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Diplomatic Impunity: A Renewed Case for Universal Jurisdiction

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Abstract

Foreign diplomats enjoy absolute immunity from arrest and prosecution before the courts of a receiving State. Even for serious crimes under international law, such as torture or slavery, they would be exempt from the State's criminal jurisdiction. A consequence of this blanket rule is that it enables impunity, particularly if sending States and third States take no steps towards initiating criminal proceedings. This article presents universal jurisdiction as a route towards arrest and prosecution in the case of international crimes. It argues that universal jurisdiction is ultimately a form of *international*, not domestic, criminal jurisdiction. Since diplomatic immunities do not apply against international criminal jurisdiction, it follows that States could exercise universal jurisdiction to circumvent the domestic procedural barriers of diplomatic immunities, albeit sparingly. This approach would reconcile the seemingly conflicting norms under general international law and international criminal law.

Keywords

universal jurisdiction – diplomatic immunities – impunity – international criminal jurisdiction

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1 Introduction

During their mission, foreign diplomats enjoy personal inviolability and immunity from the domestic criminal jurisdiction of the receiving State. They may not be arrested, prosecuted, or punished for any reason. As it stands, there is no exception to the rule. Even if a diplomat engaged in serious crimes under international law, such as torture or slavery, the receiving State may not arrest or prosecute them until after their post has ended.

This article examines the scope of diplomatic immunities, particularly in relation to serious crimes under international law. It argues that the law of diplomatic immunities operates in a manner that enables diplomatic *impunity*. None of the theoretical or technical justifications for immunities adequately support the absolute inviolability and immunity from criminal jurisdiction. To overcome this problem of diplomatic impunity, receiving States should be able to exercise universal jurisdiction to arrest, prosecute, and punish foreign diplomats for serious crimes under international law.

Section 2 of this article surveys the law of diplomatic immunities in relation to serious crimes under international law. Whilst acknowledging the well-established rule that resident and *ad hoc* diplomats enjoy absolute inviolability and immunity from the domestic criminal jurisdiction of receiving States, it concludes that diplomatic law currently operates in a manner that enables the impunity of diplomats. Although some alternative avenues are available, such as declarations *persona non grata* or waivers, they are ultimately inadequate at filling the impunity gaps enabled by diplomatic law.

Section 3 delves further into the problem by assessing the main theoretical and technical justifications for diplomatic immunities. It concludes that no theory or technicality adequately justifies the absoluteness of diplomatic immunities in relation to serious crimes under international law. Section 4 seeks to overcome the problem of diplomatic impunity by building on the works of Devika Hovell and Mara Malagodi, who argue that universal jurisdiction is not a form of domestic jurisdiction but a form of international criminal jurisdiction. It then observes that jurisdictional immunities are no bar to international criminal jurisdiction. Under this framework, it follows that States have universal jurisdiction over foreign diplomats for international crimes. Although diplomatic immunity continues to procedurally bar receiving States from exercising authority under the traditional bases for State jurisdiction, it does not preclude them from arresting or prosecuting foreign diplomats for serious crimes under international law, such as torture or slavery.

2 A Review of Diplomatic Law and Its Consequences

In surveying the law of diplomatic immunities, as applied to both resident and *ad hoc* diplomats, this section reiterates the well-established rule that foreign diplomats enjoy absolute inviolability and immunity from the domestic criminal jurisdiction of receiving States, even if they commit serious crimes under international law. A consequence of this blanket rule is that it enables the enjoyment of diplomatic *impunity*. The existing avenues for accountability – such as declarations *persona non grata*, waivers of immunity, civil liability, or State responsibility – are not entirely sufficient in addressing this impunity gap.

2.1 *Diplomatic Immunities and Serious Crimes Under International Law*

The history of diplomatic law spans at least as far back as ancient Greece, Rome, Egypt, and the early epochs of Indian diplomatic practice.[1] Although some earlier writings indicate that diplomatic immunities from criminal jurisdiction should not be absolute,[2] the dominant position in modern international law is that resident diplomats enjoy personal inviolability and immunity from the criminal jurisdiction of receiving States during their post, regardless of the nature of their crime or the functions of their mission.[3] Therefore, even if a diplomat committed an international crime, such as torture or slavery, their receiving State would be unable to arrest, prosecute, or punish them until their post has ended.

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1 Montell Ogdon, 'The Growth of Purpose in the Law of Diplomatic Immunity' [1937] 31(3) The American Journal of International Law 449–465.

2 Sir Edward Coke, *The Fourth Part of the Institutes of the Lawes of England* (London, 1644), 153, cited by Ogdon (n 1): ('But if a foreign Ambassador being Prorex committeth here any crime, which is contra jus gentium, as Treason, Felony, Adultery, or any other crime which is against the law of Nations, he loseth the privilege and dignity of an Ambassador as unworthy of so high a place, and may be punished here as any other private Alien, and not to be remanded to his Soveraigne but of curtesie').

3 *Vienna Convention on Diplomatic Relations* (VCDR), 18 April 1961, in force 24 April 1964, 500 UNTS 95, Articles 29 and 31; James Crawford, Brownlie's Principles of Public International Law (8th edn, Oxford University Press 2019) 392 ('A diplomatic agent guilty of serious or persistent breaches of the law… is immune from prosecution while in post, irrespective of the character of the crime or its relation to the functions or work of the mission'); Hazel Fox QC and Philippa Webb, The Law of State Immunity (3rd edn, Oxford University Press 2015) 593 ('A diplomat in post enjoys immunity ratione personae and materiae, and unlike his State he continues to enjoy absolute immunity').

Similar can be said in relation to *ad hoc* diplomacy,[4] which is known to be the oldest and 'primary form' of diplomatic relations.[5] In modern time, typical examples of *ad hoc* diplomats include a head of government who attends a funeral abroad in an official capacity, a foreign minister who visits another foreign minister for international negotiations, or other government members who visit a receiving State to conduct official business.[6] Unlike resident diplomats, who conduct permanent diplomatic missions, *ad hoc* diplomats are members of 'special missions', temporarily representing the sending State with the consent of the receiving State.[7] But just like resident diplomats, they enjoy absolute inviolability and immunity from criminal jurisdiction of the receiving State, during their post.[8] No matter the crime, the receiving State must refrain from arresting or prosecuting the *ad hoc* diplomat for the duration of their mission.

A State may only arrest or prosecute an *ad hoc* or resident diplomat in very limited circumstances. Once a mission has ended or has been terminated, such diplomats no longer enjoy absolute immunity but instead have 'functional' immunity from the receiving State's criminal jurisdiction.[9] In effect, States may arrest or prosecute *former* diplomats for criminal conduct which fall outside the scope of diplomatic functions, such as torture or slavery. Also, diplomats do not enjoy any immunity against the jurisdiction of third States

4 Yearbook of the International Law Commission, Fourth Report on Special Missions by Mr. Milan Bartoš, Special Rapporteur, A/CN.4/194 and Add.1-5, Vol II (1967); Sir Michael Wood, 'The Immunity of Official Visitors' [2012] in Armin Von Bogdandy and Rudinger Wolfrum, 16 *Max Planck Yearbook of United Nations Law* 35–98.

5 Jerzy Nikołajew, 'The Concept and Classification of Special Missions' [2013] 18(1) Review of Comparative Law ('Special missions are the oldest form of diplomatic relations… The primary form of diplomacy, the so-called special mission, has been known for centuries'); *R* (*Freedom and Justice Party*) *v Secretary of State for Foreign and Commonwealth Affairs* [2018] EWCA Civ 1719, para 79 ('Special missions have performed the role of ad hoc diplomats across the world for generations').

6 Crawford (n 3) 398–399; *Freedom and Justice Party* (n 5) para 58, citing Sir Ian Brownlie.

7 *United Nations Convention on Special Missions*, 1969, Article 1(a).

8 *Ibid*, Articles 29, 31(1), 43; *Freedom and Justice Party* (n 5), para 135: ('the Divisional Court was correct to hold that a rule of customary international law has been identified which now obliges a state to grant to the members of a special mission, which the state accepts and recognises as such, immunity from arrest or detention… and immunity from criminal proceedings for the duration of the special mission's visit').

