

STATE CONSENT AND ‘OFFICIAL ACTS’: CLEARING THE MUDDIED WATERS OF IMMUNITY *RATIONE MATERIAE* FOR INTERNATIONAL CRIMES

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Jurisdictional immunities – and particularly immunity ratione materiae – have stifled the ability of municipal courts to hold individual officials accountable for their actions under international human rights and international criminal law. This has resulted in significant confusion surrounding the status of immunity ratione materiae in cases where international crimes are alleged against State officials, as the very acts that would likely comprise international crimes – ‘official’ State-sanctioned acts – are those which are protected by the immunity. Whilst there is a growing body of judicial decisions, national legislation, international guidance and scholarly commentary on this issue, its complexities remain unresolved. This has led to a period of stasis in the area of international law immunities. This article seeks to contribute to the literature by providing greater clarity on these matters and in particular when an official might be held individually accountable for breaches of international criminal law. It is argued that, premised largely upon State consent, immunity ratione materiae should subside in cases of international crimes. It will be contended that State consent is implied from a combination of widespread ratification of the Rome Statute, State contributions made towards the development of international criminal law, and a global shift towards accountability and justice and away from impunity. As such, a change to the definition of ‘official acts’, which attract functional immunity, is proposed to reflect this. While such arguments may appear counterintuitive to pre-existing notions of State responsibility for certain international wrongs, and the inherent State-sanctioned nature of international crimes, it will be concluded that States and individuals can and should both be equally responsible for the perpetration of such crimes.

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I INTRODUCTION

There has been uncertainty for many years as to how compliance with international law obligations and norms can be ensured in the absence of comprehensive enforcement mechanisms and judicial bodies with broad jurisdiction. Such concerns can be illustrated by the situation of State officials that perpetrate acts so horrific that they are now deemed to be criminalised by the international legal system. Such crimes are rarely prosecuted in the domestic courts of the official in question, as most other crimes are ordinarily. It is often the case that such actions are arguably inherently, State-sanctioned or State-organised. The International Criminal Tribunal for Rwanda (ICTR) and the International Criminal Tribunal for the former Yugoslavia (ICTY) have had some success in holding officials accountable for their crimes, but these are just two confined examples of an international judicial system that in many respects is toothless, with no global agency with the ability to arrest or detain individuals. Relying instead on States parties to the Rome Statute to arrest and extradite any officials issued with an arrest warrant, the International Criminal

Court (ICC) in particular has been subject to significant criticisms regarding its enforcement capability.¹ Indeed, the ICC is unable to hear a case where a domestic court has jurisdiction and the State in question is willing and able to prosecute.² Therefore, much attention has been focused on how the domestic courts of foreign States, rather than the domestic courts of the perpetrator's own State, could aid in enforcing international law and ensuring compliance. Scholars have consistently made the compelling case that foreign domestic courts could be a much more effective tool to hold individuals accountable for breaches of international crimes.³ While it is certainly true that a court foreign to the scene of the crimes could be considered a *forum non conveniens*,⁴ in the absence of international courts that are able to effect arrest and domestic courts that are able and willing to prosecute, foreign domestic courts may well provide the most effective forum within which to ensure that State officials perpetrating international crimes are held accountable. As noted by Hill-Cawthorne:

it is well known that in an order such as international law where there is no universal, compulsory judicial system, domestic courts play an important role not only in enforcement, but also in interpretation and development of particular international legal rules.⁵

¹ See, eg, Irene Marinakis, 'A weak ICC: can the International Criminal Court succeed without U.S. participation?' (2008) 5(1) *Eyes on the International Criminal Court* 125; Gwen P Barnes, 'The International Criminal Court's ineffective enforcement mechanisms: the indictment of President Omar Al Bashir' (2011) 34(6) *Fordham International Law Journal* 1584; Rod Edmunds and Emily Haslam, 'Common Legal Representation at the International Criminal Court: More Symbolic Than Real?' (2012) 12(5) *International Criminal Law Review* 871.

² *Rome Statute of the International Criminal Court*, opened for signature 17 July 1998, 2187 UNTS 90 (entered into force 1 July 2002) ('*Rome Statute*') art 17.

³ Andrea Bianchi, 'Immunity Versus Human Rights: The *Pinochet* Case' (1999) 10 *European Journal of International Law* 237, 250-4; see generally Richard A Falk, *The Role of Domestic Courts in the International Legal Order* (Syracuse University Press, 1964); Benedetto Conforti, *International Law and the Role of Domestic Legal Systems* (Martinus Nijhoff Publishers, 1993); William J Aceves, 'Liberalism and International Legal Scholarship: The *Pinochet* Case and the Move Toward a Universal System of Transnational Law Litigation' (2000) 41(1) *Harvard International Law Journal* 129; Max Du Plessis and Andreas Coutsooudis, 'Serious human rights violations in Zimbabwe: of international crimes, immunities, and the possibility of prosecution' (2005) 21(3) *South African Journal on Human Rights* 337; Anthea Roberts, 'Comparative International Law? The Role of National Courts in Creating and Enforcing International Law' (2011) 60(1) *International and Comparative Law Quarterly* 57; Lorna McGregor, 'State Immunity and Human Rights: Is There a Future after *Germany v Italy*?' (2013) 11 *Journal of International Criminal Justice* 125, 140-4.

⁴ 'Report of the International Law Commission on the Work of its Forty-Third Session (29 April - 19 July 1991)' [1991] II(2) *Yearbook of the International Law Commission* 1, 44 ('1991 ILC Report').

⁵ Lawrence Hill-Cawthorne, *Joint Blog Series: Application of International Humanitarian Law by Domestic Courts* (15 September 2015) EJIL: Talk! <<http://www.ejiltalk.org/application-of-international-humanitarian-law-by-domestic-courts/>>.

Jurisdiction for domestic courts to hear civil or criminal claims arising from alleged international crimes committed by foreign State officials can ordinarily be quite easily established.⁶ Though it is difficult for jurisdiction over foreign State officials to be based on nationality or territoriality, the development of universal jurisdiction for all States over international crimes committed in any territory has addressed this issue. However, State officials often have immunity from foreign domestic courts – and it is immunity, not jurisdiction, that is the focus of this article.

A comparatively modern phenomenon of international law,⁷ absolute State immunity was first entrenched in the United States (US) Supreme Court decision in *Schooner Exchange* in 1812, where Chief Justice Marshall found that, ‘Sovereigns are equal. It is the duty of a sovereign, not to submit his rights to the decision of a co-sovereign. He is the sole arbiter of his own rights.’⁸ The principle that a State and its officers are immune from the jurisdiction of another State has been confirmed by civil and common law cases across the world ever since,⁹ and undoubtedly now forms a well-established rule of custom.¹⁰ However, there have been considerable exceptions carved out of these immunities in recent years, with a shift away from absolute immunity towards a relative or restrictive immunity approach. While States are now subject to suit for commercial transactions and tortious claims on the territory of a foreign

⁶ See, eg, *War Crimes Amendment Act 1989* (Cth); *Military Penal Code 1927* (Switzerland) art 109-14; *Criminal Code*, RSC 1985, c C-46, ss 6(1.91), (1.94), (1.96).

⁷ No mention of State immunities is made in any international law ‘classics’, for example in the prominent writings of Gentili, Grotius, van Bynkershoek or de Vattel: see generally ‘Report of the International Law Commission on the Work of its Thirty-Second Session (5 May – 25 July 1980)’ [1980] II(2) *Yearbook of the International Law Commission* 1, 143 (‘1980 ILC Report’).

⁸ *The Schooner Exchange v McFadden*, 11 US 116, 133 (Marshall CJ) (1812).

⁹ For common law cases, see, eg, *The Prins Frederik Case*, reported in John Dodson, *Reports of Cases argued and determined in the High Court of the Admiralty* (Butterworth, Vol. II, 1828) 451; *Vavasour v Krupp* (1878) 9 Ch D 351; *De Haber v The Queen of Portugal* (1851) 17 QB 196; *The ‘Parlement Belge’ Case* (1880) LR 5 PD 197; *Cristina Case* [1938] UKHL 940. For civil law cases, see, eg, *Blanchet v Gouvernement d’Haiti* (1827) Dalloz 1, 6; *Gouvernement espagnol v Casaux* (1849) Dalloz 1, 9; *Morellet v Governo Danese* (1882) *Giruisprudenza Italiana* 125, 130; see also Prussian decisions in the nineteenth century noted by Eleanor Wyllys Allen, *The Position of Foreign States before German Courts* (Macmillan, 1928) 1-5. For more recent cases, see the Polish decision of *Państwo i Prawo*, Warsaw Decision No. C.635/48 (April 1949) 119, and the Philippines decision of *Larry J. Johnson v Howard M. Turner*, Decision of the Philippines Supreme Court No. L-6118 (26 April 1954) 807. See also P B Carter, ‘Immunity of Foreign Sovereigns from Jurisdiction. Two Recent Decisions’ (1950) 3(1) *The International Law Quarterly* 78.

¹⁰ *Prosecutor v Blaškić (Objection to the Issue of Subpoena Duces Tecum)* (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No IT-95-14-AR-108, 18 July 1997) [38]; 1980 ILC Report, above n 7, 149.

State, officials still largely remain immune for criminal prosecution or civil claims arising in relation to international crimes; especially as States are reluctant to ever waive their officials' immunity before foreign courts.

There are two jurisdictional immunities applicable to foreign domestic cases concerning State officials, both founded in customary international law.¹¹ Immunity *ratione personae* bars any proceedings being brought against current prominent governmental office-holders, notably including heads of State, ambassadors and foreign ministers.¹² However, the focus of this article is on the second type of immunity – *ratione materiae*. Also known as functional immunity, this protection applies to all State officials; with former prominent officials, transitioning from immunity *ratione personae* upon leaving office, and current State officials that do not have the benefit of personal immunity the main beneficiaries. Functional immunity covers 'official acts' performed by State officials in the exercise of their duties. Such sovereign acts form the 'hard core' of State immunity.¹³ The responsibility for these official acts shifts instead to the State, rather than falling upon the individual official.

Determining what constitutes an 'official act' has not been an easy task, but it is only becoming more difficult in a globalised and interdependent world. The development of human rights law and international criminal law in particular demands accountability on the part of current and former State officials. Simultaneously the definition of 'official acts' would appear to include many actions falling foul of these areas of international law. The result of such intersecting developments is a paradox with no clear answer: do State officials have immunity *ratione materiae* for international crimes they perpetrated during their time in office? In a more specific sense, are international crimes 'official acts' attributable only to the State, rather than the individual? This is not a purely academic question. Since the end of the Cold War, in a period of

¹¹ These immunities are also partially sourced in treaties: see n 74, below.

¹² For a more in-depth analysis of immunity *ratione personae*, see Cour de cassation [French Court of Cassation], 00-87215, 13 March 2001 reported in (2001) Bull crim n° 64, 218; Salvatore Zappalà, 'Do Heads of State in Office Enjoy Immunity from Jurisdiction for International Crimes? The Ghaddafi Case before the French Cour de Cassation' (2001) 12(3) *European Journal of International Law* 595; Micaela Frulli, 'The Question of Charles Taylor's Immunity: Still in Search of a Balanced Application of Personal Immunities?' (2004) 2(4) *Journal of International Criminal Justice* 1118; Sarah Williams and Lena Sherif, 'The Arrest Warrant for President al-Bashir: Immunities of Incumbent Heads of State and the International Criminal Court' (2009) 14(1) *Journal of Conflict & Security Law* 71; Anna Hood and Monique Cormier, 'Prosecuting International Crimes in Australia: The Case of the Sri Lankan President' (2012) 13 *Melbourne Journal of International Law* 235.

¹³ 1991 *ILC Report*, above n 4, 23.

tangible and important development in international criminal law, there has been a proliferation of cases where immunities have been claimed for acts comprising international crimes.¹⁴

Despite the involvement of various courts, tribunals, governments and scholars in recent years, this question remains unresolved. The International Law Commission noted as early as 1980 that, in regards to disagreement over jurisdictional immunities, 'there is markedly a growing concern apparent in the writings of contemporary publicists and in...recent provisions of treaties and international conventions'.¹⁵ In particular, the various academic responses to two recent International Court of Justice (ICJ) decisions and to numerous domestic cases have muddied the waters of what was already a complex issue with voluminous scholarly discourse.¹⁶ In light of such conflicting views, legal development in the area of immunities has stagnated in recent years.¹⁷ This article seeks to contribute to the literature that aims to resolve this stasis.

Following the introduction in Part I, this article will proceed in three parts. Part II will comprehensively survey the current state of the law and academic debate concerning immunity *ratione materiae* in foreign domestic cases for acts that comprise international crimes, seeking to ascertain points of agreement

¹⁴ See, eg, *Former Syrian Ambassador to the German Democratic Republic*, Bundesverfassungsgericht [Federal Constitutional Court of Germany], 2 BvR 1516/96, 10 June 1997 reported in (1997) 96 BverfGE 68; *Bouterse*, Decision of the Court of Appeal of Amsterdam No. R 97/176/12 Sv (20 November 2000); *Gaddafi* (2000) 125 ILR 490 (Court of Appeal of Paris); *Gaddafi* (2001) 125 ILR 508 (French Court of Cassation); *Sharon and Yaron* (2002) 127 ILR 110 (Court of Appeal of Brussels); *A v Office of the Public Prosecutor of the Confederation (Nezzar Case)*, Decision of the Federal Criminal Court of Switzerland No. BB.2011.140 (25 July 2012).

