberty.[217]

3.3. The Role of Judicial Decisions

At this point, we should not neglect the cardinal role of judicial decisions as a necessary mechanism to combat torture, through the issue of legally binding decisions. As it has already been established, the various judicial decisions have reaffirmed the status of the prohibition of torture as an absolute, non-derogable norm, interpreting the provisions of human rights instruments in which the prohibition is established, imposing a clear obligation on states to respect the specific peremptory norm, encouraging the adoption of the necessary preventive mechanisms.

Initially, it could be argued that the binding character and the enforceability of international decisions emanates from the conclusion of treaties, international agreements and the subsequent principle of '*pacta sunt servanda*', obliging states to apply their obligations in *good faith*.[218] At an international scale, the conclusion of an international treaty by states indicates the willingness of states to be bound by its provisions, including the provisions that establish, for instance, the jurisdiction of the ICJ for the resolution of disputes.

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[213] Nowak, Monina (no 190) para 53

[214]UNHR Council, 'Report of the Special Rapporteur on torture and other cruel, inhuman or degradig treatment or punishment, Manfred Nowak' (9 February 2010) UN Doc A/HRC/13/39 < Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Manfred Nowak > accessed 5 September 2024, para 73

[215] ibid

[216] Ibid para 77

[217] ibid

[218] Sanjay Sarraf, 'Enforcing International Law: An Analysis of ICJ Decisions' (2023) 11(4) *IJCRT* 2320-2882 < https://ijcrt.org/papers/IJCRT2304409.pdf> accessed 28 July 2024, pages 16,17

However, it should be highlighted that, although the decisions of the ICJ are final and legally binding, reaffirming the status of the prohibition of torture as an absolute, non-derogable norm, the ICJ can not directly enforce its decisions, but it is entitled to monitor compliance with them through various processes.[219] The enforceability of its decisions relies heavily, among others, on the cooperation between states, on the domestic legal system of each state, as well as on the role of the Security Council according to article 94 of the UN Charter.[220] Towards that direction, the role of domestic courts is crucial, given that domestic courts can actually incorporate international law into their domestic legislation and constitution, reinforcing simultaneously through this way the decisions of the ICJ.[221]

The decisions of the ICJ can function as an enforcement mechanism, to the extent that they constitute legally binding decisions, reaffirming the nature of the prohibition of torture as a peremptory norm of general international law, clarifying and imposing certain obligations on states after holding them accountable in case of an infringement. In fact, they create legally binding obligations for the parties of a certain dispute brought before it and, simultaneously, they provide the necessary guidelines that ought to be adopted by the member states. Indeed, most human rights instruments provide a compromissory clause, granting jurisdiction to the ICJ for the resolution of disputes arising from their provisions.[222] Article 94 of the UN Charter provides that each Member State of the UN ought to respect and implement the decisions of the ICJ given that it is a party to a certain dispute brought before it.[223] Additionally, the UNCAT provides a compromissory clause in article 30.[224] In the case *Belgium v. Senegal*, the ICJ was asked to interpret the term '*to prosecute or extradite*', as referred to in article 7 of the UNCAT. The Court initially, reaffirmed that it had jurisdiction to adjudicate the dispute, declaring the admissibility of the claims of Belgium, based on the *erga omnes partes* regime of the UNCAT.[225] The Court concluded in a violation of articles 6 paragraph 2 and article 7 paragraph 1 of the Convention, highlighting the international responsibility of Senegal due to the aforementioned wrongful acts, requiring it to take the necessary measures, at a domestic level, in order to secure that the process of prosecution is being implemented, in case that the extradition won't take place.[226] In such a case, the Court functioned as an enforcement mechanism not only reaffirming the absolute prohibition of torture, but also highlighting the subsequent obligations of Senegal emanating from the treaty (obligation to prosecute or extradite), creating ultimately a legally binding decision for the parties to the dispute (*res judicata*) that ought to be respected.

