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SOME REFLECTIONS ON THE FUNCTIONAL IMMUNITY OF STATE OFFICIALS

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1. THE ANALOGY BETWEEN STATE IMMUNITY AND FUNCTIONAL IMMUNITY OF STATE ORGANS IN CASES WHERE INTERNATIONAL CRIMES HAVE BEEN COMMITTED

The parallel or analogy that has at times been drawn – also in the Italian jurisprudence – between the immunity of States from foreign jurisdiction and the functional immunity of State officials, with specific reference to cases where an international crime has allegedly been committed,[1] offers the opportunity to develop some considerations on current inconsistencies in the application of such immunity rules.

It is universally acknowledged, whatever theoretical perspective one may chose, that functional immunity cannot be invoked by a State official suspected of international crimes, whether before a domestic or an international court.[2] On the

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[1] See, for instance, the reasoning of the Italian Court of Cassation in the *Ferrini* case: "One final point should be made. It is by now clear that, in the presence of international crimes, it is not possible to invoke the functional immunity of foreign State organs. Conventional law in this regard is unequivocal. [...] According to prevailing opinion, functional immunity is a corollary of State immunity, since it satisfies the requirement of preventing that the prohibition on suing the foreign State can be frustrated by bringing proceedings directly against the person responsible for carrying out State activities. But if this is the case, as it seems to this Court, it must therefore be held that if functional immunity cannot be applied, because the act conducted constitutes an international crime, there can be no valid reason to maintain the immunity of the State and therefore to deny that its responsibility can be enforced before the judicial authority of a foreign State", *Corte di Cassazione (Sez. Unite civili)*, *Ferrini v. Federal Republic of Germany*, 11 March 2004, No. 5044, RDI, 2004, p. 539 ff., International Law in Domestic Courts, ILDC 19 (IT 2004), (www.oxfordlawreports.com), para. 11. ("È ormai pacifico che, in presenza di crimini internazionali, l'immunità funzionale degli organi dello Stato estero non può essere invocata. La normativa convenzionale è, a tale riguardo, inequivoca [...]. L'immunità funzionale, secondo l'opinione prevalente, costituisce specificazione di quella che compete agli Stati, poiché risponde all'esigenza di impedire che il divieto di convenire in giudizio lo Stato straniero possa essere vanificato agendo nei confronti della persona mediante la quale la sua attività si è esternata. Ma se il rilievo è esatto, come sembra a questa Corte, deve allora convenirsi con quanti affermano che se l'immunità funzionale non può trovare applicazione, perché l'atto compiuto si configura quale crimine internazionale, non vi è alcuna valida ragione per tener ferma l'immunità dello Stato e per negare, conseguentemente, che la sua responsabilità possa essere fatta valere davanti all'autorità giudiziaria di uno Stato straniero").

[2] CASSESE, *International Criminal Law*, 2nd ed., Oxford, 2008, p. 305 ff.

other hand, according to the prevailing opinion, for the very same act, the State on whose behalf the accused official was acting enjoys immunity from the civil jurisdiction of foreign States.[3]

There is an inherent conflict or contradiction in this situation – as recognized by the *Institut de Droit International* in its Resolution adopted in September 2009[4] – for an individual that has acted in an official capacity may not invoke this situation as a defence, justification or excuse in a criminal trial before a competent tribunal of a foreign State, whereas the State on behalf of which the organ has acted – that could have tolerated, authorized or even organized the commission of the alleged crime – may invoke its sovereignty not to be subject to civil proceedings in foreign domestic courts.

