Accountability in Foreign Courts for State Officials' Serious Illegal Acts:
When Do Immunities Apply?

December 2016

International Justice and Human Rights Clinic

PETER A. ALLARD SCHOOL OF LAW
THE UNIVERSITY OF BRITISH COLUMBIA

***Acknowledgements*:**

This report was written by Anthony Chang, Sadaf Kashfi, and Shirin Kiamanesh of the International Justice & Human Rights Clinic at the Peter A. Allard School of Law at the University of British Columbia in Vancouver, Canada. The report was co-authored and supervised by Clinic Director Nicole Barrett and reviewed by Clinic Fellows Pamela Germann and Julie Hunter. This immunities report forms part of a larger project on prosecuting grand corruption for Transparency International's Secretariat in Berlin, Germany. We are grateful to Transparency International's José Ugaz, Casey Kelso, Adam Foldes and Maira Martini, who helped conceive and develop this project.

Opinions expressed in the report are those of the authors alone and should not be attributed to other parties. Comments on the report may be directed to:

International Justice and Human Rights Clinic
Peter A. Allard School of Law
1822 East Mall
Vancouver, British Columbia
Canada V6T 1Z1
Email: ijhrclinic@allard.ubc.ca
Telephone: +1-604-822-9298

***Cover image*:** *Fishing For the Truth*, by Andrey Lomakin

This photograph depicts a protester attempting to rescue financial documents thrown into the river near former Ukrainian president Viktor Yanukovych's opulent estate, shortly after he fled the capital, Kiev. The following day, Ukrainian Members of Parliament voted to oust president Yanukovych from government. Some of the retrieved documents show that Yanukovych spent millions of dollars on furnishings and decorations for his former residence, the Mezhyhirya mansion, estimated to have cost more than $75 million USD. The Ukrainian public has long been suspicious that Yanukovych and his family were wrongly profiting from his control of the country as his annual presidential salary was approximately $100,000 and his annual salary prior to his presidency was approximately $24,000. Other documents retrieved include an anonymous receipt for a $12 million USD cash transfer, dated September 2010, about seven months after Yanukovych took office. In diplomatic cables released by WikiLeaks, U.S. officials described the Yanukovych government as "a kleptocracy."

***Suggested Citation*:**
Accountability in Foreign Courts for State Officials' Serious Illegal Acts: When Do Immunities Apply?, Allard International Justice and Human Rights Clinic (Vancouver: Allard School of Law, December 2016).

CONTENTS

Introduction

This report discusses the international law of immunities applicable to attempts to hold incumbent and former state officials accountable in foreign domestic courts for alleged serious illegal acts, in particular cases of grand corruption.

The report is an excerpt of a larger analysis completed for Transparency International (TI) on the possibilities of prosecuting a former country President for grand corruption. That project grew out of discussions with José Ugaz, Chair of TI, at the anti-corruption organization's 2015 International Anti-Corruption Conference in Putrajaya, Malaysia, when a shift was underway to consider more aggressive techniques in combatting corruption. Given the disheartening prevalence of grand corruption and other serious crimes at the hands of leaders throughout the world, TI agreed that for International Anti-Corruption Day, we should remove confidential factual details from our memorandum analyzing their specific case-in-progress and publically provide the general international legal analysis to assist stakeholders across the world with their assessments of how immunities will impact attempts to hold their leaders accountable.

While much has been written about immunity of state officials generally, less analysis has been done on the question of how the international law of immunities applies to corruption allegations. This report begins that discussion. We expect this conversation to expand quickly as the International Law Commission undertakes debates on ita new Draft Article 7 on immunities, "Crimes in respect of which immunity does not apply," which specifically exempts immunities for state leaders in matters related to corruption, along with numerous international crimes, such as genocide, crimes against humanity, war crimes, torture and enforced disappearances. Our hope is that this report will serve as a useful reference and benchmark for those involved in these discussions, as well as policymakers, civil society, and the public.

In the current report, Section 1 addresses the origins of state immunity. Sections 2 and 3 provide an overview of the two kinds of state immunity that apply to state officials: personal immunity (immunity *ratione personae*) and functional immunity (immunity *ratione materiae*). Section 4 provides an overview of international treaties and conventions relevant to state immunities and the pursuit of foreign corrupt officials. Section 5 offers a normative analysis outlining how the law of state immunity has changed from absolute to one that is "restrictive," or more contextual; it also discusses how immunities for state officials should

evolve to strike an appropriate balance between the competing values of state sovereignty and accountability.

To outline the current scope of customary international law, this report discusses the judicial practice of domestic and international courts in both civil and criminal proceedings and considers theoretical perspectives from the International Law Commission, as well as other leading legal commentary.[1] It concludes with some reflections on its findings and the evolving nature of immunities law with respect to criminal accountability.

1. Origins of Personal and Functional Immunity

State immunity derives from customary international law.[2] The doctrine provides that states are prohibited from prosecuting one another in domestic courts. In its earliest incarnations, state immunity was understood to be a complete and absolute bar on the ability of one state to scrutinize another.[3] The issue of immunity from jurisdiction is raised both in domestic and international civil and criminal courts. The decisions of domestic and international courts inform state practice, which in turn informs customary international law.[4]

The basic customary international law principle that one State cannot exercise its authority over another State[5] was articulated by the UK's House of Lords in *Holland v Lampen-Wolfe* as follows:

> It is an established rule of customary international law that one state cannot be sued in the courts of another for acts performed *iure imperii* [public acts of the state]. The immunity does not derive from the authority or dignity of sovereign states or the need to protect the integrity of their governmental functions. It derives from the sovereign nature of the exercise of the state's adjudicative powers and the basic principle of international law that all states are equal. The rule is "*par in parem non habet imperium"* [one sovereign power cannot exercise jurisdiction over another sovereign power].[6]

Other justifications for state immunity include comity and reciprocity.[7] The two types of state immunities discussed in greater detail below—personal immunity and functional immunity—are both rooted in this basic principle, par in parem non habet imperium, and protect individuals from prosecution when they are deemed to be representing the state. These immunities may apply to prevent both criminal and civil liability.[8]

However, conventions and treaties have modified this principle. The United Nations Convention on Jurisdictional Immunities of States and their Property (UNSCI) and the United Nations Convention against Corruption (UNCAC) address particular situations where state parties expressly consent to the exercise of jurisdiction by another state party for reasons set out in various provisions of the conventions.[9]

Personal immunity is status-based immunity that applies to certain state officials in high positions if they are recognized under international law as "representatives of the State solely by virtue of [their] office."[10] Functional immunity is conduct-based immunity that applies to acts that are "attributed to the State, so that the individual organ may not be held accountable for those acts or transactions."[11] Essentially, personal immunity protects a type of office, while functional immunity protects a type of act. Crucially, these immunities were never meant to benefit the individuals seeking to invoke them. The immunities are for the benefit of the State; they belong to the State and can thus be waived by the State.[12] By shielding either an office or an act that represents the State, both forms of immunity seek to protect state sovereignty and the peaceful cooperation between sovereign nations.

There are ambiguities in customary international law regarding which state offices and which acts can be held immune from legal process. These ambiguities will be addressed in greater detail in Sections 2 and 3 of this report. As customary international law develops, it will be informed by the tension between two competing priorities: protecting state sovereignty by upholding immunities and protecting human rights by prosecuting individuals who have violated them. This tension is further discussed in Section 5 below.

2. What Is Personal Immunity?

A. Overview of Personal Immunity

Personal immunity, also referred to as *ratione personae* or Head of State immunity, is an international law concept that bars the jurisdiction of courts over certain high-ranking state officials by virtue of their office.[13] Personal immunity is "status-based" immunity that attaches to an official's government position rather than the official themselves. Therefore, personal immunity is only available for the duration of the individual's time in office. This immunity has been consistently upheld in jurisprudence for Heads of State, Heads of Government, and Ministers of Foreign Affairs as a principle of international law.[14] Whether other government offices may benefit from personal immunity remains unsettled.[15] Similar

immunities may be granted to diplomats and members of special missions by treaty, with limitations specified in the treaty.

Personal immunity extends to *both* private and official acts and prevents foreign courts from exercising jurisdiction over an official both civilly and criminally.[16] During a state official's time in office, personal immunity shields them from liability for acts committed before taking office and during their tenure in office. After the office holder's tenure has ceased, an individual can be held to account for acts committed prior to taking office. An individual can further be held liable for acts committed during his or her tenure, depending on the circumstances. These circumstances are examined in more detail below, with a focus on seminal court decisions.

The broad material scope of personal immunity raises impunity concerns. Personal immunity can be limited, however, in the following four circumstances: (1) prosecution by an official's own state; (2) waiver of immunity by the official's own state; (3) proceedings before international criminal courts; and (4) departure of an official from government office.[17]

B. What Acts Are Covered by Personal Immunity?

Personal immunity applies to the acts of certain state officials in both their official and private capacity and includes the acts of the individual prior to taking office.[18] The influential *Pinochet* decision by the UK House of Lords provides an authoritative summary of personal immunity. This case concerned the extradition from the UK of the former Chilean Head of State who allegedly participated in a regime of torture and conspiracies to commit murder. Lord Browne-Wilkinson held in *Pinochet* that personal immunity is "a complete immunity attaching to the person of the Head of State or ambassador and rendering him immune from all actions or prosecutions whether or not they relate to matters done for the benefit of the state."[19] The International Court of Justice (ICJ) further elaborated on personal immunity in the *Arrest Warrant* case, stating that the "holders of high-ranking office in a State…enjoy immunities from jurisdiction in other States, both civil and criminal."[20]

C. To Whom Does Personal Immunity Apply?

As previously stated, personal immunity is typically conferred upon Heads of State,[21] Heads of Government, and Ministers of Foreign Affairs. Whether personal immunity shields other offices is an unsettled question in international law.[22] This section examines the different categories of officials in turn.

i. Heads of State

The personal immunity of Heads of State has long been recognized in treaties, customary international law, and decisions from international and national judiciaries.[23] Immunity for these officials is rooted in the historic notion that the Head of State is both the personification of the State itself and its chief organ at the domestic and international levels.[24] That said, if a foreign jurisdiction does not recognize an individual as the Head of State, personal immunity may not apply.[25]

In *Djibouti v France*, the ICJ reaffirmed its holding in *Arrest Warrant* and ruled that a Head of State enjoys full immunity from criminal and civil jurisdiction of a foreign state because such immunity prevents the interruption of a Head of State's duties.[26]

Some national courts have followed the *Arrest Warrant* and *Djibouti v France* holdings. In the criminal context, the District Court of The Hague in the Netherlands dismissed proceedings to indict George W. Bush, then president of the United States, for war crimes committed in Iraq and Afghanistan on the grounds that Heads of State enjoy immunity from criminal prosecution in foreign states under customary international law.[27] Similarly, Spain's *Audiencia Nacional*, a special high court with jurisdiction over international crimes, held that it lacked jurisdiction over the prosecution of alleged international crimes committed by Paul Kagame, the President of Rwanda at the time, on the grounds that he enjoyed personal immunity by virtue of his presidential office.[28]

Personal immunity also bars jurisdiction of courts in the civil context. The United States Court of Appeals for the Tenth Circuit upheld the immunity of Rwandan President Paul Kagame from a civil suit under the U.S. Alien Tort Statute on the grounds that, as Head of State, Kagame enjoyed absolute immunity from suit.[29] Similarly, the Austrian Supreme Court granted personal immunity to an incumbent Head of State in a paternity suit, holding that jurisdiction was shielded by virtue of his office.[30]

ii. Heads of Government

Heads of Government have also been accorded personal immunity under international law. The Head of Government is usually a separate role from Head of State, as in the United Kingdom where the Queen is the Head of State and the Prime Minister is the Head of Government, although in certain countries, such as the United States, they comprise one entity. In 2002, however, the ICJ in *Arrest Warrant* held that personal immunity would be accorded to Heads of Government separately[31] as they represent *de facto* political leaders of the state and thus to subjugate them to foreign jurisdiction would impede the state's

functioning.[32] U.S. courts have afforded personal immunity in criminal and civil proceedings to Margaret Thatcher of the United Kingdom,[33] Ariel Sharon of Israel,[34] and Ilham Aiyev of Azerbaijan[35] when legal proceedings were attempted against them while they were acting Heads of Government. Scholarship from the Institute of International Law on Immunities notes that heads of government "shall enjoy the same inviolability and immunity from jurisdiction as …the Head of State."[36] In short, both jurisprudence and scholarship suggest that customary international law provides Heads of Government the same personal immunity as Heads of State.[37]

iii. Ministers of Foreign Affairs

A minister of foreign affairs is a member of the government responsible for a state's international relations. The *Arrest Warrant* case is the leading legal authority on personal immunity for foreign ministers. The case was initiated by the Democratic Republic of the Congo (DRC) against Belgium for issuing an arrest warrant against an incumbent Congolese foreign minister for violations of international criminal law. Basing its finding on customary international law, the ICJ held that Ministers of Foreign Affairs enjoy personal immunity and are not subject to the jurisdiction of national courts even if suspected of committing war crimes or crimes against humanity.[38] The Court held that akin to Heads of State and Heads of Government, Ministers of Foreign Affairs are accorded personal immunity on the grounds that this office is responsible for asserting a State's position on international matters and must be able to do so without being interrupted by litigation, be it criminal or civil.

In the *Joint separate opinion of Judges Higgins, Kooijmans, and Buergenthal* in *Arrest Warrant,* the three judges disagreed with the expansive scope of immunity granted to the DRC's Minister of Foreign Affairs, because he was accused of violating international criminal law.[39] These three judges reasoned that Ministers of Foreign Affairs are not entitled to the same immunities as Heads of State, finding no basis in jurisprudence or literature for such an entitlement, thus concluding that this office should only be entitled to immunity for official acts of government.[40] Legal commentators have similarly critiqued the ICJ's extension of personal immunity to foreign ministers because other state officials have similar roles, thus increasing the likelihood that officials of many ranks could raise claims of personal immunity.[41] The current UN Special Rapporteur on Immunities of Foreign Officials, Concepción Escobar Hernández, justified the ICJ decision on the grounds that the office of the Minister of Foreign Affairs, similar to the offices of the Heads of State and Heads of Government, is automatically considered representative of the State whereas other governmental offices require authorization to act on its behalf.[42] Despite this ongoing

debate, the treatment of Ministers of Foreign Affairs in domestic case law in several countries suggests that personal immunity is frequently conferred on incumbent Ministers of Foreign Affairs.[43]

iv. Uncertainty of Personal Immunity Extending to Other Officials

There is insufficient case law to conclude which other offices may be afforded personal immunity at international law beyond Heads of State, Heads of Government, and Ministers of Foreign Affairs.[44]

In the UK, the Bow Street Magistrate's court held that the Minister of Commerce and International Trade for the Republic of China, Bo Xilai, was entitled to personal immunity with respect to allegations of torture.[45] The Court applied the rationale from the *Arrest Warrant* case and held that the office of Minister of Commerce and International Trade exercised functions analogous to the Minister for Foreign Affairs.[46] It is unclear from the reasoning, however, whether the Court conferred personal immunity because of Bo Xilai's status as commerce minister or because he was member of a "special mission," sent by his State to another State, with consent of the latter, for the purpose of negotiating with the foreign state on specific questions or tasks.[47]

In a subsequent case involving alleged grave breaches of the Geneva Convention by Israel's incumbent Minister of Defense, the Bow Street Magistrate's Court, following the reasoning set out in *Arrest Warrant*, held that the Israeli Defence Minister was entitled to personal immunity because the function of national defence is of international importance.[48]

The British High Court denied personal immunity to the Head of the Office of National Security of Mongolia, however, because the responsibilities of his office related only to the internal administrative workings of the state rather than international representation.[49] A similar decision was rendered by the *Cour de Cassation* of France, where arrest warrants for the Senegalese Minister of Transportation and Chief of Staff of the Armed Forces for crimes related to the sinking of the vessel *Joola* were affirmed because the two offices did not fall within the narrow category of State officials offered personal immunity.[50]

Though jurisprudence and legal scholarship provide no conclusive answer to the question of exactly how far personal immunity extends, they do indicate two principles: (1) personal immunity should be confined narrowly[51] and (2) if it is to extend beyond the offices of Heads of State, Heads of Government and Ministers of Foreign Affairs, those other offices must be recognized in the international community as playing a significant role in both the domestic and international arenas, such that their duties include international travel and direct

representation of the home state.[52] A normative discussion of how far immunity should extend follows in Section 5 below.

