ABSTRACT

The International Court of Justice considered sovereign immunity and jus cogens to be distinctly procedural and substantive rules: ships passing in the night. In practice, this dichotomy is not so clear: one distinctly procedural aspect of jus cogens is its relationship to universal jurisdiction, while a court’s subject-matter jurisdiction cannot be completely divorced from substantive considerations. To avoid harmonizing these issues, the European Court of Human Rights recently held that the relationship between sovereign immunity and jus cogens is in a “state of flux.” However, a careful analysis of the interaction of jus cogens and sovereign immunity reveals not a state of flux, but a matrix of consistent procedural postures dependent upon the form of immunity and subject of international law at issue. This Article unpacks the interrelation of jus cogens and sovereign immunity across three areas: immunity ratione personae, immunity ratione materiae, and the jurisdictional immunity of the State.

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Sovereign immunity embodies the principle of *par in parem non habet imperium*: between equals no power. This effect of sovereignty shields a State and its officials from the exercise of jurisdiction by foreign States. The doctrine of *jus cogens*—peremptory norms of international law from which no derogation is permitted—purports to qualify State sovereignty by placing certain non-derogable restrictions on permissible conduct in the form of rights and duties primarily addressing the individual under international law. The International Court of Justice (ICJ) recently considered sovereign immunity and *jus cogens* to be, like ships passing in the night, distinctly procedural and substantive rules. In practice, this dichotomy is not so clear: one distinctly procedural aspect of *jus cogens* is its relationship to universal jurisdiction, while a court’s subject-matter jurisdiction cannot be completely divorced from substantive considerations. To simply dispense with the “normative hierarchy” theory does not, therefore, sufficiently resolve the issue.


2. *Summary Records of the 828th Meeting*, [1966] 1 Y.B. Int’l L. Comm’n (Part 1) 38, ¶ 40, U.N. Doc. A/CN.4/SER.A/1963 (Statement by Mr. Bartos) (“[S]overeignty could [not] be absolute now that the international community had become organized . . . . By becoming members of the international society, States recognized the existence of a minimum international order, which was none other than *jus cogens*. The abstract notions of absolute freedom and absolute sovereignty were not compatible with the existence of international society.”).

3. Gerald Fitzmaurice (Special Rapporteur on the Law of Treaties), *Third Rep. on the Law of Treaties*, Int’l L. Comm’n ¶ 76, U.N. Doc. A/CN.4/115 (Mar. 18, 1958) (“Most of the cases in this class are cases where the position of the individual is involved, and where the rules contravened are rules instituted for the protection of the individual.”).

4. Jurisdictional Immunities of the State (Ger. v. It., Greece Intervening), 2012 I.C.J. 1, ¶ 93 (Feb. 3); Arrest Warrant of 11 April 2000 (Dem. Rep. Congo v. Belg.), 2002 I.C.J. 3, ¶ 60 (Feb. 4) (“Immunity from criminal jurisdiction and individual criminal responsibility are quite separate concepts. While jurisdictional immunity is procedural in nature, criminal responsibility is a question of substantive law.”).

5. Compare Jurisdictional Immunities of the State (Ger. v. It., Greece Intervening), 2012 I.C.J. 1, ¶ 57 (Feb. 3), *with* Al-Adsani v. United Kingdom, 2001-XI Eur. Ct. H.R. ¶ 3 (Rozakis & Caflisch, J.J., dissenting) (“The acceptance . . . of the *jus cogens* nature of the prohibition . . . entails that a State allegedly violating it cannot invoke hierarchically lower rules (in this case, those on State immunity) to avoid the consequences of the illegality of its actions.”).
A hypothetical illustrates the complexity of the interaction between these doctrines. Take the example of a State official directly responsible for acts of genocide, which constitutes an international crime in violation of *jus cogens*. Would he enjoy immunity from proceedings before an international tribunal or a domestic court? Does the nature of the proceeding, civil or criminal, alter the immunity analysis? What if the official holds a high-ranking political office or if the State he represents is itself being sued for his conduct? Jurisprudence denies a single answer to this matrix of procedural postures. In order to avoid harmonizing these different yet interrelated issues, the European Court of Human Rights recently held that the interaction between sovereign immunity and *jus cogens* is in a “state of flux.”

This Article posits three outcomes where immunities and *jus cogens* interact. First, the procedural effect of sovereign immunity on personal jurisdiction is rooted in considerations of respective equality between States—*par in parem non habet imperium*—rather than individual supremacy. Where sovereignty as equality is not implicated by the exercise of jurisdiction, for example by proceedings before an international tribunal rather than a foreign domestic court, immunity *ratione personae* under international law does not inhere. Second, the substantive scope of sovereign immunity does not contemplate violations of *jus cogens* as “official acts” for the purposes of subject-matter jurisdiction. Although such conduct is often undertaken under the “color of law,” violations of *jus cogens* fall outside the official capacity of State officials and are consequently not attributable to the State, depriving that official of immunity *ratione materiae*. Third, these propositions interact as procedural and substantive aspects of sovereign immunity that apply with equal force to the State, which can neither be subject *ratione personae* to the jurisdiction of a foreign State, nor have attributed to it *ratione materiae* acts not constituting “official acts.” Based on these observations, this Article contends that the interaction of *jus cogens* and sovereign immunity reveals not a state of flux, but a matrix of consistent procedural postures dependent upon the form of immunity and subject of international law at issue.

In Part II this Article introduces the doctrine of *jus cogens*, then discusses in Part III the forms of sovereign immunity to be addressed. Part IV discusses immunity *ratione personae* in the context of international criminal prosecution for *jus cogens* violations and its application.

7. Barring certain exceptions such as consent and waiver.
II. THE DOCTRINE OF JUS COGENS

Jus cogens constitutes peremptory norms of international law “accepted and recognized by the international community of States as a whole . . . from which no derogation is permitted.”\textsuperscript{8} Peremptory norms constrain the range of conduct the sovereign may authorize, giving rise to obligations \textit{erga omnes} (against all) owed to the international community as a whole\textsuperscript{9} by virtue “of the importance of the rights involved, [whereby] all States can be held to have a legal interest in their protection . . . .”\textsuperscript{10} Performance of these obligations as they arise from \textit{jus cogens} requires States to prevent and punish violations of peremptory norms.\textsuperscript{11} Peremptory norms are closely related to the doctrine of international criminal law, and a violation of a norm belonging to \textit{jus cogens} constitutes an international crime.\textsuperscript{12} To this end, the doctrine of \textit{jus cogens} is a product of the same tradition of international law as the Nuremberg prosecutions that followed the Second World War.\textsuperscript{13}


\textsuperscript{12} Jochen Frowein, \textit{Jus Cogens}, in \textit{3 ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW} 65, 68 (Rudolf Bernhardt ed., 1997) (“A crime in this sense is seen as a violation of basic rules of \textit{jus cogens}.”).

\textsuperscript{13} \textit{See} Siderman de Blake v. Republic of Argentina, 965 F.2d 699, 715 (9th Cir. 1992) (quoting Barcelona Traction, 1970 I.C.J. ¶ 32 (“The universal and fundamental rights of human beings identified by Nuremberg—rights against genocide, enslavement, and other inhumane acts—are the direct ancestors of the universal and fundamental norms recognized as \textit{jus cogens}. In the words of the International Court of Justice, these norms, which include “principles and rules
Individual responsibility is at the core of the legal regime of *jus cogens* as discussed by the International Criminal Tribunal for the former Yugoslavia (ICTY) in *Furundžija*. One legal effect of *jus cogens* is to provide universal jurisdiction over international crimes, pursuant to obligations *erga omnes* of States that require punishment of individual violators of *jus cogens* by prosecution or extradition. Universal jurisdiction provides an alternative to the traditional bases of jurisdiction—territory, nationality, protection, and passive personality—granting States jurisdiction over *jus cogens* violations: a jurisdiction equally applicable, *arguendo*, to criminal and civil proceedings. The ICJ has recognized the prohibitions against genocide and torture belong to *jus cogens* although other courts, notably U.S. circuit courts, have


15. See, e.g., Regina v. Bartle and the Commissioner of Police for the Metropolis and others *ex parte* Pinochet, [1999] 38 I.L.M. 581 (H.L.) 589 (appeal taken from Eng.) [hereinafter *Ex parte Pinochet*] (quoting *In re* Extradition of Demjanjuk, 612 F. Supp. 544, 556 (N.D. Ohio 1985)) (“The *jus cogens* nature of the international crime of torture justifies states in taking universal jurisdiction over torture wherever committed. International law provides that offences *jus cogens* may be punished by any state because the offenders are ‘common enemies of all mankind and all nations have an equal interest in their apprehension and prosecution’”[sic].)


20. See, e.g., Questions Relating to the Obligation to Prosecute or Extradite (Belg. v. Sen.), 2012 I.C.J. 1 ¶ 99 (July 20).


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recognized a broader catalogue. Over the past two decades, violations of peremptory norms have, to varying degrees of success, become the subject of increasing international and domestic litigation—in many instances raising questions related to the application of sovereign immunity.

III. THE FORMS OF SOVEREIGN IMMUNITY

The doctrine of sovereign immunity is derived from customary international law and embodies the principle of *par in parem non habet imperium*: between equals no power. The classical articulation of the principle is found in Justice Marshall’s 1812 *Schooner Exchange v. McFaddon* decision: “Sovereigns are equal. It is the duty of a sovereign not to submit his rights to the decision of a co-sovereign. He is the sole arbiter of his own rights. He acknowledges no superior, but God alone. To his equals, he shows respect, but not submission.” As a doctrine based in “comity,” sovereign immunity emerged from a customary space between law and policy, as expressed in *Hilton v. Guyot* (1895).

This same controlling principle of equality, recognized as a matter of comity, was articulated by the European Court of Human Rights (ECtHR) in *Jones v. The United Kingdom* (2014):

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23. *Jurisdictional Immunities of the State (Ger. v. It., Greece Intervening)*, 2012 I.C.J. 1, ¶ 57 (Feb. 3); Sinclair, *supra* note 1 (“Immunitiy, expressed in the maxim *par in parem non habet imperium, is a principle concerned with the status of sovereign equality enjoyed by all independent States.”).


25. *Hilton v. Guyot*, 159 U.S. 113, 163-64 (1895) (“Comity,’ in the legal sense, is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive, or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens, or of other persons who are under the protection of its laws.”).
The Court has previously explained that sovereign immunity is a concept of international law, developed out of the principle *par in parem non habet imperium*, by virtue of which one State shall not be subject to the jurisdiction of another State. The grant of sovereign immunity to a State in civil proceedings pursues the legitimate aim of complying with international law to promote comity and good relations between States through the respect of another State’s sovereignty.²⁶

Three distinct elements can be distilled from this doctrine of sovereign immunity.²⁷ Immunity *ratione personae* refers to the immunity of certain high State officials, such as Heads of State, Heads of Government, and Ministers of Foreign Affairs because “he or she is recognized under international law as representative of the State solely by virtue of his or her office.”²⁸ Immunity *ratione materiae* concerns the immunity enjoyed by organs of the State for acts performed in their official capacity, which the “State is entitled to claim . . . [as acts] attributed to the State, so that the individual organ may not be held accountable for those acts or transactions.”²⁹ Lastly, State immunity refers to the underlying principle that one State shall not be subject to the jurisdiction of another State, which is conceived as both a right and a corresponding obligation incumbent “upon other States to respect and give effect to that immunity.”³⁰ Although deriving from a common principle of sovereign immunity, each form of immunity serves a specific purpose and operates in a procedurally distinct way. Therefore, the way in which each element of sovereign immunity interacts with the doctrine of *jus cogens* requires specific consideration, and each is discussed in turn.

### IV. IMMUNITY RATIONE PERSONAE

Immunity *ratione personae* is immunity “granted to high State officials to guarantee the proper functioning of the network of mutual inter-State relations, which is of paramount importance for a well-ordered

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²⁷. Each form of sovereign immunity is discussed in greater detail in its respective section below.
³⁰. Jurisdictional Immunities of the State (Ger. v. It., Greece Intervening), 2012 I.C.J. 1, ¶ 56 (Feb. 3).
and harmonious international system.”\textsuperscript{31} The protection of high officials from the jurisdiction of foreign States reflects a core premise underlying sovereign immunity: “to promote comity among nations by ensuring that leaders can perform their duties without being subject to detention, arrest or embarrassment in a foreign country’s legal system.”\textsuperscript{32} Consequently, this procedural immunity extends to high officials “recognized under international law as representative of the State solely by virtue of his or her position.”\textsuperscript{33} Immunity \textit{ratione personae} is a status-based immunity, as observed by Lord Millett in \textit{Pinochet}:

Immunity \textit{ratione personae} is a status immunity. An individual who enjoys its protection does so because of his official status. It endures for his benefit only so long as he holds office. While he does so he enjoys absolute immunity from the civil and criminal jurisdiction of the national courts of foreign states. But it is only narrowly available.\textsuperscript{34}

As a status-based immunity that attaches to a particular office shields the office holder only during his or her tenure, this immunity is temporal, lasting only so long as the official holds that office.\textsuperscript{35} Even so, immunity \textit{ratione materiae}, in principle, continues to attach to the official conduct of senior State officials enjoying immunity \textit{ratione personae}, even after they cease to hold the office conferring that immunity.\textsuperscript{36} The corollary of this overlapping, yet not coextensive, schema of immunities is that, for conduct not protected by \textit{ratione materiae} immunity, those acts would become subject to prosecution.


\textsuperscript{33} Arrest Warrant of 11 April 2000 (Dem. Rep. Congo v. Belg.), 2002 I.C.J. 3, ¶¶ 51-53 (Feb. 4) (“[I]n international law it is firmly established that... certain holders of high-ranking offices in a state... enjoy immunities from jurisdiction in other states.”).

\textsuperscript{34} \textit{Ex parte Pinochet}, \textit{supra} note 15, at 644 (Millett, L.).

\textsuperscript{35} \textit{See id. at} 637 (Hutton, L.), 641 (Saville, L.), 653 (Phillips, L.), 644 (Millett, L.) (“This immunity is not in issue in the present case. Senator Pinochet is not a serving head of state. If he were, he could not be extradited.”). This is a key distinction between immunities \textit{ratione materiae} and \textit{ratione personae}.

\textsuperscript{36} \textit{See Restatement (Third) of Foreign Relations Law of the United States} § 464 n.14 (AM. LAW INST. 1987); Yousuf, 699 F.3d at 774 (“immunity [\textit{ratione materiae}] stands on the foreign official’s actions, not his or her status, and therefore applies whether the individual is currently a government official or not.”); Matar v. Dichter, 563 F.3d 9, 14 (2d Cir. 2009) (“An immunity based on acts—rather than status—does not depend on tenure in office.”).
after the expiration of that senior official’s status-based immunity *ratione personae.*

Immunity *ratione personae* most clearly attaches to Heads of State, a linkage “premised on the construct that a state and its ruler are one for the purposes of immunity.” High officials, such as the Head of State, are thereby “regarded as the personal embodiment of the state itself.” In this context, the U.S. District Court for the Eastern District of New York articulated immunity *ratione personae* as an incident of sovereign immunity:

> This absolute form of immunity is based on the notion that all states are equal and that no one state may exercise judicial authority over another. The foreign head-of-state, as representative of his nation, enjoys extraterritorial status when travelling abroad because he would not intend to subject himself to a jurisdiction incompatible with his dignity, and the dignity of his nation.

The ICJ considered the scope of immunity *ratione personae* in the *Arrest Warrant of 11 April 2000* case as extending to “certain holders of high-ranking office in a State, such as the Head of State, Head of Government and Minister of Foreign Affairs,” in the same sense that diplomatic agents enjoy personal immunity. The ICJ also considered immunity *ratione personae* to be subject to certain limitations: (1) it cannot shield an official from prosecution in his home country, (2) it may be waived by the official’s home State, (3) it terminates at the end of an official’s tenure, and (4) an individual enjoying such immunity may nevertheless be subject to the jurisdiction of “certain international criminal courts.”

