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The rules of immunity for heads of state and other high-ranking state officials

Private, official and the question of *jus cogens*

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Contents

Summary

This essay examines the rules of immunity for heads of state and other high-ranking state officials under international law. The aim is to create a comprehensive outline of the content of the rules, enabling a more accurate and legally sound practice in the future.

Through reviewing conventions, codifications, legal cases and legal doctrine on the subject, and through examining the current codification efforts, an outline is made of the general rules. The legal dogmatic method is used to ascertain *lex lata*, which in turns aids in ascertaining *lex ferenda*. A legal developmental perspective is used to place the rules in their historical and present context.

Under customary international law, incumbent heads of state, heads of government and foreign ministers are accorded absolute immunity from the jurisdiction of foreign national courts. For as long as they serve office, their immunity poses a bar to prosecuting even the most severe international crimes on the domestic level in other states. After high-ranking state officials leave office, they retain a partial immunity for official acts. Private acts, however, are no longer shielded by immunity. For this reason, the distinction between private and official acts is a matter of essential importance, as is the question of whether violations of *jus cogens* norms are subject to this immunity.

In distinguishing between private and official acts, the question of whether the act was undertaken through use of the official's public authority is vital. An act made under official authority is regarded to be of official character, barring the jurisdiction of foreign national courts. That an act is in violation of *jus cogens* does not rule out that it is an act of official character, or that it is not shielded by the state official's immunity. However, there are clear signs of a legal development that will weaken partial immunity, resulting in an increased possibility for foreign states to exercise jurisdiction for grave international crimes in the future.

Sammanfattning

Denna uppsats undersöker de sedvanerättsliga reglerna om immunitet för statschefer och andra högt uppsatta statsrepresentanter. Syftet är att göra en övergripande kartläggning av reglernas innehåll som möjliggör korrekt rättstillämpning i framtiden. Genom att granska konventioner, kodifieringar, rättsfall och doktrin om ämnet, samt genom att undersöka det pågående kodifikationsarbetet, kartläggs reglerna i sin helhet. Den rättsdogmatiska metoden används för att fastställa *de lege lata*, som i sin tur lägger grunden för ett resonemang om *de lege ferenda*. Ett rättsutvecklingsperspektiv används som ett verktyg för att förstå reglerna i deras historiska och nutida kontext.

Sedvanerättens regler ger sittande statschefer, regeringschefer och utrikesministrar ett absolut immunitetsskydd från andra staters domstolar. Så länge statsrepresentanterna innehar sitt ämbete utgör immuniteten ett hinder mot att lagföra även de mest allvarliga internationella brotten på nationell nivå i andra stater. Efter att en statsrepresentant lämnat sin post behåller denne fortsatt en partiell immunitet för offentliga handlingar. För privata handlingar erhåller statsrepresentanten däremot inte längre skydd mot andra staters judikativa jurisdiktion. Av detta skäl blir särskiljandet mellan privata och offentliga handlingar en fråga av grundläggande betydelse. Likaså blir frågan om huruvida brott mot *jus cogens* omfattas av immunitetsskyddet.

I gränsdragningen mellan privata och offentliga handlingar är handlingens anknytning till statsrepresentantens offentliga auktoritet avgörande. En handling som gjorts med offentlig auktoritet betecknas vara av offentlig karaktär, vilket innebär att den ligger utanför andra staters domstolars jurisdiktion. Att en handling utgör ett brott mot *jus cogens* utesluter inte att den är offentlig till sin karaktär, eller att den enligt gällande rätt inte omfattas av immunitetsskyddet. Det går däremot att se tydliga tecken på en rättsutveckling som kommer att försvaga det partiella immunitetsskyddet,

och ge stater större möjlighet att utöva domsrätt över allvarliga internationella förbrytelser i framtiden.

Abbreviations

ARSIWA	Articles on Responsibility of States for Internationally Wrongful Acts
DAISFCJ	Draft Articles on Immunity of State Officials from Foreign Criminal Jurisdiction
DARSIWA	Draft Articles on Responsibility of States for Internationally Wrongful Acts
ICJ	The International Court of Justice
ICTY	The International Criminal Tribunal for the former Yugoslavia
ILC	The International Law Commission
US	United States

1 Introduction

1.1 Background

The establishment of international courts and tribunals, such as the International Criminal Court, is part of a global effort to prosecute the perpetrators of grave atrocities and end impunity.[1] But in cases where international courts lack or fail to establish jurisdiction, the only recourse of justice that remains can at times be the national courts of sovereign states. A number of states have adopted national legislation that implements the principle of universal jurisdiction within their domestic legal systems. Often referred to as part of 'the fight against impunity', state implementation and use of universal jurisdiction enables national courts to prosecute individuals for grave crimes under international law, such as genocide, crimes against humanity and war crimes, even in cases where the alleged crimes lie outside all other means of jurisdiction. Sweden counts itself among these states, having as recently as last year prosecuted and successfully convicted a perpetrator of grave international crimes in Iran under universal jurisdiction.[2]

