The functional immunity of State officials from foreign jurisdiction: A critique of the traditional theories

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1. *Introduction: The controversial issue of the functional immunity of State officials from foreign jurisdiction and the work of the ILC*

The norms of customary international law concerning the functional (or *ratione materiae*) immunity of State officials from foreign (criminal, civil and administrative) jurisdiction are somewhat dated but nonetheless remain controversial and contemporary international law scholars still disagree about their scope of application and content. This is due to different conceptual premises of international scholars, as well as a lack of uniformity and consistency in practice and case-law.

The United Nations' International Law Commission (ILC) has recently undertaken a study on a key aspect of this topic, namely the functional (as well as personal) immunity of State officials from foreign criminal jurisdiction.[1] However, in the view of this author, these works have not yet clarified the most controversial legal issues and further have not yet produced convincing results. In fact, both the ILC Special Rapporteurs have dogmatically accepted, without any form of critical

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[1] See especially the following reports of the Special Rapporteurs: RA Kolodkin, 'Preliminary report on immunity of State officials from foreign criminal jurisdiction' (29 May 2008) UN Doc A/CN.4/601; RA Kolodkin, '*Second report on immunity of State officials from foreign criminal jurisdiction*' (10 June 2010) UN Doc A/CN.4/631; RA Kolodkin, 'Third report on immunity of State officials from foreign criminal jurisdiction' (24 May 2011) UN Doc A/CN.4/646; C Escobar Hernández, 'Preliminary report on the immunity of State officials from foreign criminal jurisdiction' (31 May 2012) UN Doc A/CN.4/654; C Escobar Hernández, 'Second report on the immunity of State officials from foreign criminal jurisdiction' (4 April 2013) UN Doc A/CN.4/661; C Escobar Hernández, 'Third report on the immunity of State officials from foreign criminal jurisdiction' (2 June 2014) UN Doc A/CN.4/673.

review, the old 'Kelsenian theory', according to which *all* State officials have the right, in principle, to functional immunity from foreign jurisdiction regarding their 'official' acts, i.e., when acting in their official capacity.

This basic theory, which will have a strong impact on the future work of the ILC, is not convincing. Thus, the issue is worth re-examining, especially in light of the most recent developments in practice and in the literature. In doing so, this paper will deal with the entire issue of the functional immunity of foreign officials, without limiting the research to immunity from criminal jurisdiction.

2. *Problems relating to the distinction between personal and functional immunities*

According to the dominant view of international scholars, a clear and radical distinction should be made between the concept of both the State officials' personal and functional immunities (and between the corresponding international norms). As we shall see below, nowadays this position demands a critical review. Effectively, some differences are clear and well-settled. The main one concerns the duration of immunity. While personal immunity is only granted to foreign officials for the duration of their mandate (covering acts performed before and during the mandate) and ceases to apply after the termination of their mandate, functional immunity is granted both during their mandate *and* after its termination (but the immunity only covers acts performed in the context of the mandate).

A second difference, according to the prevailing, but not unanimous view in the literature, concerns the scope of the application of immunity. While personal immunity covers both the 'private' and 'official' acts of foreign officials who benefit from it,[2] functional

[2] See, eg, H F Van Panhuis, 'In the Borderline Between the Act of State Doctrine and Questions of Jurisdictional Immunities' (1964) 13 ICLQ 1204; Y Dinstein, 'Diplomatic Immunity from Jurisdiction *Rationae Materiae*' (1966) 15 ICLQ 79; RA Kolodkin, 'Preliminary report' (n 1) para 79; C Escobar Hernández, 'Preliminary report' (n 1) para 61; Escobar Hernández, 'Second report' (n 1) paras 69-74 and Draft Article 5.1. For a different view see G Morelli, 'Circa l'esenzione degli agenti diplomatici dalla giurisdizione' (1940) Foro italiano I 336-339; T Perassi, 'Su l'esenzione degli agenti diplomatici

immunity only covers the acts performed by State agents in the discharge of their duties (so-called 'official acts'). However, the interpretation of the concept of 'official acts' is itself the subject of differing opinions.

Other distinctions between personal and functional immunities are more controversial. In particular, there is no agreement on one important conceptual premise which gives rise to many legal consequences, namely whether or not the legal foundation of these two forms of immunity is radically different.

In fact, personal immunity is unanimously seen as being based on the concept that an official's acts are attributed to the individual agent and that such immunity has the procedural nature of an exemption from legal proceedings (but not from the law). Moreover, there is general consensus on the fact that personal immunity is only available to a limited number of State officials (diplomatic agents, heads of State and government, ministers of foreign affairs, members of special missions), all of whom perform duties pertaining to their State's international relations.

On the contrary, scholars are divided on the question of the legal foundation of functional immunity. In brief, we can start by saying that, according to the traditional long held view, functional immunity is based on the conceptual premise that acts performed by an agent in his/her official capacity and in the exercise of his/her duties cannot be attributed to the individual agent, but only and always to the State for which the official is acting. Therefore, functional immunity should not be procedural in nature, but rather should represent a substantive exemption from the law. This would mean that functional immunity is due to *all* foreign State officials and, at least in principle, would cover *all* their 'official' acts. However, a growing number of scholars reject the basic conceptual premise of this traditional view and maintain that functional immunity has the same procedural nature as personal immunity. The latter approach induces many writers to deny the fact

dalla giurisdizione' (1940) 52 Rivista di diritto internazionale 96 ff; H Kelsen, *Principles of International Law* (Rinehart & Co. 1952) 229-230; Ph Cahier, *Le droit diplomatique contemporain* (Droz-Minard 1962) 253; M Giuliano, *Le relazioni e immunità diplomatiche* (Istituto Editoriale Cisalpino 1968) 109 ff.

that functional immunity is available to *all* foreign State agents and/or the fact that such immunity covers *all* the official acts of those agents.

Thus, the different doctrinal views on the legal basis of functional immunity have an impact on any conclusions regarding the scope of its application and its content, as well as any conclusions on the real extent and significance of the distinction between personal and functional immunities. It is therefore appropriate to carry out a brief review of these doctrinal views, in order to subsequently verify their validity through an empirical examination of international practice.

3. *Doctrinal theories regarding functional immunity*

As the doctrinal theories on the legal basis and the scope of application of functional immunity are numerous, it is worth organizing them into three main general approaches.

According to the first and oldest approach, the legal regime of functional immunity has a general scope of application; that is, it applies to *all* State officials and to *all* acts performed by them in the exercise of their duties. Within this approach, many individual theories are based on a deductive method, founded on the conceptual premise that every 'official' act of a foreign State's agent can be attributed only to the State for which the agent is acting. For some scholars, this deduction derives from the principle of international law that is intended to protect the internal organization of the State.[3] For others it derives from the principle of non-interference in the constitutional 'life' of the foreign

[3] See, eg, G Morelli, *Diritto processuale civile internazionale* (Cedam 1938) 176 ff; Morelli, 'Circa l'esenzione' (n 2) 336 ff; G Morelli, *Nozioni di diritto internazionale* (Cedam 1967) 215 ff; JP Niboyet, 'Immunité de juridiction et incompetence d'attribution'(1950) 39 Revue générale de droit international public 139 ff; H Briggs, *The Law of Nations* (Stevens 1952) 782; A Malintoppi, 'Su l'esenzione giurisdizionale degli agenti diplomatici' (1954) 57 Rivista di diritto internazionale 125 ff; G Sperduti, *Lezioni di diritto internazionale* (Giuffrè 1958) 119; Van Panhuys, 'In the Borderland' (n 2) 1205 ff; A Tanzi, *L'immunità dalla giurisdizione degli agenti diplomatici* (Cedam 1991) 8 ff; N Ronzitti, 'L'immunità funzionale degli organi stranieri dalla giurisdizione penale: il caso *Calipari*' (2008) 91 Rivista di diritto internazionale 1033 ff; Ronzitti, *Introduzione al diritto internazionale*, (4th edn, Giappichelli 2013) 146; Cannizzaro, *Diritto internazionale* (Giappichelli 2012) 331-333.