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[219] ibid, page 15
[220]Sarraf, (no 218), page 13 ; United Nations, *Charter of the United Nations* (adopted 26 June 1945, entered into force 24 October 1945) 1 UNTS XVI, art 94
[221]Sarraf, (no 218), page 13
[222] Iryna Bogdanova, 'Unilateral Sanctions in International Law and the Enforcement of Human Rights, The Impact of the Principle of Common Concern of Humankind' (2022) ch3 vol9 *World Trade Institute Advanced Studies,*< Unilateral Sanctions in International Law and the Enforcement of Human Rights – The Impact of the Principle of Common Concern of Humankind | Brill> accessed 5 September 2024, pages 183-184
[223] Bartosz Ziemblicki, Yevgenia Oralova, 'Enforcement Mechanisms of Decisions of International Courts' (2019) *Academia.edu* < (99+) ENFORCEMENT MECHANISMS OF DECISIONS OF INTERNATIONAL COURTS | Bartosz Ziemblicki - Academia.edu> accessed 2 September 2024
[224] UNCAT, art 30
[225] ICJ, *Questions relating to the Obligation to the Obligation to Prosecute or Extradite (Belgium v. Senegal)* 'Overview of the Case' < Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal) (icj-cij.org)> accessed 18 August 2024
[226] ibid

Of cardinal importance is also the order of provisional measures by the ICJ against Syria, after the request submitted by Canada and the Netherlands (*the Applicant States*). According to the specific provisional measures, which do have legally binding effect, Syria was asked to take the necessary measures for the prevention of acts of torture and other acts of ill-treatment committed by state officials, as well as to safeguard any from of evidence in case of alleged claims of acts of torture and other forms of ill-treatment.[227] Hence, to my point of view, it could be supported that, to the extent that the ICJ can order provisional measures that serve as binding guidelines to states, obliging Syria to implement certain measures, it (the ICJ) contributes to the reinforcement of the absolute prohibition of torture, functioning ultimately as a form of an enforcement mechanism.

The ICTY has also contributed significantly to the emergence and progressive development of the prohibition of torture as a jus cogens norm. To begin with, in the *Furundija*[228] ruling, the Court reaffirmed the absolute, non-derogable character of the prohibition of torture as a jus cogens norm, emphasizing that it overrides international treaties and customary law. The Trial Chamber highlighted the need for states to formulate their national legislation in such a way, so as to comply with their international obligations emanating from the prohibition of torture and continued by pinpointing the erga omnes character of the specific prohibition which permits each member of the international community to demand compliance with the norm against any other member that refuses compliance.[229]

In the Čelebići ruling the Court concluded that acts of rape could constitute torture under the prerequisite of meeting the established criteria for the characterization of an act as torture (severity of pain or suffering, intentionally inflicted).[230], It is of cardinal importance to also mention the more recent case *Prosecutor v. Kunarac, Kovač, and Vuković* (2001)[231], where the Court examined, among others, the relationship between the crimes of torture and rape. Hence, it could be argued that, through the specific rulings, the evolving interpretation of the prohibition of torture as a jus cogens norm has been illustrated, especially in relation to the recognition of sexual assaults as a form of torture.

At a regional level, the ECtHR, functioning as a supranational court, is entitled to monitor compliance of states parties with the ECHR, issuing legally binding, final decisions, creating *res judicata*.[232] Although the Committee of Ministers of the Council of Europe constitutes a body responsible for the supervision of the implementation of the decisions of the ECtHR[233], it could be argued that to the extent that the Court issues legally binding decisions for the parties to a certain

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[227] ICJ, *Provisional Measures Order: Application of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,* Order of 16 November 2023 No. 2023/67 < The Court indicates provisional measures> accessed 6 September 2024

[228] *Prosecutor v. Anto Furundzija* (Trial Judgement), IT-95-17/1-T, International Criminal Tribunal for the former Yugoslavia (ICTY), 10 December 1998 < Prosecutor v. Anto Furundzija (Trial Judgement) | Refworld> accessed 2 September 2024, para 153

[229] 'Judicial Supplement 1 – *the Prosecutor v. Anto Furundzija* – Case NO. It-95-17/1' (T) < Judicial Supplement 1 - The Prosecutor v. Anto Furundzija - Case No. IT-95-17/1-T (icty.org)> accessed 6 August 2024

[230] *Čelebići Case* Judgment: Trial Chamber, Zejnil Delalić Acquitted, Zdravko Mucić Sentenced to 7 Years' (16 November 1998) < https://www.icty.org/en/press/celebici-case-judgement-trial-chamber-zejnil-delalic-acquitted-zdravko-mucic-sentenced-7-years> accessed 2 September 2024

[231] *Prosecutor v. Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic* (Trial Judgment), IT-96-23-T & IT-96-23/1-T, International Criminal Tribunal for the former Yugoslavia (ICTY), 22 February 2001 < Prosecutor v. Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic (Trial Judgment) | Refworld> accessed 2 September 2024

[232] Rouget, (no 153), page 57

[233] ECHR, art 46(2)

dispute, providing the necessary guidelines that ought to be followed, it serves as a mechanism enforcing the absolute prohibition. In fact, the ECtHR functions as the *final arbiter,* authoritatively interpreting and specifying the requirements of article 3 of the ECHR[234], issuing legally binding judgments, the supervision of the execution of which is supervised by the Committee of Ministers.

