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The Individual as Beneficiary of State Immunity: Problems of the Attribution of Ultra Vires Conduct

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Immunity, Ultra Vires, Commercial Law, States, Crimes

THE INDIVIDUAL AS BENEFICIARY OF STATE IMMUNITY: PROBLEMS OF THE ATTRIBUTION OF *ULTRA VIRES* CONDUCT

MIZUSHIMA TOMONORI*

I. INTRODUCTION

It is a truism among international lawyers that the state immunity principle might bar a domestic legal action brought against a foreign state. There has been much discussion about the extent to which a foreign state is immune from domestic jurisdiction. No matter what answer is given to this still controversial issue, the fact remains that a state can act only through natural persons, who do not ordinarily enjoy immunity from suit. Partly for this reason, several actions have been brought against individuals who acted on behalf of a foreign state. Can they, and to what extent, invoke and enjoy state immunity?

We can hardly say that this question has received an answer based on a comparative law analysis. The scope of past observations on beneficiaries of state immunity other than a foreign state itself was mainly limited to non-natural persons such as state-owned corporations or political subdivisions of the state. Thus, even were they to enjoy state immunity, we could pose the same question as above with regard to individuals who acted for these entities. The purpose of this article is to clarify case law concerning individuals' entitlement to state immunity from the standpoint of the attribution of an act to a state.¹ Particular emphasis is placed on problems of *ultra vires* conduct of state officials.

Some preliminary remarks are useful. This article focuses upon state immunity from foreign civil proceedings. Certainly, a number of

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1. In this article, except in the asterisked footnote, "to 'attribute' an act to someone" means, "to regard, for the purposes of law, an act of a natural person as an act of a legal subject." Other possible terms, such as "impute" or "ascribe," are used only in the case of direct citations.

(quasi-) criminal cases exist in which immunity was granted to a foreign state or its agency.² However, most domestic criminal rules are intended to apply only to natural persons. In such cases, it is neither necessary nor possible to prove the immunity of foreign states, and the position of individuals who acted on behalf of a foreign state is at best unclear.³

Let us take the four criminal cases that Bothe cited in 1971 in support of his argument that state officials are, in certain circumstances, immune from foreign criminal proceedings.⁴ In regard to the *McLeod* case,⁵ it should not be ignored that, contrary to the diplomatic correspondence between the two countries concerned, which was in favor of *McLeod*,⁶ the court, in fact, denied immunity.⁷ *Horn v. Mitchell*⁸ is also a case in which immunity was denied. The court found, "no ground for extending to him any of the privileges or exemptions which *might* result from a finding that his act was a national act."⁹

The two other cases, in which immunity was granted, concern members of foreign armed forces and do not imply the extension of immunity to non-members. In *In re Gilbert*¹⁰, Judge de Azevedo stated that, "if the crime were devoid of any military aspect, the case would undoubtedly fall under the local jurisdiction."¹¹ In the *Scordalos* case,¹² the defendant was a Greek marine. Although this Egyptian case was decided without an applicable treaty between Egypt and Greece, it has been pointed out that the Egyptian courts of those days were influenced by the Anglo-Egyptian convention, which provided for the immunity of members of the British Forces.¹³ It is also to be noted that, in a similar

2. *E.g.*, *In re Investigation of World Arrangements with Relation to the Production, Transportation, Refining & Distribution of Petroleum*, 13 F.R.D. 280 (D.D.C. 1952); *Australia v. Midford (Malaysia) Sdn. Bhd.*, 86 I.L.R. 640 (Malay. Sup. Ct. 1990).

3. *See, e.g.*, *Regina v. Bow Street Magistrate*, [2000] 1 App. Cas. 61, 110 (Eng. 1998) [*hereinafter* *Pinochet* (No. 1)] (Lord Nicholls); *Regina v. Bow Street Magistrate*, (No. 3) [2000] 1 App. Cas. 147, 283 (Eng. 1999) [*hereinafter* *Pinochet* (No. 3)] (Lord Phillips).

4. *See* Michael Bothe, *Die strafrechtliche Immunität fremder Staatsorgane*, 31 ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT 246 (1971).

5. 25 Wend. 483 (N.Y. Sup. Ct. 1841).

6. Correspondence between Great Britain and The United States, respecting the Arrest and Imprisonment of Mr. McLeod, for the Destruction of the Steamboat *Caroline*, 29 BRIT. & FOREIGN ST. PAPERS 1126 (1840-1841).

7. *People v. McLeod*, 25 Wend. 483 (N.Y. Sup. Ct. 1841). For a comment to this effect, *see also* PASQUALE DE SENA, DIRITTO INTERNAZIONALE E IMMUNITÀ FUNZIONALE DEGLI ORGANI STATALI 45 (1996).

8. 232 Fed. 819 (1st Cir. 1916), *affg* 223 Fed. 549 (D. Mass. 1915).

9. *Id.* at 823 (emphasis added).

10. 13 Ann. Dig. 86 (Braz. Sup. Fed. Ct. 1944).

11. *Id.* at 90.

12. Cass., Feb. 7, 1944, JOURNAL DES TRIBUNAUX MIXTES, No. 3308, May 19/20, 1944, at 2 (Egypt).

13. *E.g.*, Alexandre Pathy, *Bulletin de la jurisprudence égyptienne*, 67-72 JOURNAL DU DROIT INTERNATIONAL 390, 391 (1940-1945); *See* G.P. Barton, *Foreign Armed Forces*:

agreement with the United States, Egypt reserved the right to prosecute civilian employees.¹⁴

Recent practice points to, if anything, non-immunity from criminal proceedings¹⁵ and provides no authority in favor of immunity.¹⁶ In order to avoid unnecessary confusion, it would be advisable to exclude criminal cases unless light can be shed, in one way or another, upon this study.

Further, given the subject matter of this article, *i.e.* the relationship between individuals who do not ordinarily enjoy immunity from suit and state immunity, some other cases fall outside its scope. One of them concerns some specific categories of individuals, *e.g.* diplomats or heads of state, who ordinarily enjoy immunity irrespective of whether their acts are attributed to the state.¹⁷ Cases in which these individuals are involved will be dealt with only where attribution might matter. Another is a case that took place before the state immunity principle was undoubtedly established.¹⁸

The final preliminary remark concerns the so-called act of state doctrine. Chief Justice Fuller provided the classic definition of this doctrine in *Underhill v. Hernandez*,¹⁹ when he said, "[T]he courts of one country will not sit in judgment on the acts of the government of

Qualified Jurisdictional Immunity, 31 BRIT. Y.B. INT'L L. 341, 351 (1954). The Convention concerning the Immunities and Privileges to be enjoyed by the British Forces in Egypt, Aug. 26, 1936, provides, "4. No member of the British Forces shall be subject to the criminal jurisdiction of the Courts of Egypt, nor to the civil jurisdiction of those Courts in any matter arising out of his official duties." 173 L.N.T.S. 433.

14. Agreement concerning Immunity from Jurisdiction in Criminal Matters of Members of the United States Forces in Egypt, Mar. 2, 1943, 204 L.N.T.S. 425. Moreover, the immunity regime under this agreement was intended to cease at the end of the war.

15. *E.g.*, *R. v. Mafart and Prieur*, 74 I.L.R. 241 (N.Z. High Ct. Auckland Registry 1985).

16. In *Pinochet (No. 3)*, Lord Browne-Wilkinson said, "As to the charges of murder and conspiracy to murder, no one has advanced any reason why the ordinary rules of immunity [*ratione materiae*] should not apply and Senator Pinochet is entitled to such immunity." [2000] 1 App. Cas. at 205. As will be seen, however, this reasoning is open to objection.

17. *E.g.*, Luigi Condorelli, *L'imputazione à l'État d'un fait internationalement illicite: solutions classiques et nouvelles tendances*, 189 RECUEIL DES COURS 9, 76 (1984).

18. In *Waters v. Collot*, the governor and commander in chief of a French island was sued before a U.S. court. Wm. Bradford, U.S. Att'y Gen., stated, "With respect to his suability, he is on a footing with any other foreigner (not a public minister) who comes within the jurisdiction of our courts. If the circumstances stated form . . . a sufficient ground of defence, they must, nevertheless, be regularly *pleaded*; . . ." 1 Op. Att'y Gen. 45, 46 (1794). After the court held Collot to bail, this action was discontinued. 2 U.S. (2 Dall.) 247 (1796). The opinion of Lee, U.S. Att'y Gen., concerning the *Henry Sinclair* cases, apparently of a civil nature, is couched in slightly different terms, "[A] person acting under a commission from the sovereign of a foreign nation is not amenable for what he does in pursuance of his commission, to any judiciary tribunal in the United States." 1 Op. Att'y Gen. 81 (1797).

19. 168 U.S. 250 (1897).

another done within its own territory."²⁰ Needless to say, "[this] doctrine is peculiar to Anglo-American law,"²¹ and distinct from the state immunity principle. While state immunity is a matter of procedural law, the act of state doctrine is arguably one of substantive law.²² Hence, "the act of state doctrine exempts no one from the process of the court."²³ However, it is not always easy to recognize which principle was applied. For instance, in regard to *Underhill v. Hernandez*,²⁴ the U.S. Supreme Court itself later comments that, "sovereign immunity provided an independent ground."²⁵ Thus, mention of cases in which the act of state doctrine was at issue is not necessarily excluded.