The next part considers the interaction of *jus cogens* with immunity *ratione personae* in three domains: criminal prosecution before interna-

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37. *Arrest Warrant of 11 April 2000* (Dem. Rep. Congo v. Belg.), 2002 I.C.J. 3, ¶ 60 (Feb. 4) (“Impunity from criminal jurisdiction and individual criminal responsibility are quite separate concepts. While jurisdictional immunity is procedural in nature, criminal responsibility is a question of substantive law. Jurisdictional immunity may well bar prosecution for a certain period or for certain offences; it cannot exonerate the person to whom it applies from all criminal responsibility.”) (emphasis added).
42. *Id.,* ¶ 61.
tional courts, criminal prosecution before domestic courts, and civil proceedings before domestic courts. This jurisprudence indicates that immunity *ratione personae*, though absolute when applied, is not absolutely applied. It further suggests that immunity *ratione personae* hails from sovereignty as *equality*, which resonates with the underling *par in parem non habet imperium* principle. The principle—that there exists no power amongst equals—is implicated by domestic proceedings in a way it is not with respect to international fora. It is likely for this reason that the application of immunity *ratione personae* in civil domestic proceedings mirrors its application in criminal prosecution at the domestic level, yet does not apply in prosecution at the international level.

### A. International Criminal Prosecution

Generally, immunity *ratione personae* may only be limited by the State from which that immunity derives; however, one notable exception to that principle is international criminal prosecution. As noted by the ICJ in the *Arrest Warrant* case:

> [Immunity *ratione personae* does] not represent a bar to criminal prosecution in certain circumstances. First, such persons enjoy no criminal immunity under international law in their own countries, and may thus be tried by those countries’ courts in accordance with the relevant rules of domestic law. Secondly, they will cease to enjoy immunity from foreign jurisdiction if the State which they represent or have represented decides to waive that immunity. Thirdly, after a person ceases to hold the office . . . he or she will no longer enjoy all of the immunities accorded by international law in other States . . . Fourthly, [such officials] may be subject to criminal proceedings before certain international criminal courts, where they have jurisdiction.

It is uncontroversial that the State may waive *sua sponte* the immunity *ratione personae* enjoyed by its senior officials to confer jurisdiction to international criminal courts. The Foreign Minister of Côte d’Ivoire

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did just that with respect to Laurent Gbagbo, Côte d’Ivoire’s now-former President. The waiver conveyed jurisdiction over crimes committed in 2004 and 2010 and “specifically confirm[ed] the acceptance by the Republic of Côte d’Ivoire of the International Criminal Court’s (ICC) jurisdiction as regards crimes allegedly committed” by Gbagbo. Such waiver, alongside the Article 27 waiver by parties to the Rome Statute, hails in State consent. However, the final limit to immunity rinsione personae articulated by the ICJ in Paragraph 61 of the Arrest Warrant case, quoted immediately above, suggests a profound development in the interaction between jus cogens and immunities. The inapplicability of immunity rinsione personae to international court proceedings stands in contrast to the general rule that this immunity applies in domestic court proceedings. Three examples illustrate the way in which international juridical organs have asserted jurisdiction over high State officials enjoying immunity rinsione personae in the absence of a consent-based waiver: the proceedings against Charles Taylor, Moammar Qaddafi, and the Arrest Warrant issued for Omar Al-Bashir.

On March 7, 2003, the Prosecutor of the Special Court for Sierra Leone (SCSL) issued an indictment for Charles Taylor, the incumbent Head of State of Liberia, for crimes against humanity and war crimes (jus cogens violations) committed in Sierra Leone during the civil war in that State. In June of that year, the Prosecutor unsuccessfully sought

46. Id.

1. This Statute shall apply equally to all persons without any distinction based on official capacity. In particular, official capacity as a Head of State or Government, a member of a Government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility under this Statute, nor shall it, in and of itself, constitute a ground for reduction of sentence.
2. Immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person.
49. See Prosecutor v. Taylor, Judgment, Case No. SCSL-03-01-T-1283, ¶ 6994(a) (Special Ct. for Sierra Leone May 18, 2012).
Taylor’s arrest by Ghana, where he was visiting for peace talks, and subsequently by Nigeria, which granted Taylor asylum. Prior to his arrest on July 23, 2003, Taylor moved to quash his indictment and set aside the Special Court’s outstanding arrest warrant on the ground that he was an “incumbent Head of State of the sovereign Republic of Liberia and was therefore immune from any exercise of the Court’s jurisdiction.” The Appeals Chamber of the Special Court disagreed, invoking the fourth limit to immunity *ratione personae* articulated by the ICJ in the Arrest Warrant case: “the principle seems now established that the sovereign equality of states does not prevent a Head of State from being prosecuted before an international criminal tribunal or court.”

The consent of the State in this instance may be taken to be an implied form of waiver, as the SCSL was formed through “an agreement between all members of the United Nations and Sierra Leone” under Resolution 1315. However, prosecution was ultimately justified on the basis that the SCSL was conceived as “an expression of the will of the international community.”

The arrest warrant for Sudanese President Omar Al-Bashir issued by the ICC provides a second illustration of the inapplicability of immunity *ratione personae* in international criminal proceedings. On March 31, 2005, the U.N. Security Council adopted Resolution 1593 under its Chapter VII authority to refer the situation in Sudan to the Prosecutor of the ICC. This was the first such referral by the Security Council. In Resolution 1593, the Security Council recalled Article 16 of the Rome Statute, which authorizes the ICC to undertake investigations pursuant to such referral and called on States to cooperate with the ICC. Following an investigation by the ICC Prosecutor, the Pre-Trial Chamber of the ICC issued two warrants for the arrest of Omar Al-Bashir, the sitting Head of State of Sudan. The first warrant, issued on July 14, 2009, stated that there were “reasonable grounds to believe that

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51. Prosecutor v. Taylor, Decision on Immunity from Jurisdiction, Case No. SCSL-03-01-I-059, ¶ 52 (Special Ct. for Sierra Leone May 31, 2004).
52. Id. ¶ 65; see also Decision Pursuant to Rome Statute, supra note 45.
53. Prosecutor v. Taylor, Decision on Immunity from Jurisdiction, Case No. SCSL-03-01-I-059, ¶ 37 (Special Ct. for Sierra Leone May 31, 2004).
54. Id.
56. Id. ¶ 2.
57. Prosecutor v. Al-Bashir, Case No. ICC-02/05-01/09-1, First Warrant of Arrest (Mar. 4, 2009); Prosecutor v. Al-Bashir, Case No. ICC-02/05-01/09-95, Second Warrant of Arrest (July 12, 2010).
Al-Bashir was criminally responsible under Article 25(3)(a) of the Rome Statute" for war crimes (two counts) and crimes against humanity (five counts) and that “his arrest appears to be necessary under Article 58(1)(b) of the Rome Statute.”

In disposing of the issue of immunity ratione personae, the Pre-Trial Chamber concluded that “the current position of Omar Al-Bashir as Head of a state which is not party to the Statute, has no effect on the Court’s jurisdiction over the present case.” The Chamber based this conclusion on four considerations: the “core goal of the Statute . . . to put an end to impunity,” the core principles articulated in Article 27(1) to achieve this end, the case law of the chamber, and the referral of the situation to the ICC by the Security Council. Only the final pillar of the Chamber’s reasoning suggests a source of authority outside the Rome Statute that might have legally significant effect on a non-State party. The Pre-Trial Chamber issued a second arrest warrant on July 12, 2010 that added three counts of genocide to the previous charges against Al-Bashir.

Proceedings at the ICC against Moammar Qaddafi offer a third illustration of the inapplicability of immunity ratione personae to international criminal proceedings. The U.N. Security Council adopted Resolution 1970 on February 26, 2011 to refer the situation in Libya to the ICC prosecutor pursuant to its directive “to hold to account those responsible for attacks, including by forces under their control, on civilians.” It was clear in the Libyan context that the ICC Prosecutor intended the issuance of arrest warrants to deter or impede ongoing violations of jus cogens norms through legal mechanisms by removing senior officials who would otherwise enjoy immunity ratione personae.

Arresting those who ordered the commission of crimes will contribute to the protection of civilians in Libya because it will deter ongoing crimes. It will deter crimes by removing those who...
ordered the crimes, and by sending a serious message to other potential perpetrators, in Libya and in other situations, that the international community will not condone such crimes.footnote{63}

The First Report of the ICC Prosecutor focused “on those who bear the greatest responsibility for the most serious crimes,”footnote{64} namely Moammar Qaddafi (de facto Head of State of Libya), his eldest son Saif Al-Islam Qaddafi (de facto Prime Minister of Libya), and Abdullah Al-Sanousi (the head of Military Intelligence).footnote{65} Instead of contemplating the immunity \textit{ratione personae} of these officials, the international community appeared satisfied that the offences at issue justified the action taken by the Security Council and the ICC.footnote{66} The ICC Prosecutor brought the case against three named individuals before the Pre-Trial Chamber of the ICC in \textit{Prosecutor v. Muammar Mohammed Abu Minyar Gaddafi, Saif Al-Islam Gaddafi and Abdullah Al-Senussi}footnote{67} for various counts of crimes against humanity committed in February 2011.footnote{68}

The actions by the SCSL and ICC in the cases concerning Taylor, Al-Bashir, and Qaddafi indicate limitations to the immunity \textit{ratione personae} that would otherwise shield incumbent Heads of State. Prosecution before international criminal organs does not implicate the same sovereignty concerns underlying the principle \textit{par in parem non habet imperium} as does prosecution by the domestic courts of a foreign State.

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footnote{64}{First Rep. of the Prosecutor of the International Criminal Court, ¶ 25 (May 4, 2011).}
footnote{66}{U.N. SCOR, 66th Sess., 6491st mtg. at 5, U.N. Doc. S/PV.6491 (Feb. 26, 2011) (Statement by Mr. Osorio) (“Reconciliation will require the establishment of responsibility, confronting impunity and ensuring that those who commit or have committed crimes against humanity are brought to justice.”). \textit{See also} Press Release, General Assembly, General Assembly Suspends Libya from Human Rights Council, Statement by Néstor Osorio, U.N. Doc. GA/11050 (Mar. 1, 2011); U.N. Secretary-General, Secretary-General’s Remarks to the General Assembly on Libya (Mar. 1, 2011) (“[T]here is no impunity . . . those who commit crimes against humanity will be punished, [and] fundamental principles of justice and accountability shall prevail.”).}
footnote{67}{Prosecutor v. Gaddafi,Case No. ICC-01/11-01/11-I, Decision on the “Prosecutor’s Application Pursuant to Article 58 as to Muammar Mohammed Abu Minyar Gaddafi, Saif Al-Islam Gaddafi and Abdullah Al-Senussi,” ¶ 4 (June 27, 2011).}
footnote{68}{Id. Moammar Qaddafi was killed on October 20, 2011; Saif Al-Islam Qaddafi was captured fleeing Libya on November 19, 2011 and faces prosecution in Libya; Al-Senussi was apprehended in Mauritania on March 17, 2012, and faces extradition requests by Libya and France, as well as a request for surrender by the ICC. \textit{See} Third Rep. of the Prosecutor of the International Criminal Court, ¶¶ 14-30 (May 16, 2012).}
Even so, sovereignty considerations are not entirely alleviated by the involvement of international fora. In the *Al-Bashir* case, for example, each arrest warrant issued by the Pre-Trial Chamber directed the ICC registry to transmit “a request for cooperation seeking the arrest and surrender” of Al-Bashir to Sudanese authorities pursuant to rule 176(2) “to all States Parties to the Statute and all the United Nations Security Council members that are not States Parties to the Statute.” Further, the ICC Registrar was directed “to prepare and transmit to any other State any additional request for arrest and surrender which may be necessary.”\(^{69}\) In the context of immunity *ratione personae*, such an order must be reconciled with Article 98 of the Rome Statute, which bars the ICC from issuing “a request for surrender or assistance which would require the requested State to act inconsistently with its obligations under international law with respect to the State or diplomatic immunity of a person or property of a third State, unless the Court can first obtain the cooperation of that third State for the waiver of the immunity.”\(^{70}\) This article contains a parallel provision respecting obligations arising under international agreements.\(^{71}\) In this context, it would seem to depend upon a waiver of immunity for execution of the warrants by national authorities to conform to immunity *ratione personae* under customary international law.

To be sure, the arrest warrants issued by the SCSL and ICC are distinct from the Belgian arrest warrant at issue in the *Arrest Warrant* case by virtue of the source of the warrant: an international judicial organ rather than a domestic court. However, they do not differ in terms of their treatment of the immunity *ratione personae* normally enjoyed by the subjects of those arrest warrants. The distinguishing feature appears to relate to forum rather than consent. The ICC is an institution independent from the U.N.;\(^{72}\) membership to the U.N. does

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70. Rome Statute, supra note 47, at art. 98(1).

71. Id. at art. 98(2).


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not imply consent to the jurisdiction of the ICC.\textsuperscript{73} If referral of a situation to the ICC by the Security Council is sufficient to waive immunity \textit{ratione personae}, then the Chapter VII power of the Security Council would impliedly include the power to remove immunity \textit{ratione personae} absent the consent (constructive or otherwise) of the State in question.\textsuperscript{74} The ICC Pre-Trial Chamber II seems to have adopted this very reasoning in its 2014 finding of non-cooperation against the Congo in the \textit{Al-Bashir} case, determining that “the cooperation envisaged in [Resolution 1593] was meant to eliminate any impediment to the proceedings before the Court, including the lifting of immunities.”\textsuperscript{75} Vesting the Security Council with such power to abrogate an immunity considered to be “an extension of the immunity of the foreign state”\textsuperscript{76} calls into question the “principle of the sovereign equality of all its Members” upon which the U.N. Organization is based,\textsuperscript{77} to which the doctrine of sovereign immunity gives effect.

On a practical level, it is unclear how States might comply with a

\begin{itemize}
  \item \textsuperscript{73} See Rome Statute, \textit{supra} note 47, at pmbl. (“The States Parties to this Statute . . . establish an independent permanent International Criminal Court in relationship with the United Nations system, with jurisdiction over the most serious crimes of concern to the international community as a whole . . . the court shall be governed by the provisions of this Statute . . .”).
  \item \textsuperscript{74} \textit{Id.} at art. 13. Article 13 provides three avenues by which the ICC may exercise its jurisdiction: (a) referral of a situation to the Prosecutor by a State Party, (b) referral by the Security Council acting under Chapter VII of the U.N. Charter, or (c) \textit{proprio motu} investigation by the ICC Prosecutor. Because the ICC is a treaty body of the Rome Statute, the authority granted to States Parties and the Prosecutor under the Statute would necessarily be limited to States parties to the Statute. The Chapter VII authority of the Security Council introduces a source of authority external to the Rome Statute with the power to subject non-parties to jurisdiction of the Rome Statute, because Chapter VII actions by the Security Council are binding upon all U.N. member States, and many members of the U.N. are not States parties to the Rome Statute. Since States not parties to the Rome Statute have not waived the immunity of its officials before the ICC under Article 27 of the Statute, an alternative explanation is required for the non-recognition of immunity \textit{ratione personae}, given that the ICC can establish jurisdiction over individuals acting on behalf of non-States parties. See discussion \textit{infra} text accompanying note 85; Dapo Akande, \textit{The Jurisdiction of the International Criminal Court over Nationals of Non-Parties: Legal Basis and Limits}, 1 J. Int’l Crim. Just. 618, 635 (2003).
  \item \textsuperscript{75} Prosecutor v. Al-Bashir, Case No. ICC-02/05-01/09-195, Decision on the Cooperation of the Democratic Republic of the Congo Regarding Omar Al-Bashir’s Arrest and Surrender to the Court, ¶ 29 (Apr. 9, 2014).
  \item \textsuperscript{76} \textit{See Restatement (Second) of Foreign Relations Law of the United States} § 66 (Am. Law Inst. 1965) (“The immunity of a foreign state . . . extends to . . . its head of state.”).
\end{itemize}
warrant to arrest and surrender a sitting Head of State while respecting that official’s immunity *ratione personae.* Absent a waiver by Liberia, Sudan, or Libya disclaiming immunity *ratione personae* of their respective Heads of State, the execution of those warrants by national authorities would appear to raise the same concerns of sovereign immunity implicated in the *Arrest Warrant* case. However, if such arrest warrants and requests for assistance are consistent with Article 98 of the Rome Statute in the case of warrants issued by the ICC, then State cooperation must be conceived to be consistent with the immunities of such officials. As the principle of complementarity calls for cooperation between domestic legal orders and the international court, parsing domestic and international juridical processes is insufficient to alleviate this tension. Reframing such warrants as imposing obligations only upon the respective official’s State is refuted by the object and purpose of such requests that call on States broadly to cooperate in the detention and surrender of officials enjoying immunity *ratione personae.*

The notion that arrest and extradition is, in any instance, consistent with immunity *ratione personae* is at odds with the basic purpose of that immunity—to shield high officials from foreign judicial process. The ability of the Security Council to “lift” immunity *ratione personae* with respect to other domestic legal orders is deeply problematic.

