



# Extent of Functional Immunity Granted to State Officials

Ayush Tiwari\*

## Abstract

Being a part of the international community has greatly altered the relations between different states. This article will focus on the concept of diplomatic immunity, and, specifically, functional immunity provided to state officials in the realm of international law. A thorough insight into the Vienna Convention regarding Diplomatic Immunity has furthered the scope of present research. Furthermore, a line of distinction is drawn between personal and functional Immunity. This paper will also take a look into the assumptions relating to functional immunity within international law and also evaluate its doctrinal approaches. Additionally, the legal ambit of the official Act, the importance for states to recognize functional immunity is also discussed. This article will not only talk about provisions established in law but also the customs which are adopted in relation to the functioning of *rationemateriae*. The possibility of weighing functional immunity alongside the states' civil and criminal jurisdiction is also evaluated in the concluding part.

**Keywords:** Diplomatic protection, functional immunity, personal immunity, state sovereignty, Vienna Convention on Diplomatic Protection, 1961

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\* Ram Manohar Lohia National Law University, Lucknow, India; ayushtiwari607@gmail.com

## **1. Introduction**

Diplomatic immunity is a legal immunity granted to officials of a state or an international organization, who act on the order of the sending state in the territory of the receiving state. The said official is granted civil and criminal immunity from the jurisdiction of the receiving state. There is an added obligation on the receiving state to protect and aid the official in the completion of his mission.<sup>1</sup> In other words, when a state (sending state) sends an official to another state (receiving state) to perform a task ordered by the Government, he is absolved of all the charges that may be brought during the course of completion of the said act. This immunity safeguards the official for the acts performed during the course of the duty. The inviolability of the officials which accompanies the immunity granted to them is recognized by most countries by the virtue of various treaties and conventions of the United Nations. Diplomatic immunity is not provided for the benefit of the individual but that of the state. The privileges of immunity are extended to officials not on the basis of their rank but on the basis of the work assigned to them by the sending state which is to be carried out within the receiving state. The concept of diplomatic immunity was quite ambiguous before the introduction of Vienna Convention in 1961 but post the Vienna Convention, most of the powers were codified thereby giving them a black letter form.

## **2. Significance of the Vienna Convention**

The primary role of the Vienna Convention, 1961, is to keep a check on the grant of diplomatic immunity.<sup>2</sup> The Vienna Convention on Consular Relations of 1963 on the other hand, codifies the diplomatic and consular practices.<sup>3</sup> This Convention provides the framework for the maintenance and termination of the diplomatic

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<sup>1</sup>CLAUDIA H. DULMAGE, RECENT DEVELOPMENTS DIPLOMATIC IMMUNITY: IMPLEMENTING THE VIENNA CONVENTION ON DIPLOMATIC RELATIONS, 806 (10th edn, case W. Res. J. Int'l L, 1978).

<sup>2</sup> Vienna Convention on Diplomatic Relations, April 18, 1961, 500 UNTS 95.

<sup>3</sup> Ibid.

relationship between the independent states based solely on their consent.<sup>4</sup> More than 160 nations are parties to these treaties.<sup>5</sup> This Convention provides immunity to officials on the basis of their ranks in diplomatic missions and consular posts in accordance to the need for such immunity, depending on the act which is to be performed.<sup>6</sup> Its success is not only because it was framed by the International Law Commission, but also because of the presence of long standing principles of diplomatic laws and the efficient reciprocity of the general approbation against non-compliance.

The key provision of this convention is regarding the declarations of *persona non grata*<sup>7</sup> of an official or a diplomat who has committed an offence. Its framework was structured in such a way that it provides guidelines for diplomats from sending states to be guarded in the receiving state by the third state. The *United States Diplomatic and Consular staff in Tehran Case*<sup>8</sup>, played an essential role in justifying most of the fundamentals of the convention. This further provided aid to the United States in preserving the support of the international coterie and affirming eventual liberation of diplomats, which was brokered by Algeria. This case highlights the need for reforms in relation to the rights of state officials within the ambit of functional immunity.

### 3. Distinction between Personal and Functional Immunity

At the outset, there exists the need to distinguish between the concepts of *functional immunity* and *personal immunity*. In relation to *Ratione Personae*, it is noteworthy that irrespective of the scope

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<sup>4</sup>EILEEN DENZA, VIENNA CONVENTION ON DIPLOMATIC RELATIONS (3rd edn., United Nation Audiovisual library of International Law 1, 2009).

<sup>5</sup> United Nation Treaty Collection, Treaty section, *United Nation Treaty Convention on Diplomacy*, <[https://treaties.un.org/pages/viewdetails.aspx?src=TREATY&mtdsg\\_n o=III-3&chapter=3&lang=en](https://treaties.un.org/pages/viewdetails.aspx?src=TREATY&mtdsg_n o=III-3&chapter=3&lang=en)> (accessed 01.08.2017).