¹⁵ 1980 ILC Report, above n 7, 143.

¹⁶ See, eg, Curtis A Bradley and Jack L Goldsmith, 'Pinochet and International Human Rights Litigation' (1999) 97 *Michigan Law Review* 2129; Jan Wouters, 'The Judgment of the International Court of Justice in the *Arrest Warrant* Case: Some Critical Remarks' (2003) 16 *Leiden Journal of International Law* 253; Dapo Akande, 'International Law Immunities and the International Criminal Court' (2004) 98(3) *American Journal of International Law* 407; David S. Koller, 'Paragraph 61 of the *Yerodia* Judgment as it Pertains to the Security Council and the International Criminal Court' (2004) 20 *American University International Law Review* 7; Pasquale De Sena and Francesca De Vittor, 'State Immunity and Human Rights: The Italian Supreme Court Decision on the *Ferrini* Case' (2005) 16(1) *European Journal of International Law* 89; Annalisa Ciampi, 'The Italian Court of Cassation Asserts Civil Jurisdiction over Germany in a Criminal Case Relating to the Second World War: The *Civitella* Case' (2009) 7 *Journal of International Criminal Justice* 597; Curtis A Bradley and Laurence R Helfer, 'International Law and the U.S. Common Law of Foreign Official Immunity' (2010) 1 *The Supreme Court Review* 213; Ingrid Wuerth, 'International Law in Domestic Courts and the *Jurisdictional Immunities of the State* Case' (2012) 13 *Melbourne Journal of International Law* 1.

¹⁷ Heike Krieger, 'Between Evolution and Stagnation – Immunities in a Globalized World' (2014) 6(2) *Gottingen Journal of International Law* 177, 178.

and disagreement in order to determine how best to proceed. In this Part it will be argued that the only fundamental point of agreement is that the scope of functional immunity is dependent upon the definition of 'official act'. Part III will then consider the *lex ferenda* – where the law should sit. This Part will rely on widespread ratification of the Rome Statute and the contemporary development of international criminal law to argue that States have impliedly consented to shifts towards accountability and justice and away from impunity; which thereby requires that immunity *ratione materiae* subside in foreign domestic cases where international crimes are alleged. While this implied consent could be considered as already constituting *lex lata*, it will be clear from the findings in Part II that this is not currently the case; and hence this must instead form the *lex ferenda*.

Part IV will then look towards how to achieve this goal; arguing that the definition of 'official acts', the widely-agreed yardstick by which functional immunity is judged, should be clearly altered to exclude international crimes. It will be argued that this modified definition is best realised in practice through soft law developments internationally and stronger implementation domestically, such as codification in domestic legislation and application in future domestic trials. Such approaches will thereby reflect implied State consent already in existence, and in turn lead to increasing *opinio juris*, and therefore custom, in this area.

While there is undoubtedly significant overlap between international crimes and serious human rights breaches, this article focuses on the hearing of international crimes in foreign domestic courts, and does not purport to explicitly apply the ideas set out to human rights law. An abundance of scholarly work,¹⁸ including the 2015 Oxford Global Justice Lecture,¹⁹ has already been dedicated to this task. International criminal law, the international

¹⁸ See, eg, Katherine Reece Thomas and Joan Small, 'Human Rights and State Immunity: Is there Immunity from Civil Liability for Torture?' (2003) 50 *Netherlands International Law Review* 1; Du Plessis and Coutsoudis, above n 3; Ed Bates, 'State Immunity for Torture' (2007) 7(4) *Human Rights Law Review* 651; Chacha Bhoke Murugnu, 'Judgment in the First Case Before the African Court on Human and Peoples' Rights: A Missed Opportunity or Mockery of International Law in Africa?' (2010) 3(1) *Journal of African and International Law* 187; Beth Stephens, 'The Modern Common Law of Foreign Official Immunity' (2011) 79 *Fordham Law Review* 2669.

¹⁹ Mary Guest, *Announcements: Conference, IHL & Modern Warfare; Oxford Global Justice Lecture; Gandhi Research Seminar Series; Chatham House Event* (10 October 2015) EJIL: Talk! <<http://www.ejiltalk.org/announcements-conference-ihl-oxford-global-justice-lecture/>>.

legal system's most concerted attempt at ensuring individual accountability and justice, is the primary focus.

II IMMUNITY *RATIONE MATERIAE* AND INTERNATIONAL CRIMES

For the purposes of this Part, international crimes are defined as any acts that would constitute genocide, war crimes, crimes against humanity or aggression under the Rome Statute;²⁰ torture under the Convention against Torture;²¹ or the oft-noted, and indeed original, international crimes of piracy or slavery.²² Though the international crime of aggression will likely not be justiciable before the ICC until 2017, it appears inappropriate to exclude this for solely temporal reasons. Considering both civil remedies and criminal prosecutions can complementarily condemn past conduct and deter future crimes,²³ it is also appropriate to consider both types of actions in this article. Indeed, Frulli argues that in most civil law countries, owing to adhesion procedures, decisions on immunity cannot practically be separated into civil and criminal matters.²⁴ As noted by van Alebeek, an act is either an 'official act' subject to the protection of functional immunity or it is not; 'the nature of the proceedings in which accountability for this act is sought cannot possibly affect that characterization.'²⁵ Both civil and criminal claims will therefore be considered together throughout this article. However, claims against individual State officials, not States themselves,²⁶ remain the focus.

²⁰ *Rome Statute*, above n 2, art 5, 6, 7, 8.

²¹ *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, opened for signature 10 December 1984, 1465 UNTS 85 (entered into force 26 June 1987).

²² It should be noted that enforced disappearance could also be considered as an international crime – but as only 51 States have ratified the relevant convention, this is not included as an international crime for the purposes of the argument outlined in this article: see *International Convention for the Protection of All Persons from Enforced Disappearance*, opened for signature 6 February 2007, 2716 UNTS 3 (entered into force 23 December 2010).

²³ Donald Francis Donovan and Anthea Roberts, 'The Emerging Recognition of Universal Civil Jurisdiction' (2006) 100 *American Journal of International Law* 142, 154.

²⁴ Micaela Frulli, 'Some Reflections on the Functional Immunity of State Officials' (2009) 19 *Italian Yearbook of International Law* 91.

²⁵ Rosanne van Alebeek, 'National Courts, International Crimes and the Functional Immunity of State Officials' (2012) 59(1) *Netherlands International Law Review* 5, 20.

²⁶ For claims against States, see generally Jane Wright, 'Retribution But No Recompense: A Critique of the Torturer's Immunity From Civil Suit' (2010) 30 *Oxford Journal of Legal Studies* 143.

The current practice surrounding functional immunity can be ascertained from five key sources:

1. cases from international courts;
2. cases from domestic courts;
3. State practice in the form of domestic legislation;
4. international guidance provided by conventions and draft resolutions; and
5. the writings of highly qualified publicists.

Through examining these sources, it will be concluded that no single view can represent the *lex lata* on immunity *ratione materiae*; considering the lack of consensus towards any particular approach, the voluminous number and complex nature of the arguments posited, and the muddied waters that this issue currently sits in as a result. However, conclusions will be drawn as to fundamental points of agreement and disagreement, which will aid in determining the *lex ferenda* on functional immunity in Part III.

A *International cases*

Three seminal international cases have shaped the discourse on State immunity in cases of international crimes: *Prosecutor v Blaškić*, *Arrest Warrant* and *Germany v Italy*. The ICTY famously held in *Blaškić* that, while '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', acts comprising international crimes are not protected by such functional immunity.²⁷ However, two ICJ cases, though not explicitly concerning the issue of immunity *ratione materiae*, appear to contradict this view. In the 2002 *Arrest Warrant* case, the ICJ created uproar by noting in *obiter* that former foreign ministers could only be tried in foreign domestic courts for acts committed during their time in office 'in a private capacity';²⁸ international crimes would rarely, if ever, be committed in such a capacity.²⁹ In contrast, the Joint Separate Opinion of

²⁷ *Prosecutor v Blaškić (Judgment on the Request for the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997)* (International Criminal Tribunal for the former Yugoslavia, Appeals Chamber, Case No IT-95-14-AR108, 29 October 1997) [38], [41].

²⁸ *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium) (Judgment)* [2002] ICJ Rep 3, [61].

²⁹ See generally Antonio Cassese, 'When May Senior State Officials Be Tried for International Crimes? Some Comments on the *Congo v Belgium* Case' (2002) 13(4) *European Journal of International Law*

Judges Higgins, Kooijmans and Buergenthal argued that, ‘serious international crimes cannot be regarded as official acts because they are neither normal State functions nor functions that a State alone can perform’.³⁰

In *Germany v Italy* in 2012, the ICJ rejected the submission that State immunity subsides where allegations of international crimes are grave, or where *jus cogens* norms are breached.³¹ However, this case concerned State immunity rather than the immunity of individuals, with the ICJ noting that ‘the question of whether, and if so to what extent, immunity might apply in criminal proceedings against an official of the State is not in issue in the present case’.³² While this preserves existing domestic case law on the question of criminal proceedings, it has been stated that this *obiter dictum* may imply, by reference only to ‘criminal’ proceedings, that the ICJ decision should extend to civil proceedings concerning individuals, thereby maintaining immunity in such circumstances.³³ The ICJ also noted that there is no conflict between State immunity and *jus cogens* norms prohibiting international crimes; though provided little justification for this reasoning.³⁴

While these three decisions have resulted in a proliferation of scholarly discourse, there has clearly been no determination as to whether international crimes remain protected by functional immunity in foreign domestic cases; though the ICJ clearly appears reluctant to declare that the immunity should subside.

853, 868; Steffen Wirth, ‘Immunity for Core Crimes? The ICJ’s Judgment in the *Congo v Belgium* Case’ (2002) 13(4) *European Journal of International Law* 877; Mark A. Summers, ‘Immunity or Impunity? The Potential Effect of Prosecutions of State Officials for Core International Crimes in States Like the United States That Are Not Parties to the Statute of the International Criminal Court’ (2005) 31(2) *Brooklyn Journal of International Law* 463.

³⁰ *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium) (Judgment)* [2002] ICJ Rep 3, [85] (Judges Higgins, Kooijmans and Buergenthal).

³¹ *Jurisdictional Immunities of the State (Germany v Italy; Greece Intervening) (Judgment)* [2012] ICJ Rep 99.

³² *Ibid* [91].

³³ See McGregor, above n 3, 138-9; see also *ibid* [87].

³⁴ *Jurisdictional Immunities of the State (Germany v Italy; Greece Intervening) (Judgment)* [2012] ICJ Rep 99, [93].

B *Domestic cases*

A vast amount of domestic case law has considered whether acts comprising international crimes are protected by immunity *ratione materiae*. The pre-eminent judgment on this question came from the *Eichmann* case in 1962, where the Israeli Supreme Court convicted a former Gestapo leader for war crimes, genocide and crimes against humanity:

Acts prohibited by the law of nations, especially when they are international crimes...are completely outside the "sovereign" jurisdiction of the State that ordered or ratified their commission, and therefore those who participated in such acts must personally account for them and cannot shelter behind the official character of their task or mission.³⁵

Though establishing a clear and resolute finding in that case, municipal case law has since been incredibly divergent when considering this question. In the prominent *Pinochet* case, the United Kingdom (UK) House of Lords held that the former Chilean President was not functionally immune from criminal prosecution for acts of torture because the Convention against Torture imposed an obligation on State parties to prosecute acts of torture.³⁶ However, this judgment did not conclude that other international crimes will also be justiciable, since five of the seven Lords actually concluded that Pinochet's acts of torture were 'official acts', and there were conflicting views on why the immunity should subside. The greatest consensus came from Lords Browne-Wilkinson, Saville and Millett, who found that the Convention against Torture was the decisive factor in precluding immunity; as to allow immunity would be to deprive the Convention of virtually all meaning.³⁷ Despite differences in reasoning, the *Prince Nasser* case of 2014 in the UK came to the same conclusion via a consent order,³⁸ while Belgian and Dutch cases have also held that torture cannot be within the official functions of a head of State, as one of their tasks is to ensure the protection of their citizens.³⁹

³⁵ *Attorney-General of Israel v Adolf Eichmann* (1962) 36 ILR 277 (Israel Supreme Court) 309.

³⁶ *Regina v Bow Street Metropolitan Stipendiary Magistrate ex parte Pinochet Ugarte (No. 3)* [2000] 1 AC 147; see also Bates, above n 18.

³⁷ See generally *Regina v Bow Street Metropolitan Stipendiary Magistrate ex parte Pinochet Ugarte (No. 3)* [2000] 1 AC 147, 169-70 (Lord Saville).

³⁸ *FF v Director of Public Prosecutions (Prince Nasser Case)* [2014] EWHC 3419 (Admin).

³⁹ *Pinochet*, Examining Magistrate of Brussels, Order of 6 November 1998; *Bouterse*, Decision of the Court of Appeal of Amsterdam No. R 97/176/12 Sv (20 November 2000).