State,[4] or from the principle that protects the 'exclusive jurisdiction' of the State in its relationship with its own agents.[5] For yet others, it derives from the concept that the functional immunity of foreign officials ultimately coincides with the immunity of foreign States.[6] A further theory, based instead on an inductive method, maintains that a specific customary norm has developed, which prohibits the exercise of State jurisdiction over foreign State agents acting in their 'official' capacity[7]. The latter theory has, in substance, been espoused by the two ILC Special Rapporteurs in their work on the immunity of State officials from foreign criminal jurisdiction.[8]

According to the second doctrinal approach, the legal regime of functional immunity has a limited scope of application because it only covers *some categories of acts* performed by foreign State officials. Within this approach, a first longstanding and widely held theory maintains that the functional immunity of foreign officials only covers their internationally lawful acts.[9] A second, and more recent theory

[4] See R Quadri, *Diritto internazionale pubblico* (Liguori Editore 1968) 487 ff and 614-616.

[5] See F Seyersted, 'Jurisdiction over Organs and Officials of States, the Holy See and Intergovernmental Organizations' (1965) 14 ICLQ 31-81 and 493-525.

[6] See H Kelsen, 'Collective and Individual Responsibility with Particular Regard to the Punishment of War Criminals' (1942-43) 31 California L Rev 530-571; H Kelsen, 'Collective and Individual Responsibility for Acts of State in International Law' (1948-49) 1 Jewish YB Intl L 226-239; H Kelsen, Principles (n 2) 235 ff; P Guggenheim, Lehrbuch des Völkerrechts, vol I (Verlag fur Recht und Gesellshaft AG 1948) 171 ff; G Dahm, Völkerrecht, vol I (Kohlhammer 1958) 225, 237, 303, 325; M B Akehurst, 'Jurisdiction in International Law' (1972-73) 46 British YB Intl L 241 ff; I Seidl-Hoenveldern, Völkerrecht (Heymann 1984) 312 ff; I Wuerth, 'Foreign Official Immunity: Invocation, Purpose, Exceptions (2013) 23 Revue Suisse de droit international et européen 214.

[7] G Balladore Pallieri, 'La competenza delle autorità giudiziarie di Danzica nei confronti dei funzionari polacchi' (1937) 1 *Giurisprudenza comparata di diritto internazionale privato* 234 ff; G Balladore Pallieri, *Diritto internazionale pubblico* (Giuffrè 1937) 385 ff; L Oppenheim, H Lauterpacht, *International Law* (Longmans, Green & Co 1955) 850 ff; M Miele, *L'immunità giurisdizionale degli organi stranieri* (Giuffrè 1961) 23, 39, 137 ff, 161 ff; W Wengler, *Völkerrrecht*, vol I (Springer 1964) 540 ff; A Verdross, B Simma, *Völkerrecht: Theorie und Praxis* (Dunker and Humblot 1984) 774.

[8] Kolodkin, 'Preliminary report' (n 1) paras 80-81, 107, 109; Kolodkin, 'Second report' (n 1) paras 19, 21, 85, 90; Escobar Hernández, 'Second report' (n 1) paras 50 e 53; Escobar Hernández, 'Third report' (n 1) paras 12, 112, 151 and Draft Article 5.

[9] See, eg, C C Hyde, *International Law Chiefly as Interpreted and Applied by the United States* (Little, Brown & Co. 1945-I) 821; A P Sereni, *Diritto internazionale* (Giuf-

maintains that functional immunity covers foreign officials when they cannot be held personally responsible for their acts because they are conducted under the authority of their State, that is to say, they are 'the arm and mouthpiece' used by the State in its actions. Consequently foreign officials have no right to functional immunity when performing acts that can also be attributed to themselves and for which they may be personally responsible.[10] A third recent theory maintains that the relationship between the individual agent and the State, which constitutes the legal basis for functional immunity, is governed by specific norms of international law, according to which this immunity is due to foreign officials only when their acts are 'performed in the service of the foreign State'; this wording excludes acts that are not based on the exercise of public duties or acts that are prohibited by international law provisions addressed to individuals.[11]

Lastly, according to the third, and less traditional, doctrinal approach, which represents a radical break from the others, the legal regime of foreign officials' functional immunity is not governed by a single and sole customary norm, as international practice demonstrates that such a regime is both fragmented and complex. In other words, no principle or customary norm on functional immunity may be applicable in the same way to all foreign officials for all their acts or for entire categories of certain acts. On the contrary, there is a range of *different norms*, which *change* according to different officials, different acts, or the exercise of criminal or civil jurisdiction. Various doctrinal theories have also developed within this third approach. A first theory maintains that different norms concerning the functional immunity of foreign officials apply according to the kind of activities performed; i.e., whether they are 'official' acts prohibited by international law, acts only lawful in international law, or acts specifically protected by international

frè 1960-II) 1, 521; M Giuliano, 'Les relations et immunités diplomatiques', *Recueil des Cours* (1960-III) 161 ff; Y Dinstein, 'Diplomatic Immunity' (n 2) 77-89; M Giuliano, T Scovazzi, T Treves, *Diritto internazionale* (Giuffrè 1983) 422-429, 506-512, 537; G Carella, *La responsabilità dello Stato per crimini internazionali* (Jovene 1985) 172 ff.

[10] See R Van Alebeek, *The Immunity of States and Their Officials in International Criminal Law and International Human Rights Law* (OUP 2008) especially 106-143; R Van Alebeek, 'National Courts, International Crimes and the Functional Immunity of State Officials'(2012) 59 Netherlands Intl L Rev 5-41.

[11] Z Douglas, 'State Immunity for the Acts of State Officials (2012) 82 British YB Intl L 281.

law.[12] According to a second theory, a distinction must be made between the exercise of criminal jurisdiction and that of civil jurisdiction: foreign officials have no right to immunity from criminal jurisdiction, at least in general international law, and only some categories of foreign officials have a right to immunity from civil jurisdiction, but on the basis of international norms having different contents.[13] According to a third theory, which is also based on a distinction between criminal and civil jurisdiction, only some categories of foreign officials have a right to immunity from both civil and criminal jurisdiction, while all other foreign officials only have the right to immunity from civil jurisdiction.[14] Lastly, according to a fourth and even more radical theory, *only a restricted core* of foreign officials, by virtue of their duties specifically pertaining to international relations, have the right to functional immunity from both criminal and civil jurisdiction, while all other foreign officials have no right to such immunity.[15]

4. *Methodological issues*

We have seen that there are numerous, and fairly diverse doctrinal theories in respect of the legal basis, scope of application and content of functional immunity for foreign officials. Before verifying the validity of

[12] See P De Sena, *Diritto internazionale e immunità funzionale degli organi statali* (Giuffrè 1996)100-104.

[13] See M Frulli, *Immunità e crimini internazionali. L'esercizio della giurisdizione penale e civile nei confronti degli organi statali sospettati di gravi crimini internazionali* (Giappichelli 2007) especially Ch I and 307-318.

[14] See B Conforti, 'In tema di immunità funzionale degli organi statali stranieri'(2010) 93 Rivista di diritto internazionale 5 ff. For similar views see E H Franey, *Immunity, Individuals and International Law: Which Individuals are Immune from the Jurisdiction of National Courts under International Law* (Lambert Academic Publishing 2011) 330-340; A Sanger, 'Immunity of State Officials from the Criminal Jurisdiction of a Foreign State' (2013) 62 ICLQ 193 ff, at 217-220.

[15] See R Nigro, 'La disciplina dei militari impegnati all'estero in missioni umanitarie: in margine al caso *Lozano*' (2009) 3 Diritti umani e diritto internazionale 565 ff; G Cataldi, G Serra, 'Ordinamento italiano e corpi di spedizione all'estero, fra diritto umanitario, diritto penale e tutela dei diritti umani' (2010) 4 Diritti umani e diritto internazionale 141 ff, 154-155; D Amoroso, 'Sull'(in)esistenza di un regime generale in materia di immunità funzionale degli organi stranieri' (2013) 8-9 Giurisprudenza italiana 1900 ff, 1908; R Pisillo Mazzeschi, 'Organi degli Stati stranieri (immunità giurisdizionale degli)' (2014-VII) Enciclopedia del diritto, Annali 749-777.

each theory in the light of international practice, it is worth providing some observations of a general and methodological character.

