IMMUNITY FOR INTERNATIONAL CRIMES

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• States must increasingly accept more interference in their sovereignty in order to ensure fundamental human rights

• Global task today: Hold the most responsible behind human rights atrocities accountable
  - Universal jurisdiction
  - International criminal courts
• Attempts to prosecute state representatives are no longer rare

• The question of immunity before national and international criminal courts is more relevant than ever
• With the last decade’s focus on human rights, one would perhaps think that immunity for international crimes was no longer accepted.

• This lecture will paint a more nuanced picture.
• States and international courts are forced to formulate views on immunity rules

• International courts, including the ICJ and the ECtHR, have laid important basic premises for the further course of these rules.

• The immunity rules of international law are gradually taking their final shape, but important questions are still unsettled.
• International law is not partisan for human rights or state sovereignty, but balances the two values

• The immunity rules appear as a compromise between the two and can be criticized from both sides
• I want to make two important points today:

1) Counter a broadly-held misunderstanding: An international criminal court cannot, as many claim, automatically disregard the immunity rules of international law

2) To circumvent the rules of immunity by labelling all international crimes as private acts (and not official acts of the state) is an unfortunate approach. At best, it is misleading. At worst, it can undermine international law’s regulations on state responsibility
• What is immunity?

• A *procedural* hurdle for prosecution

• Has nothing to do with the issue of criminal responsibility as such

• The legal effect is *dismissal* and not acquittal
• Immunity channels prosecution away from the court where the suspect is immune

• Another court may still be in a position to prosecute

• Immunity under international law can only exist outside the suspect’s home state
International law establishes two types of immunity from prosecution:

- **Functional immunity** for the official acts of a state

- **Personal immunity** for certain state representatives of high rank as well as diplomats
• The two types serve different purposes

• Functional immunity: prevents states from acting as each other’s judges

• Personal immunity gives certain state representatives full freedom of movement abroad.
• Arguments for immunity

  – Sovereignty (personification of state)

  – States’ equality—integrity of official acts of states (*par in parem non habet imperium*)

  – Consideration for the state representative

  – International relations - *states’ unimpeded foreign affairs*

  – Peace and security
• Arguments against immunity:

– Justice

– Deterrence

– Reconciliation
• Immunity before international criminal courts

Versailles treaty (28 June 1919), Article 227(2):

‘A special tribunal will be established to try [William II], thereby assuring him the guarantees essential to the right of defence. It will be composed of five judges, one appointed by each of the following Powers: namely, the United States of America, Great Britain, France, Italy and Japan.’ [Presupposes no immunity]
• Nuremberg and Tokyo tribunals (established by the victors)

Article. 7 (of Nuremberg Charter):

“The official position of defendants, whether as Heads of State or responsible officials in Government Departments, shall not be considered as freeing them from responsibility or mitigating punishment.”
• Linguistically speaking, the provision only states that a person’s official position does not exempt him or her from criminal responsibility.

• Yet, since the provision only regulated this one court’s activities, it still assumes that there will be no immunity.

• Germany’s foreign minister from 1938–45, Joachim von Ribbentrop.
• Both the IMT and the IMTFE discussed the question of immunity without taking an explicit position as to whether non-immunity was consistent with international law. Today no one contests that it was.

• Why should there be no immunity here?
• Established by the victors as occupants

• The two states had capitulated unconditionally

• Victors took over all legislative, judicial and executive authority of the respective territories

• Thus technically an expression of territorial jurisdiction
• ICTY and ICTR have similar provision - art. 7(2) and 6(2):

“The official position of any accused person, whether as Head of State or Government or as a responsible Government official, shall not relieve such person of criminal responsibility nor mitigate punishment.”

• Why no immunity here?
• UN Charter Chapter VII (Security Council)

• Article 25

• Article 2 (7) allows the United Nations to ‘intervene in matters which are essentially within the domestic jurisdiction of any state’ when authorised in Security Council resolution

• Article 103
ICC

Article. 27(1):

"Immunities and special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person."

Why no immunity?
• The ICC is established by voluntary treaty

• What about non-state parties then?
Article. 98(1):

“The Court may not proceed with a request for surrender or assistance which would require the requested State to act inconsistently with its obligations under international law with respect to the State or diplomatic immunity of a person or property of a third State, unless the Court can first obtain the cooperation of that third State for the waiver of the immunity.”
What about Security Council referrals?

