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Second report on immunity of State officials from foreign criminal jurisdiction

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Contents

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I. Introduction

1. The topic "Immunity of State officials from foreign criminal jurisdiction" was included in the long-term programme of work of the International Law Commission (hereinafter "the Commission") at its fifty-eighth session (2006) on the basis of a proposal prepared by the author of the present report.[1] At its fifty-ninth session (2007), the Commission decided to include the topic in its current programme of work.[2] At that same session, a Special Rapporteur on this topic was appointed,[3] and a request was made to the Secretariat to prepare a background study on it.[4]

2. At the sixtieth session of the Commission, a preliminary report (or to be more precise, its first part and the start of its second part)[5] and a memorandum by the Secretariat on the topic[6] were presented.

3. The first part and the start of the second part of the preliminary report briefly described the history of the consideration of the issue of immunity of State officials from foreign jurisdiction by the Commission and by the Institute of International Law (hereinafter "the Institute") and outlined the range of issues proposed for consideration by the Commission in the preliminary phase of work on the topic. These included the issue of the sources of immunity of State officials from foreign criminal jurisdiction, the issue of the substance of the concepts of "immunity" and "jurisdiction", "criminal jurisdiction" and "immunity from criminal jurisdiction" and the relationship between immunity and jurisdiction, the issue of the typology of the immunity of State officials (immunity *ratione personae* and immunity *ratione materiae*), and the issue of the rationale for the immunity of State officials and of the relationship between the immunity of officials and the immunity of the State, diplomatic and consular immunity and the immunity of members of special missions.[7]

4. In parallel with this, the part of the preliminary report presented at the sixtieth session of the Commission identified issues which the Special Rapporteur deemed it necessary to consider in order to determine the scope of this topic. Such issues included, in particular, the issue of which State officials — all or only some of them (for example, only Heads of State, Heads of Government and ministers for foreign affairs) — should be covered by any future draft guiding principles or draft articles which may be prepared by the Commission as a result of its consideration of the topic, the issue of the definition of the concept "State official", the issue of recognition in the context of this topic and the issue of the immunity of members of the families of State officials.[8]

5. In addition, issues which the Special Rapporteur deemed it necessary to consider in order to determine the scope of this topic included the issue of the scope

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[1] Contained in annex A to the report of the Commission on its fifty-ninth session, *Official Records of the General Assembly, Sixty-first Session, Supplement No. 10* (A/61/10), para. 257.

[2] *Official Records of the General Assembly, Sixty-second Session, Supplement No. 10* (A/62/10), para. 376.

[3] Ibid.

[4] Ibid., para. 386.

[5] Preliminary report on immunity of State officials from foreign criminal jurisdiction, A/CN.4/601 (hereinafter "Preliminary report").

[6] A/CN.4/596 and Corr.1 (hereinafter "memorandum by the Secretariat").

[7] Preliminary report, paras. 27-101.

[8] Ibid., paras. 125-129.

of immunity enjoyed by serving and former officials to be covered by any future draft guiding principles or articles and the issue of waiver of immunity (and possibly other procedural aspects of immunity).[9]

6. The conclusions reached by the Special Rapporteur as a result of the analysis made in the part of the preliminary report which was presented are contained in paragraphs 102 and 130 thereof.[10]

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[9] Ibid., para. 4.

[10] "102. … (a) The basic source of the immunity of State officials from foreign criminal jurisdiction is international law, and particularly customary international law.
(b) Jurisdiction and immunity are related but different. In the context of the topic under discussion, the consideration of immunity should be limited and should not consider the substance of the question of jurisdiction as such.
(c) The criminal jurisdiction of a State, like the entire jurisdiction of the State, is exercised in the form of legislative, executive and judicial jurisdiction (or in the form of legislative and executive jurisdiction, if the latter is understood to include both executive and judicial jurisdiction).
(d) Executive (or executive and judicial) criminal jurisdiction has features in common with civil jurisdiction but differs from it because many criminal procedure measures are adopted in the pre-trial phase of the juridical process. Thus the question of immunity of State officials from foreign criminal jurisdiction is more important in the pre-trial phase.
(e) Immunity of officials from foreign jurisdiction is a rule of international law and the corresponding juridical relations, in which the juridical right of the person enjoying immunity not to be subject to foreign jurisdiction reflects the juridical obligation of the foreign State not to exercise jurisdiction over the person concerned.
(f) Immunity from criminal jurisdiction means immunity only from executive and judicial jurisdiction (or only from executive jurisdiction, if this is understood to include both executive and judicial jurisdiction). It is thus immunity from criminal process or from criminal procedure measures and not from the substantive law of the foreign State.
(g) Immunity of State officials from foreign criminal jurisdiction is procedural and not substantive in nature. It is an obstacle to criminal liability but does not in principle preclude it.
(h) Actions performed by an official in an official capacity are attributed to the State. The official is therefore protected from the criminal jurisdiction of a foreign State by immunity *ratione materiae*. However, this does not preclude attribution of these actions also to the person who performed them.
(i) Ultimately the State, which alone is entitled to waive an official's immunity, stands behind the immunity of an official, whether this is immunity *ratione personae* or immunity *ratione materiae*, and behind those who enjoy immunity.
(j) Immunity of an official from foreign criminal jurisdiction has some complementary and interrelated rationales: functional and representative rationale; principles of international law concerning sovereign equality of States and non-interference in internal affairs; and the need to ensure the stability of international relations and the independent performance of their activities by States."
"130. … (a) This topic covers only immunity of officials of one State from national (and not international) criminal (and not civil) jurisdiction of another State (and not of the State served by the official).
(b) It is suggested that the topic should cover all officials.
(c) An attempt may be made to define the concept "State official" for this topic or to define which officials are covered by this concept for the purposes of this topic.
(d) The high-ranking officials who enjoy personal immunity by virtue of their post include primarily Heads of State, Heads of Government and ministers for foreign affairs.
(e) An attempt may be made to determine which other high-ranking officials, in addition to the threesome mentioned, enjoy immunity *ratione personae*. It will be possible to single out such officials from among all high-ranking officials, if the criterion or criteria justifying special status for this category of high-ranking officials can be defined.

7. For the most part, these conclusions met with support in the Commission. In his closing remarks, the Special Rapporteur was able to note broad agreement, in particular, that:

(a) The principal source of the immunity of State officials from foreign criminal jurisdiction is customary international law;

(b) The concept of "immunity" presupposes legal relations and a correlation between corresponding rights and duties;

(c) Immunity is procedural in nature;

(d) Immunity of State officials from foreign criminal jurisdiction means immunity from executive and judicial jurisdiction, but not from legislative jurisdiction;

(e) The question of such immunity arises even in the pre-trial phase of the criminal process;

(f) Differentiation between immunity *ratione materiae* and immunity *ratione personae* is useful for analytical purposes;

(g) The topic does not cover questions of international criminal jurisdiction;

(h) As regards which persons are covered by the topic, the status of all State officials should be considered;

(i) The term "State official" is the term which should be used and it should be given a definition;

(j) Immunity *ratione personae* is enjoyed by, at least, Heads of State and Government, and also by Ministers for Foreign Affairs.

8. During the discussion of the report of the Commission on its sixtieth session in the Sixth Committee of the General Assembly in 2008, many delegations made statements on the topic under consideration.[11]

9. During discussion of the Commission's report on its sixty-first session in the Sixth Committee of the General Assembly in 2009, statements by a number of delegations referred to the importance of continuing work on the topic, despite the fact that no continuation of the preliminary report had been presented by the Special Rapporteur and consequently the Commission had not considered the topic at its sixty-first session.[12] The delegation of South Africa, in particular, stressed the importance of this topic in the light of the ongoing discussion on the exercise of

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(e) It is doubtful whether it will be advisable to give further consideration within the framework of this topic to the question of recognition and the question of immunity of members of the family of high-ranking officials."

[11] See the report of the International Law Commission on the work of its sixtieth session (2008). Topical summary of the discussion held in the Sixth Committee of the General Assembly during its sixty-third session, prepared by the Secretariat. A/CN.4/606, pp. 21-24.

[12] See, in particular, statements by the delegations of Austria and South Africa on 26 October 2009 (A/C.6/64/SR.15, paras. 30, 69-70), Hungary and Portugal on 27 October 2009 (A/C.6/64/SR.16, paras. 35, 41), and Ghana and Libya on 28 October 2009. (A/C.6/64/SR.17, paras. 6, 16).

national universal jurisdiction and highlighted questions which it felt the Commission should answer.[13]

10. In the discussions between the African Union and the European Union on universal criminal jurisdiction, the outcome of which was the preparation of an expert report, the issue of immunity also occupied a position of no small importance.[14] The same is true of the discussion held in the Sixth Committee of the General Assembly in 2009 on the issue of universal criminal jurisdiction.[15]

11. During the period which has elapsed since consideration of the preliminary report, the International Court of Justice has begun considering cases relating in one way or another to this topic: the case *Concerning questions relating to obligation to prosecute or extradite* (*Belgium* v. *Senegal*) [16] and the case *Concerning jurisdictional immunities of the State* (*Germany* v. *Italy*).[17] The case *Concerning certain criminal proceedings in France* (*Republic of the Congo* v. *France*),[18] which also touches upon issues of the immunity of senior and high-ranking State officials from foreign criminal jurisdiction, is still under consideration by the Court.

12. In the period following consideration of the preliminary report these issues have been the subject of consideration within the scope of national jurisdictions on several occasions.[19]

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[13] Among the questions facing the Commission, the representative of South Africa highlighted, in particular, the following: do ministers for foreign affairs and other senior State officials possess full immunity under customary international law; is such immunity applicable in the case of genocide, war crimes and crimes against humanity; do temporal limits on such immunity exist and, if so, are they the same for all officials, what importance for immunity will the fact have that the aforementioned crimes may potentially fall within the category of crimes under the norms of *jus cogens*. The delegation of South Africa also showed interest in the question of the relationship between immunity and the powers of national authorities to take measures for the purposes of arresting senior officials on the basis of requests by international tribunals. See statement by the South African representative in the Sixth Committee of the General Assembly of the United Nations on 26 October 2009, A/C.6/64/SR.15, paras. 69-70.

[14] See the report of the African Union-European Union Technical ad hoc Expert Group on the Principle of Universal Jurisdiction, Council of the European Union document 8672/1/09 Rev.1, 16 April 2009 (hereinafter "the African Union-European Union expert report").

[15] See statements of delegations from Tunisia, Iran (Islamic Republic of), Costa Rica, Swaziland, South Africa, China, Peru, Austria, Finland, Sudan, Indonesia, Russian Federation, Liechtenstein, Rwanda, Senegal and Ethiopia on 20 and 21 October 2009 (A/C.6/64/SR.12 and SR.13). Individual delegations particularly emphasized the link between the idea of universal jurisdiction and the norms of international law on immunity of the State and its officials, pointing to the need for a considered approach to resolving the problem of the liability of persons for committing crimes under international law.

[16] *Case Concerning Questions relating to Obligation to Prosecute or Extradite* (*Belgium* v. *Senegal*), (available at: http://www.icj-cij.org).

[17] *Case Concerning Jurisdictional Immunities of the State* (*Germany* v. *Italy*), (available at: http://www.icj-cij.org).

[18] *Case Concerning Certain Criminal Proceedings in France* (*Republic of the Congo* v. *France*), (available at: http://www.icj-cij.org).

[19] In November 2008 in Frankfurt (Germany), Rose Kabuye, Chief of Protocol for the President of Rwanda, was arrested on the basis of an arrest warrant issued by a French judge and charged in connection with the murder of the former President of Rwanda in 1994, which marked the start of the bloodshed in that country. In March 2009, she was released from arrest. (BBC News, 23 December 2008, http://news.bbc.co.uk/go/pr/fr/-/2/hi/africa/7797024.stm). According to press reports, the case has been abandoned (The New Times, http://www.newtimes.co.rw/

13. In connection with the aforementioned discussion on universal jurisdiction and in connection with consideration of the issues of immunity of foreign officials in national jurisdictions, within the scope of cases in the International Court of Justice and in other cases concerning immunity from foreign jurisdiction, governments have stated their position on more than one occasion recently.[20] Changes have also been made to the legislation of several States.[21]

14. Following the issuance of the memorandum by the Secretariat and the preliminary report, a resolution was adopted by the Institute of International Law in 2009 on the immunity from jurisdiction of the State and of persons who act on behalf of the State in case of international crimes.[22] In addition, new works have been published on the topic under consideration.[23]

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index.php? issue=14030&article=20425). In December 2009, Westminster Magistrates' Court issued a warrant for the arrest of the leader of the Israeli opposition, Tzipi Livni, on charges of having committed war crimes in Gaza. Tzipi Livni held the post of Minister for Foreign Affairs of Israel during the period in which the events for which she is charged took place. The warrant was withdrawn shortly afterward, according to media reports, because it was established Tzipi Livni was not in United Kingdom territory. (The Guardian, 15 December 2009, http://www.guardian.co.uk/world/2009/dec/15/tzipi-livni-arrest-warrant-israeli). Attempts had earlier been made in the United Kingdom to secure the arrest of Ehud Barak, Israeli Defence Minister, but he was acknowledged as having diplomatic immunity. (The Guardian, 29 September 2009, http://www.guardian.co.uk/world/2009/sep/29/ehud-barak-war-crimes-israel). In Spain in the period 2008-2009 investigations were launched in connection with charges of having committed crimes against humanity and genocide in Tibet brought against high-ranking officials and politicians in China (the former President of China Jiang Zemin, Defence Minister Liang Guanglie and others). In view of changes in Spain's legislation which restricted the scope of "universal jurisdiction", the cases were abandoned. (El Pais, 27 February 2010, http://www.elpais.com/articulo/espana/Pedraz/archiva/investigacion/genocidio/Tibet/elpepuesp/20100227elpepinac_7/Tes). In December 2009, a warrant was also issued in Argentina for the arrest of Jiang Zemin and the head of the security service Luo Gan on charges of crimes against humanity which had manifested themselves in persecution of the Falun Gong movement (Argentina judge asks China arrests over Falun Gong, 22 February 2010, http://www.reuters.com/assets).

[20] See notes 12 and 15 above. High-ranking representatives of the United Kingdom and Israel voiced such comments in connection with the warrant for the arrest of Tzipi Livni issued in London. See also the materials of hearings in the International Court on the issue of temporary measures in the *Case Concerning Questions relating to Obligation to Prosecute or Extradite* (*Belgium* v. *Senegal*), Oral proceedings, 6-8 April 2009. Available at: http://www.icj-cij.org.

[21] Thus, amendments have been introduced into Spain's legislation regulating the application of universal jurisdiction. A requirement for the existence of "a link" between the case under consideration and the State of Spain has been established (Spanish Congress Enacts Bill Restricting Spain's Universal Jurisdiction, www.cja.org/artcile.php?id=740&printsafe=1; *The New York Times*, 21 May 2009 (www.nytimes.com).

