PINOCHET'S LEGACY REASSESSED

*By Ingrid Wuerth**

One of the most dramatic moments in twentieth-century international law transpired in 1999 when the House of Lords denied immunity to Augusto Pinochet, the former dictator of Chile.[1] The "breathtaking"[2] judgment cleared the way for the possible prosecution of Pinochet in Spanish national courts on charges of torture committed during his rule. By limiting immunity, the House of Lords' rulings turned the world "upside down"[3] and ushered in a new era of accountability for egregious violations of human rights. At least that is the prevailing narrative, one that pits accountability against the international law of immunity and sees *Pinochet* as a watershed moment in that struggle.[4]

But the prevailing narrative is increasingly subject to question, at least with respect to the legal issue at the heart of the case: immunity. Seminal recent decisions of national and international courts have now definitively ruled in favor of state and status-based immunity before foreign national courts, even in cases alleging human rights violations,[5] effectively undercutting many of the broad arguments against immunity and reversing a handful of post-*Pinochet* cases that had denied immunity.[6] What remains, then, of the *Pinochet* precedent? It has the

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[1] Regina v. Bow St. Metro. Stipendiary Magistrate, *ex parte* Pinochet Ugarte (No. 3), [2000] 1 A.C. 147 (H.L. Mar. 24, 1999) [hereinafter *Pinochet III*]. Earlier proceedings in this case are *Pinochet I*, *see infra* note 28 and accompanying text, and *Pinochet II*, *see infra* note 29 and accompanying text. Unless indicated otherwise, the *Pinochet* case referred to in the main text is either *Pinochet III* or the entire line of cases.

[2] Richard A. Falk, *Assessing the Pinochet Litigation: Whither Universal Jurisdiction?*, *in* UNIVERSAL JURISDICTION: NATIONAL COURTS AND THE PROSECUTION OF SERIOUS CRIMES UNDER INTERNATIONAL LAW 97 (Stephen Macedo ed., 2004).

[3] ARIEL DORFMAN, EXORCISING TERROR: THE INCREDIBLE UNENDING TRIAL OF GENERAL AUGUSTO PINOCHET 81 (2002).

[4] *See, e.g.*, PHILIPPE SANDS, LAWLESS WORLD: AMERICA AND THE MAKING AND BREAKING OF GLOBAL RULES 23 (2005); Christine M. Chinkin, Case Report: Regina v. Bow Street Stipendiary Magistrate, Ex parte Pinochet Ugarte (No. 3), 93 AJIL 703, 711 (1999); Andrea Bianchi, *Immunity Versus Human Rights: The* Pinochet *Case*, 10 EUR. J. INT'L L. 237, 237–39 (1999); *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, 238–40 (2011) (describing the development of immunity in criminal cases and terming *Pinochet* a "watershed").

[5] Jurisdictional Immunities of the State (Ger. v. It.; Greece Intervening), para. 87 (Int'l Ct. Justice Feb. 3, 2012) (rejecting *Pinochet* as irrelevant); Jones v. Ministry of Interior of the Kingdom of Saudi Arabia, [2006] UKHL 26, paras. 89–93, [2007] 1 A.C. 270 (H.L.) (appeal taken from Eng.) (Lord Hoffmann) (distinguishing *Pinochet*) (reported by Elina Steinerte & Rebecca Wallace at 100 AJIL 901 (2006)); Fang v. Jiang, [2007] NZAR 420, para. 63 (HC) (N.Z.) (same); Arrest Warrant of 11 April 2000 (Dem. Rep. Congo v. Belg.), 2002 ICJ REP. 3, paras. 56–59 (Feb. 14) (reported by Alexander Orakhelashvili at 96 AJIL 677 (2002)) (same).

[6] *See, e.g.*, Ferrini v. Federal Republic of Germany, Cass., sez. plen., 11 marzo 2004, n.5044, 87 RIVISTA DI DIRITTO INTERNAZIONALE [RDI] 539 (2004), 128 ILR 658 (reported by Andrea Bianchi at 99 AJIL 242 (2005));

greatest potential significance today in functional immunity cases brought against former and lower-level officials accused of torture and other human rights violations,[7] like the case against Pinochet himself. As the dust has settled in the state and status-based immunity contexts, the academic battle is shifting to these cases, which are seen as vitally important to ensuring individual accountability for human rights violations.[8]

This article argues that under customary international law as it stands today, there is no human rights or international criminal law exception (human rights exception)[9] to the customary international law of functional immunity. Virtually all scholars take the opposite view, arguing or positing that customary international law recognizes such an exception, especially in criminal cases, and citing national court cases in support.[10] The literature does not examine these cases in any detail, however, nor does it analyze their significance for the twin components of customary international law: state practice and *opinio juris*.[11] Although this article argues that no human rights exception currently exists, its most important goal is to carefully evaluate

Prefecture of Voiotia v. Federal Republic of Germany, Case No. 11/2000 (Hellenic Sup. Ct. 2000) (reported by Maria Gavouneli & Ilias Bantekas at 95 AJIL 198 (2001)).

[7] Functional immunity, or immunity *ratione materiae*, is held by former and sitting lower-level officials. It protects their official, but not private, conduct. Status immunity, or immunity *ratione personae* (personal immunity), protects sitting heads of state and a small group of other high-level officials from suit based on their private and official conduct, but only while they hold office. *See infra* text accompanying notes 38–41.

[8] *See, e.g.*, Beth Stephens, *Abusing the Authority of the State: Denying Foreign Official Immunity for Egregious Human Rights Abuses*, 44 VAND. J. TRANSNAT'L L. 1163, 1178 (2011); Dapo Akande & Sangeeta Shah, *Immunities of State Officials, International Crimes, and Foreign Domestic Courts*, 21 EUR. J. INT'L L. 815, 816 (2010); Jane Wright, *Retribution but No Recompense: A Critique of the Torturer's Immunity from Civil Suit*, 30 OXFORD J. LEGAL STUD. 143, 144 (2010); William J. Aceves, *Liberalism and International Legal Scholarship: The Pinochet Case and the Move Toward a Universal System of Transnational Law Litigation*, 41 HARV. INT'L L.J. 129, 130 (2000); *see also* André Nollkaemper, *Internationally Wrongful Acts in Domestic Courts*, 101 AJIL 760, 761–62, 795–97 (2007) (emphasizing the importance of foreign national courts for enforcing international law); John B. Attanasio, *Rapporteur's Overview and Conclusions: Of Sovereignty, Globalization, and Courts*, *in* INTERNATIONAL LAW DECISIONS IN NATIONAL COURTS 373, 383 (Thomas M. Franck & Gregory H. Fox eds., 1996) (same).

[9] This article uses "human rights exception" as a general term referring to denials of functional immunity for alleged violations of any *jus cogens* norms, international criminal law, or human rights law. It includes arguments that conduct violating these norms cannot be characterized as official for immunity purposes. The article does not consider other potential reasons for denying immunity *ratione materiae*, such as conduct that allegedly takes place in the forum state. *See* Khurts Bat v. Investigating Judge of the German Federal Court, [2011] EWHC 2029 (Admin) (July 29, 2011) (QB), *available at* http://www.judiciary.gov.uk/Resources/JCO/Documents/Judgments/khurts-bat-v-federal-court-germany.pdf.

[10] *See, e.g.*, ANTONIO CASSESE, INTERNATIONAL CRIMINAL LAW 305–08 (2d ed. 2008); Akande & Shah, *supra* note 8, at 839; JOANNE FOAKES, IMMUNITY FOR INTERNATIONAL CRIMES? DEVELOPMENTS IN THE LAW ON PROSECUTING HEADS OF STATE IN FOREIGN COURTS 2, 14 (2011), *at* http://www.chathamhouse.org/publications/papers/view/179865; Chimène I. Keitner, *Foreign Official Immunity and the "Baseline" Problem*, 80 FORDHAM L. REV. 605, 607 (2011); Stephens, *supra* note 8, at 1178; Steffen Wirth, *Immunity for Core Crimes? The ICJ's Judgment in the* Congo v. Belgium *Case*, 13 EUR. J. INT'L L. 877, 888–91 (2002); *see also* HAZEL FOX, THE LAW OF STATE IMMUNITY 695 (2d ed. 2008); *cf.* Bradley & Helfer, *supra* note 4, at 240, 255 (arguing that the law of functional immunity is in flux and that the evidence suggests that an exception may be developing in criminal cases alleging *jus cogens* violations). Reports issued by the International Law Commission (ILC) have been guarded. While commenting that "it is increasingly argued in the legal literature that immunity *ratione materiae* is not applicable in respect of crimes under international law," the secretariat's report notes "uncertainty" about functional immunity based on its survey of cases. International Law Commission Secretariat, Immunity of State Officials from Foreign Criminal Jurisdiction, para. 189, UN Doc. A/CN.4/596 (Mar. 31, 2008); *see also* Roman Anatolevich Kolodkin (Special Rapporteur), Second Report on Immunity of State Officials from Foreign Criminal Jurisdiction, para. 90, UN Doc. A/CN.4/631 (June 10, 2010) (concluding that customary international law does not include a human rights exception to immunity *ratione materiae* in criminal cases).

[11] RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES §102(2) (1987).

national court litigation and other potential evidence of customary international law, and to open a debate about how that evidence should be counted and weighed in assessing the content of customary international law. At a minimum, this analysis reveals the case for a human rights exception as more complicated and less convincing than the literature assumes.

Part I of this article introduces immunity, describes the *Pinochet* case, and considers subsequent developments in state and status-based immunity law.[12] Part II considers *Pinochet*'s core: cases brought against former and lower-level government officials arguably entitled to functional immunity. It begins by defining the set of cases that are potentially relevant to customary international law. Turning to the cases themselves, this part finds that when immunity has been invoked by the state entitled to do so, it is generally conferred. Most of the cases relied upon to demonstrate a human rights exception to functional immunity, however, actually say nothing about immunity, and there is no evidence that the state invoked it. A key step in understanding the customary international law of functional immunity today therefore lies in determining whether national court litigation in which immunity is not invoked or discussed nonetheless constitutes state practice or evidence of *opinio juris*. Part II presents several reasons why these cases arguably do not demonstrate acquiescence in the erosion of functional immunity: the state entitled to raise immunity may not know about the case; it may successfully elect to contest jurisdiction rather than immunity; or it may actually favor (or at least not contest) the prosecution of its own national.[13] In addition, it appears that forum states have an obligation to confer functional immunity only when it is invoked, meaning that the assertion of jurisdiction (or failure to assert jurisdiction) does not itself count toward state practice and that the failure to confer immunity when it is not invoked by the state entitled to do so means that there is no breach of customary international law.[14]

The traditional requirements of customary international law are often applied in a loose fashion, however, especially in "modern" customary international law cases.[15] These precedents could provide grounds for relaxing the requirements necessary to show an exception to functional immunity, especially as the effort to end impunity shares a normative foundation with modern customary international law. But for a human rights exception to immunity, there is none of the kind of evidence of *opinio juris* that generates modern custom. States may have a difficult time renouncing immunity and generating this kind of *opinio juris* because immunity is a form of "traditional" custom that facilitates state relations. Moreover, even if *opinio juris* were available, traditional custom is generally a poor context in which to forgo evidence of state practice. Understanding a human rights exception to functional immunity as

[12] This article does not address diplomatic and consular immunity, or the immunities of international organizations and their officers and employees. Treaties, rather than customary international law, govern the first two types of immunity and some aspects of the third. Vienna Convention on Consular Relations, Apr. 24, 1963, 21 UST 77, 596 UNTS 261; Vienna Convention on Diplomatic Relations, Apr. 18, 1961, 23 UST 3227, 500 UNTS 95; Convention on the Privileges and Immunities of the Specialized Agencies, Nov. 21, 1947, Art. V, sec. 16, 33 UNTS 261. It also does not address special-mission immunity, *see* Convention on Special Missions, *opened for signature* Dec. 8, 1969, 1400 UNTS 231, amnesties, or issues that arise when governments seek to prosecute or hold liable their own nationals. *See generally* Leila Nadya Sadat, *Exile, Amnesty and International Law*, 81 NOTRE DAME L. REV. 955 (2006).

[13] *See infra* text accompanying notes 148–76.

[14] *See infra* text accompanying notes 113–25, 134.

[15] *See* Anthea Elizabeth Roberts, *Traditional and Modern Approaches to Customary International Law: A Reconciliation*, 95 AJIL 757, 758 (2001); Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 HARV. L. REV. 815, 838–42 (1997).

implicating both modern and traditional custom reveals immunity to be more robust than most commentators allow, but this understanding also provides valuable insights for those who seek change and reform.[16]

Part III considers what the foregoing analysis suggests, going forward, about the development of immunity law and policy. This question has contemporary salience because functional immunity for foreign officials is an unsettled area of U.S. law currently under review by the Department of State;[17] it is a recurring issue in national court cases around the world;[18] and it is on the Program of Work of the International Law Commission (ILC).[19] The cases show that the conflict between immunity and accountability is somewhat overstated, as illustrated by the many situations in which states do not invoke immunity, especially for lower-level officials. The analysis also suggests that more evidence of *opinio juris*, both in specific cases and in the form of general declarations, will help create a human rights exception to functional immunity. Because immunity is a form of traditional custom, however, broad statements of *opinio juris* that are inconsistent with state practice are unlikely to be effective.

I. THE *PINOCHET* CASE AND THE LAW OF IMMUNITY

Foreign state immunity, along with the related immunities enjoyed by some government officials, is a classic doctrine of public international law often understood as a function of state sovereignty. It is enforced, in part, through retaliation and reciprocity,[20] and generally defended as in the collective interest of nation-states as a whole because it respects the dignity and equality of states.[21] Immunity also stands as a significant obstacle, however, to realizing the goals of the human rights revolution that has transformed international law over the past sixty years.[22] Because the law of immunity prevents nations and their officials from being sued or prosecuted in the courts of foreign nations for human rights violations, it means that such

[16] *See infra* text accompanying notes 237–49.

[17] Harold Hongju Koh, *Foreign Official Immunity after* Samantar: *A United States Government Perspective*, 44 VAND. J. TRANSNAT'L L. 1141, 1152 (2011).

[18] *See infra* text accompanying notes 126–93.

[19] *See* Report of the International Law Commission on the Work of Its Sixty-Third Session, UN GAOR, 66th Sess., para. 8, UN Doc. A/C.6/66/L.26 (Nov. 8, 2011) (draft resolution by the Sixth Committee). A special rapporteur of the ILC has written three reports on this topic. Roman Anatolevich Kolodkin (Special Rapporteur), Preliminary Report on Immunity of State Officials from Foreign Criminal Jurisdiction, UN Doc. A/CN.4/601 (May 29, 2008); Second Report on Immunity of State Officials from Foreign Criminal Jurisdiction, *supra* note 10; Roman Anatolevich Kolodkin (Special Rapporteur), Third Report on Immunity of State Officials from Foreign Criminal Jurisdiction, UN Doc. A/CN.4/646 (May 24, 2011); Immunity of State Officials from Foreign Criminal Jurisdiction, *supra* note 10.

[20] Arthur Lenhoff, *Reciprocity: The Legal Aspect of a Perennial Idea*, 49 NW. U. L. REV. 619, 623–25 (1954); Joan E. Donoghue, *Taking the "Sovereign" Out of the Foreign Sovereign Immunities Act: A Functional Approach to the Commercial Activity Exception*, 17 YALE J. INT'L L. 489, 531–35 (1992); John B. Bellinger III, *The Dog That Caught the Car: Observations on the Past, Present, and Future Approaches of the Office of the Legal Adviser to Official Act Immunities*, 44 VAND. J. TRANSNAT'L L. 819, 829, 833–34 (2011); *cf.* XIAODONG YANG, STATE IMMUNITY IN INTERNATIONAL LAW 56–57 (2012) (questioning reciprocity).

[21] ROSALYN HIGGINS, PROBLEMS & PROCESS: INTERNATIONAL LAW AND HOW WE USE IT 78–79 (1994).

[22] *See* Beth Stephens, *The Modern Common Law of Foreign Official Immunity*, 79 FORDHAM L. REV. 2669, 2670, 2673 (2011); ROSANNE VAN ALEBEEK, THE IMMUNITY OF STATES AND THEIR OFFICIALS IN INTERNATIONAL CRIMINAL LAW AND INTERNATIONAL HUMAN RIGHTS LAW 418–26 (2010); Lee M. Caplan, *State Immunity, Human Rights, and* Jus Cogens*: A Critique of the Normative Hierarchy Theory*, 97 AJIL 741, 742–43 (2003); JÜRGEN BRÖHMER, STATE IMMUNITY AND THE VIOLATION OF HUMAN RIGHTS (1997).

violations must generally be addressed elsewhere if at all—and none of the other enforcement mechanisms appear to be as widely available or as potentially effective.[23] Many thus argue that just as sovereignty no longer shields states from the obligation to respect fundamental human rights, it does not or should not protect states from cases brought in foreign courts when they and their officials engage in conduct that those norms prohibit.

National courts in the United States and around the world have been presented with this conflict repeatedly for the past two decades or so, most famously in *Pinochet*.[24] Augusto Pinochet, a former Chilean head of state, was arrested in 1998 in London on a warrant issued by Spanish authorities. Judge Baltasar Garzón, a Spanish magistrate, had developed an extensive file on Pinochet, who was accused of authorizing or knowingly permitting the torture and disappearance of thousands of people, including Chilean and Spanish citizens. Pinochet had assumed power in Chile in 1973 after the violent overthrow of democratically elected President Salvador Allende.[25]

The divisional court in London quashed the warrant, reasoning that Pinochet was entitled to absolute immunity from the jurisdiction of the British courts.[26] The British secretary of state did not take a position on the immunity issue, stating that the courts should resolve it.[27] On appeal, the House of Lords reversed the divisional court in a 3-2 decision, reasoning that immunity is available only for official conduct, which did not include international crimes.[28] The House of Lords quickly set its decision aside, however, because Lord Hoffmann, who sat on the original panel, had failed to disclose his relationship to Amnesty International, one of a coalition of human rights organizations granted leave to present arguments in the case.[29] The case was heard again, this time by seven Law Lords, who interpreted the Extradition Act to apply only to torture committed after September 1988, when the Convention Against Torture was incorporated into British law.[30] This conclusion narrowed the immunity issue to include only conduct that allegedly violated the Convention Against Torture. By a 6-1 decision the Law Lords rejected Pinochet's immunity for those offenses.[31] The basis for the decision is difficult to characterize because the six Law Lords in the majority each employed different reasoning. Jack Straw, the British home secretary, eventually ordered the 84-year-old Pinochet

[23] Akande & Shah, *supra* note 8, at 815–16; Wright, *supra* note 8, at 145–47; Attanasio, *supra* note 8, at 383.