… personal immunity should be confined narrowly

v. Diplomatic Agents and Members of Missions

At times, treaties will also expressly extend personal immunity to the officials discussed above as well as officials of lower rank such as diplomatic agents,[53] representatives of the sending State in a special mission, and members of its diplomatic staff.[54] These treaty-based immunities ensure that officials can conduct international affairs crucial to the well-being of their State without interruption or interference.[55] Like personal immunity, these immunities prevent legal processes from commencing in foreign courts for as long as a person holds one of the treaty-enumerated posts.[56]

D. What Are the Limitations to Personal Immunity?

Given the sweeping scope of personal immunity, its application raises concerns surrounding impunity and accountability of government officials. As noted, the ICJ has identified four limits to personal immunity, discussed in turn below.[57]

i. Prosecution in the Official's Own State

When a state decides to subjugate its own officials to criminal prosecution, it neither exercises jurisdiction over another state nor impedes its international relations functions. Rather, the State exercises its own internal decision, which the ICJ held in the *Western Sahara Case,* it is free to do.[58] This same rationale applies to the civil context in which a state, provided that it is not bound by any other international obligations or treaties, is free to determine the design of its own legal system. Thus, the civil liability of government officials is also a domestic question.

ii. Waiver of Immunity by the Official's Own State

This second limitation is derived from the general principle that immunities exist for the benefit of the state rather than for the individual office holder. This principle was clearly stated in *Pinochet*: "it is common ground that the basis of the immunity claimed is an obligation owed to Chile, not to Senator Pinochet."[59] The state can thus choose to waive the official's immunity. Once waived, foreign courts are free to exercise jurisdiction over the

official, provided that personal immunity was the only bar to jurisdiction.[60] For example, it is well accepted that a state may waive the immunity *ratione personae* of its senior officials in order to subject them to the jurisdiction of international criminal courts.[61]

iii. Proceedings before International Criminal Courts or Tribunals

To determine whether or not an incumbent high-ranking official will be afforded personal immunity from international criminal tribunals, one must look to the enabling statutes of the court in question. Where proceedings are brought before the International Criminal Court (ICC), one must determine whether the official is a citizen of a state party to the *Rome Statute,* as discussed below.

In *Arrest Warrant*, the ICJ indicated that there are limitations to personal immunity when officials are involved in proceedings before certain international courts and tribunals due to the courts' enabling statutes.[62] These statutes contain a provision deriving from Article 7 of the International Military Tribunal at Nuremberg, the world's first international criminal court:

> The official position of defendants, whether as Heads of State or responsible officials in Government Departments, shall not be considered as freeing them from responsibility or mitigating punishment.[63]

This provision strips an accused of the defence of official capacity or other immunities and holds them personally responsible for their actions.[64] Legal scholars have argued that this provision does not relate to personal immunity because immunity is a bar from jurisdiction rather than a substantive defence.[65] Nevertheless, this provision was the basis upon which the Appeals Chamber of the Special Court of Sierra Leone ("SCSL") denied personal immunity to Liberia's sitting Head of State, Charles Taylor, accused of committing war crimes and crimes against humanity during the Sierra Leone Civil War. Taylor attempted to have his indictment and subsequent arrest and detention quashed on the grounds of personal immunity as he was in office when these events occurred. In its decision, the SCSL held that the Nuremberg principle applies – personal immunity cannot be invoked as a defence to an international crime. Moreover, the SCSL Appeals Chamber upheld the limit to personal immunity because the court was structured in a way that created a vertical relationship (international community-to-state) rather than a horizontal relationship (state-to-state) and only in the latter relationship could the principle of sovereign equality trigger personal immunity.[66]

This reasoning has gained support in state immunities literature. Scholars argue that because the UN's *ad hoc* international criminal tribunals (including the SCSL, International Criminal Tribunal for Rwanda (ICTR), International Criminal Tribunal for the Former Yugoslavia (ICTY), and the Extraordinary Chambers in the Courts of Cambodia (ECCC)), were created by the UN Security Council under Chapter 7 of the UN Charter, member states' support for prosecution of serious international crimes to further international peace and security is required. This requirement is found in Article 25 of the UN Charter, which obliges UN Members to comply with and carry out decisions of the UN Security Council.[67] Further, because international criminal courts and tribunals were created by statute, they are exceptions to any claims of immunity deriving from customary international law.[68] Each of the ad hoc tribunals, with the exception of the Special Tribunal for Lebanon and the special war crimes panels in Kosovo, contain a general provision stating that superior orders or official position cannot be grounds for limiting individual criminal responsibility.

Likewise, the independent ICC, created by treaty rather than pursuant to UN Security Council referrals, expressly removes personal immunity for crimes under its jurisdiction. Article 27(2) of the Rome Statute states that "immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person." In other words, by signing the Rome Statute, state parties consent to waive their leaders' immunity with respect to the crimes included in the statute. This waiver enables the ICC to request an accused's surrender under Art. 98(1) of the Rome Statute and requires the requested State party to arrest and surrender the accused individual, including Heads of State, of another State party.

> …by signing the Rome Statute, state parties consent to waive their leaders' immunity with respect to the crimes included in the statute

More controversially, when the UN Security Council refers a specific situation within a non-State party to the ICC, the Rome Statute, including its immunity-removing clause and waiver of personal immunity, has been interpreted by the ICC to apply to that State, despite its non-party status.[69] A well-known example is the case of Sudan's current president, Omar Al-Bashir. Al-Bashir has been subject to an ICC arrest warrant since 2008, after the Security Council referred the situation in Darfur to the ICC using its Chapter VII powers designated in

the UN Charter to restore international peace and security. The Security Council referral gave the ICC jurisdiction over international crimes committed in Sudan, despite the fact that Sudan is not party to the Rome Statute. When member state Malawi refused to arrest or surrender Al-Bashir, the ICC Pre-Trial Chamber held that an exception to Head of State immunity exists when arrest is sought for the commission of an international crime.[70] Further, the Court specifically found the international crimes exception to immunities to be customary international law. The ICC's Pre-Trial Chamber distinguished *Arrest Warrant*, which did not spell out the international crimes exception, as it concerned immunity across national jurisdictions as distinct from an international court seeking arrest for international crimes.[71]

iv. Individual Ceases to Hold Office

It is universally accepted in international law that personal immunity lasts only for the period of an individual's time in office.[72] The treatment of personal immunity by Spain's National Court (Audiencia Nacional) in Madrid offers a good illustration of this limit in practice at the domestic level. In criminal proceedings relating to crimes against humanity and violations of the United Nations Convention against Torture (CAT), the Court denied immunity to Augusto Pinochet as a former Head of State of Chile while at the same time accepting the immunity of Fidel Castro as he was currently the incumbent Head of State of Cuba.[73] The ICJ also made this temporal limitation clear in *Arrest Warrant.*[74]

Even once an individual ceases to hold office, however, "official acts" may still be entitled to the protection of functional immunity, as detailed in the following section.

3. What Is Functional Immunity?

A. Overview of Functional Immunity

Functional immunity, also known as subject matter immunity (*ratione materiae)*, differs from personal immunity as it attaches to acts deemed to be "official" acts carried out on behalf of the state as opposed to attaching to a particular office or position. It is thus a narrower but more widely available immunity[75] that applies to state officials regardless of their position in the state hierarchy. It may also apply to non-state individuals that act on behalf of the state. Because functional immunity protects actions and not a particular position, it "attaches to conduct attributable to the State even after an individual's office terminates."[76]

Functional immunity serves to protect the State from litigants who attempt to circumvent State immunity by taking action against a state official carrying out the business of the State.[77] By pleading *ratione materiae,* a State is essentially asserting that the act of an official or former official was actually its own act, for which it is responsible.[78]

The ICTY's Appeals Chamber in *Prosecutor v Tihomir Blaškić* explained the rationale behind functional immunity:

> Such officials are mere instruments of a State and their official action can only be attributed to the State. They cannot be the subject of sanctions or penalties for conduct that is not private but undertaken on behalf of a State . . . This is a well-established rule of customary international law going back to the eighteenth and nineteenth centuries.[79]

For an individual to claim functional immunity, the act in question must qualify as an official or state act[80] as opposed to a private act.[81] Although functional immunity is available to *any* state official acting under the authority of their home state, state practice has consistently granted functional immunity only to a select few categories of officials.[82] A survey of domestic law shows that functional immunity is uniformly granted to former diplomatic agents.[83] Heads of State, Heads of Government, Ministers of Foreign Affairs,[84] consular agents,[85] and members of special missions, such as official visitors to a foreign country.[86] Outside of this group, the state practice of offering functional immunity for low-ranking officials acting in their official capacity is limited.

The following sections outline factors that have been used by international and domestic courts to determine when an act can be considered "official." It is important to note that although an act may be criminal in nature, criminality by itself is insufficient to negate the act's official status. Jurisprudence is mixed on whether functional immunity is available to individuals who commit international crimes or violations of *jus cogens*, as discussed further below.

B. What Is an Official Act?

i. Within the Scope of Duties Mandated to the Individual under the Authority of the State

An official act is an act that a) is performed in an official capacity b) uses the apparatus of the State and c) falls within the scope of duties mandated by the State. Both criminal and civil legal cases distinguish between acts of a governmental nature and those of a private nature. The primary legal test to determine an act's official status is whether the conduct in question

was "engaged in under colour of or in ostensible exercise of the public authority of the head of State, head of Government, or other senior official."[87] The International Law Commission (ILC), in its *Second Report on Immunity of State Official from Foreign Criminal Jurisdiction*, stated "in order for acts of an official to be deemed … official acts, they must clearly have been performed in this capacity or 'under the colour of authority."[88] In its *Fourth Report on the Immunity of State officials from Foreign Criminal Jurisdiction*, the ILC noted that "the concept 'elements of a governmental authority' must be understood in a broad sense to include the exercise of legislative, judicial and executive prerogatives."[89] In *Djibouti v. France,* the ICJ described official acts as "acts within the scope of duties [of State officials] as organs of the State."[90]

National courts have articulated similar official acts requirements. The Supreme Court of the United States has held that "acting under color of state law" requires merely that a defendant has exercised powers "possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law."[91] In some cases, courts ruled on the nature of the acts "emphasizing that they were carried out in the exercise of governmental authority or were sovereign acts…noting that they constituted a performance of public functions."[92] In Germany, the Constitutional Court in the *Former Syrian Ambassador* case held that "official acts" can be proven when a state official is acting (a) under authority of their state and (b) with attribution to that state. Each State has the ability to empower individuals to act on its behalf and to determine what is within that official's mandate. As such, in *Prosecutor v Blaškić,* the International Criminal Tribunal for the former Yugoslavia held that international law

> leaves it to each sovereign State to determine its internal structure and in particular to designate the individuals acting as State agents or organs. Each sovereign State has the right to issue instructions to its organs.[93]

Diverse activities have been found to be official acts. For example, in a case where the Austrian Ambassador to Yugoslavia accepted an invitation from the president of Yugoslavia to go hunting and then subsequently shot and killed the French Ambassador, the Supreme Court of Austria held that functional immunity could attach to participation in social activities. In proceedings brought for damages by the family of the French ambassador, the Austrian state (and not the individual) was found liable to pay compensation.[94]

In *Arrest Warrant*, the Minister of Foreign Affairs' acts required to "ensure the effective performance of their respective States,"[95] were found to be official acts, even though the acts in question constituted international crimes, such as war crimes or crimes against

humanity.[96] Officials' acts have also been deemed to extend to acts of torture, as in a 2007 French case against Donald Rumsfeld concerning the US military prisons of Guantanamo Bay and Abu Ghraib, where French authorities deemed that Rumsfeld enjoyed immunity as former Minister of Defense.[97] Likewise, in *Kazemi Estate v Islamic Republic of Iran,* the Supreme Court of Canada held that the international crime of torture can be considered an official act.[98] In *Jurisdictional Immunities of the State*, the ICJ similarly found that acts of murder, confinement and denial of prisoner-of-war status committed by the armed forces and other organs of the German Third Reich during WWII were sovereign acts covered by State immunity, although in this case, the defendant was the State rather than an individual State's officials.[99] Limits on what can be considered an official act is discussed below.

ii. Undertaken in Pursuance of State Policy

Not every act done under the tenure or color of a state official has been held to be official, however. Rather, "whether or not the acts of individuals are to be deemed official depends on the purposes for which the acts were done … If they were done for reasons associated with the policies of the state, as opposed to reasons which are purely those of the individual … then those acts should be considered official acts."[100] In *Jimenez v Arite*guieta,[101] a case relating to a request for the extradition of a former dictator for charges involving financial misconduct, the U.S. Court of Appeals for the Fifth Circuit rejected the claim that these acts were performed in an official capacity and held that they were common crimes done in "violation of his position and not in pursuance of it." In *United States v Noriega*,[102] the U.S. Court of Appeals for the Eleventh Circuit did not accept that drug trafficking for personal benefit could be a sovereign activity. Courts have also held that "where the officer's powers are limited by statute, his actions beyond those limitations are considered individual and not sovereign actions."[103]

whether or not the acts of individuals are to be deemed official depends on the purposes for which the acts were done …

iii. Can Serious Criminal Acts Be Considered Official State Acts?

State practice regarding functional immunity in serious criminal cases is inconsistent. The ICJ has found that even where the crime in question is severe, "customary international law does not treat a State's entitlement to immunity as dependent upon the gravity of the act of which it is accused or the peremptory nature of the rule which it is alleged to have

violated."[104] This suggests that criminality does not by itself destroy the official or sovereign character of an act.