First of all, in the light of contemporary international law the validity of the oldest theories, based on a merely deductive method, should be questioned, as they construct a legal regime of functional immunity applicable to *all* foreign officials based on general, aprioristic and unproven principles, such as the principle of protection of the State's domestic organization, that of non-interference in the constitutional 'life' of the State, that of protection of the State's 'exclusive jurisdiction' in its relationship with its own agents, or that of concurrence between the immunity of officials and the immunity of the State. This deductive method is now considered by international scholars to be obsolete.

Secondly, it is wise to question the traditional theory on the foundations of functional immunity, which is based on the conceptual premise that 'official' acts performed by an agent of the foreign State are always and only attributable to the foreign State, and never to the individual agent, who cannot therefore be held responsible for those acts. This fundamental idea, of the *necessary irresponsibility of individual State agents when acting in an 'official' capacity*, is at the basis of many of the above-mentioned traditional theories. However, in this author's opinion, this idea, which belongs to the historical period in which international law only recognized the collective responsibility of the State, has lost all validity in contemporary international law, which admits the *personal responsibility of individuals*, and especially of individual State agents, alongside the collective responsibility of the State. Following this trend, the rapid development of international criminal law has led to a *radical break away* from the traditional system of international responsibility, also impacting upon the whole system of international law. Therefore, the old dogma regarding the absoluteness of the organic link between the individual State agent and his/her State, which has been outmoded in domestic law for some time, is now also obsolete in international law.

Thirdly, and consequently, there is now some doubt as to the concept that the functional immunity of foreign officials should be conceived as a form of irresponsibility, i.e., as an exemption from the law, and that, therefore, it should be applicable to *all* State officials when performing their duties. On the contrary, it is conceivable that

only *some* State officials have a right to functional immunity, by virtue of the importance of their duties for their State's international relations[16]. Besides, from a logical viewpoint, it is hardly justifiable in contemporary international law for functional immunity to expand to such an extent as to include all persons belonging to the entire public administration of a foreign State.[17]

Fourthly, considering the rapid development of the whole system of international law over the last few decades, it is clearly possible that international norms regarding the immunity of foreign officials have also undergone a process of evolution, and that a progressive reduction has occurred in the scope of application of functional immunity. It is also plausible that a progressive 'rapprochement' is taking place between the legal regime of functional immunity and that of personal immunity.

That said, it is almost inevitable therefore to conclude that the doctrinal theories based on a deductive method are now inadequate and that the problem of the legal regime of foreign officials' functional immunity should be dealt with using an *inductive method*, founded on an examination of practice and *opinio iuris*. Moreover, this examination should be conducted using an appropriate methodology. This means, first of all, not starting from the aprioristic and unproven assumption that a survey of international practice will only prove the existence or non-existence of a single customary norm on functional immunity, possibly applicable to *all* foreign officials without distinction. On the contrary, such an examination needs to cover practice relating to all categories of State officials who may, at least hypothetically, have the right to immunity. Secondly, since all jurisdictional immunities of foreign officials establish an exception to the usual exercise of jurisdiction by the territorial State, any demonstration of the existence of customary norms relating to immunities must be rigorous; i.e. based on extensive, consolidated and uniform practice and a well-demonstrated *opinio iuris*. In the absence of these elements, the conclusion that such customary norms do not exist is inevitable.[18]

[16] See Nigro (n15) 575-577.

[17] For a similar comment see Douglas (n 11) 293.

[18] Therefore this author does not agree with the general methodological approach taken by Kolodkin ('Second report' (n 1) para 18), in the above-mentioned work of the ILC on immunity of foreign officials from criminal jurisdiction. According to such an

5. *The functional immunity of different State officials in practice*

5.1. *Diplomatic agents, high ranking officials, consular agents, members of special missions*

A first category of State officials who undoubtedly have a right to functional immunity is that of diplomatic agents. This emerges clearly from international practice, although such practice is not particularly extensive, since the functional immunity for the most part needs to be inferred from practice relating to *former* diplomatic agents with regard to official acts performed during their mandates.[19] It is not helpful to look at practice relating to diplomatic agents *during* their mandates, as they enjoy personal immunity for that period of time, which covers both official and private acts[20] and therefore ends up absorbing functional immunity. Although not extensive, international practice is nonetheless composed of a uniform and unambiguous series of domestic court judgments.[21] Moreover, the 1961 Vienna Convention on Diplomatic Relations, commonly considered as a codification of customary international law, contains certain provisions that confirm diplomatic agents' enjoyment of not only personal, but also functional immunity.[22]

A second category of State officials who have a right to functional immunity according to prevailing opinion is that of heads of State,

approach, which reverses the correct method, the immunity of foreign officials would be the rule and the practice would serve to prove the lack of immunity.

[19] The functional immunity of diplomatic agents could also be inferred from practice concerning diplomatic agents having the same nationality of the host State and from practice regarding the granting of immunity from States different to the host State. But such practice is almost non-existent.

[20] According to the dominant view in literature. See n 2.

[21] See, eg, Cour d'appel de Paris (29 June 1811) *Angelo-Poulos c Ferton, Recueil Sirey* (1809-1811) 514 ff; Tribunal de première instance de Genève (29 March 1927) *V et Dicker c D* (1927) Journal de droit international 1179; London Court of Appeals (24 March 1964) *Zoernsch v Waldock and McNulty* (1964) 3 ILM 425; Cour de Paris (30 June 1967) *Querouil c Breton* (1968) 14 Annuaire français de droit international 859; England, Court of Appeals (17 April 1997) *Propend Finance Pty Ltd and Others v Sing and Others*, (1997) 111 ILM 611 ff; District Court of the District of New York (20 March 2009) *Swarna v Al-Awadi, Al-Shaitan and the State of Kuwait* <www.leagle.com>; Court of Appeals for the Second Circuit (24 September 2010) *Swarna v Al-Awadi, Al-Shaitan and the State of Kuwait* <www.leagle.com>.

[22] See especially Articles 38 and 39(2) of the Vienna Convention on Diplomatic Relations (adopted 18 April 1961, entered into force 24 April 1964) 500 UNTS 95.

heads of government and ministers of foreign affairs. These figures enjoy personal immunity during their mandates and their functional immunity therefore has to be inferred, especially from practice concerning *former* heads of State, heads of government and ministers of foreign affairs with regard to official acts performed during their mandates. Although this practice is not completely uniform, it confirms the existence of a customary norm giving these three high-ranking State representatives functional immunity from foreign (criminal and civil) jurisdiction, though, a restrictive interpretation should be given to this immunity. The customary norm can be inferred, above all, from extensive domestic court case-law,[23] one may mention, as a significant example, the clear statements of some law Lords in House of Lords judgment of 24 March 1999 in the *Pinochet* case.[24] The existence of such a norm is also confirmed, albeit implicitly, in the case-law of international courts, such as in the 2002 judgment of the International

[23] See, for instance, within the extensive case law of United States courts, the following judgments: Supreme Court of the State of New York, *Hatch v Baez* (1876), 7 Hun's Rep 596 (N.Y. Sup Ct); Supreme Court, 29 November 1897, *Underhill v Hernandez*, 168 U.S. 250, 18 S. Ct. 83; District Court for the Eastern District of New York (27 January 1994) *Lafontant v Aristide*, 844 F. Supp. 128; Court of Appeals for the Seventh Circuit (8 September 2004) *Wei Ye and Others* v *Jiang Zemin*, 383 F. 3d 620; Court of Appeals for the Fifth Circuit (12 December 1962) *Marcos Perez Jimenez v Manuel Aristeguieta and John E. Maguire*, 311 F.2d 547; Court of Appeals for the Second Circuit (26 November 1986) *Republic of the Philippines v Marcos and others*, 806 F.2d 344; Court of Appeals for the Ninth Circuit (4 June 1987) *Republic of the Philippines v Marcos and others*, 818 F. 2d 1473; Court of Appeals for the Ninth Circuit (1 December 1988) *Republic of the Philippines v Marcos and others*, 862 F. 2d 1364; District Court for the Southern District of Florida, ord. 8 June 1990, *United States of America v Manuel Antonio Noriega et al.*, 746 F. Supp. 1506; Court of Appeals for the Eleventh Circuit (7 July 1997) *United States of America v Noriega*, 117 F.3d 1206. See also, for judgments in other States, Tribunale di Roma (ord. 28 February 1987) *Imputato Bigi* (1988) 24 Rivista di diritto internazionale privato e processuale 359 ff; Tribunal Correctionnel de Paris (1 July 1999) *Noriega* (1999) 103 Revue générale de droit international public 958 ff; Tribunal Correctionnel de Paris (7 July 2010) *Noriega,* <www.nytimes.com/2010/07/08/world/americas>.

