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Summary

Immunity: Development and actuality as a legal concept

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All varieties of immunities under Public International Law are exposed to a comparable form of criticism: To accord immunities in cases of serious human rights abuses contradicts the efforts of the international community to establish responsibility for such acts. Immunities are seen as a relic of the Westphalian system which resists ideas of constitutionalism in times of globalisation leading to calls for their restriction or even their abandonment. However, there is a manifest contradiction between the high number of cases challenging immunities and the sluggish legal development.

Stagnation in legal development is manifest regarding immunity in civil proceedings. In recent years several judgments – including the judgment of the ICJ in the *Jurisdictional Immunties* case – refused to restrict state immunity, immunity of international organisations or diplomatic immunity in cases of serious human rights violations. In contrast, there are indications for a legal development in cases of immunity of head of states and other state officials. However, the change of the pertinent legal rules is not as apparent as assumed by some scholars. At the same time, a state of legal uncertainty prevails.

A major reason for the sluggish legal development can be seen in the decentralized mechanism of law-making in international law. Reasons of States' self-interests and reciprocity reasons hinder the creation of rules of customary international law on the restriction of immunity in cases of serious human rights violations. Courts often take a proactive role in this law-making process and try to further the legal development against the explicit point of view of the executive branch. These conflicting positions are, for instance, apparent in a 2012 decisions of the Swiss High Court which restricted the immunity of a former Algerian defence minister.

Their functional necessity justifies to accord immunities. Thus, immunities enable their beneficiaries to effectively perform their functions in international relations. Accordingly, there are tendencies in the globalised world to extend the circle of persons and entities enjoying immunities. Globalisation is characterized by an expansion of actors in international relations. International relations are no longer restricted to the head of State and the government. Because of the increase in transnational economic and political relations through a diversification of methods and forms of coordination there are numerous other state and non-state actors including hybrid actors such as global public-private partnerships. Accordingly, customary international law rules on special missions are ascertained and immunities are accorded to high-ranking persons that are not members of a government as well as to global public-private partnerships. Immunities as a functional necessity are an important means to enable processes of globalization. At the time, special missions have become a functional equivalent to immunities of state officials in order to diminish legal uncertainties and allow for the smooth functioning of international relations.

Immunities also serve as a rule on the exercise of jurisdiction in a decentralized multi-level system where competences are divided between different levels and different actors. Immunities of international organisations are a case in point. Here we can ob-

serve a tendency to restrict immunity in employment-related disputes although this development does not cover the UN itself. However, this development has caused a conflict of norms between human rights law, such as the European Convention on Human Rights and other treaty obligations stemming from headquarter agreements. The solutions developed in jurisprudence are not apt to appropriately balance the conflicting interests.

As a rule on the exercise of jurisdiction, immunities also guarantee legal security and peaceful international relations. This function might become increasingly important in a multipolar world order. The dispute between the African Union and the European Union on the exercise of universal jurisdiction and the restriction of immunities is a pertinent example. As long as there is no international community based on States under the rule of law, immunities also serve the legitimate interest of democratic constitutional States to protect their state officials against court proceedings that do not meet the standards of the rule of law.

In order to meet the criticism that immunities work in favour of impunity, a new procedural rule could be considered for immunities ratione materiae. Instead of requiring that the courts determine immunity proprio motu as envisaged in Art. 6 para. 1 of the UN Convention on Jurisdictional Immunities of States and their Property, in cases of serious violations of human rights States could be required to notify the authorities of the other State concerned about its claim to immunity. Such an approach would rely on the findings of the ICJ in the case between Djibouti and France on *Mutual Assistance in Criminal Matters*.