

**FUNCTIONAL IMMUNITY AND NATIONAL
PROSECUTION OF INTERNATIONAL CRIMES:
BETWEEN STATE SOVEREIGNTY AND
ACCOUNTABILITY IN THE WORK OF THE
INTERNATIONAL LAW COMMISSION**

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TABLE OF CONTENTS

I.	INTRODUCTION	526
II.	THE WORK OF THE INTERNATIONAL LAW COMMISSION: SOME DEFINITIONS	528
III.	STATE SOVEREIGNTY AND THE RATIONALE OF IMMUNITY	530
IV.	FROM JUS COGENS TO SYSTEMIC INTEGRATION: COMPETING RATIONALES FOR EXCEPTIONS	532
V.	CUSTOMARY LAW VS. PROGRESSIVE DEVELOPMENT (LEX LATA VS. LEX FERENDA)	537
VI.	THE CHALLENGE OF THE INTERNATIONAL LAW COMMISSION: A NORMATIVE DILEMMA	541
VII.	THE CASE OF WAR CRIMES	542
VIII.	SOME CONCLUSIONS	545

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I. INTRODUCTION

The issue of jurisdictional immunities of state officials before criminal foreign tribunals has been a part of the discussion within the international legal order in the last decades. Starting with the *Pinochet* case, which the House of Lords decided in March 1999, both national and international courts have taken part in the debate regarding the scope of jurisdictional immunities of state officials from criminal proceedings before foreign courts in cases involving the commission of international crimes.¹

In the decision known as *Pinochet No. 3*, in the context of an extradition process, the majority of the House of Lords considered that former Chilean dictator Augusto Pinochet could not invoke immunity from prosecution before a foreign court for the crime of torture.² Albeit with separate votes, the majority held that immunity for former heads of state from prosecution was not applicable in the case of torture because it “was an international crime against humanity and *jus cogens* and . . . the International Convention against Torture and other Cruel, Inhuman and Degrading Treatment or Punishment . . . [recognized] universal jurisdiction.”³

However, shortly after that decision, the International Court of Justice issued its ruling in the *Arrest Warrant* case.⁴ Therein, the Court stated that, after “carefully examin[ing] [s]tate practice, including national legislation and those few decisions of national higher courts, such as the House of Lords . . . or the French Court of Cassation, . . .” it could not “deduce from this practice that there exists under customary international law any form of exception to the rule according immunity from criminal jurisdiction and inviolability to incumbent [m]inisters for [f]oreign [a]ffairs, where they are suspected of having committed war crimes or crimes against humanity.”⁵ Moreover, it also rejected the assertion that decisions of international criminal tribunals could have a bearing on such a rule.⁶

As a consequence, there was considerable uncertainty regarding the regulation of jurisdictional immunities of state officials from criminal proceedings before foreign courts among tribunals and academics alike.⁷ It was then high time for the International Law Commission to include the issue

1. See *R v. Bow St. Metro. Stipendiary Magis. (Ex parte Pinochet Ugarte) (No. 3) (Pinochet No. 3)* [2000] 1 A.C. 147, 148 (HL) (appeal taken from the Div. Ct. of the Queen’s Bench), <https://www.iclr.co.uk/wp-content/uploads/media/vote/1996-2014/ac2000-1-147.pdf> [<https://perma.cc/LSG2-5AVD>].

2. *Id.*

3. *Id.*

4. *Arrest Warrant of 11 April 2000 (Dem. Rep. Congo v. Belg.)*, Judgment, 2002 I.C.J. 3, ¶ 58 (Feb. 14).

5. *Id.*

6. *Id.*

7. See *id.*

on its agenda.⁸ In 2006, the Commission identified the topic for inclusion in its long-term program of work,⁹ and in 2007, Roman A. Kolodkin was appointed as the first Special Rapporteur.¹⁰ To date, three Special Rapporteurs have been designated to work on the topic and have, in that capacity, submitted several reports.¹¹ In 2022, the Commission adopted, on first reading, a set of eighteen draft articles, including an annex, together with commentaries thereto.¹² It then transmitted the draft articles to governments for comments and observations, and in January 2025, the current Special Rapporteur presented his second report with a new version of the draft articles¹³ which the Drafting Committee revised in its April-May 2025 session.¹⁴

Despite the adoption of the new version, disagreements remain within the Commission's members and the states, particularly on the issue of non-applicability of immunity *ratione materiae* or functional immunity to cases involving international crimes.¹⁵

This Article argues that the disagreement lies on the tension between the classic concept of state sovereignty and accountability for international crimes and the role domestic tribunals play in that process. I will first introduce the issue of immunity of state officials from criminal prosecution before foreign tribunals, and then I will examine the tensions involved in the discussion of its regulation, focusing on the rationale of the exceptions or the non-applicability of functional immunity to international crimes and its

8. Int'l L. Comm'n, Rep. on the Work of Its Fifty-Ninth Session, ¶ 19, U.N. Doc. A/62/10 (2007) [hereinafter Fifty-Ninth Session Report].

9. *Id.* The General Assembly took note of this decision in Resolution 62/66, Jan. 8, 2008. G.A. Res. 62/66 (Jan. 8, 2008).

10. Fifty-Ninth Session Report, *supra* note 9.

11. See Roman Anatolevich Kolodkin (Special Rapporteur on Immunity of State Officials from Foreign Criminal Jurisdiction), *Second Rep. on Immunity of State Officials from Foreign Criminal Jurisdiction*, at 395, U.N. Doc. A/CN.4/631 (June 10, 2010) [hereinafter *Kolodkin Second Report*]; Concepción Escobar Hernández (Special Rapporteur on the Immunity of State Officials from Foreign Criminal Jurisdiction), *Preliminary Rep. on the Immunity of State Officials from Foreign Criminal Jurisdiction*, ¶ 4, U.N. Doc. A/CN.4/654 (May 31, 2012) [hereinafter *Hernández Preliminary Report*]; Claudio Grossman Guiloff (Special Rapporteur on the Immunity of State Officials from Foreign Criminal Jurisdiction), *First Rep. on the Immunity of State Officials from Foreign Criminal Jurisdiction*, at 1, U.N. Doc. A/CN.4/775 (May 3, 2024). These reports serve as selected examples of all the reports the three Special Rapporteurs have submitted, and this list is non-exhaustive.

12. Int'l L. Comm'n, Seventy-Third Session, *Immunity of State officials From Foreign Criminal Jurisdiction, Texts and Titles of the Draft Articles Adopted by the Drafting Committee on First Reading, 31 May, 2022*, U.N. Doc. A/CN.4/L.969.

13. *Id.*

14. Int'l L. Comm'n, *Texts and Titles of Draft Articles 7, 8 and 9 as Provisionally Adopted by the Drafting Committee on May 12, 2025*, at 1, U.N. Doc. A/CN.4/L.1017 (May 13, 2025) [hereinafter *Draft Articles as Provisionally Adopted*].

