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Immunities of State Officials, International Crimes, and Foreign Domestic Courts

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Abstract

*This article examines the extent to which state officials are subject to prosecution in foreign domestic courts for international crimes. We consider the different types of immunity that international law accords to state officials, the reasons for the conferment of this immunity and whether they apply in cases in which it is alleged that the official has committed an international crime. We argue that personal immunity (immunity *ratione personae*) continues to apply even where prosecution is sought for international crimes. Also we consider that instead of a single category of personal immunity there are in fact two types of such immunity and that one type extends beyond senior officials such as the Head of State and Head of Government. Most of the article deals with functional immunity (immunity *ratione materiae*). We take the view that this type of immunity does not apply in the case of domestic prosecution of foreign officials for most international crimes. However, we reject the traditional arguments which have been put forward by scholars and courts in support of this view. Instead we consider the key to understanding when functional immunity is available lies in examining how jurisdiction is conferred on domestic courts.*

1 Introduction

The development of substantive norms of international human rights and international criminal law has not been matched by the development of mechanisms and

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procedures for their enforcement. The primary methods of judicial enforcement envisaged by international law are the domestic courts of the state where the human rights violation or international crime occurred and the courts of the state responsible for that violation. To this end, international law imposes obligations on states to prosecute those who have committed international crimes within their territory. Likewise human rights law includes a right to a remedy or to reparation provided by the state that has violated the substantive human right. However, these methods of enforcement of human rights and international criminal law often fail. Domestic law may not incorporate the relevant international human rights norm. International crimes are often committed by state agents as part of state policy, and so governments do not routinely prosecute their own officials engaged in such action (though, as has happened in Latin America, changes of government may bring a change of policy and prosecutions for past official conduct).

All of this has led to what has been described as a culture of impunity which contributes to a climate in which human rights violations persist and are not deterred. In order to counter this culture, there are two other possible fora where judicial enforcement of human rights norms may take place. First, it is possible that such enforcement takes place in international (including regional) courts: such as the human rights tribunals or quasi-judicial bodies dealing with state responsibility or international criminal tribunals dealing with the penal responsibility of individuals. However, enforcement of human rights norms by such courts is limited, *inter alia*, by the fact that an international court with jurisdiction over the acts in question may not exist. For this reason, some human rights advocates have turned to the second set of fora (other than the domestic court of the state committing the wrong): the domestic courts of other states. For the domestic courts of other states to serve as fora for the transnational enforcement of human rights and international criminal law a number of hurdles will have to be overcome. Some of these hurdles are practical, such as the difficulty of obtaining evidence in relation to crimes that took place abroad and the lack of motivation on the part of prosecutors in other states to take up cases which have no connection with the country. Other hurdles are those to be found in the domestic law of the state, including jurisdictional limits under domestic criminal law or under the conflict of law rules of the forum (doctrines such as *forum non conveniens*). However, there are at least two international law hurdles that also have to be overcome. It will have to be established that the foreign state has jurisdiction, as a matter of international law, to prescribe rules for the matter at hand and to subject the issue to adjudication in its courts. Also, where a case is brought in a domestic court against a foreign state or foreign state official or agent, it must be established that the state or its official is not immune from the jurisdiction of the forum. There are recent developments suggesting movement in international law on both of these issues, but the precise contours of the relevant rules are yet to be conclusively determined.

This article addresses the last of the obstacles identified: the international law rules on the immunity of state officials. Whilst it is commonly accepted that state officials are immune *in certain circumstances* from the jurisdiction of foreign

states,¹ there has been uncertainty about how far those immunities remain applicable where the official is accused of committing international crimes. Examining the rationale for the conferment of each of these types of immunity, as well as their scope, this article determines whether they remain applicable in criminal proceedings in which an official is accused of committing a crime under international law. Section 2 of this article examines the immunity that attaches to certain state officials as a result of their office or status (immunity *ratione personae*). It is argued that there are in fact two types of immunity *ratione personae*: those attaching to a limited group of senior officials, especially the Head of State, Head of Government, and diplomats, and the immunity of state officials on special mission abroad. Section 3 addresses the immunity which attaches to acts performed by state officials in the exercise of their functions (immunity *ratione materiae*). We argue that this immunity has both a substantive and a procedural function, in that it gives effect to a defence available to state officials and prevents the circumvention of the immunity of the state. In that part, we consider, and reject, a number of related arguments which are normally deployed in arguing that immunity *ratione materiae* does not apply to cases concerning human rights violations in general and international crimes in particular. The arguments in question are based on the *jus cogens* status of the norms in question or on the view that human rights violations/international crimes may not be considered sovereign (or official) acts. In our view, these arguments misunderstand the basis on which immunity is accorded or are premised on a false conflict of norms. We then go on to suggest a more persuasive rationale for the argument that immunity *ratione materiae* does not apply in cases concerning prosecutions for international crimes. In so doing, we re-examine the relationship between jurisdictional rules and rules of immunity and suggest that rules conferring extra-territorial jurisdiction may of themselves displace prior immunity rules. Our conclusion considers why it is important to clarify the rationale for denial of immunity *ratione materiae* and briefly explores some of the implications of our theory for civil cases involving human rights violations. Some of the arguments set out in this article were first summarized by one of us in a previous article.² The present article explores the arguments in more detail, filling in some of the steps in the reasoning and elaborating on some of the points made and their consequences.

¹ See, generally, Whomersley, 'Some Reflections on the Immunity of Individuals for Official Acts', 41 *ICLQ* (1992) 848; Tomonori, 'The Individual as Beneficiary of State Immunity: Problems of the Attribution of Ultra Vires Conduct', 29 *Denver J Int'l L and Policy* (2001) 261; H. Fox, *The Law of State Immunity* (2nd edn, 2008), at 455–464 and Ch. 19; Watts, 'The Legal Position in International Law of Heads of States, Heads of Governments and Foreign Ministers', 247 *Recueil des Cours* (1994-III) 13; Wickremasinghe, 'Immunities Enjoyed by Officials of States and International Organizations', in M. Evans (ed.), *International Law* (3rd edn, 2010), at 380.

² Akande, 'International Law Immunities and the International Criminal Court', 98 *AJIL* (2004) 407, 409–415.

2 Immunity of State Officials *Ratione Personae* (Immunity Attaching to an Office or Status)

International law confers on *certain* state officials immunities that attach to the office or status of the official. These immunities, which are conferred only as long as the official remains in office, are usually described as ‘personal immunity’ or ‘immunity *ratione personae*’. It has long been clear that under customary international law the Head of State and diplomats accredited to a foreign state possess such immunities from the jurisdiction of foreign states.³ In addition, treaties confer similar immunities on diplomats, representatives of states to international organizations,⁴ and other officials on special mission in foreign states.⁵ The predominant justification for such immunities is that they ensure the smooth conduct of international relations and, as such, they are accorded to those state officials who represent the state at the international level. International relations and international cooperation between states require an effective process of communication between states.⁶ It is important that states are able to negotiate with each other freely and that those state agents charged with the conduct of such activities should be able to perform their functions without harassment by other states.⁷ As the International Court of Justice (ICJ) has pointed out, there is ‘no more fundamental prerequisite for the conduct of relations between States than the inviolability of diplomatic envoys and embassies’.⁸ In short, these immunities are necessary for the maintenance of a system of peaceful cooperation and co-existence among states.⁹ Increased global cooperation means that this immunity is especially important.

³ See Watts, *supra* note 1.

⁴ E.g., Arts 29 and 31 Vienna Convention on Diplomatic Relations 1961 (VCDR), 500 UNTS 95; Art. IV, Section 11, Convention on the Privileges and Immunities of the United Nations 1946, 1 UNTS 15 and 90 UNTS 327 (corrigendum to vol. I).

⁵ Arts 21, 39, and 31 UN Convention on Special Missions 1969, 1400 UNTS 231.

⁶ See Wickremasinghe, *supra* note 1, at 406.

⁷ See Tunks, ‘Diplomats or Defendants? Defining the Future of Head-of-State Immunity’, 52 *Duke LJ* (2002) 651, at 656: ‘Head-of-State immunity allows a nation’s leader to engage in his official duties, including travel to foreign countries, without fearing arrest, detention, or other treatment inconsistent with his role as the head of a sovereign State. Without the guarantee that they will not be subjected to trial in foreign courts, heads of State may simply choose to stay at home rather than assume the risks of engaging in international diplomacy’. The same may be said of others entitled to immunity *ratione personae*. In 2010, Gordon Brown, then prime minister of the UK, expressed a similar concern: ‘[t]here is already growing reason to believe that some people are not prepared to travel to this country for fear that such a private arrest warrant – motivated purely by political gesture – might be sought against them. These are sometimes people representing countries and interests with which the UK must engage if we are not only to defend our national interest but maintain and extend an influence for good across the globe’: ‘Britain must protect foreign leaders from private arrest warrants’, *The Guardian*, 3 Mar. 2010.

⁸ *United States Diplomatic and Consular Staff in Tehran case (United States of America v. Iran)* [1980] ICJ Rep 3, at para. 91.

⁹ See *Arrest Warrant of 11 April 2000 (Democratic Republic of Congo v. Belgium)* [2002] ICJ Rep 3, Joint Separate Opinion of Judges Higgins, Kooijmans, and Buergenthal, *ibid.*, at para. 75: ‘immunities are granted to high State officials to guarantee the proper functioning of the network of mutual inter-State relations, which is of paramount importance for a well-ordered and harmonious international system’. See also Fox, *supra* note 1, at 673.

A The Scope of Immunity Ratione Personae: Immunity from Criminal Process for International Crimes

It is clear that senior officials who are accorded immunity *ratione personae* will be hindered in the exercise of their international functions if they are arrested and detained whilst in a foreign state. For this reason, this type of immunity, where applicable, is commonly regarded as prohibiting absolutely the exercise of criminal jurisdiction by states. The absolute nature of the immunity *ratione personae* means that it prohibits the exercise of criminal jurisdiction not only in cases involving the acts of these individuals in their official capacity but also in cases involving private acts.¹⁰ Also, the rationale for the immunity means that it applies whether or not the act in question was done at a time when the official was in office or before entry to office.¹¹ What is important is not the nature of the alleged activity or when it was carried out, but rather whether the legal process invoked by the foreign state seeks to subject the official to a constraining act of authority at the time when the official was entitled to the immunity. Thus, attempts to arrest or prosecute these officials would be a violation of the immunity whilst invitations by a foreign state for the official to testify or provide information voluntarily would not.¹² However, since this type of immunity is conferred, at least in part, in order to permit free exercise by the official of his or her international functions, the immunity exists for only as long as the person is in office.

In the *Arrest Warrant* case, the ICJ held that Foreign Ministers are entitled to immunity *ratione personae*, and further held that the absolute nature of the immunity from criminal process accorded to a serving Foreign Minister *ratione personae* subsists even when it is alleged that he has committed an international crime and applies even when the Foreign Minister is abroad on a private visit.¹³ The Court stated:

It has been unable to deduce . . . that there exists under customary international law any form of exception to the rule according immunity from criminal jurisdiction and inviolability to incumbent Ministers for Foreign Affairs, where they are suspected of having committed war crimes or crimes against humanity.¹⁴

The principle that immunity *ratione personae* extends even to cases involving allegations of international crimes must be taken as applying to all those serving state officials and diplomats possessing this type of immunity.¹⁵ Indeed the principle is

¹⁰ *Arrest Warrant* case, *supra* note 9, at para. 54; Fox, *supra* note 1, at 694. See also the treaty provisions cited *supra* at note 5.

¹¹ *Arrest Warrant* case, *supra* note 9, at paras 54–55.

¹² *Ibid.*, at paras 55, 70–71; *Case Concerning Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France)*, ICJ judgment of 4 June 2008, at para. 170, available at: www.icj-cij.org/docket/files/136/14550.pdf.

¹³ *Arrest Warrant* case, *supra* note 9, at para. 55.

¹⁴ *Ibid.*, at para. 58.

¹⁵ See, generally, A. Cassese, *International Criminal Law* (2nd edn, 2008), at 309–310; Gaeta, 'Official Capacities and Immunities', in A. Cassese *et al.* (eds), *Commentary on the International Criminal Court* (2002), at 975, 983–989; Zappalà, 'Do Heads of State in Office Enjoy Immunity from Jurisdiction for International Crimes? The Ghaddafi Case before the French *Cour de Cassation*', 12 *EJIL* (2001) 595; Fox, 'The Resolution of the Institute of International Law on the Immunities of Heads of State and Government', 51 *ICLQ* (2002) 119.

uncontroversial and has been widely applied by national courts in relevant cases,¹⁶ as well as being upheld in state practice.¹⁷ The only case which may be construed as denying immunity to a Head of State is *United States v. Noriega*.¹⁸ However, immunity was not accorded in this case on the ground that the US government had never recognized General Noriega (the *de facto* ruler of Panama) as the Head of State.

B Which Officials are Entitled to Immunity *Ratione Personae*?

It has long been clear that serving Heads of State,¹⁹ Heads of Government,²⁰ and diplomats²¹ possess immunity *ratione personae*. In the *Arrest Warrant* case, the ICJ held – without reference to any supporting state practice – that immunity *ratione personae* also applies to a serving Foreign Minister.²² Questions remain about whether this type of immunity applies to other senior government members. In describing the rule according immunity *ratione personae* in the *Arrest Warrant* case, the ICJ stated it

¹⁶ See the *Ghaddafi* case, Arrêt no. 1414 (2001), 125 ILR 456 (France: Cour de Cassation); *Castro* case (Spain: Audiencia Nacional, 1999), cited by Cassese, *supra* note 15, at 272 n. 20; *Re Sharon and Yaron*, 42 ILM (2003) 596 (Belgium: Cour de Cassation); *R. v. Bow Street Stipendiary Magistrate and others, Ex parte Pinochet (No. 3)* [1999] 2 All ER 97, at 126–127, 149, 179, 189 (HL, *per* Lords Goff, Hope, Millett, and Phillips); *Plaintiffs A, B, C, D, E, F v. Jiang Zemin*, 282 F Supp 2d 875 (ND Ill., 2003); *Tachiona v. Mugabe*, 169 F Supp 2d 259 (SDNY 2001). In Jan. 2004, an English District Judge rejected, on grounds of immunity, an application for a warrant for the arrest of Robert Mugabe, Head of State of Zimbabwe, in relation to allegations of torture. In 2008, Spain's *Audencia Nacional* concluded that the Spanish courts did not have jurisdiction to prosecute President Kagame of Rwanda for the crime of genocide, crimes against humanity, and terrorist activities: *Auto del Juzgado Central de Instrucción No. 4* (2008), 151–157. Likewise, in Feb. 2004, a District Judge at Bow Street Magistrates' Court rejected, on grounds of immunity, an application for a warrant for the arrest of General Mofaz, then Israeli Minister of Defence, in relation to allegations of breaches of war crimes: see Warbrick, 'Immunity and International Crimes in English Law', 53 *ICLQ* (2004) 769. In 2009, Ehud Barak, Israeli Minister of Defence was the subject of an application for an arrest warrant for war crimes committed in Gaza in Dec. 2008. This application was also denied: see Black and Cobain, 'Barak faces war crimes arrest threat during UK visit', *The Guardian*, 29 Sept. 2009.

¹⁷ The US government issued a suggestion of immunity in a case brought against the then President of China alleging torture, genocide, and other human rights violations. See Murphy, 'Head-of-State Immunity for Former Chinese President Jiang Zemin' in 'Contemporary Practice of the United States Relating to International Law', 97 *AJIL* (2003) 962, at 974–977; *Plaintiffs A, B, C, D, E, F, supra* note 16. In Aug. 2003, Saied Baghban, an Iranian diplomat accused of having been involved in the bombing of a Jewish centre in Argentina, was briefly detained in Belgium but then released on grounds of diplomatic immunity: see Beeston, 'Iran threatens to hit back over diplomat's arrest', *The Times*, 28 Aug. 2003, at 17. Similarly, despite accusations that the Israeli Ambassador to Denmark had been complicit in torture while he was head of Shin Bet, the Israeli Intelligence Service, Denmark has maintained that he is entitled to diplomatic immunity from Danish criminal jurisdiction. See Osborn, 'Danish protests greet Israeli envoy', *The Guardian*, 16 Aug. 2001, at 13; Hartmann, 'The Gillon Affair', 54 *ICLQ* (2005) 745. Likewise, the authorities of the UK took the view that a serving Israeli Defence Minister was entitled to immunity from arrest despite allegations that he had been responsible for war crimes in the West Bank. See McGreal, 'Sharon's Ally Safe from Arrest in Britain', *The Guardian*, 11 Feb. 2004, at 19.

