Affidavit on

The Immunities of Foreign State Officials Suspected of International Crimes

Outline

1. The general principle of 'functional' immunity of foreign state officials

2. The exception of international crimes

3. The protection of some specific classes of senior foreign state officials (Heads of State and government, and ministers of foreign affairs) as well as diplomatic agents through the granting of '*personal immunity*'.

4. The position of other state officials: (i) general

5. (ii) May other state officials rely upon personal immunities when on official duties abroad?

6.(iii) May bilateral agreements grant personal immunities to other state officials when on private business abroad?

7. The position of senior state officials on private business in Germany: Section 20 of the *Gerichtsverfahrensgesetz*

8. The EU Council Common Position 2005/792/CFSP

9. The possible legal consequences of the granting of a visa on humanitarian grounds

10. Summing-up

---

1. The general principle of 'functional' immunity of foreign state officials.

A well established principle of international law provides that foreign *state officials* are to be granted *immunity from jurisdiction* for acts they have performed in the exercise of their official functions.[1] The traditional idea is that those acts are performed by the State through the state official and, therefore, cannot be attributed to the state official in his or her personal capacity. The acts shall

[1] This rule was enunciated in the famous McLeod incident between the USA and the UK. As the British Law Officers put it in 1854 "The principle of international law that an individual doing a hostile act authorized and ratified by the government of which he is a Member cannot be held individually answerable as a private trespasser or malefactor, but that the Act becomes one for which the State to which he belongs is in such a case alone responsible, is a principle too well established to be now controversial" in *British and Foreign Papers* vol. 29 at 1139, as well as Lord McNair, *Law Officers Opinions ii* (Cambridge, Cambridge University Press, 1956), p. 230. Subsequently many courts have consistently held that state representatives acting in their official capacity enjoy immunity from foreign jurisdiction, see e.g. *Danzig custom officials* (Danzig Supreme Court 1932). For further details see A. Cassese, International Law (Oxford: Oxford University Press, 2005) pp. 111-112.

be attributed to the State, which alone bears responsibility under international law. This form of immunity is called 'functional' or *ratione materiae* (or organic) immunity.[2]

As the ICTY Appeals Chamber put it in *Blaškić* (*subpoena*), "[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".[3] This principle, which enjoys undisputed recognition in the legal literature,[4] as well as in national case law, was also upheld by the German Supreme Court (*Bundesgerichtshof*) in the *Scotland Yard* case.[5]

2. The exception of international crimes.

Despite the general principle that state agents are not accountable before foreign courts for their official acts, it is also well known – at least since the Nuremberg trial in 1945 – that under international law *functional immunity does not apply to international crimes*. In other words, when the acts of a state official can be characterized as international crimes (i.e. war crimes, crimes against humanity, genocide, torture, aggression) they cannot be merely attributed to the State. Whether or not those acts were performed beyond the bounds of the relevant national law, both the State and the state official in his personal capacity bear responsibility. The State as such incurs *state responsibility* for the acts (crimes) performed, while the state official incurs *personal criminal liability* for those acts, and has no right to claim 'functional' (or *ratione materiae*) immunity before foreign courts.[6]

This rule was stated in Article 7 of the London Agreement of 8 August 1945 (setting forth the Statute of the International Military Tribunal, also known as the Nuremberg Tribunal) which provided that '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'. Subsequently, the rule has clearly acquired the status of customary law. In particular, the affirmation by the General Assembly of the United Nations of the Nuremberg

---

[2] G. Dahm, *Völkerrecht* I (Stuttgart: W. Kohlhammer Verlag, 1958) at 225, 237, 303-5, 338-9, as well as A. Verdross and B. Simma, *Universelles Völkerrecht* 3rd edn. (Berlin: Duncker und Humblot, 1984) at 773-4.

[3] ICTY Appeals Chamber Blaskic (IT-95-14-AR108) at § 38.

[4] See for instance G. Morelli, *Nozioni di diritto internazionale* 7th edn. (Padova: Cedam, 1967), pp. 215-6; C. Wickremasinghe, "Immunities Enjoyed by Officials of States and International Organization", in M.D.Evans (ed.), *International Law* (Oxford: Oxford University Press, 2003), pp.388-391,403-404; A. Cassese, *International Law*, 2nd ed. (Oxford: Oxford University Press, 2005), pp.110-113.

[5] The Supreme Court hold that the Director of Scotland Yard was not amenable to German civil jurisdiction for he had acted as a State agent, in judgment 26 September 1978 in 32 *Neue Juristische Wochenschrift* (1979) at 1101-2. See also the cases referred to by M. Bothe 'Die strafechliche Immunität fremder Staatsorgane' in 31 *Zeitschrift Auslandiches und Öffentliches Recht Völk* (1971) at 246.