<sup>6</sup>MALCOLM N. SHAW, INTERNATIONAL LAW, 506 (7rd edn, Cambridge University Press, 2014).

<sup>7</sup> Vienna Convention on Diplomatic Relations, April 18, 1961, article 9.

<sup>8</sup> United States Diplomatic and Consular Staff in Tehran Case (United States of America v Iran) ICJ Rep. 3(1980).

and nature of the work assigned, it is based completely on the principles of symbolic sovereignty and non-intervention.<sup>9</sup> This is central to the understanding of the reason why only limited officials are awarded such immunity.<sup>10</sup> *RationeMateriae*, alternatively, works on two policies viz. responsibility to the state<sup>11</sup> and the ambit of official duty.<sup>12</sup> The major distinction lies in the basis of the duration of immunity. Personal immunity operates till the mandate of the official is complete or, if he is an official acting on behalf of the state, then until he ceases to function. On the other hand, functional immunity is granted during their mandate and continues even after the completion of their mandate.

The second distinction relates to the scope of its function. While personal immunity operates on both official and personal acts of the officials, irrespective of the nature of the act, functional immunity operates only in the realm of official acts of the concerned person. Functional immunity cannot be extended to instances wherein, the official acts beyond his official capacity and acts in his private capacity. The third distinction relates to the nature of the kinds of immunities. Personal immunity has a concordant view on the notion that official acts are accounted on an individual envoy and cannot be extended to the state, on whose behalf that official is acting and it has a procedural nature. Moreover, *ratione personae* is granted to limited officials, for e.g. Head of the State, Minister of foreign affairs and some diplomatic agents, who perform their duties in states' best interests. Functional immunity is of a divergent nature as scholars view *rationemateriae* to be based on the proposition that acts performed by the official in his official capacity cannot be attributed his individual person, but

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<sup>9</sup>SIR ARTHUR WATTS, 'THE LEGAL POSITION IN INTERNATIONAL LAW OF HEADS OF STATES, HEADS OF GOVERNMENTS AND FOREIGN MINISTERS', 13, 247 (Recueil des Cours, 1994-III).

<sup>10</sup> *United States v Noriega*, 117 F 3d 1206 (11th Cir. 1997, Supreme Court of USA). US government never recognized General Noriega (de facto ruler of Panama) as head of state.

<sup>11</sup>TOMONORI, 'THE INDIVIDUAL AS BENEFICIARY OF STATE IMMUNITY: PROBLEMS OF THE ATTRIBUTION OF ULTRA VIRES CONDUCT', 261 (Denver J Int'l L and Policy, 2001).

<sup>12</sup>*Zoersch v. Waldock* 1 WLR 675, at 692 (1964).

rather to the state on whose behalf he is acting. Therefore, it possesses a substantive form extending purely from the theory of law. extension from law. These are the major distinctions between the two forms of immunities with regards to its power, duration, scope and nature. It is clear that personal immunity has more power and generally has more functions compared to functional immunity, therefore it is given only to limited class of state officials compared to state officials, who enjoy functional immunity.

#### **4. Major Assumptions Regarding Functional Immunity**

The question about the very existence and the scope of functional immunity leads to many assumptions which complicate the idea further. Firstly, it is assumed that certain conventional rules granting *rationemateriae* to state officials exercising official duties are present. The second basic assumption is regarding the official duty. It is assumed that the acts of the official are to be attributed to the state, not to the individual himself.<sup>13</sup> The other assumption is that *rationemateriae* is not procedural but a substantial barrier precluding foreign courts from exercising jurisdiction over state officials. There is no general customary rule to understand functional immunity because in many controversial cases, officials were charged under the respective state's criminal jurisdiction despite the presence of functional immunity, while performing their official acts. The *Rainbow Warrior case*<sup>14</sup> is a case in point, in which officials were charged under criminal jurisdiction of foreign state and were convicted. In the above case, the state on whose behalf those officials acted, requested for functional immunity and had not authorized their conduct. This case made it evident that functional immunity is attributable to the states, even though the acts carried out by the officials were not consented to by them.

The rationale behind functional immunity is still a point of ambiguity, but it is scholarly opinion that functional immunity safeguards state sovereignty. The main reason for granting functional immunity is not the conduct of the officials themselves,

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<sup>13</sup> Hazel fox, *The law of state immunity*, 353 (3<sup>rd</sup>edn, oxford international press, 2002).