II. THE INDIVIDUAL AS BENEFICIARY OF STATE IMMUNITY

As already mentioned, the question whether, and under what circumstances, individuals can invoke state immunity has attracted no particular attention. As a result, the provisions of national legislation give little guidance in this respect.²⁶ Section 14 of the U.K. State Immunity Act 1978, for instance, provides, "(1) . . . [R]eferences to a State include references to—(a) the sovereign or other head of that State in his public capacity; (b) the government of that State; and (c) any department of that government".²⁷ The other possible beneficiaries of state immunity specified in that section are any entity (a "separate entity") which is distinct from the executive organs of the government of the state and capable of suing or being sued, and the constituent territories of a federal state. In the recent Argentine legislation, no definition or explanation is given to the term "foreign State" (*Estado extranjero*).²⁸ The Australian Foreign State Immunities Act of 1985, in accordance with which "a natural person" who fulfills certain conditions

20. *Id.* at 252.

21. F. A. MANN, *FOREIGN AFFAIRS IN ENGLISH COURTS* 164 (1986).

22. In *Kuwait Airways Corp. v. Iraqi Airways Co.*, the English courts have dealt with these two principles at separate stages. Compare the judgment of the House of Lords [1995] 2 Lloyd's Rep. 317 with that of the Court of Appeals [2001] 1 Lloyd's Rep. 161 (2000). See also SIR ROBERT JENNINGS, *THE PLACE OF THE JURISDICTIONAL IMMUNITY OF STATES IN INTERNATIONAL AND MUNICIPAL LAW* 12 (1988).

23. *Alfred Dunhill of London, Inc. v. Republic of Cuba et al.*, 425 U.S. 682, 726 (1976) (Marshall, J., dissenting).

24. 168 U.S. 250 (1897)

25. *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 430 (1964).

26. For principal pieces of national legislation, see *Materials on Jurisdictional Immunities of States and Their Property*, UN Doc. ST/LEG/SER.B/20, at 1-70 (1982).

27. U.K. State Immunity Act, §14 reprinted in 17 I.L.M. 1123 (1978).

28. Law 24.488, *Inmunidad de jurisdicción de los Estados extranjeros ante los tribunales argentinos* [1995-B] *Legislación Argentina* 1500. The Argentine Supreme Court, in eventually denying immunity, applied this statute to a foreign state agency. *Saravia v. Agencia de Cooperación Internacional del Japón*, Corte Sup. [1999-I] J.A. 509 (1998).

is to enjoy immunity as a "separate entity" of a foreign state, can be regarded as an exception.²⁹

Most instruments of an international character are equally not free from such ambiguity. It does not seem that the work of the International Law Commission (ILC) has clarified this point. A number of writers³⁰ have suggested a broad interpretation of "representatives of the State acting in that capacity" as one of the beneficiaries of state immunity under the ILC Draft Articles on Jurisdictional Immunities of States and Their Property.³¹ It is questionable, however, whether all the individuals who act on behalf of a foreign state can be considered "representatives of the State."³²

On the other hand, the International Law Association Draft Convention on State Immunity makes its position quite clear. Georg Ress, in his final report to the Association, stated:

[The term "foreign State" in this Draft Convention] is not intended to cover individuals, because the reasons underlying the concept of state immunity do not apply. Court action against an individual (who would then be liable with his personal estate only) does not implicate sovereignty or sovereign equality. . . . [T]he problem of state immunity arises only if a state is named as party to a suit.³³

29. Australian Foreign States Immunities Act §§ 3(1), 22, *reprinted in* 25 I.L.M. 715 (1986).

30. Christian Tomuschat, *Jurisdictional Immunities of States and Their Property: The Draft Convention of the International Law Commission*, in *VÖLKERRECHT, RECHT DER INTERNATIONALEN ORGANISATIONEN, WELT-WIRTSCHAFTSRECHT: FESTSCHRIFT FÜR IGNAZ SEIDL-HOHENVELDERN* 603, 621 (Karl-Heinz Böckstiegel et al. eds., 1988); Burkhard Heß, *The International Law Commission's Draft Convention on the Jurisdictional Immunities of States and Their Property*, 4 *EUR. J. INT'L L.* 269, 279 (1993).

31. Art. 2(1)(b)(v), *reprinted in* 30 I.L.M. 1565 (1991). The other beneficiaries in the ILC Draft Articles are, "(i) the State and its various organs of government; (ii) constituent units of a federal State; (iii) political subdivisions of the State . . . ; (iv) agencies or instrumentalities of the State and other entities". *Id.* at art. 2(1)(b).

32. In the commentary, the ILC states, "[This] category of beneficiaries of State immunity encompasses all the natural persons who are authorized to represent the State in all its manifestations, Thus, sovereigns and heads of State in their public capacity would be included under this category Other representatives include heads of Government, heads of ministerial departments, ambassadors, heads of mission, diplomatic agents and consular officers, in their representative capacity." *Report of the Commission to the General Assembly on the Work of its Forty-third Session* [1991] II-2 Y.B. Int'l L. Comm'n 18, U.N. Doc. A/CN.4/SER.A/1991/Add.1 (Part 2).

33. Georg Ress, *Final Report on Developments in the Field of State Immunity and Proposal for a Revised Draft Convention on State Immunity*, International Law Association, Report of the 66th Conference 452, 466 (1994). *See also* Jurgen Brohmer, *STATE IMMUNITY AND THE VIOLATION OF HUMAN RIGHTS* 50, 55 (1997); Karl Doehring and Georg Ress, *Diplomatische Immunität und Drittstaaten: Überlegungen zur erga omnes-Wirkung der diplomatischen Immunität und deren Beachtung im Falle der Staatensukzession*, 37 *ARCHIV DES VÖLKERRECHTS* 68, 97 (1999).

The first question is whether such a denial of individuals' entitlement to state immunity is in accordance with case law. Initially, a number of cases are examined which have been, or might be, taken to constitute authorities in favor of the absence of immunity. This is followed by an examination of those in which immunity was granted.

Setting this aside momentarily, we ought to bear in mind that the denial of jurisdictional immunity does not necessarily amount to the existence of responsibility as a matter of substantive law. Indeed, it has been argued that, whether or not individuals are immune from suit, they are not held responsible vis-à-vis the plaintiff for their acts on behalf of a foreign state.³⁴ Therefore, it must be noted that Ress' statement contains two distinct propositions.

A. *Denial of State Immunity to the Individual?*

(1) Belgium: *Mesdag v. Heyermans*, decided in the nineteenth century, deserves to be mentioned.³⁵ Heyermans's painting, displayed at an exhibition in Brussels, was withdrawn without her consent at the request of Mesdag, a Dutch official. The Court of Appeal of Brussels denied its competence for two reasons.³⁶ First, the Court states that Mesdag enjoys immunity, at least for acts done in his official capacity, because he is an "envoy of foreign governments" within the meaning of the Belgian decree at issue. Second, the Court found that the acts in question did not fall within the judicial power of the government since they were purely administrative acts. In both respects, the Court of Cassation annulled this judgment.³⁷ It seems that the denial of the second point by the Court of Cassation suggests the absence of the immunity of the state itself under the circumstances of this case.

(2) Danzig: In the *Polish Officials in Danzig* case,³⁸ the defendant was sued for damages allegedly arising out of his activity as a Polish customs officer. The High Court rendered a judgment to the effect that, "[t]here was no reason whatsoever to assume that a foreign official on duty in Danzig who did not come within [the domestic law provisions at issue concerning persons invested with diplomatic character] should be able to claim immunity from any action arising in connection with his

34. *E.g.*, *Soc. Vivai industriali Roma v. Legazione dell'Arabia Saudita*, Trib. Roma, Nov. 20, 1953, 38 RIVISTA DI DIRITTO INTERNAZIONALE 79 (Italy); GAETANO MORELLI, DIRITTO PROCESSUALE CIVILE INTERNAZIONALE 201-02 (2d ed. 1954).

35. *See also* *Dreyfus frères et Cie v. Godderis frères*, CA Bruxelles, Aug. 4, 1877, *Pasicrisie belge* 1877, II, 307. This *Dreyfus* case is virtually identical, in its facts and its holding, with a French case, *Isidore Dreyfus v. Dreyfus frères*. *See infra* text accompanying notes 40-42.

36. CA Bruxelles, June 25, 1897, PANDECTES PERIODIQUES 1897, 615.

37. Cass. 2e ch., May 23, 1898, 26 J. DU DROIT INT'L PRIVE 618.

38. 6 Ann. Dig. 130 (High Ct. 1932).

official function."³⁹

(3) France: In *Isidore Dreyfus v. Dreyfus frères*,⁴⁰ subscribers sued French bankers who dealt with loans on behalf of the Peruvian government. According to the Court of Appeal of Paris, "the Peruvian government not being a party [of the appellants' personal undertaking in question], the appellants cannot invoke . . . the principle of the law of nations [viz. state immunity]".⁴¹ On the other hand, the Court states, "[I]n the issue and the service of the loans [the appellants] acted only as mandataries and financial agents of the government of Peru; . . . [I]n this capacity, they are not personally obliged towards the third subscribers, . . ."⁴² The court, while denying the application of state immunity, did not hold the defendants personally responsible for their acts as agents of the Peruvian government. The Court of Cassation rejected the appeal. As seen below, other French cases have not denied state immunity to individuals or private companies.