Delving into the various judicial decisions of the ECtHR dealing with the absolute prohibition of torture, we can observe that, on the one hand they oblige states to refrain from causing severe harm on individuals under their jurisdiction (negative obligation), as indicated in the case *Hristozov and Others v. Bulgaria*[235], whereas on the other hand they also impose on states positive obligations, as indicated in the case *X and Others v. Bulgaria*[236], such as to adopt and implement the necessary legislative and preventative measures and to conduct investigations (procedural obligation) in case of claims of an infringement.[237] Additionally, in the case *O'Keeffe v Ireland* the Court highlighted the failure of Ireland to implement the necessary preventive mechanisms to tackle acts of torture and ill-treatment (in the case at hand, the incident of sexual abuse of the victim), breaching its positive obligations according to article 3 of the Convention.[238] The Court further highlighted that, in the context of article 3, essential safeguards ought to be implemented by the state to secure children against acts of sexual abuse, pinpointing that school authorities do bear responsibility for their protection, given that children are under their complete supervision and control.[239] In the specific case, the Court pinpointed the need for Ireland to undertake the necessary preventive measures at a domestic level, functioning, to my perspective, as an enforcement mechanism of the absolute prohibition of torture and ill-treatment.

Additionally, in the *Cestaro v Italy* case, the ECtHR ruled that Italy has systematically breached its positive obligations for the criminalization of torture which could be accomplished through the adoption of the necessary legislative framework.[240] In detail, the Strasbourg Court highlighted the need for Italy to criminalize at a domestic level acts that infringe article 3 of the Convention, directly linking the process of (effective) investigation to the need for criminalization of acts that constitute an infringement of article 3.[241] In fact, the Court called *the Italian lawmaker* to criminalize torture in the Italian Criminal Code, which paved the way for the approvement by the Italian Chamber of Deputies of the bill A.C. 2168, leading ultimately to the criminalization of torture, as well as of the instigation of torture.[242] Of high importance, to my point of view, was the

[234] Natasa Mavronicola, *Torture, Inhumanity and Degradation under Article 3 of the ECHR (*HART Publishing 2021, page 28
[235] *Hristozov and Others v. Bulgaria* App nos. 47039/11 and 358/12, ECtHR (29/04/2013) < HRISTOZOV AND OTHERS v. BULGARIA> accessed 2 September 2024, para 111
[236] *Case of X and Others v. Bulgaria* App no. 22457/16, ECtHR (2 February 2021) < X AND OTHERS v. BULGARIA> accessed 2 September 2024, para 178
[237] Council of Europe/European Court of Human Rights, 'Guide on Article 3 of the European Convention on Human Rights' (31 August 2023) < Guide on Article 3 - Prohibition of torture> accessed 2 September 2024, page 6
[238] Mavronicola (no 231), page 140 ; ECtHR, *O'Keeffe v Ireland* (2014) 59 EHRR 1, para 168
[239] Mavronicola (no 231), page 139 ; *O'Keeffe v Ireland* paras 152, 162
[240] Domenico Carolei, 'Cestaro v. Italy: The European Court of Human Rights on the Duty to Criminalise Torture and Italy's Structural Problem' (2017) 17(3) *International Criminal Law Review*, < Cestaro v. Italy: The European Court of Human Rights on the Duty to Criminalise Torture and Italy's Structural Problem in: International Criminal Law Review Volume 17 Issue 3 (2017) > accessed 2 September 2024, pages 567-568
[241] Mavronicola, (no 231) page 140 ; *Cestaro v Italy* App no 6884/11, ECtHR (7 April 2015), para 209
[242] Carolei (no 237) pages 567-568

fact that the Court clarified that the duty of states to enforce the necessary legislation to criminalize acts of torture constitutes a tacit duty under article 3 of the European Convention.[243]

Further, the Court clarified that the specific implicit obligation, to criminalize at a domestic level acts of torture, emanates from two other obligations under the ECHR , namely from the obligation to protect individuals against acts of ill-treatment committed by private actors, as well as from the obligation of states to effectively investigate incidents of ill-treatment.[244] In the same vein, in the case *M.C. v. Bulgaria*, the ECtHR highlighted the positive obligations of states to adopt the necessary criminal law and to conduct effective investigations and prosecutions; such obligations emanate from articles 3 and 8 of the Convention.[245] The rulings of the ECtHR permit the authoritative interpretation of article 3 of the ECHR, providing the necessary guidelines that ought to be respected and implemented. Hence, the influence of the ECtHR into the domestic legal system of Italy is obvious, functioning as an -although not direct- enforcement mechanism of the absolute prohibition.

