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Functional Immunity in Relation to Crimes Pursuant to International Law

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Abstract: *This paper examines whether functional immunity applies to crimes pursuant to international law, addressing whether State officials can evade responsibility for international crimes by resorting to immunity ratione materiae. The topic is significant as it explores the balance between State sovereignty and individual accountability for international crimes. The research builds on foundational concepts of State sovereignty, the Nuremberg Principles, and decisions in landmark cases such as Pinochet. It relates to contemporary discussions by the International Law Commission and various domestic and international court rulings that challenge the traditional scope of functional immunity. The findings demonstrate that functional immunity does not apply to crimes pursuant to international law. Courts consistently rule that such crimes, due to their gravity and the involvement of State authority, override immunity claims. Universal jurisdiction and the peremptory nature of jus cogens norms further undermine functional immunity in these cases.*

Key-words: *Functional Immunity, International Crimes, Jus Cogens, Universal Jurisdiction, State Sovereignty*

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

1. What is functional immunity?

In international law, immunity is typically understood as the right to be exempt from binding measures imposed by a foreign State.¹ It generally entails protection from any foreign authoritative actions, whether administrative or judicial in nature.²

The prevailing view holds that immunity stems from the principles of equality, independence, and dignity of States within the international community.³ As a concept that precludes the exercise of superior authority among equals, immunity can be seen as a natural extension of sovereignty on the international stage.

Two categories of immunities are to be relied upon in international law: functional immunity, also called immunity *ratione materiae* and personal immunity, also referred to as immunity *ratione personae*.⁴

Functional immunities are based on the principle of sovereignty and non-intervention, hence, State agents are not accountable to other States for acts undertaken in official capacity.⁵ Personal immunity stems from the notion that the activity of Heads of State, heads of government and foreign ministers⁶ must be immune from foreign jurisdiction in order to avoid foreign States from interfering with official functions.⁷

Functional immunity covers official acts carried out on behalf of the State⁸ of any *de jure* or *de facto* State agent, subsists even after the said official leaves their position⁹ and is applicable *erga omnes*, therefore it may be invoked

¹ Ramona Pedretti, *Immunity of Heads of State and State Officials for International Crimes* (Brill Nijhoff 2014), p. 7.

² Alina Kaczorowska, *Public International Law* (Routledge 2010), p. 363.

³ James Crawford, *Brownlie's Principles of Public International Law* (9th edn, Oxford University Press 2019), p. 488.

⁴ Antonio Cassese, *International Criminal Law* (2nd edn, Oxford University Press 2008), p. 264.

⁵ C Antonio Cassese, *International Criminal Law* (2nd edn, Oxford University Press 2008), p. 265.

⁶ *Arrest Warrant of 11 April 2000* (Democratic Republic of the Congo v. Belgium), Judgement, [2002], para 51.

⁷ Ian Brownlie, *Principles of Public International Law* (1990), p. 361.

⁸ Ramona Pedretti, *Immunity of Heads of State and State Officials for International Crimes* (Brill Nijhoff 2014), p. 14; Prosecutor v. Blaškić, Case No. it-95-14-ar108 bis, Judgment on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997 (Oct. 29, 1997), para. 38.

⁹ International Law Commission, *Draft Articles on Immunity of State Officials from Foreign Criminal Jurisdiction*, (2017), Article 6.

towards any other State.¹⁰ The status of the person performing the said act is irrelevant – functional immunities applies for all individuals covered by Article 4 of the Articles on the Responsibility of States for Internationally Wrongful Acts.¹¹

The determining factor is the nature of the act—if it is classified as an official act, it will be exempt from foreign scrutiny.¹² To qualify as official, an act must meet two criteria: the act must be executed in pursuance to a State policy and it must be carried out using the apparatus of the State.¹³

Since State officials typically carry out such acts, functional immunity becomes inevitable. They are regarded as the extended arm of the State¹⁴ and their acts are considered acts of the State under international law.¹⁵ State officials are considered mere instruments of the State and therefore they cannot suffer the consequences of wrongful acts committed on behalf of that State, benefitting from functional immunity.¹⁶ Therefore, the responsibility is shifted from the individual to the State, making it internationally responsible for those acts.¹⁷

Immunity is generally considered to be a procedural bar in judicial proceedings.¹⁸ However, functional immunity, being a mechanism that shifts responsibility, is perceived as a question of substantive law.¹⁹ This substantive nature has been confirmed by the International Criminal Tribunal

¹⁰ Antonio Cassese, *International Criminal Law* (2nd edn, Oxford University Press 2008), p. 266.