<sup>14</sup>France-New Zealand Arbitration Tribunal, (1990) I.L.R.500 82.

but the respect for the sovereign state they represent. This is in consonance with what is embodied in the principle of *par in parem non habet imperium*. In different political views, it is said that the state takes the responsibility for the acts of the officials. State practice of attribution has many a time shown that, a state cannot exempt itself from attribution by waiving the immunity of such officials. The fundamental reason for waiver of immunity is to absolve the state of its liability. However, such waiver will be nullified because of the attribution rule, according to which even *ultra vires* acts are attributable to the state. This affirms that there is a dual responsibility on the state. The first is to protect officials from criminal jurisdiction, and second, to protect the state responsibility. Attribution of state responsibility to a state organ and exercise of criminal jurisdiction over foreign officials by virtue of the prospect of dual attribution of certain acts, was considered a reasonable explanation.<sup>15</sup> The treaty rules of granting *Rationemateriae* to a certain category of state officials seems to be a desideratum instead of sovereign equality of state. In a recent judgment given in the case of *Abu Omar*, the court clarified the scope of consular functions for which immunity can be granted. It was observed that there should only be a limited number of consular duties covered by *rationemateriae* and limited administrative duties in accordance with the laws of the territorial state.<sup>16</sup> The rationale enshrined in the convention regarding functional immunity does not seem to protect the state sovereignty, irrespective of the acts of the consuls. There is no general principle of functional immunity governing the state officials, neither is there a bar on criminal prosecution by the territorial state. *Ultra vires* acts, which are grave in nature, do not mean that those are non-sovereign acts-it means those acts which cannot be incorporated in the functions which the officials are lawfully authorized to carry out by the state.

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<sup>15</sup>Letelier v. Republic of Chile, 488 F. Supp. 665 (D.D.C. 1980).

<sup>16</sup> 'Abu Omar' case, General Prosecutor at the Court of Appeals of Milan v Adler and ors.ILDC 1960 (IT 2012) (Supreme Court of cassation, 2012).

## 5. Doctrinal Approaches Regarding Functional Immunity and its Flaws

There are three major approaches regarding functional immunity. The first approach is the oldest and is of a generic and simplistic legal nature. It entails that functional immunity applies to all the state officials and their acts come under the ambit of official capacity.<sup>17</sup> Other theories are based on the dogmatic method, derived from the conceptual premise that every official act of the official can be attributed to the state. While many scholars believe that it has to do more with the protection of the states' internal systems, some others believe that it is used in order to protect the principle of 'non-interference' in matters related to the Constitution. A third set of scholars, however, believe functional immunity is a tool that is mostly used for the protection of the state's exclusive jurisdiction. This theory is based on an inductive approach, which prohibits the exercise of jurisdiction on foreign state officials. This theory, however, has a major flaw. There is a fundamental lacking in its argument as it is based on unsubstantiated principles and the application of these principles uniformly to all officials, irrespective of the nature of acts carried out by them.

The second one is quite limited in its scope, as it covers a finite set of acts of the state officials. This approach works on the premise that functional immunity covers only international acts executed by state officials.<sup>18</sup> This means that it covers the acts of officials, that are committed on behalf of the state, sealed with the authority of the sending state. In other words, this theory postulates that for the commission of these acts, the officials cannot be held personally responsible. It elaborates on the relationship between the state and the foreign official, with respect to functional immunity and norms of international law. It also bars acts that are based neither on federal duties nor on prohibited acts of international law. This has

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17 Accountability in Foreign Courts for State Officials' Serious Illegal Acts: When Do Immunities Apply?, December 2016 International Justice and Human Rights Clinic, The University of British Columbia.

18C. C. HYDE, INTERNATIONAL LAW CHIEFLY AS INTERPRETED AND APPLIED BY THE UNITED STATES, 821 (Little, Brown & Co. 1945-I).

created a loophole by denying the possibility of attributing individual responsibility, thereby making the states wholly responsible. The recent changes in international law have amalgamated the idea of individual responsibility with the state. However, only a few officials are awarded with functional immunity by virtue of their acts overseas, as it would be complex to include all officials of foreign state under functional immunity.

The third approach is traditional and complex. It states that given the complex and fragile nature of functional immunity, there cannot be a single norm governing functional immunity. In simple terms, a concrete customary law cannot be applicable to all officials in the same way for their acts. It is a radical norm that changes with respect to different official and different acts. It depends on the kind of act performed by the state official concerning the act protected under functional immunity. A radical change in international law concerning functional immunity has evolved and has an effect of progressively reducing the application of the functional immunity. There is a slight difference between the application of functional immunity and personal immunity.

These approaches of international law, derived from unproven assumptions, will only prove or impose a particular international norm on all state officials irrespective of act. It is therefore, necessary that relevant tests be developed in order to determine the class of state officials who may enjoy the power of immunity. There are several valuable consequences which follow the grant of immunity. It is therefore pertinent that the test for grant of immunity be rigorous.



