

<https://doi.org/10.25143/socr.16.2020.1.042-048>

The Interrelation between Sovereign Immunities and Individual Criminal Responsibility in International Criminal Law

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Abstract

The paper is an opinion article which analyses the essence of the principle of individual criminal responsibility in international criminal law and its key elements. The main focus of this paper is to analyze key moments of the development of the principle of individual criminal responsibility in relation to sovereign immunities. It has been shown that the development of legal doctrine and especially judicial practice greatly contributed to the balance between state sovereignty or state interests and the right of individual criminal accountability. The abolition of sovereign immunities before international courts and tribunals is the salient example of this development. Furthermore, the paper argues that when considering the effect of the principle of individual criminal responsibility and its relation to sovereign immunities, we should make conceptual distinction between personal and functional immunities. With this regard, the analysis of judicial practice clearly indicates that while personal immunity retains their force even before national courts acting on universal jurisdiction, the effect of functional immunities are somewhat restricted: functional immunities lose their power before national courts acting on universal jurisdiction. At the same time, states can abstain from using this right. Thus, the authors argue that despite recent advancements in theory and practice, the application of universal jurisdiction over international crimes still remains one of the main challenges.

Keywords: individual criminal responsibility, immunities, International Criminal Law.

George Chakhvadze. The Interrelation between Sovereign Immunities and Individual Criminal Responsibility in International Criminal Law

For man, when perfected, is the best of animals, but, when separated from law and justice, he is the worst of all.

Aristotle

The wrongs which we seek to condemn and punish have been so calculated, so malignant and so devastating, that civilization cannot tolerate their being ignored, because it cannot survive their being repeated.

Robert H. Jackson, Opening statement at the International Military Tribunal in Nuremberg

Introduction

The principle of individual criminal responsibility is the basic principle of any legal system. The core of this principle is based in the fact that the person is responsible only for acts or omissions to which his personal crime is established. Antonio Cassese notes that despite the accused acting as a representative of the state, he has a personal responsibility for his incriminated act [Cassese, 2003]. It is worthwhile to acknowledge that in modern International Criminal Law the responsibility of the state does not cover its agent's individual criminal responsibility if he has committed an international offense [Drumbl, 2005; Fletcher, 2004].

The judges of the Nuremberg tribunal spelled out a similar statement:

“crimes against international law are committed by men, not abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced individuals have international duties which transcend the national obligations of obedience imposed by the individual state. Furthermore, no one can be punished for acts that he has not committed or for acts in which he has not participated.” [Drumbl, 2005]

Accordingly, national, ethnic, racial or religious groups are not responsible for acts committed by the members of these groups. At the same time, members of these groups do not bear a criminal responsibility to the illegal activities committed by leaders and other members of the group if they have no connection with these acts [Cassese, 2003].

It is maintained that a reference to the official position as plea for individual criminal responsibility is not a rule of customary international law, but often in national criminal and civil proceedings the question arises about the proper use of certain terms like the heads of states and members of the government [Khutsishvili, 2008].

It would not be an understatement to say that in recent years dealing with the principle of individual criminal responsibility we have encountered a shift from classical norms of international law that have derived from the principles of sovereign equality and non-interference of states, including the norms that envisage the immunity from national criminal jurisdiction.

Case of Pinochet and the Issue of Universal Jurisdiction

Accordingly, firstly authors of the Paper will try to find out how state sovereignty can be compromised to protect persons from international crimes and prosecute criminals [Tams, 2002]. In this sense, Pinochet Precedent became the landmark case in the late 90s of the twentieth century. In 1998 Chile's former dictator was detained on the basis of a warrant issued by a Spanish judge during his unofficial visit to Great Britain. Spain accused Pinochet of participating in torture of Spanish citizens during his stay in power. When considering the issue of extradition, Pinochet said that English judges do not have jurisdiction over the offenses committed by foreign nationals outside the country and that the former head of state enjoyed immunity with regard to those acts related to his official status.

The English court found that the transfer of a person to another country may only be made if judges have jurisdiction to issue an arrest warrant at the time of the crime committed, because the Extradition Act had retroactive effect. Thus, the court recognised the idea of immunity. The chamber stressed on the principle of immunity and decided that it would only apply to the acts of the former heads of states acting in the legitimate exercise of their official duties which does not include torture of political opponents. The case was heard once again by the Jury of the House of Lords with seven members. This jury as well as its predecessor concludes that Pinochet had no immunity from the jurisdiction of the English Court.