The lack of coherence becomes even more evident in common law countries where civil and criminal proceedings are completely separate and where incongruity also concerns the functional immunity of State officials depending on whether it is invoked before a criminal or a civil court. A concrete example may better illustrate the negative consequences of this separation. In the very well known *Jones* case, the House of Lords held that both Saudi Arabia and its organ Colonel Abdul-Aziz were immune from the civil jurisdiction of English courts, by virtue of the State Immunity Act (SIA).[5] But what would have happened if Colonel Abdul-Aziz was to be prosecuted before a criminal tribunal? He would have been tried on the assumption that being accused of acts of torture, he could not have relied on his capacity as State official to be exempt from jurisdiction. Actually, this is exactly what happened in *Pinochet*, where the House of Lords did not accept the plea of immunity of a former Head of State for alleged acts of torture and decided that it was possible to extradite him to Spain.[6] If one shares the view of treating differently the immunity plea of a State official depending on the civil or criminal nature of the proceedings, there could hypothetically be a situation where the very same organ is immune from a civil suit but not from criminal jurisdiction for the same set of facts: this would create an objectionable discrepancy and it would undermine access to

[3] According to Fox, in the current structure of international law "there is no room for an exception to State immunity for acts in violation of international law," and these acts "may only be made subject to adjudication, whether by international or regional human rights or national tribunals, with the consent of the alleged wrongdoer State". FOX, *The Law of State Immunity*, 2nd ed., Oxford, 2008, p. 141.

[4] INSTITUT DE DROIT INTERNATIONAL (Third Commission – Rapporteur: H. FOX), *Resolution on the Immunity from Jurisdiction of the State and of Persons Who Act on Behalf of the State in case of International Crimes*, Naples, 10 September 2009 (available at: <http://www.idi-iil.org/idiE/resolutionsE/2009_naples_01_en.pdf>). In the Preamble one reads: "Considering the underlying conflict between immunity from jurisdiction of States and their agents and claims arising from international crimes".

[5] House of Lords, *Jones et al. v. Ministry of Interior Al-Mamlaka Al-Arabiya AS Saudiya (the Kingdom of Saudi Arabia) et al.*, 14 June 2006, [2006] UKHL 26.

[6] However, some of the Lords argued that if Pinochet was sued for civil liability, he could have been declared immune from the jurisdiction of British Courts for the very same acts.

justice and compensation for the victims of the most serious international crimes. A similar situation cannot occur in most civil law countries, where the adhesion procedure (*constitution de partie civile*) allows the victims to apply for compensation in conjunction with the criminal proceedings.

Not surprisingly, some of the Lords in the appeal decision in the *Jones* case drew attention to the contradiction of this complete separation of civil and criminal law in the case of torture. In a judgment subsequently quashed by the House of Lords, the Court of appeal had actually rejected the immunity plea by Abdul-Aziz, pointing out the shortcomings of making a distinction, for the purposes of applying functional immunity, between criminal and civil courts.[7] In the words of Lord Mance, "[...] there is the obvious potential for anomalies, if the international criminal jurisdiction which exists under the Torture Convention is not matched by some wider parallel power to adjudicate over civil claims".[8]

According to the definition of torture contained in Article 1 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984), acts of torture may be committed only by State officials, participation of a public official is in fact an element of the crime.[9] Assuming that the acts of every State official, even when they may be classed as crimes of torture, must always be covered by the SIA or by functional immunity in civil suits is tantamount to saying that there is never a chance for the victims of torture to obtain adequate compensation. However, Article 14(1) of the Torture Convention provides that every State must "ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation". Therefore, granting functional immunity to State officials in civil suits before foreign domestic courts thwarts the very purpose of the Convention. A similar line of reasoning could apply, *mutatis mutandis*, to many other international crimes committed by State officials.

[7] Court of Appeal (Civil Division), *Jones v. The Ministry of Interior Al-Mamlaka Al-Arabiya AS Saudiya (the Kingdom of Saudi Arabia) et al.*, 28 October 2004, [2005] Q.B. 699.

[8] *Ibid.*, para. 79, which subsequently reads: "The prosecution of crime and the pursuit of civil proceedings are in many jurisdictions (as Breyer J. observed in *Sosa*) very closely associated. In other jurisdictions like the English, Mr. Pannick's absolute distinction seems incongruous in a situation like that in *Filartiga*, if the alleged torturer was actually within and being prosecuted in the jurisdiction pursuant to one or other of the provisions of Article 5 of the Torture Convention. Despite the criminal investigation and proceedings, in respect of which no immunity could be claimed, the victim(s) of the alleged torture would be unable to pursue any civil claim".