In the same vein, the Inter-American Court of Human Rights, functions as a mechanism to combat torture. States parties to the Convention have given to the Court the jurisdiction to adjudicate disputes arising between them, through the issue of legally binding decisions on whether a certain right as established by the Convention has been infringed, ordering the necessary measures.[246] Additionally and according to article 64 of the Convention the Court has also the *advisory competence* to properly interpret the provisions of the Convention as well as of other human rights treaties.[247] Taken the case *Baldeón-García v. Peru* as an example, the Court ruled that the State infringed, among others, article 5 of the Convention (right to humane treatment), article 6 (obligation to take effective measures), as well as the obligation to prevent and punish torture established in article 1 and the obligation to investigate, established in article 8 of the Convention.[248] Further, the Court highlighted the need for the state to undertake the necessary measures to find the violators and properly punish them for their wrongful acts and among others, for the violation of the prohibition of torture, investigating properly the incidents and publishing them.[249] It is also notable that the Court, after the issue of its ruling, pinpointed in 2008 that the State hasn't provide evidence and information about the measures taken to ensure compliance with the Court's judgment, requesting it to inform the Court about such measures undertaken at a domestic level.[250] Hence, through this way, the Court attempted to exercise pressure on the state to properly implement the judicial decision.

[243] ibid, page 572
[244] ibid, page 572
[245] ibid, page 572 ; *MC v. Bulgaria* App. No 39272/98, ECtHR (4 December 2003) paras 152-153
[246] Rouget,(no 153) page 77
[247] Rouget, (no 153) pages 77-78
[248] *Baldeón García v Peru,* Loy LA Intl & Comp L Rev, (2014) 36(22) 211 < LOYOLA OF LOS ANGELES> accessed 3 September 2024, pages 2221,2223
[249] Ibid page 2226
[250] Ibid pages 2228,2229

Chapter 4: Contemporary Challenges: State Immunities and Public Interest Litigation

4.1. The Prohibition of Torture as a Limitation to State Immunities?

The relationship between jus cogens norms and state immunities constitutes a longstanding issue and simultaneously a constant challenge in the public international legal order. The concept of state immunity is established in the idea of sovereign equality of states and finds its expression in the principle '*par in parem non habet imperium*'[251], meaning that a sovereign and equal state can not be subject to the jurisdiction of another (sovereign) state.[252] In essence, we can distinguish between certain categories of immunities, such as state immunity and immunity of state officials, as well as jurisdictional immunity and immunity from enforcement.[253] For the purposes of the present LL.M. Thesis, the focus will be on state immunities (and more specifically on jurisdictional immunities) and their relation with jus cogens norms and in particular, with the prohibition of torture. On the one hand, as it has already pinpointed, the prohibition of torture, as a jus cogens norm, constitutes a hierarchical superior, non-derogable (even in times of emergency) and absolute norm. On the other hand, state immunities are considered part of customary international law and they have created great controversy as divergent approaches have been expressed in the judicial practice and in the academic legal world. Indeed, it can be observed that various approaches have been adopted particularly by domestic courts regarding state immunities [254] and their relation with jus cogens norms.

4.2. A look into the Judicial Practice

In fact, the questions that arise are whether jus cogens norms establish an exception to the doctrine of state immunity due to their hierarchical superiority, as recognized for instance, in the *Furundžija*[255] case by the ICTY, or, even, whether state immunities constitute, in essence, a limitation (or even exception?) to the absolute character of the prohibition of torture (and subsequently of jus cogens norms).