(4) Ireland (Eire): In the *de las Morenas* case,⁴³ the head of a commission appointed by the Spanish government to purchase horses for its army was sued for breach of contract. Justice O'Byrne, for the Supreme Court, said:

He is sued in his personal capacity and the judgment . . . will bind merely the appellant personally, . . . I am not aware of any rule of international law under which mere agents of a foreign State can claim immunity from the jurisdiction of the courts of the State in which they are carrying out their duties. . . . Where the Sovereign is not named as a party and where there is no claim against him for damages or otherwise, and where no relief is sought against his person or his property, I fail to see how he can be said to be impleaded either directly or indirectly.⁴⁴

Unusual circumstances in this case, however, are not to be ignored. Due to the war situation, the defendant could not procure information directly from the Spanish government. Had such information been available, the result might have been different.⁴⁵ Furthermore, as will be seen, the above approach has not been adopted in recent Irish cases.

(5) Netherlands: In *Church of Scientology v. Herold*,⁴⁶ Herold, the

39. *Id.* at 131.

40. Cass. ch. civ., Aug. 14, 1878, Dalloz, RECUEIL PERIODIQUE ET CRITIQUE [D.P.] 1879, I, 57.

41. *Id.* at 57 (the writer's translation).

42. *Id.* at 59 (the writer's translation).

43. [1945] I.R. 291 (H. Ct. and S.C. 1944).

44. *Id.* at 300-03.

45. Indeed, the High Court adjourned the proceedings due to lack of this information. *Id.* at 293-94.

46. 65 I.L.R. 380 (Dist. Ct. Amsterdam 1980). See also *Edwards v. Bureau Wijsmuller*, 94 I.L.R. 361 (C.A. Amsterdam 1987).

Chief of the German Federal Police, was sued in a defamation case because the article in question allegedly was based on a police report. For certain procedural reasons, the court regarded Herold as a litigant only in his private capacity, and said, "Thus, exceptions under international law limiting the Dutch Court's jurisdiction over sovereign states . . . do not apply to him."⁴⁷ This judgment *a contrario* suggests that the problem of immunity would arise if he appeared in his official capacity. Indeed, the court noted that Herold, "correctly stated that, in his official capacity, he should in law be identified with the German Federal Republic."⁴⁸ Moreover, the court eventually found this claim inadmissible and did not deal with the merits of the case. For while Herold appeared before the court only as a private person, the act in question was carried out in his official capacity.

(6) U.S.: In *Arcaya v. Páez*,⁴⁹ an action for libel against the Consul General of Venezuela, immunity was not granted despite the Venezuelan Ambassador's note to the effect that Páez wrote the letter at issue in pursuance of his duties. The court states, "[A] consul's duties are commercial but . . . they may be enlarged by special authority. To be effective such an enlargement must, however, 'be recognized by the government within whose dominions he assumes to exercise it'.⁵⁰ If this is the case for a consul, far less likely is the immunity of other individuals in these circumstances. It is questionable, however, whether "it" in the court's citation could be so extended as to apply in this case since originally "it" referred to, "authority to represent [a sovereign] in his negotiations with foreign states, or to vindicate his prerogatives."⁵¹ Be that as it may, as seen below, this case does not represent consistent U.S. case law prior to the enactment of the Foreign Sovereign Immunities Act 1976 (FSIA).

Republic of Philippines v. Marcos,⁵² a case under the FSIA, concerns the motion to quash a subpoena served on Ordonez, the Philippine Solicitor General. Judge Orrick states:

[T]he sovereign immunity doctrine may not serve as a basis for Ordonez' immunity . . . because it is not applicable to individual government officials. . . . The terminology of [§ 1603(a) of the FSIA]—"agency," "instrumentality," "entity," "organ"—makes it clear that the statute is not intended to apply to natural persons, except perhaps to the extent that they may personify a sovereign.⁵³

47. *Herold* at 381.

48. *Id.*

49. 145 F. Supp. 464 (S.D.N.Y. 1956), *aff'd per curiam*, 244 F.2d 958 (2d Cir. 1957).

50. *Id.* at 470.

51. *The Anne*, 16 U.S. (3 Wheat.) 435, 446 (1818).

52. 665 F. Supp. 793 (N.D. Cal. 1987).

53. *Id.* at 797.

Since the motion was eventually granted on the grounds of Ordonez's diplomatic status, the above remark is dictum. Furthermore, as will be seen, other U.S. courts have not followed this reasoning.

B. Grant of State Immunity to the Individual

(1) Australia: The question, as already mentioned, has been settled by legislation. It is worth remembering, however, that the court in *Grunfeld v. United States of America*,⁵⁴ where the termination of a contract was at issue, already had granted immunity to an officer commanding a certain U.S. office. The court stated that, "[i]t is well settled that an entitlement to sovereign immunity is not limited to the foreign sovereign himself."⁵⁵

(2) Canada: *Walker v. Bank of New York*,⁵⁶ which followed a number of precedents,⁵⁷ is of particular importance. The Ontario Court of Appeal granted immunity not only to U.S. government employees, whose immunity was not disputed, but also to bank employees, because, "[t]hey acted at the request of U.S. government law enforcement officers for the purpose of assisting them in their investigation of possible criminal activities."⁵⁸ According to the court, "the use of the broad word 'organ' in the [Canadian State Immunity] Act . . . indicates the intention of parliament to protect individuals . . . who act at the request of a foreign state in situations where that state would enjoy sovereign immunity."⁵⁹

(3) France: A number of cases, while decided in earlier periods, have not lost their significance.⁶⁰ The most illustrative among them is

54. [1968] 3 N.S.W.R. 36.

55. *Id.* at 37.

56. 16 O.R.3d 504 (1994).

57. *E.g.*, *Tritt v. U.S.*, 68 O.R.2d 284 (High Ct. 1989); *Jaffe v. Miller*, 13 O.R.3d 745 (C.A. 1993). In *Jaffe v. Miller*, the court found no difference, with regard to individuals' entitlement to state immunity, between the Canadian State Immunity Act 1982 and the common law principle. See *Jaffe*, 13 O.R.3d 745 (C.A. 1993).

58. *Walker* at 508. The court thus reversed the decision of Day, J., who had stated, "In no decided cases which were argued, has *ad hoc* assistance to a foreign government served to transform an individual or private corporation into a governmental agency for the purposes of state immunity." 15 O.R.3d 596, 601 (Ont. Ct. Gen. Div. 1993).

59. *Id.* at 508. The Ontario Court of Appeal recently confirmed, while reserving its decision about, "whether the immunity enjoyed by functionaries of the sovereign is independent of or derives from that enjoyed by the sovereign itself", that, "[e]ven if the immunity enjoyed by the individual defendants is merely derivative, they are protected from the claims . . . by virtue of the immunity enjoyed by the USA." *U.S. v. Friedland*, 46 O.R.3d 321, 329 (1999).

60. *E.g.*, *Luchmann v. Heymann*, CA Nancy, Aug. 31, 1871, D.P. 1871, II, 207; *Saabrok v. Société maritime auxiliaire de transports*, CA Rennes, 1e ch., Mar. 19, 1919, 18 REVUE DE DROIT INT'L PRIVÉ 743; *Lakhowsy v. Gouvernement fédéral suisse*, CA Paris, 1e ch., Mar. 16, 1921, 48 JOURNAL DU DROIT INTERNATIONAL. 179. *Esnault-Pelterie v. The A. V. Roe Cy Ltd.* is also instructive, though the defendant is a private company

Bernet v. Herran,⁶¹ where the members of a commission appointed to supervise a Honduran loan were sued for negligence and fraudulent manipulations. The Court of Appeal of Paris said:

Considering that . . . the members of the commission received their appointment only from the government of Honduras, and that they worked only by its will, by virtue of its delegation, and by subjecting their acts to its ratification, it results from the principle of the reciprocal independence of States that, as for the said acts accomplished in the exercise of these functions, they cannot, any more than the government . . . be subjected to the jurisdiction of the French tribunals, and that any action brought against them in this regard must be declared not admissible; . . .⁶²

The Court of Cassation found the appeal inadmissible.

(4) Germany: In the *Church of Scientology* case,⁶³ the plaintiff sought an injunction to restrain the defendant, a senior officer of the London Metropolitan Police, from making allegedly false accusations. Accepting the submission for the defendant, the court announced:

The acts of such agents [as the defendant] constitute direct State conduct and cannot be attributed as private activities to the person authorized to perform them in a given case. Any attempt to subject State conduct to German jurisdiction by targeting the foreign agent performing the act would undermine the absolute immunity of sovereign States in respect of sovereign activity.⁶⁴

(5) Ireland: In *McElhinney v. Williams*,⁶⁵ the question apparently remained unanswered whether Williams, a corporal in the British Army, can invoke state immunity. *Herron v. Ireland*⁶⁶ provided a clear answer. Two British officers were included among the defendants, as this action concerned an English court's refusal to order the return of the plaintiff's child who was wrongfully abducted by the father.⁶⁷ In regard to the Attorney General for England and Wales, the Irish Supreme Court definitively stated, "[T]here is no doubt that he is entitled to invoke the doctrine of sovereign immunity."⁶⁸ The court

rather than an individual. Trib. civ. Seine, 3e ch., Apr. 1, 1925, 52 JOURNAL DU DROIT INTERNATIONAL 702.

61. Cass.ch.civ., Apr. 21, 1886, D.P. 1886, I, 393.

62. *Id.* at 394 (the writer's translation).

63. 65 I.L.R. 193 (Fed. Sup. Ct. 1978).

