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Let the Responsible be Responsible: Judicial Oversight and Over-Optimism in the Arrest Warrant Case and the Fall of the Head of State Immunity Doctrine in International And Domestic Courts

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ARTICLES

LET THE RESPONSIBLE BE RESPONSIBLE: JUDICIAL OVERSIGHT AND OVER-OPTIMISM IN THE *ARREST WARRANT* CASE AND THE FALL OF THE HEAD OF STATE IMMUNITY DOCTRINE IN INTERNATIONAL AND DOMESTIC COURTS

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I. INTRODUCTION

In October 2013, the African Union ("AU") requested the International Criminal Court ("ICC") to defer its prosecution of Kenyan President Uhuru Kenyatta for crimes against humanity committed in his country.[1] The AU purported that any sitting African head of state should be entitled to immunity, and Kenya threatened to

1. *African Union Urges ICC to Defer Uhuru Kenyatta Case*, BBC NEWS AFRICA (Oct. 12, 2013), http://www.bbc.com/news/world-africa-24506006.

withdraw from the jurisdiction of the ICC if the court did not answer AU's request.[2]

Kenya's request rekindled the debate over whether heads of state have immunity for criminal conduct. The International Court of Justice ("ICJ") answered this question in the *Arrest Warrant of 11 April 2000*[3] case ("*Arrest Warrant*"), where it held that the Democratic Republic of Congo's incumbent Minister of Foreign Affairs had immunity from criminal prosecution.[4] The ICJ may not have expected that its holding would open the floodgates to claims for immunity, especially since the court opined that head of state immunity would be unavailable in certain situations.[5] Nevertheless, this decision has had serious implications on the ability of victims of human rights violations to seek justice.

The ICJ overvalued the immunity doctrine by unjustifiably expanding it to ministers of foreign affairs. It also failed to fully appreciate the ability of international courts to remove head of state immunity. The adventurousness and optimism of the court are not consistent with fundamental international law principles, and subsequent international and domestic jurisprudence have challenged the *Arrest Warrant*'s credibility and called for the abrogation of the head of state immunity doctrine.[6]

This article argues that international and domestic courts should not recognize head of state immunity for *jus cogens* crimes. Section II outlines the various immunity categories, namely state immunity, functional immunity, and personal immunity. It also discusses the correlations between these doctrines and addresses the possibility of invoking a *jus cogens* exception to immunity. Section III evaluates the reasoning of the *Arrest Warrant* case and the *dictum* relating to the circumstances under which head of state immunity is not

2. *Id.*

3. 2002 I.C.J. 3 (Feb. 14).

4. *Id.* at 30, ¶ 71.

5. *See id.*, at 25, ¶ 61 (highlighting four situations in which head of state criminal immunity under international law would not apply: (1) in domestic courts within the head of state's own country; (2) when the State chooses to waive immunity for the head of state's actions; (3) when the former head of state is no longer an incumbent; and (4) when certain international criminal courts have jurisdiction over the incumbent head of state).

6. *See infra* Section III (detailing subsequent case law that criticizes the ICJ's approach in *Arrest Warrant*).

applicable. It alleges that the ICJ misconceived the law when engaging in this analysis in three ways.

First, the court lacked a basis to extend head of state immunity to ministers of foreign affairs because it erroneously equated the functions of heads of state with those of ministers of foreign affairs without due regard to customary international law. It also failed to recognize that any immunity domestic courts have granted to ministers of foreign affairs has been based on comity rather than a positive obligation.

Second, the international and domestic jurisprudence after *Arrest Warrant* suggests that head of state immunity doctrine has eroded. Moreover, the modern meaning of "sovereignty" has redefined a head of state's functions, shifting it toward a duty to safeguard the interests of the State's citizens. Under this framework, officials who inflicted harm to their citizens, and thereby failed to effectively perform their functions, cannot benefit from immunity.[7] Furthermore, in recognizing head of state immunity for *jus cogens* crimes, States are in violation of article 41(2) of the International Law Commission's Draft Articles on State Responsibility for Internationally Wrongful Acts ("ILC Draft Articles on State Responsibility"), which prohibits States from recognizing serious breaches of peremptory norms as lawful acts.[8]

Finally, in affirming head of state immunity, the ICJ undermines the efficacy of prosecuting individuals for serious violations of international criminal law. While international criminal courts, such as the International Criminal Tribunal for Former Yugoslavia ("ICTY"), the International Criminal Tribunal for Rwanda ("ICTR"), the Special Court for Sierra Leone ("SCSL"), and the International Criminal Court ("ICC"), do not recognize head of state immunity,

7. *See Arrest Warrant of 11 April 2000*, 2002 I.C.J. at 85, ¶¶ 74-75 (joint separate opinion of Judges Higgins, Kooijmans & Buergenthal) (highlighting the need to balance ending impunity with independent state sovereignty).

8. *See Report of the International Law Commission: Fifty-Third Session*, 56 U.N. GAOR Supp. No. 10, at 286, U.N. Doc. A/56/10 (2001), *reprinted in* [2001] 2 Y.B. Int'l L. Comm'n 1, 29 U.N. Doc. A/CN.4/SER.A/1996/Add.1 (pt. 2) [hereinafter ILC Draft Articles on State Responsibility] ("No State shall recognize as lawful a situation created by a serious breach within the meaning of article 40 [a serious breach of a peremptory norm], nor render aid or assistance in maintaining that situation.").

heads of state may still invoke this immunity for offences over which the courts above lack jurisdiction, such as when the offences were committed beyond the territorial jurisdiction limits of the courts. Heads of state that fall outside of this jurisdiction are able to escape with impunity. Only a blanket rejection of head of state immunity can prevent this.

Section IV analyzes whether *Arrest Warrant* constitutes good precedent in terms of ensuring that the two fundamental pillars of law, legal certainty and serving justice, are met. It concludes that *Arrest Warrant* undermines both. This article suggests that an international instrument that specifically governs head of state immunity is necessary. Alternatively, local courts should be allowed to prosecute heads of state for heinous crimes because it serves as an easy avenue to achieve immediate criminal justice.

II. CATEGORIES OF IMMUNITY

There are three types of immunities: state immunity, functional immunity, and personal immunity. Although the situations in which these immunities apply vary, they are all related to the maxim *par in parem non habet imperium*. This means "the courts of one country may not assume jurisdiction over a foreign sovereign [s]tate without its consent."[9]

A. STATE IMMUNITY

State immunity protects States from adjudication in foreign domestic courts to allow the State and its representatives to perform their public functions without judicial interference[10] Chief Justice Marshall of the U.S. Supreme Court first propounded the concept by describing state immunity as "[o]ne sovereign being in no respect amenable to another; and being bound by obligations of the highest character not to degrade the dignity of his nation."[11]

State immunity has arguably progressed from an absolute to a restrictive principle that allows domestic courts to assert jurisdiction

9. HERSCH LAUTERPACHT, THE FUNCTION OF LAW IN THE INTERNATIONAL COMMUNITY 437 (2011).

10. JAMES CRAWFORD, BROWNLIE'S PRINCIPLES OF PUBLIC INTERNATIONAL LAW 487 (8th ed. 2012) [hereinafter CRAWFORD, BROWNLIE'S PRINCIPLES].

11. Schooner Exch. v. McFaddon, 11 U.S. 116, 137 (1812).

in certain circumstances.[12] A State's conduct will be subject to immunity only when "the [S]tate has acted in its official capacity as sovereign political entity" (*acta jure imperii*), as opposed to acting in a private or commercial nature (*acta jure gestionis*).[13] A plethora of international instruments and domestic legislation have accepted this restrictive approach.[14]

12. ROSALYN HIGGINS, PROBLEMS AND PROCESS, INTERNATIONAL AND HOW WE USE IT 79 (1994).

13. ELEANOR ALLEN, THE POSITION OF FOREIGN STATES BEFORE NATIONAL COURTS 301 (1933).

14. *See, e.g.*, United Nations Convention on the Jurisdictional Immunities of States and Their Property, G.A. Res. 59/38, Annex, U.N. Doc. A/RES/59/38 (Dec. 16, 2004) (limiting the availability of immunity within foreign jurisdictions in regards to commercial transactions); European Convention on State Immunity arts. 6-7, May 16, 1972, 1495 U.N.T.S. 182 (providing limits on the immunities available to States that conduct business within the territory of other States); International Convention Relating to the Arrest of Seagoing Ships art. 2, May 10, 1952, 439 U.N.T.S. 193 (providing liability for ships flagged in another State within a second State's domestic courts); 1926 International Convention for the Unification of Certain Rules Concerning the Immunity of State-Owned Ships and 1934 Additional Protocol art. 3, Apr. 10, 1926, 179 L.N.T.S. 199 (providing limited immunity for suits pertaining to ships); INSTITUT DE DROIT INT'L, TABLEAU GÉNÉRAL DES TRAVAUX (1873-1913) 150-53 (James Brown Scott ed., 1920) (Fr.); U.N. Secretariat, *Immunity of State Officials from Foreign Criminal Jurisdiction: Memorandum by the Secretariat-General*, ¶¶ 34-35, U.N. Doc. A/CN.4/596 (Mar. 31, 2008) [hereinafter *U.N. Memorandum on State Officials' Immunity*]; *Report of the International Commission to the General Assembly on the Work of Its Forty-Third Session*, 46 U.N. GAOR Supp. No. 10, at 17, U.N. Doc. A/46/10 (1991), *reprinted in* [1991] 2 Y.B. Int'l L. Comm'n 1, 33 U.N. Doc. A/CN.4/SER.A/1991/Add.1 (pt.2) (limiting immunity from jurisdiction in cases of commercial transactions); Institut de Droit Int'l, *Resolution on the Immunity from Jurisdiction of the State and of Persons Who Act on Behalf of the State in Case of International Crimes*, art. 3, Napoli Session Res. (2009), *available at* http://www.idi-iil.org/idiE/resolutionsE/2009_naples_01_en.pdf (removing personal immunity from individuals when they are no longer acting on behalf of the State). Many States have incorporated restrictive immunity into their domestic laws. *See, e.g.*, Foreign Sovereign Immunities Act, 28 U.S.C. § 1605 (2012); *Foreign States Immunities Act 1985* (Cth) s 11 (Austl.); State Immunity Act, R.S.C. 1985, c. S-18 (Can.); State Immunity Ordinance, 1981, 20 U.N. Legislative Series 20 (2003) (Pak.); State Immunity Act 1987, c. 313, § 5 (Sing.); Foreign States Immunities Act 87 of 1981 § 4 (S. Afr.); State Immunity Act, 1978, c. 33, § 3 (U.K.). Other States recognize restrictive immunity in their jurisprudence. *See, e.g.*, Manauta v. Embassy of Russian Fed'n, 113 I.L.R. 429, 430 (CSJIN 1994) (Arg.) (analyzing both legislative texts and court documents and determining that the restrictive theory of state immunity is now widely accepted); Gov't of Can. v. Emp't App. Trib.& Burke, 95 I.L.R. 467, 472 (H. Ct. Ir. 1991) (adopting the observations of Lord Wilberforce in *Congreso del Partido*, 64 I.L.R. 307, 318

States retain immunity from criminal prosecution. As a result, in the absence of any relevant rules under international law, courts cannot criminalize States for their conduct.[15] State crimes were purposefully excluded from the ILC Draft Articles on State Responsibility.[16] Similarly, neither the Rome Statute for the ICC nor the Nuremberg Charter recognizes that States are capable of committing crimes.[17] In *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*,[18] the ICJ held that a State could only incur obligations and responsibilities under international law for non-criminal conduct. The ICJ reaffirmed a State's immunity from criminal prosecution in *Jurisdictional*

(1981) (U.K.) that courts should decide whether the relevant acts are "fairly within an area of activity, trading or commercial, or otherwise of a private law character" or whether they are "outside that area, and within the sphere of governmental or sovereign activity."); Saikō Saibansho [Sup. Ct.] Jul. 21, 2006, 2003 (Ju) 1231, 60 SAIKŌ SAIBANSHO MINJI HANREISHŪ [MINSHŪ] 1 (Japan) (holding that foreign states are not immune to Japan's jurisdiction in civil cases unless that jurisdiction is likely to infringe on that State's sovereignty); Ministry of Def. Gov't of the U.K. v. Ndegwa, 103 I.L.R. 235, 235 (C.A.K. 1983) (Kenya) (finding no absolute sovereign immunity exists and the test is whether the government was acting in a governmental or a private capacity); Marine Steel Ltd. v. Gov't of the Marsh. Is., 64 I.L.R. 539, 539 (HC N.Z. 1981) (finding that restrictive immunity applies to actions both *in rem* and *in personam*); Barker McCormac (Pvt) Ltd. v. Gov't Kenya, 84 I.L.R. 18, 18 (S.C. Zim. 1981) ("The modern doctrine of restrictive sovereign immunity . . . ha[s] superseded the traditional doctrine of absolute sovereign immunity as the prevailing norm of international law and the doctrine should be incorporated into municipal law."). Although Russia and China, for instance, favor the absolute approach, commentators argue that, "[f]rom the practice of the courts it can no longer be deduced . . . that the granting of unrestricted immunity can still today be regarded as a usage followed by the great majority of States in the belief that it is legally obligatory." Pierre-Hugues Verdier & Erik Voeten, *Precedent, Compliance, and Change in Customary International Law: An Explanatory Theory*, 108 AM. J. INT'L L. 389, 405 (2014) (suggesting that these countries have held out against adopting restrictive immunity because they are "large countries with extensive state involvement in their economies, suggesting a high threshold that led them to adhere to absolute immunity while most other states switched); *see Claim Against the Empire of Iran*, 45 I.L.R. 57 (BVerfG 1963) (Ger.).

15. Nigel White & Ademola Abass, *Countermeasures and Sanctions*, *in* INTERNATIONAL LAW 532 (Malcolm Evans ed., 3d ed. 2010).

16. *See* ILC Draft Articles on State Responsibility, *supra* note 8, at 279, 281.

17. DAVID HARRIS, CASES AND MATERIALS ON INTERNATIONAL LAW 141 (7th ed. 2010).

18. 2007 I.C.J. 140, ¶ 170 (Feb. 26).

Immunities of the State.[19] At the same time, the ICJ distinguished it and ruled that the removal of immunity for *jus cogens* crimes in *Pinochet* should not apply to the present case because *Pinochet* concerns a criminal proceeding against an individual, while the present case was a civil case against a State itself.[20]

As mentioned above, the rationale for state immunity originates from the idea of *par in parem non habet imperium*. The independence and equality of States are inviolable in the sense that no State may assert jurisdiction over another.[21] The ICJ reiterated sovereignty's supremacy in the *Corfu Channel Case*,[22] finding that sovereignty refers to "the whole body of rights and attributes which a State possesses in its territory, to the exclusion of all other States, and also in its relations with other States."[23] In other words, States may not exercise their sovereign powers within the territory of another State. States must also "refrain from interfering in the exercise of another State's powers that qualify as exclusive under international law."[24] Accordingly, no foreign domestic court can subject a State to judicial scrutiny without a waiver of state immunity.

Requiring an immunity waiver is analogous to requiring States' consent to accede jurisdiction to an international court.[25] Jennings

19. 2012 I.C.J. 99, ¶ 91 (Feb. 3) (reaffirming the distinction between access to immunity in civil and criminal cases).

20. *Id.* at 142, ¶ 97. The court refused to follow *Pinochet*, which had denied head of state immunity for acts of torture, because the case only addressed the applicability of immunity in a criminal proceeding against an individual, while the ICJ was dealing with a civil case against a State. *Id.* at 138, ¶ 87.

21. *See* Lee M. Caplan, *State Immunity, Human Rights, and Jus Cogens: A Critique of the Normative Hierarchy Theory*, 97 AM. J. INT'L L. 741, 748 (2003) (describing the historical origins of state sovereignty that viewed all States as inherently equal and therefore incapable of being subject to the jurisdiction of another State).

22. 1949 I.C.J. 39 (Apr. 9).

23. *Id.* at 43 (separate opinion of Judge Alvarez).

24. ROSANNE VAN ALEBEEK, THE IMMUNITY OF STATES AND THEIR OFFICIALS IN INTERNATIONAL CRIMINAL AND INTERNATIONAL HUMAN RIGHTS LAW 68 (Vaughan Lowe ed., 2008).

25. *See* Rome Statute of the International Criminal Court arts. 12-14, Jul. 17, 1998, 2187 U.N.T.S. 3 [hereinafter Rome Statute] (providing that by becoming a party to the Rome Statute, States automatically accept the court's jurisdiction); *see also* Statute of the International Court of Justice art. 36, June 26, 1945, 59 Stat. 1055, 33 U.N.T.S. 933 [hereinafter ICJ Statute] ("The states parties to the present

stressed that immunity without waiver and state consent "are the obverse and reverse of the same coin" in that sovereignty is the historical basis and rationale for both concepts.[26] Crawford emphasized that because States cannot be subject to legal responsibility without their consent, granting state immunity is just as, if not more important, in domestic courts as it is in international fora.[27] The United Kingdom House of Lords supported this proposition in *Duke of Brunswick v. King of Hanover*,[28] opining that other States cannot judge the appropriateness of a state official's act "[a]ffected by virtue of his sovereign authority abroad" rather than personal act conducted as a British subject.[29] The United States Supreme Court in *Underhill v. Hernandez*[30] further commented that relevant States must resolve any "grievances" that arise from the official acts through diplomatic means.[31] These observations reflect the belief that in claiming competence over official foreign sovereign acts, domestic courts undermine the equality and independence of States.

B. FUNCTIONAL IMMUNITY

Functional immunity, or immunity *rationae materiae*, applies when the impugned acts are conducted under the authority of a sovereign, independent of whether the individuals are in office. This immunity applies *erga omnes* when the official is operating overseas, meaning that all States must respect his or her functional immunity, not only the official's State and the State in which he or she is operating.[32] Both incumbent and former state officials are entitled to claim functional immunity, irrespective of their place in the state

Statute may at any time declare that they recognize as compulsory *ipso facto* and without special agreement, in relation to any other state accepting the same obligation, the jurisdiction of the Court").

26. ROBERT JENNINGS, THE PLACE OF JURISDICTIONAL IMMUNITY OF STATES IN INTERNATIONAL AND MUNICIPAL LAW 4 (1987).

27. *See* James Crawford, *Execution of Judgments and Foreign Sovereign Immunity*, 75 AM. J. INT'L L. 820, 856-57 (1981) (citing civil jurisdiction in transactional disputes as one such area).

28. (1848) 9 Eng. Rep. 993, 999 (H.L.) (U.K.).

29. *Id.*

30. 168 U.S. 250 (1897).

31. *Id.* at 252.

32. CRAWFORD, BROWNLIE'S PRINCIPLES, *supra* note 10, at 114-15.

hierarchy.[33] Several international and domestic courts have allowed such claims in criminal cases.[34] A wide variety of state officials, including low-ranking ones, have also benefited from functional immunity in civil cases.[35]

Functional immunity originates from the ideology of state immunity. Kelsen highlighted this interaction observing that only acts that "human beings in their capacity as organs of the State" perform manifest the legal existence of a State.[36] He further argued that only when "the civil or criminal delict for which the individual is prosecuted has the character of an act of State" should a court grant immunity to that individual.[37] Because of the relationship between functional and state immunity, official acts conducted under state authority are attributed to the State. The officials bear no personal responsibility for such conduct. If the State as a legal entity can claim immunity under the same circumstances, the State's official is able to do the same.[38] The Appeals Chamber at the International

33. Paola Gaeta, *Official Capacity and Immunities*, *in* THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY 975, 975 (Antonio Cassese et al. eds., 2002) [hereinafter Gaeta, *Official Capacity and Immunities*].

34. *See, e.g.*, Regina v. Bow Street Metro Stipendiary Magistrate, ex parte Pinochet (No. 3), 119 I.L.R. 112, 161-62 (H.L. 1999) (Eng.) (noting such immunity is extended to heads of state in civil and criminal matters for acts performed while in office); Bundesgericht [Bger] [Federal Supreme Court] Dec. 22, 2005 (Switz.); Certain Questions of Mutual Assistance in Criminal Matters (Djib. v. Fr.), 2008 I.C.J. 177, 236-37, ¶ 170 (Jun. 4) (outlining the precedent behind head of state immunity); Prosecutor v. Blaškić, Case No. IT-95-14-AR, Judgment on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997, ¶¶ 38, 41 (Int'l Crim. Trib. for the Former Yugoslavia Oct. 29, 1997) (citing Rainbow Warrior (N.Z. v. Fr.), 82 I.L.R. 499, 500-01 (Fr.-N.Z. Arb. Trib. 1990), and Att'y Gen. of Isr. v. Eichmann, 36 I.L.R. 277, 308-09 (HCJ 1962) (Isr.)).

