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Immunity as a Circumstance Excluding the Operation of the Obligation to Extradite or Prosecute

Part III: The Effects of Immunities on the Obligation to Extradite or Prosecute

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Part III: The Effects of Immunities on the Obligation to Extradite or Prosecute

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Abstract: *This article concludes a trilogy*[1] *examining the interaction between the immunities of state officials and the obligation to extradite or prosecute. It focuses on the manner in which personal and functional immunities impact this obligation. Through doctrinal and comparative legal research, it addresses key questions, such as whether aut dedere aut judicare is a procedural bar or a substantial defence, and whether immunities apply in respect to international crimes. Additionally, the study delves into immunity waiver, suggesting implicit waivers via treaties as a solution to reconcile the conflict between the obligation to extradite or prosecute and the obligation to observe immunities.*

Key-words: *Obligation to extradite or prosecute, Immunities, Waiver, International Crimes*

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The opinions expressed in this paper are solely the author's and do not engage the institution he belongs to.

[1] Before proceeding with this article, we recommend reading the first two articles of the trilogy, where the principle of *aut dedere aut judicare* and the obligations to respect immunities are being studied. See Part I: The Principle of aut Dedere aut Judicare, *Romanian Journal of International Law*, No. 27/2022, p. 39; and Part II: Immunities and the Existence of a Conflict of Norms, *Romanian Journal of International Law*, No. 28/2022, p. 57.

1. Introduction

It is first important first to differentiate between immunities that have their basis in international law, and those arising from domestic legislation. Most States offer certain types of immunities to their own senior officials, particularly to ensure that they are able to perform their functions while being protected from politically motivated prosecutions.[2] These immunities, however, stem from constitutional or domestic legislative acts, and not from any obligation under international law. It is a purely internal matter over which any State has the freedom to decide as it pleases, provided that it does not come into conflict with international obligations. Should such a conflict arise, the international obligation would prevail, since a State 'may not invoke the provisions of its internal law as justification for its failure to perform a treaty'.[3] Accordingly, the international obligation to extradite or prosecute would prevail over domestic immunities.

The scope of this study, however, is limited to 'international' immunities, for their interaction with the Obligation to Extradite or Prosecute ('OEP') is more controversial. As indicated in the previous article of the trilogy, such immunities benefit only officials who are foreign to the state where the question of exercising jurisdiction arises. Thus, when discussing the interplay between the OEP and immunities, there will always be an element of extraneity: a foreign official who would normally benefit from immunities in the State where prosecution is being considered. The question then rises as to which of the two should prevail, the *aut dedere aut judicare* obligation or the obligation to observe immunities.

2. Effects of Personal Immunity on the OEP

With regard to personal immunities, their effect on the OEP is relatively straightforward, because it is widely accepted that immunity *ratione personae* is absolute. In the *Arrest Warrant case*, the Court concluded that there are no exceptions to the rule granting personal immunity from criminal jurisdiction, even in cases of grave international crimes such as war crimes and crimes against humanity.[4] The Court also did not distinguish between prosecution and extradition. It referred to immunity as protecting the individual concerned 'against any act of authority of another State which would hinder him or her

[2] See, e.g., Art. 72 of the Romanian Constitution.

[3] 1969 Vienna Convention on the Law of Treaties, 1155 UNTS 331, Art. 27.

[4] *Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo* v. *Belgium)*, Merits, Judgement of 14 February 2002, [2002] ICJ Rep. 3, para. 58.

in the performance of his or her duties'.[5] As such, in the conflict of norms between the OEP and the obligation to observe the personal immunity of an individual, the latter would prevail.

Having discussed the elements and components of the OEP in the first article, one could be tempted to conclude that personal immunity somehow precludes the establishment of jurisdiction by the state over the foreign official. Nevertheless, that is not the case. The Court clarified in the same case that

> The rules governing the jurisdiction of national courts must be carefully distinguished from those governing jurisdictional immunities: jurisdiction does not imply absence of immunity, while absence of immunity does not imply jurisdiction.[6]

The Court then addresses the specific situation of OEP, finding that

> [A]lthough various international conventions on the prevention and punishment of certain serious crimes impose on States obligations of prosecution or extradition, thereby requiring them to extend their criminal jurisdiction, such extension of jurisdiction in no way affects immunities under customary international law.[7]

This paragraph implies that the jurisdiction of the State may extend over the individual in question, yet the immunity essentially renders the jurisdiction ineffective. This is important to note, since it means that the OEP component consisting of the duty to establish jurisdiction is actually fulfilled. Only afterwards do immunities intervene and effectively preclude the exercise of jurisdiction. However, even then, one could further distinguish which types of jurisdiction are affected by this process. The legislative jurisdiction remains unaltered, the State still being able to prescribe a certain conduct through domestic laws. The continued existence of criminal responsibility[8] is proof of this, since responsibility could not exist if the state was unable to extend its domestic laws to impose criminal responsibility for the specific conduct. Only the adjudicative and executive jurisdictions are affected by immunities.

