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PEDIGREE PROSECUTION: SHOULD A HEAD OF STATE'S FAMILY MEMBERS BE ENTITLED TO IMMUNITY IN FOREIGN COURTS?

*Yena Hong**

States tread carefully in international affairs to maintain mutual respect for sovereignty. In today's legal order, a head of state is the sovereign state personified. Until the twentieth century, heads of state did not routinely travel outside of their respective domains. Consequently, mutual respect for foreign sovereigns was usually implemented in national courts by recognition of immunity for diplomats and public vessels—paradigmatically, warships. Today, heads of state often travel to other countries, and it is increasingly accepted as customary international law that a head of state cannot be sued or prosecuted in a foreign court on the basis of any of his or her acts, public or private. To permit such prosecution or litigation would invite reciprocal retaliation and ultimately risk a breakdown of relations between the countries involved.

But should a head of state's family members also have absolute immunity in foreign countries, particularly for private acts with no plausible connection to official functions? Despite progress in crystallizing the scope of customary international law of head-of-state immunity, there is scant discussion regarding the international law basis of immunity for members of a head of state's family. Some states have invoked the Vienna Convention on Diplomatic Relations (VCDR) to grant head-of-state family members "diplomatic immunity" from local prosecution or litigation. Such action seems plausible when, for instance, first ladies or other family members are accompanying heads of state on official visits or are themselves performing an official act in visiting a foreign nation. Yet, there are many instances involving a head of state's family members in foreign countries that have nothing to do with official business—such as sightseeing, shopping, or studying. In many notable cases involving similar personal business, host nations have accorded a head of state's family members immunity for the sake of diplomacy, though they often invoke a legal basis like the VCDR.

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*This Note distinguishes between two types of immunity for a head of state's family members: absolute immunity *ratione personae* and qualified immunity *ratione materiae*. On the one hand, absolute immunity *ratione personae* covers both private and official acts that a state official commits during his or her term in office. Qualified immunity *ratione materiae*, on the other hand, covers only those acts that are official and not private. This Note proposes that the international community should limit foreign immunity for a head of state's family members to qualified immunity *ratione materiae*. There will often be compelling reasons to allow a head of state's family member to exit and escape prosecution or litigation for private acts. There is, however, no legal basis for immunity in such cases, and suggesting that there is only serves to dilute head-of-state immunity more generally and wreak havoc in the development of relevant international law.*

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INTRODUCTION

On Saturday, August 12, 2017, Gabriella Engels, a South African model, went to the Taboo nightclub in Sandton, Gauteng, South Africa, with her two girlfriends.¹ While at the nightclub, another of Engels's friends introduced the women to Chatunga Bellarmine Mugabe and his brother Robert Mugabe Jr.,² who are the sons of Zimbabwe's former President Robert Mugabe and

1. Khanyi Ndabeni, *First Lady Grace Mugabe 'Was Ready to Murder,'* SUNDAY TIMES (Aug. 20, 2017, 12:02 AM), <https://www.timeslive.co.za/sunday-times/news/2017-08-19-first-lady-grace-mugabe-was-ready-to-murder/> [<https://perma.cc/YT7L-PL8N>] ("Engels and her two friends were celebrating a 21st birthday.").

2. *Id.*

first lady Grace Mugabe.³ Engels and her two girlfriends left the nightclub after getting into an argument with some acquaintances of the Mugabe brothers.⁴

According to news reports, the next day, Engels's friend apologized for the previous night's argument and invited the three women to come by the Capital 20 West, a hotel in Sandton.⁵ This was the same hotel at which the Mugabe brothers were staying,⁶ but the three women had no interaction with them that day.⁷ Fifteen minutes after Engels and her two girlfriends arrived at a room in the hotel, Grace Mugabe stormed into the room to look for her two sons.⁸ Instead, Grace Mugabe found Engels and confronted her about the whereabouts of her sons.⁹ When Engels could not give her an answer, Grace Mugabe proceeded to whip Engels with an extension cord.¹⁰ The attack lasted approximately twenty minutes,¹¹ during which Grace Mugabe's ten bodyguards stood by and watched.¹² Engels needed fourteen stitches to close up the gashes on her face and her scalp caused by Grace Mugabe's assault.¹³

3. *Id.* Zimbabwe's former President Robert Mugabe resigned on Tuesday, November 21, 2017, ending his "37 years of autocratic rule, finally succumbing to the pressure of a military takeover and the humiliation of impeachment." David McKenzie et al., *Robert Mugabe Resigns After 37 Years as Zimbabwe's Leader*, CNN (Nov. 21, 2017, 6:16 PM), <http://www.cnn.com/2017/11/21/africa/robert-mugabe-resigns-zimbabwe-president/index.html> [<https://perma.cc/9UA7-LLZM>].

4. Ndabeni, *supra* note 1.

5. *Id.* It is unclear who this "friend" was who apologized to Engels and her two girlfriends. The three women had also left behind a jacket when they left the Taboo nightclub the previous night, and this same "friend" invited the women to the hotel to return the jacket. *Id.*

6. *Id.*

7. *Id.*

8. *Id.* ("We had no interaction with the Mugabe brothers at all on Sunday," said Engels's friend. "We were literally there for 15 minutes. The only thing we managed to do was smoke a cigarette on the balcony. Then our friend asked us to turn off the music. Someone important was coming.") See generally Jan Bornman, *Exclusive: Pictures Reveal Inside Story of Grace Mugabe's Hotel Rampage*, TIMES LIVE (Aug. 22, 2017, 1:55 PM), <https://www.timeslive.co.za/news/south-africa/2017-08-22-exclusive-pictures-reveal-inside-story-of-grace-mugabes-hotel-rampage/> [<https://perma.cc/LNX7-E3HK>] (explaining that the bodyguards of Grace Mugabe's two sons were the ones who informed her of their disruptive behavior at the hotel).

9. Ndabeni, *supra* note 1.

10. *Id.* ("She dragged me by my hair and held me tight. She slashed me viciously with the electrical cord. She then dragged me by my hair across the floor and threw me on a couch where she forced me to call our mutual friend and Bellarmine's best friend, but their phones were off. She continued beating me with the cord; I was rescued by the hotel manager, who rushed to the room after hearing my screams for help.")

11. *Id.*

12. Jeffrey Moyo, *Zimbabwe's First Lady Said to Seek Diplomatic Immunity over Assault Claim*, N.Y. TIMES (Aug. 16, 2017), <https://www.nytimes.com/2017/08/16/world/africa/grace-mugabe-model.html> [<https://perma.cc/HPS4-FJ4M>].

13. Jane Flanagan, *'I Thought I Was Going to Die': Young Model Tells of Terror as Blood Streamed Down Her Face After 'Raging Robert Mugabe's Wife Savagely Beat Her with an Electric Plug'*, DAILY MAIL (Aug. 16, 2017, 2:49 AM), <http://www.dailymail.co.uk/news/article-4793626/I-thought-going-die-Model-tells-terror.html> [perma.cc/8YLC-3XZQ].

At the Sandton police station the following day, Engels filed “a case of assault with intent to cause grievous bodily harm” against Grace Mugabe.¹⁴ Grace Mugabe was expected to appear in South African court the next day, but she was not arrested and did not surrender herself to South African police.¹⁵ The South African police minister, Fikile Mbalula, placed the border police on “red alert” in an attempt to prevent Grace Mugabe from leaving the country.¹⁶ Nevertheless, she was able to flee South Africa on an Air Zimbabwe plane, scot-free.¹⁷

Grace Mugabe was not a diplomatic agent on an official mission to South Africa, nor was she acting in an official capacity as a state official when she whipped Engels and left her with gashes. Grace Mugabe was acting in her private function as a mother of two misbehaving adult sons.¹⁸ Yet, South Africa’s Foreign Minister Maite Nkoana-Mashabane stated that she had granted Grace Mugabe diplomatic immunity “in the interests of South Africa.”¹⁹ South Africa’s government extended Grace Mugabe the privilege of avoiding its criminal jurisdiction through the guise of “diplomatic immunity” to protect the wife of a regional ally’s leader from prosecution rather than “enforc[e] international and domestic criminal law.”²⁰

While customary international law governs the immunity of a head of state or state official,²¹ the source of immunity of members of a head of state’s

14. Nico Gous, *Alleged Grace Mugabe Assault Victim Offered Blank Cheque*, TIMES LIVE (Aug. 17, 2017, 5:09 PM), <https://www.timeslive.co.za/news/south-africa/2017-08-17-alleged-grace-mugabe-assault-victim-offered-blank-cheque/> [<https://perma.cc/9RND-RJVH>].

15. *Id.*

16. Matthew Weaver, *South African Police Issue ‘Red Alert’ to Stop Grace Mugabe from Leaving*, GUARDIAN (Aug. 17, 2017, 10:12 AM), <https://www.theguardian.com/world/2017/aug/17/south-africa-police-red-alert-grace-mugabe-zimbabwe> [<https://perma.cc/ZG8C-Y2GD>].

17. Associated Press, *Grace Mugabe Flies Home to Zimbabwe with Diplomatic Immunity*, GUARDIAN (Aug. 20, 2017, 2:12 PM), <https://www.theguardian.com/world/2017/aug/20/grace-mugabe-granted-diplomatic-immunity-after-alleged-attack> [<https://perma.cc/RTH5-XB3U>].

18. See *infra* Part II.B. Grace Mugabe’s two sons are infamous for their misbehavior. See Frank Chikowore, *Watch: Mugabe’s Son Exposes Lavish Lifestyle in a Video*, NEWS24 (Aug. 12, 2017, 7:36 AM), <http://www.news24.com/Africa/Zimbabwe/watch-mugabes-son-exposes-lavish-lifestyle-in-a-video-20170812> [<https://perma.cc/BU7F-GDZV>] (“Chatunga and his brother Robert Jnr were known for partying and were recently kicked out of a luxurious apartment in the leafy suburb of Sandton in Johannesburg for their ‘unacceptable behavior.’”); Govan Whittles & Simon Allison, *Zim’s Disgraceful First Family*, MAIL & GUARDIAN (Aug. 18, 2017, 12:00 AM), <https://mg.co.za/article/2017-08-18-00-zims-disgraceful-first-family> [<https://perma.cc/AJ3N-8LSB>] (“The brothers, who [do not] work, live in a Sandton apartment (they were kicked out of another one in April after being involved in a violent brawl. That one reportedly cost them more than R70 000 a month). They are regulars in Jo’burg’s most upmarket clubs, where they order top-end alcohol and pick up the tab for entourages of up to 20 people. . . . They know . . . rules [do not] apply to them.”).