[24] *Pinochet III*, *supra* note 1.

[25] *See* Michael Byers, *The Law and Politics of the Pinochet Case*, 10 DUKE J. COMP. & INT'L L. 415, 416 (2000). Pinochet died in Chile in 2006.

[26] Regina v. Bartle & Commissioner of Police, *ex parte* Augusto Pinochet, [1998] Q.B. Div'l Ct. (Eng.), 38 ILM 68 (1999).

[27] The British government may have favored immunity but believed that the courts would rule in favor of Chile and Pinochet, making it unnecessary to take a position. See Byers, *supra* note 25, at 426.

[28] Regina v. Bow St. Metro. Stipendiary Magistrate, *ex parte* Pinochet Ugarte (No. 1), [2000] 1 A.C. 61 (H.L. Nov. 25, 1998) (hereinafter *Pinochet I*).

[29] Regina v. Bow St. Metro. Stipendiary Magistrate, *ex parte* Pinochet Ugarte (No. 2), [2000] 1 A.C. 119 (H.L. Jan. 15, 1999) (hereinafter *Pinochet II*).

[30] Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, S. TREATY DOC. NO. 100-20 (1988), 1465 UNTS 113 [hereinafter Convention Against Torture]; *see Pinochet III*, *supra* note 1, at 224–40 (Lord Hope of Craighead). This limitation excluded most of the allegations against Pinochet, which arose from his conduct in the 1970s. *Id.* at 225–41. Lord Millett disagreed on this point, arguing that torture was extraditable offense even before 1988. *Id.* at 276 (Lord Millett).

[31] *Pinochet III*, *supra* note 1.

released due to poor health, and he returned to Chile. These events have been hailed as path-breaking and transformative, in part because they unleashed both a wave of important cases against Pinochet in Chile and suits against many other defendants in Latin American and European domestic courts.[32]

In general, the international law of state immunity prevents foreign national courts from adjudicating or enforcing claims against states. U.S. Supreme Court Justice John Marshall first articulated the basis for this kind of immunity in the 1812 *Schooner Exchange* case.[33] A strong doctrine of immunity—sometimes termed *absolute immunity*—prevailed in most countries in the nineteenth century.[34] During the twentieth century, exceptions developed, especially when the state entered the marketplace as a commercial actor.[35] Courts began to deny immunity under these circumstances—called the *restrictive approach*—and by the end of the century, most countries had accepted this approach, although China recently made clear that it adheres to the absolute view.[36] Some common law countries have adopted domestic statutes that regulate the immunity on foreign states before their courts.[37]

Immunity also applies to individuals. Immunity *ratione personae*, or status immunity, protects high-level officials from virtually all suits in foreign national courts while they are still in office.[38] By contrast, functional immunity, or immunity *ratione materiae*, attaches not to the office of the individual but to the type of act performed. It applies only to official, not private, conduct, and it continues to apply after the individual leaves office.[39] Functional immunity protects states because it prevents them from being sued indirectly through the officials that act on their behalf. Chile asserted functional immunity on Pinochet's behalf.[40] The immunity is that of the state itself, not the individual, so the state may raise or waive it.[41]

Several arguments developed by commentators and litigators in the late 1980s and 1990s find support in the Law Lords' various opinions denying Pinochet functional immunity. In particular, some critics had begun to argue against immunity in foreign national courts for acts that violate international human rights law.[42] This development generally comported with broader trends in international law—namely, the codification of international human rights

[32] *See* NAOMI ROHT-ARRIAZA, THE PINOCHET EFFECT: TRANSNATIONAL JUSTICE IN THE AGE OF HUMAN RIGHTS (2005); ROGER BURBACH, THE PINOCHET AFFAIR: STATE TERRORISM AND GLOBAL JUSTICE (2003).

[33] 11 U.S. (7 Cranch) 116 (1812); *see* FOX, *supra* note 10, at 201–06 (tracing early law of immunity).

[34] FOX, *supra* note 10, at 206–18.

[35] *See* THEODORE R. GIUTTARI, THE AMERICAN LAW OF SOVEREIGN IMMUNITY: AN ANALYSIS OF LEGAL INTERPRETATION 63–142 (1970); Letter from Jack B. Tate, Acting Legal Adviser, to Philip B. Perlman, Acting Attorney General (May 19, 1952), *reprinted in* 26 DEP'T STATE BULL. 969, 984 (1952).

[36] Democratic Republic of the Congo v. F.G. Hemisphere Assoc., [2011] HKCFAR 41, para. 211 (H.K.) (reproducing a letter from the Office of the Commissioner of the Ministry of Foreign Affairs in the Hong Kong Special Administrative Region stating China's adherence to the principle of absolute immunity).

[37] FOX, *supra* note 10, at 235–36.

[38] Chanaka Wickremasinghe, *Immunities Enjoyed by Officials of States and International Organizations*, *in* INTERNATIONAL LAW 380, 392–96 (Malcolm D. Evans ed., 3d ed. 2010); Arrest Warrant of 11 April 2000, *supra* note 5, paras. 58–61.

[39] MALCOLM N. SHAW, INTERNATIONAL LAW 738 (6th ed. 2008).

[40] *Pinochet III*, *supra* note 1, at 192 (Lord Browne-Wilkinson).

[41] *Id.* at 192; Arrest Warrant of 11 April 2000, *supra* note 5, para. 61; Koh, *supra* note 17, at 1153.

[42] *See* FOX, *supra* note 10, at 139–66.

into a variety of treaty instruments,[43] the development of *jus cogens* norms as superior to other rules of international law,[44] and criminal liability for individuals, including related efforts to create effective enforcement mechanisms, such as the ad hoc criminal tribunals and the conclusion of the Rome Statute of the International Criminal Court in the late 1990s.[45] The arguments against immunity took different forms. One version maintained that a state in violation of *jus cogens* norms has effectively waived its immunity before foreign national courts.[46] Another version, known as the *normative hierarchy* theory, postulated that *jus cogens* norms are superior to other norms of international law and thus that norms of foreign state immunity must give way in cases alleging *jus cogens* violations.[47] Others argued that conduct prohibited under international law, such as torture, cannot be considered an "official act" entitled to immunity.[48]

These arguments all found some support in the *Pinochet* opinions.[49] Those based on *jus cogens* norms potentially undermine immunity *generally*, including the immunity of states themselves. Thus, *Pinochet* might have stood for a broad assault on state immunity for human rights violations.[50] Or, somewhat more narrowly, the reasoning in the opinions might mean that conduct amounting to torture or other international crimes cannot be considered official acts, with the consequence that individuals who engage in such conduct are not entitled to immunity.[51] Even more narrowly, the actual holding of the case was limited to conduct that violated the Convention Against Torture, and the opinions rely (to a greater or lesser degree) on that convention's *aut dedere aut punire* (prosecute or extradite) provisions to deny immunity to Pinochet.[52] Thus, although it was somewhat unclear what the opinions would come to mean for the development of immunity law, it was clear that the *Pinochet* case was an important, even

[43] *See* RUTI G. TEITEL, HUMANITY'S LAW 1–72 (2011).

[44] Evan J. Criddle & Evan Fox-Decent, *A Fiduciary Theory of Jus Cogens*, 34 YALE J. INT'L L. 331, 335–39 (2009).

[45] Rome Statute of the International Criminal Court, July 17, 1998, 2187 UNTS 90 [hereinafter Rome Statute]; *see* M. CHERIF BASSIOUNI, INTRODUCTION TO INTERNATIONAL CRIMINAL LAW 387–575 (2003).

[46] Adam C. Belsky, Mark Merva & Naomi Roht-Arriaza, *Implied Waiver Under the FSIA: A Proposed Exception to Immunity for Violations of Peremptory Norms of International Law*, 77 CAL. L. REV. 365 (1989); Mathias Reimann, *A Human Rights Exception to Sovereign Immunity: Some Thoughts on* Princz v. Federal Republic of Germany, 16 MICH. J. INT'L L. 403 (1995); Juliane Kokott, *Mißbrauch und Verwirkung von Souveränitätsrechten bei gravierenden Völkerrechtsverstößen*, *in* RECHT ZWISCHEN UMBRUCH UND BEWAHRUNG: VÖLKERRECHT—EUROPARECHT—STAATSRECHT, FESTSCHRIFT FÜR RUDOLF BERNHARDT 135 (1995); *see also* Princz v. Federal Republic of Germany, 813 F.Supp. 22 (D.D.C. 1992) (accepting the waiver argument), *rev'd*, 26 F.3d 1166, 1169 (D.C. Cir. 1994); *see also* 26 F.3d at 1174 (Wald, J., dissenting) (same); Siderman de Blake v. Republic of Argentina, 965 F.2d 699 (9th Cir. 1992) (rejecting waiver argument).

[47] Andrea Bianchi, *Denying State Immunity to Violators of Human Rights*, 46 AUSTRIAN J. PUB. & INT'L L 195, 205, 217 (1994); David J. Bederman, *Dead Man's Hand: Reshuffling Foreign Sovereign Immunities in U.S. Human Rights Litigation*, 25 GA. J. INT'L & COMP. L. 255, 273–76 (1995–96).

[48] *See* Rosalyn Higgins, *The Role of Domestic Courts in the Enforcement of International Human Rights: The United Kingdom*, *in* ENFORCING INTERNATIONAL HUMAN RIGHTS IN DOMESTIC COURTS (Benedetto Conforti & Francesco Francioni eds., 1997); BRÖHMER, *supra* note 22, at 197–215; Bianchi, *supra* note 47, at 205, 217.

[49] *Pinochet III*, *supra* note 1, at 205 (Lord Browne-Wilkinson); *id.* at 248 (Lord Hope of Craighead); *id.* at 262 (Lord Hutton); *id.* at 278 (Lord Millett); *id.* at 288, 289 (Lord Phillips of Worth Matravers).

[50] *See* Bianchi, *supra* note 4, at 262–66.

[51] Brigitte Stern, *Immunities for Heads of State: Where Do We Stand?*, *in* JUSTICE FOR CRIMES AGAINST HUMANITY 103 (Mark Lattimer & Philippe Sands eds., 2003); Jurisdictional Immunities of States and Their Property, Report of the International Law Commission on the Work of Its Fifty-First Session, UN GAOR 54th Sess., at 127–28, UN Doc. A/54/10 (1999).

[52] *See* Wickremasinghe, *supra* note 38, at 415 (describing narrower and broader possible readings of *Pinochet III*).

dramatic denial of immunity to one of the world's most notorious former dictators; no wonder the case was a media sensation.[53]

Immunity of States

The immunity of states themselves is generally governed by customary international law and by domestic statutes. The 2004 UN Convention on Jurisdictional Immunities of States and Their Property has not entered into force,[54] although it reflects some principles that are likely to be widely accepted.[55] Earlier efforts at codification include the 1926 International Convention for the Unification of Certain Rules Relating to the Immunity of State-Owned Vessels and its Additional Protocol from 1934.[56] It has twenty-nine state parties. The 1972 European Convention on State Immunity has been ratified by eight states.[57] The relatively low number of state parties to these conventions has been attributed to their complexity and to substantive disagreement about their terms.[58] Customary international law continues to govern this area of law.

One might expect state immunity to be a relatively stable area of international law. States have a strong interest in avoiding suits against themselves in foreign courts, and this form of customary international law can be maintained through bilateral reciprocity or enforced through retaliation. Moreover, human rights treaties have left state immunity before foreign national courts untouched. Efforts to create a human rights exception to state immunity in the 2004 UN convention were rejected.[59]

Despite the hallmarks of a strong, stable system of international law, the customary international law of state immunity has undergone profound change over the last hundred years, most significantly in the move from absolute to restrictive immunity. National courts drove these developments.[60] Restrictive immunity allows states to be sued for commercial activity (*jure gestionis*) but not for inherently sovereign acts (*jure imperii*). Restrictive immunity obviously favors business interests, but it also serves the interests of states by making them more attractive trading partners. National courts gave commercial entities repeated opportunities in many different contexts to push back against absolute state immunity.[61] As these entities found

[53] Byers, *supra* note 25, at 429 ("There is no question that the Law Lords felt the eyes of the world upon them. The entrance to the Houses of Parliament, where the Judicial Appeals Committee heard the case (in a small and dingy meeting room) was besieged by hundreds of journalists for the full two weeks of the hearings.").

[54] UN Convention on Jurisdictional Immunities of States and Their Property, GA Res. 59/38, annex (Dec. 2, 2004).

[55] *See* David P. Stewart, *The Immunity of State Officials Under the UN Convention on Jurisdictional Immunities of States and Their Property*, 44 VAND. J. TRANSNAT'L L. 1047, 1052–60 (2011).

[56] Apr. 10, 1926, 176 LNTS 199 (entered into force Jan. 8, 1937).

[57] European Convention on State Immunity, *opened for signature* May 16, 1972, ETS No. 74, 1495 UNTS 182 (entered into force June 11, 1976). Information about Council of Europe treaties, including ratifications and current status, is available at http://www.conventions.coe.int/Treaty/Commun/ListeTraites.asp?CM=8&CL=ENG.

[58] *See* FOX, *supra* note 10, at 185–88.

[59] Christopher Keith Hall, *UN Convention on State Immunity: The Need for a Human Rights Protocol*, 55 INT'L & COMP. L.Q. 411, 412 (2006).

[60] *See* FOX, *supra* note 10, at 201.

[61] *See, e.g.*, The Porto Alexandre, [1920] P. 30 (Lord Scrutton); Baccus SRL v. Servicio Nacional del Trigo, [1957] 1 Q.B. 438, 464 (Lord Singleton); Trendtex Trading Corp. v. Cent. Bank of Nigeria, [1977] 1 Q.B. 529 (Lords Denning and Shaw); Flota Maritima Browning de Cuba, S.A. v. S.S. Canadian Conqueror, [1962] S.C.R. 598 (Can.).

occasionally receptive courts or judges, their cases in other states became stronger, and executive branches became increasingly inclined toward the restrictive approach, as were some national legislative bodies.[62]

As with the move to restrictive immunity, national courts have been at the leading edge of developing a human rights exception to state immunity in cases against states themselves. At the state-to-state level, efforts at such an exception have met with virtually no success.[63] As a matter of domestic legislation, one state (the United States) has denied immunity in cases involving the small number of states designated as "state sponsors of terrorism," but not for human rights violations more broadly.[64]

Although commentators and litigators have argued that states should not be immune in foreign courts in cases asserting human rights violations, most national courts rejected those arguments both before and after *Pinochet*. A few national courts have accepted human rights–related limitations on state immunity, however. The most significant case doing so was *Ferrini v. Germany*: in 2004, the Italian Court of Cassation held that Germany had no immunity for claims by Italian soldiers captured in Italy and taken to Germany to perform forced labor during World War II.[65] A Greek case from 2000, *Prefecture of Voiotia v. Germany*, had reached a similar conclusion based on the forum-tort exception to immunity (the massacre took place in Greece), but also appeared to reason that Germany had waived its immunity by engaging in acts that violated fundamental norms of international law.[66] Other national courts and regional human rights courts did not follow suit, however, and even the Greek and Italian courts appeared to back away from these rulings.[67] Commentators increasingly acknowledged the absence of a general human rights exception to the immunity of states.[68]

National court litigation eventually led Germany to sue Italy before the International Court of Justice (ICJ) in a case known as *Jurisdictional Immunities of the State*. Germany asserted that Italy had violated customary international law based on *Ferrini* and other judgments of the Italian courts, including some that held Greek judgments against Germany could be enforced against German property in Italy.[69] The Court held for Germany, an outcome that many had

[62] *See* FOX, *supra* note 10, at 201–36; GIUTTARI, *supra* note 35, at 352–69.

[63] *See* Lorna McGregor, *State Immunity and* Jus Cogens, 55 INT'L & COMP. L.Q. 437 (2006).

[64] *See* 28 U.S.C. §1605A (2008). The International Court of Justice (ICJ) noted in *Jurisdictional Immunities of the State*, *supra* note 5, para. 71, that this provision of U.S. law "has no counterpart in the legislation of other States."

[65] Ferrini v. Federal Republic of Germany, *supra* note 6.

[66] Prefecture of Voiotia v. Federal Republic of Germany, *supra* note 6.

[67] Based on the immunity of Germany, the Greek minister of justice refused to give consent to enforce the *Prefecture of Voiotia* judgment against German property in Greece—a decision upheld by the European Court of Human Rights. Kalogeropoulou v. Greece, 2002-X Eur. Ct. H.R. 415, 429 (2002). Moreover, in the subsequent case of *Margellos v. Federal Republic of Germany*, a judgment of the special Supreme Court of Greece reached the opposite conclusion entirely—namely, that immunity should be accorded to states for wartime crimes committed in the forum state—although it did not directly overrule *Prefecture of Voiotia*. Margellos v. Federal Republic of Germany, Spec. Sup. Ct., Sept. 17, 2002, 129 ILR 525 (Greece). In a subsequent Italian case, *United States v. Tissino*, the Court of Cassation held the United States immune in a suit alleging that the storage of nuclear weapons at an air force base violated international law. The decision noted that international practice since *Ferrini* favored immunity even when states are accused of international crimes or *jus cogens* violations. United States v. Tissino, Cass., Feb. 25, 2009, ILDC 1262, para. 20 (It.). The European Court of Human Rights rejected the normative hierarchy theory in 2001 by a vote of 9 to 8. Al-Adsani v. United Kingdom, 2001-XI Eur. Ct. H.R. 79, 103 (2001).

[68] *See, e.g.*, Wright, *supra* note 8, at 144; Roger O'Keefe, *State Immunity and Human Rights: Heads and Walls, Hearts and Minds*, 44 VAND. J. TRANSNAT'L L. 999, 1012–33 (2011).