Likewise, in *Pinochet,* the UK House of Lords stated that the domestic criminality of an act does not negate its official quality:

> It is not enough to say that it cannot be part of the functions of the Head of State to commit a crime. Actions which are criminal under the local law can still have been done officially and therefore give rise to immunity *ratione materiae*.[105]

Case law from international courts and tribunals as well as domestic courts suggests, however, that functional immunity does not extend to actions amounting to serious international crimes or violations of *jus cogens* norms. *Jus cogens* are peremptory norms of international law "accepted and recognized by the international community of States as a whole…from which no derogation is permitted." Peremptory norms constrain the range of conduct the sovereign may authorize, giving rise to obligations *erga omnes* owed to the international community as a whole by virtue "of the importance of the rights involved, whereby all States can be held to have a legal interest in their protection."[106]

---

functional immunity does not extend to actions amounting to serious international crimes or violations of *jus cogens* norms

---

Several courts have held that international crimes and violations of *jus cogens* cannot be considered official acts as they exceed the competence of the authorizing state. This conclusion is often based on the premise that an international crimes exception to *ratione materiae* immunity has existed as a rule of customary international law since the Nuremberg trials.[107] The Nuremberg military tribunal held that individuals who violate the laws of war are not afforded immunities even when acting under the authority of the state if the state moves outside its competence under international law.[108] The Israeli Supreme Court endorsed this approach in their reasoning in the *Eichmann* case.[109] The ICTY has similarly held that despite receiving authorization of the State to commit an act that violates a *jus cogens* norm, individuals remain bound to comply with preemptory norms.[110]

The *jus cogens* prohibition of torture is particularly vexing, however, with national courts taking divergent positions on whether torture can receive immunity as an official state act. Some courts have concluded that torture is necessarily an official act based on its treaty

definition.[111] The Convention against Torture (CAT) specifically defines torture as an act inflicted by, at the instigation of, or with the consent of a public official or other person acting in an official capacity.[112] Thus, in *Jones v The United Kingdom,* the European Court of Human Rights (ECtHR) found that the CAT definition "appears to lend support to the argument that acts of torture can be committed in an "official capacity" for the purpose of State immunity."[113]

Similarly, in *Kazemi Estate v Islamic Republic of Iran,* the Supreme Court of Canada held that the international crime of torture can be considered a state act.[114] Referencing *Jones*, the Supreme Court held that "by definition, torture is necessarily an official act of the state."[115] In *Pinochet,* torture was likewise held to be an official act, although the State of Chile then waived Pinochet's immunity for the alleged acts of torture, allowing his prosecution to proceed on these grounds.[116] The UK courts also granted Pinochet immunity for his ordinary (non-international) crimes of murder carried out in his official capacity.[117]

Other courts, however, have found that because the prohibition of torture is a *jus cogens* norm, it cannot be considered a State function that entitles an official to immunity.[118] As explained in 2012 by the Federal Criminal Court of Switzerland in the *Khaled Nezzar* case, "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."[119] The ECHR also explicitly acknowledged in *Jones* that there was emerging support in favour of an exception in public international law in cases concerning civil claims for torture lodged against foreign State officials.

Although often inconclusive on the question of immunity, these developments "are indicative of an increasing willingness on the part of national courts and prosecutorial authorities in many States to bring criminal proceedings against foreign officials in regard to alleged international crimes committed in their official capacity."[120]

iv. Corrupt Acts, in Particular

Clear acts of corruption are not covered by functional immunity. Considering corruption as "the abuse of public power for private gain," it is likely that corrupt acts could satisfy the first of the official acts requirements – that the act falls within the scope of duties mandated under the authority of the state. However, it would be difficult to argue that corrupt acts meet the second requirement of being carried out in the public interest or in pursuance of state policy. Indeed, the International Law Commission reports, "in general, national courts have denied immunity to individuals in cases linked to corruption, whether in the form of

diversion or misappropriation of public funds or money-laundering, or any other type of corruption."[121] National court judgements typically focus on the intention of the perpetrator to use their official position for their own benefit, thereby harming their State, to overcome immunity claims.

Clear acts of corruption are not covered by functional immunity

Furthermore, national jurisprudence from several countries indicates that courts do not consider crimes involving financial misconduct for personal benefit as acts entitled to immunity. As cited above, the U.S. Court of Appeals for the 5th Circuit held in *Jimenez v Aristeguieta*[122] that certain common crimes were not official acts since they were performed in violation of and not in pursuance of an official's position. The court also noted that the U.S. government, pursuant to a request of immunity, would suggest a former head of state was entitled to functional immunity unless there was a basis with which that initial presumption could be questioned. According to the court, "[s]uch a base might arise, for example, in a suit challenging a former official's personal financial dealings which generally would not be considered to constitute acts taken in an official capacity."[123]

Likewise, in France, in a case involving the Second Vice President of the Republic of Equatorial Guinea, Teodoro Nguema Obiang Mangue, the French Cour de Cassation held that acts of misappropriating public funds are "distinguishable from the performance of State functions protected by international custom in accordance with the principles of sovereignty and diplomatic immunity."[124] The Cour de Cassation found that the corrupt acts in question were not, by nature, acts related to the exercise of sovereignty or in the public interest. In *Jean-Juse v Duvalier*,[125] the former president of Haiti and his wife were alleged to have misappropriated public funds for their own personal use. Proceedings brought in the U.S. resulted in a default judgement against the defendants, and plaintiffs were awarded approximately half a billion dollars.[126] In *Adamov v Federal Office of Justice,*[127] a Swiss court noted, "a former minister's functional immunity is derived from the principle that no State shall extend its domestic jurisdiction to the sovereign acts of other States and their organs. As such it should not grant impunity to officials for crimes such as corruption or common crimes committed in a purely private capacity."[128] This reasoning could similarly apply to most acts of corruption.

C. Functional Immunity for International Crimes

As mentioned in section 3.B.iii above, since the Nuremberg trials, it has been accepted that where a crime can be characterized as an international crime it cannot be solely attributed to the state: "[t]he individual official bears responsibility also under international law and must be susceptible to trial before an international court."[129] Thus for some criminal acts, states are not the exclusive duty bearers under international law; individuals must also be held liable.[130] Indeed, courts such as the Italian Court of Cassation have indicated that in the case of international crimes, immunities may never apply, a position also supported by prominent ICJ judges, as detailed in the Joint Separate Opinion in the *Arrest Warrant* case, discussed below.[131]

Scholars Hazel Fox and Philippa Webb put forth two main justifications for international exceptions to functional immunity: (i) the peremptory nature of grave international crimes resulting from the *jus cogens* nature of the law that prohibits them; and (ii) universal jurisdiction, which requires all States to prohibit international crimes in their national penal codes and to extradite or prosecute any individual in their jurisdiction who commits such a crime.[132]

Another rationale for excepting international crimes from functional immunity stems from the development of various international conventions and treaties. These conventions demonstrate that "international law now accepts that States may exercise jurisdiction over certain official acts of foreign States in the context of assigning individual criminal responsibility for such acts."[133] These conventions also demonstrate a growing acknowledgement of the importance of human right norms, which "impose crucial limits on a state's power over persons and things within its territory."[134] While an exception to immunity for *jus cogens* violations exists in the criminal context, no such exception has developed in the civil context, at least in most jurisdictions.[135]

Generally, it seems that functional immunity is less available in criminal proceedings than in civil proceedings for international crimes.[136] However, state practice has increasingly denied functional immunity for former foreign government officials in both criminal and civil contexts.[137]

i. Functional Immunity in Criminal Cases

While the immunity of State officials from foreign criminal jurisdiction is individual in nature,[138] it can only be invoked for certain types of criminal conduct. In 2007, the ILC considered possible exceptions to functional immunity in cases dealing with international

crimes.[139] The *Second Report on Immunity of State Officials from Foreign Criminal Jurisdiction* identified six rationales used by domestic courts to deny functional immunity for official acts in violation of international law.[140] Former Special Rapporteur Roman Kolodkin dismissed these rationales, however, and concluded that it is "difficult to talk of exceptions to immunity as having developed into a norm of customary international law."[141] While this view reflects the ICJ's decision in *Arrest Warrant,* it is no longer the majority opinion of the ILC.[142]

ILC members heavily criticized Kolodkin's "absolutist and expansive approach to immunity," which posed "a risk to the reputation of the Commission."[143] In 2012, current Special Rapporteur Escobar Hernández observed that while exceptions to immunity were still controversial, there is greater support for potential exceptions to functional immunity than personal immunity.[144] Escobar Hernández's latest 2016 Report indicates that Commission members maintaining that there are no exceptions to immunity are now in the minority,[145] and that the "commission of international crimes is considered to be the main instance in which immunity would not be applicable," as well as other examples or limitations, "especially acts of corruption," as discussed further below.[146]

The *Joint separate opinion of Judges Higgins, Kooijmans, and Buergenthal in Arrest Warrant* indicated that serious international crimes cannot amount to official acts because they are "[not] normal State functions that a State alone . . . can perform."[147] In their view, serious crimes under international law engage the personal responsibility of high State officials and, for the purposes of immunities, the concept of official acts must be narrowly defined. Similarly, Antonio Cassese criticized the *Arrest Warrant* decision for lacking reference to the customary rule that lifts functional immunities for international crimes allegedly committed by state agents.[148] According to Cassese, when international crimes are at issue, it is irrelevant whether acts are official or private.[149]

State practice demonstrates that regardless of whether the official or private act violated international law, domestic courts are willing to deny functional immunity in certain circumstances. For instance, courts have denied functional immunity to former foreign officials accused of espionage,[150] serious breaches of the law of armed conflict,[151] and other unlawful acts.[152] Functional immunity has also been denied when former officials have been accused of domestic crimes such as murder, abduction, or terrorism committed by former foreign officials.[153] In *Abu Omar*, the Italian Court of Cassation rejected the argument that CIA agents prosecuted for the covert abduction of an Egyptian citizen in Milan should enjoy functional immunity.[154] The Court explicitly rejected the existence of a customary norm

granting functional immunity to all foreign officials due to the absence of State practice in this regard.[155] In contrast, in *Italy v Lozano*, the same court accepted that a U.S. soldier was entitled to functional immunity in relation to the prosecution of acts performed by him in the discharge of his official functions.[156] The court found that customary international law was emerging to limit functional immunity for serious crimes, but the soldier's acts did not fit within this exception.

> …courts have denied functional immunity to former foreign officials accused of espionage, serious breaches of the law of armed conflict, and other unlawful acts.

Given the wide range of grounds for granting or denying functional immunity and the differing application by domestic courts, it is arguable that there is no customary norm of functional immunity in general criminal proceedings. There does appear to be an existing, or at least an emerging, customary norm, however, that immunity cannot apply with respect to serious international crimes, corruption crimes and territorial torts.

ii. Functional Immunity in Civil Cases

Often, the relationship between the official and the State is scrutinized when contemplating whether functional immunity should be granted in a civil case. This section will first examine cases that granted functional immunity in civil proceedings and then analyze cases where functional immunity was denied, despite a finding that officials acted in their official capacity. The UN Jurisdictional Immunities Convention specifically endorses functional immunity for former and current state officials in respect of civil proceedings by including in the definition of State, "the State and its various organs of government" and "representatives of the State acting in that capacity."[157] This principle is similarly reflected in the sovereign immunities legislation of countries that have chosen to enact such laws.[158]

In *Case of Jones and Others v The United Kingdom,*[159] the European Court of Human Rights held that official acts are protected by functional immunity in civil proceedings.[160] The claimants in *Jones* brought proceedings against Saudi Arabia and a number of officials whom they alleged had committed acts of torture against them in Saudi Arabia, relying on Article 14 of the Convention against Torture, which provides that victims of an act of torture can gain redress and have an enforceable right to fair and adequate compensation. The

claimants attempted to argue that the officials could not claim functional immunity for their official acts of torture. In rejecting this argument and offering immunity to the Saudi officials, the UK House of Lords noted that the distinction between criminal and civil proceedings was fundamental.[161]

On appeal to the ECtHR in 2014, the European Court similarly held that there was "no proper distinction between the immunity of the State and its officials…in the context of civil proceedings."[162] The court remarked that "'[t]he grant of sovereign immunity to a State in civil proceedings pursues the legitimate aim of complying with international law to promote comity and good relations between States through the respect of another State's sovereignty."[163] The ECtHR confirmed that Article 14 establishes an obligation to ensure redress where an act of torture took place within a state's own jurisdiction but does not impose such a right where the torture took place outside of the foreign state.[164] Lord Bingham quoted, with approval, Hazel Fox's observation that State immunity did not "contradict a prohibition contained in a *jus cogens* norm but merely diverted any breach of it to a different method of settlement."[165] This reasoning has also been followed in a number of common law countries with the result that officials can frequently claim functional immunity in civil proceedings for official acts.[166]

As discussed above, in *Kazemi Estate v. Islamic Republic of Iran,* the Supreme Court of Canada upheld the immunity of foreign officials in a civil suit for torture, basing its rationale on the interpretation of the State Immunity Act (R.S.C, 1985, c. S-18).[167] The Court held that public officials benefit from the protection of the *State Immunity Act* when acting in their official capacity and that although an exception to immunity for *jus cogens* violations exists in the criminal context, no such exception has developed in the civil context.[168] The Court noted that the heinous nature of torture does not transform torture into a private act and that the definition of torture in the CAT makes torture, by its very nature, an official act.

In the United States, even though functional immunity can be extended to former heads of State in civil cases at the U.S. State Department's discretion, officials are "likely to be held to enjoy no immunity in respect of acts of a private nature performed while in office. [T]he tendency of U.S. courts is to construe acts of theft, fraud, and corrupt practices as performed in a private capacity."[169] Recall, however, that serving heads of state would still likely hold immunity from civil suits for both official and private acts.[170]

In civil law jurisdictions, courts in France, Italy and Switzerland have drawn a distinction between public and private acts, but have applied this distinction chiefly to limit immunity for those who are no longer heads of State.[171] Thus, a French court held Emperor Maximilian

immune when he was sued while in office for unpaid purchases of furniture, while another French court denied immunity to Isabella, former Queen of Spain, for a claim related to jewelry purchase for her own use.[172]

In contrast, national courts have declined to extend functional immunity to civil proceedings where a government official has violated international or domestic law, as such acts surpass their legitimate authority, and are thus not official acts.[173] Scholarly works have also addressed the impact of regional laws on the law and state of international immunities law more generally, noting, "state immunity is an area of the law where a unified, universal approach is critical to the fulfilment of its goals."[174]

A notable exception of denying functional immunity in civil proceedings involves cases brought under the 1789 *Alien Tort Statute* (ATS) and the 1991 *Torture Victim Protection Act* (TVPA) in the United States. The ATS provides that "[t]he district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States."[175] The statute provides federal courts with jurisdiction to hear certain cases related to violations of *jus cogens* norms of international law.[176] When the U.S. Congress enacted the TVPA, it created a cause of action for damages against individuals who, "under actual or apparent authority, or color of law, of any foreign nation," commit acts of torture or extrajudicial killing.[177] This legislation, on its face, overrides functional immunity. U.S. courts have asserted their jurisdiction over official acts of torture,[178] murder, prolonged arbitrary detention, involuntary servitude,[179] fraud under the Securities Exchange Act,[180] funneling money to terrorist groups through charities,[181] and arbitrary detention.[182]

In 2013, however, the U.S. Supreme Court significantly reduced the reach of the ATS in *Kiobel v Royal Dutch Petroleum Co.* to cases that "touch and concern the territory of the United States" with "sufficient force to displace the presumption against extraterritorial application."[183] Note, however, that *Kiobel*'s holding would not bar actions brought against persons currently residing in the United States.

In conclusion, the functional immunity of State officials from foreign civil jurisdiction depends on several factors, including whether the act is an official act versus a private act and whether the case is brought under a domestic law that explicitly strips functional immunity. While functional immunity can be denied, especially for private acts, this occurs less often in civil cases than in criminal cases.

...the functional immunity of State officials from foreign civil jurisdiction depends on several factors, including whether the act is an official act versus a private act and whether the case is brought under a domestic law that explicitly strips functional immunity.