[22] Resolution on the Immunity from Jurisdiction of the State and of Persons Who Act on Behalf of the State in case of International Crimes, Institute of International Law, Naples session, 2009 (available from www.idi-iil.org), hereinafter "resolution of the Institute — 2009".

[23] For example, K. R. O'Donnell, "Note: Certain Criminal Proceedings in France (Republic of Congo v. France) and Head of State Immunity: How Impenetrable should the Immunity Veil Remain?", Boston Univ. Int'l Law Journal 375 (2008); M. M. Penrose, "The Emperor's Clothes: Evaluating Head of State Immunity Under International Law", 7 Santa Clara J. Int'l L. 85 (2010); *Prosecuting Heads of State*, ed. by E. I. Lutz and C. Reiger. Cambridge Univ. Press, 2009; G. Buzzini, "Lights and Shadows of Immunities and Inviolability of State Officials in International Law: Some Comments on the Djibouti v. France Case", Leiden Journal of International Law, 22 (2009), pp. 455-483; Th. Rensmann, "Impact on the Immunity of States and their Officials" in The impact of human rights law on general international law, Oxford

15. The factual aspect is important to the consideration of the topic by the Commission. If we wish to obtain realistic results in our work, we have to take reality as our starting point and not portray what is desirable as being the actual state of affairs. As described in the book *Prosecuting Heads of State*,[24] which contains very interesting factual information with respect to the topic under consideration, in the period from 1990 to June 2008, attempts at criminal prosecution were undertaken against at least 67 Heads of State and Government in various jurisdictions, and in approximately 65 of these cases, the jurisdictions concerned were national jurisdictions. Around 10 out of these 65 cases were attempts at criminal prosecution of former Heads of State and Government in foreign States. The cases concerned were attempts at criminal prosecution of former Heads of State and Government of Argentina in Spain (5 cases) and in Italy and Germany (1 case); of Chile in Spain (1 case); of Chad in Senegal and Belgium (1 case) and of Suriname in the Netherlands (1 case).[25] This factual list is scarcely exhaustive. To it can be added at least statements of charges submitted against China's former leader in Spain[26] and Argentina,[27] as well as cases referred to in the preliminary report.[28] Meanwhile, in the overwhelming majority of cases, these attempts to call former Heads of State and Government and lower-ranking former officials[29] to account for their crimes have been unsuccessful. These facts are in themselves revealing.

Univ. Press, 2009, pp. 151-170; A. J. Colangelo, "Universal jurisdiction as an international "false conflict" of laws", 30 Mich. J. Int'l L. 881 2008-2009, p. 885-925; N. Roht-Arriaza, "Making the State Do Justice: Transnational Prosecutions and International Support for Criminal Investigations in Post-Armed Conflict Guatemala", 9 Chi. J. Int'l L. 79 (2008-2009), p.79-106; M. Summers, "Diplomatic Immunity *ratione personae*: did the International Court of Justice create a new customary law rule in Congo v. Belgium," 16 Mich. St. J. Int'l L. 473 (2007-2008), p. 459-473; K. Ambos, "Prosecuting Guantanamo in Europe: can and shall the masterminds of the "torture memos" be held criminally responsible on the basis of universal jurisdiction?", 42 Case W. Res. J. Int'l L. 405 (2009) p.405-447; W. Kaleck, "From Pinochet to Rumsfeld: Universal Jurisdiction in Europe 1998-2008", 30 Mich. J. Int'l L. 927 2008-2009, pp. 927-980; M. Alderton, "Immunity for Heads of State acting in their private capacity — Thor Shipping A/S V The Ship 'Al Duhail'", ICLQ vol. 58, July 2009, p.702–711; K. Gallagher, "Efforts to hold Donald Rumsfeld and other high-level United States officials accountable for torture", Journal of International Criminal Justice vol. 7 (2009), pp. 1087-1116.

[24] *Prosecuting Heads of State*, note 23 above.

[25] Ibid.

[26] See note 19 above.

[27] Ibid.

[28] See preliminary report, for example, note 219.

[29] They were launched unsuccessfully, for example, in France and Germany against United States Defense Secretary Donald Rumsfeld ("French Prosecutors throw out Rumsfeld torture case", Reuters, 23 November 2007 (www.reuters.com/article/idUSL238169520071123); K. Gallagher, note 23 above, pp. 1109-1112). Also notable is the so-called "Bush Six" case (six high-ranking officials in the Bush administration, including the former Attorney General and Undersecretary of Defense) in Spain (ibid.). Despite the recommendation of the Spanish Attorney General, in January 2010 the Central Court for Preliminary Criminal Proceedings number five, National Court (Madrid) confirmed the existence of Spanish jurisdiction over this case and sanctioned the continuation of investigations into the complaints against the United States officials. (This case is founded on a private prosecution on behalf of a number of non-governmental human rights organizations in Spain, representing the interests of persons who were victims of torture and other types of cruel and degrading treatment by United States armed services personnel. Spain's jurisdiction in this case has been confirmed despite restrictions introduced in 2009 on the application of "universal jurisdiction" in that country, since the Court considered the fact that one of the victims holds Spanish citizenship sufficient).

16. While on the one hand, attempts at the criminal prosecution of senior foreign officials continue to be made, on the other, this is happening in a very small number of States, in practice only in respect of former such officials, and these attempts come to fruition only when the State, the criminal prosecution of whose officials is at issue, consents to such prosecution. Meanwhile, such consent is extremely seldom forthcoming. In recent times, one may perhaps recall only the consent of Chad to the criminal prosecution of the former President of that country, Hissein Habré, in Senegal[30] and of Argentina in respect of its former military official Adolfo Scilingo (convicted of crimes against humanity during the "Dirty War" 1976-1983) in Spain.[31] It is noted that until now attempts to exercise universal jurisdiction that have been successful have just taken place in cases where the State concerned consented.[32] In other cases, States usually react negatively to attempts to exercise foreign criminal jurisdiction even over their former Heads of State and Government, as they also do, however, in respect of other high-ranking officials. In the absence of cooperation with the State whose official a case concerns, the proper and legally correct criminal prosecution of such a person is practically impossible. On the whole, therefore, such attempts end up merely complicating relations between States.[33]

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[30] It is noteworthy, firstly that even when Chad waived the immunity of Hissein Habré, the Senegalese court referred to the immunity of the former Head of State, and secondly that Senegal, in exercising its criminal jurisdiction in this case, relied on the corresponding decision by the African Union (See.: Decision on the Hissein Habré case and the African Union Doc. Assembly/AU/3 (VII), 02 July 2006, Assembly/AU/Dec.127 (VII), available at: http://www.africa-union.org/root/au/Conferences/Past/2006/July/summit/summit.htm). See also: Case Concerning Questions Relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal), Provisional Measures, Order, 28 may 2009 (available at: www.icj-cij.org).

[31] Argentina Recognizes Spain's Jurisdiction to Try Rights Abuser, IPS Inter Press Service, 18 April 2005, (http://ipsnews.net).

[32] Chandra Lekha Sriram, The "Pinochet Precedent": A Mixed Legacy for Human Rights, Jurist Legal News and Research, http://jurist.law.pitt.edu.

[33] As a result of the threat of arrest of Tzipi Livni, a series of visits of high-ranking Israeli representatives to the United Kingdom was cancelled, and the complication of bilateral relations became the subject of a series of publications and statements by officials (Israel fury at UK's Livni warrant, BBC News, 15 December 2009, http://news.bbc.co.uk). China lodged protests against decisions infringing upon the country's leadership in Spain and Argentina (*The New York Times*, 6 June 2006, www.nytimes.com/2006/06/06/world/europe/06iht-briefs.1904656.html?scp=1&sq=China%20warns%20Spain%20over%20Tibet&st=cse; Voice of America News, 24 December 2009, www1.voanews.com/english/news/asia/China-Criticizes-Argentina-for-Arrest-Request-of-Jiang-Zemin-Support-of-Falun-Gong--80053822.html). The attempt to secure the arrest of the minister for foreign affairs of the Democratic Republic of Congo in Belgium led to an inter-State dispute, which was referred to the International Court of Justice for consideration (*Arrest Warrant*, see at: http://www.icj-cij.org). The warrants for the arrest of a number of high-ranking Rwandan military officers issued in France led to Rwanda severing diplomatic relations with France in 2006 (*The New York Times*, 24 November 2006, www.nytimes.com).

II. The scope of immunity of a State official from foreign criminal jurisdiction

A. Preliminary considerations

17. As a starting point for the consideration of issues relating to the scope of immunity, it is necessary to recall certain provisions stated in the first part of the preliminary report. In particular, based on the analysis contained in paragraphs 56-59, 64-70 and 84-96, the conclusions contained in subparagraphs (e)-(j) of paragraph 102 were drawn up. For the purposes of considering issues relating to the scope of immunity, the following are important:

– "[i]mmunity of officials from foreign criminal jurisdiction is a rule of international law and the corresponding juridical relations, in which the juridical right of the person … not to be subject to foreign jurisdiction reflects the juridical obligation of the foreign state not to exercise jurisdiction over the person …";[34]

– "[i]mmunity from criminal jurisdiction … is immunity from criminal process or from criminal procedure measures [and not from the substantive law of the foreign State]";

– "[i]mmunity … is an obstacle to criminal liability but does not in principle preclude it";

– "[a]ctions performed by an official in an official capacity are attributed to the State. The official is therefore protected from the criminal jurisdiction of a foreign State by immunity *ratione materiae*. However, this does not preclude attribution of these acts also to the person who performed them.";

– "[u]ltimately the State … stands behind the immunity of an official, whether this is immunity *ratione personae* or immunity *ratione materiae*, and behind those who enjoy immunity";

– rationale for the immunity has some interrelated components, including principles of international law concerning sovereign equality of States and

[34] Evidently, it is more accurate to talk of the rights of a State in whose service a person stood or stands than of the rights of a person. The right to refer to immunity is enjoyed principally by a State and not a person. A dispute about a violation of rights and obligations deriving from immunity arises between a State claiming immunity and a State exercising jurisdiction. See, for example, *Arrest Warrant*, Judgment, para. 40: "[d]espite the change in professional situation of Mr. Yerodia, the character of the dispute submitted to the Court by means of the Application has not changed: the dispute still concerns the lawfulness of the Arrest Warrant issued … against a person who was at the time Minister for Foreign Affairs of the Congo, and the question whether the rights of the Congo have or have not been violated by that warrant.", available at www.icj-cij.org. In the case *Certain Criminal Proceedings in France* (Republic of the Congo v. France), the Republic of the Congo based its request for the indication of provisional measures on its right to "respect by France for the immunities conferred by international law on ... the Congolese Head of State", Provisional Measures, Order of 17 June 2003, para. 28. See also the comments of Lord Phillips of Worth Matravers: "It is common ground that the basis of the immunity claimed is an obligation owed to Chile, not to Senator Pinochet. The immunity asserted is Chile's" in the case *Regina v. Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte* (No. 3) (hereinafter "Pinochet III") (available at: http://www.parliament.the-stationery-office.co.uk/pa/ld199899/ldjudgmt/jd990324/pino8.htm).

non-interference in internal affairs; need to ensure the stability of international relations and the independent performance of States' activities.[35]

18. Despite the existence in the doctrine of a different point of view,[36] it is fairly widely recognized that immunity from foreign jurisdiction is the norm, i.e. the general rule, the normal state of affairs, and its absence in particular cases is the exception to this rule. What is important in this context is not whether a State has to or does not have to invoke the immunity of its official in order for the issue of immunity to be considered or taken into account by the State exercising jurisdiction (the subject of such invocation will be considered further in the section on procedure). What is important is that if a case concerns senior officials, other serving officials or the acts of former officials performed when they were in office, in an official capacity, then the existence of an exemption from or an exception to this norm, i.e. the absence of immunity, has to be proven, and not the existence of this norm and consequently the existence of immunity. Since immunity is based on general international law, its absence (when, of course, immunity is not waived in the specific case) may be evidenced either by the existence of a special rule or the existence of practice and *opinio juris*, indicating that exceptions to the general rule have emerged or are emerging. It is precisely on this that the logic of the judgment of the International Court of Justice in the *Arrest Warrant* case appears to have been based.[37] It is therefore impossible to agree with the criticism of this judgment that the Court, instead of proving the existence of immunity, began to examine the practice of States, court rulings, international treaties etc. for the existence of evidence of the absence of immunity.[38] There was no need for the Court to look for evidence of the immunity of a minister for foreign affairs since, according to

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[35] Preliminary report, para. 102.

[36] Moving in the same direction, the memorandum by the Secretariat (para. 88) mentions the need, in particular, to consider the question of whether international law recognizes any exceptions from or limitations to immunity. It is also characteristic that the European Convention on State Immunity 1972 and the Convention on Jurisdictional Immunities of States and Their Property of 2004 reflect the general principle of State immunity, and then formulate provisions on exceptions from this principle. On the view that immunity does not exist as a general rule, see, for example, para. 215 of the memorandum by the Secretariat, note 608.

[37] *Arrest Warrant*, Judgment, para. 58.

[38] Such criticism is expressed in her separate opinion by Judge Van den Wyngaert who dissented from the majority in the Arrest Warrant case (Arrest Warrant, Judgment, Dissenting opinion of Judge Van den Wyngaert, para. 11, at p.143). M. Frulli puts forward a corresponding analysis in her article. In her view, the existence of absolute immunity from foreign jurisdiction for the Minister for Foreign Affairs is an issue that is still under dispute, whereas the International Court "did not adequately build its conclusions on the existence of rules of customary law granting such absolute immunities to foreign ministers", "… it did not substantiate its findings through State practice nor evidence of *opinio juris*, as it has accurately done in previous cases". M. Frulli "The ICJ Judgment on the *Belgium* v. *Congo* Case (14 February 2002): a Cautious Stand on Immunity from Prosecution for International Crimes", in German Law Journal, Vol. 3, No. 3 (2002) paras. 3-4 (available at: http://www.germanlawjournal.com/article.php?id=138). D.S. Koller also challenges the existence of grounds for recognizing the "absolute" immunity of a Minister for Foreign Affairs, noting that the International Court does not produce evidence of the existence of a corresponding rule in international law. ("the Court's decision lacks any clarity as to why the functions of foreign ministers necessitate such absolute immunity, particularly with regard to private visits to foreign countries. Head of State immunity before foreign courts is derived from the dignity of the state, not the function of the position. The Court needs to determine a functional basis for the extension of such immunity to foreign ministers; it is unclear, however, that such a basis exists". D. S. Koller 'Immunities of Foreign Ministers: Paragraph 61 of the Yerodia Judgment as it Pertains to the Security Council and the International Criminal Court', 20 Am.U.Int'l L.Rev. (2004) 7, at p.15).

prevailing opinion, it is the existing norm. It looked for evidence of the existence of a norm on exemptions from the rule governing immunity and did not find any.

