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With this thought, we hereby present to you

# **BALANCING DUTY AND JUSTICE: FUNCTIONAL IMMUNITY OF STATE OFFICIALS IN THE FACE OF INTERNATIONAL CRIMES**

AUTHORED BY - PROF. (DR). SEEMA SURENDRAN<sup>1</sup>, LIDIYA MATHEW<sup>2</sup>

## **Abstract**

The precept of functional immunity, known as *immunity ratione materiae*, has long served as a protective shield for public officials performing official acts. It is entrenched in the principles of sovereignty and non-intervention, this legal concept ensures that the individuals acting in interests of a state are not held personally liable for actions taken in their official capacity. However, the dynamic evolution of international criminal law has raised questions about the legitimacy and limits of such functional immunity when the state officials are accused of grave international crimes such as genocide, crimes against humanity, and war crimes. This paper examines the complex interplay between the duty of public officials to serve the state and the global imperative to hold perpetrators of international crimes accountable. Through an analysis of key legal cases, and national jurisprudence, the research critically examines the challenges and whether the functional immunity of state officials should yield in the face of justice. The paper further evaluates how national and international courts have interpreted and applied this doctrine, and offers recommendations for reconciling legal immunity with the pursuit of international justice.

Keywords: functional immunity, state officials, international crimes, accountability, international law, sovereign duty, universal jurisdiction, ICC, transitional justice

## **Introduction**

The term immunities in accordance with international law has been practiced for a long time extending back not hundreds but thousands of years ago. For instance to maintain a channel of communication and prevent conflicts and provide solution to the society depended on their envoys and their protection particularly at times of conflict. Accordingly, international law

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developed to inviolability of a foreign state's representatives and immunities from the exercise of jurisdiction.<sup>3</sup> Immunities prevents a representative from being held liable and maintain the conduct of diplomatic relations, alongside this ,they also bring pressure on the prosecution of heinous crimes committed under international law.<sup>4</sup> Contemporary progress in the field of international criminal law has incorporated the value of human rights and multiple measures has been taken to prosecute the international criminals.<sup>5</sup> This emerges the question of extending boundaries between immunities and accountability.

In terms of immunities from prosecution there is clear distinction between personal immunities (*ratione personae*) and functional immunities (*ratione materiae*).<sup>6</sup> The first protects state from official duties and second protects high-ranking from representing their country. The conduct made by the mandate of the state is protected under functional immunity.<sup>7</sup> It is taken from the concept of sovereign equality, stating that an action and policies of state provide some form of consent. All persons who carry out the official functions of the state comes under functional immunities. The immunity provided is permanent and endures even after the person leave his offices. The assurance of functional immunities does not provide complete protection but can cover, official act conducted by the government representatives.<sup>8</sup> Hence if the act was carried out the personal bases then it is tried under criminal prosecution.

However, the application of functional immunity becomes increasingly controversial when it intersects with international crimes such as genocide, war crimes, crimes against humanity, and torture.<sup>9</sup> These crimes, inherently, involve serious violations of international law and often implicate high ranking government officials acting under the guise of their official authority.<sup>10</sup> The concept of functional immunity can, in such contexts, become an obstacle to accountability and justice. Notably, the transnational legal community has been grappling with the tension

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<sup>3</sup> Lauterpacht, H., 1951. The problem of jurisdictional immunities of foreign States. Brit. YB Int'l L., 28, p.220.

<sup>4</sup> Simbeye, Y., 2017. Immunity and international criminal law. Routledge.

<sup>5</sup> Huneus, A., 2013. International criminal law by other means: the quasi-criminal jurisdiction of the Human Rights Courts. American Journal of International Law, 107(1), pp.1-44.

<sup>6</sup> Bankas, E.K., 2022. The Overlap of Immunity Ratione Personae and Immunity Ratione Materiae. In The State Immunity Controversy in International Law: Private Suits Against Sovereign States in Domestic Courts (pp. 707-725). Berlin, Heidelberg: Springer Berlin Heidelberg.

<sup>7</sup> Van Alebeek, R., 2012. National courts, international crimes and the functional immunity of State officials. Netherlands International Law Review, 59(1), pp.5-41.

<sup>8</sup> Woolhandler, A., 1986. Patterns of official immunity and accountability. Case W. Res. L. Rev., 37, p.396.

