# ON THE EXISTENCE OF A CUSTOMARY RULE GRANTING FUNCTIONAL IMMUNITY TO STATE OFFICIALS AND ITS EXCEPTIONS: BACK TO SQUARE ONE

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## INTRODUCTION: BACK TO SQUARE ONE

About ten years ago, I decided to study both the functional immunity of state officials from foreign jurisdiction and its exceptions in depth. I operated from a basic assumption commonly made in public international law manuals: there exists a general customary rule granting all state officials exercising their official functions immunity *ratione materiae* from the jurisdiction of foreign states. However, I soon realized that a step backward was necessary. An incredible magnitude and variety of documents, elements of state practice, and national and international case law called that assumption into question.

This Article returns to square one with the intention of clarifying some possible misconceptions about the notion and the scope of immunity



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*ratione materiae*. First, it spells out doubts about the very existence of a general customary rule granting functional immunity from foreign jurisdiction to all state officials exercising their official functions. It advances the position that national courts may exercise criminal jurisdiction over foreign officials suspected of international crimes under existing rules—no exception is needed to justify the practice.

It is generally acknowledged that functional immunity from the jurisdiction of foreign states accrues to all state officials for activities performed in the exercise of their official functions, and that this immunity survives the end of office. As International Law Commission (ILC) Rapporteur Concepción Escobar Hernández explained:

> [T]he basic characteristics of immunity *ratione materiae* can be identified as follows: (a) It is granted to all state officials; (b) It is granted only in respect of acts that can be characterized as "acts performed in an official capacity"; and (c) It is not time-limited since immunity *ratione materiae* continues even after the person who enjoys such immunity is no longer an official.[1]

A second basic assumption, also widely shared, is a corollary to the first: functional immunity attaches only to official activities carried out by state officials on behalf of their state. Hence, in principle, activities must be attributable to the state itself and not to the individual.[2] Accordingly, functional immunity is conceived of not as procedural, but as a substantive obstacle to the exercise of jurisdiction over state officials by foreign courts. For the same reason, many authors contend that functional immunity

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1. Concepción Escobar Hernández (Special Rapporteur on the Immunity of State Officials from Foreign Criminal Jurisdiction), *Third Rep. on the Immunity of State Officials from Foreign Criminal Jurisdiction*, ¶ 12, U.N. Doc. A/CN.4/673 (June 2, 2014) [hereinafter Escobar Hernández, *Third Rep.*]. Hernández also highlighted that these three elements reflect definitions given by the doctrine and the jurisprudence. *Id.*

2. HAZEL FOX, THE LAW OF STATE IMMUNITY 353 (2002) ("A suit against an individual identified with and acting on behalf of a foreign state is the practical equivalent of a suit against the sovereign authority itself. To allow a suit against such persons so acting would allow the litigant indirectly to circumvent the immunity accorded to the state which they represent."); HANS KELSEN, PRINCIPLES OF INTERNATIONAL LAW 235 (1952) ("Since a state manifests its legal existence only through acts performed by human beings in their capacity as organs of the state, that is to say, through acts of state, the principle that no state has jurisdiction over another state must be interpreted to mean that a state must not exercise jurisdiction through its own courts over acts of another state unless the other state consents. Hence the principle applies not only in case a state as such is sued in a court of another state, but also in case an individual is the defendant or the accused and the civil or criminal delict for which the individual is prosecuted has the character of an act of state. Then the delict is to be imputed to the state, not to the individual . . . .").

accrues to all state officials and, at least in principle, covers all of their "official" acts.[3]

The ILC Rapporteur has a different view. In her Third and Fourth Reports, she explains that for purposes of applying functional immunity, attribution of a state official's conduct to his or her state is not sufficient; the governmental or sovereign nature of the functions carried out must also be taken into account.[4] However, most scholars, including the ILC Rapporteur, agree that the ultimate reason for granting functional immunity to a state official is respect for the sovereignty of other states, enshrined in the principle *par in parem non habet imperium*.[5] Section I focuses on challenging the existence of a customary international rule granting functional immunity to all state officials. Section II analyzes the rationale for functional immunities rules provided by treaties, and Section III dwells on the existence of an exception for international crimes.

## I. IS THERE A GENERAL CUSTOMARY RULE GRANTING FUNCTIONAL IMMUNITY TO ALL STATE OFFICIALS?

Beginning at square one requires questioning the very existence of a general rule of customary international law providing that all state officials performing official acts are immune from the criminal jurisdiction of foreign states.[6] Various elements of state practice—mainly domestic case law—provide little evidence of such a general rule. There are, to the contrary, many cases in which national courts exercised their criminal jurisdiction over foreign officials performing official acts (or were only prevented from doing so because there was a treaty provision granting functional immunity to a specific class of state officials or because the

3. GEORG DAHM, 1 VÖLKERRECHT 225, 237, 303–05, 338–39 (1958); Michael Akehust, *Jurisdiction in International Law*, 46 BRIT. Y.B. INT'L L. 145, 241 (1972–73); Michael Bothe, *Die strafrechliche Immunität fremder Staatsorgane*, 31 ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT [ZAÖRV] [HEIDELBERG J. INT'L L.] 246, 251 (1971).

4. *See* Escobar Hernández, *Third Rep.*, *supra* note 1, ¶ 146; Concepción Escobar Hernández (Special Rapporteur on the Immunity of State Officials from Foreign Criminal Jurisdiction), *Fourth Rep. on the Immunity of State Officials from Foreign Criminal Jurisdiction*, ¶ 118, U.N. Doc. A/CN.4/686 (May 29, 2015) [hereinafter Escobar Hernández, *Fourth Rep.*].

5. Escobar Hernández, *Fourth Rep.*, *supra* note 4, ¶ 118 ( "Since immunity *ratione materiae* is intended to ensure respect for the principle of the sovereign equality of states, embodied in the maxim *par in parem non habet imperium*, the acts covered by such immunity must also have a link to the sovereignty that, ultimately, is intended to be safeguarded. That link, which cannot be merely formal, is reflected in the requirement that the act performed in an official capacity cannot be only an act attributable to the state and performed on behalf of the state, but must also be a manifestation of sovereignty, constituting a form of exercise of elements of the governmental authority.")

6. I will confine myself to the exercise of criminal jurisdiction, with a few references to civil jurisdiction where needed.

officials also enjoyed personal or diplomatic immunity). It is impossible to provide an exhaustive overview of existing practice,[7] but a few examples suffice to highlight the persistent uncertainties.

A. Controversial Cases

There are several cases in which national courts have exercised criminal jurisdiction over foreign state officials for carrying out activities unauthorized by the forum state on its territory. I will discuss two of the most well-known. The first, known as the *McLeod* case, is frequently cited as demonstrating the existence of the general rule that all state officials performing official acts are immune from the criminal jurisdiction of foreign states because of the positions taken by both governments involved in the dispute.[8]

British Officer Alexander McLeod was suspected of involvement in the arson of the steamer *Caroline* in 1837.[9] In 1840, McLeod, while on a trip to New York, was arrested and charged with arson and the murder of *Caroline* crewmember Amos Durfee.[10] The British Government assumed responsibility for his acts and invoked immunity from criminal process. The British asserted that because McLeod had acted in his official capacity, the United States could not proceed against him. But the American judges

7. *See* INT'L LAW COMM'N, http://legal.un.org/ilc/ (last visited Mar. 17, 2016) (all ILC Reports are published on this website).

