IMMUNITY OF STATE OFFICIALS AND OBLIGATION TO PROSECUTE

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Résumé – Abstract

(FR) Après avoir rappelé l’état du droit positif en matière d’immunités ratione personae et ratione materiae des représentants étrangers, cette étude se penche sur les interactions existant entre ces immunités et l’obligation de poursuivre les crimes internationaux afin de déterminer si cette obligation peut servir de base solide à une éventuelle « exception » à l’immunité ratione materiae des représentants des États poursuivis à l’étranger. Les avantages et les difficultés de l’approche consistant à limiter l’immunité ratione materiae en conséquence de l’obligation de poursuivre sont évalués, de même que son fondement normatif.

(EN) After summing up the lex lata on the ratione personae and ratione materiae immunities of State officials from foreign criminal jurisdiction, this paper explores the interplay between those immunities and the obligation to prosecute international crimes in order to assess whether such obligation could provide a better rationale for an ‘exception’ to immunity ratione materiae of State officials prosecuted abroad. The advantages and difficulties of the argument against immunity ratione materiae on the basis of the obligation to prosecute are assessed, together with its normative foundation.

Mots-clé – Keywords


TABLE DES MATIÈRES – TABLE OF CONTENTS

I. THE LAW AS IT STANDS: IMMUNITY RATIONE PERSONAE AND IMMUNITY RATIONE MATERIAE.....5

1. IMMUNITY RATIONE PERSONAE........................................................................................................5
2. IMMUNITY RATIONE MATERIAE ........................................................................................................7

II. THE LAW AS IT COULD BE UNDERSTOOD: THE INTERPLAY BETWEEN THE OBLIGATION TO PROSECUTE AND IMMUNITY OF STATE OFFICIALS.................................................................9

1. TWO VIEWS ........................................................................................................................................9
2. OBLIGATION TO PROSECUTE V. IMMUNITY ..................................................................................11
3. ADVANTAGES ....................................................................................................................................14
4. NORMATIVE FOUNDATION OF THE ARGUMENT; JURISDICTION AND IMMUNITY.........................16
5. DIFFICULTIES ..................................................................................................................................18
Despite its hardly surprising outcome, the *Germany v. Italy* Judgment of the International Court of Justice\(^1\) has been felt by many human rights activists as a surprising and worrying setback. It is feared that it not only shuts the door to many civil claims instituted abroad against States in relation to past or on-going atrocities, but also that it will prevent any criminal proceedings directed at foreign State officials involved in such crimes. In light of such fear, this paper intends to revisit the interplay between international criminal law and sovereign immunity from the perspective of the obligation to prosecute.

After summing up the *lex lata* on the *ratione personae* and *ratione materiae* immunities of State officials from foreign criminal jurisdiction (I), this paper explores the interplay between those immunities and the obligation to prosecute international crimes in order to assess whether such obligation could provide a better rationale for an ‘exception’ to immunity *ratione materiae* of State officials prosecuted abroad (II). The advantages and difficulties of the argument against immunity *ratione materiae* on the basis of the obligation to prosecute are assessed, together with its normative foundation.

**I. THE LAW AS IT STANDS: IMMUNITY *RATIONE PERSONAE* AND IMMUNITY *RATIONE MATERIAE***

For the last two decades – basically from the *Pinochet*\(^2\) case and the *Arrest warrant*\(^3\) case up to the *Germany v. Italy* and *Belgium v. Senegal*\(^4\) ICJ Judgments – practice has evolved and developed, so that the overall picture on the interplay between the immunity rules and international criminal law is now much clearer than before. In other words, a few basic points relating to the international *lex lata* can, as such, be assumed with a high degree of certainty.

The first of those basic points – which is actually a starting point – is that the conceptual distinction between immunity *ratione personae* and immunity *ratione materiae* seems now\(^5\) to be very widely accepted\(^6\).

### 1. IMMUNITY *RATIONE PERSONAE*

It is now settled that under international customary law, acting heads of State, heads of government and foreign affairs ministers enjoy total immunity *ratione personae* from foreign criminal prosecution, be it for acts performed privately or officially, and indistinctively of

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\(^1\) Jurisdictional immunities of the State (*Germany v. Italy: Greece intervening*), Judgment of 3 February 2012.


\(^4\) *Questions relating to the obligation to prosecute or extradite (Belgium v. Senegal)*, Judgment of 20 July 2012.

\(^5\) This distinction was not used by the ICJ in the *Arrest warrant* judgment of 14 February 2002. Six years later, it appears in the *Djibouti v. France* of 4 June 2008. On the general acceptance of the distinction between those two types of immunity, see ILR, *Report of the 60th session* (2008), A/63/10, para. 287, p. 333.

whether those acts have been performed before or during their term of office. The same is true for diplomats and members of special missions, but only in relation to possible criminal proceedings in the States where they are accredited or on mission.

