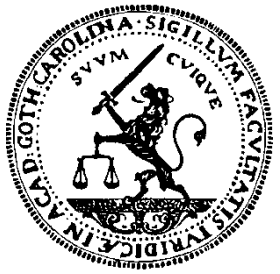

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Crime & Authority: State Actors' Protection

A Study on the Correlation Between Functional Immunity and Rules on Obedience to Orders

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Summary

Functional immunity shields individuals from criminal responsibility when they commit a criminal act in a foreign state, on behalf of their home state. However, a prevailing issue in this domain is the ambiguity surrounding the scope of individuals that are eligible for functional immunity.

This thesis examines the extent to which individuals can evade criminal responsibility for acts perpetrated on behalf of their home state in a foreign state. As acts committed for the home state typically stem from an order or instruction, it is pertinent to explore the correlation between functional immunity and rules on exemption from criminal responsibility due to obedience to orders.

It is acknowledged that functional immunity can be granted to an individual who has acted in an ‘official capacity’, either due to his position or the nature of the committed act. A general principle of law on obedience to orders is then developed based on an analysis of Swedish, German, and American law. The general principle of law proposes that freedom from criminal responsibility can be claimed for minor crimes when the act was authorised, and the action was necessary and proportionate.

This thesis posits that the general rule on duty of obedience could serve as a supplement when an individual fails to acquire functional immunity. However, the thesis also asserts that defining the range of individuals who can have functional immunity should not involve establishing a "lower limit" in the hierarchical structure. Future research should instead focus on refining the definition of ‘official capacity’ and specify when an individual has acted within such a capacity.

Sammanfattning

Funktionsimmunitet innebär att en person som begått en brottslig gärning i en annan stat, men på uppdrag av hemstaten, blir immun mot straffrättsligt ansvar. Ett kontemporärt problem på området är dock att kretsen individer som kan erhålla funktionsimmunitet är oklar.

I detta examensarbete studeras frågan i vilken utsträckning individer kan undgå straffansvar för gärningar begångna å statens vägnar i en annan stat. När en individ begår en brottslig gärning å sin hemstats vägnar föreligger i regel en order eller instruktion till grund för agerandet, varför det blir av intresse att studera sambandet mellan funktionsimmunitet och regler om straffrihet på grund av lydnadsplikt.

Det konstateras att funktionsimmunitet kan erhållas av en person som agerat i en "officiell kapacitet", antingen med anledning av dennes position eller med hänsyn till den begångna gärningens natur. En generell regel om lydnadsplikt skapas sedan utifrån en studie av svensk, tysk och amerikansk rätt. Där konstateras det att straffrihet kan erhållas för mindre brottslighet då det funnits ett bemyndigande att begå gärningen samt att agerandet ska ha varit nödvändigt och proportionerligt.

Detta examensarbete konstaterar att denna generella regel om lydnadsplikt skulle kunna tillämpas som ett komplement då funktionsimmunitet inte erhålls av individen i fråga.

Detta examensarbete konstaterar dock också att en avgränsning av kretsen personer som kan ha funktionsimmunitet inte bör kretsa kring att försöka dra en "undre gräns" i den hierarkiska strukturen. För vidare studier bör fokus i stället avsättas på att fortsättningsvis avgränsa och definiera begreppet "officiell kapacitet" och när en individ har agerat i en sådan ställning.

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1. My mother Lidija
2.
3.
4. My father Misa and my sister Sandra
5. Professor Wong for challenging me
6. Adam for thesis breaks
7. Everyone else

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Abbreviations

AC	Law Reports, Appeal Cases
AJIL	American Journal of International Law
ALI	American Law Institute
ARSIWA	Articles on the Responsibility of States for Internationally Wrongful Acts
BeamtStG	Civil Servants Status Act [German: Beamtenstatusgesetz]
Bet.	Report [Swedish: betänkande]
BGB	German Civil Code [German: Bürgerliches Gesetzbuch]
BGBl.	Federal Law Gazette [German: Bundesgesetzblatt]
BGH	Federal Court of Justice [German: Bundesgerichtshof]
BGHSt	Decisions of the Federal Court of Justice in Criminal Cases [German: Entscheidungen des Bundesgerichtshofs in Strafsachen]
BrB	Swedish Criminal Code [Swedish: brottsbalken]
BVerfG	Federal Constitutional Court [German: Bundesverfassungsgericht]
BVerfGE	Decisions of the Federal Constitutional Court [German: Entscheidungen des Bunderverfassungsgerichts]
Ds	Ministry Publications Series [Swedish: Departementsserien]
ECtHR	The European Court of Human Rights

EJIL	European Journal of International Law
F.2d	Federal Reporter, 2nd Series
GA	General Assembly
GG	Basic Law for the Federal Republic of Germany [German: Grundgesetz für die Bundesrepublik Deutschland]
ICC	The International Criminal Court
ICCSt	The Rome Statute of the International Criminal Court
ICJ	The International Court of Justice
ICLQ	International & Comparative Law Quarterly
ICTY	The International Criminal Tribunal for the former Yugoslavia
ILC	The International Law Commission
ILDC	International Law in Domestic Courts
Ill.2d	Illinois Reports, 2nd Series
ILR	International Law Reports
JO	The Parliamentary Ombudsmen [Swedish: Riksdagens ombudsmän]
JZ	Lawyer's Journal [German: Juristenzeitung]
Lackner-FS	Festschrift for Karl Lackner on his 70th birthday, 1987 [German: Festschrift für Karl Lackner zum 70. Geburtstag, 1987]
L.ED.2d	Lawyers 2nd Edition
LG	District Court [German: Landgericht]

LJIL	Leiden Journal of International Law
MK	Munich Commentary on the Criminal Code [German: Münchener Kommentar zum Strafgesetzbuch]
MPC	Model Penal Code
N.E.2d	North Eastern Reporter, 2nd Series
NJA	Swedish Legal Journal [Swedish: Nytt juridiskt arkiv]
NStZ	German Journal for Criminal Law [German: Neue Zeitschrift für Strafrecht]
N.W.2d	North Western Reporter, 2nd Series
OLG	Higher Regional Court [German: Oberlandesgericht]
P.2d	Pacific Reporter, 2nd Series
Prop.	Government bill [Swedish: proposition]
RDI	Journal of International Law [Italian: Rivista di Diritto Internazionale]
RGSt	Decisions of the Imperial Court in Criminal Matters [German: Entscheidungen des Reichsgerichts in Strafsachen]
RH	Court of Appeal Cases [Swedish: Rättsfall från Hovrätterna]
RIAA	Reports on International Arbitration Awards
Rskr	Parliamentary letter [Swedish: riksdagsskrivelse]
S.Ct.	Supreme Court Reporter
S.E.	South Eastern Reporter

SFS	Swedish Code of Statutes [Swedish: Svensk författningssamling]
SG	Legal Status of Military Personnel Act [German: Soldatengesetz]
SOU	Swedish Government Official Reports [Swedish: Statens offentliga utredningar]
StGB	German Criminal Code [German: Strafgesetzbuch]
StPO	German Code of Criminal Procedure [German: Strafprozeßordnung]
StrRG	Criminal Law Reform Act [German: Gesetz zur Reform des Strafrechts]
SvJT	Swedish Law Journal [Swedish: Svensk Juristtidning]
S.W.2d	South Western Reporter, 2nd Series
S.W.3d	South Western Reporter, 3rd Series
T.D.	Tentative Draft
UKHL	House of Lords
U.S.C.	The Code of Laws of the United States of America
Wis.2d	Wisconsin Reports, 2nd Series
Wn.2d	Washington Reports, 2nd Series

1 Introduction

1.1 Background

Functional immunity (*ratione materiae*) grants individuals of a foreign state protection from international or transnational jurisdiction due to acts performed in an 'official capacity' on behalf of their home state. Contrarily to personal immunity (*ratione personae*), functional immunity pertains to the conduct in question rather than the individual involved.[1] Furthermore, it can be said that this form of immunity persists for these actions even after the individual has vacated their official role.[2]

There are two key issues when defining the range and applicability of functional immunity within contemporary doctrine. Firstly, there is the question of which crimes functional immunity can be invoked for. This problem has been relatively well examined and in the domain of international criminal law, stipulations have been established which limit the crimes for which state officials cannot claim functional immunity.[3]

The second issue pertains to identifying the scope of individuals that can be granted functional immunity. Personal immunity is stringently confined to a select few individuals, often including heads of state, a condition not paralleled in functional immunity. Determining who can be perceived as *acting on behalf of a home state* in the event of a potential criminal act is not extensively researched in current doctrine or case law. It is broadly established, however, that the lower an individual is positioned in the state's hierarchical structure, the less probable it is that they can procure functional immunity.[4]

Given the lack of comprehensive studies outlining the demarcation of those eligible for functional immunity, it is compelling to consider the rules regarding the duty of obedience within the scope of this thesis.

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[1] Cryer, Robinson and Vasiliev (2019), 512 f. The reasoning behind this practice will be further explained in chapter 2.
[2] Baumann and Stigen (2018), 204 f.; Werle (2005), 172.
[3] In this particular context, compare, e.g., articles 6–8*bis* in the Rome Statute of the International Criminal Court (ICCSt), in which it is not possible to grant functional immunity for individuals that have committed grave international crimes (the so-called four core crimes).
[4] Alebeek (2007), 103 ff.

When a state official acts on behalf of the home state, orders or instructions are invariably involved. At the same time, most national legal systems include provisions that justify an individual's criminal act if it was executed following an order. Hence, it is worthwhile exploring the interplay between the rule on functional immunity and those on duty of obedience, and consequently determining the group eligible for functional immunity.

A study such as the one conducted in this thesis, encompassing both functional immunity and rules on obedience to orders, has not been done before. An answer or clarification on the matter would fill a gap in current academic discourse. Neither doctrine nor case law pertaining to functional immunity have engaged in this kind of discussion either. Consequently, this thesis carries a significant novelty value.

1.2 Purpose and Research Question

The main purpose of this thesis is to investigate the degree to which individuals can evade criminal responsibility for actions committed in a foreign state, on behalf of their home state. Often, such actions are based on an order or instruction from the home state, spurring the exploration of the relationship between functional immunity and rules relating to impunity derived from obedience. Therefore, it is relevant to study the following question.

> *Can a general rule on exemption from criminal responsibility, due to orders or instructions, act as a complement when functional immunity is not applicable?*

In order to thoroughly address the primary research question, it's essential to delve into two underlying questions. The first pertains to the conditions under which an individual is deemed to have acted in an 'official capacity'. The second examines the circumstances in which an individual can be considered to have acted under orders or instructions.

While not being the primary purpose of this thesis, it also aims at clarifying the law on functional immunity, especially in relation to the question of what circle of individuals that can obtain functional immunity.

Doctrine often-times uses different terms, such as *absolute immunity*, *state immunity* and *functional immunity* interchangeably, while also viewing the term 'official act' differently. Some scholars, such as O'Keefe and Yang, argue that functional immunity is an extension of state immunity, while Alebeek argues that it is a distinct kind of immunity, separate from state immunity. Arguably, these disputes are of academic interest. It is thus important to clarify what is being meant by 'functional immunity' as well as taking a stance on the matter, in order to use it as a parameter in chapter 4.

1.3 Methodology and Materials

Primarily, this thesis utilizes a legal dogmatic method, where an analysis is conducted of preparatory work, legal cases, and relevant legal provisions to decipher the legal rules.[5]

The scope of functional immunity is explored through a comprehensive analysis of the available doctrine in the field. This analysis includes an in-depth review of reports prepared by the International Law Commission (ILC), as well as legal cases dealing with functional immunity. Relevant legal cases from international and national courts and tribunals are considered to provide a wide perspective on the issue.

In developing a general legal principle on the duty of obedience, this thesis takes into account laws from Sweden, Germany, and the United States, thereby incorporating the perspectives of two continental legal systems and one common law system. At this stage, it is important to note that this is not a comparative analysis that pits the legal systems against each other. Rather, this study adopts a form of legal dogmatics, establishing a general rule based on the shared attributes across the three systems. Official translations are readily available for Swedish laws,[6] while the English translation of the German Penal Code can be accessed on the German government's website.

Given that neither German nor American law has a direct counterpart to the Swedish rule about the 'foreman's order', one must delve

[5] Jareborg (2004), 'Rättsdogmatik som vetenskap', SvJT, 1–10.
[6] Official translations are provided on the Swedish government's website.

into the essence of the Swedish rule. The rule on foreman's order (chapter 24 section 8 BrB) primarily serves as a justification for exemption from responsibility. Consequently, this study also explores section 34 StGB (*Justifying Emergency*) in German law and section 3.03 MPC (*Execution of Public Duty*) in American law, as they fundamentally offer justifying grounds for exemption from responsibility in circumstances where obedience to orders or instructions is a factor.