The implementation of universal jurisdiction gives rise to questions regarding the scope and limits of the immunity accorded to high-ranking state officials. Under customary international law, the immunity of the state and the immunity of its officials are two separate but interconnected legal frameworks. State immunity is the immunity awarded to sovereign states from the jurisdiction of foreign national courts. The sovereignty of each state means that the court of one may not assume jurisdiction over the other.[3] Emanating from state immunity,[4] a form of immunity is in turn extended to persons who function as extensions of the state: high-ranking state officials such as heads of state, heads of government, foreign

[1] Preamble, Rome Statute of the International Criminal Court, Rome 17th of July 1998.
[2] Stockholms Tingsrätt, judgment 2022-07-14 in case B 15255-19. See also Svea Hovrätt, judgment 2023-12-19 in case B 9704-22.
[3] Akehurst, p. 118.
[4] Watts, p. 35.

ministers[5] and others.[6] In the landmark *Arrest Warrant* case, the International Court of Justice (ICJ) established that an official belonging to this protected class is fully shielded from the jurisdiction of foreign national courts during the time they serve office, and that a partial shield for all official acts remains even after their term in office is ended.[7] The ICJ further held that this exception from jurisdiction is not voided in cases where the official has committed acts amounting to grave international crimes, meaning in effect that an incumbent high-ranking state official cannot be brought before a foreign national court even for engaging in the most severe crimes under international law. After the term is ended and the official is no longer in office, it becomes possible to establish jurisdiction for non-official acts.[8] However, a further complication at this stage is the much-debated character of grave international crimes, i.e. violations of *jus cogens* norms. If they are held to have an official character, rather than a private one, then they are crimes attributable to the state and not to the individual. Official acts of state officials being shielded by immunity poses a permanent bar to the jurisdiction of other states seeking to bring charges.[9] While the ICJ is careful to emphasize that immunity 'does not mean *impunity*'[10] it would seem that in practice, they risk at times to become one and the same.

1.2 Purpose and research questions

The purpose of this essay is to outline the rules of immunity for high-ranking state officials under customary international law, in order to ensure that the rules are subject to accurate and legally sound practice. Uncertainty regarding how private and official acts are to be distinguished from each other, as well as a pervasive lack of consensus within the legal field as to

[5] *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, Judgment, *ICJ Reports 2002*, p. 3 para 51.

[6] Though heads of state, heads of government and foreign ministers have previously been regarded as the "troika" for which immunity extends, the protected class of officials may also include defense ministers, see section 2.3.1 below.

[7] *Arrest Warrant*, para 54-55.

[8] Ibid, para 60-61.

[9] The only exception being if the home state choses to waive that immunity, see *Arrest Warrant* para 61.

[10] Supra 8.

whether *jus cogens* norms take priority over immunity, both mean that grave international crimes risk becoming subject to impunity.

To achieve this purpose, this essay will examine the current rules of immunity for heads of state and other high-ranking officials under customary international law, in order to facilitate a better understanding of both the established scope of the rules and the gray areas in which their precise nature remains unclear. The following research questions form the basis of the essay:

- What rules of immunity for heads of state and other high-ranking state officials exist under customary international law?

- In what ways are official acts and private acts distinguished from each other?

- Do the rules of immunity conflict with jus cogens? If so, which of the two should take priority?

1.3 Method and materials

In this essay, the legal dogmatic method is employed to outline the current legal framework and answer the research questions posed above. Through legal dogmatics, current law is established by analyzing generally accepted sources of law.[11] The sources of law used in this essay are those prescribed in article 38(1) of the Statute of International Court of Justice (ICJ). The article is considered to apply broadly to international law and defines its three primary sources: international conventions, international custom and the general principles of law. As subsidiary means, it prescribes that judicial decisions and publications by highly qualified publicists may also be used to determine the rules of law.[12]

[11] Kleineman, p. 21.

[12] Article 38(1)d, Statute of the International Court of Justice, Geneva 16th of December 1920.

The sources outlined in article 38(1) are used to identify *lex lata* — the law as it is. Through identifiying current law, the two first research questions are answered. On this foundation, the final research question is then answered with regard to both *lex lata* and *lex ferenda.* Throughout the essay, a legal developmental perspective is used to contextualize and evaluate the rules of immunity within the larger historical framework of international law and the immunity of the state.

The research material used in this essay consists of literature, commentary, legal judgments on the international and national level, as well as relevant conventions, codifications and draft articles. The Convention on Special Missions[13] and the Articles on the Responsibility of States for Internationally Wrongful Acts of 2001 (ARSIWA) are selected on the basis that they are generally held to reflect the content of customary international law. Additionally, relevant commentary of the International Law Commission (ILC) and the separate and dissenting opinion of judges in the ICJ is used to further outline legal principles, custom and the differing perspectives on the various gray areas of the law.