19. One further preliminary consideration deriving from the conclusions cited above is that the immunity of an official, whether a serving or former official, belongs not to the official but to the State. For instance, an official of a State which has ceased to exist can hardly be said to have immunity.[39]

20. And finally, the last preliminary consideration is the following. The Special Rapporteur does not yet see the need to consider immunity from pretrial measures of protection and immunity from execution separately from immunity from criminal jurisdiction as a whole.[40] From the very outset, criminal jurisdiction has been interpreted in this study as referring to the entirety of the criminal procedural measures at the disposal of the authorities in respect of foreign officials.

B. Immunity *ratione materiae*[41]

21. The issue of the immunity *ratione materiae* of State officials other than the so-called threesome was considered by the International Court of Justice in the case *Concerning certain questions of mutual assistance in criminal matters* (*Djibouti* v. *France*).[42] This case concerned the immunity of the *procureur de la République* and the Head of the National Security Service of Djibouti. The Court did not number these officials among those high-ranking persons enjoying immunity *ratione personae*. The Court noted that "there are no grounds in international law upon which it could be said that the officials concerned were entitled to personal immunities, not being diplomats within the meaning of the Vienna Convention on Diplomatic Relations of 1961, and the Convention on Special Missions of 1969 not being applicable in this case".[43] Establishing in this manner that the persons indicated lacked personal immunity in this case both under general and under

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[39] See, for example, judgments of the Federal Constitutional Court in the case of the former leader of the German Democratic Republic Honecker in 1992 and in the case of members of the Government of the former German Democratic Republic found guilty of murders in 1996, and also the judgment of the Federal supreme Court of Germany in the Border Guards case in 1992. (Memorandum by the Secretariat, para. 179, note 497).

[40] In the 2001 resolution of the Institute of International Law on immunities from jurisdiction and execution of Heads of State and of Government in international law, a separate provision (para. 1) was devoted to immunity from execution. "Immunities from Jurisdiction and Execution of Heads of State and of Government in International Law", Vancouver session, 2001 (available from www.idi-iil.org), hereinafter "resolution of the Institute — 2001". However, the subject matter of the resolution is immunity not only from criminal jurisdiction but also from other types of jurisdiction. The memorandum by the Secretariat (para. 230) also points out that such a separation is made when other types of jurisdiction are involved, although the view is expressed there that the separation of immunity from execution from immunity from jurisdiction raises certain specific issues and makes the division of immunity from execution into immunity from execution at the stage before the adoption of a substantial ruling by the court and immunity from execution at the stage after the adoption of a substantial ruling by the court worth exploring (para. 234).

[41] Memorandum by the Secretariat, paras. 154-212..

[42] *Case concerning certain questions of mutual assistance in criminal matters* (*Djibouti* v. *France*), Judgment of 4 June 2008 (hereinafter "Djibouti v. France") (available at: http://www.icj-cij.org).

[43] See *Djibouti* v. *France*, Judgment, para. 194.

special international law, the Court at the same time did not indicate directly that they held functional immunity. At the same time, it would appear to follow from the logic of paragraphs 195 to 196 of the Court judgment that if Djibouti had informed France in good time that the acts of these persons, which are the subject of consideration by the French authorities, were acts carried out in an official capacity, i.e. acts of the State of Djibouti itself, and correspondingly, that these persons enjoyed immunity from French criminal jurisdiction in respect of these acts, then it may have been a question of France ensuring that obligations stemming from the immunity were observed. The court even formulated a general provision in this respect, identifying the officials of a State with its organs.[44] The memorandum by the Secretariat cites a series of court judgments recognizing the immunity of officials with respect to official acts.[45] There is to all appearances also agreement in the doctrine on the question of the category of persons enjoying immunity *ratione materiae*: all State officials are meant, irrespective of their position within the structure of the organs of State power.[46]

22. If it is assumed that State officials enjoy immunity *ratione materiae* from foreign criminal jurisdiction, then a number of questions concerning the scope of this immunity need to be answered. It has to be determined which acts can be considered acts performed in an official capacity as distinct from acts which are private in character, whether this immunity is State immunity and whether it is identical in scope with State immunity (in particular, whether officials enjoy immunity in respect of official acts *jure gestionis*). It has to be clarified whether acts *ultra vires* and illegal acts may be considered official and consequently covered by immunity *ratione materiae*. The question has to be answered whether officials enjoy immunity *ratione materiae* in respect of acts performed before holding office and, after leaving office, in respect of acts performed while holding office. It needs to be understood whether immunity *ratione materiae* depends on the nature of the stay abroad of the person who is enjoying such immunity at the time when a decision is taken on exercising foreign criminal jurisdiction over this person. It should be stressed that we are talking here of officials who do not enjoy immunity *ratione personae*. In other words, these officials do not enjoy immunity from foreign jurisdiction in respect of acts performed in a personal capacity. At the same time, answers to these questions also apply to those high-ranking officials who enjoy immunity *ratione personae*. Furthermore, we will be concerned here with the state of affairs as a general rule. The issue of possible exceptions will be considered further.

23. In discussing the issue of the immunity of officials, the parties in the *Djibouti v. France* case were in agreement that on the whole State officials enjoy immunity *ratione materiae* from foreign criminal jurisdiction, i.e. immunity in respect of acts performed in an official capacity, since these acts are acts of the State itself which they serve.[47] This immunity was, in essence, identified by the parties with State

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[44] "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." Ibid., para. 196.

[45] See memorandum by the Secretariat, para. 169.

[46] See memorandum by the Secretariat, para. 166 (note 471).

[47] See preliminary report, para. 89, footnote 173.

immunity.[48] It would appear that the Court itself proceeds on this assumption in its judgment in this case, stating that "such a claim [Djibouti's reformulated claim of functional immunity in respect of the procureur de la République and the Head of National Security] is, in essence, a claim of immunity for the Djiboutian State, from which the procureur de la République and the Head of National Security would be said to benefit".[49] G. P. Buzzini points this out in his detailed analysis of this judgment.[50] The Commission, commenting nearly 50 years ago on a draft article on the immunity of consular officials, spoke of the same thing: "[T]he rule that, in respect of acts performed by them in the exercise of their functions (official acts) members of the consulate are not amenable to the jurisdiction of the … receiving State, is part of customary international law. This exemption represents an immunity which the sending State is recognized as possessing in respect of acts which are those of a sovereign State. By their very nature such acts are outside the jurisdiction of the receiving State, whether civil, criminal or administrative. Since official acts are outside the jurisdiction of the receiving State, no criminal proceedings may be instituted in respect of them."[51]

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[48] "What Djibouti requests of the Court is to acknowledge that a State cannot regard a person enjoying the status of an organ of another State as individually criminally liable for acts carried out in that official capacity, that it to say in the performance of his duties", *Djibouti* v. *France*, Oral proceedings, Verbatim Records, CR 2008/3, para. 24. The legal counsel for France also spoke of this (see Preliminary report, para. 89, footnote 173).

[49] *Djibouti* v. *France*, Judgment, para. 188.

[50] G. Buzzini, note 23 above, pp. 462-463.

[51] Report of the Commission to the General Assembly, *Yearbook of the International Law Commission, 1961*, vol. II, p. 117, para. 2. This viewpoint is also widespread in the doctrine. For example, E. David states that "[L]'immunité des agents étatiques n'est qu'une application du principe de l'immunité des Etats …". David E., Éléments de Droit International Pénal et Europeen, Bruylant, Bruxelles, 2009, p. 58. "Conduct that is directly attributable to state action is considered an act of state. As the person in question does not commit such acts for his own personal benefit, foreign domestic courts have to grant such acts immunity. Although the person in question commits the act, he is considered to be immune from prosecution for such conduct because it is his state that has acted. The act itself is non-justiciable in a foreign court for an indefinite period", in Y. Simbeye, Immunity and International Criminal Law, Aldershot, England; Burlington, Vt.: Ashgate, 2004, p.109. R. van Alebeek notes that "[t]he functional immunity of (former) foreign state officials is often approached as a corollary of the rule of state immunity." She refers at the same time to the well-known pronouncement of the United Kingdom Court of Appeal in Propend Finance v. Sing, "[t]he protection afforded by the [State Immunity Act] to States would be undermined if employees, officers or … 'functionaries' could be sued as individuals for matters of State conduct in respect of which the State they were serving had immunity. [The relevant provisions of the SIA] must be read as affording individual employees or officials of a foreign State protection under the same cloak as protects the State itself" (United Kingdom Court of Appeal, Propend Finance Ltd. v. Sing (1997), 111 ILR 611, at p. 669.). R. van Alebeek, The Immunity of States and their Officials in the light of International Criminal Law and International Human Rights Law, 2006, p. 153. However, this author considers that "[t]he application of the rule of state immunity to foreign state officials can be explained in different terms. As a rule, foreign state officials do not incur personal responsibility for acts committed under the authority of their home state. … The non-personal responsibility of state official for acts committed on behalf of the state may be seen to be an autonomous principle that precedes in its operation the application of the rule of state immunity to the facts of the case." Ibid., pp. 156-157. The Special Rapporteur is not sure of the correctness of such a juxtaposition of approaches, all the more so in that they lead to the same result (a little further on in her book R. van Alebeek writes: "In sum, foreign state officials enjoy immunity in regard to official acts. Acts committed as a mere arm or mouthpiece of a foreign state are acts of that

24. The Special Rapporteur considers it right to use the criterion of the attribution to the State of the conduct of an official in order to determine whether the official has immunity *ratione materiae* and the scope of such immunity.[52] At the same time, the Special Rapporteur does not see objective grounds for drawing a distinction between the attribution of conduct for the purposes of responsibility on the one hand and for the purposes of immunity on the other. There can scarcely be grounds for asserting that one and the same act of an official is, for the purposes of State responsibility, attributed to the State and considered to be its act, while, for the purposes of immunity from jurisdiction, it is not attributed as such and is considered to be only the act of an official.

25. The issue of determining whether the conduct of an official is official or personal in nature, and correspondingly of attributing or not attributing this conduct to the State, must logically be considered before the issue of the immunity of the official in connection with this conduct is considered. Commenting on the issue of functional immunity in paragraph 2 of article 39 of the 1961 Vienna Convention on Diplomatic Relations, E. Denza notes that "the correct test to be applied … is one of imputability. If the conduct in question is imputable or attributable to the sending State — even if it did not expressly order or sanction it — then continuing immunity *ratione materiae* should apply".[53]

26. That the act of an official acting in this capacity is attributed to the State is generally recognized.[54] As noted by the International Court of Justice in the *Difference Relating to the Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights* case, "[a]ccording to a well-established rule of international law, the conduct of any organ of a State must be regarded as an act of that State. This rule … is of a customary character …."[55] The question, consequently, is that of what conduct of an official can (must) be considered to have

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state rather than acts of the officials personally. Accordingly state officials cannot be called to account for them in their personal capacity." Ibid., 163.). In addition, one can talk of the "non-responsibility of foreign officials" (all the more so as a principle) only with a degree of conditionality. In law, as has already been noted in the preliminary report, immunity and responsibility are quite different things. The official conduct of an official is, of course, attributed to the State, but this does not mean that it cannot simultaneously be attributed to that person. For example, the State which the person serves has only to waive immunity, and the foreign State is given the possibility of exercising criminal jurisdiction over that person. (However, see Alebeek, p. 188. She states that it is not possible to revoke immunity in some cases. Firstly, it is possible not to claim immunity. Secondly, what is to be done about the implementation of liability on the basis of international law under international criminal jurisdiction for the same act. Does this change the attribution of the conduct or classification of the conduct as official?)

[52] See para. 89 of the preliminary report, and also the conclusion contained in para. 102 (h). In this regard, the Special Rapporteur shares the approach of the Secretariat to the meaning of attribution set out in para. 156 of the memorandum by the Secretariat.

[53] E. Denza, Diplomatic Law, A commentary on the Vienna Convention on Diplomatic Relations, 2nd ed., 1998, p. 363. See also E. Denza, *Ex parte Pinochet: Lacuna or Leap?*, 48 ICLQ (1999) 949, p. 951.

[54] See International Law Commission commentary to article 4 of the draft articles on the responsibility of States for internationally wrongful acts. Report of the International Law Commission on the work of its fifty-third session, *Yearbook of the International Law Commission, 2001*, vol. II, Part Two, pp. 40-42.

[55] Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights, Advisory Opinion, ICJ Reports 1999, p.87, para. 62.

been exercised in an official capacity and correspondingly be attributable to the State, i.e. considered as State conduct, and what cannot be considered as such and can (must) be considered as conduct exercised in a personal capacity. It is thus a question of the criterion on the basis of which it can be established that a State official is acting in a capacity as such and not in a personal capacity.

27. This question has also already been considered by the International Law Commission.[56] As noted in the commentary to article 4 of the draft articles on responsibility of States for internationally wrongful acts: "It is irrelevant for this purpose that the person concerned may have had ulterior or improper motives or may be abusing public power. Where such a person acts in an apparently official capacity, or under colour of authority, the actions in question are attributable to the State."[57] Thus, it is the view of the Commission that, in order for the acts of an official to be deemed to have been performed in this capacity, i.e. official acts, they must clearly have been performed in this capacity or "under the colour of authority".[58] Consequently, classification of the conduct of an official as official conduct does not depend on the motives of the person or the substance of the

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[56] "A particular problem is to determine whether a person who is a State organ acts in that capacity." Commentary to article 4 of the draft articles on State responsibility, para. 13. Report of the International Law Commission on the work of its fifty-third session, note 54 above, p. 41.

[57] Ibid. See examples of drawing a distinction between "unauthorized conduct of a State organ and purely private conduct" in international arbitral awards. A somewhat different criterion was applied by Japanese courts when considering criminal cases against American soldiers serving in that country's territory in order to determine whether the acts under consideration were acts performed in an official or a personal capacity. They analysed whether these acts were performed in the interests of service. Thus in the case *Japan* v. *William S. Girard* concerning the charge against an American serviceman of having inflicted grievous injury leading to death, the Court stated that "[a]lthough the Court is able to recognize that this case took place while the accused was on official duty and that it occurred at the place of duty, the case has no direct connection whatever with the execution of the duty of guarding a light machine gun, etc. as ordered by a senior officer. … [T]he act was not committed in the process of carrying out one's official duty" and further: "the act can only be regarded as excessive mischief,... an action simply carried out for the sole purpose of satisfying the momentary caprice of the accused himself". *Japan* v. *William S. Girard*, Maebashi District Court, 19 November 1957, reproduced in The Japanese Annual of International Law, No. 2 (1958) 128, pp. 132-133. In considering an appeal against a judgment by Osaka High Court in the case of another United States serviceman (he was charged of having caused grievous injury during an attempted rape) the Supreme Court of Japan upheld that "the Court in the first instance is proper that the provision 'in the performance of official duty' in Paragraph 3 (a) (ii) of Article XVII of the Administrative Agreement (this article of the Agreement between Japan and the United States establishes the priority of United States jurisdiction in the event of a crime being committed by an American serviceman as a result of actions performed during the execution of their official duties — R. K.) should be interpreted to mean 'in the course of the performance of official duty,' rather than 'during the hours of official duty'; and as applied to the instant case, the accused, even though performed during the hours of his official duty, was of a private nature independent of his official duty, and it therefore did not constitute an offense 'arising out of any act or omission done in the performance of official duty'." *Japan* v. *Dennis Cheney*, Supreme Court of Japan, 3 March 1955, ibid., p.137.