8. *See, e.g.*, ANTONIO CASSESE, INTERNATIONAL LAW 110–13 (2d ed. 2005). Cassese traces the first enunciation of the general rule back to the *McLeod* case and quotes, as recent evidence of its existence, the position expressed by the International Criminal Tribunal for the Former Yugoslavia (ICTY) Appeals Chamber in *Blaškić*: "[C]ustomary international law protects the internal organization of each sovereign state: it leaves it to each sovereign state to determine its internal structure and in particular to designate the individuals acting as state agents or organs. Each sovereign state has the right to issue instructions to its organs, both those operating at the internal level and those operating in the field of international relations, and also to provide for sanctions or other remedies in case of non-compliance with those instructions. The corollary of this exclusive power is that each state is entitled to claim that acts or transactions performed by one of its organs in its official capacity be attributed to the state, so that the individual organ may not be held accountable for those acts or transactions. The general rule under discussion is well established in international law and is based on the sovereign equality of states (*par in parem non habet imperium)*." *Id.* (citing Prosecutor v. Blaškić, Case No. IT-95-14-AR, Judgment, ¶¶ 41–42 (Int'l Crim. Trib. for the Former Yugoslavia Oct. 29, 1997)).

9. People v. McLeod, 25 Wend. 483 (N.Y. Sup. Ct. 1841). *See* Supremacy of Territorial Sovereign, Governmental Acts, 2 MOORE'S DIGEST, ch. 6, §179, at 24–30 (summarizing the *McLeod* case); *see also* Robert Y. Jennings, *The Caroline and McLeod Cases*, 32 AM. J. INT'L L. 82–99 (1938) (same).

10. *McLeod*, 25 Wend. at 485.

nonetheless declared themselves competent.[11] Ultimately, McLeod was acquitted.[12]

A more recent case frequently quoted as evidence of the existence of the general rule on functional immunity is the *Rainbow Warrior* case. The Rainbow Warrior (a Greenpeace vessel) was lying in Auckland harbor when, on July 10, 1985, an explosion sunk the ship. The Dutch-Portuguese photographer Fernando Pereira died in the incident. France initially denied any involvement; however, two agents of the French Directorate General of External Security (DGSE), Major Mafart and Captain Prieur, were later arrested in New Zealand in connection with the incident. France took responsibility for the criminal acts committed by its secret agents and invoked their immunity from criminal proceedings. Although the action was met by opposition from the government and courts of France, both agents were ultimately tried. On November 4, 1985, the agents pleaded guilty to charges of manslaughter and willful damage to a ship by means of an explosive, and were sentenced to ten years in prison.[13]

In both cases, the governments on whose behalf the state officials acted claimed that the officials ought to enjoy functional immunity. These statements are widely believed to evidence the customary rule that state officials enjoy functional immunity.[14] Indeed, some scholars emphasize that cases like these—relating to activities carried out by foreign officials on the territory of a forum state without its authorization or consent—are precisely those in which an exception to that general rule ought to apply.[15]

However, this position and the two exemplary cases described above are very difficult to reconcile with a notion of functional immunity

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11. *See id.* at 490–98 (emphasizing the appropriateness of U.S. jurisdiction).

12. *See id.* at 515–16 ("[T]o hold the prisoner guilty of murder or any crime . . . would produce in international law a revolution . . . .").

13. The decision can be found in *International Law Reports*. *R v. Mafart* (*Rainbow Warrior* case) [1985] NZHC 243, *reprinted in* 74 I.L.R. 241 (1994). The Rainbow Warriors Affair subsequently gave rise to a mediation and an arbitration between France and New Zealand. *E.g., generally*, Gilbert Apollis, *Le règlement de l'affaire du 'Rainbow Warrior'*, 91 REVUE GÉNÉRAL DU DROIT INTERNATIONAL PUBLIC 9–43 (1987); Jean Charpentier, *L'affaire du Rainbow Warrior*, 31 ANNUAIRE FRANÇAIS DE DROIT INTERNATIONAL 210–20 (1985); Jean Charpentier, *L'affaire du Rainbow Warrior: le règlement interétatique*, 32 ANNUAIRE FRANÇAIS DE DROIT INTERNATIONAL, 873–85 (1986); Jean Charpentier, *L'affaire du Rainbow Warrior*: *la sentence arbitrale du 30 Avril 1990 (Nouvelle Zélande c. France*), 36 ANNUAIRE FRANÇAIS DE DROIT INTERNATIONAL 395–407 (1990); Michael Pugh, *Legal Aspects of the Rainbow Warrior Affair*, 36 INT'L & COMP. L. Q., 665–69 (1987); J. Scott Davidson, *The Rainbow Warrior Arbitration Concerning the Treatment of the French Agents Mafart and Prieur*, 40 INT'L & COMP. L. Q. 446–57 (1991).

14. The fact that criminal jurisdiction was nonetheless exercised over McLeod, Prieur and Mafart is deemed consistent with the existence of such a general rule.

15. *See supra* notes 1, 2, and 8 and accompanying text.

conceived in terms of attributing state officials' activities to the state itself, as was done by Roman Kolodkin, the first ILC Rapporteur, and many other scholars.[16] Assuming that the application of functional immunity turns on attribution,[17] it seems activities carried out without the consent of the forum state should be attributed to the state on whose behalf the official was acting. Indeed, this seems all the more appropriate where the state to which the indicted official belongs explicitly acknowledges that the official acted on its behalf and assumes responsibility for his or her activities.

There are also a few cases concerning the exercise of foreign jurisdiction over state officials performing activities authorized by the forum state.[18] Practice is scant for an obvious reason: state officials who normally reside abroad, such as consular agents or military forces stationed in foreign countries, are covered by specific treaty rules. In those cases, if the issue of functional immunity arises, there is no need to resort to a general customary rule.[19]

Therefore, it is important to examine existing treaty rules and jurisprudence concerning some specific categories of state officials, in

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16. Int'l Law Comm'n, Immunity of State Officials from Foreign Criminal Jurisdiction, Memorandum by the Secretariat, ¶¶ 159–60, U.N. Doc. A/CN.4/596 (Mar. 31, 2008); Roman Anatolevich Kolodkin (Special Rapporteur on the Immunity of State Officials from Foreign Criminal Jurisdiction), *Second Rep. on Immunity of State Officials from Foreign Criminal Jurisdiction*, ¶¶ 29–31, U.N. Doc. A/CN.4/631 (June 10, 2010).

17. As the ICJ has ruled in the *Djibouti* case: "The state which seeks to claim immunity for one of its state organs is expected to notify the authorities of the other state concerned. This would allow the court of the forum state to ensure that it does not fail to respect any entitlement to immunity and might thereby engage the responsibility of that state. Further, the state notifying a foreign court that judicial process should not proceed, for reasons of immunity, against its state organs, is assuming responsibility for any internationally wrongful act in issue committed by such organs." Certain Questions of Mutual Assistance in Criminal Matters (Djib. v. Fr.), Judgment, 2008 I.C.J. Rep. 177, ¶ 196 (June 4).

18. *See, e.g.*, Kovtunenko v. U Law Yone, Sup. Ct., Mar. 1, 1960 (Burma), *reprinted in* 31 I.L.R. 259, 265 (1994) ("If the applicant is concerned at all in the publication of the Bulletin, including the item to which exception has been taken, his act in publishing it might be an official act authorised by his Government and within the scope of his official duties, as the applicant's learned counsel contends. But that in itself could not be a defence in law in this country. However, it is a factor to be taken into consideration if Executive intervention is sought.").

19. See the interesting reflections by Oppenheim on cases where no treaty rule is available: "Occasionally a state sends to the territory of another agents to represent it in regard to some public service or business carried on by it—for instance, the management of a state railway or a state tobacco industry or even a Trade Delegation for the purpose of general trading. Agents of this kind do not possess diplomatic character or immunities, and are fully subject to the jurisdiction of the state in whose territory they are. They only differ from their fellow-nationals in the respect that, being government agents, both prudence and international courtesy demand that as far as possible special consideration should be shown by the local authorities to them and to premises occupied by them for official purposes. *No distinct rules have been developed with regard to their position, but in some cases the matter is dealt with by agreement between the two states*." L. OPPENHEIM, 1 INTERNATIONAL LAW: A TREATISE 860–61 (Hersch Lauterpacht ed., 8th ed. 1958) (emphasis added).

order to verify whether the rules contained therein and applied in domestic courts provide for immunity *ratione materiae* from foreign criminal jurisdiction and under which conditions. A few tentative conclusions may then be drawn regarding the existence of a customary rule.

