

Is sovereign or diplomatic immunity available to government officials where they are charged with either war crimes, crimes against humanity or genocide? (This has been answered with a close focus on the Rome Statute for an International Criminal Court, the decisions of the House of Lords in the Pinochet Cases and the views of the International Court of Justice in the Congo v Belgian Case)

Introduction

The concept of State and diplomatic immunity flows from customary international law¹ and it is often expressed in the maxim *par in parem non habet jurisdictionem*, or more simply, that no State can claim jurisdiction over another. These immunities exist in order to promote stable relations between States and they are based on the notion that States will be able to conduct peaceful and passive diplomacy when they are in force. The establishment of diplomatic relations between nations takes place by their mutual consent – as stipulated in Article 2 of the *Vienna Convention on Diplomatic Relations 1961*. It is through this mutual consent that agents of one State may enter the territory of another State and act in their official capacity. The privileges bestowed upon a diplomatic agent sent to a receiving State are such that the agent has exclusive power of the territorial sovereign to regulate and to enforce decisions of its organs while ensuring they respect the territory and the population of the receiving State. It is acknowledged that these privileges are limited to the rights bestowed by the receiving State, such that the receiving State can use reasonable force when ensuring that the activities being conducted by diplomatic agents are not in excess of the licence being conferred to them, or that their actions are in breach of international law.

This paper seeks to explore whether sovereign or diplomatic immunity is available to government officials when they commit and are charged with the most serious crimes of concern to the international community as a whole. It will seek to review the effectiveness of the *Rome Statute for an International Criminal Court*, and review the most prominent criminal cases involving defense plea's which rely on State or diplomatic immunity. Finally, it will seek to consider the effectiveness of whether certain categories of individuals are exempt from prosecution in both national and international jurisdictions.

State Immunity & International Crimes

There are several justifications which exist for State immunity. The most prominent is the doctrine of restrictive immunity of foreign States which exempts foreign States from jurisdictional prosecution in another States national court. Inherent in this doctrine is also the presumption that States should not interfere with any public acts of foreign sovereign States and nor should they intervene in the conduct of foreign policy out of respect of the States sovereign equality.² This is consistent with the decision in *Underhill v Hernandez*³ case where the US Supreme Court stated that 'every sovereign State is bound to respect the independence of every other sovereign State, and the courts of one country cannot sit in judgement on acts of the government of another done within its own territory'. A similar

¹ *Report of the International Law Commission on the work of its thirty-second session*, UN GAOR, 35th Sess, Supp. No. 10, UN Doc. A/35/10 (1980) at 344.

² It is also noted that States judiciaries should not interfere with commentary on foreign policy of other States primarily due to the separation of powers doctrine. This ensures that States can discuss foreign policy through correct diplomatic channels.

³ *Underhill v. Hernandez*, 168 U.S. 250 (1897).

decision was also upheld in the UK Court of Appeal during *The Parlement belge*⁴ case, where it was stated that ‘every sovereign State is to respect the independence and dignity of every other sovereign State, each and every one must decline to exercise by means of its court any of its territorial jurisdiction over the person of any sovereign or ambassador of any other State’.

It is noted that the current leading authority on State immunity in respect of criminal acts tried under civil proceedings against a State is *Al-Adsani v. UK*.⁵ In this case, a joint British and Kuwait citizen was abducted and tortured while serving in the Kuwait military. When he returned to the United Kingdom he attempted to sue the government of Kuwait for acts of torture against him. On appeal to the European Court of Human Rights, the Court dismissed the claim stating that

‘[t]he present concerns not, as in the *Furuundzija* and *Pincohet* decision, the criminal liability of an individual for alleged acts of torture, but the immunity of a State in a civil suit for damages in respect of acts of torture within the territory of the State...the Court is unable to discern with the materials available before it any firm basis for concluding that a State no longer enjoys immunity in the courts of another State where torture is alleged.’⁶

Another ruling consistent with this notion was in *Kalogeropoulou and others v. Greece and Germany*⁷, where the European Court held that civil suits brought against a State for crimes against humanity which were perpetrated in a territory other than that of the forum State, may not be upheld because such crimes are covered by State immunity. Thus, it is apparent that there is currently no consistent State or international statutory or common law rulings which suggest that State immunity must comply with the norms of *jus cogens* – particularly in instances involving serious crimes.

