

Comment on ‘The functional immunity of State officials from foreign jurisdiction: A critique of the traditional theories’

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1. *Introduction*

Riccardo Pisillo Mazzeschi has written an impressively researched and thought-provoking article that challenges the traditional theories on functional immunity of State officials. He not only challenges the conceptual premise that the immunity of State officials is a necessary corollary of the immunity of the State, but also questions the scope of functional immunity and the long-held distinction between functional and personal immunity.

Pisillo Mazzeschi’s arguments could spark a multitude of conversations. I will focus on four points.

2. *The concept of the State official*

It would seem that the very term ‘State official’ used by Pisillo Mazzeschi through the article is overly narrow. Individuals enjoy functional immunity when they act on behalf of the State, regardless of whether they are government employees, seconded officials, contractors, sub-contractors, agents, or some other kind of authorised individuals. It seems advisable to focus on the *act* rather than the person.

I agree with the definition of functional immunity adopted by Foakes: ‘Such immunity is determined by reference to the nature of the acts in question rather than the particular office of the official who per-

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formed them. As such, it covers a narrower range of acts but a much wider range of actors' than immunity *ratione personae*.¹

In focusing on 'State officials', Pisillo Mazzeschi aligns himself with the International Law Commission's ('ILC') work on the immunity of foreign State officials from criminal jurisdiction (of which he is otherwise critical). In the Third Report of the Special Rapporteur, it is evident that ILC members have been divided over whether the draft articles should include a definition of 'State official'. At present, draft Article 2(e) defines 'State official' as 'any individual who represents the State or who exercises State functions'.²

The ILC Commentary emphasises that 'it must be borne in mind that the definition of 'State official' has *no bearing* on the type of acts covered by immunity. Consequently, the terms "represent" and "exercise State functions" may not be interpreted as defining *in any way* the substantive scope of immunity'.³ But representing the State or exercising its functions are intimately linked to whether a persona is acting on behalf of the State or in an official capacity. It seems very hard to draw a line between defining the person by reference to their acts and defining the type of act that is protected by functional immunity.

One radical way in which Pisillo Mazzeschi departs from the ILC, Foakes and other commentators is in his limited definition of the scope of functional immunity. In his view, such immunity is due to 'diplomatic agents; to heads of State, heads of government and minister of foreign affairs; to consular agents; and to members of special missions' rather than a broader range of State officials.

This position is puzzling for three reasons. First, most of these officials (diplomats, 'the troika', special missions) enjoy personal rather than functional immunity. Functional immunity only becomes relevant once they have left office. Pisillo Mazzeschi's approach would seem to limit functional immunity to a cadre of retired officials rather than incumbent officials and other individuals acting on behalf of the State. Second, most of the officials in Pisillo Mazzeschi's list enjoy personal immunity pursuant to specific treaty regimes, which makes it hard to

¹ J Foakes, *The Position of Heads of State and Senior Officials in International Law* (OUP 2014) 7.

² ILC, 'Report of the International Law Commission on the work of its sixty-sixth session' (5 May-6 June and 7 July-8 August) UN Doc A/69/10 (2014) 231.

³ *ibid* 235. Emphasis added.



extrapolate a customary rule pertaining to functional immunity.⁴ Third, it is not always the case that members of special missions enjoy functional immunity after the cessation of the mission. A member of a special mission need not be a State official. It may also be an ad hoc representative. The key requirement is that the State recognizes the 'special nature of the mission and the status of inviolability and immunity which participation in that Special Mission confers on the visitors'.⁵

I share Pisillo Mazzeschi's view that functional immunity may not be due to *all* foreign State officials in respect of *all* their 'official' acts. But I would draw the circle wider than the list of officials he proposes. Functional immunity is enjoyed by individuals acting on behalf of the State. There is an element of authorization by the State of the performance of State acts to bring the representative within that immunity. It is not enjoyed by a chance individual who performs an act of State.⁶

3. 'External life and activities of the State'

Pisillo Mazzeschi endorses a 'more modern' *ratio* for functional immunity, namely that it applies to some State officials, because of the official nature of their duties, 'which concern the external life and activities of the State'. He explains that this is not limited to the management of international relations, but it is not clear what other activities would be considered 'external'. Indeed, it is increasingly difficult to draw the line between the internal and external life of the State. Decisions that may appear to be internal in nature – domestic legislation, policies on employment, housing or education, budgetary choices, homeland security – can have ramifications on foreign States or nationals.