B. Visiting Armed Forces

In assessing treaty rules, military forces stationed on foreign territory, usually categorized as beneficiaries of immunity *ratione materiae*, are a relevant case study. The stationing of military troops on foreign territory, both on a permanent and temporary basis, is governed by bilateral or multilateral treaties. As early as World War I, the Allied Powers were creating such bilateral agreements. These agreements usually contained provisions giving the sending state exclusive jurisdiction over its forces.[20] However, the provisions were not designed as immunity rules, but as rules on the allocation of jurisdictional competencies between states. In these agreements, there is no reference to a general rule on immunity *ratione materiae* accruing to state officials, nor is there mention of an exemption from criminal jurisdiction for members of armed forces for acts performed in their official capacity.[21]

During World War II, many agreements regulating the presence of armed troops on foreign territories were concluded among the Allied Powers. As for criminal jurisdiction, the rules were diverse: some agreements provided for exclusive jurisdiction of the sending state while others provided for concurrent jurisdiction between the sending and the host state.[22] Once again, these rules were clearly not envisaged as immunity rules. It is also vital to note that some of these agreements provided for the

20. For instance, one agreement recognized: "[L]a juridiction exclusive des tribunaux . . . [des] armées d'opérations respectives à l'égard des personnes appartenant à ces armeés, quels que soient le territoire où elles se trouvent et la nationalité des inculpés." Declaration Franco-Belge relative à la juridiction pénale militaire [French-Belgian Declaration], Fr.-Belg., Jan. 29, 1916, *in* Edouard Clunet, 43 JOURNAL DU DROIT INTERNATIONAL 726, 726–27 (1916) (Fr.).

21. The exchange of diplomatic notes between governments and the position taken by domestic courts seem to show exemption from jurisdiction exclusively depended on treaty rules. With regard to the negotiation of an agreement between the U.S. and the U.K., Barton observes: "There is no evidence in the negotiations for the contention that the provision in the proposed agreement recognizing the exclusive jurisdiction of the service courts of one contracting party over its armed forces in the territory of the other was thought to consecrate any universally accepted principle of international law." G. P. Barton, *Foreign Armed Forces: Immunity from Criminal Jurisdiction*, 27 BRIT. Y.B. INT'L L. 186, 192–93 (1950).

22. *See id.* at 197–205 (summarizing the different rules in the context of Word War II). For a contrary interpretation, see Archibald King, *Jurisdiction Over Friendly Foreign Armed Forces*, 36 AM. J. INT'L L. 539 (1942) and Archibald King, *Further Developments Concerning* Jurisdiction over Friendly *Foreign* Armed Forces, 40 AM. J. INT'L L. 257 (1946).

right of the territorial state to exercise jurisdiction over civilian retinue of foreign armed forces deployed on its territory.[23]

After World War II, multilateral agreements, now commonly referred to as *status of forces agreements* (SOFAs), became prevalent. Especially relevant is the NATO SOFA, the 1951 London Agreement between the states parties to the North Atlantic Treaty regarding the Status of their Forces.[24] Article VII allows the courts of the host state to exercise criminal jurisdiction over foreign military and civilian officers for acts performed on the territory of the host state in violation of its domestic law.[25] More specifically, according to Article VII, paragraph 3, when there is concurrent jurisdiction, the sending state maintains primary (but not exclusive) jurisdiction over "offences arising out of any act or omission done in the performance of official duty."[26] Criminal jurisdiction of the host state is not excluded, and Article VII was clearly not drafted as an immunity rule, but as a rule allocating jurisdiction between the sending and the host state. In practice, national courts determine the official character of the acts and their decisions may not necessarily be consistent with the opinion of sending states.[27]

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23. *See, e.g.*, Agreement Concerning Immunity from Jurisdiction in Criminal Matters of Members of the United States Forces in Egypt, U.S.-Egypt, Mar. 2, 1943, 57 Stat. 1197 (providing for such a right).

24. Agreement between the Parties to the North Atlantic Treaty Regarding the Status of their Forces, June 19, 1951, 4 U.S.T. 1792, 199 U.N.T.S. 67 [hereinafter NATO SOFA].

25. *Id.* art. VII, ¶¶ 1–2 ("Subject to the provisions of this Article, (a) the military authorities of the sending state shall have the right to exercise within the receiving state all criminal and disciplinary jurisdiction conferred on them by the law of the sending state over all persons subject to the military law of that state; (b) The authorities of the receiving state shall have jurisdiction over the members of a force or civilian component and their dependants with respect to offences committed within the territory of the receiving state and punishable by the law of that state. (2) (a) The military authorities of the sending state shall have the right to exercise exclusive jurisdiction over persons subject to the military law of that state with respect to offences, including offences relating to its security, punishable by the law of the sending state, but not by the law of the receiving state. (b) The authorities of the receiving state shall have the right to exercise exclusive jurisdiction over members of a force or civilian component and their dependents with respect to offences, including offences relating to the security of that state, punishable by its law but not by the law of the sending state. (c) For the purposes of this paragraph and of paragraph 3 of this Article a security offence against a state shall include (i) treason against the state; (ii) sabotage, espionage or violation of any law relating to official secrets of that state, or secrets relating to the national defence of that state.").

26. *Id.* art. VII, ¶ 3(a)(ii).

27. Richard R. Baxter, *Criminal Jurisdiction in the NATO Status of Forces Agreement*, 7 INT'L & COMP. L. Q. 72, 78–79 (1958) ("The proper authority to determine whether an act was committed in the performance of official duties was at one time quite clear, but subsequent events have made it less so. According to the *travaux préparatoires* of the NATO Status of Forces Agreement, the certificate of the military authorities of the sending state would be taken as determinative of that fact. Notwithstanding this clear history, the Legal Adviser to the Department of state testified to the Foreign Relations

The status of UN peacekeeping troops and their presence in foreign territory is regulated by SOFAs as well. According to the Model UN SOFA, drafted in 1990, military personnel employed in UN peacekeeping forces are under the exclusive criminal jurisdiction of the sending state,[28] and no distinction is made between acts performed in an official or in a private capacity.[29]

In summary, it does not seem possible to detect the existence of a customary rule bestowing immunity *ratione materiae* on members of military troops stationed abroad or visiting armed forces.[30] There are instead specific treaty rules concerning the exercise of foreign jurisdiction over visiting military troops that grant primary (but not exclusive) jurisdiction of the sending state over acts performed by those troops in an official capacity. Moreover, there is no unanimous opinion on which authority is entitled to determine the official nature of the acts or on the criteria to be used to identify these acts. Nor does one find in SOFAs references to the existence of a general customary rule.

### C. Consular Agents

The category of consular agents also deserves attention. In the past, consular agents' status and treatment was regulated using bilateral agreements. The vast majority of these treaties contained functional immunity clauses. These rules provided that immunity *ratione materiae* should cover only acts performed in the exercise of consular functions.

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Committee of the United States Senate that it rested with the courts of the receiving state to review any such certificate and reach its own conclusions about the question.").

28. U.N. Secretary-General, *Comprehensive Review of the Whole Question of Peace-Keeping Operations in All their Aspects*, ¶ 47(b), U.N. Doc. A/45/594 (Oct. 9, 1990) ("Military members of the military component of the United Nations peace-keeping operation shall be subject to the exclusive jurisdiction of their respective participating states in respect of any criminal offenses which may be committed by them in [host country/territory.").