35. *See, e.g.*, Jaffe v. Miller (1993), 95 I.L.R. 446, 460 (Can. Ont. C.A.) (Can.) (finding that functional immunity was preserved even though the nature of the illegal acts was egregious and outside the scope of employment); Church of Scientology Case, 65 I.L.R. 193, 193 (BHG 1978) (F.R.G) (finding police officers covered by functional immunity in a civil case); R v. Jones, [2006] U.K.H.L. 26 (U.K.) (discussing that only a state cannot commit aggression and not an individual).

36. HANS KELSEN, PRINCIPLES OF INTERNATIONAL LAW 358 (2d ed. 1966); *see also* Propend Finance Pty. Ltd. v. Sing, [1997] A.C. 611 at 669 (Eng.) (noting that the protections that immunities afford to states would be undermined if those representing the state could be sued in their individual capacity).

37. KELSEN, *supra* note 36, at TBD; *see Sing*, [1997] A.C. at 669.

38. *See* Zachary Douglas, *State Immunity for the Acts of State Officials*, 82

Criminal Tribunal for the former Yugoslavia ("ICTY") implicitly recognized the "non-personal responsibility for official acts" in *Prosecutor v. Blaškić*.[39] In this case, Croatia contested the compulsory orders that the Trial Chamber issued against several Croatian state officers to produce certain documents. The Appeals Chamber held that the officers were acting in an official capacity and as such enjoyed functional immunity because they were "mere instruments of a State[,] and their official action [could] only be attributed to the State."[40]

The concepts of functional immunity and state responsibility are closely connected. State responsibility arises when the claim for functional immunity succeeds. Accordingly, the criteria for imposing state responsibility may also determine whether an act is "official."[41] For an act to be attributable to the State, the ILC Draft Articles on State Responsibility rely on the individual's "apparent authority" rather than on his or her motives for committing the act.[42] Courts presume that this authority exists on the basis that States are at liberty to "determine [their] internal structure" and "designate the individuals acting as [s]tate agents or organs" pursuant to the instructions issued to these individuals.[43] Courts must respect this.[44] The Italian Court explained that "the principle of international law of respect for the internal legal organization of every State by all other States . . . and thus not to attach civil or criminal consequences of a personal character to the activities of these functionaries [of foreign states]," provided that they acted within their functions.[45] The mandate and directions that a State gives to its officials determine the

BRIT. Y.B. INT'L L. 281, 282 (2012) (discussing the relationship between the foreign state and the acts of the foreign official for determining immunity from proceedings).

39. Case No. IT-95-14-AR, Judgment on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997, ¶¶ 39, 41 (Int'l Crim. Trib. for the Former Yugoslavia Oct. 29, 1997).

40. *Id.* ¶ 38.

41. *See* ILC Draft Articles on State Responsibility, *supra* note 8, at 43 (presenting the text of the Draft Articles on Responsibility of States for internationally wrongful acts).

42. *Id.* at 102.

43. *Blaškić*, Case No. IT-95-14-AR, ¶ 41.

44. GAETANO MORELLI, DIRITTO PROCESSUALE CIVILE INTERNAZIONALE 201 (2nd ed. 1954).

45. Trib., 20 novembre 1953, 38 Riv. di Dir. Int. 79 (Roma) (1953) (It.).

official nature of an official's act. However, court investigations into that mandate would require the court to assert jurisdiction over the foreign state and hence undermine the exclusive competence of that State.[46] A State has the exclusive right to sanction, or provide other remedies against, its organs for not complying with the mandate the State has authorized.[47] It follows that because a State retains exclusive power over the conduct of its officials, it has the right to request that States attribute official acts the State to protect its officials or organs from accountability.[48]

Although the "presumed apparent authority" test has received general support,[49] proponents for a "personal motives" requirement still exist. The Institut de Droit International, for example, recognized that acts "performed exclusively to satisfy a personal interest" prevent a former official from claiming functional immunity.[50] Similarly, Robertson argued that actions taken in pursuit of private gratification do not justify a claim for functional immunity.[51] Lord Hope also made similar arguments in *Regina v. Bow Street Metro Stipendiary Magistrate, ex parte Pinochet (No. 3)* ("*Pinochet*").[52]

46. *See* Herbage v. Meese, 747 F. Supp. 60, 67 (D.D.C. 1990) ("The FSIA bars . . . allegations [that] would require an adjudication of the proprietary and legality of the acts of [another state] in the performance of [its] official duties.").

47. *Blaškić*, Case No. IT-95-14-AR, ¶ 41.

48. *Id.* ¶ 43.

49. *See* Arthur Watts, *The Legal Position in International Law of Heads of States, Heads of Governments, and Foreign Ministers*, 247 RECUEIL DES COURS 21, 82 (1994) (noting that this application of international law is not always appropriate, particularly in the context of international crimes).

50. Institut de Droit Int'l, *Immunities from Jurisdiction and Execution of Heads of State and of Government in International Law*, art. 13(2), Vancouver Session 2001 Res. (Aug. 26, 2001), *available at* http://www.idi-iil.org/idiE/resolutionsE/2001_van_02_en.PDF [hereinafter *Immunities from Jurisdiction Resolution*].

51. GEOFFREY ROBERTSON, CRIMES AGAINST HUMANITY: THE STRUGGLE FOR GLOBAL JUSTICE 402 (4th ed. 2012).

52. 119 I.L.R. 135, 195 (H.L. 1999) (Eng.) ("The principle of immunity ratione materiae protects all acts which the head of state has performed in the exercise of the functions of government . . . There are only two exceptions to this approach which customary international has recognized. The first relates to criminal acts which the head of state did under the colour of his authority as head of state but which were in reality for his own pleasure or benefit.").

Whether state officials who perform *ultra vires* acts retain their functional immunity varies. U.S. courts, for instance, have rejected immunity claims for official acts that contravened national laws.[53] On the other hand, the ILC Draft Articles on State Responsibility took a broader approach and considered the lawfulness of the act was irrelevant, emphasizing that the State is responsible for all official acts of its agents.[54] Other domestic and international courts have agreed and added that *ultra vires* acts are attributable to the State even if they are malicious in nature or do not fall within the authority of a State recognized under international law.[55] Despite these varying interpretations, the international community agrees that officials performing acts that violate domestic legislation cannot rely on functional immunity if the acts are "simultaneously prescribed by a norm of international law that is directed to the conduct of individuals."[56] Section IV further explores whether *jus cogens* crimes that state officials commit constitute *ultra vires* acts.[57]

C. PERSONAL IMMUNITY

Personal immunity, or immunity *rationae personae*, "attaches to the person" and applies to all acts, whether conducted in an official capacity or not.[58] Historically, courts have limited the immunity to

53. *See, e.g.*, Doe v. Liu Qi, 349 F. Supp. 2d 1258, 1286 (N.D. Cal. 2004) (holding that when an official exceeds his or her authority, he or she can no longer enjoy immunity for those actions); Xuncax v. Gramajo, 886 F. Supp. 162, 175 (D. Mass. 1995) ("[A]n individual official of a foreign state is *not* entitled to immunity under FSIA in an action brought against him for acts beyond the scope of his authority").

54. ILC Draft Articles on State Responsibility, *supra* note 8, at 103.

55. *See* Jaffe v. Miller (1993), 95 I.L.R. 446, 460 (Can. Ont. C.A.) (Can.) (emphasizing that malicious and egregious acts are outside the scope of immunity's intent); *see also* A, B, C, D, E, F v. Zemin, 282 F. Supp. 2d 875, 883 (N.D. Ill. 2003) (noting that, although former heads of state do not retain immunity for violations of *jus cogens*, States may retain such immunity because of particular protections under their recognized sovereignty); Rainbow Warrior (N.Z. v. Fr.), 82 I.L.R. 499, 500-01 (Fr.-N.Z. Arb. Trib. 1990) (finding the French government liable when French agents sabotaged a Greenpeace boat and killed a person onboard).

56. Douglas, *supra* note 38, at 323.

57. *See infra* Section IV (discussing the exceptions to functional immunity that occur when a state actor breaches a *jus cogens*).

58. Rahmat Mohamad, *The Role of the International Criminal Court and the Rome Statute in International Criminal Justice Standard Setting: Some Reflections*, *in* SHIFTING GLOBAL POWERS AND INTERNATIONAL LAW: CHALLENGES AND

diplomats and heads of state.[59] This article will only focus on analyzing heads of state.

Head of state immunity allows heads of state to enjoy absolute immunity "from all measures of constraint and any exercise of jurisdiction on the part of a foreign [s]tate for [criminal] acts committed by them, anywhere in the world, in the exercise of their official functions," including private acts.[60] This applies *erga omnes*. The situation is different, however, in the context of foreign civil proceedings. After the mid-twentieth century, domestic courts trying civil cases departed from the absolute immunity ideology.[61] The Institut de Droit International also suggested a more restrictive approach where head of state immunity applied only when the head of state was exercising his official functions in committing the act.[62] Head of state immunity applies to incumbent, but not former, heads of state, although the latter may still claim functional immunity, if available. Heads of state are the main beneficiaries of head of state immunity. Family members, and spouses in particular,[63] may also

OPPORTUNITIES 100, 108 (Rowena Maguire et al. eds., 2013).

59. *Id.*

60. Marcos v. Fed. Dep't of Police, 102 I.L.R. 198, 202 (TF 1989) (Switz.); *see Re* Honecker, 80 I.L.R. 365, 365-66 (BHG 1984) (F.R.G.) (upholding head of state immunity and finding that this "immunity was based on the mutual interests of States in enjoying undisturbed bilateral relations"); Arrest Warrant of 11 April 2000 (Dem. Rep. Congo v. Belg.), 2002 I.C.J. 3, 20-21, ¶ 51 (Feb. 14) (emphasizing that heads of state, heads of government, and ministers of foreign affairs enjoy immunity from civil and criminal jurisdiction).

61. *See, e.g.*, Mobutu v. SA Cotoni, 91 I.L.R. 259, 260 (Civ. Ct. Brussels 1988) (Belg.) (finding that head of state immunity does not extend to family members of the head of state); Prince of X Road Accident Case, 65 I.L.R. 13, 14 (OGH 1964) (Austria) (distinguishing between the immunity of foreign states and foreign heads of state); Ex-King Farouk of Egypt v. Christian Dior S.A.R.L., 24 I.L.R. 228, 228 (CA Paris 1957) (Fr.) (holding that, although the King made a purchase while in office, he was still bound to deliver the purchase price because his immunity did not extend to this area).

62. *Immunities from Jurisdiction Resolution*, *supra* note 50, art. 3.

63. *Foreign States Immunities Act 1985* (Cth) (Austl.) s 36 (instructing that the Diplomatic Privileges and Immunities Act of 1967 applies to the spouse of the head of a foreign state); State Immunity Act, 1978, c. 33, § 20 (U.K.) (instructing that the Diplomatic Privileges Act of 1964 applies to members of a head of state's family that form part of his household); Kline v. Cordero De La Madrid, 546 N.Y.S.2D 506 (App. Div. 1989); Estate of Silme G. Domingo v. Marcos, No. C82-1055V, 1983 WL 482332, at *3 (W.D.Wash. July 14, 1983) (recognizing that the consular agreement between Poland and the United States extended to consular officials' family members).

benefit from the rule, but only in domestic criminal cases.[64] The ability of heads of government and ministers of foreign affairs to claim head of state immunity is more obscure. The ICJ "clarified" this issue in *Arrest Warrant*. However, as Section III addresses in greater detail, many commentators and courts have criticized this decision, arguing that heads of state and ministers of foreign affairs are symbolically distinct.[65]

One of the rationales for granting head of state immunity is to facilitate the head of state's exercise of its functions. A similar purpose underlies the immunity of diplomatic agents.[66] However, this argument lacks credibility because heads of state are generally entitled to claim immunity from domestic criminal jurisdiction regardless of the nature of the acts concerned, including in circumstances where the State does not discharge the functions of the head of state.

An alternate justification relies on the superlative status of heads of state. While the "mystique of sovereignty" has somewhat faded, heads of state are still viewed "as the supreme representatives of, and in some respects the personal manifestations of, their States."[67] The head of state immunity and *par in parem non habet imperium* principles are therefore intertwined.[68] The Swiss Federal Tribunal recognized this relationship in *Marcos v. Fed. Dep't of Police*,[69] finding that the representative character of heads of state in interstate relations is the symbolic embodiment of sovereignty and serves as the foundation for privileges *rationae personae* granted under customary international law.[70]

64. *See* Marcos v. Fed. Dep't of Police, 102 I.L.R. 198, 201 (TF 1989) (Switz.) (explaining that this protection has always been available to family members of heads of state under customary international law); *see also Mobutu*, 91 I.L.R. at 260-61 (refusing to grant immunity to the family members of the Zairian President Mobutu in a civil case).

65. *See infra* Part II (analyzing the *Arrest Warrant* case in detail).

66. Psinakis v. Marcos, 81 I.L.R. 605, 605 (N.D. Cal. 1975).

67. Watts, *supra* note 49, at 36.

68. ROBERT JENNINGS & ARTHUR WATTS, OPPENHEIM'S INTERNATIONAL LAW 355-63 (9th ed. 1992).

69. 102 I.L.R. 198 (TF 1989) (Switz.).

70. *See id.* at 200 ("[S]uch personal immunity is the counterpart of the immunity enjoyed by a foreign [s]tate acting *jure imperii*, that is to say in the exercise of its sovereign powers.").

As the ultimate authority within the State, heads of state have the right to waive their own immunity.[71] Unsurprisingly, no head of state has rendered such a waiver.[72] To give meaning to this mechanism, some scholars have proposed that the decision to waive immunity attached to a head of state should fall upon his affiliated government as a whole.[73]

D. VARYING APPLICATIONS OF THE IMMUNITY CATEGORIES BASED ON THE NATURE OF THE PROCEEDINGS

Some commentators have noted the relationship between state immunity and functional or head of state immunity. For instance, one commentator recognized that state immunity derived from earlier conceptions of head of state immunity.[74] Similarly, when determining that the customary international law rules must be codified, the International Law Commission ("ILC") commented that state immunity should encompass the immunity of heads of state, "men-of-war[,] and of the armed forces of the State."[75] Despite these observations, head of state or functional immunity and state immunity apply in different circumstances. In *Jurisdictional Immunities of the State*,[76] the ICJ found *Pinochet* was irrelevant to the case at hand because it dealt with head of state immunity from

71. PHILIPPE CAHIER, LE DROIT DIPLOMATIQUE CONTEMPORAIN [CONTEMPORARY DIPLOMATIC LAW] 342 (1962).

72. *See, e.g.*, Regina v. Bow Street Metro Stipendiary Magistrate, ex parte Pinochet (No. 3), 119 I.L.R. 112, 114 (H.L. 1999) (Eng.) (discussing former head of state Pinochet's claim of immunity for past crimes against humanity); Prosecutor v. Taylor, Case No. SCSL-2003-01-AR72(E), Decision on Immunity from Jurisdiction, ¶ 1 (Special Ct. for Sierra Leone May 31, 2004) (noting that Charles Taylor did not waive his immunity as the former President of the Republic of Liberia); Prosecutor v. Milošević, Case No. IT-99-37-PT, Decision on Preliminary Motions, ¶ 26 (Int'l Crim. Trib. for the Former Yugoslavia Nov. 8, 2001) (noting that the accused tried to raise his immunity as a former head of state in the proceedings).

73. *See* VAN ALEBEEK, *supra* note 24, at 181-82 (noting that heads of state should not be able to waive immunity against the government's wishes).

74. *See* Ian Sinclair, *The Law of Sovereign Immunity: Recent Developments*, 167 RECUEIL DES COURS 121, 121 (1980) (noting that state immunity is grounded in historical principles of individual sovereign immunity).

75. INT'L L. COMM'N, SURVEY OF INTERNATIONAL LAW IN RELATION TO THE WORK OF CODIFICATION OF THE INTERNATIONAL LAW COMMISSION, at ¶ 54, U.N. Doc. No. A/CN.4/1/Rev.1, U.N. Sales No. 1948.V.1(1) (1949) [hereinafter U.N. SURVEY OF INTERNATIONAL LAW].

76. 2012 I.C.J. 99, ¶ 87 (Feb. 3).

criminal prosecution, whereas the ICJ was concerned with state immunity from civil liability.[77]

The ICJ's decision illustrates that the nature of the proceedings, whether civil or criminal, may have a bearing on the type of immunity available. The House of Lords recognized this in *Pinochet*, emphasizing the criminal nature of the proceeding to justify the removal of functional immunity for torture.[78] The difference is that criminal proceedings concern individuals, not States. The punishment is "personalized" and "separat[e] from the state of nationality of the perpetrator."[79] In any event, States cannot be criminally responsible under international law, particularly for international crimes.[80]

In contrast, not applying immunity for state officials in the civil context would have implications for state immunity. In *Jones v. United Kingdom*,[81] the European Court of Human Rights ("ECtHR") explained that, in civil cases, upholding the immunities of state

77. *See id.* (distinguishing this case from *Regina v. Bow Street Metro Stipendiary Magistrate, ex parte Pinochet (No. 3), 119 (H.L. 1999) (Eng.)*).

78. *See Pinochet*, 119 I.L.R. at 235 ("Why is it said to be contrary to international law to prosecute someone who was once head of state, or a state official, in respect of acts committed in his official capacity? It is common ground that the basis of the immunity claimed is an obligation owed to Chile, not to Senator Pinochet. The immunity asserted is Chile's. Were these civil proceedings in which damages were claimed in respect of acts committed by Senator Pinochet in the government of Chile, Chile could argue that it was itself indirectly impleaded. That argument does not run where the proceedings are criminal and where the issue is Senator Pinochet's personal responsibility, not that of Chile."); *see also* Jaffe v. Miller (1993), 95 I.L.R. 446, 460 (Can. Ont. C.A.) (Can.) (arguing that the particularly egregious nature of the illegal acts removed the foreign dignitaries' entitlement to immunity).

79. Philippa Webb, *Human Rights and the Immunities of State Officials*, *in* HIERARCHY IN INTERNATIONAL LAW: THE PLACE OF HUMAN RIGHTS 114, 134 (Erika De Wet & Jure Vidmar eds., 2012).

80. *See Report of the International Law Commission on the Work of Its Fiftieth Session*, 53 U.N. GAOR Supp. No. 10, at 64-77, U.N. Doc. A/53/10 (1998), *reprinted in* [1998] 2 Y.B. Int'l L. Comm'n 1, 77 U.N. Doc. A/CN.4/SER.A/1998/Add.1 (pt. 2) (elucidating the disparate viewpoints on state criminal responsibility and concluding that the Special Rapporteur's assessment that state criminal responsibility in the penal sense does not yet exist at international law, although this may change in the future).

81. App. Nos. 34356/06 & 40528/06, para. 212 (Eur. Ct. H.R. Jan. 14, 2014), *available at* http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-140005#{"itemid":["001-140005"]}.

officials implies that States are responsible for the acts. Removing their immunities in civil cases would allow for an indirect route to recovery against foreign states. On the other hand, state immunity would bar claims brought directly against foreign states.[82] This may justify the distinction(s) in civil and criminal proceedings. In summary, the perpetrators would be protected, however, if three circumstances were met: the case was a civil claim; "immunity would [have] be[en] available had the claim instead been brought directly against the State;" and they acted in their official capacity.[83] Several domestic courts have acknowledged functional immunity exists in the civil context.[84]

Some commentators argue that distinguishing between civil and criminal proceedings is unnecessary because certain countries allow victims to present their cases and seek damages in criminal proceedings.[85] They contend that if the court maintains the civil/ criminal distinction, it only complicates matters, especially when the judges wish to adjudicate both matters in one sitting. In *Jones*, the ECtHR agreed and argued that any distinction between civil and criminal proceedings with respect to immunity would affect the degree to which civil compensation is available in mixed proceedings.[86] Commentators further argue that even if functional

82. Webb, *supra* note 79, at 142.

83. VAN ALEBEEK, *supra* note 24, at 149. *But see id.* (noting that, although actions pursued in one's official capacity carry immunity privileges, there are instances in which a foreign dignitary may be acting outside his official capacity and immunity would still attach).

84. *See* Fang v. Jiang [2007] NZAR 420, ¶¶ H4, 31-32, 69-71 (HC) (N.Z.) (finding that no valid reason exists to distinguish *Jones* and this case and arguing that it was improper for New Zealand's domestic courts to unilaterally try to establish international law precedent rather than allowing international law to develop slowly over time); *see also Habib v. Commonwealth* [2010] FCAFC 12, ¶¶ 85, 112-15 (Austl.) (noting that civil actions against government officials are actions against the State); R v. Jones, [2006] U.K.H.L. 26, ¶ 26 (U.K.) (noting that it is not possible to find individual responsibility for the crime of aggression without first determining whether the aggression was committed by a State).

85. *See* Webb, *supra* note 79, at 143 (noting that courts in Austria, Belgium, Denmark, Finland, France, Germany, Greece, Italy, Luxembourg, and the Netherlands, among others, allow victims to present their cases and seek damages in criminal proceedings).