[24] House of Lords, (24 March 1999) *Regina v Bow Street Metropolitan Stipendiary Magistrate, Ex Parte Pinochet Ugarte* ('Pinochet III') 119 ILM 136 ff. See especially the statements made by Lord Browne-Wilkinson (ibid para 202), and by Lord Millet (ibid para 269). See also House of Lords (25 November 1998) *Regina v Bow Street Metropolitan Stipendiary Magistrate, Ex Parte Pinochet Ugarte* ('Pinochet I'), ibid 51 ff.

Court of Justice (ICJ) in the *Arrest Warrant* case.[25] Moreover, the *Institut de Droit International* adopted a resolution in 2001 affirming that former heads of State have a right to functional immunity with regard to acts 'accomplis durant ses fonctions et qui partecipaient de leur exercise'.[26]

A third category of State officials who undoubtedly have a right to functional immunity according to customary international law is that of consular agents. However, their immunity from criminal and civil jurisdiction must be interpreted extremely restrictively, since it is limited to acts performed in the *typical exercise of consular functions*. This has been confirmed by the 1963 Vienna Convention on Consular Relations[27] and by extensive case-law in the domestic courts of many States.[28] Among the most significant decisions, one that stands out is the 2012 judgment of the Italian Court of Cassation in the *Abu Omar* case,[29] which 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.

Lastly, a fourth category of State officials who, in this author's view, have a right to functional immunity is that of members of special missions. In treaty law their legal regime is governed by the 1969 New

[25] ICJ, *Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium)* (Judgment) [2002] ICJ Rep 3 ff, para 61.

[26] Institut de Droit International, Resolution of 26 August 2001: 'Les immunités de jurisdiction et d'exécution du chef d'Etat et de gouvernement en droit international' (2001-2002) 69 Annuaire de l'Institut de Droit International 742-754.

[27] Vienna Convention on Consular Relations (adopted 24 April 1963, entered into force 3 September 1953) 213 UNTS 222. See especially article 43.

[28] See, eg, Tribunal correctionnel de Dieppe (22 January 1900) *Murphy c Lee Jortin* [1900] Journal de droit international privé 959 ff; District Court for the Southern District of New York (15 October 1956) *Arcaya v Páez*; Court of Appeals for the Second Circuit, 17 June 1957, *Arcaya v Páez* (1957) 23 ILR 436 ff; Corte di Cassazione, 19 April 1933, *In re Vuhotic* (1933-34) 7 Annual Digest and Rep Public Intl L Cases 392; Cour d'appel de Paris (28 January 1928) *Bigelow c Zizianov*, (1928) Journal de droit international 142 ff; Tribunale di Genova (6 May 1970) (1971) 54 Rivista di diritto internazionale 702 ff; Corte di Cassazione (28 February 1972) (1976) 2 Italian YB Intl L 339; Superior Court of Lake County, 30 September 1988, *State of Indiana v Peter L. Ström*, see T Lee, *Consular Law and Practice* (OUP 1991) 501-503.

[29] Corte di Cassazione (sez V penale), 29 novembre 2012, n 46340, *Proc. Gen. Appello Milano, Nasr Osama Mustafá Hassan detto Abu Omar e altri* (2013) 96 Rivista di diritto internazionale 272 ff.

York Convention on Special Missions,[30] which, with the intention of assimilating these missions into permanent diplomatic missions, grants members of special missions jurisdictional immunities similar to those of diplomatic agents. In this author's opinion this Convention codifies customary international law, as States' recent practice (although mostly dealing with personal immunity) shows a clear trend in favour of the existence of a customary norm granting members of special missions both personal and functional immunity.[31] In other words, international practice confirms that special missions are to be treated in the same way as permanent diplomatic missions. However, in actual fact, the functional immunity of members of special missions only applies after the cessation of their mission.

A separate legal regime governs the immunity of members of missions representing States in their relations with international organizations or in international conferences. The numerous bilateral and multilateral treaties dealing with this matter usually grant such missions only functional immunity.[32] However, it does not appear possible to infer a customary norm on immunity from this set of treaties. Moreover, international practice is not sufficiently extensive and uniform, except for the cases in which immunity has been granted on the basis of a specific treaty provision.

5.2. *Military forces*

Members of military forces deserve separate treatment. This paper includes within this broad category of State officials, members of

[30] Convention on Special Missions (adopted 8 December 1969, entered into force 21 June 1985) 1400 UNTS 231, specially articles 24-31.

[31] See, eg, High Court, Queen's Bench Division, *Khurts Bat v Investigating Judge of the Federal Court of Germany*, [2011] EWHC 2029 (Admin) and (2012) 3 Weekly L Rep 180; Divisional Court, *R. v Governor of Pentoville Prison, ex parte Teja*, [1971] 2 QB 274; Bow Street Magistrates' Court (8 November 2005) *Re Bo Xilai*, 128 ILR 713 ff; District Court (29 September 2009) *Re Ehud Barak*, reported in Franey (n 14) 146-147; District Court for the Northern District of Ohio, Eastern Division (7 December 1978) *Kirloy v Windsor*, 81 ILR 605 ff; Court of Appeals for the Eleventh Circuit (18 September 1984) *Abdulaziz v Metropolitan Dade County and Others*, 741 F.2d 1328.

[32] See, for instance, the Vienna Convention on the Representation of States in Their Relations with International Organizations of a Universal Character (adopted 14 March 1975, not yet in force) Articles 30, 37, 60, 66, 67, 68.

military forces operating abroad in times of peace, with the consent of the territorial State, as well as members of military forces operating abroad during wartime occupation or during missions authorised by the United Nations or the European Union.

International law scholars are divided about the existence of a customary norm attributing functional immunity to members of military forces. Some writers maintain that such a norm exists and that it grants immunity for acts strictly connected to the duties of the military forces[33]. Others maintain that the customary norm has a more limited scope, since it is supposed to cover only criminal and disciplinary immunity for acts 'exclusively internal' to the military force.[34] Still others deny the existence of a customary norm and maintain that the immunity of military forces is only governed at treaty level.[35]

The latter view is the most convincing, as international practice shows that the treatment of members of military forces operating abroad is almost always governed by specific bilateral agreements between the sending State and the territorial State or, in more recent times, by multilateral agreements, such as the SOFAs (Status of Forces Agreements). In fact, these agreements have left no room for the development of a customary norm, because they contain very different provisions in regards to jurisdiction over the members of military forces. In some cases the agreement provides for the exclusive jurisdiction of the sending State, in others for the exclusive jurisdiction of the territorial State, and in yet others for the concurrent jurisdiction of the sending and the territorial State. Hence, in this author's view, it should be concluded that these agreements tend to govern the distribution of competences among States, rather than the functional immunity of military forces. At most it could be inferred from this set of agreements that there is a trend in favour of the of the sending State having *priority* in terms of the exercise of jurisdiction over military forces.