The hierarchical superiority of jus cogens norms as recognized by the judicial practice, such as by the ICTY, has also gained significant support in the academic legal world, as it was supported that in case of conflict, the (*procedural) bar* of state immunity does not apply due to the supremacy of peremptory norms.[256] At this point, it would be purposeful to delve into the relevant domestic, regional and international judicial decisions. Firstly, in the *Al-Adsani v. United Kingdom* case, the

[251] Matthew McMenamin 'State Immunity before the International Court Of Justice: Jurisdictional Immunities of the State (Germany v Italy) (2013) 44 Victoria U Wellington L Rev 189 pages 190-191 < Law Journal Library - HeinOnline.org (oclc.org)> accessed 30 August 2024

[252] UNGA, 'United Nations Convention on Jurisdictional Immunities of States and Their Property' (2004) UN Doc A/RES/59/38, art 5 and 6

[253] Peter-Tobias Stoll, 'State Immunity' (April 2011), *Max Planck Encyclopedia of Public International Law* < *Max Planck Encyclopedias of International Law: State Immunity*> accessed 18 August 2024, paras 1, 13

[254] Anthony Aust, 'Handbook of International Law' (2010 2nd ed), *Cambridge University Press* <Handbook of International Law (oclc.org)> accessed 28 July 2024

[255] *Prosecutor v. Furundžija*, Judgment, Case No IT-95-17/1-T, Trial Chamber (10 December 1998), paras 153–154

[256] Lorna McGregor, 'Foreign state immunities as a barrier to accessing remedies' (2020) *Elgar Online* <Chapter 17: Foreign state immunities as a barrier to accessing remedies in: Research Handbook on Torture (oclc.org)> accessed 20 August 2024, page 381

applicant, after the UK courts (at a regional level) dismissed his claims highlighting the state immunity of Kuwait, brought the case before the ECtHR[257]. The case concerned alleged acts of torture committed by Kuwaiti officials against the applicant. In fact, the Grand Chamber of the ECtHR was called to rule upon whether the UK courts had actually violated the applicant's right of access to justice according to article 6(1) of the ECHR, due to the recognition of the state immunity of Kuwait.[258] The majority of the ECtHR held that immunity, in civil proceedings, can not be lifted even for acts of torture, whereas the minority ruled that the jus cogens status of the prohibition of torture prevails over state immunities.[259]

The Greek Supreme Court, in the *Prefecture of Voiotia v. Federal Republic of Germany* case, recognized, in the first place, that state immunities constitute part of customary international law, as well as a generally accepted and recognized rule of international law, forming according to article 28(1)[260] of the Greek Constitution, an integral part of our legal system. The Court continued by highlighting that the jus cogens nature of the norms being violated indicated an implicit waiver of state immunity.[261] In this case, the Greek Supreme Court deemed that the fundamental values being protected by the concept of jus cogens surpass the rule of state immunity, although the latter continues to form an integral part of our legal system. The theory of implied waiver is based on the premise that a violation of a peremptory norm leads to the subsequent waiver of state immunity.[262] In the *Ferrini v. Federal Republic of Germany* case, Ferrini sued Germany for acts committed during World War II and more specifically, for forced labor and deportation.[263] In the specific ruling, the Court of First Instance and the Court of Appeal in Italy ruled that, although the violations claimed constitute war crimes (acts committed during World War II), the sovereign immunity of Germany prohibited the court to proceed.[264] However, the Italian Supreme Court *(Corte di Cassazione)* judged differently. It ruled that the acts committed constituted a violation of the peremptory norms of international law which protect fundamental human values and prevail over custom and treaty law and subsequently over state immunities.[265] In fact, it has been supported that the substantial supremacy (the fundamental values being protected) of jus cogens norms and not just their formal supremacy constituted the contributing factor that led the Italian court to reject Germany's immunity.[266] In essence, the Court seemed to balance the two concepts: the sovereign immunity (and subsequently the sovereign equality) of states and the cardinal importance of absolute, fundamental human rights.[267] It should also be noted that the Court didn't accept the doctrine of implied waiver of immunity as presented by the Greek Supreme Court in the *Prefecture*

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[257] *Al-Adsani v. The United Kingdom* (2001), ECtHR, Aplication No 35763/97 para 66
[258] Mirgen Prence, 'Torture as Jus Cogens Norm' *(JURIDICA*, 2011) vol.VII no.2, page 97
[259] Andrea Bianchi 'Human Rights and the Magic of Jus Cogens' (2008) 19(3) *EJIL,*< Law Journal Library - HeinOnline.org > accessed 2 September 2024, page 501
[260] 'The Constitution of Greece' (2019), art 28(1)
[261] *Prefecture of Voiotia v. Federal Republic of Germany* Summary (2010) Areios Pagos (Supreme Court) Case No 11/2000 < ICD - Voiotia v. Germany - Asser Institute (internationalcrimesdatabase.org)> accessed 28 August 2024
[262] Wolfgang Kaleck *International Prosecution of Human Rights* Crimes (Springer, 2007), page 74
[263] Prence, (no 255), page 91
[264] *Ferrini v. Federal Republic of Germany* (Cass. Sez. Un. 5044/04) p 539
[265] ibid para 9
[266] Pasquale De Sena and Francesca De Vittor 'State Immunity and Human Rights: The Italian Supreme Court Decision on the Ferrini Case' (2005) 16(1) *EJIL* < State Immunity and Human Rights: The Italian Supreme Court Decision on the Ferrini Case | European Journal of International Law | Oxford Academic> accessed 2 September 2024, page 101
[267] Prence, (no 255), page 93

