Jurisdictional Immunities of Ministers of Defense

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SZIER RSDIE

Schweizerische Zeitschrift
für internationales
und europäisches Recht

Revue suisse
de droit international
et européen

24. Jahrgang 2/2014 24e année

Swiss Review
of International
and European Law

Schulthess §

Rivista svizzera
di diritto internazionale
e europeo

SZIER – Schweizerische Zeitschrift für internationales und europäisches Recht
RSDIE – Revue suisse de droit international et européen
RSDIE – Rivista svizzera di diritto internazionale e europeo
SRIEL – Swiss Review of International and European Law

www.szier.ch / www.rsdie.ch

Herausgegeben von / Édité par:
Schweizerische Vereinigung für internationales Recht (SVIR)
Website / Kontakt: www.svir-ssdi.ch
Société suisse de droit international (SSDI)
site / contact: www.svir-ssdi.ch

Publiziert mit Unterstützung der Schweizerischen Akademie für Geisteswissenschaften
Publié avec le soutien de l'Académie suisse des sciences humaines et sociales

Adresse der Redaktion / Adresse de la rédaction:
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Kirchweg 41, CH-8966 Oberwil-Lieli, Switzerland
Tel.: +41 (0)56 534 48 46
Lorenz.Langer@szier.ch

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Verlag und Abonnementsverwaltung / Edition et administration

Schulthess Juristische Medien AG, Zwingliplatz 2
Postfach, 8022 Zürich, Telefon: 044 200 29 19
Fax: 044 200 29 08
E-Mail: zs.verlag@schulthess.com
Internet: http://www.schulthess.com
Erscheint 4mal jährlich / Paraît 4 fois par an

Abonnementspreis / Prix de l'abonnement
CHF 250.–
Einzelnummer / Prix du numéro
CHF 71.–

ISSN 1019-0406

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Jurisdictional Immunities of Ministers of Defense

By Robert Kolb[1]

I. The Notion of Immunities in International Law

1. There are fundamentally three types of immunities[2] for entities or persons under international law.

a) *State Immunity*. The first category, not directly relevant here, is that of State immunity (or of the immunity of other entities entitled to an exemption from jurisdiction or execution under international law, such as international organizations). Immunity means that tribunals or other law-executing bodies of a State may not exercise their jurisdiction in relation to civil and penal matters against a foreign State or another entity entitled to such immunity. There are exceptions to this type immunity, e.g. for questions not relating to the exercise of sovereign power (*acta jure gestionis*) or for situations of waiver of immunity. Customary international law, international treaties[3] and relevant national law of each State regulate State immunity.

b) *Personal Immunities*. The second category is that of personal immunities, or immunity *ratione personae*. These immunities are granted by customary international law or by treaty law (such as the conventions on diplomatic law) to some individuals on account of their functions as high-profile representatives of the State. This type of immunity developed historically from the tree of State immunities: the Head of State and his diplomatic envoys, the two sets of persons initially enjoying that immunity, were considered as representing the State itself. Later, the Head of Government and the Minister of Foreign Affairs were added to the list of persons enjoying such immunity under customary international law. Personal immunities are meant to ensure the personal inviolability of the persons protected. Their aim is to enable these persons to perform their

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[2] On the international law of immunities, see notably H. Fox / P. Webb, *The Law of State Immunity,* 3rd ed., Oxford, 2013.

[3] See in particular the UN Convention on Jurisdictional Immunities of States and their Property (2004).

public missions without impairment or excessive interference by legal proceedings in front of foreign courts. The point is also one relating to the equality of States: *par in parem non habet jurisdictionem*. These personal immunities are applicable as long as the person is in office; they end with the cessation of the public office. However, the State official continues to enjoy a functional immunity (see below, c) after the end of his or her office. He or she cannot then be subjected to the jurisdiction of a foreign court for any act or omission performed as part of the official duties or under cover of the sovereign powers, while he or she had been in office. The question as to whether and to what extent international crimes constitute an exception from immunity with regard to former Heads of State or other persons entitled to immunities is controversial; the facts of the present case do not force us to enter into it[4].

