

CATEGORIZING ACTS BY STATE OFFICIALS: ATTRIBUTION AND RESPONSIBILITY IN THE LAW OF FOREIGN OFFICIAL IMMUNITY

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A “sentence of death” had been passed on John H. Tunstall “long before he was killed” on February 18, 1878, according to Tunstall’s friend and business partner Alexander McSween.¹ Tunstall, an Englishman, had prospered as a rancher and merchant in Lincoln County, New Mexico. Those with entrenched economic and political power, who had allies in the judiciary and in law enforcement, resented his success. When a local judge issued a writ of attachment against Tunstall’s store and livestock, Sheriff William Brady raised a posse to serve the writ.² Sensing trouble, Tunstall fled, taking his horses with him. He had hired a young gunman for

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1. MAURICE G. FULTON, HISTORY OF THE LINCOLN COUNTY WAR 238 (Robert N. Mullin ed., 7th ed. 1980).

2. DONALD R. LAVASH, SHERIFF WILLIAM BRADY, TRAGIC HERO OF THE LINCOLN COUNTY WAR 73–75 (1986).

protection, but it was not enough. The posse gave chase for thirty miles, ultimately killing Tunstall with shots to the head and breast.³ After witnessing Tunstall's murder, the young gunman, known to some as Billy the Kid, joined McSween and others to form "The Regulators." The Lincoln County War had begun.

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Juán Franco, a U.S. citizen and deputy constable, held a well-known grudge against Francisco Mallén, the Mexican Consul in El Paso, Texas. After Franco accosted Mallén on the street and slapped him, Franco published a statement in the *El Paso Daily Times* alleging that Mallén had purposefully thwarted the extradition of a Mexican suspect in the murder of Franco's brother-in-law to the United States.⁴ The feud did not end there. Less than two months later, on October 13, 1907, the two men found themselves travelling in the same street car from Ciudad Juárez to El Paso. Franco spied a pistol in Mallén's pocket, which Mallén claimed the El Paso county attorney had advised him to carry for his own protection.⁵ According to Mallén, Franco approached him from the rear and struck a "vicious blow" to his right temple, driving the left side of his head into a window frame and rendering him unconscious. Franco then dragged Mallén at gunpoint "with [his] clothes disarranged and [his] face bathed in blood, through the streets of El Paso to the County Jail."⁶ Franco was convicted on charges of aggravated assault and battery and ordered to pay a \$100 fine.⁷ Mallén was recalled to Mexico and never fully recovered from his injuries.

INTRODUCTION

The historical roots of the modern law of state responsibility lie in principles developed to adjust compensation claims brought by states on behalf of their injured nationals. The infamous assaults on John Tunstall and Francisco Mallén gave rise to claims for reparations against the United States because the assailants allegedly acted under color of state law. Since the injured parties were foreigners, the question was whether the United States had breached a duty owed to another state's national. In each case, answering that question required determining whether the assailant's actions were attributable to the United States.

3. Local Remedies, Tunstall's Case, 6 MOORE'S DIGEST, ch. 21, §987, at 662 [hereinafter Tunstall's Case].

4. FRANCISCO MALLÉN, THREATS ON THE LIFE OF CONSUL MALLÉN 2 (1909).

5. *Id.* at 4.

6. *Id.* at 5.

7. *Id.* at 6.

During the late nineteenth and early twentieth centuries, jurists developed principles of attribution in the context of the international law of state responsibility. More recently, these principles have figured prominently in debates about the scope of foreign official immunity. Under customary international law, and under the 1976 U.S. Foreign Sovereign Immunities Act (FSIA), foreign states and their agencies and instrumentalities are generally immune from the jurisdiction of other countries' domestic courts for their public acts (*acts jure imperii*).⁸ Unlike some other countries' state immunity acts, the FSIA does not govern the jurisdictional immunities of current or former foreign officials; these are left to other statutes and to the common law.⁹

The starting-point for most conceptual and doctrinal discussions of foreign official immunity is the observation that states can act only through individuals.¹⁰ That does not, however, mean individuals invariably enjoy the same immunity accorded foreign states. Instead, individual officials are capable of performing three types of acts and the immunity afforded each varies:

- 1) Acts attributable solely to the state and for which such attribution discharges the individual from personal responsibility, such as signing a treaty or entering into a commercial transaction on behalf of the state ("Category One").
- 2) Acts attributable to the state and for which such attribution does not discharge the individual from personal responsibility under domestic and/or international law, such as ordering torture ("Category Two").¹¹

8. See *Jurisdictional Immunities of the State* (Ger. v. It.: Greece intervening), Judgment, 2012 I.C.J. Rep 99, ¶ 70 (Feb. 3); *Saudi Arabia v. Nelson*, 507 U.S. 349, 355 (1993).

9. *Samantar v. Yousuf*, 560 U.S. 305, 319 (2010); see also Chimène I. Keitner, *Foreign Official Immunity After Samantar*, 44 VAND. J. TRANSNAT'L L. 837, 843 (2011).

10. See, e.g., Curtis A. Bradley & Jack L. Goldsmith, *Foreign Sovereign Immunity, Individual Officials, and Human Rights Litigation*, 13 GREEN BAG 2D 9, 10 (2009).

11. Article 1 of the Convention Against Torture defines "torture" as including certain prohibited acts "inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity." Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. 1, Dec. 10, 1984, S. TREATY DOC. No. 100-20, 1465 U.N.T.S. 85. Similarly, 18 U.S.C. § 2340 (2012) defines "torture" to mean "an act committed by a person acting under the color of law specifically intended to inflict severe physical or mental pain or suffering (other than pain or suffering incidental to lawful sanctions) upon another person within his custody or physical control."

- 3) Acts not attributable to the state and for which the individual bears sole responsibility, such as vandalizing a neighbor's property without actual or apparent state authority ("Category Three").

When Deputy Constable Juan Franco walked up to Francisco Mallén on the street in El Paso and slapped him Franco performed a Category Three act because the slap did not involve any use of actual or apparent state authority. By contrast, Franco performed the second attack with apparent (if not actual) state authority, since he purported to arrest Mallén and dragged him off to jail. An international arbitral tribunal ultimately determined that the second attack fell into Category Two, as discussed in Part I below.¹²

Imagine Mallén's consternation if he learned that, one hundred years later, an English court would cite his case for the proposition that an official like Franco is entitled to immunity from civil claims brought against him in another country's court because the injurious act is attributable to a foreign state. Yet, that is precisely what the U.K. House of Lords held in dismissing civil claims for torture brought by a U.K. citizen against a Saudi Arabian official.¹³ Other domestic courts have adopted similar reasoning in dismissing claims for torture and other abuses of state authority brought against foreign officials, even where the claimant sought recourse solely against the official and not the foreign state itself.¹⁴

The decision to attribute Franco's second assault to the United States was not inevitable. The arbitral tribunal could, instead, have found that the attack was not attributable to the state because it was *ultra vires*, or beyond the scope of Mallén's legitimate authority. Indeed, that is the position the United States adopted in the *Tunstall* case. When the United Kingdom sought indemnity on behalf of John Tunstall's father for the abuse of official authority that led to his son's death,¹⁵ the United States responded

12. See *Mallén (Mex.) v. United States*, 4 R.I.A.A. 173 (Gen. Cl. Comm'n 1927).

13. *Jones v. Saudi Arabia* [2006] UKHL 26 [75], [2007] 1 AC (HL) 270 (Lord Hoffmann LJ) (appeal taken from Eng.) (citing *Mallén*, 4 R.I.A.A. at 174).

14. See generally Chimène I. Keitner, *Foreign Official Immunity and the "Baseline" Problem*, 80 *FORDHAM L. REV.* 605 (2011) (citing a number of such cases). For critiques of expansive approaches to foreign official immunity more generally, see, for example, Beth Stephens, *Abusing the Authority of the State: Denying Foreign Official Immunity for Egregious Human Rights Abuses*, 44 *VAND. J. TRANSNAT'L L.* 1163 (2011); Lorna McGregor, *Torture and State Immunity: Deflecting Impunity, Distorting Sovereignty*, 18 *EUR. J. INT'L L.* 903 (2008).

15. Letter from Thomas F. Bayard to Lionel S. Sackville-West (June 1, 1885), in *PAPERS RELATING TO THE FOREIGN RELATIONS OF THE UNITED STATES* [1885] 450–51 (1886) (citing Sir Edward Thornton's notes of March 9, 1878, and June 23, 1880) [hereinafter Letter from Secretary of State Bayard].

that the shooting was not attributable to the United States because it fell outside the scope of the officials' agency.¹⁶ In other words, the United States would have placed the actions of Sheriff Brady and his posse in Category Three, not Category Two.