This criterion has its followers in the doctrine. Y. Simbeye, for example, notes that "[i]n order to act as state organs in their official function, heads of state and government must act in line with their state's position in a given subject matter, or act within that state's given boundaries for action. Then and only then can their acts be deemed official". Simbeye, note 51 above, p. 128.

[58] See preceding footnote. As R. van Alebeek notes: "In general it can be said that ostensible authority is accepted as actual authority." Note 51 above, p. 164. See also A. Watts, The legal position in international law of Heads of State, Heads of Government and Foreign Ministers, 247, RdC, 1994-III, 13, pp. 56-57.

conduct. The determining factor is that the official is acting in a capacity as such. It is necessary to judge whether the actions of an official are official or private depending on the circumstances of each concrete situation.[59]

28. One of the questions which arises in this connection is whether the distinction between acts *jure imperii* and acts *jure gestionis*, important in the context of State immunity, is applicable to situations involving the immunity of State officials. Noting that there are differing viewpoints on this issue in the doctrine, the Secretariat draws the conclusion in its memorandum that "there would seem to be reasonable grounds for considering that a State organ performing an act *jure gestionis* which is attributable to the State is indeed acting in his or her official capacity and would therefore enjoy immunity *ratione materiae* in respect of that act".[60] It would appear difficult not to agree with this. As the Commission has already noted, for the purposes of attributing conduct to the State "[i]t is irrelevant … that the conduct of a State organ may be classified as 'commercial' or as *acta iure gestionis*."[61] In such a case, the scope of immunity of the State and the scope of immunity of its official are not identical despite the fact that in essence[62] the immunity is one and the same. An official performing an act of a commercial nature, if this act is attributed to the State, enjoys immunity from foreign jurisdiction, but the State itself, in respect of such an act, does not (whereas civil and criminal jurisdiction apply in relation to the official, in relation to the State only civil jurisdiction applies).[63]

29. Another question is whether *ultra vires* conduct and illegal conduct can be attributed to the State and, correspondingly, covered by immunity. The concept of an "act of an official as such", i.e. an "official act", must be differentiated from the concept of an "act falling within official functions". The former includes the latter, but is broader. As long ago as 1961, the Commission, commenting on the draft articles concerning the immunity of consular officials, according to which "[m]embers of the consulate shall not be amenable to the jurisdiction of the … receiving State in respect of acts performed in the exercise of consular functions",[64] noted: "In the opinion of some members of the Commission, the article should have provided that only official acts within the limits of the consular functions enjoy

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[59] "In applying this test, of course, each case will have to be dealt with on the basis of its own facts and circumstances". Commentary to draft article 4, Report of the International Law Commission on the work of its fifty-third session, note 54 above, p. 42, para. 13. At the same time, account must be taken of the fact that as before there is no unanimity in doctrine in this regard. The viewpoint that the substance of conduct at least must be taken into account in order to determine the official nature of such conduct and in order to resolve the question of its attribution to the State is fairly broadly accepted. In this connection, see the discussion on actions which are crimes under international law as facts precluding the immunity of officials. See para. 57ff. of this report.

[60] Memorandum by the Secretariat, para. 161.

[61] Para. 6 of the commentary to article 4 of the draft articles on the responsibility of States for internationally wrongful acts, note 54 above, p. 40.

[62] It is characteristic that, in the passage from the judgment in the *Djibouti v. France* case cited in paragraph 25 of this report, the International Court of Justice uses the qualification "in essence". See also footnote 51 above.

[63] It is worth recalling here that, as noted in the first part of the Preliminary Report (para. 89), this does not mean that this act cannot simultaneously be attributed to the official.

[64] Report of the Commission to the General Assembly, *Yearbook of the International Law Commission 1961*, vol. II, p. 117.

immunity of jurisdiction. The Commission was unable to accept this view."[65] Acts outside the limits of the functions of an official, but performed by him in this capacity do not become private. They are not acts within the limits of his functions and acquire, for example, *ultra vires* character, but nonetheless remain official acts and, therefore, are attributed to the State. Article 7 of the draft articles on the responsibility of States is devoted to this.[66] As the Commission notes in the commentary to article 5 of these draft articles, "[t]he case of purely private conduct should not be confused with that of an organ functioning as such but acting *ultra vires* or in breach of the rules governing the operation. In the latter case, the organ is nevertheless acting in the name of the State".[67] Consequently, in respect of such acts immunity *ratione materiae* from foreign criminal jurisdiction extends to the officials who have performed them. As G. P. Buzzini notes, "excluding in general terms *ultra vires* acts from the scope of immunity *ratione materiae* from foreign criminal jurisdiction would be problematic, since this might lead to defeating the whole purpose of such immunity; in most cases, official conduct giving rise to a criminal offense should probably also be regarded as *ultra vires*".[68]

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[65] Ibid. The Commission further pointed out here that "It is in fact often very difficult to draw an exact line between what is still the consular official's act performed within the scope of the consular functions and what amounts to a private act or communication exceeding those functions." The letter merely underlines the need for the circumstances of each specific situation to be evaluated.

[66] "Article 7. Excess of authority or contravention of instructions

The conduct of an organ of a State or of a person or entity empowered to exercise elements of the governmental authority shall be considered an act of the State under international law if the organ, person or entity acts in that capacity, even if it exceeds its authority or contravenes instructions."

Report of the International Law Commission on the work of its fifty-third session, note 54 above, p. 45.

[67] Ibid., p. 41, para. 13. See also the commentary to article 7. Ibid., p. 46, paras. 7 and 8.

[68] G. Buzzini, note 23 above, p. 466. At the same time, account must be taken of the existence of national judicial practice based on the opposite approach to *ultra vires* acts. An example is the judgment of the Supreme Court of the Philippines concerning the case *United States of America*, *et al*. v. *Luis R. Reyes*, *et al.* (G.R. No.79253, 1 March 1993). In this case, the refusal to satisfy the petition of the United States concerning dismissal of a civil claim against the respondent was challenged before the court (United States citizen serving in a subdivision of the Joint United States Military Assistance Group, JUSMAG). The petition was motivated by the United States having jurisdictional immunity in relation to this claim, as well as by the respondent having immunity from a claim in connection with acts performed by her in the discharge of official functions. At the same time, the plaintiff insisted that the acts performed by the respondent (search of her person and search of the car in the presence of external witnesses and on a discriminatory basis), exceeded the limits of her official functions, were *ultra vires* acts and must be considered acts in a personal capacity. The United States submitted as an argument that "... even if the latter's [respondent's] act were *ultra vires* she would still be immune from suit for the rule that public officers or employees may be sued in their personal capacity for *ultra vires* and tortious acts is "domestic law" and not applicable in International law. It is claimed that the application of the immunity doctrine does not turn upon the lawlessness of the act or omission attributable to the foreign national for if this were the case, the concept of immunity would be meaningless as inquiry into the lawlessness or illegality of the act or omission would first have to be made before considering the question of immunity; in other words, immunity will lie only if such act or omission is found to be lawful." The Court, however, did not find the arguments of the United States persuasive and rejected the appeal, stating that "[t]he cloak of protection afforded the officers and agents of the government is removed the moment they are sued in their individual capacity. This situation usually arises where the public official acts

30. It is also difficult to agree with the viewpoint according to which conduct of an official beyond the limits of that which falls within the functions of the State may be considered as conduct of the State but, since it falls outside the limits of the functions of the State, does not have immunity extended to it.[69] This point of view is justified by claiming that immunity of the State and its officials has as its aim protection of the sovereign functions of the State, and that that which does not fall within the functions of the State cannot be covered by immunity.[70] However, immunity protects not the sovereign function as such — this would be simply an abstraction with no link to reality — but, as noted above, sovereignty itself and its bearer, the State, from foreign interference.[71]

31. Immunity *ratione materiae* also extends to the acts of an official, performed by him in that capacity, which are illegal. It would seem that the logic here is the same as that applied to *ultra vires* acts of an official. The illegal acts of an official, performed by him in that capacity, are official acts, i.e. acts of the State. As the Court of Appeal of the Province of Ontario noted in its judgment in the case of *Jaffe* v. *Miller and Others*, in which the acts of United States officials were in question, "[t]he illegal and malicious nature of the acts alleged do not themselves move the actions outside the scope of the official duties of the responding defendants".[72] As A. Watts wrote in relation to the issue of the immunity of former Heads of State, "[a] Head of State clearly can commit a crime in his personal capacity; but it seems equally clear that he can, in the course of his public functions as Head of State, engage in conduct which may be tainted by criminality or other forms of wrongdoing. The critical test would seem to be whether the conduct was engaged in under the colour of or in ostensible exercise of the Head of State's public authority. If it was, it must be treated as official conduct, and so not a matter subject to the jurisdiction of other States *whether or not* it was wrongful or illegal under the law of his own State."[73] The assertion that immunity does not extend to such acts renders the very idea of immunity meaningless. The question of exercising criminal jurisdiction over any person, including a foreign official, arises only when there are

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without authority or in excess of the powers vested in him. It is a well-settled principle of law that a public official may be liable in his personal private capacity for whatever damage he may have caused by his act done with malice and in bad faith, or beyond the scope of his authority or jurisdiction." (available at http://www.lawphil.net/judjuris/juri1993/mar1993/gr_79253_1993.htm).

[69] See memorandum by the Secretariat, note 456.

[70] B. Stern, for example, writes: "[L]es immunités ou autres doctrines de protection de l'Etat et de ses représentantes ont étés développées pour protéger la fonction souveraine, et rien d'autre: doit donc être exclu de leur bénéfice tout ce qui ne relève pas de cette fonction souveraine." B. Stern, Vers une limitation de L' "irresponsabilité souveraine", in Marcelo G. Cohen (ed.), *Promoting Justice, Human Rights and Conflict Resolution through International Law/ La promotion de la justice, des droits de l'homme et du règlement des conflits par le droit international*, Liber Amicorum Lucius Caflish, 2007, Koninklijke Brill NV, Leiden, p. 516.

[71] The question of who plays the decisive role in determining whether acts have been performed in an official or a private capacity is important. Is it sufficient for the State which an official serves to inform the State exercising jurisdiction that the acts were performed in an official capacity? Is it necessary to prove this in court and, correspondingly, does the decisive role in this case belong to the court? Is there a general answer to these questions for all cases, or does the answer depend on the specific circumstances of each case? These questions will be considered in more detail in the part of the Preliminary Report concerning procedural issues of immunity.

[72] Canada, Ontario Court of Appeal, *Jaffe* v. *Miller and Others* (1993), 95 ILR 446, at p. 460.

[73] A. Watts, note 58 above, pp. 56-57 (footnotes omitted). The views of A. Watts cited also apply in full to other State officials.

suspicions that his conduct is illegal and, what is more, criminally punishable. Accordingly, it is precisely in this case that immunity from foreign criminal jurisdiction is necessary. As noted in the memorandum by the Secretariat: "If unlawful or criminal acts were considered, as a matter of principle, to be 'non-official' for the purposes of immunity *ratione materiae*, the very notion of 'immunity' would be deprived of much of its content."[74]

32. Since immunity *ratione materiae* protects an official only in respect of acts performed in this [official] capacity, this immunity does not extend to acts which were performed by that person prior to his taking office, in a private capacity. Those acts were not State acts and did not take on the character of such acts upon entry of that person into government service.

33. Conversely, a former official is protected by immunity *ratione materiae* in respect of acts performed by him during the period when the official was acting in this capacity. These acts do not cease to be acts of the State because the official

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[74] Memorandum by the Secretariat, para. 160 (note 457). See also the position of the United States in the case *United States of America, et al*. v. *Luis R. Reyes, et al*. (see note 68 above). It should, however, be pointed out that the majority of observers advocating an absence of immunity for officials in connection with the performance of illegal acts limit the category of such acts to crimes under international law, i.e. the gravest forms of illegal act. See, for example, Y. Simbeye, note 51 above: "State officials, including heads of state or government, can commit crimes whilst in office. However, it is arguable that the commission of certain acts should exclude an individual from being classified as a state organ for international law purposes. If an individual commits an international crime he cannot be seen to be acting as a state organ under either domestic or international law", (p. 127 (emphasis added). Simbeye continues: "When dealing with international criminal law, states as abstract entities cannot order or sanction conduct punishable under criminal jurisdiction, nor indeed can a state carry out such acts itself. ... [I]n a situation where customary norms prohibit certain acts or there exists a treaty that the state in question has ratified, imputability is impossible". Ibid. p. 129. B. Stern also considers that "immunities should not be permitted to protect a state or its representatives either in criminal cases or in civil cases when an international crime is committed, since such an act should be considered as dramatically outside the functions of a state", Can a State or a Head of State Claim the Benefit of Immunities in Case an International Crime Has Been Committed?, in ILSA Journ.of Int'l & Comp. Law, 14 (2008), pp. 448-449. She explains, however, that "[i]f one considers the official acts that enjoy immunity, it must be conceded that it is not because an act is illegal that it is ipso facto disqualified from being an official act: if this were true, the institution of immunity would make no sense, as it is precisely to protect the head of state from prosecution that it was instituted", Immunities for Heads of State: Where Do We Stand? in "Justice for Crimes Against Humanity", ed. by M. Lattimer and Ph. Sands QC, Hart Publ., Portland, Oregon, 2006, p. 99.

