

Summary

Immunity of State Officials

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1. The immunity of State officials is still largely governed by customary international law. It is, however, difficult to make statements as to the status of customary international law as questions of immunity are usually decided by national courts applying national and international law.
2. The immunity of State officials from the jurisdiction of other States exists at a crossroads between two of the structural principles of international law: the sovereign equality of States and their territorial sovereignty.
3. The functional immunity of State officials is a corollary of State immunity, which in turn follows from the structural principle of the sovereign equality of States. This immunity was originally absolute. All restrictions must be established by customary international law or treaty law. States that argue for (further) restrictions to functional immunity have the burden of proof.
4. The personal immunity of State officials is a corollary to the territorial sovereignty of States. Originally, a State had absolute jurisdiction over all persons within its territory. The immunity from jurisdiction for State officials who are present or active in the territory of another State must be established by customary international law or treaty law. States that argue for (further) extensions of personal immunity have the burden of proof.
5. Both functional and personal immunity are rights of the State, not the State officials. These rights cease to exist with the collapse of the State, but not through a State's temporary inability to act.
6. International law is characterised by the relativity of legal relationships. This is also true for the immunity of State officials.
7. For the acts of State officials in the forum State, functional immunity is replaced by personal immunity as *lex specialis*. In particular, residual personal immunity is not a case of functional immunity.
8. The scope of personal immunity is not absolute and is determined based on the individual status conferred to the State official concerned. It has been extended both *ratione materiae* and *ratione personae* in response to the extension of extra-territorial jurisdiction and the restrictions placed on functional immunity.
9. In a process of development that began during the end of the 19th century, generally valid exceptions to functional immunity under customary international law were created for acts not performed in the exercise of sovereign authority. The exceptions also extend to war crimes, crimes against humanity and genocide.
10. Further restrictions to functional immunity from the jurisdiction of national criminal courts are not to be founded on purely theoretical considerations, but rather through evidence of consistent State practice based on a corresponding *opinio juris*. The four different approaches adopted by the Law Lords in their speeches in the Pino-

chet case before the House of Lords, in particular, are doctrinally unsound as a means of restricting functional immunity. The same is true for a restriction to immunity as a counter-measure.

11. The judgment in the Pinochet case and other national court decisions could mark the beginning of the development of new customary international law, but not mark its conclusion.

12. As restrictions to functional immunity are based on customary international law or treaty law, they could develop differently for different State officials, acts or jurisdictions. A restriction of the functional immunity of State officials must not necessarily be accompanied by restrictions to State immunity.

13. In terms of *lex ferenda*, it may be worth considering whether when overriding State interests restrict a private person's access to the courts due to the functional or personal immunity of a foreign State official, a right, in narrowly defined exceptional cases, should exist under national law to seek compensation from the State granting immunity.

14. There is no general exclusion of immunity before international criminal courts or so-called internationalised (national) criminal courts. In every individual case, the question of immunity is governed by the legal basis for the exercise of jurisdiction, the crime in question and the place where the offence was committed.

15. States are not insensitive to political realities. The restriction of functional immunity before national courts leads to the development of an often politically controlled "*de facto* immunity" through limitations to universal jurisdiction and an extension of the term 'special mission' that borders on abuse of right.

16. The loss of functional immunity before the International Criminal Court is being thwarted by the questionable and self-interested actions of individual UN Security Council members through the creation of "*de facto* immunity" for State officials of non-parties of the Rome Statute, as well as the legally dubious conclusion of so-called "Article 98 agreements" by States.

17. It is likely that further restrictions to functional and personal immunity will be countered by broadening the scope of "*de facto* immunity" and other "means of circumvention", in order to avoid political complications and to ensure the proper functioning of international relations.