Immunities of Persons from Jurisdiction

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IMMUNITIES OF PERSONS FROM JURISDICTION

1. Introduction

Under international law, State officials are entitled to different types of immunity from foreign jurisdiction. Generally, two categories of immunities are identified: the so-called functional immunity (or *ratione materiae*), and personal immunities (or *ratione personae*). Functional immunity from the jurisdiction of foreign states cover activities performed by various state officials in the exercise of their functions and it survives the end of office. The rationale behind this rule is that official activities are performed by state organs on behalf of their State and, in principle, must be attributed to the State itself (ICTY, *Prosecutor v. Blaskić*, AC Judgment No. IT-95-14-AR 108 *bis*, 29 October 1997, §§ 38 and 41).

Personal immunities, which only accrue to some categories of state organs because of the crucial relevance of their official position (diplomatic agents, heads of states, heads of governments and ministers of foreign affairs), cover every act performed by those who benefit from these rules, but they last only until the organs concerned remain in office. The principle underlying these rules is commonly identified as "functional necessity", and often expressed with the Latin formula *ne impediatur legatio* or *ne impediatur officium*. Personal immunities include inviolability, that is to say immunity from arrest and detention, absolute immunity from criminal jurisdiction and immunity from civil jurisdiction (with very limited exceptions).

State officials may also enjoy functional and personal immunities under their own national law: in particular, heads of state, heads of government, cabinet ministers and parliamentarians are often exempt, in diverse degrees, from the jurisdiction of their own national courts.

From an international criminal law perspective, it is crucial to ascertain whether these different immunities may be invoked when a state organ is suspected of international crimes.

2. Functional Immunity and International Crimes

It is almost universally shared that functional immunity from foreign jurisdiction cannot be invoked by those who allegedly committed one of the so-called core crimes: war crimes, crimes against humanity, acts of torture and acts of genocide.

The customary rule rendering functional immunities unavailable for state officials suspected of international crimes emerged in ancient times and consolidated after the second world war, starting with the establishment of the Nuremberg International Military Tribunal. Art. 7 of the Nuremberg Charter provides that: "The official position of the defendants, whether as Heads of States or responsible officials in Government Departments, shall not be considered as freeing them from responsibility or mitigating punishment". A parallel rule was included in the Statute of International Military Tribunal for the Far East. The two Tribunals consistently applied the rule trying and condemning some of the major Nazi and Japanese leaders.

Afterwards, similar provisions have been inserted in most of the international instruments dealing with prosecution and punishment of the most serious international crimes. Just to give some important examples, one can mention Art. IV of the 1948 Genocide Convention, Art. III of the 1973 Apartheid Convention and, more recently, Articles 7 (1) and 6 (2) of the ICTY and ICTR Statutes respectively and art. 27 (1) of the ICC Statute.

Both national and international case-law are consistent on the application of this rule. The most famous recent case is the denial of immunity for acts of torture to Pinochet, former head of state, in the extradition proceedings in the UK (1999).

A few years ago, in 2002, the debate was reopened by the ICJ judgment in the *Arrest Warrant* case (Belgium v. Democratic Republic of Congo, ICJ, Judgment, 14 February 2002), because of an obiter dictum where the Court affirmed that foreign affairs ministers can be tried only for private acts committed while in office. This position was widely criticized and does not correspond to past and current practice in this field.

Most scholars affirm that this customary rule is an exception to the general rule granting functional immunity to every state official for acts performed in an official capacity. Some others argue that the existence of this general rule cannot be proved, but there are on the contrary some specific rules granting functional immunity only to some classes of state

officials for acts performed within the limits of their official mandate. According to the latter theory, international crimes are always *ultra vires* acts and can never be considered as performed in an official capacity. Hence, the unavailability of functional immunity (even when provided for by a specific rule) is not an exception to the rule, but an expression of its correct application.

3. Personal Immunities and International Crimes

As to the relationship between personal immunities and alleged suspects of international crimes the situation is two-fold. On the one hand, State practice consistently shows that the rules on personal immunities cannot be derogated from at the national level, whereas on the other, international criminal tribunals may indict and charge high state officials, such as heads of state, suspected of crimes under their jurisdiction even if they are still in office.

National authorities refrain from exercising their jurisdiction over high foreign officials: relevant cases include the decisions of the Spanish Audiencia Nacional in *Castro* (Order of 4 March 1999, available in Spanish in CD-Rom, EL DERECHO, 2002), the decision of the French *Cour de cassation* in *Gadhafi* (Decision of 13 March 2001, available in French in *RGDIP*, 2001, 474*)* and the decision of the Belgian *Cour de cassation* in *Sharon and others* (Decision of 12 February 2003, available in French at www.cass.be/cgi-juris/juris-cass-a1.pl). The most authoritative judgement on the issue was delivered in 2002 by the ICJ in the *Arrest Warrant* case. The ICJ clearly stated that Foreign Ministers enjoy, while in office, absolute immunity from foreign criminal jurisdiction: the fight against impunity for the most serious international crimes must be checked against the stability of international relations, that personal immunities aim at preserving. In any case personal immunities are temporary in nature. Moreover, high state officials may be tried by international criminal tribunals where available.

Both the ad hoc tribunals and the so-called mixed courts have indicted serving heads of state. The ICTY indicted Milosević when he was still President of the Federal Republic of Yugoslavia and the Special Court for Sierra Leone indicted Taylor when he was in office as Liberian President.

Art. 27 (2) of the ICC Statute clearly provides for the unavailability of personal immunities, both under international and domestic law. The application of Article 27 (2) however, must

be combined with art. 98(1), with regard to cooperation with the ICC and does not solve the problem of the immunity of third states' officials.

Most recently, some national courts considered immune from their jurisdiction foreign defence ministers or ministers of the interiors: *Rumsfeld* in Germany (Decision of the German Prosecutor, 10 February 2005, available in German at www.ccr-ny.org) *Mofaz* (*Application for Arrest Warrant Against General Shaul Mofaz*, Bow Street Magistrates' Court, 12 February 2004, *ICLQ* (2004), 771) and *Bo Xilai* (*Re Bo Xilai*, Bow Street Magistrates' Court, London, 8 November 2005, 128 *ILR*, 713) in the UK. Such trend is not yet consolidated and may be criticized because it risks to enlarge indefinitely the categories of state officials who benefit from personal immunities. In particular, this trend does not express an adequate balance between the need to preserve the stability of international relations and the fight against impunity for the most serious international crimes.

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