¹⁸ 117 F 3d 1206 (11th Cir. 1997).

¹⁹ See *Djibouti v. France, supra* note 12, at para. 170.

²⁰ See *Arrest Warrant* case, *supra* note 9, at para. 51; Watts, *supra* note 1; Arts 1, 2, and 15 Res of the *Institut de Droit International* on 'Immunities from Jurisdiction and Execution of Heads of State and of Government in International Law', 2001, available at: www.idi-iil.org/idiE/resolutionsE/2001_van_02_en.PDF.

²¹ Arts 29 and 31 VCDR.

²² *Arrest Warrant* case, *supra* note 9, at para. 53.

applies to 'diplomatic and consular agents [and] certain holders of high-ranking office in a State, such as the Head of State, Head of Government and Minister for Foreign Affairs'.²³ The use of the words 'such as' suggests that the list of senior officials entitled to this immunity is not closed.

In that case, Foreign Ministers were held to be immune because they are responsible for the international relations of the state and 'in the performance of these functions, he or she is frequently required to travel internationally, and thus must be in a position to do so freely whenever the need should arise'.²⁴ However, justifying this type of immunity by reference to the international functions of the official concerned would make it difficult to confine the immunity to a limited group of state officials. A very wide range of officials (senior and junior) are charged with the conduct of international relations and need to travel in the exercise of their functions. Ministers other than those specifically designated as being responsible for foreign affairs often represent their state internationally. They may have to conduct bilateral negotiations with other governments or may represent their governments at international organizations or at international summits. Indeed it is difficult to think of any ministerial position that will not require at least some level of international involvement.²⁵

Where officials represent their states at international organizations they will usually be accorded immunity by treaty.²⁶ Likewise under Articles 29 and 31 of the UN Convention on Special Missions 1969 the person of any official abroad on a special mission on behalf of his or her state is inviolable, with the result that he or she may not be arrested or detained. Furthermore, Article 31 of that Convention provides that 'the representatives of the sending State in special mission and the members of its diplomatic staff are immune from the criminal jurisdiction of the receiving State'.²⁷ These are treaty based conferrals of immunity *ratione personae* which extend the category beyond the Head of State, Head of Government, and Foreign Minister. However, the policy underlying the immunity is, in all cases, consistent with that enunciated by the ICJ. These treaty-based conferments of immunity are intended to facilitate the conduct of international relations. Although the Convention on Special Missions is in force, only a small number of states have become party to it (38 at the time of writing). The

²³ *Ibid.* 53 (emphasis added).

²⁴ *Ibid.*

²⁵ In *Application for Arrest Warrant Against General Shaul Mofaz* (Decision of District Judge Pratt, Bow Street Magistrates' Court, Feb. 2004), it was stated that '[t]he function of various Ministers will vary enormously depending upon their sphere of responsibility. I would think it very unlikely that ministerial appointments such as Home Secretary, Employment Minister, Environment Minister, Culture Media and Sports Minister would automatically acquire a label of State immunity. However, I do believe that the Defence Minister may be a different matter': see Warbrick, *supra* note 16, at 773. However, in modern international affairs, it is difficult to see that the Ministers listed above would not be involved in travel on behalf of the state. However, some limits have been drawn. In *Djibouti v. France*, *supra* note 12, the ICJ confirmed that officials holding the (non-ministerial) posts of Public Prosecutor and Chief of National Security did not enjoy immunity *ratione personae* (at para. 194).

²⁶ See Art. IV, para. 11, Convention on the Privileges and Immunities of the UN (1946), *supra* note 4; Art. V, General Convention on the Privileges and Immunities of the Organization of African Unity (1965), available at: www.dfa.gov.za/foreign/Multilateral/africa/treaties/oaupriv.htm.

²⁷ See Arts 29 and 31 UN Convention on Special Missions 1969, *supra* note 5.

question arises whether the immunity provisions in that Convention represent rules of customary international law. If they do, then immunity *ratione personae* is available to a much broader group than was mentioned by the ICJ in the *Arrest Warrant* case. Although the International Law Commission was of the view that the immunity of special missions was established as a matter of international law, a US Federal District Court doubted that these provisions represented customary international law.²⁸ However, the US Executive Branch has taken a different view and has asserted that foreign officials only temporarily in the United States on 'special diplomatic mission' are entitled to immunity from the jurisdiction (criminal and civil) of US courts.²⁹ What is of particular interest is that such assertions of immunity have covered people who are not the Head of State, Head of Government, or Foreign Minister. For example, the US government suggested immunity in a case brought against the Chinese Minister of Commerce and International Trade.³⁰ Governments and courts in other countries are also willing to accept the customary law status of the rule granting immunity to members of Special Missions. In the *Mutual Assistance in Criminal Matters* case, Djibouti relied on the Special Missions Convention in its written pleadings although neither it nor France was a party to that Convention.³¹ The UK government and UK courts have also recognized the immunity of special missions on the basis of customary international law. In *Re Bo Xilai*,³² a magistrates' court in England was willing to grant immunity to the same Chinese Minister of Commerce on the ground that this was required by customary international law since he was part of a special mission. Likewise, Germany declined to arrest the Chief of Protocol to the President of Rwanda (Rose Kabuye) when she was on an official visit to the country in April 2008, acknowledging that she was immune, although she was subject to a French-issued arrest warrant on terrorism charges.³³ The customary international law basis of special missions immunity was accepted by the Criminal Chamber of the German Federal Supreme Court in the *Tabatabai Case*, where it stated:

²⁸ See *USA v. Sissoko*, 121 ILR 599 (SD Fla, 1997); Wickremasinghe *supra* note 1, at 391. See however *Yearbook of the International Law Commission, Volume II* (1967), 358 ('It is now generally recognized that States are under an obligation to accord the facilities, privileges and immunities in question to special missions and their members.').

²⁹ See the suggestion of immunity issued by the US Executive Branch in *Li Weixum v. Bo Xilai*, DCC Civ. No. 04-0649 (RJL), available at: www.state.gov/documents/organization/98832.pdf. See also the statement of John Bellingher Legal Adviser, US State Department, available at: <http://opiniojuris.org/2007/01/18/immunities/>.

³⁰ *Li Weixum v. Bo Xilai*, *supra* note 29.

³¹ *Djibouti v. France*, *supra* note 12, Memorial of the Republic of Djibouti, Mar. 2007, at paras 131–140, available at: www.icj-cij.org/docket/files/136/14390.pdf. Djibouti later amended its claim and declined to claim immunity *ratione personae* for persons other than the Head of State. In any event, the Court held that 'the Convention on Special Missions of 1969 [was] not . . . applicable in this case': ICJ judgment, *supra* note 12, at para. 194. This was probably no more than an indication that the facts did not fall within the scope of the Convention.

³² 128 ILR (2005) 713. See also proceedings in England regarding Israeli Minister Ehud Barak, *supra* note 16; Written Ministerial Statement by Mr Henry Bellingham (Under-Secretary of State for Foreign Affairs), HC Deb., 13 Dec. 2010, Vol. 520, 72WS.

³³ However, Germany did arrest her on a subsequent visit in Nov. of the same year arguing that she was in Germany on a private visit (a point disputed by Rwanda). See Akande, 'Prosecution of Senior Rwandan Government Official in France: More on Immunity' (2008), available at: www.ejiltalk.org/prosecution-of-senior-rwandan-government-official-in-france-more-on-immunity/. See also Thalmann, 'French Justice's Endeavours to Substitute for the ICTR', 6 *J Int'l Criminal Justice* (2008) 995.

irrespective of the [UN Special Missions Convention], there is a customary rule of international law based on State practice and *opinio juris* which makes it possible for an ad hoc envoy, who has been charged with a special political mission by the sending State, to be granted immunity by individual agreement with the host State for that mission and its associated status, and therefore for such envoys to be placed on a par with the members of the permanent missions of State protected by international treaty law.³⁴

It is important to point out that it has been accepted that this type of special mission immunity applies even in cases concerning international crimes. For example, immunity was recognized in *Re Bo Xilai*, even though the case dealt with allegations of torture. Likewise, the Belgian Government in the *Arrest Warrant* case accepted in its pleadings to the ICJ that the arrest warrant in question would not be enforceable, on immunity grounds, in cases where a representative of a foreign state was in Belgium on the basis of an official invitation.³⁵

Questions remain as to the precise contours of the special mission immunity. In particular, it needs to be determined what constitutes a special mission. According to Article 1 of the Convention on Special Missions a special mission is 'a temporary mission, representing the State, which is sent by one State to another State with the consent of the latter for the purpose of dealing with it on specific questions or of performing in relation to it a specific task'. This suggests that the receiving state must not only be aware that the foreign official is on its territory, it must also consent to that presence and to the performance of the specified task. It is this consent which gives rise to the immunity.³⁶

Although this special mission immunity is broadly applicable it does not apply to state officials abroad on a private visit. This is what distinguishes it from the type of immunity *ratione personae* discussed by the ICJ in the *Arrest Warrant* case. In that case, the Court held that the Foreign Minister (and also the Head of State and Head of Government) would be immune even if abroad on a private visit.³⁷ It is not controversial that a foreign Head of State is entitled to absolute immunity *ratione personae* from criminal jurisdiction of foreign courts even whilst abroad on a private visit. However, prior to the ICJ's decision it was not certain that this same immunity applied to Foreign Ministers or Heads of Government abroad on a private visit.³⁸ In the *Arrest Warrant* case, the ICJ justified the conferment of this broad immunity to a serving Foreign Minister on the ground that it was necessary for the conduct of international relations. However, this argument is not convincing. It is difficult to see why a Foreign Minister should require immunity from jurisdiction when on a private visit. Such visits are not

³⁴ Decision of 27 Feb. 1984, Case No. 4 StR 396/83, 80 ILR (1989) 388 (Germany: Federal Supreme Ct).

³⁵ See *Arrest Warrant* case, *supra* note 9, Counter-Memorial of the Kingdom of Belgium, 28 Sept. 2001, at paras 1.11–1.12, 3.2.32, available at: www.icj-cij.org/docket/files/121/8304.pdf.

³⁶ See *The Schooner Exchange v. McFaddon*, 11 US 116 (1812) (US Sup. Ct.) Marshall CJ, holding that whenever a Sovereign, a representative of a foreign State or a foreign army is present within the territory by consent, it is to be implied that the local sovereign confers immunity from local jurisdiction.

³⁷ *Arrest Warrant* case, *supra* note 9, at para. 55.

³⁸ See Watts, *supra* note 1, at 102–109. There appears to be little practice, if any, suggesting that states consider the position of Foreign Ministers to be the same as that of Heads of State and Government.

necessary for the international relations of the state.³⁹ To the extent that the Foreign Minister (or other official) is immune whilst abroad on *official* visits then the conduct of international relations ought not to be greatly impeded as the Minister is free to travel to conduct such relations. Justification for immunity of senior officials when abroad on a private visit must be sought elsewhere.

There are two further justifications for immunity *ratione personae*, beyond the ‘functional’ rationale discussed above, which may be of use: (1) symbolic sovereignty and (2) the principle of ‘non-intervention’. It is worth pointing out here that none of these rationales can be taken as the sole justification for the rule of immunity *ratione personae*. They must be read together to give a convincing account of why the rule of immunity still exists.

First, it has been argued that the rule according Heads of State immunity ‘reflects remnants of the majestic dignity that once attached to kings and princes as well as remnants of the idea of the incarnation of the state in its ruler’.⁴⁰ A Head of State is accorded immunity *ratione personae* not only because of the functions he performs, but also because of what he *symbolizes*: the sovereign state. The person and position of the Head of State reflects the sovereign quality of the state⁴¹ and the immunity accorded to him or her is in part due to the respect for the dignity of the office and of the state which that office represents. The principle of non-intervention constitutes a further justification for the absolute immunity from criminal jurisdiction for Heads of State. The principle is the ‘corollary of the principle of sovereign equality of states’,⁴² which is the basis for the immunity of states from the jurisdiction of other states (*par in parem non habet imperium*). To arrest and detain the leader of a country is effectively to change the government of that state. This would be a particularly extreme form of interference with the autonomy and independence of that foreign state. The notion of independence means that a state has exclusive jurisdiction to appoint its own government – and that other states are not empowered to intervene in this matter. Were the rule of Head of State immunity relaxed in criminal proceedings so as to permit arrests, such interference right at the top of the political administration of a state would eviscerate the principles of sovereign equality and independence.

Although practice on the point is not clear and although the Head of Government was not in the past considered as having the same ‘majestic dignity’ as the Head of State or as symbolizing the state,⁴³ there are good reasons for extending to the former

³⁹ See R. van Alebeek, *The Immunity of States and Their Officials in International Criminal Law and International Human Rights Law* (2008), at 179–180, making the same point with regard to Heads of State.

⁴⁰ *Ibid.*, at 180. See also Fox, *supra* note 1, at 673: ‘[t]he occasion of an official visit peculiarly celebrates the representation of the State in the person of the visiting head’.

⁴¹ See Watts, *supra* note 1, at 53, 102–103.

⁴² *Military and Para-military Activities in and against Nicaragua (Nicaragua v. United States)* [1986] ICJ Rep 14, at para. 202.

⁴³ See R. Jennings and A. Watts (eds), *Oppenheim’s International Law* (9th edn, 1992), at para. 445: ‘the head of government . . . does not represent the international *persona* of the state in the same way in which the Head of State does’. See also Watts, *supra* note 1, at 102–103: ‘heads of government and foreign ministers, although senior and important figures, do not symbolize or personify their States in the way that Heads of State do. Accordingly, they do not enjoy in international law any entitlement to special treatment by virtue of qualities of sovereignty or majesty attaching to them personally.’

the absolute immunity from criminal jurisdiction granted to the latter.⁴⁴ In many states it is the Head of Government who is the effective leader of the country.⁴⁵ Thus to arrest and detain him or her is as damaging to the autonomy of the state as is the case with Heads of State. However, the same cannot be said of other ministers (including the Foreign Minister). They may represent the state but do not embody the supreme authority of the state, and their removal does not signify a change in government of the state. While removing immunity for the Head of State and Head of Government goes to the root of the principle of equality of states, removing immunity for other senior officials on private visits does not have the same dramatic impact. Thus, by restricting the allocation of broad immunity *ratione personae* to Heads of State and Heads of Government, a balance is struck between sovereign equality and respect for the rule of (international and domestic) law. On this analysis, extending such broad immunity *ratione personae* to other ministers, as the ICJ did in *Arrest Warrant*, is erroneous and unjustified.

3 Immunity of State Officials *Ratione Materiae* (Immunity Attaching to Official Acts)

State officials are, generally speaking, immune from the jurisdiction of other states in relation to acts performed in their official capacity ('functional immunity' or 'immunity *ratione materiae*').⁴⁶ As this type of immunity attaches to the official act rather than the status of the official, it may be relied on by all who have acted on behalf of the state with respect to their official acts. Thus, this conduct-based immunity may be relied on by former officials in respect of official acts performed while in office as well as by serving state officials.⁴⁷ It may also be relied on by persons or bodies that are not state officials or entities but have acted on behalf of the state.⁴⁸

⁴⁴ This is the approach set out by the Institut de droit international, *supra* note 20.

⁴⁵ Fox, *supra* note 1, at 670 (n. 16) notes that in 1978 there were '68 States whose Heads were also Heads of Government'.

⁴⁶ For relevant cases from different jurisdictions see Tomonori, *supra* note 1, at 269–273. For a consideration of US and UK law on the matter see Whomersley, *supra* note 1; Fox, *supra* note 1, at 458–459.