The prosecution of other international crimes, however, have encountered great confusion in determining whether individuals are protected by immunity *ratione materiae* in foreign domestic cases. Many cases have retained functional immunity for such acts. A US District Court ruled in 1988 that officials involved in the planning and execution of a bombing in Libya acted in their official capacities and on orders given by their Commander-in-Chief, and therefore were immune from prosecution.⁴⁰ German, American, British, French and Italian courts have noted at various times that the exercising of police power, military authority and/or the administration of justice, even if exercised improperly, constitute sovereign acts that are protected by functional immunity.⁴¹ In *Greek Citizens*, the German Supreme Court found that international crimes violating *jus cogens* norms and committed by military forces were still 'official acts',⁴² while the Greek Special Supreme Court has held that international crimes committed by foreign armed forces remain protected by immunity.⁴³ Such jurisprudence appears to be premised on a strict textual reading of 'official acts'. Judicial officers in civil law nations, notably in France, Germany and Italy, have also come to this conclusion by focusing on a dualist approach to find that there is no international crimes exception to functional immunity in domestic codes or statutes.⁴⁴

However, in many other cases the opposite conclusion has been reached. American courts have held that political assassinations and drug trafficking cannot be considered 'official acts'.⁴⁵ Arguments as to the normative hierarchy of *jus cogens* norms prohibiting international crimes were made in recent

⁴⁰ *Saltany v Reagan et al.*, 886 F 2d 438 (1989).

⁴¹ See generally International Law Commission, *Fourth Report on the Immunity of State Officials From Foreign Criminal Jurisdiction*, 67th sess, UN Doc A/CN.4/686 (29 May 2015) 22-3 ('2015 ILC Report'); see, eg, *Empire of Iran* (1963) 45 ILR 57 (German Federal Constitutional Court); *Victory v Comisaria*, 336 F 2d 354 (1964); *Church of Scientology* (1978) 65 ILR 193 (Federal Supreme Court of Germany); *Saudi Arabia v Nelson* (1993) 100 ILR 544 (United States Supreme Court); *Propend Finance Pty Ltd v Sing* (1997) 111 ILR 611 (United Kingdom Court of Appeal); *Doe I v Israel*, 400 F. Supp. 2d 86, 106 (2005); *Lozano v Italy* [2008] ILDC 1085 (Court of Cassation).

⁴² *Greek Citizens v Federal Republic of Germany (The Distomo Massacre Case)* (2003) 42 ILM 1030 (German Supreme Court), 1033.

⁴³ *Federal Republic of Germany v Miltiadis Margellos*, Decision of the Greek Special Supreme Court No. 6/17-9-2002 (2002); see also *Prinz v Federal Republic of Germany*, 26 F 3d, 1166 (DC Cir, 1994).

⁴⁴ See generally Lorna McGregor, 'State Immunity and *Jus Cogens*' (2006) 55 *International and Comparative Law Quarterly* 437; *Bouzari v Islamic Republic of Iran* (2004) 71 OR (3d) 675 (Court of Appeal of Ontario); *Al-Adsani v Government of Kuwait* (1996) 107 ILR 536 (United Kingdom Court of Appeal).

⁴⁵ *Letelier v Chile*, 784 F 2d 790 (2nd Cir, 1984); *Jimenez v Aristeguieta*, 311 F 2d 547 (5th Cir, 1962).

Italian and Canadian cases,⁴⁶ where it was found that these acts could not be made under sovereign authority. The Swiss Federal Criminal Court in *Nezzar* also made the normative and moral argument that, 'it would be difficult to admit that conduct contrary to fundamental values of the international legal order can be protected by rules of that very same legal order'.⁴⁷ Various American, French, Dutch, Polish, Spanish, Israeli and Mexican cases have similarly come to the conclusion that international crimes are not 'official acts', though on differing grounds.⁴⁸

Clearly, therefore, there still remains a significant dichotomy in domestic jurisprudence on this issue: between those judicial officers on the one hand who consider international crimes as acts outlawed by States that cannot be protected by State immunity; and others who focus on the State-sanctioned nature of international crimes to find that such crimes must be exercised in an official capacity, and therefore immune from prosecution.

There are, however, some common threads to be identified and therefore consistencies to be found. Immunity *ratione materiae* has ordinarily been upheld for *civil* claims concerning acts that comprise international crimes or serious domestic crimes.⁴⁹ Only six years following *Pinochet*, the House of Lords held in a civil action that alleged acts of torture committed by a group of Saudi Arabian citizens were protected by immunity *ratione materiae*, as they were acting as agents of Saudi Arabia.⁵⁰ Despite this relative uniformity in maintaining functional immunity in civil cases, no consistent pattern has been applied by the various municipal courts in justifying this conclusion – with significantly differing legal approaches being taken and reasoning applied.⁵¹

⁴⁶ *Bouzari v Islamic Republic of Iran* (2004) 71 OR (3d) 675 (Court of Appeal of Ontario); *Ferrini v Federal Republic of Germany* (2004) 128 ILR 658 (Court of Appeal of Florence).

⁴⁷ *A v Office of the Public Prosecutor of the Confederation (Nezzar Case)*, Decision of the Federal Criminal Court of Switzerland No. BB.2011.140 (25 July 2012).

⁴⁸ See Cassese, above n 29, 870-1; Hood and Cormier, above n 12, 258.

⁴⁹ See, eg, *Republic of the Philippines v Marcos and others*, 806 F 2d 344 (2nd Cir, 1986); *Herbage v Meese*, 747 F. Supp. 60 (1990); *Jaffe v Miller and Others* (1993) 95 ILR 446 (Court of Appeal for Ontario); *McElhinney v Williams* (1995) 104 ILR 691 (Ireland Supreme Court); *Prefecture of Voiotia v Federal Republic of Germany* (1997) 129 ILR 513 (Court of First Instance of Livadia (Greece)); *Ferrini v Federal Republic of Germany* (2004) 128 ILR 658 (Court of Appeal of Florence); *Ali Saadallah Belhas et al. v Moshe Ya'alon*, 466 F Supp 2d 127 (DDC, 2006).

⁵⁰ This decision was recently upheld, albeit subject to a warning that this matter must be kept under constant review, by the European Court of Human Rights: see *Jones v Ministry of Interior of the Kingdom of Saudi Arabia* [2006] UKHL 26, especially [11], [13]; *Jones and Others v United Kingdom* (2014) 53 ILM 540 (European Court of Human Rights).

⁵¹ 2015 *ILC Report*, above n 41, 20.

This is the case for both civil and criminal judgments. The various decisions surveyed pre-suppose, *inter alia*, the inability to derogate from *jus cogens* norms, the normative hierarchy theory, the inherent governmental nature of international crimes, and whether acts can adequately be attributed to States rather than individuals,⁵² as differing justifications for deciding whether functional immunity should remain for international crimes.

Thus it is clear that the question of whether immunity *ratione materiae* subsides in foreign domestic cases where international crimes are alleged, and any subsequent reasoning applied, remains far from settled; this is the situation even in the civil sphere, considering the earlier argument that this should be determined together with criminal cases. The focus in domestic case law remains, however, on what constitutes an ‘official act’.

C State practice

Though rarely referenced in the case law surveyed above, prominent national legislation concerning State immunity can aid in ascertaining State practice surrounding this issue. The US, UK, Australia, Canada, France and Belgium are considered below, as they represent a broad cross-section of common and civil law traditions. In order to ensure a wider basis for conclusions made, Argentina, South Africa, Singapore, Malaysia, Japan, Pakistan, India and Israel – each representing other important regions – are also surveyed.

The US *Foreign Sovereign Immunities Act* notes that foreign State officials are not immune from the jurisdiction of American courts in cases concerning personal injury, death or damage caused by the tortious act or omission of an official in the US ‘while acting within the scope of his office or employment’.⁵³ While a recent US Supreme Court decision surprisingly found that this Act does not apply to functional immunity,⁵⁴ the 1996 *Antiterrorism and Effective Death Penalty Act* explicitly removes the immunity when allegations are made that the official has committed acts of torture, extrajudicial killing, aircraft

⁵² See, eg. *Church of Scientology* (1978) 65 ILR 193 (Federal Supreme Court of Germany); *Schmidt v Home Secretary of the Government of the United Kingdom* [1997] 2 IR 121 (Ireland Supreme Court); *Agent judiciaire du trésor v Malta Maritie Authority et Carmel X*, Decision of the French Cour de Cassation No. 04-84265 (23 November 2004); *Association des familles des victimes du Joola*, Decision of the French Cour de Cassation No. 09-84818 (19 January 2010).

⁵³ *Foreign Sovereign Immunities Act of 1976*, 28 USC § 1605(a)(5).

⁵⁴ *Samantar v Yousof*, 130 S Ct 2278 (2010).

sabotage or hostage-taking.⁵⁵ The *Torture Victim Protection Act* provides corresponding jurisdiction in civil matters,⁵⁶ while the *Alien Tort Claims Act* also allows foreign nationals to bring civil actions for torts committed abroad in violation of international law.⁵⁷ Similarly, the Australian *Foreign State Immunities Act* provides immunity from Australian jurisdiction to foreign nationals acting as 'an agency or instrumentality of the foreign State'; but also excludes tortious claims for acts or omissions occurring on Australian territory.⁵⁸ The UK and Canada provide near-identical protection for any person exercising 'sovereign authority' or acting as 'agents of the state', respectively; also excluding tortious claims arising in their territory.⁵⁹ Canada goes further, though, by removing the immunity where the proceedings relate to the support of terrorism.⁶⁰ However, the exceptions to immunity *ratione materiae* only explicitly apply to civil cases in Canada.⁶¹ Nothing in these Acts refers to international crimes.

Though the French and Belgian civil codes *prima facie* remove immunities for a foreign national,⁶² jurisprudence has significantly limited these provisions and resulted largely in the non-exercise of jurisdiction *in praxis* over acts of sovereign authority.⁶³ Argentina remains the only civil law jurisdiction that has adopted a specific statute on State immunity, and this largely reflects the common law legislation already examined; with immunity provided for State officials except where they are sued for damages resulting from acts occurring in Argentina.⁶⁴ South African legislation provides that any person exercising the 'sovereign authority' of a foreign State is immune from jurisdiction; but excludes tortious claims arising in South Africa.⁶⁵ Singaporean law reflects the same provisions and exclusions,⁶⁶ as does Malaysian law.⁶⁷ Similar to Canada, Japan grants civil immunity, but not criminal, to foreign State representatives

⁵⁵ *Antiterrorism and Effective Death Penalty Act of 1996*, 8 USC § 1101.

⁵⁶ *Torture Victim Protection Act of 1991*, 28 USC § 1350.

⁵⁷ *Alien Tort Claims Act of 1994*, 28 USC § 1350.

⁵⁸ *Foreign State Immunities Act 1985* (Cth) ss 3, 9, 13, 22.

⁵⁹ *State Immunity Act 1978* (UK) ss 1, 5, 14; *State Immunity Act*, RSC 1985, c S-18, ss 2, 3.

⁶⁰ *State Immunity Act*, RSC 1985, c S-18, ss 2.1, 6.1.

⁶¹ *Ibid* s 18.

⁶² *Code civil* [Civil Code] (France) art 14; *Code civil* [Civil Code] (Belgium) art 52, 54.

⁶³ *1980 ILC Report*, above n 7, 153.

⁶⁴ *Law 24488 of May 31, 1995* (Argentina) art 1, 2(e).

⁶⁵ *Foreign State Immunities Act 1981* (South Africa) ss 1, 6, 15.

⁶⁶ *State Immunity Act 1979* (Singapore, cap 313) ss 3, 7 16(2).

⁶⁷ See *Immunities and Privileges Act 1984* (Malaysia).

acting in their official functions;⁶⁸ provisions that are also in place in Israel.⁶⁹ Pakistan's ordinance stipulates that former government officials would only be immune from acts that exercise 'sovereign authority'.⁷⁰ In contrast to other legislation examined, India's Code of Civil Procedure requires that the central government give authority before any suit against foreign officials be brought;⁷¹ perhaps reflecting the importance of diplomatic relations to the Indian government.

While the tortious exception could clearly therefore apply to exclude immunity *ratione materiae* for some international crimes, this would be limited to acts committed in the territory of the court hearing the claim, and only for civil claims. While the legislation surveyed largely allows civil claims over commercial transactions and/or contracts of employment,⁷² these would rarely apply in the context of acts comprising international crimes. Canada, Japan and Israel purport to exclude criminal proceedings from immunity, but nothing in any of the common law Acts or civil law codes examined explicitly allows criminal proceedings to be brought against foreign State officials. It has also been suggested that State officials would remain immune from tortious claims occurring in a foreign State if they were across the border of that country due to the spill-over of an armed conflict.⁷³ Such practice suggests that, despite significant differences in legal systems, geography and political and social circumstances across the examined States, a wide range of legislatures and executive governments have failed to codify attempts to adequately bring international criminals to justice, whether in the civil or criminal sphere. Pertinently, the underlying and resounding feature of this State practice is that immunity for foreign State officials, whether current or former, will be removed for acts that are not 'official' or made under 'sovereign authority'. However, the acts and codes examined provide no guidance on the scope of these terms, nor whether international crimes would fit their definition.

⁶⁸ *Act on the Civil Jurisdiction of Japan over Foreign States 2009* (Japan) art 2, 4, 10.

⁶⁹ *Foreign States Immunity Law 2009* (Israel) ss 1, 2, 5.

⁷⁰ *State Immunity Ordinance 1981* (Pakistan) s 15(2).

⁷¹ *The Code of Civil Procedure 1908* (India) s 87.

