COUNCIL OF EUROPE CONSEIL DE L'EUROPE

Strasbourg, 27/02/2002 CAHDI (2002) 3

COMMITTEE OF LEGAL ADVISERS ON PUBLIC INTERNATIONAL LAW (CAHDI)

23rd meeting
Strasbourg, 4 - 5 March 2002

IMMUNITIES OF HEADS OF STATE AND GOVERNMENT AND OF CERTAIN CATEGORIES OF SENIOR OFFICIALS VIS-À-VIS THE STATES' OBLIGATIONS TO PROSECUTE PERPETRATORS OF INTERNATIONAL CRIMES

Revised discussion paper submitted by the Swiss Delegation

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IMMUNITIES OF HEADS OF STATE AND GOVERNMENT AND OF CERTAIN CATEGORIES OF SENIOR OFFICIALS VIS-À-VIS THE STATES' OBLIGATIONS TO PROSECUTE PERPETRATORS OF INTERNATIONAL CRIMES [1]

A. THE SITUATION

1. Since the origins of international law a set of rules has been developed intended to facilitate and promote the establishment and preservation of peaceful relations between States. These rules include *privileges and immunities*, under which States undertake, on a reciprocal basis, to refrain from exercising the rights of sovereign power vis-à-vis other States and their official representatives. One of the main forms of immunity is immunity from criminal prosecution: it protects certain representatives of one State from the action of criminal prosecution agencies in another State. Only a few of the rules on immunity have been codified[2]. Others are established by custom. In concrete cases problems may thus arise as to the principle of granting immunity and its scope.

2. Moreover, international law has always condemned States or individuals who jeopardise the peace and security of the international community. *Crimes of international concern* have in particular been considered to prompt criminal prosecution, and States have been required to prevent or prosecute such crimes. Genocide, crimes against humanity and war crimes are first to come to mind in this respect, but mention should also be made of torture, terrorism, the crime of aggression, slave trading and piracy. Nevertheless, the exact scope of the obligation to introduce criminal proceedings against such crimes cannot always be established with certainty.

3. The fact is that the *fight against impunity* is gaining in importance, and international criminal law is evolving rapidly. This evolution would appear to be challenging the scope and the very existence of the immunities granted under international law, where individuals are strongly suspected of having committed extremely serious crimes. A State may be confronted with conflicting obligations under international law: on the one hand the obligation to protect certain forms of immunity, and on the other the duty to prosecute criminals. This dilemma is particularly difficult to resolve because both obligations have perfectly legitimate aims. The basic problem is a *classic conflict between two legitimate interests* of the international community which may be difficult to reconcile in specific cases:

- the interest of protecting the functional sovereignty of States, facilitating well-regulated international relations between States in possession of equal rights;

- the interest of ensuring effective prosecution and punishment of the perpetrators of very serious crimes falling under international criminal law, with a view to guaranteeing genuine protection of human rights.

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[1] This paper is intended as a basis for preliminary CAHDI discussions and does not necessarily reflect the Swiss position.

[2] Article 31 of the Vienna Convention on Diplomatic Relations codifies the immunity of diplomats vis-à-vis the criminal jurisdiction of the receiving State. Furthermore, Article 31 of the Convention on Special Missions provides for the immunity of representatives of the sending State within a special mission (as well as members of the diplomatic staff for this mission) vis-à-vis the criminal jurisdiction of the receiving State.

4. Actual individual cases may prompt controversy as to the optimum approach to resolving this conflict of interests. However, since *the problem clearly has an international dimension,* it would be useful for the States to agree on a common approach. Any State which wished, in practice, only to take account of the first of these two interests would risk becoming a refuge for perpetrators of serious crimes who would be prosecuted elsewhere. Conversely, a State that took account solely of the second interest would be liable to raise doubts, for instance, about the foreseeability and stability required for inter-State relations. It could also be exposed to the risk of abuse of its judicial system.

5. This is why it is important to strike an *appropriate balance* and identify practicable solutions through in-depth exchanges of views between States. This paper hopes to put forward some suggestions with an eye to such dialogue. It begins the analysis with a proposed typology of possible cases.

B. TYPOLOGY OF CASES

6. Three parameters might be used to identify the relevant cases:

1. on whose initiative were the criminal proceedings commenced?
2. what is the official status of the person in question?
3. what are the charges against him/her?