Any suggestion that international arrest warrants are conceived to be

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78. *Contra* Dapo Akande, *supra* note 74, at 642 (“[T]he ICC may not request ICC parties to arrest and surrender those senior state officials of non-parties possessing immunity *ratione personae*.“).


80. See, e.g., *Arrest Warrant of 11 April 2000 (Dem. Rep. Congo v. Belg.),* 2002 I.C.J. 3, ¶ 17 (Feb. 4) (dissenting opinion by Van Den Wyngaert, J.) (“The jurisdiction of an International Criminal Court, set up by the Rome Statute, is moreover conditioned by the principle of complementarity: primary responsibility for adjudicating war crimes and crimes against humanity lies with the States. The International Criminal Court will only be able to act if States which have jurisdiction are unwilling or unable genuinely to carry out investigation or prosecution (Art. 17 [of the Rome Statute]).”); Rome Statute, *supra* note 47, at art. 1 (“the International Criminal Court established under this Statute shall be complementary to national criminal jurisdictions.”).


82. Ye v. Zemin, 383 F.3d 620 (7th Cir. 2004) (“[The] determination that a foreign leader should be immune from suit even when the leader is accused of acts that violate *jus cogens* . . . includes the power to preclude service of process. . . . ”).

limited in any meaningful way by immunity *ratione personae* was decidedly refuted in the *Qaddafi* case. The ICC Prosecutor indicated that the court was “acting in real time,” suggesting an exercise of law-enforcement-type capacities by the ICC.\(^{84}\) To this end, the ICC openly relied upon States to detain and transfer the individuals for whom it had issued arrest warrants.\(^{85}\) Comments by members of the Security Council after adopting Resolution 1593, which referred the situation in Darfur to the ICC Prosecutor, were similarly revealing. The United States delegation maintained that, “absent consent of the State involved, any investigations or prosecutions of nationals of non-party States should come only pursuant to a decision by the Council.”\(^{86}\) By this reasoning, the Chapter VII authority of the Security Council includes the power to strip an official of immunity *ratione personae*, a position at odds with the principle of sovereignty underlying the U.N. Charter.\(^{87}\) The French delegation issued a more revealing statement, stating in part:

> The Council had sent a strong message to all those in Darfur who had committed or were tempted to commit atrocious crimes, and to the victims. The international community would not allow those crimes to remain unpunished. It also marked a turning point and sent a message farther than Darfur. His delegation had been ready to acknowledge immunity from the ICC for nationals from States not party to the Rome Statute.\(^{88}\)

Rather than conceiving the action against Al-Bashir in terms of the authority of the Security Council, France emphasized that the nature of the offences in question and the will of the international community to ensure accountability for such violations was the basis of the denial of immunity. According to either understanding, the international arrest warrants and subsequent criminal proceedings against Taylor, Al-

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84. Prosecutor of the International Criminal Court, ICC Prosecutor Presents his Findings in Libya, 1 (May 16, 2011).


87. See *Rome Statute*, *supra* note 47, at art. 13(b).

Bashir, and Qaddafi suggest that immunity *ratione personae* does not apply for violations of *jus cogens* in proceedings instituted by international judicial organs such as the ICC. The presumptive execution of these warrants by national authorities raises serious questions regarding the scope of immunity *ratione personae* for international crimes where proceedings are instituted by international courts.

**B. Criminal Prosecution before Domestic Courts**

In contrast to criminal proceedings instituted by international courts, there is no evidence that *jus cogens* violations affect immunity *ratione personae* for criminal prosecution before domestic courts. As the ICJ has observed, “in international law it is firmly established that . . . certain holders of high-ranking offices in a state . . . enjoy immunities from jurisdiction in other states.”

While the authoritative illustration of this principle is the *Arrest Warrant* case decided by the ICJ in 2002, this decision followed two other decisions by national high courts articulating the same underlying principle: the 1999 *Pinochet* case before the U.K. House of Lords, and the 2001 *Gaddafi* decision by the French Court of Cassation.

In *Pinochet*, the U.K. House of Lords determined Augusto Pinochet, the former President of Chile, could be extradited to Spain and prosecuted for crimes arising from *jus cogens* violations during his term in office. The Law Lords noted that, had Senator Pinochet held office at the time of the litigation, his immunity *ratione personae* would have precluded the British courts from asserting jurisdiction. Lord Phillips succinctly articulated the presumptive effect of immunity *ratione personae*.

If Senator Pinochet were still the head of state of Chile, he and Chile would be in a position to complain that the entire extradition process was a violation of the duties owed under international law to a person of his status. A head of state on a visit to another country is inviolable. He cannot be arrested or detained, let alone removed against his will to another country, and he is not subject to the judicial processes, whether civil or

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90. *Id.*
94. *Id.* at 641 (Saville, L.), 644 (Millet, L.), 653 (Phillips, L.).
criminal, of the courts of the state that he is visiting. But Senator Pinochet is no longer head of state of Chile.\textsuperscript{95} Thus, the Law Lords clearly perceived that immunity \textit{ratione personae} would have precluded proceedings against Senator Pinochet before British courts for international crimes arising from \textit{jus cogens} violations.\textsuperscript{96} The French Court of Cassation, the highest court of the French judicial system, reached a similar conclusion in the \textit{Gaddafi} case the following year. The \textit{Gaddafi} case concerned the 1989 bombing of a civilian airliner above Chad, killing 170 people including a number of French citizens.\textsuperscript{97} Following a judgment against six Libyan nationals tried \textit{in absentia}, criminal proceedings were initiated against Colonel Gaddafi alleging his involvement in the act of terrorism.\textsuperscript{98} Before reaching the Court of Cassation, the Court of Appeal of Paris concluded in its 2000 judgment that so-called Head of State immunity does not apply in cases concerning violations of \textit{jus cogens}.\textsuperscript{99} Recalling the prosecutions of Pinochet and Noriega, the Court of Appeal observed that:

\begin{quotation}
[I]t appears that since 1945 the international community has provided for the prosecution of Heads of State in office committing international crimes and the International Court of Justice has even considered that the prosecution of such acts is based on a binding universally applicable norm of \textit{jus cogens}, pursuant to Article 5[3] of the Vienna Convention on the Law of Treaties.\textsuperscript{100}
\end{quotation}

The Court of Cassation reversed the judgment of the Court of Appeal and terminated the proceeding because customary international law precluded incumbent Heads of State from criminal prosecution by domestic courts of other States in the absence of binding, specific provisions to the contrary.\textsuperscript{101} The court concluded “the alleged crime, however serious, did not constitute one of the exceptions to the

\begin{quotation}
95. \textit{Id.} at 653 (Phillips, L.).
96. \textit{Id.}
98. \textit{Id.}
99. \textit{Id.} at 491.
100. \textit{Id.} at 496.
101. \textit{Id.} at 509.
\end{quotation}

principle of the jurisdictional immunity of foreign Heads of State in office.”

Because the Court of Cassation disposed of the case on the basis of immunity ratione personae, it did not reach the question of whether Gaddafi enjoyed functional immunity for the jus cogens violations in question.

In the Arrest Warrant case decided the following year, the ICJ delineated the parameters of the immunity ratione personae articulated in the Pinochet and Gaddafi cases. The case concerned the legality of an international arrest warrant issued in absentia by a Belgian investigating magistrate against the incumbent Minister of Foreign Affairs of the Congo, Abdu aye Yerodia Ndombasi. The warrant was issued pursuant to a Belgian universal jurisdiction statute for alleged grave breaches of the 1949 Geneva Conventions and the Additional Protocols and crimes against humanity; it was circulated through Interpol. The ICJ held that Ndombasi, as the incumbent Foreign Minister, enjoyed “immunity from criminal jurisdiction and . . . inviolability” from prosecution and made no distinction between official acts and acts outside of Ndombasi’s official conduct. This immunity shielded Ndombasi notwithstanding that the conduct in question violated jus cogens and constituted international crimes. The ICJ held that Belgium’s circulation of an arrest warrant for Ndombasi constituted an internationally wrongful act, and ordered Belgium to cancel the warrant despite the fact that Ndombasi had left office by the time the court rendered its decision. The Court of Cassation of Belgium subsequently recognized that the immunity ratione personae of Ariel Sharon, the sitting Prime Minister of Israel, rendered prosecution under Belgium’s universal jurisdiction statute inadmissible.

102. Id.
103. See Salvatore Zappalà, Do Heads of State in Office Enjoy Immunity from Jurisdiction for International Crimes? The Ghaddafi Case before the French Cour de cassation, 12 Eur. J. INT’L L. 595, 611-12 (2001) (arguing that the Court of Cassation should have also concluded that Gaddafi did not enjoy functional immunity ratione materiae for the conduct at issue).
105. Id. ¶¶ 13-15.
106. Id. ¶ 51.
107. Id. ¶¶ 54-55.
108. Id. ¶ 71.
109. Id. ¶ 76.
110. See Zappalà, supra note 103, at 600.
Judicial authority indicates that immunity *ratione personae* prevails as a rule of customary international law in domestic courts for the prosecution of international crimes. This illustrates that the principles at the heart of sovereign immunity, *par in parem non habet imperium*, endures at the national level to preclude incumbent high officials from appearing before domestic courts notwithstanding the offenses with which they are accused. The divergence in application of immunity *ratione personae* between domestic and international criminal proceedings for *jus cogens* violations suggests that sovereign immunity is a peculiarly inter-State principle that is not absolute. Chronologically, the development of international juridical organs such as a permanent international criminal court might be seen as an institutional response to the immunity of incumbent high officials from foreign domestic prosecution. Short of such correlation, international fora at least provide prosecutorial organs free from the especially political concerns that surround such proceedings before domestic courts. The divergence between the *Pinochet* dicta,112 *Gaddafi* (I) case,113 and *Arrest Warrant* decision by the ICJ,114 and the three cases discussed in Part IV.A—*Taylor*,115 *Al-Bashir*,116 and *Qaddafi* (II)117—suggest a branch point in the application of immunity *ratione personae*, whose parameters remain to be completely determined. In any event, domestic attempts to prosecute sitting high officials for *jus cogens* violations have waned with the emergence of international juridical organs competent to undertake such proceedings.

C. Civil Proceedings before Domestic Courts

The recognition of immunity *ratione personae* in civil proceedings for *jus cogens* violations before domestic courts has mirrored its application in domestic criminal proceedings of incumbent high officials. U.S. law is fairly unique in providing express jurisdiction over civil claims by

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aliens for conduct amounting to *jus cogens* violations under the Alien Tort Statute (ATS). Yet, even in this context, the application of immunity *ratione personae* prevails. Federal courts of the United States deciding claims under the ATS have consistently recognized immunity *ratione personae* to shield high State officials for proceedings for damages arising from *jus cogens* violations: immunity *ratione personae* was applied in cases concerning Jean-Bertrand Aristide (sitting President of Haiti), Robert Mugabe and Stan Mudenge (sitting President and Foreign Minister of Zimbabwe, respectively), Jaing Zemin (sitting President of China), Ariel Sharon (sitting Prime Minister of Israel), and Paul Kagame (sitting President of Rwanda) from civil claims for violations of *jus cogens* norms. In recognizing immunity *ratione personae*, U.S. courts have clearly distinguished domestic civil proceedings from international criminal proceedings. As the U.S. District Court for the District of Columbia recently observed, “[t]he application of immunity by international tribunals in criminal cases is irrelevant to the question of how individual nations treat each others’

118. 28 U.S.C. § 1350 (“The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.”). See Kiobel v. Royal Dutch Petroleum Co., 621 F.3d 111, 115 (2d Cir. 2010) aff’d, 133 S. Ct. 1659 (2013) (describing ATS as “a jurisdictional provision unlike any other in American law and of a kind apparently unknown to any other legal system in the world.”). This is notwithstanding *action civile* common to civil law systems: see discussion infra text accompanying notes 280-82.


120. Tachiona v. Mugabe, 169 F. Supp. 2d 259, 316-17 (S.D.N.Y. 2001) *aff’d in part, rev’d in part and remanded sub nom*. Tachiona v. United States, 386 F.3d 205 (2d Cir. 2004). The U.S. District Court for the Southern District of New York initially found Mugabe and Mudenge protected by immunity *ratione personae* from charges including torture and terrorism; the Second Circuit determined diplomatic immunity sufficient to reject the claim, not reaching question of immunity *ratione personae*.

121. Ye v. Zemin, 383 F.3d 620, 625-27 (7th Cir. 2004) (“The Executive Branch’s determination that a foreign leader should be immune from suit even when the leader is accused of acts that violate *jus cogens* norms is established by a suggestion of immunity.”).

122. Doe I v. State of Israel, 400 F. Supp. 2d 86, 105, 111 (D.D.C. 2005) (“*Jus cogens* violations, without more, do not constitute an implied waiver of . . . immunity . . . . Defendant Sharon is the recognized head of state for Israel, and . . . he is entitled to immunity under the head-of-state doctrine.”).

123. Habyarimana v. Kagame, 696 F.3d 1029, 1032 (10th Cir. 2012) *cert. denied*, 133 S. Ct. 1607 (2013) (“We must accept the United States’ suggestion that a foreign head of state is immune from suit—even for acts committed prior to assuming office—as a conclusive determination by the political arm of the Government that the continued [exercise of jurisdiction] interferes with the proper conduct of our foreign relations.” (internal citations omitted)).
D. Sovereignty as Equality

This final point by the district court—that the application of immunity by international criminal tribunals is irrelevant to the application of immunity in domestic proceedings—is insightful because it casts sovereign immunity as a matter of inter-State relations, based in comity, that has crystallized as customary international law. For this reason, it is likely that the treatment of immunity ratione personae in civil domestic proceedings mirrors its application in criminal prosecution at the domestic level, yet departs from prosecution at the international level. The principle that there exists no power amongst equals (par in parem non habet imperium) is implicated by domestic proceedings in a way it is not with respect to international fora. As a matter of principle, therefore, it seems that applicability of immunity ratione personae depends upon the type of forum—domestic as opposed to international—rather than the nature of the proceeding in question—civil or criminal.