The idea that there is no customary norm concerning the functional immunity of military forces was recently supported by the High Court

[33] See, eg, Conforti (n 14) 6.

[34] See, eg, G P Barton, 'Foreign Armed Forces: Immunity from Criminal Jurisdiction' (1950) 31 British YB Intl L 186-234; H Fox, *The Law of State Immunity* (2nd ed, OUP 2008) 717; C Focarelli, *Diritto internazionale*, *Il sistema degli Stati e i valori comuni dell'umanità* (2nd ed, Cedam 2012) 390.

[35] See Frulli (n 13) 34-37.

of Kerala in its judgment concerning the dispute between Italy and India in the case of the ship *Enrica Lexie*.[36] The Court rejected the Italian argument that the two Italian marines involved benefitted from functional immunity, stating that, in international law, the immunity of foreign military forces depends on the presence or absence of a specific agreement between the sending and the territorial State.

5.3. *Other State officials*

As we have seen, the practice concerning the various categories of State officials who could, at least hypothetically, enjoy functional immunity demonstrates that *only some officials* have a right to this immunity on the basis of customary international law.

Therefore, both the doctrinal approach according to which functional immunity is due to all foreign officials in relation to all their acts, and the approach according to which functional immunity is due to all foreign officials but only for their lawful acts or for certain categories of acts should be rejected. Instead, the third doctrinal approach, which denies the existence of a single and sole customary norm applicable to all foreign officials without distinction, seems a more reasonable one. However, in order to be certain, it is also necessary to examine the practice concerning State officials *other than those already taken into consideration*. In doing so, a distinction should be made between the practice relating to possible immunity from criminal jurisdiction and that relating to possible immunity from civil jurisdiction.

5.3.1. *Immunity from criminal jurisdiction*

An examination of practice, especially more recent practice, demonstrates that there is no norm of customary international law which grants functional immunity from criminal jurisdiction to foreign officials other than those in the four categories mentioned above (diplomatic agents; heads of State and government and ministers of foreign affairs; consular agents; and members of special missions).

[36] High Court of Kerala (29 May 2012) *Latorre and Others v Union of India and Others* (2012) 252 KLR 794.

Historical practice shows that domestic courts have denied functional immunity to foreign officials when they are accused of: a) espionage; b) serious breaches of the law of war; c) aerial intrusions or unlawful trespassing in foreign territories or maritime spaces. This has also been confirmed in more recent practice. With regard to espionage, for example, reference can be made to the 1998-99 dispute between Cyprus and Israel[37]. This concerned the arrest by Cypriot authorities of two Israeli agents suspected of having performed espionage activities in Cyprus, who were tried and sentenced by the Cypriot courts. With regard to war crimes, we may recall the *Von Lewinski* case,[38] decided by a British court in 1949, in which the accused contested the jurisdiction of the court and cited the *McLeod* case[39] as a precedent in his favour; however, the court decided to exercise its jurisdiction and stated that, if anything, the *McLeod* case constituted a precedent against the functional immunity of foreign officials.

Moreover, most recent practice demonstrates that the courts are willing to deny foreign officials functional immunity from criminal jurisdiction with regard to many other categories of unlawful acts, that is to say besides those mentioned above. With respect to crimes against humanity, for instance, we may cite the 1962 judgment of the Israeli Supreme Court in the *Eichmann* case,[40] and the 2004 decision of the Belgian Court of Cassation in the *Sharon and Yaron* case,[41] which denied functional immunity to Yaron. With regard to the offence of defamation, we may recall the 1960 judgment of the Supreme Court of Burma in the *Kovtunenko* case,[42] in which the accused was an officer of the Soviet Telegraph Agency, TASS, who was charged with defamation and claimed functional immunity. Even though the court recognised

[37] The diplomatic dispute is described in Franey (n 14) 216-220.

[38] British Military Court at Hamburg (Germany) (19 December 1949) *In re Von Lewinski (called von Manstein)* (1949) 16 Annual Digest Rep Public Intl L Cases 509 ff.

[39] Supreme Court of New York (6 July 1841) *People v McLeod* [1840-1841] Wendell's L Rep 483.

[40] Israel, Supreme Court (29 May 1962) *Attorney-General of the Government of Israel v Adolf Eichmann*, (1968) 36 ILR 277-342, specially 308-312.

[41] Belgium, Court of Cassation (12 February 2003) *H.S.A. et al. v S.A. et al.*, (Decision related to the indictment of Ariel Sharon, Amos Yaron and Others) No P.02.1139.f, 127 ILR 110 ff.

[42] Burma, Supreme Court *Kovtunenko v U Law Yone* (1 March 1960) 31 ILR 259 ff.

that the accused had acted in the exercise of his official duties and with the authorisation of his government, it denied him immunity.

There have also been many cases relating to crimes of murder, abduction or terrorism committed by foreign officials. Reference can be made, for instance, to the 1962 judgment of a German court in the *Staschynskij* case;[43] the 1984 judgment of an English court in the *Yusufu* case;[44] the arrest warrant of an English court in the *Lugovoi* case[45] concerning the murder of Litvinenko; the 1986 judgment of the District Court of Auckland in the *Rainbow Warrior* case, as well as the conduct of both the governments of France and New Zealand during the dispute;[46] the 2001 judgment of a Scottish court in the *Lockerbie* case and the conduct of both Libya and many other States during the dispute.[47] Lastly, the above-mentioned judgment of the High Court of Kerala in the *Enrica Lexie* case denied the existence of a customary norm providing all foreign officials with immunity from criminal jurisdiction.

Moreover, domestic courts have taken a clear and well-reasoned position against the existence of such a customary norm in two recent and important cases. In the *Khurts Bat* case,[48] the English High Court was asked to decide whether the head of the executive office of Mongolia's National Security Council - wanted for the crime of abduction among others committed in various European States - could claim functional immunity, being a foreign official who had acted in the exercise of his duties. In its judgment of 2001 the Court denied such immunity, having conducted an in-depth examination of international practice and deduced the non-existence of a customary international norm attributing functional immunity to foreign officials for crimes committed in the territory of a host State or in a third State. In the *Abu*

[43] Bundesgerichtshof (9 October 1962) *Staschynskji*, *Entscheidungen des Bundesgerichtshoft in Strafsachen* (1963) 87 ff.

[44] Lambeth Magistrates' Court (23 August 1984) *R. v Lambert Justices, ex parte Yusufu* [1985] Crim L Rev 510. For a description of the case see Franey (n 14) 256-258.

[45] See ibid 253-256.

[46] ibid 210-214 and 220-232. See also (1986) 25 ILM 1349 ff; (1986) 90 Revue générale de droit international public 1004 ff; C Focarelli, *Lezioni di diritto internazionale*, *Prassi*, vol II (Cedam 2008) 633-637.

[47] For a reconstruction of the events see Franey (n 14) 244-248. See also Scottish High Court of Judiciary (31 January 2001) *Megrahi and Fhimah* (2001) 40 ILM 582 ff.

[48] High Court, Queen's Bench Division, *Khurts Bat* (n 31).

Omar case, the one of the accused claimed that the CIA agents prosecuted for the covert abduction of the Egyptian citizen Abu Omar in Milan should enjoy functional immunity from Italian criminal jurisdiction as foreign State officials. The Italian Court of Cassation, in its judgment of 2012,[49] clearly rejected this claim, affirming the non-existence in international law of a customary norm regarding the functional immunity of *all* foreign officials. According to the Court, such a customary norm does not exist: this is confirmed by the absence of uniform and consolidated case-law, of continuous and concordant official declarations of States, and of an unambiguous doctrinal interpretation. On the contrary, the Court espoused the theory according to which functional immunity is recognized by specific international norms only in favour of certain categories of State agents in the exercise of the typical duties of their office. This position was confirmed in 2013 by the Court of Appeal of Milan,[50] and in 2014 in another judgment of the Italian Court of Cassation.[51]

On the other hand, in contrast to this long list of judgments against the functional immunity of all foreign officials, some judgments have nonetheless favoured such immunity. The most famous one is represented by the 1997 decision of the Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia (ICTY) in the *Blaškic* case.[52] In this decision the court denied the possibility of issuing an injunction against foreign officials, maintaining that they enjoyed functional immunity on the basis of customary international law. However, this decision is open to criticism: not least because the Appeals Chamber cited four cases in support of its view that are either not pertinent or tend to deny, rather than substantiate the view. The Italian Court of Cassation also pronounced in favour of the functional immunity of all foreign officials in its 2008 judgment of the *Lozano*

[49] Corte di Cassazione (sez. V penale) *Nasr Osama Mustafá Hassan detto Abu Omar e altri* (n 29).