However, the court considered that the Extradition act did not have retroactive force and found that only Britain could carry out the persecution. With a majority vote, the jury ruled that the UK does not have jurisdiction over the offenses committed by foreigners before the entry into force of the 1998 Act.

The decision on Pinochet's case may be considered as an evidence of new customary rule, which states that functional immunity from the criminal jurisdiction of foreign nationals (*ratione materiae*) is not applicable in case of international crimes [O'Neill, 2002]. With this regard, Peter Carter asks the question: *wether it can be said that the decision in the Pinochet case resulted in firm norm of general international law that does not comply with the diplomatic immunity envisaged by any treaty as far as they apply to international human rights law?* And his answer is meticulously laconic: "Maybe." [Carter, 2002]

Christian Chinkin rightly points out that here we are dealing with a kind of conflict between two fundamental visions of international law: the horizontal system based on the sovereign equality of the state and the vertical system based on the Jus Cogens norms. This author goes further and notes that the choice made in Pinochet's case was not an easy one [Chinkin, 1999]. Nevertheless, in a critical discussion of the decision on Pinochet's case, Henry Kissinger talks about the tyranny of judges, which has changed the tyranny of the government [Kissinger, 2001].

It should be noted that the head of state enjoys immunity from jurisdiction of a foreign court with regard to any offense he could have committed despite its gravity. At the same time, former heads of states have no immunity from criminal jurisdiction or acts of foreign states in which they are guilty of international crimes. In short, it can be said that personal immunities continue to act in cases of international crimes. At the same time there is a tendency to restrict functional immunities in such cases. Nowadays, it is an established customary rule of international law, which states that heads of states, their diplomatic agents and other high-ranking officials may enjoy immunities from legal persecution of foreign states.

The cases discussed below make it clear that in modern international criminal law, the application of universal jurisdiction is governed by certain rules, among which the fundamental principle is the principle of immunity [Yang, 2002].

Case of Ariel Sharron and the Issue of Universal Jurisdiction

In 2002 the Belgian Court of Appeals reviewed the decision of the Belgian court on Israeli Prime Minister Ariel Sharon and held that he did not have to stand before the court. The suit against Ariel Sharon was filed a year prior, in 1982 by relatives of Palestinians who died in Sabar and Shatila camps in Livan. In this period, Ariel Sharon was Israeli's minister of defence.

The appeal was made to the Belgian Court on the basis of the 1993 Law of Belgium in accordance with the "World Competence" of cases relating to military offenses and crimes against humanity. This law allowed Belgian judicial authorities to consider suits against citizens of any state who have committed such offenses at any place. On the basis of this law, several persons were convicted on the basis of genocide committed in Rwanda.

However, the reasoning of the claim was questioned by Ariel Sharon's lawyers on behalf of the State of Israel, which denied the competence of Belgium to persecute foreign state officials. The defendants based their arguments on the Arrest Warrant Case. In this case the international court took a stance that immunity from criminal jurisdiction and individual criminal liability were quite different concepts. The court held that *while immunity, by its nature, was procedural, criminal responsibility was a matter of material law* and that *the immunity may completely terminate the prosecution for some time or for some offense but can not rehabilitate the person against whom it is used.*

Conceptual Distinction between Functional and Personal Immunities

Distinction should be made between two types of immunity. The first is the functional immunity under which the officials of states are not responsible for acts performed in their official capacity. However, this clause does not rehabilitate representatives of

states. Consequently, there is a functional immunity from such violations when the official leaves his post. Due to its nature, this kind of immunity does not protect officials from the acts they committed for personal purposes. That is to say, acts which were not related to the exercise of official powers.

The second type of international immunity is personal immunity. Personal immunity protects activities of the heads of governments and diplomatic representatives of states from any act falling under the jurisdiction of foreign states. The logic of this reasoning goes as follows: personal immunity loses its effect from the moment when the official leaves his post, while functional immunity protects former officials from acts they have committed in their official capacity.

Likewise, distinction between two hypothetical situations must be drawn. First, when suspects are persecuted by international courts and tribunals, and the second that involves situations where such persecutions are carried out by domestic courts empowered with universal jurisdiction.