<sup>9</sup> Foakes, J., 2011. Immunity for international crimes?. Developments in the law of prosecuting heads of state in foreign courts.

<sup>10</sup> Cassese, A., 2002. When may senior state officials be tried for international crimes? Some comments on the Congo v. Belgium case. European Journal of International Law, 13(4), pp.853-875.

between the need to uphold state immunity and the imperative of ensuring individual accountability for egregious crimes.<sup>11</sup>

Recent developments by the norms of international law have called into question the absolute nature of functional immunity, particularly in relation to international crimes. Judicial bodies such as the International Criminal Tribunal for the former Yugoslavia (ICTY), the International Criminal Court (ICC), and domestic courts invoking universal jurisdiction have played a pivotal role in narrowing the scope of this immunity.<sup>12</sup> For instance, in the Pinochet case, the UK House of Lords held that former Chilean dictator Augusto Pinochet could not claim immunity for acts of torture, despite their official character, as such acts violated peremptory norms of international law.<sup>13</sup> This landmark ruling has since informed the jurisprudence of other courts and contributed to a growing body of law recognising exceptions to functional immunity in cases involving international crimes.

### **The Concept of Functional Immunity in International Law**

In recent decades, the notion of accountability for international crimes has gained traction, placing the long-standing principle of functional immunity under critical scrutiny.<sup>14</sup> Originally designed to ensure that officials could perform their duties on behalf of the state without fear of foreign prosecution, functional immunity, has become a point of contention in international criminal law.<sup>15</sup> The principle reflects a tension between two competing values: the protection of sovereign functions and the imperative to uphold justice in the face of atrocities.<sup>16</sup> As international norms evolve, particularly around the responsibility of individuals for crimes such as genocide and torture, the boundaries of functional immunity are being rigorously re-examined.<sup>17</sup>

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<sup>11</sup> Akande, D., 2004. International law immunities and the International Criminal Court. *American Journal of International Law*, 98(3), pp.407-433.

<sup>12</sup> Epik, A., 2021. No functional immunity for crimes under international law before foreign domestic courts: An unequivocal message from the German Federal Court of Justice. *Journal of International Criminal Justice*, 19(5), pp.1263-1281.

<sup>13</sup> Sison, G., 2000. A King No More: The Impact of the Pinochet Decision on the Doctrine of Head of State Immunity. *Washington University Law Quarterly*, 78(4).

<sup>14</sup> Zabyelina, Y., 2023. *Between Immunity and Impunity: External Accountability of Political Elites for Transnational Crime*. Cambridge University Press.

<sup>15</sup> Masumbe, P., 2021. Defining the Future of the Immunity Ratione Materiae of State Officials in International Criminal Law. *Turf Law Journal*, 1(2).

<sup>16</sup> Larking, E., 2004. Human rights and the principle of sovereignty: a dangerous conflict at the heart of the nation state?. *Australian Journal of Human Rights*, 10(1), pp.15-32.

<sup>17</sup> Bankas, E.K., 2022. State Immunity and Violation of International Law. In *The State Immunity Controversy in International Law: Private Suits Against Sovereign States in Domestic Courts* (pp. 343-416). Berlin, Heidelberg: Springer Berlin Heidelberg.

Functional immunity shields state officials from foreign jurisdiction for acts performed in their official capacity.<sup>18</sup> Rooted in the doctrine of sovereign equality of states and non-intervention, functional immunity recognizes that certain acts are not attributable to the individual personally but to the state itself. Therefore, the official cannot be held personally liable in foreign courts for those actions, even after leaving office.<sup>19</sup> For instance if a military officer orders an attack that violates international law. Functional immunity might protect them from being prosecuted in another country's courts because they were acting on behalf of their government. Critics argue that this kind of immunity can create a loophole, letting perpetrators of serious crimes walk free.<sup>20</sup> On the other side, defenders of functional immunity warn that weakening it could make it harder for states to function, as officials might fear prosecution every time they make a tough call.

Historically, the concept of functional immunity evolved from the need to facilitate diplomatic relations and preserve state sovereignty. Its early development can be traced to customary international law and state practice, especially through diplomatic and consular immunities, which were later codified in the 1961 Vienna Convention on Diplomatic Relations and the 1963 Vienna Convention on Consular Relations.<sup>21</sup> However, these instruments primarily address diplomatic immunity rather than accountability for international crimes.