⁴⁷ Wickremasinghe, *supra* note 1, at 383. See also Art. 39(2) VCDR, *supra* note 4, and the discussion *infra* in relation to former diplomats, and Art. 43(1) Vienna Convention on Consular Relations (1963) (VCCR), 596 UNTS 261, in relation to consular officials. Some have doubted whether the immunity *ratione materiae* applicable to former diplomats is of the same nature as the general immunity applicable to other official acts of other state officials: see, e.g., Dinstein, 'Diplomatic Immunity from Jurisdiction *Ratione Materiae*', 15 *ICLQ* (1966) 76, at 86–89, who argues that diplomatic immunity *ratione materiae* is broader than that accorded to other state officials. Tomonori, *supra* note 1, at 281, questions whether other state officials possess immunity *ratione materiae* in criminal proceedings and in relation to *ultra vires* acts.

⁴⁸ See Van Panhuys, 'In the Borderland Between the Act of State Doctrine and Questions of Jurisdictional Immunities', 13 *ICLQ* (1964) 1193, at 1201. See also *Twycross v. Dreyfus*, 5 ChD (1877) 605 (England: CA); *Kuwait Airways Corp. v. Iraq Airways Co.* [1995] 3 All ER 694 (HL); *Walker v. Bank of New York*, 16 OR 3d 1994) 504 (Canada: Ontario CA) and s.14(2) UK State Immunity Act 1978, Ch. 33.

The application of immunity *ratione materiae* to state officials has been more common in civil than criminal cases.⁴⁹ The criminal jurisdiction of states is primarily territorial and state officials do not usually exercise their official functions in the territory of other states. An important exception is during an international armed conflict where combatants will often exercise their official functions (i.e., engaging in hostilities) in the territory of the opposing state. However, international humanitarian law has provided that these officials should not face criminal prosecution at the hands of the enemy state solely for their involvement in such hostilities as long as they adhere to the laws and customs of war.⁵⁰ Thus, the circumstances in which a state official may face criminal prosecution in a foreign state for an act done in the exercise of official capacity are limited. Nevertheless, the assertion of immunity *ratione materiae* in criminal cases is not unknown and the reasons for which the immunity is conferred apply *a fortiori* in criminal cases.⁵¹

There are two related policies underlying the conferment of immunity *ratione materiae*. First, this type of immunity constitutes (or, perhaps more appropriately, gives effect to) a substantive defence, in that it indicates that the individual official is not to be held legally responsible for acts which are, in effect, those of the state. Such acts are imputable only to the state and immunity *ratione materiae* is a mechanism for diverting responsibility to the state.⁵² This rationale was cogently expressed by the Appeals

⁴⁹ For the suggestion that the paucity of domestic criminal cases recognizing the *ratione materiae* immunity of states makes it difficult to prove that this type of immunity applies in criminal proceedings see Tomonori, *supra* note 1, at 262.

⁵⁰ See Ipsen, 'Combatants and Non-Combatants', in D. Fleck (ed.), *The Handbook of Humanitarian Law of Armed Conflict* (2nd edn, 2008), at 79, 82.

⁵¹ The best-known case in which this type of immunity was asserted in respect of criminal proceedings is *MacLeod's case* (on which see Jennings, 'The *Caroline* and *McLeod* Cases', 32 *AJIL* (1938) 82, at 92); Noyes, 'The *Caroline*: International Law Limits on Resort to Force', in J. Noyes, L. Dickinson, and M. Janis, *International Law Stories* (2007), at 263. While both the British and US governments accepted that there was immunity under international law from both civil and criminal processes, MacLeod was actually subject to trial owing to the inability of the US federal government to interfere with the prosecution. In Nov. 2007 a Paris District Prosecutor dismissed a complaint against Donald Rumsfeld, former US Secretary of State for Defence, alleging that he was responsible for acts of torture in detention centres in Guantanamo Bay and Abu Ghraib. The Prosecutor's reason for dismissing the complaint was based on Rumsfeld's continuing immunity 'for acts performed in the exercise of his functions [as former Secretary of State for Defense]'. See www.fidh.org/france-in-violation-of-law-grants-donald-rumsfeld,4932. However, in the *Rainbow Warrior Case*, 74 *ILR* (1986) 241, the French government's assertion that military officers should not be tried in New Zealand once France had accepted international responsibility was rejected by New Zealand. See also the few cases cited by Tomonori, *supra* note 1, at 262.

⁵² See Cassese, *supra* note 15, at 304; Fox, *supra* note 1, at 94–97. In *Attorney General of Israel v. Eichmann*, 36 *ILR* (1962) 5, at 308–309, the Israeli Supreme Court stated that '[t]he theory of "Act of State" means that the act performed by a person as an organ of the State – whether he was Head of the State or a responsible official acting on the Government's order – must be regarded as an act of the State alone. It follows that only the latter bears responsibility therefor, and it also follows that another State has no right to punish the person who committed the act, save with the consent of the State whose mission he performed. Were it not so, the first State would be interfering in the internal affairs of the second, which is contrary to the conception of the equality of States based on their sovereignty.' However, the Court was not prepared to accept that this theory applied in all cases. See also the correspondence in the *MacLeod case*, *supra* note 51.

Chamber of the International Criminal Tribunal for the Former Yugoslavia in *Prosecutor v. Blaškić*:

[State] officials are mere instruments of a State and their official action can only be attributed to the State. They cannot be the subject of sanctions or penalties for conduct that is not private but undertaken on behalf of the State. In other words, State officials cannot suffer the consequences of wrongful acts which are not attributable to them personally but to the State on whose behalf they act: they enjoy so-called 'functional immunity'. This is a well established rule of customary international law going back to the eighteenth and nineteenth centuries, restated many times since.⁵³

One consequence of this function of immunity *ratione materiae* is that the immunity of state officials is not co-extensive with, but broader than, the immunity of the state itself. The official would be immune not only with respect to sovereign acts for which the state is immune but also in proceedings relating to official but non-sovereign acts.⁵⁴

Secondly, the immunity of state officials in foreign courts prevents the circumvention of the immunity of the state through proceedings brought against those who act on behalf of the state.⁵⁵ As was stated by the English Court of Appeal in *Zoernsch v. Waldock*:

A foreign sovereign government, apart from personal sovereigns, can only act through agents, and the immunity to which it is entitled in respect of its acts would be illusory unless it extended also to its agents in respect of acts done by them on its behalf. To sue an envoy in respect of acts done in his official capacity would be, in effect, to sue his government irrespective of whether the envoy had ceased to be 'en poste' at the date of his suit.⁵⁶

In this sense, the immunity operates as a jurisdictional, or procedural, bar and prevents courts from indirectly exercising control over the acts of the foreign state through proceedings against the official who carried out the act.

In *Jones v. Saudi Arabia* [2006] UKHL 26, at para. 68, Lord Hoffmann argued that it is 'artificial to say that acts of officials are not attributable to them personally and . . . this usage can lead to confusion, especially in those cases in which some aspect of the immunity of the individual is withdrawn by treaty, as it is for criminal proceedings by the Torture Convention'. However, he conceded that there was 'undoubted authority' for this view of functional immunity.

⁵³ *Prosecutor v. Blaškić* (Objection to the Issue of *Subpoena duces Tecum*) IT-95-14-AR108 (1997), 110 ILR (1997) 607, at 707, para. 38.

⁵⁴ See *Brief for the United States of America as Amicus Curiae in Support of Affirmance* (2007), *Matar v. Dichter* (2nd Cir. 2009): 'the Executive generally recognizes foreign officials to enjoy immunity from civil suit with respect to their official acts – even including, at least in some situations, where the state itself may lack immunity under the FSIA'.

⁵⁵ See Wickremasinghe, *supra* note 1, at 396; Fox, *supra* note 1, at 455–463.

⁵⁶ *Zoernsch v. Waldock* [1964] 1 WLR 675, at 692 (England: CA, *per* Diplock LJ). For similar statements see *Chuidian v. Philippine National Bank*, 912 F 2d 1095, 1101 (9th Cir. 1990): 'it is generally recognized that a suit against an individual acting in his official capacity is the practical equivalent of a suit against the sovereign directly'; Restatement (Third) of the Foreign Relations Law of the United States (1986), at para. 66: 'immunity of a foreign state . . . extends to . . . any other public minister, official or agent of the state with respect to acts performed in his official capacity if the effect of exercising jurisdiction would be to enforce a rule of law against the state'; and *Propend Finance Pty Ltd v. Sing*, 111 ILR (1997) 611, at 669 (England: CA).

The next question to be considered is whether state officials are entitled to rely on immunity *ratione materiae* in foreign domestic proceedings in which the person is charged with an international crime. Three related points have been raised to argue that immunity *ratione materiae* cannot be relied upon to evade liability for international crimes. First, it has been argued that because state immunity is accorded only to sovereign acts, states and their officials can never be immune from the jurisdiction of other states in respect of international crimes because these crimes, for the most part, constitute violations of *jus cogens* norms and thus cannot be sovereign acts. A related second argument is that since immunity *ratione materiae* may be pleaded only in order to shield scrutiny from official acts, the acts amounting to international crimes may not be considered official acts. Thirdly, it has been argued that because *jus cogens* norms supersede all other norms they overcome all inconsistent rules of international law providing for immunity. The next two sections of this article address and reject these arguments. It is suggested that these arguments demonstrate a misunderstanding of the basis upon which state immunity is accorded and that they suggest a false conflict between the rule according state immunity and the relevant *jus cogens* norms. A more persuasive theory is suggested upon which removal of immunity *ratione materiae* can be based in criminal cases involving international crimes. It is argued that whilst international crimes can be official acts, immunity *ratione materiae* is removed as soon as a rule permitting the exercise of extra-territorial jurisdiction over that crime and contemplating prosecution of state officials develops.

A International Crimes as (Non-)Sovereign/(Non-)Official Acts

It has been argued that state immunity applies only in respect of sovereign acts and that international crimes, particularly those contrary to *jus cogens* norms,⁵⁷ can never be regarded as sovereign acts.⁵⁸ Similar arguments have been made to the effect that acts which amount to international crimes may never be regarded as official acts. According to some, when a state engages in acts which are contrary to *jus cogens* norms it impliedly waives any rights to immunity as the state has stepped out of the

⁵⁷ Under Art. 53 Vienna Convention on the Law of Treaties (1969), 1155 UNTS 331, a peremptory norm of international law or *jus cogens* is 'a norm accepted and recognized by the international community as a whole as a norm from which no derogation is permitted'.

⁵⁸ This argument has generally been made in attempts to deny immunity in civil actions against states. See Bianchi, 'Immunity Versus Human Rights: The *Pinochet* Case', 10 *EJIL* (1999) 237, at 265: 'human rights atrocities cannot be qualified as sovereign acts: international law cannot regard as sovereign those acts which are not merely a violation of it, but constitute an attack against its very foundation and predominant values'. See also Belsky, Merva, and Roht-Arriaza, 'Implied Waiver Under the FSIA: A Proposed Exception to Immunity for Violations of Peremptory Norms of International Law', 77 *California LR* (1989) 365, at 394: '[t]he existence of a system of rules that states may not violate implies that when a state acts in violation of such a rule, the act is not recognized as a sovereign act. When a state act is no longer recognized as sovereign, the state is no longer entitled to invoke the defense of sovereign immunity'; Bianchi, 'Denying State Immunity to Violators of Human Rights', 46 *Austrian J Public and Int'l L* (1994) 195, at 205, 217; Reimann, 'A Human Rights Exception to Sovereign Immunity: Some Thoughts on *Prinz v. Federal Republic of Germany*', 16 *Michigan J Int'l L* (1995) 403, at 421–423; Orakhelashvili, 'State Immunity and International Public Order', 43 *German Yrbk Int'l L* (2002) 227, at 237.

sphere of sovereignty.⁵⁹ Essentially, the state has no authority to violate *jus cogens* norms and so these acts are not sovereign acts.

This argument has proved attractive to some national courts. *Prefecture of Voiotia v. Federal Republic of Germany* concerned a civil claim for reparation following the atrocities committed by German forces in the Greek village of Distomo which resulted in the deaths of 200 civilians.⁶⁰ The Court of First Instance in Greece, in a decision which was confirmed by the Supreme Court of Greece,⁶¹ awarded damages of approximately 30 million dollars relying on the argument that acts which violate *jus cogens* norms do not qualify as sovereign acts and that Germany had impliedly waived its immunity by committing such acts.

However, other courts have not been convinced. The claimants in the *Prefecture of Voiotia case* tried to enforce their claim in Germany, but this was dismissed by the German Supreme Court which found that the argument applied by the Greek Supreme Court '[a]ccording to the prevailing view, . . . is not international law currently in force'.⁶² In a later case regarding the Distomo massacre, the Greek Special Supreme Court held by a narrow majority that state immunity is still a generally recognized international norm which prohibits actions for damages in relation to crimes, including torture, committed by the armed forces of another state.⁶³ The Court held that there was not enough consistent or widespread state practice to demonstrate that there was an exception to the norm of state immunity. In the US case of *Prinz v. Federal Republic of Germany*,⁶⁴ Prinz was a victim of the Nazi regime and claimed that Germany had impliedly waived its immunity when it violated *jus cogens* norms. The majority of the court rejected this argument, holding that '[a]n implied waiver depends upon the foreign government's having at some point indicated its amenability to

⁵⁹ Belsky, Merva, and Roht-Arriaza, *supra* note 58, at 394.

⁶⁰ *Prefecture of Voiotia v. Federal Republic of Germany*, [1997] *Revue Hellénique De Droit International* 595 (Greece: Court of First Instance Leivadia, 1997). See Bantekas, 'Case Comment: Prefecture of Voiotia v. Federal Republic of Germany', 92 *AJIL* (1998) 765.

⁶¹ Albeit that the Supreme Court qualified the argument by emphasizing that the acts had taken place on Greek territory: *Prefecture of Voiotia v. Germany*, Case no. 11/2000 (Greece: Supreme Court, 2000). See Vournas, 'Prefecture of Voiotia v. Federal Republic Of Germany: Sovereign Immunity and the Exception for *Jus Cogens* Violations', 21 *NY Law School J Int'l & Comp L* (2002) 629; Gavouneli and Bantekas, 'Prefecture of Voiotia v. Federal Republic of Germany', 95 *AJIL* (2001) 198.

⁶² *Greek Citizens v. Federal Republic of Germany (The Distomo Massacre Case)*, 42 *ILM* (2003) 1030 (Germany: Sup. Ct, 2003), at 1033. The German Supreme Court noted both a judgment of the Special Supreme Court of Greece on a similar issue in which it was held 'that according to the current state of international law there still exists a generally recognized international norm, which prohibits that a State be sued in another State for damages in relation to crimes which were committed on the territory of the forum state with the participation of troops of the defendant State in times of war as well as in times of peace' (*Margellos v. Federal Republic of Germany* (Greece: Anotato Eidiko Dikasterio, 2002)) and the decision of the ECtHR in App. No. 50021/00, *Kalegoropoulou v. Greece and Germany*, 2002-IX ECtHR 415, which declared the same applicants' claim inadmissible.

⁶³ *Federal Republic of Germany v. Miltiadis Margellos*, Case 6/17-9-2002 (Greece: Special Supreme Court, 2002).

⁶⁴ *Prinz v. Federal Republic of Germany* 26 F 3d 1166 (DC Cir. 1994).

suit'.⁶⁵ Only Judge Wald dissented from the majority opinion, arguing that 'when a state thumbs its nose at [a *jus cogens*] norm in effect overriding the collective will of the entire international community, the state cannot be performing a sovereign act entitled to immunity'.⁶⁶ The Italian Supreme Court explicitly rejected the contention that violations of *jus cogens* do not qualify as sovereign acts or that there is an implied waiver of sovereign immunity in *Ferrini v. Federal Republic of Germany*,⁶⁷ while Lord Hoffmann summarily dismissed the argument in *Jones v. Saudi Arabia*, stating that the 'theory of implied waiver . . . has received no support in other decisions'.⁶⁸

The argument that acts which amount to international crimes cannot be regarded as sovereign acts ultimately rests on the proposition that the gross illegality of the acts means that international law cannot regard them as acts which are open to states to perform. However, this argument is not persuasive and is riddled with problems.