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[5] Ibid, para. 54.

[6] Ibid, para. 59.

[7] Ibid.

[8] Ibid, para. 60: 'The immunity from jurisdiction […] does not mean that they enjoy impunity in respect of any crimes they might have committed. Immunity from criminal jurisdiction and individual criminal responsibility are quite separate concepts. […] Jurisdictional immunity may well bar prosecution for a certain period or for certain offences; it cannot exonerate the person to whom it applies from all criminal responsibility'.

Consequently, the effect of immunity *ratione personae* is that it makes prosecution and extradition, the two elements of the obligation *aut dedere aut judicare*, impossible to perform. The scope of the State's jurisdiction remains unaffected, but its exercise, at least relating to the adjudicatory and executive powers, is obstructed. Personal immunity is therefore a circumstance that always excludes the operation of the obligation to extradite or prosecute.

3. Effects of Functional Immunity on the OEP

The mechanism through which immunities interact with the elements and components of the OEP has been discussed in the previous section. However, the effects of functional immunity differ, and depending on the doctrine one chooses to follow, the conclusions can be quite divergent.

3.1. Procedural bar or substantive defence?

As already discussed,[9] immunities are regarded as a procedural bar to jurisdiction before foreign courts. Nevertheless, some authors have made a case that functional immunities operate differently, pertaining to substantive law.[10] They argue that immunities *ratione materiae* actually entail a 'mechanism that shifts the responsibility from the official to the State',[11] because the act executed by the official is attributable to the State rather than the individual. Although not expressly declaring that it represents an issue of substantive law, this view seems to also be confirmed by the ICTY Appeals Chamber in the *Blaškić* case: 'their official action can only be attributed to the State',[12] which is why '[t]hey cannot be the subject of sanctions or penalties for conduct that is not private but undertaken on behalf of a State'.[13]

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[9] See Filip Andrei Lariu, "Immunity as a Circumstance Excluding the Operation of the Obligation to Extradite or Prosecute. Part II: Immunities and the Existence of a Conflict of Norms", *Romanian Journal of International Law,* No. 28/2022, p. 57.

[10] Antonio Cassese, *International Law*, Second edition, OUP, Oxford, 2005, at 450; Antonio Cassese, "When May Senior State Officials Be Tried for International Crimes - Some Comments on the Congo v. Belgium Case", *EJIL*, Vol. 13, 2002, p. 863; Dapo Akande, Sangeeta Shah, "Immunities of State Officials, International Crimes, and Foreign Domestic Courts", *EJIL*, Vol. 21, 2010, p. 826; Dapo Akande, "International Law Immunities and the International Criminal Court", *AJIL*, Vol. 98, 2004, p. 413.

[11] Ramona Pedretti, *Immunity of Heads of State and State Officials for International Crimes*, Brill Nijhoff, Leiden, 2015, p. 23.

[12] Bogdan Aurescu, Ion Galea, Lazar Elena, Ioana Oltean, *Scurtă culegere de jurisprudență*, Hamangiu, 2018, pp. 168-170.

[13] *Prosecutor v. Blaskic*, Judgement on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997, Case No. IT-95-14-AR 108 bis, Ap. Ch, 29 October 1997, para. 38. See also *Prosecutor v. Radislav Krstic*, Decision of the Appeals

Proponents of this approach also consider that the earliest stage in which the issue of functional immunity can be assessed is during the merits of the case, after the court has confirmed the official nature and the wrongfulness of the act.

> Criminal proceedings cannot be dismissed *in limine litis* simply on the basis of the person's status. Investigation into the merits of the case is required in order to determine whether the State official committed the alleged wrongful act in an official capacity on behalf of the State. Only then, will the accused benefit from immunity *ratione materiae*, thus diverting the responsibility for the wrongful conduct to the State.[14]

This stands in stark contrast with the currently accepted view in international law, which asserts that issues of immunities need to be addressed at the outset of the proceedings. The ICJ maintained that domestic courts have the duty to rule on immunities from jurisdiction as a 'preliminary issue […] which must be expeditiously decided *in limine litis*'.[15]

3.2. Exception of international crimes

First, it is important to note that, unlike with personal immunities, there is no general consensus on whether immunities *ratione materiae* operate when international crimes have been committed. Recent State practice seems to go in the direction of favouring the fight against impunity to the detriment of functional immunities. As such, State courts have repeatedly ruled that there is no immunity *ratione materiae* for persons who have committed international crimes. In a most recent example, the German Supreme Court maintained that a Syrian officer does not benefit from functional immunity when it comes to prosecution for war crimes.[16]

State practice confirming international crimes as an exception from functional immunity goes even farther back in time. In this regard, the oldest case before a State court was the *Eichmann case*, where the Israeli Supreme Court dismissed the defence of immunity, arguing that 'there is no basis for the

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Chamber on Application for Subpoenas, Case No. IT-98-33-A, Ap. Ch, 1 July 2003, para. 26.