19. See Jeffrey Moyo, *Grace Mugabe Wins Diplomatic Immunity After Assault Accusations*, N.Y. TIMES (Aug. 20, 2017), <https://www.nytimes.com/2017/08/20/world/africa/grace-mugabe-assault-model.html> [<https://perma.cc/4EHB-N9KN>].

20. *Id.*

21. See Roman Anatolevich Kolodkin (Special Rapporteur on Immunity of State Officials from Foreign Criminal Jurisdiction), *Preliminary Report on Immunity of State Officials from Foreign Criminal Jurisdiction*, para. 33, U.N. Doc. A/CN.4/601 (May 29, 2008).

family is international comity.²² “International comity,” in the relevant sense, is deference to foreign sovereigns beyond what is plainly required by law.²³ This deference is an essential feature of harmonious relations among nations.²⁴ However, such deference should not extend to immunity for family members of a head of state’s family for acts that were committed in a private capacity without any connection to official duties. To say or even to imply that such immunity applies as a matter of law risks undermining the important function that head-of-state immunity plays in international affairs by divorcing it entirely from functional justification.

This Note asserts that while heads of state are entitled to absolute immunity *ratione personae*,²⁵ their family members are entitled to qualified immunity *ratione materiae*:²⁶ immunity for official functions only. The following discussion supporting this assertion proceeds in three Parts. Part I explores the concepts of absolute immunity *ratione personae* and qualified immunity *ratione materiae* as they apply to the immunities of a head of state and a diplomatic agent of the state. Part II presents case studies reflecting how states have both limited and granted immunity to family members of heads of state. Part III proposes that immunity should not be granted to members of a head of state’s family for acts that do not fall within the curtilage of head-of-state functions, and it explains that not extending such immunity will neither hamper head-of-state functions nor undermine the sovereignty of the affected state.

I. THE QUALIFIED IMMUNITY *RATIONE MATERIAE* OF A HEAD OF STATE AND A DIPLOMATIC AGENT

Treaties govern diplomatic and consular immunities, but customary international law is the source for immunity of heads of state and other state officials from foreign jurisdiction.²⁷ For a practice to be established as customary international law, the practice must be widespread and uniform among the states, and states must believe that the practice is mandatory as a matter of law—that is, *opinio juris*.²⁸ Once a practice is established as customary international law, “it is universally binding on all states” that do not persistently object to the practice.²⁹

22. See *id.* para. 36; see also *infra* note 126 and accompanying text.

23. See Kolodkin, *supra* note 21, paras. 35–36.

24. See, e.g., Michael A. Tunks, *Diplomats or Defendants?: Defining the Future of Head-of-State Immunity*, 52 DUKE L.J. 651, 657 n.31 (2002).

25. See *infra* Part I.A. Absolute immunity *ratione personae*, often known as personal immunity, covers both private and official acts that a state official commits during his or her term in office. Kolodkin, *supra* note 21, para. 79.

26. See *infra* Part I.A. Qualified immunity *ratione materiae*, often known as functional immunity, covers only those acts that a state official performs in his or her official capacity. Kolodkin, *supra* note 21, para. 80.

27. Kolodkin, *supra* note 21, para. 33 (“The fact that the source of immunity from foreign jurisdiction is customary international law is noted in rulings of national courts.”).

28. JOHN H. CURRIE ET AL., *INTERNATIONAL LAW: DOCTRINE, PRACTICE, AND THEORY* 121 (2007).

29. *Id.* at 120.

The doctrine of immunity, however, originated from the concept of sovereignty in a domestic context.³⁰ When French philosopher Jean Bodin coined the term “sovereignty” in 1576, his definition embraced the idea that “kings were sovereign within their territories” (i.e., the highest authority), with only God as superior to the king.³¹ As sovereign nations formed and interacted with each other in early modern Europe, the idea developed an international dimension—“a sovereign became immune within his territory and without.”³² The rationale for sovereign immunity “was expressed in the maxim *par in parem non habet imperium*: equals cannot exercise authority over each other.”³³ Over time, sovereign immunity became “generally referred to as state immunity”³⁴ but the underlying rationale remained the same.³⁵ Thus, state immunity has served as a doctrine to protect a state’s sovereignty by preventing other states from subjecting its property or interests to lawsuits in their own domestic courts.³⁶

Questions of sovereign immunity in foreign courts were initially presented in lawsuits involving diplomats (e.g., ambassadors and consuls) and public property, such as ships.³⁷ In the age of sail, heads of state did not travel abroad, or, at least, they did not travel to foreign jurisdictions where they might potentially be sued.³⁸ A diplomatic representative had immunity under the theory that “diplomats acting on behalf of a sovereign state embody the ruler of that state.”³⁹ It followed that the ruler him or herself was, as the personification of the state, necessarily immune from legal proceedings in a foreign court.⁴⁰

At first, immunity with respect to foreign officials was based on his or her personal status—absolute immunity *ratione personae*.⁴¹ However, as the international community moved to the “restrictive” view of state immunity

30. See YITIHA SIMBEYE, IMMUNITY AND INTERNATIONAL CRIMINAL LAW 93 (2004).

31. *Id.* at 93 n.10.

32. *Id.* at 93; *see also id.* at 105–06 (explaining a king’s absolute immunity).

33. *Id.* at 93.

34. *See id.*

35. Brian Man-ho Chok, *Let the Responsible Be Responsible: Judicial Oversight and Over-Optimism in the Arrest Warrant Case and the Fall of the Head of State Immunity Doctrine in International and Domestic Courts*, 30 AM. U. INT’L L. REV. 489, 496 (2015) (“[T]he rationale for state immunity originates from the idea of *par in parem non habet imperium*.”).

36. See ROSANNE VAN ALEBEEK, THE IMMUNITY OF STATES AND THEIR OFFICIALS IN INTERNATIONAL CRIMINAL LAW AND INTERNATIONAL HUMAN RIGHTS LAW 67 (2008).

37. *See generally* The Schooner Exch. v. McFaddon, 11 U.S. (7 Cranch) 116 (1812).

38. *Cf.* Stephen L. Wright, *Diplomatic Immunity: A Proposal for Amending the Vienna Convention to Deter Violent Criminal Acts*, 5 B.U. INT’L L.J. 177, 194 n.99 (1987) (explaining that monarchs sent diplomats as a primary means of communication between states, but a given monarch would be reluctant to “send its diplomats abroad without immunity because its absence would permit other powers to interfere with the diplomat’s conduct and thus hinder his ability to communicate”).

39. Mitchell S. Ross, *Rethinking Diplomatic Immunity: A Review of Remedial Approaches to Address the Abuses of Diplomatic Privileges and Immunities*, 4 AM. U. J. INT’L L. & POL’Y 173, 177 (1989).

40. *See* SIMBEYE, *supra* note 30, at 94.

41. SATOW’S DIPLOMATIC PRACTICE § 12.3 (Sir Ivor Roberts ed., 6th ed. 2009).

doctrine,⁴² the basis for granting jurisdictional immunity shifted from absolute immunity *ratione personae* to qualified immunity *ratione materiae*—functional immunity that attaches only to the extent that the immunity-holder is performing an official function.⁴³

This Part explores functional immunity as it applies to the immunity of a head of state and a diplomatic agent. Part I.A examines the difference between absolute immunity *ratione personae* and qualified immunity *ratione materiae* and discusses acts that are covered by the latter. Part I.B outlines how qualified immunity *ratione materiae* applies in granting a head of state immunity to ensure that the official functions of the head of state are not impeded and that respect for state sovereignty is maintained. Part I.C then explains how qualified immunity *ratione materiae* applies in granting diplomatic immunity to ensure that the official functions of the diplomatic agent are not impeded.

A. *Two Types of Immunity: Absolute Immunity Ratione Personae and Qualified Immunity Ratione Materiae*

There are two types of immunity for heads of states and diplomats: immunity *ratione personae* and immunity *ratione materiae*.⁴⁴ The oldest type of immunity that exists is immunity *ratione personae*, and it is absolute.⁴⁵ It relates to the individual⁴⁶ as it “attaches to the person in question by virtue of [his or her] office.”⁴⁷ Immunity *ratione personae* is absolute in that it covers “acts performed by a State official in both an official and a private capacity, both before and while occupying his [or her] post.”⁴⁸ Such immunity is temporary in character; it only “becomes effective when the official takes up his [or her] post and ceases when he [or she] leaves [the]

42. See Tunks, *supra* note 24, at 655. Throughout the eighteenth and nineteenth centuries, there was a clear boundary between acts of a state and those of private citizens in commerce because “states tended to stay away from private acts of trade and commerce.” SIMBEYE, *supra* note 30, at 97. As states became increasingly involved in trade over time, this line became blurred as “acts that belonged to the private sphere . . . were now being attributed to the state.” *Id.* As a result, a state’s “[a]bsolute immunity became . . . increasingly inappropriate” as it placed governmental organizations in an “extremely unfair position” over private citizens. *Id.* During the twentieth century, “to ensure that commercial governmental agencies and private citizens were placed on an equal footing,” states applied the restrictive state-immunity doctrine to determine which state acts were entitled to immunity. *Id.* Under the restrictive state-immunity doctrine, a state’s public acts (acts *jure imperii*) were entitled to immunity, while a state’s private acts (acts *jure gestionis*) were not. *Id.* By the middle of the twentieth century, states in Western Europe, except the United Kingdom, applied the restrictive state-immunity doctrine in civil cases. See *id.* at 97–98 (describing the gradual adoption of the restrictive state-immunity doctrine by Austria, the United States, the United Kingdom, the European Convention on State Immunity, and the International Law Commission).

43. SATOW’S DIPLOMATIC PRACTICE, *supra* note 41, § 12.3 (“[I]mmunity *ratione materiae* is restricted to acts performed in the exercise of the functions of the office on behalf of the State.”).