Under functional immunity, acts performed *jure imperii* that is, in the exercise of sovereign authority are immune from prosecution by foreign national courts. However, this immunity has increasingly been challenged in the context of international crimes such as genocide, war crimes, and crimes against humanity. International criminal law, particularly through the jurisprudence of international tribunals, has begun to draw a distinction between acts of state and criminal conduct that violate jus cogens norms.

The International Law Commission (ILC), in its work on the “Immunity of State Officials from Foreign Criminal Jurisdiction,” has recognized this tension. In Draft Article 7 of its 2019 report, the ILC proposes that *immunity ratione materiae* shall not apply in cases involving core

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<sup>18</sup> Van Alebeek, R., 2012. National courts, international crimes and the functional immunity of State officials. *Netherlands International Law Review*, 59(1), pp.5-41.

<sup>19</sup> Cassese, A., 2002. When may senior state officials be tried for international crimes? Some comments on the Congo v. Belgium case. *European Journal of International Law*, 13(4), pp.853-875.

<sup>20</sup> Theis, W.H., 1977. Official Immunity and the Civil Rights Act. *La. L. Rev.*, 38, p.281.

<sup>21</sup> Denza, E., 2009. Vienna Convention on Diplomatic Relations. United Nations Audiovisual Library of International Law, pp.1-7.

international crimes, including genocide, crimes against humanity, war crimes, and torture. Judicial bodies such as the ICTY and the ICC have reinforced this trend. In *Prosecutor v. Blaškić* (1997), the ICTY emphasized that official capacity does not relieve individuals of criminal responsibility. Similarly, Article 27(1) of the Rome Statute of the ICC affirms that official capacity “shall in no case exempt a person from criminal responsibility.”<sup>22</sup> Thus, while functional immunity remains a valid principle under international law, its applicability to international crimes is increasingly restricted, reflecting a growing normative consensus that impunity cannot shield perpetrators of the most serious crimes against humanity.

### **Immunity granted to individual by the virtue of their governmental status.**

The first type of immunity applicable to certain state authorities is specific to their position and is only available while they are in office. This immunity is granted to a limited number of high-ranking state officials, such as heads of state, heads of government, and foreign ministers. It also extends to diplomats and other officials on special missions abroad. These privileges are primarily given to those responsible for managing the state's foreign policy, based on the recognition that effective communication between states is crucial for the successful functioning of international relations and cooperation.

For the communication and collaboration process to function effectively, state agents responsible for managing foreign relations must have the freedom to travel, allowing them to perform their duties without the fear of potential harassment from other countries. Thus, maintaining a system of friendly cooperation and coexistence among states relies on these immunities. The International Court of Justice states that “there is no more essential prerequisite for the conduct of relations between states than the inviolability of diplomatic envoys and embassies.”<sup>23</sup>

Heads of state, diplomats, and other officials granted immunity *ratione personae* are completely free from the foreign state's criminal jurisdiction because they will be unable to perform their duties if they are imprisoned and jailed while in a foreign country. The ICJ ruled in the *Arrest Warrant* case that this kind of immunity extends beyond the official actions of this select group of high-ranking officials to include private actions.

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<sup>22</sup> United Nations, 1999. Rome statute of the international criminal court. *Social Justice*, pp.125-143.

<sup>23</sup> Ahmad, N., 2020. The obligation of diplomats to respect the laws and regulations of the hosting state: A critical overview of the international practices. *Laws*, 9(3), p.18.

In case the state officials are arrested for performing their official duties in a foreign country these officials have complete immunity from foreign criminal jurisdiction. It is noticed in the search warrant case that these type of immunity is not just limited to official acts but also in relation to private act.<sup>24</sup> It explains that the act committed when the official was in the office or before entering into the office the immunity still applies. Hence the making the arrest a violation under international law. However, since the functional immunity is permitted for diplomatic functions, the immunity can only apply when they are in the office. When there is violation of human rights the discussion to remove functional immunity raise but this reasoning will only prevent the foreign leaders from travelling abroad. Functional immunity remain still in effect if the official has committed an international crime by manifold national courts. There are no instances of finding criminal jurisdiction for the alleged international crimes committed by the senior officials in a foreign state.