## 6. The Legal Ambit of the Official Act

The true meaning of the term “official act” and its extent consists of both legal and factual elements. It is a choice between judicial officers and their official acts, and, the sovereign equality of sovereign states. Whenever an act is performed in the light of sovereign authority, it will have undisputed functional immunity.<sup>19</sup> It is true that significance has been attached to acts committed in official capacity to such an extent, that a major consideration for the grant of *rationemateriae* depends on whether acts committed are within the official capacity of the individual concerned or not. International Law Commission reports and conventions have often said, ‘when the act of the official is grave in nature and is termed as international crime,’ it should be a question of state sovereignty whether such an act comes under functional immunity.<sup>20</sup> In the case of *McElhinney v. Ireland*,<sup>21</sup> where the officials’ act on foreign territory was such that it was closely related to diplomatic relations, it was considered to be within the scope of functional immunity. With reference to this, it can be said whenever the act is of such a nature that it could defile the diplomatic relations between the states, the privileges of functional immunity would be available to the concerned person.

Acts that are of such a nature so as to term them as international crimes, are also subject to functional immunity, since they are committed on behalf of the state. The International Court of Justice (ICJ) upheld this view in the case of *Djibouti v France*.<sup>22</sup> It was held that the state should take responsibility for the acts of the state officials protected by the power of functional immunity, because officials are acting on their behalf and not independently. If an official is explicitly told to commit an act that amounts to an

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<sup>19</sup>LORNA MCGREGOR, IMMUNITY V ACCOUNTABILITY: CONSIDERING THE RELATIONSHIP BETWEEN STATE IMMUNITY AND ACCOUNTABILITY FOR TORTURE AND OTHER SERIOUS INTERNATIONAL CRIMES (Redress, 2005).

<sup>20</sup>Report of the International Law Commission, 69th Session, 2017.

<sup>21</sup>*McElhinney v Ireland* 123 ILR 73 (2001) (European Court of Human Rights).

<sup>22</sup> *Certain Questions of Mutual Assistance in Criminal Matters, Djibouti v France*, ICJ Rep 177 (2008).

international crime it will automatically be considered as an official act. The existing definition of the official acts comes from cases like the *Arrest Warrant case*,<sup>23</sup> where it was held that immunity either personal or functional should be granted for the efficient performance of their functions on behalf of the state. In another case of *Jones v United Kingdom*,<sup>24</sup> it was held that official acts are those that are carried out under the official authority of the state. Since there is no statute which recognizes and facilitates the co-existence of both, functional immunity and individual criminal responsibility, the applicability and framework of the former is rendered extremely rigid. The judgment in the *Arrest warrant case* cleared many important doubts on the topic. It was held that crimes committed by the officials are not to be recognized as operations undertaken on behalf of the state. Similarly, in the dissenting opinion given in the case of *Germany v Italy*<sup>25</sup> it was held that crimes committed are not part of state functions.

Furthermore, domestic or political crimes committed on foreign soil can be termed as official acts if committed on behalf of the state. State authorized or state sanctioned acts for officials are their sole duty, and obstructing the performance of such acts will narrow the scope of the functional immunity. Crimes committed on behalf of the state should be attributable to the state itself, irrespective of them falling within the ambit of an official act. The consideration for the applicability of the functional immunity should solely depend on the circumstances. It is therefore necessary that, the applicability of functional immunity be decided on a case to case basis.

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<sup>23</sup> *Arrest Warrant case*, Democratic Republic of Congo v. Belgium, ICJ Rep 75 (2002).

<sup>24</sup> *Jones and Others v United Kingdom*, 53 ILM 540 (2014) (European Court of Human Rights).

<sup>25</sup> *Jurisdictional Immunities of the State*, Germany v Italy, ICJ Rep 99 (2012) (Judge Cangado Trindade).

## **7. The Importance of States' Consent in the Grant of Functional Immunity**

The consent of a sovereign state plays an essential role in the fundamental functioning of the *rationemateriae*. The very roots of *rationemateriae* stem from the consent of the sovereign states. As in the case of *Schooner Exchange*,<sup>26</sup> the judges were of the view that an exception to sovereign immunity must be traced back up to states consent itself. In essence, sovereign immunity is granted to the state and not to the individual. It is the state which then extends this immunity to its officials acting in other states. States consent to the grant and recognition of functional immunity as it is mutually beneficial. Consent, therefore, is an absolutely necessity in order to enforce the privileges of functional immunity. A disagreement on the principle of immunity between the sovereign states concerning sovereign equality and general principles of international law, will produce uncertainty.

Consent can be expressed or implied. When implied it holds less authority. The most important step towards a change in the system of functional immunity can be initiated when sovereign states work together in order to relax the authority of such immunity. This is especially necessary when the situation is grave in nature, harming international relations and sovereign equality. States cannot possibly argue to defend the officials in case of grave international crimes, as it will not only harm the accountability between the states, but also disrupt the international community as a whole.