Tunstall, *Mallén*, and similar cases illustrate that state practice on whether to attribute *ultra vires* acts to the state for purposes of state responsibility was divided in the late nineteenth and early twentieth centuries. Faced with these divided views, which are explored further in Part I, the International Law Commission (ILC) ultimately chose to adopt a broad attribution rule in order to promote clarity and facilitate recovery. The ILC did not consider the potential implications for the doctrine of foreign official immunity of attributing an official's *ultra vires* act to the state. It did, however, specify that its articles on state responsibility are without prejudice to questions of individual responsibility.¹⁷

Part I of this Article sheds new light on inconsistent state practice regarding whether state officials' acts fall into Category Two (under a broad approach to attribution) or into Category Three (under a narrow approach to attribution). Part II explores the unintended consequences of the ILC's decision to codify a broad attribution rule in the Draft Articles on the Responsibility of States for Internationally Wrongful Acts (Draft Articles on State Responsibility) for the doctrine of foreign official immunity, bringing the core pieces of what might be called the "attribution puzzle" into sharper focus. Understanding the origins and implications of the ILC's broad approach to attribution in the context of the law of state responsibility helps us move beyond an oversimplified reliance on attribution as the sole criterion for delineating the scope of foreign official immunity in two ways. First, it encourages decision-makers to differentiate explicitly between acts that fall into Category One, in which attribution to the state discharges the individual from personal responsibility, and those that fall into Category Two, in which attribution to the state does not discharge the individual from personal responsibility. Second, it emphasizes that the trade-offs involved in developing principles of responsibility and immunity for states may overlap with, but are not identical to, the trade-offs involved in developing principles of responsibility and immunity for individuals.

16. *Id.* at 450.

17. *Report of the International Law Commission to the General Assembly*, 56 U.N. GAOR Supp. No. 10, at 363, art. 58, U.N. Doc. A/56/10 (2001), reprinted in [2001] 2 Y.B. Int'l L. Comm'n 1, U.N. Doc A/CN.4/SER.A/2001/Add.1 (Part 2) [hereinafter *2001 ILC Draft Articles*].

I. THE RELATIONSHIP BETWEEN STATE AND INDIVIDUAL RESPONSIBILITY

A. Categorizing Acts by State Officials

Because states can act only through individuals, domestic courts have often viewed the question of foreign official immunity through the lens of state responsibility. This approach, however, can be misleading. Recall the three categories of acts proposed in the Introduction:

Category	Is the Act Attributable to the State?	Does Attribution to the State Discharge the Officials from Personal Responsibility?	Responsibility Borne by:	Examples:
One	Yes	Yes	State Only	Signing a Treaty or Entering into a Commercial Transaction on Behalf of the State
Two	Yes	No	State and Individual	Ordering Torture
Three	No	N/A	Individual Only	Vandalizing a Neighbor's Property Without Actual or Apparent State Authority

Since individuals do not bear personal responsibility for Category One acts, it makes sense to shield foreign officials from the legal consequences of those acts.¹⁸ Entering into a commercial transaction on behalf of a state,

18. In *Propend Finance Property Ltd. v. Sing*, for example, the court dismissed a claim against the incumbent Commissioner of the Australian Federal Police Force for an improper fax sent by an Australian diplomat because the incumbent Commissioner bore no personal responsibility for the act, which was performed before he took office. The challenged act could not be imputed to the named

for instance, is a Category One act for which an individual official generally does not incur personal liability. Accordingly, as Lady Hazel Fox has suggested, the appropriate defense to foreign legal proceedings brought against an individual for entering into a commercial transaction on behalf of a state is the absence of personal responsibility rather than the presence of an applicable immunity.¹⁹

Courts have not always drawn a uniform line between Category One and Category Two acts; for example, some have treated officials as potentially personally liable for purchases made on behalf of a state.²⁰ Nevertheless, the distinction between Category One and Category Two acts has generated less debate and discussion than the line between Category Two and Category Three acts.

Both Category Two and Category Three acts indisputably involve the personal responsibility of the individual actor. However, there is no basis for a foreign official to claim *ratione materiae* immunity for a Category Three act because there is no relevant link to the state other than the incidental identity of the alleged wrongdoer. To be sure, an incumbent diplomat, head of state or head of government, foreign minister, or member of a special diplomatic mission could invoke status-based (*ratione personae*) immunity from foreign legal proceedings absent a waiver of immunity by her state, but such immunity would not persist beyond her term in office.²¹ Unlike status-based immunity, a claim of conduct-based or *ratione materiae* immunity derives from the official nature of the alleged conduct, not the official position of the defendant at the time of the legal

official. [1997] EWCA (Civ) 1433 (UK). Likewise, the ICTY held that it could not issue a subpoena to a foreign official since the State, not the official, was the target of the subpoena, and the ICTY lacked the power to sanction the State itself for non-compliance. Responsibility for complying with the subpoena lay solely with the State, not the official. *Prosecutor v. Blaskić*, Case No. IT-95-14-A, Judgment, ¶ 38 (Int'l Crim. Trib. for the Former Yugoslavia Oct. 29, 1997).

19. See Hazel Fox, *Imputability and Immunity as Separate Concepts: The Removal of Immunity From Civil Proceedings Relating to the Commission of an International Crime*, in INTERNATIONAL LAW AND POWER: PERSPECTIVES ON LEGAL ORDER AND JUSTICE 165, 172–73 (Kaiyan Homi Kaikobad & Michael Bohlander eds., 2009).

20. For an early case finding that a foreign official lacked personal responsibility for a commercial transaction entered into on behalf of a government, see *Jones v. Letombe*, 3 U.S. 384, 385 (1798). For a different approach, see *Saorstat & Cont'l S.S. Co. v. de las Morenas*, [1945] IR 291, 300 (Ir.) (finding that a colonel in the Spanish army who had contracted to carry horses from Dublin to Lisbon for use by the Spanish army was not entitled to immunity because “[h]e is sued in his personal capacity and the judgment which has been, or any judgment which may hereafter be, obtained against him will bind merely the appellant personally”).

21. See *Arrest Warrant of 11 April 2000 (Dem. Rep. Congo v. Belg.)*, Judgment, 2002 I.C.J. Rep. 3, ¶¶ 53–54 (Feb. 14).

proceedings.²² Consequently, *ratione materiae* immunity persists beyond an individual's term of office.

The real debate centers on the scope of conduct-based or *ratione materiae* immunity for Category Two acts—that is, acts attributable to the state for which the individual official also bears personal responsibility. The rationale used to justify conduct-based immunity from legal consequences for Category One acts does not apply to Category Two acts because individuals bear personal responsibility for Category Two acts. At the same time, imposing legal consequences for Category Two acts can be more problematic than doing so for Category Three acts because Category Two acts are also attributable to the state. Consequently, some take the position that, because accepted doctrines of foreign *sovereign* immunity shield foreign states themselves from legal consequences for certain Category Two acts in other countries' domestic courts, foreign *official* immunity necessarily shields state officials from foreign legal proceedings for the same acts.²³ Others criticize this approach.²⁴

Discussions of the relationship between state responsibility and foreign official immunity often lack precision because they fail to distinguish among the three possible categories of acts. This is, in part, a relic of what Lady Fox has called the “classical” notion of attribution. The classical view “imputes the act solely to the State, who alone is responsible for its consequence. In consequence, any act performed by the individual as an act of the State enjoys the immunity which the State enjoys.”²⁵ However, as indicated above, only Category One acts are attributable *solely* to the state. The classical notion does not address the problem of Category Two acts because it denies the very existence of that category.

Whether or not the classical notion was ever descriptively accurate, it is certainly no longer tenable. Clearly, officials may perform acts that are attributable to a foreign state and for which attribution does not discharge the individual from personal responsibility. These acts fall into Category Two.

22. On the importance of distinguishing between conduct-based and status-based immunity, see, for example, Chimène I. Keitner, *The Common Law of Foreign Official Immunity*, 14 GREEN BAG 2D 61, 63–68 (2010).

23. E.g., Roger O’Keefe, *An “International Crime” Exception to the Immunity of State Officials From Foreign Criminal Jurisdiction: Not Currently, Not Likely*, 109 AJIL UNBOUND 167 (2015).