Diplomatic Immunity & International Crimes

Diplomatic immunity is predominately defined within the statutory pretences of the *Vienna Convention on Diplomatic Relations 1961*. The right to immunity by State officials in the international system is a rational consequence of the right by which a State can claim immunity from the jurisdiction of a foreign State. Thus, it follows that State officials performing in their official capacity are exempt from foreign law when the acts and transactions being carried out are directly correlated to their official function. As suggested in the ICTY Appeals Chamber during the *Blaskic (subpoena)*⁸ case, State officials ‘cannot suffer the consequence of wrongful acts which are not attributable to them personally but to the State on whose behalf they Act’⁹ - so called by the Court ‘functional immunities’ - which draw more weight than personal immunities¹⁰. However, as was illustrated in the *Rainbow*

⁴ *The Parlement belge* (1879) 4 P.D. 129.

⁵ *Al-Adsani v UK*, ECHR, 21st November 2001.

⁶ *Ibid* at 61.

⁷ Eur. Court H.R., *Kalogeropoulou and others v. Greece and Germany*, 12 December 2002, NJW 273, 275 (2004).

⁸ *Blaskic (subpoena)* (ICTY, *Judicial Reports*, 1996).

⁹ *Ibid* at Para 38.

¹⁰ It is noted that functional immunities stem from the official capacity of a diplomatic agent in a foreign State. This is in juxtaposition to personal immunities which are intended to merely shelter the foreign official from any interference while acting in their official capacity.

Warrior case¹¹ - if an action performed by a diplomatic agent in a functional capacity is a serious crime, and the act is consequently in breach of both the receiving States national laws and public international law – then the diplomatic agent can be held personally liable for the action regardless of whether they were ordered to do so by their sovereign.¹²

Consequently, while Article 31 of the *Vienna Convention on Diplomatic Relations 1961* is expressly definitive in its protection of diplomatic agents from criminal prosecution such that the Convention provides ‘a diplomatic agent shall enjoy immunity from the criminal jurisdiction of the receiving State’ – the Courts have been more than willing prosecute agents when they commit serious criminal atrocities. This is consistent with the decision of the ICTY Appeals Chamber in the *Blaskic (subpoena)*¹³ case, where the Court held that there can be exceptions to a State official’s immunity such that

‘the norms of international criminal law prohibiting war crimes, crimes against humanity and genocide. Under these norms, those responsible for such crimes cannot invoke immunity from national or international jurisdiction even if they perpetrated such crimes while acting in their official capacity.’¹⁴

Thus, it is evident that while personal immunities do attempt to shield State officials from prosecution of international crimes while they are in an office – they cease immediately from the moment the agent leaves their official post, or from the jurisdictional confinements of the receiving State in accordance with Article 39.2 of the *Vienna Convention on Diplomatic Relations 1961*. Furthermore, common law has clearly indicated that State officials may be prosecuted for any international crimes they may have allegedly perpetrated while in office or before. This is consistent with the ruling in the *Pinochet*¹⁵ case where the House of Lords was required to consider whether it had jurisdiction to extradite Pinochet, and determine whether he was entitled to hold immunity as a former Head of State. The majority concluded that serious international crimes such as torture, hostage-taking and other comparable crimes limit the functional immunity of a head of state and consequently circumscribe the acts to which immunity is attached.

The majority agreed with Lord Nicholls who concluded that

‘[T]he exercise of extraterritorial jurisdiction overrides the principle that one State will not intervene in the internal affairs of another An international crime is as offensive, if not more offensive to the international community when committed under color of office. Once extraterritorial jurisdiction is established, it makes no sense to exclude from it acts done in an official capacity.’¹⁶

¹¹ *Rainbow Warrior Case*, Ruling of the UN Secretary-General, 6th July 1986, in RIAA, XIX, 197-221.

¹² Equivalently, diplomatic agents can also be held personally liable if they are permanent residences of a receiving state pursuant to Article 38.1 of the *Vienna Convention on Diplomatic Relations 1961*.

¹³ *Ibid* 24.

¹⁴ *Ibid* 24at 41. It is also noted that this proposition was most recently upheld in the *Ferrini v. Repubblica Federale di Germania* (Italy, Court of Cassation, Plenary session, 11 March 2004, 87 RDI at 540-51) case where the Court made specific references to the differences between functional and personal immunities.

¹⁵ *R v. Bow Street Stipendiary Magistrate and others*, ex parte Pinochet Ugarte, United Kingdom, House of Lords, 24 March 1999 in [1999] 2 All ER 97-192.

¹⁶ *R v. Bow Street Stipendiary Magistrate and others*, ex parte Pinochet Ugarte, United Kingdom, House of Lords, 24 March 1999 in [1999] 2 All ER at 924 (Lord Phillips).

In dissent, Lord Goff primarily focused the contention that a Head of States immunity must be expressly waived.¹⁷ He concluded that

‘[p]reservation of state immunity is a matter of particular importance to powerful countries whose Heads of State perform an executive role, and who may therefore be regard as possible targets by states which politically target their actions while in office’.

