

Functional immunity of State officials before the International Law Commission: The ‘who’ and the ‘what’

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1. Introduction

Riccardo Pisillo Mazzeschi offers an interesting proposal to merge *ratione personae* and *ratione materiae* immunity for current and former state officials from the jurisdiction of foreign states. He argues that the traditional distinction between these forms of immunity ‘demands a critical review’ because, in contemporary international practice, both types of immunity are rooted *solely* in the international community’s need to protect individuals’ ability to ‘perform duties pertaining to their States’ international relations.’ Put boldly: ‘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 concerning its external relations or activities, through the protection of the officials who, as a rule, perform those functions.’ In his view, justifications for immunity that do not serve this ‘single and unitary’ goal are invalid as both a matter of legal principle and State practice.

I find Professor Pisillo Mazzeschi’s argument intriguing, but I do not find it persuasive. Most fundamentally, I do not believe the practice he cites shows that *ratione materiae* immunity invariably serves, or ought to serve, the same purpose as *ratione personae* immunity. Perhaps this makes me distinctly ‘old school’, but the difference between personal (or ‘status-based’) and functional (or ‘conduct-based’) immunities is firmly entrenched and, in my view, well-founded.¹ That said, I agree

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¹ In another context, I have taken pains to clarify the distinction between these forms of immunity. See CI Keitner, ‘The Common Law of Foreign Official Immunity’



that *ratione materiae* immunity does not, and should not, shield individuals from foreign jurisdiction for any and all acts that are attributable to a State. The question is where, and how, to draw the line.

As its name suggests, functional immunity focuses primarily on the ‘what’, rather than the ‘who’. The Special Rapporteur has not yet tackled the ‘what’ aspect of functional immunity. Draft article 2(e) adopts a functional definition of ‘State official’ to mean ‘any individual who represents the State or who exercises State functions.’² However, the commentary to draft article 2(e) emphasizes 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 Similarly, draft article 5 on ‘persons enjoying immunity *ratione materiae*’ delineates the ‘who’, not the ‘what’, of functional immunity. Draft article 5 provides that: ‘State officials acting as such enjoy immunity *ratione materiae* from the exercise of foreign criminal jurisdiction.’⁴ The commentary states that draft article 5 is ‘intended to define the subjective scope of this category of immunity’ – that is, the ‘who’.⁵ Thus, in order to enjoy functional immunity for a given act, an individual must be a State official who was acting ‘as such’. According to the commentary, this phrase ‘says nothing about the acts that might be covered by such immunity, which are to be covered in a separate draft article.’⁶ I take this to mean that not all acts performed by State officials with actual or apparent authority will necessarily fall within the scope of *ratione materiae* immunity as defined in future reports. Special Rapporteur Concep-

(2010) 14 Green Bag 2d 61, 63-68, available at <www.greenbag.org/v14n1/v14n1_articles_keitner.pdf>. I previously authored an amicus brief in the U.S. Supreme Court case *Samantar v Yousuf*, the annotated version of which details the arguments about functional immunity presented in the course of that litigation. See CI Keitner, *Annotated Brief of Professors of Public International Law and Comparative Law as Amici Curiae in Support of Respondents in Samantar v Yousuf*, (2011) 15 Lewis & Clark L Rev 609, available at <<https://law.lclark.edu/live/files/9130-lcb153keitnerpdf>>. I have provided citations to some of my other work on immunity in the footnotes for readers who are interested.

² ILC, ‘Report of the International Law Commission on the Work of its 66th Session’ (5 May–6 June and 7 July–8 August 2014) UN Doc A/69/10 231.

³ *ibid* 235, para 15.

⁴ *ibid* 236.

⁵ *ibid* 236, para 1.

⁶ *ibid* 237, para 3.



ción Escobar Hernández appears to be contemplating a more nuanced and context-sensitive approach than her predecessor Roman Kolodkin, perhaps in light of many States' discomfort with endorsing blanket immunity, particularly for international crimes.⁷

Professor Pisillo Mazzeschi frames his analysis as a critique of an overly inclusive 'who' in the ILC's work on functional immunity. Yet, his arguments also highlight the potential for the ILC's work to entrench uncritically expansive 'what'. This concern merits close attention, since what the ILC has called the 'material scope' (rather than the 'subjective scope') of functional immunity will be the subject of the Special Rapporteur's next report,⁸ and will likely be delineated in future draft articles.

