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TRAINING MANUAL ON HUMAN RIGHTS AND HUMAN RIGHTS PROTECTION FOR LAWYERS

FILE N° 27: IMMUNITY IN INTERNATIONAL LAW

In international law, as in national law, heads of state and certain senior officials exercising power and holding an official position benefit from immunity which prevents them from being prosecuted for certain acts.

➤ *Which types of immunity does this relate to ?*

Under the rules of *customary international law*, there are two immunity rules : functional immunity and personal immunity.

- **Functional immunity**

- ✓ *Persons concerned*: heads of state, prime ministers, ministers for foreign affairs, etc.
- ✓ *Acts covered* : Acts committed during the exercise of one's duties, within the scope of one's duties.
- ✓ *Duration* : This is of a permanent nature, which means that beneficiaries continue to benefit from it after they have ceased their duties.
- ✓ *Acts excluded* : -Acts committed personally, i.e. outside the scope of their official duties.
- Acts committed before they took up their duties or after having ceased their duties.

- **Personal immunity**

- ✓ *Persons concerned*: heads of state, prime ministers, ministers for foreign affairs, diplomatic officials etc.
- ✓ *Acts covered* : any type of act. Absolute immunity.
- ✓ *Duration* : This is temporary ; it only concerns the period in which they carried out their duties.



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➤ **What are the limits to this?**

- **Waiver of immunity by the State represented**

The State representing the person concerned may decide to waive this person's immunity.

- **Waiver of immunity for the most serious international crimes**

Changes in international criminal law, both in texts and case-law, have moved towards waiving functional immunity when the acts committed constitute serious international crimes : crimes against humanity, war crimes, genocide and torture.

- ✓ *Texts* : art.7 of the Nuremberg Charter, art. 4 of the Convention against Genocide, art. 7 §2 of the Statute of the ICTY, art. 6 §2 of the Statute of the ICTR, art. 27 of the International Criminal Court.
- ✓ *Case-law* : in 1998, the case against the former Chilean dictator *Augusto Pinochet* (ruling of the British House of Lords dated 25 November 1998 relating to the warrant for arrest requested by Spain for torture) ; in 2004, the case against the former President of Liberia *Charles Taylor* (charged by the Special Court for Sierra Leone for war crimes, crimes against humanity and other serious violations of international humanitarian law) ; in 1999, the case against the Head of State *Slobodan Milosevic* (committed for trial by the ICTY for crimes against humanity and violations of the laws and customs of war in Kosovo) ; the case against the Sudanese President *Omar al-Bashir* in 2008 (arrest warrant issued by the ICC in 2009 for war crimes and crimes against humanity in Darfour, and for crimes of genocide in 2010).

However, these limits do not apply to personal immunity (E.g. : *Yerodia* case in 2002, in which the International Court of Justice rejected the arrest warrant issued by Belgium against the serving Congolese Minister for Foreign Affairs, on the grounds of person immunity he enjoyed, which blocked any prosecution while he was still in office

Sources:

- Henri D. Bosly, Damien Vandermeersch *Génocide, crimes contre l'humanité et crimes de guerre face à la justice : les juridictions internationales et les tribunaux nationaux*, Bruylant, 2010.
- Website of Trial Watch : <http://www.trial-ch.org/en/home.html>
- La Documentation française: Dossier « Justice pénale internationale » : <http://www.ladocumentationfrancaise.fr/dossiers/justice-penale-internationale/index.shtml>

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