It is true that there has been some kind of *rapprochement* between personal and functional immunity in the sense that both have come to have a functional justification. The ICJ *Arrest Warrant* Judgment justi-

⁴ For the same reason, Pisillo Mazzeschi finds it is not possible to infer a customary norm on immunity from bilateral and multilateral treaties on the immunity of members of missions representing States in their relations with international organizations or in international conferences.

⁵ *Kburts Bat v The Investigating Judge of the German Federal Court* [2011] EWHC 2029 (Admin) paras 27 and 29.

⁶ Fox and Webb (n 1) 368.

fied the enjoyment of personal immunity by a Minister for Foreign Affairs on the basis that such immunity 'ensure[s] the effective performance of their functions on behalf of their respective States'.⁷ But this *rapprochement* does not go so far as to limit both types of immunity to outward-facing official acts. The critical test for functional immunity is not the status of the person (as it is for personal immunity), but the nature of their act.

4. *The position of military officials*

In my view, Pisillo Mazzeschi's argument on the immunity of military forces places too much emphasis on bilateral treaties. In his view, there is no customary norm granting functional immunity to military officials and regard must be had to treaties only.

In my view, the functional immunity of military officials is part of customary international law and derived from first principles. It is an established principle of customary international law that functional immunity attaches to a person who acts on behalf of a State in relation to conduct performed in their official capacity.⁸ The rationale is that State immunity would be undermined if individuals could be prosecuted for matters of State conduct in respect of which the State they were serving

⁷ *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium)* (Judgment) [2002] ICJ Rep 22, para 53.

⁸ See, eg, *Regina v Bartle and the Commissioner of Police for the Metropolis and Others Ex Parte Pinochet* ('Pinochet No 1'), House of Lords (25 November 1998) 37 ILR 1302, at 1309-1311; *Regina v Bartle and the Commissioner of Police for the Metropolis and Others Ex Parte Pinochet* ('Pinochet No 3'), House of Lords (24 March 1999) 38 ILR 581, at 621, 622, 641 and 644; *Jones v Saudi Arabia* [2006] UKHL 26; Arrêt de la Cour de Cassation, chambre criminelle (23 November 2004) published in (2004) Bulletin Criminel no 292, at 1096; United States District Court for the District of Columbia, *Belbas et Others v Moshe Ya'alon* (14 December 2006) 466 F Supp. 2d 127; Corte Suprema di Cassazione, I Sezione Penale (24 July 2008) no 31117/2008; *Bouzari v Iran*, 2004, CanLII 871 (Court of Appeal for Ontario), paras 40 and 85; P Gaeta, 'Official Capacities and Immunities', in A Cassese, P Gaeta, J Jones (eds), *Commentary on the International Criminal Court* (OUP 2002) 975; C Wickremasinghe, 'Immunities Enjoyed by Officials of States and International Organizations', in MD Evans (ed), *International Law* (2nd edn, OUP 2006) 395, at 397.



had immunity.⁹ The clearest example of an individual benefiting from functional immunity is a military officer on official duty.¹⁰

Parallels may be drawn from the law of State immunity. The ICJ in the *Jurisdictional Immunities* Judgment upheld the immunity of visiting armed forces on a customary basis:

'customary international law continues to require that a State be accorded immunity in proceedings for torts allegedly committed on the territory of another State by its armed forces and other organs of State in the course of conducting an armed conflict.'¹¹

The Court left open the question of immunity of State officials from criminal proceedings,¹² but it endorsed the principle of the special protection accorded to military forces.

There is some State practice where persons have been prosecuted for acts committed within the forum State's territory without its consent to the act or to the presence of the persons. Pisillo Mazzeschi refers to some of this practice, including the *Khurts Bat* case. As he observes, these cases tend to concern espionage, sabotage, and kidnapping. Often the State of nationality of the alleged perpetrator does not even assert the immunity of their official before the courts of the forum State.¹³ The *Khurts Bat* case held that a State official did not enjoy functional immunity when he entered the territory of a foreign State without its

⁹ *Propend Finance Pty Ltd v Sing* (17 April 1997) CA, (1997) 111 ILR 611 at 669 (Commissioner of Australian Federal Police could not be sued for contempt of court in the UK). See also *Jones v Minister of Interior of Kingdom of Saudi Arabia* [2006] UKHL 26 para 30.

¹⁰ A UK court has called the operation of an air force base 'about as imperial an activity as could be imagined': *Littrell v United States (No 2)* [1995] 1 WLR 82.