⁷² *Foreign Sovereign Immunities Act of 1976*, 28 USC § 1602; *State Immunity Act 1979* (Singapore, cap 313) ss 5, 6; *State Immunity Ordinance 1981* (Pakistan) ss 5, 6; *Foreign State Immunities Act 1981* (South Africa) ss 4, 5; *State Immunity Act*, RSC 1985, c S-18, s 5; *Foreign State Immunities Act 1985* (Cth) ss 11, 12; *Law 24488 of May 31, 1995* (Argentina) art 2(c), (d); *Foreign States Immunity Law 2009* (Israel) ss 3, 4; *Act on the Civil Jurisdiction of Japan over Foreign States 2009* (Japan) art 8, 9.

⁷³ 1991 *ILC Report*, above n 4, 45.

D *International legal guidance*

International legal guidance has not assisted in ascertaining such definitions. In contrast to immunity *ratione personae*,⁷⁴ no international conventions or regimes govern immunity *ratione materiae* at any widespread level. Limited guidance comes, however, from several important international legal documents and resolutions. Firstly, the International Law Commission composed Draft Articles on Jurisdictional Immunities of States and Their Property in 1991.⁷⁵ Noted exceptions to the immunity unsurprisingly include commercial transactions, contracts of employment, and personal injury claims in the territory of the foreign State;⁷⁶ but no specific mention is made of international crimes. The Draft Articles instead note in general terms that there are 'innate qualifications and limitations' to immunities.⁷⁷ The codification of the draft articles – the 2004 UN Convention on Jurisdictional Immunities – has only been ratified by 19 States, and largely reflects the State practice noted above: any individuals entitled to perform acts in exercise of the sovereign authority of the State and actually acting within 'sovereign authority' are immune from the jurisdiction of foreign domestic courts.⁷⁸ The European Convention on State Immunity, only ratified by eight States in 43 years, also maintains immunity for 'the exercise of sovereign authority'.⁷⁹

More helpfully, the 1961 Vienna Convention on Diplomatic Relations provides that a former diplomat maintains functional immunity 'with respect to acts performed...in the exercise of his functions as a member of the [diplomatic] mission'.⁸⁰ Such functions explicitly include protecting the interests of the home State 'within the limits permitted by international law'

⁷⁴ See, eg, *Vienna Convention on Diplomatic Relations*, opened for signature 18 April 1961, 500 UNTS 95 (entered into force 24 April 1964); *Vienna Convention on Consular Relations*, opened for signature 24 April 1963, 596 UNTS 261 (entered into force 19 March 1967); *Convention on Special Missions*, opened for signature 8 December 1969, 1400 UNTS 231 (entered into force 21 June 1985).

⁷⁵ See *1991 ILC Report*, above n 4, 13-62.

⁷⁶ *Ibid* 33-46 (articles 10, 11 and 12, respectively).

⁷⁷ *Ibid* 23.

⁷⁸ Declarations made by the ratifying States have also limited the breadth of this treaty in regards to criminal proceedings and military officials: see *United Nations Convention on Jurisdictional Immunities of States and Their Property*, opened for signature 17 January 2005, 44 ILM 803 (not yet in force) art 1(b)(ii), 1(b)(iii), 1(b)(iv), 5, Annex.

⁷⁹ *European Convention on State Immunity*, opened for signature 16 May 1972, CETS No 74 (entered into force 11 June 1976) art 24(1).

⁸⁰ *Vienna Convention on Diplomatic Relations*, opened for signature 18 April 1961, 500 UNTS 95 (entered into force 24 April 1964) art 39(2).

and ‘ascertaining by all lawful means conditions and developments in the receiving state’, in addition to representing the sending State, negotiating with the receiving State, and promoting friendly relations between the sending and receiving State.⁸¹ This may well exclude international crimes from immunity *ratione materiae* for former diplomats, since such acts would not be within the limits permitted by international law, and would not contribute toward negotiation, representation or promoting friendly relations; though whether this extends to other State officials is questionable.

However, these conventions all came before the rapid post-Cold War development of international criminal law. Therefore, they provide no direct guidance on how immunity *ratione materiae* may operate when international crimes are alleged in foreign domestic courts; though they suggest that, consistent with domestic case law and national legislation, this must be answered by reference to whether international crimes are considered ‘official acts’, and that implied exclusions to functional immunity are permissible. Of more direct relevance is the 2009 Institut De Droit International draft resolution on State immunity in cases of international crimes, which provides that immunity *ratione materiae* does not apply in domestic cases where international crimes are alleged.⁸² The 2011 Report of the Dutch Advisory Committee on Issues of Public International Law agreed with the finding that international crimes are not protected by immunity *ratione materiae*.⁸³ This may reflect growing international trends towards this view.

E *Scholarly writings*

The International Law Commission notes that State immunity was ‘widely upheld in the writings of publicists of the nineteenth century, almost without reservation or qualification of any description’.⁸⁴ However, scholars have since increasingly supported qualifications and exceptions to immunity, with

⁸¹ Ibid art 3.

⁸² Institut de Droit International, *Resolution on the Immunity from Jurisdiction of the State and of Persons Who Act on Behalf of the State in Cases of International Crimes*, 3rd comm., Naples session, (2009) <http://www.justitiaetpace.org/idiE/resolutionsE/2009_naples_01_en.pdf>, art III(1).

⁸³ Netherlands Advisory Committee on Issues of Public International Law, *Advisory Report on the Immunity of Foreign State Officials*, Advisory Report No. 20 (May 2011) <http://cms.webbeat.net/ContentSuite/upload/cav/doc/cavv-report-nr-20-immunity_foreign_officials.pdf>, 26.

⁸⁴ 1980 ILC Report, above n 7, 154-5.

growing academic trends towards removing the immunity for international crimes.

1 *Supporting the maintenance of immunity*

Some scholars believe that immunity *ratione materiae* must remain for international crimes. Fox and Webb argue that if functional immunity subsided in such instances, this would expose a State's entire internal administration to review by foreign domestic courts; thereby focusing on sovereign equality and non-intervention as the principles grounding State immunity.⁸⁵ They also contend that foreign domestic courts prosecuting international crimes would impede diplomatic communication and relations between States,⁸⁶ and that the question must come down to a strict reading of 'official acts', which would include State-sanctioned international crimes.⁸⁷ Wickremasinghe also appears to imply that immunity *ratione materiae* would remain for most international crimes, in order to facilitate communication and cooperation between States.⁸⁸

Others have argued that international crimes are inherently 'official acts' that rely on the authority and resources of the State to perpetrate, and therefore must remain protected by functional immunity.⁸⁹ Barker comes to the same conclusion, arguing that if international crimes are excluded from the definition of 'official acts', this will necessitate their exclusion from acts that States are internationally responsible for.⁹⁰ Hence, the focus of those supporting the maintenance of the immunity appears to be on the underlying rationale for the creation of State immunity centuries ago, a strict legalistic reading of 'official acts', or the practical implications for States when the immunity is removed.

⁸⁵ Hazel Fox and Philippa Webb, *The Law of State Immunity* (Oxford University Press, 3rd ed, 2013) 553-4.

⁸⁶ *Ibid* 553.

⁸⁷ *Ibid* 554.

⁸⁸ Chanaka Wickremasinghe, 'Immunities Enjoyed by Officials of States and International Organizations' in Malcolm D Evans (ed), *International Law* (Oxford University Press, 4th ed, 2014) 379, 408.

⁸⁹ See, eg, Marina Spinedi, 'State Responsibility v Individual Responsibility for International Crimes: *Tertium Non Datur?*' (2002) 13(4) *European Journal of International Law* 895.

⁹⁰ J. Craig Barker, 'The Future of Former Head of State Immunity After Ex Parte Pinochet' (1999) 48 *International and Comparative Law Quarterly* 937, 943.

2 Supporting the removal of immunity

More support has been given to the view that functional immunity should subside for international crimes. The most oft-cited scholarly argument in support of this conclusion is that international crimes cannot be regarded as sovereign or official acts, as they largely constitute violations of *jus cogens* norms. Adams posits that breaches of peremptory norms cannot be sovereign acts,⁹¹ while Bianchi notes that international law cannot regard as official those acts which attack its very foundation.⁹² Belsky, Merva and Roht-Arriaza argue that as *jus cogens* norms are, by their very nature, incapable of derogation, States cannot sanction any breaches of *jus cogens* norms as their own sovereign acts.⁹³ Reimann and Orakhelashvili have expressed similar sentiments.⁹⁴

Similar liberal-style arguments are made by commentators as to the normative efficacy of striving towards accountability and justice,⁹⁵ therefore requiring the removal of immunity for international crimes. Reeves has argued on a moralistic level that, 'to countenance and even increase immunity from law is obviously to decrease the range and meaning of law', noting that 'the granting of sovereign immunity may, in many situations, create injustice and hardship'.⁹⁶ Cassese has similarly argued that it is a combination of the *jus cogens* nature of the prohibition of international crimes, the standing of individual victims and the need to protect fundamental human rights that

⁹¹ Wendy Adams, 'In Search of a Defence of the Transnational Human Rights Paradigm: May *Jus Cogens* Norms Be Invoked to Create Implied Exceptions in Domestic State Immunity Statutes?' in Craig Scott (ed), *Torture as Tort: Comparative Perspectives on the Development of Transnational Human Rights Litigation* (Hart Publishing, 2001) 253.

⁹² Bianchi, above n 3, 265.

⁹³ Adam C Belsky, Mark Merva and Naomi Roht-Arriaza, 'Implied Waiver Under the FSIA: A Proposed Exception to Immunity for Violations of Peremptory Norms of International Law' (1989) 77 *California Law Review* 365, 394.

⁹⁴ Mathias Reimann, 'A Human Rights Exception to Sovereign Immunity: Some Thoughts on *Prinz v Federal Republic of Germany*' (1995) 16 *Michigan Journal of International Law* 403, 421-3; Alexander Orakhelashvili, 'State Immunity and International Public Order' (2002) 43 *Germany Yearbook of International Law* 227; Alexander Orakhelashvili, *Peremptory Norms in International Law* (Oxford University Press, 2006) 326.

⁹⁵ See, eg, Naomi Roht-Arriaza, 'State Responsibility to Investigate and Prosecute Grave Human Rights Violations in International Law' (1990) 78 *California Law Review* 449; Diane F. Orentlicher, 'Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime' (1991) 100 *Yale Law Journal* 2537; Andrew Moravcsik, 'Taking Preferences Seriously: A Liberal Theory of International Politics' (1997) 51 *International Organizations* 513; Steven R. Ratner and Jason S. Abrams (eds), *Accountability for Human Rights Atrocities in International Law: Beyond the Nuremberg Legacy* (Clarendon Press, 1997); Aceves, above n 3, 132-3.

⁹⁶ William Harvey Reeves, 'Good Fences and Good Neighbors: Restraints on Immunity of Sovereigns' (1958) 44 *American Bar Association Journal* 521, 521, 592.

necessitate the removal of functional immunity for such crimes.⁹⁷ Others come to the same conclusion on a more holistic level: whether philosophically,⁹⁸ premised on the impacts of globalisation,⁹⁹ or based upon the view that 'official acts' are only those that are *exclusively* attributable to the State.¹⁰⁰

Another argument often advanced is that, due to the superior position of *jus cogens* norms in the normative hierarchy of international law, they must prevail over State immunity norms. Orakhelashvili posits that there is doctrinal support for the normative hierarchical view that *jus cogens* norms necessitate the removal of certain immunities,¹⁰¹ while Bianchi, Byers and Karagiannakis also support this argument.¹⁰² A related view is that functional immunity is incompatible with the newer goals of international criminal law and human rights law, and therefore the more contemporary general principles of the international legal system should be prioritised.¹⁰³

However, Akande and Shah, in their well-known 2010 article entitled 'Immunities of State Officials', dismiss the arguments that rules prohibiting international crimes, as *jus cogens* norms, override immunities as a matter of normative hierarchy, and that the illegal nature of international crimes means that they cannot be considered 'official acts'.¹⁰⁴ Instead, they argue that, while the immunity does subside in the case of international crimes, this is because the reasons for which functional immunity is conferred do not apply to prosecutions for international crimes; they apply the newer principle that the official position of an individual does not exempt him or her from responsibility for international crimes.¹⁰⁵ More specifically, Akande and Shah contend that where a foreign domestic court has extra-territorial jurisdiction over an international crime or the rule providing for jurisdiction expressly

⁹⁷ Cassese, above n 29.

⁹⁸ See, eg, David Luban, 'A Theory of Crimes Against Humanity' (2004) 29 *Yale Journal of International Law* 85.

⁹⁹ Krieger, above n 17.

¹⁰⁰ Van Alebeek, above n 25, 18-19.

¹⁰¹ Alexander Orakhelashvili, 'State Immunity and Hierarchy of Norms: Why the House of Lords Got it Wrong' (2007) 18 *European Journal of International Law* 955, 964.

¹⁰² Michael Byers, 'Comment on *Al-Adsani v Kuwait*' (1996) 67 *British Yearbook of International Law* 537, 539-40; Magdalini Karagiannakis, 'State Immunity and Fundamental Human Rights' (1998) 11 *Leiden Journal of International Law* 9; Bianchi, above n 3, 265.

¹⁰³ See, eg, Bianchi, above n 3, 260-1.

¹⁰⁴ Dapo Akande and Sangeeta Shah, 'Immunities of State Officials, International Crimes, and Foreign Domestic Courts' (2010) 21(4) *European Journal of International Law* 815.