c) *Functional Immunities*. The third category is the one of functional immunities or immunities *ratione materiae*. These immunities are granted by customary international law. They cover all State agents when acting in their official capacity. An individual acting on behalf of a sovereign State may thus not be called to answer for internationally wrongful acts he committed in his or her functions. Only the State, for whom the agent acted, may be held internationally responsible and answerable in a procedure of negotiation or adjudication (the latter notably in front of an international tribunal, where the rule of immunity does not apply). As was already stressed, the notion of functional immunities is not reserved to a specific circle of persons. It is granted to any State official, if and when acting on behalf of the State (*acta jure imperii*). These immunities, being functional – i.e. linked to the public function –, last only as long as the office itself. Once a person is not any more acting on behalf of the State, he or she loses any entitlement to functional immunities, but keeps the protection of immunity for the previous public acts, performed when he or she was in office. Functional immunities are claimed by the State for whom the agent acted. The foreign State thereby carries responsibility for the acts of the agent, with the result that this agent is not personally answerable. The State itself is responsible for the acts at stake.

2. Such immunities, personal or functional, must be granted under international law only to a recognized State[5]. By the same token, a tribunal may consider that a Head of State whose immunity was revoked by a new government within his or her State of origin, also ceases to enjoy an entitlement to personal

[4] See the *Ex Parte Pinochet (No. 3)* decision of the House of Lords, 2000, 119 ILR, p. 135 ff.

[5] See e.g. *US v. Noriega,* District Court, 1990, US, 99 ILR, pp. 143 ff, 161; confirmed on appeal, cf. 121 ILR, p. 591. See also *Flatow v. Islamic Republic of Iran,* 1998, District Court of Columbia, US, 121 ILR, pp. 618 ff, 642.

immunity before foreign tribunals[6]. The extent to which municipal tribunals are bound by the relevant determinations of the executive branch is a question of domestic law. None of these questions needs to be pursued here.

3. The most relevant international case-law on immunities stems from the International Court of Justice (ICJ). There are two pertinent cases to be mentioned. In the *Arrest Warrant* (Democratic Republic of Congo v. Belgium) case of 2002[7], the question turned on an arrest warrant issued by Belgian criminal prosecution authorities against a – at that time – serving Minister of Foreign affairs of the Democratic Republic of Congo. He had been indicted for war crimes and crimes against humanity, on the basis of universal jurisdiction according to Belgian statute law. The ICJ confirmed that "certain holders of high-ranking office in a State, such as the Head of State, Head of Government and Minister of Foreign Affairs, enjoy immunities from jurisdiction in other States, both civil and criminal"[8]. The Court was concerned in this passage with the personal immunities of the mentioned persons. This is shown by the list of persons mentioned there and by the expression "inviolability" immediately following the quoted passage. The Court clearly limited its judgment to serving officials; it was not concerned with the position of former officials, i.e. officials no longer in office[9]. Finally, the Court also indicated that such personal immunities are absolute in the criminal sphere (the one relevant to the case), and that there is no distinction according to the nature of the act (*acta jura gestionis / imperii*)[10]. The most interesting question relating to this case concerns the formulation of the ICJ: 'certain holders of high-ranking office in a State, such as...'. This passage, as we will see, is interpreted in a variety of ways. Some authors consider that the Court paved the way for a customary personal immunity of other high-ranking State officials than the three classical ones. This troika is indeed introduced in the judgment by the words 'such as' the Head of State, Head of Government and Minister of Foreign Affairs.

The second case to be mentioned is the *Certain Questions of Mutual Assistance in Criminal Matters* (Djibouti v. France) case[11] of 2008. The case turned on a criminal procedure in Paris. The procedure concerned in the non-elucidated death of a French *magistrat* in Djibouti. At issue were certain acts of criminal procedure of the French authorities impacting upon higher or low-

6 See *In Re Grand Jury Proceedings Doe No. 770,* 1987, Court of Appeals of the Fourth Circuit, US, 81 ILR, p. 599.

7 ICJ, Reports, 2002, pp. 3 ff.

8 *Ibid.,* p. 21, § 51.

9 *Ibid.*

10 *Ibid.,* p. 22, § 55.

11 ICJ, Reports, 2008, pp. 179 ff.

er-rank State officials of Djibouti. First, the Court confirmed that the serving Head of State enjoys an absolute immunity in criminal and civil matters, and that he or she cannot thus be summoned to appear at a foreign court, even if only as a witness (but he or she might be invited to appear as a witness, if he or she remains free to accept or to decline)[12]. This is the part of the judgment dealing with personal immunities. Second, the Court considered what immunities were due to the 'Procureur de la République' (Public Prosecutor) of Djibouti and to the Head of National Security of that State, in the context of the criminal proceedings under way in France. The ICJ emphasized that such lower-rank personnel do not enjoy personal immunities under international law; in particular, it is not endowed with the status of diplomatic personnel[13]. The Court however recognized that these persons enjoy the cover of functional immunities. It made clear that in such a case, "[t]he State which seeks to claim immunity for one of its State organs is expected to notify the authorities of the other State concerned"; this State "is assuming responsibility for any internationally wrongful act in issue committed by such organs"[14]. These holdings are not in any manner controversial in international law.