[9] Art. 1(1) of the UN Convention against Torture reads: "For the purposes of this Convention, torture means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity".

It is also difficult to see why a civil suit against a State official for acts of torture should implead the State more than a criminal trial.[10] This consideration brings us back to the initially recalled analogy between the immunity of State officials and the immunity of States, and raises the question of what is the real issue behind these inconsistencies. In this author's opinion, behind the different attitude in criminal or civil proceedings in the application of functional immunity of State organs suspected of international crimes there is a precise will not to make an exception (not even to discuss one) to State immunity. It has often been said and always recalled, concerning the criminal liability of individuals for the most serious crimes, that State officials may not hide behind their States, that they may not claim to have been just a cog in the machine or to have conformed to instructions given by others, but if one follows the House of Lords' line of reasoning in *Jones*, one arrives at the conclusion that States may hide behind their organs, because only the latter, at the end of the day, may be prosecuted before a domestic or an international criminal tribunal.

Some authors have emphasized that domestic courts are not the appropriate forum for adjudicating State responsibility and that granting States the immunity from foreign jurisdiction does not mean absolving them from their responsibility.[11] However, there is not always an available inter-State forum to adjudicate on these issues. The most recent example, the controversy between Bosnia and Serbia on the application of the Convention on the Prevention and Punishment of the Crime of Genocide (1948), submitted to the International Court of Justice, lays bare the difficulties in establishing State responsibility for serious international crimes through an adjudication procedure that is completely separated from a criminal trial and it is very unlikely that this kind of inter-States dispute settlement mechanism would compel States to provide adequate compensation to the victims.

With all due respect for the House of Lords, the position taken by the Italian Court of Cassation is much more coherent and the judges proved courageous in advancing a logically and legally sound argument that aims to grant access to justice

[10] "Taking the basic considerations which underlie state immunity, criminal proceedings against individual alleged torturers involve domestic courts in "interfering in" and adjudicating upon the internal affairs of a foreign sovereign state. It is also natural that a state should stand behind its officials or agents in relation to contested allegations of torture, unless and until such allegations are proven. To that extent, criminal proceedings against an alleged torturer may be said indirectly to implead the foreign state. It is not easy to see why civil proceedings against an alleged individual torturer should be regarded as involving any greater interference in or a more objectionable form of adjudication upon the internal affairs of a foreign state. Nor is it easy to see why a civil claim against an individual torturer should be regarded as indirectly impleading the foreign state in any more objectionable respect than a criminal prosecution", *Jones*, *cit. supra* note 7, paras. 75-76.

[11] GATTINI, "War Crimes and State Immunity in the *Ferrini* Decision", JICJ, 2005, pp. 224-242.

to the victims of the most serious international crimes. In fact, if one contends that States must be immune from foreign jurisdiction even in cases where the most serious violations of international law – at least those violations entailing individual criminal liability, including of the high-ranking State officials – are at stake, then a procedural rule is allowed to hinder the fundamental right of victims of these violations to receive adequate compensation. In this respect, the latest decision of the Italian Court of Cassation denying immunity to the Federal Republic of Germany in the *Milde* case is very important, because it clearly made this connection purporting that in order to grant respect for fundamental rights of the victims, access to justice ought to be granted to them.[12]

2. The Rationale Underlying Functional Immunity of State Organs

A recent case decided by the Tribunal of Milan leaves some room for reflecting on the scope and rationale underlying functional immunities accruing to State officials.

The predominant opinion amongst States and scholars acknowledges the existence of a general rule of customary international law granting immunity to every State organ acting in an official capacity. According to this opinion, the foundation of this rule lies in attribution: acts committed by organs in their official capacity are to be attributed to the State, which enjoys immunity from foreign jurisdiction.[13] However, State practice is not as consistent as most authors depict it,[14] and the reasoning proposed in various decisions where functional immunities have been considered (but not always granted) is not necessarily related to matters of attribution and to the principle recalled by the formula *par in parem non habet iurisdictionem*.