29. *See, e.g.*, UN Secretary-General, *Bulletin: Observance by United Nations Forces of International Humanitarian Law*, § 4, U.N. Doc. ST/SGB/1999/13 (Aug. 6, 1999) ("In case of violations of international humanitarian law, members of the military personnel of a United Nations force are subject to prosecution in their national courts.").

30. *See, e.g.*, Talitha Vassalli di Dachenhausen, *L'Art. VII Della Convenzione di Londra Sulle Forze Militari Della NATO e il Giudice Penale Italiano*, 16 COMUNICAZIONI E STUDI 489 (1980), *passim*. For comments on a more recent incident, see Annalisa Ciampi, *Compensating Victims of the Cermis Cable Car Accident Under NATO Status of Forces Agreement*, 9 ITAL. Y.B. INT'L L. 113 (1999) (discussing the liability settlement under NATO SOFA of a U.S. military training accident which caused the death of 20 tourists in Cermis, Italy in February 1998), *passim*.

The text of these agreements was generally extremely clear and restrictive. For instance, Article 13 of the Anglo-Italian Convention of 1954 reads:

> A consular officer or employee shall not be liable, in proceedings in the courts of the receiving state, in respect of acts performed in his official capacity, *falling within the functions of a consular officer under international law as recognised in the territory*, unless the sending state requests or assents to the proceedings through its diplomatic representative."[31]

To benefit from immunity under the Convention the consular officer must have acted both in an official capacity and within the limits of his or her competencies according to international law.[32] The language of the Pan-American Consular Convention of 1928 is clear: "Consuls are not subject to local jurisdiction for acts done in their official character and within the scope of their authority."[33]

Today, this issue is covered by Article 43 of the Vienna Convention on Consular Relations, which states: "Consular officers and consular employees shall not be amenable to the jurisdiction of the judicial or administrative authorities of the receiving state in respect of acts performed in the exercise of consular functions."[34] This Article is viewed as corresponding to a rule of customary international law. It is interesting to note that the preparatory works of the Consular Convention confirm that immunity *ratione materiae* is strictly connected to the exercise of consular functions. That indication is confirmed by the failed attempt to replace the expression "consular functions" with the more generic "official functions."[35] Indeed, interpretation given to this rule seems to confirm its restrictive scope. The 1978 *aide-mémorie* of the United States State Department states that national courts shall refrain from exercising

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31. Consular Convention (With Two Protocols of Signature and Exchange of Notes) art. 13, U.K.-It., Jun. 1, 1954, 403 U.N.T.S. 275 (emphasis added).

32. *See* LUKE T. LEE, CONSULAR LAW AND PRACTICE 483–84 (2d ed., 1991) (discussing the above, and listing examples such as the Italian-French Convention of 1955 and the Anglo-Norwegian Convention of 1951).

33. Convention between the United States of America and Other American Republics Relating to the Duties, Rights, Prerogatives and Immunities of Consular Agents art. 16, Feb. 20, 1928, 47 Stat. 1976, 1979; *see also* GREEN H. HACKWORTH, IV DIGEST OF INTERNATIONAL LAW 765 (1940).

34. Vienna Convention on Consular Relations art. 43, Apr. 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 261.

35. *See generally* U.N. Conference on Consular Relations, *Official Records – Volume I: Summary Records of Plenary Meetings and of the Meetings of the First and Second Committees*, U.N. Doc. A/CONF.25/16 (Vol. I) (1963) (discussing an amendment proposed by the Brazilian delegation).

jurisdiction over foreign consular agents in cases where "it is established that the activity giving rise to the judicial or administrative proceeding was performed in an official capacity and *in pursuit of the exercise of accepted consular functions*."[36]

Criminal case law confirms a restrictive application of the immunity *ratione materiae* rule to consular agents. Early twentieth century cases already exist on this topic.[37] *Bigelow v. Zizianoff*,[38] before the Paris Court of Appeals, is very interesting because the judges recognized functional immunity only for those contested acts performed within the regular exercise of consular functions.[39]

A few recent cases confirm that the recognition of functional immunity depends on the regular performance of consular functions. A case in point is *Rissmann*.[40] Mr. Rissmann was the Consul of the Federal Republic of Germany in Genoa, Italy.[41] He was accused of releasing a passport to a minor with dual nationality so that the child could leave the country with the child's father, notwithstanding that the Italian courts had granted custody of the child to the Italian mother.[42] The Italian judges eventually recognized immunity, since they deemed issuing passports a typical consular function.[43] Some scholars advocate for an even more restrictive interpretation. Condorelli, for instance, claims that Rissman

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36. LEE, *supra* note 32, at 495 (emphasis added) (quoting Consular Officers and Consulates, "Official Acts", 1978 DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW, ch. 4, §2 at 629–30).

37. *See, e.g.*, Cass. Pen., 19 Aprile 1933, Rivista di diritto internazionale 1933, 25, 233 (It.) [*In re* Vuhotich], *reprinted in* 7 I.L.R. 392 (1994).

38. Cour d'appel [CA] [regional court of appeal] Paris, crim., Jan. 28, 1928, Gaz. Pal. 1928, 1, 726 (Fr.), *reprinted in* 4 I.L.R. 384 (1932).

39. *Id.* Acts performed in an official capacity, but not falling under consular functions were considered by the court as private acts: "Whereas it is not possible to consider that Bigelow, in the hypothesis that the act to be established, has performed an official act in revealing the third persons the reasons why he refused to visa the passport of Princess Zizianoff; indeed, he would not be within the limits of these functions in making known why he had taken this decision, and especially so because in addressing journalists, he could not but know that his remarks would be reproduced in the press and would, in consequence, be likely to give rise to acts contrary to French laws; that he has thus acted, not as a consul, but as a private person on his own responsibility and, consequently, not protected by immunity by reason of official acts and he has no legal ground to ask the court to declare itself incompetent." Tribunal correctionnel [criminal court] Seine, Apr. 5, 1927, Gaz. Pal. 1927, 2, 18 (Fr.) [Zizianoff v. Kahn], *reprinted in* 21 AM. J. INT'L L. 811, 813 (1927). For an example from the U.S., see Arcaya v. Páez, 145 F. Supp. 464, 466–67 (S.D.N.Y. 1956), *aff'd* 244 F.2d 958 (2d Cir. 1957) (holding that the immunity accorded to consuls extended only to acts performed in the course of their consular duties).

40. *Re* Rissmann, Trib. di Genova, 6 maggio 1970 (It.), *reprinted in* 71 I.L.R. 577 (1994).

41. *Id.*

42. *Id.*

43. *Re* Rissmann, Cass., 28 febbraio 1972 (It.), *reprinted in* 71 I.L.R. 577 (1994).

acted against a judgment by an Italian judge and thus "outside the limits of his functions."[44]

A similar case is *State of Indiana v. Ström*.[45] The Swedish Consul in Chicago was accused of having issued a passport to a Swedish national indicted for murder. Ström was able to benefit from immunity from criminal jurisdiction because the judges reasoned that he was acting in exercise of consular functions envisaged in the Vienna Convention.[46]

In sum, immunity from criminal jurisdiction is granted to consular agents only for acts performed in the regular exercise of the consular functions enumerated in the Vienna Convention. For acts not enlisted, interested states might reach an agreement,[47] but eventually domestic judges decide at their own discretion on the application of the rule.

### D. High-Ranking State Officials

It is also important to verify whether and to what extent high-ranking state officials, particularly former heads of state, enjoy functional immunity from foreign criminal jurisdiction. If one leaves aside cases concerning high-ranking state officials in office, to whom immunity *ratione personae* from foreign jurisdiction accrues, and cases concerning high-ranking state officials suspected of international crimes, practice and case law are very limited. The paucity of practice is not surprising. High-ranking officials usually perform their functions on the territory of their state and only occasionally abroad, typically in the context of official visits or missions.