D. Invocations and Waivers of Functional Immunity

Since immunities of foreign officials belong to the state, functional immunity may be waived by the foreign state at any time.[184] Subsequently, an individual seeking to invoke functional immunity would also arguably require their home State to confirm their entitlement to immunity.[185] In *Djibouti*, the ICJ emphasized:

> The State, which seeks to claim immunity for one of its State organs, is expected to notify the authorities of the other State concerned. This would allow the court of the Forum State to ensure that it does not fail to respect any entitlement to immunity and might thereby engage in the responsibility of that State. Further, the State notifying a foreign court that judicial process should not proceed, for reasons of immunity, against its State organs, is assuming responsibility for any internationally wrongful act in issue committed by such organs.[186]

This reasoning has been upheld in other cases where a state invokes immunity on behalf of its officials.[187] *Questions relating to the Obligation to Prosecute or Extradite (Belgium v Senegal)*[188] arose out of Belgium's attempt to extradite and prosecute Hissène Habré, the former President of the Republic of Chad, for allegations of torture during his rule. Belgium was unsuccessful in its efforts, and Habré was granted political asylum by Senegal.[189] In 2000, a Belgian national of Chad filed a complaint against Habré alleging serious violations of international humanitarian law, torture and genocide.[190] The investigating Belgian judge sought the cooperation of Chad and Senegal. Chad's Minister of Justice responded by officially lifting Habré's immunity.[191] Belgium then requested Habré's extradition from Senegal. However, the *Chambre d'accusation* of Senegal's Dakar Court of Appeal refused the extradition request on the basis of Mr. Habré's functional immunity as President.[192] When the Court issued its judgement, Senegal subsequently referred the matter to the African Union, which accepted Habré's case and directed Senegal to prosecute him.[193] In February 2009, Belgium initiated proceedings at the ICJ alleging Senegal had breached its obligations under the Convention against Torture by failing to prosecute Habré or to extradite him to

Belgium. The ICJ decision, interpreting the Convention against Torture, implicitly lifted Habré's functional immunity by ordering Senegal to extradite or prosecute Habré.

In *Paul v Avril,* a U.S. District Court held that when a foreign government waives the immunity of a military leader, it is considered a complete and effective waiver of all immunities, both personal and functional.[194] In another case, involving the former president of the Philippines, Ferdinand Marcos, and his wife, the U.S. Court of Appeals for the Fifth Circuit held that Head of State immunity was primarily an attribute of state sovereignty, not an individual right, and full effect should be given to the waiver by the Philippines government of Marcos' immunity.[195]

As State practice on invocations and revocations of functional immunity is inconsistent, however, there is arguably no guiding customary international norm.[196] Rather, the current trend seems to be that "those who have represented powerful States with relatively well-organized and stable regimes are most likely to have functional immunity asserted on their behalf and to benefit from the continuing support of their national Governments," while the situation of "those from less stable regions of the world may be more precarious."[197]

E. The U.S. State Department's Discretionary Role in Immunities

This section addresses the U.S. courts' treatment of immunity claims by current and former state officials. In cases where a foreign State is a party to the proceedings, the Foreign Sovereign Immunities Act of 1976 (FSIA) will determine immunity.[198] However, if a foreign official is seeking to invoke personal or functional immunity, the courts will pass the immunity question to the Executive Branch, namely the U.S. Department of State.[199] If the State Department suggests granting or denying immunity, this determination is generally upheld by the courts and there is no right to review the Executive's decision.[200] Thus, in a "number of cases brought before courts in the United States, immunity has been granted or refused without assessing the acts performed by a State official, but simply on the basis of the "suggestion" of immunity submitted by the US State Department in accordance with common law principles.[201] Where the Department of State does not provide an answer, however, the courts will decide the question of immunity.[202]

In a watershed case brought under the Torture Victim Protection Act and the Alien Tort Statue (ATS),[203] the U.S. Supreme Court held in *Samantar v Yousuf* (2010) that the FSIA only applies to cases where a foreign State—and not a state official—is a party to the proceedings. The Court ruled that the State Department, and not the FSIA, determines the immunity of foreign government officials with respect to being sued in their personal

capacity.[204] This decision supported the State Department's contentions that it determined immunity questions,[205] overturned a previous line of cases, including many ATS cases, and resolved the split among lower U.S. courts on this issue.[206]

4. International Treaties and Conventions

This section outlines the existing international codifications relevant to immunities in relevant international treaties and conventions as well as regional instruments.[207]

A. United Nations Convention on Jurisdictional Immunities of States

The United Nations Convention on Jurisdictional Immunities of States and Their Property was adopted by the UN General Assembly on December 2, 2004 and will enter into force upon the thirtieth state ratification. As of December 6, 2016, 28 states have signed and 21 states have ratified the Convention.[208] Commentators view this convention as constituting "a significant stage in the harmonization and articulation of the international law of State immunity."[209]

The Convention "applies to the immunity of a State and its property from the jurisdiction of the courts of another State"[210] and aims to enhance legal certainty and "contribute to the codification and development of international law and the harmonization of practice in this area."[211] The "State" is defined by the Convention in Article 2(1)(b)(iv) to include "representatives of the State acting in that capacity," but Convention provisions do not extend to cover criminal proceedings.

It is important to clarify that for every State act, there are two types of possible responsibility: international responsibility for a State and criminal responsibility for an individual. The legal regime for the two types of responsibility can differ.[212] Thus, even if an act can be attributed to a State, the attribution on its own does not mean that a State official enjoys immunity with respect to that act.[213]

…even if an act can be attributed to a State, the attribution on its own does not mean that a State official enjoys immunity with respect to that act.

Significance of the Convention

Article 7(1) of the Convention specifies that a State cannot invoke immunity from jurisdiction in a foreign court if it has expressly consented to the exercise of jurisdiction "with regard to the matter or case: a) by international agreement," among others. Extradite or prosecute clauses in international conventions could reasonably be interpreted as express consent to jurisdiction in the courts of other states party for alleged violations of the Convention.

Legal scholars Roger O'Keefe and Christian J. Tams argue that the

> adoption of the Convention reflects a tectonic shift in States' *opinio juris* from the early 1980s, accelerated by the waning and end of the Cold War and changes within the G7, in favour of the restrictive doctrine of State immunity in one form or another … The Convention reflects a general acceptance among States that the restrictive doctrine of State immunity, if not yet universally subscribed to, is at least now the way forward.[214]

The impact of the Convention remains to be seen and will obviously depend on whether it enters into force and, if so, how many states ratify it. If the Convention attracts widespread participation, the primary effect will be that a significant number of States will "be applying exactly the same rules—rather than substantially the same, or more or less similar, or diametrically opposed rules—of State immunity,"[215] which would result in improved legal certainty and fewer inter-state disputes over State immunity.

Moreover, the Convention has already had an impact beyond its "quality as a treaty" in that the process of developing and agreeing on the text clarifies the customary international law of State immunity to a certain extent. Judicial decisions from national and international bodies have referred to the Convention as a persuasive outline of the relevant legal rules.[216] On the other hand, legal commentators discussing whether the UK should sign and ratify the Convention commented:

> Bringing the Convention into force might freeze the law and stop the development of state practice outside the Convention. One alternative is to leave it to lie on the table as a generally accepted picture of the current position under international law. This would allow further developments of the law in line with the needs of businesses, individuals and governments.[217]

B. United Nations Convention against Corruption

In October 2003, the UN General Assembly adopted the United Nations Convention against Corruption (UNCAC), a global anti-corruption treaty designed to facilitate international

cooperation to prevent and end corruption, and to promote asset recovery, integrity, accountability and proper management of public affairs and property.[218] The Convention entered into force on 14 December 2005 and presently has 178 State Parties.[219]

UNCAC's Article 4, "Protection of sovereignty," upholds the doctrine of sovereign immunity in the name of "the principles of sovereign equality and territorial integrity of States and that of non-intervention in the domestic affairs of other States." The preamble notes, however, that "the prevention and eradication of corruption is a responsibility of all States and that they must cooperate with one another" in this regard.

Chapter III of UNCAC, "Criminalization and law enforcement," requires each State party to adopt legislation to criminalize a plethora of acts that constitute corruption along with trading in influence and the concealment and laundering of the proceedings of corruption. Article 30 specifically addresses immunities, stating:

> Each State Party shall take such measures as may be necessary to establish or maintain, in accordance with its legal system and constitutional principles, an appropriate balance between any immunities or jurisdictional privileges accorded to its public officials for the performance of their functions and the possibility, when necessary, of effectively investigating, prosecuting and adjudicating offences established in accordance with this Convention.

The legislative guide to the Convention indicates that the intention behind this paragraph was to uphold the legitimacy of anti-corruption strategies and to address impunity.[220]

Relevant to the initiation of civil claims, Article 35 of UNCAC requires legislative steps that enable anyone who suffered damage as a result of an act of corruption to claim compensation.

UNCAC's Article 42 requires states to adopt measures necessary to establish jurisdiction over Convention offences, permits jurisdiction over crimes of transnational corruption, and establishes an important extradite or prosecute clause in paragraph 3. State parties are obligated to establish jurisdiction over the offences set out in the Convention when an alleged offender is present in their territory and they are not extraditable solely on the grounds that they are one of that State's nationals. Article 44 further elaborates the extradite or prosecute clause and outlines under what conditions extradition shall occur.

C. Other International Instruments

Regional instruments also exist to address immunities of public officials. Among them are resolutions from the Committee of Ministers of the Council of Europe and the corresponding

Group of States against Corruption (GRECO), which provide guidelines recommending that immunity be limited to a minimum number of official positions, and that lifting immunity be done in a transparent, objective manner.[221] Likewise, the Organization for Economic Cooperation and Development (OECD), in multiple compilations of state recommendations, has widely advised in favor of lifting immunities in the context of foreign bribery investigations and prosecutions in order to allow for effective investigation and prosecution.[222]

Conversely, the African Union (AU) recently adopted an amendment specifically exempting senior government officials from prosecution by the proposed African Court of Justice and Human Rights, which would otherwise be authorized to try individuals accused of crimes against humanity and other serious international crimes.[223] Although the AU's decision may represent a step backwards in the development of a universal approach to the law of immunities, other developments mark a shift in international law towards gradual acceptance not only of the restrictive doctrine, but of building provisions into conventions, treaties and domestic laws to ensure that immunity does not equate to impunity, and to provide victims of human rights abuses with a means of redress.

...the Organization for Economic Cooperation and Development (OECD), in multiple compilations of state recommendations, has widely advised in favor of lifting immunities in the context of foreign bribery investigations and prosecutions in order to allow for effective investigation and prosecution.

5. What Is the Right Balance Between Immunity and Accountability?

A. Shift Towards Accountability and a Restrictive Application of Immunity

This section outlines the absolute and restrictive immunity doctrines and argues that the shift towards a restrictive approach logically mirrors changes in international relations that have occurred since immunities — aptly labeled a "relic of the Westphalian system"[224] — were originally developed. It also briefly considers the responsibility and accountability of states in international law and analyzes whether the means by which victims of human rights abuses can call states to account is in fact adequate.

Although there are competing doctrines underlying the application of state immunities, immunities are one means by which states can deflect efforts to enforce human right norms.[225] Over time, there has been a shift towards less absolute applications of immunity. Conceptions of sovereignty have changed from antiquated conceptions characterized by "the nation-states power to violate virgins, chop off heads, arbitrarily confiscate property, torture citizens, and engage in all sorts of other excessive and inappropriate actions" to more modern notions of sovereignty in which "extreme forms of arbitrary actions even against a sovereign's own citizens are circumscribed and constrained."[226] The modern nation state exists in tandem with a multitude of treaties and customary international law norms and must comply with substantive human right norms. Some scholars have argued that the *jus cogens* nature of international rules that protect human rights should prevail over the granting of immunities. In particular, "the doctrine of foreign state immunity must be brought into conformity with the development of international law and the notion of sovereignty, which now has a functional and normative content and requires states to exercise their powers respecting the fundamental rights of human beings."[227]

Absolute immunity offers states a complete bar from legal proceedings against their agents as defendants in foreign national courts, regardless of the public or private nature of the act.[228] This doctrine prevailed during the nineteenth century.[229] Changes in global affairs in the last century have led to the application of a more restrictive approach to immunity that acknowledges immunities for acts that are deemed to have been carried out by the state (official acts), but not for private acts.[230] The restrictive approach considers immunities to be a set of rules with exceptions as opposed to a more absolute "doctrine." The UN Convention on Jurisdictional Immunities of States, discussed above, which attempts to codify the customary international law of immunities, captures the shift towards this restrictive approach by outlining a series of exceptions where a State cannot claim immunity.[231] Thus, the Convention reflects a general acceptance among States that the restrictive doctrine of State immunity is the "way forward."[232] A movement towards the restrictive doctrine is also evidenced by changes in the approach of the International Law Commission. Reflecting this shift, Special Rapporteur Escobar Hernández has taken a much more restrictive view on immunities of state officials from foreign jurisdiction than her predecessor.[233]

For instance, in her 2016 Report, Escobar Hernández concludes:

> [D]omestic courts … have been accepting the existence of limitations and exceptions to immunity in circumstances relating to the commission of international crimes, crimes of corruption or related crimes, and other crimes of international concern, such as terrorism, sabotage, or causing the

> destruction of property and the death and injury of persons in relation to such crimes.[234]

She notes that both civil and criminal national courts have specifically denied immunity to State officials in corruption-related cases.[235] In many of those cases, it was clear that the activities under investigation were not considered official acts – and thus did not need to be analyzed from the perspective of limitations or exceptions.[236] However, even in cases where it was less clear whether acts in question were private or official, "national courts have as a rule concluded that immunity is not applicable, relying … on the intention of the perpetrators … to make use of their official position exclusively for their own benefit, thereby causing harm to the State of which they are, or were, officials."[237] To avoid the uncertainty inherent in case-by-case determinations in this area by national courts, Escobar Hernández proposes to include in the ILC draft articles a provision that expressly defines corruption as a limitation or exception to the immunity of State officials from foreign criminal jurisdiction.[238]

…both civil and criminal national courts have specifically denied immunity to State officials in corruption-related cases

---

As the concept of state sovereignty—the foundation on which personal and functional immunities is justified—is itself in relative decline, the shift towards a more restrictive application of immunity is logical. After the 1648 Peace of Westphalia, a legal order emerged whose actors were sovereign states with defined territories. International law developed as a body of rules that defined how states should behave towards other states. However, the world order has seen significant changes. New actors and bodies have since emerged in the international arena, such as intergovernmental organizations (including the United Nations and the World Bank), international courts and tribunals (including the International Court of Justice, the International Criminal Court and *ad hoc* tribunals), transnational corporations, and international nongovernmental organizations. Nearly two decades ago, Edith Brown Weiss wrote:

> [T]he international legal system that has been emerging for the new millennium is markedly different … While states continue as important actors, many other actors contribute to developing, interpreting, implementing, and complying with international law … The system is non-hierarchical in that there are transnational networks of actors, including states that interact with each other. The sharp lines

> between public and private international law have blurred. The divide between international and domestic international law is fading, and the preference for binding instruments over voluntary or legally nonbinding norms is receding.[239]

Changes in the application of the rules of immunities—rules that are justified by principles of state sovereignty—are therefore logical reflections of the legal arena in which they exist. As immunities evolve and develop, they should be shaped through this understanding of the changing international legal system. If state sovereignty continues to lose supremacy in the international legal order, so too should state immunity.[240]

The international law on immunities is in a transitional phase reflected by a lack of consensus among courts, states and scholars on how norms and doctrines should evolve.[241] The restrictive doctrine is endorsed in Europe and North America, as well as many other Commonwealth States and the U.S., Russia, Lithuania, Estonia, Finland, Slovakia, India, Singapore, Malaysia, Philippines, and Japan also generally adhere to the restrictive doctrine.[242] However, the Czech Republic, Bulgaria, Poland, Romania and most Latin American countries currently still apply absolute immunity.[243] Although China has signed the Convention on Jurisdictional Immunities, which supports the restrictive doctrine, the Hong Kong Court of Final Appeal applied absolute immunity in the case *Democratic Republic of the Congo v FP Hemisphere Associates*.[244] China thus has yet to embrace the restrictive doctrine; its adherence to the absolute doctrine underscores the continuing disagreement among countries with respect to immunities.[245]

The following sections will address normative aspects of specific elements of personal and functional immunities to argue for a restrictive application of immunities when they conflict with prosecuting human rights violations.