[6] Moreover, there is an increasing tendency to affirm that even States do not enjoy immunity for massive human rights violations. See the recent decision of the Italian Court of Cassation in *Ferrini v. Repubblica Federale di Germania*, 11 March 2004, no. 5044, in 87 *Rivista di diritto internazionale* (2004), pp.540-551.

Principles,[7] the adoption of the Statutes of the ICTY and ICTR,[8] as well as the ICC Statute[9] testify to the existence of the rule. Moreover, national courts have repeatedly upheld the rule as part of international customary law: many cases brought before national courts against foreign state agents charged with war crimes or crimes against humanity prove that functional immunity does not apply to international crimes.[10] The same opinion has also been set out or broadly echoed in the legal literature.[11]

3. The protection of some specific classes of senior foreign state officials (Heads of State and government, and ministers of foreign affairs) as well as diplomatic agents through the granting of '*personal immunity*'.

Under current international law some specific categories of foreign state officials may enjoy a different form of immunity from jurisdiction, covering their *private* acts. This immunity is however granted only during their term of office. This applies to incumbent Heads of State and heads of government as well as to ministers of foreign affairs, besides diplomatic agents.[12] The rationale for recognizing such protection is that these organs represent their State in international relations[13]; they would be seriously impaired in the exercise of their official function by proceedings opened before foreign courts. As the International Court of Justice stated in the *Arrest Warrant* case (§53), the immunities in question are afforded to prevent any prejudice to the 'effective performance' of their functions by the aforementioned classes of state officials.

This protection applies both when those state officials are abroad on official mission and when they are abroad for merely personal reasons (e.g. to visit a friend or a relative, or to be medically treated, or simply to visit a foreign country as a tourist).

However, the immunity ceases when the term of office expires. At that stage the *former* head of state or government, minister of foreign affairs or diplomat can then be prosecuted abroad "when the acts alleged constitute a crime under international law"[14] as well as for such serious crimes as murder, perpetrated in the foreign state.

---

[7] UN GA Resolution 95 (1) of 11 December 1946.
[8] Article 7.2 ICTY St. and Article 6.2 ICTR St. and Article 6.2 Special Court for Sierra Leone.
[9] Article 27 ICC Statute.
[10] See, for example, *Attorney-General* v. *Adolf Eichmann,* Supreme Court of Israel, 29 May 1962, in 36 *International Law Reports*, the various judgments in the *Barbie* case in France in 78 *International Law Reports* and 100 *International Law Reports*, the Amsterdam Court of Appeal in *Bouterse*, 20 November 2000, in English at www.icj.org/objectives/decision.htm (in Dutch at www.rechtspraak.nl).
[11] See, for example, A. Cassese, *International Criminal Law* (Oxford, Oxford University Press, 2003) 268-270.
[12] On the unique position under international law of Heads of State, heads of government and ministers of foreign affairs see Sir A. Watts, 'The legal position in international law of heads of states, heads of governments and foreign ministers' in 247 Hague Recueil (1994-III), pp. 9-130.
[13] See e.g. Article 7 of the Vienna Convention on the Law of the Treaties (1969).
[14] See e.g. Article 13 of the Resolution of the *Institut de droit international*.

4. The position of other state officials: (i) general

The rule granting personal immunity to some specific classes of high-level state officials as well as diplomatic agents *only applies* to those categories of state agents. This proposition is supported by state practice and case law, which only refer to the granting of immunity from (civil and criminal) jurisdiction to those specific classes of state officials. To the best of my knowledge, there is no practice or case law relating to, or asserting, the personal immunities of other categories of senior state officials under general international law.

That international customary law thus takes a restrictive attitude to personal immunities, is borne out by two important facts. First of all, as stated above personal immunity operates only for the duration of the official function; the state official remains criminally responsible for the international crimes he may have committed, but international law bars prosecution as long as he or she is in office. However, he or she may eventually be tried when his or her term of office comes to an end. Secondly, as the ICJ held in the *Arrest warrant* case, personal immunities do not apply in cases where an international tribunal has been established and is duly authorized to exercise jurisdiction in respect of these high-level state officials, even while they are in office (§ 61).