If jurisprudence continues to develop along this trajectory, then the development of international criminal organs with competence to prosecute sitting officials who would otherwise enjoy immunity marks a critical benchmark in the interaction of jus cogens and sovereign immunity. This jurisprudence indicates that immunity ratione personae, though absolute when applied, is not absolutely applied. It further suggests that immunity ratione personae hails from sovereignty as equality, which resonates with the underlying par in parem non habet imperium principle. This provides a coherent explanation as to why international judicial organs, such as the SCSL and ICC, might prosecute sitting Heads of State, while domestic courts in the United Kingdom, France, and Belgium would be precluded from commencing those same proceedings. The contrast between the 2001 Gaddafi case before the French Court of Cassation and the 2011 proceedings instituted before the ICC casts this point in sharp relief. The status and commensurate immunity of the official targeted had not changed, but the forum was crucially different. This supports the proposition that sovereign immunity, at least with respect to jus cogens violations, is an inter-State principle that does not apply to proceedings before interna-


125. See Kolodkin, supra note 43, ¶ 63 n.141 (“[I]mmunity derives from the principle of the sovereign equality of States . . . .”).
tional fora where sovereign equality is not at issue.

Without question, this recasting of sovereign immunity marks an erosion of the protection from personal jurisdiction afforded to high State officials by immunity *ratione personae*. Immunities are conceived to benefit the State, by shielding officials acting on its behalf, and the international community, by ensuring harmonious relations amongst its members; the individual is strictly not the legal beneficiary of such immunities.126 The Law Lords in *Pinochet* quoted from *Oppenheim’s International Law* to place these developments in the doctrine of immunity into context:

While no general rule of positive international law can as yet be asserted which gives to states the right to punish foreign nationals for crimes against humanity in the same way as they are, for instance, entitled to punish acts of piracy, there are clear indications pointing to the gradual evolution of a significant principle of international law to that effect. That principle consists both in the adoption of the rule of universality of jurisdiction and in the recognition of the supremacy of the law of humanity over the law of the sovereign state when enacted or applied in violation of elementary human rights in a manner which may justly be held to shock the conscience of mankind.127

This passage recalls that the State is not an abstract entity but a community of human beings.128 Protection of international criminals such as Al-Bashir and Qaddafi from international scrutiny under the guise of State dignity is an affront to the citizens against whom grave violations of human rights are perpetrated. As State sovereignty is increasingly viewed to be contingent upon respect for certain values common to the international community, it is perhaps unsurprising that bare sovereignty is no longer sufficient to absolutely shield high officials from prosecution for *jus cogens* violations. The extent to which sovereignty-based immunity defenses will be available in the future to high officials alleged to commit *jus cogens* violations was called into question by the U.S. District Court in the *Mugabe* case:


128. In a related sense, the State is not the proper subject of criminal responsibility: see discussion *infra* Section V(a).
These precedents instruct that resort to head-of-state and diplomatic immunity as a shield for private abuses of the sovereign’s office is wearing thinner in the eyes of the world and waning in the cover of the law. The prevailing trend teaches that the day does come to pass when those who violate their public trust are called upon, in this world, to render account for the wrongs they inflict on innocents.129

Proceedings against Charles Taylor, Omar Al-Bashir, and Moammar Gadhafi indicate a limitation of immunity ratione personae, yet the extent of this limitation is not yet fully formed. To be sure, it would go too far to conclude at present that there is no longer any sovereign immunity for jus cogens violations.130 However, it remains an open question whether the institutional, forum-based qualification of immunity ratione personae marks an end-point, or simply one stage in an evolving interplay between jus cogens and sovereign immunity. That international courts have recently issued a series of warrants calling on States to arrest and extradite individuals enjoying immunity ratione personae suggests dynamism rather than stasis.

V. IMMUNITY RATIONE MATERIAE

Immunity ratione materiae is an element of sovereign immunity according to which State officials are exempt from prosecution for official acts attributable to the State.131 The State is entitled to claim such acts as its own, “so that the individual organ may not be held accountable for those acts or transactions.”132 In effect, “sovereign immunity, which belongs to a foreign state, extends to an individual official acting on behalf of that foreign state.”133 This “official acts” or “functional”


130. ALEXANDER ORAKHELASHVILI, PEREMPTORY NORMS IN INTERNATIONAL LAW 344, 358 (2006) (suggesting immunity cannot apply in proceedings for jus cogens violations); Bianchi, supra note 126, at 261.

131. HAZEL FOX, THE LAW OF STATE IMMUNITY 455 (2d ed. 2004) (“The doctrine of imputability of the acts of the individual to the State . . . in classical law . . . imputes the act solely to the state, who alone is responsible for its consequences. In consequence any act performed by the individual as an act of the State enjoys the immunity which the State enjoys.”).


immunity is necessary to prevent the immunity of the State from circumvention by simply suing a named official in place of the State itself. In Prosecutor v. Blaškić, the ICTY Appeals Chamber articulated with clarity the rationale underlying immunity *ratione materiae*.

[State] officials are mere instruments of a State and their official action can only be attributed to the State. They cannot be the subject of sanctions or penalties for conduct that is not private but undertaken on behalf of a State. In other words, State officials cannot suffer the consequences of wrongful acts which are not attributable to them personally but to the State on whose behalf they act: they enjoy so-called “functional immunity”. This is a well-established rule of customary international law going back to the eighteenth and nineteenth centuries, restated many times since.\(^\text{135}\)

The implicit corollary of this reasoning is that an official is not protected by sovereign immunity for conduct exceeding the scope of his official duty: acts in which “the officer purports to act as an individual and not as an official, [such that] a suit directed against that action is not a suit against the sovereign.”\(^\text{137}\) By contrast to immunity *ratione personae*, which is immunity from personal jurisdiction, *ratione materiae* is a form of immunity from subject-matter jurisdiction that is conduct-based rather than office-based and, as such, attaches to conduct attributable to the State even after an individual’s official status terminates.\(^\text{138}\) Thus, while immunity *ratione personae* is limited by tenure in office, immunity *ratione materiae* is limited to official acts performed


\(^{136}\) Jones v. United Kingdom, 2014-II Eur. Ct. H.R. ¶ 205 (“It is clear from the foregoing that individuals only benefit from State immunity *ratione materiae* where the impugned acts were carried out in the course of their official duties.”).

\(^{137}\) Chuidian v. Philippine Nat’l Bank, 912 F.2d 1095, 1106 (9th Cir. 1990) (internal quotation marks omitted).

by State officials in their official capacity.139

Certain criminal acts are typically characterized to fall outside the scope of official conduct as acts, by definition, not sanctionable by the sovereign, even where such acts are carried out “under the color of law.”140 Consequently, acts outside the authority of the State are not properly attributed to the State for the purposes of State responsibility,141 and, therefore, the sovereign immunity of the State does not extend to confer immunity ratione materiae to such conduct.142 In U.S. domestic jurisprudence, this concept was expressed by the Supreme Court in United States v. Lee, an 1882 decision permitting suit against a federal official where the conduct in question, an unconstitutional taking, fell beyond the Constitutional authority of the federal government and thereby enjoyed no sovereign immunity.143 This same prin-

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140. See, e.g., In re Doe, 860 F.2d 40, 45 (2d Cir. 1988) (“[W]here we to reach the merits of the issue, we believe there is respectable authority for denying head-of-state immunity to a former head-of-state for private or criminal acts in violation of American law.”).

141. Report of the Commission to the General Assembly on the Work of Its Fifty-Third Session, [2001] 2 Y.B. Int’l Comm’n 2, U.N. Doc. A/CA.4/SER.A/2001, art. 2 (“Elements of an Internationally Wrongful Act of a State: There is an internationally wrongful act of a State when conduct consisting of an action or omission: (a) is attributable to the State under international law; and (b) constitutes a breach of an international obligation of the State”); art. 5 (“Conduct of persons or entities exercising elements of governmental authority: The conduct of a person or entity which . . . is empowered by the law of that State to exercise elements of the governmental authority shall be considered an act of the State under international law, provided the person or entity is acting in that capacity in the particular instance.” (emphasis added)).

142. See, e.g., CrimA 336/61 Attorney-General v. Eichmann, translated in 36 I.L.R. 277, 310 (1962) (Isr.) (“Of such heinous acts it must be said that they are completely outside the ‘sovereign’ jurisdiction of the state that ordered or ratified their commission, and therefore those who participated in such acts must personally account for them and cannot seek shelter behind the official character of their task or mission, or behind the ‘Laws’ of the state by virtue of which they purported to act . . . . In other words, international law postulates that it is impossible for a state to sanction an act that violates its severe prohibitions, and from this follows the idea which forms the core of the concept of ‘international crime . . . .’”).

143. United States v. Lee, 106 U.S. 196, 220, 222-23 (1882) (“No man in this country is so high that he is above the law. No officer of the law may set that law at defiance with impunity. All the officers of the government, from the highest to the lowest, are creatures of the law and are bound to obey it. It is the only supreme power in our system of government, and every man who by accepting office participates in its functions is only the more strongly bound to submit to that supremacy, and to observe the limitations which it imposes upon the exercise of the authority which it gives.”). See also Ex parte Young, 209 U.S. 123, 159-60 (1908) (rejecting an attempt by Edward Young, Attorney General of Minnesota, to claim “official acts” immunity for unconstitutional conduct. The Court held that “[t]he act to be enforced is alleged to be unconstitutional;
ciple, well established at the domestic level, has been applied as a matter of international law to violations of *jus cogens* and international crimes. These grave violations of international law fall beyond the official capacity of State officials and, as such, are not protected from international or domestic criminal jurisdiction by immunity *ratione materiae* because they cannot be sanctioned by the sovereign.\(^{144}\) Consequently, as the ICTY Appeals Chamber also noted in *Blaskić*, “those responsible for such crimes cannot invoke immunity from national or international jurisdiction even if they perpetrated such crimes while acting in their official capacity.”\(^ {145}\)

Because of its relation to substantive law,\(^ {146}\) immunity *ratione materiae* has been characterized as “a substantive defense from liability” rather than a procedural defense on jurisdiction.\(^ {147}\) In the United States, the Supreme Court has applied this approach when contemplating the immunity of U.S. officials.\(^ {148}\) It is also reflected in recent determinations by the U.S. Department of State to suggest conduct-based immunity before domestic courts.\(^ {149}\) A substantive approach to immunity *ratione materiae* follows from the need to establish whether the conduct in question is “official” as a preliminary matter necessarily precedent to a determination of whether immunity attaches to such conduct.\(^ {150}\) The

\(^{144}\) Kolodkin *supra* note 43, ¶¶ 56-57 (“The viewpoint, whereby grave crimes under international law cannot be considered as acts performed in an official capacity, and immunity *ratione materiae* does not therefore protect from foreign criminal jurisdiction exercised in connection with such crimes, has become fairly widespread.”) (internal citations omitted).


\(^{146}\) See ANTONIO CASSESE, INTERNATIONAL CRIMINAL LAW, 303-04 (2d ed. 2008).


\(^{148}\) Id. (citing Gomez v. Toledo, 446 U.S. 635, 640-41 (1980)).

\(^{149}\) Id. (citing Letter of Harold Hongju Koh, Legal Advisor to U.S. Dep’t of State, to The Hon. Stuart F. Delery, Principal Deputy Assistant Att’y Gen., Civil Div., Dep’t of Just., Dec. 17, 2012, Re: Scherr v. Lashkar-e-Taiba et al., No 10-05381-DLI (E.D.N.Y.); Chroman v. Lashkar-e-Taiba et al., No. 10-05448-DLI (E.D.N.Y.); Ragsdale v. Lashkar-e-Taiba et al., No. 11-03893-DLI (E.D.N.Y.); Statement of Interest and Suggestion of Immunity, Rosenberg et al. v. Lashkar-e-Taiba et al., Civ. Nos. 10-10-05381-DLI, 10-05382 DLI, 10-05448-DLI, 11-03893 DLI, *10 (filed Dec. 17, 2012) [sic]).

\(^{150}\) This operation of immunity *ratione materiae* in civil judicial proceedings does not raise “practical difficulties” peculiar to *jus cogens*. The concern is that “simply because the plaintiffs
alternative to this substantive approach to immunity *ratione materiae* would transform such immunity for official acts into a form of immunity *ratione personae* that would bar any consideration of the conduct at issue when determining applicability of immunity *ratione materiae* to a State official.

Paralleling the discussion in Part IV above, the following segments address the interaction of *jus cogens* and sovereign immunity in the application of immunity *ratione materiae* in three areas: criminal prosecution before international judicial bodies, criminal prosecution before domestic courts, and civil proceedings before domestic courts.

### A. International Criminal Prosecution

Since the end of the Second World War, international law has denied immunity *ratione materiae* in the prosecution of international crimes before international courts and tribunals.\(^{151}\) Article 7 of the Nuremberg Charter provided that “[t]he official position of defendants, whether as Heads of State or responsible officials in Government Departments, shall not be considered as freeing them from responsibility or mitigating punishment.”\(^{152}\) The Charter further provided that “[t]he fact that the Defendant acted pursuant to order of his Government or of a superior shall not free him from responsibility . . . .”\(^{153}\) The Charter for the International Military Tribunal for the Far East contains a parallel article.\(^{154}\) The underlying premise of these provi-

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152. Agreement for Prosecution and Punishment, supra note 151, at art. 7.

153. Id. at art. 8.

154. Far East Tribunal Charter, supra note 151, at art. 6 (“Neither the official position, at any time, of an accused, nor the fact that an accused acted pursuant to order of his government or of a
sions is that international crimes cannot properly be considered to fall within the official conduct of a State official because such acts exceed the permissible scope of State conduct under international law. As articulated by the International Military Tribunal (IMT) in its Judgment at Nuremberg,

The principle of international law, which under certain circumstances, protects the representatives of a State, cannot be applied to acts which are condemned as criminal by international law . . . . Individuals have international duties which transcend the national obligations of obedience imposed by the individual State. He who violates the laws of war cannot obtain immunity while acting in pursuance of the authority of the State if the State in authorizing action moves outside its competence under international law.

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The U.N. General Assembly contemporaneously adopted the principles articulated in the Nuremberg Charter in December 1946, indicating their endorsement by the international community. 156

The principle has been articulated by present-day international tribunals, as illustrated by the ICTY in Blaskić: “[T] hose responsible for [international crimes] cannot invoke immunity from national or international jurisdiction even if they perpetrated such crimes while acting in their official capacity . . . . Similarly, other classes of persons . . . although acting as State organs, may be held personally accountable for their wrongdoing.” 157 That the State is unable to claim violations of jus cogens as its own for the purposes of sovereign immunity and extend immunity ratione materiae to shield State officials from prosecution, is indicative of a normative hierarchy in international law, as indicated by the ICTY in Furundžija:

superior shall, of itself, be sufficient to free such accused from responsibility for any crime with which he is charged, but such circumstances may be considered in mitigation of punishment if the Tribunal determines that justice so requires.”).

156. G.A. Res. 95(I) (Dec. 11, 1946) (“Tak[ing] note of the Agreement for the establishment of an International Military Tribunal for the prosecution and punishment of the major war criminals of the European Axis . . . [a]ffirms the principles of international law recognized by the Charter of the Nürnberg Tribunal and the judgment of the Tribunal . . . .”).
The fact that torture is prohibited by a peremptory norm of international law has other effects at the inter-state and individual levels. At the inter-state level, it serves to internationally de-legitimise any legislative, administrative or judicial act authorising torture. . . . [P]erpetrators of torture acting upon or benefiting from those national measures may nevertheless be held criminally responsible for torture, whether in a foreign State, or in their own State under a subsequent regime. In short, in spite of possible national authorisation by legislative or judicial bodies to violate the principle banning torture, individuals remain bound to comply with that principle. As the International Military Tribunal at Nuremberg put it: “individuals have international duties which transcend the national obligations of obedience imposed by the individual State.”

This statement by the ICTY is important in placing into context exactly why violations of jus cogens, as international crimes, fall beyond the scope of official conduct: the State is foreclosed from sanctioning violations of rules recognized and accepted by the international community as peremptory norms of international law. Because the State is prohibited from permitting such conduct as a matter of international law, jus cogens violations cannot constitute acts authorized by the sovereign even when carried out under the color of law, and are thereby not attributable to the State as sovereign acts. Therefore, officials cannot benefit from sovereign immunity as immunity ratione materiae for jus cogens violations.