¹⁰⁵ *Ibid* 839-46.

contemplates prosecution of crimes committed as ‘official acts’, functional immunity cannot logically co-exist; and as the jurisdictional rule in question has developed subsequent to the immunity, the immunity must subside in such cases.¹⁰⁶ While the policy reasons behind universal extra-territorial jurisdiction are undoubtedly important, questions of jurisdiction and immunity have usually been dealt with separately. Responses to Akande and Shah’s argument have largely failed to clarify the efficacy of their approach.¹⁰⁷

Even within the well-compiled 2015 edited book, *Research Handbook on Jurisdiction and Immunities in International Law*, different scholars take significantly varying approaches to their examination of immunities in numerous chapters; including analyses of private international law,¹⁰⁸ ideological influences,¹⁰⁹ conceptual differentiation of immunities from jurisdiction,¹¹⁰ and how universal jurisdiction may impact upon the issue.¹¹¹ While each argument is undoubtedly sound in its own right,¹¹² overall this book does not assist in answering the central question of whether, and if so why, immunity *ratione materiae* subsides for international crimes in foreign domestic courts.

It is apparent that while there is a growing trend for scholars to argue that immunity *ratione materiae* should subside in cases of international crimes, there is no agreement as to why this is the case, or how this can be effected.

¹⁰⁶ Ibid 841-6.

¹⁰⁷ See, eg, Alexander Orakhelashvili, ‘Immunities of State Officials, International Crimes, and Foreign Domestic Courts: A Reply to Dapo Akande and Sangeeta Shah’ (2011) 22(3) *European Journal of International Law* 849; Dapo Akande and Sangeeta Shah, ‘Immunities of State Officials, International Crimes, and Foreign Domestic Courts: A Rejoinder to Alexander Orakhelashvili’ (2011) 22(3) *European Journal of International Law* 857.

¹⁰⁸ Richard Garnett, ‘Foreign state immunity: a private international law analysis’ in Alexander Orakhelashvili et al (eds), *Research Handbook on Jurisdiction and Immunities in International Law* (Edward Elgar Publishing, 2015) 297.

¹⁰⁹ Alexander Orakhelashvili, ‘State immunity from jurisdiction between law, comity and ideology’ in Alexander Orakhelashvili et al (eds), *Research Handbook on Jurisdiction and Immunities in International Law* (Edward Elgar Publishing, 2015) 151.

¹¹⁰ J Craig Barker, ‘Shared foundations and conceptual differentiation in immunities from jurisdiction’ in Alexander Orakhelashvili et al (eds), *Research Handbook on Jurisdiction and Immunities in International Law* (Edward Elgar Publishing, 2015) 185.

¹¹¹ Sienho Yee, ‘Universal jurisdiction: concept, logic and reality’ in Alexander Orakhelashvili et al (eds), *Research Handbook on Jurisdiction and Immunities in International Law* (Edward Elgar Publishing, 2015) 76.

¹¹² And indeed the editors note that ‘no attempt has been made to harmonize or unify the methods, opinions and approaches adopted by the various contributors’: Alexander Orakhelashvili et al (eds), *Research Handbook on Jurisdiction and Immunities in International Law* (Edward Elgar Publishing, 2015) xi.

F Critique

Importantly, some conclusions as to points of agreement and disagreement between scholars, judicial officers, States and the international community can now be advanced. This can aid in determining how this issue can and should be advanced.

1 *Points of agreement*

There is unwavering agreement that functional immunity does not automatically subside for international crimes, and requires a compelling justification in order to do so. It is also clear that 'official acts' remains the underlying basis for when immunity *ratione materiae* will or will not apply, and that exceptions to the immunity are plausible. Equally apparent is the need for this issue to be resolved in a clear, well-reasoned and agreeable manner. However, this is where such consensus ends.

2 *Points of disagreement*

Much of the disagreement noted above arises from the issue of whether the actor in question has focused upon the ends or means of immunity *ratione materiae*. Those that consider that immunity *ratione materiae* should subside for international crimes appear to *ex post facto* find a reason to justify this outcome, rather than examining in any detail whether the acts are official in nature; the core aspect of functional immunity. In this regard, Wuerth suggests that most domestic cases that exclude international crimes from functional immunity provide no sound analysis of the underlying purposes of State immunity.¹¹³ Meanwhile, those that consider the means and underlying purposes of immunity *ratione materiae* undertake sound processes in their approach, but there is significant disagreement amongst such actors as to the basis of immunity. Therefore, as noted by Sands, one view on immunities gives effect to broadly shared values, such as avoiding impunity, while the other looks towards the purpose of immunities as an element of sovereign equality, which requires strong protection.¹¹⁴ This could well reflect the contrasting theoretical

¹¹³ Ingrid Wuerth, 'Pinochet's Legacy Reassessed' (2012) 106 *American Journal of International Law* 731.

¹¹⁴ Philippe Sands, 'International Law Transformed? From Pinochet to Congo...?' (2003) 16 *Leiden Journal of International Law* 37, 51.

approaches of natural law and legal positivism, respectively. Though not universal or widespread, there does appear to be more agreement on the end – that the immunity should subside – than the means of coming to this conclusion. Indeed, it would appear that while a natural law view would arrive at the right conclusion on this issue, the legal positivist view is the preferred approach for the means. This article applies a legal positivist approach in Part III; but in contrast to previous arguments of this nature, arrives at the conclusion that functional immunity should subside for international crimes in foreign domestic cases.

In this regard, it is clear that there is also vast divergence of opinion on the basis of State immunity and why it was originally formulated. The Institut de Droit draft resolution appears to reflect the three main differing views espoused in this regard: ‘Immunities are conferred to ensure an orderly allocation and exercise of jurisdiction in accordance with international law in proceedings concerning States, to respect the sovereign equality of States and to permit the effective performance of [State] officials’.¹¹⁵ In light of such disagreement – arguably the source of greatest dispute over State immunity – it is inappropriate to posit an argument concerning the basis of State immunity, and how this impacts upon whether immunity *ratione materiae* subsides for international crimes. Indeed, though Akande and Shah significantly contributed to such understanding,¹¹⁶ these arguments should be actively avoided if the aim to provide greater clarity around this issue. Instead, the next part will seek to return the debate to the most oft-stated and readily-used justification for any development in international law: State consent.

III *LEX FERENDA*: IMMUNITY *RATIONE MATERIAE* SHOULD SUBSIDE

It is apparent that the issue of whether immunity *ratione materiae* subsides for international crimes requires substantial clarity if a resounding answer is ever to be found. This Part will argue that, considering the findings on points of agreement and disagreement in Part II, immunity *ratione materiae* should

¹¹⁵ Institut de Droit International, *Resolution on the Immunity from Jurisdiction of the State and of Persons Who Act on Behalf of the State in Cases of International Crimes*, 3rd comm., Naples session, (2009) <http://www.justitiaetpace.org/idiE/resolutionsE/2009_naples_01_en.pdf>, art II(1).

¹¹⁶ Akande and Shah, above n 104.

subside when international crimes are alleged. It will be argued that States have either ratified the Rome Statute, supported the development of international criminal law, or been part of a global shift towards restricting immunities; and thus, States have impliedly consented to allowing an exception to immunity *ratione materiae* for international crimes. This argument will be heavily dependent upon an international legal shift away from impunity and towards accountability and justice in the post-Cold War era. This part, and indeed this article, will make no judgment on the normative or moral values of such shifting attitudinal priorities in the international system; arguing only that States have consented to such a shift. The justification for such an approach is that an international legal argument premised upon State consent will prove far more robust than one based on normative or moralistic grounds, as the previous Part demonstrates. As in Part II, both civil and criminal claims will be considered: it would be contradictory to argue that functional immunity should subside for one type of claim but not the other.¹¹⁷

A *State consent*

As the International Law Commission has noted, it is appropriate to examine immunities in the context of 'the principle of consent which lies at the root of other norms of international law.'¹¹⁸ The Commentary to the Draft Articles on Jurisdictional Immunities stated that, 'even the most unqualified of all the theories of immunity admits one important exception, namely, consent'.¹¹⁹ Chief Justice Marshall relied on this premise many years ago in *Schooner Exchange*, finding that:

[A]ll exceptions to [state immunity] must be traced up to the consent of the nation itself. They can flow from no other legitimate source...[indeed] all sovereigns have consented to a relaxation...of that absolute and complete jurisdiction within their respective territories which sovereignty confers.¹²⁰

Just as States derive their powers from the consent of the governed, so too does international law derive its legitimacy from the consent of States. As noted by Orakhelashvili, legal positivist method provides the mainstream language for

¹¹⁷ See generally Antonio Cassese, *International Law* (Oxford University Press, 2nd ed, 2005) 450-1.

¹¹⁸ *1980 ILC Report*, above n 7, 142, 144.

¹¹⁹ *1991 ILC Report*, above n 4, 23.

¹²⁰ *The Schooner Exchange v McFadden*, 11 US 116, 135 (Marshall CJ).

international legal discourse;¹²¹ while Reus-Smith contends that, ‘consent is...the primary source of international legal obligation’.¹²² Guzman posits that, ‘A state’s legal obligations are overwhelmingly – some would say exclusively – based on its consent to be bound.’¹²³ Therefore, to base the main argument of this article on this central tenet, State consent, is clearly appropriate. It seems, accordingly, that any exclusion to immunity *ratione materiae* should only reasonably flow from State consent. While disagreement abounds over whether sovereign equality, general principles of international law or normative values might underpin the origins of State immunity as a doctrine, State consent undoubtedly is the foundation for its qualifications and exclusions. It is upon this basis that the argument is made to justify the *lex ferenda* of immunity *ratione materiae* subsiding for international crimes.

Though this is not express, implied consent is consent nonetheless. Chief Justice Marshall argued in *Schooner Exchange* that consent to justify exclusions to State immunities could be either express or implied; and while implied consent is ‘less determinate, exposed more to the uncertainties of construction...[it is], if understood, not less obligatory.’¹²⁴ Indeed, if State consent were confined to express ratifications of treaties or clear declarations, customary international law would never have developed to hold its now crucial gap-filling function in the international system. Many scholars across time have noted the viability and importance of implied State consent in forming international legal obligations.¹²⁵ Aust prominently notes that ‘[International law] is based on the consent, express or *implied* [emphasis

¹²¹ Orakhelashvili et al, above n 112, xi.

¹²² Christian Reus-Smit, ‘International Law’ in John Baylis, Steve Smith and Patricia Owens (eds), *The Globalization of World Politics* (Oxford University Press, 6th ed, 2014) 274, 278.

¹²³ Andrew Guzman, ‘The Consent Problem in International Law’, *Berkeley Program in Law & Economics, Working Paper Series* (10 March 2011) <<http://escholarship.org/uc/item/04x8x174#page-1>> 1-5.

¹²⁴ *The Schooner Exchange v McFadden*, 11 US 116, 135 (Marshall CJ).

¹²⁵ See, eg, Lassa Oppenheim, *International Law* (Longmans, Green and Co. Ltd, 1st ed, 1905) 17-18; James Leslie Brierly and Humphrey Waldock, *The Law of Nations* (Clarendon Press, 1949); Anthony D’Amato, ‘Consent, Estoppel, and Reasonableness: Three Challenges to Universal International Law’ (1969) 10 *Virginia Journal of International Law* 1; Jonathan I. Charney, ‘The Persistent Objector Rule and the Development of Customary International Law’ (1985) 56 *British Yearbook of International Law* 1; Michael Byers, ‘Conceptualising the Relationship between *Jus Cogens* and *Erga Omnes* Rules’ (1997) 66 *Nordic Journal of International Law* 220; John A Perkins, ‘The Changing Foundations of International Law: From State Consent to State Responsibility’ (1997) 15 *Boston University International Law Journal* 433; Duncan B. Hollis, ‘Why state consent still matters: Non-state actors, treaties, and the changing sources of international law’ (2005) 23 *Berkeley Journal of International Law* 1.

added], of states',¹²⁶ while Reus-Smit argues that 'implied or tacit consent plays an important role in the determination of [international law].'¹²⁷ Therefore, it is argued that States have impliedly consented to an international crimes exception to immunity *ratione materiae* on the basis expressed below.

B *States parties to the Rome Statute*

On 17 July 1998, the Rome Statute, creating the world's first ever permanent International Criminal Court, was opened for signature. With 139 signatories, 123 States have now ratified the Rome Statute; representing almost two-thirds of all States. This list includes France, the United Kingdom, Sweden, Norway, Finland, Denmark, Canada, Australia, New Zealand, Germany, Italy, Japan, South Korea, Brazil, Argentina, Mexico, South Africa,¹²⁸ Nigeria, and Kenya. As a result, most of the world's significant regions are represented wholly or in large part in this list of ratifications, including Europe, North America, the Pacific, East Asia, South America and Africa. Excluding the European Union, 12 of the 19 other members of the G20 have ratified the Rome Statute, while two have signed but not ratified (Russia and the US), and only five have not signed or ratified: India, Indonesia, Saudi Arabia, Turkey and China. Notably, the Middle-East (excluding Jordan) and South-East Asia remain the two regions with broad reluctance to ratify the Rome Statute. However, it will be argued that the 123 nations that have ratified the treaty have impliedly consented to an international crimes exception to immunity *ratione materiae*.

The Preamble to the Rome Statute provides that the States parties to this treaty:

Recognizing that [international] crimes threaten the peace, security and well-being of the world,

Affirming that the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation,

¹²⁶ Anthony Aust, *Handbook of International Law* (Cambridge University Press, 2005) 4.

¹²⁷ Reus-Smit, above n 122, 279.