The whole existences of this immunity are still in question of doubt as to which government official can claim this entitlement from foreign criminal prosecution. In the case of arrest warrant it was state by ICJ that only diplomatic and consular agents, few high ranking officers like head of the state, government and minister for foreign affairs have the entitlement of this immunity.<sup>25</sup> They enjoy absolute functional immunity and sometimes the foreign ministers have been under controversy. Hence according to international law and customary laws if any person is sent to conduct a special mission by the state is unassailable to a foreign state and they never to be arrested or detained.

### **Functional immunity granted for actions performed in an official capacity.**

The immunity of this kind is granted to state officials who within their capacity has performed an act. The immunity is also extended to those without the entitlement of personal immunity. It applies not only to officials but also to the former officials who have acted within the capacity of their official's duties. It applies to bodies organ that has acted on behalf of the state. The case of functional immunity can traced in case of civil matters than criminal. The reason for this is because the criminal jurisdiction of the state is usually territorial the officials do not conduct their function in the other state's territory. The situation which if state official is

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<sup>24</sup> Roth, J.R.J., 1997. Qualified Immunity: Private Rights of Action for Constitutional Police Violation Cases in Canada and the United States. Sw. JL & Trade Am., 4, p.245.

<sup>25</sup> Weatherall, T., 2019. Inviolability not immunity: Re-evaluating the execution of international arrest warrants by domestic authorities of receiving states. Journal of International Criminal Justice, 17(1), pp.45-76.

prosecuted for the acts determining to be criminal charged within their official capacity is limited. Nonetheless, claiming functional immunity in criminal matters is not without the precedent and the justification for its application is considered even stronger in the context of criminal liability.

The two-core principle form the basis of the *ratione materiae*. First it serves as a substantive defence, signifying that an individual official cannot be held personally liable for actions that are, in essence, attributable to the state itself. Second, the immunity granted to state officials in foreign jurisdictions helps to uphold the impunity of the state by preventing legal actions that would indirectly target the state through its representatives.<sup>26</sup> In this way, the immunity acts as a procedural or jurisdictional barrier, shielding foreign state actions from judicial scrutiny by blocking proceedings against the officials who executed those acts.

While current and former state officials usually enjoy immunity for actions taken in their official roles, this immunity does not extend to prosecutions in foreign domestic courts for international crimes. Many national prosecutions have been initiated against foreign state officials for these offenses. In almost all instances, courts have determined, either directly or indirectly, that functional immunity does not protect individuals from being held accountable for international crimes.

Two primary justifications have been advanced to support this position. The first contends that although officials may generally benefit from immunity for official conduct, acts constituting international crimes fall outside the scope of legitimate state functions and therefore cannot be considered as official acts. The second argument posits that no immunity applies in cases involving international crimes because such offences constitute violations of jus cogens norms peremptory norms of international law which are hierarchically superior and should override rules on immunity.<sup>27</sup>

However, as discussed more fully elsewhere, both arguments are flawed. They rest on a misunderstanding of the legal foundations of state immunity and create a misleading dichotomy

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<sup>26</sup> Shi, X., 2021. Diplomatic immunity *ratione materiae*, immunity *ratione materiae* of state officials, and state immunity: A comparative analysis. *Leiden Journal of International Law*, 34(1), pp.45-65.

<sup>27</sup> Caplan, L.M., 2003. State immunity, human rights, and jus cogens: a critique of the normative hierarchy theory. *American Journal of International Law*, 97(4), pp.741-781.

between the principles of state immunity and jus cogens norms. In any case, the claim that immunity should not apply to acts violating jus cogens norms has been rejected by key judicial bodies, including the ICJ, the European Court of Human Rights, and the majority of domestic courts that have considered the issue.<sup>28</sup>

Further, with the evolution of international legal norms allowing domestic courts to apply universal jurisdiction for serious international crimes, the concept of immunity based on an official's role, no longer holds in such contexts. When international law allows prosecution for crimes committed while in office, the earlier rules granting such immunity lose their significance. A clear example is the Pinochet case, where the UK's House of Lords ruled that under the Torture Convention, official capacity did not justify immunity for torture, as it conflicted with obligations under the Convention. Therefore, *immunity ratione materiae* must be seen as overridden by universal jurisdiction in such cases.

Similarly, the Geneva Conventions of 1949 establish that war crimes and grave breaches committed in international armed conflicts typically by state officials or military personnel fall under universal jurisdiction, rendering immunity claims invalid. Although crimes like genocide, crimes against humanity, and war crimes in internal conflicts may involve non-state actors, the legal frameworks still limit immunity claims because they clash with the enforcement mechanisms under international law.<sup>29</sup> Thus, national and international rules allowing prosecution of state officials take precedence over traditional immunity norms. As a result, immunity *ratione materiae* generally does not apply to cases involving international crimes as outlined in the ICC Statute.