In this landmark decision,[15] 23 US agents and 2 Italian agents were sentenced for their role in the abduction and rendition to Egypt of the Muslim cleric Abu Omar.[16] Immunity from criminal proceedings was granted instead to 3 CIA agents

[12] *Corte di Cassazione (Sez. I penale)*, *Criminal Proceedings against Josef Max Milde*, 13 January 2009, No. 1072, RDI, 2009, p. 619 ff., IYIL, Vol. XVIII, 2008, p. 325 (commented by Iovane).

[13] See Kelsen, *Principles of International Law*, London, 1952; Morelli, *Diritto processuale civile internazionale*, 2nd ed., Padova, 1954; Ronzitti, *Introduzione al diritto internazionale*, 2nd ed., Torino, 2007.

[14] See De Sena, *Diritto internazionale e immunità funzionale degli organi statali*, Milano, 1996; Frulli, *Immunità e crimini internazionali*, Torino, 2007.

[15] *Tribunale di Milano (Sez. IV penale)*, *Adler et al.*, 1 February 2010, No. 12428.

[16] In the decision it is established that there is clear evidence proving individual criminal liability for the alleged charges of each and every member of the CIA structure operating in Italy in 2003 ("a carico di tutti i componenti la struttura CIA operante in Italia nel 2003, esistono, in ordine al reato contestato, gravi ed univoci elementi di responsabilità penale", p. 72).

that were accredited as diplomatic agents at the time of the extraordinary rendition of Abu Omar. The decision and the different treatment accorded to these US organs raise some interesting questions.[17]

In the first place, it is noteworthy that immunity was not granted to the majority of US organs indicted, which were CIA agents. Now, for those purporting the existence of a general rule on the functional immunity of State organs, acts of sabotage or espionage are not covered by the rule, on the assumption that these kind of activities are carried out in the territory of a foreign State (and likely attempting at national security) without its consent. However, the judge did not contend that he was applying such an exception to a general rule;[18] he actually supposed that the abduction was expressly authorized by the US Government and he did not exclude that some kind of consent to the abduction of Abu Omar was given by the Italian Government.[19]

The judge then examined the position of the 2 indictees that were consular agents at the time of the alleged facts. He concluded that the abduction of Abu Omar could not be covered by the functional immunity provided by the Vienna Convention on Consular Relations (1963) for the reason that such immunity may not cover serious crimes. In fact, the 1963 Convention provides consular agents with immunities for activities carried out in an official capacity not (or not mainly) because these acts are to be attributed to their State, but in order to safeguard an efficient performance of consular functions.[20] Not surprisingly, if Article 43 is con-

[17] The decision is very important because, to the best of this author's knowledge, is the first conviction of government agents for their involvement in extraordinary renditions. The renditions practice stands in the background of this decision, however, it must be stressed that the abduction of Abu Omar was classed "only" as a domestic crime because Italy – in violation of the obligations included in the UN Convention against Torture ratified more than 20 years ago – never introduced the crime of torture in the Criminal Code, thus preventing the prosecutor from charging CIA agents for complicity in torture. In the latter hypothesis, there would have been no discussion about immunity, since it is generally recognized that functional immunity never covers acts of torture or complicity in torture.

[18] Judge Magi explicitly excluded that the acts could fall under Art. 51 of the Italian Criminal Code (performance of one's duty, "adempimento del dovere").

[19] According to Judge Magi, the fact that the abduction of Abu Omar was carried out with the authorization of the highest CIA agents operating in Italy suggested that Italian authorities (at least the secret services) were aware of the operation carried out by US agents and most likely approved it. However, it was impossible to examine existing evidence because of State secrecy invoked by the Italian Government (the relevant passage of the original decision reads: "L'esistenza di una autorizzazione organizzativa a livello territoriale nazionale da parte delle massime autorità responsabili del servizio segreto USA [...] lascia presumere che tale attività sia stata compiuta quanto meno con la conoscenza (e forse con la compiacenza) delle omologhe autorità nazionali, ma di tale circostanza non è stato possibile approfondire le evenienze probatorie (pur esistenti) per l'apposizione/opposizione di Segreto di Stato da parte delle Autorità Governative Italiane", p. 75).

