

Criminal Immunity of State Officials for Core International Crimes Now and in the Future

By ZHONG Yuxiang

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1. State Sovereignty and International Criminal Justice

Our times show that man's capacity for evil knows no limits. This realisation has become a force to be reckoned with in the international community. With some acts being condemned as crimes under international law and the establishment of several international criminal jurisdictions, international criminal justice has nearly from its start epitomised a 'post-sovereign era'.

Almost by definition, international criminal law, as one single facet of a broader theme, poses a fundamental challenge to traditional international law immunities. Individuals who bear the greatest responsibility for what is typically considered macro-criminality, are often precisely the ones for whom traditional immunity protection is strongest.

The international law of immunities has recently attracted attention of the International Court of Justice ('ICJ'),¹ the *Institut de Droit International* ('IDI'),² and the International Law Commission ('ILC'). In this policy brief, I confine my discussion to the impact of two factors on the availability of criminal immunities of state officials, namely the nature of the courts in which immunities are invoked (section 2), and the type of immunities (section 3). I also try to place the problématique in

a broader perspective of the evolution of the international legal order.

2. International Law Immunities Before International Courts and Tribunals

2.1. Inconsistency in ICC Jurisprudence

As can be observed in the *Bashir* case, the ICC takes an ambiguous stand on the immunity issue. ICC Pre-Trial Chamber ('PTC') I specified that "[i]mmunity of either former or sitting Heads of State cannot be invoked to oppose a prosecution by an *international* court".³ This, however, does not please PTC II, which in a recent decision held that as for a non-State Party, "[t]he question of personal immunities might validly arise".⁴

Despite the sharp disagreement expressed by the African Union Commission⁵ and PTC II, PTC I is not alone in holding that immunities cannot be successfully raised in international criminal proceedings. This view was also taken by the Special Court for Sierra Leone ('SCSL') in the case of Charles Taylor,⁶ and arguably by the ICJ in a well-known *obiter dictum* in the Arrest Warrant case.⁷

³ Malawi Decision, ICC-02/05-01/09-139, para. 36 (<http://www.legal-tools.org/doc/476812/>) (emphasis added).

⁴ Congo Decision, ICC-02/05-01/09, paras. 26-27 (<http://www.legal-tools.org/doc/89d30d/>).

⁵ Claus Kreß, "The International Criminal Court and Immunities under International Law for States Not Party to the Court's Statute", in Morten Bergsmo and LING Yan (eds.), *State Sovereignty and International Criminal Law*, Torkel Opsahl Academic EPublisher, 2012, Beijing, p. 226 (<http://www.legal-tools.org/doc/a634d0/>).

⁶ *Prosecutor v. Charles Ghankay Taylor*, Appeals Chamber, Case Number SCSL-2003-1-AR72(E), Decision on Immunity from Jurisdiction, 31 May 2004, para. 51 (<http://www.legal-tools.org/doc/3128b2/>).

⁷ *Supra* note 1, *Congo v. Belgium*, Judgment, para. 61. See contrary interpretations: LIU Daqun, "Has Non-Immunity for Heads of States Become a Rule of Customary International Law?", in Morten Bergsmo and LING Yan (eds.), *State Sovereignty and In-*

¹ Jurisdictional Immunities of the State (Germany v. Italy: Greece Intervening), Judgment, 3 February 2012 (<http://www.legal-tools.org/doc/674187/>); and Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium), Judgment, 14 February 2002 ('Arrest Warrant case') (<http://www.legal-tools.org/doc/c6bb20/>).

² *Resolution on the Immunity from Jurisdiction of the State and of Persons Who Act on Behalf of the State in case of International Crimes*, Napoli Session 2009, Third Commission (<http://www.legal-tools.org//20fd92/>); and *Les immunités de juridiction et d'exécution du chef d'Etat et de gouvernement en droit international*, Vancouver Session 2001, Thirteenth Commission (<http://www.legal-tools.org//48a982/>).