Considering that the rationale of the rule is to protect state officials who, for the *specificity of their duties*, travel abroad and *represent* their State in international relations, this is the only legitimate ground for extending this privilege to other state officials. The rationale of the rule clarifies that personal immunities are linked to the specific function of representing the State in international relations and may not be granted to other high level officials who do not exercise such a role.[15]

5. (ii) May other state officials rely upon personal immunities when on official duties abroad?

The question arises of whether other members of cabinet (e.g. the minister of Defence, the minister of interior, or the minister of justice) as well as the presidents of Parliament or of Constitutional Courts are entitled to *personal immunity* when they are abroad on *official mission.*

Although there seems to be no state practice or case law supporting one view or the other, it can be argued that under general principles of international law these state officials, when *on an official mission* on behalf of their country, may *enjoy personal immunity* in relation to the travel and for the duration of the official mission. This proposition is warranted by the fact that here one

[15] In this respect it may be worth noting that although Yerodia Ndombassi was entitled to personal immunity as a minister of foreign affairs when the arrest warrant was issued, he had meanwhile become minister of education and had lost any right to further invoke personal immunity.

should apply to the state officials under discussion the *same rationale* behind the customary rules protecting (although in more general terms) the aforementioned specific categories of senior state officials and diplomats. Indeed, also for a defence minister, minister of interior etc on an official mission abroad there is a need to be protected by immunity from jurisdiction for their private acts, so that no direct or indirect hindrance is put to the effective discharge of their mission abroad. It follows that if, for instance, a defence minister travels to a foreign country to accomplish there an official mission relating to his functions, he must enjoy there immunity from (civil and criminal) jurisdiction for private acts (his official acts being covered by functional immunity) as well as personal inviolability, as long as he exercises his functions there. For example, if one of the aforementioned senior official travels to a foreign country to attend a bilateral meeting of ministers, say of interior, or to New York to represent his or her State at a conference organized by the United Nations, or travels to Brussels to meet with NATO or EU officials and so on, arguably he or she is entitled to personal immunity for the purpose of acting undisturbed in the performance of his or her official mission.

6.(iii) May bilateral agreements grant personal immunities to other state officials when on private business abroad?

A further question arises. May a State, on the strength of an *ad hoc* bilateral agreement, grant personal immunity to a foreign senior official (other than head of state or government, foreign minister or diplomat) even if this foreign official travels *on private business*, or as a tourist or on any other personal and private ground?

The answer can be in the affirmative, subject to some strict conditions. First, to be binding upon national courts of the host state, the granting of personal immunity must be *express*, that is not implicit or implied. This is because this bilateral agreement would deviate from customary international law, which would otherwise be binding upon those courts.

Secondly, the agreement could not apply to cases where the foreign senior official is accused of such international crimes as war crimes, crimes against humanity, genocide or torture. These crimes are provided for in international norms that have acquired the status of *jus cogens*; it follows that a state is not allowed to enter into a bilateral agreement allowing it to refrain from prosecuting the alleged perpetrator of any such crime.

Thirdly, if the state is party to an international multilateral treaty imposing the obligation to prosecute authors of crimes envisaged in the treaty, the bilateral agreement would be contrary to that multilateral treaty. Thus, for instance, if State A is party to the 1984 Convention against Torture, it may not make an ad hoc bilateral agreement with State B providing that a state official of

State B accused of torture may reside or sojourn on private grounds in its territory without being prosecuted. The fact that the Convention against Torture does not contain specific provisions on immunities is itself highly significant. Torture is characterized under the Convention as a crime necessarily implying the responsibility of a state official; it must therefore be inferred that it would be illogical to think that state officials may enjoy immunity. The Convention aims at the prosecution and punishment of state officials responsible for acts of torture. It imposes an obligation on all Member States to bring to justice alleged perpetrators of torture, irrespective of their nationality, the nationality of the victims and the place where the crime was committed. Superior orders or public authority cannot justify torture. It is only logical to consider that it is implied in the Convention that both functional and personal immunities must be lifted, at least, in the relationships as between *contracting States*.[16]

Fourthly, let us consider the case of a State passing a law that provides for the prosecution and punishment of any person (national or foreigner) accused of international crimes, who happens to be on its territory. In such case the making of the aforementioned bilateral (formal or informal) agreement would be inconsistent with that law, if the foreign official does not belong to the categories of head of state or government, foreign minister or diplomat, nor is on the territory on official mission.

7. The position of foreign senior state officials on private business in Germany: Section 20 of the *Gerichtsverfahrensgesetz*

The relevant German laws would seem to echo international rules insofar as immunity is concerned. In particular, Section 20 of the procedural law for German courts (*Gerichtsverfahrensgesetz*) provides, on the one hand, that immunities under international law bar German courts from exercising jurisdiction (paragraph 2), and, on the other, that "[the] German judiciary is not competent to exercise jurisdiction over representatives of other states ... whose presence within the jurisdiction of this code is due to an *official invitation of Germany*." (paragraph 1).