[14] Pedretti, cit. supra, p. 24.

[15] *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights*, Advisory Opinion of 29 April 1999, [1999] ICJ Rep 62, p. 88, para. 63; see also Roman Kolodkin, Third report on immunity of State officials from foreign criminal jurisdiction, UN Doc A/CN.4/646 (2011), at 227.

[16] Supreme Court of Germany (Bundesgerichtshof), Judgement of 28 January 2021, Case no. 3 StR 564/19; Tom Syring, "Introductory Note to Judgment on Foreign Soldiers' Immunity for War Crimes Committed Abroad", *International Legal Materials*, 2021.

doctrine when the matter pertains to acts prohibited by the law of nations' and that 'those who participated in such acts must personally account for them and cannot shelter behind the official character of their task or mission'.[17] While acknowledging the personal immunity of the Israeli Prime Minister Sharon, Belgium also maintained that immunity does not block the prosecution of General Yaron.[18] In their communications to the ILC, various governments supported the same view that functional immunities do not apply in cases of international crimes. The Dutch Government stated that 'the plea of immunity *ratione materiae* was unavailable for international crimes'.[19] The Italian Government had a similar position.[20] Spain went even further, providing in its domestic legislation that 'the crimes of genocide, enforced disappearance, war crimes and crimes against humanity shall be excluded from that immunity'.[21]

Nevertheless, State practice on this issue has not been uniform, including conflicting examples such as the refusal of Germany to prosecute former Chinese President Jiang Zemin for several international crimes.[22] In fact, even some of the aforementioned States applied a different standard when it came to officials from allied states.[23] Furthermore, in their communication with the

[17] Supreme Court of Israel, *Attorney-General of Israel v. Adolf Eichmann*, Judgement of 11 December 1961, Case No. 40/61, 36 ILR 277, pp. 309-10.

[18] Supreme Court of Belgium, *HSA v. SA (Ariel Sharon) and YA (Amos Yaron)*, Judgement of 12 February 2003, Case No.P.02.1139.F/2.

[19] UNGA Sixth Committee, Summary Record of 29th Meeting, UN Doc. A/C.6/71/SR.29 (2016), para. 7.

[20] UNGA Sixth Committee, Summary Record of 22nd Meeting, UN Doc. A/C.6/67/SR.22 (2012), paras. 82-3.

[21] Spain, Organic Act 16/2015, Official Gazette No. 258 of 28 October 2015, Art. 23.

[22] Prosecutor General at the Federal Supreme Court of Germany, *Jiang Zemin case*, Decision of 24 June 2009, Case No. 3 ARP 654/03-2.

[23] E.g., U.S. officials were not prosecuted by French and Swiss authorities because they were deemed to benefit from functional immunity. *See* Letter from the Public Prosecutor to the Paris Court of Appeal, Case of Donald Rumsfeld, 27 February 2008.

ILC, China,[24] the United States,[25] Russia,[26] Sudan,[27] Sri Lanka,[28] and Israel[29] expressed similar views that functional immunities exist and continue to operate even in cases of international crimes.

The lack of a consensus around whether functional immunities exist when it comes to international crimes has led Special Rapporteur Kolodkin to conclude that 'it is difficult to talk of exceptions to immunity as having developed into a norm of customary international law, just as, however, it is impossible to assert definitively that there is a trend toward the establishment of such a norm'.[30] As a matter of fact, most ILC members did not view State practice as consistent enough to point to a new customary law exception in this regard.[31]

On this issue, the legal literature has also stepped in, proposing two main views. On the one hand, a more activist view which tries to reduce impunity as much as possible would contend that international crimes can never be considered official acts because it is not within the functions of the state to commit them.[32] The crimes would therefore constitute private acts which are not covered by functional immunity. Another approach that could justify this view is to consider that the *jus cogens* prohibition of the crimes somehow precludes the application of functional immunity. Alternatively, it has also

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[24] UNGA Sixth Committee, Summary Record of 23rd Meeting, UN Doc. A/C.6/72/SR.23 (2017), para. 58.

[25] UNGA Sixth Committee, Summary Record of 21st Meeting, UN Doc. A/C.6/72/SR.21 (2017), paras. 20-6.

[26] UNGA Sixth Committee, Summary Record of 27th Meeting, UN Doc. A/C.6/71/SR.27 (2016), para. 66.