86. *See* Jones v. United Kingdom, App. Nos. 34356/06 & 40528/06, para. 212 (Eur. Ct. H.R. Jan. 14, 2014), *available at* http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-140005#{"itemid":["001-140005"]} (finding some support for the contention that individuals may be held criminally liable for torture because

immunity is lifted in civil proceedings, the injured party would not be able to recover from the State because international law provides that any damages awarded in civil proceedings can only be enforced against the state official and not the State.[87] Nevertheless, if state officials were not allowed to claim functional immunity, this would inescapably diminish the State's right to immunity. Despite these arguments, the ECtHR has expressed that state practice relating to the removal of immunity in civil proceedings is still in a state of flux.[88] The court opined that while a trend in favor of lifting immunity for torture in civil cases has emerged, the view that individuals cannot sue a State's "servants or agents" to circumvent the State's immunity remains.[89] An exception to immunity in civil cases might emerge if the jurisprudence continues to develop as the ECtHR noted.

E. EXCEPTION TO FUNCTIONAL AND PERSONAL IMMUNITY FOR JUS COGENS CRIMES

Removing functional or personal immunity for *jus cogens* crimes remains a contentious issue. There are two separate justifications for lifting functional immunity. First, the crimes that state organs commit are not "official" because of the peremptory nature of the crimes. Second, the mere peremptory "tag" on the crimes creates a separate exception to functional immunity.

1. The "Disqualification" Rationale

The "disqualification" argument centers on a State's function, rather than the classification of the crimes as peremptory. Whenever an "official" act concerns an international crime, the presumption that heads of state act under ostensible authority is rebutted. The Nuremberg Tribunal explained that "[c]rimes against international law are committed by men, not by abstract entitles, and only by

torture cannot be carried out in an official state capacity).

87. Webb, *supra* note 79, at 143 (acknowledging that while the State may choose to pay the damages on the official's behalf, it has no duty to do so); *see* Saorstat v. Rafael De Las Morenas, 12 I.L.R. 97, 98 (S.C. 1994) (Ir.) (noting that the Spanish government would defray costs that a Spanish officer incurred when on official business in Ireland).

88. *Jones*, App. Nos. 34356/06 & 40528/06, para. 213.

89. *Id.*

punishing individuals who commit such crimes can the provisions of international law be enforced."[90] This statement implies that individuals cannot commit international crimes under state authority because those acts do not fall within the ambit of a State's functions. Accordingly, these acts cannot be attributed to the State.[91] Notably, the statutes of international criminal tribunals explicitly prohibit perpetrators to rely on their official position as a defense.[92] In this context, functional immunity ceases to operate before international courts when crimes against international law are involved.[93]

The peremptory nature of the crime presupposes that the acts are not official. Article 53 of the Vienna Convention on the Law of Treaties ("VCLT") emphasizes that peremptory norms are those that the international community has accepted as non-derogable.[94] In lifting the immunities that foreign state officials enjoy for some well-defined *jus cogens* crimes, state sovereignty is not undermined because determining the scope of the official's mandate is no longer necessary.[95]

While international criminal courts have explicitly rejected

90. *International Military Tribunal (Nuremberg), Judgment and Sentences*, 41 AM. J. INT'L L. 172, 221 (1947).

91. *Cf.* WILLIAM HALL, A TREATISE ON INTERNATIONAL LAW 268-69 (7th ed. 1917) (arguing that piracy cannot be committed under the authority of a State because piratical acts are lawful acts of war under such circumstances).

92. *See* Statute of the Special Court for Sierra Leone art. 6, S.C. Res. 1315, U.N. Doc. S/RES/1315 (Aug. 14, 2000) [hereinafter SCSL Statute]; Statute of the International Criminal Tribunal for the Rwanda art. 6, S.C. Res. 955, U.N. Doc. S/RES/955 (Nov. 8, 1994) [hereinafter ICTR Statute]; Statute of the International Criminal Tribunal for the Former Yugoslavia art. 7, S.C. Res. 827, U.N. Doc. S/RES/827 (May 25, 1993) [hereinafter ICTY Statute].

93. Hersch Lauterpacht, *The Subjects of the Law of Nations*, 63 L. Q. REV. 438, 442-43 (1947).

94. *See* Vienna Convention on the Law of Treaties art. 53, May 23, 1969, 1155 U.N.T.S. 331 [hereinafter VCLT] ("A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. . . . . [A] peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.").

95. *See* VAN ALEBEEK, *supra* note 24, at 241 (stating that "[f]unctional immunity ends where individual responsibility begins" and that prosecuting individuals for these crimes does not violate state sovereignty because crimes against international law do not qualify as state acts").

functional immunity in their statutes, whether national courts adopt similar approaches is less clear.[96] For instance, the ICJ in *Arrest Warrant* concluded that customary international law, as reflected in the practice of national courts, did not support removing functional immunity for *jus cogens* crimes.[97] However, some domestic courts have prosecuted foreign war criminals acting under the cloak of state authority. In *Att'y Gen. of Isr. v. Eichmann*,[98] the Israeli Supreme Court held that crimes against humanity are "completely outside the 'sovereign' jurisdiction of the State."[99] In *Wijngaarde v. Bouterse*,[100] the Amsterdam Court of Appeal stressed that the commission of crimes against humanity and torture "cannot be regarded as part of the official duties of a head of state."[101] In *Pinochet*, Lord Hutton refused to acknowledge that acts of torture could be deemed part of a head of state's official duties because "international law expressly prohibits torture as a measure which a [S]tate could employ in any circumstances whatsoever and ha[s] made it an international crime."[102]

Case law is also inconsistent in civil proceedings.[103] In *Hilao v.*

96. *Cf.* Prosecutor v. Krstić, Case No. IT-98-33-A, Decision on Application for Subpoenas, ¶ 26 (Int'l Crim. Trib. for the Former Yugoslavia Jul. 1, 2003) (noting, without deciding, that national courts may choose to recognize the functional immunity of state officials).

97. Arrest Warrant of 11 April 2000 (Dem. Rep. Congo v. Belg.), 2002 I.C.J. 3, 24 (Feb. 14).

98. 36 I.L.R. 277 (HCJ 1962) (Isr.).

99. Id. at 310.

100. Hof 's Amsterdam 20 november 200 (Wijngaarde & Hoost/Bouterse) (Neth.), *translated in* 3 Y.B OF INT'L HUMANITARIAN L. 677, 688 (2000) [(2001) 32 Netherlands Yearbook of International Law 266 (Court of Appeal of Amsterdam) District Court of Amsterdam (sitting on appeal against a decision of the office of the Public Prosecutor), interlocutory order of 3 March 2000 and order of 20 November 2000 (District Court order), case note by F van Sliedregt and N Keijzer in (2000) 3 Ybk Int'l Humanitarian L 548, English translation of the order of 20 November published in ibid 677; *see* LUC REYDAMS, UNIVERSAL JURISDICTION: INTERNATIONAL AND MUNICIPAL LEGAL PERSPECTIVES 173-78 (2003).

101. *Id.* at 113.

102. Regina v. Bow Street Metro Stipendiary Magistrate, ex parte Pinochet (No. 3), 119 I.L.R. 112, 165-66 (H.L. 1999) (Eng.).

103. *See, e.g.*, Hilao v. Marcos, 25 F.3d 1467, 1472 (9th Cir. 1994) (noting that

Marcos,[104] the U.S. Court of Appeals for the Ninth Circuit disagreed that the Foreign Sovereign Immunity Act ("FSIA") confers foreign official immunity for acts of torture and execution.[105] The court remarked that the acts were not "within any official mandate" and therefore did not constitute the acts of an "agency or instrumentality" as defined under the FSIA.[106] In addition, the court opined that its previous rejection that the conduct in question was a state act and that equating the acts in dispute with sovereign's public acts is unmeritorious.[107] Other domestic courts have decided otherwise. In *Doe v. Liu Qi*,[108] the District Court for the Northern District of California rejected the fact that the Chinese officials' acts became non-official only because they engaged in international crimes against Falun Gong practitioners.[109] In *Matar v. Dichter*,[110] the District Court for the Southern District of New York held that the fact that the former Director of Israel's General Security Service participated in *jus cogens* crimes, namely extrajudicial killings, did not necessarily mean that the impugned acts fell outside the scope of an official's lawful authority under FSIA.[111]

Although the "disqualification" argument may sound attractive, perpetrators could eschew liability for crimes that require state participation. High-ranking officials often commit *jus cogens* crimes, such as genocide and torture, as a matter of state policy. These crimes are then official by definition.[112] In *Arrest Warrant*, dissenting

the 9th Circuit rejected foreign sovereign immunity under the FSIA, 28 U.S.C. § 1605). *But see* Matar v. Dichter, 500 F. Supp. 2d 284, 292-93 (S.D.N.Y. 2007) (finding that the Foreign Sovereign Immunities Act confers automatic immunity in the absence of a statutory exception and, without more, a *jus cogens* violation does not constitute an implied waiver); Doe v. Liu Qi, 349 F. Supp. 2d 1258, 1280, 1285 (N.D. Cal. 2004) (finding that the Foreign Sovereign Immunities Act trumps the Alien Tort Claims Act).

104. 25 F.3d 1467 (9th Cir. 1994).

105. *See id.* at 1472 (finding jurisdiction under the Alien Tort Claims Act).

106. *Id.* at 1472.

107. *Id.* at 1471.

108. 349 F. Supp. 2d 1258 (N.D. Cal. 2004).

109. *See id.* at 1280, 1285 (discussing how the defendants had not only committed international crimes, but had acted outside of the scope of their individual governmental positions).

110. 500 F. Supp. 2d 284 (S.D.N.Y. 2007).

111. *Id.* at 292-93.

112. Jan Wouters, *The Judgment of the International Court of Justice in the Arrest Warrant Case: Some Critical Remarks*, 16 LEIDEN J. INT'L L. 253, 262

Judge van den Wyngaert pinpointed that "[s]ome crimes under international law . . . can, for practical purposes, only be committed with the means and mechanisms of a State and as part of a [s]tate policy. They cannot . . . be anything other than 'official' acts."[113] In consequence, the official would retain functional immunity for such acts.

2. The Peremptory Norm Rationale

An alternative rationale for lifting functional immunity for *jus cogens* crimes is that the peremptory "tag" on the crimes automatically provides for an exception. This proposition focuses on the peremptory nature of the crimes, irrespective of whether the perpetuators committed the crimes in an official capacity.[114] Gaeta articulated that high-ranking officials are not entitled to functional immunity in criminal proceedings before national or international courts when the crimes in question contravene international law.[115] She considered this customary principle to cover acts that state organs perform in their official capacity.[116] The relationship between the exception and the rule of functional immunity is one of *lex specialis* versus *lex generalis.*[117]

Some judges in *Pinochet* supported this exception.[118] Lord Millett acknowledged that torture must be committed in an official capacity, otherwise it would not meet the elements of the crime.[119] He emphasized the dilemma and stressed that if the official were acting

(2003).

113. Arrest Warrant of 11 April 2000 (Dem. Rep. Congo v. Belg.), 2002 I.C.J. 3, 161, ¶ 36 (Feb. 14) (dissenting opinion of Judge van den Wyngaert).

114. *See* Prosecutor v. Blaškić, Case No. IT-95-14-AR, Judgment on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997, ¶ 41 (Int'l Crim. Trib. for the Former Yugoslavia Oct. 29, 1997) (noting the following exceptions to the invocation of immunity: perpetrators of war crimes, crimes against humanity, and genocide and certain classes of persons such as those acting as spies).

115. *See* Gaeta, *Official Capacity and Immunities*, *supra* note 33, at 975, 982-83 (citing to crimes against humanity and genocide specifically).

116. *Id.*

117. *Id.* at 983.

118. Regina v. Bow Street Metro Stipendiary Magistrate, ex parte Pinochet (No. 3), 119 I.L.R. 112, 138, (H.L. 1999) (Eng.) (Lords Browne-Wilkinson, Hope, Hutton, Saville, Millett, and Phillips).

119. *Id.* at 231.

in a private capacity when conducting the torture, he could not be charged with torture. He could be charged if he were acting in an official capacity, but then he would enjoy immunity from prosecution[120] In the latter case, it would be a fallacy to automatically attach functional immunity to any "official" acts since "[i]nternational law cannot be supposed to have established a crime having the character of a *jus cogens* and at the same time to have provided an immunity which is co-extensive with the obligation it seeks to impose."[121] Accordingly, Lord Millett prioritized the rules establishing *jus cogens* crimes and introduced a separate exception to functional immunity that would apply to crimes that require state responsibility, such as torture and forced disappearance.[122] In *Ferrini v. Fed. Republic of Ger.*,[123] the Italian Court of Cessation affirmed this position and held that the rules establishing *jus cogens* crimes are of a higher rank and must prevail over the contradictory state immunity rule.[124]

The validity of the peremptory norm argument depends on whether a conflict between the immunity rule and the rules establishing *jus cogens* crimes exist. Proponents argue that if the immunity doctrine contradicts a peremptory norm, it will become void.[125] Various courts and judges are skeptical about this proposition. In the context of state immunity and immunity from civil jurisdiction, international courts unanimously observed that the two rules operate on different levels, one on the procedural plane and the other on the substantive plane.[126] In *Al-Adsani v. United Kingdom*,[127] the ECtHR held that despite torture's special preemptory

120. *Id.*

121. *Id.* at 232.

122. *Id.*; *see* Ferrini v. Fed. Republic of Ger., 128 I.L.R. 658, 669 (Cass. 2004) (It.); Christine M. Chinkin, *Kosovo: A "Good" or "Bad" War?*, 93 AM. J. INT'L L. 841, 841 (1999); Ruth Wedgwood, *International Criminal Law and Augusto Pinochet*, 40 VA. J. INT'L. L. 829, 836-37 n.14 (2000).

123. 128 I.L.R. 658 (Cass. 2004) (It.).

124. *Id.* at 669.

125. *Cf.* VCLT, *supra* note 94, art. 53 ("A treaty is void of, at the time of its conclusion, it conflicts with a peremptory norm of general international law.").

126. Jurisdictional Immunities of the State (Ger. v. It.), 2012 I.C.J. 99, ¶¶ 93-94 (Feb. 3); Al-Adsani v. United Kingdom, 2001-XI Eur. Ct. H.R. 79, 103; Rainbow Warrior (N.Z. v. Fr.), 82 I.L.R. 499, 499 (Fr.-N.Z. Arb. Trib. 1990); HAZEL FOX, THE LAW OF STATE IMMUNITY 525 (2002).

127. 2001-XI Eur. Ct. H.R. 79.

character, international law has not accepted that prohibiting such conduct prevails over state immunity for civil claims arising out of torture.[128] In *R v. Jones,*[129] Lord Hoffman expressed that for a conflict to arise, "an ancillary procedural rule" must exist that permits or imposes jurisdiction on States for acts of torture.[130] He continued that such development should be encouraged and might have already taken place if the prohibition of torture included it.[131] A recent ICJ decision, *Jurisdictional Immunities of the State*, clarified that the rule on state immunity and the peremptory prohibition on enslavement do not conflict.[132] The court was aware that the *Armed Activities in the Congo* and *Arrest Warrant* rulings articulated that a *jus cogens* rule by itself is incapable of conferring jurisdiction or displacing the immunities of the officials.[133] Fox concurred that "there is no substantive content in the procedural plea of [s]tate immunity upon which a *jus cogens* mandate can bite" and remarked that the immunity rule only requires that a breach of a *jus cogens* norm must be resolved through other means of settlement.[134] These remarks suggest that a *jus cogens* exception does not exist with respect to state and *a fortiori*, functional immunity from foreign civil jurisdiction.

A different scenario, however, may arise in the criminal context. Villalpando underscored that "the supreme condemnation of crimes against humanity and the principle of universality" to combat the crimes contradict the immunity defense.[135] Bianchi stressed that immunity is illogical with respect to international crimes since international law cannot simultaneously shield officials from prosecution for their heinous acts and reprimand the acts as

128. *Id.* at 103.
129. [2006] U.K.H.L. 26, 730-49 (U.K.).
130. *Id.* at 732.
131. *Id.*
132. *Jurisdictional Immunities of the State*, 2012 I.C.J. at 140-41.
133. *Id.* at 141, ¶ 95; Case Concerning Armed Activities on the Territory of the Congo (New Application: 2002) (Dem. Rep. Congo v. Rwanda), 2006 I.C.J. 6, 32, ¶ 64 (Feb. 3); Arrest Warrant of 11 April 2000 (Dem. Rep. Congo v. Belg.), 2002 I.C.J. 3, 24, ¶ 58 (Feb. 14).
134. FOX, *supra* note 126, at 525.
135. Santiago Villalpando, *L'affaire Pinochet: Beaucoup de Bruit Pour Rien? L'Apport au Droit International de la Décision de la Chambre des Lords du 24 mars 1999*, 104 REVUE GÉNÉRALE DE DROIT INTERNATIONAL PUBLIC 418, 424 (2000) (Fr.).

criminal.[136] Villalpando and Bianchi seemingly shifted the focus from whether the immunity and *jus cogens* norms conflicted to whether the international legal regime offered effective protection.

The goal of maximizing the effectiveness of the international legal regime may have prompted courts worldwide to lift functional immunity from criminal jurisdiction. In its commentary, the ILC underlined that "[t]he absence of any procedural immunity with respect to prosecution or punishment in appropriate proceedings is an essential corollary of the absence of any substantive immunity or defense."[137] This applies both to international and domestic courts.[138] The official position of the perpetrator is neither relevant nor conducive to effective humanitarian protection. The copious amount of international and domestic jurisprudence and commentary that have recognized this "irrelevance rule" is evidence that the concept has attained customary status.[139] The fact that article 27 of the Rome Statute lifts immunities *rationae materiae* for the offences further reaffirm this.[140]

For immunity *rationae personae*, the *jus cogens* exception does not apply in criminal cases. In *Arrest Warrant*, the ICJ referred to state practice and national legislation and examined a few domestic

136. Andrea Bianchi, *Immunity Versus Human Rights: The* Pinochet *Case*, 10 EUR. J. INT'L L. 237, 260-61 (1999).

137. *Report of the International Law Commission to the General Assembly on the Work of Its Forty-Eighth Session*, 51 U.N. GAOR Supp. No. 10, at 27, U.N. Doc. A/51/10 (1996), *reprinted in* [1996] 2 Y.B. Int'l L. Comm'n 1, U.N. Doc. A/CN.4/SER.A/1996/Add.1 (pt. 2).

138. *Report by Mr. J. L. Brierly, Special Rapporteur*, U.N. Doc. A/CN.4/41 (1951), *reprinted in* [1957] 2 Y.B. Int'l L. Comm'n 1, U.N. Doc. A/CN.4/SER.A/1951/Add.1.

139. *See, e.g.*, *U.N. Memorandum on State Officials' Immunity*, *supra* note 14, ¶¶ 132-33 nn. 577-78 (identifying eight international documents, three international cases, and eight domestic cases supporting this proposition); *see also* Dapo Akande, *International Law Immunities and the International Criminal Court*, 98 AM. J. INT'L L. 407, 414 (2004); Antonio Cassese, *When May Senior State Officials Be Tried for International Crimes? Some Comments on The* Congo v Belgium *Case*, 13 EUR. J. INT'L L. 853, 864-66, 870-74 (2002); 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, 601-02 (2001).

140. Rome Statute, *supra* note 25, art. 27 ("This Statute shall apply equally to all persons without any distinction based on official capacity."); *see* Gaeta, *Official Capacity and Immunities*, *supra* note 33, at 990.

cases, including *Pinochet* and *Ass. SOS Attentats and Beatrix de Boery v. France* ("*Gaddafi*"), and concluded that an exception to the personal immunity of incumbent high-ranking officials for war crimes or crimes against humanity did not exist under customary international law.[141]

Domestic legislation purportedly affirms this position. Several domestic statutes do not allow for an exception to immunity.[142] Interestingly, Belgium initially rejected any claim for immunity based on official capacity, but it amended its statute in 2003 to conform to the *Arrest Warrant* ruling.[143]

In *Gaddafi*, the French Court of Cassation accorded immunity to Colonel Muammar Gaddafi, the incumbent Libyan head of state, for complicity in a terrorist act, rejecting the prosecution's argument that "no immunity could cover complicity in the destruction of property as a result of an explosion causing death and involving a terrorist undertaking."[144] The Belgian Court of Cassation similarly reasoned that under customary international law, heads of state and heads of government should not be subject to criminal prosecution in a foreign state without express contrary provisions providing for such an exception.[145] The court disregarded the original 1993 Act, which dealt with immunity, since it "contravene[d] the principle of customary international criminal law on jurisdictional immunity."[146] In three separate cases, the England Bow Street Magistrates' Court granted immunity to the incumbent President of Zimbabwe, the Israeli Defense Minister, and the Chinese Minister of Commerce for torture and grave breaches of the Geneva Conventions.[147] The

141. Arrest Warrant of 11 April 2000 (Dem. Rep. Congo v. Belg.), 2002 I.C.J. 3, 24, ¶ 58 (Feb. 14).

142. *Foreign States Immunities Act 1985* (Cth) s 36 (Austl.); State Immunity Act, 1978, c. 33, § 20 (U.K.).