### **Balancing Functional Immunity and Demand for Justice**

Balancing the need for functional immunity with the pursuit of justice poses a challenging legal and moral predicament. Functional immunity is designed to shield government officials from legal repercussions for actions taken in their official roles, but it can also be exploited to evade responsibility for serious international offenses.<sup>30</sup> The challenge lies in upholding the principle of sovereign equality without allowing it to serve as a cover for impunity

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<sup>28</sup> Mik, C., 2013. Jus cogens in contemporary international law. Polish Yearbook of International Law, (33), pp.27-93.

<sup>29</sup> Karimova, T., 2002. Universal Permissive Jurisdiction for the Violation of Common Article 3 of the Geneva Conventions for the Protection of the Victims of War of 12 August 1949. Mil. L. Rev, 1(91), p.17.

<sup>30</sup> Woolhandler, A., 1986. Patterns of official immunity and accountability. Case W. Res. L. Rev., 37, p.396.

The international law has increasingly acknowledged the need to reconsider the boundaries of *ratione materiae*, particularly when dealing with violations such as war crimes, crimes against humanity, and genocide. Courts have begun to challenge the traditional extend of immunity when confronted with such serious allegations. A notable example is the decision by the Court of First Instance in Livadeia, Greece. In that case, the court rejected the defence of impunity in a claim involving Nazi-era atrocities, underscoring that the gravity of the crimes outweighed the customary protections typically afforded to state functions.<sup>31</sup> This judgment emphasized the evolving view that accountability must sometimes take precedence over strict adherence to immunities.

Ultimately, each case requires a sensitive, context-driven analysis. The goal is not to undermine legitimate governmental functions but to ensure that the international legal order does not permit serious violations to go unpunished under the guise of immunity.

### **Domestic courts approach towards functional immunity and international crimes**

The doctrine of functional immunity protects the state officials from legal proceedings in foreign courts for acts performed in their official duty. However, when acts that involve serious international crime, domestic courts have scrutinized and some case there has been instances of limiting the authority to stay immune from being liable. Various domestic courts have focused on the relationship between functional immunity and the prosecution of international crimes. Notably, the UK, Germany, and South Africa have each grappled with this complex legal issue, leading to significant jurisprudential developments.

Domestic courts have addressed the tension between functional immunity and liability in the following cases:

#### **United Kingdom – Pinochet Case R v Bow Street Magistrate, ex parte Pinochet Ugarte No. 3, 1999**

The Pinochet case marked a foundational shift in how domestic courts treat the immunity of former state officials. The case arose when Augusto Pinochet, the ex-Chilean head of state, was arrested in London following an extradition request from Spain. He was accused of authorizing

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<sup>31</sup> Case, D.M., 2006. State immunity—Jurisdiction—Doctrine of restrictive immunity—Exception to immunity for civil claims in tort—Immunity from civil proceedings in respect of acts of armed forces—Whether such immunity absolute—Whether any exceptions for war crimes or crimes against humanity.

acts of torture and human rights violations during his regime.

The legal issue centred on whether Pinochet was entitled to functional immunity for acts committed in exercise of his official functions. Traditionally, such immunity would protect actions done in an official capacity. However, the House of Lords ruled that acts like torture, even if performed by a government official, should not be regarded as a legitimate state functions under international law. Since the UK was a signatory to the UN Convention Against Torture, it had a legal duty to deny immunity for such crimes. The ruling established that international crimes, due to their egregious nature, fall outside the scope of lawful state functions and therefore void functional immunity. This judgment set a precedent in international and domestic law by affirming that even high-ranking former officials could be held accountable where international crimes are concerned.<sup>32</sup>

### **Germany Federal Court of Justice (BGH) Decision, 2021**

Germany has embedded the principles of international criminal law in its domestic legislation through the Völkerstrafgesetzbuch, Code of Crimes Against International Law. In a 2021 ruling, the Federal Court of Justice rejected a claim of functional immunity by a low-ranking foreign official accused of violation of the law of armed conflict.