44. SIMBEYE, *supra* note 30, at 109.

45. See Kolodkin, *supra* note 21, para. 78.

46. SIMBEYE, *supra* note 30, at 109.

47. *Id.* at 110.

48. Kolodkin, *supra* note 21, para. 79.

post.”⁴⁹ As a result, a state official can be held accountable for his or her private acts once he or she ceases to hold office.⁵⁰ But during the official’s tenure, the official cannot be sued or prosecuted.

Immunity *ratione materiae*, also known as functional immunity or qualified immunity in U.S. legal parlance,⁵¹ protects state officials with respect to acts “performed in fulfilment of functions of the State.”⁵² Such immunity is necessary so that states cannot exercise jurisdiction over foreign officials to impede the performance of government functions.⁵³ This sort of qualified immunity attaches in domestic and foreign courts.

Qualified immunity *ratione materiae*, in theory, flows from the concept of state immunity because “only acts that ‘human beings in their capacity as organs of the State’ perform manifest the legal existence of a State.”⁵⁴ Therefore, to qualify as an act covered by qualified immunity *ratione materiae*, the act must be “official.”⁵⁵

Under modern customary international law, there are two tests for determining whether a state official’s act is “official”: the “presumed apparent authority” test and the “personal motive” test.⁵⁶ The “presumed apparent authority” test relies on the apparent authority a state has given to its official;⁵⁷ the “personal motive” test turns on the state official’s underlying motive for performing an act.⁵⁸ Under the “personal motive” test, “acts ‘performed exclusively to satisfy a personal interest’ prevent” a state official from claiming immunity *ratione materiae*.⁵⁹

The International Law Commission (the “Commission”), a United Nations organ created to advise on the development of international law, recognizes that the concepts of immunity *ratione personae* and immunity *ratione materiae* are useful in demonstrating the immunity of state officials.⁶⁰ This Note uses these terms to discuss immunity as it extends to members of a head

49. *Id.*

50. SIMBEYE, *supra* note 30, at 126.

51. See generally *Harlow v. Fitzgerald*, 457 U.S. 800 (1982).

52. Kolodkin, *supra* note 21, para. 80; see also Chok, *supra* note 35, at 497 (explaining that immunity *ratione materiae* “applies when the impugned acts are conducted under the authority of a sovereign, independent of whether the individuals are in office”).

53. See Kolodkin, *supra* note 21, para. 95 (“The functional . . . rationale for the immunity of State officials is . . . a direct rationale. One State, in exercising its criminal jurisdiction over officials of another State, may not hamper the performance by those officials of their government functions, interfere with activities related to the performance of those functions, or create obstacles to the activities of persons representing the other State in its international relations . . .”).

54. Chok, *supra* note 35, at 498 (quoting HANS Kelsen, *PRINCIPLES OF INTERNATIONAL LAW* 358 (2d ed. 1966)).

55. *Id.* at 499.

56. *Id.* at 499–500.

57. *Id.* (“The mandate and directions that a State gives to its officials determine the official nature of an official’s act.”).

58. *Id.* at 500.

59. *Id.* (quoting Institut de Droit International [IDI], *Immunities from Jurisdiction and Execution of Heads of State and of Government in International Law* art. 13, para. 2 (Aug. 26, 2001), http://www.idi-ii.org/app/uploads/2017/06/2001_van_02_en.pdf [https://perma.cc/EZ2C-KFYX]).

60. Kolodkin, *supra* note 21, para. 83.

of state's family, although the argument herein proposes qualified immunity *ratione materiae* as the doctrinal rubric for such family members.

B. The Absolute Immunity of a Head of State

Head-of-state⁶¹ immunity is derived from state immunity⁶² or sovereign immunity.⁶³ Because a head of state had been generally considered a personification of the state,⁶⁴ “many countries felt no practical need to distinguish between head-of-state immunity and state sovereign immunity.”⁶⁵ So, like a state, a head of state had absolute immunity for “acts committed either in a public or a private capacity.”⁶⁶ However, state immunity and head-of-state immunity began to diverge into separate legal doctrines as the international community adopted the restrictive state-immunity doctrine.⁶⁷ As state immunity went from being absolute to restricted, it became unclear whether head-of-state immunity would follow the same trend or, more specifically, what the extent of head-of-state immunity would be.⁶⁸

Because head-of-state immunity inheres in a person, it involves a complication: a head of state may act in his or her official capacity or in his or her private capacity.⁶⁹ Heads of state act in their official capacity when they “act in line with their state’s position in a given subject matter, or act within th[eir] state’s given boundaries for action.”⁷⁰ Such official acts are entitled to immunity under any theory.⁷¹

61. Heads of state include reigning sovereigns, such as in the United Kingdom, or heads of government, such as in the United States. SIMBEYE, *supra* note 30, at 94 n.17.

62. Compare Shobha Varughese George, *Head-of-State Immunity in the United States Courts: Still Confused After All These Years*, 64 *FORDHAM L. REV.* 1051, 1056 (1995) (stating that “sovereign immunity for states and heads-of-state immunity were considered one and the same because the head-of-state was considered to be the equivalent of the state”), with SIMBEYE, *supra* note 30, at 93 n.15 (arguing that state immunity and head-of-state immunity are not the same and that head-of-state immunity is better understood as “a by-product of state immunity” because a head of state “can only be accorded immunity emanating from his state’s immunity”), and Jerrold L. Mallory, *Resolving the Confusion over Head of State Immunity: The Defined Rights of Kings*, 86 *COLUM. L. REV.* 169, 171 (1986) (explaining that both head-of-state immunity and sovereign immunity originate from a common source but have “evolved into separate legal constructs”).

63. SIMBEYE, *supra* note 30, at 93 (“State immunity grew from this personal immunity of the sovereign.”).

64. Gilbert Sison, *A King No More: The Impact of the Pinochet Decision on the Doctrine of Head of State Immunity*, 78 *WASH. U. L.Q.* 1583, 1584 (2000); see also SIMBEYE, *supra* note 30, at 94.

65. Tunks, *supra* note 24, at 655.

66. *Id.*

67. See *id.*

68. *Id.* (“[A]s the international community moved toward a restrictive form of sovereign immunity, stripping away a state’s immunity for private or commercial acts, it became unclear whether the doctrine of head-of-state immunity would follow that course as well, or whether international law would preserve a greater degree of personal inviolability for world leaders.”).

69. See SIMBEYE, *supra* note 30, at 126–27.

70. *Id.* at 128.

71. See *supra* Part I.A.

Due to competing policy concerns, there is a divergence of opinion in customary international law⁷² with respect to head-of-state immunity for private acts.⁷³ On the one hand are policies concerning the interests of justice—for instance, holding a head of state accountable for violations of international human rights in his or her own country.⁷⁴ On the other hand are policies concerning sovereign equality and the functional necessity of head-of-state immunity.⁷⁵ One view is that a head of state traveling in his or her private capacity is “not then acting as [a] representative of a sovereign state” and is therefore “not entitled to any exemptions from the authority and jurisdiction of the local state.”⁷⁶ Another view is that a head of state “is at all times in some degree representing [the] state,” so a head of state should always be entitled to the same privileges and immunities that he or she is entitled to when appearing in an official capacity to avoid interference in fulfilling the head-of-state function.⁷⁷

The international community continues to address the scope of head-of-state immunity. At its fifty-eighth session in 2006, the Commission embarked on a mission to add clarity to the extent of head-of-state immunity.⁷⁸ A preliminary report prepared by Special Rapporteur Roman Anatolevich Kolodkin and subsequent reports addressing the topic of

72. “Customary international law” is a principle that is “widely accepted by the international community and generally regarded as giving rise to legal obligations.” Mallory, *supra* note 62, at 176–77.

73. 1 OPPENHEIM’S INTERNATIONAL LAW § 454 (Sir Robert Jennings & Sir Arthur Watts eds., 9th ed. 1992). The Commission embraces the notion that heads of state are entitled to absolute immunity under absolute immunity *ratione personae*, which essentially encompasses qualified immunity *ratione materiae*. See Kolodkin, *supra* note 21, para. 82; Mallory, *supra* note 62, at 177 (“While a survey of the international community’s approach to head of state immunity reveals wide agreement that heads of state are entitled to some immunity, there is no consensus on the extent of that immunity.”); Tunks, *supra* note 24, at 655 (“[N]ations began thinking about head-of-state immunity as a distinct legal concept, and recognized the need to reconsider the extent to which the goals of sovereign equality and functional necessity together could justify exempting heads of state from judicial process abroad.”); see also Mallory, *supra* note 62, at 177–78 (describing the varying methods states have employed in determining when to grant head-of-state immunity, which further illustrates the lack of agreement among states as to the degree of head-of-state immunity that should be granted).

74. Tunks, *supra* note 24, at 656 (explaining that the end of the twentieth century saw an increasing effort by the international community to protect against human rights violations, which motivated states to “whittle away at the shield of immunity historically enjoyed by heads of state”). See generally *R. v. Bartle, Ex parte Pinochet* [1999] 38 ILM 581 (HL) (appeal taken from Eng.) (holding that Chile’s ex-dictator, General Augusto Pinochet, was not entitled to head-of-state immunity for his acts that violated the 1984 Convention on Torture); Beth Stephens, *The Modern Common Law of Foreign Official Immunity*, 79 FORDHAM L. REV. 2669 (2011) (discussing cases that have considered violations of international human rights norms in denying foreign officials immunity).

75. See Tunks, *supra* note 24, at 655–56.

76. OPPENHEIM’S INTERNATIONAL LAW, *supra* note 73, § 454.

77. See *id.*

78. See Rep. of the Int’l Law Comm’n, at 445, U.N. Doc. A/61/10 (2006) (explaining that it would be better for the Commission to limit its discussion of the scope of immunity granted to state officials to heads of state and government and ministers for foreign affairs); *id.* at 442–43 (explaining that the Commission’s discussion of the scope of immunity granted to state officials should only cover a state official’s immunity from domestic and criminal jurisdiction).