15. See *id.*

normative status.¹⁶ Finally, I will specifically deal with the particularities of immunities related to the commission of war crimes.¹⁷

II. THE WORK OF THE INTERNATIONAL LAW COMMISSION: SOME DEFINITIONS

The work of the International Law Commission under analysis specifically deals with jurisdictional immunities of state officials before foreign criminal tribunals.¹⁸ It does not involve state immunity,¹⁹ immunity of certain state officials, such as diplomatic agents,²⁰ immunity before international tribunals, nor immunity from civil suits.²¹

Jurisdictional immunities do not entail absence of substantive criminal responsibility but are rather a procedural bar preventing certain persons from being prosecuted before foreign tribunals.²² This means that if the state concerned waives its immunity, it could be subject to such prosecution.²³

In 2008, the First Special Rapporteur submitted his preliminary report.²⁴ Therein, he identified two types of immunity of state officials: (i) immunity *ratione personae* and (ii) immunity *ratione materiae*.²⁵ The former is derived from the position the official occupies in government service and from the state functions which the official must perform in that post, and it is enjoyed by officials holding senior or high-level government posts (heads of state, heads of government, and ministers of foreign affairs).²⁶ This type of immunity extends to acts performed by state officials “in both an official and a private capacity, both before and while occupying his [or her] post.”²⁷

16. See *infra* Parts II–IV (analyzing immunity of state officials and possible exceptions).

17. See *infra* Part VII (discussing the history of war crime penalties).

18. Claudio Grossman Guiloff (Special Rapporteur on Immunity of State Officials from Foreign Criminal Jurisdiction), *Second Rep. on Immunity of State Officials from Foreign Criminal Jurisdiction*, at 1, U.N. Doc. A/CN.4/780 (Jan. 29, 2025) [hereinafter *Grossman Guiloff Second Report*].

19. See *United Nations Convention on Jurisdictional Immunities of States and Their Property*, U.N. TREATY COLLECTION, https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=III-13&chapter=3&clang=_en [https://perma.cc/DCR9-VNCP] (last visited Jan. 27, 2026). The International Law Commission already examined the topic of jurisdictional immunities of states and their property. See *id.* The draft articles were adopted as a convention in 2004. *Id.* It has not entered into force because it requires thirty instruments of ratification and, to date, it has received twenty-eight. Cf. *id.* (analyzing the breakdown of all twenty-eight votes and comments from certain nations).

20. *Grossman Guiloff Second Report*, *supra* note 19. This is regulated in the 1961 Vienna Convention on Diplomatic Relations. Vienna Convention on Diplomatic Relations, Apr. 18, 1961, T.I.A.S. no. 12587, 500 U.N.T.S. 95.

21. *Grossman Guiloff Second Report*, *supra* note 19.

22. *Id.*

23. *Id.*

24. Roman Anatolevich Kolodkin (Special Rapporteur on Immunity of State Officials from Foreign Criminal Jurisdiction), *Preliminary Rep. on Immunity of State Officials from Foreign Criminal Jurisdiction*, at 1, U.N. Doc. A/CN.4/601 (May 29, 2008) [hereinafter *Kolodkin Preliminary Report*].

25. *Id.* ¶ 78.

26. *Id.*

27. *Id.* ¶ 79.

Because immunity *ratione personae* is connected with the position that the officials occupied in government service, it is temporary in character; it becomes effective when the official takes up their post, and it ceases when they leave it.²⁸ Given that their position entails active engagement in international relations, these officials have a special status in international law which, for example, recognizes that they possess full powers of representation in the celebration of international treaties.²⁹

The Special Rapporteur explained that all state officials enjoy immunity *ratione materiae*, or functional immunity, regardless of the level of their position, by virtue of the fact that they are performing official state functions.³⁰ It “extends only to acts performed by [s]tate officials acting in an official capacity, i.e. performed in fulfilment of functions of the [s]tate,” and continues after they leave the position.³¹ The idea behind this concept is that no state can adjudicate on the legality or illegality of the acts of other states in conformity with the sovereign equality principle.³²

In her third report, the Second Special Rapporteur, Concepción Escobar Hernández, identified the basic characteristics of immunity *ratione materiae*:

- (a) it is granted to all state officials;
- (b) it is granted only in respect of acts that can be characterized as “acts performed in an official capacity”; and
- (c) it is not time-limited, [because] immunity *ratione materiae* continues even after the person who enjoys such immunity is no longer an official.³³

Jurisdictional immunities of state officials before foreign tribunals may arise in different scenarios.³⁴ First, domestic judicial authorities may seek prosecution of a state official present in their state for offenses committed while carrying out official acts in its territory, or based on a different jurisdictional criterion, such as universal jurisdiction.³⁵ Second, domestic judicial authorities may seek extradition of a state official for offenses committed while carrying out official acts based on different jurisdictional

28. *Id.*

29. Vienna Convention on the Law of Treaties, art. 7, May 23, 1969, 1155 U.N.T.S. 331 [hereinafter Law of Treaties].

30. Kolodkin *Preliminary Report*, *supra* note 25, at ¶ 80.

31. *Id.*

32. *See id.* ¶ 88.

33. Concepción Escobar Hernández (Special Rapporteur on Immunity of State Officials from Foreign Criminal Jurisdiction), *Third Rep. on Immunity of State Officials from Foreign Criminal Jurisdiction*, ¶ 12, U.N. Doc. A/CN.4/673 (June 2, 2014).

34. *See Kolodkin Preliminary Report*, *supra* note 25 at ¶¶ 67–70.

35. *Id.*

criteria.³⁶ Traditionally, foreign tribunals—and national governments—have been cautious and deferential to state officials, but this has begun to change³⁷ towards recognizing certain exceptions, particularly in cases involving international crimes.³⁸

III. STATE SOVEREIGNTY AND THE RATIONALE OF IMMUNITY

The International Law Commission has adopted a broad definition of the concept of “state official,” thus allowing states to claim immunity in numerous cases, reflecting the paramount role of state sovereignty in international law, which is evidently the basis of this rule.³⁹ This is, of course, a reflection of the classic concept of sovereignty: a “Westphalian” sovereignty whereby states are the central subjects of international law and there is an absolute application of the principle of non-intervention in other states’ affairs.⁴⁰ The rules on jurisdictional immunity (both of the state and the state’s agents’ immunities) have been referred to as “sovereignty duties” that states must comply with regarding other states.⁴¹

In the comments to the 2022 report on the draft articles adopted in first reading, the Commission asserted the impossibility of identifying an exhaustive list of state officials due to “the diversity of the positions of the individuals to whom immunity may apply and the variety of national legal systems that determine which persons are their officials,” and, thus, those individuals had to “be identified on a case-by-case basis” taking into account the “link between the [s]tate and the official, namely representation of the [s]tate or the exercise of [s]tate functions.”⁴² Notwithstanding, it offered some examples, such as

a [m]inister of [d]efen[s]e; . . . [a]n attorney [g]eneral and a [g]eneral [p]rosecutor; a [h]ead of [n]ational [s]ecurity and a former intelligence service chief; . . . military officials of various ranks, and various members of government security forces and institutions, including a police director; border guards; the deputy director of a prison; and the head of a [s]tate’s central archives.⁴³

36. *Id.* ¶ 67.