When creating the general principle of law, considerations will also be given to two underlying factors, which broadly explain why rules on the duty of obedience to orders exist in the first place. First, the lack of knowledge or intent will be considered as a reason or factor. Second, the purpose of avoiding greater harm is also considered as another reason. These two factors are based on the material used to describe the current law in Sweden, Germany, and the United States.[7]

When discussing the methods being used in this particular thesis, it must be pointed out that the creation of the general principle of law is difficult to place under any specific method. This is due to the fact that there is neither a clear *de lege ferenda* nor a clear *de lege lata* purpose behind creating the general rule. It summarises the national legislations on the matter of freedom from criminal responsibility due to obedience to orders. However, the created general rule neither explains the law itself, nor tries to argue what the law should be. What can be clarified, though, is that studying the respective legal system requires different focuses. The analysis of Swedish law will largely be based on preparatory work, the studies of German law are based on available doctrine and the explanations of American law are to a greater extent based on case law.

Extending the above, it is essential to note that the legal dogmatic method adopted here allows for the establishment of the general rule based on the commonalities existing across different legal systems. This approach not only ensures an extensive and inclusive perspective but also fosters a comprehensive understanding of the principles underlying the functional immunity and the duty of obedience. This study thereby contributes

[7] See chapter 3.

significantly to the broader discourse in international criminal law by providing a nuanced understanding of the subject matter.

1.4 Delimitations

The primary limitation of this thesis revolves around the jurisdiction of the crimes that may be relevant to this research. Crimes under the jurisdiction of international courts and tribunals are excluded (as functional immunity ceases to apply in these instances), with the focus shifted towards crimes under national jurisdiction. This approach is aimed at ensuring the applicability of functional immunity.

Another restriction lies in the fact that diplomatic immunity will not be considered in the ongoing study, as this specific type of immunity is particularly regulated by its own conventions. With diplomats or diplomatic personnel being excluded from the study taking place in this thesis, the term 'public official' should be interpreted as an individual acting in an *official capacity*, which will be studied in chapter 2.3.

Since the application of functional immunity is not commonly seen in either national or international courts and tribunals, no specific time-based restriction has been applied to the legal cases analysed.

It is further important to note that while this thesis focuses on crimes under national jurisdiction, the implications of these findings may extend beyond this context. The underlying principles, particularly those related to functional immunity, could potentially inform discussions around jurisdictional boundaries in international law. Furthermore, even though diplomatic immunity is not within the scope of this study, understanding the mechanisms of functional immunity may shed light on other forms of immunity. Lastly, the lack of time-based restrictions on the analysed cases provides a broad perspective on how functional immunity has been interpreted and applied, offering insights into its evolution within the legal system.

1.5 Current State of Research

As the relationship between functional immunity and the duty of obedience has not been previously studied, there exists no prior research in this

particular area. However, legal scholars like Alebeek, Cryer, and O'Keefe have developed extensive work regarding functional immunity, which should be acknowledged. Their scholarly contributions have primarily been utilised in explaining the background and various aspects of functional immunity. The work of these scholars provides a solid foundation upon which this thesis builds. These contributions, coupled with new research into the intersection of functional immunity and the duty of obedience, can potentially open up new perspectives, ultimately enhancing our comprehension of the legal protections available to individuals acting on behalf of a state. This thesis, therefore, not only fills a gap in the existing doctrine but also expands the discussion, potentially paving the way for future research in this field.

1.6 Outline

This thesis commences with chapter 2, where the foundation and theoretical application of functional immunity is explained. This includes an analysis to understand when an individual is deemed to have operated in an 'official capacity'. Chapter 3 takes into account national regulations regarding the exemption from criminal responsibility due to the duty of obedience, facilitating the creation of a generalised rule in this realm. In addition, the underlying reasons for the existence of such rules are examined. Chapter 4 presents a practical implementation of the functional immunity rule along with the generalized rule on obedience duty. This is done to showcase how these rules interrelate and influence the potential for impunity. Finally, this thesis draws to a close with a comprehensive analysis in chapter 5 and a summary of findings in chapter 6.

2 Functional Immunity

2.1 Introduction

This chapter explores functional immunity by defining the concept and the providing the reason behind its existence. To effectively employ functional immunity as a parameter for assessing an individual's exemption from criminal responsibility (as will be done in chapter 4 below) it is vital to establish its boundaries. Being a complex and fragmented area within international criminal law, the chapter commences by clarifying the role of sovereignty in shaping and justifying functional immunity. This discussion serves as the groundwork for examining the scope and applicability of functional immunity, emphasizing that only state-related actions performed by individuals[8] in an official capacity can result in such immunity.

Thereafter, the chapter explores various perspectives on what constitutes an 'official act' to determine if these differing viewpoints impact the delimitation of functional immunity. Since the prevailing doctrine suggests that a wide range of individuals can be granted functional immunity, the chapter finishes by studying whether the requirement of a certain position or the nature of the committed act qualifies an individual as acting in an 'official capacity'.

2.2 Sovereignty as a Motive Behind Functional Immunity

To understand functional immunity, one must first understand the concept of state immunity and, in particular, why it extends to criminal jurisdiction. As a point of departure, state immunity means that a state cannot be made accountable for its actions within its borders before an international body, a foreign court or some other kind of administrative body. Unless the state

[8] Both serving and former foreign state officials, O'Keefe (2015), 425 f.; Werle (2005), 173. Diplomats holding *diplomatic immunity*, which is closely related to functional immunity, are excluded from this study, see Lewis (1990), 26 f.

submits to a local jurisdiction through consent, a state is normally also exempt from proceedings taking place in a foreign state, for actions that have been committed in that particular forum state.[9]

Rationales being put forward to justify state immunity has historically varied. Cryer et al. argues that actions have been based on fictions of 'extra territoriality' – meaning that premises of a mission have been an extension of the sending state's territory – or fictions of 'personal representation' – implying that an ambassador would be equivalent to its head of state.[10] The *Schooner Exchange*[11] is considered the first decision referring to the doctrine of foreign state immunity. At the time, the court argued that respect for 'the dignity of the head of state or the sending state' had some significance.[12] All of these rationales seem to be based on the sovereignty of the acting state and its representatives, in one way or another.

In the last century, there has been attempts to codify and clarify this field of law. When defining state immunity, current doctrine and case law explicitly refer to the maxim of *par in parem non habet imperium* and similar variations of it, roughly translated to 'equals do not have authority over each other'.[13] The development is interesting since it can be argued that the maxim did not have anything to do with state immunity in the first place. According to Dinstein, the maxim derives from canon law and can be traced back to a ruling made by Pope Innocent III in 1199, where he limited powers that future popes could have over their successors.[14] The *par in parem* maxim was not mentioned in the *Schooner Exchange* either and it did not gain popularity among scholars and courts until the 1920s. The principle

[9] Yang (2008), 1 ff.
[10] Cryer, Robinson and Vasiliev (2019), 510 f.
[11] *The Schooner Exchange v. McFaddon*, 11 U.S. (7 Cranch) 116 (1812). The case concerned the jurisdiction of U.S. federal courts over a claim against a foreign military vessel visiting a national port. In interpreting customary international law, the Supreme Court concluded that there was no jurisdiction over the vessel.
[12] Caplan (2003), 745; Barker (1996), 191 f.
[13] Cryer, Robinson and Vasiliev (2019), 511; Cryer, 'Immunities and international criminal tribunals' in *Research Handbook on Jurisdiction and Immunities in International La*w, ed. Orakhelashvili (2015), 473; O'Keefe (2015), 426; Council of Europe, *Explanatory Reports*, 5, para. 1. The maxim has also been referred to in ECtHR case law, see *Al-Adsani v UK* (35763/97), 2001 (2002), para. 54; *Fogarty v. UK* (37112/97), 2001 (2002), para. 34; *McElhinney v. Ireland* (31253/96), 2001 (2002), para. 35; *Kalogeropoulou v. Greece* (59021/00), (2002).
[14] Dinstein (1966a), 407 ff.

thus appears to be more of a *post factum* rationalisation of the current position of courts – being that state immunity is justified on the basis of sovereignty – rather than the actual reason behind state immunity.[15]

As a consequence of the historical development, the relationship between functional and state immunity is not completely assured. Functional immunity can at least be said to have derived from the same notion of sovereignty.[16] According to Kelsen, a state 'manifests its legal existence only through acts performed by human beings in their capacity as organs of the state'.[17] In this context, the principle that no state has jurisdiction over another must mean that a state cannot exercise jurisdiction through its own courts over acts of another state. Kelsen thus argued that state officials cannot be held personally responsible for acts attributable to the state unless there is consent. He advanced a broader rule, not only protecting a foreign state from proceedings intended to exercise jurisdiction over it, but also proceedings indented to challenge the legality of acts attributable to it.[18]

At this stage, the prevailing view is that functional and state immunities are intertwined and that the immunities may affect each other; suing individuals for their official conduct indirectly impleads their state and hence is caught by the principle of state immunity.[19] Upon closer consideration, the functional immunity of foreign state actors concerns a non-personal responsibility for acts committed on behalf of the home state. Alebeek therefore argues that the application of the rule of state immunity on foreign state actors, in itself, can be viewed as an autonomous principle that precedes the rule of state immunity. While Kelsen argued that a state actor cannot be *held* personally responsible, the autonomous view suggests that an individual state actor *bears* no responsibility in its personal capacity.[20] In other words, a state actor cannot be summoned to appear in court to account for criminal acts, not because he is accorded immunity, but because the acts

[15] Yang (2008), 53 ff.
[16] Alebeek (2008), 105 ff.
[17] Kelsen and Tucker (1966), 358.
[18] Alebeek (2008), 106; Kelsen (1944), 82 f.
[19] Fox and Webb (2015), 361 ff. See also *Ex Parte Pinochet Ugarte (No. 3)* [2000] 1 AC 147 at 268–270 and 281, UKHL.
[20] Alebeek (2008), 106 f.; *Società Arethusa Film v Reist* 22 ILR 544 (Italy, Tribunal of Rome 1953), para. 546.

themselves are not *his*.[21] The application of state immunity, to cases involving state actors, is based on the fact that there is no personal liability for the criminal act committed by the state actor himself. When an individual has committed an act on behalf of the foreign state, it is the state itself that bears the responsibility and not the individual.[22]

Although this study excludes crimes processed by international criminal tribunals and courts, it is still noteworthy to observe that the International Criminal Tribunal for the former Yugoslavia (ICTY) has adopted some degree of this non-personality principle in the *Blaškić* case, implying that the view is legitimate.[23] The tribunal stated that 'officials are mere instruments of a State' and that 'their official actions *only* can be attributed to the State'. Thus, 'state officials cannot suffer the consequences of wrongful acts *which are not attributable to them personally* but to the State on whose behalf they act'.[24] Similarly, an analogy can also be made to the *Krstić* case, in which the tribunal stated that '*only* the State can be responsible for the acts of an official' and that, as a corollary, 'the State may demand for its State officials (where their acts are attributed only to the State) a *functional immunity* from foreign jurisdiction'.[25]

In an attempt to define functional immunity on a level of principle, the International Court of Justice (ICJ) also suggested in both *Certain Questions of Mutual Assistance*[26] and *Jurisdictional Immunities of the State*[27] that immunity *ratione materiae* from foreign criminal jurisdiction, enjoyed by state officials under customary international law, is conceptually a manifestation of state immunity.[28] In other words, it is a function of the immunity of the official's state itself from the jurisdiction of another state's

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[21] Conforti and Iovane (2021), 220 ff. Note that the discussion correlates to the question of whether functional immunity should be viewed as a distinct kind of immunity; this will be further examined under chapter 2.3 *Official Acts*.
[22] Liivoja and Benvenisti (2017), 87 f.
[23] Werle (2005), 172 f.; Lattimer and Sands (2003), 130 ff.
[24] *Prosecutor v Blaškić*, IT-95-14-AR, ICTY, paras. 38–41 (emphasis added).
[25] *Prosecutor v Krstić*, IT-98-33-A, ICTY, paras 26–27 (emphasis added).
[26] *Certain Questions of Mutual Assistance in Criminal Matters* (Djibouti v France), Judgment, ICJ Rep 2008, 177, 242, paras. 188, 191 and 193.
[27] *Jurisdictional Immunities of the State* (Germany v Italy: Greece intervening), Judgment, ICJ Rep 2012, 99, 139, para. 91.
[28] O'Keefe (2015), 426 f.; see also Buzzini, 'Lights and Shadows of Immunities and Inviolability of State Officials in International Law: Some Comments on the *Djibouti v France* Case' (2009) 22 LJIL 455.

courts – in which the official, when acting in that capacity, is an organ[29] – and, consequently, is in line with the earlier mentioned *par in parem* maxim.