Nonetheless, it would appear that, even in the cases referred to, such acts performed by a person in an official capacity will be attributed to the State with all the consequences which that entails. See in this regard Ch. Dominice: "Certains juges ont déclaré (dans l'Affaire Pinochet — R.K.) que ce n'est pas la fonction d'un chef d'Etat d'ordonner des actes de torture, manifestement contraires au droit international. [...] Cela voudrait dire que le droit international apporte un correctif aux attributions constitutionnelles d'un chef d'Etat. Et selon quel critère? Selon que l'acte est, ou non, contraire au droit international? Cette construction n'est pas satisfaisante. Un acte de fonction reste un acte de fonction, même s'il est contraire au droit international. Dans cette hypothèse, il entraîne la responsabilité internationale de l'Etat, sans préjudice de celle de l'individu-organe", Quelques observations sur l'immunité de juridiction pénale de l'ancien chef d'Etat, RGDIP No.2, 1999, pp. 304-305.

ceased to be such and they therefore continue as before to be covered by immunity, this being, in essence, State immunity.[75]

34. From this logic it also follows that immunity *ratione materiae* can scarcely be affected by the nature of an official's or a former official's stay abroad, including in the territory of the State exercising jurisdiction. Apparently, irrespective of whether this person is abroad on an official visit or staying there in a private capacity, he enjoys immunity from foreign criminal jurisdiction in respect of acts performed in his capacity as an official.[76]

C. Immunity *ratione personae*[77]

35. This part of the report is concerned solely with the scope of this immunity and does not examine the question of the category of persons possessing immunity *ratione personae*. The Special Rapporteur is proceeding on the assumption that it is enjoyed by the so-called threesome (Head of State, Head of Government and minister for foreign affairs), as well as by certain other high-ranking State officials.

36. As noted in the preliminary report, "[i]mmunity *ratione personae* extends to acts performed by a State official in both an official and a private capacity, both before and while occupying his post."[78] The existence of this immunity is explained by the importance of the relevant post to the State, the exercise of its sovereignty and its representation in international relations.[79] In the modern world, the importance of the posts of Head of Government, Minister for Foreign Affairs and possibly certain other officials is, from this point of view, entirely commensurate with the importance of the Head of State. Therefore, it would appear, at least at the present stage of work on this topic, that it makes no sense to consider

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[75] See Cassese A.: "[immunity] does not cease at the end of the discharge of official functions by the State agent (the reason being that the act is legally attributed to the State, hence any legal liability for it may only be incurred by the State)", When May Senior State Officials Be Tried for International Crimes? Some Comments on the Congo v. Belgium Case, EJIL (2002), vol. 13 No.4, p. 863. O'Donnell K.: "Once the [diplomatic] agent leaves office, the immunity ceases with respect to private acts under immunity *ratione personae*, or personal immunity, but continues for official acts. The limited shield of immunity *ratione materiae*, or functional immunity, afforded to official acts derives from the belief that the 'ambassador's actions are attributed to his government, rather than to personal choice'", Certain Criminal Proceedings in France (Republic of Congo v. France) and Head of State Immunity: How Impenetrable Should the Immunity Veil Remain?, 26 Boston Univ. Int'l Law Journ. (2008), pp. 384-385 (citing Michael A. Tunks, Diplomats or Defendants? Defining the Future of Head-of-State Immunity, 52 Duke L.J. (2002), p. 293).

[76] In addition to immunity *ratione materiae*, officials on official visits abroad may of course enjoy immunity founded in other rules of international law, such as those regulating, for example, the status of members of special missions or delegations in the organs of international organizations. Obviously, with regard to a former official, the question of the nature of his visit to a foreign State does not arise as such a visit cannot be official. This, in turn, does not affect immunity *ratione materiae*.

[77] See memorandum by the Secretariat, paras. 94-153.

[78] Preliminary report, para. 79. Memorandum by the Secretariat, para. 137.

[79] Preliminary report, para. 93.

the scope of immunity *ratione personae* of a Head of State, Head of Government, minister for foreign affairs or other possible holders of such immunity[80] separately.

37. As noted in the memorandum by the Secretariat, the material scope of this immunity is well-settled both in judicial decisions and the legal literature, which often express this idea by qualifying immunity *ratione personae* as "complete", "full", "integral" or "absolute".[81] In terms of scope, this is the same immunity from foreign criminal jurisdiction as the immunity of heads of diplomatic missions or other diplomatic agents from the criminal jurisdiction of the receiving State under the 1961 Convention on Diplomatic Relations[82] and customary international law, or of representatives of the sending State and members of the diplomatic personnel of special missions under the 1969 Convention on Special Missions. It can be considered as supplementing immunity *ratione materiae* or as including immunity *ratione materiae*, since, while a person occupies a high-level post, it covers, in addition to acts performed in an official capacity, acts performed by him in a private capacity both while holding office and prior to taking up office. Since it is linked to a particular high-level post, personal immunity is temporary in character and ceases when the post is departed.[83] Therefore, immunity *ratione personae* would appear not to be affected either by the fact that acts, in connection with which jurisdiction is being exercised, were performed outside the limits of the functions of the official or by the nature of his stay abroad, including in the territory of the State exercising jurisdiction.[84]

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[80] Referring to how the International Court of Justice describes the scope of the immunity *ratione personae* as it applies to a minister for foreign affairs in the *Arrest Warrant* case, the Secretariat notes in its memorandum (para. 138) that this description "could be used mutatis mutandis to describe and explain the position of the head of State, head of government or any other official enjoying the same immunity".

[81] Ibid., para. 137.

[82] Ibid., para. 139. In the case concerning certain questions of mutual legal assistance in criminal matters, the International Court of Justice recalled that "the rule of customary international law reflected in Article 29 of the Vienna Convention on Diplomatic Relations, while addressed to diplomatic agents, is necessarily applicable to Heads of State." *Djibouti v. France*, Judgment, para. 174.

[83] See preliminary report, paras. 79-83.

[84] Other opinions on this matter have also been advanced. Thus, the Joint Separate Opinion of three judges in the *Arrest Warrant* case states: "Whether he [the Minister for Foreign Affairs] is also entitled to immunities during private travels and what is the scope of any such immunities, is far less clear." Here, however, the authors make the proviso: "Certainly, he or she may not be subjected to measures which would prevent effective performance of the functions of a Foreign Minister". *Arrest Warrant* (Joint Separate Opinion), para. 84. A. Watts puts forward differences between official and private visits of Heads of State to a foreign State from the viewpoint of scope of immunity. Among other things, he voices doubts that a Head of State enjoys immunity during a private visit in the three cases which are excluded from the immunity of a diplomatic agent under article 31 (1) of the Vienna Convention on Diplomatic Relations (actions in connection with private immovable property, on matters of succession and in connection with activity exercised outside official functions). He also notes that although "[a Head of State] cannot be sued in respect of … official acts while in office, or even after he has left office, and must also be granted immunity in respect of them when he is travelling privately", "... to the extent that immunity is refused in respect of a Head of State's private acts when he is in a foreign State on some official basis or when he is sued there although not present there, it is likely that it will also be refused when he is on a private visit". A. Watts, note 58 above, p. 74.

D. Acts of a State exercising jurisdiction which are precluded by the immunity of an official

38. Within the framework of this topic, criminal jurisdiction is understood to mean not just the trial phase of the criminal process but the totality of criminal procedure measures taken by a State against a foreign official. As noted in the preliminary report: "Immunity from foreign criminal jurisdiction protects [an] individual … from criminal process and criminal procedure actions by judicial and law enforcement agencies of the foreign State possessing jurisdiction. (*It might be more accurate to speak not of immunity of State officials from foreign criminal jurisdiction or criminal process but of immunity from certain measures of criminal procedure and from criminal proceedings by the foreign State*. However, this question cannot be answered until the question of the scope of immunity has been considered.)" [85] This differentiates this topic substantially from the subject of immunity from civil jurisdiction.

39. To the question of whether immunity protects an official from all measures which may be taken in the exercise of foreign criminal jurisdiction or only from some of these measures must be added the question of what measures may be taken with regard to an official who is not a suspect but features in a criminal case in another capacity, in particular as a witness.

40. In its judgment in the *Arrest Warrant* case, the International Court of Justice, having concluded that "the functions of a Minister for Foreign Affairs are such that, throughout the duration of his or her office, he or she when abroad enjoys full immunity from criminal jurisdiction and inviolability", stated: "That immunity and that inviolability protect the individual concerned against any act of authority of another state which would hinder him or her in the performance of his or her duties." [86] And continued: "Thus, if a Minister for Foreign Affairs is arrested in another State on a criminal charge, he or she is clearly thereby prevented from exercising the functions of his or her office. … Furthermore, even the mere risk that, by travelling to or transiting another State a Minister for Foreign Affairs might be exposing himself or herself to legal proceedings could deter the Minister from travelling internationally when required to do so for the purposes of the performance of his or her functions." [87] Thus, in the circumstances of this case (which, we would

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[85] Preliminary report, para. 66. Emphasis added.

[86] *Arrest Warrant*, Judgment, para. 54.

[87] Ibid., para. 55. Applying this criterion, the Court came to the conclusion that the arrest warrant violated the immunity of the Minister for Foreign Affairs of the Democratic Republic of the Congo. The conclusions of the Court in this regard follow in many respects the arguments which the Democratic Republic of the Congo party put forward in the case, although the Court does appear to narrow the range of measures, exercise of which prevents immunity, by introducing the criterion indicated. The Democratic Republic of the Congo in its Memorial points out in addition: "L'inviolabilité et l'immunité sont en effet fonctionnelles, en ce sens qu'elles sont accordées automatiquement par le droit international général à la personne qui en bénéficie en conséquence des fonctions officielles que celle-ci exerce et afin de permettre leur bon accomplissement par leur protection contre toute ingérence étrangère non autorisée par l'Etat que cette personne représente" (para. 47). As regards the arrest warrant directly: "La simple crainte de l'exécution du mandat d'arrêt est en effet de nature à limiter les déplacements à l'étranger du ministre mis en cause, portant ainsi préjudice à la bonne conduite des relations internationales de son Etat que les principes d'inviolabilité et d'immunité ont pour finalité de sauvegarder" (para. 52). *Arrest Warrant*, Mémoire de la République démocratique du Congo, 15 May 2001.

remind you, concerned the lawfulness of a warrant for the arrest of the minister for foreign affairs of another State), the International Court of Justice formulated criteria for deciding the question of whether a particular criminal procedure measure may be implemented against a foreign official: a State exercising or intending to exercise criminal jurisdiction over the official, may not perform such criminal procedure acts as hamper or prevent this person from exercising his or her functions. (It should be noted that this criterion was determined by the Court as it applies to a minister for foreign affairs who features in this case.)

41. This criterion underwent certain development in the judgment of the International Court of Justice in the case *Concerning Certain Questions of Mutual assistance in Criminal Matters*. In this case, considering the question of whether the invitation or serving of a summons to a Head of State to appear as a witness in a criminal case constituted a violation of the norm concerning the immunity of a Head of State, the Court, referring to the position cited above from the judgment in the *Arrest Warrant* case, ruled: "[T]he determining factor in assessing whether or not there has been an attack on the immunity of the Head of State lies in the subjection of the latter to a constraining act of authority."[88] Having applied this criterion, the Court came to the conclusion that "the summons addressed to the President of the Republic of Djibouti by the French investigating judge … was not associated with the measures of constraint …; it was in fact merely an invitation to testify which the Head of State could freely accept or decline. Consequently, there was no attack by France on the immunities from criminal jurisdiction enjoyed by the Head of State, *since no obligation was placed upon him* in connection with the investigation of the *Borrel* case".[89] Thus, the Court clarified that a criminal procedure measure against a foreign official violates his immunity if it hampers or prevents the exercise of the functions of that person by imposing obligations upon him.[90]

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[88] *Djibouti v. France*, Judgment, para. 170.

[89] Ibid., para. 171. Emphasis added. France adopted approximately the same position, stating that "seule la limitation de la liberté d'action nécessaire à un chef d'Etat étranger pour s'acquitter de sa fonction est de nature à méconnaître l'immunité de juridiction pénale et l'inviolabilité dont il jouit". (*Djibouti v. France*, Arrêt, para. 167.) In its counter-memorial, the French party notes that: "d'une façon générale, une demande de témoignage adressée au représentant d'une puissance étrangère n'a … aucun caractère obligatoire et s'analyse en une simple invitation, qui ne saurait des lors porter atteinte a l'immunité de juridiction pénale et a l'inviolabilité d'ont bénéficient les chefs d'Etat étrangers — ce d'ont la France convient sans réserve" — *Djibouti v. France*, Contre-memoire de la Republique Francaise, 13 Juillet 2007, para. 4.41. Djibouti, for its part, acknowledging that an invitation to testify is different in nature from an arrest warrant (with reference to *Arrest Warrant*), noted that in itself a summons to court already constitutes an infringement of immunity ("Or certes, une convocation à témoigner n'est pas en soi un acte de contrainte comparable à un mandat d'arrêt, mais elle a tout de même indiscutablement une composante contraignante, du fait même de l'intimation à comparaître qui est adressée à la personne convoquée: une telle intimation contredit alors elle aussi l'immunité de juridiction. Les deux convocations à témoin précitées à l'encontre du Président de la République de Djibouti, qui visaient à lui imposer de témoigner dans l'affaire 'Borrel', portent donc atteinte à son immunité bien qu'il ne s'agisse pas d'actes de contrainte de même nature qu'un mandat d'arrêt"). *Djibouti v. France*, Memoire de la Republique de Djibouti, 15 mars 2007, para. 135.

[90] That immunity precludes the adoption specifically of coercive, prescriptive measures against a Head of State was discussed by the parties in the case before the International Court of Justice *Certain Criminal Proceedings in France* (Republic of the Congo v. France). See, for example, *Certain Criminal Proceedings in France* (Republic of Congo v. France), Application of Congo, 11 April 2003, p. 15; statement by the Agent of the French Republic, R. Abraham: "[E]n tout état de cause, les immunités dont bénéficient les chefs d'Etats étrangers s'opposeraient à ce que des mesures de contrainte soient prises à leur encontre". 28 April 2003, CR 2003/21, p. 15.

42. In applying such a criterion, the International Court of Justice narrowed the scope or extent of immunity compared, for instance, with the judgment of the court in the Federal Republic of Germany in the *Honecker* case in 1984, according to which "[a]ny inquiry or investigation by the police or the public prosecutor is … inadmissible".[91] It is evident that where the criterion formulated by the International Court of Justice is used, immunity is far from precluding all criminal procedure measures against a foreign official, and prevents only those which impose a legal obligation on the person, i.e. may be accompanied by sanctions for their non-fulfilment or measures of constraint or be coercive in nature. For example, the commencement of a preliminary investigation or institution of criminal proceedings, not only in respect of the alleged fact of a crime but also actually against the person in question, cannot be seen as a violation of immunity, if it does not impose any obligation upon that person under the national law being applied.[92]

43. Given such an approach to immunity, a State which has grounds to believe that a foreign official has performed an act which is criminally punishable under its legislation, is able to carry out at least the initial collection of evidence for this case (to collect witness testimonies, documents, material evidence, etc.), using measures which are not binding or constraining on the foreign official.[93] After this stage, it is

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[91] *Re Honecker*, Federal Republic of Germany, Federal Supreme Court (Second Criminal Chamber), Judgment of 14 December 1984, 80 I.L.R. 365, at p. 366.