24. See, e.g., Chimène I. Keitner, *Horizontal Enforcement and the ILC’s Proposed Draft Articles on the Immunity of State Officials From Foreign Criminal Jurisdiction*, 109 AJIL UNBOUND 161 (2015); William S. Dodge, *Foreign Official Immunity in the International Law Commission: The Meanings of “Official Capacity”*, 109 AJIL UNBOUND 156 (2015).

25. HAZEL FOX, *THE LAW OF STATE IMMUNITY* 455 (2d ed. 2008).

Because the classical notion denies the existence of Category Two acts, it cannot provide meaningful guidance on the potential scope of conduct-based immunity for such acts. Under the classical view, conduct-based immunity flows directly from the *exclusive* attribution of the act to the state. This explains why individuals who perform Category One acts might be shielded by conduct-based immunity or a functionally equivalent doctrine (because they do not bear personal responsibility for such acts). It does not, however, say anything about liability for acts that fall into Category Two. Cognizant of the shortcomings of the classical approach, courts and commentators have struggled with the contours of conduct-based immunity for acts in Category Two.

In her Fourth Report on the Immunity of State Officials from Foreign Criminal Jurisdiction, ILC Special Rapporteur Concepción Escobar Hernández notes that the attributability of an act to the state begins, but does not end, the inquiry into whether the individual who performed the act can claim *ratione materiae* immunity.²⁶ This is because, as described further below, the characteristics that make an act attributable to the state for purposes of state responsibility are much broader than those that warrant shielding an individual alleged to have performed such an act from the exercise of foreign jurisdiction.²⁷ Thus, the mere attributability of an act to the state is an inadequate touchstone, both conceptually and doctrinally, for determining whether a foreign official is entitled to claim conduct-based immunity for that act.

B. Developing Principles of State Responsibility

The International Law Commission (ILC) developed the Draft Articles on State Responsibility over an almost forty-year period, from the project's inception in 1956 to the adoption of the Draft Articles in 2001.²⁸ Codifying principles of state responsibility requires identifying characteristics that make an individual's act attributable to the state. If an act is attributable to a state and violates an international obligation owed by that state, then the state is obliged to provide reparations.

26. Concepción Escobar Hernández (Special Rapporteur on Immunity of State Officials From Foreign Criminal Jurisdiction), *Fourth Rep. on the Immunity of State Officials From Foreign Criminal Jurisdiction*, ¶¶ 111–35, U.N. Doc. A/CN.4/686 (May 29, 2015).

27. The Special Rapporteur's mandate only involves examining immunity from foreign criminal jurisdiction, so her analysis does not address the question of individual civil responsibility (or whether it makes sense to differentiate between individual civil and criminal responsibility). *Id.* ¶ 110.

28. JAMES CRAWFORD, *THE INTERNATIONAL LAW COMMISSION'S ARTICLES ON STATE RESPONSIBILITY: INTRODUCTION, TEXT, AND COMMENTARIES 1* (2002).

The 2001 Draft Articles state explicitly in Article 58 that they “are without prejudice to any question of the individual responsibility under international law of any person acting on behalf of a State.”²⁹ As ILC Special Rapporteur James Crawford indicates in his commentary to the Draft Articles:

The principle that individuals, including State officials, may be responsible under international law was established in the aftermath of World War II So far this principle has operated in the field of criminal responsibility, but it is not excluded that development may occur in the field of individual civil responsibility. As a saving clause article 58 is not intended to exclude that possibility hence the use of the general term “individual responsibility.”³⁰

Emphasizing that state and individual responsibility are separate concepts allowed the ILC to avoid theorizing or elucidating the relationship between the two, which was beyond the scope of its mandate at the time.³¹

Special Rapporteur Escobar Hernández has identified “[t]he relationship between immunity, on the one hand, and the responsibility of States and the criminal responsibility of individuals, on the other” as a “general issue[] of a methodological and conceptual nature” confronting the ILC in its current work on the immunity of state officials from foreign criminal jurisdiction.³² Yet a more complete understanding of these relationships remains elusive in the ILC’s reports and more generally,³³ in part because the Special Rapporteur’s current mandate is limited to examining immunity from foreign criminal proceedings, not other types of legal consequences.³⁴

29. 2001 ILC Draft Articles, *supra* note 17, art. 58.

30. CRAWFORD, *supra* note 28, at 312.

31. Cf. Paola Gaeta, *On What Conditions Can a State Be Held Responsible for Genocide?*, 18 EUR. J. INT’L L. 631, 643 (2007) (noting that “[o]nly by recognizing that criminal responsibility is one thing and state responsibility is quite another is it possible fully to bring to fruition the notion that there is—under international law—a dual regime of responsibility for serious violations of human rights and other norms of concern for the international community as such”).

32. Concepción Escobar Hernández (Special Rapporteur on Immunity of State Officials From Foreign Criminal Jurisdiction), ¶ 6, *Second Rep. on the Immunity of State Officials From Foreign Criminal Jurisdiction*, U.N. Doc. A/CN.4/661 (Apr. 4, 2013).

33. See, e.g., BÉATRICE I. BONAFÈ, *THE RELATIONSHIP BETWEEN STATE AND INDIVIDUAL RESPONSIBILITY FOR INTERNATIONAL CRIMES* 5 (2009) (observing that “[a]lthough the existence of a system of dual responsibility is widely acknowledged, there are hardly any theoretical inquiries shedding light on their mutual relationship”).

34. See generally Hernández, *supra* note 26. I have proposed an integrated approach to the various types of legal consequences individuals may face for conduct that is attributable to a foreign

The conceptual and jurisprudential framework of the ILC's Draft Articles on State Responsibility is rooted in the international law of diplomatic protection and the settlement of international claims brought on behalf of injured aliens. Much of the ILC's early consideration of this issue involved defining the nature of state responsibility. A brief consideration of this history illustrates why a satisfying account of foreign official immunity must differentiate not only among types of *acts*, but also among types of *responsibility*. Although the present contribution focuses on the first distinction, it is worth noting the implications of the second.

The ILC's first Special Rapporteur on state responsibility, Francisco García-Amador, noted that state responsibility in "traditional doctrine and practice" was regarded as "the consequence of the breach of an international obligation," and "implied for the State a 'duty to make reparation' for the injury sustained by the alien."³⁵ In this sense, "the term 'responsibility' was identified with the 'liability' (*responsabilité civile*) of municipal law."³⁶ Under the traditional conception, as articulated by Dionisio Anzilotti in 1928,

When a wrongful act—by which is meant, as a rule, the violation of an international right—is committed, the consequence is that a new relationship comes into existence, in law, between the State to which the act is imputable (that State being under a duty to make reparation) and the State with respect to which there exists an unperformed obligation (this State having a claim to reparation).³⁷

Domestic law differentiates between civil responsibility (entailing a duty of reparation) and criminal responsibility (warranting the imposition of sanctions). In Anzilotti's view, a state could owe a duty of reparation to another state, but it could not owe a duty akin to that arising under municipal criminal law.³⁸

State. See Chimène I. Keitner, *Prosecute, Sue, or Deport? Transnational Accountability in International Law*, 164 U. PA. L. REV. ONLINE 1 (2015).

35. 1 F.V. GARCÍA-AMADOR, *THE CHANGING LAW OF INTERNATIONAL CLAIMS* 88 (1984).

36. *Id.*

37. *Id.* at 89 (quoting DIONISIO ANZILOTTI, 1 CORSO DE DIRITTO INTERNAZIONALE 416 (3d ed. 1928)); see also André Nollkaemper, *Concurrence Between Individual Responsibility and State Responsibility in International Law*, 52 INT'L & COMP. L. Q. 615, 616 (2003) (noting that "[t]raditionally, international law attributes acts of individuals who act as state organs exclusively to the state. . . . State responsibility neither depends on nor implies the legal responsibility of individuals").