[50] Corte di Appello di Milano (1 February 2013) *Medero et al*, <www.penalecontemporaneo.it>.

[51] Corte di Cassazione (sez V penale) (25 September 2014) n 39788 *Medero et al,* <www.cassazione.it>.

[52] *Prosecutor v Blaškic* (Judgment on the Request of the Republic of Croatia for the Review of the Decision of Trial Chamber II of 18 July 1997) IT-95-14 (29 October 1997) paras 38-41.

case:[53] again, this judgment was rather poorly grounded. Lastly, some scholars mention the 2008 judgment of the ICJ in the *Case Concerning Certain Questions of Mutual Assistance in Criminal Matters,*[54] in which France and Djibouti maintained opposing views in respect of the existence of a customary norm on the functional immunity of all foreign officials. However, in actual fact, the Court avoided making a pronouncement on the matter.

In conclusion, international practice testifies, in a rather consistent and uniform way, to the non-existence of a customary norm regarding the functional immunity of *all* State officials from foreign criminal jurisdiction. The few judgments in favour of the existence of such a norm are based on erroneous or unconvincing grounds.

5.3.2. *Immunity from civil jurisdiction*

Moving now to the practice relating to the functional immunity of State officials from foreign civil jurisdiction, it should be noted, above all, that although it is extensive, it is far from uniform. Three main approaches can be distinguished within the case-law.

A first group of cases includes the judgments in which domestic courts have denied, in a fairly explicit way, the existence of a customary norm giving *all* foreign officials functional immunity from civil jurisdiction.[55]

A second group of cases includes many United States court judgments, in which the judges have ruled on tort claims lodged against foreign officials, applying the 1789 *Alien Tort Statute* (ATS) and, on some occasions, the 1991 *Torture Victim Protection Act* (TVPA). In

[53] Corte di Cassazione (sez I penale) (4 July 2008) n 1171, *Lozano*, <www.cassazione.it>.

[54] ICJ, *Case Concerning Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v France)* (Judgment of 4 June 2008) [2008] ICJ Rep 177.

[55] See, eg, Court of Appeal (16 December 1921) *Fenton Textile Association Limited v Krassin*, (1919-22) 1 Annual Digest Rep Public Intl L Cases 295-298; Eire, Supreme Court (18 December 1944) *Saorstat and Continental Steamship Company Ltd. v Rafael De Las Morenas* (1943-45) 12 Annual Digest Rep Public Intl L Cases 97 ff; Philippines, Supreme Court (28 May 1992) G.R. No 74135, *Wylie and Williams v Rarang*, <www.lawpgil.net>; Philippines, Supreme Court (1 March 1993) G.R. No 79253, *United States of America and Maxine Bradford v Luis R. Reyes and Nelia T. Montoya*, <www.lawphil.net>.

these judgments the courts have asserted their jurisdiction over foreign officials and rejected the declinatory exceptions raised by them.[56] In some cases these courts have rejected the 'act of State' defence, while in other cases they have decided that the immunity granted by the 1976 *Foreign Sovereign Immunity Act* (FSIA) is not applicable. Thus, they have not explicitly dealt with the problem of the existence or non-existence of a customary norm on functional immunity. However, it may be presumed that, by asserting their jurisdiction over foreign officials, these courts have implicitly denied the existence of a customary norm of functional immunity for officials - otherwise, such a norm would surely have been applied.

Lastly, a third group of cases includes several judgments, usually originating from common law countries (with the exception of the USA), in which the courts have granted functional immunity from civil jurisdiction to foreign officials.[57] However, it should be pointed out that these courts have usually maintained that the functional immunity of the officials is synonymous with the immunity of the State. In many common law countries this position derives from the existence of

[56] See, eg, Court of Appeals for the Second Circuit (30 June 1980) *Filartiga v Pena-Irala*, 630 F. 2d 876, at 889-890; District Court for the Northern District of California (6 October 1987) *Forti and Benchoam v Suarez-Mason*, 672 F. Supp. 1531, at 1544-1547; Court of Appeals for the Second Circuit (13 October 1995) *Kadic v Karadžic*, 70 F.3d 232; District Court for the District of Maryland (26 February 2009) *Lizarbe and Others v Rondon*, 642 F. Supp. 2d 473, at 487-489; Court of Appeals for the Ninth Circuit, 21 October 1992) *Trajano v Marcos and Marcos Manotoc (In re Estate of Ferdinand E. Marcos Human Rights Litigation)*, 978 F. 2d 493; District Court for the District of Massachusetts (12 April 1995) *Teresa Xuncax and Others v Hector Gramajo*, 886 F. Supp. 162, at 178-193; District Court for the Southern District of New York, 18 April 1996) *Cabiri v Assasie Gyimah*, 921 F. Supp. 1189. See also US Supreme Court (1 June 2010) *Samantar v Yousuf and Others*, 147 ILR 726 ff; Court of Appeals for the Fourth Circuit, *Yousuf v Samantar*, 699 F.3d 763 (4th Cir 2012).

[57] Federal Republic of Germany, Federal Supreme Court (26 September 1978) *Church of Scientology Case*, (1978) 65 ILR 193 ff; Ontario Court of Appeal (17 June 1993) *Jaffe v Miller and Others*, (1993) 95 ILR 446 ff; Ireland, Supreme Court (5 December 1997) *Herron v Ireland and Others*, Lexis-Nexis; House of Lords (Appellate Committee) (14 June 2006) *Jones v Ministry of the Interior of the Kingdom of Saudi Arabia and Another; Mitchell and Others v Al-Dali and Others* (2006) 129 ILR 631 ff; New Zealand, High Court (21 December 2006) *Fang v Jiang* [2007] NZAR 420; Australia, Court of Appeal of New South Wales (5 October 2010) *Zhang v Zemin* [2010] NSWCA 255; Canada, Quebec Superior Court (25 January 2011) *Estate of the Late Kazemi and Hashemi v Islamic Republic of Iran and Others* (2011) 147 ILM 318 ff; Supreme Court of Canada (10 October 2014) *Kazemi Estate v Islamic Republic of Iran* [2014] SCC 62.

domestic laws dealing with the immunity of foreign States from civil jurisdiction[58] Sometimes these laws also expressly establish the immunity of officials acting in the exercise of their duties; in other cases the same conclusion derives from an interpretation of the same laws. Therefore, the above-mentioned judgments, being mostly based on domestic law, are not especially significant for the identification of customary international law.

It should be mentioned here that the European Court of Human Rights (ECtHR) recently espoused the approach typical of many common law countries. In fact, in the 2014 *Jones* judgment[59] the ECtHR affirmed the existence of a norm of general international law according to which the acts performed by State officials in the exercise of their duties are attributed, as far as immunity from civil jurisdiction is concerned, to the State for which they act. However, this judgment is open to criticism in respect of both its conceptual grounds and its very limited and partial examination of international practice.[60] In fact, from a conceptual point of view, the judgment again presents - without any critical examination - a theory connected to a now obsolete conception of functional immunity, which does not fit with contemporary international law. From a more empirical viewpoint, the judgment passively accepts the jurisprudential approach that identifies the immunity of an official with that of the State. This persists in some States but has no equivalent in many others.