II. Personal Immunities of the Ministers of Defense

4. The issue of the status of a Minister of Defense with regard to personal immunities has as yet not been analyzed by international case-law. It may be stated at the outset that the position of the Minister of Defense of a foreign country with regard to personal immunity is a controversial issue, on which international law is not yet settled. At best, it may be said that the tendency of the law is to extend the personal immunities to the most important members of the cabinet (or ministers) on account, *inter alia*, of their increasing necessity to travel abroad in the conditions of the modern world. The ILC (International Law Commission of the UN), the most authoritative organ for the codification of international law, when drafting the UN Convention on Jurisdictional Immunities and State Property at the beginning of the 1990ties, still believed that only the Head of State (and eventually Heads of Government and Ministers of Foreign Affairs), as well as diplomatic agents, were entitled to personal immunities[15]. All the other ministers should be covered merely by functional immu-

[12] *Ibid.,* p. 233 ff, §§ 157 ff.
[13] *Ibid.,* pp. 243–244, § 194.
[14] *Ibid.,* p. 244, § 196.
[15] Report of the ILC, *Draft articles on Jurisdictional Immunities of States and Their Property,* 1991, vol. II/2, p. 15.

nities. In the meantime, the position of the ILC has changed. First, it is not any more controversial at all that the three highest State officials (Heads of State, Heads of Government and Minister of Foreign Affairs, i.e. the so-called troika) benefit from personal immunities[16]. Second, while the current Special *Rapporteur* of the ILC leans toward the restriction of personal immunities to these three persons (plus diplomatic envoys)[17], a number of members of the ILC expressed doubts and wanted to envisage an immunity for other higher State officials, in line with the apparently broader reading of the ICJ in the *Arrest Warrant* case[18]. Legal writings share the same uncertainties: some authors propound a classical restrictive view, limiting themselves to the troika[19] (or even less than that[20]); others uphold a more expansive view, including further high-rank ministers[21], especially the minister of defense; while still others limit themselves to express doubts with regard to a law in flux[22]. It is, however, generally recognized that the tendency of international and national practice is to expand the categories of high-ranking officials benefiting from immunity *ratione personae*[23].

5. In the UK, the sole directly relevant precedent espouses the expansive view on personal immunities and grants immunity *ratione personae* to a serving Minister of Defense. This is the *Application for Arrest Warrant against General Shaul Mofaz* (2004) case, Bow Street Magistrates' Court[24]. On 11 February 2004 an application was made for an arrest warrant against S. Mofaz, the then Israeli Defense Minister, who was in England on official business. The basis of the warrant was allegations of war crimes (grave breaches to the Ge-

16 ILC, *Second Report on the Immunity of State Officials from Foreign Criminal Jurisdiction,* 4th April 2013, U.N. Doc. A/CN.4/661, p. 18, §§ 57–58. § 58 opens as follows: "[I]t is evident that, generally speaking, the granting of immunity *ratione personae* to Heads of State, Heads of Government and ministers for foreign affairs is established practice".

17 *Ibid.,* p. 20, § 60. One of the bases of such a reading is that immunities are exceptions to ordinary rules and to establish them there must be a clear supporting practice – but such a practice would not yet exist with regard to persons other than the so-called 'troika': *ibid.,* p. 21, § 63.

18 *Ibid.,* pp. 20–21, § 61, and notably p. 23, § 68.

19 See e.g. A. Watts, "The Legal Position in International Law of Heads of States, Heads of Governments and Foreign Ministers", 247 Recueil des cours de l'Académie de droit international de La Haye, 1994-III, pp. 53, 102. Some States also favour this position, e.g. Switzerland, see 19 RSDIE/SZIER (2009), p. 586.

20 For example, exclusion of the Foreign Minister: D. Akande / S. Shah, "Immunities of State Officials, International Crimes and Foreign Domestic Courts", 21 EJIL (2010), p. 825.

21 See e.g. A. Cassese, *International Criminal Law,* Oxford, 2003, p. 264, who extends personal immunities to all senior members of cabinet.