9 VCDR (n 3) Article 39(2) ('with respect to acts performed by such a person in the exercise of his functions as a member of the mission, immunity shall continue to subsist'); UNCSM (n 7) Article 43(2) ('in respect of acts performed by such a member in the exercise of his functions, immunity shall continue to subsist'); Roger O'Keefe, 'Immunity *Ratione Materiae* of State Officials from Foreign Criminal Jurisdiction' [2014] CAHDI, 5.

during personal visits.[10] They are only exempt in transit States, particularly when in the course of direct passage to or from a diplomatic post.[11] In any event, regardless of the few limited situations in which a State may arrest or prosecute a diplomat, it is clear that a receiving State may not arrest or prosecute a foreign diplomat who is currently serving their post.

2.2 *Diplomatic Immunity as Diplomatic Impunity*

To briefly illustrate the consequence of this doctrinal framework of diplomatic law, a good starting point is to consider examples of how immunities can be abused. In 1999, Indian diplomat Amrit Lugun, serving in France, was accused of torturing a 17-year-old employee.[12] After the employee's escape, medical staff at the Cochin hospital in Paris discovered mutilation, including 3–6cm knife wounds, around her genitals. The gravity of these harms caused diplomatic tensions. A political row between France and India ensued. Yet, due to Mr Lugun's diplomatic immunity, he could not be arrested, prosecuted, or punished for torture or any other relevant crime. In fact, two decades later, in 2019, Mr Lugun was appointed as an Indian ambassador to Greece.[13] Though he has since been replaced, it is reasonable to infer that, under

10 *US v Rosal*, US District Court, Southern District of New York, 191 F Supp 663; *Former Syrian Ambassador to the German Democratic Republic* (1997) 115 ILR 595; Eileen Denza, Diplomatic Law: Commentary on the Vienna Convention on Diplomatic Relations (5th edn, Oxford Commentaries on International Law 2025), 381; Dapo Akande and Sangeeta Shah, 'Immunities of State Officials, International Crimes, and Foreign Domestic Courts' [2011] 21(4) The European Journal of International Law, 851; Fox and Webb (n 3), 599.

11 VCDR (n 3) Article 40(1) ('If a diplomatic agent passes through or is in the territory of a third State, which has granted him a passport visa if such visa was necessary, while proceeding to take up or to return to his post, or when returning to his own country, the third State shall accord him inviolability and such other immunities as may be required to ensure his transit or return; and UNCSM (n 7) Article 42(1) ('If a representative of the sending State in the special mission or a member of its diplomatic staff passes through or is in the territory of a third State while proceeding to take up his functions or returning to the sending State, the third State shall accord him inviolability and such other immunities as may be required to ensure his transit or return').

12 Jon Henley, 'Indian diplomat accused of torturing servant' (*The Guardian*, 17 September 1999) https://www.theguardian.com/world/1999/sep/17/jonhenley1#:~:text=%22She%20says%20they%20abused%20her,the%20Cochin%20hospital%20in%20Paris.; Frontline, 'The tale of Lalita Oraon' (*The Hindu*, 19 February 2000) https://frontline.thehindu.com/the-nation/article30253414.ece.

13 Media Centre, 'Amrit Lugun has been appointed as the next Ambassador of India to Greece' (*Indian Ministry of External Affairs*, 3 October 2019). https://www.mea.gov.in/pressreleases.htm?dtl/31896/Amrit+Lugun+has+been+appointed+as+the+next+Ambassador+of+India+to+Greece.

international law, he would have enjoyed inviolability and immunity in Greece for the duration of his post, much like in France.

Given the same rules apply, another example can be found for *ad hoc* diplomats on special missions. In *Freedom and Justice Party*,[14] the English Court of Appeal considered whether to exercise universal jurisdiction, under the Criminal Justice Act 1988, to prosecute *ad hoc* diplomat Lieutenant General Hegazy, the Chief of Staff in the Egyptian Armed Forces, for acts of torture during events that led to the downfall of the Egyptian government in 2013. The Court unanimously held that officials on special missions enjoyed personal inviolability and immunity from criminal proceedings during the course of their official visit. Therefore, despite allegations of torture, one of the most serious crimes in international law,[15] the UK could not arrest, prosecute, convict, or punish Lt General Hegazy during his visit.[16] Today, there is no sign of any attempts to arrest, prosecution, or punishment by any other State.

The point of these examples is not simply to 'shock the conscience' of readers.[17] Rather, they are meant to draw attention to a very real consequence of diplomatic immunity: impunity. As it currently stands, international law operates in a manner whereby no form of criminal jurisdiction, not even universal jurisdiction,[18] can overcome the procedural bar imposed on receiving States by the law of diplomatic immunities. Furthermore, these examples show that diplomats can enjoy impunity even after their post or visit has ended. Therefore, evidently, immunity can in practice lead to impunity.

The counterargument might be that there are more ways of fighting impunity than punishment by courts, such as reparations, shame, sanction, memory, and recrimination.[19] There is some merit to this point. Some alternative avenues are available. For example, at any time and without need of explanation, the receiving State may declare them *persona non grata* or 'not

14 [2018] EWCA Civ 1719.

15 *Anto Furundzija*, Case No. IT-95-17/1-T, Judgment of 10 December 1998, Trial Chamber, International Criminal Tribunal for the Former Yugoslavia, Judicial Reports 1998, vol 1, p 466, at p 569, paras 153–154; *Questions relating to the Obligation to Prosecute or Extradite (Belgium v Senegal)*, Judgment, ICJ Reports 2012, p 422, at p 457, para 99; *R v Bartle and the Commissioner of Police for the Metropolis and Others, Ex Parte Pinochet*, [1998] UKHL 41.

16 *Freedom and Justice Party* (n 5) para 135.

17 Borrowed from the term 'shock the conscience' of mankind or humanity, often invoked against crimes which the international community deems to be of universal concern due to their heinousness and seriousness. See for example *Attorney-General of the Government of Israel v Eichmann* (Israeli Supreme Court 1962), Int'l L Rep, vol 36, p 277, para 10.

18 See *Freedom and Justice Party* (n 5).

19 Mark Drumbl, 'Impunities', in Kevin Jon Heller et al, *The Oxford Handbook of International Criminal Law* (Oxford University Press 2020), 238.

acceptable'.[20] In that case, the sending State must recall the individual in question or terminate their functions with the mission within a reasonable period.[21] Otherwise, the receiving State may refuse to recognize the person in question as a member of the diplomatic or special mission.[22] In practice, declarations *persona non grata* are often justified as preventative measures against spies or espionage.[23] However, a limitation of this approach is that it lacks all proportionality with the typical consequences of domestic offending – whilst murder and much lesser crimes are met with retributive punishment, serious crimes under international law would merely be met with the termination of a mission and the potential enjoyment of impunity thereafter abroad.[24] Declarations *persona non grata*, in essence, feel insufficient to meet the heinousness of the offence.

Alternatively, a sending State could expressly waive diplomatic immunities, paving the way for the receiving State to arrest and prosecute.[25] In practice, there are some occasions where sending States have decided to waive the immunities of their diplomat, including over charges of drug-trafficking, murder, and driving accidents.[26] The problem, however, is that sending States rarely waive immunity.[27] Where that is the case, the receiving State is often left to respect the personal inviolability and immunity, regardless of whether

20 VCDR (n 3) Article 9; UNCSM (n 7) Article 12.

21 *Ibid*.

22 *Ibid*.

23 Eric Paul Witiw, 'Persona Non Grata: Expelling Diplomats who Abuse their Privileges' [1988] 9(2) NYLS Journal of International and Comparative Law; BBC news, 'Spain-Russia spy row leads to diplomats' expulsion' (*BBC News*, 6 March 2012) https://www.bbc.co.uk/news/world-europe-12086186; William Eaton, 'Soviets Oust 5 US Diplomats as Spies: Shultz Promises Action in Response to Unprecedented Mass Expulsion' (*Los Angeles Times*, 20 October 1986) https://www.latimes.com/archives/la-xpm-1986-10-20-mn-6499-story.html.