143. Belgium's Amendment to the Law of June 15, 1993 Concerning the Punishment of Grave Breaches of International Humanitarian Law 2003 art. 13, Aug. 7, 2003, 42 I.L.M 1258 (2003).

144. Gaddafi, 125 I.L.R. 490, 509 (Cass. 2001) (Fr.).

145. H.S.A. v. S.A., 42 I.L.M. 596, 599-600 (Cass. 2003) (Belg.) (reasoning that domestic law cannot be interpreted in a way that would disrupt the customary international law regarding immunity).

146. *Id.* at 600.

147. *Re* Bo Xilai, 128 I.L.R. 713, 715 (Bow St. Magis. Ct. 2005) (U.K.); *Re* Mofaz, 128 I.L.R. 709, 712 (Bow St. Magis. Ct. 2004) (U.K.); Tatchell v. Mugabe, 136 I.L.R. 572, 573 (Bow St. Magis. Ct. 2004) (U.K.).

Spanish National Court similarly granted immunity to the Presidents of Cuba, Equatorial Guinea, Rwanda, and the King of Morocco for international crimes.[148] All of these courts relied heavily on *Arrest Warrant* in their decision-making process.[149]

III. DISSECTING OF THE *ARREST WARRANT* CASE

In 1993, the Parliament of Belgium passed a law allowing the Belgian courts to try people alleged to have committed war crimes, crimes against humanity, and genocide on the basis of universal jurisdiction. In 2000, Belgium issued an arrest warrant, pursuant to the law, against Yerodia, the then-Minister of Foreign Affairs of the Democratic Republic of the Congo for the Rwandan genocide. *Arrest Warrant* dicta are just as, if not more, contentious than the ICJ's ruling extending head of state immunity to ministers of foreign affairs.[150] The court enumerated four situations in which head of state immunity would be lifted. First, when the high-ranking officials' own courts try them in accordance with relevant domestic law. Second, when the official's state waives head of state immunity. Third, when the foreign state prosecutes former officials for official acts they committed before or after their official employment or for their private acts committed while in office.[151] Finally, when international criminal courts try both former and incumbent

148. S.A.N., Dec. 13, 2007 Castro (Reporter No. 4/3/1999 and 13/12/2007); S.A.N., Mar. 4, 1999; *see* J. GONZÁLEZ VEGA, 1 ANUARIO ESPAÑOL DE DERECHO INTERNACIONAL PRIVADO 811-16 (2001); S.A.N. Dec. 23, 1998 Obiang Nguema (23/12/1998) (Central Examining Magistrate No. 5) (AN); Hassan II (23/12/1998) (Central Examining Magistrate No 5) (Audencia Nacional) (Spain); Garzón archival asacusaciones contra Hassan II y Obiang, EL MUNDO, (Dec. 24, 1998); *see also* Angel Sánchez Legido, *Spanish Practice in the Area of Universal Jurisdiction*, 8 SPANISH Y.B. INT'L L. 46 (2002); S.A.N., Feb. 6, 2008 ("Immunity of President Paul Kagame") Re Kagame, Audienca Nacional, Auto del Juzgado Central de Instruction No 4 (2008) 151-57 Rwanda (6/2/2008) (Central Examining Magistrate No 4); S.A.N., Dec. 23, 1998.

149. Gionata Piero Buzzini, *Lights and Shadows of Immunities and Inviolability of State Officials in International Law: Some Comments on the* Djibouti v. France *Case*, 22 LEIDEN J. INT'L L. 455, 461 (2009) (arguing that recent pronouncements by the British courts have expanded the immunity protection afforded by government officials).

150. Arrest Warrant of 11 April 2000 (Dem. Rep. Congo v. Belg.), 2002 I.C.J. 3, 25-26, ¶ 61 (Feb. 14).

151. *Id.*

officials.[152] The subsections below will discuss how the ICJ misconceived the law when formulating these exceptions in three ways. First, the ICJ lacked a basis to extend head of state immunity to a minister of foreign affairs. Second, international and domestic jurisprudence suggests that the bases for support of head of state immunity no longer reflect customary international law. Finally, international criminal courts have refused to accept head of state immunity as a defense, but because they are limited in jurisdiction, they cannot completely lift head of state immunity. Without a blanket rejection of head of state immunity, heads of state that fall outside the jurisdiction of these international criminal courts escape with impunity.

A. ABSENCE OF A BASIS FOR THE EXTENSION OF HEAD OF STATE IMMUNITY TO MINISTERS OF FOREIGN AFFAIRS

The contentious issue is whether high-ranking officials, such as heads of state, heads of government, and ministers of foreign affairs, enjoy immunity from both civil and criminal jurisdiction in other States.[153] The ICJ answered this question in the affirmative, despite finding that international instruments, such as the Vienna Convention on Diplomatic Relations and the New York Convention on Special Missions ("New York Convention"), do not govern the issue.[154] The ICJ discussed that ministers of foreign affairs are representative of their States in international negotiations, are responsible for the government's diplomatic activities, and are frequently required to travel abroad. It accentuated that ministers of foreign affairs need full immunity from criminal prosecution and inviolability to effectively facilitate performing these official functions, rather than safeguard their personal benefit.[155]

Throughout its analysis, the ICJ disregarded state practice on granting immunity to ministers of foreign affairs. Judge van den Wyngaert summarized the crux of the argument in her dissenting opinion. She noted that the court should have done more than analyze the rationale for granting immunity to foreign ministers to

152. *Id.*
153. *Id.* at 21, 23, ¶¶ 52-53.
154. *Id.* at 21, ¶ 52.
155. *Id.* at 21-22, ¶¶ 53-54.

determine whether immunity existed under customary international law. Van den Wyngaert criticized the court for failing to assess whether state practice and *opinio juris* supported granting immunity to ministers of foreign affairs.[156]

As van den Wyngaert expressed, to determine whether ministers of foreign affairs enjoy immunity under customary international law, courts must examine whether state practice and *opinio juris* supporting immunity exist. In the *North Sea Continental Shelf Cases*,[157] the ICJ elaborated on the features of these two elements. The court noted that "[n]ot only must the acts concerned amount to a settled practice, but they must also be such, or be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it."[158] Accordingly, any head of state immunity for ministers of foreign affairs recorded in international conventions, domestic legislation, and cases would contribute to codifying that rule as customary international law.

Nonetheless, state practice does not appear to support the ICJ's majority decision. Conventions that solely provide for immunity from foreign criminal jurisdiction for ministers of foreign affairs are lacking. In addition, the ICJ ruled on the matter for the first time in *Arrest Warrant*, and only a few domestic cases involve immunity claims for heads of government and ministers of foreign affairs. With respect to domestic cases, in *Ali Reza v. Grimpel*,[159] the French Court of Appeals rejected Saudi Arabia's Minister of State's immunity claim in a civil action when the Minister was a delegate at a U.N. conference in Paris. The court indicated that it would have ruled otherwise had the claimant been a minister of foreign affairs.[160] This case is inconclusive because ministers of foreign affairs can claim immunity during an official visit pursuant to the Vienna Convention on Diplomatic Relations ("VCDR"). United States courts also granted immunity to at least one head of government and two ministers of foreign affairs.[161] The U.S. Department of State also has

156. *Id.* , 143, ¶¶ 11-12 (dissenting opinion of Judge van den Wyngaert).
157. 1969 I.C.J. 3 (Feb. 20).
158. *Id.* at 44.
159. 47 I.L.R. 275 (C.A. Paris 1961) (Fr.).
160. *Id.*
161. Saltany v. Reagan, 702 F. Supp. 319, 320 (D.D.C. *1988*) (holding that

proposed that head of immunity should be extended to other foreign government officials, but U.S. courts have rejected these claims.[162] In light of just a handful of international and domestic cases in which the courts granted immunity to heads of government or ministers of foreign affairs, the contention that a rule granting head of state immunity to the group under customary international law exists is unconvincing. Judge Al-Khasawneh observed this in his dissenting opinion to *Arrest Warrant*. He asserted that there was a "total absence of precedents with regard to the immunities of [f]oreign [m]inisters from criminal process."[163] Similarly, Judge van den Wyngaert noted that the court only referenced one domestic case before affirming the customary status of the rule.[164] The *ratio decidendi* of one case does not amount to state practice.

Despite the absence of precedent in support of the customary status of the rule granting head of state immunity to ministers of foreign affairs, the ICJ still accorded immunity to Yerodia, the then Democratic Republic of Congo's ("DRC") Minister of Foreign Affairs.[165] The court resorted to the New York Convention, to which neither the DRC nor Belgium was a contracting party, and concluded that the convention accorded immunity to heads of government,

Libyan residents could not bring suit against President Reagan for damages sustained from U.S. air strikes); Tachiona v. Mugabe, 169 F. Supp. 2d 259 (S.D.N.Y. 2001) (rejecting suit against the Foreign Minister of Zimbabwe); Kim v. Kim Yong Shik, (Cir. Ct. 1st Cir. Ha. 1963), *excerpted in* 58 AM. J. INT'L L. 165, 186-87 (dismissing case for lack of jurisdiction over the Korean Foreign Minister). *See generally* JOANNE FOAKES, THE POSITION OF HEADS OF STATE AND SENIOR OFFICIALS IN INTERNATIONAL LAW 122 (2014) (stating that the little case law available suggests that foreign ministers have immunity when overseas on official business). The ICJ considered *Kim v. Kim Yong Shik* in *Arrest Warrant*. 2002 I.C.J. at 145, ¶ 13, n. 14 (dissenting opinion of Judge van den Wyngaert).

162. Republic of Phil. by Cent. Bank of Phil. v. Marcos, 665 F. Supp. 793, 797-98 (N.D. Cal. 1987) (rejecting the U.S. government's argument that the Philippines's solicitor general should be protected under head of state immunity); *see* El-Hadad v. Embassy of the U.A.E., 69 F. Supp. 2d 69, 82, n. 10 (D.D.C. 1999) (refusing to rule on whether financial personnel of a foreign government enjoyed sovereign immunity, but noting that head of state immunity does not extend to all government officials).

163. Arrest Warrant of 11 April 2000 (Dem. Rep. Congo v. Belg.), 2002 I.C.J. 3, 96, ¶ 1 (Feb. 14) (dissenting opinion of Judge Al Khasawneh).

164. *Id.* 145, ¶ 13, n. 14 (dissenting opinion of Judge van den Wyngaert) (citing Kim v. Kim Yong Shik, (Cir. Ct. 1st Cir. Ha. 1963), *excerpted in* 58 AM. J. INT'L L. 165, 186-87); FOAKES, *supra* note 161, at 121.

165. *Arrest Warrant of 11 April 2000*, 2002 I.C.J. at 30, ¶ 71.

ministers of foreign affairs, and other high-ranking officials when these persons were sent abroad on diplomatic missions.[166] The ICJ went on to parallel the functions of a minister of foreign affairs with that of a head of state, finding that both are "recognized under international law as representative of the [s]tate solely by virtue of his or her office."[167] This analogy is controversial for two reasons. First, international jurisprudence has not yet endorsed such an amalgamation. Second, domestic courts that grant of immunity to ministers of foreign affairs base their ruling on comity, rather than framing it as an obligation.

1. The Lack of Equivalence between Heads of State and Ministers of Foreign Affairs Under International Law

Article 15(1) of the Institut de Droit International Immunities from Jurisdiction and Execution of Heads of State and of Government in International Law Resolution ("IDI Resolution") extends head of state immunity to heads of government.[168] Notably, ministers of foreign affairs were deliberately excluded. In contrast, article 21 of the 1969 Convention on Special Missions distinguishes between two groups, with heads of state on the one hand, and heads of government and ministers of foreign affairs on the other.[169] This division is significant because the ILC's draft convention initially merged the two groups under the same provision, while the United Nations General Assembly opted for the bipartite formulation.[170] Although article 21 grants the same special protection to both groups,[171] it would be too dogmatic to align that special protection with jurisdictional immunity.[172] In contrast, the ILC Draft Articles on Jurisdictional Immunities of States and their Property ("ILC Draft

166. *Id.* at 21, ¶ 52.

167. *Id.* at 22, ¶ 53.

168. *Immunities from Jurisdiction Resolution*, *supra* note 50, art. 15(1) ("The [h]ead of [g]overnment of a foreign [s]tate enjoys the same inviolability, and immunity from jurisdiction recognised, in this Resolution, to the [h]ead of the [s]tate. This provision is without prejudice to any immunity from execution of a [h]ead of [g]overnment.")

169. Convention on Special Missions art. 21, Dec. 8, 1969, 1400 U.N.T.S. 231.

170. *See Report of the International Law Commission on the Work of Its Fiftieth Session*, *supra* note 80, at 275.

171. Milan Bartoš, *Le statut des missions speciales de la diplomatie ad hoc*, 108 RECUEIL DES COURS 431, 438 (1963).

172. Watts, *supra* note 49, at 38, n. 41.

Articles on Jurisdictional Immunities") distinguishes the groups in accordance with their functions. Article 3 deals with the relationship between the privileges and immunities available under the Draft Articles and those existing under international law. Under article 3(1)(a), the drafters first recognized the privileges and immunities enjoyed by a State in exercising functions related to "its diplomatic missions, consular posts, special missions, missions to international organizations, or delegations to organs of international organizations or to international conferences." This may allow room for States and their officials to rely on state immunity and functional immunity. Further, under article 3(2), the drafters contemplated that privileges and immunities are accorded to heads of state *rationae personae* under law. Moreover, the drafters only focused on heads of state and held the view that only heads of state were entitled to privileges and immunities for their status as the personal manifestations of their States. Heads of states that are exclusively entitled to privileges and immunities for their status mirror the international community view at the time of drafting that heads of state and ministers of foreign affairs were categorically different.[173] Thus, international conventions have not yet widely recognized that heads of state and ministers of foreign affairs are equivalent.

2. Immunity Granted on the Basis of Comity, Not as a Positive Obligation

The rationale for granting head of state immunity is not solely to allow heads of state to perform their functions effectively. Heads of state also enjoy immunity because they are symbolically distinctive. The principle is based on the antiquated respect for the "dignity of kings and princes and the incarnation of the [S]tate in the person of its ruler."[174] Other officials do not share this unique feature because neither heads of government nor ministers of foreign affairs are connected to the concept of sovereignty. This connection is exclusive to heads of state. Commentators argue that the head of government and ministers of foreign affairs do not symbolize the "international *persona* of the State" as heads of state do.[175] Accordingly, heads of

173. *Report of the International Law Commission: Fifty-Third Session*, *supra* note 8, at 21.

174. VAN ALEBEEK, *supra* note 24, at 194.

175. JENNINGS & WATTS, *supra* note 68, at 1033; *see* Watts, *supra* note 49, at

government and ministers of foreign affairs are not entitled to special treatment because international law does not accord the personal "qualities of sovereignty or majesty" to them.[176] Oppenheim averred that other members of the government do not "have the exceptional position of [h]eads of [s]tates," and, therefore, do not merit the same treatment in the realm of foreign relations.[177]

The ICJ reasoned that granting immunity to ministers of foreign affairs that allows them to travel across borders to facilitate interstate relations does not explain away this symbolical difference. Other officials may also bear similar duties but are not eligible for head of state immunity. In her dissenting opinion in *Arrest Warrant*, Judge van den Wyngaert commented that States have recognized the immunity for other reasons, such as "*courtesy*, political considerations, practical concerns, and a lack extraterritorial criminal jurisdiction," rather than a sense of legal obligation to do so under customary international law.[178] Similarly, the Special Rapporteur on the ILC Draft Articles on Jurisdictional Immunities attributed the immunity granted to ministers of foreign affairs to international comity rather than any established international law.[179] Watts agreed, advancing that "international standards of courtesy and respect, not adherence to any positive obligation" explain why individuals other than heads of state enjoy immunity.[180] In *Arrest Warrant*, in only referring to the New York Convention on Special Missions, the ICJ hastily paralleled heads of government, ministers of foreign affairs, and heads of state. Having established that heads of state and

102.

176. *Id.*; *see* 1 LAWRENCE OPPENHEIM, INTERNATIONAL LAW: A TREATISE 358 (H. Lauterpacht ed., 8th ed. 1955) (referring to a head of state as an exceptional position that is entitled to greater protections).

177. OPPENHEIM, *supra* note 176, at 358.

178. Arrest Warrant of 11 April 2000 (Dem. Rep. Congo v. Belg.), 2002 I.C.J. 3, 145, 148, 150, 177, ¶¶ 13, 18, 20, 70 (Feb. 14) (dissenting opinion of Judge van den Wyngaert) (emphasis added).

179. Special Rapporteur, *Preliminary Report on Jurisdictional Immunities of States and their Property*, Int'l L. Comm'n, 103, U.N. Doc. A/CN.4/415 (1988) (by Motoo Ogiso), *reprinted in* [1988] 2 Y.B. Int'l L. Comm'n 1, 103, U.N. Doc. A/CN.4/SER.A/1988/Add.1 (pt.1); *see Report of the International Commission to the General Assembly on the Work of Its Forty-First Session*, 44 U.N. GAOR Supp. No. 10, at 102-03, U.N. Doc. A/44/10 (1989), *reprinted in* [1989] 2 Y.B. Int'l L. Comm'n 1, 102-03 U.N. Doc. A/CN.4/SER.A/1989/Add.1 (pt.2).

180. Watts, *supra* note 49, at 102-03.

ministers of foreign affairs are not the same under international law, merely referencing the New York Convention is not conclusive. This convention's preamble stipulates that the convention only supplements the existing (or non-existing) regime that governs international principles of law, but not an instrument that confers immunities.[181] At the material time, there was not a single international instrument allowing for privileges and immunities *rationae personae* claimed by ministers of foreign affairs. Further, whether they were entitled to do so under international law was still unsettled. It was difficult to conceive how the ICJ reached the conclusion that ministers of foreign affairs were entitled as such.

A customary rule formed without a legal basis lacks legitimacy. It also defeats the *raison d'être* of the decision in *S.S. Lotus*[182] with respect to forming customary rules.[183] The Permanent Court of International Justice, the predecessor of the ICJ, refused to acknowledge that mere abstentions of governmental actions could be viewed as obligatory customs of international law.[184] In *S.S. Lotus*, France submitted that Turkey's criminal proceedings against foreign officials that committed offences abroad breached customary international law. The court found that state practice abstaining from criminal prosecutions of foreign officials did not necessarily mean that these States believed they had a legal obligation to do so. It emphasized that, without the States "being conscious of having a duty to abstain," no customary international law prohibiting criminal prosecutions of foreign officials existed.[185]

The commentary above illustrates that no *opinio juris* for granting heads of government and ministers of foreign affairs immunity exists. The scarcity of domestic cases illustrating that immunities have been consistently granted to heads of government and ministers of foreign affairs further demonstrates that it is not obligatory to grant immunity to them.[186] Moreover, as *S.S. Lotus* held, abstaining

181. Convention on Special Missions, *supra* note 169, prmbl.
182. 1927 P.C.I.J. (ser. A) No. 10, at 22-23 (Sept. 7).
183. *Id.* (discussing how customary international law forms in determining jurisdiction for crimes committed at sea).
184. *Id.*
185. *Id.* at 28.
186. Adam Day, *Crimes Against Humanity as a Nexus of Individual and State Responsibility: Why the ICJ Got* Belgium v. Congo *Wrong*, 22 BERKELEY J. INT'L

from exercising jurisdiction over heads of government or ministers of foreign affairs based on comity does not amount to a custom. In her dissenting opinion in *Arrest Warrant*, Judge van den Wyngaert specifically referred to *S.S. Lotus* and argued that "negative practice" does not amount to customary international law without the requisite *opinio juris*, which she found was not established.[187]

3. Conclusion

The arguments summarized above illustrate that the ICJ drew a weak analogy when equating ministers of foreign affairs with heads of state. International law has not yet affirmed this approach. The court also did not give significant weight to the symbolical difference between heads of government and heads of state. Furthermore, the ICJ unjustifiably "legitimized" state practice granting immunity to heads of government and ministers of foreign affairs and defied the general principles of international law. Unlike heads of state and diplomatic agents, no international convention specifically confers immunity on heads of government or ministers of foreign affairs in criminal cases. Without both state practice and *opinio juris* supporting this immunity, no such principle can exist under international law. Many commentators agree that state practice granting immunity to officials other than heads of state is based solely on international comity rather than whether a legal obligation to grant such immunity exists under international law.

B. THE EROSION OF HEAD OF STATE IMMUNITY

1. International and Domestic Jurisprudence on the Move

The notion of individual criminal responsibility in international law for *jus cogens* crimes diminishes the absolute nature of the doctrine of head of state immunity.[188] In her dissenting opinion in *Arrest Warrant*, Judge Van den Wyngaert criticized the majority for

L. 489, 497 (2004) (noting that mere abstention by governments do not create legal obligations under customary international law).