I agree with Professor Pisillo Mazzeschi's observation that three interrelated ideas have been invoked with insufficient scrutiny to support an expansive definition of functional immunity:

- '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';
- 'the idea – at the basis of all the other concepts – that the very structure of international law only admits the collective responsibility of States.'

I also agree that international law 'admits the *personal responsibility of individuals*, and especially of individual State agents, alongside the collective responsibility of the State,' although I do not see this as a particularly new or revolutionary development.

I would also add to this list another assumption that has received insufficient scrutiny:

- the idea that the burden rests on those seeking to demonstrate an *exception* to immunity for acts performed with actual or apparent state authority.

I will consider each of these assumptions in the rest of this brief response.

⁷ For expressions of concern with an absolutist approach, see ILC, 'Report of the International Law Commission on the Work of its 63rd Session' (26 April–3 June and 4 July–12 August 2011), UN Doc A/66/10 221-24.

⁸ ILC, 'Report of the International Law Commission on the Work of its 66th Session' (n 2) 230, para 127.

2. *'The idea that the immunity of State officials is a necessary corollary of the fact that they act as organs of the State'*

The reality that States can only act through individuals does not necessarily mean that individuals enjoy functional immunity for all acts they perform on behalf of States. In some instances, the individual might be acting purely as an organ of the State and thus bear no personal responsibility for a given act. This explains why individual officials are not personally liable for most commercial transactions they perform on behalf of States, even though States themselves are subject to suit under the restrictive theory of immunity. It also explains why the ICTY declined to issue a subpoena to a foreign official, since the *State*, not the official, was the actual target of the subpoena, and the ICTY lacked the power to sanction the State itself for non-compliance.⁹ In these scenarios, the individual is merely a 'stand-in' for the State; the State, not the individual, is what might be called the 'real party in interest.' This is not the case when an individual official engages in conduct for which she also bears personal responsibility. This is not to say that a State has no interest in proceedings against its current or former officials, but simply that the types of State interest at stake when the State is the real party in interest and when it is not are distinguishable, both conceptually and doctrinally. As the United States Supreme Court recognized in *Samantar v Yousuf*, proceedings against individual officials do not invariably implead the State.¹⁰

3. *'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'*

The idea that all acts performed under color of law – and not just acts such as entering into commercial agreements, signing treaties, or

⁹ *Prosecutor v Blaskic* (Judgment) ICTY-95-14 (29 October 1997) para 38, <www.icty.org/x/cases/blaskic/acdec/en/71029JT3.html>.

¹⁰ *Samantar v Yousuf*, 130 S Ct 2278 (2010). I explore the reasoning and implications of the *Samantar* case in CI Keitner, 'Foreign Official Immunity after *Samantar*' (2011) 44 *Vanderbilt J Intl L* 837, available at <www.vanderbilt.edu/jotl/manage/wp-content/uploads/Keitner.pdf>.



answering subpoenas addressed to the State – are attributable *only* to the State, and not to the individual official, is untenable in the era of international criminal tribunals and universal jurisdiction for crimes such as torture. It was also untenable in the late eighteenth century, when individual defendants were sued in U.S. courts for acts performed under color of foreign law.¹¹ The ILC recognized this in draft Article 58 of its 2001 Draft Articles on the Responsibility of States, which provides: 'These articles are without prejudice to any question of the individual responsibility under international law of any person acting on behalf of a State.' Such responsibility can take the form of criminal responsibility (as evidenced by the ILC's current focus on immunity from foreign criminal jurisdiction) and may also take the form of civil responsibility in some legal systems. Immigration proceedings against individuals who are ineligible for asylum because of internationally unlawful acts committed on behalf of foreign states, and the recent rise of targeted sanctions against such individuals, also represent manifestations of the international recognition of personal responsibility for certain 'official' acts.¹²

The idea of personal responsibility has little meaning without some realistic possibility that a State official will incur consequences as a result of her unlawful acts. In this sense, the 'Kelsenian' observation (to use Professor Pisillo Mazzeschi's term) that States are legal fictions comprised of individuals actually supports the notion, which was central to the judgment at Nuremberg, that the effectiveness of international law depends on the ability to impose consequences on individuals for the acts they perform on behalf of States.

