
International Law

Discussion Questions

Gleider Hernández, *International Law* (2nd edition, Oxford University Press, 2022)

Chapter 9, Immunities

Question 1. ‘The high-ranking officials of a State may not be held responsible for crimes they have committed or have ordered.’ Is this true? Discuss and analyse critically.

It is true that currently, servicing Heads of State, Heads of Government and Foreign Ministers benefit from immunity *ratione personae* (absolute immunity: see *Arrest Warrant*) in relation to official acts as well as private acts. Such an immunity exists in order for them to exercise and discharge their functions, and is different from the immunity given to a State (see on this point *Jurisdictional Immunities of the State* and the ILC’s Reports on the Immunity of State Officials).

However, *ratione personae* immunity only subsists when they are in office. When they have left office, such high-ranking officials only benefit from immunity *ratione materiae*, a lower form of immunity that extends only to official acts. Official acts are not acts committed in a private capacity (for example, the commission of crimes when off duty, or violations of the domestic law of other States that go beyond their official duties). This means that in respect of non-official acts, even high-ranking officials may face prosecution when they have left office.

The definition of ‘official acts’ has been narrowed further in recent decades. The majority of the UK House of Lords, in the *Pinochet* case, declared moreover that immunity *ratione materiae* did not extend to acts of torture or other breaches of *jus cogens*, as these could not be considered ‘official acts’, especially once a State had ratified the relevant treaty (in that case, the Torture Convention). This limitation on former high-ranking officials is distinct, again, from whether the State will benefit

from such immunity (see e.g. *Al-Adsani v UK*, *Jones v Saudi Arabia*, *Jurisdictional Immunities of the State*; and the ILC Reports on State Officials).

Question 2. ‘A State engaged in commercial transactions no longer benefits from immunity for such behaviour.’ Discuss.

Historically, it sufficed for an act to be that of a State or of its organs for it to benefit from immunity in all circumstances and in relation to all activities (absolute immunity). Over time, many States began to adopt a rule whereby certain activities of a State would not benefit from immunity (restrictive immunity). A distinction arose between *acts jure imperii* (sovereign acts that benefit from immunity) and *acta jure gestionis* (acts of a trading or commercial character that do not benefit from immunity because they could be taken by private persons). This was confirmed by case law in certain domestic courts (the UK in *Trendtex v Central Bank of Nigeria* and *I Congreso del Partido*, Germany in *Empire of Iran*).

The restrictive immunity doctrine has also been found in the 2005 UN Convention on Jurisdictional Immunities (which is not in force, however) and in the legislation of many States. But be careful: it is not sufficient just to cite a few cases to suggest that restrictive immunity is now fully accepted: only two-thirds of States have adopted this approach, with many still adhering to a rule of absolute immunity with no distinction in relation to trading or commercial activities.

Question 3. ‘Diplomatic immunity is a “catch-all” that allows for all diplomats to escape all forms of regulation’. Is this true? Discuss and analyse critically.

A good exam answer will describe and explain the rules of diplomatic immunity and how it applies to different aspects of the diplomatic mission. Ideally, the discussion will be supplemented by reference to the rationale behind diplomatic immunity as a means for States to be represented with one another and to work

within each other's territory. For this reason, it is worth mentioning that not only diplomats, but the diplomatic mission (the embassy or 'premises') and the diplomatic 'bag' (the official courier used by a State to communicate with its embassy) are inviolable.

The most senior diplomat (usually the ambassador) will enjoy immunity *ratione personae* and the inviolability of their person, as well as their private residence, papers and property. Inviolability also extends to most members of the mission and their families under the VCDR (Arts 26, 29). However, lower-ranking members of the mission will only benefit from immunity *ratione materiae*, in respect of their official acts. It is true though that all members of a mission are protected from being called as witnesses and paying taxes or customs duties.

Diplomatic immunity does impose obligations on diplomatic personnel (see Article 41 VCDR). They should not interfere with the internal affairs of their host State and should not abuse the embassy or diplomatic mission, for example, using it as a commercial property or for personal gain. Such acts can allow the receiving State to revoke their diplomatic status and be expelled.

Finally, one should recall that States may waive immunity if their diplomatic agents and personnel are involved in unlawful situations, as the immunity belongs to the State and not to the diplomatic personnel.