2.2. International Courts: Delegation by States Parties

The argument relied upon by the SCSL and referred to by the ICC PTC I is that

[t]he principle of state immunity derives from the equality of sovereign states and therefore has no relevance to international criminal tribunals which are not organs of a state.⁸

Yet, with due respect, this is a somewhat odd argument given that international courts are normally created and sustained by States. The basic distinction made between international and national courts gives the impression that what a State cannot do individually, it can do by agreement with another State – or perhaps two or ten other States? Indeed, it would seem to make little difference whether States seek to exercise this judicial jurisdiction unilaterally or through a collective body to which the concerned State has not consented.⁹

The view that international law immunities may never be pleaded in proceedings instituted before international courts *oversimplifies* the matter. The availability of immunity before international courts depends on the nature of the international court in question. There are substantial differences between the ICTY, ICTR and ICC in this respect.¹⁰ The ICC was created on the basis of the ICC Statute, and as such it does not enjoy powers under Chapter VII of the United Nations Charter. A treaty-based international court cannot remove immunities that customary international law grants to officials of States not party to the treaty.

2.3. International Courts: Organs of the International Community

My arguments above are actually predicated on conceptualising the ICC as a delegation by its States Parties. If this is so, the ICC may not have wider powers than a national court as regards a non-State Party. The question is therefore whether there is any other approach to the concept of ‘international courts’ which would make such courts “fundamentally different”¹¹ from their national

International Criminal Law, *op. cit.*, p. 68 (<http://www.legal-tools.org/doc/a634d0/>).

⁸ Malawi Decision, para. 35.

⁹ Dapo Akande, “International Law Immunities and the International Criminal Court”, in *American Journal International Law*, vol. 98 (2004) 411, p. 417 (<http://www.legal-tools.org/doc/0252ea/>).

¹⁰ See LIU Daqun, *op. cit.*, p. 68.

¹¹ The Special Rapporteur of the ILC, who has otherwise formulated cautious views as to immunities, holds that “[i]mmunity from international criminal jurisdiction appears to be fundamentally different from immunity from national criminal jurisdiction”, see Roman Anatolevich Kolodkin, *Preliminary report on immunity of State officials from foreign criminal jurisdiction*, 29

counterparts. As a matter of principle, the answer is affirmative.

The delegation model is not the only way to conceptualise international criminal courts. In fact, international criminal law is born out of the idea of *jus cogens* and *obligatio erga omnes*, the normative force of which renders it possible that an international criminal court, which acts as a direct embodiment of the international community, has wider powers than a national criminal court, which acts as a mere fiduciary of the common good.¹²

This brings us to the question of which international criminal courts may qualify to be organs of the international community. Those courts set up by the United Nations Security Council (that is, the ICTY and the ICTR) certainly count. The case of the ICC is more difficult, especially when the situation is not referred to the ICC by the Security Council. This is a matter that should be researched and argued further.

3. Personal Immunity and Functional Immunity for Core International Crimes

Let us turn to the second question: should a distinction be drawn between functional immunity and personal immunity with respect to core international crimes? The baseline set by the ICJ¹³ provides that personal immunity is absolute and inviolable before a foreign national court. In this section I will therefore deal primarily with functional immunity, and explore its difference from personal immunity, which is the very reason why a distinction should be drawn.

3.1. Attempts to Invalidate Functional Immunity

Recent decades have seen a number of national prosecutions of foreign State officials for core international crimes.¹⁴ Notably, the Special Rapporteur of the ILC, in his second report, summarized six rationales – some of them interrelated – for exceptions to functional immunity for international crimes.¹⁵ The typical attempts to re-

May 2008, A/CN.4/601, para. 103 (<http://www.legal-tools.org/doc/97bd3b/>).

¹² See Claus Kreß, *op. cit.*, p. 246.

¹³ *Arrest Warrant* case, Judgment, paras. 51, 54, 56 and 58 (<http://www.legal-tools.org/doc/c6bb20/>); and *Djibouti v. France*, Judgment, paras. 170 and 174 (<http://www.legal-tools.org/doc/7b6a80/>).