## **8. The Operation of Functional Immunity in Civil and Criminal Jurisdictions**

### **8.1 Immunity from Civil Jurisdiction**

There are three approaches to analysing civil jurisdiction and functional immunity through case laws. The first category of cases is where officials were denied functional immunity in a blunt

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<sup>26</sup> *The Schooner Exchange v McFadden*, 11 US 116, 135 (1812), (Supreme Court of United States, Marshall CJ).

manner.<sup>27</sup> Herein, the officials are not given a chance to negotiate and the civil courts give their final order regarding such immunity. The next is of those, where the courts didn't directly deal with the presence of any customary laws on *rationemateriae*, but stressed on their authority over the officials and indirectly denied the presence of any such immunity.<sup>28</sup> The last set of cases is where the courts have awarded functional immunity to officials and considered it of equal value as that of the immunity of the state. In these cases, it was recognized that functional immunity granted to officials is not individual power, but that which is extended by sovereign states to the officials to work in furtherance of the welfare of the state. Some countries have their own laws that award officials with functional immunity,<sup>29</sup> which protect them in the fulfillment of their official acts. As mentioned in the *European Court of Human Right case (ECHR) of Jones*,<sup>30</sup> where the court affirmed the presence of customary international norms, it was observed that functional immunity is to be provided to officials at least in civil cases. The presence or absence of civil jurisdiction is question of fact and not of law, as functional immunity will be covered for official acts. If an official commits any civil wrong in his official capacity, he will be immune from the institution of proceedings against himself as functional immunity will be awarded for such an act. Such immunity, however, will not be provided for acts which are not done in his official capacity.

## 8.2 Immunity from Criminal Jurisdiction

The relationship between criminal responsibility and functional immunity is complex and difficult to understand. It is made more complex when the norms of functional immunity prevent the victim from obtaining justice for the sole reason that the accused is

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<sup>27</sup>Fenton Textile Association Limited v Krassin, 1 Annual Digest Rep Public Intl L Cases 295-298 (1922).

<sup>28</sup>Samantar v Yousuf and ors. ,147 ILR 726 ff (2012).

<sup>29</sup>State Immunity Act of the United Kingdom 1978, State Immunity Act of Canada 1985.

<sup>30</sup>CEDRIC RYNGAERT, JONES V UNITED KINGDOM: THE EUROPEAN COURT OF HUMAN RIGHTS RESTRICTS INDIVIDUAL ACCOUNTABILITY FOR TORTURE, 47-50 (30th edn, Utrecht Journal of International and European Law 30, 2014).

protected by functional immunity.<sup>31</sup> In general, the grant of such immunities hinder the path of the victim to access justice as the grant of immunity extinguishes any substantive right that the victim may have. Generally, the courts deny functional immunity to officials charged with international crimes. These also include espionage, for which the dispute of Cyprus and Israel can be used as a reference. In this case, two Israeli officials were charged of espionage in Cyprus and were sentenced by the court.<sup>32</sup> Serial breaches of law of war are also included herein, as is obvious from the observation in the case of *Von Lewinski*.<sup>33</sup> The unlawful trespassing of a foreign territory is also an example of the same. The *Arrest Warrant case*<sup>34</sup> played a major role in denying functional immunity to officials. Functional immunity, accordingly, is limited to state officials acting in their official capacity. Functional immunity, therefore, is inapplicable to acts done by the officials in their personal capacity. In the prominent case relating to functional immunity, *Prosecutor v Blaskic*,<sup>35</sup> the judges unanimously held that, if the concerned person acts in his official capacity, those acts are not imputable to them individually, but to the state on whose behalf they acted. It was further observed that the state would be held responsible even if the said crimes constituted International crimes. However, the *Arrest Warrant case* was of the contradictory viewpoint, wherein it was held that officials should be prosecuted in foreign courts alone for the crimes committed by them in their individual capacity and not for those which were done in their official capacity.<sup>36</sup>

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<sup>31</sup> Waite and Kennedy v Germany, 118 ILR 121 (1999).

<sup>32</sup> Rantsev v. Cyprus and Russia, Application no. 25965/04, Council of Europe: European Court of Human Rights, 7 January (2010).

<sup>33</sup> Inre Von Lewinski, vol. 16 Annual Digest Rep Public Intl L Cases 509 ff (1949).

<sup>34</sup> Arrest Warrant case, Democratic Republic of Congo v. Belgium, ICJ Rep 75 (2002).

<sup>35</sup> Prosecutor v Blaskic, Case No IT-95-14-AR108, 29 October, (1997), (International Criminal Tribunal for the former Yugoslavia, Appeals Chamber).

<sup>36</sup> Arrest Warrant case (Democratic Republic of the Congo v Belgium), ICJ Rep 3, [61] (2002).