It is questionable whether other persons than the ‘triad / troika’ referred to above also enjoy personal immunity by the sheer fact of the nature of their official functions (i.e. regardless of the fact that they are posted or on official visit abroad). The question arises because the enumeration by the ICJ in the Arrest Warrant Judgment was clearly not exhaustive. This being said, there does not seem to be sufficient practice to support a generous extension of the beneficiaries of such personal immunity. In order to assess the benefit of immunity ratione personae to other persons under customary international law, one crucial element has to be taken into account: if indeed, as the ICJ ruled, such immunity is to be reserved to “holders of high-ranking office”, it is because only those persons “by virtue of their office” embody or personify the State. Without always explicitly referring to such condition, domestic courts have recognized that vice-presidents, but also defence and commerce ministers are to be protected by a personal immunity, while the Arrest Warrant and the Djibouti v. France cases respectively suggest that the Education minister or the Procureur de la République, do not enjoy such immunity. The High Court in London ruled that the Head of the Office of National Security of Mongolia could be arrested for extradition purposes because he was not on an official visit in the UK and, moreover, because he lacked immunity ratione personae, as he was “an administrator far removed from the narrow circle of those who hold the high-ranking office to be equated with the State they personify”. The High Court rejected as being “too restrictive” the view held by the District Judge according to which the foreign official had to be “engaged on foreign affairs” in order to benefit from immunity ratione personae. It would indeed be too restrictive to consider that the holder of the high-ranking office must be in charge, within the constitutional meaning of the term, of actually representing the interests of the State in

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7 Arrest Warrant of 11 April 2000 (Democratic Republic of Congo v. Belgium), Judgment, ICJ Reports 2002, paras. 51-61, specially paras. 54-55. See also the Resolution adopted by the Institut de droit international during the Vancouver session (1999), Immunities from Jurisdiction and Execution of Heads of State and of Government in International Law (rapporteur J. Verhoeven).
9 Arrest Warrant of 11 April 2000 (Democratic Republic of Congo v. Belgium), Judgment, ICJ Reports 2002, para. 51: “...certain holders of high-ranking office, such as the Head of State, Head of Government, and Ministers for Foreign Affairs...”.
10 Ibid.
11 M. Wood, see footnote 9, at p. 11.
13 Notably in Belgium as far as the DRC vice-presidents under the transitional constitution were concerned, see P. d’Argent, Jurisprudence belge relative au droit international public (2004-2007), RBDI, 2007-1, n°51, p. 185.
14 M. Wood, see footnote 9, at p. 11 (footnote 27) refers to English cases where immunity ratione personae was extended to Defense and Trade ministers: Re Mofaz 128 ILR 709, and in Re Bo Xilai 129 ILR 713.
17 Ibid., per Foskett J, p. 665 para. 107 and also per Moses LJ, p. 653, para. 62.
international relations, including the capacity to legally bind and commit it. If it were the case, most constitutional monarchs would have to be excluded from the *ratione personae* scope of the *ratione personae* immunity, while it is clear that, according to the very words of the *Arrest warrant* judgment, they benefit from it\(^\text{18}\).

Immunity *ratione personae* ceases to exist when the high officials protected by it leave office or, earlier, if their State waives it. Such renunciation by the State to the immunity of its high-ranking official does not entail any renunciation by the State to its sovereign immunity as such if the act concerned was *jure imperii*. So defined, immunity *ratione personae* protects from “any act of authority of another State which would hinder [the high official] in the performance of his or her duties”\(^\text{19}\), even those relating to the prosecution of the gravest breaches of international criminal law. However, having no peremptory character, such immunity can be set aside between contracting parties by a specific treaty rule. For instance, it does not apply between States parties to the ICC Statute for the purpose of the ICC jurisdiction\(^\text{20}\) and cooperation with it. Due to the relative effect of treaties, it must nevertheless be respected when a non-Party high representative is concerned\(^\text{21}\), even, it has been argued, when the ICC jurisdiction is triggered by a Security Council referral\(^\text{22}\).

### 2. IMMUNITY *RATIONE MATERIAE*

All "representatives of the State acting in that capacity”\(^\text{23}\) enjoy immunity *ratione materiae* (also called ‘official acts immunity’) for the acts so performed, even if they have acted *ultra vires*\(^\text{24}\). ‘Representatives’ of States include of course the triad referred to above and diplomats. However, in contrast with what is required for triggering immunity *ratione personae*, the concept of ‘representatives of the State’ for the purpose of immunity *ratione materiae* is not limited to persons specifically embodying or personifying it. Rather, that concept encompasses all State organs within the meaning of Article 4 of the ILC Articles on State responsibility, together with “all the natural persons who are authorized to represent the State in all its manifestations” to use the ILC comments on the UN 2004 Convention\(^\text{25}\). As stated in the study prepared by the Secretariat for the ILC work on the subject of immunity of State officials from foreign criminal

\(^{\text{18}}\) Even if all heads of States benefit from a material presumption of competence for the purpose of contracting treaties, so that Article 7, paragraph 2, of the Vienna Convention on the Law of Treaties does not relate to the way their function is established but rather to the extent of their powers, this means only that constitutional limitations on their capacity in that regard must be “properly publicized” in order to come within the provisions of Article 46, paragraph 2, of the same Convention: see ICJ, *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea intervening)*, Judgment, ICJ Reports 2002, para. 265, p. 430.


\(^{\text{20}}\) ICC Statute, Art. 27.

\(^{\text{21}}\) ICC Statute, Art. 98 (1).


\(^{\text{23}}\) United Nations Convention on Jurisdictional Immunities of States and their Property, art. 2 (1), b) iv).


jurisdiction, “if immunity _ratione materiae_ is viewed as an implication of the principle that conduct adopted by a State organ in the discharge of his or her functions is to be attributed to the State, there appear to be strong reasons for aligning the immunity regime with the rules on attribution of conduct for purposes of State responsibility” – or at least, “the criteria for attribution of conduct in the context of State responsibility might (...) be a relevant source of inspiration in determining whether an act is to be considered as ‘official’ or ‘private’ for purposes of that immunity.”

The idea according to which the attribution of a conduct to the State by application of the rules of international responsibility serves in determining whether immunity _ratione materiae_ protects abroad the person who acted has been accepted by Special rapporteur Kolodkin.