1. Request for criminal proceedings

a. *Pro memoria*: criminal proceedings introduced in a country against one of its nationals claiming immunity

7. This paper will not go into such cases because it is not intended to deal with immunities granted by a State under its Constitution or legislation to its political leaders. We shall only consider immunities that are granted under international law to officials of foreign States.

b. Criminal proceedings involving two States

8. The following example illustrates this case: the prosecuting authorities of one State instigate criminal investigations against an official of another State, which claims penal immunities secured under international law. (In general, such an individual would be present on the territory of the prosecuting State. However, some countries permit, in exceptional cases, the introduction of criminal proceedings on the basis of universal jurisdiction even without such a link.)

c. Request for judicial assistance by a third State

9. It is also possible for a third State to submit a request for judicial assistance to the State in whose territory the perpetrator of the alleged offences is present. This request is processed in accordance with such judicial assistance convention as might have been concluded between the two States and with the requested State's legislation on judicial assistance. In general the procedure laid down in such legislation also requires the authorities to seek to identify any penal immunities to be taken into account by the requested State.

d. International courts

aa. International Criminal Tribunals for former Yugoslavia and Rwanda

10. The statutes of the Tribunals set up by the United Nations Security Council require all States to co-operate with the Tribunals, which includes an obligation to arrest and surrender to them any accused persons[3]. They exclude any form of immunity[4]. In accordance with Article 103 of the United Nations Charter, these obligations take precedence over all other legal obligations of States, requiring them to comply unrestrictedly with arrest warrants or requests for surrender issued by either of these Tribunals.

bb. International Criminal Court

11. The Rome Statute of the International Criminal Court requires States Parties to co-operate fully with the Court. Article 27 stipulates that the Court cannot be prevented from exercising its jurisdiction on the grounds of any criminal immunities, but Article 98 requires it to take account of immunities on the part of nationals of States that are not parties to the Statute.

2. Nature of the individual's immunities

12. Hypothetical cases can also be differentiated on the basis of the nature of the immunities claimable by the individual in question.

a. Serving Head of State

13. Where Heads of State are concerned, there may be some doubt as to the basis of any criminal immunity: does the Head of State enjoy *diplomatic immunity* or *State immunity*? Neither of these two alternatives may do entirely justice to the special status of a Head of State. It might be more pertinent to think that a Head of State enjoys a *sui generis* immunity which combines features of both spheres.

14. Obviously, a serving Head of State is strongly identified with his/her State and is the primary *guarantor of its ability and freedom to act*. The arrest and prosecution of a serving Head of State by another State would seriously imperil the functional sovereignty of the State in question, would paralyse the country and even plunge it into a constitutional crisis. Inter-State relations would become extremely difficult if one State were to set itself up as a judge over another State by depriving it of its supreme leader.

15. Even where a serving Head of State is suspected of having committed an extremely serious offence, the interest of preserving the State's ability to act should prevail over the interest of prosecution. For the same reason no State should lightly comply with a request from a third State for the arrest and extradition of the Head of another State. The only exceptions are arrest warrants issued by an international tribunal or – under the terms of the Rome Statute – by the International Criminal Court.

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[3] Article 29 of the Statute of the International Tribunal for former Yugoslavia; Article 28 of the Statute of the International Criminal Tribunal for Rwanda.

[4] Article 7 para. 2 of the Statute of the International Tribunal for former Yugoslavia; Article 6 para. 2 of the Statute of the International Criminal Tribunal for Rwanda.

b. Former Head of State

16. The case of a former Head of State raises the question of *prolongation of the effect* of immunities with respect to acts committed in the exercise of office. Article 39 para. 2 of the Vienna Convention on Diplomatic Relations, Article 53 para. 4 of the Vienna Convention on Consular Relations and Article 43 para. 2 of the Convention on Special Missions provide for such prolonged effect in the case of specific groups of persons enumerated in these instruments – and it might be argued that a Head of State should also enjoy similar treatment[5].

17. It is true that serving Heads of State are fully free to act only if there is no danger of their being held responsible, once they have left office, for any imaginable offences they might be alleged to have committed while in office. This is why they should enjoy some penal immunity for acts performed while carrying out their duties even after they have left office.

18. Even if we follow this line of thought, there is little scope for granting immunity in the event of prosecution for such international-law crimes as genocide, crimes against humanity and war crimes, because these are not mere violations of public international law or general allegations of human rights violations. The offences set out in international law are subject to special rules aimed precisely at ensuring that the individual in question can be called to account for his/her acts above and beyond any protection provided by immunities, especially where the perpetrator has not acted exclusively for personal reasons but also on behalf of the State he/she represents. (A typical feature of international-law crimes is that they are often perpetrated through State channels.)