The interpretation above aligns with the conventional understanding of a state official's immunity 'ratione materiae' from foreign criminal jurisdiction,[30] but it also challenges the proposition that functional immunity should be viewed as a distinct, *sui generis* category of immunity.[31] Both the ICTY and the ICJ have endorsed the conventional view, which was subsequently adopted by the International Law Commission's (ILC) first special rapporteur on the immunity of state officials from foreign criminal jurisdiction.[32] Furthermore, states have not challenged the characterization during their examination of the ILC's work in the Sixth Committee.[33]

In conclusion, functional immunity can be said to derive from the concept of state immunity; it protects foreign state officials from being held *personally* responsible for acts committed on behalf of their home state. It has its roots in the same notion of sovereignty as state immunity, which is the idea that a state cannot be made accountable for domestic actions before some kind of a foreign legal body. The *par in parem* principle has been used to explain the immunity. The relationship between functional and state immunity is intertwined, with the understanding that suing individuals for their official conduct indirectly implicates their state and thus falls under the principle of state immunity. The question of whether it should be viewed as a distinct, *sui generis* category of immunity will be further

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[29] O'Keefe makes here an interesting analogy to Articles on Responsibility of States for Internationally Wrongful Acts (ARSIWA), GA res 56/83, 12 December 2001, Annex ('Articles on Responsibility of States'), art. 4(1), available at the UN website, see O'Keefe (2015), 426.
[30] See, e.g., *Ex Parte Pinochet Ugarte (No. 3)*. See also *Jones and Others v The United Kingdom* App nos. 34356/06 and 40528/06 (ECtHR, 14 January 2014), para. 200 (where the court stated that 'the immunity which is applied in a case against State officials remain "State" immunity') and para. 204 (where it stated that '[t]he weight of authority at international and national level therefore appears to support the proposition that State immunity in principle offers individual employees or officers of a foreign State protection in respect of acts undertaken on behalf of the State under the same cloak as protects the State itself' – referring to *Second Report Kolodkin* in paras. 202–204).
[31] A discussion about it is held in, e.g., Cassese, 'When May Senior State Officials be Tried for International Crimes? Some Comments on the *Congo v Belgium* Case' (2002) 13 *EJIL* 853, 862 – referring to *Arrest Warrant of 11 April 2000* (*Democratic Republic of the Congo v. Belgium*), delivered on 14 February 2002. See also Akande and Shah, 'Immunities of State Officials, International Crimes, and Foreign Domestic Courts' (2011) 21 *EJIL* 815, 826–827.
[32] See *Second Report Kolodkin*, 12–13, para. 23. It was also stated in *Eighth Report Hernández*, 20–28, paras. 16–19.
[33] O'Keefe (2015), 427 f.

examined in 2.3 below. What can be said though is that functional immunity of foreign state actors concerns a non-personal responsibility for acts committed on behalf of their home state, as demonstrated in mentioned case law and doctrine.

2.3 Official Acts

Having established the origins and rationale for functional immunity, it is crucial to delve deeper into determining when a person can be considered to have acted in an official capacity. In such instances, a distinction is commonly made between *acta jure imperii* (a state's official acts) and *acta jure gestionis* (a state's private law acts).[34] Although this distinction has been primarily applied to civil proceedings,[35] it is also relevant to criminal proceedings when determining whether an individual is entitled to functional immunity for acts committed in an official capacity.[36] In relation to criminal proceedings, the focus is on whether the act in question can be considered an *official act* (i.e., an act *jure imperii*), which would generally grant functional immunity to the individual who performed the act.[37]

While no specific tests or criteria have been explicitly laid out in criminal law proceedings to distinguish between acts *jure imperii* and acts *jure gestionis*,[38] certain cases and legal sources provide guidance on the subject. In the context of state practice, a limited number of municipal courts have addressed the issue of functional immunity in criminal proceedings under international law concerning foreign state officials or former officials. These courts have typically focused on immunity from criminal jurisdiction

[34] Baumann and Stigen (2018), 205; Franey, 'Immunity from the criminal jurisdiction of national courts' in *Research Handbook on Jurisdiction and Immunities in International La*w, ed. Orakhelashvili (2015), 210 f.; O'Keefe (2015), 428 f.; Yang (2008), 58 f. and 75 ff.
[35] Meaning that methods and tests to distinguish acts *jure imperii* from acts *jure gestionis* are more developed and prevalent in doctrine that discusses civil law procedures, see, e.g., Bantekas and Nash (2007), 98 ff.; Franey, 'Immunity from the criminal jurisdiction of national courts' in *Research Handbook on Jurisdiction and Immunities in International La*w, ed. Orakhelashvili (2015), 210 ff.
[36] O'Keefe (2015), 428 ff.
[37] Franey, 'Immunity from the criminal jurisdiction of national courts' in *Research Handbook on Jurisdiction and Immunities in International La*w, ed. Orakhelashvili (2015), 210 f.
[38] In the sphere of civil law, there is currently a discussion on whether acts *jure imperii* should be determined on the basis of a '*purpose* of the act' or a '*nature* of the act' test, see Bantekas and Nash (2007), 98 ff.; Yang (2008), 85 ff.

for actions conducted within an *official capacity*, or alternatively, in relation to *official acts*.[39] With regards to the *Arrest Warrant* case, a brief dictum by the ICJ mentioned the unavailability of immunity *ratione materiae* for the accused concerning foreign criminal jurisdiction for acts performed 'in a private capacity'.[40] This statement implies, at least *prima facie*, that functional immunity extends to all acts conducted by the accused in a *public*, viz. *official*, capacity.[41] A similar implication arose in the *Certain Questions of Mutual Assistance* case, where the ICJ 'observe[d] that it ha[d] not been "concretely verified" before it that the acts which were the subject of the summonses as *témoins assistés*[42] issued by France were indeed acts within the scope of [the relevant officials'] duties as organs of State'.[43]

The ILC's first special rapporteur on functional immunity clearly concluded that the application of functional immunity is not limited by a specific reference to the distinction between *acta jure imperii* and *acta jure gestionis*.[44] There seems to be no disagreement with this view, either within the Commission itself or, more importantly, within the Sixth Committee of the General Assembly. In summary, as the ILC's first special rapporteur contended, both current and former state officials are generally entitled to immunity from foreign criminal jurisdiction under customary international law for acts conducted in their official capacity, without any further evaluation being specified.[45]

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[39] O'Keefe (2015), 430. Compare, e.g., *Adamov (Evgeny) v Federal Office of Justice*, ILDC 339 (CH 2005), para 3.4.2 (Switzerland); *Lozano (Mario Luiz)* ('the Calipari case'), ILDC 1085 (IT 2008), para 5 (Italy).

[40] *Arrest Warrant of 11 April 2000* (*Democratic Republic of the Congo v. Belgium*) ICJ Rep 2002, 25, para. 61.

[41] O'Keefe (2015), 430; Obokata (2010), at 71 and 74.

[42] A *témoin assisté* is a legal status in French law that translates to 'assisted witness'. It refers to someone who is not formally charged with a crime but is believed to have information that could potentially incriminate them. These individuals are summoned to provide testimony while receiving certain legal protections, such as the right to legal assistance during questioning, see Cryer and Kalpouzos (2010) 'I. International Court of Justice, *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v France)* Judgement of 4 June 2008', International & Comparative Law Quarterly (ICLQ), 59(1), at 193–205.

[43] *Certain Questions of Mutual Assistance in Criminal Matters* (*Djibouti v France*), Judgment, ICJ 2008, 243, para. 191; ibid, 244, para. 196.

[44] See *Second Report Kolodkin*, 16, paras. 28, 58 and 94(e).

[45] O'Keefe (2015), 431 – referring to *Second Report Kolodkin*, 58, para. 94(b) (agreeing with his *First Report*). See also *Preliminary Report Escobar*, 15, para. 65; *Second Report Escobar*, 16, para. 50; *Third Report Escobar*, 6, para 12(b). See also *International Law Commission*

In summary functional immunity is, according to *lex lata*, solely applicable to official acts, or acts *jure imperii*. As briefly mentioned in 2.2 above, there are, however, two differing perspectives on defining an act as *jure imperii* within the doctrine.[46] This debate stems from the disagreement over whether functional immunity should be considered a separate form of immunity or an extension of state immunity.[47] These varying viewpoints may impact the answer to the question of whether an involvement of orders or instructions is necessary for a state actor to be granted functional immunity. This will thus be further examined in the subsequent chapters.

2.3.1 Dual perspectives on 'official act'

It has been concluded that functional immunity can only be plausible when a state official has committed an official act, also known as an act *jure imperii*. When trying to define the scope of functional immunity, several doctrinal concepts have emerged regarding what constitutes an 'official act'. A doctrinal analysis shows that 'official acts' can be viewed through two distinct lenses.[48] There is also an ongoing discussion on whether functional immunity should be viewed as an extension of state immunity or as a distinct, *sui generis* type of immunity.[49] This consideration will be incorporated into the exploration of the two perspectives on acts *jure imperii*.

The first perspective, also known as *'act of state' as 'an act attributable to the state'*, posits that when an individual in a state role commits an act in his official capacity, then he is essentially performing an act on behalf of the state.[50] In this viewpoint, functional immunity is seen as an extension of state immunity, originating from the concept that the individual's actions, regardless of whether they overstep their authority or violate

(ILC), Sixty-sixth session, Immunity of State Officials from Foreign Criminal Jurisdiction, Statement of the Chairman of the drafting Committee, Mr Gilberto Vergne Saboia, 25 July 2014, 6, where the Chairman concluded the same stance, available at ILC's website.

[46] Cryer, 'Immunities and international criminal tribunals' in *Research Handbook on Jurisdiction and Immunities in International La*w, ed. Orakhelashvili (2015), 472 f.

[47] Lee (1991), 492 ff.

[48] Those being discussed below, Alebeek (2008), 143 ff.

[49] O'Keefe (2015), 427 ff.; Bantekas and Nash (2007), 101 f.

[50] Salmon (1994), 465 f.

their professional duties, are seen as an extension of the state's acts.[51] Thus, responsibility for these actions is attributed to the state, not the individual. This perspective emphasises the role of individual officials as a representative of the state, suggesting that their official acts are inherently tied to the state they represent.[52] The key determining factor for functional immunity here is the individual's status as a state official, positioning the responsibility and potential immunity with the state, not the individual.

The second perspective, however, also known as '*act of state' as 'a sovereign act'*, focuses more on the nature of the act itself rather than the position or role of the individual performing it.[53] In this viewpoint, if an act by a state official would have been immune if carried out by the state itself, then the official is also granted immunity.[54] The emphasis is on the act's connection to the state's power and sovereignty, underscoring the concept of functional immunity as a distinct, *sui generis* kind of immunity, separate from state immunity.[55] This perspective suggests that foreign state officials have a functional immunity due to *official* acts, and that an act, even though carried out by an individual, is seen as an act of the state (a 'sovereign' act).[56] As a result, the responsibility is attributed solely to the state. This viewpoint establishes functional immunity and the status of an act as

[51] Alebeek (2008), 144; see the commentary of the ILC to articles 4 and 7 of the ILC Articles on State Responsibility, ILC Report on the work of its fifty-third session (2001) A/56/10. Furthermore, it has been stated that, also in cases of 'clear incompetence', state accountability would not be obstructed, see, e.g., *Union Bridge Company Claim (United States v. Great Britain)* 6 RIAA 138 (Arbitral Tribunal (Great Britain–United States) 1924); *Caire Case (France v United Mexican States)* 5 RIAA 516 (French–Mexican Claims Commission, 1929); *Youmans Case (United States v United Mexican States)* 4 RIAA 110 (US–Mexico General Claims Commission, 1926).
[52] Salmon (1994), 468 ff.; Alebeek (2008), 146.
[53] Fox (2015), 509 f.; Alebeek (2008), 147 ff.
[54] Compare *Rubin v Console della Repubblica di Panama* (1978) 61 RDI 565 (Corte di Cassazione, 1978), at 567.
[55] Alebeek (2008), 148; see also League of Nations, Committee of Experts for the Progressive Codification of International Law, Questionnaire no 11, Competence of the Courts in Regard to Foreign States, Report of the Sub-Committee (Rapporteur Matsuda) (1927), (1928 special supplement) 22 AJIL 117, at 125. For a more recent example, see *Jaffe v Miller and Others* 95 ILR 446 (Ontario Court of Appeal 1993), where it was stated that there cannot be jurisdiction exerted over foreign state officials who have acted under the colour of law, if these officials would have been granted immunity should the lawsuit have been brought directly against the state.
[56] Compare Dinstein (1966b), 83 f.

an 'act of state' based on the nature of the act itself and its ties to the sovereign power of the state – not the official's position or role.[57]

The following can thus be said in order to simplify the complex arguments being made. The first perspective posits that the position of the official is the determining factor, since acts committed in a specific role should be presumed to constitute *official acts*. The second perspective, however, posits that the specific kind of act committed should be the determining factor instead, meaning that if the purpose of an act can be traced back to the home state, then that act should be *official* in nature.