Immunity _ratione materiae_ extends to acts _jure imperii_ and acts _jure gestionis_, provided that they were not performed in a private capacity. It survives the term of the official functions of the representative, Article 39 (2) of the 1961 Vienna Convention specifically providing that diplomats continue to benefit from criminal immunity after the end of their accreditation regarding all acts performed in the exercise of their diplomatic functions.

Immunity _ratione materiae_ is controlled by the foreign State, not only in the sense that it can be waived by it like immunity _ratione personae_, but also in the sense that it must be claimed by it. As the ICJ has ruled in the _Djibouti_ case:

“The State which seeks to claim immunity for one of its State organs is expected to notify the authorities of the other State concerned. This would allow the court of the forum State to ensure that it does not fail to respect any entitlement to immunity and might thereby engage the responsibility of that State. Further, the State notifying a foreign court that judicial process should not proceed, for reasons of immunity, against its State organs, is assuming responsibility for any internationally wrongful act in issue committed by such organs.”

The link established by the Court between the claim made by the State in favour of the immunity _ratione materiae_ of its representative and its international responsibility does not exist with the same strict necessity as far as immunity _ratione personae_ is concerned, as that immunity may relate to private acts for which no international responsibility of the State may exist.

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26 _Immunity of State officials from foreign criminal jurisdiction, Memorandum by the Secretariat, A/CN.4/596, para. 156, p.102._


29 Such claim should be made _in limine litis_, but a later invocation of functional immunity may nevertheless still be operative, as it is not clear that not raising the matter _in limine litis_ would entail any implied renunciation: see M. Wood, “The Immunity of Official Visitors”, _MPYbUNL_, 2012, at pp. 14-15, footnote 45, and also Kolodkin, _Third report on immunity of State officials from foreign criminal jurisdiction, A/CN.4/646._

30 _Certain Questions of Mutual Judicial Assistance in Criminal Matters (Djibouti v. France), Judgment, ICJ Reports, 2008, p.244, para. 196._

Like immunity *ratione personae*, immunity *ratione materiae* does not apply for the purpose of the ICC jurisdiction between State parties.

**II. THE LAW AS IT COULD BE UNDERSTOOD: THE INTERPLAY BETWEEN THE OBLIGATION TO PROSECUTE AND IMMUNITY OF STATE OFFICIALS**

To what extent does immunity apply when international crimes are prosecuted by foreign domestic courts? This question is well known and has fuelled controversy for nearly two decades. Many arguments have been presented in that regard and the question has divided the *Institut de droit international*, but also the International Law Commission. Since the *Arrest warrant* Judgment, the question seems to be limited to immunity *ratione materiae*, as the ICJ found the immunity of serving high officials – i.e. immunity *ratione personae* – to be “full”\(^{33}\), i.e. absolute.

### 1. TWO VIEWS

The ‘progressive’ (or ‘activist’) view affirms that international crimes cannot attract any immunity. Taking stock of the *Arrest warrant*, the less extreme version of such view is ready to concede that immunity *ratione personae* stands as a matter of *lex lata* during the term of office of the high-ranking officials making up the ‘troika’, but firmly argues that immunity *ratione materiae* does not stand when grave international crimes have been committed. The rationales for such ‘exception’ to the immunity *ratione materiae* remain varied. In order to circumvent the obstacle resulting from paragraph 61 of the 2002 Judgment – where the Court ruled that former foreign affairs ministers could be prosecuted by domestic courts having jurisdiction under international law for crimes that occurred during their term of office if those crimes have been committed in their private capacity\(^{34}\) –, some have argued that such crimes have to be considered as private acts rather than sovereign acts committed in an official capacity because, presumably, it would not be in the function of a State to perform them. Others have considered that those crimes were so gravely illegal that the State was not entitled to such immunity, either because the hierarchy of norms based on the *jus cogens* nature of the rules prohibiting them would require so, or because the commission of such crimes would entail a necessary, albeit tacit, renunciation to immunity by the responsible State. Some have also considered that the right of victims to judicial redress was so fundamental that such immunity had to be set aside.

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32 See the *Resolution on the Immunity from Jurisdiction of the State and of Persons Who Act on Behalf of the State in case of International Crimes*, Naples session (2009), (rapporteur: Lady Fox).
34 *Ibid.*, para. 61, p. 26: “Provided that it has jurisdiction under international law, a court of one State may try a former Minister for Foreign Affairs of another State in respect of acts committed prior or subsequent to his or her period of office as well as in respect of acts committed during that period of office in a private capacity.”
All those arguments are well-known, and some of them have found their way in domestic\textsuperscript{35} or international case-law\textsuperscript{36}. There is however no need to rehearse them at length here, as they have already been thoroughly reported\textsuperscript{37}.

The ‘conservative’ (or ‘orthodox’) view holds that there is no exception to immunity \textit{ratione materiae}. The argument is largely based on the construction according to which such immunity has developed as a customary rule without any ‘exception’, except perhaps “where criminal jurisdiction is exercised by a State in whose territory an alleged crime has taken place, and this State has not given its consent to the performance in its territory of the activity which led to the crime and to the presence in its territory of the foreign official who committed this alleged crime.”\textsuperscript{38} However, whether crimes committed during an armed conflict are included in that territorial exception, so as to allow their prosecution by the forum State, does not seem to be a settled issue even among those who are ready to concede such territorial exception\textsuperscript{39}. For the rest, the doctrine upholding immunity \textit{ratione materiae} even when the gravest crimes have been committed by a foreign official consider that the arguments developed by the ‘activist’ doctrine lacks sound logical-legal foundation and that it is difficult to consider that the \textit{Pinochet} case has actually given rise to a consistent practice amounting to the existence of a new customary ‘exception’ to the official acts immunity when grave international crimes have been perpetrated\textsuperscript{40}.