187. Arrest Warrant of 11 April 2000 (Dem. Rep. Congo v. Belg.), 2002 I.C.J. 3, 144-45 (Feb. 14) (dissenting opinion of Judge van den Wyngaert).

188. *See* FOAKES, *supra* note 161, at 81 (discussing the justification for extensive immunity for heads of State); *Arrest Warrant of 11 April 2000*, 2002 I.C.J. at 153, ¶ 27 (dissenting opinion of Judge van den Wyngaert).

adopting a "very narrow interpretation" of the provisions in the various international instruments that deny immunity for serious international crimes.[189] Individual criminal responsibility is reflected in voluminous international documents.[190] For instance, the Treaty of Versailles that concluded World War I ("WWI") contained a provision calling for the creation of a special tribunal to try the former German Emperor, Kaiser Wilhelm II, for "a supreme offence against international morality and the sanctity of treaties."[191] Notably, the Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties, established in 1919 to investigate which State was responsible for WWI, recommended that individuals responsible for "the greatest outrages against the law and customs of war and the laws of humanity" should not escape criminal prosecution because of their rank.[192] It emphasized that allowing for such immunity and thereby acknowledging that such crimes "could in no circumstances be punished" would "shock the conscience of civilized mankind."[193]

The Nuremberg Tribunal, which was established at the end of World War II to punish individuals most responsible for the atrocities that occurred during that war, similarly held that "[t]he authors of these acts cannot shelter themselves behind their official positions in order to be freed from punishment in appropriate proceedings."[194] Rejecting immunity for incumbent heads of state for international crimes is also enshrined in the statutes of the

189. *Id.*

190. *E.g.*, Rome Statute, *supra* note 25, art. 25; ICTR Statute, *supra* note 92, art. 6; ICTY Statute, *supra* note 92, art. 7; Charter of the International Military Tribunal at Nuremberg art. 6, Aug. 8, 1945, 82 U.N.T.S 279.

191. Treaty of Versailles, art. 227, June 28, 1919, *reprinted in* 13 AM. J. INT'L L. SUPP. 151, 250 (1919); *see* M. Cherif Bassiouni, *World War I: "The War to End All Wars" and the Birth of a Handicapped International Criminal Justice System*, 30 DENV. J. INT'L L. & POL'Y 244, 266, 280-81 (2002) (noting that Kaiser Wilhelm was never prosecuted because the Dutch royal family granted him asylum).

192. *Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties: Report Presented to the Preliminary Peace Conference*, 14 AM. J. INT'L L. 95, 116 (1920) [hereinafter *WWI Commission Report*]; *see* Bassiouni, *supra* note 191, at 253.

193. *WWI Commission Report*, *supra* note 192.

194. Trial of the Major War Criminals Before the International Military Tribunal, Proceedings: Two Hundred and Seventeenth Day, HMSO London Pt. 22, 411, 466 (1950).

international criminal courts.[195] Commentators have also favored this approach. For instance, Watts recognized the absolute nature of the immunity afforded to heads of state, but contended that this immunity should be qualified for certain international crimes.[196] Notably, these courts and commentators have limited the non-applicability of head of state immunity to international courts.[197]

Practice at the domestic level has been mixed. Although the House of Lords in *Pinochet* allowed for an exception to the functional immunity of a former head of state for torture, Lord Browne-Wilkinson affirmed that the doctrine of personal immunity remained unaffected.[198] Other domestic courts have ruled in a similar fashion.[199] The French Court of Cassation in *Gaddafi* similarly commented that immunity of incumbent heads of state must be precluded "in the absence of specific international provisions to the contrary binding on the parties concerned."[200] The IDI Resolution stipulated that in the context of criminal cases, serving heads of state enjoy immunity from foreign jurisdiction regardless of the gravity of the offences, but recognized that former heads of state may be criminally prosecuted for international crimes.[201] The ILC similarly specified that serving heads of state possess immunity *rationae personae*.[202]

Conversely, some countries have incorporated certain statutes of the international criminal tribunals into their domestic legislation.[203]

195. *E.g.*, Rome Statute, *supra* note 25, art. 27; ICTR Statute, *supra* note 92, art. 6; ICTY Statute, *supra* note 92, art. 7.

196. Watts, *supra* note 49, at 82 (providing that a war crime should serve as an exception to the general rule that all actions are protected by immunity).

197. *See infra* Section III.C.

198. *See* Regina v. Bow Street Metro Stipendiary Magistrate, ex parte Pinochet (No. 3), 119 I.L.R. 112, 153-54 (H.L. 1999) (Eng.) (emphasizing that former heads of state lose their immunity *ratione personae* much like former diplomats).

199. *See supra* Section II E(2).

200. Gaddafi, 125 I.L.R. 490, 509 (Cass. 2001) (Fr.); *see* FOAKES, *supra* note 161, at 82.

201. *Immunities from Jurisdiction Resolution*, *supra* note 50, arts. 2, 13.

202. Int'l L. Comm'n, *Immunity of State Officials from Foreign Criminal Jurisdiction: Report of the Drafting Committee*, 3, U.N. Doc. A/CN.4/SR.3174 (Aug. 2, 2013).

203. *See*, *e.g.*, Law on the Application of the Statute of the International Criminal Court and the Prosecution of Criminal Acts Against International Law of War and Humanitarian Law of 2003, art. 6(3) (Croat.) (implementing the statute of the International Criminal Court in Croatia); Implementation of the Rome Statute

Such implementing legislation effectively lifts immunity for both former and incumbent heads of state in domestic criminal proceedings if international crimes are involved. To commence criminal proceedings against Pinochet for *jus cogens* violations, a Belgian judge explicitly stated that head of state immunity does not cover crimes under international law.[204]

These examples illustrate that apart from a few domestic legislation, state practice consistently supports the absolute personal immunity of heads of state from foreign criminal jurisdiction. Nevertheless, two ICJ cases after *Arrest Warrant* may suggest that international courts have changed their position. Although the two ICJ decisions did not relate to individual criminal prosecution, the decisions challenge the traditional concept of the inviolability of head of state immunity.

a) Certain Criminal Proceedings in France (Democratic Republic of the Congo v. France)

In *Certain Criminal Proceedings in France*,[205] the ICJ commented on the inviolability of the Democratic Republic of the Congo's head of state.[206] France had exercised universal jurisdiction over Sassou Nguesso, the President of the DRC and other Congolese officials for crimes against humanity, torture, and enforced disappearance of more than 350 individuals. A French Tribunal had already investigated many of the Congolese officials named in the complaint.[207]

The Congolese government's complaint to the ICJ argued that in asserting universal jurisdiction over Nguesso and issuing a *réquisitoire* to gather evidence from him under article 656 of the French Code of Criminal Procedure, France transgressed the criminal

of the International Criminal Court Act 27 of 2002 § 4(1) (S. Afr.) (implementing the Rome Statute in South Africa).

204. Tribunal de Première Instance [Civ.] [Tribunal of First Instance] Bruxelles, Nov. 6, 1998, Order of Juge d'Instruction Vandermeersch (Belg.), *available at* http://www.haguejusticeportal.net/Docs/NLP/Belgium/pinochet_mandat_arret_06-11-98.pdf.

205. 2003 I.C.J. 102, (Jun. 17).

206. *Id.* at 110, ¶ 35 (noting that French courts protected the immunity of President Sassou Nguesso).

207. *Id.* at 104.

immunity that foreign heads of state enjoy.[208] The DRC requested that ICJ order provisional measures to cease all the investigations against Nguesso, but the ICJ refused to exercise its statutory discretion to grant such measures.[209] When determining whether provisional measures are appropriate, the ICJ must balance the rights of the applicant state and the rights of the respondent state because the former has not yet established that it possesses those rights, while the ICJ has not yet determined that the latter acted unlawfully.[210] The court must also consider the need to prevent irreparable prejudice to the rights in dispute.[211] In balancing these rights, the ICJ in *Certain Criminal Proceedings in France* held that the proceedings in France would not lead to any irreparable prejudice to the rights that the DRC head of state allegedly enjoyed.[212]

Nevertheless, the concurring Judges Koroma and Vereschetin suggested that the court should have focused on "the risk of grave consequences arising from the violation of such rights," rather than just the potential irreparable harm.[213] One commentator has observed that the DRC and the concurring judges were concerned about

208. *Id.* at 107, ¶ 23.

209. ICJ Statute, *supra* note 25, art 41 (providing the ICJ discretion to grant provisional measures to protect "rights which are the subject of dispute in judicial proceedings"); *see* United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran), 1980 I.C.J. 3, 6, ¶ 3 (May 24) (indicating provisional measures as part of the United State's complaint against Iran); Aegean Sea Continental Shelf Case (Greece v. Turk.), 1978 I.C.J. 3, 6, ¶ 6, 45 ¶ 108 (Dec. 19) (acknowledging that it is necessary to decide whether the court has jurisdiction over Greece's request for provisional measures and concluding that it lacked such jurisdiction).

210. Special Rapporteur, *Third Report on State Responsibility*, Int'l L. Comm'n, 44, U.N. Doc. A/CN.4/507/Add.1 (Jun. 15, 2000) (by James Crawford); Special Rapporteur, *Third Report on State Responsibility*, Int'l L. Comm'n, 141, U.N. Doc. A/CN.4/507/Add.1 (Jun. 15, 2000) (by James Crawford). H.W.A. Thirlway, *The Indication of Provisional Measures by the International Court of Justice*, *in* INTERIM MEASURES INDICATED BY INTERNATIONAL COURTS 95, 7 (Rudolf Bernhardt ed., 1994) (arguing that preserving rights has its genesis in the Arbitration Commission that the Bryan Treaties contemplated).

211. Nuclear Tests Case (N.Z. v. Fr.), Order, 1973 I.C.J. 135, 139, ¶ 21, 142, ¶ 36 (June 22) (finding that France's testing of nuclear weapons prejudices New Zealand's rights and consequently granting New Zealand's request for provisional measures).

212. Certain Criminal Proceedings in France (Dem. Rep. Congo v. Fr.), 2003 I.C.J. 102, 109, ¶ 31 (Jun. 17) (opining that immunity was not violated when proper procedures were followed).

213. *Id.* at 114, ¶ 6 (joint separate opinion of Judges Koroma & Vereshchetin).

Nguesso's loss of immunity because it would adversely affect his ability to perform his official duties while on trial, undermine the international reputation of the DRC, and jeopardize the stability of the DRC's internal institutions.[214]

The dissenting Judge de Cara articulated that provisional measures to preserve the traditional doctrine of head of state immunity are necessary.[215] He highlighted the prominence of being an incumbent head of state in Africa, emphasizing that the "[h]ead of [s]tate embodies the nation itself"[216] and "symbolizes the existence of the nation."[217] Because of this "very special position," the citizens of a particular African state see an attack against their head of state as an attack on the nation as a whole.[218] Encroaching on other States' ability to conduct criminal investigations against Nguesso would injure the present condition of the DRC, "given that the case involve[d] the [h]ead of an African [s]tate [that was] on the morrow of a series of vicious civil wars."[219]

Interestingly, the position of Judges Korma and Vereschetin is consistent with the *Arrest Warrant* majority decision. The judges in that case emphasized the significance of permitting heads of state or ministers of foreign affairs to discharge their duty to maintain interstate relations without hindrance or fear that other States will prosecute them when travelling abroad. Judge de Cara's reasoning, on the other hand, is compatible with the archaic notion that heads of state are "the personal manifestations of their States."[220] Notably, however, the majority in *Certain Criminal Proceedings in France* did not adopt these concepts, and observed a trend that implied that recognizing head of state immunity is diminishing. The majority concluded that the DRC failed to prove that foreign criminal proceedings against its President would cause instability within the

214. *See* Kaitlin R. O'Donnell, *Certain Criminal Proceedings in France (Republic of Congo v. France) and Head of State Immunity: How Impenetrable Should the Immunity Veil Remain?*, 26 B.U. INT'L L.J. 375, 404 (2008).

215. *Id.* (opining that Judge de Cara's fears of irreparable prejudice against Nguesso implicitly extend to all incumbent heads of state).

216. *Certain Criminal Proceedings in France*, 2003 I.C.J. at 116 (dissenting opinion of Judge de Cara).

217. *Id.* at 132.

218. *Id.*

219. *Id.* at 124.

220. Watts, *supra* note 49, at 36.

State or would deteriorate its "international standing."[221] As mentioned above, when deciding to grant provisional measures, the ICJ must weigh the interests of both parties. Here, the DRC asserted the right to claim head of state immunity. This right contradicted France's right to assert universal jurisdiction over *jus cogens* crimes. In refusing to order any provisional measures, the ICJ implied that head of state immunity is no longer absolute and the ICJ may override it.

If the majority accepted the modus operandi of Judges Koroma and Vereschetin, courts could easily justify claims for head of state immunity on the basis of preventing a covert *coup d'état* or preserving the State's international reputation, especially in war-torn countries.[222] Moreover, such unmeritorious contentions would frustrate domestic investigations of victims' human rights complaints. This suggests that relying on the traditional justifications for head of state immunity is inconsistent with protecting against *jus cogens* crimes. States must adduce genuine evidence to justify invocating immunity for safeguarding national interest.

Certain Criminal Proceedings in France signifies a possible departure from *Arrest Warrant* because the ICJ allowed domestic criminal investigations against a foreign head of state to continue, even though the investigations aimed to establish liability. Nonetheless, decisions relating to provisional measures do not have any bearing on the court's judgment on the merits.[223] Given that the case was discontinued in 2010, whether the ICJ would reach a similar conclusion on the merits is unclear. Moreover, although this case involved an indictment, France ultimately wanted Nguesso to provide evidence to assist France's investigations, although the indictment could have eventually resulted in prosecution. In contrast, *Arrest Warrant* wanted to prosecute DRC's Minister of Foreign Affairs in its domestic courts. An indictment, therefore, may not be

221. *Certain Criminal Proceedings in France*, 2003 I.C.J. at 108-09, ¶ 29.
222. *Id.* (joint separate opinion of Judges Koroma & Vereshchetin).
223. *See* Thirlway, *supra* note 210, at 11.

as intrusive as an arrest warrant when the inviolability of a head of state is concerned.

b) Case Concerning Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France)

Although the ICJ affirmed the *Arrest Warrant* decision in *Certain Questions of Mutual Assistance in Criminal Matters*,[224] the court was less focused on the dignity of a head of state.[225] Djibouti alleged that France violated two bilateral treaties enacted between France and Djibouti, the 1977 Treaty of Friendship and Cooperation and the 1987 Convention on Mutual Assistance in Criminal Matters.[226] It asserted that France violated the personal and functional immunity of three Djibouti officials, the Public Prosecutor, the Head of National Security, and President Ismaël Omar Guelleh, when it issued individual witness summonses to all three.[227] None of these officials were personally accused of committing the relevant crimes at the time.[228]

When assessing Public Prosecutor and Head of National Security's immunity, the ICJ distinguished between immunities *rationae personae* and *rationae materiae* and consequently refined its decision in *Arrest Warrant*. It affirmed its *Arrest Warrant* ruling that incumbent officials entitled to claim immunity *rationae personae* should enjoy "full immunity from criminal jurisdiction and inviolability" and should be protected from "any act of authority of another State which would hinder him or her in the performance of his or her duties." It also held that the Public Prosecutor and Head of National Security did not fall into this category.[229] The court reasoned that persons who were not included in the VCDR or the New York Convention as diplomats could not claim immunity.[230] At

224. 2008 I.C.J. 177 (Jun. 4).

225. *Id.* at 236-37, ¶ 170 (stating that whether an outside authority constrained the authority of the head of state was the determining factor in determining whether there was an attack on immunity).

226. *Id.* at 181, ¶ 1.

227. *Id.* at 194, ¶¶ 32-33, 241, ¶ 185, 240-44, ¶¶ 181-197.

228. *See id.* at 241, ¶ 184 (explaining that the witness summonses, *témoin assisté*, are used when the French authorities are suspicious of the person receiving the summons but lack the grounds to issue an arrest warrant).

229. *Id.* at 236, ¶ 170, 244, ¶ 194-37.

230. *Id.* at 244, ¶ 194; *see Bat v. Investigating J. of the Fed. Ct. of Ger.* [2011]

first glance, it was encouraging that the ICJ was reluctant to extend personal immunity to Djibouti's Public Prosecutor and Head of National Security. However, because the court strictly adhered to its *Arrest Warrant* analysis, it failed to address the exact class of beneficiaries entitled to claim immunity *rationae personae* in a more detailed manner. In focusing on the VCDR and the New York Convention, like *Arrest Warrant*,[231] the court's analysis was tantamount to acquiescing that heads of state, heads of government, and ministers of foreign affairs to continue to enjoy personal immunity because they are included in these two instruments.

In deciding whether France infringed on Djiboutian President's immunity, the ICJ observed that the key factor "lie[d] in the subjection of the latter to a constraining act of authority."[232] The court found that no such a constraint existed and emphasized that the summonses only served as an invitation to testify that the head of state could accept or refuse.[233] It concluded that France did not violate the President's head of state immunity "since no obligation was placed upon him."[234]

However, the ICJ did find that it should have apologized to the President because France failed to "act in accordance with the courtesies due to a foreign [h]ead of [s]tate."[235] The court noted that the invitation was sent as a facsimile, contained a short deadline, and did not request consultation to appear at the French judge's office.[236] Assessing the comity due to a foreign head of state raised the question of the degree of respect that heads of state are entitled to under international law beyond the immunity arena. Article 29 of the VCDR, which applies *mutatis mutandis* to heads of state, provides that the receiving State shall treat the head of state with due respect and undertake all appropriate measures to safeguard his freedom or

EWHC (Admin) 2029, [2013] Q.B. 349, 368 (U.K.) (holding that non-ministerial posts are not entitled to claim head of state immunity).

231. Arrest Warrant of 11 April 2000 (Dem. Rep. Congo v. Belg.), 2002 I.C.J. 3, 26 (Feb. 14) (stating that once a person ceases to hold their office, they are not protected by immunity).

232. *Certain Questions of Mutual Assistance in Criminal Matters*, 2008 I.C.J. at 237, ¶ 170.

233. *Id.* at 237, ¶ 171.

234. *Id.*

235. *Id.* at 237-238, ¶¶ 172-73.

236. *Id.* at 237, ¶ 172.

dignity.[237] Despite this obligation, the ICJ did not consider that the absence of a French apology violated international law.[238] Cryer and Kalpouzos commented that the ICJ "was speaking in terms of comity rather than legal obligations" because issuing the summonses neither breached international law nor mandated an apology.[239]

This case has two implications. First, whether a state action against a foreign head of state violates the foreign head of state's immunity depends on the coercive nature of the action. Second, the archaic justification for head of state immunity concerning the dignity and comity owed to heads of state may be insignificant because non-compliance with that obligation does not necessarily trigger an international judicial response. The ICJ only urged that France apologize to the Djiboutian President, but did not mandate it. Failing to do so would have no legal consequences.

However, the immunity invoked in response to the issuing of witness summons in this case is not the same as invoking criminal jurisdiction over a head of state. These measures have varying degrees of coerciveness. Serving witness summons to the officials was minimally coercive since it was only an invitation. Nevertheless, the case still holds persuasive value because the Public Prosecutor and the Head of National Security were subjected to an arrest warrant for subornation of perjury and convicted of *in absentia* after the ICJ's decision.[240] Like *Certain Criminal Proceedings in France,* this illustrates that witness summonses are conducive to criminal investigation and prosecution at a later stage. As a result, judicial decisions in relation to immunity claims concerning witness summonses serve as good precedent for future cases that will assess lifting head of state immunity.

237. Vienna Convention on Diplomatic Relations art. 29, April 18, 1961, T.I.A.S. No. 7502; J. Craig Barker, *The Future of Former Head of State Immunity After* Ex Parte Pinochet, 48 INT'L & COMP. L.Q. 937, 939 (1999) (arguing that such special recognition is based on respecting the sovereignty of nations).

238. *Certain Questions of Mutual Assistance in Criminal Matters*, 2008 I.C.J. at 237-28, ¶ 173; Robert Cryer & Ioannis Kalpouzos, *International Court of Justice* Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v France) *Judgment of 4 June 2008*, 59 INT'L & COMP. L.Q. 193, 202 (2010).

239. Cryer & Kalpouzos, *supra* note 238.

240. *Certain Questions of Mutual Assistance in Criminal Matters*, 2008 I.C.J. at 196, ¶ 36.

2. The Modern Meaning of "Sovereignty" as the Duty to Safeguard the Citizens' Interests

In granting immunity to ministers of foreign affairs in *Arrest Warrant*, the ICJ emphasized the need "to ensure the effective performance of [the] functions [of the officials concerned] on behalf of their" State and the proper functioning of the network of mutual inter-state relations.[241] This reasoning, however, overlooked the nature of inter-state relations and misunderstood the source of authority conferring power on heads of state.