2.3.2 A presumption of authority

Each state, as a sovereign entity, has the right to define the structure of its government, assign roles to its officials and delineate the scope of their official duties. It is within this framework that the question arises of whether a state official is acting in an 'official capacity' when performing certain acts.[58] Given that it can often be challenging to determine if individuals are genuinely acting on behalf of a state, either because of their positions or the nature of their acts, the presumption serves as an additional layer.[59]

The *presumption of authority* posits that, unless it is abundantly clear that a state official's act constitutes an act *jure gestionis* (an act done in a private capacity), his *ostensible authority* is assumed to be *actual authority*.[60] This presumption thereby bears substantial, practical implications for the decision on granting an official functional immunity. In other words, even if a public official asserts that he acted outside his official role or contrary to his instructions, if the acts present the appearance of an official act under the colour of his authority, it can still be considered an official act. Conversely, even if an official holds a relevant role, an act may not be

[57] This was also concluded in Harvard Law School, Research in International Law (Reporter JS Reeves) Diplomatic Privileges and Immunities, (1932 supplement) 26 AJIL 15, at 99.
[58] Alebeek (2008), 112 f.; Seyersted, 'Jurisdiction over Organs and Officials of States, the Holy see and Intergovernmental Organisations' (1965) 14 ICLQ 31, at 33. This was also stated in *Soc Vivai industriali Roma v Legazione dell'Arabia Saudita* (1955) 38 RDI 79 (Tribunale di Roma, 1953), at 82.
[59] Compare *Jaffe v Miller and Others* 95 ILR 446 (Ontario Court of Appeal 1993), at 460.
[60] Alebeek (2008), 113; O'Keefe (2015), 435. See also *The Prosecutor v Tihomir Blaškić* (IT-95-14-AR) (ICTY), at section 41 and 43 as well as *Boyer v Aldrète* 23 ILR 445 (Tribunal Civil de Marseille, 1956).

considered *official* if it significantly deviates from the expected responsibilities or state directives.[61]

In essence, the *presumption of authority* allows for ostensible authority to be interpreted as actual authority. Since individual states have the sovereignty to assign 'official' positions or delineate what acts are attributable to the state, it can be challenging to determine if an official is genuinely acting on behalf of the forum state. As long as the act in question is not clearly an act *jure gestionis*, the presumption applies. The principle should thus be considered when using both perspectives analysed in chapter 2.3.1[62] as parameters for the practical assessment in chapter 4.

2.4 General Conclusions on Functional Immunity

Functional immunity is a complex concept in international criminal law that provides an exemption from criminal responsibility for individuals acting in an official capacity. Functional immunity is closely tied to the concept of state immunity, which is rooted in the principle of sovereignty, asserting that a state cannot be held accountable for its actions within its borders before an international body, a foreign court, or another administrative body.

The application of functional immunity is largely influenced by the interpretation of what constitutes an 'official act'. The first interpretation of what an 'official act' encompasses, often identified as *'act of state' as 'an act attributable to the state'*, implies that when state officials perform an act within their role, they are essentially acting on behalf of the state *per se*. Their acts are thus perceived, not as personal, but as acts representing the state. The second interpretation, often referred to as *'act of state' as 'a sovereign act'*, places more emphasis on the nature of the act committed, irrespective of who performs it. From this standpoint, an act is deemed official

[61] O'Keefe (2015), 436 f.; *Second Report Kolodkin*, 15, para. 27. See also *Mallén v United States of America*, 4 RIAA 173, 177, paras. 7–9 (Mexico–US General Claims Commission 1927), which concerned the guise of state authority being misused as a mere cover for personal revenge.

[62] Those being *the position of the official* and *the nature of the act committed*, respectively.

if it is a task typically performed by a state official in their role. Such actions are viewed as sovereign acts, signifying the authority of the state.

In both instances, the acts performed by state officials are inherently linked to the state they represent – either because of the position or the nature of the act. As a result, these officials may be afforded functional immunity, which serves to protect them from legal ramifications for these official acts, on the grounds that they are viewed as actions of the state rather than individual actions.

In addition to these perspectives, the *presumption of authority* plays a significant role in defining the applicability of functional immunity. The presumption posits that, unless it is abundantly clear that a state official's act constitutes an act *jure gestionis* (acts done in a private capacity), his ostensible authority is assumed to be actual authority. This presumption thereby bears substantial, practical implications for the decision on granting an official functional immunity.

In essence, functional immunity applies when the claim necessarily regards the official in his official capacity. In these cases, the foreign state is, *in fact*, the defendant. This means that the official is not personally responsible for the criminal act committed, but rather, it is the state itself that bears the responsibility. The determination of whether an act is 'official' is due to either the position of an official or the nature of the act an official commits.

3 Duty of Obedience

3.1 Introduction

This chapter explores exemptions from criminal responsibility due to compliance with orders. No general standard exists for such an exemption; the chapter thus begins by examining national regulations from Sweden, Germany, and the United States. In addition, two primary theories supporting the existence of these exemptions will be studied as well. The first theory argues that obedience to orders may negate the intent or knowledge needed for accountability, while the second theory suggests that individuals may commit crimes in order to prevent worse outcomes. The chapter aims to develop a general principle of law, using the legal systems and theories mentioned, to later be used as a parameter in chapter 4.

It is crucial to note that this study only offers an initial indication of such a general principle of law. Although a more comprehensive investigation is needed, as pointed out in chapter 1, the findings in this chapter suffice for the study's purposes. The chapter also compares the created legal principle to the rule on ‘Superior orders and prescription of law’ in Article 33 of the Rome Statute of the International Criminal Court (ICCSt), demonstrating a congruence between the two and their basis in current *opinio juris*.

3.2 Duty of Obedience in National Law

3.2.1 Sweden

Pertaining to general grounds for exemption from liability in Swedish legislation, chapter 24 section 8 of the Swedish Criminal Code (BrB) provides a justification based on the obligation to obey a *foreman's order* [Swedish: förmans order]. According to the provision, a person being in a relationship of obedience shall not be responsible for an act committed if, considering

the nature of the relationship of obedience, the nature of the act and the circumstances in general, the person had to obey the order.[63]

The basic principle is that an order to a subordinate to do something that would constitute a crime (a 'criminal' act) should not be obeyed and that the act, despite the order, remains a crime *per se*. Exemption from criminal responsibility for obeying an order to commit a criminal act should therefore be viewed as an exception to the presumption.[64] The provision was first introduced in the original enactment of the current criminal code (SFS 1962:700) in order to clarify the circumstances in which such an exception could be made.[65] The reason for clarifying the circumstances lies in the fact that exemption has been granted long before the provision was enacted, but for various reasons. This was especially the case if an individual had committed a crime under some kind of threat or if the limitations of which tasks were included in an individual's duties, were unclear.[66] The provision has subsequently undergone minor rewordings throughout the years, but no substantive change has been made.[67]

The three prerequisites stated in chapter 24 section 8 BrB[68] mean that a certain balance of interests must be made when assessing the absence of criminal responsibility. Primarily, it is necessary to establish a vested interest in maintaining a relationship or fulfilling a duty that entails obedience. Additionally, it is also imperative to consider another interest, namely that the person should not be required to verify the legality of commands issued to him. These two interests, when taken together, should supersede any interest in abstaining from the commission of a criminal act. In

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[63] For the English text of chapter 24 section 8 BrB, as amended through SFS 1994:458, see *The Swedish Criminal Code* (updated continuously), available at the Swedish Government's website.

[64] Strahl (1976), 386; Johansson et al. (2019), BrB 24:8 p. 1. NJA II 1949 p. 106 contains motives for the provision on disobedience for military personnel (current chapter 21 section 5 BrB), but the presumption is considered applicable also in issues relevant to this study.

[65] Rskr 1962:390.

[66] Prop. 1962:10, 399 ff.; Johansson et al. (2019), BrB 24:8 p. 1. An analogy can be made to NJA 1931 s. 183 where a corporal was acquitted of responsibility for a traffic offence after obeying the orders of a sergeant, who happened to be his foreman.

[67] Prop. 1985/86:9, 196 f.; bet. 1985/86:JuU24, 14 f.; Prop. 1993/94:130, 78; bet. 1993/94:JuU27.

[68] Those being 'the nature of the command relationship' [Swedish: lydnadsförhållandets art], 'the nature of the act' [Swedish: gärningens beskaffenhet] and 'other circumstances' [Swedish: omständigheterna i övrigt].

other words, if the interest in maintaining discipline is strong enough, the exception applies to the individual obeying the order in question.[69] The legal procedure can thus be said to primarily resemble a 'justification assessment' for the person who have carried out the act.[70]

In order to achieve a balance of interests and to evaluate the justification of potentially criminal actions in this context, the importance of addressing two subsidiary inquiries has been emphasised in the doctrinal analysis of this provision. The first inquiry involves evaluating who is involved in a relationship of obedience, while the second inquiry involves identifying the specific orders or commands that necessitate obedience.[71] Consequently, the subsequent study will adhere to the outlined structure.

Firstly, following the doctrinal analysis, one must determine who can possibly be in a relationship of obedience. In certain spheres of public law, the need to uphold discipline is as imperative as in military settings. This is particularly applicable to the police force as the work of foremen is specified in section 7 of the Police Regulation (2014:1104) [Swedish: polisförordningen]. Notwithstanding, section 8 of the Police Act (1984:387) [Swedish: polislagen] mandates police officers to comply with statutory or constitutional regulations while performing their duties, a subordinate police officer can still be exonerated from criminal liability for committing an offense based on a superior's instruction. This exception is, however, very narrow. Given that individuals are typically accountable for their own actions, the room for a police officer to be released from responsibility is relatively restricted.[72]

There are, furthermore, circumstances wherein the obligation of compliance is expressly mandated or reinforced. Such instances pertain to, among others, unarmed conscripts, civil defence conscripts, individuals

[69] Leijonhufvud, Wennberg and Ågren (2015), 81; Johansson et al. (2019), BrB 24:8 p. 2.
[70] Asp, Ulväng and Jareborg (2013), 236 ff. Since the amendment of chapter 24 of the BrB in 1994, there has been a discussion in the legal doctrine as to whether the 'foreman's order' provision should be seen as a justifying or an excusing circumstance, Asp, Ulväng and Jareborg (2013), 239 f.; Leijonhufvud, Wennberg and Ågren (2015), 82.
[71] Johansson et al. (2019), BrB 24:8 p. 2 f.; Asp, Ulväng and Jareborg (2013), 236.
[72] Asp, Ulväng and Jareborg (2013), 238 ff.

engaged in rescue operations, and security personnel.[73] However, it can be observed that the responsibility to comply with authoritative directives is notably less pronounced for individuals working in state and municipal administrations. This is primarily attributable to the relatively limited scope and nature of the orders issued in these contexts, in contrast to more extensive commands characteristic of institutions such as law enforcement agencies. Consequently, the diminished stringency of the duty of obedience in state and municipal administration reduces the likelihood of exemption from criminal responsibility.[74] The Counsel on Legislation [Swedish: lagrådet] has opined that the determination of the kind of individuals who may be granted immunity ought to be primarily evaluated based on the character of the obedience relationship. With regards to certain professional roles, the requirement for, e.g., safety precautions, has been said to entail a particularly strict relationship of obedience.[75]

The prevailing legal doctrine suggests that chapter 24 section 8 BrB is not exclusively applicable to individuals compelled to obey orders to circumvent personal liability. Rather, it also encompasses, albeit to a limited extent, those persons who possessed the option to refuse but nonetheless elected to comply with the directives.[76] Consequently, in circumstances where an individual had the opportunity to reject a command but opted to adhere to it, this provision may still be invoked by the person obeying the orders, albeit within a narrow scope and depending on the nature of the extant conditions that are governing the obedience relationship. A common example of this could involve a police officer being instructed by their superior to employ excessive force in detaining a suspect or conducting a criminal investigation.[77]

Secondly, it is crucial to identify the kind of orders that have to be obeyed. It can generally be asserted that *acts of a graver nature* [Swedish: gärningar av allvarligare art] (such as murder, rape, or aggravated

[73] Johansson et al. (2019), BrB 24:8 p. 2 f.; Asp, Ulväng and Jareborg (2013), 238. For security guards or such personnel in particular, see section 6, Act (1980:578) on Security Guards [Swedish: lagen om ordningsvakter].
[74] NJA II 1962 p. 362 ff.; Strahl (1976), 387 f.
[75] Strahl (1976), 387; Asp, Ulväng and Jareborg (2013), 238.
[76] Johansson et al. (2019), BrB 24:8 p. 2.
[77] Asp, Ulväng and Jareborg (2013), 238 f.; Johansson et al. (2019), BrB 24:8 p. 2 f.

assault)[78] cannot be justified by invoking the exemption from responsibility provided for in chapter 24 section 8 BrB.[79] Conversely, it remains entirely feasible that *acts constituting minor breaches of the law* [Swedish: gärningar av förseelsekaraktär] (such as petty theft, inflicting minor property damage or minor traffic violations)[80] may fall under the scope of the duty of obedience, consequently leading to exemption from responsibility in accordance with the provision. It is here essential to not only consider the nature of the obedience relationship, as was being done when answering the inquiry of what individuals may be involved in a relationship of obedience, but also the hierarchical standing of the person mandated to follow the order. In other words, an evaluation of the degree to which the individual holds a subordinate or superior position must also be made.[81]

The case NJA 1987 s. 655 included an evaluation of both the nature of the obedience relationship and the hierarchical standing of the persons being involved. As an individual was forced to ride with three police officers in a police bus, the police officer who drove the bus, as well as one of the other two policemen, were held liable for unlawful coercion [Swedish: olaga tvång] according to chapter 4 section 4 BrB, even though none of them was considered a foreman.[82] Even non-foremen police officers are thus obligated to intervene when witnessing unlawful acts by colleagues, as failure to do so may result in joint liability. In this case, a policeman's failure to prevent the use of force against the victim led to his liability for unlawful coercion due to his participation in the transgression.[83]