[27] UNGA Sixth Committee, Summary Record of 28th Meeting, UN Doc. A/C.6/71/SR.28 (2016), paras. 3-6.

[28] UNGA Sixth Committee, Summary Record of 30th Meeting, UN Doc. A/C.6/71/SR.30 (2016), para. 10.

[29] UNGA Sixth Committee, Summary Record of 24th Meeting, UN Doc. A/C.6/72/SR.24 (2017), paras. 109-13.

[30] *See* Roman Kolodkin, Second report on immunity of State officials from foreign criminal jurisdiction, cit. supra, para. 90.

[31] Rosanne van Alebeek, "The "International Crime" Exception in the ILC Draft Articles on the Immunity of State Officials from Foreign Criminal Jurisdiction: Two Steps Back?" *AJIL*, Vol. 112, 2018.

[32] ILC Immunity of State officials from foreign criminal jurisdiction - Memorandum by the Secretariat, UN. Doc. A/CN.4/596 (2008), at 191; Andrea Bianchi, "Denying State Immunity to Violators of Human Rights", *AJPIL*, Vol. 46, 1994, pp. 227-8.

been argued that 'the right of victims to judicial redress was so fundamental that such immunity had to be set aside'.[33] All these views, although in the minority, can be found in both domestic[34] and international cases.[35]

The theories described above, however, are not accepted by the majority of scholars in the field. Many maintain that functional immunity is absolute, just like personal immunity, since it has developed as a customary rule without any exceptions.[36] The only instance which this approach could interpret as an exception, also called 'the territorial tort exception',[37] is the instance where:

> criminal jurisdiction is exercised by a State in whose territory an alleged crime has taken place, and this State has not given its consent to the performance in its territory of the activity which led to the crime and to the presence in its territory of the foreign official who committed this alleged crime.[38]

There are indeed strong arguments to support the premise for the near-absolute nature of the immunity *ratione materiae*.

First of all, while international crimes can certainly be committed as private acts, it should be noted that they are in most cases committed in an official capacity.[39] The persons responsible for their perpetration use the State

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[33] Pierre d'Argent, "Immunity of State Officials and the Obligation to Prosecute", in Anne Peters et al (eds.), *Immunities in the Age of Global Constitutionalism*, Brill Nijhoff, Leiden, 2014, p. 251; Riccardo Mazzeschi, "The Functional Immunity of State Officials from Foreign Jurisdiction: A Critique of the Traditional Theories", in Pia Acconci et al (eds.), *International Law and the Protection of Humanity*, 2017, p. 530.

[34] Swiss Federal Criminal Court, *A. v. Office of the Attorney General*, Judgement of 25 July 2012, Case no. BB.2011.140.

[35] *Prosecutor v. Blaskic*, cit. supra, para. 41.

[36] d'Argent, cit. supra, p. 251. For the opposite view, see Micaela Frulli, "Some Reflections on the Functional Immunity of State Officials", *The Italian Yearbook of International Law Online*, Vol. 19, 2009.

[37] Gleider Hernandez, *International Law*, OUP, Oxford, 2019, p. 237.

[38] Roman Kolodkin, cit. supra, para. 94 (p); This view seems to be supported by extensive state practice. See *Khurts Bat v. The Investigating Judge of the German Federal Court*, cit. supra, paras. 63-101 and per Judge Foskett, paras. 104-5; Federal Court of Justice of Germany, *The Staschynskij case*, Judgement of 9 October 1962, Case no. 9 StE 4/62; UK Divisional Court, *R v. Lambeth Justices, ex parte Yusufu*, Judgement of 8 February 1985; High Court of Justiciary of Scotland, *Her Majesty's Advocate v. Abdelbaset Ali Mohmed Al Megrahi and Al Amin Khalifa Fhimah*, Judgement of 10 October 2000, Case No. 1475/99.

[39] See ILC Immunity of State officials from foreign criminal jurisdiction - Memorandum by the Secretariat, cit. supra, para. 192; Josette Wouters, 'The Judgment of the International Court of Justice in the Arrest Warrant case: Some Critical Remarks', *LJIL*, Vol. 16, 2003, p.

institutions, such as the military or police, as instruments to commit the acts. Moreover, sometimes it is the law itself that requires a crime to be committed by an official. Such is the case with the Convention Against Torture, which stipulates that 'the term "torture" means any act […] inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity'.[40]

When the conditions are fulfilled, it is crucial to consider international crimes as official acts. This is because it also has implications on the responsibility of the State. If the crimes are committed in private capacity, then the acts will never be attributable to States. 'The conduct of any State organ shall be considered an act of that State […] whether the organ exercises legislative, executive, judicial or any other functions'.[41] Should one admit that the official has not committed the crime in an official capacity, and therefore not exercising State functions, it would be impossible to attribute the conduct to the State and ultimately hold it responsible.[42]