¹²⁸ Though it should be noted that South Africa may soon leave the Rome Statute: see 'ANC plans to withdraw South Africa from international criminal court', *The Guardian* (online), 11 October 2015 <<http://www.theguardian.com/world/2015/oct/11/anc-withdraw-south-africa-international-criminal-court>>.

Determined to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes,

Recalling that it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes...

Resolved to guarantee lasting respect for and the enforcement of international justice,

Have agreed [to this Statute]...¹²⁹

Agreement with such sentiments must imply consent to removing the most significant barrier to exercising jurisdiction over such international crimes – functional immunity. If functional immunity remains in place for international crimes, then, in the absence of more effective international courts or more willing and able domestic courts, foreign domestic courts will be barred from holding such perpetrators to account; and their crimes will almost certainly go unpunished as a result. Putting an end to impunity for the perpetrators of these crimes clearly necessitates the removing of immunity *ratione materiae* where international crimes are alleged.

It is not only the Preamble that supports this view. More specifically, the Rome Statute gives jurisdiction to the ICC over persons who commit international crimes;¹³⁰ which, it goes on to define, are the crime of genocide, crimes against humanity, war crimes, and the crime of aggression.¹³¹ These are ‘the most serious crimes of concern to the international community as a whole.’¹³² The Statute provides for criminal responsibility for individual State officials,¹³³ such that official capacity or title cannot exempt an individual from being held accountable.¹³⁴ More specifically, functional immunity does not apply in the ICC;¹³⁵ though no specific mention is made of the status of this immunity in foreign domestic courts. Considering reservations are not permitted under the Rome Statute,¹³⁶ how then can a State authorise conduct that they have expressly declared is an international crime that cannot be subject to immunity before an international court? To suggest that an

¹²⁹ *Rome Statute*, above n 2, Preamble.

¹³⁰ *Ibid* art 1.

¹³¹ *Ibid* art 5(1).

¹³² *Ibid*.

¹³³ *Ibid* art 25.

¹³⁴ *Ibid* art 27(1).

¹³⁵ *Ibid* art 27(2).

¹³⁶ *Ibid* art 120.

international crime can be an 'official act' not only sanctioned but authorised by the State clearly runs counter to the purposes of the Rome Statute, as laid out in its Preamble. How could an act that 'threaten[s] the peace, security and well-being of the world' hide behind the façade of the State for protection?

To maintain immunity *ratione materiae* in foreign domestic cases, for the very same reason that it provides the main barrier to exercising jurisdiction over those accused of international crimes, would not ensure the 'effective prosecution' of such persons. Just as States party to the Convention against Torture are under an obligation to prosecute acts of torture, which as shown in domestic case law has precluded such acts from immunity on that very ground, so too are States party to the Rome Statute obligated to prosecute acts comprising international crimes; which therefore must also be precluded from immunity. As noted by Fox and Webb in reference to the Convention against Torture, immunity *ratione materiae* must subside for 'crimes for which by treaty States are under an obligation to make penal offences and prosecute in their national systems.'¹³⁷ To allow the immunity to remain for international crimes would be to defeat the very purposes of the Rome Statute in this regard.¹³⁸ It would also defeat the purposes of the Convention against Torture, which has 158 ratifications, and the well-established customary prohibitions against slavery and piracy.

It is therefore advanced that a State that has ratified the Rome Statute can no longer sanction international crimes as acts of their sovereign authority; and therefore, these 123 States have impliedly consented to exclude international crimes from functional immunity.

C *States not party to the Rome Statute*

Other States have not ratified the Rome Statute but clearly support its principles, and can also be seen to impliedly consent to this exception. China, Russia and the US are undoubtedly the most prominent nations that have not ratified the Rome Statute. The latter two are signatories, however, and many of

¹³⁷ Fox and Webb, above n 85, 554-5.

¹³⁸ A sentiment expressed by Austria, Belgium and the Netherlands, all States parties to the Rome Statute, in statements made to the UN in 2011: see Roger O'Keefe, 'Jurisdictional Immunities' in Christian J Tams and James Sloan (eds), *The Development of International Law by the International Court of Justice* (Oxford University Press, 2013) 107, 129.

their recent actions imply support for international criminal law. It is clear and apparent that the US, in particular, strongly supports the aims of international criminal law. In response to Russia and China vetoing a 2014 Security Council resolution to refer the Syrian crisis to the ICC, the US Ambassador to the UN, Samantha Power, stated that:

[T]oday [was] about accountability for crimes so extensive, so deadly, that they have few equals in modern history...to ensure that the perpetrators of atrocities are held accountable...[However,] Syrian people will not see justice today. They will see crime, but not punishment.¹³⁹

The US also declared at the 2010 Review Conference of the Rome Statute that it is committed to ‘advanc[ing] the case of human rights and international criminal justice...[and] making international criminal law for the real world.’¹⁴⁰ American opposition to ratifying the Rome Statute appears to instead turn on the impending judicialisation of the crime of aggression.¹⁴¹

Even the two permanent members of the UN Security Council most opposed to the development of international criminal law – Russia and China – have displayed some consent to its processes. On 13 October 2015, the Prosecutor of the ICC filed a request to begin an investigation into war crimes and crimes against humanity during the 2008 armed conflict between Georgia and Russia. Pertinently, this request revealed that Russia, a well-known objector to certain developments in international criminal law, has apparently cooperated with the ICC’s existing inquiry into the Georgia conflict, by providing information to the Prosecutor’s office, responding to requests for assistance and even welcoming three missions made by ICC officials.¹⁴² While this revelation does not provide a resounding declaration that all States, regardless of apparent opposition, have provided support for international criminal, it does suggest that even among the most vehement opponents of the ICC, there is tacit and implicit acceptance of its principles and goals. Similarly, China released the following statement at the 2009 General Debate on the Rome Statute:

¹³⁹ Mark Kersten, *Unnecessary & Counter-Productive: Samantha Power Explains US Position on ICC & Syria* (28 May 2014) Justice In Conflict <<http://justiceinconflict.org/2014/05/28/unnecessary-counter-productive-samantha-power-explains-us-position-on-icc-syria/>>.

¹⁴⁰ Harold Hongju Koh, *Statement at the Review Conference of the International Criminal Court* (4 June 2010) U.S. Department of State <<http://www.state.gov/s/l/releases/remarks/142665.htm>>.

¹⁴¹ *Ibid.*

¹⁴² Alex Whiting, *The Significant Firsts of an ICC Investigation in Georgia* (14 October 2015) Just Security <<https://www.justsecurity.org/26817/icc-investigation-georgia/>>.

[China] always supports the purposes and objectives for which the ICC was established and is in favor of setting up an independent, impartial, effective and universal international criminal tribunal, as a supplement of national judicial systems to punish the gravest international crimes, promote world peace and realize judicial justice.¹⁴³

Indeed, it appears that many States that have not ratified or signed the Rome Statute have done so because of perceived flaws of the ICC;¹⁴⁴ not its underlying purposes. Many States have implicitly consented to its principles and goals in other ways. Facing significant political and legal barriers to ratification, Ukraine has instead lodged two *ad hoc* declarations under article 12(3) of the Rome Statute accepting the jurisdiction of the ICC for crimes committed on its territory since November 2013.¹⁴⁵ Of the five G20 nations that have not signed or ratified the Rome Statute, all except Saudi Arabia have expressed explicit consent to ending impunity for international crimes and implicit consent towards using international criminal law to achieve accountability and justice in pursuing this end.¹⁴⁶

¹⁴³ Xu Hong, *Statement of Chinese Delegation at the General Debate of the Eighth Session of the Assembly of States Parties to the Rome Statute of International Criminal Court* (20 November 2009) Coalition for the International Criminal Court <<https://www.iccnw.org/documents/ICC-ASP-ASP8-GenDeba-China-ENG.pdf>>.

¹⁴⁴ These flaws include significant questions over the formulation of the ICC's jurisdiction over aggression, the ICC's alleged over-focus on Africa since its inception, and the inability for States to lodge reservations to the Rome Statute: see, eg, *ibid*; *Statement of Chinese Delegation at the General Debate of the Review Conference of Rome Statute* (2010) International Criminal Court <http://www.icc-cpi.int/iccdocs/asp_docs/RC2010/Statements/ICC-RC-gendeba-China-ENG.pdf>; Garima Tiwari, *Why India Continues to Stay Out of the ICC?* (27 April 2013) A Contrario ICL <<http://acontrarioicl.com/2013/04/27/why-india-continues-to-stay-out-of-icc/>>.

¹⁴⁵ Aaron Matta and Tom Buitelaar, *Guest Post: Do All Roads Lead to Rome? Why Ukraine Resorts to Declarations Rather than Ratification of the Rome Statute* (14 October 2015) *Opinio Juris* <<http://opiniojuris.org/2015/10/14/guest-post-do-all-roads-lead-to-rome-why-ukraine-resorts-to-declarations-rather-than-ratification-of-the-rome-statute/#more-32125>>.

¹⁴⁶ See Tiwari, above n 144; Mulya Wirana, *Statement of Indonesian Delegation at the Review Conference of the Rome Statute* (2010) International Criminal Court <http://www.icc-cpi.int/iccdocs/asp_docs/RC2010/Statements/ICC-RC-gendeba-Indonesia-ENG.pdf>; Ismail Aramaz, *Statement of Turkish Delegation at the Review Conference of the Rome Statute* (1 June 2010) International Criminal Court <http://www.icc-cpi.int/iccdocs/asp_docs/RC2010/Statements/ICC-RC-gendeba-Turkey-ENG.pdf>; cf Mohammed Amin, 'ICC asks Saudi govt to arrest Sudan President Bashir during pilgrimage', *Daily Nation* (online), 6 October 2014 <<http://mobile.nation.co.ke/news/ICC-Saudi-govt-arrest-Bashir/-/1950946/2476440/-/format/xhtml/item/1/-/i895j4/-/index.html>>.

Acquiescence can also contribute toward implied State consent.¹⁴⁷ The ICJ has held that an absence of protest by States can imply State consent in circumstances where such States would have been expected to publicly declare opposition.¹⁴⁸ A State not reacting in circumstances where a significant development of international law occurs can contribute towards finding such implied consent.¹⁴⁹ There is little doubt that the UN General Assembly vote to adopt the Rome Statute, at the 1998 Rome Conference, is one of the most significant moments in the history of international criminal law. Consequently, the fact that only 7 States voted against its adoption, and that 21 nations instead chose to abstain, suggests that there may also be considerable acquiescence towards the principles underlying the Rome Statute. This is especially the case considering the vote was not made public, and therefore States are less likely to have been significantly pressured into abstention through public perception.

D *Global trends*

Steps towards accountability and justice are also reflected in trends of the international community as a whole; and, by extension, for many of the States not considered above. In the context of international courts, immunities clearly do not apply. The Rome Statute follows the original Nuremberg Charter in excluding the official position of defendants or any immunity they may receive as a result from the consideration of the ICC.¹⁵⁰ The ICTY, ICTR and the Special Court for Sierra Leone all contain a similar exclusion.¹⁵¹ Of course, international courts do not face the same major concern of foreign domestic courts: decisions made over officials of other States could unduly impinge upon

¹⁴⁷ See generally Ian Sinclair, 'Estoppel and Acquiescence' in Vaughan Lowe and Malgosia Fitzmaurice (eds), *Fifty Years of the International Court of Justice* (Cambridge University Press, 1996) 104.

¹⁴⁸ *Land, Island and Maritime Frontier Dispute (El Salvador v Honduras; Nicaragua Intervening) (Judgment)* [1992] ICJ Rep 351, 601; see also *Gulf of Maine Area (Canada v US) (Judgment)* [1984] ICJ Rep 246, 306.

¹⁴⁹ Malcolm N Shaw, *International Law* (Cambridge University Press, 7th ed, 2014) 64.

¹⁵⁰ *Rome Statute*, above n 2, art 27(1), (2).

¹⁵¹ UN Security Council, *Statute of the International Criminal Tribunal for the former Yugoslavia* (25 May 1993) International Criminal Tribunal for the former Yugoslavia <http://www.icty.org/x/file/Legal%20Library/Statute/statute_septo9_en.pdf> art 7(2); UN Security Council, *Statute of the International Criminal Tribunal for Rwanda* (8 November 1994) International Criminal Tribunal for Rwanda <<http://www.unictt.org/en/documents>> art 6(2); UN Security Council, *Statute of the Special Court for Sierra Leone* (16 January 2002) Special Court for Sierra Leone <<http://www.rscsl.org/Documents/scsl-statute.pdf>> art 6(2).

sovereign equality. However, these provisions reflect a growing trend towards restricting and removing immunities in favour of holding international criminals to justice; such that this now represents 'firmly established principles of international law.'¹⁵²

Recent international developments in furthering accountability and avoiding impunity reflect this. The development of extraterritorial and universal jurisdiction over international crimes has shown 'a determination within international society to put an end to the impunity of the perpetrators of such crimes'.¹⁵³ Guatemalan President Otto Pérez Molina resigned in September 2015 following a Congressional vote to lift his immunity and an order that he stand trial for corruption and bribery, 'punctur[ing] the veil of impunity which has reigned at the highest levels of government in Guatemala for decades.'¹⁵⁴ Following the suspected US air strike on a hospital in the Afghan city of Kunduz in October 2015, which killed 22 people and has been labelled a war crime, there has been significant public backlash worldwide and widespread calls to open an international investigation into the attack;¹⁵⁵ with the Pentagon declaring they would hold accountable any officials deemed to have breached international law.¹⁵⁶ Similarly, in response to the downing of Malaysian Airlines Flight 17 over Ukraine in 2014, the UN Security Council

¹⁵² Van Alebeek, above n 25, 18.