**B. Criminal Prosecution before Domestic Courts**

Unlike the clear demarcation between the non-application of immunity ratione personae for jus cogens violations in international fora and its uniform application in domestic courts, the inapplicability of immunity ratione materiae before international courts and tribunals has been consistently extended to the criminal prosecution of international crimes before domestic courts. This section considers findings of the inapplicability of immunity ratione materiae in domestic criminal prosecutions of jus cogens violations by the U.K. House of Lords (Augusto Pinochet), Amsterdam Court of Appeal (Desi Bouterse), French Court of Assizes and ECtHR (Ely Olud Dah), Federal Court of Switzerland

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159. See discussion supra Part III.
The seminal case establishing that functional immunity is unavailable to shield former officials from *jus cogens* violations is the *Pinochet* case. In *Pinochet*, the House of Lords determined that *jus cogens* violations—in this instance the international crime of torture—could not be considered “official acts” under international law for the purposes of immunity *ratione materiae* because such conduct cannot be officially authorized by the sovereign. The House of Lords alluded to the attribution of official acts to the State as the mechanism by which immunity *ratione materiae* extends to State officials for official acts, and the corollary, that the immunity of the State from responsibility where such acts are not attributable to it exposes former officials to prosecution:

> [A]cts which attract state immunity in civil proceedings because they are characterised as acts of sovereign power may, for the very same reason, attract individual criminal liability . . . . It is important to emphasize that Senator Pinochet is not alleged to be criminally liable because he was head of state when other responsible officials employed torture to maintain him in power. He is not alleged to be vicariously liable for the wrongdoing of his subordinates. He is alleged to have incurred direct criminal responsibility for his own acts in ordering and directing a campaign of terror involving the use of torture.

The criminality of alleged conduct, the House of Lords made clear, is alone insufficient to render immunity *ratione materiae* inapplicable, as criminal acts can be carried out officially to give rise to attribution to the State and, in turn, immunity *ratione materiae*.

The *jus cogens* status of the prohibition against torture under international law, and universal jurisdiction over prosecution of the crime,

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161. Id. at 594-95 (Browne-Wilkinson, L.), 626 (Hope, L.), 639 (Hutton, L.), 643 (Saville, L.), 651 (Millett, L.), 663 (Phillips, L.).
162. *See Responsibility of States for Internationally Wrongful Acts*, supra note 9, at arts. 1-2 (stating the international responsibility of the State arises from an act that is attributable to the State under international law which constitutes a breach of an international obligation of the State).
164. Id. at 593 (Browne-Wilkinson, L.) (“It is not enough to say that it cannot be part of the functions of the head of state to commit a crime. Actions which are criminal under the local law can still have been done officially and therefore give rise to immunity *ratione materiae*. The case needs to be analysed more closely.”).
rendered Pinochet’s conduct *ultra vires*.\(^{165}\) According to Lord Hope, although immunity *ratione materiae* would apply to all acts performed by a Head of State in the exercise of his government functions, it would not extend to acts undertaken under the “color of law” for personal benefit or to violations of *jus cogens* norms.\(^{166}\) In this vein, Lord Browne-Wilkinson asked rhetorically, “[h]ow can it be for international law purposes an official function to do something which international law itself prohibits and criminalises?”\(^{167}\) To recognize immunity *ratione materiae* for such conduct would “produce bizarre results” by immunizing all perpetrators of torture as defined by the Torture Convention from prosecution, rendering the instrument moot.\(^{168}\) The House of Lords thus concluded Senator Pinochet did not enjoy immunity *ratione materiae* for conduct undertaken under “color of law” in violation of *jus cogens*, rendering him subject to detention and extradition to Spain.\(^{169}\)

In 2000, the Amsterdam Court of Appeal refused to grant immunity *ratione materiae* to Desi Bouterse, the former military ruler of the Republic of Suriname accused of the torture and summary execution of fifteen political opponents in December 1982.\(^{170}\) In the absence of prosecution by Suriname authorities, family members of two victims filed a complaint in the Netherlands, leading the Court of Appeal in Amsterdam to order the public prosecutor to initiate proceedings.\(^{171}\) Bouterse was charged with crimes against humanity\(^{172}\) and torture\(^{173}\) under customary international law and faced prosecution under the retroactive application of the Netherlands Act against Torture on the basis of universal jurisdiction.\(^{174}\) Bouterse claimed immunity from prosecution because he was Head of State at the time of the offences.\(^{175}\)

\(^{165}\) Black’s Law Dictionary, *Ultra Vires* (10th ed. 2014) (translating ultra vires as “beyond the powers (of),” meaning “[u]nauthorized; beyond the scope of power allowed or granted by a corporate charter or by law”).

\(^{166}\) *Ex parte Pinochet*, *supra* note 15, at 622 (Hope, L.) (noting that these two exceptions are the “only two exceptions to this approach which customary international law has recognised.”).

\(^{167}\) *Id.* at 594 (Browne-Wilkinson, L.).

\(^{168}\) *Id.*

\(^{169}\) *Ex parte Pinochet*, *supra* note 15, at 581.


\(^{173}\) *Id.* ¶ 6.4.

\(^{174}\) *Id.* ¶ 8.3.

\(^{175}\) *Id.* ¶ 4.1.
The Court of Appeal rejected the application of immunity *ratione materiae* to the *jus cogens* violations in question, holding that “the commission of very serious offences as are concerned here—cannot be considered to be one of the official duties of a head of state.”\(^{176}\) In effect, the Court of Appeal applied the same reasoning as the House of Lords did in *Pinochet*, namely that conduct over which universal jurisdiction can be exercised as a matter of international law cannot be considered “official” for purposes of sovereign immunity.\(^{177}\)

The French Court of Assizes similarly declined to recognize immunity *ratione materiae* from criminal prosecution for *jus cogens* violations in the *Ould Dah* case,\(^{178}\) a conclusion subsequently endorsed by the ECtHR.\(^{179}\) Ould Dah participated in an “ethnic purge” and a “campaign of oppression” as an intelligence officer and member of the investigating committee of the Mauritanian Government.\(^{180}\) Mauritius subsequently passed an amnesty law on June 14, 1993, foreclosing domestic proceedings.\(^{181}\) Dah later travelled to France in August 1998 for military training, where human rights groups lodged a criminal complaint against him for torture allegedly committed during the coup.\(^{182}\) The case was the first to be brought under the universal jurisdiction provision of the French penal code, which grants French courts jurisdiction where a defendant is present on French territory and the claim is based on certain international conventions.\(^{183}\)

On July 1, 2005, the French Court of Assizes convicted Dah of torture arising from the suppression of a coup between November 1990 and March 1991.\(^{184}\) Dah challenged his conviction under Article 7 of the European Convention on Human Rights,\(^{185}\) claiming that the Mauri-
tian amnesty law had been displaced by the French penal code, which was being applied retroactively because French law at the time of the acts did not conceive of a separate crime of torture.\textsuperscript{186} The ECtHR dismissed the retroactivity claim given the nature of the offense in question and, finding that the criteria of the French penal code had been satisfied, determined that the Mauritian amnesty law did not preclude application of the French universal jurisdiction provision.\textsuperscript{187} In addressing sovereign immunity, the ECtHR determined that \textit{ratione materiae} immunity was inapplicable to acts of torture, which are prohibited under international law as a matter of \textit{jus cogens}:

The Court considers that, in agreement with ICTY jurisprudence, the prohibition against torture is an imperative norm, in other words \textit{jus cogens}. Even if states can claim immunity from responsibility in civil cases for acts of torture allegedly perpetrated but not provided for in the forum state, this case deals with the criminal responsibility of an individual for acts of alleged torture and not with state immunity in a civil claim by a torture victim.\textsuperscript{188}

In so finding, the court distinguished \textit{Al-Adsani v. United Kingdom}, which concerned the jurisdictional immunity of the State itself from civil claims arising from \textit{jus cogens} violations.\textsuperscript{189} It rightly considered State immunity as distinct from the immunity \textit{ratione materiae} of its officials for \textit{jus cogens} violations, though it did not describe how the two doctrines interact as the House of Lords did in \textit{Pinochet}.\textsuperscript{190} The ECtHR ultimately approved France’s application of its universal jurisdiction

\begin{enumerate}
\item No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.
\item This article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognised by civilised nations.
\end{enumerate}

\textsuperscript{187} \textit{Id.} at 894-95.
\textsuperscript{188} \textit{Id.} at 894 (internal citations omitted).
\textsuperscript{189} See infra note 315.
\textsuperscript{190} \textit{Ex parte} Pinochet, \textit{supra} note 15, at 651.
statute and found Dah’s application inadmissible.\footnote{191}

Applying this same principle, the Federal Criminal Court of Switzerland dismissed a claim of immunity in criminal proceedings against Kahled Nezzar, a former minister of defense who had been part of the ruling military junta of Algeria, on July 25, 2012.\footnote{192} Nezzar was part of a 1992 military coup that committed war crimes during the country’s internal armed conflict, after which torture and other extrajudicial atrocities became State policy.\footnote{193} Algerian refugees in Switzerland subsequently filed complaints against Nezzar for acts of torture and war crimes, and Nezzar claimed both immunity \textit{ratione personae}, as a member of the Algerian High Council of State, and immunity \textit{ratione materiae}, because the alleged atrocities were carried out in the discharge of his function as Minister of Defense.\footnote{194} In response, the court observed that “respect of humanitarian \textit{jus cogens} rules and the existence of several judgments issued on this subject by national and international courts, has highlighted the emergence of an evolution towards an increase in the causes of exceptions to immunity from jurisdiction,”\footnote{195} even in cases of “the immunity of (former) Heads of State vis-à-vis crimes contrary to rules of \textit{jus cogens}.”\footnote{196} It rejected Nezzar’s claim to immunity \textit{ratione materiae} for war crimes and torture as “contradictory and futile”:

\begin{quote}
[I]t is generally recognized that the prohibition of serious crimes against humanity, including torture . . . and war crimes is mandatory in nature (\textit{jus cogens}) . . . . [I]t would be difficult to admit that conduct contrary to fundamental values of the international legal order can be protected by rules of that very same legal order. Such situation would be paradoxical . . . . It follows that, in the present case, the suspect cannot claim any immunity \textit{ratione materiae}.\footnote{197}
\end{quote}

The court determined that Nezzar’s immunity \textit{ratione personae} was “extinct” as he no longer held office at the time of the proceedings.\footnote{198}
A final indication of the extent to which the inapplicability of immunity \textit{ratione materiae} to criminal prosecution for \textit{jus cogens} violations prevails in contemporary jurisprudence is the treatment of the matter by the ICJ in \textit{Questions Relating to the Obligation to Prosecute or Extradite.}\textsuperscript{199} The case originated from a civil-party application filed in Belgium on November 30, 2000, against Hissène Habré, the former President of Chad, for torture, genocide, and serious violations of international humanitarian law.\textsuperscript{200} The Minister of Justice of Chad reported to the Belgian investigating judge that Habré’s Head of State immunity had been officially lifted by the Sovereign National Conference of Chad.\textsuperscript{201} The investigating judge subsequently issued an international arrest warrant and indicted Habré for serious violations of international humanitarian law, torture, genocide, crimes against humanity, and war crimes.\textsuperscript{202} On September 22, 2005, Belgium sought Habré’s extradition from Senegal for prosecution under its international crimes statute, which in article 5(3) provides that “[t]he immunity attaching to the official capacity of a person does not preclude the application of this Act.”\textsuperscript{203}

The \textit{Chambre d’accusation} of the Dakar Court of Appeal rejected Belgium’s jurisdiction over Habré on November 25, 2005, because the alleged conduct was “committed in the exercise of his functions” as President of Chad and thereby enjoyed “jurisdictional immunity” even after the termination of Habré’s tenure in office.\textsuperscript{204} Belgium instituted proceedings before the ICJ in 2009 against Senegal concerning its compliance with its obligation to prosecute or extradite Habré for acts of torture committed as Head of State. In its judgment in the case, the ICJ recalled that the Torture Convention—under which the dispute proceeded—is based on universal jurisdiction.\textsuperscript{205} Moreover, it recognized the prohibition against torture as \textit{jus cogens},\textsuperscript{206} and held that

\textsuperscript{199} Questions Relating to the Obligation to Prosecute or Extradite (Belg. v. Sen.), 2012 I.C.J. 1 (July 20).
\textsuperscript{200} Id. ¶ 19.
\textsuperscript{201} Id. ¶ 20.
\textsuperscript{202} Id. ¶ 21.
\textsuperscript{204} Questions Relating to Obligation to Prosecute or Extradite (Belg. v. Sen.), 2012 I.C.J. 1, ¶ 22 (July 20).
\textsuperscript{205} Id. ¶ 75.
\textsuperscript{206} Id. ¶ 99.
Senegal was in breach of its obligations *erga omnes* which required Senegal to prosecute or extradite Habré. In ordering Senegal to submit the case to prosecution or extradite Habré, the ICJ was silent on the issue of immunity *ratione materiae* raised by Senegal. One might infer from this omission that the precedent had been sufficiently established by 2012 that immunity *ratione materiae* does not apply to the criminal prosecution of *jus cogens* violations before domestic courts.

The foregoing cases stand for the proposition that *jus cogens* violations, even if committed under the color of law, are not “official acts” for the purposes of applying immunity *ratione materiae* in criminal proceedings before domestic courts. Because the violation of *jus cogens* cannot be sanctioned by the State as a matter of international law, such conduct cannot be attributed to the State as a sovereign act; consequently, sovereign immunity cannot extend from the State to shield officials alleged to have committed such acts from prosecution. Although this distinction has been criticized because “such violations are, by definition, committed in the exercise of sovereign authority,” this critique fails to consider the underlying rationale by which *jus cogens* constrains what is within the power of the sovereign to authorize and, in turn, what may constitute an official act sanctioned by the sovereign. This conceptualization of the interaction between sovereign immunity and *jus cogens* in the *ratione materiae* context parallels its application before international criminal tribunals, unlike immunity *ratione personae* where a clear dichotomy exists between criminal prosecution at the international and domestic levels.

This procedural commonality between international and domestic proceedings is significant because it indicates that the sovereignty concerns which preserve immunity *ratione personae* in domestic criminal proceedings for *jus cogens* violations are not clearly implicated by the prosecution in domestic courts of individuals who are not protected by their status (as is the case where immunity *ratione personae* applies). This follows logically from the premise that *jus cogens* violations are not

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207. Id. ¶ 117.

208. Similarly, in the *Guatemala Genocide* case, the Spanish Supreme Court asserted universal jurisdiction over eight former high-ranking Guatemalan officials, including former president Efrain Rios Montt, for acts of torture, genocide, terrorism, and grave breaches of humanitarian law that occurred during that country’s civil war. See S.T.C., Sep. 26, 2005 (Case No. 331/1999-10, Dec. No. 237) (Spain).


210. See discussion supra Section III.
attributable to the State—prosecution of such acts is not thereby tantamount to impleading the State. Given the apparent clarity with which this “fairly widespread” principle has emerged in domestic criminal proceedings,\footnote{Kolodkin, supra note 43, ¶ 57 (“The viewpoint, whereby grave crimes under international law cannot be considered as acts performed in an official capacity, and immunity ratione materiae does not therefore protect from foreign criminal jurisdiction exercised in connection with such crimes, has become fairly widespread.”).} it follows next to consider how domestic courts have applied this principle in civil proceedings, where jurisprudence has been less consistent.

