Jus Cogens and the Procedural Alibi: Rethinking Sovereign Immunity in Contemporary International Law

The doctrine of sovereign immunity has long been treated as an almost natural expression of sovereign equality, a structural rule protecting the autonomy of states from the adjudicative authority of foreign courts (Malcolm N Shaw, International Law (8th edn, Cambridge University Press 2017) 489-516). The post war international legal order is built around peremptory norms prohibiting torture, genocide, war crimes and crimes against humanity, admitting no derogation (International Law Commission, 'Draft Conclusions on Peremptory Norms of General International Law (Jus Cogens), with Commentaries' (2022)). The central question dividing courts and commentators is whether a procedural bar such as state immunity can legitimately neutralise the practical enforcement of such norms.

This essay argues that the prevailing orthodoxy, which presents immunity as a rigid rule of custom untouched by the jus cogens quality of the underlying wrong, rests on a formalism increasingly difficult to defend. It draws on several doctrinal sites: the ICJ judgment in Jurisdictional Immunities of the State (Germany v Italy: Greece intervening) [2012] ICJ Rep 99, which finds no conflict between immunity and peremptory norms because they belong to different planes of law; the statutory terrorism exceptions in the United States and Canada, and the ICJ litigation they generated between Iran and the United States; the ECtHR decision in Al-Adsani v United Kingdom (2002) 34 EHRR 11, which accepts that immunity can limit access to a court even where torture is alleged; the House of Lords Pinochet decisions, implying that some international crimes can never be acts of state for immunity purposes; and two recent UK Supreme Court decisions extending similar logic to diplomatic immunity and the exploitation of domestic workers. Together, these show a sophisticated but deeply problematic system.

I. Classical Foundations and the Shift to Restrictive Immunity

Classical theory rested on the idea that par in parem non habet imperium: no state should be subject to the jurisdiction of another without its consent. The United States Supreme Court in The Schooner Exchange v McFaddon 11 US (7 Cranch) 116 (1812) framed this as an exemption grounded in consent and the needs of peaceful intercourse between states, later translated into an absolute rule of immunity.

For much of the nineteenth and early twentieth centuries, municipal practice reflected this absolute theory, declining jurisdiction over foreign states whether transactions were governmental or commercial (Hazel Fox and Philippa Webb, The Law of State Immunity (3rd edn, Oxford University Press 2015) 43-63). Once states began to participate in ordinary markets through state owned companies and public borrowing, that image became untenable.

The restrictive approach that followed makes immunity available only for sovereign or public acts (acta jure imperii), not private or commercial acts (acta jure gestionis). The distinction, developed in continental practice, was adopted in the United States via the Tate Letter of 1952 (Jack B Tate, Letter to Philip B Perlman, 19 May 1952, reprinted in 26 Department of State Bulletin 984 (1952)) and codified in the Foreign Sovereign Immunities Act 1976, 28 USC §§ 1602-11 and the State Immunity Act 1978 (UK). An absolute bar to jurisdiction became a default rule qualified by specific statutory exceptions.

II. Codification, Markets and the Functional Logic of Immunity

The UN Convention on Jurisdictional Immunities of States and Their Property (adopted 2 December 2004, not yet in force) UNGA Res 59/38, annex, is often seen as an international codification of the restrictive approach, confirming a basic principle of immunity subject to qualifications for commercial transactions, employment contracts, tort claims, rights in rem, and arbitration. Though not in force, it is commonly cited as evidence of a growing consensus.

Empirical work on sovereign debt contracts shows a similar market shift. Before the FSIA and the State Immunity Act, bondholders generally regarded immunity as non-negotiable; afterwards, waiver provisions became common in international bonds, with states agreeing to submit to foreign jurisdiction and limit execution immunity to enhance the credibility of their commitments (W Mark C Weidemaier and Mitu Gulati, 'Differing Perceptions? Market Practice and the Evolution of Foreign Sovereign Immunity' (2017) Law and Social Inquiry). Immunity became a negotiable parameter serving borrower and creditor alike.

This flexibility in contractual matters contrasts with the near absolute rigidity shown in matters of torture or war crimes, underscoring the pragmatic rather than purely conceptual nature of the doctrine.