[69] Jurisdictional Immunities of the State, *supra* note 5, para. 35.

predicted, in part because the courts of other states had not followed the Italian and Greek precedents of denying immunity.[70] The Court could have held for Germany without reaching questions of immunity by finding that Italy had waived any reparations claims on behalf of its nationals.[71] Instead, the Court resolved the case based on Germany's immunity from suit under customary international law.

The judgment made clear that state immunity is grounded in international law, not comity.[72] It also emphasized the procedural nature of state immunity, which is derived from the "sovereign equality of States, . . . one of the fundamental principles of the international legal order."[73] With respect to Italy's argument that immunity did not protect Germany from suits based on conduct within Italy, the Court held for Germany because the conduct took place in the course of an armed conflict.[74] As to an immunity exception based on the nature and gravity of Germany's violations of international law (which were uncontested), the Court rejected the normative hierarchy theory, concluded that a state's entitlement to immunity did not depend upon the gravity of the violations alleged, rejected the argument that immunity should not apply when other remedial measures are unavailable, and distinguished *Pinochet* as irrelevant because it was about functional immunity for a former head of state in a criminal case, not state immunity.[75] The Court went on to characterize the *Pinochet* judgment narrowly as "based upon the specific language of the 1984 United Nations Convention against Torture, which has no bearing on the present case."[76]

Immunity Ratione Personae *(Status or Personal Immunity)*

The broad potential impact of the *Pinochet* judgment has also not been realized in immunity *ratione personae* cases. This immunity applies only as long as the official is in office. It allows a small group of very high-level officials to perform their functions free of impairment from the courts of another state, thus facilitating interstate communication and cooperation.[77] After leaving office, these officials enjoy functional immunity, or immunity *ratione materiae*, which protects only their acts performed in an official capacity.[78] Historically, *ratione personae* immunity has been close to absolute. Today, the issue is somewhat more complicated because some states view status immunity as a function of state immunity itself; accordingly, heads of state (like states themselves) are perhaps not entitled to immunity from civil proceedings for certain

[70] *See* Marko Milanovic, *Germany v. Italy: Germany Wins*, EJIL: TALK! (Feb. 3, 2012), *at* http://www.ejiltalk.org/germany-v-italy-germany-wins/; Andrea Bianchi, *On Certainty*, EJIL: TALK! (Feb. 16, 2012), *at* http://www.ejiltalk.org/author/abianchi/.

[71] Jurisdictional Immunities of the State, *supra* note 5, para. 108.

[72] Jurisdictional Immunities of the State, paras. 56–58; *see also id.*, Diss. Op. Yusuf, J., para. 21.

[73] Jurisdictional Immunities of the State, para. 57; *see also id.*, Sep. Op. Keith, J., para. 2.

[74] *Id.*, para. 78.

[75] *Id.*, paras. 84, 92–98. Writing in dissent, Judge Yusuf reasoned that immunity should not be resolved in the abstract but should be based on the specific factors of each case. In this case, he argued, because of the right to effective remedy for violations of international humanitarian law and because no other means of redress were available, Germany was not entitled to immunity before the Italian national courts. *Id.*, Diss. Op. Yusuf, J., paras. 9–42. Judge Bennouna's reasoning was similar, but he concurred because interstate negotiation left the door open to reparations for the victims. *Id.*, Sep. Op. Bennouna, J., paras. 23–25, 30. Judge Trindale, also writing in dissent, apparently accepted the normative hierarchy argument. *Id.*, Diss. Op. Trindale, J., paras. 129, 227, 288–99.

[76] Jurisdictional Immunities of the State, para. 87.

[77] FOX, *supra* note 10, at 666–67.

[78] *Id.*

private acts.[79] Civil proceedings in national courts against foreign sitting heads of state nonetheless remain rare.

The most significant change to *ratione personae* immunity has taken place in the context of international criminal tribunals. Sitting heads of states Slobodan Milošević, Charles Taylor, and Omar Al Bashir have all been indicted by international or hybrid criminal tribunals.[80] The Rome Statute of the International Criminal Court explicitly eliminates immunity: "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."[81]

The willingness of some states to lift *ratione personae* immunity before certain international criminal tribunals has not extended to foreign national courts. National courts and prosecutors have consistently rejected cases against sitting heads of state.[82] The 2002 ICJ decision in the *Arrest Warrant* case affirmed that status-based immunities apply before foreign national courts. The case held a sitting Congolese minister of foreign affairs immune from suit in Belgium national courts on charges of crimes against humanity and grave breaches of the Geneva Conventions.[83]

The *Arrest Warrant* case represented a setback for broad readings of *Pinochet*. It rejected a customary international law exception to status immunity for those accused of international crimes before foreign national courts. The judgment undercut the argument that *jus cogens* norms are hierarchically superior to immunity norms—if they were, immunity would be available neither to states nor to former or current government officials—thereby setting the stage for the Court's 2012 judgment in *Jurisdictional Immunities of the State*.[84] Moreover, in *Arrest Warrant* the Court said in dicta that former officials would lack immunity in domestic courts for "acts committed during that period of office in a private capacity."[85] This language suggests that immunity persists for nonprivate acts, so that lifting immunity for international crimes depends on characterizing the conduct in question as "private." Although this position finds

[79] *See* Institut de droit international, Resolution on Immunities from Jurisdiction and Execution of Heads of State and of Government in International Law (Aug. 26, 2001), *reprinted in* STATE IMMUNITY: SELECTED MATERIALS AND COMMENTARY 212 (Andrew Dickinson, Rae Lindsay & James P. Loonam eds., 2004), *available at* http://www.idi-iil.org/idiE/resolutionsE/2001_van_02_en.PDF.

[80] *See* Noah B. Novogrodsky, *Speaking to Africa—the Early Success of the Special Court for Sierra Leone*, 5 SANTA CLARA J. INT'L L. 194, 203–07 (2006); ICC Press Release, ICC Issues a Warrant of Arrest for Omar Al Bashir, President of Sudan (Mar. 4, 2009), *at* http://www.icc-cpi.int/Menus/ICC/Press+and+Media/Press+Releases/Press+Releases+%282009%29/.

[81] Rome Statute, *supra* note 45, Art. 27(2).

[82] Akande & Shah, *supra* note 8, at 819–20 (2010) (listing cases); Enrique Carnero Rojo, *National Legislation Providing for the Prosecution and Punishment of International Crimes in Spain*, 9 J. INT'L CRIM. JUST. 699, 723–24 (2011) (collecting and discussing cases from Spain); *cf.* United States v. Noriega, 746 F.Supp. 1506, 1519–20 (S.D. Fla. 1990) (denying head-of-state immunity to Noriega because the United States did not recognize him as a head of state).

[83] Abdoulaye Yerodia Ndombasi was minister of foreign affairs when the warrant was issued but had left that office by the time the case was heard and resolved by the ICJ. Belgium argued that the case should be dismissed because it no longer presented a live controversy. The Court disagreed. Arrest Warrant of 11 April 2000, *supra* note 5, paras. 23–32; *see also* Certain Questions of Mutual Assistance in Criminal Matters (Djib. v. Fr.), 2008 ICJ REP. 177, para. 170 (June 4) (reaffirming head-of-state immunity).

[84] *See supra* note 5.

[85] Arrest Warrant of 11 April 2000, *supra* note 5, para. 61.

some support in the *Pinochet* opinions, scholars have increasingly rejected it, and even the British courts themselves reasoned to the contrary in *Jones v. Ministry of Interior*.[86] Finally, the ICJ reasoned in *Arrest Warrant* that treaty-based extensions of jurisdiction and obligations to prosecute or extradite individuals do not affect immunities under customary international law:[87] this reasoning is at odds with even the narrowest reading of *Pinochet*, pursuant to which the Convention Against Torture obviates immunity by imposing an obligation to prosecute or extradite.[88]

II. *PINOCHET*'S CORE: IMMUNITY *RATIONE MATERIAE* (FUNCTIONAL IMMUNITY)

In the *Pinochet* case, Chile invoked immunity *ratione materiae*, the doctrinal branch of immunity for which the case has most relevance today. As noted in the part I, the broader arguments against immunity that found some support in the *Pinochet* opinions have been undercut by subsequent cases, including the ICJ's recent decision in *Jurisdictional Immunities of the State*. For civil cases against individuals, the judgment reinforces immunity as a matter of customary international law, at least when the case is treated as one against the state itself.[89] And although the judgment states explicitly that it does not address individual immunity from criminal prosecution,[90] a few aspects of the Court's reasoning may also be relevant in criminal cases. First, the rejection of the normative hierarchy theory should apply equally in criminal cases against individuals. Second, the Court characterizes immunity as "essentially procedural in nature" and as "entirely distinct from the substantive law which determines whether that conduct is lawful or unlawful."[91] Some have argued that immunity *ratione materiae*, which applies in criminal as well as civil cases, is an aspect of substantive law,[92] a conclusion that is potentially in tension with the Court's reasoning here. Third, the Court relies heavily on the judgments of national courts,[93] noting that national courts gave "careful consideration" to the immunity question.[94] By contrast, some national court decisions that are cited to show the erosion of immunity in criminal cases do not explicitly consider immunity at all.[95]

Other courts have also cabined the effects of the *Pinochet* decision for immunity *ratione materiae*. Most significantly, in *Jones v. Ministry of Interior*, the UK House of Lords held in a civil torture case that the State Immunity Act of 1978 conferred immunity not just on the Kingdom of Saudi Arabia but also on former state officials, servants, and agents. Contrary to some language in the *Pinochet* opinions, the *Jones* opinion reasons that torture *is* an official act of the

[86] *Jones*, *supra* note 5, at 89–93 (Lord Hoffmann); *see, e.g.*, Akande & Shah, *supra* note 8, at 828–31.

[87] Arrest Warrant of 11 April 2000, *supra* note 5, para. 59 (reasoning that "jurisdiction does not imply absence of immunity, while absence of immunity does not imply jurisdiction").

[88] *See* Ed Bates, *State Immunity for Torture*, 7 HUM. RTS. L. REV. 651, 672–73 (2007) (discussing the tension between *Arrest Warrant* and *Pinochet*); Wirth, *supra* note 10, at 882–85 (same).

[89] *See infra* text accompanying notes 135–37.

[90] Jurisdictional Immunities of the State, *supra* note 5, para. 91.

[91] *Id.*, para. 58.

[92] VAN ALEBEEK, *supra* note 22, at 106–07.

[93] Jurisdictional Immunities of the State, paras. 73–76, 85, 96.

[94] *Id.*, para. 96.

[95] *See infra* text accompanying notes 140–76.

state and, accordingly, that officials are entitled to functional immunity, at least in civil cases.[96] *Jones* thus interprets the *Pinochet* decision as being based narrowly on the Convention Against Torture.[97]

Commentators generally understand immunity *ratione materiae* as least secure in criminal cases, but many argue that it should also be unavailable in civil ones. The doctrinal basis for these claims varies,[98] but proponents of limiting immunity for violations of international law uniformly cite national court cases in support of their positions. Functional immunity is governed by customary international law, generally defined as law that arises from the practice of nations followed out of a sense of legal obligation (*opinio juris*).[99] The traditional definition thus has two requirements: general and consistent state practice, and the motivation (or subjective) requirement of *opinio juris*.[100]

This part of the article, divided into five sections, analyzes whether national court litigation[101] reflects either state practice or *opinio juris* demonstrating a human rights exception to immunity. The first of the five sections describes and defends preliminary choices about which cases to include as potential state practice and *opinio juris*. The second section considers cases in which immunity was apparently invoked. The third section analyzes the more common cases in which immunity was apparently not invoked, and concludes that they generally provide only weak evidence of state practice and *opinio juris*. The fourth section contrasts the cases relied upon today to demonstrate an erosion of functional immunity with the cases relied upon in the past to show the erosion of state immunity for commercial activity: unlike the former, the latter were cases in which immunity was invoked, examined, discussed, and granted or denied. The last section then relaxes the assumptions employed in the earlier sections, which apply a traditional definition of customary international law based on state

[96] *Jones*, *supra* note 5, paras. 89–93 (Lord Hoffmann).

[97] *Id.* Jones has taken his case to the European Court of Human Rights, arguing that the House of Lords decision denied him access to courts as guaranteed by the European Convention. *See* Jones v. United Kingdom, App. No. 34356/06 (Eur. Ct. H.R. filed July 26, 2006).

[98] Akande & Shah, *supra* note 8, at 851–52 (based on conferral of jurisdiction by international law, no immunity in criminal and some civil cases); Bradley & Helfer, *supra* note 4, at 239–40 (arguing, based on state practice, that an exception to immunity might be developing in criminal, but not civil, cases); Antonio Cassese, *When May Senior State Officials Be Tried for International Crimes? Some Comments on the* Congo v. Belgium *Case*, 13 EUR. J. INT'L L. 853, 867–74 (2002) (based on state practice and *opinio juris*, no immunity in criminal cases); Alexander Orakhelashvili, *International Crimes, Human Rights Violations, and the Subject-Matter Immunity of States and Their Officials*, *at* http:/ssrn.com/abstract=1966307 (for various reasons, no immunity in civil or criminal cases alleging serious human rights violations, international crimes, or breach of *jus cogens*); Stephens, *supra* note 8, at 1170 (no immunity in criminal or civil cases); Wirth, *supra* note 10, at 888–91 (questioning "not official act" argument but reasoning that state practice and *opinio juris* show that customary international law denies functional immunity in criminal cases alleging "core crimes"); Wright, *supra* note 8, at 164–65 (no immunity for torture in civil or criminal cases).

[99] *See, e.g.*, Statute of the International Court of Justice, Art. 38(1); RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES, *supra* note 11, §102(2).

[100] SHAW, *supra* note 39, at 72–75; North Sea Continental Shelf (FRG/Den.; FRG/Neth.), 1969 ICJ REP. 44, para. 77 (Feb. 20).

[101] The cases include those cited by other authors and those found reports issued by the ILC, as well as some cases discovered through Oxford databases and Internet searches. The author has endeavored to include every reported criminal case denying or accepting functional immunity but not every case in which immunity was not invoked if doing so would simply repeat the analysis already provided. For a general discussion of national court decisions and customary international law, including objections to characterizing decisions as state practice, see Philip M. Moremen, *National Court Decisions as State Practice: A Transnational Judicial Dialogue?*, 32 N.C. J. INT'L L. & COM. REG. 259, 274–84 (2006).

consent.[102] The final section thus considers a broader set of potential sources that might demonstrate *opinio juris* in favor of an exception.

This part proceeds from the overarching assumption that immunity *ratione materiae* is one aspect of the immunity of states. State immunity thus provides the background norm of functional immunity, and the question is whether an exception has developed. The derivation of functional immunity from state immunity also explains why immunity remains the norm if state practice is thin or if it points in both directions. This starting principle—that as a function of state immunity, current and former state officials are entitled to immunity for acts performed in their official capacity—is consistent with the approach of national courts in civil and criminal cases,[103] the ICJ,[104] reports of the ILC secretariat and special rapporteur,[105] commentators,[106] and states.[107] Only one of the seven opinions in *Pinochet* does not begin with this premise.[108] Historically, the issue rarely arose because states generally had jurisdiction only

[102] State consent is often cited as the basis for customary international law. *See, e.g.*, Louis Henkin, *International Law: Politics, Values and Functions,* 216 RECUEIL DES COURS 9, 50 (1989 IV). Many commentators argue that in practice the requirements of customary international law are applied in ways that may make the consent of individual states fictional.

[103] *Jones*, *supra* note 5, para. 27 (Lord Bingham of Cornhill); Italy v. Lozano, No. 31171, ILDC 1085 (It. 2008) (English summary of the case).

[104] Certain Questions of Mutual Assistance in Criminal Matters, *supra* note 83, para. 188 (interpreting claim of functional immunity as one of state immunity); Arrest Warrant of 11 April 2000, *supra* note 5, paras. 58–61.

[105] Immunity of State Officials from Foreign Criminal Jurisdiction, *supra* note 10, paras. 88, 181 (framing the question in terms of an exception to immunity); Second Report on Immunity of State Officials from Foreign Criminal Jurisdiction, *supra* note 10, para. 18 (same).

[106] BASSIOUNI, *supra* note 45, at 81–82 (framing the issue in terms of an exception to immunity); CASSESE, *supra* note 10, at 304, 305 (same); FOX, *supra* note 10, at 695–700 (same); Dapo Akande, *International Law Immunities and the International Criminal Court*, 98 AJIL 407, 412–16 (2004) (same); Bradley & Helfer, *supra* note 4, at 233–40 (same); FOAKES, *supra* note 10, at 8–9 (same); Wickremasinghe, *supra* note 38, at 403 (same); Wirth, *supra* note 10, at 878, 884 (same); *see also* OPPENHEIM'S INTERNATIONAL LAW 1043–44 (Robert Jennings & Arthur Watts eds., 9th ed. 1992); SATOW'S GUIDE TO DIPLOMATIC PRACTICE §§2.4, 15.27 (Lord Gore-Booth ed., 5th ed. 1979). *But see* Stephens, *supra* note 8, at 1175–76. *But cf.* Keitner, *supra* note 10, at 606–21 (questioning the background norm of immunity in civil cases against defendants present in the forum state's territory). If *jus cogens* violations are not official conduct, then they are not entitled to this kind of immunity. Immunity is generally available even for criminal conduct, however, and there is little state practice and *opinio juris* tending to show that *jus cogens* violations are not official conduct. For evidence that arguably supports the not-official-conduct view, see *infra* notes 137, 191–93. *But see supra* note 86; Cassese, *supra* note 98, at 867–74; *infra* note 135.