C. Civil Proceedings before Domestic Courts


In Samantar, Somali natives brought a civil suit in U.S. district court against the former Prime Minister of Somalia, Mohamed Ali Samantar, for jus cogens violations including acts of torture.\footnote{Samantar v. Yousuf, 560 U.S. 305, 308 (2010). Samantar also held the rank of First Vice President and Minister of Defense. Id.} In the first phase of the case, the Supreme Court distinguished the acts of an individual official from those of the State for purposes of sovereign immunity under the Foreign Sovereign Immunities Act (FSIA) and remanded to the Fourth Circuit.\footnote{Id. In 1976, Congress enacted the FSIA to codify the “restrictive theory” of sovereign immunity existing in common law. See 28 U.S.C. §§ 1602-1611. The FSIA is “the sole basis for obtaining [subject matter] jurisdiction over a foreign state in our courts.” Argentine Republic v. Amerada Hess Shipping Corp., 488 U.S. 428, 434 (1989).} The Court held that a foreign official, sued as an individual for conduct undertaken in his official capacity, is not a “foreign State” for purposes of sovereign immunity and the FSIA, in
This follows, the Court reasoned, because “the immunity of the foreign state extends to an individual for acts taken in his official capacity,” but not to acts beyond this scope, indicating that an assessment of the individual conduct in question for the purposes of attribution must precede a determination of sovereign immunity. The Court thus refuted the notion that foreign officials are automatically afforded immunity as States under the FSIA for *jus cogens* violations, and rejected the reasoning of the Ninth Circuit in *Chuidian*, which had found the FSIA inapplicable only to *ultra vires* conduct by State officials. The same distinction between individual and State conduct is implicit in the Torture Victim Protection Act, which provides a civil cause of action against individual officials for torture committed on behalf of the State under “actual or apparent authority, or under color of law,” which holding authoritatively rejected the proposition that a suit against an official for conduct on behalf of the State automatically equates to a suit against that official’s State, an assertion that prejudges the question of attribution.

On remand from the Supreme Court, Samantar renewed his motion to dismiss his case based on immunity *ratione personae*, as he was Head of State of Somalia at the time of the offences, and immunity *ratione materiae*, given that the conduct in question was undertaken in the

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216. *Id.* at 325-36 (“[W]e think this case, in which respondents have sued petitioner in his personal capacity and seek damages from his own pockets, is properly governed by the common law because it is not a claim against a foreign state as the Act defines that term.”).

217. *See id.* at 322.


220. *Id.* at 1098 (“Federal courts have jurisdiction over suits against foreign sovereigns under the Foreign Sovereign Immunity Act . . . . Nevertheless, we do not base our jurisdiction on the Act. To do so would be insufficient for this case because some of the claims presented do not raise an issue of sovereign immunity [because they do not involve sovereign acts].”).

221. *See* 28 U.S.C.A. § 1350 note § 2(a)(1) (“an individual who, under actual or apparent authority, or color of law, of any foreign nation . . . subjects an individual to torture shall, in a civil action, be liable for damages to that individual.”).

discharge of his official duties.\textsuperscript{223} The Fourth Circuit, citing the application of immunities \textit{ratione personae} and \textit{ratione materiae} in domestic criminal proceedings for \textit{jus cogens} violations, determined that “American courts have generally followed the foregoing trend, concluding that \textit{jus cogens} violations are not legitimate official acts and therefore do not merit foreign official immunity but still recognizing that head-of-state immunity, based on status, is of an absolute nature and applies even against \textit{jus cogens} claims.”\textsuperscript{224} Consequently, as in the criminal context, immunity \textit{ratione materiae} is inapplicable in civil proceedings for \textit{jus cogens} violations because such acts cannot be considered “official acts” for the purposes of responsibility and sovereign immunity:

Unlike private acts that do not come within the scope of foreign official immunity, \textit{jus cogens} violations may well be committed under color of law and, in that sense, constitute acts performed in the course of the foreign official’s employment by the Sovereign. However, as a matter of international and domestic law, \textit{jus cogens} violations are, by definition, acts that are not officially authorized by the Sovereign.\textsuperscript{225}

The court indicated that this must be so as a matter of logic, “because no state officially condones” \textit{jus cogens} violations, so “few such acts, if any, would fall under the rubric of ‘official actions’ taken in the course of an official’s duties.”\textsuperscript{226} Decades earlier, in the \textit{Siderman de Blake} case, the Ninth Circuit indicated that regardless of whether such conduct is officially condoned by the State, the controlling rationale is that “[i]nternational law does not recognize an act that violates \textit{jus cogens} as a sovereign act.”\textsuperscript{227} Adopting this rationale, the Fourth Circuit concluded in \textit{Samantar} that, “under international and domestic law, officials from other countries are not entitled to foreign official immunity for \textit{jus cogens} violations, even if the acts were performed in the defendant’s official capacity.”\textsuperscript{228} Samantar could not benefit from immunity \textit{ratione personae} because he no longer occupied a position conferring such immunity. On January 13, 2014, the Supreme Court denied

\textsuperscript{224} \textit{Id.} at 776.
\textsuperscript{225} \textit{Id.} at 775-76.
\textsuperscript{226} \textit{Id.} at 777 (quoting S. REP. NO. 102-249, at 8 (1991) (with respect to the Torture Victim Protection Act)).
\textsuperscript{227} \textit{Siderman de Blake} v. Republic of Argentina, 965 F.2d 699, 718 (9th Cir. 1992).
\textsuperscript{228} \textit{Samantar}, 699 F.3d at 777.
certiorari in the Samantar case, leaving the Fourth Circuit’s holding intact.

The House of Lords reached a different conclusion in Jones v. Ministry of the Interior of Saudi Arabia and Lieutenant Colonel Abdul Aziz, a claim brought against Saudi Arabia and Lieutenant Colonel Abdul Aziz in his individual capacity in the courts of England for acts of torture. The case concerned an appeal by the Kingdom of Saudi Arabia from a decision by the England Court of Appeal, which unanimously held that, while service against the State of Saudi Arabia was properly denied by the government, claims against the individual defendant for acts of torture were not precluded by immunity ratio materiae and must be allowed to proceed. Departing from his own comments in Pinochet, Lord Justice Phillips, writing for the Court of Appeal, concluded:

On reflection I have concluded that the argument does not run . . . . If civil proceedings are brought against individuals for acts of torture in circumstances where the state is immune from suit ratio personae, there can be no suggestion that the state is vicariously liable. It is the personal responsibility of the individuals, not that of the state, which is in issue. The state is not indirectly impleaded by the proceedings.

The House of Lords disagreed, finding that acts of torture constitute official acts, given that the Torture Convention expressly envisages torture by a public official acting under color of law. Lord Bingham, of the House of Lords, distinguished Pinochet as a criminal case, which

229. Jones v. Ministry of the Interior of Saudi Arabia and Lieutenant Colonel Abdul Aziz, [2006] UKHL 26 (H.L.) (appeal taken from Eng.) On appeal, a second claim was heard alongside that of Jones. Id.
231. Id. ¶ 128 (Phillips, L.J.).
233. Id. ¶ 19 (Bingham, L.), ¶ 83 (Hoffmann, L.). See Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. 1 (1), opened for signature Dec. 10, 1984, 1465 U.N.T.S. 85 (entered into force June 26, 1987) [hereinafter Convention Against Torture] (“For the purposes of this Convention, the term “torture” means any act by which severe pain or suffering . . . . is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.”).
could have no bearing on immunity from civil proceedings, and determined that acts of officials are equated with acts of the State itself, attracting “an absolute preliminary bar, precluding any examination of the merits.” Accordingly, the House of Lords reversed the Court of Appeal and restored the government’s denial of permission to serve process against Aziz.

Jones challenged the decision of the House of Lords before the ECtHR. The case proceeded as one concerning the right of access to a court under ECtHR Article 6, and whether granting blanket State immunity to a State official for acts of torture breached Article 6. The ECtHR determined on January 14, 2014, that the U.K. had not breached the applicants’ Article 6 right of access. In considering the matter, the ECtHR discussed at length the absolute immunity of the State under the U.K. State Immunity Act (1978), the European Convention on State Immunity (1972), and the United Nations Convention on Jurisdictional Immunities of States and Their Property (2004), the latter of which defines “State” to include representatives of the State acting in that capacity and includes no “jus cogens exception.” In considering whether acts of officials—as individuals—can be distinguished from acts of the State, the ECtHR quoted the House of Lords, which reached the opposite outcome to the U.S. Supreme Court in *Samantar v. U.S.*: “[C]ustomary international law did not admit of any exception—regarding allegations of conduct amounting to torture—to the general rule of immunity *ratione materiae* for State officials in the

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235. Id. ¶ 33 (Bingham, L.), ¶ 68 (Hoffmann, L.) (“[S]tate immunity affords individual employees or officers of a foreign state protection under the same cloak as protects the state itself.” (internal quotation marks omitted)).

236. Id. ¶¶ 30-31 (Bingham, L.), ¶¶ 83-85 (Hoffmann, L.).


240. Id. ¶ 215.


sphere of civil claims where immunity is enjoyed by the State itself.”

Because claims against a foreign official amount to impleading the foreign State, which enjoys absolute State immunity, such claims must also be barred by sovereign immunity, practically transforming immunity _ratione materiae_ into a form of immunity _ratione personae_. The ECtHR also distinguished between the application of immunity _ratione materiae_ in the criminal and civil contexts, and with “little national case-law concerning civil claims lodged against named State officials for _jus cogens_ violations,” concluded that “State practice on the question is in a state of flux . . . .” As such, the decision by the House of Lords was found neither arbitrary nor manifestly erroneous.

The _Samantar_ and _Jones_ cases illustrate disharmony in contemporary jurisprudence regarding the applicability of immunity _ratione materiae_ in civil proceedings against State officials for _jus cogens_ violations. Both extraterritorial criminal and civil proceedings for _jus cogens_ violations rely upon the same basis of jurisdiction: universal jurisdiction. Justice Breyer observed as much in _Sosa v. Alvarez-Machain_ (2004), finding no reason for universal jurisdiction to differ in application between criminal and civil proceedings. However, it would go too far

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245. Id. ¶ 214.
246. Id. ¶¶ 175, 207.
247. Id. ¶ 212.
248. Id. ¶ 210.
249. Id. ¶ 213.
250. Id. ¶ 214.
251. Kolodkin, _supra_ note 43, ¶ 66, 66 n.159. (“The question arises as to whether it can in principle be said that the consequences for immunity of prohibiting grave international crimes by _jus cogens_ norms may be different depending on what kind of jurisdiction is being exercised—civil or criminal. Neither practice nor logic appear to show that such consequences would differ . . . . If a peremptory norm prevails over immunity, then immunity from which jurisdiction—civil or criminal—is of no account. And vice versa. All the more so since sometimes the two types of jurisdiction exercised are very close—for example, when a civil action is brought and is considered within the scope of a criminal case.”).
252. See _Sosa v. Alvarez-Machain_, 542 U.S. 692, 762-63 (2004) (Breyer, J., concurring) (“The fact that this procedural consensus exists suggests that recognition of universal jurisdiction in respect to a limited set of norms is consistent with principles of international comity. That is, allowing every nation’s courts to adjudicate foreign conduct involving foreign parties in such cases will not significantly threaten the practical harmony that comity principles seek to protect. That consensus concerns criminal jurisdiction, but consensus as to universal criminal jurisdiction itself suggests that universal tort jurisdiction would be no more threatening . . . . That is because the criminal courts of many nations combine civil and criminal proceedings, allowing those injured by criminal conduct to be represented, and to recover damages, in the criminal proceeding itself . . . . Thus, universal criminal jurisdiction necessarily contemplates a significant degree of civil tort recovery as well.”).
to propose generally that universal jurisdiction “prevail[s] over the prior rule according immunity *ratione materiae*,”253 for, as the ICJ has noted, “jurisdiction does not imply absence of immunity, while absence of immunity does not imply jurisdiction.”254 Therefore what remains at issue is the immunity applicable where jurisdiction lies.

Resolution of this issue appears to turn, in part, on whether or not there is a meaningful distinction between the immunities applicable to criminal and civil proceedings. Writing in dissent in *Jones*,255 Judge Kalaydjieva found “it difficult to accept that general differences between criminal and civil law justif[y] a distinction in the application of immunity in the two contexts.”256 Judge Kalaydjieva also expressed skepticism over how civil proceedings against a State official constituted a greater interference with the State than criminal proceedings,257 a premise underlying recognition of immunity from civil suit notwithstanding the *erga omnes* obligation to extradite or prosecute under the Torture Convention.258 The U.S. approach in *Samantar* denies such a distinction,259 paralleling immunities jurisprudence from criminal prosecutions before domestic courts.260 And the United States is not alone: this approach is implicit in civil law countries such as France,261 where civil and criminal proceedings may commence together.262

253. ORAKHELASHVILI, supra note 130; Dapo Akande, *supra* note 83, at 415; *Ex parte Pinochet*, supra note 15, at 661 (Phillips, L.) (“Once extra-territorial jurisdiction is established, it makes no sense to exclude from it acts done in an official capacity.”).

254. Arrest Warrant of 11 April 2000 (Dem. Rep. Congo v. Belg.), 2002 I.C.J. 3, ¶ 59 (Feb. 4); see also Colangelo, *supra* note 147, at 81 (“This sort of heaping implication upon implication strains the international lawyer’s fidelity to discerning international law from actual state practice and opinio juris.”).


256. *Id.*

257. *Id.*

258. Convention Against Torture, *supra* note 233, at art. 5(2) (“Each State Party shall likewise take such measures as may be necessary to establish its jurisdiction over such offences in cases where the alleged offender is present in any territory under its jurisdiction and it does not extradite him pursuant to article 8 to any of the States mentioned in paragraph I of this article.”).

259. Yousuf v. Samantar, 699 F.3d 763, 776 (4th Cir. 2012) *cert. denied*, 134 S. Ct. 897 (2014) (“American courts have generally followed the foregoing trend, concluding that *jus cogens* violations are not legitimate official acts and therefore do not merit foreign official immunity . . . .”).

260. See, e.g., *Ex parte Pinochet*, supra note 15, at 581 (denying immunity *ratione materiae* to former Head of State for *jus cogens* violations).


262. See discussion *infra* text accompanying notes 280-82.
Conversely, Commonwealth courts, as affirmed by the ECtHR in *Jones*, have maintained a distinction in the application of immunities between criminal and civil proceedings. One would presume that the determination of an “official act” should not depend on whether the proceeding against an individual is criminal or civil. However, this distinction appears controlling where immunity *ratione materiae* has barred civil litigation for *jus cogens* violations. Lords Bingham and Hoffmann concluded in *Jones* that, because the Torture Convention applied specifically to torture by a “public official or other person acting in an official capacity,” all such acts must fall within the scope of immunity *ratione materiae* as official acts. Immunity *ratione materiae* in civil proceedings for torture, by this reasoning, is coextensive with the crime: “if they are official enough to come within the Convention, I cannot see why they are not official enough to attract immunity.” In effect, the House of Lords found the *jus cogens* violation of torture in *Pinochet* could not constitute an “official act” in a criminal prosecution yet in *Jones* concluded that torture by State officials is always an “official act” attracting sovereign immunity in a civil proceeding.

One point of departure between *Samantar* and *Jones* is the legal explanation for the inapplicability of immunity: whether the Torture Convention or *jus cogens* does the heavy lifting. While reliance on the Torture Convention cabins the inapplicability of immunity *ratione materiae* to criminal proceedings, domestic proceedings contemplating immunity for *jus cogens* violations frequently rely on the *jus cogens* nature of the norm to justify non-recognition of immunity *ratione materiae*. A second point of departure between the two proceedings is

263. *But see* *Jones v. Ministry of the Interior of Saudi Arabia and Lieutenant Colonel Abdul Aziz*, [2006] UKHL 26 (H.L.) ¶ 32 (appeal taken from England) (Bingham, L.) (“[T]he distinction between criminal proceedings . . . and civil proceedings . . . was fundamental to [the Pinochet] decision.”).