Several commentators recognize an understanding of sovereignty that is different from that of the ICJ. For instance, Caplan put forward a "collective benefit" theory that recognizes immunity only for "state activity that collectively benefits the community of nations."[242] He explained that such acts contribute to the "development of beneficial interstate relations."[243] Caplan asserted that conduct that "does significant harm to the vital interests of the forum state" is a prime example of the type of state activity that should not enjoy immunity. He consequently suggested that, in determining whether to grant immunity, courts should consider whether the conduct of a head of state harms these vital interests rather than attempting to determine whether the act was public or private.[244]

Some States may have a vital interest to safeguard the dignity of a sovereign. This reflects the traditional aim of head of state immunity. However, under the modern definition of sovereignty, as elaborated upon below, the dignity of a sovereign and the interests of the citizens are intertwined and this definition no longer gives heads of state *carte blanche* to invoke immunity simply for the reason of upholding a sovereign's dignity under all circumstances, regardless of whether the acts are beneficial to its citizens.

Reisman asserted that the traditional concept of sovereign's sovereignty has become obsolete. He emphasized that international scrutiny of a State's human rights record without consent historically

241. Arrest Warrant of 11 April 2000 (Dem. Rep. Congo v. Belg.), 2002 I.C.J. 3, 22, ¶ 53 (Feb. 14).
242. Caplan, *supra* note 21, at 744.
243. *Id.* at 777.
244. *Id.*

constituted a violation of that State's sovereignty. However, he claimed, "such pronouncements [have] become . . . the stuff of refined comedy."[245] Instead, Reisman opined that sovereignty should be understood as belonging to the people, rather than a State's sovereign or territory.[246] Under this understanding of sovereignty, the population's needs take priority.

The theories of Caplan and Reisman together illustrate that head of state immunity claims should not be permitted if the impugned acts inflict harm to the head of state's citizens.[247] A State's citizens are the de facto sovereign because their consent grants a ruler's power. Upholding immunity for the benefit of the de jure sovereign, namely heads of state, at the expense of the de facto sovereign's interests should no longer be permitted.[248] Moreover, the international community has undeniably accepted the principle that States bear responsibility for protecting their citizens from mass atrocity crimes.[249] These principles illustrate that the interests of the citizens should have priority as far as safeguarding the dignity of a sovereign is concerned.

The modern understanding of sovereignty prioritizes the interests of the citizens, so logically it must also recognize that human rights protection should supersede traditional notions of exclusive sovereign authority over domestic affairs. Higgins observed "tremendous erosion in the concept of sovereignty, relating particularly to the areas of human rights and now possibly

245. *Id.* at 869-70.

246. W. Michael Reisman, *Sovereignty and Human Rights Law in Contemporary International Law*, 84 AM. J. INT'L L. 866, 869, 871 (1990).

247. *Cf.* Hari M. Osofsky, *Foreign Sovereign Immunity from Severe Human Rights Violations: New Direction for Common Law Based Approaches*, 11 N.Y. INT'L L. REV. 35, 52 (1998) (arguing that extreme human rights violations could be a basis for an exception to sovereign immunity).

248. *Cf.* Kathryn Sikkink, *Transnational Politics, International Relations Theory, and Human Rights*, 31 POL. SCI. & POL. 516, 517 (1998) (arguing that international human rights norms challenge understandings of the political system as being composed of sovereign states that have authority over their respective societies and can "command [society's] obedience").

249. *See generally* Dou Hubert, *The Responsibility to Protect: Preventing and Halting Crimes Against Humanity*, *in* MASS ATROCITY CRIMES: PREVENTING FUTURE OUTRAGES 89 (Robert Rotberg ed., 2010) (providing an overview of the development of the "responsibility to protect" doctrine).

humanitarian intervention."[250] Indisputably, effectively performing the functions of state officials indicates state sovereignty. However, asserting criminal jurisdiction over these officials for perpetrating *jus cogens* crimes does not undermine the sovereignty of that State. Acts involving extreme human rights violations do not represent state sovereignty and independence.[251] It is anomalous to contend that international law ensures the effective performance of official state functions, but refuses to deny any *ineffective* performance or atrocious acts that state officials commit. It would be a "travesty of law and a betrayal of the universal need for justice" if human rights protections were subservient to the concept of state sovereignty.[252]

In their joint separate opinion in *Arrest Warrant* in determining whether an exception to immunity should exist, Judges Higgins, Koojimans, and Buergenthal emphasized that the ICJ must balance "the interest of the community of mankind to prevent and stop impunity for perpetrators of grave crimes against its members" and "the interest of the community of States to allow them to act freely on the interstate level without unwarranted interference."[253] The ICJ majority erroneously struck this balance because it allowed the state interest to override the community interest. If the court adopted the pragmatic and modern understanding of sovereignty detailed above, it would have placed greater weight on the interest of the community of mankind.

Notably, exercising jurisdiction over the officials of a foreign state for *jus cogens* crimes does not undermine interstate relations.

250. Richard Ponzio, *Theme Panel IV: The End of Sovereignty? Roundtable*, 88 AM. SOC'Y INT'L L. PROC. 71, 73-74 (1994) (transcribing Rosalyn Higgins' remarks at a roundtable that assessed the status of sovereignty under international law).

251. *See, e.g.*, *Siderman de Blake v. Republic of Argentina*, 965 F. 2d 699, 718 (9th Cir. 1992) (concluding that a violation of *jus cogens* did not qualify as a sovereign act under international law); *Prefecture of Voiotia v. Germany*, 129 I.L.R 513, 521 (A.P. 2000) (Greece) (ruling that torturous acts of German forces were not of a *jure imperii* character since the forces breached peremptory norms of international law).

252. Prosecutor v. Tadić, Case No. IT-94-1-I, Decision on the Defense Motion for Interlocutory Appeal on Jurisdiction, ¶ 58 (Int'l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995).

253. Arrest Warrant of 11 April 2000 (Dem. Rep. Congo v. Belg.), 2002 I.C.J. 3, 85, ¶ 75 (Feb. 14) (joint separate opinion of Judges Higgins, Kooijmans & Buergenthal).

Reimann opined that human rights protection is not the sole prerogative of the State, but rather is "a concern of the community of all nations."[254] This observation confirms that the *par in parem non habet imperium* principle must give way to the broader concept of "the interest of the community of all nations."

The modern definition of sovereignty does not only prioritize the interests of States' citizens, but also prevent states officials from misusing the notion of safeguarding the dignity of a nation, which is an abstract concept, to eschew criminal liability for atrocious crimes. More importantly, it casts serious doubts on the bases on which head of state immunity was established at the outset. If a doctrine is no longer fit for the purpose it was created, this may suggest that the doctrine should be reformulated or even abolished.

3. A Duty Not to Honor Head of State Immunity under the ILC Draft Articles on Responsibility of States for Internationally Wrongful Acts

Chapter III of the ILC Draft Articles on State Responsibility governs state responsibility for serious breaches of peremptory norms of general international law. Article 41(2) specifies that, "no State shall recognize as lawful a situation created by a serious breach" of a peremptory norm, "nor render aid or assistance in maintaining that situation."[255] An argument in favor of abolishing head of state immunity is that any recognition of immunity for *jus cogens* violations violates article 41(2). Under this rationale, a State that grants heads of state immunity would either be condoning the head of state's illegal conduct, or be acting as an accomplice to the head of state.[256] Bianchi congruously agreed that "to uphold the

254. Mathias Reimann, *A Human Rights Exception to Sovereign Immunity: Some Thoughts on Princz v Federal Republic of Germany*, 16 MICH. J. INT'L L. 403, 422 (1995).

255. ILC Draft Articles on State Responsibility, *supra* note 8, art. 41.

256. Adam C. Belsky, Mark Merva & Naomi Roht-Arriaza, *Implied Waiver Under the FSIA: A Proposed Exception to Immunity for Violations of Peremptory Norms of International Law*, 77 CALIF. L. REV. 365, 401 n. 198 (1989) (asserting that if a court recognizes head of state immunity for *jus cogens* crimes, it would be violating the principle of non-recognition and would become "an accomplice to the act"); Jordan J. Paust, *Federal Jurisdiction over Extraterritorial Acts of Terrorism and Nonimmunity for Foreign Violators of International Law Under the FSIA and the Act of State Doctrine*, 23 VA. J. INT'L L. 191, 226 (1983) (arguing that permitting foreign perpetrators of serious crimes to enjoy immunity is "similarly offensive" as allowing the State's own nationals to escape justice).

claim of immunity would have the undesirable effect of supporting the unlawfulness of the foreign State's acts."[257] Bantekas explained that the Court of First Instance of Leivadia in *Voiotia* similarly acknowledged that "[t]he recognition of immunity by a national court for an act that is contrary to *jus cogens* would be tantamount to collaboration by that national court."[258]

Advancing this argument is problematic because of the abstract nature of the "non-recognition" concept under article 41(2). The third ILC Special Rapporteur, Willem Riphagen, characterized the term "non-recognition" as a response to an internationally wrongful act whereby the injured state refuses "to give an otherwise mandatory follow-up to the event that has taken place."[259] He explained that an injured state could ignore any "mandatory follow-up[s]," namely the rights or privileges granted to States that would normally arise under the circumstances, because the State in question triggered these consequences by violating international law. Riphagen saw the "immunities of foreign [s]tates and their property" as an example of such "mandatory follow-up[s]."[260] Riphagen's successor, Gaetano Arangio-Ruiz, also advocated for this interpretation of non-recognition that confirmed that even States could adopt non-recognition as a response even when they were not the direct injured parties of a State's international law violation.[261]

257. Andrea Bianchi, *Overcoming the Hurdle of State Immunity in the Domestic Enforcement of International Human Rights*, *in* ENFORCING INTERNATIONAL HUMAN RIGHTS IN DOMESTIC COURTS 405, 437 (Benedetto Conforti & Francesco Francioni eds., 1997).

258. Ilias Bantekas, *State Responsibility in Private Civil Action–Sovereign Immunity–Immunity for Jus Cogens Violation–Belligerent Occupation–Peace Treaties*, 92 AM. J. INT'L L. 765, 766 (1998).

259. Special Rapporteur, *Preliminary Report on the Content, Forms and Degrees of International Responsibility (Part 2 of the Draft Articles on State Responsibility*, Int'l Law Comm'n, ¶ 45, U.N. Doc. A/CN.4/330 (Apr. 1, 1980) (by Willem Riphagen), *reprinted in* [1980] 2 Y.B. Int'l L. Comm'n 107, 117, U.N. Doc. A/CN.4/SER.A/1980/Add.1 (pt. 1); *see* Stefan Talmon, *The Duty Not to "Recognize as Lawful" a Situation Created by the Illegal Use of Force or Other Serious Breaches of a* Jus Cogens *Obligation: An Obligation Without Real Substance?*, *in* THE FUNDAMENTAL RULES OF THE INTERNATIONAL LEGAL ORDER: *JUS COGENS* AND OBLIGATIONS *ERGA OMNES* 99, 115 (Christian Tomuschat & Jean-Marc Thouvenin eds., 2006).

260. Talmon, *supra* note 259, at 116.

261. Special Rapporteur, *Fifth Report on State Responsibility*, Int'l Law

Riphagen's formula, however, does not deviate from the current head of state immunity regime, even when serious human rights violations are involved. It would be difficult, if not impossible, to identify what amounts to "an otherwise mandatory follow-up to the event that has taken place."[262] The ICJ cases involving article 41(2) were mainly concerned with territories occupied on the basis of a breach of a peremptory norm, such as apartheid[263] and the illegal use of force.[264] A common feature of these cases is that the factual situation that arose out of the international breach, such as the creation of a State or a legal claim to statehood, territorial sovereignty, or governmental capacity.[265] Applying article 41(2) to a legal claim arising from a breach of a peremptory norm is unwarranted because the ILC Commentary only referred to factual situations, rather than legal claims, under international law.[266] Consequently, whether a forum state should perform its obligation under article 41(2) not to recognize head of state immunity for *jus cogens* crimes is unprecedented. Unlike cases concerning occupied territories where the legal claim for territorial sovereignty is relatively uncontroversial, the legal claim inherent in serious human rights violations is more obscure. Head of state immunity does not

Comm'n, ¶ 158, U.N. Doc. A/CN.4/454/Add.2 (Jun. 8, 1993) (by Gaetano Arangio-Ruiz), *reprinted in* [1993] 2 Y.B. Int'l L. Comm'n 1, 4-41, U.N. Doc. A/CN.4/SER.A/1993/Add.l (pt. 1).

262. *See* Talmon, *supra* note 259, at 116-18 (explaining that a broader interpretation of non-recognition is necessary because "[t]here are . . . very few factual situations created by . . . serious breaches that . . . automatically give rise to legal consequences").

263. *See* Legal Consequences for States of the Continued Presence of South Africa in Namibia (South-West Africa) Notwithstanding Security Council Resolution 276 (1970), 1971 I.C.J. 16, 55-56, ¶¶ 122-124 (Jun. 21) (advising States to deny South Africa a variety of rights that are owed to it, including refraining from entering into treaties, maintaining diplomatic relations, and entering into economic relations with South Africa, in response to its occupation of Namibia).

264. *See* Legal Consequences of the Construction of a *Wall in the Occupied Palestinian Territory, Advisory Opinion,* 2004 I.C.J. 136, 196, ¶ 146 (Jul. 9) (finding that Israel's construction of a wall in Jerusalem to divide the Israeli and Palestinian sides breached international law, and obligating states to not recognize the legality of the wall, to refrain from assisting Israel in maintaining the wall, and prosecute individuals who have violated the Geneva Conventions when constructing and maintaining the wall).

265. *See* Talmon, *supra* note 259, at 125.

266. *Report of the International Law Commission: Fifty-Third Session*, *supra* note 8, at 113-16.

emerge as a consequence of the breach. It is attributed to the antiquated notion of state sovereignty, which already existed when the perpetrator became the head of state. For this reason, recognizing head of state immunity pursuant to human rights violations would not give rise to a claim under article 41(2) unless the perpetrator became the head of state as a result of the illegal acquisition of territory through genocide or other *jus cogens* offences. Talmon also supported this proposition and opined that not all factual situations created by breaches of a *jus cogens* norm will per se "give rise to any legal consequences which are capable of being denied by other States."[267]

Nevertheless, denying legal effects can be construed broadly to suggest that other States could deny any legal effect of "any property or other rights" premised on the *jus cogens* acts.[268] Head of state immunity is arguably one of these rights. This observation gives rise to another interpretation that if a high-ranking official did not commit *jus cogens* crimes, he would not need to invoke head of state immunity. His existing right to immunity is then "premised on" the fact that he committed the crimes. It would follow that States should deny any claim for head of state immunity "premised on" a breach of *jus cogens* norms in domestic criminal proceedings. This interpretation is fairly far-fetched and lacks support from jurisprudence.

It is difficult to determine which interpretation is best given that the ILC and the ICJ provide limited explanations of non-recognition. In the meantime, Riphagen's formula should retain priority since the customary status of the "non-recognition" concept is generally confined to "territorial acquisition resulting from the threat or use of force."[269] However, this interpretation likely only covers situations of illegal occupation. As such, this article welcomes further guidance on an alternative expansive interpretation of non-recognition.

There is a possibility under article 41(2) that States are justified in not giving effect to head of state immunity in cases of serious breaches of *jus cogens* norms. The probability that this will happen

267. Talmon, *supra* note 259, at 120.
268. *Id.* at 118.
269. *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, 2004 I.C.J. at 171.

depends on further clarifications by international courts and jurists. The concept of state responsibility has a relatively brief history and its development is still in a state of flux. For the time being, the analysis above shows that article 41(2) does not support States to lift immunity enjoyed by heads of state *merely* for serious breaches of human rights, unless the immunity to be relied upon was a direct product of the breaches. The author suspects that article 41(2) may support States lifting head of state immunity if the subject of the charge relates to *de novo* illegal occupation of territories.

C. THE LACUNAE RELATING TO THE REMOVAL OF HEAD OF STATE IMMUNITY BEFORE INTERNATIONAL COURTS

In *Arrest Warrant*, the ICJ held that head of state immunity is not available when the suspect is tried before an international court,[270] as was the case in *Prosecutor v. Milošević*,[271] *Prosecutor v. Karadzić*,[272] *Prosecutor v. Kambanda*,[273] *Prosecutor v. Taylor*,[274] *Prosecutor v. Al-Bashir*,[275] among others. Nevertheless, this observation is

270. Arrest Warrant of 11 April 2000 (Dem. Rep. Congo v. Belg.), 2002 I.C.J. 3, 25-26, ¶ 61 (Feb. 14).

271. Case No. IT-99-37-PT, Decision on Preliminary Motions, ¶¶ 28, 34 (Int'l Crim. Trib. for the Former Yugoslavia Nov. 8, 2001) (affirming that the lifting of head of state immunity for criminal prosecutions in international courts has become part of customary international law and, as such, dismissing Milošević's argument that he cannot be subjected to the jurisdiction of the court as former president of Republic of Serbia).

272. Case No. IT-95-5-D, Decision on a Proposal for a Formal Request for Deferral, ¶ 23 (Int'l Crim. Trib. for the Former Yugoslavia May 16, 1995) (holding that it has jurisdiction over the defendant because "the principle of individual criminal responsibility of persons in positions of authority has been reaffirmed in a number of decisions taken by national courts, and adopted in various national and international instruments").

273. Case No. IR-97-23-S, Judgment, ¶ 62 (Int'l Crim. Trib. for Rwanda Sept. 4 1998) (affirming the guilty plea of a high-ranking minister in Rwanda).

274. Case No. SCSL-2003-01-AR72(E), Decision on Immunity from Jurisdiction, ¶ 52 (Special Ct. for Sierra Leone May 31, 2004) ("[T]he principle seems now established that the sovereign equality of states does not prevent a [h]ead of [s]tate from being prosecuted before an international criminal tribunal or court.").

275. Case No. ICC-02/05-01/09, Decision on the Prosecution's Application for a Warrant of Arrest Against Omar Hassan Ahmad Al Bashir, ¶ 41 (Mar. 4, 2009) ("[T]he Chamber considers that the current position of Omar Al Bashir as Head of a state which is not a party to the Statute, has no effect on the Court's jurisdiction over the present case.").

misleading for two reasons. First, before the ICC was established, only a few international penal tribunals prosecuted high-ranking officials for heinous crimes. Only a limited number of countries have benefited from these courts' jurisdiction. [276] Second, because of its treaty-based nature, the ICC is unable to provide for a comprehensive mechanism to prosecute high-ranking officials.

1. The Limited Territorial Jurisdiction of the International Tribunals

In the past several decades, the international community has established a series of international penal tribunals to prosecute serious international crimes. Historically, domestic courts were responsible for trying international crimes. However, over time, the international community increasingly preferred that such crimes be tried in the international fora because it assured better due process compared to domestic courts of "victorious States."[277]

In asserting jurisdiction, international courts do not compromise state sovereignty because States consent to submit their own sovereign will in concordance with other States to "maintain the supremacy of international law."[278] In *Taylor*, the SCSL acknowledged that international courts are not the organs of a State and thus do not adjudicate States' conduct.[279] Instead, these courts "derive their mandate from the international community."[280] The

276. *See, e.g.*, SCSL Statute, *supra* note 92, art. 1(1) (establishing jurisdiction over crimes committed in Sierra Leone); ICTR Statute, *supra* note 92, art. 7 (establishing jurisdiction over crimes committed in Rwanda and its neighboring states); ICTY Statute, *supra* note 92, art. 8 (establishing jurisdiction over crimes in the territory of the former Yugoslavia, which includes Bosnia and Herzegovina, Croatia, Kosovo, Macedonia, Montenegro, Serbia, and Slovenia); Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea art. 1, Oct. 27, 2004 (Cambodia), *available at* http://www.cambodia.gov.kh/krt/pdfs/KR Law as amended 27 Oct 2004 Eng.pdf (unofficial translation by the Council of Jurists and the Secretariat of the Task Force, revised Aug. 26, 2007) (addressing crimes committed in Cambodia).

277. U.N. SURVEY OF INTERNATIONAL LAW, *supra* note 75.

278. *Id.*

279. Prosecutor v. Taylor, Case No. SCSL-2003-01-AR72(E), Decision on Immunity from Jurisdiction, ¶ 51 (Special Ct. for Sierra Leone May 31, 2004).