First, at the stage of proceedings during which immunity is raised it will not yet have been established that the state has acted illegally. Indeed, it may turn out that the allegations made against the state or official are unfounded. It would therefore be wrong to assert that the state, by acting in a grossly illegal manner, has deprived itself of the rights which it would otherwise be entitled to in international law and has implicitly waived its immunity. This assertion would be especially problematic in criminal cases, where there is a presumption of innocence.

Secondly, whether or not an act is *jure imperii* or sovereign for the purposes of state immunity does not depend on the international legality or otherwise of the conduct, but on whether the act in question is intrinsically governmental. This in turn depends on an analysis of the nature of the act as well as the context in which it occurred.⁶⁹

⁶⁵ *Ibid.*, at 1174. Other US cases where this argument has been dismissed include: *Smith v. Socialist People's Libyan Arab Jamahiriya*, 101 F 3d 239 (CA, 2nd Cir., 1996); *Persinger v. Islamic Republic of Iran*, 90 ILR 486 (DC Cir. 1996); *Sampson v. Federal Republic of Germany*, 975 F Supp 1108 (ND Ill., 1997).

⁶⁶ *Ibid.*, at 1182.

⁶⁷ *Ferrini v. Repubblica Federale di Germania*, 87 RDI (2004) 539 (Italy: Cassazione), at paras 7 and 8.2. See De Sena and de Vittor, 'State Immunity and Human Rights: the Italian Supreme Court Decision on the Ferrini Case', 16 *EJIL* (2005) 89, at 101–102; Focarelli, 'Denying Foreign State Immunity for Commission of International Crimes: the Ferrini Decision', 54 *ICLQ* (2005) 951, at 956–957. However, it should be noted that the Court did accept the normative hierarchy theory discussed *infra*.

⁶⁸ *Jones v. Saudi Arabia*, *supra* note 52, at para. 62. See also *Argentine Republic v. Amerada Hess Shipping Corporation*, 488 US 428, 442–443 (1989) (US Sup. Ct).

⁶⁹ See Lord Wilberforce in *I Congresso del Partido* [1981] 2 All ER 1064, at 1074 (HL): 'in considering, under the restrictive theory, whether State immunity should be granted or not, the court must consider the whole context in which the claim against the State is made, with a view to deciding whether the relevant act(s) on which the claim is based should, in that context, be considered as fairly within an area of activity, trading or commercial or otherwise of a private law character, in which the State has chosen to engage or whether the relevant activity should be considered as having been done outside the area and within the sphere of governmental or sovereign activity'. See also *Holland v. Lampen Wolfe* [2000] 3 All ER 833 (HL), where Lord Hope stated that 'it is the nature of the act that determines whether it is to be characterised as *iure imperii* or *iure gestionis*. The process of characterisation requires that the act must be considered in its context. In the present case the context is all-important. The overall context was that of the provision of educational services to military personnel and their families stationed on a US base overseas. The maintenance of the base itself was plainly a sovereign activity.' For similar statements see also *United States v. Public Service Alliance of Canada*, 32 ILM (1993) 1 (Canada: Sup. Ct); *Litterell v. USA* (No. 2), 100 ILR (1995) 438 (England: CA); *Egypt v. Gamal-Eldin* [1996] 2 All ER 237 (England: Employment Appeals Tribunal).

International crimes committed by states usually occur in the context of the use of armed force or in the exercise of police power, and these are acts which are as intrinsically governmental as any other.⁷⁰ State immunity is not designed to shield states from the consequences of their illegal conduct, although it cannot be denied that it can have this effect.⁷¹ The plea of state immunity does not mean that a state is not responsible in international law,⁷² and it has never been the case that immunity is only available for those acts which are internationally lawful.⁷³ On the contrary, the very purpose of the rule according immunity is to prevent national courts from determining the legality or otherwise of certain acts of foreign states. Thus, it would be illogical if the application of that rule depended on a prior determination that conduct was illegal or grossly illegal. To say that an act is sovereign is not to say that it is an act permitted by international law or within a sphere of permitted acts. In fact, one consequence of the restrictive immunity theory is that it is precisely in those circumstances where international law has something to say about the acts of states, i.e., governmental or public acts, that national courts are precluded from acting.⁷⁴

For much the same reasons as those discussed above, the related argument that international crimes can never be considered official acts protected from scrutiny by immunity *ratione materiae* must be rejected.⁷⁵ This argument was relied upon by some judges of the House of Lords in the series of *Pinochet* cases in which it was held that a

⁷⁰ In *Nelson v. Saudi Arabia*, 100 ILR (1993) 544, at 553 the US Sup. Ct stated that 'however monstrous such abuse undoubtedly may be, a foreign state's exercise of the power of its police has long been understood for purposes of the restrictive theory as peculiarly sovereign in nature'. See also *Claim against the Empire of Iran*, 45 ILR (1963) 57, at 81 (West Germany: Federal Constitutional Court): '[i]n this generally recognisable field of sovereign activity are included transactions relating to foreign affairs and military authority, the legislature, the exercise of police authority, and the administration of justice'. See further *Propend Finance Pty. Ltd and others v. Sing*, *supra* note 56; *Argentine Republic v. Amerada Hess*, *supra* note 68; *Paprocki v. German State*, 104 ILR (1995) 684 (England: High Ct).

⁷¹ See McGregor, 'Torture and State Immunity: Deflecting Impunity, Distorting Sovereignty', 18 *EJIL* (2007) 903.

⁷² 'The immunity, where it exists, is from the local jurisdiction and not from legal (or State) responsibility on the international plane. The issue is, in part at least, a question of the appropriate forum' (emphasis in original): Brownlie, 'Preliminary Report on the Contemporary Problems Concerning the Jurisdictional Immunity of States', 62-1 *Annuaire de L'Institut de Droit international* (Cairo, 1987) 13, at 18. See also Fox, 'International Law and Restraints on the Exercise of Jurisdiction by National Courts of States', in M.D. Evans (ed.), *International Law* (3rd edn, 2010), 340, 351. See also *Arrest Warrant* case, *supra* note 9, at para. 59.

⁷³ *Jones v. Saudi Arabia*, *supra* note 52, at para. 12 (*per* Lord Bingham). See generally Fox, *supra* note 1, at ch. 13.

⁷⁴ Art. 2(3)(a) and (b), Res of the Institut de Droit International on 'Contemporary Problems Concerning the Immunity of States in Relation to Questions of Jurisdiction and Enforcement' (1991) indicates that the fact that a particular case involves the adjudication of the validity or legality of the acts of the defendant state in terms of international law itself indicates the incompetence of the forum court in the matter. See 64-II *Annuaire de L'institut de Droit international* (Basle, 1991), 338, 393-394.

⁷⁵ See Tunks, *supra* note 7, at 659-660; Tomonori, *supra* note 1, at 283 ff.

former Head of State is not immune in respect of torture committed whilst in office.⁷⁶ However, as stated above, whether or not acts of state officials are regarded as official acts does not depend on the legality, in international or domestic law, of those acts. Rather, whether or not the acts of individuals are to be deemed official depends on the purposes for which the acts were done and the means through which the official carried them out.⁷⁷ If they were done for reasons associated with the policies of the state, as opposed to reasons which are purely those of the individual, and were carried out using state apparatus, i.e., under colour of law, then those acts should be considered official acts. Acts which constitute international crimes are often carried out by individuals invested with state authority and regularly undertaken for state rather than private purposes. Thus, '[t]o deny the official character of such offences is to fly in the face of reality'.⁷⁸ Such acts are characterized as acts of the state for the purpose of imputing state responsibility,⁷⁹ and it would be artificial to impose a different test in the context of individual responsibility.⁸⁰

B Immunity and Jus Cogens Violations – Addressing the Normative Hierarchy Theory

It has been argued that owing to the superior position of *jus cogens* norms in the hierarchy of international law, they must prevail over the rules of international law providing immunity.⁸¹ As was stated in *Siderman de Blake v. Republic of Argentina*, this argument:

⁷⁶ See *Pinochet (No.3)*, *supra* note 16, at 113, 166 (per Lords Browne-Wilkinson and Hutton); *R. v. Bow Street Stipendiary Magistrate and others, ex parte Pinochet (No.1)* [1998] 4 All ER 897, at 939–940, 945–946 (HL, per Lords Nicholls and Steyn). It is amazing that these judges could have reached this conclusion in respect of torture, which under Art. 1 Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984), 1465 UNTS 85 is limited to acts 'of a public official or other person acting in an official capacity' (emphasis added). See also the Joint Separate Opinion of Judges Higgins, Kooijmans, and Buergenthal in the *Arrest Warrant* case, *supra* note 9, at para. 85 and the *Bouterse* case, at para. 4.2 (Netherlands: Gerechtshof Amsterdam, 2000), cited in the Joint Separate Opinion above. A similar position has been taken in a number of US civil cases under the Alien Tort Claims Act. See, e.g., *In re Estate of Ferdinand Marcos*, 25 F 3d 1467, at 1469–1472 (9th Cir. 1994); *Xuncax v. Gramajo*, 886 F Supp 162, at 175 (D. Mass. 1995); *Cabiri v. Assasie-Gyimah*, 921 F Supp 1189, at 1197–1198 (SDNY 1996).

⁷⁷ See Watts, *supra* note 1, at 56–57; Wirth, 'Immunity for Core Crimes? The ICJ's Judgment in the *Congo v. Belgium* Case', 13 *EJIL* (2002) 877, at 891; Cassese, 'When May Senior State Officials be Tried for International Crimes? Some Comments on the *Congo v. Belgium* Case', 13 *EJIL* (2002) 853, at 867–870.

⁷⁸ Barker, 'The Future of Former Head of State Immunity After *Ex Parte Pinochet*', 48 *ICLQ* (1999) 937, at 943. Taking the same view are Denza, 'Ex Parte Pinochet: Lacuna or Leap', 48 *ICLQ* (1999) 949, at 952; Cassese, *supra* note 77, at 870 (who argues that it would be artificial to consider international crimes committed by senior state officials as private acts). See also the views of the Prosecutor dismissing a complaint seeking the prosecution in France of former US Defence Secretary, Donald Rumsfeld, for torture, discussed in Gallagher, 'Universal Jurisdiction in Practice: Efforts to Hold Donald Rumsfeld and Other High Level United States Officials Accountable for Torture', 7 *J Int'l Criminal Justice* (2009) 1087, at 1110–1111.

⁷⁹ See Arts 4 and 7, International Law Commission's Articles on the Responsibility of States for Internationally Wrongful Acts 2001, UN Doc. A/CN.4/L.602.

⁸⁰ See Jones v. Saudi Arabia, *supra* note 52, at paras 74–78 (per Lord Hoffmann).

⁸¹ See Bianchi, *supra* note 58, at 265: '[a]s a matter of international law, there is no doubt that *jus cogens* norms, because of their higher status, must prevail over other international rules, including jurisdictional immunities'. See also Reimann, *supra* note 58, at 421–423; Byers, 'Comment on *Al-Adsani v.*

begins from the principle that *jus cogens* norms 'enjoy the highest status within international law,' and thus 'prevail over and invalidate . . . other rules of international law in conflict with them' . . . since sovereign immunity itself is a principle of international law, it is trumped by *jus cogens*. In short, . . . when a state violates *jus cogens*, the cloak of immunity provided by international law falls away, leaving the state amenable to suit.⁸²

However, this argument is unpersuasive.

First, it should be noted that although it has been stated that 'most norms of international humanitarian law, in particular those prohibiting war crimes, crimes against humanity and genocide, are also peremptory norms of international law or *jus cogens*',⁸³ it is by no means established that all rules prohibiting international crimes are prohibitions that rise to the level of *jus cogens*. While the prohibitions of aggression,⁸⁴ genocide,⁸⁵ and torture⁸⁶ would seem clearly to fall into that category, it is doubtful that other rules of international humanitarian law are norms of *jus cogens*. Doubts whether many of the rules of international humanitarian law rise to the level of *jus cogens* can be seen in the debate about belligerent reprisals. To the extent that some violations of humanitarian law can be legally justified as belligerent

Kuwait, 67 *British Yrbk Int'l L* (1996) 537, at 539–540; Orakhelashvili, 'State Immunity in National and International Law: Three Recent Cases Before the European Court of Human Rights', 15 *Leiden J Int'l L* (2002) 703, at 712–713; Orakhelashvili, 'International Decisions: *Arrest Warrant* case', 96 *AJIL* (2002) 677; Orakhelashvili, *supra* note 58, at 255 ff; Karagiannakis, 'State Immunity and Fundamental Human Rights', 11 *Leiden J Int'l L* (1998) 9; Orakhelashvili, 'State Immunity and Hierarchy of Norms: Why the House of Lords Got it Wrong', 18 *EJIL* (2007) 955, at 964: '[t]here is solid doctrinal support for the approach that *jus cogens* trumps state immunity before national court, and this has been the case throughout the whole period in which this issue has been arising in practice'.

⁸² *Siderman de Blake v. Republic of Argentina*, 965 F 2d 699, at 718 (CA 9th Cir. 1992). A similar argument was made and accepted in *Ferrini v. Federal Republic of Germany* (2004), Cass sex un 5044/04; 87 *Rivista di diritto internazionale* (2004) 539 (Italy: Cassazione); *Prefecture of Voiotia v. Federal Republic of Germany* (2000), Case No. 11/2000 (Greece: Court of Cassation); *Lozano 91 Rivista di diritto internazionale* (2008) 1223 (Italy: Cassazione); *FRG v. Mantelli and others, Order No. 14201 (2008)* (Italy: Cassazione); *Milde* ('Civitella'), 92 *Rivista di diritto internazionale* (2009) 618 (Italy: Cassazione); and by six of the dissenting judges (Rozakis and Callisch, joined by Wildhaber, Costa, Cabral Barreto, and Vajić) in App. No. 35763/97, *Al-Adsani v. United Kingdom*, 34 EHRR (2002) 11. In 2008, the rash of Italian judgments against Germany became the subject of proceedings before the ICJ when Germany initiated proceedings against Italy, claiming that 'Italian judicial bodies have repeatedly disregarded the jurisdictional immunity of Germany as a foreign State': *Jurisdictional Immunities of the State (Germany v. Italy)*, press release no. 2008/44, 23 Dec. 2008, available at: www.icj-cij.org/docket/files/143/14925.pdf.

⁸³ *Prosecutor v. Kupreškić et al*, IT-95-16 (ICTY: Trial Chamber, 2000), at para. 520. For similar assertions see Cassese, *supra* note 15, at 203. In the *Nuclear Weapons Advisory Opinion (Request by General Assembly)* [1996] ICJ Rep 226, the ICJ was evasive on this point. On the one hand, it stated (at para. 79) that 'a great many rules of humanitarian law' were 'fundamental rules' which 'constitute intransgressible principles of international customary law'. However, the Court stated later in the same opinion (at para. 83) that while it had been argued that the rules and principles of humanitarian law were part of *jus cogens*, there was 'no need for the Court to pronounce on this matter'.

⁸⁴ See *Nicaragua v. USA*, *supra* note 42, at para. 190.

⁸⁵ See Judge *ad hoc* Elihu Lauterpacht, in *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia)*, Further Request for Provisional Measures, Order of 13 Sept. 1993 [1993] ICJ Rep 325, at 440.

⁸⁶ See *Prosecutor v. Furundžija*, Judgment, Case No. IT-95-17/1-T (1998), 121 ILR 213, at 260 (ICTY: Trial Chamber), para. 153; *Al-Adsani v. UK*, *supra* note 82, at paras 60–61.

reprisals,⁸⁷ it is not possible to assert that those rules are *jus cogens* norms. Despite the considerable extension of the prohibition of belligerent reprisals in the First Additional Protocol to the Geneva Conventions,⁸⁸ the prohibitions in that instrument cannot be regarded as representing customary international law⁸⁹ – let alone *jus cogens* – given the opposition of countries such as the US, UK, and France to those provisions.⁹⁰

Secondly, it is difficult to see how the rules concerning state immunity⁹¹ come into conflict with norms of *jus cogens*.⁹² The main purpose and effect of such immunities is to prevent adjudication of such violations in the domestic courts of other states. For the granting of immunity to come into proper conflict with those *jus cogens* norms prohibiting certain international crimes, it would have to be argued that (i) there is an *obligation* on third states (i.e., states other than that responsible for the violation) to prosecute the crime in their domestic courts (or in civil cases to provide a civil remedy) and (ii) that this obligation itself is a rule of *jus cogens*.⁹³ Each step of this argument is tenuous and fraught with difficulties.