In the case of activities performed by a high-ranking state official on his or her territory, a right for foreign courts to exercise their criminal jurisdiction is highly unlikely. Even if jurisdiction were established, the forum state may not be able to hold *in absentia* trials. There may be other rules preventing the exercise of criminal jurisdiction, such as the act of state doctrine or *forum non conveniens*. In addition, activities performed by a high-ranking state official on foreign territory do not commonly involve a violation of the criminal law of the forum state. In any case, heads of state,

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44. Luigi Condorelli, *Judicial Decisions: Consular Immunity*, 2 ITAL. Y.B. INT'L L. 305, 341 (1976) (concluding that "the consul who assists a minor without respecting the laws of the receiving state acts outside the limits of his proper functions; and his action cannot be covered by functional immunity").

45. Indiana v. Ström, No. 45G03-8801-CF-00010 (Ind. Super. Ct. Lake Cnty. Sept. 30, 1988). For another more recent case, see *L. v. The Crown* [1977] NZSC, *reprinted in* 68 I.L.R. 175 (1994).

46. Indiana v. Ström, No. 45G03-8801-CF-00010 (Ind. Super. Ct. Lake Cnty. Sept. 30, 1988). For detailed analysis see LEE, *supra* note 32, at 501–04.

47. According to Lee, "in the interest of promoting friendly relations and avoiding retaliations, a country may well let go a consul charged with committing a crime – ostensibly on legal grounds but in reality on political or policy considerations." LEE, *supra* note 32, at 503–04.

heads of government, and foreign ministers may not be prosecuted while in office because of personal immunity and inviolability; once they relinquish their position other obstacles may emerge, such as the ones mentioned just above. However, the scantiness of cases is not related to the existence of a customary rule on functional immunity of state officials from foreign jurisdiction.

One of the cases most frequently cited by supporters of the existence of a customary rule is the extradition case against Jimenez, the former Head of State of Venezuela.[48] Jimenez was extradited to his country by the United States Supreme Court for crimes committed on his territory.[49] The Court reasoned that these offenses could not fall within his official functions, but were instead "common crimes committed by the Chief of State done in violation of his position and not in pursuance of it."[50] However, a closer look reveals that the justices qualified the acts as common crimes with a view to excluding the act of state doctrine, not a functional immunity rule. Additionally, the case is unique because extradition was requested by Jimenez's state of nationality, a very peculiar situation.[51]

In other cases, suggestions of immunity by governments have influenced domestic court decisions on immunity of high-ranking state officials. In these cases, political considerations—as opposed to the application of a general function immunity rule—were the driving force behind judicial restraint. If there were a general customary rule of functional immunity applicable to all state officials acting in their official capacity, suggestions of immunity would be unnecessary. U.S. case law, for instance, is very much conditioned by political considerations and is quite contradictory. In *United States v. Noriega*,[52] for example, the U.S. District Court for the Southern District of Florida denied immunity to Manuel Noriega, former head of State of Panama, suspected of drug-trafficking, because he was never officially recognized by the U.S.

48. Jiminez v. U.S. District Court, 84 S. Ct. 14 (1963).

49. *Id.* at 16–17 (noting that the claim for extradition was based on a treaty between the U.S. and Venezuela mandating extradition in cases of embezzlement by public officers).

50. Jiminez v. Aristeguieta, 311 F.2d 547, 558 (5th Cir. 1962), *aff'd sub nom.* Jiminez v. U.S. District Court, 84 S. Ct. 14 (1963).

51. The issue also came up before Swiss courts in the *Affaire Marcos*. *See* Marc Henzelin, *L'immunité pénale des chefs d'Etat en matière financière. Vers une exception pour les actes de pillage de ressources et de corruption?*, 12 REVUE SUISSE DE DROIT INTERNATIONAL ET DE DROIT EUROPEEN 179, 192–96 (2002).

52. 746 F. Supp 1506 (S.D. Fla. 1990).

government as the legitimate head of State of Panama.[53] On the contrary, in *Lafontant v. Aristide*,[54] the Eastern District of New York held that Jean-Bertrand Aristide was entitled to absolute immunity (*ratione personae*) even after he was overthrown by a military *golpe*, because he was considered by the American government as the acting head of state of Haiti.[55]

Finally, it is worth mentioning the *Institut de Droit International* (IDI) resolution: *Les immunités de juridiction et d'exécution du chef d'Etat et de gouvernement en droit international,* which was adopted in 2001 on the basis of a study conducted by Rapporteur Joe Verhoeven.[56] In the final version of this resolution, former heads of states enjoy immunity from criminal, civil, and administrative jurisdiction for acts that are, or relate to, the exercise of official functions.[57] It is interesting to note that the formula chosen does not refer generally to official functions, but instead to acts accomplished in the typical or regular exercise of head of state functions—it is, therefore, highly restrictive.[58]

On the basis of such a scarce practice, it is difficult to reach firm conclusions. Even assuming that a customary rule grants former heads of state and other high-ranking state officials functional immunity from

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53. *See id.* at 1519 n.11 (noting that "there is ample doubt whether head of state immunity extends to private or criminal acts in violation of U.S. law. . . . Criminal activities such as the narcotics trafficking with which Defendant is charged can hardly be considered official acts or governmental duties which promote a sovereign state's interests, especially where, as here, the activity was allegedly undertaken for the sole personal benefit of the foreign leader"). The court concluded that "[s]ince the United States has never recognized General Noriega as Panama's head of state, he has no claim to head of state immunity." *Id.* at 1521. The act of state doctrine was rejected as well. *Id.* at 1521–23.

54. 844 F. Supp 128 (E.D.N.Y. 1994); *see also* Joseph W. Dellapenna, *Lafontant v. Aristide*, 88 AM. J. INT'L L. 526, 528–32 (1994).

55. In *Lafontant*, the U.S. Department of Justice submitted a suggested immunity letter which did not mention any obligation to apply immunity rules: "The United States has an interest and concern in this action against President Aristide insofar as the action involves the question of immunity from the Court's jurisdiction of the head-of-state of a friendly foreign state. The United States' interest arises from a determination by the Executive Branch of the Government of the United States, in the implementation of its foreign policy and in the conduct of its international relations, that permitting this action to proceed against President Aristide would be incompatible with the United States' foreign policy interests." 844 F. Supp at 131.

56. JOE VERHOEVEN (RAPPORTEUR), L'INSTITUT DE DROIT INTERNATIONAL, LES IMMUNITÉS DE JURIDICTION ET D'EXÉCUTION DU CHEF D'ETAT ET DE GOUVERNEMENT EN DROIT INTERNATIONAL (2001), http://www.justitiaetpace.org/idiF/resolutionsF/2001_van_02_fr.PDF. Note that the 2001 Resolution is divided into two sections: one dealing with heads of state in office and one dealing with former heads of state.

57. In the official French version it is even clearer: "en raison d'actes qu'il a accomplis durant ses fonctions et qui *participaient de leur exercice*." *Id.* art. 13 (emphasis added).

58. It is expressly ruled out that a former head of state may benefit from functional immunity when suspected of having committed an international crime. *Id.*

foreign criminal jurisdiction, it has to be understood in a strictly functions-related perspective. In other words, such a rule would work like the rules on personal immunities accruing to high-ranking state officials.

E. Some Tentative Conclusions

State practice and jurisprudence—particularly domestic case law—demonstrate that the existence of a general rule granting all state officials acting in their official capacities *ratione materiae* immunity from the jurisdiction of foreign states should not be taken for granted. These sources also invite the conclusion that an alternative general rule exists: domestic courts may exercise criminal jurisdiction over foreign state officials unless otherwise specified by a specific treaty rule.