Another argument that dismisses the 'activist approach' and indirectly reinforces the near-absolute nature of functional immunity is that of a lack of conflict of norms between *jus cogens* rules and immunities. The object of the norms is different, the former pertaining to substantive law, as a prohibition

262; *Arrest Warrant of 1 April 2000*, cit. supra, p. 162, para. 36 (Judge Van den Wyngaert, Dissenting opinion): '[The Court] could and indeed should have added that war crimes and crimes against humanity can never fall into [the] category [of private acts]. Some crimes under international law (e.g., certain acts of genocide and of aggression) can, for practical purposes, only be committed with the means and mechanisms of a State and as part of a State policy. They cannot, from that perspective, be anything other than 'official' acts.'.

[40] 1984 Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment 1465 UNTS 85, Art. 1; It is important to note that not all instances of torture require it to be committed by an official. The *ad hoc* international criminal tribunals have repeatedly held that when torture is committed as a war crime, the perpetrator does not need to act in an official capacity. See *Prosecutor v. Laurent Semanza*, Judgement in the Appeals Chamber, Case No. ICTR-97-20-A, A. Ch, 20 May 2005, para. 248*;* Christoph Burchard, "Torture in the Jurisprudence of the Ad Hoc Tribunals", *JICJ,* Vol. 6, 2008, p. 171.

[41] ILC Articles on the Responsibility of States for Internationally Wrongful Acts, 2001 YILC, Vol. II (Part Two), Art. 4.

[42] For an argument which contends that the crimes are official acts, but *ultra vires,* see Micaela Frulli, "On the consequence of customary rule granting functional immunity to state officials and its exceptions: back to square one", *Duke Journal of Comparative and International Law*, Vol. 26, 2016, p. 498.

to commit an act, while the latter are purely procedural, as obstacles to the exercise of jurisdiction.[43]

Last but not least, there is no rule in customary international law that the very commission of the wrongful act entails the implicit waiver of immunities,[44] nor is the right of victims to adjudication absolute and able to remove immunities.[45]

It would appear that immunity *ratione materiae*, just like immunity *ratione personae*, has the ability to procedurally block the exercise of jurisdiction, thus leaving the obligation to extradite or prosecute inoperable. Even though there is increasing state practice to show an exception in instances where international crimes are committed, such practice is not yet widespread and consistent enough to crystallise the exception into customary law.[46] It is therefore necessary to look towards other theories that would render functional immunity inoperable when it comes to international crimes and, implicitly, the obligation to extradite or prosecute. Such a theory will be discussed in the following section.

4. Waiver of Immunities

Since they are not peremptory norms, derogations from immunities are possible, in the form of waivers. Both personal and functional immunities can be waived by the State on whose behalf the official is acting or has acted in

[43] *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)*, Merits, Judgment of 3 February 2012, [2012] ICJ Rep. 99, p. 140, para. 93; See also Leonard Caplan, "State Immunity, Human Rights, and Jus Cogens: A Critique of the Normative Hierarchy Theory", *AJIL*, Vol. 97, 2003.

[44] d'Argent, cit. supra, p. 252.

[45] A case that confirms this, albeit with regards to the immunities of international organisations, is the *Stichting Mothers of Srebrenica et al. v. United Nations* case before the Dutch Supreme Court. The Court ruled that the White & Kennedy Logic, a theory developed by the ECtHR which rejects claims of immunities where there is no proper legal remedy for the victim, does not apply. The case was also inadmissible before the ECtHR. Indeed, the Logic used in the 1999 *Waite & Kennedy v. Germany* case (para. 68), although invoked numerous times before the ECtHR, has never been successful in subsequent cases, possibly indicating that even the ECtHR has renounced its theory. See Henry Schermers, Niels Blokker, *International Institutional Law*, Brill Nijhoff, Leiden, 2018, pp. 408, 1081.

[46] Rosanne Alebeek, "Functional Immunity of State Officials from the Criminal Jurisdiction of Foreign National Courts", in Tom Ruys *et al.* (Eds.), *The Cambridge Handbook of Immunities and International Law*, CUP, Cambridge, 2019, p. 517.

the past.[47] The waiver is executed by the competent authorities or even by the individual[48] if such matters are within his official functions.[49] However, because immunities are a prerogative of the State and not of the individual, even in cases where the person can waive their own immunity, they do so not in its individual capacity, but in its capacity of State organ. It is important to note, though, that such a waiver does not imply the renunciation by the State of its sovereign immunity related to *acta iure imperii*.[50]