38. GARCÍA-AMADOR, *supra* note 35, at 91 (quoting ANZILOTTI, *supra* note 37, at 416). Interestingly, Anzilotti took the view that, in "an earlier stage of social history . . . compensation was also a penalty" as a matter of municipal law, because "the State was a[s] yet powerless to assert itself as the guardian of the law" by imposing criminal consequences. *Id.* (quoting ANZILOTTI, *supra* note 37, at

The distinction between duties of reparation and other legal duties is important for the law of foreign official immunity because the nature of the responsibility borne by the state is not identical to, and does not subsume, that borne by an individual official. Under the traditional view of state responsibility, an injurious Category One or Category Two act creates a new relationship between the state to which the act is imputable and another state. Importantly, however, an injurious Category Two act may *also* create a new relationship between the individual wrongdoer and the person sustaining the injury (civil responsibility), and between the individual wrongdoer and the relevant community (criminal responsibility).³⁹

At various points, the ILC contemplated expanding its conception of state responsibility to encompass criminal dimensions, citing the occasional award of punitive damages against states in arbitral decisions.⁴⁰ Special Rapporteur García-Amador noted that, following the Second World War, “the idea of international criminal responsibility had become sufficiently characterized and so widely acknowledged that it had to be admitted as one of the consequences of the breach of certain international obligations.”⁴¹ The idea that states might also bear criminal responsibility led to the controversial distinction proposed in previous Draft Article 19, which was provisionally adopted in 1976 under the stewardship of Special Rapporteur Roberto Ago, between “international crimes” and “international delicts.”⁴² Ultimately, however, the ILC abandoned this idea and settled on an understanding that certain international obligations may be owed to the international community as a whole (*erga omnes*) rather than to a particular state, and that certain violations might amount to particularly grave or

416). *See also id.* at 92 n.104 (citing HANS Kelsen, *PRINCIPLES OF INTERNATIONAL LAW* 116–17 (1952)) (noting Kelsen’s view that State responsibility is neither civil nor criminal in nature, because general international law does not differentiate between the two).

39. *See id.* (quoting ANZILOTTI, *supra* note 37, at 416) (noting that, in municipal law, an unlawful act gives rise *both* to a relationship between “the person committing [the act]—or rather the person to whom the law imputes the act—and the person sustaining the injury” *and* a relationship between the person committing the act and “the community represented by the State”). I am exploring these questions further as part of ongoing work with the International Law Association Study Group on Individual Responsibility in International Law, which I co-chair with Lorna McGregor.

40. Georg Nolte, *From Dionisio Anzilotti to Roberto Ago: The Classical International Law of State Responsibility and the Traditional Primacy of a Bilateral Conception of Inter-State Relations*, 13 *EUR. J. INT’L L.* 1083, 1092 (2002).

41. GARCÍA-AMADOR, *supra* note 35, at 92.

42. *Id.* at 94–95; *see also* THE INTERNATIONAL LAW COMMISSION’S DRAFT ARTICLES ON STATE RESPONSIBILITY 179–206 (Shabtai Rosenne ed., 1991). On the distinction between Anzilotti’s and Ago’s conceptions of state responsibility, *see* Nolte, *supra* note 40, at 1092.

serious breaches under the law of state responsibility.⁴³ These developments proceeded without prejudice to the potentially concurrent civil or criminal responsibility of individuals whose acts are attributable to states.

The ILC finally adopted its 2001 Draft Articles on State Responsibility under the stewardship of Special Rapporteur James Crawford.⁴⁴ State responsibility continued to elude categorization as either civil or criminal in nature. That said, as noted above, the inclusion of Article 58 as a saving clause in the 2001 Draft Articles left open the possibility of individual criminal and/or civil responsibility for acts that are also attributable to a state, and for which such attribution does not discharge the individual from personal responsibility—that is, for acts in Category Two.

C. Attributing Acts to the State

The 2001 Draft Articles had the important effect of expanding the circumstances under which an individual's act would fall into Category Two instead of Category Three. As described below, the ILC decided to adopt broad rules of attribution as part of an expansive approach to the conditions under which a state would incur responsibility for the acts of individuals under international law. Under such an approach, as Charles de Visscher noted long ago, it is irrelevant whether a state agent acted based on public or private motives, or whether the agent was or was not authorized by the state to engage in the injurious act. "It is sufficient, for international responsibility to exist, that the guilty agent abused the authority or means that were at his disposal on account of his official status."⁴⁵ Draft Article 7 codified this approach by providing that "[t]he

43. See CRAWFORD, *supra* note 28, at 20. André Nollkaemper suggests that "[t]he emergence of this category of [peremptory] norms [with an *erga omnes* character] underlies both the individualisation of responsibility and the disruption of the unity of state responsibility." Nollkaemper, *supra* note 37, at 631.

44. See generally Alan Nissel, *The Duality of State Responsibility*, 44 COLUM. HUM. RTS. L. REV. 793, 837–44 (2013) (noting that the 2001 articles represent a blend of García-Amador's conception of State responsibility as rooted in the "regional practice of alien protection" and reparation, and Ago's notion of a "universal doctrine of State responsibility"); Marina Spinedi, *International Crimes of State: The Legislative History*, in INTERNATIONAL CRIMES OF STATE—A CRITICAL ANALYSIS OF THE ILC'S DRAFT ARTICLE 19 ON STATE RESPONSIBILITY 7 (Joseph H. H. Weiler et al. eds., 1989) (detailing the process leading up to the adoption of draft article 19).

45. Charles de Visscher, *Notes sur la responsabilité internationale des états et la protection diplomatique d'après quelques documents récents*, 8 REV. DROIT INT'L & LEGIS. COMP. (3d ser.) 245, 253 (1927) (author's trans.) ("Il suffit, pour qu'il y ait responsabilité internationale, que l'agent coupable ait abusé de l'autorité ou de la force matérielle dont il disposait en vertu de son caractère officiel.").

conduct of an organ of a State or of a person or entity empowered to exercise elements of the governmental authority shall be considered an act of the State under international law if the organ, person or entity acts in that capacity, even if it exceeds its authority or contravenes instructions.”⁴⁶

The ILC’s decision to attribute *ultra vires* acts to the state was not a foregone conclusion. State practice on attribution varied, as evidenced by the different approaches to attribution in the *Tunstall* and *Mallén* disputes, among others. As one might expect, states called upon to account for the egregious acts of their officials often disclaimed responsibility and endorsed a narrow approach to attribution. By contrast, states espousing claims on behalf of their injured nationals articulated broader criteria for attributing harmful acts by officials to the respondent state. As described below, *Tunstall* and *Mallén* illustrate the narrow and broad approaches to attribution, respectively.

1. *Tunstall*

The United States’ response to the United Kingdom’s claim for reparations in the *Tunstall* case illustrates a narrow approach to attribution. In that case, as described above, a posse pursued and shot John Tunstall, a British subject, in the U.S. territory of New Mexico in the course of serving a writ authorizing the sheriff to seize Tunstall’s property and livestock.⁴⁷ The U.S. Department of Justice sent Judge Frank Warner Angel to investigate,⁴⁸ but the United Kingdom maintained that the federal government should also indemnify Tunstall’s father given his inability “to recover damages from the Territorial Government of New Mexico by proceedings at law or otherwise.”⁴⁹ U.S. Secretary of State Thomas Bayard responded that Tunstall’s injury was not a suitable basis for a diplomatic claim because Tunstall’s father had not exhausted local remedies.⁵⁰

46. 2001 ILC Draft Articles, *supra* note 17, art. 7.

47. Letter from Secretary of State Bayard, *supra* note 15, at 450; see Theodor Meron, *International Responsibility of States for Unauthorized Acts of Their Officials*, 33 BRIT. Y.B. INT’L L. 85, 90–91 (1957).

48. See IN THE MATTER OF THE CAUSE AND CIRCUMSTANCES OF THE DEATH OF JOHN H. TUNSTALL, A BRITISH SUBJECT: REPORT OF FRANK WARNER ANGEL, SPECIAL AGENT, 44-4-8-3, Record Grp. 60, Nat’l Archives & Records Admin. (Dep’t of Justice Oct. 1878).

49. Letter from Secretary of State Bayard, *supra* note 15, at 451 (quoting Sir Edward Thornton’s note of June 23, 1880).

50. *Id.* at 453 (arguing that “in countries subject to the English common law, where there is the opportunity given of a prompt trial by a jury of the vicinage, damages inflicted on foreigners on the soil of such countries must be redressed through the instrumentality of courts of justice, and are not the subject of diplomatic intervention by the sovereign of the injured party”).

Secretary Bayard also disputed the United Kingdom's assertion that the United States bore legal responsibility for Tunstall's death:

Killing, in personal malice, by an officer, of a defendant in a civil process in such officer's hands, such killing being subsequent to the execution of the writ, is as collateral to the official action of the officer as would be the commission of arson against the dwelling, or rape of a member of the family, of the party [defendant] by such an officer after the civil process had been served.⁵¹

Bayard took the position that the United States could not be held responsible for an act that was “wholly outside the scope of the agency.”⁵² In sum, in his view, “[t]he injury complained of is a personal tort . . . For such a tort the guilty party may be properly pursued and punished. But it was not an act of the Government.”⁵³ Bayard seemed to think it was self-evident that the sheriff and the posse's acts were not attributable to the U.S. government—in other words, that they fell into Category Three rather than Category Two. The U.K. government, which was espousing the claim for damages on behalf of its injured national, took the opposite view and advocated a broader approach to delineating Category Two.