Lord Goff’s decision was similar in nature to the ruling in the *The Arrest Warrant*¹⁸ case where the International Court of Justice held that only serious criminal acts of State officials in a private capacity can circumvent the immunity provided under Article 31 of the *Vienna Convention on Diplomatic Relations 1961*. The case concerned the issue of an international warrant by a Belgian magistrate for the arrest of the presently serving Congolese Foreign Minister for his alleged involvement in Crimes against Humanity and severe breaches of the Geneva Convention. The International Court of Justice upheld Congo’s defense that the arrest warrant was a violation of the Ministers immunity from criminal jurisdiction, and was also in violation of the personal inviolability which incumbent Foreign Minister’s enjoy under international law.

The Court based its decision on the functional immunity that is required for a Foreign Minister to adequate perform his duties, and ruled that only acts conducted in a private capacity would circumvent the Ministers immunity after leaving office. It is apparent that the decision by the International Court of Justice in this case was entirely contradictory – since it is nearly impossible to perform criminal acts of a grave and serious ‘in a private capacity’. Furthermore, the Court did not specify or provide any guidance in respect of how far reaching its decision could be extended to other Ministers or officials.

Rome Statute for an International Criminal Court

The International Criminal Court was created to have jurisdiction over only ‘the most serious crimes of concern to the international community as a whole’¹⁹, which are crimes that include genocide, crimes against humanity, war crimes and the crime of aggression. According to Article 12(2) of the Statute, the Court can only exercise jurisdiction in cases where a State has become party to the Statute and the crime has been committed on the territory of that State. This infers that the Court can still exercise jurisdiction over nationals of other States who are not signatories to the Statute, but have committed a crime on the territory of a State that has ratified that Statute. Currently, more than 40 countries have not ratified the Statute primarily originating from Asia and Africa as well as 3 members of the Security Council including China, Russia and the United States which considerably weakens the Statutes effectiveness. The primary reasons for rejection of the Statute by these countries has been the universal jurisdiction and responsibility that the Statute would place over a State’s international forces allowing them to be a potential target for political heresy, the fact that the Statute considerably weakens the fundamental role of the Security Council and broad definition of serious crimes under the Statue.²⁰ Additionally, there has been contention about

¹⁷ Ibid at 856-57.

¹⁸ *The Arrest Warrant (Democratic Republic of Congo v. Belgium)*, ICJ, 14th February 2000.

¹⁹ As stated in Article 5(1) of the *Rome Statute of the International Criminal Court 2002*.

²⁰ Parties to the Rome Statute of the ICC,

http://en.wikipedia.org/wiki/States_Parties_to_the_Rome_Statute_of_the_International_Criminal_Court,
Viewed 3rd June 2008.

a critical element of the Statute being that its jurisdictional power can only ever be complementary to that of a State's territorial based justice system – although this is consistent with the concept of State sovereignty.

Article 27.1 of the Statute is clear in its directive by providing that the 'Statute shall apply equally to all persons without any distinction based on official capacity and shall in no case exempt a person from criminal responsibility under this Statute or constitute a ground for reduction of sentence'. Furthermore, Article 27.2 removes all relevant immunities '[w]hich may attach to the official capacity of a person and shall not bar the Court from exercising its jurisdiction over such a person'. This is the first clear and unambiguous statutory provision documented in international criminal law which definitively strips diplomatic immunity from any level of State hierarchy for the commission or execution of serious crimes.²¹

Conclusion

It is evident that there are clear and obvious disparities between the relevant immunities available to States and their respective agents. There is a transparent inequality between the willingness of the international community to prosecute State agents for serious criminal crimes while equivalently adopting a contradictory view which does not allow individual sovereign States to be held accountable to the norms of *jus cogens* for similar actions. While the Rome Statute is effective in its underpinning notion of dealing with personal criminal responsibility, its current restrictive downfall is its inability to compel most of the international community to ratify it – particularly in countries where the most serious crimes are prevalent – making it less effective. However, there is no doubt that international criminal law is becoming increasingly prevalent in the international legal system as more States accept that serious criminal actions can no longer be tolerated in modern society. While most States do accept that there is a need to more effectively respond to atrocities committed by States and their agents through the removal of the protective veil of Sovereign and diplomatic immunity - the challenge for the international community is to ratify a Statute which can be agreed upon by all States, and one which holds both States and their agents accountable for serious crimes.

²¹ It is further noted that Article 28 of the Rome Statute also extends upon this provision and defines the specific responsibilities of commanders and superiors.