264. Convention Against Torture, supra note 233, at art. 1(1).


266. *Ex parte Pinochet*, supra note 15, at 651 (Millett, L.). Lord Millett continued, “International law cannot be supposed to have established a crime having the character of *jus cogens* and at the same time to have provided an immunity which is co-extensive with the obligation it seeks to impose.” *Id.*

268. It is evident from the opinions by the Law Lords in *Pinochet* that the Torture Convention and *jus cogens* were considered to be distinct, authoritative rationales for the denial of immunity.
that the Fourth Circuit’s 2012 decision in *Samantar* was preceded by the Supreme Court’s determination that acts of the individual are distinguishable from those of the State.\(^{269}\) Commonwealth countries have not reached the conclusions of the *Samantar* holding in the civil context, a critical step toward the conclusion that *jus cogens* violations cannot constitute “official acts.” Instead, courts in those countries have ruled consistently with *Jones*, namely in New Zealand\(^{270}\) and Australia,\(^{271}\) that immunity *ratione materiae* is “incidentally conferred” by the jurisdictional immunity of the State. The American approach, a structural analysis focusing on the subjects of suit—the individual or the State—rather than the nature of the suit—civil or criminal—alleviates tensions arising in this area of jurisprudence. The Commonwealth approach, by contrast, lends itself to the legal error of lumping individual immunity from subject-matter jurisdiction together with the jurisdictional immunity of the State,\(^{272}\) insofar as the procedural immunity of the State from civil suit before domestic courts is taken to be determinative of the immunity *ratione materiae* of State officials in civil suits for *jus cogens* violations,\(^{273}\) a linkage rejected by the ECtHR in *Jones*.\(^{274}\)

Reconciliation of this divergence is complicated by the fact that each approach involved the statutory interpretation of domestic legislation purporting to codify customary international law.\(^{275}\) This context explains why *Samantar* concerned the application of immunity under common law in the absence of a controlling statute, while *Jones* con-

\(^{269}\) See discussion *supra* text accompanying notes 213-18.

\(^{270}\) Fang v. Jiang, [2007] NZAR 420 (HC) (NZ) (dismissing civil claims against former members of Chinese government for *jus cogens* violations).

\(^{271}\) Zhang v. Zemin, [2010] NSWCA 255 (Austl.) (dismissing civil claim for *jus cogens* violations against former President of China).

\(^{272}\) See Jones v. Ministry of the Interior of Saudi Arabia and Lieutenant Colonel Abdul Aziz, [2006] UKHL 26 (H.L.) (appeal taken from Eng.), ¶ 84 (Hoffman, L.), ¶¶ 18, 25 (Bingham, L.) (“The Grand Chamber’s decision in *Al-Adsani* is very much in point, since it concerned the grant of immunity to Kuwait under the 1978 [State Immunity] Act, which had the effect of defeating the applicant’s claim in England for damages for torture allegedly inflicted upon him in Kuwait . . . .”).


\(^{274}\) Jones v. United Kingdom, 2014-II Eur. Ct. H.R. ¶ 205 (“The fact that there is no general *jus cogens* exception as regards State immunity rules is therefore not determinative as regards claims against named State officials.”).

cerned exceptions to a statute found to be controlling. Which approach more closely conforms to the application of immunity *ratione materiae* under customary international law might be inferred from consistent application of immunity *ratione materiae* in domestic criminal prosecutions for *jus cogens* violations, which is governed by customary international law.\(^{276}\)

**D. Sovereignty Limited by Jus Cogens**

The jurisprudence of criminal prosecution for *jus cogens* violations, before both international and domestic fora, indicates that such conduct does not constitute “official acts” of State officials because *jus cogens* violations cannot be sanctioned by the sovereign as a matter of international law. As such, the immunity *ratione materiae* that shields the “official acts” of individuals does not extend to *jus cogens* violations even if such acts are undertaken under the color of law.\(^{277}\) The common application of this principle across both international and domestic fora suggests that the principle underlying sovereign immunity, *par in parem non habet imperium*, is not implicated where State officials are prosecuted for *jus cogens* violations. Immunity *ratione materiae* prevents the immunity of the State from being bypassed by simply naming State officials; however, because *jus cogens* violations fall beyond the official conduct of the State, they are not properly considered sovereign acts. Therefore, prosecution of such acts does not implicitly implead the State in criminal proceedings, this accounting for the common inapplicability of immunity *ratione materiae* in criminal proceedings in domestic as well as international courts. This conclusion presupposes that *jus cogens* limits sovereignty in such a way as to preclude the State from officially authorizing violations of peremptory norms.

The International Law Commission (ILC) Special Rapporteur on jurisdictional immunities rejected a distinction based on the criminal or civil nature of proceedings as contrary to both practice and logic.\(^{278}\) Those arguing otherwise maintain that civil proceedings more directly implead the State than criminal prosecution because the former more closely resemble proceedings that might be brought against the State

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276. See discussion supra Section IV(B).

277. See, e.g., Orakhelashvili, supra note 130 (“[I]f foreign courts adjudicate a breach of *jus cogens* such as torture they do not infringe on the sovereignty of the State in which that breach took place: a violation of *jus cogens* is not a sovereign act and attracts no immunity.”); Zappala, supra note 103, at 601 (“It is generally agreed that an exception to functional immunity exists in cases where the individual is responsible for crimes under international customary law.”).

278. Kolodkin, supra note 43, ¶ 66 n.159.
itself; therefore civil immunities should accordingly be broader.\textsuperscript{279} Importantly, however, some legal systems conduct parallel civil and criminal proceedings, or initiate civil claims in the context of criminal proceedings.\textsuperscript{280} In many civil law countries this process, action civile, enables plaintiffs to attach civil claims to criminal prosecutions.\textsuperscript{281} France, for example, has on numerous occasions rendered civil awards concurrently alongside criminal judgments in cases involving jus cogens violations.\textsuperscript{282} The ICC prosecutor similarly indicated that the ICC could award civil damages in conjunction with criminal judgments against Saif Al-Islam Qaddafi and Abdullah Al-Senusi.\textsuperscript{283} Divergence between immunities applicable to criminal and civil proceedings for jus cogens violations would produce the absurd result of immunizing State officials from such civil proceedings brought in conjunction with criminal charges for which no such immunity would apply.

The outcome reached by the House of Lords in \textit{Jones}, which relies on such a distinction, might best be viewed through a political lens. While the government retains control over public criminal indictments, it does not retain that control over private civil litigation,\textsuperscript{284} creating

\begin{footnotesize}
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\item[279.] See, e.g., Jones v. Ministry of the Interior of Saudi Arabia and Lieutenant Colonel Abdul Aziz, [2006] UKHL 26 (H.L.) ¶ 31 (appeal taken from Eng.) (Bingham, L.).
\item[280.] Kolodkin, \textit{supra} note 139, ¶ 54.
\item[281.] International Bar Association, \textit{REPORT OF THE TASK FORCE ON EXTRATERRITORIAL JURISDICTION} 120-21 (2009) (“\textit{In actions civiles}, the court may order compensation even though it may not have had jurisdiction to do so had the plaintiff brought the claim in a purely civil action. Countries recognizing the action civile generally do not make distinctions according to the basis of the criminal court’s jurisdiction . . . . [These] countries include[e] Argentina, Bolivia, Bulgaria, China, Colombia, Costa Rica, Denmark, Finland, France, Germany, Greece, Italy, Luxembourg, Myanmar, Netherlands, Norway, Panama, Poland, Romania, Russia, Senegal, Spain, Sweden and Venezuela . . . .”); Donald Francis Donovan & Anthea Roberts, \textit{The Emerging Recognition of Universal Civil Jurisdiction}, 100 Am. J. Int’l L. 142, 154 (2006).
\item[283.] Second Rep. of the Prosecutor of the International Criminal Court, ¶ 13 (Nov. 4, 2011) (“The Office will also continue to search out the personal assets of Saif Al-Islam Gaddafi and Abdallah Al-Senussi for the potential benefit of the victims, through reparations awarded by the Court.”).
\item[284.] This, evidently, is one of the principal fears arising from ATS litigation in the United States and its potential impact on U.S. foreign policy: see Curtis A. Bradley, \textit{The Costs of International Law}.
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potentially “serious consequences for both the development and expression of the Nation’s foreign policy.” The United States has mitigated this lack of control by deferring to statements of immunity by the Department of State in civil proceedings, although this authority was called into question vis-à-vis *jus cogens* violations by the *Samantar* decision. Without the ability to assert immunity, there is no “safety valve” by which a State government might ameliorate the potential foreign policy complications that may arise from civil suits by private individuals against State officials. Variation in State practice in the area of immunity *ratione materiae* in civil litigation for *jus cogens* might therefore reflect political reservations inherent in opening national courts to such litigation. The amicus brief submitted by former Attorneys General of the United States in support of former Prime Minister Samantar outlines the underlying policy concerns: the application of such precedent to U.S. officials in foreign courts, the uncertainty arising in immunities jurisprudence, the effect on decision-making by government officials, etc. The effect of such a policy would be to deny all prospect of relief to victims of *jus cogens* violations, a troubling outcome if a central function of legal order is to “make whole” persons injured by tortious conduct. Moreover, whatever its merits, this approach raises the very real question of whether immunities should be the domain of law or policy. Today, the doctrine of immunities belongs to customary international law. Policy preferences are improperly imposed under


286. *Yousuf v. Samantar*, 699 F.3d 763, 773 (4th Cir. 2012) _cert. denied_, 134 S. Ct. 897 (2014) (“In sum, we give absolute deference to the State Department’s position on status-based immunity doctrines such as head-of-state immunity. The State Department’s determination regarding conduct-based immunity, by contrast, is not controlling, but it carries substantial weight in our analysis of [violations of *jus cogens* norms].”). This is not the first time that the discretion of the executive branch to determine the application of immunity has been curtailed: see 28 U.S.C. § 1602 (“Claims of foreign states to immunity should henceforth be decided by courts of the United States and of the States in conformity with the principles set forth in this chapter.”).


288. Jurisdictional Immunities of the State (Ger. v. It., Greece Intervening), 2012 I.C.J. 1, ¶ 54 (Feb. 3). See, _e.g._, Stewart, _supra_ note 150, at 648 (“International immunities can no longer be
the guise of legal principle in “a state of flux.”

VI. STATE IMMUNITY

State responsibility under international law is informed by the ILC Draft Articles on Responsibility of States for Internationally Wrongful Acts. Although international responsibility of the State is neither criminal nor civil, it has been characterized as a blend of the two as it may provide both sanctions and reparations for internationally wrongful acts. The international responsibility of the State arises from an act that is attributable to the State under international law which constitutes a breach of an international obligation of the State. The international responsibility of the State for jus cogens violations came before the ICJ in Application of the Convention on the Prevention and Punishment of the Crime of Genocide. The case was brought by Bosnia and Herzegovina against Serbia and Montenegro for acts of genocide committed against the Muslim population of Bosnia by Yugoslavian paramilitary forces during the Balkans War.

In contemplating the responsibility of the State arising under the Genocide Convention, the Court indicated that contracting parties “are bound not to commit genocide, through the actions of their organs or persons or groups whose acts are attributed to them.” In its 2007 judgment, however, the ICJ was unable to establish Serbia’s international responsibility for violations of the prohibition against genocide. The ICJ did, however, determine that Serbia had breached its erga omnes obligations arising from the jus cogens prohibition of genocide by failing to prevent and punish acts of genocide and take measures to suppress genocide pursuant to the provisional measures

296. Id. ¶ 471.
Underlying the ICJ’s reasoning in the case is the principle of “dual responsibility,” the doctrine by which State responsibility is distinct from individual criminal and civil responsibility. This application by the ICJ of the principle of dual responsibility is critical for the discussion to follow because it indicates a number of underlying principles. Implicit in this duality is the premise that the conduct of the individual is distinct from that of the State, and each gives rise to distinct forms of legal responsibility. The sense in which the State might be held internationally responsible for a jus cogens violation is, as per the ILC Articles on State Responsibility, by attribution only. As the State itself cannot violate a jus cogens norm, criminal and civil liability for such conduct does not attach to the State under international law. Therefore, in contemplating the criminal and civil responsibility of States for violations of jus cogens norms, the duality of responsibility underlying the ICJ’s 2007 judgment is central.

A. Prosecution of States for Jus Cogens Violations

Historically, international law has rejected the criminal prosecution of States qua States for violations of jus cogens norms as international crimes. The International Military Tribunal of Nuremburg simultaneously rejected both the notion of State criminal responsibility and the immunity of State officials who carry out international crimes on behalf of the State:

It was submitted that international law is concerned with the actions of sovereign States, and provides no punishment for individuals; and further, that where the act in question is an act of State, those who carry it out are not personally responsible but are protected by the doctrine of the sovereignty of the State. In the opinion of the Tribunal, both these submissions must be rejected . . . . Crimes against international law are committed by men, not by abstract entities, and only by punishing individu-

297. Id.
298. See id. ¶¶ 162, 166-67 (distinguishing individual and State responsibility); see also Pellet, supra note 291, at 13 (distinguishing the nature of State responsibility from forms of individual responsibility).
299. Note that the International Court’s discussion of attribution was based on findings by the ICTY of criminal responsibility for genocide. See Application of Convention on Prevention and Punishment of Crime of Genocide (Bosn. & Herz. v. Serb. & Montenegro), 2007 I.C.J. 43, ¶¶ 374-76, 413-15 (Feb. 26).
als who commit such crimes can the provisions of international law be enforced.\textsuperscript{300}

Consequently, while the Military Tribunals at Nuremberg and Tokyo prosecuted individuals for crimes against international law, the States of Germany and Japan were not subject to such criminal sanction. The ad hoc criminal tribunals for Rwanda and the former Yugoslavia similarly held only individuals accountable for international crimes, as observed by the ICTY: “under present international law it is clear that States, by definition, cannot be the subject of criminal sanctions akin to those provided for in national criminal systems.”\textsuperscript{301} The ICC shares this focus on individual criminal responsibility.\textsuperscript{302} While an early version of the Draft Articles on State Responsibility contemplated State criminal responsibility in Draft Article 19,\textsuperscript{303} evidently envisaged to constitute violations of \textit{jus cogens} norms,\textsuperscript{304} this article was ultimately abandoned because international law recognized no such criminal sanction of States.\textsuperscript{305}

International law therefore provides for neither international crimes of States nor criminal responsibility of States for \textit{jus cogens} violations.\textsuperscript{306} Consequently, at either the international or domestic level, it appears inappropriate to contemplate the non-justiciability of States for international crimes in terms of jurisdiction or immunity, as international law simply does not recognize State criminal responsibility. With respect to the attribution of individual conduct to engage the international

\textsuperscript{300} Nazi Conspiracy and Aggression, supra note 155, at 52-53.
\textsuperscript{302} Rome Statute, supra note 47.
\textsuperscript{303} Draft Articles on Responsibility of States for Internationally Wrongful Acts art. 19(2), First Reading [1996], U.N. Doc. A/51/10 and Corr. 1 (“An internationally wrongful act which results from the breach by a State of an international obligation so essential for the protection of fundamental interests of the international community that its breach is recognized as a crime by that community as a whole constitutes an international crime.”).
\textsuperscript{304} Robert Ago (Special Rapporteur on State Responsibility), \textit{Fifth Rep. on State Responsibility}, [1976] 2 Y.B. Int’l L. Comm’n (Part 1), ¶¶ 99, 151, U.N. Doc. A/CN.4/SER.A/1976/Add.1 (Part 1) (“The recognition in our draft that a distinction should be made between some internationally wrongful acts which are more serious and others which are less serious is comparable in importance to the recognition, in the Convention on the Law of Treaties, of the distinction to be made between ‘peremptory’ norms of international law and those norms from which derogation through particular agreements is possible.”).
\textsuperscript{305} Responsibility of States for Internationally Wrongful Acts, supra note 9, at 111-12, ¶¶ 5-7.
responsibility of States, such conduct must be attributable to the State as a preliminary matter,\textsuperscript{307} which will be discussed in Part V(B) below. The key point for present purposes is that the State is not the proper subject of prosecution for international crimes before any judicial body.