The United States took a similarly narrow approach to attribution in other cases involving injuries inflicted by U.S. officials that gave rise to reparations claims. In a later case involving U.S. officials' illegal seizure of arms aboard a foreign ship, for example, U.S. Attorney General John Griggs opined that “the torts of an officer may subject him to suit, but, not being within his orders as agent of the Government, the latter is not responsible for them.”⁵⁴ In these and other cases, the debate was not about whether the individual could be held personally liable for the injurious acts. Rather, the debate was about whether the state *also* bore responsibility—that is, whether the acts were properly categorized as falling within Category Two or Category Three. A narrow approach to attribution limited

51. Tunstall's Case, *supra* note 3, at 664 (alternation in original). See also When Remedy is Judicial, 2 WHARTON'S DIGEST, ch. 9, §241, at 679–93.

52. Letter from Secretary of State Bayard, *supra* note 15, at 458.

53. *Id.* In an attempt to reconcile the United States' position with a broad attribution rule, the ILC's 1975 Commentary characterized the conduct at issue in the *Tunstall* case as an “injurious act having in practice been performed by an organ acting in a purely private capacity”—in other words, as a Category Three act. *Report of the International Law Commission to the General Assembly*, 27 U.N. GAOR Supp. No. 10, at 62 n.42, U.N. Doc. A/10010/Rev.1 (1975), reprinted in [1975] 2 Y.B. Int'l L. Comm'n 47, U.N. Doc. A/CN.4/SER.A/1975/Add.1 [hereinafter *1975 ILC Draft Articles*].

54. Seal Fisheries—Bering Sea, 22 Op. Att'y Gen. 64, 69 (1900).

Category Two acts to those that were “within [the] orders” of a government agent, and characterized all other acts as falling within Category Three.

2. *Mallén*

A narrow construction of Category Two allows a respondent state to disclaim responsibility for its agent’s harmful act by asserting that the act fell outside the scope of the agent’s authority. However, despite the existence of some state practice supporting a narrow approach, other states and tribunals have rejected it, including the General Claims Commission established in 1923 by the United States and Mexico to adjudicate outstanding claims for diplomatic protection between the two countries.⁵⁵ One of the unresolved claims subject to arbitration was Mexico’s claim on behalf of its consul, Mallén, for injuries inflicted by deputy constable Franco. The arbitral tribunal in *Mallén* agreed with Mexico that certain injurious acts performed by Franco with apparent authority fell into Category Two, not Category Three.

Three days before Christmas, in December 1910, the *El Paso Herald* reported that Captain Rogers of the Texas state rangers had arrived in town as the Governor’s special representative.⁵⁶ Francisco Mallén, the former Mexican consul in El Paso, had brought a claim against the United States for \$100,000. Mallén alleged that he had been assaulted and seriously injured by Juan Franco, a Texas deputy constable.⁵⁷ As noted above, Franco was convinced that Mallén had intentionally thwarted the extradition of a man alleged to have killed Franco’s relative in the United States.⁵⁸ Franco first assaulted Mallén by slapping him in the face. Several weeks later, Franco allegedly attempted to arrest Mallén for carrying a concealed weapon. When Mallén refused to surrender the weapon, Franco allegedly beat him, causing serious injuries including permanent damage to his eyesight.⁵⁹

The arbitral panel issued its decision in 1927. It determined that the United States bore international responsibility for the second attack.⁶⁰ By contrast, the initial slap was “a malevolent and unlawful act of a private

55. See General Claims Convention (Mex./U.S.), 4 R.I.A.A. 7 (Gen. Cl. Comm’n 1923).

56. *Governor Sends Capt. Rogers to Report on Former Consul’s Case*, EL PASO HERALD, Dec. 22, 1910, at 1.

57. *Id.*

58. *Id.*; see also *Francisco Mallen Wants Indemnity: Pushing His Claims for His Alleged Injuries*, EL PASO MORNING TIMES, Dec. 22, 1910, at 1 [hereinafter *Francisco Mallen Wants Indemnity*].

59. *Francisco Mallen Wants Indemnity*, *supra* note 58; see also *Alleged Conspiracy of Mexican Consul: Some Heretofore Unpublished History in the Sensational Mallen-Franco Feud*, EL PASO MORNING TIMES, Dec. 14, 1909, at 1–2.

60. See *Mallén (Mex.) v. United States*, 4 R.I.A.A. 173, 181 (Gen. Cl. Comm’n 1927).

individual who happened to be an official; not the act of an official”⁶¹—in other words, a Category Three act for which the United States was not responsible.

The arbitral panel characterized the second attack as falling into Category Two and giving rise to state responsibility because, in beating Mallén and purporting to arrest him, Franco had “misus[ed] his official capacity”⁶² as a deputy constable. Unlike in the *Tunstall* case, “both Governments consider[ed] Franco’s acts as the acts of an official on duty . . . [and] the evidence establishe[d] his showing his badge to assert his official capacity.”⁶³ This was so even though the arrest was “a mere pretext for taking private vengeance.”⁶⁴ Contrary to the United States’ suggestion in *Tunstall* that acts motivated by “personal malice” belong in Category Three, the *Mallén* tribunal found that Franco’s abuse of official authority gave rise to both individual and state responsibility.

Mexico also claimed that the United States was responsible for a “denial of justice” because it had not afforded Mallén adequate redress for his injuries. The panel determined that the allegedly insufficient \$100 fine imposed on Franco did not constitute a denial of justice; however, the lack of evidence that Franco actually *paid* the fine (or that he was committed to jail for non-payment) amounted to a compensable denial.⁶⁵ In addition, Franco’s appointment as a deputy sheriff following the termination of his appointment as a deputy constable amounted to a failure to provide the protection owed a foreign consul.⁶⁶ The panel ultimately entered an award of \$18,000 against the United States.

The ILC cited the 1927 *Mallén* arbitral decision in support of its decision to adopt a broad attribution rule,⁶⁷ even though the ILC recognized that such a rule was not supported by uniform state practice. The ILC preferred the broad rule because it was easier to administer (since it did not require ascertaining the exact parameters of an official’s authority or instructions), and because it was less susceptible to manipulation (since states could not evade responsibility by arguing that an injurious act was beyond the scope of the official’s authority or contravened municipal

61. *Id.* at 174–75.

62. *Id.* at 175.

63. *Id.* at 177.

64. *Id.*

65. *See id.* at 178.

66. *See id.*

67. 2001 ILC Draft Articles, *supra* note 17, art. 7 ¶ 5 n.147.

law).⁶⁸ The ILC did not, however, consider or envision that a broad attribution rule for state responsibility would be used to support broad conduct-based immunity for state officials from the jurisdiction of foreign courts.

II. IMPLICATIONS OF A BROAD ATTRIBUTION RULE

A. The Decision to Attribute *Ultra Vires* Acts to the State

As indicated above, state practice did not uniformly favor a broad attribution rule. States embraced contradictory rules depending on whether they were espousing a claim on behalf of an injured national or defending against such a claim. For example, although Mexico supported a broad attribution rule in the *Mallén* case, it took a different position in the 1926 *Youmans* arbitration. In *Youmans*, Mexico argued that it should not be held liable for the acts of Mexican soldiers who, instead of protecting American citizens from an angry mob, opened fire and participated in the mob violence, resulting in the deaths of three Americans.⁶⁹

Mexico argued that the soldiers' acts were not imputable to Mexico because they fell outside the scope of the soldiers' competency and exceeded their powers. The tribunal rejected this argument on the grounds that, under Mexico's approach, "it would follow that no wrongful acts committed by an official could be considered as acts for which his Government could be held liable," because such acts would always fall "outside the scope of [the official's] competency."⁷⁰ Mexico also argued against attribution to the state because, in its view, the soldiers' misconduct amounted to "malicious acts . . . committed in their private capacity."⁷¹ The tribunal rejected this characterization, noting that "[t]here could be no liability whatever for such misdeeds if the view were taken that any acts committed by soldiers in contravention of instructions must always be considered as personal acts."⁷² The *Youmans* panel, like the *Mallén* panel, viewed a narrow attribution rule as too susceptible to manipulation by the respondent state, which would invariably seek to avoid state responsibility by arguing that an injurious act belonged in Category Three (giving rise

68. According to the ILC's 1975 Report, State practice tilted in favor of attributing *ultra vires* acts with the 1926 decision in the *Youmans* case between the United States and Mexico, and the 1929 decision in the *Caire* case between France and Mexico. *1975 ILC Draft Articles, supra* note 53, art. 10 ¶ 19.