“Immunity of State Officials from Foreign Criminal Jurisdiction” have consistently recognized that heads of state enjoy absolute immunity *ratione personae*.⁷⁹ The Commission’s most recent reports, however, evidence its consideration of imposing limitations or exceptions to a head of state’s absolute immunity *ratione personae* as it is applied in foreign criminal jurisdiction.⁸⁰ Thus, formulating the degree of immunity awarded to heads of state is still a work in progress.⁸¹

In the preliminary report prepared by Kolodkin, the Commission considered whether the scope of head-of-state immunity extends to the family members of a head of state, but Kolodkin asserted that this subject was outside the Commission’s mandate.⁸² In its limited discussion of the immunity granted to family members of a head of state, the Commission noted that, in both doctrine and practice, the source of granting immunity to family members of a senior official, such as a head of state, is not international law but international comity.⁸³ Furthermore, such immunity could only be absolute immunity *ratione personae* in nature.⁸⁴ The Commission also found that one common basis upon which immunity had been extended to head-of-state family members in the past was that the family members were part of a head of state’s immediate family.⁸⁵ Since mentioning it in the preliminary report, no subsequent report by the Commission on the topic of “Immunity of State Officials from Foreign

79. See Concepción Escobar Hernández (Special Rapporteur), *Fifth Report on Immunity of State Officials from Foreign Criminal Jurisdiction*, para. 19(f), U.N. Doc. A/CN.4/701 (June 14, 2016) [hereinafter Hernández, *Fifth Report*]; Concepción Escobar Hernández (Special Rapporteur), *Fourth Report on the Immunity of State Officials from Foreign Criminal Jurisdiction*, para. 25, U.N. Doc. A/CN.4/686 (May 29, 2015); Concepción Escobar Hernández (Special Rapporteur), *Third Report on the Immunity of State Officials from Foreign Criminal Jurisdiction*, para. 112, U.N. Doc. A/CN.4/673 (June 2, 2014); Concepción Escobar Hernández (Special Rapporteur), *Second Report on the Immunity of State Officials from Foreign Criminal Jurisdiction*, para. 58, U.N. Doc. A/CN.4/661 (Apr. 4, 2013); Concepción Escobar Hernández (Special Rapporteur), *Preliminary Report on the Immunity of State Officials from Foreign Criminal Jurisdiction*, para. 33, U.N. Doc. A/CN.4/654 (May 31, 2012); Roman Anatolevich Kolodkin (Special Rapporteur), *Third Report on Immunity of State Officials from Foreign Criminal Jurisdiction*, para. 19, U.N. Doc. A/CN.4/646 (May 24, 2011); Roman Anatolevich Kolodkin (Special Rapporteur), *Second Report on Immunity of State Officials from Foreign Criminal Jurisdiction*, para. 35, U.N. Doc. A/CN.4/631 (June 10, 2010); Kolodkin, *supra* note 21, para. 78. Kolodkin’s preliminary report includes heads of state in its definition of state officials in its discussion of immunity for state officials from the criminal jurisdiction of foreign states. *Id.* para. 106.

80. Rep. of the Int’l Law Comm’n, at 163–64, U.N. Doc. A/72/10 (2017) (“The Commission had before it the fifth report of the Special Rapporteur analysing the question of limitations and exceptions to the immunity of State officials from foreign criminal jurisdiction (A/CN.4/701), which it had begun to debate at its sixty-eighth session.”); Hernández, *Fifth Report*, *supra* note 79, para. 235 (“The goal is to determine whether or not Heads of State, Heads of Government and Ministers for Foreign Affairs, during their term of office, are affected by the limitations or exceptions to immunity analysed above.”).

81. The Commission is currently soliciting information from states regarding how they approach immunity. *Sixty-Ninth Session (2017)*, INT’L LAW COMM’N (Mar. 2, 2018), <http://legal.un.org/ilc/sessions/69/> [<https://perma.cc/F8RK-DQNM>].

82. Kolodkin, *supra* note 21, para. 129.

83. See *id.* paras. 36, 128.

84. See *id.* para. 125.

85. See *id.* paras. 127–28.

Criminal Jurisdiction” has further explored the subject of immunity granted to family members of a head of state.

C. *Functional Immunity as It Applies to a Diplomatic Agent*

The concept of immunity of state representatives dates back to ancient times.⁸⁶ The “bearers of messages from one leader to another were sacrosanct” and “[t]his idea eventually grew to the practice we now know as diplomatic inviolability and immunity.”⁸⁷ Such privileges and immunities enable diplomats “to act independently of any local pressures in negotiation, to listen and speak on behalf of a foreign State while being themselves under protection from attack or harassment,” and were accordingly “essential to the conduct of relations between independent sovereign States.”⁸⁸

It was not until the Congress of Vienna adopted the Regulation of March 19, 1815, however, that the international community began to codify diplomatic law, including immunity from litigation or prosecution.⁸⁹ Attempts at systematic codifications of the rules of diplomatic law continued throughout the first half of the twentieth century but were unavailing.⁹⁰ Finally, in 1961, the current international law on diplomatic immunity and other privileges was codified in the Vienna Convention on Diplomatic Relations of 1961 (VCDR).⁹¹

Justification for the continuing tradition of diplomatic immunity is grounded in three interrelated theories based on the history noted above: (1) the concept of diplomats as foreign sovereign representatives; (2) the notion of foreign sovereign persons as property, which meant that diplomats and embassies were extraterritorial; and (3) the functional necessity of

86. See Wright, *supra* note 38, at 195–96 (“Diplomatic immunity is a doctrine dating as far back as ancient India, Rome and the Greek city-state system. Islamic law from as early as Mohammed also accorded diplomats immunity.”); Eileen Denza, *Vienna Convention on Diplomatic Relations*, U.N. AUDIOVISUAL LIBR. INT’L L., <http://legal.un.org/avl/ha/vcdr/vcdr.html> [https://perma.cc/CQ4G-YYFZ] (last visited Apr. 13, 2018).

87. See SIMBEYE, *supra* note 30, at 94; see also *id.* at 94–95 nn.19–21.

88. SATOW’S DIPLOMATIC PRACTICE, *supra* note 41, § 8.4.

89. *Documents of the Eighth Session Including the Report of the Commission to the General Assembly*, [1956] 2 Y.B. Int’l L. Comm’n 133, U.N. Doc. A/CN.4/SER.A/1956/Add.1.

90. See generally SATOW’S DIPLOMATIC PRACTICE, *supra* note 41, § 8.5 (explaining that the 1928 Havana Convention on Diplomatic Officers and the 1932 Harvard Research Draft Convention on Diplomatic Privileges and Immunities were the two most important attempts at establishing uniform rules of diplomatic law, but neither one of these efforts drew majority support from the international community).

91. Vienna Convention on Diplomatic Relations, Apr. 18, 1961, 500 U.N.T.S. 95. The VCDR is currently ratified by 191 countries. *Vienna Convention on Diplomatic Relations*, UNITED NATIONS TREATY COLLECTION, https://treaties.un.org/pages/viewdetails.aspx?src=treaty&mtdsg_no=iii-3&chapter=3&lang=en [https://perma.cc/LV6R-2PWD] (last visited Apr. 13, 2018). The privileges and immunities under the VCDR do not extend to consuls, which are instead covered by the Vienna Convention on Consular Relations of 1963. See Vienna Convention on Consular Relations, Apr. 24, 1963, 596 U.N.T.S. 261. Throughout history, consuls have been viewed as “distinct in function and legal status from diplomatic agents.” Thomas H. Lee, *The Safe-Conduct Theory of the Alien Tort Statute*, 106 COLUM. L. REV. 830, 884 (2006). The principle job of a consul is not diplomatic but commercial. *Id.* at 884–85 nn.273–74.

guaranteeing protection to ensure reciprocity and sovereign-to-sovereign dialogue.⁹² The functional necessity theory has emerged as the prevailing modern basis for diplomatic immunity.⁹³ Hence, this Note focuses on the theory of functional necessity in its discussion.⁹⁴ The functional necessity theory “assumes that the absence of diplomatic immunity would lead to a breakdown in the conduct of foreign relations.”⁹⁵ If diplomats were to be “liable to ordinary legal and political interference like other individuals, . . . they might be influenced by personal considerations of safety and comfort to a degree [that] would materially hamper them in the exercise of their functions.”⁹⁶ Therefore, the acts that a diplomat commits “as the arm or as mouthpiece of the home state” are subject to immunity.⁹⁷

When the Commission drafted the VCDR, it expressly stated in draft commentary its intent to apply the theory of functional necessity.⁹⁸ The preamble to the VCDR also reflects this intent.⁹⁹ Furthermore, article 39(2) of the VCDR sets forth the concept of immunity *ratione materiae* to those acts that are closely related to the fulfillment of diplomatic functions.¹⁰⁰ As a result, acts that diplomatic personnel commit and are not connected with his or her official diplomatic functions are not entitled to immunity.¹⁰¹

The VCDR concerns diplomatic personnel and their families.¹⁰² A diplomat is someone who is appointed by a national government to “promot[e] friendly relations between the sending State and the receiving

92. Nina Maja Bergmar, Note, *Demanding Accountability Where Accountability Is Due: A Functional Necessity Approach to Diplomatic Immunity Under the Vienna Convention*, 47 VAND. J. TRANSNAT'L L. 501, 507 (2014). The theory of representative of the sovereign grants an individual diplomat the same privileges and immunities as that of the sending state. *Id.* (explaining that the “theory of representative of the sovereign, also known as personal representation, holds that ‘the representative’s privileges are similar to those of the sovereign herself, and an insult to the ambassador is an insult to the dignity of the sovereign’” (quoting Leslie Shirin Farhangi, Note, *Insuring Against Abuse of Diplomatic Immunity*, 38 STAN. L. REV. 1517, 1520–21 (1986))). The theory of extraterritoriality holds that the civil and criminal jurisdictions of the receiving state can never reach a diplomat because a diplomat cannot be deemed to have ever left the sending state. Wright, *supra* note 38, at 197.

93. See SATOW’S DIPLOMATIC PRACTICE, *supra* note 41, § 8.3 (“Modern practice and theory have adopted this explanation of ‘functional need’ as the correct explanation of and justification for diplomatic privileges and immunities.”).

94. For a discussion of the representative of the sovereign and extraterritoriality theories, see Ross, *supra* note 39, at 177–78.

