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IMMUNITY OF STATE OFFICIALS FROM FOREIGN CRIMINAL JURISDICTION

AUTHORED BY - A R ANJALI

On 11 April 2000, a Belgian Magistrate issued an international arrest warrant against Mr. Yerodia who was the Foreign Minister of Congo. The Court issued the warrant based on universal jurisdiction alleging that he committed grave breaches of the Geneva Conventions of 1949 and its Additional Protocols and crimes against humanity. In its judgement,¹ the Court held that Belgium failed to respect, and infringed, Yerodia's immunity and the inviolability enjoyed by him under international law. It is an established principle of international law that Heads of States and Governments, Foreign Ministers and Diplomatic and Consular agents enjoys immunities from civil and criminal jurisdictions of other States. These immunities "...are not given for their personal benefit; but to ensure the effective performance of their functions of behalf of their...States". International law recognizes him as a representative of the State solely by virtue of his office. It was after this case that the ICJ accepted that the immunity of state officials originates from customary international law.²

Article 31 of the Vienna Convention on Diplomatic Relations provides for immunity for diplomatic agents from criminal jurisdiction of a state.² Where officials represent their states at international organizations, they will usually be accorded immunity by treaty.³ Likewise under Articles 29 and 31 of the UN Convention on Special Missions 1969 the person of any official abroad on a special mission on behalf of his or her state is inviolable. *Immunity Rationae personae* is granted to a certain number of officials under international law while in office. This was the core of the previously mentioned judgment⁴ although there is still some debate around this subject. The *immunity ratione personae* of a Head of State was recognized by both parties in the Djibouti v. France case before the ICJ⁵. *Immunity rationae materiae* spans only official acts which is the actions taken by state official in discharge of his or her functions. It does not apply in criminal prosecutions for international crimes. International law confers extra-territorial jurisdiction and reject arguments derived from *jus cogens* or the allegedly non-sovereign and non-official

¹ Arrest Warrant of 11 April 2000 (Dem. Rep. Congo v. Belg.), 2002 I C J .

² Vienna Convention on Diplomatic Relations, 18 April 1961, 500 U.N.T.S. 95-239 at art. 31-32.

³ Art. IV, para. 11, Convention on the Privileges and Immunities of the UN (1946); Art. V, General Convention on the Privileges and Immunities of the Organization of African Unity (1965).

⁴ Supra note 1.

⁵ Memorial of the Republic of Djibouti, 15 March 2007, para. 133.

character of acts amounting to international crimes.

The justification for such immunities is that they ensure the proper ongoing of international relations and as a result, they are given to officials who represent the state at the international level. As the International Court of Justice (ICJ) has pointed out, “there is no more fundamental prerequisite for the conduct of relations between States than the inviolability of diplomatic envoys and embassies⁶.”

In January 2021, the Federal Court of Justice,⁷ held that State officials, do not enjoy functional immunity under customary international law in foreign criminal proceedings for war crimes or certain other crimes that are of concern to the international community as a whole. The Court relied on the Nuremberg Principles, which laid down that functional immunity cannot be used as a defence in cases of crimes against peace, war crimes, or crimes against humanity.

In *The Prosecutor v. Tihomir Blaskic*⁸, the International Criminal Tribunal for the former Yugoslavia (ICTY) charged Blaskic, who was the Commander of the Croatian forces in Central Bosnia, with war crimes and crimes against humanity that he was responsible for in Bosnia, and sentenced him to 9 years in prison.

In the summer of 2017, the UN International Law Commission adopted Draft Article 7 and an associated draft annex for its project on immunity of state officials from foreign criminal jurisdiction. The draft article identifies six “crimes under international law in respect of which immunity *ratione materiae* shall not apply”: genocide; crimes against humanity; war crimes; crime of apartheid; torture; and enforced disappearance. But is difficult to assume whether it mirrors *lex lata*. As there is a lack of state practice⁹ including lack of widespread, representative state practice¹⁰ in support of ceasing immunity for state officials, it’s status as *lex lata* can be doubted.

It is clear that the seemingly absolute nature of immunity granted to State officials from foreign criminal jurisdiction, is in fact, not absolute.

⁶ *United States Diplomatic and Consular Staff in Tehran case (United States of America v. Iran)* [1980] ICJ Rep 3, at para. 91.

⁷ BGH, Jan. 28, 2021, 3 StR 564/19 [*BGH Immunity Decision*].

⁸ *Prosecutor v. Tihomir Blaskic (Appeal Judgement)*, IT-95-14-A, International Criminal Tribunal for the former Yugoslavia (ICTY), 29 July 2004.

⁹ *2017 Report*, *supra* note 1, at 178-91 (Commission’s Commentary to Draft Article 7 and the associated draft annex).

¹⁰ Concepción Escobar Hernández (Special Rapporteur for Immunity of State Officials from Foreign Criminal Jurisdiction), *Fifth Report*, UN Doc. A/CN.4/701 (June 14, 2016)