¹⁵³ Wickremasinghe, above n 88, 402.

¹⁵⁴ Nina Lakhani, 'Guatemalan president's downfall marks success for corruption investigators', *The Guardian* (online), 9 September 2015 <<http://www.theguardian.com/world/2015/sep/09/guatemala-president-otto-perez-molina-cicig-corruption-investigation>>.

¹⁵⁵ See, eg, 'Swiss Support International Probe of Afghan Hospital Bombing: Foreign Minister', *NDTV* (online), 15 October 2015 <<http://www.ndtv.com/world-news/swiss-support-international-probe-of-afghan-hospital-bombing-minister-1232628>>; Vickie Hawkins, 'America and Afghanistan must investigate the Kunduz hospital bombing', *The Telegraph* (online), 16 October 2015 <<http://www.telegraph.co.uk/news/worldnews/asia/afghanistan/11935559/America-and-Afghanistan-must-investigate-the-Kunduz-hospital-bombing.html>>; 'MSF demands investigation after Kuncuz hospital bombed', *SBS* (online), 5 October 2015 <<http://www.sbs.com.au/news/article/2015/10/05/msf-demands-investigation-after-kunduz-hospital-bombed>>; Mark Anderson, 'Aid agencies back call for investigation into "horrific" US attack on MSF hospital', *The Guardian* (online), 13 October 2015 <<http://www.theguardian.com/global-development/2015/oct/12/aid-agencies-investigation-horrific-us-attack-msf-hospital-kunduz>>; 'Afghanistan: ICRC condemns bombing of MSF hospital in Kunduz', *International Committee of the Red Cross* (online), 3 October 2015 <<https://www.icrc.org/en/document/afghanistan-icrc-condemns-bombing-msf-hospital-kunduz>>; Phoebe Wynn-Pope, 'Kunduz bombing is an attack on humanitarian action', *Australian Red Cross* (online), 12 October 2015 <<http://www.redcross.org.au/kunduz-bombing-is-an-attack-on-humanitarian-action.aspx>>.

¹⁵⁶ 'MSF demands investigation after Kuncuz hospital bombed', *SBS* (online), 5 October 2015 <<http://www.sbs.com.au/news/article/2015/10/05/msf-demands-investigation-after-kunduz-hospital-bombed>>.

adopted Resolution 2166, which ‘demands that those responsible for this incident be held to account and that all States cooperate fully with efforts to establish accountability.’¹⁵⁷ In the UN General Assembly’s own coverage of its 73rd and 74th meetings in 2014, it was noted that various resolutions were passed, many without a vote, to send a strong message to end impunity and renew efforts to promote and protect human rights;¹⁵⁸ with breaches of human rights often comprising international crimes. Case law in the human rights arena has also supported this finding, with the Inter-American Commission decision in *Velasquez* in particular representing the increasing avoidance of impunity.¹⁵⁹ Clearly, therefore, the international community, and consequently the States that comprise it, have contributed to a significant shift towards accountability and justice. Indeed, even the commercial and contractual exceptions carved into immunity *ratione materiae* can be seen as an attempt to ensure the accountability of States in their commercial transactions.

Though such recent shifts have been dramatic, the progression has significant historical roots and is not a mandate subject to any swift reversal. In 1955, the US Supreme Court observed that:

[t]he immunity enjoyed by the United States as territorial sovereign is a legal doctrine which has not been favoured by the test of time. It has increasingly been found to be in conflict with the growing subjection of governmental action to the moral judgment...¹⁶⁰

A growing trend also emerged in the 1970s and 1980s to hold former State officials accountable for their crimes, especially in Greece, Portugal and Latin America, and the creation of *ad hoc* international criminal tribunals from the 1990s onwards, especially in Rwanda, the former Yugoslavia, Sierra Leone, Cambodia and Lebanon, to ensure accountability and justice for international crimes has been well documented. De Visscher once likened the development of custom to the formation of a road across vacant land, such that, after the majority of users begin to follow the same path, ‘[n]ot long elapses before that

¹⁵⁷ SC Res 2166, UN SCOR, 69th sess, 7221st mtg, UN Doc S/RES/2166 (21 July 2014).

¹⁵⁸ *Adopting 68 Texts Recommended by Third Committee, General Assembly Sends Strong Message Towards Ending Impunity, Renewing Efforts to Protect Human Rights* (18 December 2014) United Nations Meetings Coverage and Press Releases <<http://www.un.org/press/en/2014/ga11604.doc.htm>>.

¹⁵⁹ *Velasquez Rodriguez Case* (1988) Inter-Am.Ct.H.R. (Ser. C) No. 4.

¹⁶⁰ *National City Bank of New York v Republic of China*, 348 US 356, 359 (1955).

path is transformed into a road accepted as the only regular way'.¹⁶¹ Aptly reflecting the development of international criminal law,¹⁶² these historical developments and the creation of the ICC first laid down this line as a single, well-formed road, and States not party to the Rome Statute in the 13 years since have appeared to impliedly accept this as the regular path to take, even if they have not taken this route themselves. This path must be acknowledged as the only way to proceed for foreign domestic cases where international crimes are alleged.

E *Immunity ratione materiae must subside*

It is therefore posited that, whether by ratification of the Rome Statute, general support expressed for international criminal law or trends in the international community, States have impliedly consented to a dramatic shift of the international system towards accountability and justice in the post-Cold War era. As noted above, however, international courts and the domestic courts of State officials have been ineffective at ensuring such accountability. The problems facing the effectiveness of these two mechanisms – lack of an international police force and/or strong global enforcement mechanisms, and judicial reluctance to prosecute their own State's officials, respectively – are wicked and will not be subject to any swift resolution. Political considerations are an inherent risk in any domestic hearing of a case involving an official of the same State,¹⁶³ and often render impossible any prosecution. This is especially the case where that official is part of the same government in a nation that has perpetrated international crimes; even when such crimes are committed by a past regime.¹⁶⁴ Instead, domestic courts of foreign States where State officials may be residing, visiting or passing through must be the focus of ensuring that international criminals are duly punished and deterred. Supporting this view, Sands questions whether international criminal law could ever fulfil its objectives of accountability and justice without removing

¹⁶¹ Shaw, above n 149, 56.

¹⁶² A sentiment that is reflected in the dissenting opinion of Judge Van den Wyngaert in *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium) (Judgment)* [2002] ICJ Rep 3, [24]-[28].

¹⁶³ *1980 ILC Report*, above n 7, 150.

¹⁶⁴ Ratner and Abrams, above n 95, 146.

functional immunity and improving the ability of domestic courts to hear cases of international crimes.¹⁶⁵

Therefore, the single most significant barrier to foreign domestic courts being able to do so – immunity *ratione materiae* – must be removed. More specifically, the State consent presented in this part renders impossible the suggestion that international crimes can be protected by functional immunity in foreign domestic cases, whether civil or criminal. Albeit argued on different grounds to implied State consent, McGregor reaches the same conclusion:

states cannot reasonably argue that immunity should still be available in cases involving the most serious international crimes, the prohibition of and accountability for which the majority of States have demonstrated their support and commitment and which do not merely concern the internal acts of one State, but the concern and legal interest of the international community as a whole.¹⁶⁶

IV EXCLUDING INTERNATIONAL CRIMES FROM ‘OFFICIAL ACTS’

While it is therefore apparent that international crimes should not be subject to immunity *ratione materiae*, the question remains: how should the international legal system arrive at this point? This part will argue that the definition of ‘official acts’ or ‘sovereign authority’ should explicitly exclude international crimes. This is especially the case in light of the significant reliance national legislation and domestic judicial officers place on the concept of ‘official acts’ or ‘sovereign authority’ to determine whether functional immunity applies. The commentary to the Draft Articles on Jurisdictional Immunities posits that, ‘There is common agreement that for acts performed in the exercise of...“sovereign authority of the State”, there is undisputed immunity.’¹⁶⁷ Therefore, any changes to exclude international crimes from immunity must incur a corresponding change to the definition of ‘sovereign authority’; i.e., ‘official acts’. As noted by the International Law Commission’s recent report on functional immunity:

¹⁶⁵ Sands, above n 114, 52-3.

¹⁶⁶ Lorna McGregor, *Immunity v Accountability: Considering the Relationship Between State Immunity and Accountability For Torture and Other Serious International Crimes* (Redress, 2005) 55.

¹⁶⁷ 1991 ILC Report, above n 4, 23.

[i]t is clear that great importance must be attached to the “act performed in an official capacity” in the context of immunity *ratione materiae*, as has been emphasized by all members of the Commission and by States. Some have raised it to the level of exclusivity, taking the view that the only consideration in determining the applicability of immunity *ratione materiae* is whether the act concerned is an “act performed in an official capacity”.¹⁶⁸

A *'Official acts' ordinarily include international crimes*

While the jurisprudence noted in Part II comprehensively covers judicial decisions on whether international crimes are subject to functional immunity, the more specific question of whether international crimes are ‘official acts’ must be considered in greater depth; as it appears that this will remain the fundamental marker for immunity *ratione materiae* for the foreseeable future. As international criminal law was originally intended to cover primarily State action,¹⁶⁹ international crimes are often, if not innately, State-sanctioned and therefore ‘official acts’. Worryingly, jurisprudence reflects the view that international crimes would ordinarily fit within the definition of ‘official acts’; as noted by the 2015 International Law Commission Report on immunity *ratione materiae*.¹⁷⁰ The European Court of Human Rights has argued that, as the Convention against Torture defines torture as an act inflicted by a ‘public official or other person acting in an official capacity’, acts of torture are ‘official acts’ for the purposes of immunity.¹⁷¹ In *McElhinney v Ireland*, the Court also noted that the acts of a soldier on foreign territory are closely related to ‘the core area of state sovereignty...which, of their very nature may’ concern issues ‘affecting diplomatic relations between States and national security’.¹⁷² Many international crimes are committed in armed conflicts; connecting such circumstances to core issues of diplomatic relations and national security would appear to imply the maintenance of functional immunities for most acts comprising international crimes. In *Germany v Italy*, the ICJ focused only on

¹⁶⁸ Ibid 8.

¹⁶⁹ William A Schabas, ‘State Policy as an Element of International Crimes’ (2008) *Journal of Criminal Law and Criminology* 953.

¹⁷⁰ 2015 ILC Report, above n 41.

¹⁷¹ See *Jones and Others v United Kingdom* (2014) 53 ILM 540 (European Court of Human Rights) [206]; see also similar implications made in *Al-Adsani v United Kingdom* (2001) 123 ILR 24 (European Court of Human Rights) [58], [61], [66].

¹⁷² *McElhinney v Ireland* (2001) 123 ILR 73 (European Court of Human Rights) [38]; see also 2015 ILC Report, above n 41, 15.

private, commercial activities as acts that are ‘non-sovereign’. Similar to the majority judgment in *Arrest Warrant*, which suggested that simply acting as the government’s representative could induce all acts conducted therein to become ‘official’,¹⁷³ this may imply that acts comprising international crimes are still subject to functional immunity; since they are often conducted on behalf of the State.

In *Djibouti v France*, the ICJ also implied that if a State were to take responsibility for certain acts of its officials, this may render the acts ‘official’ and therefore protected by immunity *ratione materiae*.¹⁷⁴ Domestic courts have produced similar outcomes. While Moldovan and American courts in particular have split on whether an official acting under only the colour or appearance of authority is acting under ‘sovereign authority’,¹⁷⁵ American, Canadian, British and Irish case law consistently suggests that if an official is explicitly *authorised* to commit a violation of international law, this would be considered an ‘official act’.¹⁷⁶ Similarly, the House of Lords has held that intrinsically governmental acts, regardless of their legality, must be ‘official acts’.¹⁷⁷ International crimes are ordinarily sanctioned on a governmental level, often by police or military officials, and thus are subject to official authorisation and take on an intrinsic governmental nature. Therefore, it appears that international crimes would often fit within the existing definition of ‘official acts’, and remain immune from prosecution or suit in cases that correctly consider this issue by focusing on the core question of whether international crimes are ‘official acts’.

¹⁷³ *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium) (Judgment)* [2002] ICJ Rep 3, [53].

¹⁷⁴ *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v France) (Judgment)* (International Court of Justice, General List No 136, 4 June 2008) [196].

¹⁷⁵ See generally the European Court of Human Rights case of *Urechean and Pavlicenco v the Republic of Moldova* [2014] ECHR 141; *Hilao, et al v Marcos*, 878 F 2d 1438 (9th Cir, 1989); see also 2015 *ILC Report*, above n 41, 16-17.

¹⁷⁶ See *In Re Doe I, et al v Liu Qi, et al., Xia Deren et al*, C-02-0672 CW, C-02-0695 CW (2004); *Jaffe v Miller and Others* (1993) 95 ILR 446 (Court of Appeal for Ontario); *McElhinney v Ireland* (1995) 104 ILR 691 (Ireland Supreme Court); *Jones v Ministry of Interior of the Kingdom of Saudi Arabia* [2006] UKHL 26 (in particular, per Lord Hoffman).

¹⁷⁷ *Holland v Lampen Wolfe* [2000] 3 All ER 833 (HL).