¹¹ ILC Articles on the Responsibility of States for Internationally Wrongful Acts, 2001 YILC, Vol. II (Part Two), Article 4

¹² Ramona Pedretti, *Immunity of Heads of State and State Officials for International Crimes* (Brill Nijhoff 2014), p. 14

¹³ International Law Commission, *Second Report on Immunity of State Officials from Foreign Criminal Jurisdiction*, A/CN.4/631 (June 10, 2010), para 23, 27.

¹⁴ Rosanne Van Alebeek, *The Immunity of States and Their Officials in International Criminal Law and International Human Rights Law* (Oxford University Press 2008), p. 114.

¹⁵ Articles on the Responsibility of States for Internationally Wrongful Acts, Article 4.

¹⁶ Prosecutor v. Blaškić, Case No. it-95-14-ar108 bis, Judgment on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997 (Oct. 29, 1997), para. 38.

¹⁷ Antonio Cassese, *International Law* (Oxford University Press 2005), p. 112.

¹⁸ *Arrest Warrant of 11 April 2000* (Democratic Republic of the Congo v. Belgium), Judgement, [2002], para 60.

¹⁹ Antonio Cassese, *International Law* (Oxford University Press 2005), p. 318;

for the Former Yugoslavia, stating that it diverts responsibility from the individual to the State.²⁰

2. What are crimes pursuant to international law?

Crimes pursuant to international law are serious offenses that violate peremptory norms, including acts that threaten international peace, security and humanity's core values. These crimes concern the international community as a whole as they violate the most fundamental values protected by international law.²¹ These acts constitute crimes pursuant to international law not only when committed on a large scale and in a systematic manner, but also when a single occurrence is in question – *e.g.* when a single individual is tortured²².

Most commonly, crimes pursuant to international law are known as those referred to in the Rome Statute of the International Criminal Court: genocide, crimes against humanity, war crimes, and the crime of aggression.²³ The International Law Commission has extended this notion to a series of other crimes through its work regarding immunity, including crimes of apartheid, torture and enforced disappearances.²⁴

3. Is functional immunity applicable to crimes pursuant to international law?

The aim of this article is to analyse whether functional immunity is applicable for crimes pursuant to international law. In other words – can a State official hide behind the veil of the State when such grave violations of human rights are committed?

The rule regarding functional immunity – according to which State officials may not be held accountable for acts performed in an official capacity - was undermined after the Second World War.

²⁰ Prosecutor v. Radislav Krstić, Case No. IT-98-33-A, Decision of the Appeals Chamber on Application for Subpoenas (July 1, 2003), para. 26.

²¹ *Rome Statute of the International Criminal Court* (adopted 17 July 1998, entered into force 1 July 2002) preamble, para. 5.

²² Carmen-Gina Achimescu (Puscasu), Ion Galea, *Drept international public*, Hamangiu, Bucharest, 2023, pp 68-70

²³ *Rome Statute of the International Criminal Court* (adopted 17 July 1998, entered into force 1 July 2002) arts 5–8bis.

²⁴ ILC, *Draft Articles on Immunity of State Officials from Foreign Criminal Jurisdiction*, Article 7.

The United Nations General Assembly unanimously adopted Resolution 95 (I) in 1945, which affirmed the principles recognized by the Charter of the Nuremberg Tribunal.²⁵ According to the renowned resolution, the fact that a person committed a crime pursuant to international law acting in official capacity does not relieve them from responsibility under international law and therefore cannot benefit from functional immunity before foreign courts.