37. ROBERT CRYER ET AL., AN INTRODUCTION TO INTERNATIONAL CRIMINAL LAW AND PROCEDURE 429 (1st ed. 2007).

38. *Id.* at 429–30.

39. Samantha Besson, *Sovereignty*, at ¶ 70, OXFORD PUB. INT’L LAW (Apr. 2011), <https://opil.oup.com/display/10.1093/law:epil/9780199231690/law-9780199231690-e1472> [<https://perma.cc/M9JZ-7Q73>].

40. *Id.* ¶ 13.

41. *Id.* ¶ 124.

42. Int’l Law Comm’n, Rep. on the Work of its Seventy-Third Session, at 205, U.N. Doc. A/77/10 (2022) [hereinafter Report on Seventy-Third Session].

43. *Id.*

It is apparent then that the list of persons who could invoke functional immunity before a foreign tribunal is extensive and does not differentiate between the tasks the official performed, as long as it has a connection to the state.⁴⁴ In this regard, the Commission interpreted the concept of “act performed in an official capacity” together with the expression “in the exercise of [s]tate authority” to highlight the fact that there must also be a direct connection between the act and the exercise of state functions and powers, because it is this connection that justifies the recognition of immunity in order to protect the principle of the sovereign equality of states.⁴⁵ Thus, the Commission established a two-step criterion: first, the act must be attributed to the state, making a reference to the “single act, dual responsibility” model,⁴⁶ and second, the act must be the exercise of state authority.⁴⁷

This understanding of an official act has a bearing on the justification of exceptions of jurisdictional immunities. When it adopted the draft articles on first reading, the Commission explained that the *chapeau* of Draft Article 7 includes “the phrase ‘shall not apply’ in order to reflect the fact that in both practice and doctrine two different interpretations have been followed with regard to whether or not such crimes are to be considered ‘acts performed in an official capacity.’”⁴⁸ One view is that the commission of such crimes can never be considered a function of the state, and they therefore cannot be regarded as “acts performed in an official capacity.”⁴⁹ Hence, if international crimes constituted exceptions, then they had to be considered as private acts.⁵⁰

This position is problematic because it excludes the possibility of state responsibility for them and limits their attribution to the perpetrator only, dismissing the possibility of dual responsibility.⁵¹ The duality of responsibilities is a constant feature of international law,⁵² and it allows for the determination of equally the responsibility of the state and the responsibility of its agents for the same facts constituting international crimes.⁵³ These responsibilities can be both adjudicated by an international

44. *See id.* at 205–06.

45. *Id.* at 209 (internal quotes omitted).

46. *Id.* In the Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France) Judgment, the International Court of Justice affirmed that if a state claims immunity for one of its organs before the tribunal of another state, it is assuming responsibility for any internationally wrongful act in issue committed by such organs. Certain Questions of Mutual Assistance in Criminal Matters (Djib. v. Fr.), Judgment, 2008 I.C.J. 177, ¶ 196 (June 4).

47. Report on Seventy-Third Session, *supra* note 43, at 209.

48. *Id.* at 236.

49. *Id.* (internal quotes omitted).

50. *See id.* at 236–37.

51. *See id.*

52. Application of Convention on Prevention and Punishment of Crime of Genocide (Bosn. & Herz. v. Serb. & Montenegro), Judgment, 2007 I.C.J. 43, ¶ 173 (Feb. 26).

53. *See id.*

tribunal (such as, for example, the International Court of Justice and the International Criminal Court) or by an international tribunal and a domestic one.⁵⁴ Therefore, it would be illogical to allow a rule such as jurisdictional immunities to obstruct the realization of the duality of responsibilities.⁵⁵

The contrary view holds that crimes under international law either require the presence of a state element (torture or enforced disappearance) or else must have been committed with the express or implied backing of the state machinery so that there is a connection with the state, and such crimes can therefore be considered in certain cases as “acts performed in an official capacity.”⁵⁶ This view is consistent with the above-mentioned current position on international responsibility that allows for attribution of responsibility of both the state and its officials for the same conduct.⁵⁷ In the same sense, the Second Special Rapporteur contended that “the characterization of international crimes as ‘acts performed in an official capacity’ does not mean that a [s]tate official can automatically benefit from immunity *ratione materiae* for the commission of such crimes.”⁵⁸

IV. FROM JUS COGENS TO SYSTEMIC INTEGRATION: COMPETING RATIONALES FOR EXCEPTIONS

The most contentious issue in the work of the International Law Commission is Draft Article 7, which states that immunity *ratione materiae* shall not apply in respect of certain crimes under international law.⁵⁹ The current version of the draft article reads as follows:

54. On the issue of duality of responsibilities for international crimes, *see generally, inter alia*, Andre Nollkaemper, *Concurrence Between Individual Responsibility and State Responsibility in International Law*, 52 INT’L AND COMPAR. L. Q., 615, 615–40 (2003); BEATRICE I. BONAFE, THE RELATIONSHIP BETWEEN STATE AND INDIVIDUAL RESPONSIBILITY FOR INTERNATIONAL CRIMES, (2009); Philippa Webb, *Binocular Vision: State Responsibility and Individual Criminal Responsibility for Genocide*, in THE DIVERSIFICATION AND FRAGMENTATION OF INTERNATIONAL CRIMINAL LAW, 117–48 (Larissa van der Herik & Carsten Stahn eds., 2012); THOMAS WEATHERALL, DUALITY OF RESPONSIBILITY IN INTERNATIONAL LAW (2022); Natalia M. Luterstein, *Entre el Hecho Internacionalmente Ilícito y el Crimen Internacional: La Responsabilidad Dual por Genocidio en las Jurisdicciones Internacionales y su Análisis desde la Fragmentación Secundaria*, [Between the Internationally Wrongful Act and International Crime: Dual Responsibility for Genocide in International Jurisdictions and its Analysis from the Perspective of Secondary Fragmentation] (2025).

55. *See supra* note 55 and accompanying text (discussing dual responsibility doctrine).

56. Int’l L. Comm’n, Immunity of State Officials from Foreign Criminal Jurisdiction: Texts and Titles of the Draft Articles Adopted by the Drafting Committee on First Reading, at 236, U.N. Doc A/CN.4/L.969 (2022).

57. *See supra* note 55 (providing the current position on dual responsibility).

58. Concepción Escobar Hernández (Special Rapporteur on Immunity of State Officials from Foreign Criminal Jurisdiction), *Fourth Rep. on Immunity of State Officials from Foreign Criminal Jurisdiction*, ¶ 126, U.N. Doc. A/CN.4/686 (May 29, 2015).