On the contrary, some courts have formulated that functional immunity does not apply to official's part of international crimes. An example for the same is the case of *Belgium v Senegal*<sup>37</sup> where former president of Chad Mr. H. Hab̄re dealt with international crimes regarding torture, during his presidency. It was Belgium's contention that both states being party to the Convention against Torture and other Cruel Inhuman or Degrading Treatment or Punishment,<sup>38</sup> Belgium has have violated Article 7, of the Convention which says that parties to this convention are obliged to "prosecute" or "extradite" anyone who has committed any inhuman crime. Belgium filed an application before the ICJ. The court was of the opinion that functional immunity cannot be absolute and cannot be granted even in instances where inhuman crimes have been committed. The Court also believed that Senegal was at fault by providing asylum to the former President of Chad, under the pretext of immunity.

There are, however, exceptions for functional immunity and criminal jurisdiction on state officials. It is substantially clear that functional immunity cannot be availed for the typical exercise of governmental functions that will not be attributable to the state. The above mentioned case not only criticized the actions of nations providing shelter to officials who are the offenders of grave crimes but also limited the boundary of functional immunity. Grave international offences cannot be regarded as acts covered under official duty, as those acts are neither ordinary state functions nor acts that states can perform solitarily. In the case of *Germany v Italy*,<sup>39</sup> the court was of the view that functional immunity cannot assuage the grave nature of the international crimes committed outside the purview of the official duty, as they had been committed in private capacity.

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<sup>37</sup> Questions relating to the obligation to prosecute or extradite (*Belgium v Senegal*), ICJ Rep 422 (2012).

<sup>38</sup> Convention against Torture and other cruel inhuman or degrading treatment or punishment, 1984.

<sup>39</sup> Jurisdictional immunities of the State (*Germany v Italy*), [2012] ICJ Rep 99.

Both of the above mentioned ICJ judgments concur with the opinion that functional immunity is not extended to state officials, when any crime is committed in their official capacity. In crimes against humanity such as in the *Eichmann Case*,<sup>40</sup> functional immunity was denied, based on their act which was considered to be against the society. In the *Kovtunenko Case*,<sup>41</sup> the official was charged for the offence of defamation. In this case, even though it was established that the official was acting in his official capacity, functional immunity was denied. Furthermore, in other instances too, were grave crimes such as murder, abduction or terrorism were committed, functional immunity was not granted. Judges are of the view that functional immunity should not subsist for international crimes as it would expose the state's internal administration to review by foreign courts. This would defeat the point of state sovereign equality along with the non-intervention principle. On the contrary, some scholars are of the view that *rationemateriae* should be removed from international crimes because it cannot be regarded as an official act. They believe that the continuance of immunity for international crimes will definitely decrease the importance of law and will create injustice.

## **9. Rationale behind the Grant of Functional Immunity to International Organizations**

The main reason organizations claim functional immunity is to secure its independence. International organizations belong to ratified states and each of those states is entitled to immunity. International organizations with the support of functional immunity provide safeguards to all the ratified states. For efficient functioning and the maintenance of balance of power, organizations should be kept out of influence. Functional immunity stabilizes member states by ensuring equal distribution of power and decision management. International organizations cannot be regarded as states, because of the lack of territorial boundary and the fact that they have a judiciary of their own. In relation to the

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<sup>40</sup>Attorney-General of the Government of Israel v Adolf Eichmann, [1968] 36 ILR 277-342, specially 308-312.

<sup>41</sup>Kovtunenko v U Law Yone, [1960] 31 ILR 259 ff.

territory of operation too, organizations depend on sovereign member states, with limitations both geographical and operational. Therefore, functional immunity of sovereign states protects the mechanism of organizations altogether. Waiver of such immunity is very rare and the dispute settlement mechanism is weak.<sup>42</sup>

Organizations enjoy functional immunity for the purposes of independent functioning however, the assumed restrictive premise of immunity turned out to be fairly wide and unrestricted. In the case of *Dupree Associates Inc. v OAS*,<sup>43</sup> where the action was brought against OAS in the U.S. District court, it was held that OAS enjoys immunity and was absolved from all charges. The court also held that organizations enjoy the same functional immunity as sovereign states. Additionally, in the case of *Cynthia Brazak and Nasr Ishak v. the UN et al*,<sup>44</sup> the United Nations and its top officials were sued for sexual harassment. The American District Court and the Court of Appeal, both, gave the decision in favor of the United Nations as they enjoyed functional immunity from jurisdiction of the courts. It is not mandatory for an organization to be associated with the sovereign state, but an International Organization may have its own authority, for e.g. Even though the United States of America, is not a party to the International Organizations Immunities Act, 1945, yet the World Bank has provided functional immunity to the concerned state through the respective statute.<sup>45</sup> International organizations enjoy functional immunity based on diplomatic practices. Scholars have opined that the functional immunity granted to organizations should only be limited to their efficient and independent functioning. Some have even said that privileges and immunities should be strictly limited to their independent status and not be of a nature, which permits misuse.