I must confess that, together with the ‘orthodox’ doctrine, I have never found the arguments developed by the ‘activist’ doctrine to be fully convincing\textsuperscript{41}. The reasons to reject them are well-known\textsuperscript{42}: crimes are most usually committed in an official and sovereign capacity\textsuperscript{43}, precisely in

\begin{footnotesize}
\textsuperscript{35} One of the latest case to set aside immunity \textit{ratione materiae} in case of grave crimes, posterior to the UN Secretariat memorandum mentioned below in footnote 38, is the decision of 25 July 2012 of the “\textit{Cour des plaintes}” of the Swiss “\textit{Tribunal pénal fédéral}”: http://bstger.weblaw.ch/pdf/20120725_BB_2011_140.pdf
\textsuperscript{37} On those various arguments and the authors or case-law supporting them, see the thorough presentation prepared by the UN Secretariat, \textit{Immunity of State officials from foreign criminal jurisdiction, Memorandum by the Secretariat}, A/CN.4/596.
\textsuperscript{38} Kolodkin, \textit{Second report on immunity of State officials from foreign criminal jurisdiction}, A/CN.4/631, para. 90, p. 56, and para. 94(p), p. 59 ; see also paras. 81-86. See also \textit{Khurts Bât v. The Investigating Judge of the German Federal Court} (21 July 2011), 147 \textit{ILR} 633, \textit{per} Moses LJ, paras. 63-101 and \textit{per} Foskett J, para. 104-105.
\textsuperscript{40} See I. Wuerth, “\textit{Pinochet’s Legacy Reassessed}”, \textit{AJIL}, 2012, pp.731-768.
\textsuperscript{41} See already my pleadings on behalf of the DRC in the \textit{Arrest warrant} case, available on the ICJ web site.
\textsuperscript{43} The view according to which grave crimes can only be committed in a private capacity should logically lead to consider that the State of the official who acted cannot bear any international responsibility for his or her crimes, as they would not be attributable to it. Needless to say, such result is not in the interest of the victims and it is strange to see part of the ‘activist’ doctrine supporting this argument.
\end{footnotesize}
order to remain in control of the State apparatus – when they are not simply required to be committed by State organs in order to exist, as it is the case with torture as defined under the 1984 Convention –; the hierarchy of norms argument based on the *jus cogens* nature of the prohibition of such crimes simply cannot hold as it sees a conflict between two norms that actually have two different objects and do not contradict each other, as the ICJ rightly stressed in the *Germany v. Italy* Judgment; no implicit waiver of immunity by the State concerned can reasonably be derived from the commission of a wrongful act, while the right of victims to a judge is never absolute and peremptory.

2. OBLIGATION TO PROSECUTE V. IMMUNITY

This being said, as far as substantive values are concerned, there is no doubt that the quest for greater accountability and the fight against impunity are worthy and legitimate political objectives. Neither is there any doubt that there is a clear contemporary aspiration to try to limit immunity *ratione materiae* if justice is not done at home. If this is so, and in light of the setbacks suffered by the traditional arguments put forward by the ‘activist’ doctrine, one should perhaps design a more convincing way to argue in favour of such limitation when State officials are prosecuted abroad for having allegedly committed grave crimes, usually in their home country. As announced in the short introduction of this paper, the argument here explored is whether the fact that the forum State has an international obligation to prosecute the foreign State official could be the legal way to justify a limitation to immunity *ratione materiae*. The fundamental argument is simple and straightforward: it would be contradictory to require prosecution and at the same time to confer immunity from criminal prosecution. A few developments are needed here in order to circumscribe this argument more precisely.

As the ICJ recalled in *Belgium v. Senegal*, an obligation to prosecute entails the duty to submit the case to competent authorities for the purpose of prosecution, those competent authorities having to decide whether or not to initiate proceedings. This is not the place to list the various treaties, like the 1984 torture Convention (Art. 7, para. 1) at stake in the above-mentioned case, that incorporate such obligation. Neither is it the place to enquire about the possible customary nature of such obligation. As this latest issue is much debated and doubtful, this enquiry shall be limited to treaty obligations, knowing that if those can serve to restrict immunity *ratione materiae*, any similar customary obligation should have the same effect. However, by limiting this exploration to treaty obligations, two things must be made clear.

First, an international obligation to prosecute must exist. Thus, it is not because international law criminalizes an act through a *jus cogens* norm that such act cannot attract immunity *ratione materiae*.

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45 *Jurisdictional immunities of the State (Germany v. Italy: Greece intervening)*, Judgment of 3 February 2012, para. 93.
46 *Questions relating to the obligation to prosecute or extradite (Belgium v. Senegal)*, Judgment of 20 July 2012, para. 90.
materiae. This would not be sufficient and conclusive. Neither is it because international law allows, or even requires, States to have a rule conferring universal jurisdiction to their courts in relation to those crimes, or to make an inquiry into the facts, that immunity *ratione materiae* does not stand. According to the argument put forward, it does not stand for such crimes only if and because an international obligation to prosecute them exists, such obligation being a fourth and not automatic step after the duty to make those acts illegal under domestic law, the duty to confer universal jurisdiction to domestic courts and the duty to inquire.

Why is it not sufficient that States may, are allowed, either by treaty or by application of the *Lotus* principle, to prosecute? Why is it not sufficient that an obligation to criminalize domestically exists, or that an obligation to have universal jurisdiction or to make an inquiry exists? If the obligation to prosecute is enunciated without any exception, irrespectively of the quality of the suspected author of the crime, the answer is simple: because limiting immunity *ratione materiae* cannot be considered to depend on the good will or the choice of the State exercising criminal jurisdiction *vis-à-vis* certain State officials and not *vis-à-vis* the officials of other States, nor of the choice of the victims. Thus, there is actually no need to establish that the crime is of *jus cogens* nature, nor that the obligation to prosecute is similarly peremptory. What is of paramount importance is that, in the very circumstances of the case, the State concerned has an international obligation to prosecute the person having allegedly committed the crime, and not simply the right or the discretion to do so.