This issue was more recently analysed by the International Law Commission, in its work regarding the Draft Articles on Immunity of State Officials. It has pointed out that these crimes most often require the involvement of individuals in positions of governmental authority and in doing so, they not only provide the means required to commit the crime, but also abuse the power vested in them.²⁶

The 2009 Naples Resolution of the Institut de Droit International reaffirms this principle: “No immunity from jurisdiction other than personal immunity in accordance with international law applies with regard to international crimes.”²⁷

These claims are supported by the interaction of functional immunity with various principles of international law: *ultra vires* action, universal jurisdiction and the *jus cogens* nature of crimes pursuant to international law.

3.1. Ultra vires action

Many domestic courts have ruled that functional immunity cannot be applied to illegal *ultra vires* acts. In *Xuncax v. Gramajo*, the former Guatemalan Minister of Defence, Hector Gramajo, was sued for his alleged involvement in the commission of serious crimes, including torture.²⁸ In *Enahoro v. Abubakar*, which concerned the responsibility of Abdusalami Abubakar for grave human rights violations allegedly committed during his time as the Head of State of Nigeria, a Circuit Judge pointed out that “officials receive no immunity for acts that violate international *jus cogens* human rights norms.”²⁹ This is also held in the renowned *Pinochet* case, where it was considered that such severe crimes went beyond the scope of the functions of

²⁵ UN General Assembly, *Resolution 95 (I), The Status of the International Court of Justice* (11 December 1946).

²⁶ International Law Commission, *Report of the International Law Commission on the Work of its Forty-Eighth Session*, A/51/10, para. 26.

²⁷ Institut de Droit International, *Resolution on the Immunity from Jurisdiction of the State and of Persons Who Act on Behalf of the State in Case of International Crimes* (Napoli Session, 2009).

²⁸ *Xuncax v. Gramajo*, 886 F. Supp. 162 (D. Mass. 1995) at 176.

²⁹ *Enahoro v. Abubakar*, 408 F. 3d 877 (7th Cir. 2005) at 893.

a Head of State³⁰ and are not included even in the most extensive meaning of official acts performed in the exercise of official functions.³¹

According to the rationale in such cases, no immunity, especially functional immunity, is applicable for acts that fall out the official functions of a State official.³² However, through the nature of the acts, crimes pursuant to international law are in most cases only possible if State authority is abused, profiting from official status to facilitate their commission or by abusively using the State apparatus, *e.g.* police officers or military personnel, through orders they do not have the power or the courage to contest. In other cases, these crimes can by definition only be committed in official capacity, such as torture, crimes of aggression or enforced disappearances.

Even so, such conduct is regarded as *ultra vires* at it exceeds public authority. It may often be identified when an individual commits a crime pursuant to international law by contravening instructions or acting in an excess of power.³³

An act is considered *ultra vires* by analysing domestic law or instructions given by the State on behalf of which the official is acting.³⁴ The designation of persons competent to act on behalf of the State or the determination of their mandate, functions or authority belongs to the State's *domaine réservé*.³⁵ If this determination was left at the discretion of the State, these acts could be prevented by qualifying as *ultra vires* conduct through mandates given to officials to commit such crimes.³⁶

On the other hand, the concept of functional immunity itself would have no efficiency if it were only available for legal acts, allowed by State policies and national laws. If applied in such way, it would have no bearing in any

³⁰ See *R. v. Bow St. Metro. Stipendiary Magistrate ex parte Pinochet Ugarte* (No. 1), [2000] 1 a.c.

61 at 115–116, per Lord Steyn;

³¹ *R. v. Bow St. Metro. Stipendiary Magistrate ex parte Pinochet Ugarte* (No. 1), [2000], p. 115.

³² Ramona Pedretti, *Immunity of Heads of State and State Officials for International Crimes* (2014), p. 315.

³³ Ramona Pedretti, *Immunity of Heads of State and State Officials for International Crimes* (2014), p. 318.

³⁴ International Law Commission, Report of the International Law Commission on the Work of its Fifty-Third Session, A/56/10, para. 45.

³⁵ *Prosecutor v. Blaškić*, Case No. it-95-14-ar108 bis, Judgment on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997 (Oct. 29, 1997), para. 41.