[20] Art. 43(1) provides for immunity from the jurisdiction of the receiving State "in respect of acts performed in the exercise of consular functions". The consular functions are defined in Art. 5

strued in combination with Article 41 of the Convention – dealing with personal inviolability – it may be contended that serious crimes are never covered by consular immunity.[21] In other words, the rationale underlying the functional immunity rule inserted in the Convention on Consular Relations is not the protection of State sovereignty irrespective of whatever act may be accomplished by its organs in their official capacity, but the fulfilment of consular functions which may not include serious crimes. From this viewpoint, it is quite straightforward that the abduction of a foreign citizen (moreover a person that was under investigation by Italian judicial authorities at the time of the kidnapping) and his rendition to a country where he has allegedly been tortured, may not fall within the performance of consular functions. All the more so when evidence was brought that the accused were acting in their role as CIA members and not as consular agents.

Actually the same functions-related perspective may be found in the Vienna Convention on Diplomatic Relations (1961), although diplomatic agents also enjoy a different kind of immunity, that is to say personal immunity, which covers all their acts (including private acts) as long as they are in office. However, personal immunities, which only accrue to some categories of State organs because of the crucial relevance of their official position (diplomatic agents, heads of States, heads of governments and ministers of foreign affairs) are procedural in nature and come to an end with the end of the mandate. When these organs relinquish their position, they may invoke, if appropriate, only functional immunity.

In the case at hand, with respect to the position of the 3 former US diplomatic agents, the judge had to establish whether the alleged acts were accomplished in the exercise of diplomatic functions, in order to decide whether to grant functional immunity (as former diplomatic agents they could not invoke personal immunity). The single presiding judge chose, at least partially, a correct functions-related approach when appraising the situation of three former diplomatic agents involved in the *affaire*, but his conclusions, in this respect, are not to be shared.

The decision, in this author's opinion, is not entirely coherent. Firstly, the judge argued that the abduction of Abu Omar may fall within the diplomatic functions provided for in Article 3 of the Convention on Diplomatic Relations, which includes "the protection of State interests". In doing so, he properly chose to take into account the functions accomplished by the organs and not the issue of attribution of those acts to the State. As outlined above, this seems to be the correct line of reasoning to be followed. However the conclusion that the extraordinary rendition of Abu Omar can easily be classified as regular performance of diplomatic func-

of the Convention and there is a vast jurisprudence supporting a strictly functional interpretation of the immunity rules of the Convention. FRULLI, *cit. supra* note 14, p. 29 ff.

[21] Art. 41(1) states that "Consular officers shall not be liable to arrest or detention pending trial, except in the case of a grave crime and pursuant to a decision by the competent judicial authority". This is confirmed by Art. 3 of Law No. 804 of 9 August 1967, implementing the Consular Convention in the Italian legal order.

tions seems highly questionable. The preparatory works, State practice and many authors point at a rigorous interpretation of what is to be considered a diplomatic function. The formula adopted by the Convention on Diplomatic Relations, according to which "with respect to acts performed by such a person in the exercise of his functions as a member of the mission, immunity shall continue to subsist",[22] cannot be stretched to cover the secret performance of unlawful acts carried out as members of an intelligence agency. It is crystal-clear that the indictees were not acting in their capacity as diplomatic agents when organizing and carrying out the abduction and rendition of Abu Omar. In addition, one has to bear in mind that according to Article 3(1) of the 1961 Convention "[t]he functions of a diplomatic mission consist, inter alia, in: [...] b) Protecting in the receiving State the interest of the sending State and of its nationals, *within the limits permitted by international law* [...]" (emphasis added), which was clearly not the case with the Abu Omar's abduction, whatever may be the view of the US Government. An interpretation of the rules of the Convention on Diplomatic Relations aimed at including this kind of activity within the regular exercise of diplomatic functions undermines the very purpose of the treaty and should be fully rejected.[23]