Second, in order for the immunity *ratione materiae* to be set aside, the international obligation to prosecute must exist between the prosecuting State and the State whose official is being prosecuted. If the obligation to prosecute cannot be based on general international law but on a treaty, then it is only if the State whose official is prosecuted is party to that treaty that one can consider that the immunity *ratione materiae* of its representative does not exist for such crime. The argument is to say that the State cannot claim the benefit of such immunity nor complain about the prosecution abroad of its official because it has consented that the prosecuting State has an obligation to do so.

So, according to this argument, the fundamental question appears to be whether an international obligation to prosecute (as opposed to the right or the discretion to prosecute) the crime exists, in the very precise circumstances of the case, and if that obligation can legally be opposed to the State whose official is being prosecuted. It would only be if those conditions are met that the immunity *ratione materiae* would not apply.

There is nothing really new in this argument48. It was on that basis49, together with the *jus cogens* nature of the prohibition of torture, that the House of Lords ruled in the *Pinochet III* case.

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- Per Lord Browne-Wilkinson (at p. 156), considering that the “whole elaborate structure of universal jurisdiction over torture committed by officials is rendered abortive and one of the main objectives of the Torture Convention – to provide a system under which there is no safe haven for torturers – will have
It is true that the 1984 torture Convention only applies to acts of torture committed “at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity” (Art. 1, para. 1) and that this definitional element was crucial in many of the Lords reasoning. As the obligation to prosecute specifically applied in that context to such ‘official’ crime, the claim to immunity ratione materiae was rendered all the more difficult to accept. This being said, it does not seem that the effect of the obligation to prosecute on immunity should be limited to international crimes that must be committed by State authorities in order to exist.

The argument based on the obligation to prosecute can also be traced in Jones v. Saudi Arabia50, which related to civil suits, rather than criminal proceedings. The difference between the existence of an international obligation to prosecute torture under the 1984 Convention and the lack of a comparable international obligation to offer judicial civil redress to victims51 was

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50 House of Lords, Jones v. Saudi Arabia, 14 June 2006, 129 ILR 713, per Lord Bingham of Cornhill (at p. 723, para. 19): “But the [Pinochet] case was categorically different from the present, since it concerned criminal proceedings falling squarely within the universal criminal jurisdiction mandated by the Torture Convention (...). The essential ratio of the decision, as I understand it, was that international law could not without absurdity require criminal jurisdiction to be assumed and exercised where the Torture Convention conditions were satisfied and, at the same time, require immunity to be granted to those properly charged.” See also on para. 32, p. 729, on the fundamental difference between mandatory criminal proceedings and civil proceedings and its impact on the issue of immunity.

51 Other than the one where torture took place, as provided by Article 14 of the Convention.
Indeed at the very core of the reasoning of the Law Lords in 2006. Hence, from a methodological point of view, all civil suits against States or State officials involving issues of immunity must be strictly distinguished from criminal cases where foreign State officials are accused\(^{52}\) — and among those cases, only those triggered by an obligation to prosecute bearing on the forum State and opposable to the State of the official are relevant.

In *Belgium v. Senegal*, it is quite telling that the ICJ found a breach of the obligation to prosecute disregarding, and even without mentioning, a possible problem relating to the immunity of the former Chadian president. It is true that the Court had been informed of the fact that Chad was not claiming any immunity for its former president as “the Sovereign National Conference, held in N’Djamena from 15 January to 7 April 1993, had officially lifted from the former President all immunity from legal process”\(^{53}\). Such lifting seems to have been done in favour of all States, even if it might actually refer to domestic immunities in Chadian law\(^{54}\), and well in advance of any foreign legal proceedings. Had Chad not lifted “all immunity” of its former president, a strict ‘orthodox’ analysis of this dispute should have led to consider that the Court would have had to conclude that it had no jurisdiction to entertain it, by application of the *Monetary Gold* principle\(^{55}\). It is submitted that such result would however be at odds with the unequivocal and general findings of the Court relating to the *erga omnes* nature of the torture Convention obligations\(^{56}\) and that the Court would probably not have failed to qualify them by reference to the issue of immunity, if such issue could have otherwise been a matter of principle. The fact that the Court did not feel the need to include an immunity proviso in those paragraphs, nor elsewhere in its reasoning, should perhaps be understood as an indication that immunity *ratione materiae* does not apply when an obligation to prosecute exists.

### 3. ADVANTAGES

However daring in the eyes of the ‘orthodox’ doctrine, the argument based on the obligation to prosecute presented above might actually sound fairly restrictive for the ‘activist’ doctrine. It has however the advantage of departing from ontological considerations relating to the ‘nature’ of crimes and, so, possibly extend to a large array of criminal behavior, thus limiting immunity *ratione materiae* much more than it seems at first glance. Immunity *ratione materiae* has been usually analyzed through the same grammatical lens as the one, based on the ‘nature’ of the act performed, which is used for the purpose of determining whether State immunity exists in civil

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\(^{52}\) See very explicitly: *Jurisdictional immunities of the State (Germany v. Italy: Greece intervening)*, Judgment of 3 February 2012, para. 87.

\(^{53}\) *Questions relating to the obligation to prosecute or extradite (Belgium v. Senegal)*, Judgment of 20 July 2012, para. 20, where the response by Chadian Justice Minister to a request on that subject by the Belgian investigating judge is recalled.