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<sup>42</sup> Emmanuel Gaillard and Isabelle Pingel-Lenuzza, *International Organizations and Immunity from Jurisdiction: To Restrict or to Bypass*, 51 (ICLQ, 2002).

<sup>43</sup> *Dupree Associates Inc. v. OAS*, [1982] 63 ILR 92.

<sup>44</sup> *Cynthia Brazak and Nasr Ishak v. the UN et al.*, 551 F.Supp.2d 313 (2008 U.S. District Court).

<sup>45</sup> International Organizations Immunities Act 1945, 22 U.S.C. §288a ("IOIA").



## 10. Extent of Functional Immunity granted to Different Classes of State Officials

### 10.1 High Ranking Officers, Diplomatic Agents and Officials on Special Mission

High-ranking officials generally perform their duties in their own states and only occasionally in foreign states. The officials enjoy personal immunity and disputes regarding *rationemateriae* only arise scarcely. Operations performed by High-ranking officials on the forum state do not generally involve an infraction of criminal law of some other state. There are guidelines to prevent exercise of criminal jurisdiction, for example, the act of *state doctrine* or *Forum non convenine*. This means that no sovereign state can interfere with the independent functioning of the other sovereign state and it has to respect its judiciary and its decisions. In the case concerning the of the former Head of State Venezuela,<sup>46</sup> his acts were not considered to be under the ambit of his official duty. Despite this, judges classified those acts as common crimes performed by officials by state doctrine. The proposition adopted by the *Institut de Droit International* (IDI) refers to immunity to officials from civil, criminal and administrative jurisdiction not as an exercise based on the nature of the act committed, but as one which ensures that there is only restricted interference in the discharge of the officials' duties.

The first category of officials who need functional immunity the most, is that of diplomatic agents. Such immunity is granted after taking into consideration the general practices resorted to by former diplomatic agents with regard to the performance of their official duties. Diplomatic officials enjoy a wide array of immunities, as they benefit from personal immunity which covers both personal and official acts, leading to the absorption of *rationemateriae*. These practices are more or less derived from the judgments of the courts and the Vienna Convention which gave it a black letter form enabling diplomats to enjoy both kinds of

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<sup>46</sup>Jiminez v U.S. District Court, 407 U.S. 297 (1972, Supreme Court of United States).

immunity.<sup>47</sup> The next set of officials who are in need of functional immunity, consists of the various Heads of states, Heads of Governments, and Ministers and officials from the department of Foreign affairs. These officials enjoy functional immunity during the mandate. The scope and ambit of this immunity too, has to be inferred from the practice of the former head of states, governments and foreign minister with regard to the official acts performed, when they were in office. However, the grant of such immunity is relatively non-uniform and is granted only sparingly.<sup>48</sup> The last category of officials refers to members on special missions. In 1969, the *New York convention on special missions*<sup>49</sup> was constituted with the intention of later subsuming it with the permanent mission and it grants a balanced functional immunity similar to that granted to a diplomatic agent.<sup>50</sup> However, in recent practice, functional immunity applies only after the completion of their mission. Sometimes the various bilateral and multilateral treaties usually aid the grant of functional immunity.

## 10.2 Military Officers

There is a lot of ambiguity as to the extent to which military officials enjoy functional immunity. Scholars believe that their immunity is strictly limited to their military duty in foreign states; others believe that immunity is limited to cover only criminal and disciplinary immunity, which is limited to the military force.<sup>51</sup> The extent of the application of such immunity is still uncertain as most of the military operations in the foreign state are covered by bilateral treaties or multilateral treaties, for example, Status of Force agreements. The exercise of jurisdiction varies from treaties to

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<sup>47</sup>Vienna Convention on Diplomatic Relations, April 18, 1961, art. 38, art. 39(2), 500 UNTS 95.

<sup>48</sup>Regina v Bow Street Metropolitan Stipendiary Magistrate, Ex Parte Pinochet Ugarte ('Pinochet III') [1999] 119 ILM 136 ff.

<sup>49</sup>Convention on Special Missions, Arts. 24-31, December 8, 1969, 1400 UNTS 231.

<sup>50</sup>Khurts Bat v Investigating Judge of the Federal Court of Germany, [2011] EWHC 2029 (Admin) and (2012) 3 Weekly L Rep 180.

<sup>51</sup>G P Barton, 'Foreign Armed Forces: Immunity from Criminal Jurisdiction', 186-234 (31 edn, British YB Intl L, 1950); H Fox, *The Law of State Immunity*, 717 (2<sup>nd</sup> edn, OUP, 2008).

treaties. Where some treaties grant exclusive jurisdiction to sending states, some others grant immunity to the receiving state. Sometimes concurrent jurisdiction is also given to both the sending and receiving states. Although in recent practice, the sending state has priority over the receiving state in relation to jurisdiction, it is more balanced than the grant of functional immunity to diplomatic agents. This view can be substantiated by the judgment in case of *Ship Enrica Lexie*<sup>52</sup> between India and Italy. The court herein, rejected the defendant's pleadings that marines enjoy functional immunity and observed that the same is dependent on the treaties between the respective sending and receiving states.