A further statutory exception, sitting uneasily beside the commercial activity rationale, is the terrorism exception developed in the United States and later Canada. The Antiterrorism and Effective Death Penalty Act 1996 amended the FSIA to strip immunity from states designated as sponsors of terrorism, later consolidated in a federal cause of action for extrajudicial killing, torture and hostage taking attributable to a listed state (Foreign Sovereign Immunities Act 1976, 28 USC § 1605A). Canada followed in 2012, amending its State Immunity Act, RSC 1985, c S-18, through the Justice for Victims of Terrorism Act, SC 2012, c 1. Unlike the jus cogens arguments considered elsewhere, these exceptions rest not on the peremptory character of the conduct but on unilateral executive designation, withdrawing immunity from named adversary states rather than any state responsible for comparable conduct, a feature criticised as politicising what is presented as a legal category.

This exception has itself generated ICJ litigation. After default judgments against Iran, United States courts permitted plaintiffs to attach the assets of Bank Markazi, Iran's central bank, prompting Iran to sue under the 1955 Treaty of Amity, Economic Relations and Consular Rights. In Certain Iranian Assets (Islamic Republic of Iran v United States of America) (Judgment) [2023] ICJ Rep 1, the Court held that the United States had breached the Treaty by failing to accord Iranian companies, including Bank Markazi, the treatment required for their property, though it declined jurisdiction over claims resting directly on sovereign immunity, since the Treaty does not codify a general immunity guarantee. The case shows terrorism exceptions generating a treaty based track of litigation parallel to the customary framework in Jurisdictional Immunities, without engaging the jus cogens argument rejected in the German case.

III. Jus Cogens and the ICJ in Jurisdictional Immunities

The ICJ judgment in Jurisdictional Immunities is the leading statement of the orthodox position. Italian courts, notably in Ferrini v Federal Republic of Germany, Corte di Cassazione, judgment no 5044 (11 March 2004), had allowed civil claims against Germany for Second World War atrocities, invoking the peremptory character of the underlying norms to deny immunity, and the Greek Supreme Court took a similar line in the Distomo massacre litigation (Prefecture of Voiotia v Federal Republic of Germany, Areios Pagos, Case 11/2000, 4 May 2000), treating breaches of jus cogens as an implicit waiver of immunity.

Germany argued that these developments violated its jurisdictional immunity and conflicted with the post war reparations framework; Italy argued that the customary rules of immunity conflicted with jus cogens prohibitions of war crimes and crimes against humanity, which should prevail as hierarchically superior. The key issue was whether a state could rely on immunity where the claim concerned conduct contrary to peremptory norms.

The Court denied any conflict existed. Rules on state immunity and rules prohibiting grave breaches of humanitarian law regulate different matters: the former the jurisdiction of national courts, the latter the substantive wrongfulness of conduct. Granting immunity does not declare the acts lawful; it simply recognises the forum court is not entitled to adjudicate them. On this reasoning, the jus cogens quality of the substantive norms cannot displace immunity.

The Court relied heavily on the European Convention on State Immunity (16 May 1972) ETS No 74 and the UN Convention on Jurisdictional Immunities, reading their silence on a human rights exception as evidence that none exists in customary law, and treating domestic experimentation with denying immunity in atrocity cases as too limited to crystallise a new rule.

IV. Critiques of the Procedural and Substantive Divide

The ICJ's move has attracted sustained criticism. One concern is that the substance and procedure distinction obscures the practical effect of immunity: when courts in all plausible fora must decline jurisdiction, injured individuals are effectively deprived of any realistic prospect of redress, and continued wrongfulness at the level of state responsibility offers little comfort where no forum can enforce it (Jasper Finke, 'Sovereign Immunity: Rule, Comity or Something Else?' (2010) 21 EJIL 853).

A second criticism challenges the Court's treatment of treaty texts as near conclusive evidence of custom. Commentators note that the drafting history of the UN Convention on Jurisdictional Immunities reveals serious disagreement over a possible human rights exception, and that its silence reflects diplomatic compromise rather than a shared intention to exclude one (Alexander Orakhelashvili, 'State Immunity and Hierarchy of Norms: Why the House of Lords Got It Wrong' (2007) 18 EJIL 955). Elevating that silence into custom arguably entrenched a conservative reading at the expense of more progressive domestic developments.