⁸⁷ Belligerent reprisals are defined as 'coercive measures which would normally be contrary to international law but which are taken in retaliation by one party to a conflict in order to stop the adversary from violating international law'. See Oeter, 'Methods and Means of Combat', in Fleck (ed.), *supra* note 50, at 232. See generally F. Kalshoven, *Belligerent Reprisals* (1971).

⁸⁸ See Hampson, 'Belligerent Reprisals and the 1977 Protocols to the Geneva Conventions 1949', 37 *ICLQ* (1988) 818; Greenwood, 'The Twilight of the Law of Belligerent Reprisals', 20 *Netherlands Yrbk Int'l L* (1989) 35; Kalshoven, 'Belligerent Reprisals Revisited', 21 *Netherlands Yrbk Int'l L* (1990) 43.

⁸⁹ For the view that Art. 51(6), Protocol Additional to the Geneva Conventions of 12 August 1949 (1977), 1125 UNTS 3, which prohibits reprisals against civilians, constitutes a rule of customary international law see *Prosecutor v. Kupreškić*, *supra* note 83, at paras 521–536; and Rule 146 ICRC Customary Study which provides that 'Belligerent reprisals against persons protected by the Geneva Conventions are prohibited': J. Henckaerts and L. Doswald-Beck, *Customary International Humanitarian Law, Volume 1* (2005), at 519, especially at 520–523.

⁹⁰ See Greenwood, *supra* note 88, at 63–64; Kalshoven, *supra* note 87, at 53; Oeter, *supra* note 87, at 206–207; R. Cryer *et al.*, *An Introduction to International Criminal Law and Procedure* (2nd edn, 2010), at 421. See also *Prosecutor v. Kupreškić*, *supra* note 83, at 532–533. See UK Ministry of Defence, *The Manual of the Law of Armed Conflict* (2004), at 422–423.

⁹¹ This applies equally to the rules regarding diplomatic immunity.

⁹² See Fox, *supra* note 1, at 525: '[s]tate immunity is a procedural rule going to the jurisdiction of a national court. It does not go to substantive law; it does not contradict a prohibition contained in a *jus cogens* norm but merely diverts any breach of it to a different method of settlement. Arguably, then, there is no substantive content in the procedural plea of State immunity upon which a *jus cogens* mandate can bite.' Lady Fox's argument was cited with approval in *Jones v. Saudi Arabia* by both Lords Bingham and Hoffmann: see *supra* note 52, at paras 24 and 44. See also Voyiakis, 'Access to Court v. State Immunity', 52 *ICLQ* (2003) 297, at 321: 'it is not all clear how the prohibition of torture and the law of State immunity could collide in the first place. To risk some triviality, the prohibition of torture seems mainly about prohibiting the practice of torture, whereas the rules of State immunity are mainly about the exercise of jurisdiction over foreign States.'

⁹³ This argument was presented by Judge Al-Khasawneh in his dissenting opinion in the *Arrest Warrant* case, *supra* note 9, at para. 7.

Undoubtedly, there are some rules which impose obligations on third states to prosecute *some* international crimes, for example those rules concerning grave breaches of the Geneva Conventions⁹⁴ and torture.⁹⁵ However, in other cases of war crimes or crimes against humanity there is no recognized *obligation* on third states to institute criminal prosecutions,⁹⁶ even if there may be a *right* to do so.⁹⁷ Similarly, although there have been judicial and quasi-judicial dicta suggesting otherwise,⁹⁸ there is no obligation on third states to provide a civil remedy.⁹⁹ Indeed it would be strange if the violation of a *jus cogens* norm automatically conferred jurisdiction on foreign national courts by setting aside the rules of state immunity when such violations do not automatically confer jurisdiction on international courts.¹⁰⁰ Furthermore, even in the

⁹⁴ Art. 49, First Geneva Convention (1949), 75 UNTS 31; Art. 50, Second Geneva Convention (1949), 75 UNTS 85; Art. 129, Third Geneva Convention (1949), 75 UNTS 135; Art. 146, Fourth Geneva Convention, (1949), 75 UNTS 287; Art. 85(1), First Additional Protocol to the 1949 Geneva Conventions (1977), *supra* note 89.

⁹⁵ Art. 7, Convention Against Torture 1984, *supra* note 76.

⁹⁶ See B. Broomhall, *International Justice and the International Criminal Court: Between Sovereignty and the Rule of Law* (2003), at 111–112; Meron, 'International Criminalization of Internal Atrocities', in T. Meron, *War Crimes Law Comes of Age* (1998), 228, at 249–256.

⁹⁷ In *Prosecutor v. Furundžija*, Judgment, *supra* note 86, at para. 156, the ICTY held that '[a]t the individual level, that is, of criminal liability, it would seem that one of the consequences of the *jus cogens* character bestowed by the international community upon the prohibition of torture is that every State is entitled to investigate, prosecute and punish or extradite individuals accused of torture, who are present in a territory under its jurisdiction. Indeed, it would be inconsistent on the one hand to prohibit torture to such an extent as to restrict the normally unfettered treaty-making power of sovereign States, and on the other hand bar States from prosecuting and punishing those torturers who have engaged in this odious practice abroad' (emphasis added.) See also *Pinochet (No. 3)*, *supra* note 16, at 109 (*per* Lord Browne-Wilkinson), 177 (*per* Lord Millett).

⁹⁸ See dicta by the ICTY in *Prosecutor v. Furundžija*, *supra* note 86. The Committee Against Torture also made similar statements in its Concluding Comments on Canada, 7 July 2005, CAT/C/CR/34/CAN, at paras 4(g) and 5(f); Concluding Observations on Republic of Korea, 25 July 2006, CAT/C/KOR/CO/2, at para. 8(a); Concluding Observations on Japan, 3 Aug. 2007, CAT/C/JPN/CO/1, at para. 23; and Concluding Observations on New Zealand, 14 May 2009, at para. 14. See also Hall, 'The Duty of States Parties to the Convention against Torture to Provide Procedures Permitting Victims to Recover Reparations for Torture Committed Abroad', 18 *EJIL* (2007) 921. Reference may also be made to the limited practice of immunity being lifted in civil cases under the US Alien Tort Claims Act 1789, 28 USC § 1350.

⁹⁹ See *Jones v. Saudi Arabia*, *supra* note 52, where it was held that there was 'no adequate foundation in any international convention, State practice or scholarly consensus' for such a practice (*per* Lord Bingham, at para. 34). In his judgment, Lord Hoffmann stated that for the claimants to succeed with this argument it was 'necessary to show that the prohibition on torture has generated an ancillary procedural rule which, by way of exception to State immunity, entitles or perhaps requires States to assume civil jurisdiction over other States in cases in which torture is alleged'. See also Fox, *supra* note 1, at 525, and *Bouzari v. Iran* (2002), 124 ILR 427 (Canada: Ontario Sup. Ct. approved on appeal 2004), at paras 43–56, holding that Art. 14(1) Torture Convention, *supra* note 76, which provides that states parties 'shall ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation', does not impose an obligation on parties to provide a civil remedy in respect of torture committed by another state.

¹⁰⁰ See *East Timor Case (Portugal v. Australia)* [1995] ICJ Rep 90; *Armed Activities on the Territory of the Congo (New Request, 2002) (Congo v. Rwanda)*, Jurisdiction and Admissibility [2006] ICJ Rep 6, at para. 64. For the argument that state immunity is based on the consent rule applicable to international tribunals see Crawford, 'International Law and Foreign Sovereigns: Distinguishing Immune Transactions', 53 *British Yrbk Int'l L* (1983) 75, at 79–85.

minority of cases where there is an *obligation* to prosecute, it would be erroneous to suggest that the obligation is peremptory or of a *jus cogens* character. The *jus cogens* obligation is the rule *prohibiting* the act and not the rule requiring a prosecution by third states. It is the state which has committed the act that is in violation of a norm of *jus cogens*, and not the state which has failed to prosecute or provide a civil remedy. If the obligation to prosecute were *jus cogens*, it would prevail over other norms of international law and there would be an obligation to prosecute even in situations where such a prosecution would violate the rights of the individual concerned or that of other states. This is clearly not the current situation.

Some have suggested that wherever there is a violation of a norm of *jus cogens* this gives rise to a right on the part of third states to exercise universal jurisdiction.¹⁰¹ It may then be argued that if this right to universal jurisdiction is an effect which is derived from a *jus cogens* norm it is itself peremptory and prevails over any inconsistent rights of states. However, this is to read too much into *jus cogens* prohibitions. In the first place, it is doubtful that violations of *jus cogens* norms automatically confer the right to exercise universal jurisdiction. Apart from the prohibition of torture and that of genocide, a further prohibition which is indisputably accepted to have attained *jus cogens* character is the prohibition of aggression.¹⁰² Nevertheless, there is no universal jurisdiction over the crime of aggression.¹⁰³ The ILC has stated that individual states are not competent to prosecute leaders of other states for the crime of aggression and there is no state practice which would support such a right.¹⁰⁴ Similarly, it is

¹⁰¹ See *Prosecutor v. Furundzija*, ICTY Trial Chamber, Dec. 1998, at para. 156: 'it would seem that one of the consequences of the *jus cogens* character bestowed by the international community upon the prohibition of torture is that every State is entitled to investigate, prosecute and punish or extradite individuals accused of torture, who are present in a territory under its jurisdiction'. See A. Orakhelashvili, *Peremptory Norms in International Law* (2006), at 288–319 and 340–357: '[i]f *jus cogens* crimes are peremptorily outlawed as crimes, then the duty to prosecute or extradite their perpetrators must be viewed as peremptory' (at 305) 'under international law peremptory rules such as core norms of human rights law prevail over non-peremptory norms of immunities. Also in the case of international crimes outlawed under *jus cogens*, such as crimes against humanity, it must be accepted that the principles of immunity have no peremptory status and that the conflict between the two sets of norms must be resolved considering the framework of normative hierarchy giving primacy to the relevant peremptory norm' (at 343).

¹⁰² See J. Crawford, *The International Law Commission's Articles on State Responsibility* (2002), at 188 (para. 5 of commentary to Art. 26).

¹⁰³ See Akande, 'Prosecuting Aggression: The Consent Problem and the Security Council Issue', Oxford ELAC Working Paper (May 2010), available at: www.elac.ox.ac.uk/downloads/dapo%20akande%20working%20paper%20may%202010.pdf. See also Res. RC/Res. 6 adopted at the Kampala Review Conference by states parties to the Statute of the International Criminal Court (June 2010), Annex III, 'Understandings regarding the amendments to the Rome Statute of the International Criminal Court on the Crime of Aggression', at para. 5: '[i]t is understood that the amendments [relating to aggression] shall not be interpreted as creating the right or obligation to exercise domestic jurisdiction with respect to an act of aggression committed by another State'.

¹⁰⁴ 'The aggression attributed to a State is a *sine qua non* for the responsibility of an individual for his participation in the crime of aggression. An individual cannot incur responsibility for this crime in the absence of aggression committed by a State. Thus, a court cannot determine the question of individual criminal responsibility for this crime without considering as a preliminary matter the question of aggression by a State. The determination by a national court of one State of the question of whether another State had committed aggression would be contrary to the fundamental principle of international law *par in*

asserted by some that the obligation to respect the right of self-determination has a *jus cogens* character.¹⁰⁵ However, there is no practice to support the view that violation of this obligation gives rise to individual international criminal responsibility or that all states have the right to prosecute such violators.

Even if the right to universal jurisdiction were to flow directly from the peremptory nature of a prohibition, it does not follow that the right is itself of *jus cogens* character. Secondary norms which emerge as a consequence of violations of norms of *jus cogens* are not themselves necessarily of overriding effect. For example, it is recognized that all states have a duty not to recognize as lawful situations created by breaches of *jus cogens*.¹⁰⁶ However, it follows from the ICJ's decision in the *Namibia (South West Africa)* advisory opinion that this secondary norm does not have peremptory effect and gives way to humanitarian concerns which may arise where non-recognition would cause serious harm to private rights.¹⁰⁷ It would have to be demonstrated that a norm which emerges from another *jus cogens* norm is (to use the words of Article 53 of the Vienna Convention on the Law of Treaties) itself accepted by the international community as a whole as a peremptory norm from which no derogation is permitted. This is clearly not the case with regard to any obligation or right to exercise universal jurisdiction, since there is still debate whether some of those norms are even to be found at all in customary international law.

To summarize, a failure by a third state to prosecute those accused of committing an international crime (or to provide a civil remedy), as a result of an immunity, is in many cases not a breach of any international obligation. Furthermore, even where there is an obligation on third states to prosecute (or a right to prosecute or provide a civil remedy) that obligation does not rise to the level of *jus cogens*. Therefore, there is no conflict between rules of immunity and the *jus cogens* nature of the prohibition.

Thirdly, the argument that there is no immunity in cases alleging violations of *jus cogens* norms has been both explicitly and implicitly rejected by two international tribunals. The European Court of Human Rights (ECtHR) has held in a number of cases that the fact that there is a violation of a *jus cogens* norm does not of itself supersede the

parent imperium non habet. Moreover, the exercise of jurisdiction by the national court of a State which entails consideration of the commission of aggression by another State would have serious implications for international relations and international peace and security': Commentary to Art. 8, ILC Draft Code of Crimes Against the Peace and Security of Mankind, 1996, available at: http://untreaty.un.org/ilc/texts/instruments/english/commentaries/7_4_1996.pdf.

¹⁰⁵ See the International Law Commission's Commentary to Art. 26 of the Articles on the Responsibility of States, in Crawford, *supra* note 102, at 188, para. 5; Separate Opinion of Judge Ammoun, *Barcelona Traction* [1970] ICJ Rep 304; I. Brownlie, *Principles of Public International Law* (7th edn, 2008), at 511; and Cassese, *supra* note 15, at 203.

¹⁰⁶ See Art. 41(2), ILC Articles on State Responsibility in Crawford, *supra* note 102.

¹⁰⁷ '[T]he non-recognition of South Africa's administration of the Territory should not result in depriving the people of Namibia of any advantages derived from international co-operation . . . the effects of which can be ignored only to the detriment of the inhabitants of the territory': *Legal Consequences for States of the Continued Presence of South African in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)* [1971] ICJ Rep 16, at para. 125.

rules of state immunity. In *Al-Adsani v. United Kingdom*, a slim majority of the ECtHR (nine votes to eight) held that the grant of state immunity in a case involving an allegation of torture by a foreign state was consistent with international law and therefore not a denial of the right of access to a court. While the majority of the ECtHR acknowledged that the prohibition of torture was a peremptory norm of international law, it held that:

Notwithstanding the special character of the prohibition of torture in international law, the Court is unable to discern in international instruments, judicial authorities or other materials before it any firm basis for concluding that, as a matter of international law, a State no longer enjoys immunity from civil suit in the courts of another State where acts of torture are alleged.¹⁰⁸

This view has since been followed by broader majorities of the ECtHR in other cases.¹⁰⁹ These cases dealt only with the immunity of states from civil actions. However, if the ECtHR had accepted the normative hierarchy theory and was of the view that the *jus cogens* prohibition prevailed over immunity in criminal cases, it is difficult to see how such a prohibition would not also override immunity in civil cases as well.

Furthermore, in the *Arrest Warrant* case, the ICJ held that the immunities *ratione personae* of senior state officials such as the Head of State, Head of Government, and Foreign Minister continue to apply even when they are alleged to have committed acts constituting international crimes.¹¹⁰ Unless it is asserted that the rule granting immunity *ratione personae* is itself a rule of *jus cogens*,¹¹¹ the ICJ's decision is a further, albeit implicit, rejection of the argument under consideration.