In matters relating to the armed forces, where the military is a beneficiary of the functional immunity, despite residing on a temporary or permanent basis, it is governed by many bilateral or multilateral treaties. These treaties or agreements provide exclusive jurisdictions over its forces. There is neither reference of any customary rule regarding *rationemateriae* nor exemption from jurisdiction for armed force, from their official acts.<sup>53</sup> After the 1951 London agreement between the states, on North Atlantic Treaties regarding position of officials,<sup>54</sup> Article VII of the agreement allowed the host state to exercise criminal jurisdiction over military officials for the violation of domestic rules. It was drafted not to give an exemption of immunity, but to allocate jurisdiction between sending state and receiving state.

### 10.3 Consular Agents

Consular agents also enjoy functional immunity for acts performed in the exercise of their functions. The Vienna Convention on Consular Relations, 1963<sup>55</sup> governs the immunity of consular officials. Article 43 affirms that *rationemateriae* is attached to consular functions. The U.S. State department has also stated that there should be no proceedings in relation to the accepted consular

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<sup>52</sup>Latorre and others v Union of India and Others, (2012) 252 KLR 794.

<sup>53</sup> G.P. Barton, *Foreign armed forces: Immunity from criminal jurisdiction*, 186, 192-93 (27 edn, Brit, Y.B. INT'L L, 1950).

<sup>54</sup> North Atlantic Treaty Organization, April 4, 1951.

<sup>55</sup> Vienna Convention on Consular Relations, April 22, 1963, art. 43, 596 U.N.T.S. 261.

functions in the realm of official duty. The Paris court in the case of *Bigelow v. Zizianoff*,<sup>56</sup> recognized that functional immunity exists only for the acts done in relation to their consular functions. The major case in this regard is that of *Abu Omar*<sup>57</sup> where it was determined that the scope of immunity for consular officials is limited to their administrative duty with regard to the laws of the territorial state. Another such case is that of *Rissmann*,<sup>58</sup> wherein a consular agent of Germany was charged for defaulting passports. The Italian Courts, however, held that issuing passports is a typical consular function. Conclusively, functional immunity is granted to consular officials only for the discharge of typical consular functions, as envisaged by the Vienna Convention.

## 11. Conclusion

In relation to the extensive study mentioned herein above, the only conclusion that can be drawn is that there are no general customary norms or any principles regarding functional immunity that are applicable to state officials. However, there are norms that are applicable to specific state officials with respect to their official duties. It is lucid that official acts are covered under functional immunity, but it is still a question of fact and law, especially, if the offence is grave in nature. The limits of official capacity are not defined in law. It is to be ascertained by facts of each case. Consent of the states plays a major role in granting functional immunity, in its absence there will be no authority providing functional immunity to the official. This radical change in the nature of functional immunity is because of the numerous doctrinal approaches derived to operate functional immunity for the state officials who act on behalf of state.

The major misconception about functional immunity is that immunity to state officials is an organ of state in itself. That the acts of officials are not attributable individually, but to the state itself is a false premise, as the evolution of functional immunity with

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<sup>56</sup> *Bigelow v. Zizianoff*, [1932] 4 I.L.R. 384.

<sup>57</sup> Proc. Gen. Appello Milano, *Sez v Penale: Nasr Osama Mustafá Hassan detto Abu Omar e altri*, [2013] 96 *Rivista di diritto internazionale* 272 ff.

<sup>58</sup> *In re Rissmann* [1994] 71 I.L.R. 577.

regard to international crimes brought normativity in the legal regime of international law and introduced a principle wherein, those acts are attributable even to individuals. Therefore, the functional immunity enjoyed by state officials is limited and also coincides with officials who enjoy personal immunity.

The prior foundation of functional immunity no longer exists, as the immunity granted to state officials for their acts is obsolete. Today, the state officials, because of the duties that concern extrinsic issues of the state, have a power of functional immunity. The duties of state officials should not be considered as the true rendition of the state, in relation to other states. Generally, officials enjoy personal immunity which provides them with more exemptions than that provided by functional immunity, during their mandate. It is also reasonable that functional immunity, albeit less important, should be bound to shield officials even after the end of their mandate. It should also protect officials who do or do not represent state internationally but act on behalf of the state. The extent of functional immunity is limited only to protect certain specific functions of the State in foreign territories, through the protection offered to state officials performing their duties on behalf of the state. This should predominantly be dependent on the efficiency with which the officials discharge their duties.