\(^{56}\) *Questions relating to the obligation to prosecute or extradite (Belgium v. Senegal)*, Judgment of 20 July 2012, paras. 68-69.
claims. But there is actually not logical necessity to do so, especially since there does not exist an obligation to offer civil redress, whereas there may exist an international obligation to prosecute specific crimes.

The argument might sound unsatisfactory as it leads to a certain form of relativity of the immunity *ratione materiae*, depending on whether the obligation to prosecute can be invoked against the State of the prosecuted official. But immunity is a ‘normal’ rule of international law and such rules are intrinsically relative. Except in order to satisfy some principled position or some requirement of (esthetic) harmony within international law, there is actually no logical or legal necessity to solve this matter irrespectively of the positive obligations at stake. Moreover, relativity of immunity *ratione materiae* (but also *ratione personae*) in criminal matters results from the ICC Statute itself, as it is binding on State parties only.

One of the advantages of this argument is that, by departing from a rationale found in the *jus cogens* nature of crimes, it survives the *Germany v. Italy* Judgment on State immunity, especially paragraph 82 of that Judgment where the Court presents the intrinsic “logical problem” of the normative hierarchy theory\(^57\). One could of course be tempted to argue that the argument based on the obligation to prosecute faces the same “logical problem” because the absence of immunity depends again not on the nature of the act (*jure gestionis* or *jure imperii*), but on its illegality. However, the obligation to prosecute does not require that the crime be established: it is triggered when a person alleged to have committed the crime is found. What matters is that the conditions of the obligation to prosecute are met, and it is a false logical construction to think that if the foreign official accused is finally declared innocent, it would retroactively mean that the prosecuting State has breached the immunity *ratione materiae* by instituting criminal proceedings. The argument developed on the basis of the obligation to prosecute affirms that there is no such immunity if the obligation to prosecute exists and applies. Hence, even if the implementation of such obligation does not result in a criminal conviction, no breach of immunity could be retroactively found. The “logical problem” to which the Court has pointed in the *Germany v. Italy* Judgment only arises in civil claims, where the forum State is under no obligation to initiate proceedings. Of course, the prosecuting State could be responsible for having breached the immunity *ratione materiae* if it acted lightly, i.e. if there were no solid grounds for initiating criminal proceedings. But this conduct would mean that the conditions to trigger the application of the obligation to prosecute were not met, so that immunity actually existed.

\(^57\) *Jurisdictional immunities of the State (Germany v. Italy: Greece intervening)*, Judgment of 3 February 2012: “82. At the outset, however, the Court must observe that the proposition that the availability of immunity will be to some extent dependent upon the gravity of the unlawful act presents a logical problem. Immunity from jurisdiction is an immunity not merely from being subjected to an adverse judgment but from being subjected to the trial process. It is, therefore, necessarily preliminary in nature. Consequently, a national court is required to determine whether or not a foreign State is entitled to immunity as a matter of international law before it can hear the merits of the case brought before it and before the facts have been established. If immunity were to be dependent upon the State actually having committed a serious violation of international human rights law or the law of armed conflict, then it would become necessary for the national court to hold an enquiry into the merits in order to determine whether it had jurisdiction. If, on the other hand, the mere allegation that the State had committed such wrongful acts were to be sufficient to deprive the State of its entitlement to immunity, immunity could, in effect be negated simply by skilful construction of the claim.”
Finally, the argument developed on the basis of the obligation to prosecute allows keeping distinct the issues of sovereign immunity and of immunity *ratione materiae*, the first one having no bearing on the second, and vice-versa. It was true already of acts *jure gestionis*, which do not attract sovereign immunity but are covered by immunity *ratione materiae*, but it is true also for *jus cogens* crimes that are the object of an obligation to prosecute, not so much because they are of that nature but because their suppression is governed by such obligation.

Conversely, the absence of immunity *ratione materiae* flowing from an obligation to prosecute enshrined in international criminal law has no bearing on sovereign immunity within the traditional meaning of the word, i.e. on jurisdictional immunity of States that are served abroad with a civil claim. The fundamental reason is that there is no obligation to exercise civil suit against foreign States responsible for any breach of international law and that the right of victims to a judge is never absolute. The result of such discrepancy is that the State will be immune from foreign civil claims relating to core crimes while its organs or agents might be exposed abroad to criminal liability. This may sound morally problematic, but one has to keep in mind that the immunity of the State is without prejudice to its international responsibility and that the conviction by a foreign criminal court of those who were its organs or agents at the time of the commission of the crime might constitute a crucial element in establishing the international responsibility of the State. Furthermore, as stated by the Nuremberg Tribunal, crimes are not committed by abstract entities but by human beings. Beyond immunity lays responsibility and there is no doubt that, from a moral (but also legal) point of view, responsibility is a very different thing when it is faced by the abstract entity called ‘State’ or by individuals. It is therefore no surprise that the interplay between sovereign immunity and international criminal law might produce such result.

4. NORMATIVE FOUNDATION OF THE ARGUMENT: JURISDICTION AND IMMUNITY

After having reviewed the advantages of the argument based on the obligation to prosecute, but before addressing its pitfalls, it is important to say a few words on its normative foundation. There seems to be indeed something inadequate in conceiving the lack of immunity *ratione materiae* in certain circumstances as an ‘exception’ to the immunity rule. Strangely enough, this misconception is usually shared both by the ‘orthodox’ and ‘activist’ doctrines – besides being used by the ICJ. One can understand the common language reference to the notion of an ‘exception’ to a rule, but it seems to be flawed in the sense that exceptions to a rule are always part of it and developed within it. This does not seem to be the adequate way of understanding the interplay between the obligation to prosecute crimes and the regime of State officials’ immunity *ratione materiae*.