[107] *See* Statement of Interest of the United States, paras. 10–11, Yousuf v. Samantar, 2011 U.S. Dist. LEXIS 155280 (E.D. Va. 2011) (Civil Action No. 1:04 CV 1360 (LMB)); *see also* Bellinger, *supra* note 20, at 829–30. At least some French, German, and Swiss officials share this view. *See infra* text accompanying notes 126–33. Spain's position in the *Pinochet* litigation was that former heads of states are immune for actions taken in their official capacity. *House of Lords Hearing, Excerpts from Legal Submissions, November 1998, in* THE PINOCHET PAPERS: THE CASE OF AUGUSTO PINOCHET IN SPAIN AND BRITAIN 111–12 (Reed Brody & Michael Ratner eds., 2000); *see also* Simon N. M. Young, *Immunity in Hong Kong for Kleptocrats and Human Rights Violators*, 41 HONG KONG L.J. 421, 428 (2011) (suggesting that China (and Hong Kong) will afford absolute immunity to former heads of state who allegedly committed international crimes, and noting that a case like *Pinochet* would come out differently in those courts). As this article went to press, the United States reaffirmed its position in a case brought against the former president of Mexico alleging human rights violations. The State Department requested immunity, reasoning in part that former officials are entitled to immunity for acts "taken in an official capacity" and that "the Department of State generally presumes that actions taken by a foreign official exercising the powers of his office were taken in his official capacity." Suggestion of Immunity Submitted by United States of America, Doe v. Zedillo Ponce de Leon, Exh. 1, No. 3:11-cv-014330AWT (D. Conn. Sept. 7, 2012) (letter from Harold Hongju Koh, Legal Adviser, to Stuart F. Delery, Acting Assistant Attorney General (Sept. 7, 2012)) [hereinafter Koh letter].

[108] *Pinochet III*, *supra* note 1, at 201–03, 205 (Lord Browne-Wilkinson); *id.* at 210–12 (Lord Goff of Chieveley); *id.* at 241–43 (Lord Hope of Craighead); *id.* at 249–53 (Lord Hutton); *id.* at 265 (Lord Saville of Newdigate); *id.* at 269 (Lord Millett). All five of the Law Lords who decided *Pinochet I* apparently shared this starting point.

over conduct that took place in their territory; when immunity did arise, it was apparently conferred.[109] State immunity, the basis for functional immunity, is itself well established in customary international law, even for conduct that violates *jus cogens* norms or constitutes a crime under international law.[110]

What Counts? Initial Considerations

National court litigation might serve as evidence of customary international law in several ways. When a foreign national court or prosecutor asserts jurisdiction over an individual defendant, then either the defendant's state of nationality invokes immunity on the defendant's behalf or it does not. The invocation of immunity and the forum state's response (conferring or denying immunity) may each demonstrate state practice and provide evidence of *opinio juris*,[111] as shown by rectangle B in Figure 1. As also depicted in rectangle B, the failure to invoke immunity may itself potentially count as state practice or as evidence of *opinio juris*, an issue explored in more detail below.[112]

The mere exercise of jurisdiction by the forum state over the defendant is not state practice with respect to immunity, however, because the forum state is apparently obligated to confer functional immunity only if it is invoked.[113] The ICJ held in *Certain Questions of Mutual Assistance in Criminal Matters* that Djibouti's head of national security was not entitled to functional immunity before French courts, in part because Djibouti never invoked immunity on his behalf.[114] France argued in that case that functional immunity must be invoked.[115] A spe-

Pinochet I, *supra* note 28, at 73–75, 77, 83 (Lord Slynn of Hadley); *id.* at 90–95 (Lord Lloyd of Berwick); *id.* at 114–15 (Lord Steyn); *id.* at 118 (Lord Hoffmann); *cf. id.* at 110 (Lord Nicholls of Birkenhead) (discussing whether former heads of state enjoy "residual immunity" from prosecutions in other states). Only Lord Phillips in *Pinochet III* suggests that former heads of state do not generally enjoy immunity from criminal suit in foreign national courts for alleged crimes committed in the exercise of official functions. *Id.* at 280–85 (Lord Phillips of Worth Matravers).

[109] Troops passing through a foreign state were immune from suit so as not to divert the troops from "national objects and duties." HENRY WHEATON, ELEMENTS OF INTERNATIONAL LAW §99 (Richard Henry Dana Jr. ed., 8th ed. 1866). The same applied to public vessels, a situation that Wheaton contrasted to private subjects in the territory of a foreign sovereign, who are "not employed [by the sovereign], nor are they engaged in national pursuits. Consequently there are powerful motives for not exempting persons of this description from the jurisdiction of the country in which they are found, and no motive for requiring it." *Id.* §101. Litigation in the United States from the 1790s has been interpreted, however, to mean that foreign officials other than diplomats were not entitled to immunity in civil cases. *See* Chimène I. Keitner, *The Forgotten History of Foreign Official Immunity*, 87 N.Y.U. L. REV. 704, 709–10 (2012). *But see* Curtis A. Bradley & Jack L. Goldsmith, *Foreign Sovereign Immunity and Domestic Officer Suits*, 13 GREEN BAG 2D 137, 141–42 (2010).

[110] *See supra* text accompanying notes 54–76.

[111] Jurisdictional Immunities of the State, *supra* note 5, para. 55. This article takes a broad view of state practice and does not engage the academic debate on whether it includes verbal acts. *See* Andrew T. Guzman, *Saving Customary International Law*, 27 MICH. J. INT'L L. 115, 125–26, 151–53 (2005) (describing this debate). Note that narrower definitions of state practice could provide further reasons for concluding that the national court cases have little relevance to the customary international law of immunity.

[112] *See infra* text accompanying notes 140–47.

[113] The *Lotus* case did consider cases in which jurisdiction not asserted, but the case was about jurisdiction, not immunity. S.S. Lotus (Fr./Turk.), 1927 PCIJ (ser. A) No. 10, at 28 (Sept. 7). Similarly, the analysis below includes an examination of cases in which immunity was not invoked.

[114] Certain Questions of Mutual Assistance in Criminal Matters, *supra* note 83, para. 196.

[115] *See* Immunity of State Officials from Foreign Criminal Jurisdiction, *supra* note 10, para. 216.

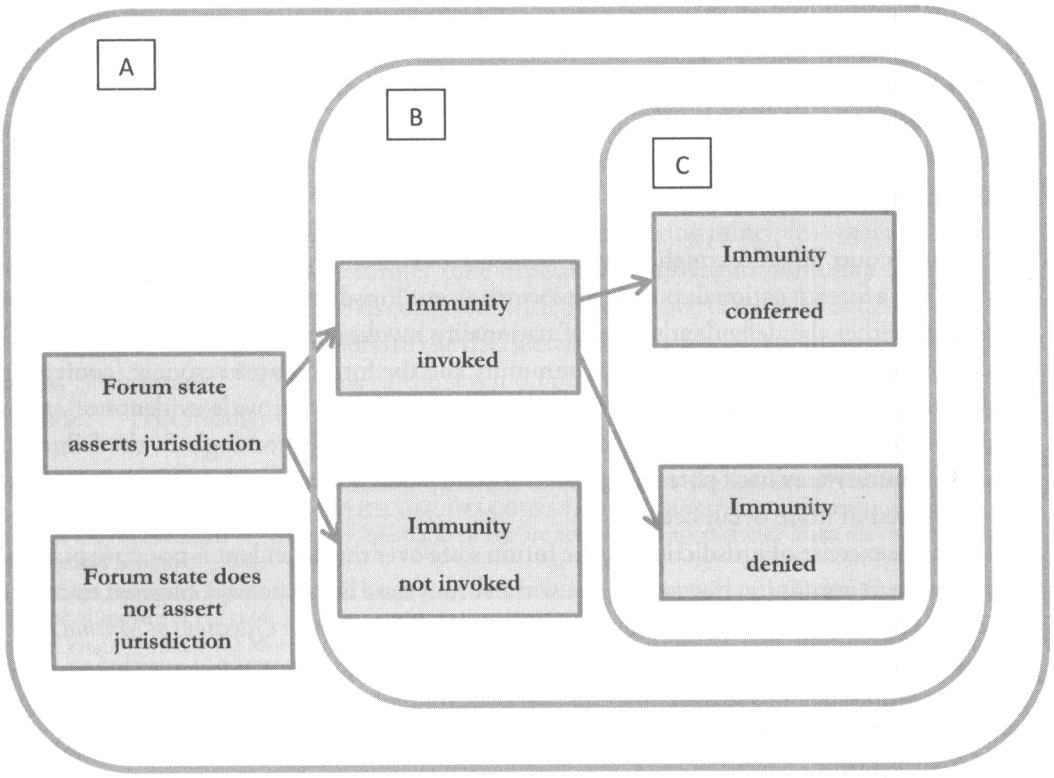

FIGURE 1. State practice and immunity.

cial rapporteur of the ILC, Roman Kolodkin, has reached the same conclusion.[116] State practice with respect to the invocation of functional immunity is mixed, however. In a few cases courts have granted functional immunity with no clear indication that it had been formally invoked[117]—perhaps suggesting that invocation is not legally necessary—but this evidence is difficult to evaluate because immunity might have been invoked through diplomatic channels rather than in a public proceeding before the courts.[118] In *Pinochet* itself, Chile formally invoked immunity.[119] In other cases, too, states have invoked functional immunity[120]—perhaps suggesting that invocation is legally necessary—but states might take this action in order to be careful, not because it is legally required.

[116] Third Report on Immunity of State Officials from Foreign Criminal Jurisdiction, *supra* note 19, paras. 17–31. A few cases explicitly deny immunity invoked by the individual defendant rather than the state. *See* Gabriella Citroni, *Swiss Court Finds No Immunity for the Former Algerian Minister of Defence Accused of War Crimes: Another Brick in the Wall of the Fight Against Impunity*, EJIL: TALK! (Aug. 15, 2012), *at* http://www.ejiltalk.org/swiss-court-finds-no-immunity-for-the-former-algerian-minister-of-defence-accused-of-war-crimes-another-brick-in-the-wall-of-the-fight-against-impunity/ (describing decision of Swiss Federal Criminal Court); *see also infra* text accompanying notes 178–91 (the *Yaron* and *Bouterse* cases arguably fall into this category, although both were dismissed for lack of jurisdiction). This analysis suggests that Figure 1 needs an additional line that connects "Immunity not invoked" to "Immunity denied."

[117] *See, e.g.*, *infra* text accompanying notes 126–34.

[118] Third Report on Immunity of State Officials from Foreign Criminal Jurisdiction, *supra* note 19, paras. 27–28.

[119] *See supra* note 40.

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There are policy reasons for concluding that functional immunity must be invoked by the state entitled to do so. Individuals arguably entitled to functional immunity are frequently low-level or former government officials, and the forum state may have no reason to know that they may be entitled to immunity. Unlike personal immunity, functional immunity depends upon whether the person acted in an official capacity, a determination that should generally be made based in part upon the submissions of the state arguably entitled to immunity. Finally, if the purpose of immunity is to protect relations among nation states, it makes sense to require states to invoke immunity before it is supplied.[121]

If the foregoing claim is incorrect, and the forum state is obligated to confer functional immunity even if it is not invoked by the state entitled to do so, then the assertion of jurisdiction itself should count as state practice. Cases in which jurisdiction is *not* asserted would also need to be included,[122] as shown rectangle A in Figure 1. Including these cases would make the inquiry difficult from a practical perspective.[123] The approach taken here—looking exclusively at cases in rectangle B of Figure 1—is consistent with the ICJ's approach in *Jurisdictional Immunities*,[124] which considered cases in which immunity was invoked and ruled upon. Excluding the assertion of jurisdiction itself from the state practice of immunity is also generally consistent with how customary international law evolved from the absolute to the restrictive view. Indeed, that history suggests that we might include even a narrower set of cases—just those in which immunity was invoked or otherwise actually became an issue in the litigation,[125] as in rectangle C in Figure 1. But failures to invoke immunity (as represented in the bottom center rectangle of Figure 1) might also be relevant—if, for example, the state failed to invoke immunity because it believed that it was not entitled to do so as a matter of law. Thus, cases that fall within rectangle B are considered below.

National Court Cases: Immunity (Apparently) Invoked

If the state entitled to do so invokes immunity based on international law (an action generally taken by the Foreign Office or State Department), these actions reflect state practice and

[120] *See* Zhang v. Jiang Zemin [2010] NSWCA 255, para. 12 (Austl.) (setting out the Australian minister of foreign affairs' submission, which discusses China's invocation of immunity on behalf of Jiang Zemin), *available at* http://documents.law.yale.edu/sites/default/files/Zhang_243FLR299.pdf; Matar v. Dichter, 500 F.Supp.2d 284, 292 (S.D.N.Y. 2007), *aff'd* 563 F.3d 9 (2d Cir. 2009) (Israel invoked immunity); Koh letter, *supra* note 107; *see also* JSP v. Spain, ILDC 545 (Haarlem Dist. Ct. 2006) (Neth.) (holding that Spain was not entitled to immunity, because it did not invoke it); *id.*, paras. A1–A6 (analysis by Roseanne van Alebeek) (questioning the court's decision with respect to the immunity of states but distinguishing it from cases against individual state organs or officials). *But cf. Zhang*, *supra*, para. 48. Some evidence suggesting that immunity need not be invoked also involves states rather than their officials, *see* Immunity of State Officials from Foreign Criminal Jurisdiction, *supra* note 10, para. 215, but the two contexts are distinguishable. *See* Gionata Piero Buzzini, *Lights and Shadows of Immunities and Inviolability of State Officials in International Law: Some Comments on the* Djibouti v. France *Case*, 22 LEIDEN J. INT'L L. 455, 470–73 (2009).

[121] Third Report on Immunity of State Officials from Foreign Criminal Jurisdiction, *supra* note 19, paras. 17–19.

[122] *See* FOAKES, *supra* note 10, at 11 ("There have also been many cases suggesting a strong reluctance to prosecute foreign state officials, particularly where the foreign state concerned is likely to object to such proceedings.").

[123] Guzman, *supra* note 111, at 126–27.

[124] Jurisdictional Immunities of the State, *supra* note 5, para. 55 (explaining sources of state practice and *opinio juris*, but not mentioning the assertion of jurisdiction or the failure to bring cases).

[125] *See infra* text accompanying notes 194–200.

opinio juris.[126] The national court or prosecutor may grant immunity, and the case then serves as state practice and *opinio juris* favoring immunity. Functional immunity has been granted by the court or prosecutor in criminal cases alleging violations of international criminal law in France against Donald Rumsfeld[127] and in Germany against former Chinese president Jiang Zemin.[128] A Swiss official from the Ministry of Justice has publicly said that former U.S. president George Bush would be immune from Swiss prosecution for torture, but no complaint was filed in that case.[129] This declaration, which specifically addressed immunity, is evidence of state practice under the broad definition used in this article.[130] An Italian court conferred immunity on a U.S. military officer in a case alleging an international crime, but on the ground that the alleged conduct involved no serious crime under international law.[131]

The best known of these cases is the 2007 criminal complaint filed in France by private parties against Rumsfeld, the former U.S. secretary of defense. The complaint alleged that he had direct responsibility for torture in Afghanistan and Iraq, and at the Guantánamo Bay detention center. In affirming the district prosecutor's decision to dismiss the complaint on immunity grounds, the Office of the Prosecutor of the Paris court of appeal cited dicta from *Arrest Warrant* suggesting that former officials retain their immunity for official conduct after leaving office, reasoned that the allegations of torture fell within Rumsfeld's official functions, and rejected the argument that immunity was inconsistent with the Convention Against Torture.[132] Note that the case against Rumsfeld was virtually identical to the case against Pinochet: it involved allegations of torture committed after the state of nationality became party to the Convention Against Torture. The prosecutor apparently relied on the views of the French Ministry of Foreign Affairs, which may also serve as evidence of state practice and *opinio juris*,[133] and which may suggest that the U.S. government sought immunity on the former defense secretary's behalf through diplomatic channels.

[126] Jurisdictional Immunities of the State, *supra* note 5, para. 55.

[127] Katherine Gallagher, *Universal Jurisdiction in Practice: Efforts to Hold Donald Rumsfeld and Other High-Level United States Officials Accountable for Torture*, 7 J. INT'L CRIM. JUST. 1087, 1110 (2009).

[128] Der Generalbundesanwalt beim Bundesgerichtshof, Az. 3 ARP 654/03-2, Strafanzeige gegen Jiang Zemin (2005); *see* http://www.kaleck.org/index.php?id=84,174,0,0,1,0 (which includes a link to the decision itself). It is unclear whether China formally invoked immunity on Jiang's behalf. China has done so in other litigation. *See* Zhang v. Jiang Zemin, *supra* note 120, para. 12 (setting out the submission of the Australian minister of foreign affairs and discussing China's invocation of immunity on behalf of Jiang Zemin). Germany apparently also declined to investigate Chechyan Vice President Ramzan Kadyrov because he enjoyed immunity, but this decision has not been published. *See* INTERNATIONAL PROSECUTION OF HUMAN RIGHTS CRIMES 107–08 (Wolfgang Kaleck, Michael Ratner, Tobias Singelnstein & Peter Weiss eds., 2006).

[129] Bush may not have felt confident in the statement by Swiss officials, as he eventually canceled the trip, although the reason he gave was concern with protests, not the fear of arrest. Ewen MacAskill & Afua Hirsch, *George Bush Calls Off Trip to Switzerland*, GUARDIAN (London), Feb. 6, 2011, *at* http://www.guardian.co.uk/law/2011/feb/06/george-bush-trip-to-switzerland ("Folco Galli, a spokesman for the Swiss justice ministry, told the Associated Press that the department's initial assessment was that Bush would have enjoyed immunity from prosecution for any actions taken while in office.").

[130] *See supra* note 111.

[131] Antonio Cassese, *The Italian Court of Cassation Misapprehends the Notion of War Crimes*, 6 J. INT'L CRIM. JUST. 1077 (2008) (discussing *Lozano*, *supra* note 103).

[132] *See* Gallagher, *supra* note 127, at 1110; Letter from Public Prosecutor, Paris Court of Appeal, to Patrick Baudouin (Feb. 27, 2008), *at* http://ccrjustice.org/files/Rumsfeld_FrenchCase_%20Prosecutors%20Decision_02_08.pdf.

[133] Gallagher, *supra* note 127, at 1110.

The cases highlight difficulties created by the lack of information about immunity practice—an issue addressed in greater detail below. That is, if immunity was invoked in these cases, they may support the argument made above that invocation is necessary to create a legal obligation. But if it was not invoked but nonetheless conferred, then it provides some support for the opposite position—a legal obligation exists whether or not functional immunity is invoked.[134] With respect to the substance of immunity law, if immunity was invoked and then conferred, both actions count as state practice and *opinio juris*, as long as these actions were based upon a legal obligation, which appears to be the case. But if immunity was conferred but not invoked, then (assuming that invocation is necessary to trigger immunity) these cases confer immunity beyond what international law requires and are not evidence of state practice or *opinio juris*. Even in this situation, however, if state actors had misapprehended a condition precedent for a legal obligation, one might argue that their actions with respect to the obligation itself may constitute state practice and *opinio juris*.