Relevant cases in international courts are sparse, and those selected are chosen insofar as they relate to the research questions. The *Arrest Warrant* case is examined as it has an immediate relevance for how rules of immunity are presently understood. The *Jurisdictional Immunities, Prosecutor v. Blaskic* and *Prosecutor v. Furundzija* cases all provide relevant perspectives on the relationship between *jus cogens* and immunity. As for the national cases, the *Pinochet* case is relevant as an immediate predecessor to *Arrest Warrant*. In section 3.4, two national cases from the United States (US) are examined because they involve the acts of heads of state specifically. While the US uses its own domestic doctrine to decide questions of immunity, the doctrine is aligned with the restrictive theory of immunity[14] and I therefore deem the two cases to be relevant at least in part in outlining state practice, which serves as an indication of customary

[13] Convention on Special Missions, New York 8th December 1969.
[14] Van Alebeek, p.121.

international law. The *Castro* case has been selected for the same reason. The *Caire* case has been selected specifically due to the judgment providing an opposing view to the US cases.

The selected literature is authored by legal scholars and published by reputable publishers, providing relevant and valuable depth not only to the subject of immunity, but to the specific questions examined in this essay. The literature is used as subsidiary means of determining the law, and as sources providing historical and theoretical context of the legal framework.

The question of immunity for high-ranking state officials has been substantially researched, and this essay builds upon this prior research. Most notably, *Statsrepræsentaers immunitet* by Kjeldgaard-Pedersen has provided an extensive, update overview of the subject, significantly aiding in the research for this essay.

1.4 Delimitations and clarifications

The topic of this essay is the jurisdictional immunity under customary international law awarded to heads of state, heads of government, foreign ministers and others from the judicial jurisdiction of foreign national courts. Officials accorded this immunity will be referred to using the umbrella term 'high-ranking state officials'.

The essay does not examine the subject of immunity before international courts and tribunals, nor the waiving of immunity or the possibility of trying a case within the official's home state.[15] National legislation on immunity for state officials is beyond the scope of this research, as is diplomatic immunity and the different grounds of jurisdiction. State immunity is examined only as it relates directly to the immunity of state officials, or functions as a tool for understanding its historical context. *Jus cogens* is examined only in relation to the specific research questions posed in this essay.

[15] These are three of the four possible recourses listed in *Arrest Warrant*, para 61.

When high-ranking state officials are described as having immunity, this refers to the fact that they can successfully retain immunity before a foreign court that would otherwise have jurisdiction. Immunity, as it is understood in this essay, is not innately possessed by the official.

1.5 Outline

In this chapter, I have provided introduction to the subject of the essay and the research method and material used. In chapter 2, the general legal framework of the rules of immunity is outlined. In chapter 3, legal cases, codifications and commentary are used to examine the distinction between private and official acts. In chapter 4, the possible conflict between rules of immunity and peremptory norms is examined. The arguments for and against an exception to immunity are systemized, and a concise description of each is provided. Lastly, the research questions are evaluated and answered in a concluding analysis.

2 The rules of immunity

2.1 Introduction

The rules of immunity for high-ranking state officials are found under customary international law.[16] While no codification of the rules currently exists, article 21 of the 1969 Convention on Special Missions is generally held to reflect them in part.[17] The article asserts the existence of an 'immunity accorded by international law', enjoyed by certain high-ranking state officials during special missions. Aside from the Convention on Special Missions, various legal cases and soft law instruments help form a basis for understanding the rules of immunity.

The immunity of high-ranking state officials functions as an exception to jurisdiction. In their Joint Separate Opinion to the *Arrest Warrant* case, judges Higgins, Kooijmans, and Buergenthal argue that immunity has no value *per se*, and is only 'an exception to a normative rule [of jurisdiction] which would otherwise apply'.[18] This means that a state official does not innately or independently possess immunity. Rather, it arises only in direct response to 'a pre-existing jurisdiction'.[19]

2.2 The evolving doctrines of state immunity

State officials are accorded their immunity on account of the state, meaning that in its foundation, the immunity resides with the state, not the individual.[20] Through understanding the evolving doctrines of state immunity, it becomes possible to contextualize the immunity extended to its officials. In the last few centuries, state immunity has been subject to periodic changes.[21] For much of history, the state and its sovereign ruler were considered one and the same. The actions of the sovereign ruler were

[16] *Arrest Warrant*, para 52.
[17] Kjeldgaard-Pedersen, p. 129-131.
[18] *Joint Separate Opinion*, para 71.
[19] Fox, p. 58.
[20] Kjeldgaard-Pedersen, p. 61.
[21] M. Caplan, p. 743.

the actions of the state, for which an absolute immunity applied. This meant that no state could exercise its jurisdiction over another.[22] This legal doctrine is commonly referred to as the doctrine of absolute state immunity. In the twentieth century, as states increasingly came to participate in commercial activity, the absolute doctrine gradually evolved into a restrictive doctrine of immunity. As opposed to the absolute doctrine, which shielded a state from foreign jurisdiction for any and all of its acts, the restrictive doctrine instead separated the acts of a state into two categories: *acta jure imperii* and *acta jure gestionis.* The former was conduct of official, governmental character, whereas the latter was conduct of commercial or private character. The emergence of the restrictive doctrine has allowed foreign states to exercise their jurisdiction over another state for acts of a private nature, as they are no longer shielded by the state's immunity.[23]