95. Wright, *supra* note 38, at 201.

96. OPPENHEIM’S INTERNATIONAL LAW, *supra* note 73, § 489.

97. See VAN ALEBEEK, *supra* note 36, at 106.

98. *Documents of the Tenth Session Including the Report of the Commission to the General Assembly*, [1958] 2 Y.B. Int’l L. Comm’n 129, U.N. Doc. A/CN.4/SER.A/1958/Add.1.

99. Vienna Convention on Diplomatic Relations, *supra* note 91, at 96 (“Realizing that the purpose of such privileges and immunities is not to benefit individuals but to ensure the efficient performance of the functions of diplomatic missions as representing States . . .”).

100. See *id.* at 118 (“[W]ith 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.”).

101. See *id.*

102. See Justin M. Papka, *The Grace Mugabe Incident: Defining Immunity and Inviolability of Spouses of Heads of State*, BSIS J. INT’L STUD., 2009, at 1, 5.

State, and develop[] their economic, cultural and scientific relations.”¹⁰³ The VCDR defines four different categories of diplomatic personnel and attributes varying degrees of diplomatic immunity to each category.¹⁰⁴ These categories are diplomatic agents, administrative and technical staff, service staff, and private servants. The focus of this Note is the first category.¹⁰⁵

A diplomatic agent is “the head of the mission or a member of the diplomatic staff of the mission.”¹⁰⁶ Under the VCDR, diplomatic agents are granted absolute immunity from the criminal jurisdiction of a receiving state—that is, they cannot be prosecuted for any official or private acts.¹⁰⁷ However, diplomatic agents are subject to the civil jurisdiction of the receiving state in certain cases.¹⁰⁸

The family members of diplomatic agents are granted the same privileges and immunities as diplomatic agents.¹⁰⁹ Although the drafters of the VCDR “abstained from determining criteria for members of the family,” they emphasized that a spouse and the minor children of a diplomatic agent constitute core family members who receive diplomatic immunity.¹¹⁰ The drafters of the VCDR recognized the necessity of extending diplomatic immunity to cover the acts of a diplomatic agent’s family members because

103. Vienna Convention on Diplomatic Relations, *supra* note 91, at 98 (noting that other functions of a diplomatic mission include “representing the sending State in the receiving State,” “protecting in the receiving State the interests of the sending State and of its nationals, within the limits permitted by international law,” “negotiating with the Government of the receiving State,” and “ascertaining by all lawful means conditions and developments in the receiving State, and reporting thereon to the Government of the sending State”).

104. Ross, *supra* note 39, at 181.

105. The second category is the administrative and technical staff, which includes “members of the staff of the mission employed in the administrative and technical service of the mission.” Vienna Convention on Diplomatic Relations, *supra* note 91, at 98. Those who fall into this category of diplomatic personnel and their family members enjoy blanket immunity from the criminal jurisdiction of the receiving state. *Id.* at 116. However, immunity from the civil jurisdiction of the receiving state is limited to the members of the administrative and technical staff, and their family members, in that they only have immunity when it comes to acts performed within the course of their duties. *Id.* The third category covers service staff, which includes “members of the staff of the mission in the domestic service of the mission.” *Id.* at 98. Members of the service staff “who are not nationals of or permanently resident in the receiving State” enjoy immunity only with respect to the acts they perform in the course of their duties. *Id.* at 116. The fourth and final category is the private servant, who “is a person . . . in the domestic service of a member of the mission and who is not an employee of the sending State.” *Id.* at 98. Private servants are only granted immunity “to the extent admitted by the receiving State.” *Id.* at 116. The receiving state can only exercise its jurisdiction over a private servant to the extent that it does not “interfere unduly with the performance of the functions of the mission.” *Id.*

106. *Id.* at 98.

107. *Id.* at 112.

108. *Id.* (stating that a diplomatic agent is not entitled to immunity from a receiving state’s civil jurisdiction for (1) “a real action relating to private immovable property situated in the territory of the receiving State”; (2) “an action relating to succession in which the diplomatic agent is involved as executor, administrator, heir or legatee as a private person and not on behalf of the sending State”; and (3) “an action relating to any professional or commercial activity exercised by the diplomatic agent in the receiving State outside his official functions”).

109. *Id.* at 116.

110. Mehmet Yavuz, *Scope of Diplomatic Family in Vienna Convention on Diplomatic Relations*, 4 LAW & JUST. REV. 181, 192 (2013).

the functions of a diplomatic agent would otherwise be impeded by pressure if, for instance, his or her spouse or child was being criminally prosecuted by the host nation's law enforcement authorities.¹¹¹

The VCDR accordingly grants absolute immunity from criminal prosecution by the receiving state to members of a diplomatic agent's family.¹¹² Otherwise, ambassadors would likely live in their stations alone and leave their families behind.¹¹³ It is worth noting that states do have a legitimate legal basis for extending diplomatic immunity to family members of a diplomatic agent.

The above argument was made in an infamous case in the United States. On November 29, 1982, Antonio F. Azeredo da Silveira Jr. shot Kenneth Skeen at the Godfather nightclub in Washington, D.C.¹¹⁴ Silveira Jr. was initially charged with shooting Skeen,¹¹⁵ but prosecution ceased because diplomatic immunity was granted to Silveira Jr., the son of Brazil's then-ambassador to the United States.¹¹⁶ This grant of diplomatic immunity was legally grounded in the Diplomatic Relations Act, the U.S. statute that implements the VCDR.¹¹⁷ The U.S. Department of State's guidance states that the privileges and immunities under the VCDR are essential because "foreign representatives can carry out their duties effectively only if they are accorded a certain degree of insulation from the application of standard law enforcement practices of the host country."¹¹⁸ The same view was applied when U.S. State Department official Richard Gookin expressed in a letter to

111. *Summary Records of the Tenth Session*, [1958] 1 Y.B. Int'l L. Comm'n 162, U.N. Doc. A/CN.4/SER.A/1958 ("Lastly, unless the members of a diplomatic agent's family enjoyed immunity, pressure could be brought to bear on the diplomatic agent through his family.").

112. See Vienna Convention on Diplomatic Relations, *supra* note 91, at 112 ("A diplomatic agent shall enjoy immunity from the criminal jurisdiction of the receiving State.").

113. Whether such blanket immunity is subject to abuse when it is granted to members of a diplomatic agent's family is beyond the scope of this Note. For a discussion on abuse of diplomatic immunity, see Eirwen-Jane Pierrot, *Escaping Diplomatic Impunity: The Case for Diplomatic Law Reform*, B. COUNCIL (Oct. 2010), http://www.barcouncil.org.uk/media/61895/eirwen-jane_pierrot_42_.pdf [<https://perma.cc/4CBD-AFFM>].

114. Eric Pianin, *Bounds of Diplomatic Immunity*, WASH. POST (Aug. 5, 1987), <https://www.washingtonpost.com/archive/local/1987/08/05/bounds-of-diplomatic-immunity/5d050b31-cb14-43b4-b28e-eb5634e8faed> [<https://perma.cc/U67U-8D5M>].

115. *Brazil and Ambassador's Son Face Lawsuit over Shooting*, N.Y. TIMES (Dec. 12, 1982), <http://www.nytimes.com/1982/12/12/us/brazil-and-ambassador-s-son-face-lawsuit-over-shooting.html> [<https://perma.cc/9NGM-XJN2>].

116. Pianin, *supra* note 114.

117. Diplomatic Relations Act, 22 U.S.C. § 254a(4) (2012) ("[VCDR] entered into force with respect to the United States on December 13, 1972."). The United States enforces the provisions of the VCDR through its Diplomatic Relations Acts that it enacted in 1978. See generally Diplomatic Relations Act of 1978, Pub. L. No. 95-393, 92 Stat. 808 (codified as amended in scattered sections of 22, 28 U.S.C.); Bergmar, *supra* note 92, at 504 ("The VCDR, which is a non self-executing treaty, gained legal force in the United States through the enactment of the Diplomatic Relations Act of 1978, in which Congress 'established the Vienna Convention as the sole U.S. law governing diplomatic privileges and immunities.'" (quoting LINDA S. FREY & MARSHA L. FREY, *THE HISTORY OF DIPLOMATIC IMMUNITY* 490 (1999))).

118. See U.S. DEP'T OF STATE, OFFICE OF FOREIGN MISSIONS, DIPLOMATIC AND CONSULAR IMMUNITY: GUIDANCE FOR LAW ENFORCEMENT AND JUDICIAL AUTHORITIES 4 (2015), <https://www.state.gov/documents/organization/150546.pdf> [<https://perma.cc/SK7T-RY2N>].

Skeen that “it is not fair to conclude that diplomatic immunity as a concept is not legitimate or that the laws concerning immunity need be changed.”¹¹⁹

A state’s decision to extend immunity to a diplomatic agent is premised in large part on reciprocity—the expectation that its diplomatic agents will be treated in the same manner when they are in a foreign state.¹²⁰ A diplomatic agent and members of his or her family who enter the territory of a foreign state subject themselves to the laws of that state.¹²¹ Hence, only that state, as a formal matter, holds the power to grant jurisdictional immunity, which protects a diplomatic agent and his family from “being subject to the power and authority of a [foreign state’s] court to hear and decide a judicial proceeding.”¹²² The sending state may waive diplomatic immunity pursuant to article 32 of the VCDR.¹²³ This rarely happens. And when the sending state refuses to do so, the receiving state could in theory declare “the head of the mission or any member of the diplomatic staff of the mission” *persona non grata* and order him or her out of the country.¹²⁴ Nevertheless, states rarely declare a diplomatic agent or his or her family members *personae non gratae* because doing so could create tension between the receiving state and the sending state, which could possibly lead to reciprocal retaliation.¹²⁵

II. HOW STATES HAVE GRANTED AND LIMITED IMMUNITY TO MEMBERS OF A HEAD OF STATE’S FAMILY

The extent of head-of-state immunity under customary international law is unclear; the extent of immunity for members of a head of state’s family is necessarily also unsettled. A host state may voluntarily declare a family member immune to avoid rocking the boat—not out of a sense of legal obligation but on the basis of international comity.¹²⁶ When a family member

119. Pianin, *supra* note 114.

120. See SIMBEYE, *supra* note 30, at 93 n.9 (“States accord each other’s representatives immunity on a reciprocal basis . . .”); Mallory, *supra* note 62, at 169.