The court emphasized that conduct amounting to war crimes or crimes against humanity cannot be protected under the principle of functional immunity, regardless of the perpetrator's official status or state authority. The judgment relied heavily on the principle that such crimes are universally condemned and therefore cannot be justified or shielded by invoking state functions. This view aligns with Germany's legal philosophy that there must be no impunity for grave breaches of international norms, and its courts have jurisdiction regardless of where the crime occurred or national status of the alleged offender.<sup>33</sup>

### **South Africa – Minister of Justice v Southern African Litigation Centre, 2016<sup>34</sup>**

South Africa's domestic legal framework was tested in the controversial al-Bashir case. When

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<sup>32</sup> Chinkin, C.M., 1999. United Kingdom House of Lords. Regina v. Bow Street Stipendiary Magistrate ex parte Pinochet Ugarte (No. 3).[1999] 2 WLR 827. American Journal of International Law, 93(3), pp.703-711.

<sup>33</sup> Kuru, I.A., 2023. German Federal Supreme Court decides on German Based "British" limited companies' future post-Brexit: Order of the German Federal Supreme Court (Bundesgerichtshof) 16.02. 2021–II ZB 25/17. Sunderland Journal of Law and Criminology, (1).

<sup>34</sup> Schwartz, R., 2015. South Africa Litigation Centre v. Minister of Justice & Constitutional Development: Balancing Conflicting Obligations-Prosecuting al-Bashir in South Africa. Tul. J. Int'l & Comp. L., 24, p.407.

Sudanese President Omar al-Bashir visited South Africa in 2015, he was under two ICC arrest warrants for genocide and war crimes. Despite South Africa's legal obligations under the Rome Statute and its national enforcement of the Rome Statute Act, al-Bashir was allowed to leave the country.

The domestic High Court, and later the Supreme Court of Appeal, found that the South African government had a legal duty to arrest al-Bashir and had acted unlawfully in permitting his departure. The courts ruled that the duty to cooperate with the ICC overrides any immunity that may be conferred in accordance with customary international law or regional agreements. This decision reinforced the notion that international legal commitments to prosecute international crimes can prevail over traditional claims of immunity, especially within the framework of international treaties like the Rome Statute.

These cases demonstrate a significant judicial evolution away from absolute functional immunity toward a more accountability-oriented approach, particularly where international crimes are involved. Domestic courts in democratic and rights-based legal systems are increasingly willing to restrict or deny immunity to uphold justice and affirm the supremacy of international legal norms.

### **Extend of limitation in functional immunities with the case analysis**

Despite having immunity the states have proposed the concern of human rights violation and recognised that international crimes committed must be prosecuted and made accountable under international law. Courts and tribunals across various jurisdiction have begun to assert that crime such as genocide, torture and crime and against humanity are so grave that they transcends the protection normally afforded by the functional immunity.

The jurisprudence emerging from cases involving Augusto Pinochet, Hissène Habré, and Charles Taylor represents a turning point, wherein courts devised legal justifications to override traditional immunity protections in favour of ensuring justice and redress for victims of grave international crimes.

Augusto Pinochet, Chile/United Kingdom - The arrest of General Augusto Pinochet in London in 1998 marked a seminal moment in the development of international criminal accountability.

Acting on a Spanish extradition request, British authorities detained the former Chilean head of state on charges of torture and other severe infringements on human rights violation committed during his dictatorship.<sup>35</sup> Central to the legal debate was whether Pinochet, having held the highest political office, could invoke functional immunity for acts allegedly committed while exercising official authority.

The UK House of Lords, in a divided but historic ruling, held that torture constitutes an international crime that cannot be considered a lawful function of the state. The Lords concluded that when a state criminalizes torture through treaty obligations (specifically under the UN Convention Against Torture, no official can invoke immunity to escape responsibility for such acts. This judgment established that certain crimes are universally condemned and incompatible with any claim of lawful state conduct because of their inherent nature.

Following his return to Chile, Pinochet's legal journey continued. In 2000, Chile's Supreme Court revoked his immunity in relation to specific human rights violations, including the infamous Caravan of Death. Although deteriorating health ultimately spared him a full trial, the willingness of both UK and Chilean courts to pierce the veil of immunity signaled an evolving consensus: former heads of state could no longer rely on past official status to evade justice for international crimes.