B. Specific Areas of Tension

i. Competing Norms of Human Rights vs. National Sovereignty

The competing norms or human rights and national sovereignty in international law present a key tension in the immunities arena. International law can be used as a tool for unifying different states' laws on sovereign immunities. However, legal conflict may occur at the international level when immunity law encounters competing norms, such as international human rights law and other international legal tenets. The tension this produces has a tendency to create weaknesses and exceptions in immunities law. These complications tend to arise "[w]hen a state official is accused of serious human rights violations in the court of another state" and "that court must make a choice with normative consequences."[246]

The interaction between human rights and immunities may also be complicated due to three emerging phenomenon: 1) the development of the principle of individual human rights under international law 2) the ascendance of human rights and 3) the expansion of domestic jurisdictions over human rights violations.[247] Thus, although the laws surrounding state sovereignty and immunities are complicated and can involve competing norms, there is growing recognition of the importance of holding those who violate international human rights law accountable. This report argues that customary international law is evolving away from outdated concepts of immunity towards accountability.

Philippa Webb describes the lack of clarity in the tension between human rights and immunities:

> In a broad sense, there are indications that human rights are acquiring a higher status: states have created international criminal courts and tribunals to prosecute individuals regardless of their official capacity; they have ratified human rights treaties and expanded the jurisdictional reach of their domestic laws. At the same time, there are also signs of hesitancy to recognize a hierarchy of norms. During the negotiations on the UN State Immunity Convention, the drafters twice rejected proposals to remove immunity in cases involving claims for civil damages against states for serious human rights violations. The Chair of the Ad Hoc Committee later explained that there was no clearly established pattern of state practice in this regard and if the Committee had included such a provision, it would have jeopardized the conclusion of the Convention.[248]

Although the tension between human rights and immunities seems obvious, it can be argued that the tension can be resolved, as stated in *Jurisdictional Immunities.*[249] The ICJ in this case "emphasized the essentially procedural nature of the law on State immunity which is 'thus entirely distinct from the substantive law which determines whether that conduct is lawful or unlawful.'"[250] However, it seems that in practice this is not so clear; the relationship of *jus cogens* to universal jurisdiction is procedural while a court's subject matter jurisdiction cannot be separated from substantive considerations.[251] Webb argues that the decision of the ICJ in *Jurisdictional Immunities* may have a chilling effect on the development of human rights and state immunity laws and may prevent a deeper, more reflective analysis of the choice between different norms.[252]

Yet the development of other regional treaties such as the Council of Europe's anti-corruption conventions and previously mentioned regional legal instruments[253] contemplates immunities and their effect.[254] In order to remain effective and relevant,

customary international law should develop in accordance with changes in the context it seeks to serve. These changes of the last century signal an important shift towards greater accountability of perpetrators of both grave violations of human rights and those who commit serious corruption offences.[255]

This shift will undoubtedly also alter courts' treatment of those who commit corruption-related offences. The link between corruption and the violation of human rights is well-recognized.[256] Indeed, some argue that grand corruption by itself and particularly in certain areas of the world is a crime against humanity within the definition of Article 7(1)(k) of the Rome Statute of the International Criminal Court.[257] Courts' treatment of perpetrators of corruption and human right violations will likely be in flux as customary international law evolves and changes. Courts that decline immunity on the basis of customary international law when a grant of immunity would conflict with international human rights norms should acknowledge this shift. Human rights are growing in importance while notions of state sovereignty are shifting under significant pressures from globalization. As immunities doctrines evolve, they should increasingly give way when they conflict with the prosecution of serious violations of human rights.

…some argue that grand corruption by itself and particularly in certain areas of the world is a crime against humanity within the definition of Article 7(1)(k) of the Rome Statute of the International Criminal Court

ii. The Breadth of Personal Immunity

As articulated in section 2 above, personal immunity is well-established for Heads of State, Heads of Government, and Ministers of Foreign Affairs.

There is some uncertainty, however, as to which other officials can and should enjoy personal immunity from suit. Arguments have been made for "the extension of the scope of persons to be protected by immunities, resting upon the pluralization of actors in the globalized world."[258] These arguments seek to extend personal immunity to other actors—such as a head of state's consultant or a chief of police on a special mission, or even representatives of a rebel organization—[259] to allow them to perform international relations

functions effectively. These arguments, however, are rooted in a false understanding of the source of personal immunity and the concept of sovereignty.

Given the more particularized scope of their activities, officials lower in rank than the "troika" (head of State, head of government and Foreign Minister) may not be representing the state per se, but rather carrying out a particular element, policy, or function of the state. Expanding immunity to cover such diverse acts would unjustifiably extend the state officials' immunity doctrine beyond its rationale. It is also worth noting that there is currently no concept of sovereignty or immunity for non-state actors, nor should there be, given the growing power imbalance between corporate entities and governments.

Because immunity is an exception to an otherwise valid jurisdiction, and because of the concerns outlined above in allowing violations of human rights to go unprosecuted, a principled and justified approach must be applied when extending the application of immunities. Expanding the ranks of individuals entitled to personal immunity must be justified through the principles underpinning the original immunity doctrine rather than facile references to globalization.

iii. Can Criminal Acts Be Protected by Functional Immunity?

As discussed in sections 3.B.iii. and 3.C.i., another area of tension in the law of state immunity is whether functional immunity is available in criminal proceedings. National and international jurisprudence acknowledge a growing exception to the application of functional immunity in cases that involve international and domestic crimes. This exception is founded on the notion that acts that violate international law cannot be official acts as they are generally not normal functions of a state or in the state interest. Other cases have held that official acts that violate international or domestic law should not be protected by functional immunity.

Dapo Akande argues that functional immunity should not apply to international crimes committed by state officials because the rule of exception to immunity is the more recent international law rule:

> The best explanation for the absence of immunity *ratione materiae* in cases concerning international crimes is that the principle is necessarily in conflict with more recent rules of international law and it is the older rule of immunity which must yield. Developments in international law now mean that the reasons for which immunity *ratione materiae* are conferred simply do not apply to prosecutions for international crimes.[260]

The growing global anti-corruption movement, signified by widespread state participation in UNCAC, indicates that the prosecution of individuals who commit acts of corruption is gaining importance as a norm within the framework of international law. Akande's argument could thus similarly be applied to argue that corrupt acts should not be protected by functional immunity because, where prosecution of corruption and application of immunity conflict, the more recent legal rules against corrupt acts must prevail.

C. Entry into a Country: Could Corrupt Officials be Turned Away at the Border?

The G-20, an international forum for the governments and central bank governors from 20 major economies, is exploring the issue of the impunity of the wealthy and privileged by examining methods by which denial of entry into a country can be effected. Immunities may potentially impact how privileged, wealthy and corrupt individuals enjoy their wealth, holidays and shopping excursions in foreign countries. Countries may have an interest in effecting measures such as denial of entry in a country as a legal means of combatting impunity, particularly in situations where the prosecution or apprehension of a high-profile individual may be complicated.

Countries may have an interest in effecting measures such as denial of entry in a country as a legal means of combatting impunity

So-called diplomatic immunities as expressed in the law of two significant conventions – the Vienna Convention on Diplomatic Relations (VCDR) and the Vienna Convention on Consular Relation – impact officials' entry into a country.

Article 9 of the Vienna Convention on Diplomatic Relations provides that

> The receiving State may at any time and without having to explain its decision, notify the sending State that the head of the mission or any member of the diplomatic staff of the mission is *persona non grata* or that any other member of the staff of the mission is not acceptable. In any such case, the sending State shall, as appropriate, either recall the person concerned or terminate his functions with the mission. A person may be declared non grata or not acceptable before arriving in the territory of the receiving State.

Article 23 of Vienna Convention on Consular Relations further provides that

> A person appointed as a member of a consular post may be declared unacceptable before arriving in the territory of the receiving State or, if already in the receiving State, before entering on his duties with the consular post. In any such case, the sending State shall withdraw his appointment.

Both of these conventions apply to a range of diplomatic staff, members, and agents. The Convention on Consular Relations similarly provides a definition of "consular post" that includes any consulate-general, consulate, vice-consulate or consular agency.

According to scholar Eileen Denza, Article 9 of the VCDR "has proved in practice to be a key provision which enables the receiving State to protect itself against numerous forms of unacceptable activity by members of diplomatic missions and forms an important counterweight to the immunities conferred elsewhere in the Convention."[261] The right to designate someone *persona non grata* is one of the oldest principles of diplomatic law.[262] It is not necessary to give reasons when declaring someone *persona non grata*. Furthermore, such a declaration is entirely discretionary, allowing a receiving state to make the declaration based on an individual's behavior, or other reasons such as actions taken by the sending state. Indeed "expelling a diplomat whose misdemeanor was deemed to be personal and not attributable to his sending State" has become general practice.[263]

In effect, by declaring a person *non grata*, a state can request that an individual leave a receiving state. The receiving state does not usually expel the person declared *non grata*; rather, it is for the sending state to recall the person. However, the general practice is that the receiving State's desire for recall prevails over any resistance from the sending State.[264] Only if the person declared *non grata* does not leave the country can the receiving state be permitted to consider the person without immunities or privileges. The ICJ has held that this effect takes place almost immediately.[265] Furthermore the individual being requested to leave has no right to judicial review of the decision.[266]

At customary international law, countries may exercise their discretion in choosing whom they allow through their borders. Individuals that do not enjoy diplomatic privileges are subject to the customs of international law and the practices of countries – which have the ability to exercise their discretion and deny allegedly corrupt individuals entry into a country. Denying entry to indicate disapproval may help rein in allegedly corrupt officials' lavish lifestyles. In Canada, for example, there are many grounds on which a person may be denied entry, including financial reasons and misrepresentation.[267]

In sum, for those individuals that are covered by full immunities, the Vienna Conventions on Diplomatic and Consular Relations provide means by which they may be expelled or denied entry into a country.

6. Conclusion

From the perspective of international law, immunities protect law and order, the stability of international relations, inter-state cooperation and the secure discharge of public functions of relevant actors. However, immunities should not be extended beyond their original purpose so as to "degenerate into privileges which are inadequate in the contemporary global order"[268] – particularly when concerning the commission of serious international crimes or corruption by individuals, whether or not they are acting in official state capacity. Although consistent state practice of lifting immunities has not yet crystallized into an established norm of customary international law, increasing attempts to bring suits against individuals—and tendencies of both domestic and international courts to entertain such suits—make it likely that a trend will emerge in favor of diminishing certain sovereign immunities protecting individuals.

Thus, as the concept of state sovereignty continues to be challenged by other international legal norms, including international human rights law and international criminal law, a new balance will be struck between immunities for state officials and accountability. Restrictive applications of immunities as a result of these international legal developments will encourage further cases to hold officials accountable for their non-official acts.

ENDNOTES

[1] Although national cases are not binding on foreign states, in some instances domestic jurisprudence can assist with international law interpretation.
[2] *United Nations Convention on Jurisdictional Immunities of States and Their Property*, 2 December, 2004, [Treaty Series] [*UNSCI*] (Preamble: "Considering that the jurisdictional immunities of States and their property are generally accepted as a principle of customary international law").
[3] *Kazemi Estate v. Islamic Republic of Iran*, 2014 SCC 62 at para 41, [2014] 3 SCR 176 LeBel J [*Kazemi*] at para 39; see also Hazel Fox & Philippa Webb, *The Law of State Immunity,* 3rd ed (New York: Oxford University Press, 2013) at 1 ("[I]immunity is a plea relating to the adjudicative and enforcement jurisdiction of national courts which bars the national court of one State from adjudicating the disputes of another State").
[4] Philippa Webb, "Human Rights and the Immunities of State Officials", in Erika De Wet & Jure Vidmar eds, *Hierarchy in International Law: The Place of Human Rights* (Oxford: Oxford University Press, *2012)* 114 at 117. Online: <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2558666]>.
[5] *Jurisdictional Immunities of the State (Germany v Italy),* [2012] ICJ Rep 99 at 123 [*Jurisdictional Immunities*]. The ICJ expressly confines its judgement to the State, leaving the law on immunity of State officials for violation of same acts to develop independently. See also *Case of Jones and Others v The United Kingdom*, No 34356/06 [2014] ECHR, (14 January 2014) at para 188 [*Jones*]; Antonio Cassese, *International Law*, 2nd ed (New York: Oxford University Press, 2005) at 98; Anthony J Colangelo, "Jurisdiction, Immunity, Legality and *Jus Cogens*" (2013) 14:1 Chicago J Intl L 53 at 62; *R v Commissioner of Police for the Metropolis and Others, Ex Parte Pinochet*, [1999] UKHL 17 (LJ Browne Wilkinson) [*R v Commissioner*] ("It is a basic principle of international law that one sovereign state (the forum state) does not adjudicate on the conduct of a foreign state").
[6] *Holland v. Lampen-Wolfe,* [2000] UKHL 20 (LJ Millet).
[7] *Kazemi, supra* note 3 at para 37.
[8] *R v Commissioner, supra* note 5.
[9] *UNSCI, supra* note 2 at arts 7 – 8; *United Nations Convention against Corruption,* 31 October 2003, 2349 UNTS 41 (entered into force 14 December 2005) [*UNCAC*].
[10] *The Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium), (*2002) ICJ Rep 3 at para 53 [*Arrest Warrant*].
[11] Prosecutor v Blaškić, IT-95-14, Judgement on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II on 18 July 1997 (29 October 1997) at para 41 (International Criminal Tribunal for the former Yugoslavia, Appeals Chamber), online: ICTY <www.icty.org>.
[12] *R v Commissioner, supra* note 5 (Lord Phillips) ("It is common ground that the basis of the immunity claimed is an obligation owed to Chile, not to Senator Pinochet. The immunity asserted is Chile's").
[13] *Arrest Warrant, supra* note 10 at para 51; *Immunity of State Officials from Foreign Criminal Jurisdiction: Memorandum by the Secretariat,* ILC, 60th Sess, UN Doc A/CN.4/596 (2008) 1 at para 94 [ILC Immunity Memo]; Joanne Foakes, *The Position of Heads of State and Senior Officials in International Law* (New York: Oxford University Press, 2014) at 9.
[14] Riccardo P Mazzeschi, "The Functional Immunity of State Officials from Foreign Jurisdiction: A Critique of Traditional Theories" (2015) 3:31 QIL 17 at 13; Huang Huikang, "On Immunity of State Officials from Foreign Criminal Jurisdiction" (2014) 13:1 Chinese J Intl L 1 at 4; Andrew Sanger, "Immunity of State Officials from the Criminal Jurisdiction of a Foreign State" (2013) 62:1 ICLQ 193 at 198; Dapo Akande and Sageeta Shah, "Immunities of State Officials, International Crimes, and Foreign Domestic Courts" (2011) 21:4 Eur J Intl L 815 at 818.
[15] ILC Immunity Memo, *supra* note 13 at para 132; Foakes, *supra* note 13 at 25; Ramona Pedretti, *Immunity of Heads of State and State Officials for International Crimes* (Leiden: Martinus Nijhoff Publishers, 2014) at 31.
[16] *Arrest Warrant, supra* note 10 at para 55; *R v Commissioner, supra* note 5 at para 269A, 269B, [1999] 2 WLR 827; ILC Immunity Memo, *supra* note 13 at 94.
[17] *Arrest Warrant, supra* note 10 at para 61; see section 2.D.