24 Hannah Arendt, *Eichmann in Jerusalem: A Report on the Banality of Evil* (1963), Epilogue: ('Nothing is more pernicious to an understanding of these new crimes, or stands more in the way of the emergence of an international penal code that could take care of them, than the common illusion that the crime of murder and the crime of genocide are essentially the same, and that the latter therefore is "no new crime properly speaking." The point of the latter is that an altogether different order is broken and an altogether different community is violated').

25 VCDR (n 3) Article 32(2); UNCSM (n 7) Article 41; *Nzie v Vessah*, 74 ILR 519; Denza (n 10) 273.

26 Denza (n 10) 284–287.

27 Veronica L Maginnis, 'Limiting Diplomatic Immunity: Lessons Learned from the 1946 Convention on the Privileges and Immunities of the United Nations' [2002] 28(3) Brooklyn Journal of International Law, 1021.

the consequence is impunity. The decision to waive immunity is still entirely in the hands of the sending State. Even if a diplomat wished to stand trial, but the sending State refused to waive immunities, the receiving State may not put the diplomat on trial unless they decide to resign.[28]

Receiving States may also exercise domestic civil jurisdiction over a foreign diplomat. However, States may only exercise civil jurisdiction over a diplomat in a few circumstances. With respect to resident diplomats, States may decide claims relating to private immovable property situated in the receiving State's territory; claims relating to succession in which the diplomatic agent is involved as executor, administrator, heir or legatee as a private person; or claims relating to any professional or commercial activity exercised by the diplomatic agent in the receiving State outside official functions.[29] The same is true in relation to *ad hoc* diplomats, with an added avenue whereby receiving States may exercise civil jurisdiction over claims relating to damages arising from driving accidents that fall outside official functions.[30] This approach has been with some success. For example, despite previous difficulties in exercising civil jurisdiction in cases of modern slavery,[31] the UK Supreme Court recently decided to exercise civil jurisdiction over a Saudi diplomat on the basis that his acts of modern slavery – namely forced labour, domestic servitude, and human trafficking – fell within the scope of commercial activities.[32] Unfortunately, the limitation of such an approach is that it would not capture international crimes. For instance, acts of torture, in its ordinary meaning, would not fall within the scope of private immovable property, succession, commercial activity, or driving accidents.[33] Thus, survivors of torture would likely struggle to successfully bring civil actions before courts of the receiving State. Therefore, civil jurisdiction provides no realistic avenue for survivors or victims of international crimes.

Finally, another proposed avenue is for the receiving State to invoke the responsibility of the sending State. Philippa Webb and Rosana Garciandia, in this regard, suggest that diplomatic involvement in modern slavery could

28 Denza (n 10) 274.

29 VCDR (n 3) Article 31(1)(a)-(c).

30 UNCSM (n 7) Article 31(2)(a)-(d).

31 *Tabion v Mufti*, 877 F Supp. 285 (ED Va 1995).

32 *Basfar v Wong* [2022] UKSC 20.

33 *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, United Nations, Treaty Series, vol 1465, p 85, 10 December 1984, Article 1; *Vienna Convention on the Law of Treaties*, United Nations, Treaty Series, vol 1155, p 331, 23 May 1969, Article 31.

implicate the responsibility of the sending State. Likewise, perhaps a receiving State could make claims against a sending State for torture[34] or even genocide.[35] From the perspective of an international lawyer, State responsibility makes strategic sense where State officials commit mass atrocities at a large scale through the control of the State, whereby the line between individual and State becomes more blurred.[36] If a State official on a special mission had committed a large-scale international crime – such as genocide, crimes against humanity, aggression, or war crimes – then State responsibility would serve as a strong alternative to individual criminal responsibility.[37] However, such cases are distinguishable from the conduct of resident diplomats, who often do not have the capacity to engage in large-scale crimes but instead engage in smaller-scaled crimes, such as torture.[38] Thus, even though invoking State responsibility serves as a strong strategic avenue for international lawyers to explore, it may often feel inadequate for victims in comparison to the most direct form of accountability: individual criminal responsibility.

In the end, there may be more ways to fight impunity than punishment, but punishment is still the fundamental purpose of international criminal law and plays a primary role in the fight against impunity.[39] As it currently stands, however, international law operates in a manner whereby no form of domestic criminal jurisdiction can overcome the procedural bar of diplomatic immunity.[40] To put it simply, diplomatic immunity contributes to diplomatic impunity.

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34 *Belgium v Senegal* (n 15).

35 *Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip* (*South Africa v Israel*) (Provisional Measures) ICJ Reports 2024.

36 José Alvarez, 'Crimes of States/Crimes of Hate: Lessons from Rwanda' [1999] 24(2) Yale Journal of International Law.

37 Marko Milanovic, State Responsibility for Genocide, The European Journal of International Law Vol 17 no 3 (2006); *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (*Bosnia and Herzegovina v Serbia and Montenegro*), Judgment, ICJ Reports 2007, p 43.

38 *R v Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte* (*No 3*) [1999] UKHL 17 (Lord Browne-Wilkinson): ('But in the course of time this linkage with war fell away and torture, divorced from war or hostilities, became an international crime on its own'); Torture Convention (n 32), Article 1.

39 Arendt (n 24) 253: ('The purpose of a trial is to render justice, and nothing else; even the noblest of ulterior purposes…can only detract from the law's main business: to weigh the charges brought against the accused, to render judgment, and to mete out due punishment').

40 Lorna Mcgregor, 'State Immunity and Jus Cogens' [2006] 55(2) The International and Comparative Law Quarterly, 443: ('While the availability of immunity is sometimes framed as a matter of forum cation only, the de facto impunity that usually accompanies the

3 A Review of the Rationale for Diplomatic Immunities

This section delves into whether the rationale for diplomatic immunities explains or justifies the problem of diplomatic impunity. The traditional justifications stem from the theories of extraterritoriality, sovereign representations, and functional necessity. However, this section concludes that none of those theories are satisfactory for resolving the impunity problem. Furthermore, it assesses the technical justification that diplomatic immunities are procedural rules that do not conflict with substantive peremptory norms. This section finds that justification unsatisfactory, as the dichotomy between substance and procedure is false one; and even so, there is an emerging jurisprudence pushing for the peremptory status of victims' right of access to justice. Thus, no available rationale or justification serves to adequately resolve the problem of diplomatic impunity.

3.1 *The Theoretical Justifications for Diplomatic Immunities*

Historically, diplomatic immunities were justified by the theory of extraterritoriality. As Grotius once said, an ambassador represents a legal fiction, that is, the 'actual person of his master' and is thus regarded to be 'outside the territory of the power in respect of whom he exercises his functions'.[41] This theory is no longer accepted today. First, it does not adequately explain the fact that diplomats remain obliged to respect the laws of the receiving State,[42] nor does it explain why immunities are enjoyed outside diplomatic premises or why the receiving State has a positive obligation to protect those premises.[43] Furthermore, this theory is understood as excessive and, in some ways, ironic because the diplomat would not be immune for the same crimes in the sending State.[44]

Another early theoretical justification can be found in the sovereign representation theory, which takes the position that a diplomat is afforded inviolability and immunity because they represent their sovereign. Hence, an insult to the sovereign's representative would be tantamount to an insult on the sovereign themselves.[45] However, this theory has been largely discredited.

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provision of immunity due to the lack of an alternative forum by law or in practice highlights a potential conflict with the Vienna Convention').