121. See Mallory, *supra* note 62, at 169.

122. See *id.* at 170 n.3.

123. Vienna Convention on Diplomatic Relations, *supra* note 91, at 112 (explaining that a waiver of diplomatic immunity by the sending state must always be express). However, states are typically unwilling to waive diplomatic immunity, “even in cases where the cost of doing so would be minimal.” Bergmar, *supra* note 92, at 506.

124. Vienna Convention on Diplomatic Relations, *supra* note 91, at 102.

125. See Bergmar, *supra* note 92, at 506 (“Although a *persona non grata* procedure appears simple, it is rarely used in practice. Fear of reciprocity and disrupted diplomatic relationships weigh in favor of simply absorbing the costs of misdeeds.”); see also, e.g., Ross, *supra* note 39, at 188, 202–03 (“The main practical reason cited for continuing diplomatic immunity in the face of constant abuse of the privilege is the political reality of reciprocity. Some commentators fear direct foreign governmental responses in the form of fabricated charges against United States foreign service officers abroad if the United States prosecuted foreign diplomats at home.”).

126. Kolodkin, *supra* note 21, para. 128 (“The view that, if the members of the family of a Head of State are also granted immunity, it is on the basis only of international comity and not of international law was supported in the resolution of the Institute of International Law.”). The Institute of International Law is a private organization composed of leading international lawyers who present resolutions to governmental authorities, international organizations, and the scientific community to facilitate the development of international law. *About the Institute*,

arrives in the receiving state as part of the head of state's entourage during an official visit, or is acting in his or her own official capacity, extending the same privileges and immunities as are extended to a head of state seems more in line with a legal obligation.¹²⁷ However, exempting members of a head of state's family from "the authority and jurisdiction of the state which they are visiting" for private acts sounds more in the realm of a policy choice.¹²⁸

Nevertheless, even in such cases, many states have asserted that they are granting immunity from prosecution to members of a head of state's family, and one could assert that the commonality of the practice has attained the status of customary international law. This Part presents cases that demonstrate how states have addressed whether to grant immunity to a member of a head of state's family in light of concerns of international comity and impeding the function of a head of state. Part II.A discusses cases where states have limited immunity for members of a head of state's family to official acts. In contrast, Part II.B examines cases in which states have granted immunity to family members of a head of state for private acts.

*A. To Grant, or Not to Grant, "How Official" Is the Question:
Extending Immunity to Members of
a Head of State's Family for Official Acts*

As discussed above, head-of-state immunity is founded upon the fundamental concept of sovereign immunity that "the state and its ruler [are] one."¹²⁹ States hesitate to exercise their jurisdiction over the representatives of other states out of respect for sovereignty and a desire for reciprocal respect.¹³⁰ This undergirds grants of immunity *ratione materiae* to members of a head of state's family for acts committed in an official capacity.

This principle was illustrated in a U.S. case involving Prince Charles of Great Britain, who, at the time as now, was the son and heir apparent of Queen Elizabeth II.¹³¹ A U.S. district court dismissed a civil complaint brought against Prince Charles for acts that he allegedly committed during a state visit to the United States.¹³² In October 1977, Prince Charles embarked on a thirteen-day trip to the United States and was scheduled to visit ten cities, including Cleveland, Ohio.¹³³ In Ohio, Prince Charles was "to address a special convocation called to dedicate the building housing Cleveland State

INSTITUT DE DROIT INT'L, <http://www.idi-iil.org/en/a-propos/> [<https://perma.cc/4STG-MU2Q>] (last visited Apr. 13, 2018).

127. See OPPENHEIM'S INTERNATIONAL LAW, *supra* note 73, § 453.

128. See *id.*

129. Mallory, *supra* note 62, at 170.

130. See Kolodkin, *supra* note 21, para. 96 n.184; see also *supra* Part I.B.

131. Janice Williams, *Will Queen Elizabeth Give Prince Charles the Throne in 2018?*, NEWSWEEK (Dec. 28, 2017, 12:05 PM), <http://www.newsweek.com/queen-elizabeth-prince-charles-retirement-762110> [<https://perma.cc/3DNS-VHGL>].

132. See *Kilroy v. Windsor*, No. C 78-291, 1978 U.S. Dist. LEXIS 20419, at *1 (N.D. Ohio Dec. 7, 1978).

133. Roy Reed, *Charles, A Dashing Prince, Is Likely to Charm U.S. on Visit*, N.Y. TIMES (Oct. 15, 1977), <http://www.nytimes.com/1977/10/15/archives/charles-a-dashing-prince-is-likely-to-charm-us-on-visit.html> [<https://perma.cc/7T3M-BW75>].

University's Cleveland-Marshall College of Law.”¹³⁴ Just as Prince Charles was preparing to address his audience, third-year law student Jack Kilroy, stood up and asked the Prince, “I would like to know when England is going to stop torturing political prisoners?”¹³⁵ Kilroy was subsequently escorted out by security guards.¹³⁶

In 1978, a year later, Kilroy filed a civil complaint against Prince Charles for alleged deprivation of “various rights guaranteed by the Constitution and laws of the United States.”¹³⁷ In response to Kilroy's complaint, the U.S. Attorney General, upon the recommendation of the State Department, filed a suggestion of immunity with the court.¹³⁸ The State Department made the suggestion, despite the fact that Prince Charles was a member of Queen Elizabeth II's family and not yet Great Britain's head of state, on the view that the acts he allegedly committed were performed in his official capacity.¹³⁹ The district court agreed with the State Department and reasoned that immunity “applies with even more force to live persons representing a foreign nation on an official visit.”¹⁴⁰ Declining to grant immunity in such a case would not only deter future visits by a head of state's family members but would also “possibly offend[the] nation.”¹⁴¹ The court relied heavily on the fact that Prince Charles was in Cleveland on official business, not for personal reasons.

The Austrian Supreme Court of Justice applied similar logic when it refused to grant immunity to the siblings of the reigning Prince Hans-Adam II of Liechtenstein. In 2001, an Austrian citizen identified as Anita W. brought suit against the Prince, his sister, and his two brothers seeking a declaratory judgment that would establish affiliation between her and the siblings' father.¹⁴² The court held that Prince Hans-Adam II was entitled under customary international law to absolute immunity as the head of state with respect to both official and private functions.¹⁴³ However, the court held that the Prince's siblings were not entitled to the same immunity.¹⁴⁴ The court reasoned that the Prince's siblings “were not close members of the family of the Head of State forming part of his household” and were,

134. W. James Van Vliet et al., *Irish Ire Cooled by Royal Reserve: Student Asks Prince About Ulster Torture*, PLAIN DEALER, Oct. 21, 1977, at 8-A.

135. *Id.*

136. *Id.*

137. *Kilroy*, 1978 U.S. Dist. LEXIS 20419, at *1.

138. *Id.* at *2 (explaining that a determination of immunity “by the Executive Branch of our government, pursuant to its primacy over questions of foreign policy and the conduct of international affairs, is binding and not reviewable in this or any court”).

139. *See id.* at *3 (explaining that the U.S. Department of State reasoned that it granted Prince Charles immunity because his visit was a special diplomatic mission and he was therefore considered an official diplomatic envoy during his visit to the United States).

140. *Id.* at *2–3.

141. *See id.* at *3.

142. Oberster Gerichtshof [OGH] [Supreme Court] Feb. 14, 2001, 7 Ob 316/00x, 74 ENTSCHEIDUNGEN DES ÖSTERREICHISCHEN OBERSTEN GERICHTSHOFES IN ZIVILSACHEN [SZ] No. 20 (Austria) (Oxford Public International Law, Oxford Reports on International Law).

143. *Id.*

144. *Id.*

therefore, not “entitled to immunity under customary international law.”¹⁴⁵ In addition, the court recognized that the case before it concerned a private function that did not affect the Prince’s public and constitutional position.¹⁴⁶ As a result, the court’s refusal to grant immunity to the Prince’s siblings did not impede any official functions of the head of state, and respect for sovereignty remained intact.

Likewise, the Civil Court of Brussels refused to extend immunity to the wife and children of the former President of Zaire. In 1988, former President Mobutu Sese Seko Kuku Ngbendu Wa Za Banga asked the Brussels court to vacate an attachment on his family’s property in Belgium that was granted upon request by Cotoni, an agriculture company.¹⁴⁷ Former President Mobutu argued that he and his family enjoyed head-of-state immunity from “both civil and criminal jurisdiction, whether or not the acts in question fall within the framework of the exercise of their official duties.”¹⁴⁸ The court rejected then-President Mobutu’s argument and did not recognize immunity for the members of his family.¹⁴⁹ The court reasoned that unlike the former President Mobutu, who would be entitled to head-of-state immunity under customary international law, his wife and children “could not rely on a rule of immunity from jurisdiction.”¹⁵⁰ Furthermore, the court noted that head-of-state immunity only covered official acts as the actual head of state.¹⁵¹ Nevertheless, the court vacated the attachment on the separate, nonimmunity ground that former President Mobutu and his family could not be held personally liable to pay debt that “was clearly the responsibility of a company properly constituted under the law of Zaire.”¹⁵²

B. First Ladies and Their Private Acts: Extending Immunity to Members of a Head of State’s Family for Private Acts

While there have been instances in which states limited immunity for members of a head of state’s family to acts committed in official functions,¹⁵³ there have also been cases where states have granted immunity to family

145. Kolodkin, *supra* note 21, para. 126.

146. See JOANNE FOAKES, *THE POSITION OF HEADS OF STATE AND SENIOR OFFICIALS IN INTERNATIONAL LAW* 91 (2014) (“The court held that . . . questions of personal and family (including marital) status belong exclusively to the private life of a head of State, particularly in the present case where the question of family status related to the head of State’s father rather than directly to the head of State himself and did not affect the latter’s public and constitutional position.”).

147. *Mobutu v. SA Cotoni*, [Civ.] [Civil Court of Brussels], Dec. 29, 1988, *Jurisprudence de Liège, Mons et Bruxelles* [JLMB] 1989, 169 (Belg.), *reprinted in* 91 I.L.R. 259, 259 (1993). At the time, SA Cotoni was a company “involved in agriculture and livestock breeding.” *Belgian Court Seizes Mobutu Properties*, UPI (Dec. 21, 1988), <https://www.upi.com/Archives/1988/12/21/Belgian-court-seizes-Mobutu-properties/5862598683600/> [<https://perma.cc/3VF6-VGGZ>].