22 See e.g. M. Shaw, *International Law,* 6th ed., Cambridge, 2008, pp. 738–740.

23 H. Fox / P. Webb, *supra* n. 2, p. 559.

24 128 ILR, p. 709ff. See also C. Warbrick, "Current Developments, Public International Law", 53 ICLQ (2004), pp. 771–773.

neva Convention IV of 1949). The Court ruled that by its formula the ICJ in the *Arrest Warrant* case did not intend to limit personal immunities to the troika: the expression 'such as' buttressed such a reading. In other words, it was held that the listed troika was not exclusive[25]. Moreover, it was considered that the position of the Minister of Defense differed from that of other members of government. The roles of defense and foreign policy are said to be very much intertwined in the modern world. The Court emphasizes that many States maintain troops overseas (sometimes in UN missions), making visits abroad necessary in order to correctly perform the State functions[26]. The conclusion is as follows: "[A] Defence Minister would automatically acquire State immunity in the same way as that pertaining to a Foreign Minister"[27].

6. Two main arguments can be presented as sustaining this progressive line of reasoning. First, under modern conditions, a Minister of Defense is called to travel in many different countries. This necessity of a functional nature triggers a corresponding need for personal immunities, lest the office be not correctly performed. Formerly, ministers of the State other than those of the troika were not considered as exercising a function implying the need to travel abroad. This has changed in the last 20 to 30 years. Second, to the extent that the treaty-making power is progressively extended beyond the three highest positions of the State (Head of State, Head of Government, Minister of Foreign Affairs), there should probably concomitantly be an extension of the immunities. Traditionally, only three persons (apart from diplomatic envoys or some members of the armed forces) were empowered under international law to conclude treaties and agreements on behalf of a State without specific full-powers. This was once again the classical troika. Article 7, § 2, letter a, of the Vienna Convention on the Law of Treaties (1969) expressed and reflected this position according to traditional rules of customary international law. However, more recently, the ICJ has suggested that this automatic treaty-making power (without an appointment under full-powers) is progressively extended, by State practice, to other ministers of the State. In the *Armed Activities* (Democratic Republic of Congo v. Rwanda, 2006) case[28], the ICJ ruled that other ministers, such as a Minister of Justice, could directly bind their State internationally by virtue of the sole authority of his or her office[29]. It is not out of order to establish a parallel between this development and the one on immunities. If ministers with a particular portfolio are increasingly entitled to internationally bind their State, i.e. to

[25] 128 ILR, pp. 711–712.
[26] *Ibid.,* p. 712.
[27] *Ibid.*
[28] ICJ, *Reports,* 2006, pp. 6 ff.
[29] *Ibid.,* pp. 27–28, §§ 47–48.

perform functions formerly exercised by the Minister of Foreign Affairs, and if international meetings and travels are nowadays necessary in order to perform such functions, it may seem straightforward to protect the holder of these highest offices by relevant personal immunities. The aim of such immunities of serving ministers is always the same: *ne impediatur officium*; do not hamper the exercise of (highest) sovereign functions. The foregoing is particularly true for a Minister of Defense. From the perspective of these two arguments, it seems warranted to include such a Minister in the scope of the holders of personal immunities, as the progressive jurisprudence of the Bow Street Magistrates' Court did. It would however be difficult to claim that such immunity *must* be granted under an already fully consolidated rule of public international law. Such a rule is only *in statu nascendi*; but the present judgment could help to build up another element of relevant practice.

7. The case-law also shows that tribunals will venture into the question as to what extent the actual functions of a member of cabinet (minister) are similar to those of the Minister of Foreign Affairs, i.e. to what extent he or she is performing acts relevant for international relations. Thus, In the *Re Bo Xilai* case, decided by the English Bow Street Magistrates' Court in 2005[30], it was held that the Chinese Minister for Commerce (including International Trade) exercised functions "equivalent" to those of a Minister of Foreign Affairs; and that he was therefore entitled to (personal) immunity. The Judge expressed as follows: "I have concluded his functions are equivalent to those exercised by a Minister for Foreign Affairs and, adopting the reasoning of the International Court of Justice in the case of *Democratic Republic of Congo v. Belgium* […], I reach the conclusion that under the customary international law rules Mr. Bo has immunity from prosecution as he would not be able to perform his functions unless he is able to travel freely"[31]. The criterion used is that of 'functional equivalence': the point is to decide to what extent a minister is concerned with the external relations of his State (and thus needs to travel abroad).