41 Grotius, *De Jure Belli et Pacis* (1625), Book II, Ch XVIII, para 5.

42 VCDR (n 3) Article 41; UNCSM (n 7) Article 47.

43 Fox and Webb (n 3) 587.

44 Maginnis (n 27) 994.

45 Nina M Bergmar, 'Demanding Accountability Where Accountability Is Due: A Functional Necessity Approach to Diplomatic Immunity Under the Vienna Convention' [2021] 47(1)

First, despite its historical significance, this theory also does not adequately explain the duty of resident and *ad hoc* diplomats to respect the laws of the receiving State.[46] Applying the logic of the sovereign representation to its fullest implications, this theory leads to the absurd inference that this obligation to respect local laws owed by the sovereign's representative would be tantamount to an obligation owed by the sovereign to respect the local laws of the receiving State. Second, it does not explain why diplomats enjoy wider civil immunities than even States.[47] Third, it is outdated. In today's world order, underpinned by self-determination,[48] the 'sovereign' is less so the monarch or head of State and is often understood as 'the people'.[49] Thus, if the people (the representees) do not enjoy immunities, it is unclear then why the diplomat (the representor) should enjoy immunities from the criminal jurisdiction of a receiving State.

As a sidenote, a practical justification might be based on the principle of reciprocity, which posits that States extend diplomatic immunities onto diplomats under the expectation of reciprocal treatment to their own diplomats abroad.[50] In fact, serious breaches of diplomat immunities are rare primarily because of the reciprocal benefits that accrue from the mutual observance of diplomatic law.[51] Nevertheless, this practical benefit is not so much a justification as it is a form of equilibrium favouring any existing status quo. In theory, if States struck a balance of reciprocity whereby diplomats could be arrested or prosecuted for certain crimes, then that system would also be reciprocal and therefore practically justified. It is not so much the immunities that are justified, it is the equilibrium under the assumption that immunities apply absolutely. In the end, although reciprocity may offer a practical benefit or justification for already existing immunities, it is by no

Vanderbilt Journal of Transnational Law, 507; Leslie Farhangi, 'Insuring against Abuse of Diplomatic Immunity' [1986] 38(6) Stanford Law Review.

46 Nkatomba Nkatomba Eyina and Callistus Nekabari Dumle, 'Theoretical Basis of Diplomatic Immunities and Privileges: Its Implications in International Politics' [2024] 10(1) Journal of Political Science and Leadership, 61; VCDR (n 3) Article 41; UNCSM (n 7) Article 47.

47 *United Nations Convention on Jurisdictional Immunities of States and Their Property*, A/RES/59/38, 2 December 2004, Articles 10–17.

48 United Nations, *Charter of the United Nations*, 1945, 1 UNTS XVI, Article 1(2); and Georges Abi-Saab, The System of the Friendly Relations Declaration, in J.E. Viñuales, *The UN Friendly Relations Declaration at 50: An Assessment of the Fundamental Principles of International Law* (Cambridge University Press, 2020), pp 12–22.

49 Maginnis (n 27) 995.

50 Eyina and Dumle (n 46) 62; Denza (n 10).

51 Crawford (n 3) 384.

means an independent and strong theoretical basis for *absolute* diplomatic inviolability and immunity.

The strongest justification for diplomatic immunities is the functional necessity theory. In both the Vienna Convention on Diplomatic Relations and the Convention on Special Missions, it is understood that the purpose of immunities is not to benefit the individuals in question but to ensure the efficient performance of the functions of diplomatic and special missions as representing States.[52] According to Hazel Fox and Philippa Webb, diplomatic immunities are given as: recognition of the sovereign independent status of the sending State and of the public nature of the acts which render them not subject to the jurisdiction of the receiving State; and protection to the diplomatic mission and staff to ensure their efficient performance of functions free from interference from the receiving State.[53] Furthermore, immunities are made even more necessary today considering the increased risk to resident diplomats of violence, kidnapping, and attack on embassy premises.[54] A similar style of reasoning can be found in *Freedom and Justice Party*, concerning Lt General Hegazy, where the English Court of Appeal justified the absolute inviolability and immunity enjoyed by *ad hoc* diplomats on the basis that a special mission could not be performed 'without the functional protection afforded by the core immunities'.[55]

In sum, according to the domestic understanding of diplomatic immunities, functional necessity prevails as the best justification for the personal inviolability and immunity of diplomats from the receiving State's domestic criminal jurisdiction. This justification is applied equally for both resident and *ad hoc* diplomats. Despite its persuasiveness, the functional necessity theory is unsatisfactory in justifying absolute diplomatic immunities, and hence, fails to extend any resolution to the impunity problem. Under this theory, diplomatic immunities are only justifiable insofar as it is 'necessary for the

52 VCDR (n 3) Preamble; UNCSM (n 7) Preamble.

53 Fox and Webb (n 3) 588; James Crawford (n 3) 384; Farhagni (n 45) 1521. Also, see dictum of *ne imediatur legatio* in *Russel v Srl Immobiliare Soblim,* (1979) 62 RDI 797 [147], cited by Paul Gaeta and others, Cassese's International Law (3rd edn, Oxford University Press 2020) 133: (diplomatic immunities 'sprang up not in order to bestow a personal privilege but for the purpose of assuring in all Indeed, immunity from civil jurisdiction, although with some exceptions, became necessary precisely to guarantee complete independence in accomplishing the mission: *ne impediatur legatio'*).

54 Fox and Webb (n 3) 588; *Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents*, No. 15410, 14 December 1973; *Ministère Public and Republic of Mali v Keita* (1977) Journal des Tribunaux 678, 77 ILR 410, cited by Crawford (n 3) 383.

55 *Freedom and Justice Party* (n 5), para 79.

furtherance of the mission'.[56] However, in practice, it seems the rules of diplomat immunities protect the individual in question, *regardless of the success or failure of the mission*.[57] Serious crimes by a diplomat are arguably as capable of hindering the diplomatic mission as are criminal proceedings against a diplomat. Yet, those crimes are often met with impunity whilst criminal proceedings by receiving States are always met with immunity. For this reason, the functional necessity theory fails to adequately justify the absoluteness of immunity, particularly within the context of serious crimes under international law.

3.2 *The Technical Justification for Diplomatic Immunities*

In addition to theoretical jurisdictions, courts often rely on one technical justification to supplement the rationale for the absolute inviolability and immunity from criminal jurisdiction. Based on available jurisprudence,[58] the reasoning can be broken down as follows. A peremptory norm is a 'norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character'.[59] Such norms include the substantive prohibition of torture, slavery, genocide, aggression, war crimes, and genocide.[60] If any treaty conflicts with a peremptory norm, that treaty is void.[61] However, diplomatic immunities are procedural in nature. They operate as procedural bars to the domestic jurisdiction of the receiving State. Since diplomatic immunities are

56 Bergmar (n 45) 509.

57 Henley (n 12): ('A row has erupted between the French foreign ministry and the Indian embassy in Paris over allegations that an illiterate 17-year-old servant was beaten, tortured and sexually mutilated by her employer, a senior Indian diplomat').

58 *Case Concerning the Arrest Warrant of 11 April 2000* (*Democratic Republic of the Congo v Belgium*) ICJ Reports 2002, para 60; *Jurisdictional Immunities of the State* (*Germany v Italy: Greece intervening*), ICJ Report 143 (2012), para 100; *Certain Questions of Mutual Assistance in Criminal Matters* (*Djibouti v France*) ICJ Reports 2008, p 244, para 196; *Jones v Saudi Arabia*, [2007] 1 AC 270 629; *Reyes v Al-Malki*, [2017] UKSC 61, para 40; *Freedom and Justice Party* (n 5), para 108; Akande and Shah (n 10) 834. See also Preliminary report on immunity of State officials from foreign criminal jurisdiction, by Roman Anatolevich Kolodkin, Special Rapporteur, Document A/CN.4/601 (29 May 2008); and Fifth report on immunity of State officials from foreign criminal jurisdiction, by Ms. Concepción Escobar Hernández, Special Rapporteur, Document A/CN.4/701.

59 VCLT (n 33), Article 53.

60 International Law Commission's Draft Conclusions on identification and legal consequences of peremptory norms of general international law (*jus cogens*), with commentaries (2022), A/77/10, Conclusion 23, Annex.

61 *Ibid.*

procedural, and since the peremptory prohibitions of certain serious crimes under international law are substantive, it follows that the law of diplomatic immunities and peremptory norms do not conflict. On the basis of this technicality, diplomats therefore enjoy their inviolability and immunity under diplomatic law even if they act in breach of a peremptory norm.