2.3 Personal and functional: two types of immunity

The rules of immunity from high-ranking state officials comprise of two components. One is personal immunity, unique to the high-ranking class of state officials, and the other functional immunity, a more general immunity accorded to all state officials. Personal immunity is temporary in nature, whereas functional immunity is lasting.[24] During the time officials are incumbent, personal immunity provides a full shield from foreign national jurisdiction, including for acts undertaken prior to assuming office.[25] Once their term is ended, officials retain immunity only for acts of official character, and not for any private acts, regardless of whether they were undertaken prior to or during their time in office.[26]

2.3.1 Personal immunity

[22] Akehurst, p. 118-119.
[23] Supra 21.
[24] Cassese, 'When May Senor State Officials Be Tried for International Crimes? Some Comments on the *Congo v Belgium* Case', p. 862.
[25] Fox, p. 423.
[26] *Arrest Warrant*, para 61.

Under customary international law, high-ranking state officials retain immunity *ratione personae* (so-called personal immunity) from the jurisdiction of foreign domestic courts for as long as they hold office. Personal immunity exists as a facet of state sovereignty, stemming from the governing legal foundation of state equality and independence.[27] Furthermore, it is motivated by the need for efficiency in state affairs.[28]

Personal immunity is temporary in nature,[29] and shields all conduct of the official, making it equal to the immunity enjoyed by the state itself.[30] The rule of personal immunity is extensively reflected in judgements on both the national and international level. Two cases of considerable importance are the *Pinochet* case before the British House of Lords, and the later *Arrest Warrant* case in the ICJ.

2.3.1.1 Pinochet

Upon seeking medical treatment in London, Chilean military leader and dictator Augusto Pinochet was taken into police custody to be extradited to Spain, where he would face charges of torture for actions related to the Chilean coup d'état. Pinochet invoked head of state immunity, and a lengthy legal process followed. In the Lords' third and final judgment, *Pinochet (No 3)* in 1999, Lord Saville asserted that a serving head of state 'enjoy[s] immunity from criminal proceedings in other countries by virtue of holding that office', covering 'all conduct of the head of state' and that this immunity 'draws no distinction between what the head of state does in his official capacity [...] and what he does in his private capacity'.[31]

2.3.1.2 Arrest Warrant

The ICJ came to the same conclusion in the *Arrest Warrant* case of 2000. Congo had instituted proceedings against Belgium following the circulation of a Belgian arrest warrant for Congo's serving foreign minister Abdoulaye

[27] Jennings & Watts, p. 129.
[28] Kjeldgaard-Pedersen, p. 128-130.
[29] Sixty-third session, para 109-110.
[30] Fox, p. 441.
[31] *Regina v. Bow Street Metropolitan Stipendiary Magistrate and Others, Ex parte Pinochet Ugarte (No 3)*. House of Lords, 1999, p. 265 F.

Yerodia Ndombasi. The crimes over which Belgium had jurisdiction were conducted before Yerodia became foreign minister. They also involved the violation of *jus cogens* norms. While the judgment has been criticized for failing to separate personal and functional immunity,[32] it stipulated clearly the absolute, inviolable bar to jurisdiction for a high-ranking official currently holding office, regardless of the nature of the crime alleged. It also established that aside from heads of state and government, foreign ministers also enjoyed immunity. The court emphasized that the nature of the minister of foreign affair's functions were of importance in determining if they were accorded immunity.[33]

Similar conclusions have also been reached in a number of other cases on the national level. In *Castro*, the court found that it could not exercise its criminal jurisdiction to prosecute Fidel Castro, as he held the position of head of state at the time.[34] Similarly, when Ariel Sharon stood accused before a Belgian court on charges of genocide and crimes against humanity for the Sabra and Shatila massacre, he was found to be exempt *ratione personae* from jurisdiction, as he was defense minister of Israel at the time of proceedings. Just as in *Arrest Warrant*, the fact that the crimes preceded his appointment had no relevance as to the validity of his personal immunity.[35]

Within the legal field, there is largely a consensus that for as long as the official holds office, personal immunity is inviolable and absolute.[36] The absolute nature of personal immunity means that three categories of acts are exempt from jurisdiction: (1) all acts undertaken before assuming office, as well as both (2) private and (3) official acts conducted during the time

[32] Supra 24, p. 855.

[33] *Arrest Warrant*, para 53.

[34] Order of 4 March 1999 (no. 1999/2723), Audencia National, as referenced by Cassese in 'When May Senor State Officials Be Tried for International Crimes? Some Comments on the *Congo v Belgium* Case', p. 860-861, note 21.

[35] Cassese, 'The Belgian Court of Cassation v. the International Court of Justice: The Sharon and Others case', p. 437-452.

[36] Kjeldgaard-Pedersen, p. 147. In the *Dissenting Opinion of Judge Van den Wyngaert to the Arrest Warrant Case of 2000, ICJ*, however, the judge argues that there is no provision under international law that grants foreign ministers the same immunity as heads of state and government, para 13.

serving.[37] Once a high-ranking state official leaves office, however, the absolute protection *ratione personae* no longer applies. This does not mean that the official's conduct in its entirety can become subject to legal proceedings. A former official can still invoke an exemption from jurisdiction on the ground of functional immunity, for actions undertaken in an official capacity.