**B. Civil Proceedings against States before Domestic Courts**

Given that the State cannot be the subject of criminal responsibility for violations of \textit{jus cogens}, it follows logically that the State is equally nonjusticiable as a subject of civil liability for those same acts. As a matter of civil responsibility before domestic courts, State immunity has been found to shield the State from litigation for \textit{jus cogens} violations in the United States,\textsuperscript{308} United Kingdom,\textsuperscript{309} Canada,\textsuperscript{310} Greece,\textsuperscript{311} Slovenia,\textsuperscript{312} Poland,\textsuperscript{313} and France.\textsuperscript{314} Findings of State immunity in these cases centered on considerations of State equality in accordance with the \textit{par in parem non habet imperium} principle, which recognizes no exception for \textit{jus cogens} violations. The ECtHR has considered the immunity of the


\textsuperscript{310} Bouzari v. Iran, [2004] 243 D.L.R. 4th 406, 427-29, ¶¶ 86-95 (Can. Ont. C.A.), 128 I.L.R. 586 (2004) (“[T]he rules of customary international law binding Canada do not accord to the appellant the civil remedy he seeks . . . . It would be inconsistent . . . to provide a civil remedy against a foreign state for torture committed abroad.”).


\textsuperscript{312} A.A. v. Germany, Constitutional Court, UP-13/99-24 (2001), ¶¶ 13-14 (Slovenia) (noting that customary international law had not yet established a general rule allowing Slovenian courts to try foreign States for \textit{jus cogens} violations).

\textsuperscript{313} Natoniewski v. Germany, IV CSK 465/09 (2010) (Pol.), [2010] Polish Y.B. Int’l L. 299, 301-03 (finding that, although in some cases courts have found that “States are not entitled to plead immunity where there has been a violation of human rights norms with the character of \textit{jus cogens},” there is insufficient legal ground to consider such instances “an exception to the State immunity,” notwithstanding “a trend in international and domestic law towards limiting State immunity in respect of human rights abuses . . . .”).

State from litigation for *jus cogens* violations at least three times, perhaps most notably in *Al-Adsani v. The United Kingdom*,315 and most recently in *Jones v. United Kingdom*.316 The ICJ affirmed the immunity of the State from civil liability in *Jurisdictional Immunities of the State*,317 where it effectively reversed those exceptional instances in which domestic courts had recognized an exception to State immunity for *jus cogens* violations.318 As an expressly preclusive procedural rule,319 the ICJ determined that State immunity bars proceedings for the violation of a substantive rule.320 Voices in both the academy321 and the judi-

315. Al-Adsani v. United Kingdom, No. 35763/97, 2001-XI Eur. Ct. H.R. ¶ 61. In deciding whether the United Kingdom had violated Article 6 of the ECtHR by recognizing the State immunity of Kuwait in civil litigation brought by a victim of torture by Kuwaiti agents, the ECtHR concluded:

[Although] the prohibition of torture has achieved the status of a peremptory norm in international law, it observes that the present case concerns not, as in *Furundzija* and *Pinochet*, the criminal liability of an individual for alleged acts of torture, but the immunity of a State in a civil suit for damages in respect of acts of torture within the territory of that State. Notwithstanding the special character of the prohibition of torture in international law, the Court is unable to discern in the international instruments, judicial authorities or other materials before it any firm basis for concluding that, as a matter of international law, a State no longer enjoys immunity from civil suit in the courts of another State where acts of torture are alleged.

See also *Kalogeropoulou v. Greece and Germany*, 2002-X Eur. Ct. H.R. 389 (“[T]he applicants appeared to be asserting that international law on crimes against humanity was so fundamental that it amounted to a rule of *jus cogens* that took precedence over all other principles of international law, including the principle of sovereign immunity. The Court does not find it established, however, that there is yet acceptance in international law of the proposition that States are not entitled to immunity in respect of civil claims for damages brought against them in another State for crimes against humanity . . . .”).


319. *Jurisdictional Immunities of the State (Ger. v. It., Greece Intervening)*, 2012 I.C.J. 1, ¶ 82 (Feb. 3).

320. Id. ¶ 93.

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ciary have objected to this outcome on the basis that *jus cogens* overcomes sovereign immunity as a normatively superior rule. Nevertheless, the Italian Parliament passed legislation giving effect to the 2012 ICJ decision, and Italian courts have subsequently denied jurisdiction in civil proceedings against the State for *jus cogens* violations. As discussed below, State immunity from civil suit follows naturally from developments in the procedural and substantive application of sovereign immunity to the individual.

C. Jurisdictional Immunities of the State

The rationale underlying State immunity in cases arising from violations of *jus cogens* hails from a personal-jurisdiction-type immunity which shields one State absolutely from involuntary subjugation to the jurisdiction of another State even for *jus cogens* violations. Given this preclusive procedural immunity, akin to the immunity *ratione personae* of the individual, “there is no substantive content in the procedural plea of State immunity upon which a *jus cogens* mandate can bite.”

If the observation in Part III above is correct, and sovereign immunity is rooted in equality as per the underlying principle *par in parem non habet imperium*, then it would seem that the principle of sovereignty underpinning the jurisdictional immunities of the State would be alleviated by

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322. Jurisdictional Immunities of the State (Ger. v. It., Greece Intervening), 2012 I.C.J. 1, ¶ 316 (Feb. 3) (dissenting opinion by Cançado Trindade) (“*Jus cogens* stands above the prerogative or privilege of State immunity, with all the consequences that ensue therefrom, thus avoiding denial of justice and impunity.”).

323. See, e.g., Orakhelashvili, supra note 130 (“Therefore, the prohibition on torture prevails over State immunity and this happens because of the normative characteristics of that prohibition, not because the ‘rules’ on State immunity shall or actually do allow this.”); Orakhelashvili, supra note 268, at 966 (“A state committing the breach of *jus cogens* waives the entitlement of sovereign immunity for those breaches.”).

324. Legge 14 January 2013, n. 5/2013 (It.) (requiring courts to deny jurisdiction where the I.C.J., “in a judgment settling a dispute in which Italy is a party, excluded the possibility of subjecting a specific conduct of another State to civil jurisdiction.”).

325. Frascà v. Germany and Giachini (guardian of Prießke) and Italy (joining), Corte di cassazione [Cass.], No. 4284/2013 (2013) (It.) (recognizing the jurisdictional immunity of Germany from civil proceedings for *jus cogens* violations in accordance with the 2012 I.C.J. decision Jurisdictional Immunity of the State and Article 3(1) of Law No. 5/2013); Military Prosecutor v. Albers and ors and Germany (joining), Corte di cassazione [Cass.], No. 32139/2012 (2012) (It.) (recognizing immunity of German State from civil proceeding awarding damages to *partie civile* in conjunction with criminal proceedings against individual perpetrators of *jus cogens* violations committed during the San Terenzo Monti massacre during World War II.).

326. Fox, supra note 131, at 525.
proceedings before an international juridical organ such as the ICJ. Alternatively, a State might consent to suit before the jurisdiction of another State by treaty or other ad hoc arrangement. However, imputing direct civil or criminal liability upon the State for violations of *jus cogens* appears to be a departure from the principle of dual responsibility that distinguishes individual responsibility—criminal and civil—from the international responsibility of the State. It would also appear impossible as a matter of attribution.

Approached as a form of subject-matter immunity, the jurisprudence of international and domestic courts indicates that *jus cogens* violations do not constitute “official acts” for purposes of sovereign immunity. Importantly, *jus cogens* violations are not merely an excess of authority or contravention of instructions. As a matter of international law, the sovereign does not possess the authority to authorize *jus cogens* violations in the first instance, therefore, such conduct cannot constitute “official acts” attributable to the State for purposes of individual responsibility, even if committed “under the color of law.” If *jus cogens* violations were attributable to the State in this sense, it would seem that the classical doctrine of sovereign immunity would then apply to shield those individuals who commit such conduct from criminal and civil responsibility while exposing the State to responsibility. Instead, the distinction that violations of *jus cogens* committed “under the color of law” do not constitute “official acts” is determinative in denying immunity *ratione materiae* for purposes of both individual criminal responsibility and civil liability. Taken together, immunity *ratione personae* is the procedural effect and immunity *ratione materiae* is the substantive result of the same principle of sovereign immunity, elements which apply equally to the State to provide effectively complete jurisdictional immunity for *jus cogens* violations before domestic courts. This reasoning may explain the broad recognition of State immunity before domestic courts.

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329. *Articles on Responsibility of States for Internationally Wrongful Acts*, supra note 9, at art. 7. (Excess of authority or contravention of instructions) (“The conduct of an organ of a State or of a person or entity empowered to exercise elements of the governmental authority shall be considered an act of the State under international law if the organ, person or entity acts in that capacity, even if it exceeds its authority or contravenes instructions.”).

courts in cases concerning *jus cogens* violations.331

On the other hand, the international responsibility of the State can be engaged by attribution of conduct committed “under the color of law,”332 notwithstanding that the individual cannot benefit from that attribution for purposes of immunity *ratione materiae*. The regime of the international responsibility of the State appears to differ sufficiently from criminal and civil responsibility in the realm of individual responsibility in such a way that internationally wrongful acts committed “under the color of law” are attributable to the State for purposes of international responsibility, while those same acts are insufficient to engage immunity *ratione materiae* as “official acts” in individual proceedings. The ILC indicated the possibility of such a relation in its commentary to the Articles on State Responsibility, observing that conduct undertaken under “official capacity or under the colour of authority” is attributable to the State when assessing international responsibility.333 This position would partially achieve the same practical effect as the rejected “normative hierarchy” theory that *jus cogens* “trumps” immunity,334 insofar as the State and individual may be dually responsible for the same conduct, albeit in different respects.335

Therefore, sovereign immunity as a principle, and its application to the State, is not interchangeable because sovereign immunity clearly applies in particular ways to individuals and States.336 Commentators have criticized such a bifurcation of individual and State immunities because it “would eviscerate the responsibility of states for the crimes committed by their organs.”337 But here it should be recalled that there is little to eviscerate. A State cannot be criminally prosecuted for *jus*

331. See discussion supra text accompanying notes 308-325.
333. Id. (emphasis added).
335. See discussion supra text accompanying note 299.
336. Cf. Roger O’Keefe, *Jurisdictional Immunities*, in THE DEVELOPMENT OF INTERNATIONAL LAW BY THE INTERNATIONAL COURT OF JUSTICE, 107, 144-46 (Christian Tams & James Sloane, eds., 2013) O’Keefe seems to refer to sovereign immunity and State immunity interchangeably. Moreover, he posits the immunity of the State and its officials to be the same—the latter is “an instantiation of state immunity pure and simple”—and refers to the distinction, particularly in the United States, between the immunity of the State from suit and the immunity of acts of individual officials from suit as “idiosyncratic national approaches.” Id.
337. Knuchel, supra note 209, at 165.
cogens violations before any forum as a matter of international law.\textsuperscript{338} And civil liability for States before domestic courts has been rejected by the ICJ,\textsuperscript{339} with a notable remaining outlier in the U.S. FSIA terrorism exception,\textsuperscript{340} which itself is of admittedly limited effectiveness.\textsuperscript{341} What remains is the international responsibility of the State for jus cogens violations, as considered by the ICJ in Application of the Convention on the Prevention and Punishment of the Crime of Genocide (2007).\textsuperscript{342}

VII. Conclusions

The foregoing analysis of the interaction of jus cogens and sovereign immunity reveals a matrix of consistent procedural postures dependent upon the form of immunity and subject of international law at issue. Immunity \textit{ratione personae} does not apply in proceedings before international courts and tribunals; yet it endures in domestic proceedings, both civil and criminal, to shield high State officials from the personal jurisdiction of foreign courts. By contrast, the immunity \textit{ratione materiae} that bars “official acts” of State officials from subject-matter jurisdiction does not apply to jus cogens violations in proceedings of international courts and tribunals, or domestic criminal proceedings for jus cogens violations; the same trend appears with some regularity in domestic civil proceedings. And while the State may be subject to international responsibility before international courts and tribunals to which it has consented to jurisdiction for jus cogens violations attributable to it carried out under the color of law, the jurisdictional immunity of the State persists in domestic proceedings notwithstanding the jus cogens nature of violations at issue. This latter finding may be viewed as a product of both immunity \textit{ratione personae}—which shields the State from personal jurisdiction just as its high officials—and immunity \textit{ratione materiae}—where the reasoning that precludes immunity for conduct not constituting “official acts” (i.e., jus cogens violations) may as a corollary preclude attribution of such conduct to the State in domestic proceedings. These conclusions are represented by the following

\begin{itemize}
\item \textsuperscript{338} See discussion \textit{infra} text accompanying note 305.
\item \textsuperscript{339} Jurisdictional Immunities of the State (Ger. v. It., Greece Intervening), 2012 I.C.J. 1, ¶¶ 92-97 (Feb. 3).
\item \textsuperscript{340} 28 U.S.C. § 1605A (terrorism exception to the jurisdictional immunity of a foreign state).
\item \textsuperscript{341} \textit{In re} Islamic Republic of Iran Terrorism Litigation, 659 F. Supp. 2d 31, 137-40 (D.D.C. 2009).
\end{itemize}
The divergence in immunities for States and individuals in proceedings for *jus cogens* violations demonstrates a nuanced interaction between the doctrines of sovereign immunity and *jus cogens*. This interaction suggests that sovereignty is a doctrine of equality, not supremacy, and that the power of sovereign authority to sanction official conduct is limited. These findings are consistent with the doctrine of *jus cogens*, a category of public order norms of international law that by design constrains the sovereignty of the State by permitting no derogation. Moreover, these conclusions resonate with other legal effects of *jus cogens*—obligations *erga omnes* requiring the State to prevent and punish, and the obligation to extradite or prosecute given effect by universal jurisdiction—by lowering the barrier of sovereign immunity that would impede the performance of these obligations. Questions remain as to whether international institutions will continue to erode immunity *ratione personae* by coordinating national law enforcement action against individuals traditionally enjoying absolute immunity. Similarly, conflicting jurisprudence in domestic courts relating to immunity *ratione materiae* in civil proceedings remains to be resolved, though U.S. precedent, charts a jurisprudence most consistent with the evolution of this immunity in criminal proceedings before international and domestic courts.

Taken together, the contemporary regime of international law immunities effectively shields the State from responsibility for *jus cogens* violations while exposing individual violators to both criminal responsibility and civil liability before a range of international and domestic fora. This jurisprudence embodies the principle underlying the IMT’s recognition at Nuremberg, that “[c]rimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international

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**Table summarizing the interaction of *jus cogens* and sovereign immunity:**

<table>
<thead>
<tr>
<th>Forum (proceeding)</th>
<th>Form of Immunity</th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td><em>Ratione Personae</em> (Status-based)</td>
<td><em>Ratione Materiae</em> (Conduct-based)</td>
</tr>
<tr>
<td>International</td>
<td>–</td>
<td>–</td>
</tr>
<tr>
<td>Domestic (Criminal)</td>
<td>+</td>
<td>–</td>
</tr>
<tr>
<td>Domestic (Civil)</td>
<td>+</td>
<td>–</td>
</tr>
</tbody>
</table>

– immunity not applicable  
+ immunity applicable  
* proceeding requires initial consent
law be enforced.”\textsuperscript{343} The ability of international and foreign domestic fora to exercise jurisdiction over criminal proceedings and civil claims for \textit{jus cogens} violations notwithstanding traditional forms of immunity is not, alone, the solution to impunity for egregious violations of international law. However, the effect of \textit{jus cogens} on sovereign immunity clearly demonstrates that sovereignty is limited by peremptory norms. And this interaction between \textit{jus cogens} and sovereign immunity incentivizes the State to hold accountable its own citizens who violate \textit{jus cogens} norms by enabling the international community to do so in its stead.

\textsuperscript{343} Nazi Conspiracy and Aggression, supra note 155, at 52-53.