More fundamentally, the judgment embodies a vision in which sovereign equality retains near absolute priority even against peremptory, non derogable norms. Jus cogens constrains substantive conduct but not procedural access to adjudication, sitting uneasily alongside a human rights trajectory where the right to an effective remedy has become central.

V. The European Court of Human Rights in Al-Adsani

The European Court of Human Rights had already confronted a similar tension in Al-Adsani. The applicant, alleging torture by Kuwaiti officials, brought civil proceedings in England dismissed on grounds of state immunity under the State Immunity Act, arguing before the Strasbourg Court that this denial of jurisdiction violated his right of access to a court under article 6 of the European Convention on Human Rights (4 November 1950) 213 UNTS 221.

By a narrow majority, the Grand Chamber found no violation. Article 6 confers a right of access to a court, but that right is not absolute and may be subject to proportionate limitations pursuing a legitimate aim, and respect for state immunity as a recognised rule of international law was treated as such an aim. The majority accepted the jus cogens status of the prohibition of torture but found insufficient state practice to support a civil jurisdiction exception, concluding that requiring the United Kingdom to disapply immunity would breach its own international obligations. A strong dissent argued that denying any judicial forum where a non derogable prohibition is engaged undermines the essence of the right of access to a court.

VI. Individual Criminal Responsibility and the Pinochet Turn

The immunity of the state itself is only part of the story; the immunity of officials from foreign criminal jurisdiction is a parallel strand. The House of Lords Pinochet decisions are emblematic. General Augusto Pinochet, former head of state of Chile, was arrested in London on a Spanish extradition request for torture and other international crimes, and claimed immunity ratione materiae on the basis the acts were performed in his official capacity (R v Bow Street Metropolitan Stipendiary Magistrate, ex p Pinochet Ugarte (No 3) [2000] 1 AC 147 (HL)).

A majority held that Pinochet was not entitled to immunity for acts of torture committed after the United Kingdom had implemented the Convention against Torture (10 December 1984) 1465 UNTS 85, which treats torture as a crime that states must prosecute or extradite when a suspect is present in their territory; torture could not, therefore, be an official function of a head of state for immunity purposes. The jus cogens character of the prohibition underpins the conclusion that such conduct cannot be reframed as a protected act of state.

This reasoning has influenced International Law Commission debates on the immunity of state officials from foreign criminal jurisdiction (International Law Commission, 'Draft Articles on Immunity of State Officials from Foreign Criminal Jurisdiction, with Commentaries' (2017)). There is no settled customary rule establishing a jus cogens exception to official immunity in criminal proceedings, but practice suggests growing willingness to let the gravity of conduct shape what counts as an official act.

The Pinochet jurisprudence, however, resolves the tension not by openly subordinating immunity to jus cogens, but by reclassifying certain conduct as non official, avoiding a frontal collision of norms at the price of a legal fiction: immunity remains tied to official acts, yet the gravest acts officials commit are said never to have been official at all.

VII. Diplomatic Immunity and Domestic Servitude: Reyes and Basfar

A more recent parallel concerns diplomatic immunity and the exploitation of domestic workers in diplomatic households. In Reyes v Al-Malki [2017] UKSC 61, a domestic worker employed by a serving diplomat in London alleged she had been trafficked and kept in conditions amounting to forced labour. By the time the claim was heard the diplomat had left his post; the Supreme Court unanimously held that his employment and mistreatment of her fell outside his official functions, so no residual immunity survived under article 39(2) of the Vienna Convention on Diplomatic Relations (18 April 1961) 500 UNTS 95. A narrow majority added, obiter, that the same conduct would have fallen within the commercial activity exception in article 31(1)(c) had the diplomat still been in post.

That question returned in Basfar v Wong [2022] UKSC 20, where the diplomat remained in post throughout. A majority held that keeping a domestic worker in conditions of modern slavery was itself outside a diplomat's official functions and fell within the commercial activity exception, so immunity did not bar the claim. The dissent warned this strains the ordinary meaning of commercial activity and risks converting article 31(1)(c) into a general human rights exception unsupported by the Convention's text. Read with Pinochet, these decisions show courts reclassifying conduct rather than confronting immunity doctrine directly, here applied to diplomatic rather than state or head of state immunity.