[92] As E. David notes, "[c]omme le simple fait d'ouvrir une instruction n'entrave nullement l'exercice des fonctions, cette instruction reste compatible avec l'immunité de juridiction". Op.cit., p. 123. As noted in the Joint Separate Opinion in the *Arrest Warrant* case, "commencing an investigation on the basis of which an *Arrest Warrant* may later be issued does not of itself violate those principles [principles of the inviolability or immunity of the persons concerned — R.K.]. The function served by the international law of immunities does not require that States fail to keep themselves informed." *Arrest Warrant* (Joint separate opinion), para. 59, at p. 80. The question arises here as to whether immunity prevents acts which do not bind the person enjoying immunity directly, but restrict him in some way or other. For example, is the seizure of his personal property, in particular, bank accounts (used, for example, in illegal operations) or car (for example, in a case where the alleged crime was committed with the use of this car) legal? It would appear that such acts are legal.

Support by the Court for this line may also be pointed to in connection with the *Congo v. France* case, where the Court, having considered the question of provisional measures, refused them, finding that the circumstances were not such as to require that France be prohibited from continuing the investigation in relation to officials of the Congo, including the President of the Congo. This conclusion was drawn, in particular, on the basis that the Congo did not present evidence that the immunity of the Head of State had been violated as a result of the investigation being conducted (in circumstances where France had not undertaken any measures of a binding nature or preventing the President from discharging his duties). Despite the fact that this decision does not predetermine the decision of the Court on the substance of the case, it is significant if only in that it does not rule out the possibility of investigation proceedings being continued. See *Certain Criminal Proceedings in France* (Republic of the Congo v. France), Request for the Indication of a Provisional Measure, Order of 17 June 2003.

See, however, the position of A. Watts: "A head of government or a foreign minister who, while on an official visit to another State was subject to legal proceedings in that State would be likely to find his ability to carry out his functions seriously impaired. Even the risk that by visiting another State he might be opening the way for the institution of legal proceedings against him could deter him from making the visit at all, to the prejudice of his conduct of the international affairs of his State". A. Watts, note 58 above, pp. 106-108.

[93] K. O'Donnell comments thus on the decision of the International Court of Justice on the issue of provisional measures in the *Congo v. France* case: "While carefully recognizing a head of state as inviolate from prosecution while in office, the ICJ is increasing opportunities for human rights victims to successfully build a case against an official when evidence is still fresh and witnesses are still alive or locatable. Thus, once the official leaves office and is no longer cloaked in impenetrable immunity, he may be subject to prosecution, depending on the claims and evidence at issue." op.cit., p. 396.

possible, in particular, to judge with greater or lesser certainty whether this person was involved (and if so to what extent) in the commission of the alleged crime, whether the person's acts should be considered official, etc. If there are sufficient grounds for supposing the involvement of the foreign official in the crime, then, depending on the circumstances, the state exercising jurisdiction retains the option of further measures which do not violate the immunity of the person concerned. It may, for example, notify the foreign State concerned of the circumstances of the case and propose that it waive the immunity of the official; it may send a request for assistance in this criminal matter; it may hand over materials collected within the framework of the preliminary investigation or initiated criminal case to this State, proposing that it institute a criminal prosecution of this person. If the case concerns an alleged crime which falls under the jurisdiction of an international criminal tribunal or the International Criminal Court, then such an approach allows the handing over of the collected materials to the relevant organization exercising international criminal jurisdiction. Finally, having collected evidence, it may, refraining from further steps which immunity prevents, wait until the immunity ceases to apply, and then initiate a criminal prosecution of the person concerned (where the acts concerned are those of persons enjoying personal immunity which were performed in a private capacity before they took up office or during their term in office).

44. As G. Buzzini rightly notes, "the criterion identified by the Court seems to be convincing".[94] The opinion of the Court that the "concept of 'constraining act of authority' covers not only those acts that are addressed to state officials who are themselves accused of criminal conduct, but also certain acts — such as witness summonses or other orders — that may be notified, in connection with a judicial proceeding, to individuals who are not (or not yet) accused of criminal conduct"[95] also appears convincing to him. The criterion formulated by the International Court of Justice does, indeed, seem to be completely convincing in the case of officials enjoying immunity *ratione personae* who are suspects or are summoned as witnesses in a criminal case. However, as it applies to officials enjoying immunity *ratione materiae*, the issue requires further clarification.

45. An official enjoying immunity *ratione materiae* is protected from criminal procedure measures in respect of acts performed by him in an official capacity. It is therefore logical to assume that restrictive measures cannot be taken against him solely in connection with an alleged crime committed by this person in the performance of such acts.

46. A former official is, of course, no longer performing official functions. In this regard, it cannot be said that his remaining immunity *ratione materiae* protects him from criminal procedure measures which hamper/preclude the performance of his functions at this time. It can be stated only that the absence of such protection after the person has left his post would hamper the official in the independent performance of his functions while occupying the post. The clarification of the International Court of Justice that the protection concerned is protection from criminal procedure measures *imposing obligations* on the person in respect of whom they are being implemented is particularly important here. For States, it is important in terms of safeguarding their sovereignty and equality that their officials cannot be

[94] G. Buzzini, note 23 above, p. 476.
[95] Ibid.

subjected to such criminal procedure measures by a foreign State as impose obligations on them in connection with their official activity, not only during the performance of this activity by them but also subsequently. Thus, a former official, like a serving official enjoying immunity *ratione materiae*, is protected by immunity from criminal procedure measures in connection with an alleged crime committed by this person during the performance of official acts which impose obligations. Of course, what is at issue here is immunity specifically from being summoned as a witness. An invitation to give witness testimony, which, in contrast to a summons, does not impose any legal obligation on the invited official and which therefore may be rejected without any detrimental legal consequences, does not violate his immunity and is a legitimate procedural measure.[96]

47. The situation as regards the immunity of an official enjoying immunity *ratione materiae* from being summoned as a witness requires further commentary. It is clear that in principle an official enjoying immunity *ratione materiae* may be summoned as a witness if testimony concerning the acts of other persons or of the official himself in a private capacity is required (provided, of course, that this summons does not restrict this person in the performance of their official activity). But what is the situation if the case concerns the giving of testimony in respect of acts performed by a serving or former official himself, or by another person?

48. One of the questions in the case *Concerning Certain Questions of Mutual Assistance in Criminal Matters* (*Djibouti v. France*) was that of the immunity of Djiboutian officials enjoying immunity *ratione materiae* from being summoned as witnesses.[97] Djibouti pointed out that in order to be sure that the two Djiboutian officials had been acting in an official capacity and therefore enjoyed immunity from being summoned as witnesses with regard to acts as such, it was necessary to verify concretely in what capacity — private or official — these acts had been performed.[98] The International Court of Justice, responding to this point, noted that "it has not been 'concretely verified' before it that the acts which were the subject of the summonses as *témoins assistés* issued by France were indeed acts within the scope of their duties as organs of State".[99] This became one of the grounds on which the Court did not recognize the immunity of the Procureur général of the Republic of Djibouti and the Head of the National Security Service of Djibouti from being summoned as witnesses to a French court. Thus, following the logic of the Court in this case, an official enjoying immunity *ratione materiae* can be said to have immunity from being summoned as a witness in a case where the person is being summoned to give testimony concerning acts performed by him within the scope of his duties as a State organ.

49. This criterion is clear and sufficient in the circumstances of the case considered by the International Court of Justice. But would it be sufficient if the matter concerned the summoning of an official enjoying immunity *ratione materiae* as a witness to a foreign court not in connection with acts within the scope of his duties but in connection with *ultra vires* acts or in connection with the acts of other persons?

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[96] See para. 41 and note 90 above.

[97] The issue of the peculiarities of French legislation on this issue, which was analyzed in detail in his case both by the parties and by the Court, will not be touched upon here.

[98] *Djibouti* v. *France*, Judgment, para. 190.

[99] Ibid., para. 191.

50. It would appear that the logic applied to the summoning of such an official to give testimony in connection with his *ultra vires* acts may be the same as that which applies to his immunity in respect of such acts. It may therefore be presumed that immunity must provide protection from such a summons as a witness.

51. Moreover, it would appear that where a case concerns the giving of testimony concerning the acts of other persons, events or facts which became known to the official as a result of the discharge of his official functions, immunity *ratione materiae* protects the official from the imposition of any obligations upon him by a foreign State in this regard.[100]

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[100] G. P. Buzzini writes: "Arguably a more appropriate criterion [than the one used by the International Court of Justice in the *Djibouti v. France* case] would be whether the required testimony possibly involves the provision of information or evidence on facts knowledge of which would have been acquired by the state official in connection with the performance of his or her functions as an organ of state." G. Buzzini, note 23 above, p. 468. In a civil judgment cited in the memorandum by the Secretariat, the German Federal Appeal Court in 1988 refused to subpoena as a witness the Indian Minister of Defence concerning the question of the actions of Indian troops against Tamils in Sri Lanka, concluding that State immunity protects it and its officials from being summoned as witnesses on questions concerning sovereign acts of the State, which include acts of its armed forces. See memorandum by the Secretariat, para. 238, note 684. The position of the Appeals Chamber of the International Tribunal for the Former Yugoslavia in the *Prosecutor* v. *Blaskic* case was similar, ruling that it was not admissible to serve the Minister of Defence of Croatia with a summons to appear in order to produce official documents (*subpoena duces tecum*) *Prosecutor* v. *Blaskic*, case No. IT-95-14, Appeals Chamber Judgment on the Request of The Republic of Croatia for Review of the Decision of Trial Chamber of 18 July 1997 (Issuance of Subpoenae Duces Tecum), 29 October 1997 (available at http://www.icty.org/case/blaskic/4). As noted in the memorandum by the Secretariat, "[a]lthough the case concerns immunity before an international tribunal rather than a national criminal court, the Appeals Chamber noted that exercises of judicial authority of the Tribunal follow similar rules of those of a national court" (see para. 237, note 683). In the *Prosecutor* v. *Radislav Krstic* case, the same Appeals Chamber of the International Tribunal for the Former Yugoslavia delivered a judgment pointing in a different direction, stating that the functional immunity of an official, on which the Appeals Chamber relied in the *Blaskic* case on the issue referred to above, does not include immunity "against being compelled to give evidence of what the official saw or heard in the course of exercising his official functions", and "[s]uch immunity does not exist". *Prosecutor* v. *Radislav Krstic*, case No. IT-98-33-A, Appeals Chamber Decision on Application for Subpoenas, 1 July 2003, para. 27. It is explained in the Chamber's decision that "[u]nlike the production of State documents, the State cannot itself provide the evidence which only such a witness could give". Ibid., para. 24. The logic of this decision does not appear to be fully understandable. The dissenting opinion of Judge Shahabuddeen seems more convincing. He noted that the immunity of an official from subpoena does not come down to a situation involving a demand to produce official documents, but extends to all information obtained by a person in the fulfilment by him of his official functions. "…[I]t is not right to narrow the definition of information to material collected in some central place under the authority of the State, such as its archives. A State acts through its officials; it has information held by them over the whole field of its activity, national and international, including information of matters seen or heard by them". Referring to the *Blaskic* case, he stated that "the test which it lays down is whether the material was acquired by the proposed witness in his capacity as a State official". *Prosecutor* v. *Radislav Krstic*, case No. IT-98-33-A, Decision on Application for Subpoenas, Dissenting opinion of Judge Shahabuddeen, 1 July 2003, paras. 15-16. As G. Buzzini writes, "it remains difficult to understand why a subpoena to give evidence as a witness on facts knowledge of which was acquired by the state official in the discharge of his or her functions should be treated differently, for purposes of immunity *ratione materiae*, from a subpoena to produce official documents". Buzzini G., op. cit., p. 468, note 79. Nonetheless, in the *Prosecutor* v. *Bagosora et al*. case, for example, the International Criminal Tribunal for Rwanda, referring to the aforementioned

E. Territorial scope of immunity[101]

52. In its judgment in the *Arrest Warrant* case, the International Court of Justice stated that a minister for Foreign Affairs enjoys immunity from foreign criminal jurisdiction, when he is abroad.[102] The same judgment states that "in international law it is firmly established 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".[103] The parties in both the *Arrest Warrant*[104] case, and the *Certain Questions of Mutual Assistance in Criminal Matters*[105] case, talked of State officials having immunity when they are travelling abroad. This position is understandable in the circumstances of both cases. However, to what extent is it in principle accurate to assert that immunity operates only in a situation when the official is abroad?

53. Of course, in cases where officials are representing a State in international relations, it is important that a foreign State not be able to impede the exercise of precisely this function. Immunity is therefore particularly important at a time when such an official is abroad. Moreover, it is precisely when he finds himself outside his own State that an official is most vulnerable, unprotected from criminal procedure measures by the foreign State. However, immunity from the jurisdiction of a foreign State also appears to operate while an official is in the territory of the State which he is serving or has served. It follows from what has been stated above that immunity is a procedural protection, based on the sovereignty of a State, from foreign criminal procedure measures which impose on its official an obligation of some kind. From the legal point of view, it is in this sense not entirely clear why this protection comes into effect when the person is abroad. Immunity as a legal rule includes obligations of the State exercising jurisdiction not to take (but possibly also to prevent) criminal procedure measures which would hamper or prevent an official from exercising his official activity, by imposing obligations upon him. It is not very clear why such an obligation takes effect or may be considered to have been violated only when the official is outside the territory of his own State. In addition, immunity is also enjoyed by officials not engaged in representing the State in international relations, or in functions which amount to such representation. Doesn't, for example, a prosecutor, judge or other official exercising only

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decision within the scope of the *Krstic* case, stated without further commentary in its decision on the question of a subpoena to give witness testimony that «Government officials enjoy no immunity from a subpoena, even where the subject-matter of their testimony was obtained in the course of government service», The *Prosecutor* v. *Bagosora et al*., case No. ICTR-98-41-T, Trial Chamber I, Decision on Request for a Subpoena for Major Jacques Biot, 14 July 2006.

101 See para. 153 of the memorandum by the Secretariat.

102 "[T]he functions of a Minister for Foreign Affairs are such that, throughout the duration of his or her office, he or she when abroad enjoys full immunity from criminal jurisdiction and inviolability" (emphasis added — R.K.). *Arrest Warrant*, Judgment, para. 54.

103 Ibid., para. 51. Emphasis added. This provision was also reproduced in the judgment of the Court in the case concerning *Certain Questions of Mutual Assistance in Criminal Matters*, *Djibouti* v. *France*, Judgment, para. 170. The Court does not speak of jurisdiction of other States, but of jurisdiction "in" other States.