ILC Rapporteur Escobar Hernández is undertaking a comprehensive analysis of this question and, if I am not mistaken, shares some of my doubts about the existence of a customary rule granting functional immunity from foreign criminal jurisdiction to all state officials. In her Fourth Report, released in June 2015, the Rapporteur acknowledged that:

> The responses of national courts to the question of immunity have varied; it cannot be concluded from the judicial decisions analysed that a consistent pattern has been uniformly followed. On the contrary, such decisions are based on different legal approaches and reasoning, in which national courts have taken into account the defendant's status as a state official, the nature of the acts for which immunity is invoked and, in some cases, the position taken by the government authorities of the forum state or the official's state.[59]

More specifically, Escobar Hernández is analyzing case law and practice in order to determine whether it is possible to set out criteria for identifying state officials for immunity purposes and for determining when state officials are in fact carrying out official activities. Her provisional conclusion is that the inquiries into whether an individual is a state official and whether his or her acts were carried out in an official capacity should be conducted on a case-by-case basis[60]—both conditions have to be fulfilled for any rule on functional immunity to apply.[61]

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59. Escobar Hernández, *Fourth Rep.*, *supra* note 4, ¶ 51.

60. "In short, the existence of a connection between the beneficiary of immunity *ratione materiae* and the state should be taken to mean that the person in question is in a position to perform acts that involve the exercise of governmental authority. Whether a specific act performed by an official benefits from that immunity or not would depend on the existence or non-existence of the two normative elements of such immunity, namely whether the act in question can be deemed an 'act performed in an

Escobar Hernández's finding that the definition of state official for purposes of invoking immunity *ratione materiae* does not coincide with the broad definition of state organ given by the ILC in the 2001 Articles on State Responsibility is a great step forward.[62] The category of state officials who fulfill the functional immunity criteria is indeed smaller than the category of individuals whose official or governmental acts may be attributed to the states on which behalf they acted. In other words, an individual will not necessarily benefit from immunity *rationae materiae* every time his or her conduct is attributable to the state on whose behalf the official acted.

But most scholars and lawyers arguing in favor of the existence of a customary rule on functional immunity have concluded that such a rule is a substantive obstacle preventing the exercise of jurisdiction over foreign states' officials. Since the individual acting on behalf of the state cannot be held responsible for his acts, which must be attributed to the state itself, immunity *ratione materiae* would simply be a mechanism for diverting responsibility to the state.[63] This was the point of view prevailing in the

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official capacity', and whether said act was performed by the person at a time when he or she was an official of the state." Escobar Hernández, *Third Rep.*, *supra* note 1, ¶ 146.

61. *Id.* ¶¶ 111–12 ("111. On the basis of the foregoing study of the practice, a number of conclusions can be drawn for determining the criteria for identifying what constitutes an official for the purposes of the draft articles on immunity from foreign criminal jurisdiction, namely: (a) The official has a connection with the state. This connection can take several forms (constitutional, statutory or contractual) and can be temporary or permanent. The connection can be de jure or de facto; (b) The official acts internationally as a representative of the state or performs official functions both internationally and internally; (c) The official exercises elements of governmental authority, acting on behalf of the state. The elements of governmental authority include executive, legislative and judicial functions. 112. These identifying criteria apply both to those state officials who enjoy immunity *ratione personae* (Heads of State, Heads of Government and Ministers for Foreign Affairs) and to those who enjoy immunity *ratione materiae* (all other officials). The criteria in question, however, are especially relevant in the case of immunity *ratione materiae* because it is not possible to enumerate explicitly the categories of persons to whom it applies. In order, then, to identify a given person as an official, it must be determined on a case-by-case basis if all the criteria are met.").

62. *Report of the International Law Commission to the General Assembly*, 56 U.N. GAOR Supp. No. 10, at 44, U.N. Doc. A/56/10 (2001), *reprinted in* [2001] 2 Y.B. Int'l L. Comm'n 26, U.N. Doc. A/CN.4/SER.A/2001/Add.1 (Part 2) ("The conduct of any state organ shall be considered an act of that state under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the state, and whatever its character as an organ of the central Government or of a territorial unit of the state. . . . An organ includes any person or entity which has that status in accordance with the internal law of the state.").

63. *See generally* Dapo Akande & Sangeeta Shah, *Immunities of State Officials, International Crimes, and Foreign Domestic Courts: A Rejoinder to Alexander Orakhelashvili*, 21 EUR. J. INT'L L. 815 (2010); Pierre D'Argent, *Immunity of State Officials and Obligation to Prosecute* 7 (Universite catholique de Louvain (UCL) CeDIE Working Paper No. 2013/04), https://www.uclouvain.be/cps/ucl/doc/ssh-cdie/documents/2013-04-PdArgent.pdf ("However, in contrast with what is required for triggering immunity *ratione personae*, the concept of 'representatives of the state' for the purpose of immunity *ratione materiae* is not limited to persons specifically embodying or personifying it. Rather,

ILC before Professor Escobar Hernández was appointed. According to the study prepared by the Secretariat for the ILC on the subject of immunity of state officials from foreign criminal jurisdiction:

> "[I]f immunity *ratione materiae* is viewed as an implication of the principle that conduct adopted by a state organ in the discharge of his or her functions is to be attributed to the state, there appear to be strong reasons for aligning the immunity regime with the rules on attribution of conduct for purposes of state responsibility" or at the very least "the criteria for attribution of conduct in the context of state responsibility might [] be a relevant source of inspiration in determining whether an act is to be considered as 'official' or 'private' for purposes of that immunity."[64]

The first ILC Rapporteur, Roman Kolodkin, shared this opinion, and in reports he confirmed that the attribution of conduct to the state according to the rules enshrined in the 2001 Articles on State Responsibility serves to determine whether immunity *ratione materiae* from foreign jurisdiction should apply.[65]

However, I have just shown above that the application of functional immunity does not turn solely on the attribution of official conduct to the state. First, there is no general rule consistently applied every time a state official is indicted before a foreign domestic court. In addition, domestic courts do not turn to those rules when making decisions on functional immunity; instead, they evaluate the circumstances on a case-by-case basis, relying on the existence of a treaty rule and taking into account the nature of the activities performed. True, establishing state responsibility depends entirely on whether the relevant conduct may be attributed to the state on which behalf an organ has acted. But where immunity *ratione materiae* is concerned, attribution to a state is only a preliminary step that could trigger the application of an existing rule (when there is one). Judges must then verify whether the acts at issue are covered by that rule (assuming, again, that one exists). These conclusions ultimately bring me to challenge the second basic assumption mentioned in the Introduction: that functional immunity attaches only to official activities carried out by state officials on behalf of their state.

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that concept encompasses all state organs within the meaning of Article 4 of the ILC Articles on state responsibility, together with 'all the natural persons who are authorized to represent the state in all its manifestations' to use the ILC comments on the UN 2004 Convention.").

64. Int'l Law Comm'n, *supra* note 16, ¶ 156.

65. Kolodkin, *supra* note 16, ¶ 24.

## II. THE RATIONALE OF FUNCTIONAL IMMUNITY RULES

The ILC Rapporteur expounded the view that the rationale for functional immunity is protecting state sovereignty, a position rooted in the *par in parem* principle. Further reflection on the combination of this corollary with the first basic assumption—and on the *raison d'etre* of immunity *ratione materiae* rules (in cases where they do exist)—reinforces doubts about the existence of a general rule on functional immunity covering all state officials.

If one assumes that functional immunity exists to protect state sovereignty then the temptation to move back to the first basic assumption is strong. It seems self-evident that if protecting state sovereignty is the purpose of *ratione materiae* rules, the only relevant factor is whether the state has assumed responsibility for the actions of the officials invoking functional immunity. The analysis is brought full circle, back to the attribution rules. As we have seen, however, this conclusion is not convincingly supported by state practice and case law.