The second paragraph of this provision does not pose any particular problem, since it refers to the international rules discussed above. The first paragraph of Section 20 may instead give rise to a problematic debate which should be addressed.

It seems logical and appropriate to interpret this provision against the background of, and in keeping with, international law and practice, the more so because a general principle of interpretation applicable in all states including Germany prescribes that, in case of doubt, national laws must be so construed as to be consistent with international rules. The expression "an official

[16] Both Germany and Uzbekistan are parties to the 1984 Convention against Torture,

invitation of Germany" should be considered as referring to those cases where the representatives of another state are invited to Germany for the purpose of a visit somehow linked to their official functions. In this respect, the rationale of immunities under general international law suggests that any official invitation must be linked to some sort of activity other than purely private matters.

The granting of a visa for humanitarian reasons, e.g. to receive medical treatment, cannot amount to an official invitation. This is indirectly confirmed by the *Pinochet* case. In any event, the fact of admitting a person on the territory of a State (through a visa) cannot be equated with admission pursuant to an official invitation.

8. **The EU Council Common Position 2005/792/CFSP**

In the instant case, the above interpretation seems to be confirmed in the light of the Common Position of the EU concerning restrictive measures against Uzbekistan, adopted by the EU Council on 14 November 2005.

The Council "decided to implement restrictions on the admission to the European Union aimed at those individuals who are directly responsible for the indiscriminate and disproportionate use of force" in specific incidents that occurred in Uzbekistan, and who are obstructing an independent inquiry into these matters (para. 6). Among these individuals, listed in Annex II, one can find the minister of interior, Zakjrian Almatov. Article 3.1 of the Common Position provides that "Member States shall take the necessary measures to prevent the entry into, or transit through, their territories of those individuals listed in Annex II. Paragraph 3 of the same article clarifies that the above mentioned obligation

> "shall be without prejudice to cases where a Member State is bound by an obligation of international law, namely: (i) as host country of an international intergovernmental organization; (ii) as host country to an international conference convened by, or under the auspices of, the United Nations; or (iii) under a multilateral agreement conferring privileges and immunities; or (iv) under the 1929 Treaty of Conciliation (Lateran Pact) concluded by the Holy See (State of the Vatican City) and Italy."

It is subsequently required that when a State grants an exemption pursuant to paragraph 3, the Council must be duly informed. The provision on the granting of exemptions referred to in paragraph 3 of Article 3 of the Council's Common Position clearly reflects general international law.

Some uncertainty could arise with regard to Article 3.6 which states that

> "Member States may grant exemptions from the measures imposed in paragraph 1 when travel is justified on the grounds of urgent humanitarian need or on grounds of attending intergovernmental meetings, including those promoted by the EU, where a political dialogue

is conducted that directly promotes democracy, human rights and the rule of law in Uzbekistan".

In this context a distinction should be drawn between the first class of cases (humanitarian reasons) and the second category (intergovernmental meeting). In the latter case, the reason for derogating from the ban on admission is that one of the individuals listed in Annex II must attend an official meeting. Here, an official invitation (by the state or by an international body) to take part in intergovernmental talks is the justification for granting the exemption. The other ground (humanitarian needs) does not logically presuppose an official invitation *by the relevant state:* it will be for the foreign state to which the senior official belongs, or for such state official himself, to request admission of the official to the territory of the relevant state, and the latter may or may not grant this request.

9.The possible legal consequences of the granting of a visa on humanitarian grounds

As I have just pointed out, under the aforementioned Article 3 paras 1 and 6, one of the individuals listed in Annex may II enter the territory of a Member State of the EU "on the grounds of urgent humanitarian need". Clearly, the provision at issue only stipulates that a state may allow one of the foreign state officials listed in Annex II to exceptionally enter its territory, thereby derogating from the ban laid down in Art. 3 para1. The provision does not go beyond that. It simply allows entry. It does not specify what treatment the host state must or may accord to the foreign state official. The authority of the host state with regard to the foreign state official remains intact, and must be exercised in accordance with the obligations incumbent upon it under international law, as well as in keeping with the state's domestic legislation.