The two mentioned cases (*Mofaz*, *Xilai*) show that the UK case-law favors an extension of personal immunities beyond the troika. It does so on the basis of a careful analysis of the actual functions of a high-ranking State representative. It may be noted that the case-law of other States goes in the same direction as the English practice. Thus, in France, the *Cour de cassation*, in a judgment of 19th of January 2010, has held that personal immunities (and thus inviolability of the person) should extend to other ministers of State who may represent their

[30] 128 ILR, , pp. 713–715.
[31] *Ibid.,* p. 714.

State internationally by sole virtue of their function[32]. This depends on the functions of the ministers: those who are called upon to represent the State in international affairs, such as the minister of defense, are manifestly within this circle of persons. Some authors have claimed that the Swiss Federal Court recognized the immunity *ratione personae* of a Russian Minister of Atomic Energy on the basis of a similar reasoning. This is however not precise. The Russian Minister in question was not any more in office, and the federal Tribunal therefore considered the issue only under the guise of functional immunities[33].

8. This approach was also followed by the High Court (Queen's bench Division, Divisional Court, England) in the *Khurts Bat* case (2011)[34]. The appellant was the Head of the Office of National Security of Mongolia. The Court (per LJ Moses) stated that to the extent the appellant had a status which customary international law would regard as of sufficient high rank, he would have been entitled to immunity[35]. In this context, the Court emphasized that the words "such as" used by the ICJ in the *Arrest Warrant* case had the following impact: "The words 'such as', whilst indicating that the list is not limited to those they identify [the troika], also carries with it the implication that in order to fall within that narrow circle it must be possible to attach to the individual in question a similar status"[36]. The Court then states that Defense Ministers and Ministers of Commerce have been afforded that immunity (*Mofaz* and *Xilai* cases)[37]. It then concludes that in the present case the functional equivalence criterion is not satisfied, the appellant not being of a sufficiently high rank: "It is clear to me that Mr Khurts Bat falls outwith that narrow circle. In British terms he is a civil servant ... [...]. The documents showing his job description and his authority [...] underline his status as an administrator far removed from the narrow circle of those who hold the high-ranking office..."[38].

9. Summing up, it can be said that while the question of personal immunities of certain high-ranking State officials beyond the troika is still a matter of controversy and uncertainty under general international law, the tendency of judicial practice is not to formally limit personal immunities to the three most

[32] <www.legifrance.gouv.fr>, Number of case: 09-84818: "[Q]ue cette coutume [personal immunities] s'étend également à ceux des ministres occupant une position qui fait, qu'à l'instar du chef de l'Etat et du chef du gouvernement, ils se voient reconnaître par le droit international la qualité de représenter un Etat du seul fait de leur fonction; que, pendant toute la durée de leur charge, ils bénéficient d'une immunité de juridiction pénale et d'une inviolabilité totales à l'étranger".

[33] *E. Adamov* case, Judgment No 1A.288/2005, ATF 132, II, pp. 81 ff, pp. 98–100.

[34] 147 ILR, pp. 633 ff.

[35] *Ibid.,* p. 653, § 62.

[36] *Ibid.,* p. 653, § 59.

[37] *Ibid.,* p. 653, § 60.

[38] *Ibid.,* p. 653, § 61.

high-profile States' representatives. The criterion used by the English courts is to assess to what extent the sphere of responsibility of a minister enters into the realm of foreign affairs, with its concomitant need to travel[39]. In the quoted case-law, the Minister of Defense has been considered the prototype of a high-ranking State minister entitled to immunity beyond the troika. This evolution reflects the diversification of the State's functions over the past decades. While formerly only the members of the troika participated significantly in foreign affairs (and thus were granted corresponding personal immunities), today other ministers, and especially the Defense Minister, perform international functions in the context of a globalized world. The law of immunities will adapt to this state of affairs; it will thus certainly expand. This evolution also shows that it is mistaken to consider immunity as an old-fashioned notion in demise, promised to a fate of ineluctable shrinking because of the rise of access to justice and of human rights. The functional necessities of inter-State relations produce their own law and will continue to take some precedence over groups fighting for ideals placed beyond the pale of State interests.

[39] In legal doctrine, the following criteria have been suggested (H. Fox / P. Webb, *supra* n. 2, p. 560): "(i) the exercise of the official's powers abroad; (ii) immunity as indispensable for carrying out such functions; and (iii) the authorization of the official to represent the State as to its position in foreign relations, including responsibility for matters which occur outside the State's territory".