69. *See Youmans (U.S.) v. United Mexican States*, 4 R.I.A.A. 110, 116 (Gen. Cl. Comm'n 1926).

70. *Id.*

71. *Id.*

72. *Id.*

solely to personal responsibility) rather than Category Two (giving rise both to personal and to state responsibility).

The arbitral decision in the often-cited *Caire* case, which was brought by France against Mexico, articulated similar reasoning and cited the unanimous decision in *Youmans* in support of a broad attribution rule.⁷³ The French-Mexican Claims Commission was established to adjust claims brought on behalf of French nationals for losses incurred during the Mexican Revolution of 1910–1920.⁷⁴ In the *Caire* case, France brought a claim on behalf of the widow and children of Frenchman Jean-Baptiste Caire, who was murdered in the Mexican village of San Bártolo Naucálpam in 1914.⁷⁵ The Presiding Commissioner, Jan Hendrik Willem Verzijl, was a respected Dutch jurist who held the Chair of International Law at Utrecht.⁷⁶ In the face of procedural disputes and a lack of cooperation from Mexico (culminating in the absence of the Mexican Commissioner), Verzijl “found himself formulating, practically single-handed, the principles of State responsibility to be imposed upon a refractory government.”⁷⁷ Verzijl’s opinion in the *Caire* case, written in these difficult circumstances, represents a *locus classicus* for the rule attributing *ultra vires* acts to the state.

Jean-Baptiste Caire met an unhappy end. General Tomás Urbina was a close ally of revolutionary Pancho Villa, who joined forces with Emiliano Zapata and entered Mexico City on December 6, 1914. Five days later, a commander in Urbina’s brigade, Everardo Ávila, appeared with two armed soldiers at Caire’s boarding-house and demanded that he pay an exorbitant sum equivalent to \$5,000. Caire managed to scrape together only \$200 after having been detained and threatened by the officers. The officers executed Caire, along with another innocent man who had tried to help him.⁷⁸

The Mexican National Claims Commission denied compensation to Caire’s widow, who subsequently presented a claim to the French-Mexican Commission.⁷⁹ In an opinion written by Presiding Commissioner Verzijl

73. Estate of Caire (Fr.) v. United Mexican States, 5 R.I.A.A. 516, 529 n.1 (1929).

74. See Convention Between France and the United Mexican States, Sept. 25, 1924, 79 L.N.T.S. 418. The Commission operated without a Mexican Commissioner from June 3–24, 1929. Historical Note, 5 R.I.A.A. 309 (2006). During this interval, the Presiding Commissioner and the French Commissioner affirmed their jurisdiction to sit as a two-member tribunal and entered awards in twenty-three cases, including the *Caire* case. *Id.*

75. *Caire*, 5 R.I.A.A. at 517.

76. See C.G. Roelofsen, *Jan Hendrik Willem Verzijl*, in 12 INTERNATIONAL LAW IN HISTORICAL PERSPECTIVE, at xviii–xix (1998).

77. *Id.* at xx.

78. See *Caire*, 5 R.I.A.A. at 517–18.

79. *Id.* at 516–17.

and joined by the French Commissioner, the Commission found that Caire was murdered by officers serving in revolutionary (Villista) forces that had never actually come to power—a category that might not ordinarily be treated as equivalent to government’s own army,⁸⁰ but that fell within the scope of Article III(2) of the agreement establishing the Commission.⁸¹

In awarding an indemnity in favor of Caire’s widow, the Commission held that Mexico bore state responsibility for the soldiers’ conduct, even though the soldiers had violated orders and exceeded their authority. The tribunal approached the question of Mexico’s responsibility “in light of the general principles that govern the conditions for the international responsibility of States for the acts of their public officials in general.”⁸² Observing that jurists were moving away from fault-based conceptions of state responsibility towards a more “objective” regime, the tribunal endorsed an approach under which a state bears responsibility under international law “for all acts committed by its agents (*fonctionnaires*) or organs that constitute unlawful acts under international law, regardless of whether the agent or organ in question acted within the limits of its competence or exceeded such limits.”⁸³

Under this conception, *ultra vires* acts are not considered acts of the state in a strict sense, because “[t]he act of an official lacking competence is not an act of the State.”⁸⁴ However, *ultra vires* acts are still attributable to the state for the purpose of state responsibility because foreign states cannot be expected to know, or to figure out, which acts do or do not fall within the actual competence of a domestic official.⁸⁵ Consequently, as long as an act is performed with “apparent authority” or under “color of

80. *Id.* at 529.

81. *Id.* at 534. Article 3(2) of the Convention Between France and the United Mexican States, *supra* note 74, provided that the Commission could award damages for acts performed by a variety of forces, including “revolutionary forces opposed to” revolutionary forces that, following their victory, established either *de jure* or *de facto* governments.

82. *Caire*, 5 R.I.A.A. at 528 (author’s trans.) (“à la lueur des principes généraux qui régissent les conditions de la responsabilité internationale des Etats pour les actes de leurs fonctionnaires publics en general”).

83. *Id.* at 529–30 (author’s trans.) (“tous les actes commis par ses fonctionnaires ou organes et qui constituent des actes délictueux au point de vue du droit des gens, n’importe que le fonctionnaire ou l’organe en question ait agi dans les limites de sa compétence ou en les excédant”).

84. *Id.* at 530 (author’s trans.) (internal quotation marks omitted) (quoting Observations de Maurice Bourquin, 1 ANNUAIRE DE L’INSTITUT DE DROIT INTERNATIONAL 507–08 (1927)). The tribunal also noted that the Institut endorsed a broad attribution rule in a 1927 resolution. *Id.*

85. *Id.* (noting that *ultra vires* acts are attributable to the State “pour une raison propre au mécanisme de la vie internationale,” namely because “les rapports internationaux deviendraient trop difficiles, trop compliqués et trop peu sûrs, si l’on obligeait les Etats étrangers à tenir compte des dispositions juridiques, souvent complexes, qui fixent les compétences à l’intérieur de l’Etat”).

law”—the appearance, if not the reality, of state authority—it falls within Category Two.⁸⁶ Because Caire’s murder met these criteria, it was attributable to Mexico for the purpose of state responsibility.⁸⁷

In the end, the ILC adopted the expansive attribution rule reflected in the *Youmans* and *Caire* decisions, notwithstanding conflicting state practice.⁸⁸ In an article he wrote as a graduate student, international law professor and international criminal tribunal judge Theodor Meron described the principle that emerged as follows: “If an official purports to act within his apparent authority, the State is responsible even if the official has exceeded his competence; provided, of course, that the act, if authorized, would be internationally wrongful.”⁸⁹ The ILC’s Commentary to Draft Article 7 rationalized its codification of this rule as follows:

The rule evolved in response to the need for clarity and security in international relations. Despite early equivocal statements in diplomatic practice and by arbitral tribunals, State practice came to support the proposition, articulated by the British Government in response to an Italian request, that “all Governments should always be held responsible for all acts committed by their agents by virtue of their official capacity.”⁹⁰

In adopting Draft Article 7, the ILC’s dual mandate of codification and progressive development of the law led it to endorse one strand of state practice over another.

The ILC’s decision to place *ultra vires* acts in Category Two rather than Category Three also entailed adopting a broad definition of “official capacity” for attribution purposes. The 1975 Commentary noted that the question of “[t]he attribution or non-attribution to the State of the conduct

86. As Anzilotti stated, “Due cose si possono ritenere per certe: la prima, che un atto di questo genere non è in alcun modo un atto dello Stato, ma un puro atto individuale; l’altra, che il diritto internazionale positivo afferma in modo non dubbio la responsabilità dello Stato per i fatti illeciti dei funzionari, anche quando sono stati compiuti illegalmente e fuori della rispettiva competenza.” *Id.* at 530 n.1 (quoting DIONISIO ANZILOTTI, *TEORIA GENERALE DELLA RESPONSABILITÀ DELLO STATO NEL DIRITTO INTERNAZIONALE* 167–68 (1902)).

87. *See id.* at 531.

88. The *Caire* decision, and the ILC, also rejected the narrow approach advocated by Gustavo Guerrero and Wang Chung-Hui in their 1926 Report on behalf of the ILC’s predecessor, the Committee of Experts for the Progressive Development of International Law. League of Nations Doc. C. 46.M.23. *See Caire*, 5 R.I.A.A. at 530–31.

