CHAPTER 15

Immunity of State Officials and the Obligation to Prosecute

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1 Introduction

Despite its hardly surprising outcome, the Germany v. Italy judgment of the International Court of Justice\(^1\) has been felt by many human rights activists as an astonishing and worrying setback. It is feared that it not only shuts the door to many civil claims instituted abroad against states in relation to past or on-going atrocities, but also that it will prevent any criminal proceedings directed at foreign state officials involved in such crimes. In light of such fear, this chapter intends to revisit the interplay between international criminal law and sovereign immunity from the perspective of the obligation to prosecute.

After summing up the *lex lata* on the *ratione personae* and *ratione materiae* immunities of state officials from foreign criminal jurisdiction (section 2), this chapter explores the interplay between those immunities and the obligation to prosecute international crimes in order to assess whether such an obligation could provide a better rationale for an “exception” to immunity *ratione materiae* of state officials prosecuted abroad (section 3). The merits and difficulties of the argument against immunity *ratione materiae* on the basis of the obligation to prosecute are assessed, together with its normative foundation.

2 The Law as it Stands: Immunity *ratione personae* and Immunity *ratione materiae*

For the last two decades—basically from the *Pinochet* case\(^2\) and the *Arrest Warrant* case\(^3\) up to the *Germany v. Italy*\(^4\) and *Belgium v. Senegal*\(^5\) 1CJ

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judgments—practice has evolved and developed, so that the overall picture on the interplay between the immunity rules and international criminal law is now much clearer than before. In other words, a few basic points relating to the international *lex lata* can, as such, be assumed with a high degree of certainty.

The first of those basic points—which is actually a starting point—is that the conceptual distinction between immunity *ratione personae* and immunity *ratione materiae* seems now⁶ to be very widely accepted.⁷

2.1 *Immunity racion personae*

It is now settled that under international customary law, acting heads of state, heads of government and foreign affairs ministers enjoy total immunity *ratione personae* from foreign criminal prosecution, be it for acts performed privately or officially, and indistinctively of whether those acts have been performed before or during their term of office.⁸ The same is true for diplomats and members of special missions, but only in relation to possible criminal proceedings in the states where they are accredited or on mission.⁹

It is questionable whether other persons than the “triad/troika” referred to above also enjoy personal immunity by the sheer fact of the nature of their official functions (i.e. regardless of the fact that they are posted or on official

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⁴ ICJ, *Jurisdictional Immunities* (n. 1).
⁶ This distinction was not used by the ICJ in the *Arrest Warrant* judgment of 14 February 2002 (n. 3). Six years later, it appears in ICJ, *Certain Questions of Mutual Judicial Assistance in Criminal Matters* (Djibouti v. France), Judgment of 4 June 2008, ICJ Reports 2008, 177. On the general acceptance of the distinction between those two types of immunity, see ILC, Report of the 60th Session, 5 May–6 June and 7 July–8 August 2008, A/63/10, 333, para. 287. The distinction is also reflected in the case-law of the ECtHR, *Jones and others v. United Kingdom*, Judgment of 14 January 2014.