C The ICJ's Obiter Dictum in the *Arrest Warrant* Case

In the *Arrest Warrant* case, the ICJ appeared to suggest that immunity *ratione materiae* would bar the prosecution of officials or former officials for international crimes committed whilst in office. This suggestion is *implicit* in a paragraph of the Court's judgment in which the Court listed the circumstances in which the immunities of an incumbent or former Foreign Minister would not act as a bar to criminal prosecution.¹¹² According to the Court, these circumstances included prosecution (i) in the home country of the Foreign Minister; (ii) where the immunity has been waived by

¹⁰⁸ *Al-Adsani v. United Kingdom*, *supra* note 82, at para. 61. A similar conclusion was reached by the British Branch of the Human Rights Section of the International Law Association, 'Report on Civil Actions in the English Courts for Serious Human Rights Violations Abroad' [2001] *European Human Rts L Rev* 129.

¹⁰⁹ See also App. No. 59021/00, *Kalogeropoulou v. Greece & Germany*, *supra* note 62; App. No. 14717.06, *Grosz v. France*, Admissibility Decision, 16 June 2009 (ECtHR).

¹¹⁰ *Arrest Warrant* case, *supra* note 9, at para. 58. Although note the dissenting opinions of Judges Al-Khasawneh and Van den Wyngaert, *ibid.*, at 7 and 28 respectively.

¹¹¹ While some support this view (see Black-Branch, 'Sovereign Immunity Under International Law: The Case of Pinochet', in D. Woodhouse (ed.), *The Pinochet Case: A Legal and Constitutional Analysis* (2000), 93, at 101; *Pinochet* (No. 3), *supra* note 18, at 149 (*per* Lord Hope)), it is untenable since immunity *ratione personae* can always be waived or set aside by treaty. Indeed, it has been argued elsewhere that Art. 27 Rome Statute of the International Criminal Court (1998), 2187 UNTS 3, constitutes a treaty waiver of immunity *ratione personae*. See Akande, *supra* note 2, at 419–421.

¹¹² *Arrest Warrant* case, *supra* note 9, at para. 61.

the state of the Foreign Minister; (iii) of a former Foreign Minister in the courts of another state ‘in respect of acts committed prior or subsequent to his or her period of office, as well as in respect of acts committed during that period of office in a private capacity’;¹¹³ and (iv) before certain international criminal tribunals which have jurisdiction. The third circumstance in this list deals with immunity *ratione materiae* and makes clear that state officials possess immunity in relation to official acts committed whilst in office. However, since this list was constructed in a case involving allegations of international crimes, it may be significant that the Court failed specifically to refer to immunities of former officials in such cases. This omission might suggest that the Court took one of two views. First, the Court may have taken the view that international crimes are to be regarded as private acts and that, in line with the third circumstance in the Court’s list, there is therefore no immunity with respect to such acts. However, as argued above, the categorization of international crimes as always being private acts is wrong. Secondly, the Court may have taken the view that international crimes committed by state officials are official acts and may be regarded as suggesting that immunity *ratione materiae* continues to exist in proceedings before foreign national courts relating to those crimes. This would be contrary to extensive post-World War II practice. It will be argued below that this interpretation would be wrong. A further possibility, however, is that the Court’s list is non-exhaustive and does not preclude the possibility that there is a rule removing immunity *ratione materiae* in relation to prosecutions for acts amounting to international crimes.

D The Relationship Between Immunity Ratione Materiae, Individual Criminal Responsibility, and Extra-Territorial Jurisdiction

Despite the fact that international crimes when committed by state officials in their official capacity are to be categorized as official acts, there are good reasons for arguing that international law is now at a stage where immunity *ratione materiae* does not apply in relation to such crimes.¹¹⁴ There have been a significant number of national prosecutions of foreign state officials for international crimes.¹¹⁵ All of these decisions proceed – at least implicitly (and sometimes explicitly¹¹⁶) – on the basis of a

¹¹³ *Ibid.*

¹¹⁴ See Art. III(1), *Resolution on the Immunity from Jurisdiction of the State and of Persons Who Act on Behalf of the State in case of International Crimes*, Institut de Droit International (2009): ‘[n]o immunity from jurisdiction other than personal immunity international law applies with regard to international crimes’. See Cassese, *supra* note 77, at 870 ff; Cassese, *supra* note 15, at 305 ff; Gaeta, *supra* note 15, at 981–983; Zappalà, *supra* note 15, at 601–605; Wirth, *supra* note 77.

¹¹⁵ See Cassese, *supra* note 77, at 870–871, referring to cases in which Israeli, French, Italian, Dutch, British, US, Polish, Spanish, and Mexican courts have entertained proceedings against foreign state officials (particularly foreign military officers) in respect of war crimes, crimes against humanity, and genocide; Cryer *et al.*, *supra* note 90, at ch. 4.

¹¹⁶ See, e.g., *Eichmann*, *supra* note 71, at 44–48 (Israel: Ct of Jerusalem), at 308–311 (Israel Sup. Ct); *Pinochet (No. 3)*, *supra* note 16. See also the *Lozano Case* (Cassazione, 2008), discussed in Cassese, ‘The Italian Court of Cassation Misapprehends the Notion of War Crimes: The *Lozano Case*’, 6 *JICJ* (2008) 1077, where the Court accepts that there is no immunity *ratione materiae* with respect to international crimes but appears to misconstrue the criteria for war crimes.

lack of immunity *ratione materiae* in respect of such crimes. The best explanation for the absence of immunity *ratione materiae* in cases concerning international crimes is that the principle is necessarily in conflict with more recent rules of international law and it is the older rule of immunity which must yield. Developments in international law now mean that the reasons for which immunity *ratione materiae* are conferred simply do not apply to prosecutions for international crimes.¹¹⁷

As set out above, the first reason for this type of immunity is that official acts done by individuals are deemed to be acts of the state for which it is the state and not the individual which is responsible. However, this general principle does not apply to acts which amount to international crimes, because there is a further, newer, principle that the official position of an individual does not exempt him/her from individual responsibility for international crimes.¹¹⁸ As the Nuremberg Tribunal stated:

The principle of international law which under certain circumstances protects the representatives of a State, cannot be applied to acts which are condemned as criminal by international law. The authors of these acts cannot shelter themselves behind their official position in order to be freed from punishment in appropriate proceedings.¹¹⁹

Indeed, the very purpose of international criminal law is to attribute responsibility to individuals, including state officials, and to defeat the defence of official capacity or act of state. Since acts amounting to international law crimes are to be attributed to the individual, there is less need for a principle which shields those officials from responsibility for acts which are to be attributed solely to the state. The newer rule of attribution supersedes the earlier principle of immunity which seeks to protect non-responsibility.

Similarly, the development of principles permitting the exercise by states of extra-territorial jurisdiction in relation to international crimes suggests that international law now contemplates that states may exercise jurisdiction over some official acts of foreign states in the context of considering individual criminal responsibility for such acts. This development means that the second purpose that immunity *ratione materiae* serves (preventing national courts from indirectly exercising control over acts of foreign states through proceedings against foreign officials) is also inapplicable in the case of domestic prosecutions for international crimes.

In the *Arrest Warrant* case, the ICJ held:

¹¹⁷ For a similar view see McGregor, *supra* note 71, at 912–918.

¹¹⁸ See Art. 7, London Agreement for the International Military Tribunal at Nuremberg (1945), 82 UNTS 279; Art. 6, Charter of the International Military Tribunal for the Far East (1946), TIAS 1589; Art. 7(2), Statute of the International Criminal Tribunal for the Former Yugoslavia (1993), UN SC Res 827 (1993); Art. 6(2), Statute of the International Criminal Tribunal for Rwanda (1994), UN SC Res 995 (1994); Art. 27(1), ICC Statute, *supra* note 111; and Art. 6(2), Statute of the Special Court for Sierra Leone (2002), available at: www.sc-sl.org. While these treaty texts apply to the respective tribunals, there is no doubt that this lack of a substantive defence is now a principle of international law applicable even with respect to domestic prosecutions. See the works cited *supra* in note 114.

¹¹⁹ *In re Goering and others* (1946), 13 ILR 203, at 221.

the rules governing the jurisdiction of national courts must be carefully distinguished from those governing jurisdictional immunities: jurisdiction does not imply absence of immunity, while absence of immunity does not imply jurisdiction. Thus, although various international conventions on the prevention and punishment of certain serious crimes impose on States obligations of prosecution or extradition, thereby requiring them to extend their criminal jurisdiction, such extension of jurisdiction in no way affects immunities under customary international law, including those of Ministers of Foreign Affairs. These remain opposable before the courts of a foreign State, even where those courts exercise such a jurisdiction under these conventions.¹²⁰

It is generally correct to say that jurisdiction does not imply an absence of immunity – indeed, immunity is generally speaking an exception to an otherwise applicable jurisdiction.¹²¹ However, it must be remembered that the Court was considering the immunity *ratione personae* available to serving senior state officials. The position with regard to immunity *ratione materiae* is different. There may well be circumstances in which a rule providing for jurisdiction may by itself override an immunity which would otherwise be available. This will clearly be the case where a subsequent jurisdictional rule is practically co-extensive with a prior rule according immunity. By practically co-extensive we mean that both rules apply in large measure to the same set of circumstances. In such circumstances, there will be a conflict between the later jurisdictional rule and the prior rule of immunity so that the two cannot be applied simultaneously. Where the application of the prior immunity would deprive the subsequent jurisdictional rule of practically all meaning, then the only logical conclusion must be that the subsequent jurisdictional rule is to be regarded as a removal of the immunity. Even where the subsequent jurisdictional rule is not practically co-extensive with the rule according immunity, the subsequent jurisdictional rule will remove immunity where the jurisdictional rule contemplates and provides authority for national proceedings in circumstances which would otherwise be covered by immunity. In this latter circumstance, the jurisdictional rule will apply to scenarios covered by the immunity rule (i.e., prosecution of state officials) and cases outside that rule (e.g., prosecution of non-state actors). However, the fact that the jurisdictional rule gives authority to foreign domestic courts in cases which are covered by the immunity rule suggests that foreign domestic courts are competent in those cases to adjudicate on acts of the foreign state.

These principles constitute the best explanation for the decision by the House of Lords in *Pinochet* (No. 3). As was stated by most of the judges in that case, a grant of immunity *ratione materiae* would have been inconsistent with those provisions of the Torture Convention according universal jurisdiction for torture.¹²² The Torture Convention defines torture as ‘any act by which severe pain or suffering, whether physical

¹²⁰ *Arrest Warrant* case, *supra* note 9, at para. 59; see also the Joint Separate Opinion of Judges Higgins, Kooijmans, and Buergenthal, *ibid.*, at para. 4.

¹²¹ Caplan, ‘State Immunity, Human Rights and Jus Cogens: A Critique of the Normative Hierarchy Theory’, 97 *AJIL* (2003) 741, at 756–757.

¹²² See *Pinochet* (No. 3), *supra* note 16, at 114, 169–170, 178–179, 190 (*per* Lords Browne-Wilkinson, Saville, Millett, Phillips).

or mental, is intentionally inflicted for [certain] purposes . . . when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a *public official or any other person acting in an official capacity*'.¹²³ The jurisdiction provisions of the Convention envisage that states parties must legislate to ensure that all acts of torture are offences under its criminal law,¹²⁴ and in situations where an alleged perpetrator of torture is present on the territory of a contracting party that state will either prosecute or extradite the individual to a state where he or she will be prosecuted.¹²⁵ Since the Torture Convention limits the offence of torture to acts committed in an official capacity, extra-territorial prosecution can occur only in cases where immunity *ratione materiae* would ordinarily be applicable. However, application of immunity *ratione materiae* would deprive the jurisdiction provisions of the Convention of practically all meaning. Such a result would be contrary to the object and purpose of the treaty, and therefore it was held in *Pinochet (No. 3)* that immunity *ratione materiae* must be regarded as having been displaced.¹²⁶

Similarly, the crime of enforced disappearance as defined by Article 2 of the International Convention for the Protection of All Persons from Enforced Disappearance can be perpetrated only by 'agents of the State' or 'persons or groups of persons

¹²³ Art. 1, Convention Against Torture, *supra* note 76. 3

¹²⁴ By obliging states parties to legislate against *all* acts of torture, the Convention prescribes for universal jurisdiction. See O'Keefe, 'Universal Jurisdiction. Clarifying the Basic Concept', 2 *JICJ* (2004) 735, who argues that universal jurisdiction is a particular form of the jurisdiction to prescribe where there is no link between the prescribing state and the offender at the time of the commission of the offence.

¹²⁵ Arts 4, 5, and 7, Convention Against Torture, *supra* note 76. See *Guengueng v. Senegal* (181/01), CAT/C/36/D/181/2001 (Committee Against Torture). On 19 Feb. 2009, Belgium instigated proceedings against Senegal before the ICJ in relation to the failure of Senegal to fulfil its obligations set out in the Convention against Torture to prosecute or extradite Hissène Habré, former President of Chad: see *Questions Relating to the Obligation to Prosecute or Extradite (Senegal v. Belgium)*, Provisional Measures, 2009, ICJ Press Release 2009/13, 19 Feb. 2009.

¹²⁶ Lord Saville stated in *Pinochet (No. 3)*, *supra* note 16, at 169–170 that '[s]o far as the states that are parties to the Convention are concerned, I cannot see how, so far as torture is concerned, this immunity [*ratione materiae*] can exist consistently with the terms of that Convention. Each state party has agreed that the other state parties can exercise jurisdiction over alleged official torturers found within their territories, by extraditing them or referring them to their own appropriate authorities for prosecution; and thus to my mind can hardly simultaneously claim an immunity from extradition or prosecution that is necessarily based on the official nature of the alleged torture. Since 8 December 1988 Chile, Spain and this country [the UK] have all been parties to the Torture Convention. So far as these countries at least are concerned it seems to me that from that date these state parties are in agreement with each other that the immunity *ratione materiae* of their former heads of state cannot be claimed in cases of alleged official torture. In other words, so far as the allegations of official torture against Senator Pinochet are concerned, there is now by this agreement an exception or qualification to the general rule of immunity *ratione materiae*.' According to Lord Millett, '[t]he definition of torture, . . . in the Convention . . . is in my opinion entirely inconsistent with the existence of a plea of immunity *ratione materiae*. The offence can be committed *only* by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. The official or governmental nature of the act, which forms the basis of the immunity, is an essential ingredient of the offence. No rational system of criminal justice can allow an immunity which is coextensive with the offence.'

acting with the authorisation, support or acquiescence of the State'.¹²⁷ Articles 4, 9, and 11(1) establish a set of obligations on states parties to legislate for the crime of enforced disappearance, and prosecute or extradite individuals suspected of committing enforced disappearances similar to those provided for in the Torture Convention. Once again, it would defeat the purpose of this treaty regime if immunities were allowed to bar prosecutions of individuals in the courts of third states.

In summary, where extra-territorial jurisdiction exists in respect of an international crime and the rule providing for jurisdiction expressly contemplates prosecution of crimes committed in an official capacity, immunity *ratione materiae* cannot logically co-exist with such a conferment of jurisdiction.

While most international crimes (i.e., genocide, war crimes, and crimes against humanity) as defined in the ICC Statute and other relevant conventions are not limited to official acts (as is the case with torture and enforced disappearance), it is clearly the case that these crimes are intended to capture the conduct of those acting in the exercise of official capacity.¹²⁸ In fact, when most of these international crimes were originally created, they were intended, primarily, to cover state action,¹²⁹ and it is only more recently that they have been extended to cover private (i.e., non-state) action.

Apart from torture and enforced disappearance a strong argument can be made that any rule permitting the exercise of universal jurisdiction with respect to war crimes committed in international armed conflicts will clearly contemplate the prosecution of state officials and is, thus, practically co-extensive with immunity *ratione materiae*. Although war crimes in international armed conflicts (i.e., grave breaches of the Geneva Conventions¹³⁰ as well as 'other serious violations of the laws and customs applicable in an international armed conflict' as defined in the ICC Statute¹³¹) are not, as is the case with torture, explicitly restricted to acts of state officials or agents' acts, the position is very similar. Since the opposing parties to an international armed conflict are, by definition, states, and since the acts amounting to war crimes in such a conflict must have some connection with the international armed conflict, these acts

¹²⁷ International Convention for the Protection of All Persons from Enforced Disappearance (2006), GA Res 61/177, 20 Dec. 2006, A/RES/61/177. See Anderson, 'How Effective Is the International Convention for the Protection of All Persons from Enforced Disappearances Likely to Be in Holding Individuals Criminally Responsible for Acts of Enforced Disappearance', 7 *Melbourne J Int'LL* (2006) 245, at 275–277.