B *Existing definitions of 'official acts'*

Thus, it is appropriate to look to existing, broader definitions of 'official acts', in order to ascertain what changes can be made to facilitate international crimes being excluded. Though few clear definitions have ever been espoused, implicit guidance can be provided by international and domestic jurisprudence, and other prominent international legal actors. In the *Arrest Warrant* case, the ICJ found that immunities, both personal and functional, are granted to Foreign Ministers 'to ensure the effective performance of their functions on behalf of their respective states'.¹⁷⁸ The 2008 ICJ case of *Djibouti v France* similarly posited that official acts must be within the 'scope of duties' of the official in question.¹⁷⁹ The European Court of Human Rights noted in *Jones v United Kingdom* that 'official acts' are only acts that are 'carried out in the course of their official duties'.¹⁸⁰ The International Law Commission argues that sovereign acts must be performed in exercise of 'elements of the government authority', ordinarily comprising of legislative, executive, or judicial functions.¹⁸¹ While many cases appear to be including international crimes within the definition of 'official acts', it is clearly open from these findings to envisage the exclusion of international crimes from such definitions – by implementing the argument made in Part III that a State cannot sanction an international crime as an act of sovereign authority.

C *International crimes exclusion to 'official acts'*

Considering that functional immunity appears to be entirely dependent upon the definition of 'official acts', and it has already been established that functional immunity should subside in cases of international crimes, it logically follows that the definition of 'official acts' should exclude international crimes. As Lord Millett noted in *Pinochet*, responding to the view that international crimes are inherently 'official acts', 'No rational system of criminal justice can

¹⁷⁸ *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium) (Judgment)* [2002] ICJ Rep 3, [51], [53].

¹⁷⁹ *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v France) (Judgment)* (International Court of Justice, General List No 136, 4 June 2008) [191].

¹⁸⁰ *Jones and Others v United Kingdom* (2014) 53 ILM 540 (European Court of Human Rights) [205].

¹⁸¹ 2015 *ILC Report*, above n 41, 36.

allow an immunity which is coextensive with the offence.¹⁸² In a separate opinion in *Arrest Warrant*, Judges Buergenthal, Higgins and Kooijmans doubted whether ‘serious international crimes [can] be regarded as official acts because they are neither normal State functions nor functions that a State alone (in contrast to an individual) can perform’.¹⁸³ Dissenting in *Germany v Italy*, Judge Cançado Trindade argued that ‘international crimes are not acts of State’.¹⁸⁴

A more recent analogy provides similar support for this view. In September 2015, the Colombian government overcame a major hurdle in peace negotiations with the guerrilla FARC group, with the agreement that a form of amnesty be provided to both FARC fighters and State military officials who confess their acts and submit to a newly-formed criminal jurisdiction.¹⁸⁵ This provision of amnesty makes a key distinction: it is not available for international crimes, not even for State officials, but is available for all other domestic and political crimes. As part of the general trend towards accountability for international crimes noted in Part III, it is little stretch to extend this analogy to ‘official acts’: such that ordinary domestic or political crimes can remain the purview of ‘official acts’ if committed on behalf of the State, while international crimes become incapable of being committed in an official capacity regardless of the circumstances. This avoids normative concerns, of the kind that Akande and Shah were concerned with,¹⁸⁶ that an exception to immunity *ratione materiae* in regards to international crimes could expose any conduct breaching any domestic laws throughout the world to prosecution; which would of course defeat the very purpose of immunities. Rather, this would clearly constitute a practical extension of how to effect the change argued for in this article; namely, the subsiding of functional immunity in cases of international crimes. Considering the phenomenal focus on ‘official acts’ in State legislation, domestic cases and international guidance, no other

¹⁸² *Regina v Bow Street Metropolitan Stipendiary Magistrate ex parte Pinochet Ugarte (No. 3)* [2000] 1 AC 147, 277 (Lord Millett).

¹⁸³ *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium) (Judgment)* [2002] ICJ Rep 3, [85] (Judges Higgins, Kooijmans and Buergenthal).

¹⁸⁴ *Jurisdictional Immunities of the State (Germany v Italy; Greece Intervening) (Judgment)* [2012] ICJ Rep 99, [181] (Judge Cançado Trindade).

¹⁸⁵ Kai Ambos, *Guest Post: Colombia – How Much Justice Can the Peace Take?* (8 October 2015) *Opinio Juris* <<http://opiniojuris.org/2015/10/08/guest-post-colombia-how-much-justice-can-the-peace-take/>>.

¹⁸⁶ Akande and Shah, above n 104, 830.

approach would adequately implement this *lex ferenda* to any widespread effect in international law.

D *Effecting the change*

Considering the complexity of this issue, this change should be effected through clear domestic law mechanisms and soft law developments internationally, in order to codify *opinio juris* on this view. Firstly, the most ideal solution would be the passing of a UN General Assembly resolution to exclude international crimes from the 'official acts' that immunity *ratione materiae* protects. Considering the disagreement that may arise over the phrasing of such a resolution, however, other soft law developments are more likely to help guide and encourage State practice towards this end. International institutions, or organisations such as the Institut de Droit International or International Law Commission, could pass a resolution that provides that:

[I]nternational crimes, being those crimes outlawed by the Rome Statute, in addition to piracy, slavery, torture, and any other crimes outlawed by the international community, are hereby excluded from the definition of 'official acts' and 'sovereign authority' to which immunity *ratione materiae* applies to former or current state officials in both civil and criminal cases brought before domestic courts foreign to the state official.

Were a UN resolution to prove impractical, the UN could instead pass a Declaration on Immunity *Ratione Materiae* for International Crimes, comprising of this provision. On a domestic level, legislation could be introduced or amended to implement this provision in order to provide judges with a clear mandate in future cases. Alternatively, judicial officers could rely upon the provision as a developing rule of international law, owing to growing State consent, or develop practice rules reflecting this. Regardless of whether one or a combination of these mechanisms is used, any change must focus on the definition of 'official acts' and must ensure clarity and concision, to avoid the confusion and disparate arguments and views espoused in recent decades by multiple commentators.

E *Practical considerations: State responsibility and procedure*

Some may argue that focusing on the ‘official acts’ definition is the wrong approach to take, because international crimes are inherently State-sanctioned or State-organised acts, and denying this could narrow the scope and breadth of State responsibility for international crimes.¹⁸⁷ However, one commentator has noted that, ‘This criticism proceeds from the preconceived idea that the notion “official act” used in different legal rules must nevertheless have an identical meaning...[which] is refuted here’.¹⁸⁸ Indeed, changing the definition of ‘official acts’ in the context of State immunity does not undermine the fact that a State-sanctioned act is exactly that; nor does it preclude international responsibility. In order to explicitly avoid this outcome, international crimes that are committed under State authority or on behalf of the State should remain attributable to the State for the purposes of international responsibility, but not be considered ‘official acts’ for the purposes of immunity. Such a finding was made in the Greek case of *Voiotia*,¹⁸⁹ while two of the Lords in the majority judgment in *Pinochet* found that torture could not be an ‘official act’, despite the fact that the Convention against Torture specifically limits the definition of torture to acts perpetrated by ‘a public official or other person acting in an official capacity’.¹⁹⁰ To argue that excluding international crimes from the definition of ‘official acts’ is the wrong approach on these grounds would be focused too heavily on triviality rather than substance; which is one of the very reasons that much of the confusion noted in this article has arisen. In contrast to Lord Hoffman’s finding in *Jones*,¹⁹¹ it is not artificial to have different tests for ‘official acts’ under State responsibility and immunity *ratione materiae* when these are substantively different areas of international law.

Furthermore, in applying the arguments made in this article, the procedure at trial for foreign domestic cases must be considered. It seems that if international crimes are alleged in a case against a State official who would

¹⁸⁷ For example, Barker notes that, ‘to deny the official character of [international crimes] is to fly in the face of reality’: see J Craig Barker, ‘The Future of Former Head of State Immunity After Ex Parte Pinochet’ (1999) 48 *International and Comparative Law Quarterly* 937, 943.

¹⁸⁸ Van Alebeek, above n 25, 24.

¹⁸⁹ *Prefecture of Voiotia v Federal Republic of Germany* (1997) 129 ILR 513 (Court of First Instance of Livadia (Greece)).

¹⁹⁰ *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, opened for signature 10 December 1984, 1465 UNTS 85 (entered into force 26 June 1987) art 1(1).

¹⁹¹ *Jones v Ministry of Interior of the Kingdom of Saudi Arabia* [2006] UKHL 26, [74]-[78] (Lord Hoffman); see also Akande and Shah, above n 104, 832.

ordinarily have functional immunity, this requires two steps to be taken: procedural, and substantive. Firstly, a procedural case must be made out for the immunity to be removed at first instance, to allow the case to proceed to trial. In a civil matter, this should require the establishment of a *prima facie* case against the defendant. In a criminal case, this should require sufficient evidence that the official has committed international crimes on the balance of probabilities. These are both lower thresholds than those required to be held responsible substantively in a civil matter or be prosecuted in a criminal matter, respectively. The procedural aspect of immunity *ratione materiae* must only be removed at first instance if such a case is established. If this occurs, the action would not be barred from commencing. This does not, as suggested by Akande and Shah,¹⁹² deprive State officials of an immunity they may well be entitled to after a finding on conduct; as the substantive aspect will ensure this protection remains.

Secondly, therefore, the court must consider as part of the trial whether, substantively, immunity *ratione materiae* should apply in the circumstances. In this regard, the court must determine whether international crimes have been committed; if so, the immunity subsides, and if not, the immunity remains if the act is 'official'. This would be tested against the usual levels of proof required in civil and criminal cases – the balance of probabilities and beyond reasonable doubt, respectively. If the immunity remains, the action would therefore be decided in favour of the State official, regardless of any other considerations at trial. This approach ensures that any cases where international crimes are alleged on a sound basis and have some likelihood of being proven true are carefully considered and able to be pursued. This also prevents the floodgates opening such that an individual could wildly postulate, on no valid grounds or evidence, that an official has committed an international crime, necessitating the removing of their functional immunity. This balanced, practical approach ensures accountability and justice can be served in cases that require them, while maintaining the importance of immunities and not allowing the process to be subject to misappropriation or misuse.

¹⁹² Akande and Shah, above n 104, 830.

V CONCLUDING REMARKS

In an ideal international legal order, domestic judiciaries would prosecute their own State's officials and executive governments would regularly respond to ICC arrest warrants and deliver up those accused of international crimes. However, this is not the world as it currently exists. Instead, foreign domestic courts, free of many of the barriers that prevent domestic and international courts from trying State officials accused of international crimes, must be more effectively utilised to ensure that international criminals are brought to justice. Removing immunity *ratione materiae* is the most important step, but not the only step, towards ensuring foreign domestic courts can hold accountable those who perpetrate international crimes. Practical issues in obtaining evidence in relation to acts ordinarily committed in a foreign State, and the desire of such courts to hear these cases, must also be considered and overcome to ensure impunity is avoided. The political dimensions of removing immunity *ratione materiae* should also not be ignored. The *realpolitik* argument that State officials will simply stop travelling to other States and the view that diplomatic relations may be strained through the trying of another State's former or current officials are both sound and require further attention to ensure that they are adequately considered. This is especially the case for prominent former officials, such as heads of State. While such discussions are beyond the scope of this article, the inherent practical difficulties in State officials never travelling beyond their own borders, and the evidence that many former State officials have already been tried in foreign domestic courts without significant diplomatic consequences,¹⁹³ suggests that such views do not significantly undermine the arguments put forward in this article.

Though scholars, judicial officers, States and other international actors have split over the underlying purposes of functional immunity and how to

¹⁹³ Most diplomatic tensions in the immunity context are caused by the removal of immunity *ratione personae*, rather than immunity *ratione materiae*. However, one recent example that caused diplomatic tensions should be noted: in early 2014, proceedings were commenced by a French judge against Abdellatif Hammouchi, head of the Moroccan secret services, over alleged torture allegations under the principle of universal jurisdiction. Morocco responded to these allegations by suspending judicial cooperation agreements with France, especially in regards to intelligence-gathering for terrorist activities in Northern Africa. Tensions were only resolved one year later, when judicial cooperation resumed and France announced that it would be awarding Mr Hammouchi its highest award – the Légion d'honneur. See generally 'Spy chief to get Legion of Honour despite torture allegations', *France 24* (online), 15 February 2015 <<http://www.france24.com/en/20150215-france-morocco-legion-honour-torture-Hammouchi>>.

justify its maintenance or removal in the case of international crimes, there is widespread agreement that 'official acts' remains the core feature of the immunity. It is clear that if changes are to be made to the scope of the immunity, and such changes must only reasonably be based upon the fundamental international law pillar of State consent, the definition of 'official acts' must be clarified and altered. In a decision twelve years after his seminal *Schooner Exchange* judgment, Chief Justice Marshall held that, '[a government] descends to a level with those with whom it associates itself, and takes the character which belongs to its associates'.¹⁹⁴ Nearly two centuries later, implied State consent towards prioritising accountability and justice over impunity has rendered it more appropriate and necessary than ever for State officials associating with and acting as international criminals to be treated as such. The efficacy of such State consent for international law cannot be overlooked. As the International Military Tribunal famously declared in Nuremburg in 1946, in the first tangible step towards establishing this very consent, unlawful State acts are 'committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced.'

¹⁹⁴ *The Bank of the United States v The Planters' Bank of Georgia*, 9 Wheat. 904, 907 (1824).