89. Meron, *supra* note 47, at 94.

90. 2001 ILC Draft Articles, *supra* note 17, art. 7 ¶ 3 (internal quotation marks omitted) (also citing the response of the Spanish government and a note verbale by Duke Almodovar del Rio, Archivio del Ministero degli Affari esteri italiano, serie politica P, No. 43 (1898) (on file with author)); *see also* 1975 ILC Draft Articles, *supra* note 53, art. 10 ¶ 7.

of organs which acted in their official capacity but outside their competence under internal law . . . had been one of the questions most keenly debated among international lawyers.”⁹¹ The term “official capacity” in this context meant acting with apparent authority. The *Caire* decision referred to acting “at least apparently as competent agents or organs,”⁹² while Special Rapporteur García-Amador used terms such as “purport[ing] to be acting by virtue of [one’s] official capacity,”⁹³ or acting “under cover of [one’s] official character,’ although possibly in excess of [one’s] functions.”⁹⁴ Those who favored a broad attribution rule recognized that state officials could still perform Category Three acts if they acted “in a capacity wholly unrelated to [their] office or function.”⁹⁵ Even under a broad approach, acts that “had no relationship with the official function”⁹⁶ were not attributable to the state, and were treated as the acts of a private individual.

The ILC explained that it adopted the expansive rule “on the basis of the data provided by State practice and international judicial decisions, and also bearing in mind the requirements of modern international life”⁹⁷— what the *Caire* decision had called “une raison propre au mécanisme de la vie internationale.”⁹⁸ The ILC’s 1975 Report notes candidly in its review of state practice that “[a]t times the legal departments of States give the impression of groping in the dark for a definition of principles, and not of having always had clear and distinct criteria in view.”⁹⁹ As for arbitral awards, “the criteria adopted vary from case to case and the reasons given for the decisions sometimes reveal a confusion of thought which does not make for easy interpretation.”¹⁰⁰ Some of this variation might simply represent the “shoe-on-the-other-foot” phenomenon, as states often sought to define responsibility narrowly when they were on the receiving end of international claims, and more broadly when they were bringing claims on

91. 1975 ILC Draft Articles, *supra* note 53, art. 10 ¶ 3.

92. *Caire*, 5 R.I.A.A. at 530 (author’s trans.) (“au moins apparemment comme des fonctionnaires ou organes compétents”).

93. F.V. García-Amador (Special Rapporteur on State Responsibility), *Second Rep. on State Responsibility*, 107, U.N. Doc. A/CN.4/106 (Feb. 15, 1957).

94. *Id.* at 110.

95. *Id.*

96. *Caire*, 5 R.I.A.A. at 531 (author’s trans.) (indicating that the State would only escape responsibility “dans le seul cas où l’acte n’a eu aucun rapport avec la fonction officielle et n’a été, en réalité, qu’un acte d’un particulier”).

97. 1975 ILC Draft Articles, *supra* note 53, art. 10 ¶ 3.

98. *Caire*, 5 R.I.A.A. at 530.

99. 1975 ILC Draft Articles, *supra* note 53, art. 10 ¶ 5.

100. *Id.* art. 10 ¶ 12.

behalf of their nationals, as illustrated above. It might also reflect the conceptual difficulty in attributing acts beyond an official's competence to the state for purposes of state responsibility, even though such acts might not be treated as acts of the state in other contexts.¹⁰¹

In sum, the question for the Draft Articles on State Responsibility was where to draw the line between Category Two and Category Three acts—a task that occupied several successive Special Rapporteurs on State responsibility. For example, previous Draft Article 10 included in the ILC's 1975 Report provided for the “[a]ttribution to the State of conduct of organs acting outside their competence or contrary to instructions concerning their activity.”¹⁰² The ILC's Commentary noted that “these provisions apply, of course, only to conduct which the persons constituting the organs have adopted in performing their functions as members of those organs and not as private individuals.”¹⁰³ By contrast, acts of those persons “performed in their capacity as private individuals” are “never attributable to the State even if their perpetrators have used, in the case in question, the means—including weapons—placed at their disposal by the State for the exercise of their functions.”¹⁰⁴

The ILC's 1975 Report emphasized that the driving rationale for a broad attribution rule was that a narrower rule “would make it all too easy for the State to evade its international responsibility.”¹⁰⁵ This rationale also led the ILC to propose, contrary to earlier suggestions, that acts “manifestly” outside an agent's competence would still be attributable to the state. The ILC included such acts in Category Two because “the fact of knowing that the organ engaging in unlawful conduct is either exceeding its competence, or contravening its instructions, [does] not enable the victim of such conduct to escape its harmful consequences.”¹⁰⁶ Excluding such acts from Category Two would “run the unpardonable risk of presenting the State with an easy loophole in particularly serious cases where its

101. See *supra* note 86.

102. 1975 ILC Draft Articles, *supra* note 53, art. 10.

103. *Id.* art. 10 ¶ 1.

104. *Id.* art. 10 ¶ 2; see also JAMES CRAWFORD, STATE RESPONSIBILITY: THE GENERAL PART 136–40 (2013). Crawford differentiates between acts that are simply made possible “by virtue of [an official's] position,” which might not be attributable to the State under the 2001 Draft Articles, and those in which the official “h[e]ld himself out as acting on behalf of the state,” which are attributable to the State even if the official exceeded his actual authority. *Id.* at 138.

105. 1975 ILC Draft Articles, *supra* note 53, art. 10 ¶ 18. On the other hand, certain States, “particularly the Latin American States, had opposed the principle because they thought they were not treated on an equal footing by other States and were continually subject to interference in their domestic affairs by foreign powers.” *Id.* art. 10 ¶ 19.

106. *Id.* art. 10 ¶ 25.

international responsibility ought to be affirmed”¹⁰⁷—for example, if a head of state manifestly violated municipal law by starting a war of aggression.¹⁰⁸

The ILC retained this approach in its 2001 Draft Articles in the name of “clarity and security in international relations,”¹⁰⁹ emphasizing that a narrow approach would allow “a State [to] rely on its internal law in order to argue that conduct, in fact carried out by its organs, was not attributable to it.”¹¹⁰ The ILC opted to make all acts performed with apparent authority attributable to the state in order to avoid the need to determine the content of internal law regarding the scope of an agent’s actual authority, and in order to preclude spurious denials of state responsibility on the grounds that an agent exceeded her authority.

In addition to citing early arbitral decisions in support of a broad attribution rule, the ILC’s 2001 Commentary to Draft Article 7 cites the Inter-American Court of Human Rights’ much more recent articulation of this approach in *Velásquez-Rodríguez v. Honduras*:

This conclusion [that the Convention was breached] is independent of whether the organ or official has contravened provisions of internal law or overstepped the limits of his authority: under international law a State is responsible for the acts of its agents undertaken in their official capacity and for their omissions, even when those agents act outside the sphere of their authority or violate internal law.¹¹¹

The ILC recognized that, at some point, any theory of attribution would have to draw the line between acts performed with “apparent authority” and those performed in a “private capacity”—in other words, between Category Two and Category Three acts. The 2001 Commentary emphasizes:

Cases where officials acted in their capacity as such, albeit unlawfully or contrary to instructions, must be distinguished from cases where the conduct is so removed from the scope of their official functions that it should be assimilated to that of private individuals, not attributable to the State.¹¹²

107. *Id.*

108. *Id.* art. 10 ¶ 25 n.92.

109. 2001 ILC Draft Articles, *supra* note 17, art. 7 ¶ 3.

110. *Id.* art. 7 ¶ 2.

111. *Id.* art. 7 ¶ 6 (quoting *Velásquez Rodríguez v. Honduras*, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 4, ¶ 170 (July 29, 1988)).

112. 2001 ILC Draft Articles, *supra* note 17, art. 7 ¶ 7.

This line is not always easy to draw; the 2001 Commentary suggests distinguishing between these categories by asking whether the officials “were acting with apparent authority.”¹¹³

The ILC adopted a broad attribution rule in the limited context, and for the limited purpose, of drawing the line between Category Two and Category Three acts. The attribution of acts beyond the scope of an agent’s actual authority to the state became entrenched as a bedrock principle of the law of state responsibility in Draft Article 7. The ILC’s decision to adopt an expansive definition of acts that fall into Category Two—as opposed to Category Three—was intended to serve two central goals: first, promoting state accountability by increasing predictability in resolving claims for diplomatic protection; and second, encouraging states to curb, punish, and provide remedies for their officials’ excesses, since an international claim could only be brought after exhausting local remedies. In the end, the ILC’s rule favored states espousing claims for diplomatic protection over states defending against claims for reparations; in so doing, it also favored the interests of those injured by the unlawful conduct of state officials.