Immunity has also been invoked and conferred in civil cases brought against individual defendants. In some states, these cases are considered equivalent to ones brought against the state itself, and immunity is conferred even when plaintiffs allege violations of international criminal law and basic human rights norms.[135] Because these cases do not demonstrate a human rights exception and because they raise the issue of state immunity, which is now well settled, they are not considered in more detail here. In the United States, however, the Supreme Court recently held that the Foreign Sovereign Immunities Act does not apply to cases against individual government officials; these cases are treated differently than those brought against states themselves.[136] Nevertheless, U.S. courts have also granted functional immunity invoked by recognized governments, even in civil cases alleging violations of international criminal law.[137]

It is also possible for a national court to deny immunity when it is invoked—a form of state practice that may also reflect *opinio juris*.[138] Although *Pinochet* falls into this category, it is the sole case in which a national court has denied functional immunity for human rights–related reasons when immunity was clearly invoked by the state entitled to do so.[139] Taken

[134] *See infra* text accompanying notes 113–21. This analysis also suggests that Figure 1 needs an additional line that connects "Immunity not invoked" to "Immunity conferred."

[135] *See, e.g.*, Zhang v. Jiang Zemin, *supra* note 120, paras. 159–72; *Jones*, *supra* note 5, paras. 89–93 (Lord Hoffmann); Fang v. Jiang, *supra* note 5; Bouzari v. Iran, 71 O.R.3d 675 (Ont. Ct. App 2004); Schmidt v. Home Sec'y, [1995] 1 I.L.R.M. 301 (Ir.); Jaffe v. Miller, [1993] 13 O.R.3d 745, 758–59 (Can.); Church of Scientology v. Comm'r (Fed. Sup. Ct. Sept. 26, 1978), 65 ILR 193, 198 (Ger.); *see also* UN Convention on Jurisdictional Immunities of States and Their Property, *supra* note 54 (defining a state as including its representatives; providing that states are immune from suit; and not including an exception for human rights violations).

[136] Samantar v. Yousuf, 130 S.Ct. 2278 (2010); *see also* Ingrid Wuerth, *Foreign Official Immunity Determinations in the U.S. Courts: The Case Against the State Department*, 51 VA. J. INT'L L. 915 (2011) (describing *Samantar* and official immunity determinations in U.S. courts).

[137] *See, e.g.*, Matar v. Dichter, 563 F.3d 9 (2d Cir. 2009) (immunity granted for Israeli official in case alleging torture and war crimes); *see also* Koh letter, *supra* note 107; *cf.* Yousuf v. Samantar, No. 1:04cv1360 (LMB/JFA) (E.D. Va. Feb. 15, 2011) (order denying immunity because the United States does not recognize any government of Somalia and because the defendant had spent significant time in the United States); *see also* Ahmed v. Magan, No. 2:10-cv-342 (S.D. Oh. Nov. 7, 2011) (denying defendant's motion to dismiss). Some U.S. cases decided under the Foreign Sovereign Immunities Act (before the Supreme Court's decision in *Samantar*) have suggested that international crimes cannot constitute official conduct. *See, e.g.*, *In re* Estate of Marcos, 25 F.3d 1467, 1472 (9th Cir. 1994); *In re* Doe, 860 F.2d 40, 45 (2d Cir. 1988); Xuncax v. Gramajo, 886 F.Supp. 162, 175 (D. Mass. 1995).

[138] Jurisdictional Immunities of the State, *supra* note 5, para. 55.

[139] For other cases that might be classified with *Pinochet*, see *infra* text accompanying notes 180–91.

together, the cases discussed in this section do not demonstrate a general and consistent practice of denying immunity to states that invoke it when their nationals are accused of human rights violations. Equally significant, however, is the small number of cases represented here as compared to the cases discussed in the next section, in which states have apparently failed to invoke immunity.

National Court Cases: Immunity Not Invoked

More complicated questions arise in the far more common cases in which immunity is apparently not invoked or addressed by the court or prosecutor. The legal effect of failing to raise immunity is that the forum state has no obligation to confer it, at least in the context of individual functional immunity.[140] The failure to raise immunity might therefore count as state practice or *opinio juris* in the form of acquiescence.[141]

Does the significance of these cases for customary international law depend upon the motivations of the states that fail to claim immunity on behalf of their nationals? In other words, does it matter *why* they fail to raise immunity? Some authors cite cases against former officials as evidence that state practice does not support immunity, without considering the motivations of the states that fail to raise immunity.[142] However, the ILC special rapporteur's *Second Report on Immunity of State Officials from Foreign Criminal Jurisdiction* appears to discount cases in which immunity was not raised by the state entitled to do so,[143] and the leading treatise on immunity maintains that in the context of immunity, "[a]cquiescence in the [immunity] practice of another State considered to be contrary to international law cannot necessarily be deduced from the absence of diplomatic protest."[144]

For some commentators, motivation is generally irrelevant in evaluating acquiescence as evidence of *opinio juris*.[145] Others have noted that if customary international law is grounded in state consent, then acquiescence should count only if a state "know[s] that failure to object will be taken as acceptance."[146] Indeed, acquiescence is often criticized as a basis for inferring the consent of states to customary international law because nations may acquiesce from a lack of legal interest in the issue, from a lack of knowledge that their actions will be interpreted as acquiescence, or for other policy reasons.[147] The cases commonly cited in the context of

[140] Certain Questions of Mutual Assistance in Criminal Matters, *supra* note 83, para. 195; *see also supra* notes 113–21.

[141] Hugh Thirlway, *The Sources of International Law*, *in* INTERNATIONAL LAW 95 (Malcolm D. Evans ed., 3d ed. 2010); ANTHONY AUST, HANDBOOK OF INTERNATIONAL LAW 6 (2d ed. 2010); I. C. MacGibbon, *Customary International Law and Acquiescence*, 1957 BRIT. Y.B. INT'L L. 115, 118; *cf.* Khurts Bat v. Investigating Judge of the German Federal Court, [2011] EWHC 2029, para. 99 (Admin) (Lord Justice Moses).

[142] *See supra* note 98.

[143] *See* Second Report on Immunity of State Officials from Foreign Criminal Jurisdiction, *supra* note 10, paras. 68–72.

[144] FOX, *supra* note 10, at 17.

[145] Michael Akehurst, *Custom as a Source of International Law*, 1975 BRIT. Y.B. INT'L L. 1, 39; *cf.* SHAW, *supra* note 39, at 85 (acquiescence constitutes consent when a rule develops in a new field of international law, "whether it stems from actual agreement or lack of interest").

[146] Jonathan I. Charney, *Universal International Law*, 87 AJIL 529, 536 (1993).

[147] J. Patrick Kelly, *The Twilight of Customary International Law*, 40 VA. J. INT'L L. 449, 473 (2000); ANTHONY A. D'AMATO, THE CONCEPT OF CUSTOM IN INTERNATIONAL LAW 69–70 (1971).

functional immunity appear to confirm that states fail to invoke immunity for a variety of reasons, as explored below.

Motivations and reasons for omissions matter: Easy cases. Certain reasons for not raising immunity must matter, at least based on the traditional definition and justification for customary international law. A state might not raise immunity on behalf of its official because it is unaware of the case at all, which seems likely in some civil cases in the United States.[148] The defendants, frequently former government officials, may not have informed their states of the litigation, especially if the officials had left their home states for the United States with no intention of returning[149] or knew that their governments would not invoke immunity to protect them.[150] From the perspective of individual state consent, if a state is unaware of the case, then its failure to invoke immunity should not count as state practice, much less *opinio juris.*[151]

By contrast, if the motivation for failing to raise immunity is that the state believes its official is not legally entitled to immunity, then the acquiescence would count as state practice and also demonstrate *opinio juris.* The civil litigation against the estate of Marcos in U.S. courts, which took place before the *Pinochet* decision, appears to fall into this category.[152] The Philippine government did not object to the suit against Marcos, and the minister of justice wrote a letter apparently concluding that Marcos could be held liable in the United States for torture and inhumane treatment of detainees committed while he was president, because he was not legally entitled to immunity.[153] A state may also fail to invoke immunity even if it believes it is legally entitled to it, because it believes that invocation would be futile. This motivation for the failure to protest should probably count as *opinio juris.*[154] More information suggesting that states hold this belief could make some of the cases discussed in the following subsections relevant to demonstrating a human rights exception to functional immunity.

Contested jurisdiction. Other reasons are more difficult to evaluate. A state might not raise immunity because the jurisdiction of the forum state's courts is unclear or contested. In some situations it is not certain that the forum state will be able to exercise jurisdiction at all. Until

[148] Filártiga v. Peña-Irala, 630 F.2d 876 (2d Cir. 1980). Commentators citing *Filártiga* and other Alien Tort Statute cases to show an erosion of immunity include Wright, *supra* note 8, at 167, and Antonio Cassese, *The Belgian Court of Cassation v. the International Court of Justice: The* Sharon and Others *Case*, 1 J. INT'L CRIM. JUST. 437, 446–47 (2003).

[149] *Filártiga*, 630 F.2d 876; *see* Beth Stephens, Filártiga v. Peña-Irala: *From Family Tragedy to Human Rights Accountability*, 37 RUTGERS L.J. 623, 625–26 (2006).

[150] *See, e.g.*, Abebe-Jira v. Negewo, 72 F.3d 844 (11th Cir. 1996). The suit was based on torture that the defendant committed while he was an Ethiopian government official in 1977. After a regime change he fled Ethiopia and, in 1987, was granted political asylum in the United States on the ground that he feared persecution by the Ethiopian government. *See* Andrew Rice, *The Long Interrogation*, N.Y. TIMES, June 4, 2006, §6 (Magazine), at 50.

[151] I. C. MacGibbon, *The Scope of Acquiescence in International Law*, 1954 BRIT. Y.B. INT'L L. 143, 173–77 (discussing cases). In the *Fisheries* case, the United Kingdom argued that it had not acquiesced in the Norwegian practices, because it was unaware of them. The Court rejected the United Kingdom's argument on the ground that the United Kingdom "could not have been ignorant . . . of Norwegian practice." Fisheries (UK v. Nor.), 1951 ICJ REP. 116, 138–39 (Dec. 18).

[152] *In re* Estate of Marcos, 25 F.3d 1467, 1472 (9th Cir. 1994).

[153] *Id.*; *cf.* Paul v. Avril, 812 F.Supp. 207, 210–11 (S.D. Fla. 1993) (noting that Haitian government waived any possible immunity to which the defendant, a former head of state, might be entitled).

[154] Antonio Cassese suggests that the individual defendants in Alien Tort Statute cases may not have raised immunity for this reason, Cassese, *supra* note 148, at 447 n.22. It is the state, however, not the individual, that is entitled to raise immunity. *See supra* note 41.

that issue has been resolved, there is no reason to raise immunity.[155] Indeed, states have good reasons not to raise immunity on behalf of individual officials unless they are forced to do so. Invoking immunity may require giving information about the official's position and the state's own relationship to the conduct, and the invocation also has the effect of making the state responsible for the individual's conduct.[156] Moreover, jurisdictional defenses are often successful in these cases. For example, the criminal cases brought in Germany and Spain against Rumsfeld and other U.S. defendants did not go forward because the national courts had no jurisdiction under the relevant statutes. It appears that immunity was not raised, but it also was not relevant, because the forum state decided that it lacked jurisdiction.[157] The same reasoning may apply in cases that do go forward but in which the state objects to the forum state's jurisdiction and does not raise immunity. Objecting to the litigation as a whole on the logically prior question of jurisdiction arguably does not constitute acquiescence with respect to immunity. Thus, these cases do not count as state practice. Some cases involving trials in absentia and refusals to extradite may fall within this category.[158]

Mauritania and Tunisia, for example, opposed cases in France against their nationals who may have been entitled to functional immunity, but it does not appear that the states asserted

[155] The ICJ reasoned in *Arrest Warrant* that "it is only where a State has jurisdiction under international law in relation to a particular matter that there can be any question of immunities in regard to the exercise of that jurisdiction." Arrest Warrant of 11 April 2000, *supra* note 5, para. 46. In that case the Court nevertheless considered the issue of immunity without resolving whether the Belgian courts had jurisdiction, because the Democratic Republic of Congo did not contest jurisdiction. *Id.*, paras. 42–46. In U.S. practice, questions of personal jurisdiction have historically been resolved before issues of immunity. Petrol Shipping Corp. v. Kingdom of Greece, 360 F.2d 103, 106 (2d Cir. 1966); *see also* Rosalyn Higgins, *Certain Unresolved Aspects of the Law of State Immunity*, 29 NETH. INT'L L. REV. 265, 271 (1982) (characterizing immunity as an exception to jurisdiction). Although both jurisdiction and immunity should be considered before the merits of the case, *cf.* Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights, Advisory Opinion, 1999 ICJ REP. 62, para. 63 (Apr. 29), this does not imply that immunity must be raised before the jurisdictional issues are resolved.

[156] Certain Questions of Mutual Assistance in Criminal Matters, *supra* note 83, para. 196.

[157] Gallagher, *supra* note 127, at 1101–09; Center for Constitutional Rights Press Release, Spanish Judge Drops Case Against Bush Lawyers (Apr. 14, 2011), *at* http://www.ccrjustice.org/newsroom/press-releases/spanish-judge-drops-case-against-bush-lawyers.

[158] The Guatemalan genocide cases may also fit this description. A complaint was filed in 1999 in Spain against former Guatemalan head of state General Efrain Rios Montt and seven other senior officials, alleging genocide, torture, and other crimes against the indigenous Mayan people. *See* Center for Justice & Accountability, *Guatemala Genocide Case Summary*, *at* http://www.cja.org/section.php?id=83#%20IN%20BRIEF. The Spanish lower courts issued several opinions on jurisdiction. In 2005, the Spanish Constitutional Court held that the Spanish universal jurisdiction statute applied to the alleged crimes, reasoning that no link was required between Spain and the alleged crimes or the defendants. *See* Naomi Roht-Arriaza, Case Report: Guatemala Genocide Case, 100 AJIL 207, 213 (2006). Immunity does not appear to have played a role in the case. *See* International Law Commission, Immunity of State Officials from Foreign Criminal Jurisdiction, UN Doc. A/CN.4/SR.3086, at 5 (2011), *at* http://untreaty.un.org/ilc/documentation/english/a_cn4_sr3086.pdf (noting that "the question of [universal] jurisdiction had been studied in depth [by the Supreme Court of Spain], whereas the subject of immunity had not been broached (perhaps one of the reasons was that the Guatemalan Government had not raised it)"). Arrest warrants were issued. The Guatemalan Constitutional Court first accepted the warrants but then reversed itself, holding that the Spanish courts lacked jurisdiction and that defendants were not subject to extradition. *See* NAOMI ROHT-ARRIAZA, PROSECUTING GENOCIDE IN GUATEMALA: THE CASE BEFORE THE SPANISH COURTS AND THE LIMITS TO EXTRADITION 3 (2009), *at* http://cgs.gmu.edu/publications/hjd/hjd_wp_2.pdf. The Spanish universal jurisdiction statute was amended in 2009 to require a link between the case and Spain. *See* Máximo Langer, *The Diplomacy of Universal Jurisdiction: The Political Branches and the Transnational Prosecution of International Crimes*, 105 AJIL 1, 40 (2011). Under the revised statute, the Guatemalan genocide case may not go forward.

this defense.[159] In the Tunisian case it is not clear that Tunisia sought release or participated in the litigation in any way; it simply denounced the decision once it was issued in absentia. In the 2005 Ely Ould Dah case, a military officer from Mauritania was also tried in absentia in France for torture, over the objection of his government.[160] Initially, Ould Dah was placed in pretrial detention in France, and Mauritania expelled some French citizens in response. But Ould Dah was released to house arrest after intervention by the French foreign minister who was concerned about French-Mauritanian relations, and he then escaped back to Mauritania, perhaps with the help of the French government.[161] By the time that the case went to trial, Mauritania had relaxed its pressure. The role, if any, of immunity in the communications between Mauritania and France is unclear.

A Spanish indictment of Rwandan officials in 2008 serves as another example. The indictment did not include the sitting president (as he was entitled to immunity *ratione personae*) but did name lower-level officials and authorize their prosecution.[162] The Rwandan authorities did not cooperate and did not respond to requests for information about whether Rwanda had already investigated the alleged crimes.[163] Rwanda complained to the African Union about its nationals being prosecuted by European states based on expansive jurisdictional claims, and the African Union condemned the practice.[164]

It is hard to characterize these cases as ones in which Tunisia, Mauritania, and Rwanda, respectively, acquiesced in the assertion of immunity by failing to invoke it. Instead, they denounced the prosecutions in their entirety, and the indictments and convictions could not reach the defendants, in any event, as they had already left or had never been in the forum states. Such cases may be significant for understanding the customary international law of universal jurisdiction, but they have little relevance to the customary international law of immunity as either state practice or *opinio juris*. Of course, additional information could become available that makes these cases relevant to immunity, such as evidence that immunity was invoked or that the forum states (the foreign office, prosecutor, or court) concluded that immunity was legally unavailable.

[159] The case against Khaled Ben Saïd, a former Tunisian police chief serving in France as a vice-counsel, was brought in 2002 by a private party alleging acts of torture that violated the Convention Against Torture. The prosecutor investigated and moved forward with the case; Saïd himself apparently raised the issue of consular immunity, to which he was not entitled under the Vienna Convention on Consular Relations. *See* International Federation for Human Rights, *A Strasbourg Judge Issues an International Arrest Warrant Against a Tunisian Vice-Consul for Torture* (Mar. 4, 2002), *at* http://www.fidh.org/communiq/2002/tn0403a.htm. Saïd eventually fled to Tunisia and was tried and convicted in absentia by the French courts in 2008. *See* Langer, *supra* note 158, at 22. The French cour d'assises of Paris tried Alfredo Astiz in absentia in 1990 for the killing of French nuns in Argentina, and Argentina tried and convicted him in 2011. Sam Ferguson, *Argentina's 'Blonde Angel of Death,' Convicted for Role in Dirty War*, CHRISTIAN SCI. MONITOR, Oct. 27, 2011, *at* http://www.csmonitor.com/World/Americas/2011/1027/Argentina-s-Blond-angel-of-death-convicted-for-role-in-dirty-war.