³⁶ Ramona Pedretti, *Immunity of Heads of State and State Officials for International Crimes* (2014), p. 319.

criminal proceeding. In the final *Pinochet* decision, Lord Browne-Wilkinson criticised that the argument that torture cannot be part of the functions of the Head of State was insufficient, since, on the other hand, acts that constituted crimes under domestic law could attract functional immunity if they fell under the definition of official acts.³⁷

Doctrine has evolved and reached the conclusion that the real test for whether functional immunity is applicable is to determine whether or not the conduct was committed in the “ostensible exercise of public authority”.³⁸

In this regard, immunity *ratione materiae* cannot be applied to crimes pursuant to international law as they cannot fall under the normal exercise of State authority.

3.2. Universal Jurisdiction

Jurisdictional clauses establish a link between a relevant action and a State for the purpose of justifying jurisdiction.³⁹ Jurisdictional clauses include territoriality, nationality, passive personality and universal jurisdiction. Universal jurisdiction applies “irrespective of the place of commission of the crime and regardless of any link of active or passive nationality, or other grounds of jurisdiction recognized by international law”, as defined by the Institute of International Law.⁴⁰ The only relevant condition for the application of universal jurisdiction is for the perpetrator to be on the territory of the State exercising jurisdiction. Universal jurisdiction attaches to a specific conduct, which is grave enough that it violates fundamental values protected by the international community as a whole.⁴¹

Since the Second World War, several multilateral treaties have surfaced providing for prevention and punishment of specific crimes, allowing⁴² or

³⁷ R. v. Bow St. Metro. Stipendiary Magistrate ex parte Pinochet Ugarte (No. 3), [1999], p. 203.

³⁸ Arthur Watts, *The Legal Position in International Law of Heads of States, Heads of Governments and Foreign Ministers* in *British Contributions to International Law*, p. 56–57.

³⁹ Robert Cryer, *An Introduction to International Criminal Law and Procedure* (3rd edn, Cambridge University Press 2014), p. 43–44;

⁴⁰ Institute of International Law, *Universal Criminal Jurisdiction with Regard to the Crime of Genocide, Crimes against Humanity and War Crimes*, Resolution of Krakow Session (2005), para. 1.

⁴¹ Ramona Pedretti, *Immunity of Heads of State and State Officials for International Crimes*, p. 343.

⁴² International Convention on the Suppression and Punishment of the Crime of Apartheid, Article 5; United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, Article 4(2)(b); United Nations Convention against Transnational Organized Crime, Article 15(4).

even obliging⁴³ States to establish universal jurisdiction. Beyond treaty obligations, the principle of universal jurisdiction also exists under customary international law.⁴⁴ In *Eichmann*, the Israeli Supreme Court considered that the gravity of the crimes alleged “vests in every State the authority to try and punish those who participated in their commission.”⁴⁵

In the *Pinochet* decision, it was found that immunity *ratione materiae* cannot be applied for crimes over which universal jurisdiction is established. A variety of arguments are presented by the Law Lords in the case. In the case, it was found that the conferment of immunity was excluded among the States that are parties to the Convention against Torture, as all domestic courts are allowed to exercise universal jurisdiction for these crimes.⁴⁶

Moreover, the acceptance of the terms of a convention granting universal jurisdiction amounts to an implicit waiver of immunity.⁴⁷ Since functional immunity is based on the principle that the wrongful acts are attributed to the State, its application is incompatible with an express permission in international law to prosecute a crime under universal jurisdiction. If immunity would be applicable, the legal mechanisms that are destined to address these crimes would be rendered ineffective. This contradictory character is even more evident when the acts is required to be carried out in official capacity.

On the other hand, it was found in the *Arrest Warrant* case by the majority of the judges that immunity is not connected with jurisdiction, as the question arises only after jurisdiction is determined.⁴⁸

⁴³ International Convention against the Taking of Hostages, Article 5(2); International Convention for the Protection of All Persons from Enforced Disappearance, Article 9(2).

⁴⁴ Bogdan Aurescu, Ion Gâlea, Elena Lazăr, Ioana-Roxana Oltean, *Drept internațional public*, (Hamangiu, 2018), p. 26.