[18] *Arrest Warrant, supra* note 10 at para 55; *R v Commissioner, supra* note 5 at para 269A, 269B; *Habyarimana v Kagame* 821 F Supp (2d) 1244 at 1262-1264; *Habyarimana v Kagame* 696 F 3d 1029 (10th Cir 2012) at 1032 [*Habyarimana 2012*]; ILC Immunity Memo, *supra* note 13 at para 94; Foakes, *supra* note 13 at 89.
[19] *R v Commissioner, supra* note 5.
[20] *Arrest Warrant, supra* note 10 at para 51.
[21] *Ibid* at section 2.D.iv (where incumbent Heads of State indicted by International Criminal Tribunals for international crimes).
[22] ILC Immunity Memo, *supra* note 13 at para 132; Foakes, *supra* note 13 at 25; Pedretti, *supra* note 15 at 31.
[23] *Vienna Convention on Diplomatic Relations,* 18 April 1961, 500 UNTS 95 art 31 (entered into force 24 April 1964) [*V. Conv. on Diplomatic Relations*]; *Case Concerning Certain Questions of Mutual Assistance in Criminal Matters* (*Djibouti v France)*, [2008] ICJ Rep 177 at para 174 [*Crim. Matters*]; *Marcos and Marcos v Federal Department of Police* (1989) 102 ILR 198 (Swiss, Fed Tribunal) [*Marcos*]; *Gadaffi* (2001) 125 ILR 490 (Cour of Cassation, France) [*Gadaffi*]; ILC Immunity Memo, *supra* note 13 at 59-61.
[24] Foakes, *supra* note 13 at 10, 42, 110 ("The fact that heads of State possess a number of internationally relevant powers and are entitled under international law to special treatment by other States means that it is important that other States are clear as to whether or not a particular individual is accepted as head of a recognized State").
[25] See *United States v Noriega,* 746 F Supp 1506 (SD Fla 1990) [*Noriega*]; *Lafontant v Aristide,* 844 F Supp 128 (ED NY 1994) [*Aristide*].
[26] *Arrest Warrant, supra* note 10 at paras 161-180; *Crim. Matters, supra* note 23.
[27] LJN: AT5152, Provisional Relief Judge (*Voorzieningenrechter*), The Hague District Court, KG 05/432 at para 3.6-3.7.
[28] "The Spanish Indictment of High Ranking Rwandan Officials" (2008) 6:5 J Int'l Crim J 1003; see also *Gadaffi, supra* note 23 (The Court of Cassation held that as Head of State, Muammar Gadaffi was personally immune from criminal proceedings related to the alleged crime of terrorism).
[29] *Habyarimana 2012, supra* note 18 at 1244.
[30] *AW v J(H)AF v L,* A/9 Registration No (Austria Supreme Ct, 2001). See also *Aristide, supra* note 25.
[31] *Arrest Warrant, supra* note 10 at para 51.
[32] *Arrest Warrant, supra* note 10 at para 51; Roman A Kolodkin, *Preliminary Report on Immunity of State Officials from Foreign Criminal Jurisdiction*, ILC, 2008, UN DOC A/CN.4/601 158 at para 82.
[33] *Saltany v Reagan* 868 F 2d 438 (DC Cir 1989).
[34] *Doe I et al v State of Israel* 400 F Supp 2d (DC 2005).
[35] *Daventree Ltd v Republic of Azerbaijan* 349 F Supp 2d 736 (SDNY 2004).
[36] Justitia et Pace Institut de Droit International, *Immunities from Jurisdiction and Execution of Heads of State and of Government in International Law*, Res, Session of Vancouver (2001).
[37] *In re* Joola, Cour de Cassation, Cass. Crim., Jan 19, 2010 No.09-84818 [*Re Joola*] (The French Court of Cassation affirmed the lower court's decision for the annulment of the arrest warrant for Mr. Souleymane Ndene Ndiaye, who at the time was the Senegalese Head of Government, for the sinking of the vessel Joola because customary international law afforded him personal immunity); *Immunity of State officials from Foreign Criminal Jurisdiction,* ILC, 65th Sess, UN Doc A/CN.4/L.814 (2013); Foakes, *supra* note 13 at 113; Akande & Shah, *supra* note 14 at 824.
[38] *Arrest Warrant, supra* note 10 at para 54-55.
[39] *Ibid* at para 71.
[40] *Arrest Warrant, supra* note 10 at paras 81, 83.
[41] Akande & Shah, *supra* note 14 at 821.
[42] *Second Report on Immunity of State Officials from Foreign Criminal Jurisdiction: Memorandum by the Secretariat,* ILC, 65th Sess, UN Doc A/CN.4/661 (2013) 1 at para 61 [2nd ILC Report].
[43] *Tachiona v Mugabe* 169 F Supp 2d 259 (SD 2001) (Zimbabwe's Foreign Minister Mudenge entitled to personal immunity and therefore court dismissed civil suit filed against him); *Chong Boon Kim v Kim Young-Shik* (Hawaii Cir Ct 1963) 81 ILR 604 (Korean Foreign Minister Kim Young-shik entitled to personal immunity and therefore court

dismissed civil suit filed against him); *Ali Ali Reza v Grimpel*, Cour d'appel [Regional Court of Appeal] 47 ILR 275 (Saudi Arabia's Minister of State Ali Ali Reza not entitled to personal immunity as his office was distinguishable from the office of a Foreign Affairs Minister).

[44] See Pedretti, *supra* note 15 at 41 – 45, 48 – 52.

[45] *Re* Bo Xilai, Bow St. Magistrate's Court, [2005], 128 ILR 713 [*Re Bo Xilai*]. See also *Re* Barak, City of Westminister Magistrate's Court, 29 September 2009 *discussed in* Roger O'Keefe, "Decisions of British Courts During 2009 Involving Questions of Public or Private International Law" (2009) 80:1 Brit YB Intl L 451 at 542 – 543.

[46] *Re Bo Xilai, supra* note 45 at 714.

[47] *Re Bo Xilai, supra* note 45 at 714 – 715. Members of special missions enjoy immunity under the Convention on Special Missions as well as under customary international law. While there is some uncertainty with regards to the content of immunities under customary international law it is generally accepted that members of a special mission are immune from criminal jurisdiction for the duration of the special mission.

[48] *Re* Mofaz, Bow St Magistrates' Court, [2004], 128 ILR 709 at 712; See also A v Ministere Public de la Confederation, Bundesstrafgericht [BStGer] [Federal Criminal Court of Switzerland] July 25, 2012 BB.2011.140 at para 5.4.2 (The Swiss Federal Criminal Court held that the former Algerian Minister of Defence, Mr. Khaled Nezzar, could have been entitled to personal immunity had he been in office which would have barred the court from extending jurisdiction over him for alleged war crimes and acts of torture); *Re Joola*, *supra* note 37 (The French Court of Cassation affirmed a decision by the lower courts that nullified an arrest warrant for the Senegalese Defence Minister given the important role the office plays at the international level); but see HSA v AS and YA, Court of Cassation of Belgium, 12 Feb 2003, no P.02.1139.F, 127 ILR 110 at 121 – 124 (The Belgian Court of Cassation held that the Director General at the Ministry for National Defence, Mr. Amos Yaron, would not be entitled to personal immunity as the office did not fall within the exclusive categories of high ranking officials who benefit from it).

[49] *Khurts Bat v Investigating Judge of the German Federal Court and others* [2011] EWHC 2029.

[50] *Re Joola*, *supra* note 37.

[51] *Immunity of State officials from Foreign Criminal Jurisdiction,* ILC, 62nd Sess, UN Doc A/CN.4/L.631 (2010) 1 at para 94 [2010 ILC Report]; Pedretti, *supra* note 15 at 21.

[52] Foakes, *supra* note 13 at 133; Fox & Webb, *supra* note 3 at 560.

[53] *V. Conv. on Diplomatic Relations*, *supra* note 23 at art 31 (entered into force 24 April 1964); Vienna Convention on Consular Relations, 24 April 1963, 597 UNTS 261 (entered into force 19 March 1967).

[54] *Convention on Special Missions*, 8 December 1969, 1400 UNTS 231 art 31 (entered into force 21 June 1985).

[55] *United States Diplomatic and Consular Staff in Tehran (United States of America v Iran)* [1980] ICJ Rep 3 at para 86; *Boos v Barry*, 485 U.S. 312 at 323 (1988).

[56] See John H Currie et al, *International Law: Doctrine, Practice, and* Theory, 2nd ed (Toronto: Irwin Law, 2014) at 525-538; Foakes, *supra* note 13 at 19-21; Fox & Webb, *supra* note 3 at 561-564, 570-604.

[57] *Arrest Warrant, supra* note 10 at 61.

[58] *Western Sahara Case,* Advisory Opinion, [1975] ICJ Rep 12 at 43-44.

[59] *R v Commissioner, supra* note 5.

[60] *Paul v Avril* 812 F Supp 207, 211 (SD FLA 1993); Foakes, *supra* note 13 at 97.

[61] Thomas Weatherall, "Jus Cogens and Sovereign Immunity: Reconciling Divergence in Contemporary Jurisprudence*"* (2015) 46:4 Geo J Int'l L 1152 at 1160.

[62] *Arrest Warrant, supra* note 10 at para 61. See also William A Schabas, *The International Criminal* Court: *A Commentary on the Rome Statute* (New York: Oxford University Press, 2010) at 448; Asad Kiyani, "Al-Bashir & the ICC: The Problem of Head of State immunity" (2013) 12:3 J Chinese L 467 at para 38.

[63] Charter of the International Military Tribunal (Nuremberg Charter), art 7 reprinted in: Michael R Marrus, *The Nuremberg War Crimes Trial,* 1945-46: *A Document History* (Boston: Bedford/St.Martin's, 1997); see also Charter of the International Military Tribunal for the Far East, art 6 reprinted in: Robert Cryer and Neil Boster, *Documents on the Tokyo International Military Tribunal* (New York: Oxford University Press, 2008); Statute for the

International Criminal Tribunal for the Former Yugoslavia, 32 ILM 1159 art 7(2); Statute for the International Criminal Tribunal for Rwanda, 33 ILM 1602 art 6(2); Statute of the Special Court for Sierra Leone, 2178 UNTS 138, 145, art 6(2).

[64] Pedretti, *supra* note 15 at 240.

[65] Schabas, *supra* note 62 at 449; Kiyani, *supra* note 62 at para 27.

[66] *Prosecutor v Charles Ghankay Taylor*, SCSL-2003-01-I, Decision on Immunity from Jurisdiction (31 May 2004) at paras 43-53 (Special Court for Sierra Leone, Appeals Chamber), online: RCSL <www.rcsl.org>.

[67] Pedretti, *supra* note 15 at 68; Weatherall, *supra* note 61 at 1160 - 1168.

[68] Webb, *supra* note 4 at 136.

[69] See *V. Conv. on Diplomatic Relations*, *supra* note 23 at art 34; Schabas, *supra* note 62 at 451 (argument against ICC jurisdiction); Kiyani, *supra* note 62 at para 17; Pedretti, *supra* note 15 at 290 (argument for ICC jurisdiction).

[70] *The Prosecutor v Omar Hassan Ahmad Al Bashir*, ICC-02/05-01/09, Decision Pursuant to Article 87(7) of the Rome Statute on the Failure by the Republic of Malawi to Comply with Cooperation Requests Issued by the Court with respect to the Arrest and Surrender of Omar Hassan Ahmad Al Bashir (12 December 2011) at para 43 (International Criminal Court, Pre-Trial Chamber I) online: ICC <www.icc-cpi.int>.

[71] *Arrest Warrant, supra* note 10; *ibid at* para 34.

[72] *Arrest Warrant, supra* note 10 at para 61; ILC Immunity Memo, *supra* note 13 at para 98.

[73] See *Pinochet* (solicitud de extradicion), Audiencia Nacional [National Court of Spain], Juzgado de Istruccion No. 5, 3 November 1998; *In re* Fidel Castro, Audiencia Nacional [National Court of Spain], Sala de lo Penal, 4 March 1999, Order No. 1999/2723.

[74] *Arrest Warrant, supra* note 10.

[75] *R v Commissioner, supra* note 5.

[76] Kolodkin, *supra* note 32 at paras 78 - 82; *Arrest Warrant, supra* note 10 at para 61 ("after a person ceases to hold the office of Minister for Foreign Affairs, he or she will no longer enjoy all of the immunities accorded by international law in other States. Provided that it has jurisdiction under international law, a court of one State may try a former Minister for Foreign Affairs of another State in respect of acts committed prior or subsequent to his or her period of office, as well as in respect of acts committed during that period of office in a private capacity").

[77] *Jones, supra* note 5 at paras 202, 204 ("State immunity in principle offers individual employees or officers of a foreign State protection in respect of acts undertaken on behalf of the State"); Robert Cryer, "Immunities and International Criminal Tribunals" in Alexander Orakhelashvili, ed*, Research Handbook on Jurisdiction and Immunities in International Law*, (UK: Edward Elgar Publishing Limited, 2015) 468 at 473.

[78] Foakes, *supra* note 13 at 7. Interestingly, "[b]ecause of its relation to substantive law, immunity *ratione materiae* has been characterized as a substantive defence from liability rather than a procedural defence on jurisdiction."

[79] *Prosecutor v Tihmoir Blaškić*, IT-95-14, Judgement on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II on 18 July 1997 (29 October 1997) at para 38 (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber), online: ICTY www.icty.org [*Blaškić*].

[80] *Jones, supra* note 5 at para 205.

[81] Other terms that have been used interchangeably with "official acts" include "act in representation of the State", "act in the name of the State", "public act", "governmental act" or even "act of State."" See *Fourth Report on the Immunity of State Officials from Foreign Criminal Jurisdiction,* ILC, 67th Sess, UN Doc A/CN.4/686 (2015) 3 at para 28 [4th ILC Report]. See also *Jones, supra* note 5 at para 205 ("[I]ndividuals only benefit from State immunity *ratione materiae* where the impugned acts were carried out in the course of their official duties.")

[82] Mazzeschi, *supra* note 14 at 12 - 15.

[83] Mazzeschi, *supra* note 14 at 12 (citing CA Paris, 29 June 1811, *Angelo-Poulos c Ferton, Recueil Sirey* 514); Tribunal de premiere instance, Geneve, 29 March 1927, *V et Dicker c D* (1927) Journal de droit international 1178; *Zoernsch v Waldock and McNulty* (1964), 3 ILM 425; CA Paris, 30 June 1967, *QWuerouil c Breton* (1968) 14 Annuaire francais de droit international 859; *Propend Finance Pty Ltd and Others s Sing and Others,* (1997) 111 ILM 611 (CA (Eng)); see also *Swarna v Al-Awadi*, 622 F.3d 123 (2d Cir 2010).