2.3.2 Functional immunity

Immunity *ratione materiae* (so-called functional immunity) provides a lasting exemption from foreign criminal jurisdiction for all acts performed in an official capacity during the official's time in office. The existence of this continued exemption for official acts was established through *Pinochet*, as until then it has been unclear what the application was in international law.[38] Currently, the rule is reflected in draft article 6 and 7 of the ILC:s Draft Articles on the Immunity of State Officials from Foreign Criminal Jurisdiction (DAISFCJ).[39]

Though heads of state, foreign ministers and other high-ranking state officials are the focus of this essay, immunity *ratione materiae* is accorded to all state officials. It extends from the legal entity of the state and its immunity to 'cloak' individual officials acting on behalf of the state. While personal immunity is motivated by state sovereignty, the reasoning behind functional immunity is instead that it is otherwise non-viable for the function and integrity of a state, if a state official acting within his or her official capacity can be *individually* subjected to foreign domestic legal proceedings stemming from those same official acts.[40] Or, as the ICTY held in *Prosecutor v Blaskic*: as the official is considered a 'mere instrument of the State', it follows that 'their official action can only be attributed to the State'.[41]

[37] Supra 26.
[38] Fox, p. 442.
[39] Seventy-third session, p. 190.
[40] *Propend Finance Pty Ltd v Sing.* Court of Appeal, 1997. Referenced by Van Alebeek, see p. 103.
[41] *Prosecutor v. Tihomir Blaskic.* ICTY, 2000, para 38.

Asserting the scope of immunity *ratione materiae* is arguably far more complex than doing so *ratione personae*, as it requires discerning between private and official acts. In the following chapter, the different characteristics of private and official acts will be discussed further.

3 Private and official acts

3.1 Introduction

Functional immunity poses a permanent bar to foreign domestic jurisdiction for acts conducted in an official capacity, as such acts are instead attributed to the state. The opposite applies to acts undertaken in a private capacity; once an official leaves office and personal immunity ceases to be in effect, there is no bar to foreign national jurisdiction for the official's private acts.[42] For this reason, the distinction between what constitutes a *private* and an *official* act becomes essential when determining if a former high-ranking state official can be prosecuted on the national level for an act undertaken during the time he or she held office.

3.2 Official acts

An official act is an act attributable to the state itself and for which, by extension, the state official enjoys functional immunity from foreign national jurisdiction.[43] The key characteristic of an official act is that the official has undertaken it either 'under colour of authority'[44] or 'in ostensible exercise' of the official's public authority.[45] Notably, even unlawful acts and acts *ultra vires*, meaning acts that are in violation of the official's domestic authority in the home state, are still sovereign acts of state for which functional immunity is in effect.[46] In its commentary to the Draft Articles on Responsibility of States for Internationally Wrongful Acts (DARSIWA), the ILC highlights that acts under color of authority are to be considered official even if the person in question acted with 'ulterior or

[42] Supra 26.
[43] Article 4 ARSIWA. See also Van Alebeek, p. 132.
[44] Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries *Yearbook of the International Law Commission 2001, vol. II, Part Two*, p. 42, para 13.
[45] Watts, p. 56-57.
[46] Article 7 ARSIWA.

improper motives', or through abuse of public power.[47] Commenting on the case of *Prosecutor v Blaskic,* Van Alebeek similarly notes:

> As long as state officials perform acts in their official capacity within the context of the exercise of state authority under international law they are presumed to have acted as a mere arm and mouthpiece of their home state.[48]

3.3 Private acts

A private act is an act not made in an official capacity, for which a high-ranking state official does not retain functional immunity once their term is ended. In its commentary to draft article 7 of DARSIWA, the ILC describes private acts as acts where 'the conduct [of the official] is so removed from the scope of their official functions' that it should instead 'be assimilated to that of private individuals'.[49] In instances where this is the case, it naturally follows that state officials are not shielded from jurisdiction on the grounds that their crime in fact constituted an act of state.[50]

3.4 The gray zone

When functional immunity is invoked on the grounds that the action subject to the judicial proceedings was done within the scope of official authority, it falls to the court to determine whether the act was private or official in nature. Some acts are bound to have such a markedly private character, that there can be no question that they constitute private acts.[51] In other cases, an act may include both elements of private and official character, making the question more complex. A relative absence of judgments on the international level furthers this complexity, effectively creating a 'gray zone' where the precise rules of customary law remain elusive.

[47] Supra 44.
[48] Van Alebeek, p. 114.
[49] DARSIWA commentary, p. 46, para 7.
[50] Van Alebeek, p. 115.
[51] Ibid.