⁴⁵ Attorney-General of Israel v. Eichmann, Supreme Court of Israel, Judgment of 29 May 1962, [1962], p. 298

⁴⁶ R. v. Bow St. Metro. Stipendiary Magistrate ex parte Pinochet Ugarte (No. 3), [2000], p. 266–267.

⁴⁷ R. v. Bow St. Metro. Stipendiary Magistrate ex parte Pinochet Ugarte (No. 3), [2000], p. 267. On the implicit waiver of immunity, particularly in relation to the obligation to extradite or prosecute, see also Filip Andrei Lariu, Immunity as a Circumstance Excluding the Operation of the Obligation to Extradite or Prosecute – Part I: The Principle of aut Dedere aut Judicare”, *RJIL*, 27/2022, “Part II: Immunities and the Existence of a Conflict of Norms”, *RJIL*, No. 28/2022 and “Part III: The Effects of Immunities on the Obligation to Extradite or Prosecute”, *RJIL*, No. 29/2023.

⁴⁸ *Arrest Warrant of 11 April 2000* (Democratic Republic of the Congo v. Belgium), Judgement, [2002], para. 46.

The question raised is whether universal jurisdiction can override rules regarding immunity *ratione materiae*, more specifically, if these two principles can coexist and apply simultaneously or whether they are in conflict.

According to treaty law, a number of crimes pursuant to international law can only be committed in official capacity, such as torture,⁴⁹ crimes of aggression,⁵⁰ or enforced disappearances.⁵¹ This leads to the conclusion that universal jurisdiction and immunity *ratione materiae* coexist, as they both pertain to responsibility for official acts.

Rules regarding universal jurisdiction and immunity *ratione materiae* refer to different stages of criminal proceedings, as universal jurisdiction creates the basis for these proceedings and immunity is part of the merits of the case.⁵² However, these rules are in conflict when crimes are committed in official capacity, as immunity protects the individual from criminal responsibility while universal jurisdiction allows for an alleged offender to be held responsible.

Two principles of interpretation can be used to determine which rule prevails in such a conflict— *lex posterior derogat legi priori* and *lex specialis derogat legi generali*.⁵³

The principle of immunity *ratione materiae* has its origins in the 18th century.⁵⁴ The principle of universal jurisdiction also has an extensive history, deriving from crimes of piracy, as pirates were considered enemies of mankind.⁵⁵ It is difficult to precisely indicate the date of the emergence of universal jurisdiction, however it is accepted that it developed during the twentieth century, as it was extensively analysed in regard to the crimes included in the Rome Statute.⁵⁶ Regarding the principle of *lex specialis*, the principle of functional immunity relates to any act that is performed in official capacity, while universal jurisdiction attaches only to crimes pursuant to

⁴⁹ Art. 1(1) of the Convention against Torture, Article 1 (1).

⁵⁰ Rome Statute, Article 8bis(2).

⁵¹ International Convention for the Protection of All Persons from Enforced Disappearance, Article 2.

⁵² Ramona Pedretti, *Immunity of Heads of State and State Officials for International Crimes*, p. 360.

⁵³ Mark E Villiger, *Customary International Law and Treaties* (Martinus Nijhoff 1997), p. 59–60.

⁵⁴ Prosecutor v. Blaškić, Case No. it-95-14-ar108 bis, Judgment on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber ii of 18 July 1997 (Oct. 29, 1997), para. 38.

⁵⁵ Hans Kelsen, *Principles of International Law* (2nd edn, Holt, Rinehart & Winston 1966), p. 203–205.

⁵⁶ Ramona Pedretti, *Immunity of Heads of State and State Officials for International Crimes*, p. 365.

international law. It can be concluded, that universal jurisdiction prevails over the principle of immunity *ratione materiae* and entails the lifting of such immunity.