There is some support for this technicality. Historically, William Blackstone identified a distinction between substantive and procedural law. In his view, substantive law refers to injuries cognizable by the courts with respective remedies for each injury; and procedural law refers to the method for pursuing those remedies before courts.[62] Jeremy Bentham is also credited with 'fathering' this substance-procedure dichotomy in 1782, in his book *On Laws in General*, though it is more likely he was influenced by Blackstone's *Commentaries*.[63] Since then, though the definitions of substance and procedure had not reached a consensus,[64] their dichotomous relationship had become defended and reified over centuries.[65]

However, the problem with this technical reasoning is that it erroneously assumes that substance and procedure cannot conflict. According to Thomas Main, procedure is inherently substantive and substance is inherently procedural.[66] Procedural law is understood to change the way substantive law can be enforced or not enforced; and to contribute to the weakening of civil rights and discrimination law; and is known to mask substantive decisions and substantive impacts.[67] To put it metaphorically, 'adjectives can pervert the meaning of sentences, pipes can leak or pollute, handmaids can become mistresses, and player pianos can be so out of tune that the music is unrecognizable'.[68] The key point to take away is that procedural law can conflict with the aims of substantive law through its substantive effects.

62 William Blackstone, Commentaries on the Laws of England (1965), cited by Thomas O Main, 'The Procedural Foundation of Substantive Law' [2010] 87(4) Washington University Law Review, 805.

63 D Michael Risinger, 'Substance' and 'Procedure' Revisited with Some Afterthoughts on the Constitutional Problems of "Irrebuttable Presumptions" [1982] 30 UCLA Law Review, 191; Main (n 62).

64 Leslie M Kelleher, Taking 'Substantive Rights' (in the Rules Enabling Act) More Seriously, [1998] 47 Notre Dame Law Review, 105.

65 Main (n 62) 812; Stefan Talmon, 'Jus Cogens after Germany v. Italy: Substantive and Procedural Rules Distinguished' [2012] 25 Leiden Journal of International Law, 979–1002.

66 Main (n 62) 841.

67 *Ibid* 819–821.

68 *Ibid* 822. See also *Regulatory Reform Act*: Hearing on HR 2327 Before the Subcommittee on Administrative Law and Governmental Regulations of the H Comm on the Judiciary, 98th

Likewise, the law of diplomatic immunities operates as a procedural bar, but with the substantive effect in which diplomats enjoy impunity for their serious crimes under international law.[69] It would be mistaken to defend the absolute inviolability and immunity of diplomats on the basis of a false dichotomy between substance and procedure. Courts should therefore no longer rely on such dichotomy to inform their decision-making.

The second problem with the technical justification is that it fails to account for the emergence of victims' access to justice as a peremptory procedural norm. In *El Sayed*,[70] the Special Tribunal for Lebanon determined that the right of access to justice has 'acquired the status of a peremptory norm' based on national and international jurisprudence.[71] Furthermore, the Inter-American Court of Human Rights (IACtHR) has consistently affirmed the position that victims' access to justice is a peremptory norm of international law and gives rise to States' obligation *erga omnes* to adopt all measures to protect fundamental human rights by *inter alia* exercising their judicial power to apply domestic and international law to punish perpetrators for grave violations of human rights, such as forced disappearances, executions, massacres, persecution, etc.[72] This right is to be contextualized in light of the overarching shift in international law from the old *raison d'État* to the primacy of the *raison d'humanité*.[73] In this sense, immunity should not be upheld in cases of international crimes, since the victims' right of access to justice and reparations may call for arrest or prosecution.[74]

Cong 312 (1983) (testimony of Rep John Dingell), cited by Main (n 62) 821: ('I'll let you write the substance… you let me write the procedure, and I'll screw you every time').

69 *Al-Adsani v UK* (Application no. 35763/97), 2001, Joint Dissenting Opinion of Judges Rozakis and Caflisch, joined by Judges Wildhaber, Costa, Cabral Barreto and Vajic, para 30.

70 Case No CH/PRES/2010/01, Order of 15 April 2010 assigning Matter to Pre-Trial Judge, President of the Special Tribunal of Lebanon.

71 *Ibid*, para 29; ILC Draft Conclusions on Peremptory Norms (n 60) Conclusion 9, Comment 3.

72 *Case of La Cantuta v Peru*, IACtHR Judgment of 2006 (Merits, Reparations and Costs), para 160; *Case of Goiburú, et al v Paraguay*, IACtHR Judgment on 2006 (Merits, Reparations and Costs), para 131 (Separate Opinion of Judge Trindade), para 68; *Case of Pueblo Bello Massacre v Colombia*, IACtHR Judgment on 2006 (Separate Opinion of Judge Trindade), para 64.

73 *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965* (Advisory Opinion) [2019] ICJ Reports 95 (Separate Opinion Judge Trindade), para 86; The Yearbook of the International Law Commission, 1999, vol ii(2), Report of the International Law Commission on the work of its fifty-first session, 3 May – 23 July 1999, Official Records of the General Assembly, Fifty-fourth session, Supplement No.10 (A/54/10), Appendix, 172, para 3.

74 *Jurisdictional Immunities* (n 58) Dissenting Opinion of Judge Trindade.

Notably, the European Court of Human Rights, on multiple occasions, has expressed that it does not recognize victims' right to criminal proceedings against a perpetrator.[75] But where prosecutions could be brought, States must protect human rights by conducting *inter alia* prosecutions for the purposes of deterring serious crimes.[76] Thus, there is nevertheless an emergence of a peremptory norm that provides victims with an absolute right of access to justice for the purposes of prosecuting serious crimes under international law. In time, diplomatic immunities could be displaced by this peremptory right. But as it stands today, what is clear is that the technical justification for diplomatic immunities is unsatisfactory and being steadily weakened by the development of a peremptory right of access to justice against perpetrators of serious crimes under international law. For this reason, the technical justification does not serve to justify the absolute inviolability and immunity enjoyed by diplomats and, hence, does not resolve the problem of diplomatic impunity.

4 A Case for Universal Jurisdiction

To recap this article's analysis so far, Section 2 revealed that the door is absolutely shut for survivors and victims seeking criminal proceedings against diplomats. Receiving States simply cannot exercise their criminal jurisdiction over foreign diplomats. A consequence of this rule is that it enables diplomatic impunity. Section 3 investigated the rationale for absolute diplomatic immunities and found unsatisfactory theoretical and technical justifications, thereby failing to resolve the impunity problem. Now, Section 4 seeks to unlock this shut door by using a different key: universal jurisdiction. Though initially understood as a form of domestic jurisdiction, this section defends the position that universal jurisdiction is

75 *Helmers v Sweden*, Application no 11826/85, 29 October 1991, para 29; *Perez v France* [GC], Application no 47287/99, 12 February 2004, para 70; *Atanasova v Bulgaria*, Application no 72001/01, 2 October 2008, para 35.

76 *Sandra Janković v Croatia*, Application no 38478/05, 5 March 2009; para 58; *Beganović v Croatia*, Application no 46423/06, 25 June 2009, paras 80-87, cited by Jeremy McBride, The Case Law of the European Court of Human Rights on Victims' Rights in Criminal Proceedings (Partnership for Good Governance between the Council of Europe and the European Union), para 42 https://rm.coe.int/council-of-europe-georgia-european-court-of-human-rights-case-study-vi/16807823c4.

best understood as a form of *international* criminal jurisdiction.[77] It then finds that jurisdictional immunities are no bar to international criminal jurisdiction. Therefore, it should follow that diplomatic immunities should not preclude States from exercising universal jurisdiction against foreign diplomats for serious crimes under international law. States should be able to prosecute foreign diplomats, taking into consideration the problem of lawfare and diplomatic costs.