[160] Information about the unreported, 2005 case of Ely Ould Dah at the cour d'assise of Nimes is available at http://www.trial-ch.org/fr/trial-watch/profile/db/facts/ely_ould-dah_266.html. Ould Dah subsequently filed an application with the European Court of Human Rights, which rendered its decision in 2009. Ould Dah v. France, App. No. 13112/03, Admissibility (Eur. Ct. H.R. Mar. 17, 2009), 48 ILM 869 (2009).

[161] Langer, *supra* note 158, at 21–22.

[162] Sala v. Kabarebe, Indictment, ILDC 1198 (Spain 2008).

[163] *Id.*, para. A6 (analysis by Juan Santos Vara).

[164] *Id.*, para. A7; *see also* Assembly of the African Union, Decision on the Report of the Commission on the Abuse of the Principle of Universal Jurisdiction, Doc. Assembly/AU/Dec.199 (XI) (July 1, 2008); *The Spanish Indictment of High-Ranking Rwandan Officials*, 6 J. INT'L CRIM. JUST. 1003 (2008) (criticizing the indictment and noting that it has generated much controversy).

Commentators who argue that motivations do not matter in assessing state practice and *opinio juris* cite examples such as that of a state that makes a declaration (like "torture violates customary international law") but is insincere and does so to curry favor with other states.[165] The immunity context described above is different, however.[166] The states have not made any declarations with respect to immunity at all; the motivation for a declaration or act is not used to defeat its meaning but, instead, to determine whether any relevant action has taken place. A closer analogy would be a state that does not object to another state's use of territorial waters and then argues that this omission is irrelevant to customary international law because the acquiescing state did not have any interest in exploiting the territorial waters for itself. But again, the analogy does not wash, because in the immunity context the state *has* objected, but on the logically prior question of jurisdiction. In this sense, it is not an "interested state" for the purposes of immunity.

State of nationality favors (or does not contest) prosecution. In some cases the state supports (or at least does not contest) the prosecution of its national in a foreign domestic court. Many of these are postwar cases in which the defendant's state of nationality no longer exists in the same form or lacks the incentive or political will to assert immunity on the defendant's behalf. These states include post–World War II Germany,[167] the former Zaire,[168] Yugoslavia, and Rwanda.[169] Similarly, in some states, including Rwanda, a regime change occurred, and the new regime is unwilling to protect former officials associated with criminal acts of the prior regime. The same appears to be true with respect to cases brought against Afghan,[170] Argen-

[165] *See* Akehurst, *supra* note 145, at 39.

[166] The direct analogy would be a state that declared its nationals were not entitled to immunity, but the declaration was purportedly undermined by the state's desire to curry favor with the forum state. The argument here accepts that such a declaration would be evidence of state practice and *opinio juris*.

[167] *See* Fédération Nationale des Déportées v. Barbie, Cass., Oct, 6, 1983, 78 ILR 124 (Fr.); *In re* Ahlbrecht, Spec. Ct. Cass., Apr. 11 1949, ANN. DIG. & REP. PUB. INT'L L. CASES 397 (Neth.); *In re* Bühler, Sup. Nat'l Trib., July 10 1948, ANN. DIG. & REP. PUB. INT'L L. CASES 680 (Pol.). Eichmann's conviction in Israel raised the act-of-state doctrine, but not immunity. Att'y Gen. of Israel v. Eichmann, Dist. Ct.–Jerusalem, Dec. 11, 1961, *in* Covey Oliver, *The Attorney-General of the Government of Israel v. Eichmann*, 56 AJIL 805 (1962) (reprinting excerpts from the decision). That court's reasons for rejecting the act-of-state doctrine might also apply to immunity, but the case is not evidence of state practice or *opinio juris* with respect to immunity.

[168] Zaire is now the Democratic Republic of Congo. The Dutch convicted Sebastian Nzapali, a former official of Zaire, of torture in 2004. No evidence indicates that the Democratic Republic of Congo objected to this case. *See* Ward Ferdinandusse, Case Report: Prosecutor v. N, 99 AJIL 686 (2005); *see also* Marlise Simons, *Dutch Court Puts Former Congo Officer on Trial in Torture Case*, N.Y. TIMES, Mar. 25, 2004, *at* A13 (noting that Nzapali allegedly feared persecution by the DRC after the change in government and that Dutch officials traveled there to collect evidence).

[169] Writing about universal jurisdiction prosecutions, Langer notes:

> Of the 32 defendants who have been brought to trial, 24—amounting to three-quarters of all defendants tried under universal jurisdiction—have been Rwandans, former Yugoslavs, and Nazis. These are defendants about whom the international community has broadly agreed that they may be prosecuted and punished, and whose state of nationality has not defended them.

Langer, *supra* note 158, at 9. *Sala v. Kabarebe* was a case that Rwanda apparently did oppose. *See supra* note 162. Afghan and Congolese defendants were also not defended by their states of nationality. Langer, *supra* note 158, at 9, 23–24.

[170] In a Dutch case against Hesammudin Hesa, a former Afghan military official accused of war crimes for conduct beginning in 1979 and lasting into the 1980s, Hesa sought asylum in the Netherlands. There is no indication that Afghanistan objected to his trial there in 2005. An English translation of the 2008 Netherlands Supreme Court judgment is available at http://zoeken.rechtspraak.nl/detailpage.aspx?ljn=BG1476. For other similar cases in which it appears that Afghanistan did not object to the prosecution of its nationals, see those of

tine,[171] and Chadian defendants.[172] In all of these cases, the state entitled to assert immunity appears to have supported (or at least not contested) the prosecution of its national in a foreign court.

Failure to invoke immunity allows the forum state to assert jurisdiction and potentially convict or hold liable the foreign national. These cases are arguably state practice of not asserting immunity and thus of acquiescing in the assertion of jurisdiction. Analogous to states that fail to object to assertions of jurisdiction over territorial waters and the continental shelf, these states are consenting to the forum state's exercise of jurisdiction over their nationals.[173] The analogy is not clear-cut, however, because in national court litigation, states may have no expectation that a failure to raise immunity in one case—in which immunity is therefore never adjudicated—will mean that immunity should be legally unavailable in future cases.[174] This view would be strengthened through an examination of the way that national court cases have generally contributed to the law of immunity—namely, through a court's explicit discussion of immunity, followed by a clear decision to accept or reject the plea.[175] Looking at the history of national court litigation and the development of immunity, states would well understand that such opinions, like *Pinochet* itself, make powerful contributions to the customary international law of immunity. They would have no reason to think that state practice with respect to immunity included cases in which states allowed the prosecution of their national in foreign courts without so much as mentioning immunity.

Habibullah Jalalzoy, *at* http://www.haguejusticeportal.net/index.php?id=6419 (convicted), and Abdullah Faqirzada, *at* http://www.asser.nl/default.aspx?site_id=36&level1=15248&level2=&level3=&textid=39801 (acquitted). *See also* Langer, *supra* note 158, at 9, 16–17.

[171] In *Cavallo*, the Mexican Supreme Court held that Cavallo, a former Argentine naval officer, could be extradited to Spain based on crimes he allegedly committed in Argentina. Apparently, the Mexican Foreign Ministry assertively supported extradition, even for the torture-related charges that the Mexican Supreme Court rejected on statute of limitations grounds. It is unclear what role, if any, immunity played in the case; the Court apparently did not consider any jurisdictional issues (which may have included immunity) because the extradition treaty did not permit it to do so. *See* Luis Benavides, *Introductory Note to Supreme Court of Mexico: Decision on the Extradition of Ricardo Miguel Cavallo*, 42 ILM 884 (2003); Decision on the Extradition of Ricardo Miguel Cavallo (Supreme Court of Mexico June 19, 2003), 42 ILM 888 (2003). Cavallo was extradited to Spain, which then returned him to Argentina for trial—suggesting that Argentina continued to contest jurisdiction, although it generally favored his prosecution. *See* Wolfgang Kaleck, *From Pinochet to Rumsfeld: Universal Jurisdiction in Europe 1998–2008*, 30 MICH. J. INT'L L. 927, 956 (2009). The *Scilingo* trial in Spain may also serve as example. A retired Argentine military captain was tried in Spain for atrocities committed in Argentina. It is the only universal jurisdiction case in Spain to go to trial. It does not appear that immunity played a role in the case, perhaps because Argentina supported the case by the time it went to trial in 2003. *See* Langer, *supra* note 158, at 34 (noting that originally Argentina refused to provide evidence but thereafter began to support the case in Spain). One report said Argentina and Spain "work[ed] together" to bring the case to trial. Marcela Valente, *First Trial for Genocide Set to Begin in Spain*, OTHER NEWS, Jan. 20, 2005, *at* http://other-news.info/index.php?p=15.

[172] Chad did not raise immunity on behalf of its former president Hissène Habré when he faced indictment in Belgium. Human Rights Watch, Chad Lifts Immunity of Ex-dictator (Dec. 6, 2002), *at* http://www.hrw.org/news/2002/12/05/chad-lifts-immunity-ex-dictator. Belgium has sought to extradite Habré from Senegal, where he may also face charges. *See* Jan Arno Hessbruegge, *ECOWAS Court Judgment in Habré v. Senegal Complicates Prosecution in the Name of Africa*, ASIL INSIGHTS (Feb. 3, [2011]), *at* http://www.asil.org/insights110203.cfm. The ICJ has held that Senegal must extradite or prosecute Habré without further delay. Questions Relating to the Obligation to Prosecute or Extradite (Belg. v. Sen.) (Int'l Ct. Justice July 20, 2012).

[173] *Fisheries*, *supra* note 151, at 116, 138–39.

[174] *Id.* at 136–39 (emphasizing that Norway framed its claim to the fisheries in terms of international law and that the United Kingdom did not object). Here, the assertion of jurisdiction is not necessarily a claim with respect to the legal unavailability of immunity, and the state that fails to object may have no reason to think it is engaging in state practice with respect to immunity.

[175] *See infra* notes 194–200.

A slightly different way to put the point is that by not asserting immunity, states are not acquiescing in a breach of customary international law. There is no breach because they never asserted immunity on behalf of their nationals. It would be odd to conclude that when state *A* works with state *B* to permit the trial of state *A*'s national in the domestic courts of state *B*, that state *B* violated the law of immunity, with the consequence that state *A* must protest in order to protect its future right to claim immunity on behalf of other nationals before the courts of state *B* or *C*. If that were true, then state *B* should decline to prosecute state *A*'s national at all, even if state *A* agrees to the prosecution, because that would count as evidence that state *B* has violated the law of immunity and therefore cannot invoke immunity on behalf of its nationals sued in the courts of state *A* or *C*. To the contrary: if immunity is not invoked, there is no breach and no acquiescence.

Even if these failures to invoke immunity constitute a weak form of state practice tending to show that immunity is no longer available, they cannot be used to infer *opinio juris*. When a state favors the case against its own national or simply does not care if the members of a former regime are prosecuted elsewhere, then the failure to invoke immunity does not necessarily reflect a sense that immunity is legally unavailable. As the Permanent Court of International Justice reasoned in the *Lotus* case:

> Even if the rarity of the judicial decisions to be found among the reported cases were sufficient . . . , it would merely show that States had often, in practice, abstained from instituting criminal proceedings, and not that they recognized themselves as being obliged to do so; for only if such abstention were based on their being conscious of having a duty to abstain would it be possible to speak of an international custom.[176]

The problem of insufficient information. Cases in which immunity is not clearly invoked often pose information problems. It may be unclear which of the foregoing reasons accounts for a state's failure to raise immunity or the court's failure to discuss it. Maybe the state did not know about the case at all; maybe the state did not invoke immunity because it believed that immunity was legally unavailable; or maybe the state chose to raise jurisdiction first. Or perhaps the state *did* invoke immunity before the forum state's executive branch—which was denied in correspondence that never reached court.[177] Or perhaps some other motivation was involved.[178] Even in cases in which immunity is directly addressed, commentators have warned that care

[176] S.S. Lotus, *supra* note 113, at 28. In the *Nottebohm* case, by contrast, the ICJ reasoned:

> [T]he practice of certain States, which refrain from exercising protection in favour of a naturalized person when the latter has in fact severed his links with what is no longer for him anything but his nominal country, manifests the view that, in order to be invoked against another State, nationality must correspond with a factual situation.

Nottebohm (Liech. v. Guat.), 1955 ICJ REP. 4, 22 (Apr. 6). This reasoning would support using cases in which immunity is not invoked as evidence of state practice and *opinio juris* that immunity is no longer legally available. The Court's reasoning in *Nottebohm* has been widely criticized, and this aspect of the opinion has been characterized as dicta. *See* Josef L. Kunz, *The Nottebohm Judgment (Second Phase)*, 54 AJIL 536, 540 (1960); Robert D. Sloane, *Breaking the Genuine Link: The Contemporary International Legal Regulation of Nationality*, 50 HARV. INT'L L.J. 1, 17–24 (2009).

[177] Certain Questions of Mutual Assistance in Criminal Matters, *supra* note 83, para. 195 (noting that immunity can be invoked through diplomatic exchanges).

[178] *See* FOAKES, *supra* note 10 at 3, 10–11 (emphasizing difficulties in characterizing the cases and describing the many reasons that prosecutions may not go forward or that states may not invoke immunity, including that "internal disorder may have meant that the home state was not in a position to assert immunity or to object to the proceedings on those grounds").

is necessary to determine whether such cases evidence state practice. They may be poorly reasoned or not represent the views of the forum state's executive branch, or the executive branch might take one position in domestic litigation and another in foreign litigation when its nationals are sued.[179]

Information problems make it especially difficult to evaluate two criminal cases in which functional immunity was apparently denied. In the first, private litigants brought a criminal case in Belgium in 2001 against Ariel Sharon and Amos Yaron for conduct that allegedly took place during their tenure as high-level officials in the Israeli army.[180] The case against Sharon, the prime minister of Israel at the time, was dismissed based on immunity *ratione personae*. Yaron (like Pinochet) was not entitled to personal immunity, however, and the Belgian Court of Cessation apparently denied him functional immunity.[181] The Court's reasoning with respect to Yaron was "not clearly articulated,"[182] and the case was subsequently dismissed after Belgium amended its universal jurisdiction statute under pressure from the United States.[183]

As described above, jurisdiction is logically prior to immunity, so perhaps Israel raised jurisdiction but not immunity. After all, the case was eventually dismissed on precisely that basis, and a lower court had also refused jurisdiction because the accused were not in Belgium.[184] An interview with one of Israel's lawyers in the case suggests that it did not raise immunity.[185] Arguably, Belgium was obligated to raise status-based immunity on behalf of a foreign head of state,[186] which could explain why the case was dismissed against Sharon but not Yaron. It appears that the Belgian prosecutor also did not raise immunity but, instead, sought to have the case dismissed based on jurisdiction.[187] This case might be one in which Israel or Belgium thought that the official was not entitled to functional immunity, one in which both states thought that Yaron was entitled to immunity (although the court denied immunity), one in which immunity discussions were held between Israel and Belgium but do not appear on the record, or one in which Israel deliberately did not invoke immunity to avoid questions of state responsibility.

The 2000 Dutch indictment of Desi Bouterse for torture and war crimes serves as a second example. Bouterse, the former president of Surinam, was indicted for his alleged role in the December 1982 torture and murder of political opposition leaders.[188] The court of appeal's

[179] FOX, *supra* note 10, at 20–21.

[180] Cassese, *supra* note 148, at 437.

[181] H.S.A. v. S.A., Cour de Cassation, Feb. 12, 2003, No. P.02.1139.F, 42 ILM 596, 599–600 (2003) (granting immunity to Sharon and allowing case to go forward against Yaron, but not clearly explaining why).

[182] Cassese, *supra* note 148, at 444.

[183] Steven R. Ratner, *Belgium's War Crimes Statute: A Postmortem*, 97 AJIL 888, 889 (2003).

[184] Cassese, *supra* note 148, at 438.

[185] *See* Interview by Manfred Gerstenfeld with Irit Kohn, Israeli Ministry of Justice (Sept. 5, 2007), *at* http://missioneuropakmartell.files.wordpress.com/2008/05/jcpac2a0about-jcpa-the-suit-against-sharon-in-belgium_-a-case-an.pdf. Kohn was part of the Israeli defense team. She describes Israel's arguments against universal jurisdiction. Among other things, Israel had already fully investigated the alleged crimes, and the Belgium courts were ill suited to adjudicate them. She notes that the case against Sharon was dismissed on immunity grounds, but it does not appear that Israel raised this issue: "Independently of our case the question of immunity came up. There had been a decision by the International Court of Justice in The Hague in a case that involved Belgium and the Congo."

[186] *Cf. supra* note 120.

[187] Cassese, *supra* note 148, at 438.

[188] *See* Pita J. C. Schimmelpenninck van der Oije, *A Surinam Crime Before a Dutch Court: Post-colonial Injustice or Universal Jurisdiction*, 14 LEIDEN J. INT'L L. 455, 456–57 (2001) (describing the case). Today he is president

decision noted that Bouterse's counsel raised the issue of immunity, and reasoned that it "need not consider whether this insufficiently argued submission concerning the position of Bouterse is correct. This is because the commission of very grave criminal offenses of this kind cannot be regarded as part of the official duties of a Head of State."[189] Although Surinam never extradited Bouterse, it did actively investigate the 1982 murders and court-martialed some participants.[190] The views of Dutch and Surinam officials on immunity are not clear. As with many other cases cited in the immunity context, *Bouterse* was eventually dismissed for lack of jurisdiction under the relevant domestic statute.[191]

Since the opinions in *Yaron* and *Bouterse* do (sort of) consider and deny immunity, they could arguably be characterized as state practice and *opinio juris* tending to show a human rights exception. But this argument is weak: customary international law should not be derived from opinions in which the reasoning is unclear (as in *Yaron*) or in which the court dismissed the argument apparently without considering it (as in *Bouterse*). Alternatively, the cases might arguably count as evidence of acquiescence (but not *opinio juris*) by Israel and Surinam, respectively, as there is no record that those states invoked immunity. Israel did object to jurisdiction, however, which was the basis upon which the case was ultimately dismissed. Surinam's position concerning *Bouterse* is unclear. At best, these cases provide only weak evidence for a functional immunity exception.