104 See, for example, Memorial of the Democratic Republic of Congo (*Arrest Warrant*, Mémoire présenté par le Gouvernement de la République démocratique du Congo).

105 See, for example, para. 164 of the judgment, and also para. 4.21 and para. 4.34 of the Counter-Memorial of the French Republic (*Djibouti* v. *France*, Contre-mémoire de la République française).

"domestic" functions also enjoy, while in the territory of his own State, the same immunity *ratione materiae* from an arrest warrant issued by a foreign State or from a summons imposing an obligation to appear as a witness in a criminal case as he would enjoy if he were abroad? Criminal procedure measures imposing an obligation on a foreign official could appear to violate the immunity which he enjoys and therefore the sovereignty of his State, irrespective of whether this person is abroad or in the territory of his own State. Violation of an obligation not to take such measures against a foreign official takes effect from the moment such a measure is taken, and not only when the person, against whom it has been taken, is abroad. It is therefore also legitimate to pose the question of the abrogation of such a measure and not of its suspension for the period during which the official is abroad (the latter would be more logical if such a measure violated the immunity of the official only during the period of his stay abroad).[106]

F. Are there exceptions to the rule on immunity?[107]

1. Preliminary considerations

54. We note the following as preliminary considerations. Firstly, we are dealing here with such exceptions to immunity as are founded in customary international law. There can be no doubt that it is possible to establish exemptions from or exceptions to immunity through the conclusion of an international treaty. Immunity, as noted at the beginning of this part of the report, is a rule existing in general customary international law. The hypothesis of the existence of exceptions to it in customary international law, i.e. the existence of or even tendency toward the emergence of a corresponding customary international legal norm (norms) has to be proven, accordingly, on the basis of the practice and *opinio juris* of States. Secondly, the Special Rapporteur proceeds on the assumption that exceptions to the rule on immunity are not identical to the normal absence of immunity. For example, for all officials who do not enjoy immunity *ratione personae* (i.e. the overwhelming majority of serving officials and all former officials), the absence of immunity from foreign criminal jurisdiction in connection with crimes committed by them in the performance of acts in a private capacity, is a normal occurrence and not an exception to the rule. Thus, if it is known (proven) that in the commission of criminal acts, a former official was acting in a private capacity, the absence of immunity is self-explanatory and not requiring of proof. An exception to immunity is considered within the scope of this topic to be a situation where, as a general rule, an official enjoys immunity, but due to certain circumstances does not have immunity. For example, officials as a general rule enjoy immunity in respect of crimes committed by them in the exercise of official acts. However, there is a view

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[106] During the course of discussion of this topic at the 60th session of the International Law Commission, Mr. G. Gaja touched upon the issue of the immunity of an official from the jurisdiction of third States, expressing the hope that it would be considered in the next report (A/CN.4/SR.2983, pp. 16-17). The Special Rapporteur is not yet sure of the need to consider this issue since he does not, yet at least, see, grounds for assuming that immunity (scope of immunity) depends on whether a foreign official is in the territory of his own or of a third State. Further consideration is required of the issue of whether immunity depends on the whereabouts of the person (or alleged performance by him of the criminal acts) in the territory of the State which exercises criminal jurisdiction. This issue will be considered below.

[107] See memorandum by the Secretariat, paras. 141-153, 180-212.

that when these crimes are of the utmost gravity and recognised as crimes under international law, then immunity from foreign jurisdiction is absent. Such a situation is considered in the present report as an exception to immunity.

55. The question of exceptions to the rule on immunity is posed chiefly with regard to serving and former officials enjoying immunity *ratione materiae*. At least in respect of serving senior officials — Heads of State, Heads of Government and ministers for foreign affairs — the prevailing view is that the immunity *ratione personae* from foreign criminal jurisdiction, which they enjoy, is not subject to exceptions. Knowing no exceptions, absolute immunity *ratione personae*, as it is called, has been upheld by the International Court of Justice in the *Arrest Warrant* and *Certain Questions of Mutual Assistance in Criminal Matters* cases,[108] in the judgments of national courts,[109] and in resolutions of the Institute of International Law.[110] Such is also the prevailing viewpoint in the doctrine.[111] Thus, M. Frulli notes, "state practice consistently shows that the rules on personal immunities cannot be derogated from at the national level".[112] There is, however, also a view according to which there have to be exceptions to the rule on immunity *ratione*

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[108] *Arrest Warrant*, Judgment, paras. 51, 54, 56, 58; Djibouti v. France, Judgment, paras. 170, 174.

[109] *Gaddafi*, Bulletin des Arrêts de la Cour de Cassation 2001, p. 218; *Ariel Sharon*, Belgian Supreme Court, Judgment of 12.02.2003 (see at http://www.indictsharon.net); *Wei Ye* v. *Jiang Zemin*, 383 F.3d 620, 2004 U.S. App. LEXIS 18944 (7th Cir. Sept. 8, 2004); *Tachiona* v. *United States* (Magabe case), 386 F.3d 205, 2004 U.S. App. LEXIS 20879 (2d Cir. Oct. 6, 2004), *W.v Johannes (Hans) Adam*, *Furst von Liechtenstein*, Supreme Court of Austria, Judgment of 14.02.2001; *Jones* v. *the Ministry of the Interior Al-Mamlaka Al-Arabia as Saudiya* (The Kingdom of Saudi Arabia), United Kingdom Court of Appeal Judgment 28.10.2004, EWCA Civ 1394; *Jones* v. *the Ministry of the Interior Al-Mamlaka Al-Arabia as Saudiya* (The Kingdom of Saudi Arabia), House of Lords Judgment 14.06.2006, [2006] UKHL 26; *Tatchell* v. *Mugabe*, United Kingdom District Court Judgment of 14.01.2004, *Application for Arrest Warrant against general Shaul Mofaz*, United Kingdom District Court Judgment of 12.02.2004 both sited in Current developments, ICLQ, vol. 53, p. 769-774. Procedures for calling Fidel Castro to account for crimes in Spain and Belgium were also discontinued in connection with the affirmation of his immunity (see http://www.trial-ch.org/en/trial-watch/profile/db/legal-procedures/fidel_castro_425.html).

[110] "In criminal matters, the Head of State shall enjoy immunity from jurisdiction before the courts of a foreign State for any crime he or she may have committed, regardless of its gravity" (this case concerns a serving Head of State — R.K.). Resolution of the Institute — 2001, note 40 above, article 2. "No immunity from jurisdiction other than personal immunity in accordance with international law applies with regard to international crimes" (this case concerns the immunity of persons acting on behalf of the State — R.K.). Resolution of the Institute — 2009, note 22 above, article III, para. 1.

[111] See memorandum by the Secretariat, para. 137, note 375. Hamida A. G. ("...even when in the case of a State official perpetrating an international crime while in office, he can still enjoy immunity *ratione personae* (personal or status immunity) ... and is inviolable and immune from prosecution so long as he is in office"). A. G. Hamida, K. M. Sein and H. A. Kadouf, "Immunity Versus International Crimes: the Impact of Pinochet and *Arrest Warrant* Cases", Indian Journ. of Int'l Law, 2006, vol. 46, No. 4, p. 511. K. Parlett: "It is not disputed that immunity applies for torture in proceedings against persons accorded immunity *ratione personae*" ("Immunity in Civil Proceedings for Torture: The Emerging Exception", European Human Rights Review, 2006, No. 1, p. 60).

[112] M. Frulli, Immunities of persons from jurisdiction. In: The Oxford companion to international criminal justice, Editor-in-chief A. Cassese, 2009, p. 369.

personae.[113] This view is held by a number of authors.[114] It is from such a position, for example, that Belgium came to the International Court of Justice in the *Arrest Warrant* case.[115] This position received support in the opinions of the judges who did not agree with the decision of the Court adopted by a significant majority of the judges[116] and was reflected to a certain extent in the joint separate opinion of three judges in this case.[117]

2. Rationales for exceptions

56. The need for the existence of exceptions to immunity is explained, above all, by the requirements of protecting human rights from their most flagrant and large-scale violations and of combating impunity. The debate here is about the need to protect the interests of the international community as a whole and, correspondingly, the fact that these interests, as well as the need to combat grave international crimes, most often perpetrated by State officials, dictate the need to call them to account for their crimes in any State which has jurisdiction.[118] This, in turn, requires that exceptions to the immunity of officials from foreign criminal jurisdiction exist.

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[113] See memorandum by the Secretariat, para. 151; Principle 5 of the Princeton Principles on Universal Jurisdiction ("… the official position of any accused person, whether as head of state or government or as a responsible government official, shall not relieve such person of criminal responsibility nor mitigate punishment") the developers comment thus: "A substantive immunity from prosecution would provide heads of state, diplomats, and other officials with exoneration from criminal responsibility for the commission of serious crimes under international law when See Commentary on the Princeton Principles, prepared by S.W. Becker, in Princeton Principles on Universal Jurisdiction, p. 48. (available at: http://lapa.princeton.edu/hosteddocs/unive_jur.pdf). However, it is further noted that this principle does not affect "procedural" immunity, which remains in effect during a Head of State's or other official's tenure in office: "Under international law as it exists, sitting heads of state, accredited diplomats, and other officials cannot be prosecuted while in office for acts committed in their official capacities", ibid., p. 49.

[114] See memorandum by the Secretariat, para. 151.

[115] In its Counter-Memorial, Belgium pointed out, in particular, that: "… international sources are not lacking to show that the head of State or a member of his government does not benefit from immunity when accused of having committed crimes under international humanitarian law", Arrest Warrant, Counter-Memorial of the Kingdom of Belgium, 28 September 2001, para. 3.5.13. See also *Arrest Warrant*, Judgment, para. 56.

[116] See memorandum by the Secretariat, para. 149. In his separate opinion in the *Arrest Warrant* case, Judge Al-Khasawneh notes that: "[t]he effective combating of grave crimes has arguably assumed a *jus cogens* character reflecting recognition by the international community of the vital community interests and values it seeks to protect and enhance. Therefore, when this hierarchically higher norm comes into conflict with the rules on immunity, it should prevail". *Arrest Warrant*, Judgment, Dissenting opinion of Judge Al-Khasawneh, para. 7, at p. 98. A tough stance was also taken by Judge Van den Wyngaert, in whose opinion "[i]mmunity should never apply to crimes under international law, neither before international courts nor national courts", *Arrest Warrant*, Judgment, Dissenting opinion of Judge Van den Wyngaert, para. 36, at p. 161.

[117] Ibid., Joint separate opinion of Judges Higgins, Kooijmans and Buergenthal. In the joint separate opinion of three judges, doubts are expressed regarding the cases where immunity is absent, listed in para. 61 of the Judgment of the Court. In particular, the authors of the opinion note with regret that: "The only credible alternative ... seems to be the possibility of starting proceedings in a foreign court after the suspected person ceases to hold the office of Foreign Minister", para. 78.

[118] See, for example, K. O'Donnell: "Upon leaving office ... a state should be able to hold a head of state accountable for international crimes. Victims of human rights violations should not be left without a remedy. Ideally, the knowledge that the cloak of immunity will be unveiled upon completion of office will serve as a sufficient deterrence for sitting heads of state so as to prevent the commission of international crimes". Op. cit., p. 416.

Exceptions to the immunity of serving and former officials enjoying immunity *ratione materiae* are reasoned in various ways. The principal rationales boil down to the following. Firstly, as already noted, the view exists that grave criminal acts committed by an official cannot under international law be considered as acts performed in an official capacity.[119] Secondly, it is considered that since an international crime committed by an official in an official capacity is attributed not only to the State but also to the official, then he is not protected by immunity *ratione materiae* in criminal proceedings.[120] Thirdly, it is pointed out that peremptory norms of international law which prohibit and criminalize certain acts prevail over the norm concerning immunity and render immunity invalid when applied to crimes of this kind.[121] Fourthly, it is stated that in international law a norm of customary international law has emerged, providing for an exception to immunity *ratione materiae* in a case where an official has committed grave crimes under international law.[122] Fifthly, a link is being drawn between the existence of universal jurisdiction in respect of the gravest crimes and the invalidity of immunity as it applies to such crimes.[123] Sixthly, an analogous link is seen between the obligation *aut dedere aut judicare* and the invalidity of immunity as it applies to crimes in respect of which such an obligation exists.[124] In one way or another, all these rationales for exceptions are fairly close to one another.

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[119] See memorandum by the Secretariat, paras. 191 and 192. Also, note 74 above.

[120] For example, three non-governmental organizations — Redress fund, Amnesty International and Justice — adopt a similar position in their submission to the European Court of Human Rights in the *Jones* v. *United Kingdom* and *Mitchell and Others* v. *United Kingdom* cases made in 2010. (Available at: http://www.interights.org/jones, paras. 10-17).

[121] This approach is constructed on the basis of the "normative hierarchy" theory and relies on the proposition that norms prohibiting torture and certain other acts are *jus cogens* norms, while immunity of the State and its officials is not of a peremptory nature. See, for example, Bassiouni Ch. "Searching for Peace and Achieving Justice: The Need for Accountability" in Reining in Impunity for International Crimes and Serious Violations of Fundamental Human Rights: Proceedings of the Siracusa Conference 17-21 September 1998, sp.ed.Ch.J.Joyner, Association International de droit penal, 1998 ("Crimes against humanity, genocide and war crimes … and torture are international crimes which have risen to the level of *jus cogens*. As a consequence, the following duties arise: the obligation to extradite or prosecute, … to eliminate immunities of superiors up to and including heads of states". p. 56).

[122] See memorandum by the Secretariat, paras. 197-204.

[123] See Principle 5 of the Princeton Principles on Universal Jurisdiction (available at: http://lapa.princeton.edu/hosteddocs/unive_jur.pdf). «In fact, it would appear that the notion of immunity from criminal liability for crimes under international law perpetrated in an official capacity, whether by existing or former office holders, is fundamentally incompatible with the proposition that gross human rights offences are subject to universal jurisdiction», International Law Association, Committee on International Human Rights Law and Practice, Final Report on the Exercise of Universal Jurisdiction in Respect of Gross Human Rights Offence, London Session (2000), p. 14 (available at: http://www.ila-hq.org).

[124] See memorandum by the Secretariat, note 26 and para. 205.