The limited prospect of obtaining exemption from criminal responsibility under chapter 24 section 8 BrB is counterbalanced by the

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[78] See chapter 3 section 1 BrB [Swedish: mord], chapter 6 section 1 BrB [Swedish: våldtäkt] and chapter 3 section 6 [Swedish: grov misshandel] respectively.
[79] If simplifying Strahl's argument, this is found on the presupposition that each individual is responsible for their own behaviour (an analogy can be made to chapter 2 section 1 and chapter 23 section 1 BrB), and thus, in cases of serious crimes, the responsibility cannot reasonably be shifted to another person, see Strahl (1976), 387 f.
[80] See chapter 8 section 2 BrB [Swedish: ringa stöld] and chapter 12 section 2 BrB [Swedish: ringa skadegörelse]. See also provisions in the Act (1951:649) on Road Traffic Offences [Swedish: Lag (1951:649) om straff för visa trafikbrott; trafikbrottslagen].
[81] Johansson et al. (2019), BrB 24:8 p. 3 f.
[82] Leijonhufvud, Wennberg and Ågren (2015), 82.
[83] See also NJA 1971 s. 245, where only the one of two policemen, who was the foreman of the other, was considered responsible for an improper action that they jointly undertook.

stipulation mentioned in chapter 23 section 5 BrB, pertaining to *minor involvement* [Swedish: ringa medverkan]. This provision articulates, *inter alia*, that in instances where an individual is compelled to engage in a criminal act by having their vulnerable position exploited, the ensuing punishment must be established below the minimum threshold of the punitive scale, not exceeding the general minimum fine. According to the doctrinal analysis, it is important to exclude the rule on minor participation according to chapter 23 section 5 BrB as these arise in similar situations. In contrast to the provision on 'foreman's order', minor involvement falls outside the punishable area. Thus, in such cases, it is not a question of a justifying circumstance.[84]

In this particular context, it can additionally be mentioned that *intermediate perpetration* [Swedish: medelbart gärningsmannaksap], which involves a person using another as a tool to commit a crime or taking responsibility for the crime, typically in situations where the other person is dependent, unwilling, or viewed as a victim,[85] should not be confused with the provision on foreman's order. Such an act would not allow for an exemption from criminal responsibility.[86]

With respect to the necessity clause in chapter 24 section 4 BrB [Swedish: nöd], it has been suggested that a public official who follows government orders may lack constitutional support, with the Parliamentary Ombudsman (JO) stating that the official is not responsible if expecting constitutional backing for orders is unreasonable.[87] With regards to putative necessity and self-defence [Swedish: putativ nöd, putativt nödvärn] in chapter 24 section 1 and section 4 BrB respectively, a person may be acquitted due to lack of intent [Swedish: bristande uppsåt], including cases of mistakenly assumed orders.[88] These provisions, alongside chapter 24 section 5 BrB[89],

[84] Johansson et al. (2019), BrB 24:8 p. 4.
[85] NJA II 1962 p. 364; Asp, Ulväng and Jareborg (2013), 240. See chapter 23 section 4 subsection 2 BrB.
[86] Johansson et al. (2019), BrB 24:8 p. 4; Asp, Ulväng and Jareborg (2013), 240.
[87] Sjöholm, SvJT 1974 p. 589 f.; JO 1975 p. 50 and 55. Note that the question arose in the aftermath of the hijacking drama in Bulltofta, September 1972.
[88] Johansson et al. (2019), BrB 24:8 p. 4. An analogy can be made to RH 1992:3, where an intoxicated driver imagined being asked by two police officers to move his car a few meters when, in fact, this was not the case. He was afterwards charged with drunk driving.
[89] Referring to freedom from criminal responsibility due to aiding or abetting in some cases.

can exempt subordinates from responsibility for crimes committed in such situations, distinct from the 'foreman's order' provision.[90]

In conclusion, Swedish legislation provides exemptions from responsibility in specific circumstances, in the sphere of public law, where obedience is necessary. This requires a careful balance of interests – those being upholding a relationship of obedience versus abstaining from committing a crime. What should be considered when doing such a balance of interests is the nature of the obedience relationship, the hierarchical standing of the individuals involved, and the severity of the actions in question. Graver acts cannot be justified under chapter 24 section 8 BrB, while less serious actions may lead to an exemption from responsibility. The limited possibility of being exempted from criminal responsibility under chapter 24 section 8 BrB means that provisions addressing minor involvement and necessity can be considered as an alternative, although with caution. These provisions can lead to reduced penalties or, in some cases, no liability for subordinates involved in minor cases of complicity. The provision is indeed primarily designed for application to Swedish supervisors. However, there is no explicit restriction in the provision that prevents its application to foreign supervisors or subordinates.

3.2.2 Germany

Regarding possible grounds for exemption from criminal responsibility, sections 34 and 35 of the German Criminal Code (StGB) stipulate that under certain conditions, criminal acts may be either justified or excused, respectively.[91] While no provision explicitly discusses an exemption from criminal responsibility due to compliance with an order, Section 34 StGB does refer, *inter alia*, to *another legal interest* [German: ein anderes Rechtsgut] as a distinct mitigating or exculpatory circumstance. Section 35 StGB, on the other hand, refers to *a special legal relationship* [German: einem

[90] Asp, Ulväng and Jareborg (2013), 239 f.; Johansson et al. (2019), BrB 24:8 p. 4.
[91] For the English text of sections 34 and 35 StGB, as promulgated on 13 November 1998 (BGBl. I S. 945, S. 3322), see *The German Criminal Code* (updated continuously), available at the German Government's website.

besonderen Rechtsverhältnis] as a relevant circumstance to be considered.[92] It is thus relevant to highlight the content of both legal provisions.

Section 34 StGB, known as *justifying necessity* [German: Rechtfertigender Notstand], addresses situations where a person commits an unlawful act to avert an imminent, but avoidable danger, which cannot otherwise be averted, and does this to avert the danger from himself or another.[93] This objective defence can thus be said to stipulate three main requisites that need to be fulfilled. First, the situation must involve *a present or imminent danger* [German: eine gegenwärtige Gefahr] that threatens a legally protected interest such as life, health, personal freedom, or another legally protected interest. In addition, such a danger must be real and not based on mere speculation. Second, the act committed must be *necessary*[94] to avert the danger, and there should be *no other legally permissible option available* to the actor to achieve the same goal [compare the German phrase: nicht anders abwendbare Gefahr]. Third, the protected interest that is being saved or defended must be of equal or higher value than the interest that is being sacrificed or harmed by the act. This means that the harm caused by the action must not be disproportionate to the harm that would have occurred if the action had not been taken. In other words, a balance of interests [German: Interessensabwägung or Güterabwägung] must be made when assessing whether the act was justified.[95]

The provision on *justifying necessity* in section 34 StGB was introduced through the second major criminal law reform from 1969, coming into effect in 1975.[96] The reform legally codified and further developed the formerly implicit justification known as *super legal state of emergency* [German: übergesetzlichen Notstands]. The aim was to both clarify and

[92] Appl (2014), 135 f.; Bohlander (2008), 45.
[93] Bock (2021), 397 f.
[94] The requirement of the committed act being necessary is a natural result of the danger being imminent, Erb and Schäfer (MK) (2020), 53; Küper, Puppe and Tenckhoff (Lackner-FS) (2018), 95 f.
[95] Murmann (2017), 248 ff. Note that this is an interpretation made by Murmann and that different formulations or divisions of the requisites are being exercised in the doctrine. A distinction is, e.g., typically – but not always – being made between the requirement of proportionality and the requirement of doing an overall balancing of interests. Compare Köhler (1997), 288.
[96] 2. StrRG; BGBl. I S. 717.

expand the circumstances under which a justification because of necessity could be invoked. This amendment proved essential because the emergency regulations in the German Civil Code (BGB) and other laws offered limited applicability in criminal cases.[97] In pertinent legal precedents, a justifying 'super legal state of emergency' typically implied that breaching a lower-value legal interest was not considered unlawful if it served to protect a higher-value interest.[98]

Subsection 1 of the provision initially enumerates life, body, freedom, honour, and property as elements to safeguard, before concluding with the phrase *or another legal good*. The prevailing view is that the provision has a relatively wide and general applicability. It is interpreted as not only protecting existing legal interests, but the provision also empowers individuals to prevent potential legal harm.[99] Furthermore, the provision extends beyond only individual interests since it can also encompass protection of legal interests for the general public[100] – that not solely involve legal interests safeguarded by criminal law.[101] A person being ordered to, i.e., confiscate an intoxicated driver's car keys has been considered justifiable on the basis of necessity to protect legal interests for the general public.[102]

The required balancing of interests according to the provision can be effectively divided into two parts. First, the act committed must be necessary to avert danger or protect a specific legal interest. If alternative actions are available, the least damaging option should be chosen. Moreover, the act must be an appropriate means of mitigating the danger. This includes adhering to the solidarity principle [German: das Solidaritätsprinzip], which ensures that the act poses minimal risk to others.[103] Second, the act committed must carry more weight than refraining from action or choosing a different course of action. In this context, Murmann highlights three key

[97] Schönke and Schröder (2014), 679 f.
[98] Compare RGSt 61, 242 and RGSt 62, 137.
[99] Fischer (2009), 303 ff.; Bock (2021), 399 f.
[100] OLG Naumburg U. v. 22.02.2018 – 2 Rv 157/17; LG Magdeburg U. v. 11.10.2017.
[101] Compare OLG Frankfurt B. v. 11.12.1978 – 4 Ws 127/78.
[102] OLG Frankfurt U. v. 28.08.1995 – 3 Ss 116/95; OLG Koblenz U. v. 25.07.1963 – (2) Ss 248/63. See also section 316 StGB regarding the offence of *driving while under the influence of drink or drugs* [German: Trunkenheit im Verkehr].
[103] Kindhäuser, Neumann and Paeffgen (2005), 1218 f.

aspects to consider when assessing such an act. Firstly, the abstract priority relationship of the legal interests involved in the specific case must be taken into account. Secondly, a comprehensive evaluation of both parties' interests is necessary. Finally, the origin of the danger must be considered.[104] In a defensive emergency, if only the interest of the person posing the danger is attacked, this factor should be considered in accordance with section 228 BGB (with regards to) when weighing the interests against the intrusion on the property.[105]

When discussing the potential application of section 34 StGB, it is relevant to note that orders and directives issued by public officials may have a justifying effect if they are legally binding for the recipient.[106] Such orders and instructions do not necessarily need to be lawful from a criminal law perspective, as has been previously pointed out. Guilt may be excluded if a comprehensive balance of interests indicates that obedience to an order, or maintaining an obedience relationship, is of significant importance for protecting the particular legal interest in question.[107] Nonetheless, the general assumption should be that there is no obligation to comply with an order to commit a crime, particularly if the act is neither justifiable nor legal under administrative law (compare section 11 part II subsection 1 SG as well as sections 35–36 BeamtStG). In such cases, acting on an unlawful order would typically not be justified.[108] Under certain circumstances, however, general clauses in administrative or public law may grant rights for special interventions (such as general police clauses according to section 127 of the German Code of Criminal Procedure, StPO).[109] This has also been concluded in relevant case law.[110]

Consequently, the use of section 34 StGB mostly depends on whether the lack of a specific guideline implies that the lawmaker did not prioritise a more prevalent interest in that scenario. To exemplify the situation, procedural tools used in criminal investigations, which have no basis in

[104] Murmann (2017), 249 f.
[105] Kindhäuser (2010), 303.
[106] BGH 27, 260.
[107] Bock (2021), 401 and 442.
[108] Schönke and Schröder (2014), 682 f.
[109] Dubber and Hörnle (2014), 447.
[110] BVerfGE 8, 326; BVerfGE 13, 161.