Indeed, the possibility of waiver, especially of diplomatic immunity, has been well crystalized in customary international law, being also confirmed in treaties.[51] Of special importance, however, is the practice of States regarding the waiver of immunities for officials who have committed international crimes. In this regard, it is important to distinguish between a lack of immunity due to the operation of the waiver, and the actual 'exception of international crimes', discussed in the previous section. Examples where States considered that they had to waive the immunity of the official accused of international crimes include cases like Ferdinand Marcos,[52] Hissène Habré,[53] Prosper Avril,[54] and Sánchez de Lozada.[55] In all these instances, the

[47] There is a case to be made that the UN Security Council also has the power to remove immunities. Considering the creation of the ad hoc international criminal tribunals, and their jurisdiction over officials who have committed international crimes, that certainly seems to be true. However, since the OEP is an obligation on states and does not concern the Security Council, the discussion on the powers of the Security Council in this area will not be further addressed. They are not relevant for the study of the interplay between the OEP and immunities. For an article that addresses these issues in depth, see Sophie Papillon, "Has the United Nations Security Council Implicitly Removed Al Bashir's Immunity?", ICLR, Vol. 10, 2010, p. 275.

[48] Hernandez, cit. supra, p. 233.

[49] This may usually happen with high-ranking officials such as heads of states within whose powers it is to waive immunities.

[50] d'Argent, cit. supra, p. 247.

[51] *Arrest Warrant case*, cit. supra, para. 62; Ian Brownlie, *Principles of Public International Law*, OUP, Oxford, 2008, p. 340; 1961 Vienna Convention on Diplomatic Relations, 500 UNTS 95, Art. 32.

[52] Former Pesident of the Philippines, see Federal Court of Switzerland, *Ferdinand et Imelda Marcos v. Office fédéral de la police*, Judgement of 2 November 1989, Case no. BGE 115 Ib?, p. 496.

[53] Letter of the Chadian Minister of Justice on the Immunity of Hissène Habré, 7 Oct. 2002, 329/MJ/CAB/2002.

[54] US District Court, *Paul v. Avril*, Judgement of 14 January 1993, 812 F. Supp. 207.

[55] US Court of Appeals, *Mamani v. Berzain*, Judgement of 29 August 2011, 654 F. 3d 1148.

wording used by States in their communications for the purpose of waiving immunities could give rise to some confusion. Despite being at times vague, referring generally to any immunities that the individuals 'may enjoy',[56] or sometimes using ambiguous terms that could be interpreted as meaning that the individuals do not have immunity at all,[57] the States end up clarifying that the individuals do indeed benefit from immunities. Besides, if a State deems it necessary to discuss the issue of immunity, there should be a presumption that the person concerned would normally have been entitled to immunity, or at the very least the State were convinced by it.[58] It cannot be presumed that the State just wanted to 'clarify' that there is no immunity.

4.1. Implicit waiver through treaties

Having discussed the possibility of States waiving the immunity of their officials, it is now essential to consider the form of such waiver. The most common and clear manner is by States sending a diplomatic note through which they express their intention to waive the immunities of the official in question. However, this is not the only option. The waiver can be also implied from the conduct of the State, at least in regard to functional immunities. Special Rapporteur Kolodkin maintained that there are different procedural rules for invoking functional and personal immunities respectively. For the latter, the State exercising jurisdiction must consider itself the question of immunity, the official's state bearing no duty to do anything in this regard. For immunity *ratione materiae*, on the other hand, it is the official's State who is responsible for invoking it. 'The State exercising jurisdiction is not obliged to consider the question of immunity *proprio motu* and, therefore, may continue criminal prosecution.'[59] The same report contends that in the case of immunity *ratione personae* vis-à-vis heads of States, heads of government, or ministers of foreign affairs, waiver must always be express.[60]

Seeing that the implicit waiver of functional immunities is permitted, there is no reason why such a waiver cannot be included in treaties. As stated above, immunities are not peremptory norms. Consequently, states can freely dispose of them through international agreements. Furthermore, there is nothing in international law that would suggest that waiver must occur only

[56] US Court of Appeals, *In re Doe*, Judgement of 19 October 1988, 860 F. 2d 40.

[57] Pedretti, cit. supra, p. 84.

[58] Cassese (2005), cit. supra, p. 119.

[59] Roman Kolodkin, Third report on immunity of State officials from foreign criminal jurisdiction, UN Doc. A/CN.4/646 (2011), para. 61(e)-(f).