280. *Id.* However, international courts sanction States to continue to act in accordance with their international obligations. *See generally* G.A. Res. 3074 (XXVIII), U.N. Doc. A/RES/3074(XXVIII) (Dec. 3, 1973) (declaring "principles of international [cooperation among States] in the detection, arrest, extradition, and

"complementarity" principle under the Rome Statute of the ICC similarly holds that international courts supplement, but do not supplant, the jurisdiction of domestic courts over international crimes.[281]

Notably, none of these tribunals recognize head of state immunity as a bar to prosecution.[282] Lifting immunity in international tribunals reflects customary international law and is closely connected with the notion of individual criminal responsibility. This concept was first enumerated in the Nuremberg Charter and has subsequently appeared in other international documents, including the Draft Code of Crimes against the Peace and Security of Mankind ("Draft Code").[283] It has developed robustly in recent years to include not only former, but also incumbent high-ranking officials. The ILC has remarked that procedural concerns should not play a role in prosecuting high-ranking officials who committed a crime against the peace and security of mankind.[284] It further highlighted that the removal of "any procedural immunity with respect to prosecution or punishment in appropriate juridical proceedings is an essential

punishment of persons guilty of war crimes and crimes against humanity").

281. *See* Rome Statute, *supra* note 25, pmbl., art. 1 (establishing the ICC's jurisdiction is "complementary to national criminal jurisdictions").

282. SCSL Statute, *supra* note 92, art. 6(2); ICTR Statute, *supra* note 92, art. 6(2); ICTY Statute, *supra* note 92, art. 7(2); Charter of the International Military Tribunal at Nuremberg, *supra* note 190, art. 7; Prosecutor v. Krstić, IT-98-33-T, Judgment, ¶ 541, (Int'l Crim. Trib. for the Former Yugoslavia Aug. 2, 2001); Prosecutor v. Furundžija, Case No. IT-95-17/1-T, Judgment, ¶ 140 (Int'l Crim. Trib. for the Former Yugoslavia Dec. 10, 1998); Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Judgment, ¶ 11 (Int'l Crim. Trib. for Rwanda Sept. 2, 1998); *Karadzić*, Case No. IT-95-5/18-T, ¶ 24; *see* Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion, 1951 I.C.J. 15, 24 (May 28) (discussing whether state reservations from the Genocide Convention are binding); S.C Res. 808, U.N. Doc. S/Res/25704 808 (Feb. 22, 1993) ("Persons who commit or order the commission of grave breaches of the [Geneva] Conventions are individually responsible in respect of such breaches.").

283. Charter of the International Military Tribunal at Nuremberg art. 6, Aug. 8, 1945, 82 U.N.T.S 279 (imposing individual criminal responsibility for crimes against peace, war crimes, and crimes against humanity); *Report of the International Law Commission: Forty-Eighth Session*, U.N. Doc. A/CN.4/L.532/ corr.1 and corr.3, *reprinted in* [1996] 2 Y.B. Int'l L. Comm'n 15, 18-19, art. 2, U.N. Doc. A/CN.4/SER.A/1996/Add,1 (pt. 2).

284. U.N. Int'l L. Comm'n, Summary Records of the 2408th Meeting, para. 36, [1995] 1 Y.B. Int'l L Comm'n 1, U.N. Doc. A/CN.4/SR.2408.

corollary of the absence of any substantive immunity or defense."[285] It would be self-defeating to prevent an individual from relying on his official position to eschew responsibility, but at the same time allow him to invoke his official position to avoid prosecution on a procedural basis.[286] The Draft Code's Special Rapporteur concluded that despite the difficulty of ascertaining the precise circumstances under which high-ranking officials could be prosecuted, international tribunals should eventually prosecute them.[287]

Without the immunity shield before international penal tribunals, the authors behind the massacres in the former Yugoslavia, Rwanda, and Sierra Leone have been prosecuted and convicted.[288] However, these courts can only prosecute criminals on a territorial basis.[289] This is regrettable because perpetrators of human rights violations in other States, such as North Korea and Somalia, are automatically excluded from international criminal prosecution.

Scharf argues that the Security Council has been unwilling or unable to set up more *ad hoc* tribunals for three reasons. First, establishing an *ad hoc* tribunal is extraordinarily "time-consuming and politically exhausting" because States must agree on the statute's content, the judges and prosecutor, and the budget.[290] Second, China,

285. *Report of the International Law Commission to the General Assembly on the Work of Its Forty-Eighth Session*, *supra* note 137, art. 7(6).

286. *Id.* art. 7(6), n.69.

287. Special Rapporteur, *Twelfth Report on the Draft Code of Crimes Against the Peace and Security of Mankind*, Int'l L. Comm'n, 108, U.N. Doc. A/CN.4/460/Corr.1 (Apr. 15, 1994) (by Doudou Thiam), *reprinted in* [1994] 2 Y.B. Int'l L. Comm'n 1.INT'L L. COMM'N, *Report of International Law Commission to the General Assembly on the Work of Its Forty-Sixth Session*, at paras. 133-34, U.N. Doc. A/CN.4/460, *reprinted in* [1994] 2 Y.B. Int'l L. Comm'n 1, U.N. Doc. A/CN.4/SER.A/1994/Add.1 (pt. 1).

288. *See* SPECIAL COURT FOR SIERRA LEONE, ELEVENTH AND FINAL REPORT OF THE PRESIDENT OF THE SPECIAL COURT FOR SIERRA LEONE 11-17, 19 (2013), *available at* http://www.rscsl.org/Documents/AnRpt11.pdf (summarizing outcome of trials against high-ranking officials and rejection of head of state immunity in the case against Charles Taylor); *Key Figures of ICTR Cases*, ICTR, http://www.unictr.org/sites/unictr.org/files/file_attach/KeyFigures-ICTR-cases-141028_EN.pdf (last visited Dec. 28, 2014); *Key Figures of ICTY Cases*, ICTY, http://www.icty.org/sections/TheCases/KeyFiguresoftheCases (last updated Oct. 28, 2014).

289. *See* SCSL Statute, *supra* note 92, art. 1; ICTR Statute, *supra* note 92, art. 7; ICTY Statute, *supra* note 92, art. 8.

290. Michael P. Scharf, *The Politics of Establishing an International Criminal*

who has veto power on the Security Council, has had reservations about establishing more international criminal courts.[291] China likely fears that its unpleasant human rights record would result in prosecuting Chinese officials.[292] The fact that China is still reluctant to sign and ratify the Rome Statute adds merit to this allegation.[293] Third, States without veto power might consider establishing extra *ad hoc* tribunals as "inherently unfair" because the permanent members would likely protect themselves and their allies from the tribunals' jurisdiction by using their veto power.[294]

While the exact reason for not establishing more *ad hoc* tribunals to try international crimes is difficult to decipher, the territorial jurisdiction barrier imposed on the existing international tribunals creates a gap in the international penal system. This prevents some victims of human rights violations from obtaining redress, especially if domestic courts are unable to try high-ranking officials for heinous crimes because of immunity claims.

2. The Failure of the Rome Statute to Provide for a "Catchall Mechanism" to Prosecute High-Ranking Officials

Article 27 of the Rome Statute lifts the immunity of high-ranking officials.[295] However, unlike the *ad hoc* courts, the Rome Statute has a more comprehensive territorial jurisdiction.[296] The ICC can assert

Court, 6 DUKE J. COMP. & INT'L L. 167, 169 (1995).

291. VIRGINIA MORRIS & MICHAEL P. SCHARF, AN INSIDER'S GUIDE TO THE INTERNATIONAL CRIMINAL COURT FOR THE FORMER YUGOSLAVIA: A DOCUMENTARY HISTORY AND ANALYSIS 344 (1995).

292. Steven W. Becker, *The Objections of Larger Nations to the International Criminal Court*, 81 REVUE INTERNATIONALE DE DROIT PÉNAL 47, 58 (2010).

293. *See generally id.* (explaining why China and other countries do not accept ICC jurisdiction).

294. *See generally Report of the Ad Hoc Committee on the Establishment of an International Criminal Court*, Sept. 6, 1995, U.N. Doc. A/50/22, GAOR, 50th Sess., Supp. No. 22 (1995) (discussing concerns about the Security Council's political influence on the ad hoc international tribunals)

295. Rome Statute, *supra* note 25, art. 27(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.").

296. *Compare* Rome Statute, *supra* note 25, arts. 11-13, *with* ICTR Statute, *supra* note 92, art. 7, and ICTY Statute, *supra* note 92, art. 8.

jurisdiction over nationals of state parties if the atrocities took place in the territory of the contracting parties[297] or the accused is a national of the contracting parties.[298] Non-contracting parties can, on an *ad hoc* basis, also consent to ICC jurisdiction over crimes enumerated in the Rome Statute that were committed within its borders.[299] If states parties or the Prosecutor on his or her own initiative refers cases to the ICC, they may do so under any of the above jurisdictional bases.[300] Interestingly, the Security Council is entitled to refer cases to the ICC pursuant to its authority under Chapter VII of the U.N. Charter ("Charter"). While the statute does not explicitly concede this, any State, whether it is a party to the statute or not, may be subjected to the jurisdiction of the ICC through Security Council referral.

Although the ICC has broader jurisdiction than the ICTY or ICTR, for instance, perpetuators can still eschew liability in three ways. First, the Rome Statute is a multilateral treaty that only binds contracting parties.[301] The ICC's treaty-based nature is distinct from the ICTY and the ICTR, which were set up as subsidiary bodies of the United Nations pursuant to article 41 of the Charter.[302] The universal membership of the United Nations and the requirement under article 25 of the Charter that all members comply with Security Council decisions enable the ICTY and the ICTR to lift immunity with respect to all States.[303] In contrast, the ICC is not a subsidiary body of the United Nations.[304] States must give consent to the court to lift immunity, either by becoming a contracting party or acceding to the jurisdiction of the ICC on an *ad hoc* basis.[305]

Second, the question of whether a Security Council referral could waive the immunity of a non-contracting state is controversial. Commentators have vigorously criticized any coercive assertion of

297. Rome Statute, *supra* note 25, art. 12(2)(a).
298. *Id.* art. 12 (2)(b).
299. *Id.* art. 12(3).
300. *Id.* arts. 13(c), 15.
301. VCLT, *supra* note 94, art. 26.
302. *See* ICTR Statute, *supra* note 92; ICTY Statute, *supra* note 92.
303. Akande, *supra* note 139, at 417; *see* U.N. Charter art. 25 ("The Members of the United Nations agree to accept and carry out the decision of the Security Council in accordance with the present Charter.").
304. Rome Statute, *supra* note 25, pmbl.
305. *Id.* art. 12(3).

ICC jurisdiction or denial of head of state immunity as illegitimate and unlawful, absent consent from non-contracting states.[306] A fundamental principle of international law is that "a treaty does not create either obligations or rights for a third [s]tate without its consent."[307] Thus, article 13(b) cannot, *sua sponte*, lift immunities for a national of a non-contracting state.

When interpreting a treaty, it is essential to include all applicable provisions of the treaty and construe them in a harmonious fashion.[308] The Rome Statute, except for article 13(b), heavily emphasizes state consent. In his dissenting opinion in *Krstić*, Judge Shahabuddeen articulated that consent in this context is significant and asserted that "there is no substance in the suggested automaticity of [the] disappearance of the immunity just because of the establishment of international criminal courts," even when States act together, directly or indirectly, to establish the courts.[309] Given that the ICC is merely a treaty-based institution that is not a subsidiary of the Security Council, the latter's referrals should be considered a mere surrogate triggering mechanism.

Third, the ICC can only prosecute officials of contracting states under article 27(2). Officials of non-contracting states are entitled to rely on their immunity to escape arrest when contracting states act pursuant to an ICC-issued arrest and surrender under article 98. Article 27(2) states that the immunities attached to the official capacity of an individual shall not bar the ICC from exercising

306. *E.g.*, Madeline Morris, *High Crimes and Misconceptions: The ICC and Non-Party States*, 64 L. & CONTEMP. PROBS 13 (2001); David Scheffer, *The United States and the International Criminal Court*, 93 AM. J. INT'L L. 12, 18 (1999) (arguing that the Rome Statute binds non-contracting states in ways that it does not for contracting states); Ruth Wedgwood, *The Irresolution of Rome*, 64 L. & CONTEMP. PROBS. 193, 199-200 (2001).

307. VCLT, *supra* note 94, art. 34.

308. *Id.*, art. 31 (requiring that treaties should be interpreted "in accordance with the ordinary meaning to be given to the terms of the treaty in their context" and explaining that "context" includes the text of the treaty, including its preamble and annexes); *see* RICHARD GARDINER, TREATY INTERPRETATION 161 (2008) (noting that the duty to interpret treaties effectively under the VCLT requires that the interpreter read a particular provision in harmony with the rest of the treaty's text).

309. Prosecutor v. Krstić, Case No. IT-98-33-A, Decision on Application for Subpoenas, ¶¶ 11-12 (Int'l Crim. Trib. for the Former Yugoslavia Jul. 1, 2003) (dissenting opinion of Judge Shahabuddeen).

jurisdiction over such a person.[310] Schabas contended that this provision is a treaty clause and should only bind the nationals of the contracting states.[311] In contrast, article 98(1) of the Rome Statute prohibits requests for surrender or assistance that would require the requested state to infringe state or diplomatic immunity of a national of a third state.[312] Article 27 and 98 therefore create a conflict when the ICC decided to prosecute the high-ranking officials of non-contracting states, such as the United States, pursuant to Security Council referral. In *Al-Bashir*, the ICC upheld that customary international law prevails when a conflict exists between two Rome Statute provisions.[313] Therefore, the head of state immunity upheld in article 98 is the governing rule because it reflects customary international law.[314]

Nevertheless, Article 98 is still reconcilable with the customary law discussed in the previous section, such that immunity is lifted in international tribunals. The customary law deals with the relationship between international courts and States. It primarily refers to instances where heads of states are being tried in international courts (except for the ICC) on the assumption that the State to which the head of state belongs has already waived the right to claim immunity due to the special nature of United Nations as explained above. Meanwhile, article 98 concerns interstate relationship whether a State could arrest a head of state belonging to a State which has not yet waived the right to claim immunity. In this regard, the traditional concept of *par in parem non habet imperium* comes into play and restricts States from infringing the integrity of another State by

310. Rome Statute, *supra* note 25, art. 27(2).

311. WILLIAM A. SCHABAS, AN INTRODUCTION TO THE INTERNATIONAL CRIMINAL COURT 245 (4th ed. 2011) [hereinafter SCHABAS, INTRO TO THE ICC]; *see* Paola Gaeta, *Does President Al-Bashir Enjoy Immunity from Arrest?*, 7 J. INT'L CRIM. JUST. 315, 324 (2009).

312. Rome Statute, *supra* note 25, art. 98.

313. Prosecutor v. Al Bashir, Case No. ICC-02/05-01/09, Decision on the Prosecution's Application for a Warrant of Arrest Against Omar Hassan Ahmad Al Bashir, ¶ 43 (Mar. 4, 2009).

314. *See* Kai Ambos, *La construcción de una Parte General del Derecho Penal Internacional* [Building a General Part of International Criminal Law], *in* TEMAS ACTUALES DEL DERECHO PENAL INTERNACIONAL CONTRIBUCIONES DE AMERICA LATINA, ALEMANIA Y ESPANA [CURRENT ISSUES OF INTERNATIONAL CRIMINAL LAW: CONTRIBUTIONS IN LATIN AMERICA, GERMANY, AND SPAIN] 16 (Kai Ambos et al. eds., 2005); *see also* SCHABAS, INTRO TO THE ICC, *supra* note 311, at 391.

arresting its figure head, such as its head of state, without the its consent. States not signing the Rome Statute and acceding jurisdiction to the ICC may demonstrate lack of consent.

The three loopholes detailed above illustrate that head of state immunity before the ICC is neither automatic nor settled. Under the Rome Statute's current framework, state officials, especially those of non-contracting states, can eschew liability. For instance, the United States has strategically taken advantage of these loopholes and refused to become a contracting party to the Rome Statute. Schabas explained that, during drafting, the United States was dubious about the non-contracting state referral mechanism under article 12(3) of the Rome Statute.[315] The initial draft of the Rome Statute "required consent of both the state of nationality and the state of territory," one of which must be a contracting party.[316] In contrast, the final statute only requires the consent of the non-contracting state of whose territory the atrocities took place.[317] The unintended loosening of the consent requirement raised concerns for the United States given their leading role in world peacekeeping.[318] Ambassador Scheffer was wary that Saddam Hussein would possibly invoke this mechanism to allow the ICC to scrutinize the actions of the American troops in northern Iraq.[319] Moreover, the United States would be unable to use its veto power in the Security Council to prevent Iraq from voluntarily submitting to the jurisdiction of the ICC. Article 27 of the Charter requires all five permanent members, together with four non-permanent members, to vote in favor of Chapter VII resolutions, which would include ICC referrals.[320] Schabas advanced that the United States might not be able to obtain the requisite unanimity among the permanent members to prevent ICC prosecutions of U.S.

315. William A. Schabas, *United States Hostility to the International Criminal Court: It's All About the Security Council*, 15 EUR. J. INT'L L. 701, 718 (2004) [hereinafter Schabas, *United States Hostility*].

316. *Id.*; *see also Report of the International Law Commission on the Work of its Forty-Sixth Session, 2 May-22 July 1994*, UN Doc. A/49/10, Chapter II, art. 22(4).

317. Rome Statute, *supra* note 25, art. 12(2).

318. M. Cherif Bassiouni, *Negotiating the Treaty of Rome on the Establishment of an International Criminal Court*, 32 CORNELL INT'L L.J. 433, 458, 462 (1999).

319. Scheffer, *supra* note 306, at 18-20.

320. Rome Statute, *supra* note 25, art. 16.

officials.[321]

The United States is not the only country benefiting from the lacuna inherent in the Rome Statute's framework. As of January 2015, there were 122 state parties to the Rome Statute.[322] Consequently, approximately seventy States remain beyond the reach of the ICC. Aside from the United States, these include two other permanent members of the Security Council, China and Russia. The only way the high-ranking officials of these States would be prosecuted for *jus cogens* crimes committed in their home countries would be through Security Council referral. However, such a referral is unlikely given that these States have veto power at the Security Council. If the judges in *Arrest Warrant* acknowledged this lacuna, they would have realized that the only way to ensure that all heads of states are barred from escaping justice on the basis of their official role is to lift head of state immunity in domestic courts.

IV: THE COMPLIANCE OF *ARREST WARRANT*'S HEAD OF STATE IMMUNITY DOCTRINE WITH THE FUNDAMENTAL PRINCIPLES OF LAW?

Legal certainty and justice are the fundamental pillars of law.[323] This section examines whether the *Arrest Warrant* decision satisfies these two criteria and answers in the negative for both. Unjustifiably extending immunity to ministers of foreign affairs in disregard of emerging customary norms fails to achieve legal certainty. Furthermore, *Arrest Warrant*'s understanding of the head of state immunity doctrine denies victims' right to justice because high-ranking officials can claim immunity to avoid prosecution. Allowing high-ranking officials to claim immunity also defeats the right to effective protection, which is an essential concept of criminal justice.

A. LEGAL CERTAINTY

The Organization for Economic Cooperation and Development

321. Schabas, *United States Hostility*, *supra* note 315, at 716.

322. *The States Parties to the Rome Statute*, INT'L CRIMINAL COURT, http://www.icc-cpi.int/en_menus/asp/states%20parties/Pages/the%20states%20parties%20to%20the%20rome%20statute.aspx (last visited Jan. 9, 2015).

323. *Cf.* Heather Leawoods, *Gustav Radbruch: 'An Extraordinary Legal Philosopher'*, 2 WASH. U. J.L. & POL'Y 489, 493 (2000).

opined "a rule-based society" should be established to foster legal certainty and predictability.[324] Such a society ultimately aims to provide guidance and to prevent arbitrary application of state power over those subject to the law.[325] In *Korchuganova v. Russia*,[326] the ECtHR explained that legal certainty could be achieved when all laws are "sufficiently precise to allow the person – if need be, with appropriate advice – to foresee the consequences which a given action may entail to the extent that is reasonable under the circumstances."[327]

The *Arrest Warrant* decision fails to achieve legal certainty because the ICJ failed to "apply" customary international law when assessing the applicability of head of state immunity to ministers of foreign affairs.[328] Despite acknowledging that no custom governed this matter, the court, nevertheless, created its own law when it drew a flawed analogy between heads of state and ministers of foreign affairs.[329] Judges cannot create law without an express provision under the ICJ Statute to that effect.[330] Moreover, the court, in

324. ORG. ECON. CORP. & DEV., ISSUES BRIEF: EQUAL ACCESS TO JUSTICE AND THE RULE OF LAW 2 (2005), *available at* http://www.oecd.org/development/incaf/35785584.pdf.

325. *Id.*

326. App. No. 75039/01, para. 47 (Eur. Ct. H.R. June 8, 2006), *available at* http://hudoc.echr.coe.int/sites/eng/Pages/search.aspx#{%22fulltext%22:[%22CASE%20OF%20KORCHUGANOVA%20v.%20RUSSIA%22],%22documentcollectionid2%22:[%22GRANDCHAMBER%22,%22CHAMBER%22],%22itemid%22:[%22001-75706%22]}.

327. *Id.*

328. ICJ Statute, *supra* note 25, art. 38(1)(b) ("The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply: . . . (b) international custom, as evidence of a general practice accepted as law").