StPO, can rarely be expanded or permitted according to section 34 StGB.[111] Assessing such a situation should be based on determining what constitutes a genuine state emergency with some given authority involved.[112] The primary objective of the provision's formulation is to prevent its usage as a broad authorization for state actions.[113] In general, both legal doctrine and case law aim to base state actions on criminal justification grounds in narrowly defined exceptional cases. These cases typically involve state emergencies, where the highest legal interests face unforeseen dangers.[114]

Due to the limited application of justified necessity, as a ground for exemption from criminal responsibility, section 35 may become relevant in situations where a person is in a relationship of obedience and when section 34 is not applicable.[115] Section 35 subsection 1 StGB, which outlines the provision on *excusing necessity* [German: Entschuldigender Notstand], states that an individual who commits an illegal act in response to an immediate, but avoidable threat to life, limb, or freedom, in order to protect himself, a relative, or someone close to him, is considered to be acting without guilt. However, this does not apply if the individual could reasonably accept the danger, such as if they caused the danger themselves or due to a special legal relationship. In cases involving a special legal relationship, such as police officers,[116] the sentence may be reduced under section 49 subsection 1 StGB if the danger was not reasonably acceptable [German: *Besondere gestzliche Milderungsgründe*].[117] As a ground for exemption from criminal liability,[118] section 35 StGB is more likely to be applicable in situations where a person is coerced by another person to commit a criminal act (compare subsection 1) or when the individual who commits the act

[111] Compare BGH 31, 307; BGH 34, 51 f.
[112] Schönke and Schröder (2014), 683.
[113] Herzberg, JZ 2005, 321.
[114] Murmann (2017), 239; compare BGHSt 27, 260 (262 ff.), where it was pointed out that justifications of state acts should be narrowly interpreted, especially in cases of state emergency, or 'when the highest legal interests are exposed to unforeseen dangers'.
[115] Bock (2021), 496.
[116] See NStZ 2012, 236 f.; Murmann (2017), 318 f.
[117] Bohlander (2012), 193 f. Certain reasons for such a reduction or must then be clearly explained by the court in question according to section 267 StPO.
[118] Note that in Swedish criminal law doctrine, there is a discussion about whether obedience to orders should be considered on a *justifying* or an *excusing* basis for freedom from criminal responsibility.

complies with an order due to a genuine belief that he is acting lawfully (compare subsection 2).[119]

In discussing the application of both sections 34 and 35 StGB, legal experts often refer to a widely known case, the 'hijacking-case'. The hijackers, members of an organisation seeking to raise awareness about their political and religious agendas, commandeered two planes with the intent of crashing them into a crowded football stadium during a Bundesliga match. The first hijacker piloted an empty transport plane, while the second one seized a passenger plane carrying 200 people. They communicated their intent to kill as many people as possible to the authorities. Responding to the threat, the defence minister ordered two pilots to intercept and shoot down the planes over a deserted nature reserve, after which no passenger on the passenger plane survived.[120] The act that authorised the use of military force against any aircraft with the intention of killing was, however, later found to be unconstitutional. The Federal Constitutional Court found the act to breach the guarantee of human dignity according to article 1(1) of the Basic Law for the Federal Republic of Germany (GG), also meaning that the applicability of sections 34 and 35 StGB cannot have a too wide application.[121] Another case involves the *Mauerschützen* (i.e., 'wall shooters') trials, which pertains to border guards who served on the Berlin Wall. Following the collapse of the former German Democratic Republic, the Federal Court of Justice (BGH) ruled that leniency was justified because the guards' superiors, who held significantly more responsibility, could not be brought to justice in this particular circumstance.[122]

In conclusion, based on sections 34 and 35 StGB, exemption from criminal responsibility may be achieved under specific circumstances. Section 34 StGB, known as *justifying necessity*, allows for an unlawful act to be justified if committed to avert an imminent danger to a legal interest, provided the act is necessary, there is no other legal alternative, and the

[119] Kindhäuser, Neumann and Paeffgen (2005), 1244 ff. This can be compared to putative necessity or self-defence in BrB, see chapter 2.3.1.
[120] BVerfG U. v. 15.02.2006 – 1 BvR 357/05. See Bock (2021), 497.
[121] BVerfGE 115, 118; Naske and Nolte, 'Aerial Security Law', *The American Journal of International Law* (2007), 466 f.
[122] BGHSt 39, 1; 146; Bohlander (2012), 193.

harm prevented is not disproportionate to the harm caused. This provision, interpretable in a broad sense, extends to protecting potential legal harm and public interests. However, orders from public officials may also justify actions if they are legally binding. Section 35 StGB, or *excusing necessity*, is applicable when an illegal act is committed in response to a threat to life, limb, or freedom. However, this provision is more applicable in situations of coercion or when the individual genuinely believes they are acting lawfully. It's crucial to note that both sections are intended for narrowly defined exceptional cases to prevent misuse as broad authorization for state actions.

3.2.3 United States

It is important to note that, unlike countries with a unitary criminal law system, such as Sweden and Germany, each state in the United States has its own criminal code.[123] The *Model Penal Code* (MPC) is thus a significant development within the sphere of criminal law in the United States. It was completed by the American Law Institute (ALI) during its Annual Meeting in 1962, an organisation comprised of lawyers, judges, and legal scholars. Its primary purpose can be said to describe and generalise the main principles of criminal law across the nation.[124] Organised into four main parts, Article 3 of the first part of the MPC outlines the general principles governing justifications, with the provision on *Execution of Public Duty* being specified under section 3.03.[125] As a result of its comprehensive and coherent structure, the MPC has been widely, in whole or partially, adopted by numerous jurisdictions throughout the United States.[126] It will thus also be considered in this study. The main rationale for examining the MPC, even though no state has adopted it *in toto*, lies in its comprehensive provisions. It

[123] Titus Reid (2017), 10 ff.
[124] LaFave (2009), 5 f.; Robinson and Dubber (2007), 'The American Model Penal Code: A Brief Overview', *The New Criminal Law Review*, 320 ff.
[125] For the full text on Section 3.03 of the MPC with regards to *Execution of Public Duty*, as adopted at the 1962 Annual Meeting of The American Law Institute, see Article 3 of *The Model Penal Code and Commentaries*, available at the American Law Institute's website. For further commentaries, see HeinOnline's website. For original detailed commentary, see T.D. 8 at 11 (1958).
[126] The MPC has influenced the replacement of existing criminal codes in over two-thirds of the states. New Jersey, New York, and Oregon have enacted almost all of the MPC provisions. Idaho had once adopted the MPC in its entirety in 1971, but it was repealed two months after coming into effect in 1972, LaFave (2009), 5 f.

offers a basis for understanding the consistent application of fundamental criminal law principles across the state statutes and judicial precedents.[127]

Justifications based on public authority apply when an actor is explicitly authorised to carry out acts that would otherwise constitute an offense, provided these acts are intended to safeguard or advance a public interest.[128] Unlike justifications related to defensive force, the scope of the actor's authority is not confined to defensive acts protecting individuals or property but may stretch further. Public officials are permitted to take *affirmative* measures to uphold or protect a public or private interest, even if that interest is entirely abstract or intangible.[129]

Section 3.03 of the MPC, pertaining to the *execution of public duty*, offers a defence for actions that could otherwise be deemed unlawful if they are mandated or sanctioned by law, a competent court's judgment or order, or a public officer's duties.[130] This defence holds even if the court is without jurisdiction or the officer has overstepped their legal bounds, given that the actor perceives their conduct as mandatory.[131] Yet, this section also specifies that other parts of the code relating to the use of force continue to apply unless the use of force is explicitly sanctioned by law.[132]

The provision consists of several subsections, including 3.03(1)(a) and 3.03(1)(c), which are particularly relevant to this study. Subsection 3.03(1)(a) justifies a conduct when required or authorised by the law defining a public officer's duties, suggesting that if a public official argues that their duties necessitated a minor crime, this subsection might apply.[133] Similarly, subsection 3.03(1)(c) justifies conduct required or authorised by a judgment or order of a competent court or tribunal, meaning that if a directive for a minor crime came from a court or tribunal, this subsection

[127] Podgor, Henning and Cohen (2015), 16.
[128] Dripps, Boyce and Perkins (2016), 1001.
[129] Robinson (1984), 113 ff.
[130] Dripps, Boyce and Perkins (2016), 1026 f.
[131] See subsections 3.03(3)(a) and 3.03(3)(b).
[132] Dripps, Boyce and Perkins (2016), 1026 f.
[133] Some statutes even allow a public officer to call for assistance from the public when the officer encounter or reasonably anticipate resistance in the execution of his duties, see, e.g., Nev, section 281.290(1); Okla. Stat. Ann. tit. 22, section 91 (West 1969); Tenn. Code Ann. section 38-204 (1975).

could be applicable.[134] Generally, subsection 3.03(1) provides justification for actions required or permitted by public or official duties, with the law outlining these duties serving as the basis for conduct justification.[135]

Although an officer's misunderstanding of the law typically does not serve as an excuse, there are certain exceptions that can be provided in this context. For example, an officer will not be held criminally responsible for actions authorised by an established law, such as a statute or official administrative regulation, even if the law contradicts a superior one.[136] Subsections 2.04(3)[137] and 3.03(3) offer some allowances for such legal errors. Certain crimes necessitate awareness that the behaviour is unlicensed, while others impose specific intent requirements to safeguard individuals who sincerely believe they are acting within the law.[138] As the law defining official duties often accommodates officers' reasonable judgment, it would be contradictory to criminally penalise an officer who, acting reasonably and in good faith, is exempted from civil damages.[139] In this context, it can also be mentioned that subsection 3.03(3) provides justification for actions based on a mistaken belief in legal authority.[140] Subsection 3.03(3)(a) offers defence for actions believed to be authorised by a court's judgement, even if jurisdictional or procedural errors exist,[141] while 3.03(3)(b) covers

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[134] *Model Penal Code and Commentaries (Official Draft and Revised Comments)* [Part 1: General Provisions, sections 3.01 to 5.07], 23 f. See also State v. Watson, 26 Del. (3 Boyce) 273, 275–276, 82 A. 1086, 1087 (1912).
[135] Compare Titus Reid (2017), 83 f.
[136] *Model Penal Code and Commentaries (Official Draft and Revised Comments)* [Part 1: General Provisions, sections 3.01 to 5.07], 25 f.
[137] Subsection 2.04(3) stipulates a defence in situations where an individual either was unaware of the law defining an offense due to it not being reasonably accessible, or acted based on an official, but later determined incorrect interpretation of the law, see *Model Penal Code and Commentaries (Official Draft and Revised Comments)* [Part 1: General Provisions, sections 1.01 to 2.13], 267 ff.
[138] Lippman (2016), 131 ff.; Bender et al. (2013), 51 f. In this particular case, compare, e.g., 18 U.S.C. sections 241 and 242 with regards to the crimes of *Conspiracy against rights* and *Deprivation of rights under the colour of law* respectively, which require a 'special intent'.
[139] In Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 456 F.2d 1339 (2nd Cir. 1972), upon remand from the Supreme Court, it was ruled that the agents could defend against a civil suit if they had a 'good faith and reasonable belief in the validity of the arrest and search'. See also Pierson v. Ray, 386 U.S. 547 (1967).
[140] *Model Penal Code and Commentaries (Official Draft and Revised Comments)* [Part 1: General Provisions, sections 3.01 to 5.07], 27 f.
[141] LaFave (2009), 565. See, e.g., Walker v. Commonwealth, 127 S.W.3d 596 (Ky. 2004). Some state jurisdictions are more limited by requiring the belief to be *reasonable*, see Jurco v. State, 825 P.2d 909 (Alaska App. 1992).

situations where actions are believed to aid a public officer in duty fulfilment, regardless of the officer overstepping their authority.[142]

The formulation has primarily been framed in relation to situations where public officials seek assistance from a bystander. However, it also encompasses more complex policy issues when private citizens assist a government official over an extended period, especially in covert actions usually considered criminal, unaware of the officer's authority extent.[143] The justification under subsection 3.03(3)(b) only applies to circumstances covered by subsection (1). If the officer's authority falls under a more specific section, such as section 3.07 governing *law enforcement's use of force*, a citizen complying with the officer's request must rely on that section, 3.07(4)(a). Notably, neither subsection 3.03(3)(b) nor more specific sections authorise a person to use deadly force upon an officer's request if the officer lacked the authority to use such force, limiting the possibility of receiving a justification to acts constituting lesser breaches of the law.[144]

When the MPC received approval, there were already decisions clearly expressing the principle of justification because of an execution of a public duty, although instances of prosecutions raising such concerns were uncommon.[145] Laws at the time generally tackled a specific facet of the issue, primarily concerning violent actions towards an individual or instances where the action has led to a death.[146] Subsection 3.03(1) was thus drafted with the belief that this principle should be clearly expanded to cover all kinds of conduct where a defence might be applicable.[147]

The MPC does not, however, provide explicit guidance on determining the circumstances under which it is deemed necessary to adhere to an order or instruction. This has instead been a subject of substantial

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[142] Compare State v. Stoehr, 134 Wis.2d 66, 396 N.W.2d 177 (1986).
[143] See States v. Barker, 546 F.2d 940 (D.C. Cir. 1976), where E. Howard Hunt, asserting to act on the White House's behalf, requested the defendants to infiltrate a psychiatrist's office.
[144] *Model Penal Code and Commentaries (Official Draft and Revised Comments)* [Part 1: General Provisions, sections 3.01 to 5.07], 27 f.
[145] See, e.g., Dietrichs v. Schaw, 43 Ind. 175 (1873); State v. Godwin, 123 N.C. 697, 31 S.E. 221 (1898); Claybrook v. State, 164 Tenn. 440, 51 S.W.2d 499 (1932); Moyer v. Meier, 205 Okla. 405, 238 P.2d 338 (1951).
[146] *Model Penal Code and Commentaries (Official Draft and Revised Comments)* [Part 1: General Provisions, sections 3.01 to 5.07], 24.
[147] Dripps, Boyce and Perkins (2016), 1001 f.

discourse in relevant doctrine. According to Robinson, public authority justifications generally rely on two initiating elements – those being the existence of a specific authority and the circumstances that trigger that authority – as well as two responsive elements, referring to the necessity and proportionality of the conduct in question.[148] In other words, the conjunction of the *authorisation* and *evocation* elements delineate the individuals who can assert a public authority justification and the specific circumstances that can warrant such a justification. Furthermore, the *necessity* and *proportionality* elements set the parameters for the type of conduct that can be justified when the justification defence is invoked.