Though judgments on the national level are not themselves an expression of customary international law, they may provide an indication of state practice and *opinio juris* on the subject. In *Noriega*, Manuel Noriega (Panama's *de facto* leader at the time) argued that he was exempt from the jurisdiction of the court on charges of trafficking narcotics into the US since he enjoyed immunity as head of state. While the question of immunity was sidestepped in its entirety by the US Court on the grounds that the US had never recognized Noriega as the head of state of Panama, the court also asserted the distinct private character of the act, concluding that 'utilizing an official position to engage in criminal activity' does *not* 'cast [the] actions in a public light'.[52] Similarly, in *Jiménez v. Aristeguieta*, a US court concluded that the financial crimes of Venezuela's head of state Marcos Pérez Jiménez were undertaken for 'private financial benefit' and 'in violation of his position, rather than pursuant of it'.[53]

In the *Caire* case, on the other hand, state officials engaged in the extortion and unlawful killing of a foreign national were found to have committed the act in their official capacity. The presiding commission found that even if the officials had acted *ultra vires* and for their own private gain, the utilization of their position and of means made available to them in their official capacity meant that the act was official in nature. The commission argued that an act could only be considered private if it was 'merely the act of a private individual', having 'no conne[c]tion with the official function'.[54]

In its current efforts to codify the definition of an 'act performed in an official capacity', the ILC makes particular note of a seemingly uniform practice among national courts to deny immunity *ratione materiae* in cases where the official is charged with crimes of corruption, or where the acts are

[52] *United States v. Noriega*, 746 F. Supp. 1506, US District Court for the Southern District of Florida, 1990, section II(B).

[53] *Jimenez v. Aristeguieta*, 311 F.2d 547, 5th Circuit, 1962, section III.

[54] *Caire Claim* (France v. Mexico). UNRIAA, vol. V (Sales No. 1952.V.3) 1929. Also cited by ILC in DARSIWA commentary, p. 42 para 13.

‘closely linked to a private activity’, functioning more as a form of personal enrichment for the person of the official, than for the benefit of the state.[55]

[55] Seventy-third session, p. 203, p. 213 para 33.

4 The conflict between rules of immunity and *jus cogens*

Often referred to as peremptory norms of general international law, *jus cogens* rules are governing legal norms that are collectively recognized by the international community as being of mandatory, non-derogable character.[56] Their elevated status means that they, in effect, 'trump' conflicting rules of international law.[57] While no exhaustive list of peremptory norms exist, egregious conduct amounting to genocide, crimes against humanity and torture are generally held to be breaches of *jus cogens* rules.[58]

A contested issue regarding immunity for high-ranking state officials is the collision that occurs when the rules of immunity shield an official from jurisdiction related to grave international crimes, on the grounds that the act was of official character and therefore exempt from foreign national jurisdiction *ratione materiae*. In the report of its sixty-third session, the ILC illustratively summarizes the fraught relationship between immunity and *jus cogens* as a question of 'the balance between the need to ensure stability in international relations' on one hand, and 'the need to avoid impunity for grave crimes under international law' on the other.[59]

When examining this issue, one question is how an ensuing conflict between rules of immunity and the governing, overarching principles of *jus cogens* should best be resolved. Another question is if such a conflict even exists.

4.1 The *jus cogens* exception to immunity

Within the legal field, two dominant, oppositional views on the relationship between immunity and *jus cogens* have emerged. The first, which will be

[56] Article 53, Vienna Convention on the Law of Treaties, Vienna 23rd of May, 1969.
[57] Guilfoyle, p. 8-9.
[58] Draft conclusions on identification and legal consequences of peremptory norms of general international law (jus cogens), 2022, p. 6.
[59] Sixty-third session, para 119.

examined in this subchapter, is that the elevated status of jus cogens norms in effect 'trumps' immunity. The argument can be divided into two separate viewpoints.

4.1.1 *Jus cogens* overrides conflicting rules

The first viewpoint is that *jus cogens* would override any conflicting rules of customary international law, just as it does treaty law. In *Siderman de Blake v. Republic of Argentina*, the court supports this view, arguing that just as a treaty contravening peremptory norms is void *ab initio*,[60] rules of international law that are in conflict with a norm that has attained the status of *jus cogens* are invalidated.[61] A similar view is found in *Prosecutor v. Furundzija*, where the tribunal argues that every state is entitled to pursue violations of peremptory norms, on account that the international community has bestowed certain prohibitions with jus cogens status.[62]

4.1.2 *Jus cogens* violations cannot be official acts

The second viewpoint is that a violation of a jus cogens norm cannot, by its nature, be an official act for which there is immunity. In their Joint Separate Opinion, judges Higgins, Koojimans and Buergenthal refer to an increasingly held opinion among scholars that 'serious international crimes cannot be regarded as official acts'.[63] This view is supported by DAISFCJ, draft articles presented in the 73rd session of the ILC. Draft article 7 lists six crimes for which the commission believes that immunity *ratione materiae* should not apply: genocide, crimes against humanity, war crimes, apartheid, torture and enforced disappearance. [64]

4.2 Opposition to a *jus cogens* exception to immunity

[60] Supra 56.
[61] *Siderman de Blake v. Republic of Argentina*, 965 F.2d 699, 9th Circuit, 1992, p. 726.
[62] *Prosecutor v. Anto Furundzija.* ICTY 1998, para 156.
[63] Supra 18, para 85.
[64] Seventy-third session, p. 189-191.