64. *Id.* at 198 (citation omitted).

65. [1995] 3 I.L.R.M. 276 (S.C.).

66. 242/1997 (S.C. Dec. 5, 1997) (LEXIS, IRELAND Library, CASES File). *See also* Schmidt v. Home Sec., 103 I.L.R. 322 (High Ct. 1994).

67. *In re M. (A Minor) (Abduction)* [1994] 2 Family Law Reports [F.L.R.] 126 (C.A. 1993).

68. *Herron v. Ireland*, *supra* note 66.

reached the same conclusion for the British Official Solicitor in saying:

[H]e was acting as an officer of the British Courts at the request of the English Courts to furnish them with his view as an *amicus curie* [sic] . . . He was also acting as head of the child's abduction unit and again it appears to be beyond doubt that he acted throughout in his official capacity and he performed a function which was entrusted to him by the Court.⁶⁹

(6) Philippines: The case law of this country is firmly established.⁷⁰ The position, which has invariably been taken, is summed up by the following view of the Supreme Court in *United States of America v. Guinto*⁷¹:

While the doctrine [of state immunity] appears to prohibit only suits against the state without its consent, it is also applicable to complaints filed against officials of the state for acts allegedly performed by them in the discharge of their duties. The rule is that if the judgment against such officials will require the state itself to perform an affirmative act to satisfy the same . . . the suit must be regarded as against the state itself although it has not been formally impleaded.⁷²

(7) U.K.: *Propend Finance Pty. Ltd. v. Sing*⁷³ confirmed that the U.K. State Immunity Act of 1978 did not affect a number of precedents.⁷⁴ Documents relating to alleged tax evasion by Propend were seized through mutual judicial assistance at the request of Australia. Contrary to Sing's undertaking to the court, extracts from the documents were sent to Australia. Proceedings for contempt of court were brought against Sing and the Commissioner of the Australian Federal Police Force. As Sing was granted diplomatic immunity, what interests us is the immunity granted to the Commissioner. Finding that the police function is essentially a part of governmental activity, the Court of Appeal held:

69. *Id.*

70. *E.g.*, *Syquia v. López*, 18 I.L.R. 228 (Sup. Ct. 1949); *Johnson v. Turner*, 21 I.L.R. 103 (Sup. Ct. 1954); *Baer v. Tizon*, 57 Supreme Court Reports Annotated [S.C.R.A.] 1 (1974); *Sanders v. Veridiano II*, 162 S.C.R.A. 88 (1988). See generally Florentino P. Feliciano, *The Doctrine of Sovereign Immunity from Suit in a Developing and Liberalizing Economy: Philippine Experience and Case-law*, in *JAPAN AND INTERNATIONAL LAW: PAST, PRESENT AND FUTURE* 173, 178-79 (Nisuke Ando ed., 1999).

71. 182 S.C.R.A. 644 (1990).

72. 182 S.C.R.A. 644, at 653-54 (1990).

73. 111 I.L.R. 611 (Q.B. 1996 and C.A. 1997).

74. *E.g.*, *Twycross v. Dreyfus*, 5 Ch. D. 605 (C.A. 1877); *Rahimtoola v. Nizam of Hyderabad*, 1958 App. Cas. 379 (1957). For a succinct account of these cases, see C.A. Whomersley, *Some Reflections on the Immunity of Individuals for Official Acts*, 41 INT'L & COMP. L.Q. 848, 849-50 (1992). See also *Godman v. Winterton*, 11 Ann. Dig. 205 (C.A. 1940).

The protection afforded by the Act of 1978 to States would be undermined if employees, officers . . . could be sued as individuals for matters of State conduct in respect of which the State . . . had immunity. Section 14(1) [of the Act] must be read as affording to individual employees or officers of a foreign State protection under the same cloak as protects the State itself.⁷⁵

It went on to say, "Where [a 'separate entity' (section 14)] exists and is entitled to immunity, then its servants or officers would of course benefit by immunity Further, an individual might possess status as a corporation sole or similar status which could constitute him in that capacity a 'separate entity'"⁷⁶ This position has been maintained in subsequent cases.⁷⁷

(8) U.S.: In *Heaney v. Government of Spain*,⁷⁸ the court, making reference to a provision of the Restatement (Second) of Foreign Relations Law, granted state immunity to Gomero without taking account of his consular status.⁷⁹ Then, and only then, the court considered, "perhaps unnecessarily, whether Gomero's actions could be considered as exceeding his consular functions"⁸⁰ and confirmed consular immunity as well.

The FSIA has brought about little change in this respect. *Republic of Philippines v. Marcos*, cited above, is rather isolated, and a number of district courts, both before and after this case, admitted the applicability of the FSIA to individuals.⁸¹ In *Chuidian v. Philippine*

75. 111 I.L.R. at 669.

76. *Id.* at 670.

77. In *In re P. (Diplomatic Immunity: Jurisdiction)*, the defendant was able to enjoy state immunity notwithstanding the denial of diplomatic immunity, [1998] 1 F.L.R. 1026 (Fam. and C.A.). See *id.* the decision of President Sir Stephen Brown. The Court of Appeal did not address the issue of immunity. In *Holland v. Lampen-Wolfe*, it was confirmed that, whether the applicable law was the State Immunity Act or the common law, "[w]here [state] immunity applies, it covers an official of the state in respect of acts performed by him in an official capacity." [2000] 1 W.L.R. 1573, 1583 (H.L.) (Lord Millett). For an analysis of the latter case, see Mizushima Tomonori, *One Immunity Has Gone . . . Another . . . : Holland v Lampen-Wolfe*, 64 MOD. L. REV. 472 (2001).

78. 445 F.2d 501 (2d Cir. 1971). See also *Underhill v. Hernandez*, *supra* note 19; *Bradford v. Director General of Railroads*, 278 S.W. 251 (Tex. Civ. App. 1925); *Oliner v. Can. Pac. Railway Co.*, 311 N.Y.S.2d 429 (App. Div. 1970).

79. *Hearney* at 505.

80. *Id.*

81. *E.g.*, *Mueller v. Diggelman*, No. 82 Civ. 5513 (CBM), 1983 U.S. Dist. LEXIS 16970 (S.D.N.Y. May 13, 1983); *Am. Bonded Warehouse Corp. v. Compagnie Nationale Air Fr.*, 653 F. Supp. 861 (N.D. Ill. 1987); *Kline v. Kaneko*, 685 F. Supp. 386 (S.D.N.Y. 1988); *Herbage v. Meese*, 747 F. Supp. 60 (D.D.C. 1990), *aff'd without opinion*, 946 F.2d 1564 (D.C. Cir. 1991). *Rios v. Marshall* ought to be cited with a brief comment. The court held that, "insofar as Edwards is sued in his official capacity as agent of the instrumentality, he is equally protected by principles of foreign sovereign immunity." *Rios v. Marshall*, 530 F. Supp. 351, 371 (S.D.N.Y. 1981). It is not clear whether his immunity is based upon the FSIA or other grounds.

National Bank,⁸² the Court of Appeals for the Ninth Circuit followed these decisions. The Bank was sued for its refusal to make payment under a letter of credit. Daza, an official of the Philippine government, was later added as a defendant. Observing that, “[i]t is generally recognized that a suit against an individual acting in his official capacity is the practical equivalent of a suit against the sovereign directly,” the court concluded that, “section 1603(b) [which defines an ‘agency or instrumentality of a foreign state’] can fairly be read to include individuals sued in their official capacity.”⁸³

Also to be noted in this case is the United States government’s “Statement.” The United States argues, “Daza is not covered by the [FSIA] because he is an individual rather than a corporation or an association, but he is nevertheless entitled to immunity under the general principles of sovereign immunity expressed in the Restatement (Second) of Foreign Relations Law § 66(b).”⁸⁴ Although the court did not take this approach, the difference between this “Statement” and the court’s finding is immaterial for the purpose of this study.

Despite some negative views on this judgment,⁸⁵ courts in other circuits also have found the FSIA applicable to individuals in subsequent cases,⁸⁶ so that, as was recently stated, “maintenance of a coherent practice regarding foreign sovereign immunity weighs heavily in favor of applying the FSIA to individuals.”⁸⁷

82. 912 F.2d 1095 (9th Cir. 1990).

83. *Chuidian*, 912 F.2d. at 1101 and 1103 respectively.

84. *Id.* at 1099. It seems that § 66(b) was wrongly quoted and § 66(f) should replace it. The relevant part of § 66 reads, “The immunity of a foreign state . . . extends to . . . (b) its head of state and any person designated by him as a member of his official party; . . . (f) any other public minister, official, or agent of the state with respect to acts performed in his official capacity if the effect of exercising jurisdiction would be to enforce a rule of law against the state; . . .”

85. *E.g.*, Joan Fitzpatrick, *The Claim to Foreign Sovereign Immunity by Individuals Sued for International Human Rights Violation*, 15 WHITTIER L. REV. 465, 469 (1994); Mathias Reimann, *A Human Rights Exception to Sovereign Immunity: Some Thoughts on Prinz v. Federal Republic of Germany*, 16 MICH. J. INT’L L. 403, 405 (1995). Ress’ statement is in part a reaction to this case. See Ress, *supra* note 33, at 465-66.