The difference between justifications of public authority and defensive force or lesser evils justifications[149] primarily lies in their respective triggering conditions. The former is typically limited to individuals who have been explicitly given a specific *authority*, while the latter are generally accessible to all.[150] This does not contradict the overarching principle that justified behaviour is equally valid for all individuals in comparable situations.[151] The specific conditions that validate societal interests in this case involve the actor having special authorisation. However, there are exceptions to the rule that confines public authority justifications to those distinguishable from the general public.[152] For instance, under specific conditions, everyone may be permitted to prevent a suicide or exercise law enforcement powers to stop a crime.[153] In addition to requiring specific authorisation, the actor is not required to face a direct threat to personal safety or property for public authority justifications to be invoked. Instead, these justifications come into play whenever a recognised interest is at risk or an opportunity to advance such an interest arises.[154] Importantly, public authority justifications apply even in the absence of physical aggression; a bus driver or train

[148] Robinson (1984), 115.
[149] See sections 3.05 and 3.02 MPC respectively.
[150] LaFave (2009), 564 f.; Dripps, Boyce and Perkins (2016), 1001 ff.; Robinson (1984), 116.
[151] See United States v. Santana, 427 U.S. 38, 96 S.Ct. 2406, 49 L.Ed.2d 300 (1976) and Schneckloth v. Bustamonte, 412 U.S. 218, 219, 93 S.Ct. 2041, 2043, 36 L.Ed.2d 854 (1973).
[152] Robinson (1984), 117 f.
[153] The interference must, however, still be *necessary*. Compare, e.g., section 3.02 MPC on *Necessity* (i.e., *Choice of Evils*) or section 3.05 MPC on *Use of Force for the Protection of Other Persons*. See Saltzburg et al. (1994), 786 ff.
[154] Dripps, Boyce and Perkins (2016), 1023 ff.; Robinson (1984), 118.

conductor can, for instance, expel a passenger from a vehicle even if that individual is not posing a physical threat to others.[155]

Upon meeting the *authorisation* and invocation *criteria* for a public authority justification,[156] the actor is empowered to act. However, the individual must utilise the least damaging means required to protect or advance the societal or personal interests defined by the justification, acting only when it is *necessary*.[157] Regarding the requirement of *proportionality*, the damage inflicted should be 'reasonable' in comparison to the societal interests involved. Entities like law enforcement, judiciary, military, and general public authority uphold broad societal interests.[158] When the harm caused by the actor is weighed solely against the personal interests of the individual against whom the force is directed, the balance is scrutinised more rigorously. Conversely, when extensive societal interests are at risk, the harm caused by the actor should be evaluated against both any physical threat and all societal interests. Therefore, public officials might have a justification for using more force.[159]

In conclusion, public officials may be exempted from criminal responsibility under certain circumstances, as outlined in section 3.03 of the MPC. This includes situations where their actions are mandated by law, a court's judgment, or their public officer duties, even in instances of overstepping legal bounds.[160] However, the use of deadly force is not justified if the officer lacked such authority. Public authority justifications differ from defensive force justifications in that they require explicit authorisation and do not necessitate a direct threat to personal safety or property. Nevertheless, the actor must act only when necessary, utilising the least damaging means required to protect or advance societal or personal interests, with the damage inflicted being proportionate to the societal interests involved.

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[155] Robinson (1984), 118.
[156] I.e., the triggering conditions.
[157] Robinson (1984), 118 f.
[158] Compare Reese v. City of Seattle, 81 Wn.2d 374, 383, 503 P.2d 64, 71 (1972). Interests furthered to maintain order and safety are, however, narrower, see People v. Ibom, 25 Ill.2d 585, 185 N.E.2d 690 (1962) and Carr v. Wright, 423 S.W.2d 521, 522 (Ky. 1968). A comparison can be made to section 2.10 MPC regarding *Military Orders*, LaFave (2009), 566.
[159] Robinson (1984), 118 f.; LaFave (2009), 565 f.
[160] See section 3.03(1) MPC.

3.3 Underlying Principles

To construct a general principle of law, it is crucial first to examine the motivations that underpin the existence of such rules. This examination aids in ensuring that the created principle of law aligns with these foundational motives. Essentially, two main motivations drive the justification rules regarding adherence to orders or instructions. Firstly, individuals might choose to follow orders due to their incomplete understanding of the action's potential repercussions, meaning that there is no intent to commit a criminal act. Secondly, individuals might opt to comply with an instruction or order as it may be more beneficial than an alternative course of action, particularly in situations posing a risk to the individual or to society at large.

Other reasons, such as maintaining discipline or transferring responsibility, are also cited in the legal doctrine. However, these motivations are often considered secondary or contingent on the two primary motives discussed. Given the complexity of this legal area, only a rudimentary analysis of these two motives will be provided. It is also important to note that these two motivations are not mutually exclusive but coexist, suggesting it is not a matter of choosing one over the other.

3.3.1 Lack of knowledge or intent

In many legal systems, the principle of *mens rea*, or 'guilty mind', is a fundamental requirement for criminal responsibility, indicating that an individual must have had the intent to commit a crime.[161] This is particularly evident in cases where individuals are acting on orders or instructions and might not have full knowledge of the potential consequences of their actions. They may be unaware of the larger context or implications of their tasks and therefore might not have the requisite intent to cause harm.[162]

[161] Keiler, 'Actus Reus and Mens Rea: The Elements of Crime and the Framework of Criminal Liability' in *Comparative Concepts of Criminal Law*, ed. Roef (2016), 57 f., 62 ff.; Ashworth and Horder (2013), 6 f., 74.

[162] However, this should not be confused with provisions on *mistake of law*, which is founded on the same premise but is applicable in other circumstances, see, e.g., chapter 24 section 9 BrB [Swedish: straffrättsvillfarelse], section 17 StGB [German: Verbotsirrtum] and section 3.03(3) MPC.

All three legal systems that have been studied in this thesis leave room for the application of the rule to persons who have not been ordered to know that they have committed a criminal act.[163] In such cases, the absence of *mens rea* may absolve them from criminal responsibility. This principle underscores the fairness of not punishing individuals for outcomes they did not foresee or intend.[164]

Nevertheless, a crucial constraint exists within this principle that naturally emerges from the possibility of justifying an act in the first place; if it is evident to an individual that carrying out a specific order or instruction will inevitably result in committing a criminal act – i.e., if it is clear that the order is illegal – then such a criminal act cannot be justified.[165] Consequently, the justification is practically feasible only for acts representing minor breaches of the law.[166]

3.3.2 Avoidance of greater harm

The second rationale for such legal justifications is rooted in the doctrines of necessity or the 'lesser of two evils'.[167] These doctrines recognise situations where non-compliance with an order could lead to more substantial harm, either to the individual himself or to society at large.[168] In relation to international criminal law, they also pertain to emergency situations where individuals, if they do not perform the punishable act, risk facing sanctions from the forum state.[169] This is particularly relevant in high-stakes environments

[163] See chapter 24 section 8 BrB, section 34 StGB and section 3.03(1)–(2) MPC.
[164] Fletcher (2007), 307 ff.
[165] Johansson et al. (2019), BrB 24:8 p. 1; Schönke and Schröder (2014), 679 f. See also Strahl SvJT 1949 p. 161 and Prop. 1984/85:156, 21 f. In NJA 1946 s. 65, a man carried out espionage on Norwegian soil on behalf of the German government, targeting Swedish military objects. Despite this, he was acquitted because he had no intention of committing espionage through his intelligence activities. In Andenæs SvJT 1946 rf p. 22, the boundary between espionage and illegal intelligence activities is discussed.
[166] *Model Penal Code and Commentaries (Official Draft and Revised Comments)* [Part 1: General Provisions, sections 3.01 to 5.07], 25 f.; SOU 2011:76, 147; also compare Ds Ju 1984:6, 53 f.
[167] The so-called 'lesser of two evils' is more prevalent in doctrine surrounding section 3.03 MPC, while preparatory works to chapter 24 section 8 BrB and section 34 StGB only refers to an assessment of the necessity in question. These should, however, be equated with each other, see Ashworth and Horder (2013), 131; Dubber and Hörnle (2014), 480 f.
[168] This especially prevalent in section 34 StGB and section 3.03(1) MPC, see Schönke and Schröder (2014), 680 ff.; Robinson (1984), 119 f.
[169] Prop. 1984/85:156, 21 f.; compare SOU 2011:76, 147.

like the police or emergency services, where immediate and unquestioned obedience to orders is crucial for maintaining order and safeguarding vital societal interests.[170] In such contexts, an individual's disobedience could precipitate chaos, hinder operations, or even directly threaten higher values, thereby necessitating compliance.[171]

This consideration is reflected in the mandated proportionality assessments in the three legal systems under discussion. Each system requires a balance of interests, suggesting that these rules may apply if the alternative action would result in greater harm than the actual criminal act.[172] This principle exemplifies a pragmatic approach to law, acknowledging the difficult choices individuals often have to make under pressure or during emergencies. It accepts that sometimes the 'lesser of two evils' must be chosen, and it would be considered immoral to penalise individuals for making such decisions.[173]

3.4 A General Principle of Law

Chapter 1 established the idea that the selection of the regulatory framework in any given legal system depends on the shared characteristics of the rules. Common among Chapter 24 section 8 BrB, section 34 StGB, and section 3.03 MPC is the concept that they provide identical grounds for justification, applicable in circumstances involving a relationship of obedience or a compulsion to comply with a given order or instruction. The primary differentiation lies in the fact that a justification negates the ‘wrongfulness’ of the act, while an excuse negates the ‘blameworthiness’ of the individual who perpetrated the crime.[174]

Each of these rules involves a subjective evaluation of the individual's disposition towards the act, coupled with an objective appraisal of the compulsion to obey the order or instruction. The general stance is that

[170] *Model Penal Code and Commentaries (Official Draft and Revised Comments)* [Part 1: General Provisions, sections 3.01 to 5.07], 23 f.
[171] Robinson (1984), 114 ff.
[172] Dubber and Hörnle (2014), 442 ff.; Asp, Ulväng and Jareborg (2013), 236.
[173] Johansson et al. (2019), BrB 24:8 p. 1; Fletcher (2007), 165 f., 209.
[174] Blomsma and Roef, ‘Justifications and Excuses’ in *Comparative Concepts of Criminal Law*, ed. Roef (2016), 158.

there ought to be legal *authorisation* for the act, that the act should be *necessary* or vital for preserving the relationship of obedience, and that the executed act should be *proportionate*.

Firstly, it is required that a public official is legally *authorised*, ordered by the court, or within his official duties to carry out the act. This implies that a public official could be absolved of criminal responsibility if he received a legal order or had a lawful duty to comply with it. This necessity is grounded in the assumption that an individual who perpetrates a criminal act bears the criminal responsibility, and that absolution from responsibility for the crime committed by justification should be seen as an exceptional circumstance. Therefore, a command or directive disrupts this presumption.[175] Furthermore, the individual committing the act must have believed in good faith (legally speaking) that the act was legally justified and essential, or that the act was indispensable to prevent more severe damage or immediate threat.[176]

Secondly, it is logical that either the relationship of obedience or the action itself should have been *necessary*. The public official's act should aim to safeguard or defend a specific interest, which could be societal or individual. This principle is mirrored in all three legal systems under consideration, suggesting that legal orders and the notion of immediate threat necessitating defensive action provide justification.

Lastly, the act's justification must undergo a *proportionality* assessment. The public official should employ the least detrimental means necessary to safeguard or promote the societal or personal interests involved. If the alternative to not obey a command or instruction would provide a worse outcome, then a criminal act can be justified. This requirement aligns with the necessity of obeying the order or preserving the obedience relationship. This principle of refraining from using excessive force is present in StGB and the MPC, which state that the act should not cause damage

[175] Johansson et al. (2019), BrB 24:8 p. 1.
[176] Compare Robinson (1984), 118 ff.

that outweighs the danger prevented.[177] It is also inferred from the BrB based on the requirement that the order is lawful.

A general principle of law on obedience to orders – guideline

Authorisation	Was there an order, a court decision or any other instruction involved? Did the individual act 'in good faith', believing the act was just?
Necessity	Was there a special interest to safe-guard or protect? Was it necessary to thus follow the order or instruction, or to uphold the obedience relationship?
Proportionality	Would not following the order or instruction potentially lead to worse outcomes?

In this discussion, it is noteworthy to turn our attention to Article 33 ICCSt, which embodies an analogous principle concerning 'Superior orders and prescription of law'.[178] The article asserts that the mere act of obeying an order from a superior or a government does not excuse an individual from criminal liability if such order leads to a crime within the International Criminal Court's (ICC's) jurisdiction.[179] However, an individual may be exempted from criminal responsibility if the person was legally bound to follow the government or superior's orders,[180] or if the individual was unaware of the order's unlawfulness, and more so if the order was not overtly unlawful.[181]

[177] Dubber and Hörnle (2014), 480 f.; *Model Penal Code and Commentaries (Official Draft and Revised Comments)* [Part 1: General Provisions, sections 3.01 to 5.07], 27 f.
[178] For the English text of the ICCSt, as promulgated on 17 July 1998, see *the Rome Statute of the International Criminal Court*, available at the court's website.
[179] Olásolo (2009), 112 f.; Than and Shorts (2003), 331 f.
[180] See Article 33(1)(a) ICCSt.
[181] See Article 33(1)(b)–(c) ICCSt.