[84] *Arrest Warrant, supra* note 10 at para 61. See *Hatch v Baez* 7 Hun's Rep 596 (NY Sup Ct 1876); *Underhill v Hernandez,* 168 U.S. 250 18 SCt 83 (1987); *Aristide, supra* note 25; *Wei Ye and Others v Jiang Zemin*, 383 F 3d 620 (2004); *Republic of the Philippines v Marcos and others,* 862 F2d 1364 (11th Cir 1998); *Noriega, supra* note 25.
[85] *V. Conv. on Diplomatic Relations*, *supra* note 23 at art 43.
[86] Mazzeschi, *supra* note 14 at 12 - 15.
[87] Foakes, *supra* note 13 at 143.
[88] 2010 ILC Report, *supra* note 51 at para 27.
[89] 4th ILC Report, *supra* note 81 at para 83.
[90] *Crim. Matters, supra* note 23 at para 191.
[91] See *United States v Classic* 313 U.S. 299, 326 (1941). See also *Kadic v Karadzic* 70 F 3d 232, 245 (2nd Cir 1995); *United States v Roy M Belfast aka Chuckie Taylor*, U.S. Ct of Appeals (11th Cir 2010).
[92] 4th ILC Report, *supra*, note 81 at para 53.
[93] *Blaškić, supra* note 79 at para 38.
[94] Foakes, *supra* note 13 at 145.
[95] *Arrest Warrant, supra* note 10 at paras 51, 53.
[96] *Ibid* at paras 57 – 58.
[97] Center for Constitutional Rights, "France in Violation of Law Grants Donald Rumsfeld Immunity, Dismisses Torture Complaint," Nov 27, 2007, online: < https://ccrjustice.org/home/press-center/press-releases/france-violation-law-grants-donald-rumsfeld-immunity-dismisses>.
[98] *Kazemi, supra* note 3 at para 19 ("It is, I think, difficult to accept that torture cannot be a governmental or official act, since under article 1 of the Torture Convention torture must, to qualify as such, be inflicted by or with the connivance of a public official or other person acting in an official capacity").
[99] *Jurisdictional Immunities, supra* note 5 at paras 60 – 61.
[100] Akande & Shah, *supra* note 14 at 831 (referring to scholarly literature and cases from the International Court of Justice and the UK House of Lords).
[101] Tex, 621 F3d 372 (5th Cir 2010).
[102] 117 F3d 1206 (11th Cir 1997).
[103] 4th ILC Report, *supra* note 81 at para 55.
[104] *Jurisdictional Immunities, supra* note 5.
[105] *R v Commissioner, supra* note 5.
[106] Weatherall, *supra* note 61 at 1154.
[107] Foakes, *supra* note 13 at 149 (referring to Nuremberg and Arrest Warrant). The UN Jurisdictional Immunities Convention, however, does not include an exception to State immunity based on an alleged violation of jus cogens norms.
[108] *Trial of the Major War Criminals before the International Military Tribunal* (14 November 1945 - 1 October 1946) (Nuremberg, Germany) at page 223 online: Library of Congress <www.loc.gov>.
[109] *Attorney General v Adolf Eichmann* (1962) 36 Intl L Rep 5 at para 14.
[110] *Prosecutor v Anto Furundzja,* IT-95-17/1-T, Judgement (10 December 1998) at para 155, International Criminal Tribunal for the former Yugoslavia, Trial Chamber, online: ICTY <www.icty.org>.
[111] See e.g. *Jones, supra* note 5 at para 206; *Kazemi, supra* note 3 at para 96.
[112] *United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 10 December 1984 1465 UNTS 85 art 1 (entered into force 26 June 1987).
[113] *Jones, supra* note 5 at para 206.
[114] *Kazemi, supra* note 3 at para 19 ("It is, I think, difficult to accept that torture cannot be a governmental or official act, since under article 1 of the Torture Convention torture must, to qualify as such, be inflicted by or with the connivance of a public official or other person acting in an official capacity").
[115] *Ibid* at para 96.
[116] *R v Commissioner, supra* note 5.

[117] Foakes, *supra* note 13 at 148.
[118] See 4th ILC Report, *supra* note 81 at para 57 (citing, e.g., Pinochet case, Examining Magistrate of Brussels, Order of 6 November 1998; the Bouterse case, R 97/163/12 Sv and R/97/176/12 Sv, Court of Appeal of Amsterdam, 2000). See also Khaled Nezzar, Re decision 25 July 2012, Swiss Federal Criminal Court.
[119] Khaled Nezzar, Re decision 25 July 2012, Swiss Federal Criminal Court.
[120] Foakes, *supra* note 13 at 159.
[121] 4th ILC Report, *supra* note 81 at 25; *Fifth report on immunity of State officials from foreign criminal jurisdiction, by Concepción Escobar Hernández, Special Rapporteur*, 68th Sess, UN Doc A/CN.4/701 (2016) 10 at paras 230-34 [5th ILC Report] (citing *Adamov v Federal Office of Justice*, Appeal Judgement, No 1A 288/2005; ILCD 339 (Switzerland 2005); *Fujimori Extradition Case,* Chilean Supreme Court, judgement of 11 July 2007, case No. 5646-05, paras. 15-17 (Chile 2007); *Teodoro Nguema Obiang Mangue*, Court of Appeal of Paris, Pole 7, Second Investigating Chamber, judgement of 13 June 2013 (France 2013).
[122] Tex, 621 F3d 372 (5th Cir 2010).
[123] Foakes, *supra* note 13 at 149.
[124] 4th ILC Report, *supra* note 81.
[125] (1988) No-86-0459 Civ (U.S. District Court), SD Fla, noted in (1988) 82 AJIL 594
[126] Foakes, *supra* note 13 at 177.
[127] *Adamov*, *supra* note 121.
[128] *Ibid*.
[129] Foakes, *supra* note 13 at 149.
[130] Paola Gaeta, "Immunity of States and State Officials: A Major Stumbling Block to Judicial Scrutiny" in Realizing Utopia: The Future of International Law Edited by Antonio Cassese (Oxford: Oxford University Press, 2012) at 237.
[131] Foakes, *supra* note 13 at 149.
[132] Fox & Webb, *supra* note 3.
[133] Foakes, *supra* note 13 at 153; See United Nations Convention against Corruption, arts. 42 and 44 – 46; Criminal Law Convention on Corruption, arts. 17 and 25 – 27; Inter-American Convention against Corruption, art. V; and African Union Convention on Preventing and Combating Corruption,
arts.13, 15, 18 and 19.
[134] Beth Stephens, "The Modern Common Law of Foreign Official Immunity" (2011) 79:6 Fordman L R 2670 at 2688.
[135] *Kazemi, supra* note 3 at para 103.
[136] *Preliminary report on the immunity of State officials from foreign criminal jurisdiction,* ILC, 64th Sess, UN Doc A/CN.4/654 (2012) 2 at para 68 [2012 ILC Report].
[137] Stephens, *supra* note 134 at 2695.
[138] *Ibid* at 149.
[139] *Report of the Commission to the General Assembly on the work of its Fifty-Ninth Session* International, ILC, 2007, UN Doc A/62/10 at para 376.
[140] 2010 ILC Report, *supra* note 51 at para 56 ((i) serious crimes cannot be regarded as acts exercised in an official; (ii) severe crimes are attributable to the official for which reason immunity *ratione materiae* cannot be conferred; (iii) peremptory norms prevail over rules on immunity; (iv) customary international law provides an exception to immunity *ratione materiae*; (v) the principle of universal jurisdiction invalidates immunity *ratione materiae;* and (vi) the obligation *aut dedere aut judicare* abrogates immunity *ratione materiae*).
[141] 2010 ILC Report, *supra* note 51 at para 90.
[142] *Arrest Warrant, supra* note 10 at para 61.
[143] *Report of the Commission to the General Assembly on the work of its Sixty-Third Session* International, ILC, 2011, UN Doc A/66/10 at paras 117, 161-62.
[144] 2012 ILC Report, *supra* note 136 at para 68.
[145] 5th ILC Report, *supra* note 121 at para § 19(a).
[146] *Ibid.* at para 19(b).

[147] *Arrest Warrant, supra* note 10 Joint and Separate Opinion, at para 85.
[148] Antonio Cassese, *When May Senior State Officials Be Tried for International Crimes? Some Comments on the Congo v Belgium Case, (*2002) 13:4 EJIL 853 at 867-71 (Many cases where military officials were brought to trial before foreign courts demonstrate that state agents accused of war crimes, crimes against humanity or genocide may not invoke before national courts, as a valid defence, their official capacity . . . *Eichmann* in Israel, *Barbie* in France, *Kappler* and *Priebke* in Italy, *Rauter*, *Albrecht* and *Bouterse* in the Netherlands, *Kesserling* before a British Military Court sitting in Venice and *von Lewinski* (called von *Manstein*) before a British Military Court in Hamburg, *Pinochet* in the UK, *Yamashita* in the U.S., *Buhler* before the Supreme National Tribunal of Poland, *Pinochet* and *Scilingo* in Spain, *Miguel Cavallo* in Mexico) (citations omitted).
[149] *Ibid* at 870.
[150] E H Franey, *Immunity, Individuals and International Law: Which Individuals are Immune from the Jurisdiction of National Courts under International Law* (Lambert Academic Publishing 2011) at 216-200.
[151] British Military Court at Hamburg (Germany) (19 December 1949) *In re Von Lewinski (called von Manstein)* (1949) 16 Annual Digest Rep Public Intl L Cases 509 ff.
[152] Burma Supreme Court *Kovtunenko v U Law Yone* (1 March 1960) 31 ILR 259 ff.
[153] Bundesgerichtshof (9 October 1962) *Staschynskji, Entscheidungen des Bundesgerichtshoft in Strafsachen* (1963) 87 ff; R v Lambert Justices, ex parte Yusufu [1985] Crim L Rev 510; Rainbow Warrier.
[154] Mazzeschi, *supra* note 14 at 20 citing Corti di Cassazione (sez. V penale) *Nasr Osama Mustafa Hassan detto Abu Omar e altri* (2013) 96 Rivista di diritto internationale 272; R 97/163/12 Sv & R 97/176/12 Sv (Netherland, Gerechtshof Amsterdam 2000).
[155] *Ibid*; see also *General Prosecutor at the Court of Appeals of Milan v Adler* Final Appeal judgement, no 46040/2012; ILDC 1960 (Italy 2010).
[156] Case no 31171/2008; ILDC 1085 (IT 2008), 24 July 2008.
[157] *UNSCI, supra* note 2 at arts 2(1)(b)(i) - (iv).
[158] Foakes, *supra* note 13 at 168.
[159] *Jones, supra* note 5.
[160] This judgement has been criticized on conceptualized grounds and its very limited and particular examination of international practice. See Mazzeschi, *supra* note 14 at 23.
[161] *Jones, supra* note 5 (this distinction between civil and criminal proceedings has been subject to some debate).
[162] Foakes, *supra* note 13 at 170.
[163] *Jones, supra* note 5 at para 188.
[164] *Ibid.*
[165] *Ibid.*
[166] Federal Republic of Germany, Federal Supreme Court (26 September 1978) *Church of Scientology Case*, (1978) 65 ILR 193; Ontario Court of Appeal (17 June 1993) *Jaffe v Miller and Others*, (1993) 95 ILR 446; Ireland, Supreme Court (5 December 1997) *Herron v Ireland and Others*, Lexis-Nexis; House of Lords (Appellate Committee) (14 June 2006) *Jones v Ministry of the Interior of the Kingdom of Saudi Arabia and Another; Mitchell and Others v Al-Dali and Others* (2006) 129 ILR 631; New Zealand, High Court (21 December 2006) *Fang v Jiang* [2007] NZAR 420; *Jones v Kingdom of Saudi Arabia,* [2006] UHKL 26; *Zhang v Zemin* [2010] NSWCA 255; *Estate of the Late Kazemi and Hashemi v Islamic Republic of Iran and Others* (2011) 147 ILM 318; *Kazemi, supra* note 3.
[167] *Kazemi, supra* note 3.
[168] *Ibid* at paras 93-103.
[169] Fox & Webb, *supra* note 3 at 692.
[170] *Ibid* at 691.
[171] *Ibid.*
[172] *Ibid.*

[173] Mazzeschi, *supra* note 14 at 3-31 (citing Court of Appeal (16 December 1921) *Fenton Textile Association Limited v Krassin*, (1919-22) 1 Annual Digest Rep Public Intl L Cases 295-298; Eire, Supreme Court (18 December 1944) *Saorstat and Continental Steamship Company Ltd. v Rafael De Las Morenas* (1943-45) 12 Annual Digest Rep Public Intl L Cases 97 ff; Philippines, Supreme Court (28 May 1992) G R No 74135, *Wylie and Williams v Rarang*, <www.lawpgil.net>; Philippines, Supreme Court (1 March 1993) G.R. No 79253, *United States of America and Maxine Bradford v Luis R. Reyes and Nelia T. Montoya*, <www.lawphil.net>); Enahor v Abubakar, 408 F3 877, 893 (7th Cir 2005) (nothing that "officials receive no immunity for acts that violate international *jus cogens* human rights norms (which by definition are not legally authorized acts)"); See also the US Torture Victim Protection Act of 1991, S Rep No 102-249, at 9 (1991) ("[B]ecause no state officially condones torture or extrajudicial killings, few such acts, if any, would fall under the rubric of 'official acts' taken in the course of an official's duties.")
[174] Philippa Webb, "Regional Challenges to the Law of State Immunity",(European Society of International Law Conference Paper Series Conference Paper No. 6/2012 delivered at the 5th Biennial Conference, Valencia, Spain, 13-15 September 2012) at 1 Online: < http://ssrn.com/abstract=2193750> [Webb 2012].
[175] Alien Tort Statute, 28 U.S.C. § 1350.
[176] Sosa v Alvarez-Machain, 542 U.S. 692, 694 (2004).
[177] Torture Victim Protection Act of 1991, U.S.C § 1350, Sec. 2(a)(1) and (2).
[178] See *Filartiga v Pena-Irala*, 630 F 2d 876, at 889-890; *Forti and Benchoam v Suarez-Mason*, 672 F. Supp. 1531, at 1544-1547; *Kadic v Karadzic*, 70 F 3d 232, 239 (2d Cir 1995); *In re Estate of Ferdinand Marcos, Human Rights Litig.,* 25 F.3d 1467, 1470 (9th Cir. 1994).
[179] *Swarna v. Al-Awadi*, 622 F.3d 123, 137 (2d Cir. 2010). See also *Baoanan v Baja*, 627 F Supp 2d 155, 15 Wage & Hour Cas. 2d (BNA) 203 (SDNY 2009).
[180] *Atlantica Holdings v Sovereign Wealth Fund Samruk-Kazyna JSC*, 813 F.3d 98, 106 (2d Cir. 2016).
[181] *In re Terrorist Attacks on Sept. 11, 2001*, No. 02-CV-6977, 2015 WL 5724893, at *6 (SDNY 2015).
[182] See *Filartiga v Pena-Irala*, 630 F 2d 876, at 889-890 ("Act of State Doctrine probably does not apply to acts of a foreign government official that are wholly unauthorized and expressly forbidden by the foreign sovereign); *Forti and Benchoam v Suarez-Mason*, 672 F. Supp. 1531, at 1544-1547; *Kadic v Karadžic*, 70 F3d 232; Chen Gang v. Zhao Zhizhen, No. 3:04CV1146 RNC, 2013 WL 5313411, at *1 (D Conn 2013); Magnifico v. Villanueva, 783 F Supp 2d 1217, 1224 (SD Fla 2011); *Lizarbe and Others v Rondon*, 642 F. Supp. 2d 473, at 487-489; *Trajano v Marcos and Marcos Manotoc (In re Estate of Ferdinand E Marcos Human Rights Litigation)*, 978 F 2d 493; *Teresa Xuncax and Others v Hector Gramajo*, 886 F Supp. 162, at 178-193; *Cabiri v Assasie Gyimah*, 921 F Supp 1189. See also *Samantar v Yousuf and Others*, 147 ILR 726 ff; *Yousuf v Samantar*, 699 F3d 763 (4th Cir 2012). But see *Martar v Dicheter*, 563 F3d 9, 15 (2d Cir 2009); Belhas v Ya'alon, 515 F3d 1279, 1283 (DC Cir 2008).
[183] *Kiobel v Royal Dutch Petroleum Co,* 133 S Ct 1659, 1669 (2013).
[184] *Arrest Warrant, supra* note 10 at para 61; See Statement of Interest of the United States para 10, Yousuf v Samantar, No 1:04 CV 1360 (LMB) (ED Va Feb 14, 2011); Cassese (2005), *supra* note 5 at 112.
[185] Foakes, *supra* note 13 at 157. (A case against Donald Rumsfeld was brought in France and was dismissed on the ground of immunity by relying on views expressed by the French Minister of Foreign Affairs, referred specifically to the dicta in the *Arrest Warrant* case which suggest that former officials retain their immunity for all acts carried out while in office.)
[186] *Crim. Matters, supra* note 23 at para 196.
[187] See *Samantar,* 130 SCt at 2284 (citing *Hoffman,* 342 U.S. at 34-36); *Ex parte Peru,* 318 U.S. 578; *Compania Espanola De Navegacion Maritima, SA v The Navemar,* 303 U.S. 68 (1938).
[188] *Questions relating to the Obligation to Prosecute or Extradite (Belgium v Senegal)* [2012], ICJ Rep 422.
[189] *Ibid* at paras 15 – 17.
[190] *Ibid* at para 19.
[191] *Ibid* at para 20.
[192] *Ibid* at para 22.
[193] *Ibid* at para 23.