What conclusion should therefore be drawn from the international practice relating to the functional immunity of State officials from foreign civil jurisdiction? The answer is complex, because a part of the practice seems to be in favour of immunity, while another part

[58] See, eg, the 1978 *State Immunity Act* of the United Kingdom, the 1985 *State Immunity Act* of Canada, the 1985 *Foreign States Immunities Act* of Australia, in A Dickinson, R Lindsay and J P Loonam (eds), *State Immunity: Selected Materials and Commentary* (OUP 2004).

[59] *Case of Jones and Others v The United Kingdom* App no 34356/06 and 40528/06 (ECtHR, 14 January 2014).

[60] See R Pisillo Mazzeschi, 'Le immunità degli Stati e degli organi statali precludono l'accesso alla giustizia anche alle vittime di torture: il caso *Jones* dinanzi alla Corte europea dei diritti umani' (2014) 6 Diritti umani e diritto internazionale 215-223; P Pustorino, 'Immunità dello Stato, immunità degli organi e crimine di tortura: la sentenza della Corte europea dei diritti dell'uomo nel caso *Jones*' (2014) 97 Rivista di diritto internazionale 493 ff.

demonstrates the very opposite view. On the whole, considering the lack of extensive, consistent, consolidated and uniform practice, it is difficult to maintain the existence of both the *diuturnitas* and the *opinio iuris* necessary for the identification of a customary norm giving *all* State officials functional immunity from foreign civil jurisdiction.

6. *Conclusion on the legal basis and scope of application of functional immunity*

The examination of international practice conducted above confirms the doctrinal approach according to which there are neither principles nor customary norms on functional immunity that are applicable to *all* foreign officials, but that there are, instead, a variety of *different norms,* which are applicable according to the roles of different officials and their respective duties.

With regard to the different officials, functional immunity is due to diplomatic agents; to heads of State, heads of government and ministers of foreign affairs; to consular agents; and to members of special missions. These are, with the positive exception of consular agents, the same officials who enjoy personal immunity. Besides, other State officials – i.e. the members of military forces operating abroad - do not enjoy true functional immunity, but rather the sending State enjoys priority in the exercise of coercive, disciplinary and criminal jurisdiction on the basis of treaty law. Therefore, the categories of State officials that have a right to functional immunity are relatively limited in number, almost tending to coincide with the categories of officials who have a right to personal immunity.

With regard to the duties of the various officials, international practice shows that functional immunity is recognized broadly in relation to diplomatic agents and members of special missions; in a somewhat more restricted way in relation to the three most high ranking State representatives; and in an much more restrictive way to consular agents.

These two conclusions are important and suggest a radical change of mind about the foundations, goals and nature of functional immunity. First of all, it is highly significant that international practice disavows the numerous doctrinal views according to which functional immunity should be due to *any* individual who has the qualification of

State official and who acts in that role. This completely undermines the conceptual premise on which the theory of functional immunity has long been grounded, that is to say: the idea that the immunity of State officials is a necessary corollary of the fact that they act as organs of the State; the idea that such immunity derives from the fact that the agent's official acts are not attributable to him/her because they are attributable only to the State for which he/she is acting; and, lastly, the idea - and the basis of all the other concepts - that the very structure of international law only admits the collective responsibility of States. However, this latter idea has clearly been rendered obsolete by the development of international criminal law, which has established the 'normality' of the criminal responsibility of the individual agent besides that of the State and has brought about a structural change in the whole legal regime of international responsibility. In this author's view, this also marks the final demise of the above-mentioned conceptual premise behind the traditional theory of functional immunity.

Having rejected these premises, it becomes clear that the radical difference between the traditional theoretical foundations on which functional and personal immunity were respectively grounded no longer exists; consequently, the idea that any individual who acts for the State has a right to immunity for that reason alone must also be deemed obsolete. International practice, on the contrary, suggests another, more modern, *ratio* as the basis of functional immunity: i.e. that only some State officials, because of the particular nature of their duties, *which concern the external life and external activities of the State*, have a right to functional immunity.[61] In other words, the modern *ratio* of the norms on functional immunity of foreign officials is not founded on the aim of protecting the State as such and, consequently, in the protection of all public functions; but, instead, in the protection of a limited number of State functions: those which are typically important for the external activities of every State. Under this perspective it is absolutely logical that functional immunity covers *only those State officials who are typically and normally required to perform duties concerning the external life and activities of the State.*

[61] For similar views see Nigro (n 15) 575-579; Amoroso (n 15) 1908; Cataldi, Serra (n 15) 155.

It should be pointed out that, for the purposes of functional immunity, these duties need not concern a true representation of the State in its relations with other States, or the management of international relations. The protection of such duties is entrusted to personal immunity, which is more extensive and significant because it covers both official and personal acts and protects only the officials who, during their mandates, fulfil the important function of representing their State at the international level or of managing its international relations. On the contrary, it is logical that functional immunity, which is less extensive and important because it covers only official acts, be destined to protect the same State officials after the cessation of their mandate, as well as other State officials (i.e. consular agents) who do not represent the State at the international level nor manage its international relations, but have more limited duties concerning the State's external activities. Lastly, for those State officials who only occasionally perform public duties in foreign States (military forces), a lesser protection than that given by immunity seems sufficient: the priority and exclusive jurisdiction sometimes exercised by their national States on the basis of treaty law is a sufficient mechanism of protection in such cases.

In short, it is this author's view that in contemporary international law the whole legal regime of personal and functional immunity from jurisdiction has only one goal, of a single and unitary nature - that of protecting *certain specific functions* of the State in its external relations or activities, through the protection of the officials who, as a rule, perform those functions. This protection is graduated according to the importance of the functions performed by the different officials and according to whether or not the officials are effectively acting out their mandate at the time. If this is true, it prompts the question whether it is still useful or meaningful to make a clear and radical conceptual distinction between personal and functional immunity.

7. *Brief remarks on the relationship between functional immunity and international crimes*

As is well known, one of the most topical and controversial problems of contemporary international law is that of the relationship

between the international norms on immunity (including those on the functional immunity of foreign officials) and international norms prohibiting gross violations of human rights, grave breaches of humanitarian law, and international crimes.[62]

This problem is too complex to be dealt with[63] thoroughly here and therefore will be dealt with only in some brief remarks on the international practice which relates to the conflict between the functional immunity of State officials from foreign (criminal and civil) jurisdiction and the pursuit of justice for international crimes. We must start by saying that the conflict only arises when the norms on immunity *totally prevent* the victim from having access to justice against a foreign official accused of an international crime, because the victim has no alternative means of redress (the so-called rule of 'equivalent protection').[64] In this case, the norms on immunity contrast not only with the norms on the prohibition of international crimes, but also (in a more direct way) with the victim's right to access to justice and right to reparation. These latter rights are strictly and necessarily linked to the right not to suffer from the acts of an international crime. In fact, it is clear that an effective substantive right cannot be said to exist in the absence of remedies in the event of its breach; in other words, the victims of international crimes are effectively interested in having access to justice in order to obtain reparation and ensure the punishment of the persons responsible.

That said, international practice tends, on the whole, to deny functional immunity to foreign officials suspected or accused of

[62] The international norms on immunities also raise the problem of their possible conflict with certain domestic norms or principles, especially with the norms protecting the right of access to justice. On this issue see Pisillo Mazzeschi (n 60)790-792 and, recently, Corte Costituzionale (22 October 2014) n 238, <www.cortecostituzionale.it>.

[63] See Pisillo Mazzeschi (n 60) 777 ff, also for a review of the doctrinal theories on the subject.