86. *E.g.*, *Granville Gold Trust v. Commissione del Fullimento*, 924 F. Supp. 397 and 928 F. Supp. 241 (E.D.N.Y. 1996), *affd without published opinion*, 111 F.3d 123 (2d Cir. 1997); *El-Fadl v. Central Bank of Jordan*, 75 F.3d 668 (D.C. Cir. 1996); *Ortega Trujillo v. Banco Central del Ecuador*, 17 F. Supp. 2d 1340 (S.D. Fl. 1998). A mention of some other cases might be appropriate. For example, *Xuncax v. Gramajo* reached its conclusion, “[w]ithout deciding whether the scope of FSIA immunity should be thus extended”. *Xuncax v. Granmajo*, 886 F. Supp. 162, 175 (D. Mass. 1995). *Dewhurst v. Telenor Invest AS* denied the application of the FSIA to the individual defendants, but this was simply because the corporations which employed them were not considered to be “agencies or instrumentalities” of a foreign state and consequently the individual defendants never acted on behalf of the foreign state. *Dewhurst v. Telenor Invest AS*, 83 F. Supp. 2d 577 (D. Md. 2000).

87. *Flatow v. Islamic Republic of Iran*, 999 F. Supp. 1, 11 n.3 (D.D.C. 1998). See also

C. *Some Observations*

In the past, a number of cases existed that suggested a negative answer to the question of individuals' entitlement to state immunity. Yet, it is evident that they did not correctly reflect case law as it stands today. The vast majority of cases in various jurisdictions have recognized the individual as a beneficiary of state immunity. It is thus submitted that Ress' view mentioned earlier is clearly against the weight of authority.

The question might be posed whether such a practice is compatible with the argument that, for instance in the U.K., "[t]he immunity of the Crown was only tolerable because it did not extend to ministers and Crown officers, who were liable personally in law for anything unlawful that they did; and it made no difference that they were acting in an official capacity."⁸⁸ An affirmative answer is suggested. State immunity under international law is no more than immunity from legal proceedings before foreign domestic courts, and it does not make states immune either from their own legal proceedings⁸⁹ or from any sort of responsibility.⁹⁰ In other words, to grant state immunity prescribed by international law does not mean the end of the rule of law.

We ought not to lose sight of the problem of the extent to which such alternative measures are practical. This, however, falls well outside the scope of this article. If this study can shed any light, it is upon the question of whether the withholding of state immunity from individuals would result, in return for making state immunity "illusory,"⁹¹ in more satisfactory protection of the plaintiff's claim. An affirmative answer does not automatically follow. Several authorities, which are necessarily rare due to the very practice of according state immunity to individuals, suggest that, as a matter of substantive law, individuals are not held personally responsible vis-à-vis the plaintiff for their acts on behalf of a foreign state. If this argument is correct, the plaintiff's claim fails even if state immunity is not granted and the

Bolkiah v. Superior Court, 88 Cal. Rptr. 2d 540, 547 (Cal. App. 2 Dist. 1999).

88. Sir William Wade, *The Crown, Ministers and Officials: Legal Status and Liability*, in *THE NATURE OF THE CROWN: A LEGAL AND POLITICAL ANALYSIS* 23, 25-26 (Maurice Sunkin & Sebastian Payne eds., 1999).

89. See, e.g., G.G. Fitzmaurice, *State Immunity from Proceedings in Foreign Courts*, 14 BRIT. Y.B. INT'L L. 101, 122 (1993); *Nacci v. Bari Institute*, 114 I.L.R. 539, 554 (Italy Ct. Cassation Plenary Session 1994).

90. See, e.g., Sompong Sucharitkul, *Immunities of Foreign States before National Authorities*, 149 RECUEIL DES COURS 87, 96 (1976); Peter D. Trooboff, *Foreign State Immunity: Emerging Consensus on Principles*, 200 RECUEIL DES COURS 235, 268 (1986).

91. Diplock, L.J., says, "[T]he immunity to which [a foreign sovereign government] is entitled in respect of its acts would be illusory unless it extended also to its agents in respect of acts done by them on its behalf." *Zoernsch v. Waldock* [1964] 1 W.L.R. 675, 692 (Eng. C.A.).

court has jurisdiction. While jurisdictional immunity for those who are legally responsible might be open to criticism, the same cannot be said for those who are not.

Individuals' entitlement to state immunity would be all the more permissible in cases where they are sued not for their own acts, but on the grounds of vicarious liability. For vicarious liability to arise, it is required that a person stands in a particular relationship to the actor and that the act is referable in a certain manner to that relationship.⁹² In cases of our concern, it is a state institution that makes such a relationship conceivable. It would then be far from persuasive that a plaintiff, bringing a legal action on this basis, attempts to deny the immunity which the state, if sued, could enjoy.

III. ATTRIBUTION TO THE STATE OF *ULTRA VIRES* CONDUCT OF ITS OFFICIALS

If individuals having no immunity *ratione personae* could enjoy state immunity, it would be safe to seek the grounds of the immunity by attributing their conduct to a foreign state. As state immunity is arguably a rule of international law, this is attribution under international law. Certain acts might not provide the basis of immunity for an individual even if they are attributed to the state: e.g. commercial activities.⁹³ Even then, the analysis of attribution still has more than academic interest, for the burden of proof could be shifted.

It would be apposite to compare suits against a foreign state with those against an individual. In the former, insofar as a presumption of immunity exists for foreign states, neither party needs to prove attribution. Consequently, state immunity usually is granted or denied without touching upon the problem of attribution. Only in unusual cases could it matter. For instance, a court might find an otherwise applicable exception to state immunity inapplicable due to non-attribution, according immunity as a result.⁹⁴ The paucity of such cases, however, makes further analysis premature. On the other hand, in the latter, the attribution of conduct to a foreign state plays a critical role as a precondition for the operation of the state immunity principle, for individuals would otherwise enjoy no immunity. From these cases, therefore, we could obtain some meaningful observation on problems of

92. *E.g.*, WINFIELD AND JOLOWICZ ON TORT 693 (W.V.H. Rogers ed., 15th ed. 1998).

93. *See, e.g.*, the Philippine Supreme Court's view with regard to the individual defendants in G.R. No. 76607, *Guinto* at 662.

94. *E.g.*, *Skeen v. Federative Republic of Brazil*, 566 F. Supp. 1414 (D.D.C. 1983); *First Fidelity Bank v. Government of Antigua & Barbuda*, 877 F.2d 189 (2d Cir. 1989); *Moran v. Kingdom of Saudi Arabia*, 27 F.3d 169 (5th Cir. 1994); *Storr v. National Defence Security Council of the Republic of Indonesia-Jakarta*, 95 Civ. 9663 (AGS), 1997 U.S. Dist. LEXIS 15890 (S.D.N.Y. Oct. 9, 1997).

attribution.

Herein lies another question to be asked, "Where are the outer limits of attribution?" More specifically, "Does an individual's entitlement to state immunity extend to his *ultra vires* conduct?"

What makes this apparently straightforward question debatable is in part the argument in the field of state responsibility under international law that *ultra vires* conduct of state officials is, at least to some extent, attributable to the state. A number of writers, in their analyses of the immunity granted to some specific types of individuals, refer to a provision concerning the attribution of *ultra vires* conduct in the ILC's work on state responsibility.⁹⁵ Thus, although we could simply argue that no analogy is permissible because attribution for the purposes of state responsibility is not intended to serve other purposes,⁹⁶ it would not entirely be meaningless to see some problems of the attribution of *ultra vires* conduct in state responsibility. Partly for the same reason, the analysis in the following section is mainly confined to the work of the ILC, though, needless to say, its work is not all that counts for the arguments of state responsibility.

A. Attribution of Ultra Vires Conduct in State Responsibility

It has incontestably been stated that, "[i]t is the national legal order, the law of the state, which determines under what conditions an individual acts as an organ of the state."⁹⁷ That is why this question is qualified as "apparently straightforward" in the preceding paragraph. It is to be conceded that, since we are discussing responsibility under international law, the ILC is undeniably correct in saying, "[T]he attribution of conduct to a State for the purpose of establishing the possible existence of an internationally wrongful act by that State can take place only in accordance with international law."⁹⁸ Yet, it is completely conceivable that international law delegates to domestic law the decision of what is to be regarded as an act of the state.⁹⁹ From this standpoint, one can naturally ask why *ultra vires* conduct can nevertheless be attributed to the state, if not for every purpose of international law.

95. Jean Salmon, *Immunités et actes de la fonction*, 38 ANNUAIRE FRANÇAIS DE DROIT INTERNATIONAL 314, 348 (1992); Sir Arthur Watts, *The Legal Position in International Law of Heads of States, Heads of Governments and Foreign Ministers*, 247 RECUEIL DES COURS 9, 56 n.90 (1994). See also MONIKA LÜKE, *DIE IMMUNITÄT STAATLICHER FUNKTIONSTRÄGER* 184-85 (2000).

96. See [1973] II Y.B. INT'L L. COMM'N 189.

97. HANS KELSEN, *PRINCIPLES OF INTERNATIONAL LAW* 117 (1952).

98. [1973] II Y.B. INT'L L. COMM'N 181.

99. See, e.g., KELSEN, *supra* note 97, at 117; 1 DIONISIO ANZILOTTI, *CORSO DI DIRITTO INTERNAZIONALE* (4th ed.) in 1 *OPERE DI DIONISIO ANZILOTTI* 1, 224, 387 (1955).