Somewhat better evidence for such an exception is provided by a very recent decision of the Swiss Federal Criminal Court. Immunity was considered and rejected, although the request for immunity came from the individual defendant, not from his state of nationality, Algeria.[192] Another potential source of evidence for the exception derives from the handful of domestic statutes that might be understood as denying immunity to individuals accused of certain human rights violations. Whether courts will interpret them in this way remains to be seen.[193]

again. *See* Simon Romero, *Returned to Power, a Leader Celebrates a Checkered Past*, N.Y. TIMES, May 3, 2011, at A4 (describing Bouterse's return to power).

[189] *In re* Bouterse, Hof Amsterdam Nov. 20, 2000, NJ 2001, 51, para. 54, *Eng. trans.* at 2001 NETH. Y.B. INT'L L. 266, 277; *aff'd* HR, Sept. 18, 2001, NJ 2002, 59, *Eng. trans. at* 2001 NETH. Y.B. INT'L L. 282.

[190] Amnesty International, *Suriname: After 25 Years, a Chance for Accountability and Justice for the Families of Victims of the December 1982 Extrajudicial Killings* (2007), *at* http://www.amnesty.org/en/library/info/AMR48/001/2007/en.

[191] *See* L. Zegveld, *The Bouterse Case*, 2001 NETH. Y.B. INT'L L. 97, 105–09.

[192] *See* Citroni, *supra* note 116.

[193] *See* Council of the European Union, The EU-AU Expert Report on the Principle of Universal Jurisdiction, para. 17, Doc. 8672/1/09 (Apr. 16, 2009) (referring to legislation in the Democratic Republic of Congo, Niger, and South Africa). The South African law cited in support states only that official capacity does not provide a defense to the crime; it does not mention immunity. Implementation of the Rome Statute of the International Criminal Court Act, 2002 No. 27, §4(2)(a) (S. Afr.), *available at* http://www.info.gov.za/gazette/acts/2002/a27-02.pdf. Belgian law explicitly limits application of its universal jurisdiction statute based on the international law of immunity "derived from a person's official capacity." *See* Belgium's Amendment to the Law of June 15, 1993 (as Amended by the Law of February 10, 1999) Concerning the Punishment of Grave Breeches of Humanitarian Law, Apr. 23, 2003, 42 ILM 749, 755 (2003). Dutch law excludes criminal prosecution of "foreign heads of state, heads of government and ministers of foreign affairs, as long as they are in office, and other persons in so far as their immunity is recognised under customary international law." Although this provision might be read as denying immunity to high-level officials once they are out of office, the Dutch Parliament rejected proposed amendments to the statute that would have made that explicit. M. Boot-Matthijessen & R. van Elst, *Key Provisions of the International Crimes Act 2003*, 2004 NETH. Y.B. INT'L L. 251, 286 (citing International Crimes Act [Wet Internationale Misdrijven], Art. 16, June 19, 2003, Stb. 2003, 270). The Torture Victim Protection Act (28 U.S.C. §1350 note), a U.S. statute, is sometimes interpreted as implicitly lifting immunity in cases for which it creates a cause of action. *See* Curtis A.

Taken together with the *Pinochet* case and the cases conferring immunity, this evidence shows no general and consistent practice demonstrating an exception to functional immunity.

Acquiescence and the End of Absolute Immunity

National court decisions drove much of the change from absolute to restrictive immunity, as described above. Those decisions are markedly different, however, from the cases commonly cited today in the context of functional immunity, and they provide an example of acquiescence and its role in the development of international law.[194] In a famous 1951 article arguing against absolute immunity, Hersch Lauterpacht wrote that "it is a fact that the courts of a considerable majority of states have departed from [absolute immunity], at least to the extent of exercising jurisdiction over foreign states in matters *jure gestionis*, without, as a rule, giving occasion for protest on the part of the foreign states concerned."[195]

Lauterpacht's description might seem to support the view that cases in which jurisdiction is exercised and the court does not discuss immunity can be used to infer that immunity is not required by international law. But an examination of the cases that he described shows something different: the cases explicitly discussed and addressed immunity[196]—and as he often explicitly noted, the issue was raised by the interested states.[197] These states' lack of protest appears to refer *not* to the failure to invoke immunity or otherwise protest when jurisdiction was asserted by the forum court but, instead, to the failure to protest the outcome of cases in which courts considered and then denied immunity.

The commercial-activity cases allowed courts and executive branches from other states the chance to read, evaluate, and challenge or emulate the reasons for denying or conferring immunity. Unfortunately, the cases in which immunity is not invoked or discussed do not provide the same opportunities for developing international law. The failure to discuss immunity and explain why it is not conferred matters a great deal because the basis for, and scope of, a human rights exception is contested even among those who believe it should exist. It might apply broadly to civil and criminal cases; it might be generated more narrowly by the terms of the Convention Against Torture; it might be linked to offenses over which the forum state has

Bradley & Jack L. Goldsmith, Pinochet *and International Human Rights Litigation*, 97 MICH. L. REV. 2129, 2156–57 (1999) (considering and rejecting this argument).

[194] MacGibbon, *supra* note 141, at 118.

[195] Hersch Lauterpacht, *The Problem of Jurisdictional Immunities of Foreign States*, 1951 BRIT. Y.B. INT'L L. 220, 221.

[196] Lauterpacht details over sixty years of state practice from Austria, Belgium, Egypt (Mixed Courts), France, Germany, Greece, Holland, Ireland, Italy, Latin-American states, Poland, Romania, Russia, Scandinavian states, Switzerland, the United Kingdom, and the United States. *Id.* at 250–72.

[197] *See, e.g.*, *id.* at 251 (Italian court rejecting immunity claimed by Greece), 252 (Italian court rejecting Russia's plea of immunity), 253 (Italian court accepting the British Consul's intervention based on immunity), 255 (Egyptian Mixed Courts assuming jurisdiction, notwithstanding the Palestine State Railways Administration's plea of immunity; Commercial Tribunal of Alexandria rejecting claim of immunity by Spanish state organ), 257–58 (Swiss court denying plea of immunity by Austrian Treasury), 260 (French court declining to grant immunity to the Romanian government), 261 (French court rejecting Soviet plea that the act in question was sovereign in nature and thus entitled to immunity; French commercial court declining jurisdiction when Dutch ambassador represented that government vessel was on a political mission), 262 (France apparently asserting immunity on behalf of Norway; French court accepting plea of immunity by Morocco), 268–70 (discussing U.S. cases in which immunity was invoked and analyzed), 270–72 (discussing UK cases in which immunity was invoked and analyzed).

jurisdiction; or it might apply only to *jus cogens* offenses.[198] If one characterizes the failure to invoke immunity as acquiescence in the development of an exception, what is the basis for that exception and how broadly does it apply? The functional immunity cases from national courts, as discussed in this and the preceding sections, give little grounds for an answer,[199] diminishing their ability to create clear norms likely to generate compliance.[200]

Customary International Law: Normative Frames

The analysis in the preceding sections looked at domestic legislation and litigation in national courts, and it applied a narrow definition of, and rationale for, customary international law: the consent of individual nations. It argued that national court decisions silent on the issue of immunity generally are, at best, only weak state practice and provide little basis for inferring *opinio juris*. Only a small number of cases actually mention immunity, and they do not show a general and consistent practice of denying immunity.

This section discusses whether broader understandings of customary international law and broader potential evidence of state practice and *opinio juris* would demonstrate a human rights exception to functional immunity. Put differently and more provocatively, since customary international law is sometimes proclaimed without a careful analysis of its purported requirements,[201] why not do the same for a human rights exception to functional immunity?

Relaxing the requirement of consent. Perhaps consent is unnecessary for the formation of customary international law. States are bound by customary international law that is formed before they become states, and states are not permitted to withdraw from custom once it is formed. Both of these principles are inconsistent with the claim that each state must consent to the customary international law to which it is bound.[202] Moreover, for many of the reasons canvassed in the discussion above, the use of acquiescence to derive norms of customary international law means that individual states have not actually consented.[203] Commentators have therefore argued that for the purposes of customary international law, the question is not whether a specific state has consented but, instead, whether the international system as a whole has done so.[204]

[198] *See* Akande & Shah, *supra* note 8, at 852 (linking an exception to immunity to jurisdiction in criminal and civil cases, and noting that their approach leads to different results than the normative hierarchy or not-official-conduct approaches); *see also supra* note 98.

[199] National court decisions serve not just as evidence of international custom but also as a "subsidiary means for the determination of rules of law." Statute of the International Court of Justice, *supra* note 99, Art. 38(1)(d); *see also* Anthea Roberts, *Comparative International Law? The Role of National Courts in Creating and Enforcing International Law*, 60 INT'L & COMP. L.Q. 57 (2011). They cannot serve the latter function if they say nothing about what the rules of law are.

[200] *See* THOMAS M. FRANCK, THE POWER OF LEGITIMACY AMONG NATIONS 50–66 (1990).

[201] *See* DAVID J. BEDERMAN, CUSTOM AS A SOURCE OF LAW 149 (2010).

[202] Henkin, *supra* note 102, at 53–61; Charney, *supra* note 146, at 531; Curtis A. Bradley & Mitu Gulati, *Withdrawing from International Custom*, 120 YALE L. J. 202, 214 (2010). Note, however, that the persistent-objector rule, which allows a state to opt out of custom while it is forming, may reflect the need for consent from individual states. Prosper Weil, *Towards Relative Normativity in International Law?*, 77 AJIL 413, 434 (1983).

[203] Charney, *supra* note 146, at 531–32; MacGibbon, *supra* note 141, at 135–38; *see also* Guzman, *supra* note 111, at 143–44.

[204] William S. Dodge, *Withdrawing from Customary International Law: Some Lessons from History*, 120 YALE L.J. ONLINE 169, 169–70 (2010), *at* http://yalelawjournal.org/the-yale-law-journal-pocket-part/international-law/

In other words, if Germany's acquiescence to the trials of Nazi-era war criminals in foreign national courts cannot be understood as "consent" by Germany to the unavailability of immunity in future cases, perhaps Germany is nonetheless bound by a norm of customary international law (allowing denial of immunity) if the "international system" has generally consented to the erosion of immunity. The difficulty in this context, however, lies in finding consent of the "international system." Unlike a situation in which state practice builds up over time between interested states and then binds other states that have acquiesced in these developments, the problem here is that there is only weak evidence of any state practice and *opinio juris* between interested states themselves, for the reasons described in the preceding sections. The jump sometimes made from practice between interested states to acquiescence of the community of states does not work here because no (or little) practice of interested states serves as a point of departure.[205]

Alternatively, as many commentators have advanced and as some decisions of the ICJ suggest, strong evidence of *opinio juris* might demonstrate the consent of the international community.[206] But in the functional immunity context, even if we count as a weak form of state practice the cases in which states do not invoke immunity, they do not demonstrate *opinio juris*. And unlike many situations in which customary international law is claimed, no other evidence of *opinio juris* points toward an obligatory norm, as the following subsection discusses.

Relaxing the state practice or opinio juris *requirements.* The strongest challenge to both state consent and the traditional definition of customary international law comes from "contemporary" or "modern" customary law.[207] Instead of focusing on state practice, it relies on UN General Assembly and Security Council debates and resolutions, the statements made by and within other international organizations, and treaty commitments to show that a binding legal norm exists.[208] *Jus cogens* norms and some of the customary international law of human rights serve as examples.[209] For some, this development signals the end of customary international law and provides a basis for criticizing some of the ICJ's jurisprudence.[210] For others, it presents an opportunity to generate customary international law rapidly around normatively attractive principles.[211] The tension in these accounts is generated by declarations with a normative content ("the prohibition on torture is a *jus cogens* norm") and contrary state practice (many states torture). Commentators have given a variety of reasons to justify the relaxation of the state prac-

withdrawing-from-customary-international-law:-some-lessons-from-history/; Henkin, *supra* note 102, at 57; Charney, *supra* note 146, at 541–43; Guzman, *supra* note 111, at 117.

[205] Kelly rejects this jump. Kelly, *supra* note 147, at 473.

[206] Charney, *supra* note 146, at 541–43.

[207] Roberts, *supra* note 15, at 758; Henkin, *supra* note 102, at 58.

[208] Roberts, *supra* note 15, at 758; Charney, *supra* note 146, at 543–44; Bradley & Goldsmith, *supra* note 15, at 838–42; Hiram E. Chodosh, *Neither Treaty nor Custom: The Emergence of Declarative International Law*, 26 TEX. INT'L L.J. 87, 102 (1991).

[209] *See* Criddle & Fox-Decent, *supra* note 44, at 339–42.

[210] Arthur M. Weisburd, *Customary International Law: The Problem of Treaties*, 21 VAND. J. TRANSNAT'L L. 1 (1988); Anthony D'Amato, *Trashing Customary International Law*, 81 AJIL 101 (1987).

[211] Charney, *supra* note 146, at 537; THEODOR MERON, HUMAN RIGHTS AND HUMANITARIAN NORMS AS CUSTOMARY LAW 810 (1989).

tice requirement when the declaratory evidence of *opinio juris* is high,[212] and some court decisions can be explained in those terms.[213]

But for immunity the "modern custom" approach does not work, as the declaratory evidence of *opinio juris* is weak. Apparently, states have not explicitly relinquished functional immunity for their nationals before foreign national courts, save the case-specific declaration by the Philippines that asserted that Marcos was not entitled to immunity. No treaties do so, either.[214] The Rome Statute establishing the International Criminal Court explicitly lifts immunity before that tribunal,[215] but not before foreign national courts.

One possible source of *opinio juris* is the Charter of the International Military Tribunal of Nuremberg (Charter), which was affirmed by a UN General Assembly resolution. It provides in Article 7 that "[t]he official position . . . shall not be considered as freeing [defendants] from responsibility or mitigating punishment."[216] The Nuremberg Judgment reasons that "[h]e who violates the laws of war cannot obtain immunity while acting in pursuance of the authority of the state if the state in authorizing action moves outside its competence under international law."[217] Notwithstanding the judgment's broad wording, however, the Charter's language relates to the defense of official capacity, not immunity. If the language pertained to immunity, it would apply to sitting heads of state, yet it is now well established that sitting heads of state are absolutely immune from suit in foreign national courts.[218] It would also make Article 27(2) of the Rome Statute (explicitly stating that immunity is no bar to the Court's jurisdiction) irrelevant in light of Article 27(1), which provides for "[i]rrelevance of official capacity."[219] More-

[212] Roberts, *supra* note 15, at 764; Charney, *supra* note 146, at 537.

[213] Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), 1986 ICJ REP. 14 (June 27); *see* Filártiga v. Peña-Irala, *supra* note 148, at 882.

[214] Some evidence from subsidiary sources suggests that there is a human rights exception. The Institute of International Law, for example, has declared that functional immunity should be unavailable in criminal cases alleging violations of international criminal law. Institut de droit international, Resolution on the Immunity from Jurisdiction of the State and of Persons Who Act on Behalf of the State in Case of International Crimes (2009), *at* http://www.idi-iil.org/idiE/resolutionsE/2009_naples_01_en.pdf. According to its website, *see* http://www.idi-iil.org/idiE/navig_history.html, the institute was created to be "independent of any governmental influence." The appeals chamber of the International Criminal Tribunal for the Former Yugoslavia reasoned in dicta that exceptions to functional immunity for state officials "arise from the norms of international criminal law prohibiting war crimes, crimes against humanity and genocide. Under these norms, those responsible for such crimes cannot invoke immunity from national or international jurisdiction even if they perpetrated such crimes while acting in their official capacity. . . ." Prosecutor v. Blaškić, Case No. IT-95-14, Appeals Chamber, Judgement on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997, para. 41 (Oct. 29, 1997).

[215] Rome Statute, *supra* note 45, Art. 27(2).

[216] Charter of the International Military Tribunal, Art. 7, Aug. 8, 1945, 59 Stat. 1544, 82 UNTS 279; *see also* Affirmation of the Principles of International Law Recognized by the Charter of the Nuremburg Tribunal, GA Res. 95(I), UN Doc. A/64/Add.1 (Dec. 11, 1946); Convention on the Prevention and Punishment of the Crime of Genocide, Art. 4, *opened for signature* Dec. 9, 1948, 102 Stat. 3045, 78 UNTS 277 (entered into force for the United States Nov. 4, 1988) (similar language); Cassese, *supra* note 148, at 448 (listing other international instruments that foreclose an official-capacity defense).

[217] International Military Tribunal (Nuremberg): Judgment and Sentences (Oct. 1, 1946), 41 AJIL 172, 221 (1947) [hereinafter Judgment and Sentences].

[218] Arrest Warrant of 11 April 2000, *supra* note 5, para. 58.

[219] Rome Statute, *supra* note 45, Art. 27; *see also* Immunity of State Officials from Foreign Criminal Jurisdiction, *supra* note 10, para. 83 (discussing similar language in the ILC's Draft Code of Crimes Against the Peace and Security of Mankind and noting that the draft code's language preventing an individual from invoking his official position to avoid responsibility does not address "removal of procedural immunity from domestic judicial process"); *id.*, para. 82 n.186 (noting that "judicial proceedings before an international criminal court would be the quintessential example of appropriate judicial proceedings in which an individual could not invoke any substantive or

over, with respect to states themselves, immunity prevents national courts from determining when they have moved beyond their competence under international law.[220]

Germany, after its unconditional surrender, was under four-party occupation and in no position to assert immunity. Indeed, it was not even clear whether Germany was, or would continue to be, a state,[221] so the issue did not arise.[222] The focus at Nuremberg was thus not on Germany itself or on any immunities that it might have been able to assert on behalf of its nationals but, instead, on establishing that the individual defendants could be held criminally liable for international crimes despite their official positions. Even if the Charter's language were properly interpreted as relating to immunity, it applies before an international (not a domestic) tribunal. With reference to Article 7 of the Charter, the judgment reasons that the "authors of these acts cannot shelter themselves behind their official position in order to be freed from punishment in appropriate proceedings."[223] This last language—"in appropriate proceedings"—makes clear that Article 7 does not determine the *forums* in which defendants can be tried or the factors that might determine what makes a forum appropriate or not. The judgment also reasons that the trials by the International Military Tribunal could have been undertaken individually by any of the states to which Germany unconditionally surrendered,[224] but this right does not necessarily mean that immunity could not be invoked under other circumstances, by states other than Germany, before other foreign national courts.