[194] *Paul v. Avril*, 812 F Supp 207, 211 (SD Fla 1993). The waiver upheld reads, "Prosper Avril, ex-Lieutenant-General of the Armed Forces of Haiti and former President of the Military Government of the Republic of Haiti, enjoys absolutely no form of immunity, whether it be of a sovereign, a chief of state, a former chief of state; whether it be diplomatic, consular, or testimonial immunity, or all other immunity, including immunity against judgement, or process, immunity against enforcement of judgements and immunity against appearing before court before and after judgement."
[195] *In Re* Grand Jury Proceedings, No 770*,* 817 F2d 1108 (1987); 81 ILR, p 599.
[196] Foakes, *supra* note 13 at 174.
[197] *Ibid.*
[198] 28 USCA §§ 1602 et seq.
[199] *Samantar v Yousuf,* 560 U.S. 305 (2010).
[200] *Rosenberg v Lashkar-e-Taiba*, 980 F Supp 2d 336 (EDNY 2013). Ex parte *Republic of Peru* (1943) 318 U.S. 578; *Doe v Roman Catholic Diocese of Galveston-Houston*, 408 F Supp 2d 272 (SD Tex 2005) (Held that judicial review was not appropriate with respect to the executive's decision of Suggestion of Immunity and letter from the Department of State Legal Advisor that Pope Benedict XVI was entitled to head-of-state immunity from suit involving conspiracy to cover-up abuses committed by priests). See also Curtis A Bradley & Laurence R Helfer, *International Law and the U.S. Common Law of Foreign Official Immunity,* 2010 Sup Ct Rev 213, 219-20. See also Suggestion of Immunity, Submitted by the United States of America, American Justice Center, et al v. Narendra Modi; 14 Civ. 7780 (AT) ("The courts' deference to Executive Branch determinations of foreign state immunity is compelled by the separation of powers").
[201] 4th ILC Report, *supra* note 81 at para 60.
[202] *Republic of Mexico v Hoffman*, 324 U.S. 30, 34-35 (1945).
[203] 560 U.S. 305 (2010) at 324.
[204] *Ibid*. In *Samantar v Yousef*, Somali plaintiffs brought suit against Samantar, the former Prime Minister of Somalia, for damages. The District Court, relying on the FSIA, granted a motion to dismiss the complaint. The U.S. Court of Appeals for the Fourth Circuit reversed, holding that the FSIA does not apply to individual foreign government agents and therefore did not protect Samantar. *Yousuf v Samantar,* 552 F3 371 (4th Cir 2009). On appeal, the U.S. Supreme Court held that the statute does not apply to foreign officials and that the common law following State Department practice governs immunity claims for foreign officials sued in their personal capacity. 560 U.S. 305 (2010) at 324.
[205] See *Chuidian v Philippine Natl Bank*, 912 F2d 1095, 1100-01 (9th Cir 1990).
[206] *Samantar v Yousuf*, 552 F3d 371, 381 (4th Cir 2009); *Enahoro v Abubakar*, 408 F3d 877, 881-82 (7th Cir 2005). (Cases that held FSIA does not apply to foreign officials.) Compare *In re* Terrorism Attacks on Sept 11, 2001, 538 F3d 71, 81 (2d Cir 2009); *Keller v Cent Bank of Nigeria*, 277 F3d 811, 815-16 (6th Cir 2002); *Byrd v Corporacion Forestaly Industrial de Olancho*, SA 182 F3d 380, 288-89 (5th Cir 1999); *El-Fadl v Cent Bank of Jordan*, 75 F3d 668, 671 (DC Cir 1996).
[207] See *International Convention on Economic, Social and Cultural Rights*, 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976). (Discussion of the ICESCR is beyond scope of this report as it pertains to the obligation of State Parties to provide the positive rights of its citizens and therefore would not be useful for attempts to hold specific individuals accountable in a court of law. However, it is useful to note that there is considerable scholarship on how corruption is a source of State Parties' violation of their obligations under the ICESCR. For example, corrupt management of public resources hinders the ability of government to provide services in the health, education and welfare sectors which are necessary services in order for State Parties to meet the economic, social and cultural rights enumerated in the ICESCR); see *Final Report of the Human Rights Council Advisory Committee on the Issue of the Negative Impact of Corruption on the Enjoyment of Human Rights*, HRC, 28th Sess, A/HRC/28/73 (2015) (Report that identifies varying categories of corruption and maintains that the link between human rights and corruption can be established either through violation of human rights as a result of corrupt acts or violation vis-à-vis anti-corruption measures). See also Kenneth Roth, "Defending Economic, Social

and Cultural Rights: Practical Issues Faced by an International Human Rights Organization" (2004) 26:1 Hum Rts Q 63 (discussing how international organizations can utilize mechanisms such as documentation of violations, public awareness and shaming in order to deter acts of corruption and hold Governments accountable to their ICESCR obligations).

[208] *UNSCI, supra* note 2.

[209] Fox & Webb, *supra* note 3 at 284 (noting that uncertainty and differences between States in the application of State immunity prompted the UN General Assembly to include State immunity in the International Law Commission's (ILC's) work program in 1977). Joanne Foakes and Elizabeth Wilmshurst, "State Immunity: The United Nations Convention and Its Effects" (May 2005), online: <https://www.chathamhouse.org/sites/files/chathamhouse/public/Research/InternationaLaw/bpstateimmunity.pdf> (noting that the General Assembly adopted the Jurisdictional Immunities Convention "(t)hirteen years, two Working Groups, and one Ad Hoc Committee later.") Roger O'Keefe and Christina J. Tams, *The United Nations Convention on Jurisdictional Immunities of States and Their Property: A Commentary* (New York: Oxford University Press, 2013) at xxxviii.

[210] *UNSCI, supra* note 2 at art. 1.

[211] *Ibid* at preamble.

[212] 5th ILC Report, *supra* note 121 at paras 154 – 55. *See also* ICJ Jurisdictional Immunities case.

[213] *Ibid.*

[214] O'Keefe & Tams, *supra* note 209 at xxxvii.

[215] *Ibid* at xli.

[216] *Jurisdictional Immunities, supra* note 5 at para 55 (the Court states that, to identify rules of customary international law, it must determine State practice and *opinio juris*, and (among other sources) can look for this in "the statements made by States, first in the course of the extensive study of the subject by the International Law Commission and then in the context of the adoption of the United Nations Convention").

[217] Foakes & Wilmshurst, *supra* note 209.

[218] *UNCAC, supra* note 9.

[219] United Nations Office on Drugs and Crime, "United Nations Convention against Corruption" online: (26 March 2016), UNODC, online: < https://www.unodc.org/unodc/en/treaties/CAC/ >.

[220] See Legislative Guide for the Implementation of the United Nations Convention against Corruption, 132, paras 386 – 388, online: <https://www.unodc.org/pdf/corruption/CoC_LegislativeGuide.pdf>.

[221] Group of States against Corruption (GRECO) Lessons learnt from the three Evaluation Rounds (2000-2010), Council of Europe, at 45 – 46 online: <https://www.coe.int/t/dghl/monitoring/greco/general/Compendium_Thematic_Articles_EN.pdf >.

[222] OECD, "Compilation of Recommendations made in the Phase 2 Reports" (2010) at 26, 45, 62 et al, online: <http://www.oecd.org/daf/anti-bribery/anti-briberyconvention/45605080.pdf>; and OECD, "Compilation of Recommendations made in the Phase 3 Reports" (2010) at 134, online: < http://www.oecd.org/corruption/anti-bribery/CompilationofRecommendationsP3ReportsEN.pdf> [OECD Reports].

[223] International Justice Resource Center, "African Union Approves Immunity for Government Officials in Amendment to African Court of Justice and Human Rights' Statute" (2 July 2014) online: <http://www.ijrcenter.org/2014/07/02/african-union-approves-immunity-for-heads-of-state-in-amendment-to-african-court-of-justice-and-human-rights-statute/> [IJRC, "AU"]. Article 46A *bis* of the Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights ("the Protocol on Amendments") provides: "No charges shall be commenced or continued before the Court against any serving African Union Head of State or Government, or anybody acting or entitled to act in such capacity, or other senior state officials based on their functions, during their tenure of office."

[224] Heike Krieger, "Between Evolution and Stagnation – Immunities in a Globalized World" (2014) 6:2 Gottingen J Intl L 178 at 180.

[225] See Webb 2012, *supra* note 174.

[226] Stephens, *supra* note 134.
[227] Gaeta, *supra* note 130.
[228] Xiaodong Yang, *State Immunity in International Law* (Cambridge: Cambridge University Press, 2012) at 7.
[229] H Kelson, *Principles of International Law*, 2nd ed (New York: Holt, Rinehart & Winston, 1967) at 358 ("No state is allowed to exercise through its own court's jurisdiction over another state unless the other state expressly consents").
[230] Foakes & Wilmshurst, *supra* note 209; *Guttieres v Elmilik* (1886), Foro It 1886-I, 913 (Court of Cassation in Florence); *SA des Chemins de Fer Leigeois-Luzembourgeois v l'Etat Neerlandais,* Pasicrisie belge 1903, I 294.
[231] See section 4.A. for further background and discussion of The UN Convention on Jurisdictional Immunities of States and Their Property.
[232] O'Keefe & Tams, *supra* note 209 at xxxvii.
[233] Fox & Webb, *supra* note 3 at 566; Kolodkin, *supra* note 32 at 80-81, 107, 109; 2nd ILC Report, *supra* note 42 at paras 19, 21, 85, 90; 2nd ILC Report, *supra* note 42 at paras 50 to 53; *Third Report on Immunity of State Officials from Foreign Criminal Jurisdiction: Memorandum by the Secretariat,* ILC, 66th Sess, UN Doc A/CN.4/673 (2014) 3 at paras 12, 112, 151.
[234] 5th ILC Report, *supra* note 121 at 48 – 49, para 114.
[235] *Ibid* at 51, para 117.
[236] *Ibid* at 90, para 231.
[237] *Ibid.*
[238] Escobar Hernández's proposed draft article reads as follows: "Draft Article 7
Crimes in respect of which immunity does not apply

> 1. Immunity shall not apply in relation to the following crimes: (i) Genocide, crimes against humanity, war crimes, torture and enforced disappearances; (ii) Corruption-related crimes; (iii) Crimes that cause harm to persons, including death and serious injury, or to property, when such crimes are committed in the territory of the forum State and the State official is present in said territory at the time that such crimes are committed.
> 2. Paragraph 1 shall not apply to persons who enjoy immunity ratione personae during their term of office.
> 3. Paragraphs 1 and 2 are without prejudice to: (i) Any provision of a treaty that is binding on both the forum State and the State of the official, under which immunity would not be applicable; (ii) The obligation to cooperate with an international court or tribunal which, in each case, requires compliance by the forum State." *Ibid* at 95.

[239] Edith Brown Weiss, "Understanding Compliance with International Environmental Agreements: The Baker's Dozen Myths" (1999) 32 U Richmond L R 1555 at 1558.
[240] Webb, *supra* note 4 at 147 ("The conflict avoidance techniques are printing a deeper more reflective analysis of the choice between different norms. On the one hand is the drive to end impunity for serious human rights violations by holding perpetrators, whatever their official status responsible. On the other hand is the classic principle of sovereign equality of states and, in this context, the purpose served by immunities: namely, 'the proper functioning of the network of mutual inter-state relations which is of paramount important for a well-ordered and harmonious international system. While the protection of human rights is clearly at the heart of the first norm, the inter-state communication and exchange facilitated by immunities can also help prevent or remedy human right violations").
[241] Webb, *supra* note 4 at 146.
[242] Webb 2012, *supra* note 174.
[243] *Ibid* at 5 online.
[244] *Democratic Republic of the Congo v FG Hemisphere Associates* [2011] KHEC 747 at para 183.
[245] Webb 2012, *supra* note 174 at 5.
[246] Webb, *supra* note 4 at 117.

[247] *Ibid* at 115.
[248] *Ibid* at 117.
[249] *Jurisdictional Immunities, supra* note 5 (The ICJ found no conflict between the rules of immunity and *jus cogens* norms of international humanitarian law infringed by Germany. As already highlighted by several scholars, the pertinent *jus cogens* norms constitute substantive law, while the rules regarding immunity before national courts belong to procedural law).
[250] Foakes, *supra* note 13 at 152.
[251] Weatherall, *supra* note 61 at 1152.
[252] Webb, *supra* note 4 at 117.
[253] See, e.g., the Organization for Economic Cooperation and Development (OECD), *OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions* online: < http://www.oecd.org/daf/anti-bribery/ConvCombatBribery_ENG.pdf>; and OECD Reports, *supra* note 222.
[254] Also see: Council of Europe, "Action against economic crime" online: <http://www.coe.int/t/dghl/cooperation/economiccrime/corruption/default_en.asp>. ("[t]he Council of Europe is pursuing a comprehensive approach against corruption (AC) and money laundering (AML) by setting standards in the form of conventions and "soft law" instruments (recommendations and resolutions), and by monitoring their compliance with Council of Europe and global standards through its monitoring mechanisms…").
[255] See discussion of Escobar Hernández's 2016 report establishing corruption as contrary to the definition of official acts on page 27-28 of this report.
[256] James Thuo Gathii, "Defining the Relationship between Human Rights and Corruption" (2009) 31:3 J. Int'l L. 125, online <http://scholarship.law.upenn.edu/jil/vol31/iss1/3>; Hun Joon Kim and J.C. Sharman, "Accounts and Accountability: Corruption, Human Rights, and Individual Accountability Norms" (2014) 68:2 Int'l Org 417.
[257] Ilias Bantekas, "Corruption as an International Crime and Crime against Humanity: An Outline of Supplementary Criminal Justice Policies" (2006) 4:3 J Int'l Criminal Justice 466; GOPAC, "Prosecuting Grand Corruption as an International Crime: Discussion Paper" (2013), online: < http://gopacnetwork.org/Docs/DiscussionPaper_ProsecutingGrandCorruption_EN.pdf>.
[258] Krieger, *supra* note 224.
[259] *Ibid* at 200.
[260] Akande & Shah, *supra* note 14 at 840.
[261] Eileen Denza, *Diplomatic Law: Commentary on the Vienna Convention on Diplomatic Relations* (Oxford: Oxford University Press, 2008) at 74.
[262] See generally Max Planck Encyclopedia of Public International Law, (Oxford Public International Law, January 2009) online: <http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e974?rskey=m3EUfe&result=1&prd=EPIL> [Planck Encyclopedia].
[263] Denza, *supra* note 261 at 74.
[264] *Ibid.*
[265] Planck Encyclopedia, *supra* note 262 ("According to the International Court of Justice (ICJ), if the sending State does not recall the agent concerned, the loss of diplomatic and consular privileges is 'almost immediate' (United States Diplomatic and Consular Staff in Tehran Case)").
[266] Denza, *supra* note 261 at 85.
[267] Government of Canada, Immigration and citizenship, "Reasons for Inadmissibility" online: <http://www.cic.gc.ca/english/information/inadmissibility/who.asp>.
[268] Anne Peters et. al (Eds), Immunities in the Age of Global Constitutionalism, (Leiden: Brill Nijhoff, 2015) at 17.