The opposing view of the relationship between immunity and jus cogens is that the *jus cogens* character of a rule violated does not override or circumvent rules of immunity on the foreign domestic level. On the matter of personal immunity, *Arrest Warrant* makes it clear that this is the case — the absolute nature of personal immunity seemingly allows for no exception on the basis of *jus cogens*.[65] On the matter of functional immunity, however, the relationship between the two is more unclear. The position that *jus cogens* has no overruling function can be divided into two main arguments, that will in the following be referred to as the procedural argument and the 'character of the act'-argument.

4.2.1 The procedural argument

One argument against *jus cogens* taking priority over immunity hinges on the procedural nature of immunity, as opposed to the substantive nature of *jus cogens* rules. The procedural argument rejects the very premise that the rules are in conflict, holding instead that the two sets of rules 'address different matters'.[66] In *Jurisdictional Immunities*, the ICJ concludes that as the rules of immunity only determine whether the court may exercise jurisdiction or not, and not whether the acts in question were lawful or unlawful, they exist on a separate dimension from *jus cogens*.[67] In its judgment, the court refers to the *Armed Activities* case, concluding that the fact that a case concerns the breach of a peremptory norm does not mean that the court is granted jurisdiction which it would not otherwise have possessed.[68] While the Jurisdictional Immunities case concerns state immunity, and not the separate rules determining immunity for state officials, the judgment echoes assertions made in the Arrest Warrant case.[69]

[65] *Arrest Warrant*, para 58, 78.

[66] Ibid, para 60.

[67] *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)*, Judgment, *ICJ Reports 2012*, p. 99 para 93-95.

[68] *Armed activities*, Jurisdiction and Admissibility, Judgment, *ICJ Reports 2006*, p. 32 para. 64, p. 52 para. 125.

[69] Supra 66.

In summation, the argument holds that immunity and *jus cogens* operate on separate dimensions of the law, one judicial and the other substantive, and that as they do not interact, there is no 'collision' between them.

4.2.2 The 'character of the act'-argument

Another argument against the proposition of a *jus cogens* exception is that high-ranking state officials violating peremptory norms do so through use of their official authority. Such an act would by its very nature require the use of the state apparatus, which in and of itself means that it is official in character.[70] As such, the act would be attributable to the entity of the state, and not to its officials as individual persons. As immunity *ratione materiae* covers all acts of an official nature, the argument holds that no exception exists solely based on the severity of the official act in question.

[70] Supra 24, p. 868.

Analysis

While the rules of immunity for high-ranking state officials have historically been fragmented and subject to change in tandem with the immunity of the state itself, the *Pinochet* and *Arrest Warrant* cases have largely asserted the content of the law in its current form. In *Pinochet*, the serving head of state was determined to enjoy both a temporary, absolute immunity by reason of his person (*ratione personae*), and a lasting immunity for official acts by reason of the subject-matter (*ratione materiae*). In *Arrest Warrant*, personal immunity was confirmed to not only apply to heads of state and government, but also extend to foreign ministers.

The ICJ motivated the inclusion of foreign ministers by emphasizing the nature of the functions exercised by them. This might indicate that an even larger circle of officials could be accorded personal immunity, if they serve similar functions. The Belgian court's finding that Ariel Sharon had personal immunity as defense minister of Israel could possibly indicate that defense ministers are also included in the protected class of high-ranking state officials. However, I find that caution should be exercised when using standalone national judgments to determine or speculate as to the content of customary international law. National judgments are not an expression of customary international law, only a possible indication of its content. As it stands, only heads of state, heads of government and foreign ministers can with certainty be said to enjoy personal immunity.

The historical shift from absolute to restrictive state immunity doctrine is likely reflected in this legal development. It can no longer be said that a single, sovereign ruler embodies a state. Rather, several high-ranking state officials perform different essential state functions and represent different facets of state authority. By necessity, this wider circle of officials must then be granted absolute immunity.

As opposed to personal immunity, functional immunity extends to *all* state officials, irrespective of whether they are high or low ranking. Their acts are

effectively the state's acts, and in their official capacity they have simply served as an instrument of the state entity. The principles of state sovereignty and independence ensure their acts cannot be placed under the jurisdiction of another state. While former high-ranking state officials have lost the absolute immunity of their office, they still retain a permanent exemption from foreign national jurisdiction for acts they undertook in their official capacity.

The precise distinction between a private and an official act proves somewhat elusive. As mentioned above, official acts are shielded on the grounds that they are acts of the state, not of the individual person of the official. Yet, paradoxically, even acts that are not legitimate within the home state, such as acts that are unlawful or beyond the scope of authority, are still considered to be of official character. In its commentary to DARSIWA, the ILC asserts that private acts must be completely or nearly completely separate from the exercise of public authority, essentially 'removed from the scope of [...] official functions'. This restrictive view of private acts reflects the commission's finding in the *Caire* case. However, hinging the private nature of an act on its disconnect from the exercise of public authority is not without its problems. A head of state or other high-ranking official could (depending on the nature of their office) be considered in possession of their public authority, or in exercise of official functions, at all times. For a ruler who removes or systematically contravenes the national mechanisms of democracy and accountability (i.e. a dictator), for example, private and official may effectively become one and the same. This would render public authority a nearly innate quality of their person, making even acts that would otherwise be private take on the color of authority.