And other elements, including waiver, do not fit in the puzzle. If the general rule serves the purpose of attributing conduct to the state, then it stands to reason that the state cannot discharge itself simply by waiving the immunity of its official. State practice, however, reveals that states who waived their officials' functional immunity did so precisely to absolve themselves of responsibility. However, these attempts cannot be successful because the rules on attribution provide that *ultra vires* acts are also to be attributed to the state. There are indeed cases where dual responsibility is possible, as highlighted in the Reports of Rapporteur Escobar Hernández. On one hand, there is the criminal liability of the individual (domestic or, perhaps, international) and on the other hand, the international responsibility of the state. State practice shows that in many cases domestic courts exercised their criminal jurisdiction over foreign state officials precisely because the possibility of dual attribution of a certain act was considered: on the internal plane criminal responsibility could be attributed to the state organ whereas on the international level responsibility accrues to the state.[66]

However, another (and in my opinion more important) factor also raises doubts about the wisdom of framing functional immunity in terms of attribution. This factor calls into question the rationale usually linked with immunity *ratione materiae*. If we take a close look at the treaty rules

66. *See generally* Letelier v. Republic of Chile, 488 F. Supp. 665 (D.D.C. 1980). For additional commentary, see generally Haley D. Collums, *The* Letelier *Case: Foreign Sovereign Liability for Acts of Political Assassination*, 21 VA. J. INT'L L., 251 (1980–81).

granting functional immunity to a specific category of state officials, the underlying rationale seems to be "functional necessity" rather than the sovereign equality of states.

The example of consular agents is a fitting one. One of the most significant recent decisions is the 2012 judgment of the Italian Court of Cassation in the *Abu Omar* case. There, the Court stated that the scope of consular duties covered by functional immunity must be limited to typically administrative duties performed in observance of the laws and regulations of the territorial state.[67] A vast jurisprudence, as I have attempted to show above, supports a strictly functional interpretation of the immunity rules of the Consular Convention.[68] In other words, the rationale underlying the functional immunity rule inserted in the Convention does not seem to be protecting the sovereignty of the sending state irrespective of whatever act may be accomplished by its consuls in their official capacity. It lies instead in the efficient performance of consular functions, the *ne impediatur officium* rationale, normally attached to personal immunities granted to diplomatic agents and high-ranking state officials. The same functional perspective is reflected in the 1961 Convention on Diplomatic Relations, although diplomatic agents also enjoy personal immunity from criminal jurisdiction, which covers all their acts (including private acts) as long as they are in office.

In addition, there is another trend that may be identified in case law on this matter: In a number of cases, officials' immunity was not upheld because they acted *ultra vires*, or outside the scope of functions covered by the specific rules. In other words, there seems to be a tendency by domestic courts to increasingly apply a strictly functions-related rationale to the interpretation of functional immunity rules accruing to state officials.[69]

Both of these trends are recognized by the ILC Reports of Rapporteur Escobar Hernández, but they did not lead the Rapporteur to draw radical conclusions about the *raison d'être* of immunity *ratione materiae*. In my opinion, the fact that immunity *ratione materiae* rules are applied in a very restrictive manner shows that they have been interpreted as protecting the activities performed by certain categories of state officials, not only (and I would argue not primarily) the sovereignty of the state on which behalf the organ acted.

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67. Cass. Pen., sez. V., 29 novembre 2012, n. 46340, Giur. it. 2013, 930 (It.).

68. *See supra* Part I. C.

69. For an extended analysis of case law and practice related to diplomatic agents and other categories of state officials, see MICAELA FRULLI, IMMUNITÀ E CRIMINI INTERNAZIONALI: L'ESERCIZIO DELLA GIURISDIZIONE PENALE E CIVILE NEI CONFRONTI DEGLI ORGANI STATALI SOSPETTATI DI GRAVI CRIMINI INTERNAZIONALI (2007).

In conclusion, the rationale underlying existing rules on functional immunity does not differ profoundly from the motivation underlying personal immunity rules. In the latter case, however, given the relevance of activities performed by certain categories of state officials for a peaceful conduct of interstate relations, immunity also covers private acts as long as these officials remain in office.

## III. CAN WE TALK ABOUT AN EXCEPTION FOR INTERNATIONAL CRIMES?

Assuming that the line of reasoning proposed above is correct, it is easier to conclude that it possible to prosecute state officials in national courts for international crimes. There is no need to find an exception to a general rule. Instead, existing rules suffice to justify the prosecution of state officials suspected of having committed international crimes.

In practice, there is rarely a functional immunity rule covering state officials and there is often no bar to the exercise of criminal jurisdiction by the territorial state. In cases where there is a treaty rule, it typically does not cover international crimes. The main function of these rules is, as explained above, safeguarding the efficient performance of specific functions (crucial for interstate relations such as consular or diplomatic functions). Such functions obviously cannot include the commission of international crimes, which are inherently *ultra vires* acts. From this viewpoint, the inapplicability of existing functional immunity rules before domestic courts in case of allegations of international crimes would correspond to their correct application and would not be an exception to those rules.

The argument equating crimes with *ultra vires* acts has sometimes been misunderstood. Saying that grave crimes are *ultra vires* acts does not mean that they are non-official acts or non-sovereign acts; they may well be committed under the color of law. It simply means that grave crimes cannot be included in functions legally entrusted to state officials and in some cases covered by functional immunity rules. It also means, incidentally, that the state may not be absolved from its responsibilities because there are criminal proceedings against its officials.

This was also, I believe, the conclusion reached by Lady Hazel Fox in her work as Rapporteur of the *Institut de droit international* (IDI) on the topic "Immunity from Jurisdiction of the State and of Persons Who Act on Behalf of the State in case of International Crimes." She defined grave crimes as acts that *per se* may not be included among those for which

functional immunity may be invoked.[70] This was more evident in the previous versions of the Resolution proposed in 2009.[71] But in the final draft adopted by the IDI a more general formulation on this issue—proposed by Giorgio Gaja—was chosen. Lady Fox's position is consistent, in my view, with the line of reasoning followed by Joe Verhoeven as Rapporteur of the IDI on the topic of "Immunities from Jurisdiction and Execution of Heads of State and of Government in International Law." In fact, the 2001 resolution mentioned above referred to immunity *ratione materiae* as covering only acts which are performed in the exercise of official functions and relate to the exercise thereof.[72] In any case, that resolution held that a former head of state may be prosecuted and tried when the acts alleged constitute a crime under international law.

More generally, when dealing with immunity of state officials and international crimes, it is particularly misleading to frame the issue as a matter of exception, even for logical reasons. In the case of international crimes, the dual attribution of conduct to the state and to the individual is regulated by international rules, so that both kinds of responsibility arise at the international level. The emerging of individual criminal responsibility on the international plane renders possible a dual attribution at that level, and on that account national courts may, and sometimes are obliged to, prosecute those suspected of international crimes, irrespective of their official position. International criminal responsibility for certain grave acts may be adjudicated, since the early days, at the national level, and rules establishing it would be meaningless if any kind of rule on functional immunity could hamper their application. Needless to say, most serious crimes are very seldom committed by private persons. National courts are indeed the "natural judge" for these cases, and often the only viable option. Not surprisingly, the cornerstone of the International Criminal Court (ICC) system is complementarity and its best chance to be an efficient tribunal rests on the will of states to prosecute at the national level.[73]

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70. Hazel Fox (Rapporteur), Inst. of Int'l Law, Third Comm'n, Resolution on the Immunity from Jurisdiction of the State and of Persons Who Act on Behalf of the State in Cases of International Crimes, art. I (2009), http://www.justitiaetpace.org/idiE/resolutionsE/2009_naples_01_en.pdf.