¹¹ *Jurisdictional Immunities of the State (Germany v Italy: Greece intervening)* (Judgment) [2012] ICJ Rep 99, para 79.

¹² *ibid* para 91.

¹³ A Kolodkin, 'Second report on the immunity of State officials from foreign criminal jurisdiction' (10 June 2010) UN Doc A/CN.4/63 para 81. *Francis Gary Powers* case, Hearing before the Senate Committee on Foreign Relations, 86th Congress, 2nd Sess 175 (1960). See I de Lupis, 'Foreign Warships and Immunity for Espionage' (1984) 78 AJIL 61 at 69. In *Rainbow Warrior (New Zealand v France) case*, France-New Zealand Arbitration Tribunal (30 April 1990) 82 ILR 500: although France considered the detention in New Zealand of the two agents was unjustified as France was ready to give an apology and pay compensation, the agents did not plead immunity to charges of manslaughter and wilful damage.



knowledge and committed acts (abduction of a national) against the order and security of the foreign State.¹⁴ I would suggest that these cases are guided by the fact that the act was committed on the territory of the forum State and do not represent a general denial of the existence of a customary norm regarding immunity from criminal jurisdiction applicable to all foreign officials.

From a policy perspective, States deploy their military and law enforcement officials overseas with increasing frequency, whether as part of UN peacekeeping missions, as members of visiting armed forces, or pursuant to mutual legal assistance schemes. It is vital that the immunity of such officials is respected, even in the absence of a State of Forces Agreement. This would not equate to impunity for any violations of international law, as the sending State would retain jurisdiction over such officials.

Finally, Pisillo Mazzeschi makes two references to the Judgment of the High Court of Kerala in the *Enrica Lexie* case. It should be noted that the State of Kerala was found by the Indian Supreme Court wrongly to have assumed jurisdiction over the *Enrica Lexie* incident. The immunity of the Italian Marines was addressed in argument before the Indian Supreme Court, but it was not the subject of comment in the Court's Judgment of 18 January 2013. Indeed, the Supreme Court of India expressly left the question of jurisdiction open to be re-agitated.¹⁵

5. *Interpreting State practice*

Pisillo Mazzeschi's survey of doctrine and practice is extensive and scholarly. Some of the practice relied on, however, might not be compelling evidence of a customary rule if the State of nationality did not claim immunity on behalf of the individual. Although domestic courts are supposed to consider immunity *in limine litis*, they are less likely to do so if the State of nationality does not invoke immunity.¹⁶

¹⁴ *Khurts Bat v The Investigating Judge of the German Federal Court and Others* [2011] EWHC 2029 (Admin).

¹⁵ Indian Supreme Court, *Latorre and Others v Union of India and Others* (Judgment of 18 January 2013) para 102.

¹⁶ In *Djibouti v France*, the ICJ observed that 'The State which seeks to claim immunity for one of its State organs is expected to notify the authorities of the other State



Pisillo Mazzeschi relies, for example on a series of cases to assert that functional immunity does not apply to foreign officials accused of international crimes. The 2004 *Ferrini* Judgment concerned primarily State immunity rather than functional immunity, but it was also found to be in violation of international law in the 2012 ICJ *Jurisdictional Immunities* Judgment. As for the 2012 and 2014 Italian Judgments in the *Abu Omar* case, the US did not claim immunity on behalf of its CIA officials. As for the Audiencia Nacional decisions, the *Kagame* case relates to personal immunity rather than functional immunity. Finally, in the *Nezzar* case, Algeria did not invoke immunity on behalf of the former Minister of Defence.¹⁷

The *Habre* and *Pinochet* cases, important as they are, are expressly limited to the wording of the Torture Convention rather than carving out a general 'international crimes' exception to functional immunity.

These points may be pedantic, but in an area of law in which a small number of cases can change the landscape, it is important to assess State practice and *opinio juris* on a case by case basis.

Pisillo Mazzeschi's arguments should be taken seriously. While I do not believe that they represent *lex lata*, I hope that they will form a vital part of the dialogue as the *lex ferenda* develops.

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': *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v France)* (Judgment) ICJ Rep 2008 177, para 196.

¹⁷ For an evaluation of national litigation that concludes most cases relied upon to demonstrate a human rights exception to immunity actually says nothing about immunity, see I Wuerth, 'Pinochet's Legacy Reassessed' (2012) 106 AJIL 731.