¹²⁸ See Dupuy, 'International Criminal Responsibility of the Individual and International Responsibility of the State', in Cassese *et al.* (eds), *supra* note 15, ii, at 1085–1099; Commentary of the International Law Commission to Article 5 of the Draft Code of Crimes, *supra* note 104.

¹²⁹ Schabas, 'State Policy as an Element of International Crimes', 98 *Journal of Criminal Law and Criminology* (2008) 953. With respect to genocide see the Report of the Ad Hoc Committee on Genocide (and Draft Convention Drawn Up by the Committee), UN Doc E/794 (1948), at 29 and 32 (recognition by state representatives that 'in almost every serious case of genocide it would be impossible to rely on the Courts of the States where genocide had been committed to exercise effective repression because the government itself would have been guilty, unless it had been, in fact, powerless' and that 'genocide would be committed mostly by the State authorities themselves or that these authorities would have aided and abetted the crime').

¹³⁰ See Arts 49, 50, 129, and 146, Geneva Conventions 1949, *supra* note 94; Art. 85(1), First Additional Protocol to the Geneva Conventions 1949, *supra* note 89.

¹³¹ Art. 8(2)(b), ICC Statute, *supra* note 111. Note that under Art. 85(1) First Additional Protocol to the Geneva Conventions 1949, *supra* note 89, many of the crimes listed in Art. 8(2)(b) ICC Statute constitute grave breaches of that Protocol.

will usually have been committed by soldiers in a state's armed forces or other officials or agents exercising state authority. Therefore when the Geneva Conventions¹³² and customary international law¹³³ conferred universal jurisdiction in respect of those crimes, it cannot be supposed that immunity *ratione materiae* was left intact as that would have rendered the conferment of such jurisdiction practically meaningless.

As regards war crimes committed in non-international armed conflicts,¹³⁴ clearly one party to the conflict will be a non-state entity, and it is therefore the case that liability for these crimes is not restricted to state officials. However, it may be argued that if international law permits universal jurisdiction¹³⁵ with respect to such acts it cannot be supposed that it permits the exercise of jurisdiction over persons of one party only whilst leaving persons of the state party free from such jurisdiction.

Furthermore, although the more modern definition of crimes against humanity does not require connection with an armed conflict or state action,¹³⁶ the definition which was used at Nuremberg effectively required that those crimes be linked to an international armed conflict and thus implicitly to state action.¹³⁷ Also, it has been

¹³² This is provided for in the provisions listed *supra* in note 130. See O'Keefe, 'The Grave Breaches Regime and Universal Jurisdiction', 7 *JICJ* (2009) 811.

¹³³ Rule 157 ICRC Study of Customary International Humanitarian Law provides that '[s]tates have the right to vest universal jurisdiction in their national courts over war crimes'. The Study points to a large amount of state practice, including both legislation to this effect and national prosecutions on the basis of extra-territorial jurisdiction, to confirm this finding. See Henckaerts and Doswald-Beck, *supra* note 89, at 604–607. Furthermore, the ICJ has held in two cases (*Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion [1996] ICJ Rep 66, at para. 79 and *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion [2004] ICJ Rep 136, at para. 157) that the fundamental principles of the Geneva Conventions are part of customary international law. Arguably, this includes the grave breaches regime.

¹³⁴ These crimes are set out in Common Art. 3 to the Geneva Conventions I–IV, *supra* note 94, and in Art. 8(2)(c) and (e) ICC Statute, *supra* note 111.

¹³⁵ There have been some prosecutions of war crimes committed in non-international armed conflicts on the basis of universal jurisdiction. See *Butare case* (unpublished) (Belgium: Court of Assizes) (for a case report see Reydam's, 'Belgium's first application of Universal Jurisdiction: The *Butare Four* case', 1 *J Int'l Criminal Justice* (2003) 428); *Munyeshyaka case*, 4 RGDIP (1996) 1084 (France: CA); *Knesević*, 11 Nov. 1997, 1 *Yrbk Int'l Humanitarian L* (1998) 599 (Netherlands: Sup. Ct); *Grabež*, 18 Apr. 1997 (unpublished) (Switzerland: Military Tribunal at Lausanne); *Niyonteze*, 26 May 2000 (unpublished) (Switzerland: Military Tribunal at Lausanne) (for a case report see Reydam's, 'Case Report: Niyontese v Public Prosecutor', 96 *AJIL* (2002) 232). Rule 157 ICRC Customary Study, *supra* note 133, is considered to be applicable to war crimes committed in non-international armed conflicts as well as those committed in international armed conflicts.

¹³⁶ Art. 7(2)(a), ICC Statute, *supra* note 110, requires that the attack on the civilian population, which is the contextual element for crimes against humanity, must have occurred 'pursuant to or in furtherance of a State or organizational policy to commit such attack'. This element contemplates cases which involve state action and those which do not. There are questions whether this policy element is contained in customary international law. See Cryer *et al.*, *supra* note 90, at 237–241.

¹³⁷ Art. 6(c) Nuremberg Charter defines crimes against humanity as 'murder, extermination, enslavement, deportation and other inhumane acts committed against any civilian population, before or during the war, or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the law of the country where perpetrated'. However, the nexus between crimes against humanity and armed conflict was gradually dropped and customary law recognizes crimes against humanity in times of both peace and conflict; see *Tadić* (Interlocutory Appeal), 2 Oct. 1995, ICTY Appeals Chamber, at para. 141 and Art. 7 ICC Statute.

noted that ‘national jurisprudence on crimes against humanity following the Second World War frequently indicated that governmental policy is a requirement’.¹³⁸ In particular, in many cases that came before the German Supreme Court in the British Occupied Zone officials were prosecuted for crimes against humanity when their actions were in accordance with and supported by state policy.¹³⁹ Indeed, even prior to Nuremberg, the initial use of the term ‘crimes against humanity’ was in connection with the possible prosecution by states of officials of a foreign state for such crimes. The term was first used in 1915, in relation to the mass killings of Armenians by Turkish forces; the British, French, and Russian governments issued a declaration calling these acts ‘crimes . . . against humanity and civilisation’ and stating that ‘they [would] hold personally responsible [for] these crimes all members of the Ottoman Government and those of their agents who are implicated in such massacres’.¹⁴⁰ Similarly, the first extraterritorial prosecution for crimes against humanity¹⁴¹ – the Israeli prosecution of Adolf Eichmann – was for crimes against humanity committed during World War II by a government official. Significantly the exercise of universal jurisdiction by Israel was not challenged by any state. Other domestic prosecutions of foreign government officials for crimes against humanity have also occurred where no challenges based on immunity *ratione materiae* have been made.¹⁴² Thus, it seems clear that at the time when international law began to confer extra-territorial jurisdiction over this crime, the jurisdictional rule contemplated (or was even restricted to) prosecution of those acting on behalf of states. In this way immunity *ratione materiae* possessed by those persons would have necessarily been displaced.

In relation to genocide, Article IV of the Genocide Convention provides that ‘[p]ersons committing genocide . . . shall be punished whether they are constitutionally responsible rulers, public officials or private individuals’. There is an intention that all individuals, including state officials, responsible for genocide shall be prosecuted. It is possible that the Convention could be interpreted in a restrictive manner so that the prosecution of an official is limited to the national courts of the state from which the official comes.¹⁴³ However, Article VI provides that ‘persons charged with

¹³⁸ See Cryer *et al.*, *supra* note 90, at 238.

¹³⁹ Cassese, *supra* note 15, at 116.

¹⁴⁰ Dispatch of the US Ambassador in France, Sharp, to the US Secretary of State, Bryan, of 28 May 1915, cited in *ibid.*, at 101.

¹⁴¹ The grounds on which the Israeli Supreme Court upheld Eichmann’s conviction suggests that the basis for the prosecution was universal jurisdiction: ‘the peculiarly universal character of these crimes [against humanity] vests in every State the authority to try and punish anyone who participated in their commission’: *Eichmann*, *supra* note 52, at 287.

¹⁴² See *Fédération Nationale des Déportés et Internés Résistants et Patriotes and Others v. Barbie*, 78 ILR 124 (France: Court of Cassation (Criminal Chamber)); *In re Ahlbrecht*, 11 Apr. 1949, [1949] *Annual Digest and Reports of Public International Law Cases* 397 (Netherlands: Special Court of Cassation); *In re Buhler*, 10 July 1948 [1948] *Annual Digest and Reports of Public International Law Cases* 680 (Poland: Supreme National Tribunal).

¹⁴³ In the drafting of the Convention, universal jurisdiction for genocide was considered and rejected: see the Report of the Ad Hoc Committee on Genocide, *supra* note 129, at 32.

genocide . . . shall be tried by a competent tribunal of the State in the territory of which the act was committed', and the ICJ has made clear that obligations under the Convention apply also to genocide committed extra-territorially.¹⁴⁴ Therefore, it would appear that the Convention, through Articles IV and VI, has displaced immunity *ratione materiae* in a situation where prosecutions take place in the state where the genocide occurs. Importantly, there is also evidence that the national rules which form the basis of the international law permitting universal jurisdiction for genocide have been drafted with the intention of extending them to prosecutions of foreign state officials. For example, in the debates in the US Senate leading up to the passage of the US Genocide Accountability Act of 2007,¹⁴⁵ Senator Richard Durbin, the main sponsor of the Act, specifically stated that the Act was intended to allow the US to prosecute foreign government officials. He specifically referred to the head of security in the Sudanese Government, who is alleged to be involved in the crimes committed in Darfur and who had visited the United States in 2005, and to Pol Pot.¹⁴⁶

Since the possible rules providing for extraterritorial jurisdiction over war crimes in a non-international armed conflict, crimes against humanity, and genocide are not practically co-extensive with immunity *ratione materiae*, it must be admitted that the arguments relating to these crimes are not as strong as those relating to torture, enforced disappearance, or war crimes in an international armed conflict. However, these arguments are consistent with the policy goals underlying universal jurisdiction. Arguably, the primary reason for permitting universal jurisdiction is that persons who commit such international crimes are often connected to the state concerned and might escape justice if only their home state had jurisdiction. To the extent that rules relating to universal jurisdiction are intended to avoid impunity often caused by the failure of states to take action against persons acting on their behalf, those rules contemplate prosecution of those officials by other states. The position was well summarized by Lord Phillips in *Pinochet (No. 3)*:

International crimes and extra-territorial jurisdiction in relation to them are both new arrivals in the field of public international law. I do not believe that State immunity *ratione materiae* can co-exist with them. The exercise of extra-territorial jurisdiction overrides the principle that one State will not intervene in the internal affairs of another. It does so because, where international crime is concerned, that principle cannot prevail. . . . Once extra-territorial jurisdiction is established, it makes no sense to exclude from it acts done in an official capacity.¹⁴⁷

E Does International Law Permit the Exercise of Extra-Territorial Jurisdiction over International Crimes?

It follows that an important challenge is one of establishing the circumstances in which universal, or at least extra-territorial, jurisdiction is permitted under

¹⁴⁴ 'The Court notes that the obligation each State . . . has to prevent and to punish the crime of genocide is not territorially limited by the Convention': *Application of Genocide Convention, Preliminary Objections (Bosnia and Herzegovina v. Yugoslavia)* [1996] ICJ Rep 594, at para. 31.

¹⁴⁵ Genocide Accountability Act 2007, Public Law 110-151, signed 21 Dec. 2007.

¹⁴⁶ See <http://durbin.senate.gov/showRelease.cfm?releaseId=270718>.

¹⁴⁷ *Pinochet (No. 3)*, *supra* note 16, at 190.

international law in relation to national prosecutions for international crimes. Whilst this task is an endeavour beyond the scope of this article, some tentative, general remarks may be made.¹⁴⁸ The first point to be noted is that this task is complicated by two opposite trends which are concurrently taking place in the international community. On the one hand, the principle of universal jurisdiction is being increasingly asserted in national legislation (much of it prompted by the ICC Statute)¹⁴⁹ and judicial decisions.¹⁵⁰ On the other hand, this increasing assertion of universal jurisdiction has resulted in increased challenges to the principle. The principle has been challenged in

¹⁴⁸ For consideration of this question, see O'Keefe, *supra* note 124; Reydams, *Universal Jurisdiction: International and Municipal Legal Perspectives* (2003); ILA Final Report on the Exercise of Universal Jurisdiction in Respect of Gross Human Rights Offences, Report of the 69th Conference of the International Law Association (2000). See Fletcher, 'Against Universal Jurisdiction', 1 *J Int'l Criminal Justice* (2003) 580; Cassese, 'Is the Bell Tolling for Universality? A Plea for a Sensible Notion of Universal Jurisdiction', 1 *J Int'l Criminal Justice* (2003) 589; Bassiouni, 'Universal Jurisdiction for International Crimes: Historical Perspectives and Contemporary Practice', 42 *Virginia J Int'l L* (2001) 81; Wedgwood, 'National Courts and the Prosecution of War Crimes', in G. Kirk-McDonald and O. Swaak-Goldman (eds), *Substantive and Procedural Aspects of International Criminal Law* (2000), i, ch. 10; Randall, 'Universal Jurisdiction Under International Law', 66 *Texas L Rev* (1988) 785; Restatement (Third) of the Foreign Relations Law of the United States (1986), at para. 404.

¹⁴⁹ See, e.g., (i) s. 8(b), Canadian Crimes Against Humanity and War Crimes Act 2000, providing for jurisdiction over any person who 'after the time the offence is alleged to have been committed . . . is present in Canada'; (ii) s. 8(1)(c), New Zealand International Crimes and International Criminal Court Act 2000, providing for jurisdiction over genocide, crimes against humanity and war crimes irrespective of (a) the nationality of the accused, (b) the place of commission of the crime and (c) the presence of the accused in New Zealand at the time a decision was made to charge him with the offence; (iii) s. 268.117, Australian Criminal Code Act 1995 (Act No. 12 of 1995) (together with s. 15(4)), providing for jurisdiction over genocide, crimes against humanity and war crimes 'whether or not the conduct constituting the alleged offence occurs in Australia'; (iv) Art. 1 German Code of Crimes Against International Law 2002, 42 *ILM* (2003) 995, providing for jurisdiction over international crimes 'even when the offence was committed abroad and bears no relation to Germany'; (v) s. 4(3)(c), South African Implementation of the Rome Statute of the International Criminal Court Act 2002 (27/2002), providing for jurisdiction over non-nationals present in South Africa who are accused of committing international crimes whilst abroad; (vi) s. 2(1)(a), Netherlands International Crimes Act 2003, providing for jurisdiction over 'anyone who commits any of the crimes defined in this Act outside the Netherlands, if the suspect is present in the Netherlands'; (vii) s. 12(2), Irish International Criminal Court Act 2006, providing for jurisdiction over non-nationals who whilst abroad commit war crimes in the course of an international armed conflict; (viii) Art. 23(4), Spanish Judicial Power Organization Act, 6/1985, providing for jurisdiction over certain international crimes committed by Spanish or foreign nationals outside Spanish territory; (ix) US Genocide Accountability Act 2007, *supra* note 145, amending s. 1091 of title 18 of the US Code and providing for jurisdiction when 'the alleged offender is brought into, or found in, the United States, even if the conduct occurred outside the United States'. See, further, the national surveys in Reydams, *supra* note 148; ILA Report on Universal Jurisdiction, *supra* note 148; and Amnesty International, 'Universal Jurisdiction: The Duty of States to Enact and Enforce Legislation'. Note that the most notorious piece of legislation asserting universal jurisdiction – Art. 7, Belgian Act Concerning the Punishment of Grave Breaches of International Humanitarian Law 1999 – has been amended to restrict Belgian prosecutors to international crimes committed by or against Belgian nationals or residents. See 42 *ILM* (2003) 740.