¹¹ I recount the history of these cases in CI Keitner, 'The Forgotten History of Foreign Official Immunity' (2012) 87 *New York University L Rev* 804, available at <www.nyulawreview.org/sites/default/files/pdf/NYULawReview-87-3-Keitner.pdf>.

¹² I explore this idea in a short draft article entitled 'Prosecute, Sue, or Deport? Transnational Accountability in International Law', 164 *University of Pennsylvania L R* (forthcoming 2015), available at <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2605108>.



4. *'The idea – at the basis of all the other concepts – that the very structure of international law only admits the collective responsibility of States'*

The existence of individual responsibility under international law can no longer seriously be questioned, although its precise nature and implications remain underexplored.¹³ The difficult question is not whether individuals bear responsibility, but rather what types of accountability regimes States are willing to support (or at least tolerate). Although the ILC has been tasked with examining immunity, the danger with this exclusive focus is that immunity doctrines may be thought to bear the entire burden of allocating authority horizontally among States over internationally unlawful conduct. Other important mechanisms can and do perform this function, such as prosecutorial discretion and jurisdictional limits in criminal proceedings, and exhaustion of remedies and forum selection doctrines in civil proceedings.

Rather than attempting to identify generalizable immunity norms in customary international law, it might be advisable to focus on building understandings about immunity into particular treaties with respect to specific conduct (as done explicitly in the Rome Statute for the International Criminal Court, and arguably implicitly in the Convention Against Torture), just as other treaties (such as the Vienna Convention on Diplomatic Relations) explicitly codify the contours of immunity in particular contexts.

5. *The idea that the burden rests on those seeking to demonstrate an exception to immunity for acts performed with actual or apparent state authority*

Professor Pisillo Mazzeschi rejects a baseline of functional immunity, concluding that 'considering the lack of extensive, constant, 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

¹³ Lorna McGregor and I have recently co-founded an ILC Study Group on Individual Responsibility in International Law, <www.ila-hq.org/en/committees/study_groups.cfm/cid/1054>, to foster collaborative investigation in this area.



foreign civil jurisdiction.' Although my own approach would focus less on *who* has benefited from *ratione materiae* immunity and more on *what* type of acts have been deemed immune in various contexts, I agree that the proponents of blanket functional immunity should bear the burden of demonstrating that such immunity is required by customary international law.

Although we have grown accustomed to speaking in terms of 'exceptions' to immunity, the assumption that immunity – rather than territorial sovereignty – represents the appropriate baseline should not escape scrutiny.¹⁴ Professor Pisillo Mazzeschi cites Ingrid Wuerth's recent work on official immunity.¹⁵ Professor Wuerth, like many others, begins from a baseline of immunity, and then looks for evidence of state practice and *opinio juris* sufficient to override this background norm.¹⁶ Professor Beth Stephens, by contrast, takes a different approach.¹⁷ As students of customary international law learn by studying the *Lotus* case, the choice of baseline, and the resulting allocation of the burden of proof, often predetermines outcomes. It might be advisable to spend more time debating and unpacking our assumptions about baselines, and less time debating what may inevitably amount to somewhat disparate practice.

Given that individual officials' actions are not always attributable *only* to the state (in perhaps the most elementary example of what we now call 'dual attribution' or 'shared responsibility'), the notion that state immunity and *ratione materiae* immunity should always be congruent seems puzzling. Professor Pisillo Mazzeschi's challenge to this presumed congruence has stimulated welcome debate, but my sense is that debates about the 'what' rather than the 'who' will prove more fruitful going forward.

¹⁴ I have written on this question in relation to cases in the United Kingdom, New Zealand, Australia, Canada, and the United States. CI Keitner, 'Foreign Official Immunity and the "Baseline" Problem', 80 *Fordham L Rev* 605 (2011), available at <http://fordhamlawreview.org/assets/pdfs/Vol_80/Keitner_November.pdf>.

¹⁵ I Wuerth, 'Pinochet's Legacy Reassessed' (2012) 106 *AJIL* 731.

¹⁶ *ibid* 744.

¹⁷ B Stephens, 'Abusing the Authority of the State: Denying Foreign Official Immunity for Egregious Human Rights Abuses' (2011) 44 *Vanderbilt J Transnational L* 1163, 1175-76.