of Voiotia v. Federal Republic of Germany case.[268] The *Ferini* reasoning was reaffirmed in various other rulings of the Italian Court of Cassation.[269]

In the most recent case *Germany v. Italy* (*Jurisdictional Immunities of the State*) the ICJ, although not directly dealing with the prohibition of torture offers significant clarification regarding the relationship between jus cogens norms and state immunity, reflecting the contemporary approach on the issue and more specifically the progressive development of the doctrine of state immunity. In brief, the factual background of the case concerned gross violations of international humanitarian law committed during World War II by Germany; the claims were firstly brought before the Italian courts.[270] The ICJ didn't agree with the decisions of the Italian courts and ruled in favor of Germany, pinpointing that Italy didn't respect Germany's immunity.[271] The ICJ ruled that although if it could be argued that Germany violated jus cogens norms, state immunity (customary law and of procedural nature) and peremptory norms (substantive character) are two distinct concepts and hence there is no collision between them.[272] More specifically, it noted that state immunity rules are procedural and are referred to the issue of jurisdiction of states.[273] In other words, it was supported that the specific procedural bar of jurisdictional state immunity concerned the question whether a case can be heard by the courts of the forum state. In an attempt to draw a conclusion from the aforementioned, it could be argued that the concept of state immunity is firstly examined by the courts in order to establish or not their jurisdiction. The issue of jus cogens is examined at a later stage -after the court has concluded in a non-violation of state immunity- as it concerns the substantive part of the case.

A significant number of scholars have also supported that state immunity constitutes a procedural impediment, whereas the prohibition of torture is strongly linked with the substance of the legal issue and hence, there is no collision between the two concepts (substantive nature vs procedural character).[274] Hence, state immunity, as a procedural rule, is linked with the question of the jurisdiction of a court, without affecting the substantive law.[275] However, serious concerns are raised. In fact, the challenging point to the specific conclusion concerns the risk of impunity of states; at which point is that permitted? can it lead to state impunity? should a limit be set? To my point of view these are some crucial questions that emanate from the aforementioned examination and render necessary the establishment of a balance between the two concepts: the sovereign equality of states and the protection of fundamental human rights. Although theoretically the two concepts do not collide, in practice there are serious risks that state immunity may be utilized as a *cover* and justification for the commitment of gross human rights violations. Hence, courts are required to evaluate each case separately with respect to the fundamental human rights, without completely nullifying the concept and significance of jus cogens.

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[268] De Sena and De (no 263), pages 101-102
[269] McMenamin, (no 248), page 196
[270] Ibid, page 189
[271] *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)* (3 February 2012) Summary < INTERNATIONAL COURT OF JUSTICE> page 7
[272] ibid
[273] McMenamin, (no 248) page 201 ; *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)* (3 February 2012) ICJ < 143-20120203-JUD-01-00-EN.pdf (icj-cij.org)> accessed 17 August 2024, para 92
[274] Bianchi, (no 256), page 500 ; Hazel Fox, Philippa Webb 'The law of state immunity' (3rd edn 2013) *Oxford University Press*, page 573
[275] McGregor (no 253), page 77

4.3. Public Interest Litigation and the Concept of *Erga Omnes Partes* Obligations emanating from the UNCAT

However, apart from the challenge of state immunity, which could be argued that is somehow and in certain cases restricting the absolute protection offered by jus cogens norms, there is another concept, the public interest litigation that has emerged and is progressively developing in our contemporary legal world, leading to the protection of fundamental human rights. For the purposes of the present LL.M. Thesis, we will examine the relationship between the mechanism of public interest litigation and the prohibition of torture as a jus cogens norm, using as our basis the UNCAT.