With this regard, the case of Omar Al-Bashir is notable for the fact that the case was initiated by Security Council, which means that it served to protect international peace and security. It is also interesting to note that this was the first time since the establishment of the International Criminal Court that an arrest warrant had been issued against the current head of the state. Also, it is important to mention serious problems that have arisen with the execution of arrest warrant.

In the view of the author's of the Paper, the protest by the states and the issuance of a special document to terminate the relationship with the court shows that the jurisdiction of the International Criminal Court is limited by the sovereignty of the states, which often hinders the enforcement of the judgement. It is clear that functional immunity loses any force before international courts and tribunals if it concerns international crimes. Hence, the functional immunity does not cease to exist even after the official is removed from his post.

In short, any form of international immunity, including functional and personal immunities, are not applicable before international tribunals and courts equipped with appropriate jurisdictions. In cases where international offenses are pursued by the national courts, empowered with universal jurisdiction, the issue of immunity is not uniform. This is the reason for certain inconsistencies in case law.

Former state officials may be subjected to a criminal prosecution by other states, because functional immunity loses its power towards international crimes, but as long as these individuals hold their position they enjoy personal immunity from foreign jurisdictions. That is what the municipal courts of Spain held in the Fidel Castro Case stipulating that Castro could not be persecuted by the Spanish National Court as heads of states and their diplomatic agents enjoy international immunity. In the case of Muammar Gaddafi, the French court acknowledged that international custom is contrary to the fact that the active officials of states were the object of persecution from foreign states. Moreover in the case of Mugabe's extradition, the London Court ruled that international customary law currently granted absolute inviolability to any state commander.

Conclusion

The article highlighted serious changes made in the principles of sovereign equality of the states and the inviolability of immunity. It has been shown that one of the main reasons for such development was the advancement of international human rights law. This development is based on the main premise that nowadays the protection of human rights from gross violations cannot be considered as internal matter of the state. In this sense, the application of universal jurisdiction over international crimes remains one of the main challenges.

Eventually, it should be noted that any immunity ceases to exist before International Courts which are equipped with appropriate jurisdiction by the competent authorities of the United Nations. All immunities lose their power before the International Criminal Court. Personal immunity retains its force before national courts acting on universal jurisdiction. In practice it means that heads of states, foreign ministers, heads of government who hold their positions are not subject to criminal jurisdiction. Functional immunity loses its power before national courts acting on universal jurisdiction. At the same time, states can abstain from using this right.

Valstu suverenitātes un individuālās kriminālās atbildības sasaiste starptautiskajās krimināltiesībās

Kopsavilkums

Šajā rakstā ir analizēta individuālās kriminālatbildības principa būtība starptautiskajās krimināltiesībās un tā galvenie elementi. Galvenā uzmanība ir pievērsta individuālās kriminālatbildības principa attīstības galvenajiem momentiem saistībā ar valsts imunitāti. Juridiskās doktrīnas un, it īpaši, tiesu prakses attīstība lielā mērā ir sekmējušas līdzsvaru starp valsts suverenitāti vai valsts interesēm un individuālās kriminālatbildības tiesībām. Turklāt rakstā tiek apgalvots, ka, apsverot individuālās kriminālatbildības principa ietekmi un tā saistību ar valsts imunitāti, mums būtu konceptuāli jānošķir personiskā un funkcionālā imunitāte. Šajā sakarā tiesu prakses analīze skaidri norāda, ka, kaut arī personiskā imunitāte saglabā spēku pat valstu tiesās, kuras rīkojas saskaņā ar vispārējo jurisdikciju, funkcionālās imunitātes ietekme ir nedaudz ierobežota: funkcionālā imunitāte zaudē spēku nacionālajās tiesās, kas darbojas vispārējā jurisdikcijā. Tajā pašā laikā valstis faktiski var atturēties no šo tiesību izmantošanas. Noslēgumā autori apgalvo, ka, neskatoties uz jaunākajiem sasniegumiem teorijā un praksē, universālās jurisdikcijas piemērošana starptautiskajiem noziegumiem joprojām ir viens no galvenajiem izaicinājumiem.

Atslēgvārdi: individuālās kriminālatbildība, imunitāte, starptautiskās krimināltiesības.

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