59. *See Draft Articles as Provisionally Adopted, supra* note 15.

Crimes under international law in respect of which immunity *ratione materiae* shall not apply

Immunity *ratione materiae* from the exercise of foreign criminal jurisdiction shall not apply in respect of the following crimes under international law, as defined according to the applicable rules of international law:

- (a) crime of genocide;
- (b) crimes against humanity;
- (c) war crimes;
- (d) crime of *apartheid*;
- (e) torture;
- (f) enforced disappearance;
- (g) crime of aggression;
- (h) slavery;
- (i) slave trade.⁶⁰

This Draft Article almost did not come to existence because the First Special Rapporteur took the view that both *ratione personae* and *ratione materiae* immunities were absolute.⁶¹ In his opinion, none of the rationales for exceptions to the immunity of state officials from foreign criminal jurisdiction were sufficiently convincing.⁶²

The Second Special Rapporteur adopted the opposite view.⁶³ In her preliminary report, she observed that during discussions within the International Law Commission, some members expressed concern about the fact that the first “Special Rapporteur had not taken sufficient account of new aspects of international law, related to the effort to combat impunity, that reflected a tendency to limit immunity and its scope.”⁶⁴ Therefore, the more state sovereignty-centric position of the First Special Rapporteur was replaced by a position focusing on the importance of accountability for international crimes, not only before international criminal tribunals, but also before domestic tribunals.⁶⁵

Once this position was adopted, it was necessary to identify the reasons that would justify it.⁶⁶ A reading of the work of the Second and Third Special

60. *Id.*

61. Kolodkin *Second Report*, *supra* note 12, at ¶ 94(n).

62. *Id.*

63. See Escobar Hernández *Preliminary Report*, *supra* note 12, at X.

64. *Id.* ¶ 29.

65. See *id.*

66. See *id.* ¶¶ 72–77.

Rapporteurs and the comments of the ILC shows competing rationales stemming from different interpretative frameworks.⁶⁷

On the one hand, Escobar Hernández considered that the non-applicability of immunity of state officials from foreign criminal jurisdiction to international crimes resulted from two factors: (i) the connection between international crimes and *jus cogens*, and (ii) the comparison between immunity and the fight against impunity.⁶⁸ In that vein, she argued that “the characterization of international crimes as acts contrary to fundamental values, norms and legal principles of the international community,”⁶⁹ taking into account their gravity,⁷⁰ justified their inclusion in Draft Article 7.⁷¹ Hence, she proposed a conflict-based justification whereby the application of functional immunity to international crimes would violate *jus cogens* rules.⁷²

Against the first reason, some argue that there is no real normative conflict between *jus cogens* and jurisdictional immunity.⁷³ As the International Court of Justice put it—albeit when discussing state immunities—the rules on immunities are of a procedural nature and concern the manner or timing of prosecution, and they do not bear upon the question on whether the conduct is lawful or unlawful.⁷⁴ Moreover, it has been asserted that not all rules prohibiting the commission of international crimes are of *jus cogens* nature⁷⁵ and that there is no obligation on third states to prosecute persons accused of committing international crimes, at least, not regarding all of them, and even if there were, it would not be a peremptory rule.⁷⁶

On the other hand, when the Commission adopted the draft articles on first reading, it offered the following reasons to justify the selection of the crimes included in Draft Article 7:

- (a) they are crimes which in practice tend to be considered as crimes not covered by immunity *ratione materiae* from foreign criminal jurisdiction; and
- (b) they are crimes under international law that have been identified as the most serious crimes of concern to the international community, and there are international, treaty-based and customary norms relating to their

67. See Concepción Escobar Hernández (Special Rapporteur on Immunity of State Officials from Foreign Criminal Jurisdiction), *Fifth Report on Immunity of State Officials from Foreign Criminal Jurisdiction*, ¶ 178, U.N. Doc. A/CN.4/701 (2016) [hereinafter *Escobar Hernández Fifth Report*]; Grossman Guiloff *Second Report*, *supra* note 19, at ¶¶ 21–23.

68. *Escobar Hernández Fifth Report*, *supra* note 68.

69. *Id.* ¶ 192.

70. *Id.* ¶ 179.

71. *See id.* ¶ 192.

72. *See id.*

73. Jurisdictional Immunities of the State (Ger. v. It.), Judgment, 2012 I.C.J. 99, ¶ 93 (Feb. 3).

74. *Id.*

75. Dapo Akande & Sangeeta Shah, *Immunities of State Officials, International Crimes, and Foreign Domestic Courts*, 21 EUR. J. INT'L L. 815, 833 (2011).

76. *Id.* at 835–36.

prohibition, including an obligation to take steps to prevent and punish them.⁷⁷

By rejecting the conflict model, the Commission reinterpreted functional immunity through the lens of systemic integration, privileging coherence over hierarchy.⁷⁸ Indeed, the Commission mentioned that “the draft articles . . . are intended to apply within an international legal order whose unity and systemic nature cannot be ignored[,]” tacitly referring to Article 31(3)(c) of the Vienna Convention on the Law of Treaties.⁷⁹ This article recognizes the principle of systemic integration, whereby international obligations are interpreted by reference to their normative environment (system).⁸⁰ It means that when interpreting a particular rule, there is a need to take into account the normative environment more widely,⁸¹ and therefore, in case of a conflict between two or more rules, “recourse may always be had to that provision in order to proceed in a reasoned way.”⁸²

In this sense, the Commission stated that it should not overlook other existing standards or clash with the legal principles enshrined in such important sectors of contemporary international law as international humanitarian law, international human rights law, and international criminal law.⁸³

In the same vein, Dapo Akande—currently a member of the International Law Commission—asserted that, in the context of international criminal law, whose purpose is to attribute responsibility to individuals including state officials, this rule “supersedes the earlier principle of immunity which seeks to protect non-responsibility.”⁸⁴ He argued that because there are international treaties which impose on states the obligation to prosecute certain international crimes (such as torture, enforced disappearances, and grave breaches of international humanitarian law) on the basis of different jurisdictional criteria, including universal jurisdiction, this principle of *inter parte* universal jurisdiction would suffice as a rationale for

77. Report on Seventy-Third Session, *supra* note 43, at 233.

78. *See id.* at 229–41.

79. Report on Seventy-Third Session, *supra* note 43, at 233. When regulating the rule on treaty interpretation, this article reads as follows: “1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose. . . . 3. There shall be taken into account, together with the context: . . . (c) any relevant rules of international law applicable in the relations between the parties.” Law of Treaties, *supra* note 30, at art. 31.

80. Martti Koskeniemi, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, ¶ 413, U.N. DOC. A/CN.4/L.682 and Add. 1. (Apr. 13, 2006).

81. *Id.* ¶ 415.

82. *Id.* ¶ 420.