148. *Mobutu*, 91 I.L.R. at 260.

149. *Id.* at 260–61.

150. VAN ALEBEEK, *supra* note 36, at 184.

151. See *Mobutu*, 91 I.L.R. at 260 (explaining that head-of-state immunity “can only benefit [former President Mobutu] as the bearer of the title of Head of State”).

152. *Id.* at 259.

153. See *supra* Part II.A.

members for private acts. Such grants of immunity have often been invoked when concerns about foreign relations outweighed concerns of whether the act was committed in an official function.

In *Kline v. Kaneko*,¹⁵⁴ a U.S. court extended immunity to a head of state's family member despite acknowledging that the conduct at issue involved a private act.¹⁵⁵ In 1988, Rukmini Sukarno Kline sued the first lady of Mexico, Paloma Cordero de De la Madrid, for causing her "false imprisonment and abduction . . . from her Mexico City apartment."¹⁵⁶ The case was filed in state court but was removed to federal court before it was remanded back to state court to determine whether the case would be dismissed against De la Madrid on grounds of immunity.¹⁵⁷ The State Department filed a suggestion of immunity for De la Madrid upon request by the Mexican government.¹⁵⁸ The New York Supreme Court subsequently dismissed the case against Mexico's then-first lady pursuant to the suggestion of immunity.¹⁵⁹ The state court echoed the federal court's finding that De la Madrid's "alleged conduct was carried out exclusively in a private capacity."¹⁶⁰ Nevertheless, the court reasoned that it was the "court's duty" to dismiss the case so as not to "interfere with the executive's *proper handling* of foreign affairs."¹⁶¹ Thus, the New York court strongly implied that the discretionary dismissal was a matter of international comity, not a legal obligation.

The long and corrupt tenure of Philippine dictator Ferdinand Marcos and his infamously profligate wife Imelda spawned a welter of litigation in multiple jurisdictions that resulted in important immunity holdings. Even after the two were ousted from their country by prodemocracy opposition,¹⁶² they were dogged by accusations of having diverted large amounts of money belonging to the Philippine government.¹⁶³ One instance involved the Federal Supreme Court of Switzerland's recognition of immunity for both Marcos and his wife in response to U.S. requests for discovery assistance with respect to purloined assets suspected to be stashed in Swiss bank

154. 685 F. Supp. 386 (S.D.N.Y. 1988).

155. *Id.* at 388.

156. *Id.*

157. *Kline v. Kaneko*, 535 N.Y.S.2d 303, 304–05 (Sup. Ct. 1988).

158. *Id.* at 305.

159. *Id.*

160. *Kline*, 685 F. Supp. at 393. *Compare id.*, with *Kline*, 535 N.Y.S.2d at 305 (describing how immunity did not "extend to Mrs. De la Madrid because she held no official position within the government.").

161. *Kline*, 535 N.Y.S.2d at 304 (emphasis added) (quoting *Spacil v. Crowe*, 489 F.2d 614, 616 (5th Cir. 1974)).

162. See Tracie A. Sundack, *Republic of Philippines v. Marcos: The Ninth Circuit Allows a Former Ruler to Invoke the Act of State Doctrine Against a Resisting Sovereign*, 38 AM. U. L. REV. 225, 241–42 (1988).

163. For a discussion on how Ferdinand and Imelda Marcos allegedly spent government funds, see Amy Qin, *Hunt for Missing Marcos Art Seeks to Regain Momentum*, N.Y. TIMES (Dec. 12, 2016), <https://www.nytimes.com/2016/12/12/arts/design/hunt-for-missing-marcos-art-seeks-to-regain-momentum.html> [<https://perma.cc/WGP2-28NU>].

accounts.¹⁶⁴ In pursuing a criminal matter against the former President and first lady, the U.S. Public Prosecutor for the State of New York, acting through the U.S. Department of Justice, requested mutual assistance from the Swiss Federal Office of Police.¹⁶⁵ Ferdinand and Imelda Marcos objected to the grant of this request before the Federal Supreme Court of Switzerland on the ground of head-of-state immunity.¹⁶⁶ The Swiss court agreed and upheld immunity for both Ferdinand and Imelda Marcos despite their alleged and paradigmatically private acts—stealing government funds.¹⁶⁷

Consider again the case elaborated in the Introduction regarding the South African government’s invocation of immunity for the now-former first lady of Zimbabwe after she assaulted a model with an extension cord.¹⁶⁸ Was the immunity granted diplomatic immunity? The VCDR has force of law in South Africa under section 2(1) of South Africa’s Diplomatic Immunities and Privileges Act.¹⁶⁹ The VCDR defines a diplomatic agent as “the head of the mission or a member of the diplomatic staff of the mission.”¹⁷⁰ A diplomatic agent enjoys blanket immunity from the criminal jurisdiction of the receiving state under article 31(1) of the VCDR.¹⁷¹ Article 37(1) of the VCDR extends this to “members of the family of a diplomatic agent forming part of his household.”¹⁷²

Grace Mugabe was not in South Africa as the head of a mission or as a member of the diplomatic staff of a mission at the time of attack on Engels.¹⁷³ Her husband, former President Robert Mugabe, confirmed that the purpose of her visit to South Africa was for medical consultation over an injured leg.¹⁷⁴ However, following her attack on Engels, Grace Mugabe claimed that

164. *Marcos v. Fed. Dep’t of Police*, Tribunal fédéral [TF] [Federal Tribunal] Nov. 2, 1989, 155 ARRÊTS DE TRIBUNAL FÉDÉRAL SUISSE (RECUEIL OFFICIEL) [ATF] Ib 533, *reprinted in* 102 I.L.R. 198, 198–99 (1989).

165. *Marcos*, 102 I.L.R. at 199. The United States and Switzerland signed a treaty on May 25, 1973, that obligates the states to help each other obtain information for criminal matters. *Id.*

166. *Id.* at 200.

167. Papka, *supra* note 102, at 9–10 (explaining that the Swiss Federal Tribunal found that immunity for a head of state is absolute and it also covers the private activities of the head of state).

168. *See supra* notes 8–13 and accompanying text.

169. Diplomatic Immunities and Privileges Act 37 of 2001 §§ 2–3 (S. Afr.) (“The [VCDR], 1961, applies to all diplomatic missions and members of such missions in the Republic.”).

170. Vienna Convention on Diplomatic Relations, *supra* note 91, at 98; *see supra* Part II.C.

171. Vienna Convention on Diplomatic Relations, *supra* note 91, at 112; *see also supra* Part II.C.

172. Vienna Convention on Diplomatic Relations, *supra* note 91, at 116; Simba Mubvuma, *Diplomatic Immunity for Grace Mugabe?*, LINKEDIN (Aug. 18, 2017), <https://www.linkedin.com/pulse/diplomatic-immunity-grace-mugabe-simba-mubvuma> [https://perma.cc/9UBN-NFSA]; *see also* Shoeshoe Malisa, *Warranted or Not?: Diplomatic Immunity and Grace Mugabe*, LEGAL AFR. (Sept. 27, 2017, 10:03 PM), <http://www.legalafrican.com/articles/2017/09/warranted-or-not-diplomatic-immunity-and-grace-mugabe/> [https://perma.cc/66YX-G2D9]; *supra* Part II.C.

173. *See* Bornman, *supra* note 8.

174. Moyo, *supra* note 12 (“President Mugabe, speaking during a recent party rally in Gwanda, in Zimbabwe’s Matabeleland Province, said his wife had gone to South Africa for a medical consultation over her leg, which had been injured in a freak accident.”).

the purpose of her visit to South Africa was to attend the regional summit held by the Southern African Development Community,¹⁷⁵ an event Grace Mugabe did not attend.¹⁷⁶

Furthermore, Grace Mugabe was not entitled to diplomatic immunity as former President Robert Mugabe's spouse because he was in South Africa as the head of state of Zimbabwe, not as a diplomatic agent. The summit hosted by the Southern African Development Community is an annual gathering of regional heads of state and of government.¹⁷⁷ A document published by the Southern African Development Community on its website after the summit lists then-President Robert Mugabe as one of the attendees among other heads of state who were in attendance.¹⁷⁸ Based on these facts, the protection extended to family members of a diplomatic agent under article 37(1) of the VCDR plainly does not extend to Grace Mugabe.¹⁷⁹ The VCDR "does not deal with the personal privileges and immunities of the head of state."¹⁸⁰ In sum, the VCDR or diplomatic immunity generally does not extend to the facts of South Africa's grant of diplomatic immunity to Grace Mugabe.

III. FOREIGN IMMUNITY FOR A HEAD OF STATE'S FAMILY MEMBERS SHOULD BE LIMITED TO QUALIFIED IMMUNITY *RATIONE MATERIAE*

The reason for extending absolute immunity to a head of state does not apply to his or her family members, and so they warrant only qualified immunity for official acts. The head of state "is seen as personifying the sovereign State and the immunity to which he [or she] was entitled is predicated on status."¹⁸¹ But this logic does not apply to family members; nor do the practical reciprocity policy reasons extend with equal force since diplomatic family members live for extended periods in the receiving country.

As an intermediary position, this rationale could apply to the spouse of a head of state who accompanies the head of state on an official visit to a foreign country. When the spouse and the head of state arrive together in a

175. Anita Powell, *Alleged Assault by Grace Mugabe in South Africa Becomes Diplomatic Headache*, VOICE AM. (Aug. 17, 2017, 4:21 PM), <https://www.voanews.com/a/zimbabwe-president-mugabe-in-south-africa-after-wife-is-accused-of-assault/3989445.html> [<https://perma.cc/T5AW-7QFG>].

176. *Grace Mugabe Returns Home Pursued by South Africa Assault Allegation*, REUTERS (Aug. 20, 2017, 4:43 AM), <https://www.reuters.com/article/us-safrica-mugabe/grace-mugabe-returns-home-pursued-by-south-africa-assault-allegation-idUSKCN1B007S> [<https://perma.cc/929P-MLB7>] ("President Mugabe attended a South African Development Community (SADC) summit in Pretoria on Saturday, but his 52-year-old wife was not there or part of his delegation.").