[60] Ibid., para. 61(l).

retrospectively: a State may agree to lift an official's immunity before another state even decides to exercise its jurisdiction over the individual in question. Indeed, looking on the UN Convention on Jurisdictional Immunities of States and Their Property, it is clear that treaties are an accepted manner of removing such immunities.[61] Whether or not such a treaty waiver can be implicit, authors have argued that:

> When States enter into an international agreement creating or recognizing an international crime and imposing the obligation to punish it, this is logically incompatible with the upholding of immunity where the accused is a foreign State official. As such, the necessary implication is that these States have opted to waive in advance any State immunity presumptively attaching to the impugned conduct, insofar as it is inconsistent with the agreement. In short, the act of establishing universal and mandatory criminal jurisdiction in respect of potentially official conduct constitutes consent in advance to the exercise of that jurisdiction by foreign municipal courts, regardless of the doctrine of State immunity.[62]

The contradictory character of this matter is even more obvious when the nature of the crime itself requires that it be committed by an official, as is the case with torture. Precisely that was the object of the *Pinochet case*.[63] Although it was accepted that the accused would normally benefit from functional immunity even in respect to international crimes, the Convention against Torture was interpreted in such a way as to preclude the applicability of immunities.

Lord Hutton rejected the argument that the Convention was designed to give one state jurisdiction to prosecute only if the other state decided to waive the immunity: 'I consider that the clear intent of the provisions is that an official of one state who has committed torture should be prosecuted if he is present

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[61] 2004 United Nations Convention on Jurisdictional Immunities of States and Their Property, UN Doc. A/59/49, Art. 7(1) reads: 'A State cannot invoke immunity from jurisdiction in a proceeding before a court of another State with regard to a matter or case if it has expressly consented to the exercise of jurisdiction by the court with regard to the matter or case: (a) by international agreement; (b) in a written contract; (c) or by a declaration before the court or by a written communication in a specific proceeding. Another example, albeit of a more explicit waiver of immunity, is contained in Art. 27 of the Rome Statue of the International Criminal Court. '.

[62] Roger O'Keefe, "The European Convention on State Immunity and International Crimes", *CYELS*, Vol. 2, 1999, p. 513.

[63] UK House of Lords, *Bartle and the Commissioner of Police for the Metropolis and Others, Ex Parte Pinochet; R v. Evans and Another and the Commissioner of Police for the Metropolis and Others*, Decision of 24 March 1999.

in another state'.[64] Lord Millet, using a similar approach, affirmed that Chile must be taken 'to have assented to the imposition of an obligation on foreign national courts to take and exercise criminal jurisdiction in respect of the official use of torture'.[65] Even though there was no general consensus on how exactly the immunity has been eliminated, most Judges accepted that the Accused did not benefit from immunity due to the operation of the Convention against Torture.

4.2. Effects of implicit waiver on the OEP

Having established how waivers function, and particularly the various forms in which they may be exercised, we will now look at how such waivers interact with the obligation to extradite or prosecute. Of special importance for our discussion is the implicit waiver through a treaty, as discussed in the previous subsection. It is contradictory to, on the one hand, impose an obligation prosecute, and, at the same time, confer immunity from criminal jurisdiction to the perpetrator. To solve this apparent paradox, one could use the theory of implied waiver through the prism of rules that help solve conflicts of norms.

Since both treaties and custom are 'equally capable of generating norms of comparable weight, and overlap and coexist with one another without any hierarchy',[66] other rules are necessary to solve a potential conflict of norms. The most useful in this regard are two guiding principles identified by the Latin maxims of *lex posteriori derogat priori* ('more recent law prevails over an inconsistent earlier law') and *lex specialis derogat legii generali* ('specific rules prevail over rules of general application').

The former establishes the rule that in the case of a conflict or norms, the most recent one will have priority over the conflicting older norms. Usually, it is the treaty provision that temporally succeeds the customary rule, especially when they are created for the specific purpose of codifying or replacing existing custom.[67] Nevertheless, this is not always the case. More recently formed custom may just as well replace older treaties. In our concrete example, immunities belong to the sphere of customary law, while the OEP

[64] Ibid., p. 215.

[65] Ibid., p. 231.

[66] Hernandez, cit. supra, p. 34.

[67] Richard Baxter, "Multilateral Treaties as Evidence of Customary International Law", *BYIL*, Vol. 41, 1966, p. 275.

is a treaty obligation.[68] While the two have the same value in the hierarchy of norms, there is no doubt that the OEP is more recent, even when considering the earliest instruments where it was first included, such as the Geneva Conventions or the Genocide Convention. Therefore, in a conflict between the obligation to observe immunities and the obligation to extradite or prosecute, the latter would prevail if one were to invoke the principle of *lex posteriori*.