Traditional arguments on state responsibility were centered on the treatment of aliens. In line with such a tradition, García Amador, the ILC's first Special Rapporteur on this topic, limited the scope of his work to, "international responsibility of the State for injuries caused in its territory to the person or property of aliens". State responsibility for injuries caused by *ultra vires* conduct has long been a controversial issue. In this respect, the revised draft prepared by García Amador provided that *ultra vires* conduct was attributed to the state if the officials, "purported to be acting in their official capacity" and if the conduct was not "totally" or "manifestly" outside the scope of their competence.¹⁰⁰ As is well known, this draft did not come to fruition.

The ILC afterwards decided to deal with, "the rules which govern all the new legal relationships which may follow from an internationally wrongful act of a State, regardless of the particular sector to which the rule violated by the act may belong."¹⁰¹ This change in approach carries two implications. First, the ILC did away with the traditional limitation to the treatment of aliens. Second, and no less significantly, the ILC limited its work to "state responsibility for its wrongful act," excluding "state responsibility without its wrongful act" such as responsibility for damage caused by the fall of space objects.¹⁰²

Insofar as this approach is maintained, it is not objectionable that the ILC has addressed problems of attribution in the work on state responsibility for its wrongful act, i.e. the ILC Draft Articles on State Responsibility.¹⁰³ For, as a matter of elementary logic, if a state is held responsible for an internationally wrongful act of the state, there exists "an act of the state" which is to be qualified as "internationally wrongful,"¹⁰⁴ and it is necessary to know what constitutes such an act. What is and what is not attributable to the state under international law is provided for in a fairly detailed manner in Articles 5 to 15. For instance, the conduct of a state organ having that status under domestic law is, irrespective of the position of the organ in the state's organization, attributed to the state (Articles 5 and 6), and the conduct of persons not acting on behalf of a state is not attributed to the state (Article 11).

Article 10, which addresses *ultra vires* conduct, provides, "The

100. Art. 12(2)-(4). See [1961] II Y.B. INT'L L. COMM'N 47-48.

101. [1973] II Y.B. INT'L L. COMM'N 170.

102. The ILC subsequently began its work on, "international liability for injurious consequences arising out of acts not prohibited by international law."

103. As the second reading of these Articles has not been completed at the time of writing, use is made of those adopted in 1996. For the text, see 37 I.L.M. 440 (1998).

104. Art. 3 of the ILC Draft Articles provides, "There is an internationally wrongful act of a State when: (a) conduct . . . is attributable to the State under international law; and (b) that conduct constitutes a breach of an international obligation of the State." For the text, see 37 I.L.M. 440 (1998).

conduct of an organ of a State, . . . such organ having acted in that capacity, shall be considered as an act of the State under international law even if, in the particular case, the organ exceeded its competence according to internal law or contravened instructions concerning its activity." This provision attributes broad, if not unlimited, scope of *ultra vires* conduct to the state. The broader scope than that in García Amador's draft can be confirmed by the ILC's comment that, "[t]he limitation to exclude from qualification as acts of the State the actions of organs in situations of 'manifest' lack of competence has no place in the rule defined in [Article 10]."¹⁰⁵

As in the case of the other Articles, the ILC referred to numerous relevant precedents in accordance with its "preference for an essentially *inductive* method, rather than for deduction from theoretical premises."¹⁰⁶ The writer entirely agrees with the result of the ILC's induction from these precedents that a state is held responsible for *ultra vires* conduct of its officials. Yet, the correctness of its inductive argument ends there. If the conclusion of the attribution of *ultra vires* conduct is to be reached, it has to be confirmed that state responsibility arising from such conduct is state responsibility for its wrongful act, rather than state responsibility without its wrongful act. Needless to say, it is only the former that necessarily presupposes the existence of an act of the state.

In order to *a posteriori* confirm this, it is essential to ascertain, in advance, features which are peculiar to state responsibility for its wrongful act, and which state responsibility without its wrongful act does not possess, and then to examine whether the responsibility at issue conforms to them. It is not feasible, however, to ascertain the features of state responsibility for its wrongful act without identifying acts of the state. In other words, for this *a posteriori* method the purpose of which is to prove the attribution of acts, we need to identify acts attributable to a state.

This would mean that, if we are to decide acts of a state for the purposes of state responsibility, we must resort to an *a priori* method at some stage. One possible way would have been to *a priori* consider that specific acts, e.g. acts of the state in accordance with domestic law, are acts of the state under international law. Instead, the ILC *a priori* considered that state responsibility for certain conduct, e.g. *ultra vires* conduct, is state responsibility for its wrongful act, and deduced the attribution of the conduct from this premise. Whether such a method brings about appropriate results is another matter.

No matter how the conclusion is drawn, one wonders whether any useful purpose is served by qualifying *intra vires* acts and *ultra vires*

105. [1975] II Y.B. INT'L L. COMM'N 69.

106. [1973] II Y.B. INT'L L. COMM'N 172.

acts equally as acts of the state, if, all other conditions being equal, different legal consequences ensue in terms of state responsibility. Viewed from such a standpoint, the opinion of the European Commission of Human Rights in *Ireland v. United Kingdom*¹⁰⁷ requires reconsideration. This opinion is cited in support of the argument that Article 10 of the ILC Draft Articles conforms to practice under the European Convention on Human Rights.¹⁰⁸ This argument is based upon the Commission's observation that, "[a state's] existing obligations can be violated also by a person exercising an official function vested in him at any, even the lowest level, without express authorisation and even outside or against instructions."¹⁰⁹

The Commission shows, however, neither a theoretical basis nor any authority for considering that a person acting *ultra vires* can violate an obligation that the state owes. Be that as it may, later in this opinion, the Commission states, "[T]he elements constituting a practice [in breach of Article 3 of the European Convention] are repetition of acts and official tolerance . . ."¹¹⁰ It also says, "The question remains, . . . whether or not [the acts] were officially tolerated with the consequence that . . . the violations established are to be regarded more serious."¹¹¹ These passages plainly indicate that state responsibility arising from *ultra vires* acts, in the absence of official tolerance, is different from state responsibility arising from *intra vires* acts, which are necessarily accompanied by official tolerance.

Another example is "assurances and guarantees of non-repetition" of the wrongful act provided for in Article 46 of the ILC Draft Articles as a form of, "rights of the injured State and obligations of the State which has committed an internationally wrongful act."¹¹² Undoubtedly, with regard to *intra vires* conduct, a state could give assurances or guarantees of non-repetition by promising to no longer authorize the conduct at issue. However, from the nature of things, without excessively extending the meaning of the terms, a state could not give "assurances" or "guarantees" of non-repetition of the same sort of *ultra vires* conduct any more than it could do as regards non-repetition of the fall to Earth of one of its space objects. This, in addition, illustrates a similarity between state responsibility for *ultra vires* conduct and state responsibility without its wrongful act.

The considerations outlined above lead us to doubt whether the attribution of *ultra vires* conduct can satisfactorily explain state

107. 23-I Eur. Ct. H.R. (ser. B) at 8 (1976).

108. HARITINI DIPLA, LA RESPONSABILITE DE L'ETAT POUR VIOLATION DES DROITS DE L'HOMME: PROBLEMES D'IMPUTATION 36-39 (1994).

109. *Ireland v. United Kingdom*, 23-I Eur. Ct. H.R. (ser. B) at 393-94.

110. *Id.* at 466.

111. *Id.* at 478.

112. 37 I.L.M. 440, *supra* note 103, at art. 46.

responsibility for such conduct. Rather, the theory of risk,¹¹³ based upon the risk that a person entrusted with a certain state activity, which is as such lawful, causes injuries by acting *ultra vires*, is less artificial and more cogent. It is less artificial in that this theory does not regard *ultra vires* acts as acts of the state, and more cogent in that it can explain differences between *ultra vires* acts and *intra vires* acts as well as similarities between state responsibility for *ultra vires* conduct and state responsibility without its wrongful act. As regards state responsibility for *ultra vires* conduct, Anzilotti refers to the, "necessity for each State to give others a guarantee against the danger that its internal organization, with regard to which it enjoys the broadest freedom, could represent to them."¹¹⁴ From today's standpoint, this is nothing but a justification for state responsibility without its wrongful act,¹¹⁵ though, for Anzilotti, this was a reason for the attribution of *ultra vires* conduct to the state.

B. *Functional Immunity and Ultra Vires Conduct*

The above analysis on state responsibility does not obviate the need to examine whether state immunity is granted to individuals for *ultra vires* conduct. As seen below, a view exists which affirmatively answers this question without touching upon the argument of state responsibility. Before addressing this issue, however, the problem of *ultra vires* conduct is examined in the context of functional immunity, i.e. jurisdictional immunity under international law to be granted in respect of a specific function of states (or international organizations).¹¹⁶ Jean Salmon's suggestion that case law has retained functional immunity even for *ultra vires* conduct¹¹⁷ might have a bearing upon individuals' entitlement to state immunity for conduct of a similar sort.

Strictly speaking, each functional immunity provision should be interpreted and applied in accordance with its own object and purpose, and no generalization ought to be lightly assumed. It is submitted with respect that some of the Law Lords in *Pinochet (No. 3)* made a misconceived interpretation. As is widely known, whether Pinochet

113. *E.g.*, Charles de Visscher, *La responsabilité des Etats*, 2 BIBLIOTHECA VISSERIANA 89, 91-92 (1924); Maurice Bourquin, *Règles générales du droit de la paix*, 35 RECUEIL DES COURS 1, 215-16 (1931).