### **Hissène Habré (Chad/Senegal)**

Hissène Habré's prosecution represented a watershed for international criminal law in Africa. Following his removal from office in 1990, Habré sought refuge in Senegal. Efforts to bring him to justice were initially obstructed by procedural roadblocks and arguments rooted in sovereign immunity. However, under increasing pressure from human rights organizations and a 2006 decision by the ICJ affirming Senegal's duty to prosecute or extradite, the AU intervened.<sup>36</sup>

In response, Senegal created the Extraordinary African Chambers (EAC), a special jurisdiction within its legal system, with a mandate to try Habré for atrocities committed in Chad. The trial culminated in a 2016 conviction, where Habré was found guilty of war crimes, crimes against

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<sup>35</sup> Wilson, R.J., 1999. Prosecuting Pinochet: International crimes in Spanish domestic law. *Human Rights Quarterly*, 21(4), pp.927-979.

<sup>36</sup> Arnould, V., 2015. Review of 'The President on Trial: Prosecuting Hissène Habré'. *Policy*, 101, p.209.

humanity, and acts of torture. Importantly, the EAC rejected any defense based on functional immunity, arguing that such crimes cannot be categorized as legitimate acts of state, especially when they target civilians and political dissidents. Habré's conviction marked the first time a former African head of state was tried and sentenced by the court of another African country, setting a powerful precedent for regional enforcement of international norms.

### **Charles Taylor (Liberia/Special Court for Sierra Leone)**

Charles Taylor's case further advanced the principle that high-ranking officials are not exempt from prosecution when implicated in mass atrocities. Indicted in 2003 while still serving as President of Liberia, Taylor was accused of orchestrating and aiding rebel forces in Sierra Leone culpability for systematic breaches of the laws of armed conflict and the intentional killings, rape, and forced conscription of child soldiers.

The SCSL, established through an formal accord between the United Nations and the Sierra Leonean government, rejected the notion that Taylor's position as a sitting head of state exempted him from prosecution. The court relied on Article 6(2) of its Statute, which explicitly denies immunity to individuals based on official capacity. In its reasoning, the SCSL emphasized that exemption granted pursuant to international law does not apply before international tribunals. After being transferred to The Hague for security reasons, Taylor was tried and, in 2012, convicted and sentenced to 50 years in prison. The verdict not only reinforced the notion of individual accountability but also underscored the limited scope of immunity before hybrid and international courts.<sup>37</sup>

The prosecution of Pinochet, Habré, and Taylor collectively illustrates a doctrinal transformation in how the international community addresses the intersection of state authority and criminal responsibility. These cases reflect a growing judicial rejection of immunity defenses where official authority has been abused to perpetrate international crimes. By recognizing that such crimes transcend sovereign privilege, courts have moved toward a model of justice where accountability prevails over formal legal protections. This evolution affirms the principle that no individual regardless of title or status is beyond the reach of the law when protection of human are jeopardized.

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<sup>37</sup> Jalloh, C.C., 2010. Special Court for Sierra Leone: Achieving Justice. *Mich. J. Int'l L.*, 32, p.395.

## Conclusion

The doctrine of functional immunity has long served as a mechanism to uphold the principle of state sovereignty by shielding government representative from external jurisdiction for acts performed in their official capacity. However, this protection becomes increasingly problematic when it collides with the international community's obligation to prosecute serious crimes such as genocide, torture, and crimes against humanity. As demonstrated through evolving jurisprudence and scholarly critique, functional immunity is no longer regarded as absolute when invoked to shield perpetrators of atrocity crimes.<sup>38</sup>

This analysis indicates that, while functional immunity continues to play an important role in maintaining diplomatic stability and sovereign equality, its misuse can create a legal vacuum that allows impunity for egregious violations of international law. Courts and tribunals are increasingly recognizing that certain acts particularly those that violate jus cogens norms cannot be considered legitimate state functions, and therefore fall outside the protective reach of functional immunity. Balancing the preservation of state functions with the imperative of justice requires a refined and principled approach. International and domestic courts must adopt standards that neither compromise the lawful exercise of official duties nor allow immunity to obstruct the pursuit of justice. In conclusion, the research establishes that a more coherent and restrictive interpretation of functional immunity, informed by international human rights obligations, is essential to ensure accountability without undermining the legitimate interests of state sovereignty.

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<sup>38</sup> Zabyelina, Y., 2024. Considerations of (non)-application of immunity of state officials from foreign jurisdiction in cases of international and transnational crimes. *International Criminal Law Review*, 1(aop), pp.1-21.