83. Report on Seventy-Third Session, *supra* note 43, at 233.

84. Akande & Shah, *supra* note 76, at 840.

an exception to functional immunity.⁸⁵ Along these lines, Paola Gaeta has also argued that the theoretical foundation of the non-applicability of functional immunity to the commission of international crimes lies more on the normative structure of international law, in particular international human rights law, than to normative hierarchy.⁸⁶

This argument is consistent with the International Law Commission's reference to the existence of treaty-based and customary norms relating to the obligation of states parties to take steps to prevent and punish certain international crimes.⁸⁷ In fact, the inclusion of certain crimes which are not usually considered as core crimes or are not included in the Rome Statute—such as apartheid, torture, and enforce disappearance as autonomous crimes and not as underlying offences of crimes against humanity—responds to the fact that they are

[T]he subject of treaties that establish a special legal regime for each crime for the purposes of prevention, suppression, and punishment, which imposes specific obligations on [s]tates to take certain measures in their domestic legislation, including the obligation to define such crimes in their national criminal legislation and to take the necessary measures to ensure that their courts are competent to try such crimes.⁸⁸

In addition, the Commission considered the fact that, in many cases, when national courts have dealt with these crimes in relation to immunity, they have done so by treating them as separate crimes.⁸⁹

On his last report, the third and current Special Rapporteur, Claudio Grossman, proposed certain amendments to Draft Article 7, which the Drafting Committee later adopted and presented to the plenary of the Commission.⁹⁰ He included new crimes to the list of exceptions to functional immunity: aggression, slavery, and slave trade.⁹¹ The Drafting Committee explained that the new crimes included fulfilled the criteria of being clearly recognized as a crime under international law, whether through widely ratified treaties or established rules of customary international law.⁹² In this

85. *Id.* at 842. He concedes that the argument for genocide, crimes against humanity and war crimes committed in a non-international armed conflict is not as strong. *Id.* at 846.

86. Paola Gaeta, *Immunity of States and State Officials: A Major Stumbling Block to Judicial Scrutiny?*, in *REALIZING UTOPIA: THE FUTURE OF INTERNATIONAL LAW* 237, 230 (Antonio Cassese ed., 2012).

87. Report on Seventy-Third Session, *supra* note 43, at 243.

88. *Id.* at 239.

89. *Id.* at 240.

90. See Grossman Guiloff *Second Report*, *supra* note 19, at ¶¶ 75–82.

91. *Id.* ¶ 79.

92. See Mario Oyarzábal (Chairman of the Drafting Committee), Statement on Immunity of State Officials from Foreign Criminal Jurisdiction, 4 (May 23, 2025), https://legal.un.org/ilc/documentation/english/statements/2025_dc_chair_statement_iso.pdf [<https://perma.cc/6SMR-3JU7>] (on file with the Texas Tech Law Review).

sense, it drew particular attention to the Rome Statute of the International Criminal Court because several members regarded it as the most comprehensive and widely accepted expression of the core international crimes.⁹³ Nevertheless, it admitted that States were bound by other treaties more universally ratified, such as the 1949 Geneva Conventions.⁹⁴ He added that the decision to include them should consider their seriousness or gravity.⁹⁵

In that vein, the Drafting Committee also decided to eliminate the annex with the definitions of the crimes included in the first version of Draft Article 7 and replace it for the phrase “as defined according to the applicable rules of international law” inserted in the first paragraph.⁹⁶ The Committee considered that many states were not parties to the treaties mentioned in the annex and the draft did not intend to “impose the obligations of such treaties on [s]tates not party to them, nor to compel [s]tates to ratify those treaties.”⁹⁷

The Drafting Committee justified the inclusion of Draft Article 7 by adopting the systemic integration model.⁹⁸ It underlined that given that “international law conferred extraterritorial jurisdiction over certain crimes and expressly permitted the prosecution of individuals for acts committed in an official capacity, it would be logically inconsistent to permit the invocation of functional immunity to block such proceedings.”⁹⁹

V. CUSTOMARY LAW VS. PROGRESSIVE DEVELOPMENT (LEX LATA VS. LEX FERENDA)

The inclusion of Draft Article 7 yielded a discussion on its nature in light of the mandate of the International Law Commission.¹⁰⁰ Some members have asserted that it is not based on a customary international rule, and therefore, its inclusion would represent a progressive development on the part of the Commission, one that has not been widely accepted by all states.¹⁰¹

In her report dedicated to this issue, the Second Special Rapporteur fell short of asserting the existence of a customary international rule and, instead, stated that domestic and international practice revealed a “clear trend towards considering the commission of international crimes as a bar to the application

93. *Id.*

94. *See id.* at 8.

95. *Id.* at 5.

96. *See id.* at 7.

97. *Id.* at 8.

98. *See id.* at 4.

99. *Id.*

100. *See id.* at 9 (noting that members disassociated themselves from Draft Article 7 because it was not reflective of customary law).

101. *See* U.N. Charter art. 13. Article 13 of the UN Charter grants the General Assembly the power to make recommendations on encouraging the progressive development of international law and its codification. *Id.* The General Assembly delegated it to its subsidiary organ, the International Law Commission. *See also* G. A. Res. 174 (II) (Nov. 21, 1947).

of the immunity of state officials from foreign criminal jurisdiction.”¹⁰² Therefore, she understood that the topic should be considered both from the perspective of *lex ferenda* and *lex lata*, thus fulfilling the Commission’s dual mandate encompassing both the codification and the progressive development of international law.¹⁰³

In the same vein, the International Law Commission noted “that there has been a discernible trend towards limiting the applicability of immunity from jurisdiction *ratione materiae* in respect of certain types of behavior that constitute crimes under international law,”¹⁰⁴ thus it also did not univocally affirm the existence of a customary international law.¹⁰⁵

Nevertheless, it did identify enough practice and *opinio juris* (though without clarifying the status of the evidence cited in the report as evidence of one or the other element) to include Draft Article 7.¹⁰⁶ In this sense, it mentioned both its codification and progressive development mandate with regard to this rule, without clearly stating where it stands.¹⁰⁷ This is usually the practice of the Commission because it has regarded “‘the distinction between the two processes as unworkable’ and has, rather, proceeded on the basis of ‘a composite idea of codification and progressive development.’”¹⁰⁸ Therefore, it has been argued that “the assessment of Draft Article 7 requires only some evidence of practice,” which does not need to “be conclusive, widespread, or consistent.”¹⁰⁹

After the adoption of the draft articles on first reading, thirty-five states submitted written observations, and thirty-two made oral comments in the Sixth Committee of the General Assembly.¹¹⁰ Within those states that raised criticism to Draft Article 7, a distinction can be made between those completely opposing it and advocating for its deletion, such as the Russian Federation or the United Arab Emirates, and those arguing for a more nuanced position of accepting the Draft Article if conditioned to express indication that it constitutes *lex ferenda*, adding that, if misunderstood, could cause serious harm to international relations on a highly sensitive matter.¹¹¹ In the same vein, Japan noted a necessity to strengthen evidence of state practice¹¹² and a number of states expressed doubts regarding the current existence of a customary international rule, like Brazil, Israel, Saudi Arabia,

102. Escobar Hernández Fifth Report, *supra* note 68, at ¶ 179.

103. *See id.* ¶ 17.