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See footnote 61.
Like other immunity regimes, immunity _ratione materiae_ is an ‘immunity from jurisdiction’ and it cannot be understood as severed from jurisdiction. This is not the starting point of the reports of Special rapporteur Kolodkin who considers that “[d]espite the interrelationship of immunity and jurisdiction and the fact that the development of the institution of exterritorial and, in particular, universal jurisdiction has had a significant influence on thinking on immunity, the issue of immunity may be considered and studied without consideration of the substance of the question of jurisdiction as such, and vice versa.” However, as the ICJ has since then stressed, immunity “derives from the principle of sovereign equality of States” and represents a “departure from (...) the jurisdiction” of the State based on the principle of territorial sovereignty according to which each State possesses “jurisdiction (...) over events and persons within that territory”.

Hence, if immunity, as an obligation under international law, entails derogation to the jurisdicational power of the State stemming from its territorial sovereignty, any ‘exception’ to immunity is actually a return to normality, i.e. to the power to adjudicate over events or persons present within the State territory. In other words, what is at stake in the definition of the immunity regime is just its precise scope and limits in light of the territorial power of jurisdiction of States, rather than so-called ‘exceptions’ since the situations supposedly falling within those are simply submitted to the normal jurisdicational power of the State.

If the exercise of the State's jurisdicational power is, on the one hand, _commanded_ by an international obligation – like the obligation to prosecute as defined above – and is thus not at the discretion of the State, it seems difficult to consider simultaneously that a “departure” from the same power could, on the other hand, result from the immunity rules. In other words: if there is immunity, no power of jurisdiction can be legally exercised under international law and hence, strictly speaking, no power to prosecute can lawfully exist; but, conversely, there must be jurisdiction – and hence no immunity – if there is an obligation to prosecute.

This may sound extremely (and unnecessarily) complicated and removed from the usual understanding of the relationship between jurisdiction and immunity, according to which “it is only where a State has jurisdiction under international law in relation to a particular matter that

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59 Joint separate opinion of Judges Higgins, Kooijmans and Buergenthal, _Arrest Warrant of 11 April 2000 (Democratic Republic of Congo v. Belgium)_ , ICJ Reports 2002, paras.3-4, p. 64.


61 _Jurisdictional immunities of the State (Germany v. Italy: Greece intervening)_ , Judgment of 3 February 2012, para. 57: “The Court considers that the rule of State immunity occupies an important place in international law and international relations. It derives from the principle of sovereign equality of States, which, as Article 2, paragraph 1, of the Charter of the United Nations makes clear, is one of the fundamental principles of the international legal order. This principle has to be viewed together with the principle that each State possesses sovereignty over its own territory and that there flows from that sovereignty the jurisdiction of the State over events and persons within that territory. Exceptions to the immunity of the State represent a departure from the principle of sovereign equality. Immunity may represent a departure from the principle of territorial sovereignty and the jurisdiction which flows from it.”

62 The French version of the paragraph quoted in the preceding footnote uses the words “dérrogation au ... pouvoir de juridiction”.

63 When a domestic Court upholds an immunity rule, it should conclude in the operative part of its ruling that it has no power to entertain the dispute, rather than the claim is inadmissible or that it lacks jurisdiction. See Cass. (Belgium), 12 mars 2001, _Ligue des Etats arabes, Rev. crit. Juris. B._ , 2002, p. 377.
there can be any question of immunities in regard to the exercise of that jurisdiction”\textsuperscript{64}. The normative foundation of the argument here explored requires to consider that, conceptually speaking, a State does not (cannot) have “jurisdiction under international law” if the exercise of that jurisdictional power entails a breach of international law. Hence, it maintains that if the exercise of jurisdictional power is commanded by a valid international obligation, it can only be because such power of jurisdiction is legal (i.e. exists) under international law.

Once this is accepted, the question is of course to know whether the obligation to prosecute applies (is binding) in situations presumably covered by immunity. The ‘orthodox’ doctrine will answer that it does not, so that upholding immunity cannot result in a breach of the obligation to prosecute, precisely because such obligation can only exist where there is jurisdiction – and the argument is to say that there is none (i.e. no lawful jurisdiction) since there is immunity. But this answer seems circular and does not take the obligation to prosecute seriously enough in what it means as far as jurisdictional power is concerned. In other words, the perspective should be the opposite, so as to ask whether the immunity rules applies (is binding, or simply, exists) in situations where the obligation to prosecute exists. The argument here explored maintains that a negative answer to that question is sustainable for the reason that the obligation to prosecute, being unqualified, compels to exercise a power of jurisdiction which could not legally exist under international law if immunity applied.

5. DIFFICULTIES

The main obstacle to such construction is to be found in paragraph 59 of the \textit{Arrest Warrant} Judgment:

“It should further be noted that the rules governing the jurisdiction of national courts must be carefully distinguished from those governing jurisdictional immunities: jurisdiction does not imply absence of immunity, while absence of immunity does not imply jurisdiction. Thus, although various international conventions on the prevention and punishment of certain serious crimes impose on States obligations of prosecution or extradition, thereby requiring them to extend their criminal jurisdiction, such extension of jurisdiction in no way affects immunities under customary international law, including those of Ministers for Foreign Affairs. These remain opposable before the courts of a foreign State, even where those courts exercise such a jurisdiction under these conventions.”\textsuperscript{65}

This statement of the Court must probably be understood in light of the issue at stake in the \textit{Arrest Warrant} case, i.e. immunity \textit{ratione personae}. However, it is true that the distinction between immunity \textit{ratione personae} and immunity \textit{ratione materiae} is not reflected in the 2002 Judgment, and that this paragraph is embracing “immunities under customary international law”

\textsuperscript{64} \textit{Arrest Warrant of 11 April 2000 (Democratic Republic of Congo v. Belgium)}, Judgment, ICJ Reports 2002, para. 46, p. 20.

in general. How, then, to circumvent this statement of principle which seems to be a radical obstacle to the argument explored?