In fact, even by their definition, jus cogens norms and obligations *erga omnes partes* are considered as representing the public interest, a legal interest that extends beyond the scope of the two state parties members to a certain dispute.[276] It has been supported that it is difficult to provide a generally accepted definition of public interest litigation in the international legal world.[277] By defining the term 'interest', it could be argued that it concerns the situation in which there is an objective concern. In essence, public interest litigants share a common interest for the protection of fundamental rights.[278] As it has already been established, the prohibition of torture creates not only *erga omnes* obligations (as a jus cogens norm), but also *erga omnes partes*. The UNCAT serves as the necessary basis, permitting states parties to sue other member states, in case that an obligation of the convention is breached, securing that the fundamental rights and obligations, as established by the convention, are respected.[279] In other words, it could be argued that all member states to the Convention do have a common interest to initiate proceedings against the perpetrator, promoting in such a way the mechanism of public interest litigation; all member states -even if not directly injured- can invoke the responsibility of another member state, on behalf of the broader, community interests.[280] In fact, the existence of an undeniable *presumed legal interest* could further be supported.[281] The specific presumed legal interest emanates logically from the fact that all states parties, members to a specific convention e.g to the UNCAT or to the Genocide Convention (as was the case of *Ukraine v. Russian Federation*[282]), do have a legal interest for its proper implementation and for the subsequent respect to fundamental human rights as established by the Conventions.

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[276] Marion Esnault 'Public Interest Litigation in International Law' (2024) *Routledge Research in International Law Series* < Public Interest Litigation in International Law | Justine Bendel, Yusr (oclc.org)> accessed 1 September 2024, page 13
[277] ibid, page 28
[278] Yusra Suedi and Justine Bendel, *Public Interest Litigation in International Law* (Routledge 2024) pages 35,36
[279] *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)* ICJ, Overview of the case < Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)> accessed 5 September 2024
[280] Pearce Clancy 'Erga Omnes Partes Standing after South Africa v Israel' (1 February 2004) *EJIL* < Erga Omnes Partes Standing after South Africa v Israel – EJIL: Talk!> accessed 1 September 2024
[281] *Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation)* (5 June 2023) < Order of 5 June 2023 > accessed 28 August 2024, page 364 para 27
[282] ibid

4.4. A look into the Judicial Practice

The examination of the relevant case-law is highly enlightening. More specifically, initially, the Court in its ruling *Questions Relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, pinpointed that the Convention against Torture permits states parties to hold accountable another state party in case of an infringement of the *erga omnes partes* obligations emanating from the specific treaty. [283] The Court highlighted the interest of all states parties to the Convention to secure the enforcement of its provisions; the specific shared interest of all states parties grants to them the legal standing before the ICJ.[284] Further, the *Gambia v. Myanmar* case, although not directly linked with the prohibition of torture, can be used as an illustrative example. In the specific dispute, article IX of the Genocide Convention[285] (in conjunction with article 36 para.1 of the ICJ Statute[286]) were invoked as the necessary jurisdictional basis. The Court pinpointed that all states parties to the specific Convention do have a common interest to secure the effective protection against genocide, permitting any state party to sue against another state not complying with its *erga omnes partes* obligations emanating from the Genocide Convention.[287]. Hence, the *erga omnes partes* character of the Conventions (Genocide Convention and the UNCAT) grants locus standi to any state party to bring a claim against the violator. In fact, if that was not permitted, the whole object and purpose of the Conventions would have been rendered void.

In the same vein, the case *Canada and the Netherlands v. Syria*, constitutes another illustrative example of how member states to the UNCAT are entitled to initiate proceedings against another member state that violates the Convention, even if the acts of torture are not directly linked with the applicant states. The jurisdictional basis was established in the compromissory clause of article 30 of the UNCAT, as well as on article 36 para 1 of the ICJ Statute.[288] The Court took also into consideration that neither of the member states has made a reservation to the Convention.[289] The applicants accused Syria for acts of torture and other cruel treatment, as well as for its failure to effectively investigate and prevent such acts.[290] It is notable, that although Syria claimed that the applicants were not entitled to bring the case before the ICJ, due to the fact that they are not directly injured (no direct damage), the Court rejected the specific argument, highlighting the *erga omnes partes* character of the obligations emanating from the Convention.[291] For the specific purpose, the ICJ mentioned the *Belgium v. Senegal* case, where it was pinpointed that any State Party to the Convention is entitled to secure the enforcement of its provisions, due to their shared interest.[292] It seems that public interest litigation before the ICJ, is established, among others, in the *erga*

