CHAPTER XI

Limits of International Law Immunities for Senior State Officials in Criminal Procedure

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I. CONCEPT AND REALM OF IMMUNITY FOR SENIOR STATE OFFICIALS

Immunity of State officials, which is accorded to Heads of State or Government, Government members and other senior State officials, does not in itself form a part of *jus cogens* and is therefore open to exceptions, which can be found in several international agreements – e.g. in Article 27 of the ICC Statute – which do not violate Article 53 of the Vienna Convention on the Law of Treaties (in the following, “The Vienna Convention”). However, while the immunity of States and their senior officials is undoubtedly one of the major rules of customary international law\(^1\) and is assumed to be applicable *erga omnes*, its content and, what is more, its limits, have been the subject of increasing debate, at least since the House of Lord’s final judgment in the *Pinochet* case\(^2\). Hence, the question is whether senior State officials enjoy immunity even for international crimes, such as genocide, crimes against humanity and war crimes.

When discussing this immunity, one must distinguish between immunity *ratione materiae* and immunity *ratione personae*. While immunity *ratione personae* (personal immunity) is accorded to serving senior State officials for their private actions in order to protect the individual and the office he or she represents from judicial proceedings in another State, immunity *ratione materiae* (functional immunity) is granted for official acts, namely acts of the State which the official represents, and also constitutes a

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\(^1\) A good overview of the immunities accorded to Heads of State and other state officials can be found in Hazel Fox, *State Immunity*, Oxford 2004, pp. 421 *et seq.*

\(^2\) R v Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte (No. 3) [1999] 2 All ER 97 *et seq.*

bar from another State’s jurisdiction. Both concepts derive from the principle of sovereign equality of States, according to which one State cannot exercise its powers over another State (par in parem non habet imperium). As a logical consequence, senior State officials, while in office, enjoy both personal and functional immunity for their actions. After cessation of office, however, it has so far been established customary international law that they may be subject to criminal proceedings in foreign States, initiated with regard to their private actions (which were before covered by personal immunity), but not with regard to official actions, that is actions imputed to the State they represented, due to the fact that States cannot be held criminally liable, but only individuals. What is more, in recent years there has been some debate over the issue of whether State officials may be criminally prosecuted in their home State for offences allegedly committed before taking office, kicked off by criminal proceedings initiated against the incumbent Heads of State of Italy (Berlusconi) and France (Chirac). However, since the aforementioned proceedings are mainly a problem of constitutional law, they shall not be scrutinized further at this point.

All this being said, it is obvious that State immunity and immunity of State officials do not necessarily share the same fate. The most prominent example of this is the ruling of the House of Lords in the Pinochet case, in which the accused could not claim personal immunity from British jurisdiction since he had ceased to be Chilean Head of State at the time of the proceedings. What is more, the Law Lords in this specific case concluded that the accused could not claim immunity rationae materiae either for acts of State constituting international crimes during his incumbency.

II. LIMITS OF IMMUNITY OF SENIOR STATE OFFICIALS

The Pinochet case leads to the core of this article, namely the issue of the limits of State immunity, a question that has received considerable impetus from both national and international jurisprudence as well as from legal

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4 Karin Oellers-Frahm, “Italy and France: Immunity for the prime minister of Italy and the president of the French Republic”, International Journal of Constitutional Law 53 (2005), 107 et seq., has elaborated on the constitutional aspects of this topic.

5 See supra note 2.