One could question the fact that treaty obligations to prosecute have, as the Court writes, the effect of requiring contracting States "to extend their criminal jurisdiction" and consider that those obligations rather impose on State parties that they exercise their usual criminal jurisdiction flowing from their territorial sovereignty over events and persons within their territory. One could also consider that, despite the fact that "jurisdiction does not imply absence of immunity" and that "absence of immunity does not imply jurisdiction", it nevertheless remains that immunity is "une dérogation (...) au pouvoir de juridiction", as recalled in the Germany v. Italy Judgment and developed above. Finally, one could recall that it was undisputed that Belgium did not issue the arrest warrant in order to comply with any conventional obligation to prosecute, so that this paragraph, introduced as a "further" development by the Court itself, should be understood as an obiter dictum. However, none of those considerations really help to get over the Court's position of principle.

That position reflects a certain understanding of "various international conventions". It is thus an interpretation of those conventions. But one cannot fail to be struck by the rather undetailed character of this interpretative exercise by the Court: instead of applying the usual rules of treaty interpretation, the above-mentioned paragraph is based on the undemonstrated premise according to which "rules governing the jurisdiction of national courts must be carefully distinguished from those governing jurisdictional immunities". It is certainly true that those two sets of rules must not be confused – hence, that they must be distinguished. But it seems to be rather abstract and artificial to consider that rules governing jurisdiction cannot have any bearing on the rules governing jurisdictional immunities, especially when the former contain an obligation to exercise jurisdictional power. It is true that those conventions do not contain any provision explicitly precluding immunity and that their travaux préparatoires are silent on that matter. Therefore, it is probably difficult to consider that contracting parties had the implied intention to set aside or waive any immunity. This being said, if one reconsiders the interplay between the international obligation to prosecute and the rules governing immunities in light of the above normative developments relating to jurisdiction, the issue does not boil down to trying to construe treaty provisions as providing for an implied waiver of immunity. Rather, more radically, taking due account of the object and purpose of treaties imposing an obligation to prosecute means conceiving such erga omnes inter partes obligation as being necessarily

67 This being said, retracing the common intention of the negotiating parties is not the paramount rule of multilateral treaty interpretation, let alone because all the contracting parties did not necessarily take part in the negotiation: see J.-M. Sorel & V. Boré Éveno, “Article 31”, in O. Corten & P. Klein (eds), The Vienna Conventions on the Law of Treaties. A Commentary, Vol. I, OUP, 2011, p. 829, n°48 et al. Moreover, State parties may have profoundly diverging views on the issue of the effect of the obligation to prosecute on immunity ratione materiae and it is not necessarily the case that all contracting States would claim such immunity. See e.g. the position of Belgium, which understands the effect of the obligation to prosecute as being the absence of immunity ratione materiae: Comments of the Kingdom of Belgium on the report of the II LC on the work of its 63th and 64th sessions, 67th session of the Sixth Committee of the General Assembly (2012), Agenda item n°79.
68 See footnote 57.
grounded on a lawful power of jurisdiction that contracting States recognize and require, and which could not stand if immunity existed. In other words, one party could not, lawfully and in good faith, dispense another one (vis-à-vis all other contracting parties) with the performance of the obligation to prosecute by the invocation of the immunity \textit{ratione materiae} of its official, as it agreed that prosecution was required.

One could object that such interpretation would deter States from contracting new treaties enshrining obligations to prosecute, or from acceding to existing treaties which provide for such obligation. This utilitarian argument must not be underestimated but it might also just be rhetorical, since it could actually very well be the case that, in this age of world public opinion, States would not like to be seen to refuse to adhere to treaties regulating international cooperation in the fight against grave crimes for the sake of allowing their officials to escape justice abroad, while claiming that they do not perpetrate such crimes.

Finally, one could object that if the obligation to prosecute has such effect on immunity \textit{ratione materiae}, why would immunity \textit{ratione personae} stand? Since that immunity exists under customary law, as recalled in the \textit{Arrest Warrant}, does it not mean that the whole argument based on the obligation to prosecute is flawed? In order to address this apparent contradiction, it has to be recalled that immunity \textit{ratione materiae} has no limit in time, while immunity \textit{ratione personae} is temporally limited to the duration of the exercise of the high-ranking office which attracts such immunity. Hence, it could be reasonably inferred from this difference, but also from the specific purpose and rationale of immunity \textit{ratione personae}, that States bound by an obligation to prosecute understand that it does not apply to persons enjoying immunity \textit{ratione personae} or that its non-performance might be temporarily excused.


This brief exploration of the interplay between the obligation to prosecute and immunity \textit{ratione materiae} of State officials cannot be fully conclusive as a matter of \textit{lex lata}. Nevertheless, overall, the argument based on the obligation to prosecute might offer a reasonable legal ground in order to limit the immunity \textit{ratione materiae} of State officials who have allegedly committed grave crimes to which such obligation apply. However, such result requires that the relationship between immunity and jurisdiction be reconsidered from a normative point of view, with the ‘constitutional’ perspective of arriving at an orderly allocation of jurisdiction between States based on a logic of validity instead of responsibility. In other words, a Copernican revolution.
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