The *Noriega* and *Jiménez v. Aristeguieta* cases could indicate the opposite of the ILC's findings, namely that some acts cannot possibly be official, even if official authority has been used in the commencement of them. In *Noriega*, the US court concludes the systematic utilization of official authority in criminal activity does not mean the actions take on an official

character. Meanwhile, in *Jiménez v. Aristeguieta*, the court held that crimes undertaken for private benefit stood opposed to an official's public authority, rather than under it. The reasoning is compelling, and aligns with the findings of the ILC's report on its seventy-third session in 2022. In the process of codifying the definition of official acts, the commission found that there is extensive national practice excluding both crimes of corruption actions undertaken only for the personal benefit of the official from immunity. This suggests a distinction between private and official acts aligned with the findings in the US cases, rather than with the *Caire* case. It can be concluded that even though unlawful acts and acts *ultra vires* may still partially lie within the definition of official acts, the definition may have an outer limit. Abuse of public authority in the form of corruption or crimes strictly for private enrichment are not acts for which *ratione materiae* extends in practice. Instead, they are categorically considered private. The same applies for acts that have either none or a very miniscule connection to the exercise of public authority.

The legal developments from the *Caire* case to current law show an ongoing shift in how acts of state are viewed. The historical view was that all acts of state were expressions of its sovereignty that could not be subjected to jurisdiction of other states. In the initial shift to restrictive doctrine, acts of commercial nature were excluded from immunity. Some form of restrictive development seems to continue in the present, given the narrowing definition of official acts for state officials.

Lastly, there is the question of whether *jus cogens* comes into conflict with the rules of immunity, and how such a conflict should be resolved. The question has both a component of *lex lata* and *lex ferenda*.

Proponents of a *jus cogens* exception to immunity argue that immunity takes priority either because its higher status renders other international rules void, or because a *jus cogens* violation by merit of its nature cannot be regarded as an official act. Opponents to the exception, on the other hand, may argue either that the rules exist in different dimensions of the law, or

that for a high-ranking state official, a *jus cogens* crime naturally implies use of the state apparatus. The procedural argument is well-supported by judgments in the ICJ.

Taking the position of *lex lata*, the evidence in support of a *jus cogens* exception to immunity appears insufficient. There is certainly merit in the argument of the court in *Siderman de Blake v. Republic of Argentina*, that conflicting rules of customary international law should be voided the same way a treaty would be, if found to conflict with *jus cogens* norms. But the argument ignores immunity as a procedural rule, meant to ascertain jurisdiction in the stage preceding a judicial process that deals with substantive questions. The argument that *jus cogens* crimes cannot constitute official acts also holds some merit. Nevertheless, it seems currently to exist more as a matter of scholarly opinion than as a definitive rule of law. The process of drafting articles in the ICJ is ongoing, and though the proposed article 7 of DAISFCJ likely indicates what direction the law will soon take, it cannot yet be said to reflect *lex lata*. As a consequence, high-ranking state officials are protected *ratione materiae* from foreign national courts for *jus cogens* crimes. As it presently stands, it would seem that immunity fuels impunity.

Taking the stance of *lex ferenda,* on the other hand, renders a different result. The rules of *jus cogens* are non-derogable; they offer no exception. They override and render void any conflicting rule of treaty. It seems contradictory to the larger international legal framework that their effect would at the same time be effectively 'cancelled out' by the existence of a procedural rule. Also contradictory is the argument that a high-ranking state official is protected *ratione materiae* from jurisdiction for grave international crimes simply by utilizing the state apparatus to commit said crimes. State leaders can perhaps be said to be the most responsible if, for example, a crime of genocide or apartheid occurs in their state. Yet, by this argument, they would also have the most all-encompassing protection.

I would argue that the rules of immunity for high-ranking state officials should instead be interpreted in the light of the governing, mandatory principles of international law. Not only would this ensure that the larger international framework is consistent, but it would also align with the continuous, collective efforts made by the international community to fight impunity everywhere. For this reason, the proposed draft article 7 of the DAISFCJ, which excludes crimes of genocide, crimes against humanity, war crimes, torture and enforced disappearance from the scope of immunity *ratione materiae*, is a perfect reflection of the law as it should be. A more restrictive interpretation of immunity *ratione materiae* would ensure that it is no longer possible for officials engaged in grave international crimes to hide behind the protection afforded to them by virtue of their office. Instead, perpetrators who would otherwise have safely resided beyond the reach of any jurisdiction may finally be brought to justice through national courts.

It is clear that the rules of immunity are slowly changing, and that there is a fundamental shift at the horizon. When we reach it, we may be entering the era that finally ends impunity.

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