71. For the previous versions of the Resolution and the travaux preparatoires of the Third Commission of the IDI on this topic see *Annuaire de l'Institut de droit international* (Session de Naples), Vol.73, 2009, Paris, Pedone, *passim*.

72. Joe Verhoeven (Rapporteur), Inst. of Int'l Law, Thirteenth Comm'n, Immunities from Jurisdiction and Execution of Heads of State and of Government in International Law, art. 3 (2001), http://www.justitiaetpace.org/idiE/resolutionsE/2001_van_02_en.PDF.

73. *See, e.g.*, Jeffrey L. Bleich, *Complementarity*, 25 DENVER J. INT'L L. & POL'Y 281 (1996–97). The ICC may proceed with investigations only when Member States are unwilling or unable to prosecute crimes under the jurisdiction of the Court. *See* Rome Statute of the International Criminal Court art. 17, July 1, 2002, 2187 U.N.T.S. 90 ("Issues of admissibility: 1. Having regard to paragraph

## CONLUSION: A FEW THOUGHTS ON A MORE GENERAL LEVEL

The same conclusions, in my view, should be reached for functional immunity from foreign civil proceedings. In civil law countries, where the adhesion process (*la constitution de partie civile*) allows the victims to apply for compensation in conjunction with the criminal proceedings, it would be artificial if the immunity issue were resolved differently depending on whether the complaint against the state official was filed before a civil or a criminal court. In common law countries, where the two proceedings are separate, the two courts may well resolve a given immunity issue differently.

It is inconsistent to give a different solution to the immunity of state officials depending on the nature of the court, and it is this incongruity that brings us back to the question of attribution as the pivotal one around which the issue of functional immunity is usually solved. If we abandon the idea that functional immunity is a substantive obstacle to the exercise of jurisdiction, then why should it be upheld before a civil court? Moreover, if international crimes may not be covered by functional immunity rules, why could the same acts fall under the reach of functional immunity in civil proceedings?

A concrete example may better illustrate the negative consequences of this separation. In the very well known case, *Jones v. Ministry of Interior Al-Mamlaka Al-Arabiya AS Saudiya (the Kingdom of Saudi Arabia) and Others*, the U.K. House of Lords held that both respondents, the government of Saudi Arabia and its organ Colonel Abdul-Aziz, were immune from the civil jurisdiction of English courts by virtue of the

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10 of the Preamble and article 1, the Court shall determine that a case is inadmissible where: (a) The case is being investigated or prosecuted by a state which has jurisdiction over it, unless the state is unwilling or unable genuinely to carry out the investigation or prosecution; (b) The case has been investigated by a state which has jurisdiction over it and the state has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the state genuinely to prosecute; (c) The person concerned has already been tried for conduct which is the subject of the complaint, and a trial by the Court is not permitted under article 20, paragraph 3; (d) The case is not of sufficient gravity to justify further action by the Court. 2. In order to determine unwillingness in a particular case, the Court shall consider, having regard to the principles of due process recognized by international law, whether one or more of the following exist, as applicable: (a) The proceedings were or are being undertaken or the national decision was made for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court referred to in article 5; (b) There has been an unjustified delay in the proceedings which in the circumstances is inconsistent with an intent to bring the person concerned to justice; (c) The proceedings were not or are not being conducted independently or impartially, and they were or are being conducted in a manner which, in the circumstances, is inconsistent with an intent to bring the person concerned to justice. 3. In order to determine inability in a particular case, the Court shall consider whether, due to a total or substantial collapse or unavailability of its national judicial system, the state is unable to obtain the accused or the necessary evidence and testimony or otherwise unable to carry out its proceedings.").

Sovereign Immunity Act (SIA).[74] However, what would have happened if Colonel Abdul-Aziz were prosecuted before a criminal tribunal? It would have been assumed that he could not rely on his capacity as a state official to render him exempt from jurisdiction because he was being accused of acts of torture. This is, in fact, what happened in *Pinochet*,[75] where the House of Lords did not accept the plea of immunity of a former head of state for alleged acts of torture and decided that it was possible to extradite him to Spain.[76] Therefore, if one shares the view that the immunity plea of a state official should be treated differently depending on the civil or criminal nature of the proceedings, there could hypothetically be a situation where the very same organ is immune from a civil suit but not from criminal jurisdiction on the same set of facts. This would create an unacceptable contradiction, undermining access to justice and compensation for the victims of the most serious international crimes.

Not surprisingly, some of the Lords in the appeal decision in *Jones* drew attention to the incongruity of completely separating civil and criminal proceedings in the case of torture. In a judgment subsequently quashed by the House of Lords, the Court of Appeal had actually rejected the immunity plea by Abdul-Aziz, pointing to the shortcomings of separating civil and criminal courts for the purposes of applying functional immunity.[77] In the words of Lord Mance, "there is the obvious potential for anomalies, if the international criminal jurisdiction which exists under the Torture Convention is not matched by some wider parallel power to adjudicate over civil claims."[78]

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

75. R v. Bartle, *ex Parte* Pinochet (*Pinochet I*) [1998] UKHL 41, [2000] 1 AC 61 (HL) (appeal taken from Eng.); R v. Bartle, *ex Parte* Pinochet (*Pinochet II*) [1999] UKHL 17, [2000] 1 AC 147 (HL) (appeal taken from Eng.).

76. However, Lord Hutton and Lord Phillips of Worth Matravers argued that if Pinochet were sued for civil liability, he could have been declared immune from the jurisdiction of British Courts for the very same acts. *Pinochet II*, 1 AC at 249 (Lord Hutton LJ), 279 (Lord Phillips of Worth Matravers LJ).

77. Jones v. Saudi Arabia [2004] EWCA (Civ) 1394 (appeal taken from QB High Ct. of Justice).

78. *Id.* [79] (Lord Mance LJ). Lord Mance continues: "[T]he prosecution of crime and the pursuit of civil proceedings are in many jurisdictions (as Breyer, J. observed in *Sosa*) very closely associated. In other jurisdictions like the English, Mr. Pannick's absolute distinction seems incongruous in a situation like that in *Filartiga*, if the alleged torturer was actually within and being prosecuted in the jurisdiction pursuant to one or other of the provisions of article 5 of the Torture Convention. Despite the criminal investigation and proceedings, in respect of which no immunity could be claimed, the victim(s) of the alleged torture would be unable to pursue any civil claim." *Id.*

Under the definition of torture contained in Article 1 of the UN Convention, acts of torture may be committed only by state officials.[79] Assuming that the acts of every state official, even when they may be classed as crimes of torture, must always be covered by the SIA or by functional immunity in civil suits, is tantamount to saying that there is never a chance for the victims of torture to obtain adequate compensation. However, Article 14(1) of the Torture Convention provides that every state must "ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation."[80] Therefore, granting functional immunity to state officials in civil suits before foreign domestic courts thwarts the very purpose of the Convention. A similar line of reasoning could apply, *mutatis mutandis*, to many other international crimes committed by state officials. These considerations raise the question of what is the real issue behind these inconsistencies. In my opinion, behind the different attitude in criminal or civil proceedings in the application of functional immunity of state organs suspected of international crimes, there is a precise will not to make an exception—not even to discuss one—to state immunity.

I conclude with a paradox: it has often been said, concerning the criminal liability of individuals for the most serious crimes, that state officials may not hide behind their states. They may not claim to have been just a cog in the machine or to have obeyed to instructions given by others. But if one follows the House of Lords' line of reasoning in *Jones* and keeps separate the question of functional immunity for crimes in civil proceedings, one arrives at the conclusion that states may hide behind their organs, because only the latter, at the end of the day, may be prosecuted before a domestic criminal court or, where available, an international criminal tribunal.

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79. 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 ("For the purposes of this Convention, torture means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is 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.").

80. *Id.* art. 14(1).