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[283] Cecily Rose, 'Symposium: Public Interest Litigation at the International Court of Justice Introduction' (2023) *The Law & Practice of International Courts and Tribunals 22*, < Search Results for Symposium: Public Interest Litigation at the International Court of Justice | Brill>page 230 ; *Questions relating to the Obligation to Prosecute or Extradite (Belgium v Senegal),* Judgment, ICJ Reports 2012 page 422 para 69

[284] ibid

[285] UNGA, 'Convention on the Prevention and Punishment of the Crime of Genocide', 78 UNTS 277 (entered into force 12 January 1951) art 9

[286] UN, 'Statute of the International Court of Justice' (18 April 1946) art 36 para 1

[287] Esnault (no 273) pages 23,24

[288] *Application of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Canada and the Netherlands v. Syrian Arab Republic),* ICJ, Summary (16 November 2023), pages 2,3

[289] ibid

[290] Lawrence Hill-Cawthorne 'The Responsibility of Syria under the Convention Against Torture before the ICJ' (2023) *EJIL* < The Responsibility of Syria under the Convention Against Torture before the ICJ – EJIL: Talk! (ejiltalk.org)> accessed 6 September 2024

[291] *Canada and the Netherlands v. Syria,* ICJ, page 5

[292] ibid

omnes partes regime, emanating from the Convention against Torture and the Genocide Convention.[293]

In my assessment, the encouragement of the mechanism of public interest litigation through the concept of *erga omnes partes* obligations being established in the conclusion of a certain treaty, is crucial because it could also lead to a humanization of international law, as from the state-centric approach we are shifting towards a more humanitarian one, where the shared concerns and values of the humanity (concerns such as the effective protection against acts of torture), are being placed at the center, permitting all member states to act for their respect.

5. Concluding Remarks

Undeniably, torture constitutes a severe human rights offence, against fundamental human values, such as the physical and mental integrity of individuals. The rights emanating from article 3 of the ECHR, article 7 of the ICCPR, as well as from the provisions of the UNCAT reflect the fundamental, core values of our legal order. Especially after the end of World War II, a significant number of efforts have been marked, aiming at the protection of individuals from atrocities, through the signature and ratification of various human rights instruments and the simultaneous, gradual recognition of the prohibition of torture as a jus cogens norm, as reaffirmed by various judicial decisions at an international, regional and domestic level. In fact, the recognition of torture as a jus cogens norm constitutes a milestone for our international community, reflecting the international will of states to prohibit acts of torture in absolute terms, as indicated by its absolute, non-derogable nature. The legal consequences of the recognition of the prohibition of torture as a jus cogens norm, such as the *erga omnes* obligations and the universal jurisdiction, underline the fundamental values being protected by the specific prohibition. Theoretically, it seems that there is a widespread, international consensus on the cardinal importance of the specific obligation. However, in practice phenomena of torture are still present, as indicated through an examination e.g. of the reports of the Special Rapporteur, or of the various judicial decisions. Although, the mechanisms to combat torture adopted at a regional and at an international level indicate the willingness to eliminate acts of torture, it is crucial to intensify the specific efforts, especially at the level of each domestic legal system, in order to effectively prevent and combat torture and other forms of ill-treatment.

Additionally, certain contemporary challenges, as illustrated in chapter four of the LL.M Thesis at hand demand our attention. The issue of state immunity raises the reasonable question of whether it could ultimately lead to state impunity, specifically after the recent judgment of the ICJ pinpointing that state immunity constitutes essentially a procedural bar and hence, should not be confused with the concept of the prohibition of torture as a jus cogens norm. However, to my point of view and after the specific examination, it is crucial to establish a balance between the two concepts, in terms that state immunity as a procedural bar, should not reach the level at which state officials would remain unpunished for their acts; a certain level of protection functioning as a safeguard should be established, balancing between state immunity and the protection of fundamental human values. On the other hand, a newly emerging concept, namely the mechanism of public interest litigation functions as a mechanism contributing to the promotion of fundamental

[293] Rose, (no 280), page 231

human rights, as it gives, among others, the legal standing to member states of a specific convention, to bring a case against another member state, perpetrator of a provision of the convention. Hence, the *erga omnes partes* nature of the obligations arising from the prohibition of torture as a jus cogens norm, permits all states, members to the UNCAT to sue against another member state, violator, securing, ultimately, the protection of the physical and mental integrity of individuals who are under the jurisdiction of one of the member states to the Convention. Ultimately, it could also be argued that the gradual recognition of a significant number of human rights as jus cogens norms, indicates the movement from a state-centric approach to an approach where the individual is being place at the centre, which it could further be supported that it paves the way towards a humanization of our international legal system.

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