19. So we might argue that where there is reliable evidence that a former Head of State has committed extremely serious violations of international law, any State – even without an international warrant or the consent of the State concerned – should be able to bring proceedings on its own initiative or at the request of a third State[6].

c. Head of Government and member of Government in power

20. The case of a serving Head of Government first of all raises the question of delimiting his/her attributions from those of the Head of State – particularly where the Head of State mainly carries out symbolic duties while the Head of Government holds a wide range of real powers. It is true, though, that international law generally disregards the question of the domestic attribution of powers; it confines itself to the

[5] If we consider that a functionally limited prolongation of the effect of immunities should also be extended to former Heads of State, the corollary question arises whether a Head of State who commits extremely serious offences is really doing so "while carrying out his/her duties". In a way the question answers itself, because there can be no doubt that perpetration of crimes under international law is no part of the attributions of a Head of State as laid down in the constitutional order of that State. On the other hand, these crimes are often committed with the use of state forces. The question is therefore possibly misleading. Considering crimes committed by a Head of State as purely private in nature might also have serious consequences for the victims in terms of State responsibility, as it might seem that a Head of State who has perpetrated an international-law crime might incur not only his/her own responsibility but possibly also that of his/her State. If one were to qualify the commission of such crimes as private, a link to State responsibility might be more difficult to make.

[6] However, consideration should be given to all the possibilities for attenuating the consequences in such a case: is the State whose former leader committed the international-law crimes prepared to waive immunity? Is it possibly even prepared to bring proceedings against the individual in question itself, and on what conditions? Are there any possible grounds for assigning the judicial proceedings to another State or to an international tribunal?

designation of the various duties as communicated to the outside world. This suggests that a Head of State who mainly carries out representative duties may have far broader immunities than a Head of Government with greater real power.

21. Again, the exact scope of the immunities is fairly vague. Where heads and members of governments make official journeys, we must consider the application of provisions governing the immunities granted to State representatives on special missions (see section e. below). If protection were really confined to these prerogatives alone, this would imply that a head or member of a government in power would be exposed to prosecution by a foreign judge if he/she were travelling for private reasons. Such minimal protection against criminal proceedings might be justified where extremely serious charges are actually being brought. In the absence of such accusations, it might be better to determine the duties actually discharged by the individual in question. At all events, the arrest by another State of a head of government or a minister responsible for external relations followed by prosecution or extradition to a third State is a procedure which should not be undertaken lightly.[7]

22. There are few problems, on the other hand, with the issuing by the International Criminal Tribunals for former Yugoslavia or Rwanda of arrest warrants or requests for surrender, since all States are required to co-operate with them regardless of any immunities granted. The same should apply in future for the International Criminal Court, at least where the State representative indicted is a national of a State Party to the Rome Statute.

d. Accredited diplomats

23. Where accredited diplomats are concerned, there are also no difficulties if the arrest warrant is issued by an international court or tribunal. Matters become more complicated where a State receives a request for extradition from another State or where a national court wishes to prosecute a foreign diplomat.

24. In the receiving State, accredited diplomats act as instruments of the accrediting State. They represent the latter State, ensure that its interests and those of its nationals are preserved, and conduct negotiations with the government of the receiving State. Although the duties carried out by a diplomat cannot be compared to those of a Head of State, the arrest of a diplomat would damage the accrediting State and considerably reduce this State's ability to maintain relations with the receiving State.

25. Given that diplomats need the receiving State's approval, it would be against the principle of good faith to grant them official approval for the sole purpose of arresting them on entry into the territory of the receiving State. If suspicions arose after completion of the accreditation procedure and the accrediting State refused to waive diplomatic immunity, the diplomat would have to be declared *persona non grata.* However, this rule is not applicable where an international court or tribunal has issued an arrest warrant.

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[7] In its judgement of 14 February 2002 concerning the Arrest Warrant of 11 April 2000, the International Court of Justice clarified that, on the basis of customary international law, a Foreign Minister in office enjoys "full immunity from criminal jurisdiction and inviolability when abroad. That immunity and that inviolability protect the individual concerned against any act of authority of another State which would hinder him or her in the performance of his or her duties" (para. 54). That statement is valid regardless of the private or official nature of the act or the private or official purpose of the visit (para. 55). When establishing the facts, though, the Court seemed to insist that no nexus was shown between the alleged crimes and the State issuing the arrest warrant in question (para 15).

26. Furthermore, one might argue that even an accredited diplomat could be prosecuted if there was sufficient evidence that an international-law crime had been committed *within the territory* of the receiving State, if it is accepted that the international obligations on prosecuting and punishing certain crimes took precedence over those guaranteeing immunity[8].

e. Representatives on special missions

27. Like diplomatic representatives, State representatives on special missions enjoy immunity from the criminal jurisdiction of the receiving State (Article 31 of the Convention on Special Missions and perhaps customary international law). The dilemma arising out of the requirements of such immunity and the international obligations with regard to criminal prosecution can be mitigated in the same way as for diplomats.