104. Report on Seventy-Third Session, *supra* note 43, at 230.

105. *See id.*

106. *See id.*

107. *See id.*

108. Dire Tladi, *The International Law Commission’s Recent Work on Exceptions to Immunity: Charting the Course for a Brave New World?*, 32 LEIDEN J. INT’L L. 169, 172 (2019).

109. *Id.* at 182.

110. Grossman Guiloff Second Report, *supra* note 19, at ¶¶ 20–21.

111. Int’l L. Comm’n, Rep. on the Work of its Seventy-Sixth Session, ¶ 112, U.N. DOC. A/80/10, (2025) [hereinafter Seventy-Sixth Session Report].

112. Grossman Guiloff Second Report, *supra* note 19, at ¶ 29.

Singapore, and the United States.¹¹³ Others remarked “the need to strike a careful balance between sovereign equality of states and accountability for serious international crimes” and observed a link between Draft Article 7 and the principle of universal jurisdiction.¹¹⁴

A third group composed by Liechtenstein, Luxembourg, Romania, and Ukraine objected to the list of crimes, reorganizing the existence of a customary rule regarding only crimes against humanity, genocide, and war crimes.¹¹⁵

Overall, although comments by governments tend to be somewhat ambiguous in nature and subject to interpretation, there seems to be a general support for the inapplicability of functional immunity to international crimes, in particular, genocide, crimes against humanity, and war crimes (leaving aside apartheid, torture, and enforce disappearance as autonomous crimes).¹¹⁶

In his latest report, the current Special Rapporteur revised new state practice and noted that in recent years courts of several states “have convicted foreign [s]tate officials for international crimes, mainly crimes against humanity and war crimes.”¹¹⁷ The Special Rapporteur cited decisions by national tribunals which exercised criminal jurisdiction over state officials, without mentioning whether such issue was actually discussed, but limiting himself to stating that immunity *ratione materiae* has not been a bar to prosecution in those cases.¹¹⁸ The report also mentions national legislation that codifies “the non-applicability of immunity *ratione materiae* to certain crimes under international law.”¹¹⁹

Two of the most important instances of practices took place in recent time. Firstly, on February 21, 2024, the German Federal Court (BGH) held that there is a customary international rule establishing that immunity *ratione materiae* of state officials before foreign tribunals is not applicable in cases involving the commission of international crimes, regardless of the status or rank of the accused person.¹²⁰ The accused had been part of a militia integrated to a state paramilitary organization (National Forces of Defense) which worked with Syrian intelligence military services.¹²¹ This view was confirmed the following month in another case concerning a former senior officer of the Syrian secret service for his involvement in crimes against

113. *Id.* at 9 n.43.

114. Seventy-Sixth Session Report, *supra* note 112, at ¶¶ 113, 115, 117.

115. Grossman Guiloff *Second Report*, *supra* note 19, at ¶ 26.

116. *See id.* ¶¶ 26, 49, 50.

117. *See id.* ¶ 54.

118. *Id.* ¶¶ 56–71.

119. *Id.* ¶¶ 72–74.

120. *See id.* ¶ 27.

121. Bundesgerichtshof [BGH] [Federal Court of Justice] Feb. 21, 2024, AK 4/24, juris (Ger.). English translation available at <https://www.eurojust.europa.eu/sites/default/files/assets/files/49.-germany-translation-of-the-order-of-the-federal-court-of-justice-of-21-february-2024-ref.-ak-4-24.pdf> [https://perma.cc/8NH9-RLR2] (last accessed Jan. 27, 2026). His nickname was “Abu H. Trucks.” *See id.*

humanity in forms of homicide, torture, serious deprivation of personal liberty, rape, and sexual assault that occurred in Damascus.¹²² Moreover, on July 25, 2025, the *Cour de Cassation* of Paris concluded that a French-Syrian citizen and former director of the Central Bank of Syria, who is being investigated for aiding and abetting in the commission of crimes against humanity and war crimes could not invoke functional immunity.¹²³ The court asserted that there is a significant practice among states of setting aside functional immunity in cases of international crimes and, even though it did not clearly state the existence of a customary international rule, it did mention the development in international custom, to which the Court of Cassation intended to contribute, which defined a new balance between immunities and the fight against impunity.¹²⁴

These decisions, taken in the context of the exercise of universal jurisdiction, are perhaps the clearest in terms of the value as evidence of the exceptions to functional immunity as a customary rule of international law, and thus support Draft Article 7 as they are examples of the non-applicability of jurisdictional criminal immunity of state agents before foreign tribunals in cases involving international crimes.¹²⁵ However, at the same time, they are limited to two European countries and not enough to support the existence of a customary international rule.¹²⁶

During the 2025 session, a number of the Commission's members raised concerns regarding the fact that the majority of the case law in relation to Draft Article 7 referred to in the Special Rapporteur's reports was not representative enough because it did not include case law from all regions of the world.¹²⁷ In that sense, some states raised concerns about the methodology for the identification of customary international rules and referred to the conclusions of the Commission on the topic "[i]dentification of customary international law."¹²⁸ The Special Rapporteur indicated that practice was limited "largely because the crimes giving rise to the inapplicability of immunity were exceptional crimes and not all [s]tates had been in the situation to prosecute foreign officials for such crimes."¹²⁹ At this point, it should be noted that the identification of customary international rules in the field of international criminal law presents particular challenges. It is sometimes easier to come by evidence of *opinio juris* rather than

122. Grossman Guiloff *Second Report*, *supra* note 19, at ¶ 55.

123. Cour d'appel [CA] [Court of Cassation], July 25, 2025, No. 24-84.071 (Fr.), https://www.courdecassation.fr/decision/68836da7c6072b5ce8fd57b7?judilibre_jurisdiction=cc&sort=date-desc&previousdecisionpage=&previousdecisionindex=&nextdecisionpage=0&nextdecisionindex=1 [https://perma.cc/VL8F-ZV2F] (last visited Jan. 27, 2026).

124. *See id.*

125. *See supra* notes 121–25 and accompanying text (detailing German and French court decisions).