As regards the principle of *lex specialis,* it has been repeatedly affirmed that treaty norms, when compared to customary law, represent special law.[69] In the words of Hernandez, 'should an inconsistency arise, it is to be presumed that parties to a treaty were aware of the existing customary rule and have decided to exclude its application'.[70] Regarding the interplay of immunities and the OEP, the latter could be seen as *lex specialis.* The customary law of immunities represents the *lex generalis*, but the States intended to create a special regime with the inclusion of OEP clauses in treaties. Of course, it could certainly be argued that immunities are actually the exception from the general rule that is prosecution. While the default is that the perpetrator must be prosecuted, immunities, acting as an obstacle, impede the exercise of jurisdiction. However, even though they can be seen in this sense as an exception, immunities cannot be considered *lex specialis* and the OEP *lex generalis*. This is because immunities are not limited to international crimes, but rather to all (official) acts.[71] The OEP, on the other hand, is a special regime created specifically for certain international crimes. As such, one could say that the OEP institutes an exception to the exception, thereby returning to the general rule. In any case, when it comes to the crimes that imply the OEP, immunities represent *lex generalis* and the OEP *lex specialis.* In a conflict of norms, the obligation *aut dedere aut judicare* would therefore prevail. This argument is particularly relevant when it comes immunity

[68] Because the customary nature of the OEP is not yet settled, we will treat it purely as a treaty norm.

[69] *Gabcikovo-Nagymaros Project (HungarylSlovakia)*, Merits, Judgment of 25 September 1997, [1997] ICJ Rep. 7, p. 76, para. 132; *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America),* Merits, Judgment of 27 June 1986, [1986] ICJ Rep. 14, p. 137.

[70] Hernandez, cit. supra, p. 34; See also *Dispute regarding Navigational and Related Rights (Costa Rica v. Nicaragua)*, Merits, Judgment of 13 July 2009, [2009] ICJ Rep. 213, p. 233, para. 36.

[71] Depending on the type of immunities in question. See the previous article in the trilogy.

ratione materiae, where some exceptions from the absolute character of the immunities may be accepted.

Nevertheless, certain conditions need to be fulfilled. First, there must be an international obligation to extradite or prosecute. The *jus cogens* prohibition of a crime, and the *possibility* of prosecution on the basis of universal jurisdiction are not enough to exclude immunity, as demonstrated by all the discussed cases. The State in question must be bound by a treaty provision to extend and exercise its criminal jurisdiction over the accused.

Secondly, the OEP must exist between both the State exercising the jurisdiction, and the state of the accused. This is achieved when both States are parties to the treaty which contains the obligation *aut dedere aut judicare*.

> The argument is that the state cannot claim the benefit of such immunity nor complain about the prosecution abroad of its official because it has consented that the prosecuting state has an obligation to do so. [72]

On the other hand, no implicit waiver can be inferred if one of the States in question is not party to a treaty that contains the OEP. The basis for waiver is the consent of the State. If a State did not even agree to being bound by the obligation to extradite or prosecute, then the foundation for presuming the consent to waive the functional immunity is entirely absent.

In conclusion, both personal and functional immunities possess certain particularities that influence the effects they have on the obligation to extradite or prosecute. Immunity *ratione personae* is widely seen as absolute, allowing for no exceptions apart from where the State of the official expressly waives it. Immunity *ratione materiae*, on the other hand, although traditionally also viewed as near-absolute, does seem to allow for some exceptions. By using the theory of implied waiver, OEP provisions in treaties can be interpreted as representing the prospective consent of States to the exercise of jurisdiction by foreign courts over their officials accused of international crimes.

[72] d'Argent, cit. supra, p. 254.

5. Conclusions

The interplay between immunities and the obligation to extradite or prosecute is an intricate matter with most of the issues still disputed. Nevertheless, upon a close examination of the OEP and the obligation to observe immunities, several conclusions can be drawn.

First, there seems indeed to be a conflict of norms between the OEP and the obligation to observe immunities. A state cannot fulfil both of them simultaneously in relation to the same person. While some authors have tried to reconcile them by limiting the scope of the OEP, such arguments prove to be lacking.

Having established that there is a conflict between the object of the OEP and that of immunities, one must then turn to rules that decide which of the two would prevail over the other. On the one hand, the absolute character of personal immunities remains uncontested. While immunity *ratione personae* does not affect the obligation to establish jurisdiction, it does nevertheless obstruct its exercise, and implicitly, the two constitutive elements of the OEP: prosecution and extradition.

On the other hand, it is becoming increasingly accepted that functional immunity is not absolute. While state practice is not yet uniform enough to point to a complete lack of functional immunity for international crimes, there are nevertheless other grounds for excluding it. One is provided by the theory of implied waiver through treaty provision. The argument goes that States have prospectively waived the immunity of their officials when they have agreed to be bound by the obligation to extradite or prosecute. Since it would be contradictory to demand the prosecution of a person and at the same time maintain that the person in question has immunity from prosecution, it must be considered that states wanted to create special rules to derogate from the general regime of immunities. While the general rule is that functional immunities impede the exercise of jurisdiction, when it comes to certain crimes covered by the OEP, immunity *ratione materiae* is to be considered waived through the operation of the implied consent of the states.

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