177. See Dep't of Int'l Relations & Cooperation, S. African Dev. Cmty., *Communiqué of the 37th Summit SADC of Heads of State and Government or Tambo Building 1* (Aug. 20, 2017), http://www.sadc.int/files/4715/0347/1755/37th_SADC_Summit_English_Communique.pdf [<https://perma.cc/FT48-2HGF>].

178. *Id.* at 1–2. The document appears to list the names of attendees in the order of the attendees' status, beginning with heads of state and government, vice presidents, prime ministers, and ministers of foreign affairs. *Id.*

179. See *supra* note 172.

180. SATOW'S DIPLOMATIC PRACTICE, *supra* note 41, § 12.1.

181. Kolodkin, *supra* note 21, para. 92 n.171.

foreign state on official business, the two are viewed as one unit representing the sovereign state. Subjecting the spouse, who is fulfilling an official duty, to criminal or civil liability could interfere with the function of the head of state because the couple is recognized as a unit. Moreover, there are instances in which the spouse could be carrying out an official function by furthering diplomacy on behalf of his or her country.¹⁸² Therefore, in instances where the spouse of a head of state is accompanying the head of state on an official visit and is fulfilling an official function, it would be appropriate to extend immunity to the spouse.

But even when the act in question has been committed in a private capacity and not in the fulfillment of an official function, states have granted immunity to members of a head of state's family, particularly to first ladies.¹⁸³ As the New York court's opinion suggests,¹⁸⁴ however, this is done as a matter of discretionary international comity, not law.¹⁸⁵ The bottom-line rationale is reciprocity—a favor to the other state with hopes that such favor will be returned in the future.¹⁸⁶ When host governments such as South Africa characterize grants as legally compelled, they risk diluting the general logic for the immunities and disables justice for victims who are often host-nation citizens. Specifically, granting absolute immunity to a first lady suggests that she has a function that is equivalent to that of a head of state, which is not true. A head of state is entitled to absolute immunity *ratione personae* because he or she is considered the personification of the sovereign state.¹⁸⁷ Diplomatic agents were historically granted absolute immunity *ratione personae* under the theory that they represented the sovereign state, but such absolute immunity has been reduced to qualified immunity *ratione materiae*.¹⁸⁸ This restriction makes sense in light of the fact that diplomatic agents, unlike heads of state, are not embodiments of the sovereign state itself but act only as an arm or mouthpiece of the state.¹⁸⁹ The function of a first lady is closer to that of a diplomatic agent than that of a head of state because her position does not symbolize the state itself. Therefore, it is more appropriate for a first lady to be entitled to qualified immunity *ratione materiae* for official conduct, not for private acts.

182. See, e.g., Barbara Maranzani, *A First Lady Brings a French Icon to American Shores*, HISTORY (Jan. 8, 2013), <https://www.history.com/news/a-first-lady-brings-a-french-icon-to-american-shores> [<https://perma.cc/3TVS-8MZD>] (explaining how President Charles de Gaulle was not impressed with President John F. Kennedy during his visit to France but was impressed with First Lady Jacqueline Kennedy Onassis, who quickly built rapport with President de Gaulle during her visit).

183. See *supra* Part II.B.

184. See *supra* note 160.

185. See *supra* note 126 and accompanying text.

186. See George, *supra* note 62, at 1061 (explaining that under the doctrine of comity, states grant immunity to the official of a foreign state so that its own state officials will be treated the same way when they are in the foreign state and that “[c]omity is also closely related to such policies as protecting the dignity of foreign governments and safeguarding mutual respect among nations”).

187. See *supra* notes 64–66 and accompanying text.

188. See *supra* notes 87–88, 93 and accompanying text.

189. See *supra* note 97.

Moreover, limiting a first lady's immunity to qualified immunity *ratione materiae* does not necessarily impede the functions of her official position. When Grace Mugabe attacked Engels, she was not acting in an official capacity as a diplomatic agent on a diplomatic mission.¹⁹⁰ She was acting in her private capacity as a mother on a personal mission to reprimand her two sons for their bad behavior.¹⁹¹ The former first lady's pursuit of her private mission made Engels a victim of the first lady's private conduct.¹⁹² If Grace Mugabe were to have been subject to South Africa's criminal jurisdiction as a result of her behavior, this would not have necessarily impeded her official duties as first lady. Although Grace Mugabe later changed her story to make it appear as if she were in South Africa to carry out her official duties as first lady,¹⁹³ her own husband had already confirmed that she was in South Africa for medical treatment.¹⁹⁴ Even if the altered story were true, subjecting Grace Mugabe to South Africa's criminal jurisdiction would not have changed the outcome of her so-called "official visit" because she failed to attend the regional summit even after diplomatic immunity was granted.¹⁹⁵ As exemplified in the incident between Grace Mugabe and Engels, allowing immunity of first ladies for acts committed in their private capacity and not in the furtherance of an official duty only encourages abuse of power.¹⁹⁶

Refusing immunity for the private acts of a first lady is also unlikely to interfere with the official functions of a head of state in a way that the law should countenance. One commentator, Justin Papka, poses a hypothetical outcome to the incident of Grace Mugabe beating a photographer for snapping a photo of her during a shopping spree in Hong Kong.¹⁹⁷ If Hong Kong were to prosecute Grace Mugabe for assault, her husband might have been distracted from his official duties as President of Zimbabwe. From a logical standpoint, this could have disrupted Zimbabwe's internal affairs, and it also might have damaged Zimbabwe's relations with China.¹⁹⁸ Papka concludes that the chance of these consequences is remote.¹⁹⁹ But even if they were likely, the answer is that it should be up to China to let Grace Mugabe leave and escape prosecution as a policy choice and a matter of sovereign grace, not legal obligation.

As a general matter, there has been a movement away from absolute immunity and toward qualified immunity in both civil and criminal contexts,

190. *See supra* note 173.

191. *See supra* note 173.

192. *See supra* notes 8–13 and accompanying text.

193. *See supra* note 175.

194. *See supra* note 174 and accompanying text.

195. *See supra* note 176 and accompanying text.

196. *See, e.g.,* Papka, *supra* note 102, at 1–2 (explaining that Hong Kong granted Grace Mugabe diplomatic immunity to protect her from prosecutorial proceedings after she violently beat a photographer during a personal shopping trip).

197. *See id.* at 12–17.

198. *See id.*

199. *See id.* at 17 (“Based on the case facts, when assessing the potential costs to state relations between the Hong Kong SAR and Zimbabwe, or the possible threat to Zimbabwe’s executive office or national security; there does not appear to be a reasonable legal necessity or probability of threat to either nation.”).

with a focus on balancing respect for sovereignty with interests of justice and individual rights.²⁰⁰ State immunity, for instance, has evolved from absolute to none whatsoever with respect to commercial activities carried on by sovereign entities in foreign jurisdictions.²⁰¹

Furthermore, in recent years, some in the international community have argued for abolishing head-of-state blanket immunity from criminal jurisdiction in other countries for grave international human rights law violations,²⁰² such as the 1984 Convention on Torture.²⁰³ If the country itself has ratified the treaty, then it cannot possibly be justified as a sovereign act and so the act could only have been committed in the individual's private capacity.²⁰⁴

The immunity of a member of a head of state's family should be similarly restricted. While there are instances in which family members of a head of state serve as embodiments of the sovereign official, and must therefore be granted immunity,²⁰⁵ that determination should be made after considering the potential injustice that may result from a grant of immunity. Upholding respect for the sovereignty of a state may become the less attractive option depending on the seriousness of the act and the capacity in which the act was committed.²⁰⁶ A state's grant of immunity to a member of a head of state's family for a private act that has no connection with the fulfillment of an official function should be clearly identified and justified as a policy decision, not a legal obligation.²⁰⁷

CONCLUSION

Heads of state, particularly in the developing world, are often fabulously wealthy and lead lives of which their people can only dream. It has become common for the family members of heads of state—including wives, children, and grandchildren—to travel to foreign countries to obtain an education, shop, travel, eat, and play in sparkling cities that often stand in stark contrast to their homes. When these family members commit crimes or act in ways that cause injury, the legal presumption should be that they are liable or prosecutable. True, a lawsuit may seem to be a sham, a grudge, or even a shakedown. If so, the host government is at liberty to dismiss the suit or allow the implicated family member to leave the country for the sake of

200. *See supra* notes 73–77 and accompanying text.

201. Foreign Sovereign Immunities Act, 28 U.S.C. § 1605(a)(2) (2012).

202. *Cf.* Naomi Roht-Arriaza, *The Pinochet Precedent and Universal Jurisdiction*, 35 *NEW ENG. L. REV.* 311, 315 (2001) (discussing the Spanish court's prosecution of Chile's ex-dictator, General Augusto Pinochet, pursuant to Spanish judicial law that permits universal jurisdiction over heads of state for heinous crimes and how "transactional prosecutions can catalyze domestic prosecutions").

203. *See* REBECCA M.M. WALLACE & OLGA MARTIN-ORTEGA, *INTERNATIONAL LAW* 148 (6th ed. 2009).

204. SIMBEYE, *supra* note 30, at 129.

205. *See* *Kilroy v. Windsor*, No. C 78-291, 1978 U.S. Dist. LEXIS 20419, at *1 (N.D. Ohio Dec. 7, 1978).

206. *See supra* note 74 and accompanying text.

207. *See supra* notes 127–28.

harmonious relations. But to act or even imply that immunity in such instances is an obligation of customary international law, whether as a part of diplomatic or head-of-state immunity, is not only inaccurate—it risks undermining respect for those bona fide immunities and the reasons for which they exist. When the South African public saw Grace Mugabe get off scot-free because of “diplomatic immunity,” many likely perceived diplomatic immunity as a joke or a gross inequity. And what of the victim? Does the state not have a duty to protect the interests of its people, as well as a duty to ensure peaceful international relations? The language of law deployed as justification here is dangerous and should be curtailed. The proper balance is to recognize that the family members of heads of state have immunity when traveling to foreign countries on official business for their official acts but not for their private acts. Just as the international community has come to accept nonimmunity for the commercial activities of foreign sovereigns, it should acknowledge nonimmunity for the private activities of family members of foreign heads of state.