4.1 *Universal Jurisdiction as International Criminal Jurisdiction*

Under international law, there are two basic types of State jurisdiction: prescriptive and enforcement. Within the criminal context, prescriptive jurisdiction refers to the power to 'assert the applicability of its criminal law to given conduct, whether by primary or subordinate legislation, executive decree or, in certain circumstances, judicial ruling'.[78] Enforcement jurisdiction, on the other hand, refers to the State's authority to carry out prescribed law,[79] either through the police or other executive body, or through the judiciary.[80]

States may exercise domestic criminal jurisdiction if the following traditional jurisdictional nexus are present: first, territoriality, jurisdiction linked to where the crime took place or took effect; second, nationality, linked to the nationality of the perpetrator; third, passive-personality, linked to the survivor or victim's nationality; and fourth, linked to the State's national interests (the protective principle).[81] Universal jurisdiction, however, can be exercised 'without regard' for whether these links are present.[82] Within this framework

77 Devika Hovell and Mara Malagodi, 'Universal jurisdiction: law out of context' [2024] Modern Law Review.

78 Roger O'keefe, 'Universal Jurisdiction: Clarifying the Basic Concept' [2004] 2(3) Journal of International Criminal Justice, 736. For general definitions of prescriptive jurisdiction, see James Crawford (n 3) 440; Donald R Rothwell, International Law: Cases and Materials with Australian Perspectives (Cambridge University Press 2010) 294.

79 *Ibid*.

80 O'Keefe (n 78) 736.

81 Harvard Research Draft Convention on Jurisdiction with Respect to Crime (1935) 29 AJIL Supp 519; *SS Lotus* (1927) PCIJ Ser A No 10; *The Queen v Klassen*, ILDC 941 (2008); *Nusselein v Belgian State* (1950) 17 ILR 136; *US v Peterson*, 812 F2d 486, 494 (9th Cir, 1987); Crawford (n 3) 441–446; Hannah L Buxbaum, 'Territory, Territoriality, and the Resolution of Jurisdictional Conflict' 57(3) [2009] 57 The American Journal of Comparative Law, 631; Douglas Guilfoyle, International Criminal Law (Oxford University Press 2016) 32–3; Cedric Ryngaert, Jurisdiction in International Law (2nd edn, Oxford University Press 2015) 110–13.

82 The Princeton Principles on Universal Jurisdiction (2001), Principle 1(1); Crawford (n 3) 451; Guilfoyle (n 81) 37; O'Keefe (n 78) 745; Claus Kreß, 'Universal Jurisdiction over International

of State jurisdiction, it is most widely understood as a domestic prescriptive criminal jurisdiction based 'solely on the nature of the crime, without regard to where the crime was committed, the nationality of the alleged or convicted perpetrator, the nationality of the victim, or any other connection to the State exercising such jurisdiction'.[83] The nature of the crime typically concerns serious crimes under international law, including but not limited to piracy, slavery, war crimes, the crime of aggression, crimes against humanity, genocide, and torture.[84] In relation to any of these crimes, it is understood that every State has an interest in exercising its domestic criminal jurisdiction for the purposes of combatting heinous offences that States have universally condemned.[85]

Often, it is understood that universal jurisdiction is exercised by third States, those who have no jurisdictional links whatsoever. However, universal jurisdiction is not necessarily about a lack of jurisdictional links; rather, it concerns the nature of the crime, 'without regard' or *regardless* of any jurisdictional links.[86] Thus, even though a receiving State might identify certain links, it is in theory possible for the State to exercise universal jurisdiction solely on the basis of the nature of the crime, even if the crime took place within the State's territory or against the State's nationals.

A landmark case of universal jurisdiction was *Eichmann*,[87] where the District Court of Jerusalem exercised jurisdiction over Adolf Eichmann for his international crimes during the Holocaust, namely crimes against the Jewish People (akin to genocide) and crimes against humanity.[88] The crimes in question were not mere domestic crimes but 'crimes which offended the whole of mankind and shocked the conscience of nations' – they are 'grave offences against the law of nations itself'.[89] Without an international criminal court at the time, the Court

Crimes and the Institut de Droit international' [2006] Journal of International Criminal Justice, 4.

83 Princeton Principles (n 82), Principle 1(1). For explicit reference to 'domestic' jurisdiction, see Kenneth C Randall, 'Universal Jurisdiction under International Law' [1988] 66 Texas Law Review, 788. For 'prescriptive' reference, see O'Keefe (n 78).

84 Princeton Principles (n 82), Principle 2(1).

85 Randall (n 83) 788.

86 Princeton Principle (n 82), Principle 1(1).

87 *Attorney General v Adolf Eichmann*, (1961) 36 ILR 5.

88 *Ibid.*

89 *Ibid*, paras 12 & 16.

acted for 'the judicial and legislative authorities of every country' to enforce criminal law and punishment.[90]

Since *Eichmann*, the role, nature and scope of universal jurisdiction have enjoyed their fair share of controversy. From a positivistic perspective, it is difficult to identify a concrete legal source for the universal jurisdiction of domestic courts under treaty,[91] custom,[92] or domestic law.[93] On the one hand, in the *Arrest Warrant* case, the majority of the International Court of Justice found there to be no treaty or customary exception to the rule of inviolability and immunity of incumbent officials from domestic criminal jurisdictions.[94] In their separate opinion, Judges Higgins, Kooijmans and Buergenthal opined that there was not yet a customary basis for universal jurisdiction.[95] On the other hand, in the *Malawi* decision, the Pre-Trial Chamber of the International Criminal Court found that 'customary international law creates an exception to Head of State immunity when international courts seek a Head of State's arrest for the commission of international crimes'.[96] Against this backdrop, there is further debate as to whether States

90 *Ibid*, paras 12-13, citing Corpus Juris Civilis, C 3, 15, "ubi de criminibus agi oportet"; Donnedieu de Vabres Les Principes Modernes du Droit Penal International, 1928, p 136; Blackstone (n 60) 68.

91 Devika Hovell, 'The Authority of Universal Jurisdiction' [2018] 29(2) The European Journal of International Law, 432: ('The source of jurisdiction does not derive ultimately from the treaty obligation but from a deeper sense that certain crimes are justifiably of broader concern such that third states are justified in prosecuting them'). Furthermore, one can see how universal jurisdiction cannot be explained by treaty law for genocide or crimes against humanity because of lack respective provisions.

92 *Arrest Warrant* Case (n 58), Separate Opinion of Judges Higgins, Kooijmans, and Buergenthal.

93 Hovell (n 91), 431: ('It is clear that the claim to universal jurisdiction is not made against those within the domestic legal community but, instead, is a claim to authority in relation to states, individuals and normative communities external to it').

94 *Arrest Warrant* Case (n 58), para 58.

95 *Arrest Warrant* Case (n 58), Separate Opinion of Judges Higgins, Kooijmans, and Buergenthal, para 52.

96 *The Prosecutor v Omar Hassan Ahmad Al-Bashir*, Decision pursuant to Article 87(7) of the Rome Statute on the failure by the Republic of Malawi to comply with the cooperation requests issued by the Court with respect to the arrest and surrender of Omar Hassan Ahmad Al-Bashir, Case no ICC-02/05-01/09-139, ICL 1568 (ICC 2011), Pre-Trial Chamber I, para 43. But also see the later *Al-Bashir* cases, which contain revised positions: *The Prosecutor v Omar Hassan Ahmad Al-Bashir*, Decision on the Cooperation of the Democratic Republic of the Congo Regarding Omar Al Bashir's Arrest and Surrender to the Court, Case no ICC-02/05-01/09-195, 9 April 2014, Pre-Trial Chamber II; and *The Prosecutor v Omar Hassan Ahmad Al-Bashir*, Decision on the Situation in Darfur, Case no ICC-02/05-01/09-397, 6 May 2019, Appeals Chamber.

may exercise universal jurisdiction *in absentia*.[97] In sum, as it stands today, there is no clear consensus between States on the nature and scope of universal jurisdiction.[98] Nevertheless, universal jurisdiction continues to develop through its application and quiet expansion for over 80 years, through judicial trials against low-level foreign officials.[99]

To better understand universal jurisdiction, Hovell proposes that, instead of shoehorning universal jurisdiction into a positivistic framework of international law, one ought to conceptualize universal jurisdiction in light of the normative community on whose behalf it is exercised.[100] Upon surveying 52 post-*Eichmann* cases between 1961 and 2017, Hovell found that 27 out of 52 universal jurisdiction cases were primarily exercised on behalf of the victim community; 19 cases were on behalf of the international community; 5 on behalf of the domestic community; and 1 on behalf of the interstate community.[101] Based on these findings, Hovell argued that universal jurisdiction should be understood as 'being based in an individual's right of access to justice for victims of serious international crimes'.[102] Although this conclusion omits the other significant motivations,[103] a more holistic conclusion was recently proposed by Hovell and Malagodi. In their view, a complete understanding of universal jurisdiction is not that it serves one particular normative community but that it serves multiple.[104] From this harmonized polycentric perspective, their position is that universal jurisdiction is 'essentially a licence granted by the *inter-state community* to universalise the

97 *Arrest Warrant* Case (n 58), Separate Opinion of President Guillaume; Antonio Cassese, 'Is the Bell Tolling for Universality? A Plea for a Sensible Notion of Universal Jurisdiction' [2003] 1(3) Journal of International Criminal Justice, 592; O'Keefe (n 78).