3.3. The *jus cogens* nature of crimes pursuant to international law

Having *jus cogens* status, rules regarding crimes pursuant to international law can override not only contrary substantive rules which do not share this status, but also rules which prevent their enforcement,⁵⁷ including rules on immunity *ratione materiae*.⁵⁸ This is also held in *Pinochet*, confirming that the *jus cogens* nature of the prohibition of an international crime has priority over immunity *ratione materiae*.⁵⁹

Immunity *ratione materiae* is a rule of *jus dispositivum*, as evident from rulings denying such immunity for crimes under international law and from national legislation.⁶⁰

In the *Lozano* case, the Italian Court of Cassation asserted that such a conflict should be solved by given priority to the higher rank and the *jus cogens* character of crimes pursuant to international law.⁶¹ The EctHR has also accepted that the prohibition of crimes pursuant to international law has a *jus cogens* status and prevails over immunity *ratione materiae*.⁶²

Moreover, in a decision concerning Saddam Hussein, the Higher Regional Court of Cologne concluded that a (former) State official cannot hide behind the veil of the State for acts committed in official capacity which constitute crimes pursuant to International Law.⁶³ Austrian courts found that crimes under International Law could not be considered official acts and supported a removal of immunity *ratione materiae*.⁶⁴ A decision of the Belgian Court of Cassation regarding Israeli officials concluded that when crimes pursuant to International Law are involved, no protection by immunity *ratione materiae*

⁵⁷ S. I. Strong, *General Principles of Procedural Law and Procedural Jus Cogens*, (2018), p. 394, 404.

⁵⁸ *Arrest Warrant of 11 April 2000* (Democratic Republic of the Congo v. Belgium), Judgement, [2002], Dissenting Opinion of Judge Al-Khasawneh, para. 7.

⁵⁹ Hazel Fox, *The Law of State Immunity* (2002), p. 528.

⁶⁰ Ramona Pedretti, *Immunity of Heads of State and State Officials for International Crimes*, p. 401.

⁶¹ *Lozano v. Italy*, Court of Cassation of Italy, 24 July 2008, n. 31171, i.l.d.c. 1085 (it 2008) at § 6.

⁶² *Al-Adsani v. United Kingdom*, App. No. 35763/97, 2001-xi Eur. Ct. h.r. at § 65;

⁶³ *In re Hussein* Oberlandesgericht (Higher Regional Court) Köln [16 May 2000], 2 Zs 1330/99, para. 9.

⁶⁴ *Oberster Gerichtshof* (Supreme Court of Austria) [14 February 2001], docket No. 7 Ob 316/00x, 74 SZ No. 20, para. 13.

is afforded to foreign State officials.⁶⁵ A number of Chilean decisions regarding former Head of State of Peru, Fujimori, shows that immunity *ratione materiae* is not an admissible plea in the context of accusations amounting to crimes pursuant to International Law.⁶⁶ In a case regarding a former Algerian Minister of Defence, the Swiss Federal Criminal Court stressed the *jus cogens* character of the prohibition of crimes pursuant to international law and ruled that no immunity *ratione materiae* is available.⁶⁷

These cases provide evidence for the formation of a custom in regards to rejecting the plea of immunity *ratione materiae* due to the *jus cogens* status of norms prohibiting crimes pursuant to international law.

4. Conclusions

The findings of this article demonstrate that functional immunity does not apply to crimes pursuant to international law. While functional immunity is rooted in the principle of State sovereignty and aims to shield officials from foreign jurisdiction for acts performed in an official capacity, international legal developments have consistently limited its scope when it comes to grave human rights violations.

Through the principles of *ultra vires* actions, universal jurisdiction, and the *jus cogens* nature of such crimes, courts and legal bodies have affirmed that State officials cannot evade responsibility by invoking immunity. As international law evolves, the trend remains clear: accountability for serious violations takes precedence over the traditional protections afforded by functional immunity.

⁶⁵ H.S.A. v. A.S. and Y.A., Court of Cassation of Belgium [12 February 2003], no. P.02.1139.F, 127 ILR 110 at 124.

⁶⁶ In re Fujimori, Supreme Court of Chile, first instance [11 July 2007], no. 5646-05, para. 17, aff'd in Peru v. Chile, Supreme Court of Chile, second instance [21 September 2007], no. 2242-06, ILDC 1443.

⁶⁷ A. v. Ministère Public de la Confédération, Bundesstrafgericht (Federal Criminal Court of Switzerland) [25 July 2012], BB.2011.140.

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