The Convention Against Torture might provide treaty-based evidence of *opinio juris* in favor of a human rights exception in torture cases. It defines torture as an act committed in an official capacity and also obligates parties to extradite or prosecute those alleged to have committed torture.[225] If immunity *ratione materiae* protects former officials, it arguably deprives the prosecute-or-extradite provisions of their effectiveness, as anyone in a position to commit the offense of torture may also be entitled to immunity. This argument is widely accepted by commentators[226] and is supported by the reasoning in several of the *Pinochet* opinions and by dicta in the *Jones* case. It is not obviously correct, however. As the foregoing analysis of the cases suggests, some governments choose not to invoke immunity, meaning that some extraterritorial torture prosecutions are possible even if immunity survives the Convention. The argument also relies on an implicit, rather than an explicit, renunciation of immunity, and it applies only to cases that come within the terms of the Convention Against Torture and perhaps similar multilateral treaties, but not to all crimes under international law.[227] The French prosecutor and Foreign Office appear to have rejected it in the *Rumsfeld* case. Most fundamentally,

procedural immunity based on his official position to avoid prosecution and punishment"); FOX, *supra* note 10, at 676–77 (distinguishing immunity from official-capacity defense). For an argument that Article 7 of the Charter pertains to functional, but not personal, immunity, see Paola Gaeta, *Official Capacity and Immunities*, *in* I THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY 975 (Antonio Cassese, Paola Gaeta & John R. W. D. Jones eds., 2002).

[220] Jurisdictional Immunities of the State, *supra* note 5, paras. 81–91.

[221] Hans Kelsen, *The Legal Status of Germany According to the Declaration of Berlin*, 39 AJIL 518, 520 (1945).

[222] FOX, *supra* note 10, at 677.

[223] Judgment and Sentences, *supra* note 217, at 221.

[224] *Id.* at 216.

[225] Convention Against Torture, *supra* note 30, Art. 7.

[226] *See* Akande & Shah, *supra* note 8, at 841–42.

[227] It might also apply to other treaties that have an extradite-or-prosecute requirement, but the argument is not as strong when the offense is not limited to official conduct. *See id.*

little evidence suggests that *states*, as opposed to commentators, have accepted this argument, except to the extent that *Pinochet* itself represents state practice.

The foregoing discussion is not intended to gainsay that immunity *ratione materiae* is in some tension with both the Convention Against Torture and the Charter of the International Military Tribunal at Nuremberg. Imposing individual international criminal responsibility undercuts one reason often advanced for immunity: it keeps individuals from bearing liability that should be imposed solely on the state. And immunity *ratione materiae* may prevent some prosecutions by states of other states' officials, although such prosecutions appear to be contemplated by the Convention against Torture and could advance its core values. These tensions are real, but they do not entirely undercut immunity as a matter of logic, as the foregoing discussion demonstrates. Moreover, as a matter of state practice and *opinio juris*, little evidence suggests that states believed that, through the Convention Against Torture, they were abolishing functional immunities. Perhaps the arguments based on the text of the Convention are so straightforward that immunity did not need not to be mentioned explicitly, but this position is undercut by the endurance of immunity *ratione personae*, by the apparently few states that have adopted that understanding of the Convention, and by customary international law's preference for prosecutions by the state in which the conduct took place or by the state of the defendant's nationality (for which immunity is not an obstacle to prosecution).[228] Extrapolating or inferring from this evidence that states intended to abolish functional immunity is a step removed even from most "modern" custom, in which states make clear declarations of their commitments to particular norms.

States *do* clearly renounce the underlying conduct at issue in the immunity cases, and accountability is understood to have significant normative value, as is increasingly recognized by international law.[229] The modern international law that protects human rights[230] (often as *jus cogens* norms) makes individuals accountable for certain violations of international law,[231] expands the jurisdiction of domestic and international tribunals to punish violations,[232] and provides the doctrinal and intellectual basis for claims that functional immunity has eroded. These developments make the erosion of immunity potentially attractive to states; like other "modern" custom, it reflects important normative values.[233] A human rights exception to traditional immunity norms might thus be justified based on general statements of *opinio juris*,

[228] Harmen van der Wilt, *Universal Jurisdiction Under Attack: An Assessment of African Misgivings Towards International Criminal Justice as Administered by Western States*, 9 J. INT'L CRIM. JUST. 1043, 1048–49 (2011); Darryl Robinson, *Serving the Interests of Justice: Amnesties, Truth Commissions and the International Criminal Court*, 14 EUR. J. INT'L L. 481, 491–92 (2003).

[229] *See, e.g.*, Mark S. Ellis, *Combating Impunity and Enforcing Accountability as a Way to Promote Peace and Stability—the Role of International War Crimes Tribunals*, 2 J. NAT'L SECURITY L. & POL'Y 111, 162–64 (2006).

[230] The RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES, *supra* note 11, §702, lists seven human rights norms protected by customary international law and notes that the list is not necessarily complete.

[231] *See* Steven R. Ratner, *New Democracies, Old Atrocities: An Inquiry in International Law*, 87 GEO. L.J. 707, 711–17, 726–32 (1999) (tracing the development of individual accountability for human rights abuses but arguing that customary international law imposes no obligation on states to hold violators accountable).

[232] Akande & Shah, *supra* note 8, at 840–49.

[233] Roberts, *supra* note 15, at 764–65 (discussing the moral foundation of modern customary international law); Ruth Wedgwood, *Augusto Pinochet and International Law*, 46 MCGILL L.J. 241, 244–48 (2000) (discussing *Pinochet* in normative and moral terms); Alfred von Verdross, *Forbidden Treaties in International Law: Comments on Professor Garner's Report on "The Law of Treaties,"* 31 AJIL 571 (1937) (discussing peremptory norms in international law in ethical terms).

as commentators have argued for modern custom generally.[234] Again, however, unlike a norm against torture—which states universally *say* they accept even if actual practice falls short—states have not declared that they accept a human rights exception to functional immunity before foreign national courts.

The foregoing discussion considered whether *opinio juris* supports a human rights exception to immunity if, as with other forms of modern custom, the requirement of state practice is relaxed. As the ICJ emphasized in *Jurisdiction Immunities*, however, immunity is also an example of a traditional customary international law norm that protects the sovereign equality of states,[235] which, in turn, facilitates relations between states and promotes coexistence and cooperation. Facilitative custom generally involves less direct evidence of *opinio juris* than does modern custom—which might be a reason to relax the *opinio juris* requirement or to infer *opinio juris* from state practice.[236] But as described in the foregoing sections, much of the litigation provides only weak evidence of state practice.

Neither relaxing state practice in favor of *opinio juris* nor relaxing *opinio juris* in favor of state practice generates a convincing case for a human rights exception to functional immunity. Moreover, immunity is an unusual form of custom—with a strong normative and a strong facilitative aspect—that should arguably require both *opinio juris* and state practice to demonstrate a human rights exception. The facilitative importance of immunity means that state practice purporting to show the erosion of immunity should be understood as such by states, or the risk and costs of noncompliance will be high. But a human rights exception is also a doctrinal and intellectual aspect of modern custom with a significant moral component, so one might also expect strong, declaratory evidence of *opinio juris* to emerge. As with other forms of modern custom, states have had the opportunity and the normative grounds for generating declaratory evidence in favor of such an exception, but they have not done so.

Finally, declaratory evidence of *opinio juris* could play an especially important role in the development of a human rights exception to immunity because it could clarify ambiguous or unclear state practice. As argued in the foregoing sections, failure to raise immunity cannot necessarily be understood as acquiescence in its erosion. But as also noted there, more information could strengthen the case for inferring acquiescence. Declaratory statements that immunity *ratione materiae* does not protect those accused of international crimes before foreign national courts would strengthen the inference that failure to raise immunity should be construed as acquiescence in its denial.

III. *PINOCHET* REASSESSED

The *Pinochet* judgment did not fundamentally change the trajectory of immunity law, as the foregoing discussions of state, status, and functional immunity demonstrate. Yet the opinions of the Law Lords effectively drew a set of largely academic arguments directly and fully into a legal judgment. The case *was*, in one sense, an immunity watershed. It offered up a set of reasons and overlapping arguments against immunity in a dramatic, public judgment that

[234] Roberts, *supra* note 15, at 790.

[235] Jurisdictional Immunities of the State, *supra* note 5, paras. 55, 73, 77, 85.

[236] *See* Maurice Mendelson, *The Subjective Element of Customary International Law*, 1995 BRIT. Y.B. INT'L L. 177, 204–08.

allowed national courts and executive branches around the world to see, understand, and evaluate what the Law Lords had done. Like the great immunity cases in the commercial activity context, its transparency and comprehensiveness contributed tremendously to shaping and framing the immunity debate. Unlike the commercial activity context, however, we have yet to see substantial change in immunity practice, even in the functional immunity context.

Nevertheless, the post-*Pinochet* functional immunity cases do provide some important insights regarding the development of immunity law and policy for states and litigants who seek to increase individual accountability for human rights violations. First, the conflict between functional immunity and accountability is somewhat overstated. In a surprising number of cases, the state entitled to assert immunity apparently did not do so. This observation is consistent with recent empirical work showing that universal jurisdiction cases are most likely to be successful when they are brought against defendants whose state of nationality is not willing to defend them—cases in which immunity is not raised, in other words.[237] Such cases should be welcomed, highlighted, and encouraged. Prosecutions in foreign national courts that are viewed as fair and effective may encourage subsequent governments not to contest the prosecutions of, or civil cases against, their nationals. Unlike a full-fledged exception to immunity that bars its invocation in *any* foreign national court, this option allows states to assert immunity in one state but choose not to raise it elsewhere.

Second, in evaluating state practice and *opinio juris*, information is powerful. States seeking to move immunity practice toward greater accountability should consider declarations and statements that will help to demonstrate *opinio juris*. The extent to which they are willing to do so is not clear.[238] The United States made a positive signal in this direction when the State Department's legal adviser mentioned the possibility of issuing a "Tate Letter" in the immunity context.[239] The Tate Letter famously set out the U.S. State Department's view that commercial activity was an exception to state immunity.[240] A similar letter in the current immunity context might substantially influence the development of customary international law. To the extent possible, litigants and organizations pushing for greater accountability should also make information available about the invocation of immunity or the reasons why it was not invoked.

Third, there appears to be some risk of state-to-state friction and regional divisions around immunity issues. The most significant conferrals of immunity *ratione materiae* in criminal cases involve defendants from China and the United States,[241] so perhaps an exception to functional immunity would be widely accepted by the rest of the international community (or even by these two states moving forward). If so, then the United Nations and other forums provide the opportunity for states to generate *opinio juris* demonstrating state-specific consent or general consent of the international community to such an exception, even if a small number of states dissent. But tension generated between Africa and Europe over universal jurisdiction and

[237] Langer, *supra* note 158, at 3, 6–9.

[238] *See, e.g.*, Boot-Matthijessen & van Elst, *supra* note 193, at 288–89 (noting the Dutch government's unclear position on whether international crimes are acts committed in an official capacity for the purposes of immunity); *cf.* Koh, *supra* note 17, at 1154 ("A government official's legitimate authority has not generally been thought to encompass a right to commit 'official acts' that violate both international and domestic law.").

[239] *See* Koh, *supra* note 17, at 1152.

[240] Letter from Jack B. Tate, Acting Legal Adviser, to Philip B. Perlman, Acting Attorney General, *supra* note 35.

[241] *See supra* text accompanying notes 127–33.

immunity suggests that potential conflict might be more widespread.[242] Recent discussions at the UN General Assembly's Sixth Committee suggest that regional differences might be an ongoing issue.[243]

Strong normative values support limiting immunity for those who commit grave human rights violations, as discussed above. The accounts of torture and other violations in Syria, at Guantánamo, and elsewhere underscore the profound human suffering and horrible infliction of pain that lie at the core of the immunity debate. When accountability for such crimes is pitted against "sovereignty"—as debates about immunity are often characterized—the normative pull of accountability feels ineluctable, and abstract notions of sovereignty difficult to defend. After all, the prohibitions against torture, genocide, and other international crimes themselves already limit or alter the meaning of sovereignty; dialing back on immunity seems like a small procedural step after international law makes both states and individuals responsible for such conduct. Not all sovereignty interests are the same, however, and their erosion poses different risks. The interests of states in torturing their own citizens are, in other words, different from the interests of states in not being sued in foreign national courts for such conduct. The facilitative value of the latter is far higher than that of the former. The ICJ recently emphasized the value of immunity as a traditional form of custom protecting the sovereign equality of states, while also acknowledging that Germany's actions "can only be described as displaying a complete disregard for the 'elementary considerations of humanity.' "[244]

Even ardent proponents of broad accountability in national courts sometimes explicitly limit their approach, applying it only to "liberal" nations and thereby suggesting that opening the doors to prosecutions in all nations is unlikely to be successful.[245] This limitation sometimes seems implicit in the immunity debate, which focuses on questions like the potential prosecution of Rumsfeld in Europe, but not other prosecutions that some might think appear less fair, such as the trial of Israelis in Iran or Europeans in Libya. One response is to say that such cases are unlikely to be brought at all, but this response itself suggests that immunity *ratione materiae* continues to have facilitative value because it recognizes that not all national court prosecutions of foreign defendants are equally desirable.[246]

[242] Council of the European Union, The AU-EU Expert Report on the Principle of Universal Jurisdiction, paras. 37, 42, Doc. 8672/1/09 REV 1 (2009) (elaborating on African concerns with European universal jurisdiction prosecutions, including immunity); Tobias Kelly, *Why Are 'Others' Always Guilty of Torture?*, ALJAZEERA, Nov. 8, 2011, *at* http://www.aljazeera.com/indepth/opinion/2011/11/201111512465031592 6.html. Arrest Warrant of 11 April 2000, *supra* note 5, at 91, para. 9 (Sep. Op. Rezek, J.).

[243] Some state delegations appeared prepared to accept a human rights exception to immunity in criminal cases, whereas others did not. *Compare* UN GAOR 6th Committee, 66th Sess., 26th mtg., Agenda Item 81, paras. 14–18, UN Doc. A/C.6/66/SR.26 (Dec. 7, 2011) (Stuerchler Gonzenbach, Switzerland), *with id.*, paras. 66–72 (Jannsens de Bisthoven, Belgium); *see* also Elizabeth Wilmshurst, *Prosecuting Former Heads of State for International Crimes* 8 (2011) (meeting summary: remarks of Georg Nolte describing the Sixth Committee debate in October 2011), *at* http://www.chathamhouse.org/sites/default/files/public/Research/International%20Law/241111 prosecuting.pdf.

[244] Jurisdictional Immunities of the State, *supra* note 5, para. 52 (quoting Corfu Channel (UK v. Alb.), 1949 ICJ REP. 4, 22 (Apr. 9)); *see id.*, paras. 55, 73, 77, 85; *see also id.*, Sep. Op. Koroma, J., para. 10; *id.*, Sep. Op. Keith, J., para. 3.

[245] Aceves, *supra* note 8, at 169; *cf.* Karen Knop, *Here and There: International Law in Domestic Courts*, 32 N.Y.U. J. INT'L L. & POL. 501, 522 (2000) (noting that some of the academic writing on the use of international law in domestic courts may be driven by a sense of "unexamined American benevolence").

[246] *See* Brad R. Roth, *Coming to Terms with Ruthlessness: Sovereign Equality, Global Pluralism, and the Limits of International Criminal Justice*, 8 SANTA CLARA J. INT'L L. 231, 235, 285–86 (2010).

Fourth, state practice appears to show that functional immunity is raised and conferred most often on behalf of former high-level officials—perhaps providing a basis for distinguishing between former low- and high-level officials.[247] Commentators mention this distinction from time to time,[248] but it is not reflected in the current doctrinal arguments for a human rights exception. Another way of attempting to align practice and doctrine might be to focus on the Convention Against Torture and the argument that the treaty obligation to prosecute or extradite is inconsistent with functional immunity in criminal cases, as the House of Lords suggested in both *Pinochet* and *Jones*.[249]

Whatever its ultimate legacy for functional and other kinds of of immunity, *Pinochet* was and is a great case. It carved out intellectual space for a vitally important set of issues about the relationship between immunity and accountability. By memorializing those issues in extremely visible judicial opinions, the Law Lords created markers or placeholders for ideas that will remain intellectually powerful and normatively attractive even if other courts reverse course in whole or in part. The move from absolute to restrictive immunity took half a century or more, and involved courts, executive branches, and legislatures, to give it full effect; perhaps a human rights exception to various immunities will develop over time as well. Today, however, despite the prevailing narrative to the contrary, customary international law does not yet recognize one, even for functional immunity in criminal cases. Proclaiming a broad human rights exception before states have accepted or understood that one exists has potential costs. States may not comply—they may insist that immunities protect their officials before foreign national courts despite the purported exception—and the deterioration of a facilitative custom through noncompliance has much higher potential costs in terms of state-to-state and regional friction than does noncompliance with purely modern forms of customary international law.

[247] *See supra* text accompanying notes 125–30; *see also* Strafanzeige gegen Jiang Zemin, *supra* note 128, at 2 (analyzing the immunity of a former president but not lower-level officials; cases against the latter were dismissed on jurisdictional grounds instead of immunity).

[248] *See, e.g.*, FOX, *supra* note 10, at 52, 695; Richard J. Wilson, *Argentine Military Officers Face Trial in Spanish Courts*, ASIL INSIGHTS (Dec. 2003), *at* http://www.asil.org/insigh122.cfm.

[249] *Jones*, *supra* note 5, paras. 89–93 (Lord Hoffmann). The Committee Against Torture has also suggested that conferring immunity in civil damages cases may be inconsistent with the Convention. *See* Bradley & Helfer, *supra* note 4, at 241 n.142.