98 General Assembly, Seventy-Eighth Session, 12th Meeting, Debate Reveals Rift in Speakers' Understanding of Universal Jurisdiction Scope, Application, as Sixth Committee Takes Up Report on Principle (2023).

99 Máximo Langer and Mackenzie Eason, 'The Quiet Expansion of Universal Jurisdiction' [2019] 30(3) The European Journal of International Law; Máximo Langer, 'Universal Jurisdiction is Not Disappearing: The Shift from "Global Enforcer" to "No Safe Haven" Jurisdiction' [2015] 13 Journal of International Criminal Justice.

100 Hovell (n 91).

101 *Ibid* 456.

102 *Ibid* 455.

103 The concluding argument omitted the significant motivation of serving the international community. See Introduction to The Princeton Principles on Universal Jurisdiction (n 82), 23–24: ('When national courts exercise universal jurisdiction appropriately, in accordance with internationally recognized standards of due process, they act to vindicate not merely their own interests and values but the basic interests and values common to the international community').

104 Hovell and Malagodi (n 77) 11.

right of access to justice for *victim communities*… to prosecute certain heinous crimes of concern to the *international community*'.[105] Flowing from this definition, 'a coherent theory of universal jurisdiction is achievable if this form of jurisdiction is understood, not as a form of domestic jurisdiction dependent on State will expressed through treaty or custom, but as a form of international jurisdiction attaching to international crimes'.[106]

This theory is quite persuasive. First, in *Eichmann,* the District Court of Jerusalem made the following statement in support of universal jurisdiction: 'in the absence of an International Court, the international law is in need of the judicial and legislative authorities of every country, to give effect to its penal injunctions and to bring criminals to trial'.[107] The Court was effectively licensing an international form of jurisdiction at the domestic level to give effect to individual criminal responsibility. Second, despite the institutionalization of an international criminal court, domestic courts remain at the forefront of international criminal justice. The International Criminal Court is only a forum of last resort, available where a State which has jurisdiction is either unable or unwilling to investigate or prosecute the suspect in question.[108] The 'primary burden of prosecuting the alleged perpetrators' is still on the 'national legal systems'.[109] Domestic courts therefore continue to play a vital role in the trial and punishment of perpetrators of serious crimes under international law.[110] In light of a 'justice cascade',[111] this decentralization of international criminal justice likely bolsters the quiet expansion of universal jurisdiction as an even quieter expansion of international criminal jurisdiction at the domestic plane.

To view universal jurisdiction as an international form of jurisdiction, however, is not to say that domestic courts would thereby have the same nature of jurisdiction as international courts or tribunals. Nor is it to say that international courts and tribunals have universal jurisdiction – they do not.

105 *Ibid.*

106 *Ibid*, 3.

107 *Eichmann* (n 87), para 12.

108 *Rome Statute of the International Criminal Court* (*last amended 2010*), ISBN No. 92-9227-227-6, UN General Assembly, 17 July 1998, Article 17.

109 Introduction to the Princeton Principles (n 82) 24.

110 Rome Statute (n 108) Preamble, Article 1: ('The International Criminal Court… shall be complementary to national criminal jurisdictions'). This article recognizes, however, that domestic courts did not always have primacy. See *1993 Statute of the International Criminal Tribunal for the Former Yugoslavia* (*as amended on 17 May 2002*), Article 9(2); *1994 Statute of the International Criminal Tribunal for Rwanda* (*as last amended on 13 October 2006*), Article 8(2).

111 Kathryn Sikkink, The Justice Cascade (1st edn, WW Norton & Co 2011).

The point is that the form of universal jurisdiction is best informed by its nature, in light of the normative community that it serves. Since universal jurisdiction evidently serves to prosecute perpetrators of international crimes on behalf of victims and the international community as a whole, without need of the traditional bases for State jurisdiction, it is best understood as an international form of jurisdiction.

Notably, it begs the question whether States can exercise universal jurisdiction without express domestic legislation to that effect.[112] To some extent, this issue is likely a matter of domestic law. Nevertheless, it is worth reiterating that universal jurisdiction is also prescriptive, not to mention being based solely on the nature of the crime itself.[113] In *Eichmann*, the Court applied the Nazis and Nazi Collaborators (Punishment) Law 5710–1950,[114] which prescribed provisions on international crimes, without needing any further procedural rules. So long as the substantive provisions on the impugned international crimes are either automatically or otherwise prescribed as law, a corresponding international jurisdiction of relevant domestic courts to apply and give effect to such law should then follow.

In sum, universal jurisdiction is not simply a form of domestic jurisdiction, to be grouped alongside the traditional bases of State jurisdiction. A better understanding would be that it is a license, bestowed upon States by the inter-State community, to apply and give effect to what is prescribed by international criminal law, at the domestic level, on behalf of victims and the international community as a whole. In other words, it is best to describe universal jurisdiction as a form of international criminal jurisdiction in a domestic forum.

4.2 *International Criminal Jurisdiction and Jurisdictional Immunities*

The question, then, is why it matters whether universal jurisdiction is an international criminal jurisdiction. The answer is quite simple: the prescribed law of diplomatic immunities operates as a procedural bar to *domestic*, not international, jurisdiction.[115] Thus, if universal jurisdiction is understood as a form of international jurisdiction, albeit in a domestic forum, the implication

112 Diplomatic Privileges Act 1964 (c 81); Diplomatic Relations Act of 1978, Pub L 95-393, 92 Stat 808; Foreign Missions and International Organizations Act, SC 1991, c 41.

113 Princeton Principles (n 82), Principle 1(1); Claus Kreß (n 82); Crawford (n 3) 451; Guilfoyle (n 81) 37; and O'Keefe (n 78) 745.

114 *Eichmann* (n 87) para 181.

115 Diplomatic Privileges Act 1964; VCDR (n 3) Article 31; UNCSM (n 7) Article 31. Also see *Al-Bashir* (n 95) Appeals Chamber, para 1: ('There is neither State practice nor *opinio juris* that would support the existence of Head of State immunity under customary international law

is that a receiving State, and other States, would be entitled to prosecute a foreign diplomat for their serious crimes under international law.

The first tribunals to exercise international criminal jurisdiction were the Nuremberg and Tokyo Military Tribunals. Though they were not international tribunals *per se*, they took on a role akin to an international court, applied international law, and operated to prosecute and punish perpetrators of international crimes during the Holocaust, based on an amalgamation of passive-personality, protective, and universal jurisdiction.[116] For the purposes of combatting impunity for the individuals responsible for the Second World War, namely the crime against peace, the Charters of these Military Tribunals provided that the status of a perpetrator is no bar to their prosecution and punishment.[117]

The same can be said for *ad hoc* tribunals, namely the International Criminal Tribunals for the Former Yugoslavia and for Rwanda. Based on their respective Statutes, it was clearly understood that any perpetrator falling within the jurisdiction of the tribunals would be prosecuted for their alleged international crimes, no matter their personal status.[118] Immunities were no bar to their jurisdiction. Likewise, hybrid tribunals, such as the Special Court for Sierra Leone, operate without any hindrance from the law of jurisdictional immunities.[119] Currently, within the permanent regime under the Rome Statute, it is again well-established that the status of the perpetrator cannot act as a procedural bar from their prosecution.[120] Notably, this form of jurisdiction is not restricted to international or internationalized courts or tribunals. The International Crimes Tribunal in Bangladesh is an example of how a *domestic* forum can operate as a vehicle for international criminal justice, regardless of the alleged perpetrator's personal status.[121]

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vis-à-vis an international court. To the contrary, such immunity has never been recognised in international law as a bar to the jurisdiction of an international court').