28. A special mission can only be sent with the consent of the receiving State. The sending State must notify the names and duties of the persons to be included on the mission. The receiving State can then reject the whole delegation or any one of its members without having to give reasons. If the receiving State knows or, in view of the circumstances, ought to know, that one of the persons nominated is suspected of having committed an international-law crime, it should withhold its consent[9]. It is unacceptable that the receiving State should authorise the entry of representatives on special mission only to arrest them on their arrival within the national territory. If, on the other hand, a representative on a special mission commits such a crime in the territory of the receiving State, this State's primary duty to prevent and prosecute such acts in its territory might perhaps override the Convention on Special Missions. There is a grey area between these two hypothetical cases which should be clarified for each individual case, depending either on the type of special mission or on the responsibility and office of the representative in question.

3. Nature of the crimes

29. Cases can also be differentiated on the basis of the types of crimes to be investigated. Depending on the crime, a State is subject to a different obligation to prosecute. It would be very difficult to list all the crimes defined by international law, but we could begin with the categories of serious crimes recently identified in international law by the Rome Statute of the International Criminal Court: genocide, crimes against humanity and war crimes. This list is, however, by no means exhaustive.

30. Nor can we precisely circumscribe the State's obligations in terms of penal action. Detailed consideration of this matter would be beyond the scope of this paper. However, the following points are particularly important.

31. a. For some crimes States are subject to *alternative obligations* which may dispense them from introducing criminal proceedings on their own initiative. This applies, for instance, to the crime of genocide, as the Convention for the Prevention

[8] It might be argued, for instance, that Article 6 in conjunction with Article 4 of the Convention for the Prevention and Punishment of the Crime of Genocide comprises an obligation on all States to give *priority* to combating acts of genocide committed *within* their own territory.

[9] If the consent has already been given it is still possible to declare unacceptable a representative on a special mission before his/her arrival in the territory of the receiving State (Article 12 of the Convention on Special Missions).

and Punishment of the Crime of Genocide sets out the principle of *aut dedere aut judicare.* The same is true in the case of torture.

32. b. The obligation is not always universal in nature and sometimes only exists under *certain conditions* (for example, the crime may be required to have been committed in the national territory of the State in question or by one of its nationals).

33. c. Some conventions, on the other hand, do impose *universal jurisdiction.* It must then be carefully examined what this precisely means. Oftentimes, it would seem to be a "subsidiary" universal jurisdiction only. If not, one might wonder to what extent a State is allowed, in fulfilling its obligations, to lay down additional conditions (such as the presence of the accused during proceedings) for the commencement of proceedings under universal jurisdiction.

34. d. The strict interpretation of the provisions of an older convention may sometimes be abandoned on the basis of more recent *developments* in international law. While it used to be possible to interpret Article 6 of the Convention on Genocide as stipulating that the obligation to prosecute only applied to crimes committed in the territory of the State Party concerned, such a narrow interpretation would probably no longer be possible today.

35. e. The Rome Statute of the International Criminal Court does not *create* any obligations to prosecute *per se*; it *presupposes* their existence. It urges States to provide the necessary bases for effectively punishing the crimes which it covers, failing which they may have to hand over jurisdiction to the Court.

4. Pro memoria: obligations arising out of host agreements and agreements on privileges and immunities of international organisations

36. *Host agreements* and *agreements on privileges and immunities* of international organisations raise similar questions to those addressed above. The resultant obligations might be *superimposed* on the aforementioned ones: e.g. attendance by a member of a foreign government at a conference convened by an international organisation, whereby this person is present in the organisation's headquarters. If the person is suspected of international-law crimes, can he or she be arrested by the host State? A third interest should accordingly be added to the two interests mentioned at the beginning of this paper, the interest of the smooth functioning of the international organisation.

C. SUMMARY

37. The rules on immunity and the obligations to prosecute under international law stand in a increasingly complex relationship to one another. Looking at the issue from the side of immunities, the most pertinent questions are which immunities are applicable and whether there are any exceptions provided for. Examining the question from the side of the international obligations to prosecute, the exact scope of the obligation to prosecute the alleged crime in question must be examined and again the existence of any exceptions. Some cases may be solved through such an analysis, others may not. A differentiated approach taking account of all the interests at issue is needed in any case. Given the international dimension of the question, it would seem advisable for States to continue their exchange of views in order to prevent any risks of dissent.