Secondly, the judge of the Tribunal of Milan found that he was not able to prosecute the members of the Italian intelligence agency (SISMI) because the Italian Government invoked State secrecy, stating that court proceedings might disclose sensitive information which endanger national security. In this section, the judge refers to the possible, or even likely, existence of an agreement between the Italian and US Governments allowing for US CIA agents to abduct Abu Omar for the purpose of rendering him abroad and he seems to consider this supposed agreement as a possible additional basis for immunity. This reasoning does not seem appropriate. Would there be such an agreement, it would be illicit and contrary to international law obligations accruing both to Italy and the US. For Italy, such an agreement would clearly run counter to several constitutional provisions. Most importantly it would run against the rules protecting fundamental rights of individuals, but also against the provisions concerning the conclusion of treaties. Such an agreement, if proven, would not only deny immunity to US officials, but it would have as a consequence the prosecution of Italian intelligence agents involved in the abduction and rendition of Abu Omar.

The single judge did not have much room for choice, on account of the fact that there was a previous decision by the Italian Constitutional Court which upheld

[22] Article 39(2) of the 1963 Convention.

[23] It was previously recalled that Italy ratified the 1984 Convention against Torture. Italy also signed the International Convention for the Protection of All Persons from Enforced Disappearance (2006) and it is a party to several human rights treaties which clearly proscribe acts like those occurred in the Abu Omar *affaire*, which can never be reconciled with respect of international law and which, by definition, could never be labelled as "diplomatic functions".

State secrecy.[24] However, it seems unacceptable that a black curtain is drawn on the widely condemned practice of extraordinary renditions. The Italian judiciary has proved elsewhere very sensitive to international law and to the protection of fundamental rights and should consider that the protection of basic human rights may be advanced not only through the denial of immunity from jurisdiction of foreign States, but also by not allowing State secrecy or the political question doctrine to come into play and hinder the adjudication of responsibilities accruing to the Italian Government and/or government officials.

Going back to the question posed at the beginning of this paragraph: what is the rationale underlying the various rules on functional immunity of State officials? Does this rationale change according to the different needs of States in a specific situation? It seems that there is a tendency to increasingly apply a strictly functions-related rationale to the interpretation of functional immunity rules accruing to State officials. As a consequence, the application of immunities is to be excluded whenever State organs clearly act outside the scope of their functions and in contrast with international law (or even worse on the basis of agreements that run counter to international law) and it should not be possible to call into question the protection of State sovereignty whenever there is a highly embarrassing situation. This latter attitude does not help legal certainty and prevents an interpretation of international law rules more attuned to the protection of human rights: it is highly contradictory to call for the application of a procedural bar for the sake of protecting State sovereignty when what is at stake is the application of international rules which protect individuals from the abuses of State sovereignty. In a case like the one discussed above, where both governments presumably agreed for their organs to commit serious crimes against an individual in violation of fundamental rules of international law, what other forum should be competent to adjudicate if not the forum of the territorial State in which the crimes have been committed?

[24] *Corte Costituzionale*, 3 April 2009, No. 106. However, Judge Magi declared that there is an inherent contradiction in saying that the crime itself is not covered by State secrecy, but in practice it is not possible to investigate it. In his words, it amounts to a legal and logical paradox to affirm that the crime for which US and Italian intelligence agents are indicted is not covered by State secrecy and at the same time to establish that State secrecy covers the relationship between US and Italian Secret services and the operational structure of the Italian SISMI, even for the aspects related to the alleged crime ("Ammettere che vi è segreto di Stato correttamente opponibile all'autorità giudiziaria che riguardi i rapporti tra servizi segreti italiani e stranieri e assetto organizzativi e operativi del SISMI 'ancorché' collegati a un fatto reato per cui si procede, nel momento in cui si afferma che per quel fatto reato non vi è segreto e nel momento in cui per quel medesimo fatto risultano indagati o imputati persone appartenenti a quei servizi stessi, costituisce (a sommesso parere dello scrivente) un 'paradosso logico e giuridico' di portata assoluta e preoccupante", p. 46).