[64] As is well known, the rule of 'equivalent protection' or 'alternative means of redress' has been developed especially by the ECtHR in order to resolve the conflict between the right of access to justice and the immunity of international organizations. See, eg, *Waite and Kennedy v Germany*, App no 26083/94 (ECtHR, 18 February 1999); *Beer and Regan v Germany*, App no 28934/95 (ECtHR, 18 February 1999); *Naletilic v Croatia*, (ECtHR, 4 May 2000); *Gasparini c Italie et Belgique*, App no 10750/03 (ECtHR, 12 May 2009). This author believes that such a rule should also be applied to immunity of foreign officials and immunity of foreign States.

international crimes.[65] This position emerged during the proceedings held by the allied military tribunals and by the domestic courts of the Allied States against foreign officials accused of having committed war crimes or crimes against humanity during World War II.[66]

More recent developments in international practice are, however, more significant. Initially, we can cite the 1997 ICTY decision in the *Blaškic* case;[67] the first and third judgments of the House of Lords in the *Pinochet* case;[68] the proceedings against former heads of State started by the Dutch courts against *Bouterse;*[69] by the French, Swiss and Dutch courts against *Pinochet;*[70] by the Spanish courts against *Rios Montt,*[71] *Lucas García* and *Mejía Victores;*[72] and by the Spanish, German and Italian courts against *Bignone*, *Lambruschini*, *Massera* and *Videla.*[73]

Subsequently, there seemed to be a tendency to deny functional immunity to foreign officials accused of international crimes, brought on by the famous *obiter dictum* contained in the 2000 ICJ judgment regarding the *Arrest Warrant* case. This apparently limited the exception to functional immunity in relation to international crimes to acts performed by State agents in the exercise of their duties, but only for private purposes.[74] The *obiter dictum* of the ICJ had a negative impact on subsequent practice, causing uncertainty among States and domestic courts about the relationship between functional immunity and international crimes.

[65] On the contrary, international practice shows that there is no exception to the customary norm on the *personal* immunity of diplomatic agents, heads of State, heads of government and ministers of foreign affairs, even when those officials are accused of international crimes. See Pisillo Mazzeschi (n 60) 783-785.

[66] See the judgments cited by Frulli (n 13) 82-92.

[67] ICTY, *Prosecutor v Blaškic* (n 52) para 41.

[68] See in the judgment *Pinochet I* (n 24) the statements by Lord Steyn (para 115) and Lord Nicholls of Birkenhead (paras 110-11); and in the judgment *Pinochet III* (n 24) the statements made by Lord Browne-Wilkinson (para 198), Lord Hope of Craighead (para 247), Lord Hutton (para 262), Lord Phillips of Worth Matravers (paras 289-290) and Lord Browne-Wilkinson (para 205).

[69] Gerechtshof Amsterdam (20 November 2000) *In re Bouterse*, (2001) Netherlands YB Intl L 266 ff; (18 September 2001) ibid 282 ff.

[70] See N Roht-Arriaza, 'The Multiple Prosecutions of Augusto Pinochet', in E L Lutz and C Reiger (eds), *Prosecuting Heads of State* (CUP 2009) 77 ff.

[71] See Frulli (n 13) 127-128.

[72] See E L Lutz and C Reiger (n 70) 295-298.

[73] ibid 295-298.

[74] *Case Concerning the Arrest Warrant of 11 April 2000* (n 25) para 61.

Following that, international practice has been somewhat divided. Some domestic courts, especially in common law countries and with regard to *civil* proceedings, have granted functional immunity to foreign officials accused of international crimes and here we may mention the 2006 British judgment in the *Jones* case,[75] the 2006 New Zealand judgment in the *Fang* case,[76] the 2010 Australian judgment in the *Zhang* case,[77] and the 2011 and 2014 Canadian judgments in the *Kazemi* case.[78] The ECtHR recently adopted the same position in the 2014 *Jones v UK* case,[79] but with a very poorly grounded judgment.

On the contrary, many other courts have continued to maintain that functional immunity does not apply to foreign officials accused of international crimes: here we may mention the 2004 *Ferrini* judgment of the Italian Court of Cassation;[80] the 2012 and 2014 judgments of the same Court in the *Abu Omar* case;[81] the decisions of the Spanish *Audencia Nacional* of 2006 in the *Zemin* case[82] and of 2008 in the *Kagame* case;[83] and the 2012 judgment of the Swiss Federal Criminal Tribunal in the *Nezzar* case.[84]

The same position also emerged, on the whole, from the long diplomatic dispute between Belgium and Senegal in the case of the former Chadian Head of State *Habré*. In particular, the Report of the Committee of Eminent African Jurists, submitted to the African Union in 2006, explicitly stated that the functional immunity of heads of State

[75] House of Lords (Appellate Committee) *Jones v Ministry of the Interior of the Kingdom of Saudi Arabia and Another; Mitchell and Others v Al-Dali and Others* (n 57).

[76] High Court, *Fang v Jiang* (n 57).

[77] Court of Appeal of New South Wales, *Zhang v Zemin* (n 57).

[78] Quebec Superior Court, *Estate of the Late Kazemi and Hashemi v. Islamic Republic of Iran and Others* (n 57); Supreme Court of Canada *Kazemi Estate v Islamic Republic of Iran* (n 57).

[79] *Case of Jones and Others v The United Kingdom* (n 59).

[80] Corte di Cassazione (11 March 2004) n 5044, *Ferrini c Repubblica Federale Tedesca*, (2004) 97 Rivista di diritto internazionale 550-551, para 11.

[81] Corte di Cassazione, *Proc. Gen. Appello Milano, Nasr Osama Mustafá Hassan detto Abu Omar e altri* (n 29); Corte di Cassazione, *Medero et al* (n 51).

[82] Audiencia Nacional, Sala de lo Penal, 10 January 2006, *Auto de admisión a trámite de la querella por genocidio en el Caso Tibet*, <www.derechos.org/nizkor/espana>.

[83] Audiencia Nacional (6 February 2008) *Auto del Juzgado Central de Instrucción No. 4*, 4° § No 1, at 157.

[84] Tribunal pénal fédéral (25 July 2012) BB.2011.140, A. c Ministère Public de la Confédération, B. et C., <www.bstger.ch>.

cannot override the principle of the prohibition of impunity for international crimes[85]; and the 2012 ICJ judgment in the case *Belgium v. Senegal,*[86] although not expressly dealing with immunity, affirmed many 'strong' principles on the prohibition of impunity for torture.

Lastly, the recent and very important judgment no. 238/2014 of the Italian Constitutional Court is worth mentioning.[87] Even though the Court was dealing with the problem of State immunity and from the perspective of the conflict between such immunity and constitutional principles, it affirmed that State immunity cannot be applied to acts that are not related to the typical exercise of governmental authority but are expressly qualified as unlawful acts because they breach fundamental rights. This statement implicitly strengthens the view that the functional immunity of foreign officials cannot cover international crimes.

In conclusion, prevailing practice shows that there is an exception to the norms regarding the functional immunity of foreign officials from *criminal* jurisdiction in cases of officials accused of international crimes. In contrast, the practice is more uncertain with regard to the same exception in relation to immunity from *civil* jurisdiction. In this author's view, this depends particularly on the fact that the courts of some common law countries continue to uphold the 'Kelsenian theory', according to which the immunity of foreign officials from civil jurisdiction coincides with the immunity of the State for which they act. This paper has already outlined why this opinion is now conceptually outdated. Moreover, it contrasts with the principles and values that inspire the contemporary international community, which recognizes norms on the punishment of international crimes as belonging to customary *ius cogens.* In contrast, the international community does not grant the same value to the customary norms on functional immunity, even though they protect important values for the pacific development of international relations. Therefore, in the case of true and effective

[85] 'Report of the Committee of Eminent African Jurists on the case of Hisséne Habrè, submitted to the Summit of the African Union in July 2006', in *Immunity of State officials from foreign criminal jurisdiction*, *Memorandum by the Secretariat*, A/CN.4/596, (31 March 2008) 121, fn 521.

[86] ICJ, *Questions Relating to the Obligation to Prosecute or Extradite (Belgium v Senegal)* (Judgment of 20 July 2012) [2012] ICJ Rep 422.

[87] Corte Costituzionale, 22 October 2014, n 238 (n 62).

conflict between the two groups of norms, those of the first group should prevail.

It is to be hoped that, at some future date, the courts and States that still persist in defending traditional international law, based on a 'State-centred' approach, will revise their position on the relationship between the norms on functional immunity from *civil* jurisdiction on the one hand and, on the other hand, the norms regarding international crimes, access to justice and reparation for the victims of such crimes.