126. Seventy-Sixth Session Report, *supra* note 112, at ¶ 116.

127. *Id.*

128. *Id.*

129. *Id.* ¶ 166.

evidence of state practice or to assert their existence without clarifying whether the evidence pertains to the objective or to the subjective element.¹³⁰

VI. THE CHALLENGE OF THE INTERNATIONAL LAW COMMISSION: A NORMATIVE DILEMMA

When the issue of jurisdictional immunities of state officials was discussed at the Sixth Committee of the General Assembly in its sessions of 2016 and 2017, states pointed out to some methodological problems with the way in which the Commission had provisionally adopted Draft Article 7, especially regarding the fact that the Commission had resorted to voting, contrary to its most recent practice, affirming that the Commission should act by consensus.¹³¹ The voting was accompanied by a “strongly worded explanation[] of [the] vote.”¹³² Twenty-one members voted in favor of Draft Article 7, eight voted against it and one member abstained.¹³³ The choice of methodology shows that there was not enough agreement within the members to adopt the Draft Article by consensus.¹³⁴

As it stands, the state of the art is not clear about the issue of exceptions to functional immunity.¹³⁵ There is not a distinct precedent of the International Court of Justice dealing exclusively with this type of immunity.¹³⁶ The *Arrest Warrant* case addressed the immunity *ratione personae* of an incumbent Minister of Foreign Affairs.¹³⁷ However, some commentators have observed that when the court listed the circumstances in which such immunity would not act as a bar to criminal prosecution, it mentioned that “a court of one [s]tate may try a former [m]inister for [f]oreign [a]ffairs of another [s]tate in respect of acts committed prior or subsequent to his or her period of office, as well as in respect of acts committed during that period of office in a private capacity,”¹³⁸ thus indirectly referring to immunity *ratione materiae*.¹³⁹ It is not clear, though, whether the International Court of Justice included the commission of international crimes in that analysis.¹⁴⁰ If it did, the sentence could be read as considering international crimes as private acts—and thus outside the scope of *ratione materiae* immunity—or

130. Robert Cryer, *International Criminal Tribunals and the Sources of International Law Antonio Cassese's Contribution to the Canon*, 10 J. INT'L CRIM. JUST. 1047, 1049 (2012); Yudan Tan, *The Identification of Customary Rules in International Criminal Law*, 34 UTRECHT J. INT'L AND EU. L. 92, 99, 104 (2018).

131. Tladi, *supra* note 109.

132. *Id.*

133. *Id.*

134. *Id.* at 172–73.

135. *Id.*

136. *Id.*

137. *Id.*

138. See Dem. Rep. Congo v. Belg., 2002 I.C.J. ¶ 61.

139. See Akande & Shah, *supra* note 76, at 839–40.

140. See Dem. Rep. Congo v. Belg., 2002 I.C.J. ¶¶ 25–26.

as official acts covered by functional immunity.¹⁴¹ In any case, none of those positions seem to support the Commission's Draft Article 7.

In his last report, the current Special Rapporteur advanced that "the most appropriate form for the final outcome of the topic was a set of draft articles that might be brought to the attention of [s]tates with the ultimate goal of concluding a treaty."¹⁴² Such a process would provide states "with the opportunity to address some contentious matters on the basis of the Commission's proposal."¹⁴³

It remains to be seen whether states will agree to such proposal and carry out negotiations with a view to adopt a treaty on the subject.

VII. THE CASE OF WAR CRIMES

The 1949 Geneva Conventions (Articles 49, 50, 129, and 146, respectively) contain a clause related to grave breaches whereby state parties have the obligation to search for alleged offenders "regardless of their nationality," and either bring them before their own courts or hand them over for trial by another state party which has made out a *prima facie* case.¹⁴⁴ Whereas the Conventions do not specifically mention the principle, they have generally been interpreted as providing for mandatory *inter partes* universal jurisdiction reflected through the formula *aut dedere aut judicare*.¹⁴⁵ Moreover, Additional Protocol I of 1977 extends the principle of universal jurisdiction to grave breaches relating to the conduct of hostilities, which it qualifies as war crimes (Article 85).¹⁴⁶ Similar obligations appear in the Hague Convention of 1954 for the protection of cultural property in the event of armed conflict and its Second Protocol.¹⁴⁷ Both instruments require states'

141. See Akande & Shah, *supra* note 76, at 839–41.

142. Seventy-Sixth Session Report, *supra* note 112, at ¶ 36.

143. See *id.*

144. See Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field art. 49, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31; Geneva Convention for the Amelioration of the Condition of Wounded, Sick, and Shipwrecked Members of Armed Forces at Sea art. 50, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85; Geneva Convention Relative to the Treatment of Prisoners of War art. 129, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135; Geneva Convention Relative to the Protection of Civilian Persons in Time of War art. 149, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287.

145. See Luis Benavides, *The Universal Jurisdiction Principle: Nature and Scope*, 1 ANUARIO MEXICANO DE DERECHO INTERNACIONAL 19, 52–53 (2001).

146. See Protocol Additional to the Geneva Conventions of 12 Aug. 1949, and Relating to the Protection of Victims of International Armed Conflicts art. 85, June 8, 1977, 1125 U.N.T.S. 3 [hereinafter AP I].

147. See Convention for the Protection of Cultural Property in the Event of Armed Conflict, May 14, 1954, T.I.A.S. No. 09-313.1, 249 U.N.T.S. 240 [hereinafter Protection of Cultural Property]; Protocol Additional to the Geneva Conventions of 12 Aug. 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, June 8, 1977, 1125 U.N.T.S. 609 [hereinafter AP II].

parties to repress serious violations regardless of the nationality of the accused person or the place of commission.¹⁴⁸

In this context, non-applicability of functional immunity (*immunity ratione materiae*) to war crimes strengthens the capacity of states to meet their international obligations to prosecute or extradite individuals accused of such crimes.¹⁴⁹ This rationale explains why war crimes have consistently appeared in Draft Article 7 since its earliest version.¹⁵⁰ It is also a clear example of the application of the principle of systemic integrations.¹⁵¹ If functional immunity did not include the exception of war crimes, states would be prevented from fulfilling their treaty obligations to prosecute them.¹⁵²

When the International Law Commission adopted the draft articles on first reading in 2022, it included an annex to define the relevant crimes.¹⁵³ As regards to war crimes, the annex referred exclusively to Article 8 of the Rome Statute, omitting any mention of the 1949 Geneva Conventions and its Additional Protocols.¹⁵⁴ During the 2025 revision, however, the Drafting Committee recognized that whereas the Geneva Conventions enjoy near-universal ratification, many amendments to Article 8 of the Rome Statute do not.¹⁵⁵ The Committee therefore considered it more appropriate to encompass both treaty and customary definitions of war crimes, especially for states not party to those treaties.¹⁵⁶ As a result, the annex was deleted and replaced by the phrase “as defined according to the applicable rules of international law,” allowing national courts to determine the relevant definitions when applying Draft Article 7.¹⁵⁷

Unlike immunity *ratione personae*, which protects a narrow category of high-ranking officials during their term in office (the so-called troika), immunity *ratione materiae* applies to all state officials—from the Chief of Staff to the lowest-ranking soldier—and continues after they leave office

148. See Protection of Cultural Property, *supra* note 148; AP II, *supra* note 148.

149. See Akande & Shah, *supra* note 76, at 839–46.

150. See *supra* Part IV (explaining that Draft Article 7 covers crimes of serious international concern that are subject to treaty-based obligations to prevent and punish). Jurisdictional immunities should not be mistaken with “combatant immunity.” See *Immunities*, ICRC, https://casebook.icrc.org/a_to_Z/glossary/immunities [<https://perma.cc/A2WL-3MED>] (last visited Jan. 27, 2026). This is one of international humanitarian law’s basic rule, which derives from the right to participate directly in hostilities of the members of armed forces—also called combatant privilege—contained in Article 43.2 of Protocol Additional I of 1977. See AP I, *supra* note 147. It bars the prosecution of combatants for mere participation in hostilities unless such acts constitute war crimes. See *Immunities*, *supra*.