B. Unintended Consequences of a Broad Attribution Rule for the Potential Scope of Foreign Official Immunity

The basic idea that both an individual and a state may bear responsibility for the same act is no longer controversial, even though the “classical” theory treated individual and state responsibility as mutually exclusive.¹¹⁴ As the European Court of Human Rights (ECtHR) observed in *Jones v. United Kingdom*, “There is no doubt that individuals may in certain circumstances also be personally liable for wrongful acts which engage the State’s responsibility.”¹¹⁵ In that case, the ECtHR found that the European Convention on Human Rights did not prevent the United Kingdom from granting immunity from civil proceedings to individual Saudi officials accused of torture, a Category Two act.¹¹⁶ The U.K. House

113. *Id.* art. 7 ¶ 8. The tribunal in *Caire* would also have attributed acts in which the individuals “aient usé de pouvoirs ou de moyens propres à leur qualité officielle,” even if they did not act with apparent authority. *Estate of Caire (Fr.) v. United Mexican States*, 5 R.I.A.A. 516, 530 (1929).

114. *See supra* note 25 and accompanying text.

115. *Jones v. United Kingdom*, App. Nos. 34356/06, 40528/06, ¶ 207, Eur. Ct. H.R. (2014) (emphasis added).

116. Bill Dodge, among others, has criticized this opinion for “mixing up state responsibility with official immunity despite Draft Article 58’s clear warning not to do so.” William S. Dodge, *Is Torture an “Official Act?”—Reflections on Jones v. United Kingdom*, OPINIO JURIS (Jan. 15, 2014), <http://opiniojuris.org/2014/01/15/guest-post-dodge-torture-official-act-reflections-jones-v-united-kingdom/>.

of Lords had denied permission to serve the defendants outside the jurisdiction based on its interpretation of the UK State Immunity Act, which does not apply to criminal proceedings.¹¹⁷

In *Jones*, the House of Lords found that the State Immunity Act applies to civil claims brought in U.K. courts against an individual official if the challenged acts are attributable to a foreign state. Lord Bingham reasoned that “a civil action against individual torturers based on acts of official torture does indirectly implead the state *since their acts are attributable to it*.”¹¹⁸ In his view, whether or not the alleged acts were performed in accordance with, or contrary to, municipal or international law, their *attributability* to a foreign state under the 2001 Draft Articles brings the acts within the scope of conduct-based immunity.¹¹⁹ Similarly, Lord Hoffmann emphasized that “[t]he cases and other materials on state liability make it clear that the state is liable for acts done under colour of public authority, whether or not they are actually authorised or lawful under domestic law.”¹²⁰

Lords Bingham and Hoffmann’s reasoning assumes that Category Two acts should be treated like Category One acts where conduct-based immunity from civil (but not criminal) proceedings is concerned. This approach, which conflates Categories One and Two, fails to grapple with the reality that Category Two acts entail *dual* responsibility.¹²¹ Equating state responsibility with conduct-based immunity might be alluring because of its simplicity, but its results are demonstrably over-inclusive. As Special Rapporteur Escobar Hernández has noted, not all acts that are attributable to the state under the 2001 Draft Articles necessarily benefit from *ratione materiae* immunity, including certain acts performed by individuals who are not state officials (under Draft Articles 8, 9, or 11) or by members of an insurrectional movement that subsequently gains control of a state (under

117. *Jones v. Saudi Arabia* [2006] UKHL 26, [2007] 1 AC (HL) 270 (appeal taken from Eng.).

118. *Id.* at [31] (Lord Bingham of Cornhill LJ) (emphasis added).

119. *Id.* at [12].

120. *Id.* at [74] (Lord Hoffmann LJ). Lord Hoffmann cited *Mallén* as standing for the proposition that “the United States was liable because the deputy constable had acted under colour of public authority” even though “the assault was in pursuit of a private grudge.” *Id.* at [75]. As indicated above, the tribunal in *Mallén* found that Franco’s first attack on Mallén fell into Category Three, and that the second attack belonged in Category Two.

121. See, e.g., Lorna McGregor, *Jones v. UK: A Disappointing End*, EJIL: TALK! (Jan. 16, 2014), <http://www.ejiltalk.org/jones-v-uk-a-disappointing-end/> (noting that “[t]he better way of looking at the issue is to ask whether subject-matter immunity applies in cases – such as torture – in which the underlying allegations if proven would attract the dual responsibility of the state and the individual”); Lorna McGregor, *State Immunity and Human Rights: Is There A Future After Germany v. Italy?*, 11 J. INT’L CRIM. JUST. 125, 138–44 (2013).

Draft Article 10).¹²² The 2001 Draft Articles were designed to expand and concretize state responsibility and accountability, not to shield individuals from the legal consequences of their acts.

Lord Hoffmann seems to have been persuaded to equate state responsibility with individual conduct-based immunity in part because of a perceived risk of dual recovery in situations of shared responsibility:

It has until now been generally assumed that the circumstances in which a state will be liable for the act of an official in international law mirror the circumstances in which the official will be immune in foreign domestic law. There is a logic in this assumption: if there is a remedy against the state before an international tribunal, there should not also be a remedy against the official himself in a domestic tribunal.¹²³

However, reasoning based on the possibility of dual recovery is plagued by both practical and conceptual challenges. Practically speaking, the risk of dual recovery is low because remedies are rarely available against the state itself. Additionally, proceedings against the state and proceedings against the official are not conceptually interchangeable because they involve different legal relationships. The former involves relationships with the state created by virtue of the act's attributability to that state (for Category One and Category Two acts). Proceedings against the official, on the other hand, involve relationships with the individual wrongdoer that can have civil and/or criminal dimensions (for Category Two and Category Three acts).¹²⁴ Lord Phillips of Worth Matravers, who also participated in the House of Lords's decision in *Pinochet (No. 3)*, made a related point in his concurrence in the Court of Appeal's decision in *Jones*:

[T]he argument [that the state is indirectly impleaded by criminal proceedings, which was rejected in *Pinochet*] does not run in relation to civil proceedings either. If civil proceedings are brought against individuals for acts of torture in circumstances where the state is immune from suit *ratione personae*, there can be no suggestion that the state is vicariously liable. It is the personal responsibility of the individuals, not that of the state, which is in issue. The state is not indirectly impleaded by the proceedings.¹²⁵

122. Hernández, *supra* note 26, ¶ 82.

123. *Jones* [2006] UKHL at [74] (Lord Hoffmann LJ).

124. See *supra* note 39 and accompanying text.

125. *Jones v. Saudi Arabia* [2004] EWCA (Civ) 1934 [128] (Lord Phillips of Worth Matravers MR) (appeal taken from QB High Ct. of Justice).

For these reasons, relying on attributability as a guide to conduct-based immunity is misguided. If attribution does not discharge the individual from personal responsibility (that is, if the act falls into Category Two rather than into Category One), the individual is not automatically entitled to *ratione materiae* immunity solely on the basis of attribution.

CONCLUSION

Attribution cannot be the sole basis for determining whether or not a state official should be held personally responsible by a foreign court. An over-reliance on attribution as the sole criterion for determining whether or not an individual is entitled to *ratione materiae* immunity for a particular act is not supported by uniform historical precedents. It also runs counter to the rationale behind the ILC's expansive approach to attribution in its 2001 Draft Articles on State Responsibility.

Recognizing that Category Two acts do not invariably entail *ratione materiae* immunity will enable us to move beyond simple syllogisms and engage in a more robust debate about the trade-offs involved in designing transnational accountability regimes for individuals who violate international law.¹²⁶ Debates about whether to attribute *ultra vires* acts to the state for purposes of state responsibility percolated for a century before the ILC adopted the 2001 Draft Articles. Draft Article 7 responds to the perceived "requirements of modern international life" with respect to state responsibility, but it says nothing about foreign official immunity.

Drawing on the analytic framework proposed here, decision-makers can more clearly differentiate among acts that fall into Category One, Category Two, and Category Three. Only by unpacking these categories—which are not monolithic—can we move towards a more conceptually and doctrinally coherent account of conduct-based immunity.

126. I suggest some possible factors to consider in Keitner, *supra* note 9, at 851–53, including whether a recognized foreign government has requested immunity on behalf of the official; whether the conduct was performed with actual rather than apparent authority; whether the defendant was served or arrested within the forum state's territory; and whether the forum State's legislature has attached legal consequences to the conduct, regardless of where it was performed.