¹⁵⁰ See Reydams, *supra* note 148.

several recent cases before the ICJ,¹⁵¹ as well as in diplomatic exchanges and national proceedings.¹⁵² For instance, the US Executive branch expressed serious concern over the exercise by Belgian courts of universal jurisdiction over US officials under Belgium's notorious universal jurisdiction statute.¹⁵³ This challenge resulted in the amendment of the Belgian statute and the restriction of Belgian jurisdiction to international crimes committed by or against Belgian nationals or residents.¹⁵⁴

However, these challenges to the exercise of universal jurisdiction have not, in the main, been challenges to the very principle of universality, but rather challenges to particular applications of the principle. The challenges have been made in cases in which the alleged offender is not present in the territory of the forum and the state in question is seeking to exercise universal jurisdiction *in absentia*.¹⁵⁵ In addition, the

¹⁵¹ See *Arrest Warrant case*, *supra* note 9. *Certain Criminal Proceedings in France (Republic of Congo v. France)* (Provisional Measures Request) [2003] ICJ Rep 102; Liberia's application instituting proceedings against Sierra Leone in respect of the indictment by the Special Court for Sierra Leone of the Liberian Head of State. See 'Liberia applies to the International Court of Justice in a dispute with Sierra Leone concerning an international arrest warrant issued by the Special Court for Sierra Leone against the Liberian President', ICJ Press Release 2003/26 (5 Aug. 2003), available at: www.icj-cij.org/icjwww/ipresscom/ipress2003/ipresscom2003-26_xx_20030805.htm; Rwanda's application against France of 18 Apr. 2007, 'The Republic of Rwanda Applies to the International Court of Justice in a Dispute with France', ICJ Press Release, 18 Apr. 2007, available at: [http://www.icj-cij.org/presscom/index.php?pr=1909\(p1=6p2=1;p1=6&p2=1\)](http://www.icj-cij.org/presscom/index.php?pr=1909(p1=6p2=1;p1=6&p2=1)).

¹⁵² See, e.g., the *Guatemalan Genocide case*, 42 ILM (2003) 683 (Spain Sup. Ct), holding, by an 8–7 majority, that the exercise of universal jurisdiction is limited by the 'principle of subsidiarity'. According to this principle, universal jurisdiction will be exercised only where the territorial state has failed to exercise jurisdiction and where there is a link with the forum's national interest. Such a link would include the nationality of the victim or the presence of the accused in Spain. See, further, Ascencio, 'Are Spanish Courts Backing Down on Universality? The Supreme Tribunal's Decision in *Guatemalan Generals*', 1 *J Int'l Criminal Justice* (2003) 690; *Peruvian Genocide Case*, 42 ILM (2003) 1200 (Spain: Sup. Ct). However, in Sept. 2005, Spain's Constitutional Tribunal found that there was no need for a nexus between Spain and the alleged incident for a complaint to be initiated, and that there was no need to show that prosecution would not take place in the state where the incident took place. See *Guatemalan Genocide Case*, Judgment No. 237/2005, available at: www.tribunalconstitucional.es/stc2005/STC2005-237.htm. See Roht-Azzaria, 'Guatemala Genocide Case', 100 *AJIL* (2006) 207.

¹⁵³ See Murphy, 'U.S. Reaction to Belgian Universal Jurisdiction Law', in 'Contemporary Practice of the United States Relating to International Law', *supra* note 17, at 984–987. In addition to the concerns expressed by the US Executive, Rep. Gary Ackerman in May 2003 introduced into the US Congress a bill entitled the 'Universal Jurisdiction Rejection Act', 2003 HR 2050. S. 3 of this bill states that '[i]t is the policy of the United States to reject any claim of universal jurisdiction made by foreign governments and to refuse to render any assistance or support to any foreign government pursuing an investigation or prosecution under a universal jurisdiction act'. See <http://thomas.loc.gov/cgi-bin/query/D?c108:1:/temp/~c108p6Eiei::>

¹⁵⁴ See 'Belgium's Amendment to the Law of June 15, 1993 (as Amended by the Law of February 10, 1999 and April 23, 2003) Concerning the Punishment of Grave Breaches of Humanitarian Law', 42 ILM (2003) 740. For analysis see Reydams, 'Belgium Reneges on Universality: The 5 August 2003 Act on Grave Breaches of International Humanitarian Law', 1 *J Int'l Criminal Justice* (2003) 679; Black, 'Belgium Gives in to US on War Crimes Law', *The Guardian*, 24 June 2003, at 13.

¹⁵⁵ See Reydams, *supra* note 148, at 223–226. O'Keefe, *supra* note 124, argues that as a matter of logic there cannot be a category of universal jurisdiction *in absentia*. This is a persuasive critique of much of the debate which has surrounded this topic since the *Arrest Warrant* case. However, there is nothing to prevent state practice from developing a principle that universal jurisdiction cannot be enforced unless the alleged offender is present within the territory of the state seeking enforcement.

exercise of universal jurisdiction has been challenged in cases where the alleged offender possesses immunity *ratione personae*. The fact that a very significant number of states have legislation permitting the exercise in principle of universal jurisdiction with respect to the crimes in the ICC Statute suggests that the principle does exist in customary international law. As regards war crimes committed in international armed conflict, the principle is to be found in the provisions of the Geneva Conventions (and First Additional Protocol) dealing with repression of grave breaches of those conventions. However, the application of this principle is not unlimited. Rather international law recognizes only universal jurisdiction exercised where the alleged offender does not possess immunity *ratione personae*.¹⁵⁶ It is also arguable that the suspect must be present on the territory of the prosecuting state for a legitimate exercise of universal jurisdiction.¹⁵⁷ Yet, as demonstrated above, the principle of universal jurisdiction over certain international crimes is inconsistent with immunity *ratione materiae*; it follows that that type of immunity does not exist in relation to those crimes. Therefore serving state officials not entitled to immunity *ratione personae* and former state officials who are present on the territory of the forum state may be arrested and prosecuted for such crimes.

F Diplomatic Immunity *Ratione Materiae*

A final point which needs to be considered in relation to immunity *ratione materiae* is whether the position of the former diplomat is the same as that of other state officials. The position of the former diplomat deserves separate consideration because, unlike the case with other state officials, the immunity *ratione materiae* is set out in a treaty provision: Article 39(2) of the Vienna Convention on Diplomatic Relations 1961. This provision states that a former diplomatic agent will continue to be immune even after he leaves office 'with respect to acts performed . . . in the exercise of his functions as a member of the [diplomatic] mission'. Whilst some have argued that the immunity *ratione materiae* of the diplomat is simply a reflection of the general immunity *ratione materiae* available to other state officials,¹⁵⁸ this view has been rejected by other authors¹⁵⁹ and by the German Constitutional Court.¹⁶⁰ This question is important for at least two reasons. First, the question arises whether any exceptions to immunity *ratione materiae* for state officials (particularly the exception for international crimes) also apply to former diplomats. Secondly, the question arises whether the immunity *ratione materiae* of former diplomats applies *erga omnes*, i.e., in relation to states other than the state to which the diplomat was accredited.

¹⁵⁶ See *Arrest Warrant* case, *supra* note 9, at para. 59.

¹⁵⁷ See Cassese, *supra* note 148, and Abi-Saab, 'The Proper Role of Universal Jurisdiction', 1 *J Int'l Criminal Justice* (2003) 596. O'Keefe, *supra* note 124, argues that, at the conceptual level, there is no distinction between the exercise of universal jurisdiction *in absentia* and universal jurisdiction with presence.

¹⁵⁸ See, e.g., Van Panhuys, *supra* note 48, at 1206.

¹⁵⁹ See Dinstein, *supra* note 47, at 86–89.

¹⁶⁰ *Former Syrian Ambassador to the German Democratic Republic* case, Case No. 2 BvR 1516/96 (1997), 115 ILR 595, at 609–610, 613–614 (Germany: Federal Constitutional Ct).

It has been argued that acts which amount to international crimes cannot amount to acts performed in the exercise of diplomatic functions because the definition of diplomatic functions in Article 3 of the VCDR limits them to acts within the limits of international law.¹⁶¹ This provision states that the functions of a diplomatic mission are, *inter alia*:

- (a) Representing the sending state in the receiving state;
- (b) Protecting in the receiving state the interests of the sending state and of its nationals, within the limits permitted by international law;
- (c) Negotiating with the government of the receiving state;
- (d) Ascertaining by all lawful means conditions and developments in the receiving state, and reporting thereon to the government of the sending state;
- (e) Promoting friendly relations between the sending state and the receiving state, and developing their economic, cultural, and scientific relations.

On a textual analysis of this provision, international law is only a restriction to two of the five functions listed. Other functions, such as representing the sending state in the receiving state and negotiating with the government of the receiving state, are not so limited.¹⁶² So, if in the course of negotiating on behalf of his state with the receiving state, the Ambassador were to conspire to commit genocide, the text of Article 3 does not indicate that this is not an act performed in the exercise of his diplomatic function. Beyond this textual analysis, the reasons for rejecting the argument that acts contrary to international law are not official acts of other state officials discussed above apply with equal force to diplomats. Thus the German Constitutional Court confirmed in the *Former Syrian Ambassador case*, ‘diplomatic immunity from criminal prosecution basically knows no exception for particularly serious violations of law’.¹⁶³

As the immunity *ratione materiae* of former diplomats is treaty-based and there is no evidence to suggest that the VCDR has fallen into disuse, it is difficult to argue that this immunity is superseded by the emerging customary international law rule

¹⁶¹ Wirth, ‘Immunities, Related Problems, and Article 98 of the Rome Statute’, 12 *Criminal Law Forum* (2001) 429, at 449.

¹⁶² In a recent Italian case, it was held that three CIA agents who were accredited to the US Embassy in Rome benefited from diplomatic immunity in proceedings against them for the ‘extraordinary rendition’ of Abu Omar from Italian territory. Although the court did not address whether the abduction was an ‘international crime’, Judge Magi did affirm that ‘the activity of “extraordinary renditions” committed by CIA agents, albeit being a crime in Italy, may and should be understood within the functional ambit of Article 3 of the Vienna Convention [on Diplomatic Relations] (“Protecting in the receiving State the interests of the sending State”): *Adler Monica Courtney and others*, n. 12428/09, verdict of 4 Nov. 2009, judgment delivered by Dr Oscar Magi, registered on 1 Feb. 2010 (Italy Fourth Criminal Section of Milan Tribunal), II-93. See Akande, ‘The Conviction by an Italian Court of CIA Agents for Abduction – Some Issues Concerning Immunity’, Nov. 2009, available at: www.ejiltalk.org/the-conviction-by-an-italian-court-of-cia-agents-for-abduction-some-issues-concerning-immunity/. Messineo, ‘The Untidy Dystopias of anti-terrorism: Italian State Secrets, CIA Covert Operations, and the Criminal Law in the Abu Omar Judgment’, Aug. 2010, available at: www.ejiltalk.org/the-untidy-dystopias-of-anti-terrorism-italian-state-secrets-cia-covert-operations-and-the-criminal-law-in-the-abu-omar-judgment.

¹⁶³ *Supra* note 160, at 607.

according universal jurisdiction. It would therefore appear that *the state to which a former diplomat was accredited* is bound to respect his or her immunity *ratione materiae*, even if the diplomat is charged with having committed an international crime. However, the treaty rule according diplomatic immunity *ratione materiae* does not apply with respect to third states.¹⁶⁴ With respect to those states the position of the former diplomat is the same as that of other officials: he or she is entitled to the general immunity *ratione materiae* of state officials which derives from state immunity.¹⁶⁵ Therefore, *when in a third state*, a former diplomat is not entitled to immunity *ratione materiae* with respect to prosecutions for international crimes.

4 Conclusion

In this article, we have examined the status-based and conduct-based immunity which international law confers on state officials. We have argued that in addition to the long-standing customary international law rules conferring immunity *ratione personae* on Heads of State, Heads of Government, and diplomats, international law confers a broader immunity *ratione personae* on state officials abroad on special mission. This broader immunity allows for the smooth conduct of international relations, but does not necessarily result in impunity, as it does not prevent prosecutions when the person in question is not exercising his/her international functions.

We have argued that there are good reasons for coming to the conclusion that immunity *ratione materiae* does not apply in criminal prosecutions for international crimes. In so doing we rely on arguments derived from the way international law confers extra-territorial jurisdiction and reject arguments derived from *jus cogens* or the allegedly non-sovereign and non-official character of acts amounting to international crimes. The rejection of these arguments is important for a number of reasons and may have important consequences. First, those arguments are unpersuasive and rely on faulty logic. Secondly, they misunderstand the basis for immunity. Thirdly, and more importantly, basing the non-availability of immunity *ratione materiae* on jurisdictional grounds may have important consequences not merely for prosecution of state officials but for immunity of the state and for civil cases against individual officials.

One of the difficulties relating to the question of immunity from jurisdiction in cases concerning human rights violations and international crimes is that these questions can arise in different types of proceedings raising different types of immunity. There are civil cases brought against the state, civil cases brought against officials, and criminal proceedings against officials. Should international law provide immunity in all cases,

¹⁶⁴ *Ibid.*, at 610–613.

¹⁶⁵ The finding in *ibid.*, at 613–614 that former diplomats do not possess even the immunity accorded to other former state officials is unconvincing. It is difficult to see why the immunity of the state *ratione materiae* will not apply where the official acting on behalf of the state was a former diplomat. See Fassbender, 'Case Comment', 92 *AJIL* (1998) 74.

deny it in all cases, or can there be justifiable differences between the answers provided in different cases? This article has dealt in particular with criminal prosecutions against officials. The conclusion reached with regard to a lack of immunity *ratione materiae* leads to a different result from that which is reached in most judicial decisions regarding the immunity of the state in proceedings dealing with human rights violations.¹⁶⁶ The question has also been raised as to what the position should be in civil cases brought against individuals.¹⁶⁷ Should civil cases against individuals be deemed to be analogous to civil proceedings against the state on the theory that such actions are an indirect way of suing the state?¹⁶⁸ Or alternatively should the position of individual officials in civil cases be deemed analogous to the position of individual officials in criminal cases? As Justice Breyer of the United States Supreme Court has suggested:

consensus as to universal criminal jurisdiction itself suggests that universal tort jurisdiction would be no more threatening. . . . That is because the criminal courts of many nations combine civil and criminal proceedings, allowing those injured by criminal conduct to be represented, and to recover damages, in the criminal proceeding itself. . . . Thus, universal criminal jurisdiction necessarily contemplates a significant degree of civil tort recovery as well.¹⁶⁹

The approach we take to the removal of immunity *ratione materiae* in criminal cases, when combined with Justice Breyer's views and the assertion that the exercise of criminal jurisdiction over an individual is more coercive than the exercise of civil jurisdiction, may well suggest that in cases where international law confers extraterritorial jurisdiction over international crimes there is no immunity in either criminal or civil proceedings. The result reached on this view would be different from that reached by those who argue for lack of immunity in human rights cases on the ground of a normative hierarchy or alleged lack of official status for human rights violations. This is because our view would lead to the conclusion of a lack of immunity in civil cases only (if at all) in cases where international law rules and practice confer extra-territorial jurisdiction over acts of state officials which are co-extensive with the immunity or cases where the rule conferring jurisdiction contemplates jurisdiction over official conduct. Since the category of norms falling into this category is smaller than the universe of human rights norms, our view would suggest that, when considering the question of immunity from proceedings alleging human rights violations, careful attention needs to be paid to the human rights violation in question and whether it amounts to an international crime over which international law grants extra-territorial jurisdiction.

¹⁶⁶ See the cases cited *supra* in notes 68–71.

¹⁶⁷ For recent discussion of the issue in the US see *Samantar v. Yousuf*, 130 S Ct 2278 (US Sup. Ct. 2010); Bradley and Goldsmith, 'Foreign Sovereign Immunity, Individual Officials and Human Rights Litigation', 13 *Green Bag 2D* (2009) 9; Keitner, 'Officially Immune? A Response to Bradley and Goldsmith', 36 *Yale J Int'l L Online* (2010); Keitner, 'The Common Law of Foreign Official Immunity', 13 *Green Bag 2D* (forthcoming 2010); Stephens, 'The Modern Common Law of Foreign Official Immunity', 79 *Fordham LRev* (forthcoming 2011).

¹⁶⁸ See *Jones v. Saudi Arabia*, *supra* note 52.

¹⁶⁹ *Sosa v. Alvarez Machain*, 542 US 692 (2004) (US Sup. Ct).