151. See *supra* Part IV (explaining the interpretation of functional immunity through a systemic integration lens).

152. See *supra* Part IV (arguing that functional immunity cannot be invoked to block prosecutions authorized by international law).

153. Report on Seventy-Third Session, *supra* note 43, at 353.

154. *Id.*

155. Seventy-Sixth Session Report, *supra* note 112, at 21.

156. *Id.*

157. *Id.*

with respect only to official acts.¹⁵⁸ Under Draft Article 7, however, even acts performed in an official capacity, such as those carried out by members of the armed forces, may not shield an official from prosecution for war crimes or other international crimes.¹⁵⁹ Consequently, both senior and lower-level officials could face proceedings for such offenses before national or international courts.¹⁶⁰

The attribution of criminal responsibility may arise from various modes, ranging from the classic direct commission to a more modern command responsibility.¹⁶¹ The latter imposes liability on superiors, military or civilian, who knew or should have known that subordinates were committing war crimes and failed to prevent or punish them.¹⁶² Given the wide scope of officials covered by functional immunity, domestic prosecutions could rely on any of these modes of liability.¹⁶³ Importantly, the chosen mode of attribution does not alter the principle that functional immunities do not apply to war crimes.¹⁶⁴

A further normative complexity may arise in the context of peacekeeping and other international military operations.¹⁶⁵ Jurisdictional immunities of troops are fundamental for facilitating states' participation in such missions, and Status of Forces Agreements (SoFAs) are typically concluded prior to deployment to regulate these matters.¹⁶⁶ These agreements establish that peacekeeping personnel remain under the exclusive criminal jurisdiction of the troop-contributing state.¹⁶⁷ While the 1946 Convention on the Privileges and Immunities of the United Nations provides a general framework, UN practice has relied primarily on SoFAs.¹⁶⁸ The Model Status of Forces Agreement for Peacekeeping Operations, for instance, grants full immunity to members of UN operations for acts performed in their official

158. See *Dem. Rep. Congo v. Belg.*, 2002 I.C.J. ¶ 61.

159. Int'L L. Comm'n, *Draft Articles on Prevention and Punishment of Crimes Against Humanity* (2019) https://legal.un.org/ilc/texts/instruments/english/draft_articles/7_7_2019.pdf. [<https://perma.cc/U69H-KP4P>].

160. *Id.*

161. Rome Statute of The International Criminal Court, art. 8, July 17, 1998, 2187 U.N.T.S. 90 [hereinafter Rome Statute], <https://www.icc-cpi.int/sites/default/files/2024-05/Rome-Statute-eng.pdf> [<https://perma.cc/73KK-SMU6>].

162. *Id.* Article 87 of Additional Protocol I regulates this mode of liability but refers solely to military superiors. AP I, *supra* note 147, art. 87. The most current version of this doctrine is codified in Article 28 of the Rome Statute, which contains certain differences between the military and the civil superior relating to the *mens rea* or subjective elements. *Id.*

163. Rome Statute, *supra* note 161.

164. *Id.*

165. See U.N. Secretary-General, *Rep. of the Panel on United Nations Peace Operations*, U.N. Doc. A/55/305-5/2000/809 (Aug. 21, 2000).

166. See William T. Worster, *Immunities of U.N. Peacekeepers in the Absence of a Status of Forces Agreement*, 47 MIL. L. & L. WAR REV. 277, 310 (2008).

167. See *id.* 288, 302.

168. Convention on the Privileges and Immunities of the United Nations, Feb. 13, 1946, 21 U.S.T. 1418, 1 U.N.T.S. 15; see Worster, *supra* note 167, at 328-29, 331.

capacity,¹⁶⁹ recognizing a form of functional immunity.¹⁷⁰ SoFAs are silent on possible exceptions to such immunity.¹⁷¹ In this sense, it would be possible to assert that, despite the exclusive criminal jurisdiction of the sending state, if members of troops are accused of committing war crimes, then the rule embodied in Draft Article 7 would apply to such situations.¹⁷²

VIII. SOME CONCLUSIONS

The revision of the work of the International Law Commission reveals that the consensus on Draft Article 7 is fragile and a number of states are not willing to accept this rule, yet.¹⁷³ The tensions between state sovereignty, accountability for international crimes and the role that domestic tribunals play in that process are still unresolved.¹⁷⁴ Despite the fact that the International Law Commission's Drafting Committee has adopted the Draft in its last session, this decision has not come without controversy.¹⁷⁵

Therefore, the question remains: Will the adoption of these draft articles consolidate accountability as a structural principle of international law, or will it reaffirm the primacy of the principle of state sovereignty? As Gaeta has observed, it is contradictory to protect sovereign immunity when international crimes are committed by individuals abusing such sovereignty.¹⁷⁶ By clarifying that official capacity does not exempt individuals from responsibility, Draft Article 7 reinforces the integrity of the international legal order and the principle that international crimes must be prosecuted wherever they occur.¹⁷⁷ Indeed, the importance of Draft Article 7 should not be underestimated because the possibility of bringing criminal complaints against state officials before foreign courts often represents the only remaining avenue for certain groups of victims who, due to other jurisdictional or procedural obstacles, cannot resort to either the domestic tribunals of the state concerned or international tribunals, such as the International Criminal Court.¹⁷⁸

In this way, non-applicability of functional immunity both fulfills states' obligations under international law and strengthens the broader system of

169. Gian M. Farnelli, *A Controversial Dialogue Between International and Domestic Courts on Functional Immunity*, 14 L. & PRAC. OF INT'L & TRIBUNAL 255, 264 (2015).

170. *See id.*

171. *See id.*

172. *See Draft Articles as Provisionally Adopted*, *supra* note 15.

173. *See supra* Part IV (discussing the arguments behind Draft Article 7).

174. *See supra* Part IV (discussing various arguments that address the tensions behind Draft Article 7).

175. *See supra* Part IV (showcasing various viewpoints for the drafting of the Article).

176. Gaeta, *supra* note 87, at 237.

177. *See supra* Part IV (discussing justifications for the draft articles).

178. *See Gaeta, supra* note 87, at 237.

international criminal accountability as an essential safeguard against impunity.¹⁷⁹

179. *Id.*