¹⁴ Mention can be made of the *Pinochet* case, in which the British House of Lords explicitly took the view that functional immunity cannot excuse international crimes. See the speech of Lord Browne-Wilkinson, in *Regina v. Bow Street Stipendiary Magistrate and others, Ex parte Pinochet (No. 3)*, Judgment of 24 March 1999, paras. 107-115 (<http://www.legal-tools.org/doc/b48ec0/>).

¹⁵ Roman Anatolevich Kolodkin, *Second report on immunity of State officials from foreign criminal jurisdiction*, 10 June 2010, A/CN.4/631, p. 32 (<http://www.legal-tools.org/doc/b1d862/>).

move functional immunity mainly resort to the non-official nature of core international crimes and the *jus cogens* nature of such crimes, which, upon close scrutiny, prove to be insufficiently convincing.¹⁶

I concur with the conclusion that functional immunity, unlike personal immunity, cannot apply to core international crimes. However, I prefer to take a different route to arrive at this conclusion. In the present text, I am inclined to invoke the principle of irrelevancy of official capacity to remove functional immunity.

3.2. Time to Pierce the Veil of Official Capacity

Let us revisit the central differences between functional and personal immunity, which is also the very reason why functional immunity has to be lifted while personal immunity remains absolute. Personal immunity attaches to the position of the officials, and is thus only enjoyed by some senior, incumbent State officials. In contrast, functional immunity attaches to the official nature of the act *per se*, and hence is enjoyed by whoever conducted the act in an official capacity. Indeed, as held in the *Eichmann* and *Blaškić* cases,¹⁷ functional immunity is in fact a mechanism for diverting responsibility of State officials to the State.

In other words, ‘official capacity’ lies at the heart of functional immunity. Yet, the very purpose of international criminal justice is to attribute responsibility to individuals, and to defeat the defence of official capacity and State act.¹⁸ As late Antonio Cassese observed,¹⁹ it is questionable to resort to the distinction between private acts and official acts for the purpose of immunity for international crimes. If a foreign minister can be prosecuted for the murder of his foreign servant in a fit of rage (a private act) before a foreign court, then it would be preposterous to assert the opposite when he murdered numerous foreign civilians during office (an official act), which is condemned as war crimes, genocide or crimes against humanity.

Moreover, as Judge *ad hoc* van den Wyngaert stressed in the *Arrest Warrant* case,²⁰ some international crimes “can, for practical purposes, only be committed with the means and mechanisms of a State and as part of State policy” and they cannot be anything other than “official acts”. Accordingly, if functional immunity were not to be lifted, prosecution for some international crimes might never, or in any event rarely, be instituted.

So far, I have explained why official capacity, the core of functional immunity, is irrelevant. There remains a technical challenge posed by the ICJ and some scholars:²¹ individual responsibility and immunity are separate concepts embedded in substantive and procedural law respectively, so how come the principle of irrelevance of official capacity could affect procedural law? It is true that immunity lies in procedural law.²² However, for substantive law to be effective there has to be corresponding procedural law. If official capacity could bar criminal proceedings in the first place, then the aforesaid principle which denies official capacity as a substantive defence would hardly make practical sense. It is therefore no surprise that the ILC stressed

[t]he absence of any procedural immunity [...] is an *essential corollary* of the absence of any substantive immunity or defence.²³

3.3. Policy Considerations Behind the Distinction

As mentioned at the outset, State sovereignty and international criminal justice are minted to speak different languages, to different constituencies, and this can lead to conceptual tension.²⁴ To strike a balance between the protection of State sovereignty and the demands of international criminal justice, a distinction should be made

¹⁶ For the full exposition of this view, see *ibid.*, pp. 29–56.

¹⁷ *Attorney General of Israel v. Eichmann*, Judgment of the Supreme Court of Israel of 29 May 1962, in *International Law Review* vol. 36 (1962) (<http://www.legal-tools.org/doc/aceae7/>), pp. 308–309; and *Prosecutor v. Blaškić*, Judgment on the Request of the Republic of Croatia for review of the Decision of Trial Chamber II of 18 July 1997, 29 October 1997, para. 38 (<http://www.legal-tools.org/doc/c5e5ab/>).