114. ANZILOTTI, *supra* note 99, at 388 (the writer's translation).

115. *See, e.g.*, Art. 1 of the current ILC Draft Articles on International Liability, which provides, "The present articles apply to activities not prohibited by international law and carried out in the territory or otherwise under the jurisdiction or control of a State which involve a risk of causing significant transboundary harm through their physical consequences." For the text, *see*, for example, [1995] II-2 Y.B. INT'L L. COMM'N 89.

116. For instance, Art. 43(1) of the Vienna Convention on Consular Relations provides for consular immunity, "in respect of acts performed in the exercise of consular functions."

117. Salmon, *supra* note 95, at 348.

was to enjoy immunity or not depended upon, subject to, "any necessary modifications,"¹¹⁸ Article 39(2) of the Vienna Convention on Diplomatic Relations, which provides for subsisting immunity for diplomats after leaving post "with respect to acts performed . . . in the exercise of his functions as a member of the mission."¹¹⁹ The qualification of this immunity as immunity *ratione materiae* is correct in that this immunity is accorded for the reason of subject matter. Indeed, it is suggested that Article 39(2), "applies only to acts performed on behalf of or imputable to the sending State."¹²⁰ However, nowhere is it provided that immunity *ratione materiae* of this sort, "applies not only to ex-heads of state and ex-ambassadors but to all state officials who have been involved in carrying out the functions of the state."¹²¹

By way of illustration, while Article 39(2) does not exclude the possibility of immunity from criminal jurisdiction,¹²² it is highly doubtful, as pointed out at the outset, whether such immunity exists for those to whom this provision does not apply.¹²³ We should rather consider that such a rule as laid down in Article 39(2), "constitutes a combination of immunity *ratione personae* and *ratione materiae*."¹²⁴ As Yoram Dinstein appropriately qualifies, Article 39(2) immunity is "diplomatic" (or "head of state" if it is applicable to heads of state as well)¹²⁵ immunity *ratione materiae*.¹²⁶ Insofar as an element of immunity *ratione personae* is involved, we cannot necessarily infer the immunity of other persons.

Consequently, even if the observation that functional immunity has been granted for *ultra vires* conduct should be correct, it does not automatically follow that state immunity is granted to state officials

118. U.K. State Immunity Act, § 20(1), *reprinted in* 17 I.L.M. 1123 (1978).

119. EILEEN DENZA, *DIPLOMATIC LAW: A COMMENTARY ON THE VIENNA CONVENTION ON DIPLOMATIC RELATIONS* 357-63 (2d ed. 1998).

120. *Id.* at 363

121. *Pinochet (No. 3)*, [2000] 1 App. Cas. at 205 (Lord Browne-Wilkinson).

122. *See, e.g.*, the *Tabatabai* case. In this criminal case, the court denied Art. 39(2) immunity due to its finding that "the importation of narcotic substances . . . is not to be classified as one of the official functions of a special envoy." *Tabatabai*, 80 I.L.R. 388, 424 (F.R.G. Superior Provincial Ct. 1986). If Art. 39(2) were inapplicable to criminal cases, the classification would have been unnecessary.

123. Therefore, Lord Millet's observation in *Pinochet (No. 3)* that "any narrow statutory immunity is subsumed in the wider immunity in respect of other official or governmental acts under customary international law" is also open to objection. [2000] 1 App. Cas. at 270.

124. F.A. Mann, *The Sacrosanctity of the Foreign Act of State*, 59 L.Q. REV. 42 and 155, 49 (1943).

125. The Swiss Federal Tribunal says, "Articles 32 and 39 of the Vienna Convention must . . . apply by analogy to Heads of State." *Marcos and Marcos v. Fed. Dep't of Police*, 102 I.L.R. 198, 203 (1989). *But see* Hazel Fox, *The Pinochet Case No.3*, 48 INT'L & COMP. L.Q. 687, 693-94 (1999).

126. Yoram Dinstein, *Diplomatic Immunity from Jurisdiction Ratione Materiae*, 15 INT'L & COMP. L.Q. 76 (1966).

acting *ultra vires*. We must ascertain what is the basis of functional immunity for *ultra vires* conduct and whether it could also be the basis of state immunity to individuals for such conduct. For example, if, as is pointed to by Salmon,¹²⁷ Article 10 of the ILC Draft Articles on State Responsibility is the reason for according functional immunity for *ultra vires* conduct, the basis of immunity for state officials in general is provided. For this provision applies irrespective of the function at issue.

It is questionable, however, whether Salmon's observation is supported by the cases cited by him and can serve as a starting point for discussion. For instance, otherwise applicable consular immunity was withheld from the following persons: a person who was entrusted by a vice-consul to set in order the documents of a deceased marquis, but who, availing himself of this occasion, entered the apartment and burnt the will of the marquis;¹²⁸ a consul general who converted and appropriated the funds which his government sent to him in trust for the plaintiff;¹²⁹ and a vice-consul who was prosecuted on account of a sexual assault during the ordinary hours of business against a woman who came to renew her passport.¹³⁰

As pointed out, the scope of Article 10 of the ILC Draft Articles is broad. The cases that the ILC had in mind include the *Youmans* case,¹³¹ in which Mexico was held internationally responsible for the acts of its soldiers who, contrary to the order to protect the U.S. nationals threatened by a mob, shot and killed one of them.¹³² Thus, Article 10 would cover the cases mentioned in the preceding paragraph, if it is appropriate at all. Nevertheless, immunity has been denied in those circumstances.

Insofar as the writer is aware of, the only case, among those cited by Salmon, which might support his argument is *Boyer v. Aldrète*.¹³³ In this defamation case against the consul general of Panama, the Civil Tribunal of Marseille stated:

[T]his absolute incompetence [of the French courts with regard to foreign consuls' function] would subsist even in the hypothesis in which the acts of a foreign consul were tainted by the excess of authority or the diversion of authority, only the Tribunals of the State which he

127. Salmon, *supra* note 95, at 348.

128. J.-B. Fassio et Jérôme Fassio v. Bocconi, Trib. civ. Nice, Jan. 21, 1896, 24 J. DU DROIT INT'L PRIVE 131 (Fr.).

129. Carl Byoir & Assoc. v. Tsune-Chi Yu, 112 F.2d 885 (2d Cir. 1940).

130. L. v. The Crown, 68 I.L.R. 175 (N.Z. Sup. Ct. Auckland 1977).

131. *Youmans* (U.S.) v. United Mexican States, 4 R.I.A.A. 110 (Mex.-U.S. Gen. Claims Comm'n 1926).

132. *Id.*

133. Trib. civ. Marseille, 9e ch., Oct. 18, 1956, Gazette du Palais 1956, 2, jurisprudence, 319 (Fr.).

represents being qualified to judge such an abuse.¹³⁴

This argument bases immunity for *ultra vires* conduct not on the attribution of, or state responsibility for, such conduct but on the allegedly exclusive competence of the courts of the foreign state concerned. Taken to extremes, this would mean that immunity is granted for virtually all acts of a foreign consul. The result that follows comes much closer to purely “personal” immunity, rather than “functional” immunity. To infer from this isolated and somewhat unpersuasive instance that, as a matter of principle, functional immunity is granted even for *ultra vires* conduct would go too far. It seems that the basis of the contrary proposition that, in principle, functional immunity has been withheld in *ultra vires* cases is the stronger.

C. *State Immunity Granted to the Individual for Ultra Vires Conduct?*

Since functional immunity as defined earlier and state immunity, even where the latter’s beneficiary is an individual, are not co-extensive, the former might be available when the latter is not, and *vice versa*. Accordingly, the observation in the preceding paragraph does not *a priori* mean the denial of state immunity to individuals in *ultra vires* cases, and separate analysis is called for.

It would not be out of place to begin this section with *Pinochet (No. 3)*. As stated, a number of the Law Lords addressed the immunity issue, rightly or wrongly, as a matter of state immunity *ratione materiae* rather than as one of former head of state immunity. Moreover, despite the criminal character of this case, some of the Law Lords suggested Pinochet’s immunity from civil proceedings.¹³⁵ If Chilean law prohibits torture, does it follow that immunity would have been granted to the individual in civil proceedings for *ultra vires* acts?¹³⁶

A negative answer must be given. Even if, in written law taken at face value, torture is prohibited and therefore at first sight *ultra vires* conduct, another fact should not be overlooked. In this case, it was submitted for the government of Chile, intervening, that, “[it] deplores the fact that the government at the time violated human rights”.¹³⁷ In short, at least *ex post facto*, the Chilean government conceded the attribution of Pinochet’s conduct, rendering it difficult to see an *ultra*

134. *Id.* at 320 (the writer’s translation).

135. [2000] 1 App. Cas. at 264 (Lord Hutton); 278 (Lord Millett); 281 (Lord Phillips).

136. On the other hand, *Pinochet (No. 1)*, in which all the Law Lords dealt with the issue as a matter of former head of state immunity, is of little assistance for the analysis of individuals’ entitlement to state immunity from civil jurisdiction for their *ultra vires* conduct. [2000] 1 App. Cas. 61.

137. [2000] 1 App. Cas. at 172.

vires character in the conduct.¹³⁸

However, in *obiter* saying that, "Senator Pinochet could . . . claim immunity if sued in civil proceedings for damages,"¹³⁹ Lord Hutton had state responsibility for *ultra vires* conduct in mind.¹⁴⁰ As noted, the argument based upon state responsibility leads to the proposition that immunity would be granted to individuals irrespective of whether he is a former head of state or not.