- Gadaffi (Libya)

- Al-Bashir (Sudan)
Article 13 Exercise of jurisdiction

The Court may exercise its jurisdiction with respect to a crime referred to in article 5 in accordance with the provisions of this Statute if:

(b) A situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by the Security Council acting under Chapter VII of the Charter of the United Nations
Immunity before courts of foreign states

- ICJ, *Arrest warrant case* (judgment, 2002)
• The DRC initially invoked both lack of jurisdiction and immunity

• In the end only immunity invoked

• Separate opinions on universal jurisdiction
ICJ: Personal Immunity is absolute:

Para 54:
”the functions of a Minister for Foreign Affairs are such that, throughout the duration of his or her office, he or she when abroad enjoys full immunity from criminal jurisdiction and inviolability. That immunity and that inviolability protect the individual against any act of authority of another State which would hinder him or her in the performance of his or her duties”.
• What about international crimes?

Para 58:

“The Court has carefully examined State 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 has been unable to 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 Ministers for Foreign Affairs, where they are suspected of having committed war crimes or crimes against humanity.”
• Who are covered?

Para. 51:

- Heads of state
- Heads of government
- Ministers for foreign affairs

• The «prominent threesome»
• State and head of state must be recognised:

• *Karadzic* (USA, 1995):

”recognized States enjoy certain privileges and immunities relevant to judicial proceedings”. But Karadzic was not recognised as head of state.

*United States v. Noriega and Others:*

”in order to assert Head of State immunity, a government official must be recognized as Panama’s Head of State either under the Panamanian Constitution or by the United States”
Manuel Antonio Noriega
C.I.P: 8-74-291
CÓDIGO: 76707
F.D: 11-12-2011
Art 60:

“The Court emphasizes, however, that the immunity from jurisdiction enjoyed by incumbent Ministers for Foreign Affairs does not mean that they enjoy impunity in respect of any crimes they might have committed, irrespective of their gravity.”

Accordingly, the immunities enjoyed under international law by an incumbent or former Minister for Foreign Affairs do not represent a bar to criminal prosecution in certain circumstances.
Para 61:
“First, such persons enjoy no criminal immunity under international law in their own countries, and may thus be tried by those countries’ courts in accordance with the relevant rules of domestic law.”
“Secondly, they will cease to enjoy immunity from foreign jurisdiction if the State which they represent or have represented decides to waive that immunity.”
“Thirdly, after a person ceases to hold the office of Minister for Foreign Affairs, he or she will no longer enjoy all of the immunities accorded by international law in other States. Provided that it has jurisdiction under international law, a court of one State may try a former Minister for Foreign Affairs of another State 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.” [Functional immunity]
“Fourthly, an incumbent or former Minister for Foreign Affairs may be subject to criminal proceedings before certain international criminal courts, where they have jurisdiction.”
• Discussion of the distinction between official and private acts

Lord Steyn in *Pinochet 1*:

”He who violates the laws of war cannot obtain immunity while acting in pursuance of the authority of the State if the State in authorizing action moves outside its competence under international law.”
• ICJ in *Arrest Warrant* case

”It is now increasingly claimed in the literature [...] that serious international crimes cannot be regarded as official acts because they are neither normal State functions nor functions that a State alone (in contrast to an individual) can perform. [...] This view is underscored by the increasing realization that State-related motives are not the proper test for determining what constitutes public State acts. The same view is gradually also finding expression in State practice, as evidenced in judicial decisions and opinions.”
• Immunity and *jus cogens*

Fox:

”State immunity is a procedural rule going to the jurisdiction of a national court. It does not go to substantive law; it does not contradict a prohibition contained in a *jus cogens* norm but merely diverts any breach of it to a different method of settlement. Arguably, then, there is no substantive content in the procedural immunity upon which a *jus cogens* mandate can bite.”
• *Al-Adsani* (ECHR):

”Notwithstanding the special character of the prohibition of torture in international law, the Court is unable to discern in the international instruments judicial authorities or other materials before it any firm basis for concluding that, as a matter of international law, a State no longer enjoys immunity from civil suit in the courts of another State where acts of torture are alleged.”
• With regard to functional immunity:

Can international crimes be viewed as «private acts»?

Could be unfortunate...

• State responsibility
STATE RESPONSIBILITY

• Individual responsibility does not exclude state responsibility

• State immunity

• How can a state be held responsible for human rights violations?

• Human rights courts/committees vs. ICJ

• Other “mechanisms” of responsibility?
- ILC draft Articles on State Responsibility (2001)
- The key articles
- The notion of “state crime”
- *Jus cogens* prohibitions (and the concept of *erga omnes*)