116 Kevin Jon Heller, The Nuremberg Military Tribunals and the Origins of International Criminal Law (Online edn, Oxford Academic 2011), 107–138.

117 *Charter of the International Military Tribunal* (1945), Article 7; *Charter of the International Military Tribunal for the Far East* (1946), Article 6; *Nuremberg judgment* [1946] 22 IMT 203, 56: ('He 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').

118 ICTY Statute (n 110), Article 7(2); ICTR Statute (n 110), Article 6(2).

119 *2000 Statute of the Special Court for Sierra Leone*, Article 6(2); *Prosecutor v Charles Ghankay Taylor,* SCSL-03-1-T, Special Court for Sierra Leone, 18 May 2012.

120 Rome Statute (n 108), Article 27.

121 The International Crimes (Tribunals) Act 1973 (Act No. XIX of 1973), s 3(1): ('The Tribunal shall have the power to try and punish any individual or group of individuals, or any member of any armed, defence or auxiliary forces, irrespective of his nationality, who

A key implication of these examples is that international jurisdiction is not restricted to international fora. There is no reason why a domestic court, as a result, could not exercise such a form of jurisdiction as a domestic forum for international criminal justice. Though the concept of jurisdiction is largely expressed by treaty law, these treaties reflect a wider international norm: that international, hybrid, internationalized, and domestic courts or tribunals can entertain and make decisions on proceedings concerning international crimes, notwithstanding the personal status of an alleged perpetrator. In accordance with this norm, States and their domestic courts could thereby prosecute foreign diplomats for international crimes.

In sum, individual criminal responsibility can be imposed by courts and tribunals of various legal systems. This section puts together two interdependent premises: first, universal jurisdiction is a license, bestowed upon States, in the form of international criminal jurisdiction; and second, international criminal jurisdiction can be exercised by a domestic court over anyone, regardless of what immunities they may enjoy against domestic forms of jurisdiction. Based on these premises, it follows that diplomatic immunities should not procedurally bar receiving States (or other States) from exercising universal jurisdiction over foreign diplomats for serious crimes under international law.

4.3 *Questions of Lawfare and Diplomacy*

Understandably, even if a receiving State could exercise jurisdiction, it is an entirely separate and important question whether that State *should* exercise it. In this regard, the predominant position is one of caution. Perhaps the most cautious, however, was Henry Kissinger. In his view, 'any universal system should contain procedures not only to punish the wicked but also to constrain the righteous' and, thereby, 'must not allow legal principles to be used as weapons to settle political scores'.[122] He argues *Ex Parte Pinochet*[123] sets a bad

commits or has committed, in the territory of Bangladesh, whether before or after the commencement of this Act, any of the crimes mentioned in sub-section (2)'). Also, see s 5(1): ('The official position, at any time, of an accused shall not be considered freeing him from responsibility or mitigating punishment').

122 Henry Kissinger, 'The Pitfalls of Universal Jurisdiction [2001] 80(4) Council of Foreign Relations, 88. Also see Lord Browne-Wilkinson's reasons for his dissent from the Princeton Principles (n 82): ('zealots in Western States might launch prosecutions against, for example, Islamic extremists for their terrorist activities. It is naïve to think that, in such cases, the national state of the accused would stand by and watch the trial proceed: resort to force would be more probable. In any event the fear of such legal actions would inhibit the use of peacekeeping forces when it is otherwise desirable and also the free interchange of diplomatic personnel').

123 [1998] UKHL 41 (n 15).

precedent, allowing 'any magistrate' to demand extradition and subject an accused to procedural rules that violate human rights; and, furthermore, allowing any magistrate to bring an accused into procedural rules designed for ordinary crimes.[124] In other words, in the eyes of Kissinger, universal jurisdiction is prone to the risk of lawfare. There are many ways to respond to this concern. First, regarding Pinochet: he was not prosecuted for political reasons, such as leading a coup against an elected leader, but rather because he was responsible for the murder, forced disappearance, and torture of thousands of people.[125] Second, more broadly, the fear over lawfare fails to recognize the fact that victims are the primary drivers of universal jurisdiction, not States.[126] Currently, there is no State practice indicating an eagerness to exercise universal jurisdiction, particularly over high-status officials.[127]

Despite lawfare being overblown, receiving States should nevertheless be careful enough to consider a variety of possible diplomatic costs before deciding to prosecute a person of high official status.[128] In this regard, Hovell and Malagodi provide holistic criteria for consideration, including the international consensus as to the seriousness of the crime; the victim or victim organizations' desire for access to justice; the risk of impunity; the location of the accused; the effective administration of justice; the vulnerability and security of victims and witnesses; the standing, reputation, and diplomatic costs in international relations; and the affordability of prosecution.[129] Though the consideration of these criteria would necessarily affect whether a State has universal jurisdiction over a diplomat, they would nevertheless assist courts in making an informed decision, on a case-by-case basis, over whether it is appropriate to exercise such jurisdiction.

If universal jurisdiction, being a form of international jurisdiction, could be exercised against a diplomat, it may follow that the same is true for incumbent Heads of States. However, the key distinction is in costs. It is one thing to arrest a diplomat but another to arrest, prosecute, or imprison the highest

124 Kissinger (n 122) 90–91.

125 Kenneth Roth, 'The Case for Universal Jurisdiction' [2001] 80(5) Council on Foreign Relations, 153.

126 Hovell and Malagodi (n 77) 16; Hovell (n 91), 455; Frédéric Mégret, 'The 'elephant in the room' in debates about universal jurisdiction: diasporas, duties of hospitality, and the constitution of the political' [2015] 6(1) Transnational Legal Theory.

127 Máximo Langer, 'The Diplomacy of Universal Jurisdiction: The Political Branches and the Transnational Prosecution of International Crimes' [2011] 105 American Journal of International Law.

128 *Ibid*.

129 Hovell and Malagodi (n 77) 18.

leader of a foreign State. There would likely be severe implications for international relations if an incumbent foreign Head of State were punished by a domestic court. Thus, even if States had universal jurisdiction over current Heads of States for serious crimes under international law, it would rarely, if ever, be appropriate for a domestic court to exercise such jurisdiction in those circumstances.

5 Conclusion

This article has shown that the law of diplomatic immunities operates in a manner that enables impunity for diplomats, even if they commit serious crimes under international law. The lack of an exception to this rule is excessive and unjustified. The theories of sovereign representation, extraterritoriality, and functional necessity fail to adequately resolve the problem of diplomatic impunity; and the technical justification is founded on a false substance-procedure dichotomy. The very foundations of diplomatic law are shaken, particularly in relation to the well-established aims of international criminal justice. Thus, this article invites scholars and courts to more directly challenge the absoluteness of diplomatic immunity from criminal jurisdictions.

To overcome the seemingly insurmountable problem of diplomatic impunity, this article then took a step back and assessed the strategies for continuing the fight against impunity. No avenue seems to capture the essence of international criminal justice as much as universal jurisdiction. Despite its hurdles before the International Court of Justice, and scholarly criticism, it remains relevant today as a means for *any State* (including the receiving State) to surmount the wall of diplomatic immunities and bring perpetrators before an international criminal jurisdiction exercised by domestic courts. Thus, even at the face of a seemingly immovable force, there is still a way to protect the most fundamental norms of international law. Still, as the expansion of universal jurisdiction is on a delicate balance, States should not hastily resort to prosecutions without considering the possible diplomatic costs. But if a State is willing to deal with the cost, universal jurisdiction could serve as a useful tool for jurists in the global fight against impunity.