329. *See* Arrest Warrant of 11 April 2000 (Dem. Rep. Congo v. Belg.), 2002 I.C.J. 3, 21, ¶ 52 (Feb. 14) ("These conventions, provide useful guidance on certain aspects of the question of immunities. They do not, however, contain any provision specifically defining the immunities enjoyed by Ministers for Foreign Affairs. It is consequently on the basis of customary international law that the Court must decide the questions relating to the immunities of such Ministers raised in the present case").

330. *Cf.* Edward McWhinney, *The International Court of Justice and International Law-Making: The Judicial Activism/Self-Restraint Antinomy*, 5(1) CHINESE. J. INT'L L. 3, 13 (2006) (documenting the ICJ's role as an interpreter of international law throughout its history and opining that the court will likely adopt self-restraint in the future when engaging in policy rulings).

adopting the phrase "such as" to imply that a non-exhaustive list of persons can claim immunity, further muddled the concept of head of state immunity.[331] The ICJ unquestionably undermined legal certainty in these two circumstances.

B. JUSTICE

Criminal justice aims to maintain law and order, deter crime, and/or penalize or rehabilitate lawbreakers.[332] Transitional justice further centers on ensuring that there are adequate mechanisms for victims' redress. This system focuses on developing mechanisms after a "period of conflict, civil strife or repression" that address past human rights and humanitarian law violations.[333] It values judicial responses to human rights violations because they potentially help victims deal with the past and foster reconciliation.[334] Accordingly, the transitional justice paradigm places great significance on abrogating head of state immunity.

The U.N. Updated Set of Principles of the Protection and Promotion of Human Rights Through Action to Combat Impunity ("Updated Principles") reiterates that it is important for all States to secure respect for human rights through effective measures that combat impunity.[335] These include national and international

331. *Arrest Warrant of 11 April 2000*, 2002 I.C.J. at 20-21, ¶ 51.

332. *See generally* Francis A. Allen, *Criminal Justice, Legal Values and the Rehabilitative Ideal*, 50 J. CRIM. L., CRIMINOLOGY, & POLICE SCI. 226, 226-28 (1959) (exploring the value of rehabilitation as a principle of criminal justice); Albert W. Alschuler, *The Changing Purposes of Criminal Punishment: A Retrospective on the Past Century and Some Thoughts About the Next*, 70 U. CHI. L. REV. 1, 1 (2003) (discussing trends in theories of punishment and arguing retribution "merits recognition as the criminal law's central objective"); Julian V. Roberts, *Public Opinion, Crime, and Criminal Justice*, 16 PUB. OPINION, CRIME, & CRIM. JUST. 99, 133, 143-44, 158 (1992) (discussing the role of various theories of punishment and proportionality in criminal justice).

333. Naomi Roht-Arriaza, *The New Landscape of Transitional Justice*, *in* TRANSITIONAL JUSTICE IN THE TWENTY-FIRST CENTURY: BEYOND TRUTH VERSUS JUSTICE 1, 2 (Naomi Roht-Arriaza & Javier Mariezcurrena eds., 2006).

334. Jessica Almqvist & Carlos Espósito, *Introduction*, *in* THE ROLE OF COURTS IN TRANSITIONAL JUSTICE: VOICES FROM LATIN AMERICA AND SPAIN 1, 6 (Jessica Almqvist & Carlos Espósito eds., 2012).

335. Diane Orentlicher, *Promotion and Prot. of Human Rights: Rep. of the Indep. Expert to Update the Set of Principles to Combat Impunity*, 5, U.N. Doc. E/CN.4/2005/102/Add.1 (Feb. 8, 2005) [hereinafter Orentlicher, *Revised Updated Principles*].

measures to secure observance of the "right to the truth, the right to justice and the right to reparation."[336] Notably, principle 19, which governs the victims' right to justice, specifies that States should "undertake prompt, thorough, independent and impartial investigations" of *jus cogens* violations and take measures to ensure that the perpetrators are prosecuted, tried, and duly punished.[337] Any measures that prevent the prosecution of perpetrators are antithetical to victims' right to justice. The ECtHR has addressed such denial of justice claims.

Article 6(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms ("ECHR") governs the right to a fair trial.[338] The provision guarantees individuals the right to equality of arms[339] and the right to have access to the courts.[340] Claimants commonly argue that applying immunity prevents victims from exercising their rights under article 6(1).

McElhinney v. Ireland[341] concerned Irish nationals' wrongful assault claim against United Kingdom soldiers. In his dissenting opinion, Judge Loucaides highlighted the fallacy of granting a blanket immunity that would frustrate justice.[342] In his opinion, while the ECHR permits limitations on the right to a fair trial, such limitations should not undermine the substance of the right.[343] He emphasized that a blanket immunity imposed *irrespective of the nature of the case* is one such impermissible limitation.[344] In his dissent, Judge Rozakis also observed that state immunity is in a

336. *Id.*
337. *Id.* at 12.
338. European Convention for the Protection of Human Rights and Fundamental Freedoms art. 6, Nov. 4, 1950, 213 U.N.T.S. 221 [hereinafter ECHR].
339. Neumeister v. Austria, 8 Eur. Ct. H.R. (ser. A) at 19 (1968).
340. Golder v. United Kingdom, 18 Eur. Ct. H.R. (ser. A) at 14 (1975).
341. 2001-XI Eur. Ct. H.R. 37.
342. *Id.* at 55 (dissenting opinion of Judge Loucaides) ("In present democratic society an absolute immunity from judicial proceedings appears to be an anachronistic doctrine incompatible with the demands of justice and the rule of law . . . The doctrine of [s]tate immunity has in modern times been subjected to an increasing number of restrictions, the trend being to reduce its application in view of developments in the field of human rights which strengthen the position of the individual.").
343. *Id.*
344. *Id.* at 55-56.

transitional stage and asserted that its application is now only limited to specific types of actions.[345]

These remarks highlight that offenders should at least face the possibility of being prosecuted. Principle 22 of the Updated Principles, which requires States to adopt and enforce safeguards against any abuse of amnesty rules, *non bis in dem*, and official immunities, among others that foster or contribute to impunity.[346]

International human rights law not only prohibits States from committing human rights violations but also imposes positive obligations on States to render effective human rights protections within their territory.[347] States may guarantee effective protection if their "civil and criminal law provide effective deterrence against the violation of fundamental rights."[348]

Principle 35 of the Updated Principles highlights the importance of guaranteeing the non-recurrence of *jus cogens* violations to combat impunity.[349] As mentioned above, one purpose of criminal law is to incriminate the perpetrators and make them accountable for their behavior. Permitting incumbent high-ranking officials to claim immunity impedes such accountability. As such, a criminal system that recognizes such immunity fails to achieve effective deterrence.

Orentlicher argued that effective protection entails the obligation to bring persons who committed human rights violations within its border to justice.[350] She advanced that the authoritative interpretations of several expansive human rights conventions, including the ECHR, the International Covenant on Civil and Political Rights ("ICCPR"), and the American Convention on Human Rights, require States to "investigate serious violations of physical integrity . . . and to bring to justice those who are

345. *Id.* at 49 (dissenting opinion of Judge Rozakis) (describing personal injury actions that occurred in the territory of the forum state in circumstances where the victim "had alternate means" to effectively enforce its rights under the ECHR).

346. Orentlicher, *Revised Updated Principles*, *supra* note 335, at 13.

347. THE DUTY TO PROTECT AND ENSURE HUMAN RIGHTS (Eckart Klein ed., 1999).

348. VAN ALEBEEK, *supra* note 24, at 410.

349. Orentlicher, *Revised Updated Principles*, *supra* note 335, at 17.

350. Diane Orentlicher, *Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime*, 100 YALE L.J. 2537, 2571 (1991).

responsible."[351] In her view, the only avenue to safeguard human rights adequately and effectively is through prosecution and punishment.[352]

Several ECtHR cases that acknowledged the ECHR obligation to "secure to everyone within their jurisdiction the rights and freedoms defined in [the] Convention" reflect Orentlicher's arguments.[353] This obligation implicitly mandates that States implement some form of "effective official investigation" that identify and punish those liable for human rights violations.[354] Without such measures, the ECtHR emphasized, the prohibition of serious violations of human rights, such as murder, torture, and inhuman and degrading treatment and punishment, would become practically ineffective and would be abused with virtual impunity.[355] For instance, *X and Y v. Netherlands*[356] involved a Dutch law that did not permit the prosecution of a person who allegedly raped a mentally disabled girl.[357] The ECtHR ruled that States have a positive obligation to adopt measures to "secure respect for private life even in the sphere of the relations of individuals between themselves."[358] The court elaborated that breaches of "fundamental values and essential aspects of private life" can only be effectively deterred through criminal law.[359] Therefore, the court concluded that the absence of penal provisions governing the rape of mentally disabled girls violated article 8 of the ECHR.[360]

In *Kilic v. Turkey*,[361] the ECtHR held that a lack of accountability would give rise to an ineffective criminal law system for the

351. *Id.* at 2568.
352. *Id.*
353. ECHR, *supra* note 338, art 1.
354. All three of the following cases involved circumstances in which a State's agents used deadly force against individuals. Yasa v. Turkey, 1998-VI Eur. Ct. H.R. 423, ¶ 98 (1998); Kaya v. Turkey (No. 65) 1998-I Eur. Ct. H.R., 324, ¶ 86 (1998); McCann v. United Kingdom, 324 Eur. Ct. H.R. (ser. A), at ¶ 161 (1995).
355. Assenov v. Bulgaria, 1998-VIII Eur. Ct. H.R. 3242, ¶ 102 (1998).
356. 91 Eur. Ct. H.R. (ser. A) at 3 (1985).
357. *Id.* at 3-4 (explaining the victim was incapable of bringing the complaint herself and was too old for her father to act as a substitute).
358. *Id.* at 7.
359. *Id.* at 8.
360. *Id.* at 9.
361. 2000-III Eur. Ct. H.R. 75 (2000).

purposes of the Convention.[362] If investigations did not lead to the punishment or accountability of those responsible for serious crimes, the system would fail to preserve the rights of the victims and effectively protect them.[363]

The U.N. Human Rights Committee has similarly construed article 7 of the ICCPR as obligating States to effectively conduct investigations and to penalize those responsible for allegations of ill-treatment.[364] In *Muteba v. Zaire*,[365] the U.N. Commission on Human Rights ruled that States must investigate alleged acts of torture, punish those found guilty of such conduct, and implement measures to ensure that others do not repeat acts of torture in the future.[366]

Prosecution is not the only means of guaranteeing effective deterrence. Reparations also play an important role.[367] The victim's right to reparations has been a longstanding principle of international human rights law and is enumerated in article 31(1) of the Draft Articles on State Responsibility, article 3 of the Hague Convention (IV) Respecting the Laws and Customs of War on Land, article 91 of the Additional Protocol No. I to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts.[368] On several occasions, the U.N. Commission on Human Rights has ruled that the victims of serious

362. *Id.* at 99.

363. *See id.*

364. International Convention on Civil and Political Rights art. 7, Dec. 19, 1966, 999 U.N.T.S. 173; Rep. of the Human Rights Comm. Annex VI: General Comment No. 20, 44th Sess., 1992, 193-94, U.N. Doc. A/47/40; GAOR, 47th Sess., Supp. No. 40 (1994).

365. Rep. of the Human Rights Comm. Annex XIII: Views of the Human Rights Comm. concerning Communication No. 124/1982, 22d Sess., July 9-July 27, 1984, U.N. Doc. A/39/40; GAOR, 39th Sess., Supp. No. 40 (1994).

366. *Id.*

367. Diane Orentlicher, *Promotion and Prot. of Human Rights: Rep. of the Indep. Expert to Update the Set of Principles to Combat Impunity*, 28, n.76, U.N. Doc. E/CN.4/2005/102 (Feb. 18, 2005).

368. Protocol Additional to the Geneva Conventions of 12 August 1949 art. 91, Dec. 12, 1977, 1125 U.N.T.S. 43; Convention (IV) Respecting the Laws and Customs of War on Land and its annex: Regulations Concerning the Laws and Customs of War on Land art. 3, Oct. 18, 1907, *available at* https://www.icrc.org/applic/ihl/ihl.nsf/52d68d14de6160e0c12563da005fdb1b/1d1726425f6955aec125641e0038bfd6; ILC Draft Articles on State Responsibility, *supra* note 8, at 91.

violations of human rights must be able to seek judicial remedies.[369] Principle 32 of the Updated Principles also reflects this concept.[370] The non-recognition of head of state immunity in domestic criminal proceedings would facilitate the ability of victims of human rights violations to seek such remedies in domestic courts.

The foregoing analysis suggests that head of state immunity from domestic criminal jurisdiction renders criminal justice ineffective. Van Alebeek observed that the domestic courts of the State engaging in human rights abuses often fail to show sympathy for the victims.[371] Moreover, countries are unlikely to subject their own incumbent officials to criminal investigations and, even if they were subject to criminal investigation, waiving immunity is unlikely an option because the officials are part of the ruling power. Van Alebeek observed that because prosecution in the courts of the official's home state is unrealistic and absent any access to international enforcement mechanism, victims of human rights abuses can only realistically resort to foreign domestic courts.[372] However, Bröhmer emphasized that international mechanisms for redress are inadequate.[373] He opined that only national remedies could give effect to the procedural side of international human rights law.[374]

These observations underline the significance of relying on foreign states to prosecute high-ranking officials. However, if foreign states are prohibited from initiating criminal proceedings against impugned state officials and international courts are unable to claim jurisdiction over those officials' crimes, the victims must wait until the impugned officials leave their post because head of state immunity is no longer

369. *See* Rep. of the Human Rights Comm. Annex V: Views of the Human Rights Comm. concerning Communication No. 778/1997, 76th Sess., Oct. 14-Nov. 1, 2002, ¶ 6.2, U.N. Doc. A/58/40; GAOR, 58th Sess., Supp. No. 40 (2003); Rep. of the Human Rights Comm. Annex: Views of the Human Rights Comm. concerning Communication Nos. 241/1987 and 242/1987, 37th Sess., Oct. 23-Nov. 10, 1989, ¶ 14, U.N. Doc. A/45/40; GAOR, 45th Sess., Supp. No. 40 (1990).

370. Orentlicher, *Revised Updated Principles*, *supra* note 335, at 17 (emphasis added) ("All victims shall have access to a readily available, prompt and effective remedy in the form of *criminal*, civil, administrative or disciplinary *proceedings*").

371. VAN ALEBEEK, *supra* note 24, at 340.

372. *Id.*

373. JÜRGEN BRÖHMER, STATE IMMUNITY AND THE VIOLATION OF HUMAN RIGHTS 206 (1997).

374. *Id.*

available to former officials.[375] However, this waiting period is unpredictable and any justice delayed is justice denied.[376] Relying on the forum states to serve immediate justice in such circumstances becomes merely theoretical.

Other obstacles hinder effective prosecution in the courts of the perpetrator's home state. Roht-Arriaza explained that States in transition after a period of internal turmoil lack the substantive and procedural infrastructure to investigate and prosecute perpetrators of egregious crimes.[377] She attributes this lack of a legal basis to amnesties.[378]

Moreover, in some jurisdictions, some *jus cogens* crimes are not even codified into national penal codes.[379] Even if the State introduces such crimes into this legal framework, the *nullum crimen singe lege* principle prevents such laws from being applied retroactively to violations that occurred before their date of enactment. Such obstacles further illustrate that foreign domestic courts are the only viable forums through which victims of human rights abuses can seek redress. However, as long as those courts continue to recognize head of state immunity, they will deny victims' rights to justice and leave them uncompensated. Their human rights would, therefore, lose their significance because, as Bröhmer explained, a substantive right lacks that status if "the holder of the right [does not have] the possibility to enforce that right."[380]

C. THE FAILURE OF *ARREST WARRANT* TO ENSURE LEGAL CERTAINTY OR JUSTICE

The arguments above illustrate that *Arrest Warrant* does not constitute good precedent for ensuring legal certainty and justice for several reasons. The ICJ created a shortfall of legal certainty for two

375. *See* Arrest Warrant of 11 April 2000 (Dem. Rep. Congo v. Belg.), 2002 I.C.J. 3, 25 (Feb. 14) (noting States may try former ministers of foreign affairs once their terms are over).

376. *See generally* FRANK MWELA, JUSTICE DELAYED IS JUSTICE DENIED PRINCIPLE: TANZANIA PRIMARY COURTS: THE CASE STUDY OF IRINGA MUNICIPAL (2013) (exploring alternative methods to overcome delays in criminal and civil proceedings).

377. Almqvist & Espósito, *supra* note 334, at 9.

378. *Id.* at 9-10.

379. *Id.* at 10.

380. BRÖHMER, *supra* note 373, at 206.

reasons. First, the case deviated from customary international law and the court controversially created new law *propri motu*. Second, the ICJ drew an awry analogy between heads of state and ministers of foreign affairs. In upholding head of state immunity, the ICJ also hindered criminal justice. Radbruch theorized that the legal status of a positive law is jeopardized when equality is deliberately disavowed in its enactment or the statute does not aim to address justice.[381] Judicial decisions or statutory provisions that uphold the head of state immunity doctrine prevent victims from seeking judicial remedies and thus fail to preserve justice. The fact that the ICJ broadened the scope of officials eligible for immunity only exacerbated the problem because more incumbent high-ranking officials are able to eschew criminal responsibility for human rights violations.

V. CONCLUSION

In *Arrest Warrant*, the ICJ wrongfully permitted the head of state immunity doctrine to flourish and disregarded the serious human rights implications that would result from the decision. If the court had been more conscious of customary international law, ministers of foreign affairs would not have benefited from head of state immunity. Subsequent ICJ interpretations of the immunity suggested that the notion of the inviolability of heads of state might not be as robust as commentators contended in the past. The modern definition of sovereignty also undermines the argument that human rights concerns are within the purview of a State's sovereign independence or dignity. These observations illustrate that the granting of head of state immunity for *jus cogens* crimes lacks justification.

States have already abused the unwillingness and/or inability of the current international legal regime to lift head of state immunity for *jus cogens* crimes. This reality emphasizes the need to abrogate head of state immunity from foreign criminal prosecutions.[382] It is

381. Robert Alexy, *A Defense of Radbruch's Formula*, *in* LLOYD'S INTRODUCTION TO JURISPRUDENCE 426-28 (Michael Freeman ed., 8th ed. 2008).

382. *Immunities from Jurisdiction Resolution*, *supra* note 50, art. 13 (including Rapporteur Verhoeven's report on immunities, in which Verhoeven advocated for an exception to immunity for *jus cogens* crimes and other particularly serious offences before national courts); Hersch Lauterpacht, *The Problem of Jurisdictional Immunity of Foreign States*, 20 BRIT. Y.B. INT'L L. 220, 237 (1951)

unlikely that high-ranking officials, particularly heads of state, will be subjected to criminal prosecution in their home courts. For this reason, more judicial platforms, including the courts of foreign states, should be available to victims of human rights violations to seek justice. Although critics cast doubt on the practicality of prosecuting incumbent heads of state in foreign courts because it may be difficult to establish a case "when evidence might be most easily attainable" in the home countries of the heads of state, this is a separate issue.[383]

The argument that heads of state should be allowed to discharge their official duties and facilitate interstate relations without interference is understandable. However, that should not excuse them from being prosecuted for committing serious human rights violations.[384] In fact, heads of state would not need to invoke immunity if they duly honored their international obligations to refrain from committing *jus cogens* crimes.

Even more than a decade after *Arrest Warrant*, the need to further limit the application of the head of state immunity doctrine still remains. A specific international instrument that abolishes head of state immunity for foreign criminal prosecutions is certainly welcomed.[385] Alternatively, foreign states should be allowed to prosecute the perpetrators in their courts, at least for *jus cogens* crimes, to ensure that justice is upheld.

(hinting that the annulment head of state immunity for *jus cogens* crimes under an international agreement or unilateral legislative action is imminent); Gaeta, *Official Capacity and Immunities*, *supra* note 33, at 986-89 (advancing that the risk of impunity trumps immunity *rationae personae*, especially when the evidence indicates that the official's own State will not prosecute or arrest the official).

383. O'Donnell, *supra* note 214, at 410.

384. Leen De Smet & Frederik Naert, *Making or Breaking International Law? An International Law Analysis of Belgium's Act Concerning the Punishment of Grave Breaches of International Humanitarian Law*, 35 REVUE BELGE DE DROIT INT'L 471, 503 (2002) (proposing that courts should only recognize head of state immunity for official visits that are "essential for the maintenance of international relations").

385. This may be particularly essential for countries that lack any connection with the *jus cogens* offences committed in a particular instance. In that circumstance, the only jurisdictional basis these countries could rely upon is universal jurisdiction. However, whether universal jurisdiction trumps head of state immunity is still uncertain. For further details, see Brian Man-ho Chok, *The Struggle Between the Doctrines of Universal Jurisdiction and Head of State Immunity*, 20 U.C. DAVIS J. INT'L L. & POL'Y. 233, 256-64 (2014).