Nevertheless, one might take Article 3 para 6 to imply that the State, in addition to exceptionally allowing the foreign state official to enter its territory, should also refrain from prosecuting the person on the grounds on which Article 3 para 1 had instead excluded entry, namely for being "directly responsible for the indiscriminate and disproportionate use of force in Andijan and the obstruction of an independent inquiry". In other words, the host state might consider it necessary to derive from its granting of an entry visa an *implicit waiver* of its right and duty to initiate criminal proceedings for those offences; the individual in question would thus not be amenable to prosecution in the host State *for those offences*.

Even if this assumption were correct, *quod non*, the fact remains that that person may nevertheless be prosecuted in the host State (Germany) *for other crimes* amounting to crimes against humanity (for instance, torture) or for torture as a discrete international crime.

The granting of immunity from prosecution, especially when allegations of international crimes are concerned, is not dependent on the mere discretion of governments, which must act within the boundaries determined by applicable law. First, Germany is under an obligation deriving from international conventions (namely under Articles 5 and 7 of the Torture Convention and the Preamble of the ICC Statute), as well as international customary law, to prosecute, or to cooperate in bringing to justice, the alleged perpetrators of some of the most egregious violations of international law. Secondly, it would be hard to maintain that the Federal Government could grant immunity from jurisdiction to a foreign state official for humanitarian reasons alone. Humanitarian reasons may only justify the adoption of specific safeguards in the course of the proceedings (e.g. during the proceedings the accused ought to be allowed to receive all necessary and appropriate medical treatment; no pre-trial detention in prison should be applied; in case of conviction the penalty should be executed in a safe-house or hospital, not in a prison).

It would seem totally inappropriate to grant 'personal immunity', which traditionally finds its rationale in the principle *ne impediatur legatio* (that is, the need for the state official to represent his state untrammeled by any restriction), to a state official who *is not entitled* to such a protection under international law (because he does not represent his state). This would also be extremely dangerous since, should this interpretation be deemed correct, *any State could make arrangements to extend the boundaries of immunity* beyond what provided for by international law. Any state would thus be allowed to shield suspected authors of international crimes from prosecution, thereby granting them full *impunity*.

10. Summing up

It may be useful to summarize the main legal propositions set forth above:

a) **as all foreign state officials, the minister of interior of a country is entitled abroad to functional or *ratione materiae* immunity for his official acts;**
b) **functional immunity, however, does not apply to international crimes, which entail both the responsibility of the State and the individual criminal liability of the state official concerned;**
c) **a minister of interior, when abroad, does not enjoy any *personal* immunities (in particular, immunity from criminal jurisdiction for both official and private acts) under general international law;**
d) **nonetheless, under specific circumstances he may be granted personal immunities, e.g. when on an official mission abroad, during which he represents his own State;**

e) national law may, to a certain extent, broaden personal immunities of foreign officials; however, especially when possible prosecution for international crimes is at stake, the granting of immunities not provided for by international law are subject to stringent conditions: (a) immunity must be granted explicitly (it cannot be inferred or considered to be implicit in the admission of the state official to the territory of the *forum* State), (b) it must be linked to some sort of official reason; (c) it must not lead to impunity for international crimes; (d) it must be limited in time.

f) The German law providing for personal immunities of foreign officials entering German territory *on official invitation* (Section 20 of the *Gerichtsverfahrensgesetz*) must be construed in light of and in keeping with the general principles and rules of international law. It follows that this German provision must be taken to mean that a foreign official in Germany enjoys personal immunities as long as he has entered German territory on an invitation to attend bilateral or multilateral meetings, or to attend an official ceremony, or on similar official grounds. Any foreign official who enters Germany on private grounds does not enjoy any personal immunity under Section 20 of the *Gerichtsverfahrensgesetz*.

(g) The granting of an entry visa on humanitarian grounds to a foreign state official, following the decision of the EU Council to exempt that official from the restrictions imposed on the strength of Art. 3(1) of the Council Common Position 2005/792/CFSP, does not entail that that foreign state official is immune from prosecution for alleged crimes against humanity or torture. The exemption in question only implies that humanitarian grounds justify a derogation from the ban on entry or transit through a state territory. The foreign state official may stay on the territory of a member state of the EU. If however he is accused of international crimes, no legal hurdle exists to his being prosecuted for those crimes.

h) The granting of an exemption to the EU ban on visas does not amount to an official invitation under German law, but it is logically and legally distinct from such an official invitation.

Antonio Cassese

Professor of international law, University of Florence (Italy), member of the *Institut de droit international*, former Judge and President of the International Criminal Tribunal for the former Yugoslavia (1993-2000), former Chairman of the UN Commission of Inquiry on Darfur (2004-2005)

Florence, 15 December 2005