Equally, the dictum of Lord Millett should not be ignored. He stated:

[Immunity *ratione materiae*] is available whether the acts in question are illegal or unconstitutional or otherwise unauthorised under the internal law of the state, since the whole purpose of state immunity is to prevent the legality of such acts [i.e. official and governmental or sovereign acts] from being adjudicated upon in the municipal courts of a foreign state. A sovereign state has the exclusive right to determine what is and is not illegal or unconstitutional under its own domestic law.¹⁴¹

This argument coincides, in its essence, with the reasoning of *Boyer v. Aldrète*, i.e. the exclusive right of the foreign state concerned.¹⁴²

This study indicates that state immunity has not been granted to individuals for *ultra vires* conduct on the above, or any other, grounds. In according state immunity to individuals, some of the courts already mentioned have stressed that the conduct at issue was carried out *intra vires*. Furthermore, in a number of jurisdictions, state immunity has been denied to individuals because of the *ultra vires* nature of their conduct.

In *Wright v. Cantrell*¹⁴³, a defamation action before an Australian court, immunity was not granted because, according to Chief Justice Jordan, "[t]he defendant is not alleged to have defamed another member of the forces in the course of making a report about him which it was his duty to make, but to have defamed a civilian whilst doing something in the course of his duties."¹⁴⁴ Although Chief Justice Jordan assumed that the defendant was a member of the visiting forces, Justice Roper rather considered the defendant as a civilian employee of the U.S. and said, "If this view . . . is correct the reasoning of [Jordan,

138. For a comment to this effect in the context of state responsibility, see [1975] II Y.B. INT'L L. COMM'N 61-62.

139. *Pinochet (No.3)*, [2000] 1 App. Cas. at 264.

140. *Id.* at 252, 264.

141. *Id.* at 270.

142. *Boyer*, Trib. civ. Marseille, 9e ch., Oct. 18, 1956, Gazette du Palais 1956, 2, jurisprudence, 319 (Fr.).

143. 44 N.S.W. St. R. 45 (1943).

144. *Id.* at 53.

C.J.], . . . applies a *fortiori* to show that no case of immunity . . . is raised¹⁴⁵

Philippine case law leaves no ambiguity. In *Sanders v. Veridiano II*,¹⁴⁶ the Supreme Court said, “[T]he mere invocation of official character will not suffice to insulate him from suability and liability for an act imputed to him as a personal tort committed without or in excess of his authority.”¹⁴⁷ Applying this criterion, the Supreme Court has denied immunity in a number of cases.¹⁴⁸ Of particular importance among them is *United States of America v. Reyes*¹⁴⁹, in that the court did not accept the following submission: “[E]ven if [the individual defendant’s] act were *ultra vires*, she would still be immune from suit for the rule that public officers or employees may be sued in their personal capacity for *ultra vires* and tortious acts is ‘domestic law’ and not applicable in International Law.”¹⁵⁰

U.S. case law is no less unambiguous in refusing state immunity to those who acted *ultra vires*. Prior to the enactment of the FSIA, in *Pilger v. United States Steel Corp.*,¹⁵¹ the Public Trustee, a corporation sole of the U.K., was sued for the seizure and retention of the stock purchased by Pilger. Affirming that the Public Trustee is a British governmental agency and that he acted *ultra vires*, the court stated:

An instrumentality of government, whether corporate or not, . . . does not cease to be personally answerable for acts done under color of the authority conferred upon it, but, in fact, in excess of that authority and without legal justification. The immunity of a sovereign against suits arising out of the unlawful acts of its representatives does not extend to those who acted in its name, and cannot be set up by them as a bar to suits brought against them for the doing of such unlawful acts.¹⁵²

Likewise, after the enactment of the FSIA, the U.S. courts indicated their intention to deny, or did deny, immunity on the grounds of *ultra vires* conduct in various cases, whether brought under the Alien Tort Claims Act¹⁵³ or not.¹⁵⁴ *Phaneuf v. Republic of Indonesia*¹⁵⁵ would

145. *Id.* at 54.

146. 162 S.C.R.A. 88 (1988).

147. *Sanders*, 162 S.C.R.A. at 94.

148. *E.g.*, *Shauf v. Court of Appeals*, 191 S.C.R.A. 713 (1990); *Wylie v. Rarang*, 209 S.C.R.A. 357 (1992).

149. 219 S.C.R.A. 192 (1993).

150. *Id.* at 204.

151. 130 Atl. 523 (N.J. 1925).

152. *Id.* at 524. *See also* *Lyders v. Lund*, 32 F.2d 308 (N.D. Cal. 1929).

153. *E.g.*, *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980); *Forti v. Suarez-Mason*, 672 F. Supp. 1531 (N.D. Cal. 1987); *Xuncax v. Gramajo*, 886 F. Supp. 162 (D. Mass. 1995); *In re Estate of Ferdinand Marcos Human Rights Litigation*, 25 F.3d 1467 (9th Cir. 1994); *Kadic v. Karadzic*, 70 F.3d 232 (2d Cir. 1995); *Cabiri v. Assasie-Gyimah*, 921 F. Supp. 1189 (S.D.N.Y. 1996).

154. *E.g.*, *Chuidian v. Philippine National Bank*, *supra* note 82; *Alicog v. Kingdom of*

serve as an example. This case relates to promissory notes allegedly issued by the National Defense Security Council of Indonesia. In respect of the individual defendant, the Court of Appeals, remanding the case, said, "If the district court finds that Mawardi's actions were within the scope of his authority, then Mawardi is entitled to a presumption of immunity under the FSIA; if Mawardi acted without authority, the FSIA cannot shield him from suit in his individual capacity."¹⁵⁶ It went on to say, "If the foreign state has not empowered its agent to act, the agent's unauthorized act cannot be attributed to the foreign state; . . ."¹⁵⁷

It does not seem that any objection can be raised to these cases. The citation of authority would no longer be required to point to possible bases of state immunity, such as the principles of sovereignty, independence, equality and dignity of states. Whether or not any of them can really provide a satisfactory basis, given that *ultra vires* conduct is, by definition, what the state does not authorize or even prohibits, the denial of state immunity to individuals acting *ultra vires* would be contrary to none of them.

It is true that a state might be held legally responsible even for *ultra vires* conduct. Yet, this, standing alone, does not provide any theoretical or practical reason for making such individual actors immune from jurisdiction or responsibility. With regard to Lord Millett's remark,¹⁵⁸ it remains unclear why a foreign court cannot determine whether an act was carried out *intra vires* or *ultra vires*, whereas it can determine, as he presupposes, whether an act was official or not. It is submitted that the view that state immunity is granted to individuals even where they acted *ultra vires* is supported neither by principle nor by authority.

IV. CONCLUDING REMARKS

This study has demonstrated that the individual is recognized as a beneficiary of state immunity. The basis for this was sought in the attribution of the conduct to a foreign state. Problems of *ultra vires* conduct were then examined from the standpoint of attribution in state responsibility and that of functional immunity. Some views that have been put forward in these areas, if correct, might lend support to state immunity to individuals even for their *ultra vires* conduct. However,

Saudi Arabia, 860 F. Supp. 379 (S.D. Tex. 1994); *Doe v. Bolkiah*, 74 F. Supp. 2d 969 (D. Haw. 1998); *Shalaby v. Saudi Arabian Airlines*, 97 Civ. 9393 (DC), 1998 U.S. Dist. LEXIS 17571 (S.D.N.Y. Nov. 9, 1998).

155. 106 F.3d 302 (9th Cir. 1997).

156. *Id.* at 307.

157. *Id.* at 308.

158. *See supra* text accompanying note 141.

closely analyzed, the bases of these views are rather weak. More importantly, state immunity has simply been denied to individuals whose *ultra vires* acts were at issue, and no reason can be found for according state immunity to such individuals. We can conclude that there is no ground, either in theory or in practice, to consider that *ultra vires* conduct is attributed to the state.

As we have seen, at present, there usually exists a presumption of immunity for foreign states, whereas no such presumption exists for individuals. That being the case, different results in terms of immunity could ensue in civil proceedings concerning *ultra vires* conduct. If proceedings are brought against individuals who acted *ultra vires*, no room is left for state immunity to be granted. On the other hand, a foreign state, if named as a defendant, might enjoy immunity from such proceedings. If this does occur,¹⁵⁹ the immunity accorded to the state can be explained only as a sort of immunity *ratione personae*, illustrating, "the accepted position that state immunity is a personal plea exempting a state from the jurisdiction otherwise properly exercisable by reason of its personal status as an independent and equal state."¹⁶⁰

159. *E.g.*, *Anglo-Iberia Underwriting Management Co. v. Jamsostek*, 97 Civ. 5116 (HB), 1998 U.S. Dist. LEXIS 8181 (S.D.N.Y. June 2, 1998) and 1999 U.S. Dist. LEXIS 1563 (S.D.N.Y. Feb. 10, 1999). In this case, immunity was denied to the individual defendant, an employee of an enterprise owned by the Indonesian government, who engaged in reinsurance activities without authority, whereas immunity was granted to Indonesia and the enterprise. *Id.* This is not to say that immunity has been granted to a foreign state in every *ultra vires* case. *See, e.g.*, *Liu v. Republic of China*, 892 F.2d 1419 (9th Cir. 1989).

160. Hazel Fox, *Access to Justice and State Immunity*, 117 L.Q. REV. 10, 13 (2001).