VIII. Domestic Courts at the Frontiers: Ferrini and Distomo

Domestic apex courts have occasionally gone further than international or regional tribunals. In Ferrini, the Italian Corte di Cassazione held that Germany could not rely on sovereign immunity for civil claims arising from deportation and forced labour imposed on an Italian national during the Second World War, treating serious violations of fundamental rights as international crimes grave enough to justify an exception to immunity, drawing on analogies with the erosion of functional immunity for state officials in criminal cases (Pasquale De Sena and Francesca De Vittor, 'State Immunity and Human Rights: The Italian Supreme Court Decision on the Ferrini Case' (2005) 16 EJIL 89).

In the Distomo massacre litigation, the Greek Supreme Court confirmed a judgment holding Germany liable in damages for a 1944 massacre in a Greek village and declined to recognise immunity, holding that acts violating peremptory norms could not be sovereign acts and that Germany had impliedly waived its immunity. Enforcement was later blocked by the Greek executive, but the reasoning remained influential.

These judgments were neutralised by the ICJ ruling in Germany v Italy and later domestic decisions (Paolo Palchetti, 'The Judgment of the Italian Constitutional Court on State Immunity in Cases of Serious Violations of Human Rights or Humanitarian Law' (2016) 37 Sequencia 97), yet they show some national courts prepared to treat jus cogens as reshaping immunity itself, through explicit exceptions or a reinterpretation of what counts as an act jure imperii.

IX. An Analytical Framework: Immunity as Principle Under Jus Cogens Pressure

First, the normative status of immunity: the orthodox view treats it as a rule of customary law with closed exceptions, while an alternative, associated with writers such as Finke, treats it as a principle expressing a presumption of non jurisdiction, balanced against access to justice and respect for peremptory norms. The rule view invites a binary search for a customary exception; the principle view a structured assessment of competing factors.

Secondly, how far jus cogens reaches. On a narrow reading, peremptory norms regulate only substantive wrongfulness; on a broader reading, they also constrain procedural rules, including jurisdiction and immunity. The ICJ, the ECtHR in Al-Adsani, and the terrorism exception cases follow versions of the narrow reading, resolving hard cases through statutory design or treaty interpretation rather than jus cogens itself, while the Italian and Greek courts in Ferrini and Distomo, and the UK Supreme Court in Basfar, move toward the broader reading by letting the gravity of the conduct affect the scope of immunity.

Thirdly, a court adopting the principle approach and the broader view must weigh the gravity of the conduct, the connection to the forum state, the availability of other redress, and the systemic impact of assuming jurisdiction, including diplomatic consequences. Germany v Italy privileges the rule view and systemic concerns, whereas Ferrini and Basfar give greater weight to gravity and forum connection, at the cost of candour about what is actually being decided.

X. Conclusion

The doctrine of sovereign immunity emerged as a corollary of sovereign equality and was traditionally absolute. The shift to a restrictive, codified system reflects the need to adapt it to the economic realities of the trading state, a logic visible both in commercial waiver practice and, in cruder unilateral form, in the terrorism exceptions of the United States and Canada and the ICJ litigation they produced. With the rise of jus cogens principles and individual claims to a remedy, a new fault line has appeared, especially in cases involving torture, war crimes, crimes against humanity, and, as Reyes and Basfar show, the trafficking of domestic workers within diplomatic households.

The ICJ in Germany v Italy and the ECtHR in Al-Adsani address this fault line by emphasising the separation between substance and procedure, denying the relevance of the peremptory character of the norms to the existence of immunity. The House of Lords in Pinochet, the UK Supreme Court in Basfar, and domestic courts in Ferrini and Distomo suggest a more dynamic horizon in which the seriousness of the violation redefines immunity through reclassification and exception.

A plausible theory of sovereign immunity must preserve the interests the concept protects while capturing the constitutional effects of emerging human rights and international criminal law regimes. Subjecting immunity to a test of justification against jus cogens and effective remedy could preserve the dignity of states without diminishing the dignity of the victim.