¹⁸ Dapo Akande and Sangeeta Shah, “Immunities of State Officials, International Crimes, and Foreign Domestic Courts”, *European Journal of International Law*, vol. 21 no. 4 (2010) 815, p. 840 (<http://www.legal-tools.org/doc/1e66d7/>).

¹⁹ Antonio Cassese, “When May Senior State Officials Be Tried for International Crimes? Some Comments on the Congo v. Belgium Case”, *European Journal of International Law*, vol. 13 no. 4 (2002) 853, p. 866 (<http://www.legal-tools.org/doc/8a503a/>).

²⁰ *Arrest Warrant* case, Dissenting opinion of Judge van den Wyngaert, para. 36 (<http://www.legal-tools.org/doc/3f2ab6/>).

²¹ See *Arrest Warrant* case, Judgment, para. 60; LIU Daqun, *op. cit.*, p. 66.

²² It has been observed that functional immunity is considered by some scholars as a substantive defence, see, for example, Antonio Cassese, *op. cit.*, p. 863. However, I contend that just because functional immunity is a conduct-based immunity does not mean it is a substantive defence. Self-defence is a substantive defence because it aims to negate responsibility, whereas immunity (be it functional or personal) relates to procedural law since it merely serves as a bar to the exercise of jurisdiction. In fact, it is because a conduct-based procedural defence is so closely connected with substantive law that functional immunity is regarded by some as a substantive defence.

²³ *Yearbook of International Law Commission* 1996, vol. II (Part Two), p. 27, para. (6) of the commentary to Article 7 (emphasis added) (<http://www.legal-tools.org/doc/9a950a/>).

²⁴ Morten Bergsmo and LING Yan, “On State Sovereignty and Individual Criminal Responsibility for Core International Crimes in International Law”, in Morten Bergsmo and LING Yan (eds.), *State Sovereignty and International Criminal Law*, *op. cit.*, p. 68 (<http://www.legal-tools.org/doc/a634d0/>).

between functional and personal immunity. For incumbent senior State officials, due to their exceptional importance for the smooth functioning of a State, the protection of sovereignty trumps international criminal justice; for former state officials,²⁵ on the other hand, State sovereignty no longer provides an impenetrable shield that State officials could shelter themselves behind.

3.4. A Short Digression:

Lift of Immunity Equals Presumption of Guilt?

There is an interesting counter-argument, which contends that at the stage of proceedings during which immunity is raised, the allegations made against the State officials are unfounded.²⁶ According to this view, proceeding in the absence of immunity based on allegations of international crimes is presuming guilt.

Plausible as this proposition could appear at first, it fails to capture the essence of the principle of presumption of innocence (which entails that the accused is considered innocent until proved guilty). The onus of proof can only be discharged through criminal proceedings. The aim of the innocence presumption is not to obstruct criminal proceedings, but to ensure that the burden of proof rests on the prosecution. To lift functional immunity, the prosecution has to prove that the suspected official has committed certain core international crimes to such an extent that the requisite evidentiary threshold is met. The removal of functional immunity is therefore not at odds with the presumption of innocence.

4. Conclusions

First of all, functional immunity cannot be raised successfully for core international crimes before national or international courts. Accordingly, Heads of State, or any other State officials for that matter, should be aware of this, as once they leave office, accusations of international crimes could follow.

Second, as to personal immunity, it is safe to conclude that it is available before national courts and unavailable before the ICTY and ICTR. With respect to the

²⁵ Including, for that matter, some lower-rank serving officials who do not enjoy personal immunity.

²⁶ See Dapo Akande and Sangeeta Shah, *op. cit.*, p. 830.

ICC, its States Parties have waived immunity by consenting to Article 27 of ICC Statute; non-States Parties, on the other hand, can still invoke personal immunity.²⁷ Technically, non-States Parties can enter into bilateral agreements with States Parties which, taking advantage of Article 98(2) of ICC Statute, could render the ICC unable to issue co-operation requests to States Parties.

In the longer term, looking towards our common future, it would seem that it will become more difficult to justify any immunity for core international crimes, whether on substantive or technical ground.

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²⁷ If the ICC qualifies as “an organ of the international community”, personal immunity may be lifted as well.