Additionally, the article unambiguously declares that orders inciting genocide or crimes against humanity are unequivocally unlawful.[182] This provision strengthens the principle that no order can legitimise such grave crimes, while those executing these actions cannot evade their accountability. It also serves as a deterrent for those who might consider committing such acts under the guise of obedience to orders.[183]

Consequently, one might argue that the conditions for exemption from criminal responsibility according to Article 33 ICCSt is harmonious with the conditions established by the general principle of law as constructed in this thesis.[184] For state. officials to have their criminal act justified, they must have received authorisation, through a direct order or instruction, and believed that the order was both necessary and proportional in order to safeguard a particular interest, either on an individual or a societal level. Therefore, it can be inferred that the fundamental principles articulated in chapter 3.3 are consistent with Article 33 ICCSt.

In summary, an individual may be exempted from criminal responsibility due to orders or instructions, given the presence of an authorisation (that was not clearly unjust), the act was necessitated by a special interest, and the act was proportionate. The general principle of law established in this chapter arguably aligns with international regulations, such as Article 33 ICCSt, and the fundamental principles related to the absence of knowledge or intent, as well as the prevention of greater harm, respectively.

[182] Olásolo (2009), 113. See Article 33(2) ICCSt.
[183] Sliedregt (2012), 293 ff.
[184] See Appendix A.

4 A Practical Example

4.1 Introduction

This chapter aims at illustrating the interplay between the rule on functional immunity and the general principle of law on duty of obedience. It initially delineates the circumstances considered in determining the possibility of exemption from criminal responsibility. The first evaluation is premised on the idea that official capacity is defined by *the individual's position*, while the second bases official capacity on *the nature of the act*. Both a superior and a subordinate individual will be considered in these evaluations.

It is important to observe that this presents a relatively broad proposal for resolution. Its objective is to depict circumstances under which a state official could be exempt from criminal responsibility, even when the applicability of functional immunity is dubious. Additionally, this chapter serves as a groundwork for the discussion in chapter 5.2.3, which explores whether the general principle of law on duty of obedience can be used to delineate the scope of individuals eligible for functional immunity.

4.2 Relevant Circumstances

To facilitate a clearer understanding, this thesis employs a scenario involving minor theft committed during a criminal investigation in Sweden, a context commonly characterised by item seizures for the purpose of evidence gathering. The provision pertinent to *petty theft* [Swedish: ringa stöld] is outlined in chapter 8 section 2 BrB. This provision becomes relevant when an act described in chapter 8 section 1 BrB – involving the unlawful appropriation of another's property, or *theft* [Swedish: stöld] – is considered being on a minor level.[185] This consideration is based on the value of the confiscated item and other circumstances surrounding the crime.[186] Upon applying functional immunity and the general principle of law on duty of obedience,

[185] Träskman and Wennberg (2019), BrB 8:2 p. 1 f.
[186] See NJA 2019 s. 951, where it was concluded that stealing items with a value of up to 1 250 SEK should be considered a *minor theft*.

it is discerned that neither applies to serious crimes, leading to the relevance of the provision on petty theft in this evaluation.

Furthermore, the petty theft is purported to be perpetrated by two individuals operating on behalf of a foreign state. One individual holds a superior position, being a police chief or a higher government official, while the other holds a subordinate position, such as an ordinary policeman. This distinction is considered in the evaluation of how an individual's hierarchical status influences the prospect of criminal responsibility exemption.

It is imperative to note that functional immunity fundamentally acts as a deterrent to legal proceedings. In other words, should an individual be accorded functional immunity, then they are immune from prosecution for the criminal act that is under scrutiny. Theoretically, it is the home state, not the individual, that is then responsible for the act. Contrarily, the general rule of exemption from liability due to duty of obedience provides a foundation for exemption from responsibility after a prosecution has taken place. The involved individual is prosecuted for the crime, but the criminal act is subsequently deemed justified. It is crucial to distinguish between these two rules, given their application at distinct junctures of a legal process

4.2.1 The position of the individual

As delineated in chapter 2.3.1, an individual can be considered acting in an 'official capacity' if his acts fall within the bounds of a specific role or position. Conceptually, it is the state that assigns roles through its sovereignty and consequently, the state bears responsibility for the individual's acts.

For an individual of superior rank, such as a police chief or a higher government official, the acts can readily be viewed as representing the state due to the status of the individual. Through the so-called presumption of authority[187] it can further be inferred that such an individual acted within his *official capacity*, even if exact tasks cannot be concretely illustrated but the role was apparent. This holds true provided that the petty theft committed does not unambiguously constitute an act *jure gestionis*, which is highly unlikely given that the crime was perpetrated amid a criminal

[187] See chapter 2.3.2.

investigation. Even if a higher public official purports to have acted beyond his official capacity or in opposition to his directives, it may still be regarded as an official act if the actions mirror an official act under the guise of their authority.

For a subordinate, such as an ordinary police officer, the situation becomes more complex as such an individual is distanced from decision-making processes compared to his superiors. As one descends the hierarchy, the probability of the presumption of authority being applied diminishes, as the risk of the subordinate committing an act *jure gestionis* increases. However, as the petty theft occurred in the context of a criminal investigation, likely in the context of evidence gathering, an act might not be deemed official if it significantly deviates from expected responsibilities or government directives. This is true even if an official holds a relevant role.

Considering the likelihood of a subordinate to obtain functional immunity though his position is less probable, the general principle of law on exemption from responsibility due to duty of obedience may instead come into play. If a Swedish court determines that the police officer lacks functional immunity – that is, he did not act in a sufficiently official capacity to warrant functional immunity – prosecution for petty theft proceeds. At this stage, the possibility of exemption from responsibility still exists as the police officer acted under orders or instructions. Given the identical circumstances, the prerequisites for the general rule of obedience[188] could be applied in this context.

If a police officer seizes an object during a criminal investigation, it can be inferred that an authorisation existed, particularly if the policeman is instructed to take the object. The subordinate has then likely acted in 'good faith' amid the investigation. Additionally, the necessity to resolve the crime could justify compliance with the order being given. A proportionality assessment may further deem the potential harm of leaving the crime unsolved as greater than complying with the order. The acts of a subordinate may thus align with the motives underpinning the general rule of

[188] See Appendix A

obedience; the absence of intent to commit the crime as the subordinate aimed to avert the greater danger of an unresolved crime is noteworthy.

If a subordinate, devoid of functional immunity, faces prosecution for a crime, then he is later able to refer to a general rule on duty to obedience, in order to be exempted from criminal responsibility. This invocation can thus take place at a further legal process.

4.2.2 The nature of the act

As highlighted in chapter 2.3.1, the acts of a state official can be construed as *official* based on the nature of the act performed. It the objective of the act can be somehow linked to the state, then it is the state (not the individual) that assumes responsibility for the act. This notion is underpinned by the state's sovereignty in delineating who is authorised to act on its behalf.

For an individual holding a superior position, it is less complicated to establish that the act was performed on behalf of the forum state. Superior roles generally imply that the individuals are acting under *jure imperii* instead of *jure gestionis*, meaning that a higher position implies that the nature of the act is ‘official’. Additionally, the presumption of authority lends credence to the notion that a superior can attain functional immunity.

When comparing the possibility for a subordinate to obtain functional immunity based on the nature of the act versus their position, it is more likely that functional immunity can be granted when 'official capacity' is determined by the act. If the assessment hinges on the individual's position, this assumes that the state authorizes actions by defining roles. In this context, the permission arises when either the state or a superior issues an order or instruction to the subordinate.

To substantiate that the act had an 'official' character, i.e., constituted an act *jure imperii*, one can resort to the criteria from the general principle of law on the duty of obedience.[189] To begin with, the subordinate must have received authorisation, through an order or instruction, to steal the object, while genuinely believing that this directive was justifiable. The

[189] See Appendix A.

justification of the act then fundamentally hinges on the need to resolve the crime, thereby rendering the act necessary and proportional.

It must be reiterated that the general rule on duty of obedience exempts an individual from criminal responsibility, while not being an impediment to legal proceedings. However, given the involvement of an order or instruction, this thesis contends that the criteria can be applied analogously to demonstrate an official capacity based on the nature of the act.

4.3 Schematic Overview

Chapter 2 established that 'official capacity' can be determined either by a person's position or by the nature of the act committed. This clearly impacts the conditions under which a subordinate can be absolved of criminal liability. When emphasis is on position, a subordinate's chances of attaining functional immunity are reduced, hence the rule on duty of obedience may become applicable in subsequent procedural stages. Conversely, when the focus is on the nature of the act, the likelihood increases and criteria belonging to the rule on duty of obedience can be analogously employed.

A schematic overview on the interaction between functional immunity and rules on obedience to orders

	Superior	Subordinate	
The position of the individual	Plausible	Not plausible	→ General principle of law applicable instead (Appendix A)
The nature of the act	Plausible	Plausible	← Criteria on general principle of law to be used analogically (see Appendix A)

5 Analysis

The main question to be asked is whether it is possible to clearly delineate the subset of individuals who are eligible for functional immunity. As described in chapter 1, this issue tends to grow murkier as one navigates down the ladder of a state's hierarchical structure.

The challenge of defining a lower limit is rooted in the foundational principle of sovereignty that underlies functional immunity. Essentially, sovereignty gives each state the prerogative to configure its own structural organisation. Therefore, the determination of whether an individual acted in an *official capacity* – either via a specific position or the inherent nature of the act – remains a subjective matter due to the lack of a more explicit definition. Currently, the practicalities of constructing a definition within the sphere of international criminal law based on subjective criteria prove to be untenable.

Seen in this light, the concept of *presumption of authority* could be viewed as an endeavour within the pertinent doctrine to formulate an objective criterion for when an individual can be considered to have acted in an official capacity. The subsequent evaluation then centres on whether the individual engaged in a conspicuous act *jure gestionis*.

Hence, one could argue that efforts should not be overly concentrated on attempting to sketch a definitive 'lower limit' for those who should qualify for functional immunity. A more productive line of inquiry may be to rather investigate the possibility of crafting an objective definition or scope for 'official capacity'.

This thesis introduces a general rule on duty of obedience as a tool to examine the breadth of freedom from criminal responsibility that can be granted to individuals who execute orders from a state or its institutions. As analysed in chapter 4.2.1, it holds true that such a rule can serve as an adjunct in situations where a state official cannot secure exemption from criminal liability via functional immunity. This, in turn, affects the degree to which an individual can be held accountable for a crime.

However, it would be a mistake to conclude that a general rule concerning the duty of obedience could act as a lower boundary for the

scope of functional immunity. These rules are invoked at varying stages of a legal process and the application of the general rule presupposes that functional immunity cannot be confidently granted to a particular individual.[190]

Further studies on the interaction between functional immunity and rules on obedience to orders could at least help clarify to what extent freedom from criminal responsibility for state officials is possible. Additionally, more theoretical work might be done to understand the ethical and moral implications of these rules. Ultimately, the goal would be to develop a more coherent and universally applicable framework for understanding functional immunity in the context of international criminal law.

[190] Compare Appendix B, which summarises the theory.

6 Final Reflections and Conclusions

The purpose of this thesis has been to study the extent to which an individual, who has acted for his home state can escape criminal responsibility due to an order or instruction. The answer to this depends on the view of *official capacity,* as demonstrated by answering the research question in this thesis.

The central question has been to explore if a universal rule exempting individuals from criminal liability, due to obeying orders or instructions, can supplement when functional immunity is unattainable. The research indicates a theoretical possibility of applying this universal rule as a substitute when functional immunity is unachievable. However, the application of the rule hinges on whether the act *jure imperii* is based on the state official's role or the act's character.

The position of the official predominantly influences the act's official status, thus implying a greater chance of applying the universal rule on obedience duty. Yet, when the nature of the act is paramount instead, the criteria of the universal rule could be analogously used to show an obedience relationship.

Another issue emerging in this thesis is whether a universal obedience duty rule can demarcate the scope of individuals that are able to obtain for functional immunity. The response is negative, with the concept of 'official act' guiding this boundary.

In summary, functional immunity presents intricate issues, with its undefined boundaries and lack of clarity contributing to its infrequent application in national courts and minimal discourse in international criminal law doctrine. Consequently, it can be said that the findings of this thesis pave the way for future research in this field of law.

Appendix A

A general principle of law on obedience to orders – guideline

Authorisation	Was there an order, a court decision or any other instruction involved? Did the individual act 'in good faith', believing the act was just?
Necessity	Was there a special interest to safe-guard or protect? Was it necessary to thus follow the order or instruction, or to uphold the obedience relationship?
Proportionality	Would not following the order or instruction potentially lead to worse outcomes?

Appendix B

A schematic overview on the interaction between functional immunity and rules on obedience to orders

	Superior	Subordinate	
The position of the individual	Plausible	Not plausible	→ General principle of law applicable instead (Appendix A)
The nature of the act	Plausible	Plausible	← Criteria on general principle of law to be used analogically (see Appendix A)

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