WHICH IMMUNITY FOR HUMAN RIGHTS ATROCITIES?

Jo Stigen

1. Introduction

States must increasingly accept more interference in their sovereignty in order to ensure fundamental human rights. Some of these interferences shall ensure that those most responsible behind massive atrocities will be prosecuted. The development of universal jurisdiction and the establishment of international criminal courts have created a potential of which no one yet knows the full extent. Attempts to prosecute state representatives suspected of human rights atrocities are no longer rare. This makes the question of immunity before national and international criminal courts more relevant than ever.

With the last decade’s focus on human rights, one would think that immunity for international crimes was no longer accepted. This article will paint a more nuanced picture. Great uncertainty about the legal situation, and a lack of treaty regulation, tempts states and interest groups to challenge the limits of international law. Thus states and international courts are forced to formulate views on the extent of immunity rules. International courts, including the International Court of Justice (ICJ) and the European Court of Human Rights (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. One thing, however, seems clear; 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 criticised from both sides.


2 See Democratic Republic of the Congo v. Belgium (the Arrest Warrant case), ICJ Reports 2002, p. 3; Al-Adsani v. United Kingdom (the Al-Adsani case), ECtHR 2001, 34 EHRR, p. 273 (concerning state immunity and with indirect relevance for state representatives’ functional immunity).
I have two purposes with this article. The first one is to counter a broadly-held misunderstanding. An international criminal court cannot, as many claim, automatically disregard the immunity rules of international law. Because immunity, as a point of departure, also applies to an international criminal court, the particular court’s statute must be interpreted in order to decide whether immunity is repealed in a valid way vis-à-vis the concerned state.

My other purpose is to criticise the technique which legal theorists as well as national and international courts, including the ICJ, suggest voids the immunity for former state representatives suspected of international crimes before a foreign state’s courts. To call such crimes private acts, as opposed to official acts of a state, is an unfortunate approach. At best, it is misleading. In the worst case, it can undermine international law’s regulations on state responsibility.

I will first briefly explain immunity’s main principles and legal sources (section 2) and cast light on the lex ferenda considerations (section 3). Thereafter, I discuss immunity before international and hybrid criminal courts (section 4) and before foreign states’ courts (section 5). After this, I consider how immunity for former state representatives suspected of international crimes most appropriately can be avoided (section 6). Finally, I formulate a conclusion and some thoughts on further development (section 7).

2. Immunity’s main principles and legal sources

2.1. The main principles

In general, a criminal court will treat questions concerning immunity after it has determined that it has jurisdiction, but before it takes a stance on the question of guilt. Immunity is a procedural hurdle for prosecution and has nothing to do with the issue of criminal responsibility as such. The legal effect is dismissal and not acquittal.

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3 The question concerning jurisdiction is also procedural, but must be treated before the question of immunity. The term ‘immunity’ is in fact a shortened form for ‘immunity from jurisdiction.’ In the Arrest Warrant case, the ICJ noted that ‘it is only where a State has jurisdiction under international law in relation to a particular matter that there can be any question of immunities in regard to the exercise of that jurisdiction,’ see supra note 2, p. 20, para. 46.

4 Higgins, Kooijmans and Buergenthal pronounced in the Arrest Warrant case, supra note 2, that ‘immunity is never substantive and thus cannot exculpate the offender