57. The viewpoint, whereby grave crimes under international law[125] cannot be considered as acts performed in an official capacity, and immunity *ratione materiae* does not therefore protect from foreign criminal jurisdiction exercised in connection with such crimes, has become fairly widespread.[126] Therefore, if this viewpoint is followed, immunity protects from foreign criminal jurisdiction only persons who enjoy immunity *ratione personae*, i.e. the "threesome" and, possibly, certain other high-ranking officials during their tenure of office. Other serving officials and all former officials, including the "threesome", are, according to this view, subject to foreign criminal jurisdiction in a case where they have committed such a crime. In principle, the International Court of Justice has left its judgment in the *Arrest Warrant* case open to similar interpretation. Listing the circumstances in which immunity does not prevent the exercise of foreign criminal jurisdiction, the Court indicated, inter alia: "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*."[127] This gave three judges, who on the whole agreed with the judgment of the Court, grounds for stressing in their Joint Separate Opinion that immunity protects a minister for foreign affairs after he has left office only in connection with "official" acts, and to state further: "It is now increasingly claimed in the literature … that serious international crimes cannot be regarded as official acts because they are neither normal State functions nor functions that a State alone (in contrast to an individual) can perform…. This view is underscored by the increasing realization that State-related motives are not the proper test for determining what constitutes public State acts. The same view is gradually also finding expression in State practice, is evidenced in judicial decisions and opinions."[128]

58. Prior to the judgment in the *Arrest Warrant* case, this point of view was formulated by Lord Steyn and Lord Nicholls in the *Pinochet I* case and by Lord

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[125] It is difficult to speak of a list of crimes generally recognized by proponents of this position as being among those crimes which cannot be considered as official acts. They usually talk of those crimes which fall under the jurisdiction of the International Criminal Court — genocide, crimes against humanity, war crimes and aggression. As J. Verhoeven noted in his Final Report (Rapport définitif) on the issue of immunities of the Thirteenth Commission of the Institute, "[l]a difficulté reste de s'entendre sur les crimes qui autorisent une dérogation à l'immunité. La Commission a préféré demeurer sur ce point relativement vague. Ces crimes sont certainement ceux qui sont visés par le Statut de la Cour pénale internationale (agression, crime de guerre, génocide, crime contre l'humanité)". Institut de droit international, Annuaire, vol. 69, 2000-2001, Session de Vancouver, 2001, pp. 594-595. "[l]a Commission n'a pas souhaité reprendre à son compte une définition de ces crimes de manière à laisser la porte ouverte à des évolutions qui permettraient de considérer comme des crimes graves de droit international des infractions qui ne rentrent pas à l'heure actuelle dans la compétence des tribunaux pénaux internationaux ou de la Cour pénale internationale." Ibid., p. 615.

[126] See above, note 119.

[127] *Arrest Warrant*, Judgment, para. 61. Emphasis added.

[128] Ibid., Joint separate opinion of Judges Higgins, Kooijmans and Buergenthal, para. 85. The judges refer to the article by Andrea Bianchi, "Denying State Immunity to Violators of Human Rights", 46 Austrian Journ. of Publ. and Int'l Law (1994), pp. 227-228, and also to the judgment of the Supreme Court of Israel in the *Eichmann* case, Supreme Court Judgment, 29 May 1962, 36 I.L.R., p. 312 and to the judgment of the Amsterdam Court of Appeal in the *Bouterse* case (Gerechtshof Amsterdam, 20 November 2000, para. 4.2). In addition, reference is made to the opinions of the judges of national courts who spoke in the *Pinochet I* and *Pinochet III* cases (Lords Steyn and Nicholls, Lords Hutton and Phillips of Worth Matravers, respectively).

Hatton and Lord Phillips in the *Pinochet III* case.[129] In the judgment of the Amsterdam Court of Appeal in the *Bouterse* case in 2000, it was noted, in particular, that "the commission of very grave criminal offences of this kind cannot be regarded as part of the official duties of a Head of State".[130]

59. At the same time, this point of view has, as the memorandum by the Secretariat confirms, been subject to criticism both in national courts and in the doctrine.[131] In particular, Lord Goff said in the *Pinochet III* case that an act performed by a Head of State, provided it is performed not in a private capacity, is

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[129] Lord Steyn: "It is therefore plain that statutory immunity in favour of a former Head of State is not absolute. It requires the coincidence of two requirements: (1) that the defendant is a former Head of State (*ratione personae* in the vocabulary of international law) and (2) that he is charged with official acts performed in the exercise of his functions as a Head of State (*ratione materiae*). In regard to the second requirement it is not sufficient that official acts are involved: the acts must also have been performed by the defendant in the exercise of his functions as Head of State". "...the development of international law since the Second World War justifies the conclusion that by the time of the 1973 coup d'etat, and certainly ever since, international law condemned genocide, torture, hostage taking and crimes against humanity (during an armed conflict or in peace time) as international crimes deserving of punishment. Given this state of international law, it seems to me difficult to maintain that the commission of such high crimes may amount to acts performed in the exercise of the functions of a Head of State." *Regina* v. *Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte* (No.1) (Hereinafter "*Pinochet I*") (available at: http://www.publications.parliament.uk/pa/ld199899/ldjudgmt/jd981125/pino09.htm).

Lord Nicholls of Birkenhead: "In my view, article 39.2 of the Vienna Convention, as modified and applied to former heads of state by section 20 of the 1978 Act, is apt to confer immunity in respect of acts performed in the exercise of functions which international law recognises as functions of a head of state, irrespective of the terms of his domestic constitution.… International law does not require the grant of any wider immunity. And it hardly needs saying that torture of his own subjects, or of aliens, would not be regarded by international law as a function of a head of state.... [I]nternational law has made plain that certain types of conduct, including torture and hostage-taking, are not acceptable conduct on the part of anyone. This applies as much to heads of state, or even more so, as it does to everyone else; the contrary conclusion would make a mockery of international law." Ibid.

Lord Hutton: "Therefore having regard to the provisions of the Torture Convention, I do not consider that Senator Pinochet or Chile can claim that the commission of acts of torture after 29 September 1988 were functions of the head of state. The alleged acts of torture by Senator Pinochet were carried out under colour of his position as head of state, but they cannot be regarded as functions of a head of state under international law when international law expressly prohibits torture as a measure which a state can employ in any circumstances whatsoever and has made it an international crime". "My conclusion that Senator Pinochet is not entitled to immunity is based on the view that the commission of acts of torture is not a function of a head of state, and therefore in this case the immunity to which Senator Pinochet is entitled as a former head of state does not arise in relation to, and does not attach to, acts of torture." (*Pinochet III*) (available at: http://www.parliament.the-stationery-office.co.uk/pa/ld199899/ldjudgmt/jd990324/ pino6.htm).

Lord Phillips of Worth Matravers: "Insofar as Part III of the Act of 1978 entitles a former head of state to immunity in respect of the performance of his official functions I do not believe that those functions can, as a matter of statutory interpretation, extend to actions that are prohibited as criminal under international law." (*Pinochet III*), ibid.

[130] See note 539 and para. 191 in the memorandum by the Secretariat. The former leader of Suriname has been accused of the torture and murder of 15 people in December 1982. Commentary on this case: L. Zegfeld. The Bouterse case. Netherlands Yearbook of International Law, 2001, pp. 97-120.

[131] See list of judgments of national courts: Memorandum by the Secretariat, para. 192, notes 540-545. See also R. van Alebeek, note 51 above, p. 286 ff.

not deprived of its character as a "State" act by its illegality, and stressed that this was true of crimes of any nature.[132] The judgment referred to in the *Bouterse* case has been interpreted sceptically by some experts.[133] In her dissenting opinion in the *Arrest Warrant* case, Judge ad hoc Van den Wyngaert, criticizing the International Court of Justice for pointing in its list of restrictions on immunity to its absence for a former Minister for Foreign Affairs in respect of acts performed during his tenure of office in a private capacity, noted that in its judgment the Court "could and indeed should have added that war crimes and crimes against humanity can never fall into this category."[134] And stressed further that: "Some crimes under international law (e.g. certain acts of genocide and of aggression) can, for practical purposes, only be committed with the means and mechanisms of a State and as part of State policy. They cannot, from that perspective, be anything other than 'official' acts."[135] The fact that the idea that the functional immunity of foreign officials protects the acts of the States they serve, "is increasingly echoed in judicial and academic thinking", is recognized even by authors who are critically disposed towards it.[136]

60. It is also said in this regard that if crimes under international law committed by an official are not considered as acts which can be attributed to the State which this person serves or, in the case of a former official, served, then it will not be possible to speak of the responsibility of this State under international law for this crime.[137] This argument is logical and, possibly, appropriate, however it is founded on considerations of expediency rather than on a basis of law.

61. If the situation is looked at from an exclusively legal point of view, then the following considerations emerge. It is not fully clear why the gravity of a criminal act may lead to a change in its attribution both for accountability purposes and for

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[132] Lord Goff of Chieveley: "The functions of, for example, a head of state are governmental functions, as opposed to private acts; and the fact that the head of state performs an act, other that a private act, which is criminal does not deprive it of its governmental character. This is true of a serious crime, such as murder or torture, as it is of a lesser crime". (*Pinochet III*, available at: http://www.publications.parliament.uk/pa/ld199899/ldjudgmt/jd990324/pino3.htm). Lord Slynn in the *Pinochet I* case also noted that: "clearly international law does not recognise that it is one of the specific functions of a Head of State to commit torture or genocide. But the fact that in carrying out other functions, a Head of State commits an illegal act does not mean that he is no longer to be regarded as carrying out one of his functions. If it did, the immunity in respect of criminal acts would be deprived of much of its content. I do not think it right to draw a distinction for this purpose between acts whose criminality and moral obliquity is more or less great." (Lord Slynn of Hadley in *Pinochet I*, available at: http://www.publications.parliament.uk/pa/ld199899/ldjudgmt/jd981125/pino02.htm).

[133] "In my view, no order from a head of state in his capacity of the commander of the military to its subordinates could be qualified as 'non-official'. The decision of Amsterdam Court of Appeal, that the December killings are 'non-official' acts and as consequence fall outside the immunity claim, should therefore be rejected.", L. Zegfeld. op. cit., p. 115.

[134] *Arrest Warrant*, Judgment, Dissenting opinion of Judge Van den Wyngaert, para. 36, at p. 161.

[135] Ibid.

[136] See, for example, R. van Alebeek, note 51 above, pp. 303-304. Although this author holds just the other point of view.

[137] See, for example, D. S. Koller: "First, such acts quite often are official acts in the sense that state actors carry them out in the name of the state. … Second, this legal fiction would effectively eliminate state responsibility, as acts done in one's own capacity are no longer attributable to the state.", op. cit., p. 29. See also S. Wirth, "Immunity for Core Crimes? The ICJ's Judgment in *Congo* v. *Belgium* Case", EJIL 13 (2002) 877, p. 891.

immunity purposes. If the illegal official acts of an official are as a general rule attributed to the State and continue to be considered as its, i.e. official, acts, then why do the most grave of these cease to be attributed to the State and lose their official character? And, correspondingly, why does the gravity of an act allegedly committed by a foreign official suspend operation of the principle of the sovereign equality of States, from which the foreign State derives the immunity *ratione materiae* of its official? Of course, in a number of cases, grave international crimes are also committed by persons who are not State officials (for example, representatives of a non-governmental party during an armed conflict of a non-international nature). But in these situations the question of immunity does not even arise. It arises only with regard to State officials. Meanwhile, as a rule, the very possibility of performing illegal acts on a large scale arises for State officials only by virtue of the fact that they are backed by the State, are acting on its behalf, using the relevant apparatus of enforcement, issuing orders, etc. In this situation, the assertion that acts of this kind are of a private, not an official, nature, looks, perhaps, like an artificial and not entirely legal attempt to overcome the barrier of an official's immunity *ratione materiae* from foreign criminal jurisdiction.

62. Another rationale is that immunity *ratione materiae* is inapplicable since a criminal act is attributed not only to the State but also to the official who performed it.[138] It may be noted in this regard that the preliminary report also stated that the attribution to the State of an illegal act performed by an official acting as such does not preclude the attribution of this same act to the official.[139] However, the official character of these acts is not altered by this. It is not fully clear in this context why this precludes the protection of an official by immunity *ratione materiae*, in essence State immunity, when a case concerns not merely an illegal act but a crime under international law.[140]

63. A further rationale for the absence of immunity *ratione materiae* for serving and former officials in the event of their committing grave crimes under international law consists is the proposition that these very grave human rights violations are criminalized and prohibited by the peremptory norms of general international law. Therefore, in the opinion of the proponents of this point of view, these *jus cogens* norms prevail over the customary dispositive norm of immunity *ratione materiae*.[141] Such a position was held, in particular, by a minority of the judges in the *Al-Adsani* case in the European Court of Human Rights.[142] The dissenting opinion of Judges Rosakis, Caflish, Costa, Wildhaber, Cabral Barreto and Vajic stated, in particular: "Due to the interplay of the *jus cogens* rule on prohibition of torture and the rules on State immunity, the procedural bar of State immunity is

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[138] See note 120 above.

[139] See para. 89 of the preliminary report.

[140] In principle, if the logic of the proponents of the point of view under consideration is followed, then the immunity of officials *ratione materiae* from foreign criminal jurisdiction does not necessarily exist at all, and not only in respect of international crimes, since any (and not only a grave) illegal act of an official in an official capacity may be attributed not only to the State but also to the official himself.

[141] Despite the fact that immunity derives from the principle of the sovereign equality of States, one of the fundamental principles of international law, it is evidently correct to consider the norm of immunity as a dispositive norm from which States may, by agreement between themselves, deviate.

[142] European Court of Human Rights Judgment of 21 November 2001, *Case of Al-Adsani* v. *The United Kingdom* (App No. 35763/97), http://hudoc.echr.coe.int.

automatically lifted, because those rules, as they conflict with a hierarchically higher rule, do not produce any legal effect. In the same vein, national law which is designed to give domestic effect to the international rules on State immunity cannot be invoked as creating a jurisdictional bar, but must be interpreted in accordance with and in the light of the imperative precepts of *jus cogens*."[143] Lord Millett spoke of approximately the same thing in the *Pinochet III* case.[144] In the *Ferrini* case, the Italian Court of Cassation stated that the commission of international crimes is a grave violation of fundamental human rights and of the universal values of the global community and that these values are protected by the peremptory norms of international law, which entails that national courts have universal criminal and civil jurisdiction with respect to them, and they prevail over the principle of immunity.[145] In the *Lozano* case, which centred on the issue of the immunity from Italian criminal jurisdiction of an American serviceman in connection with a crime allegedly committed in Iraq, the Court of Cassation stated that "a customary rule was emerging to the effect that the immunity of a state did not cover acts which qualified as crimes under international law. The rationale behind this exception to immunity lay in the fact that, in case of conflict between the rules on immunity and those establishing international crimes, the latter, being rules of *jus cogens*, had to

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[143] *Al-Adsani* v. *United Kingdom*, op. cit. Joint dissenting opinion of Judges Rozakis and Caflisch joined by Judges Wildhaber, Costa, Cabral Barreto and Vajić, para. 3 (available at: http://hudoc.echr.coe.int).

[144] Lord Millett: "The international community had created an offence for which immunity *ratione materiae* could not possibly be available. International law cannot be supposed to have established a crime having the character of a *jus cogens* and at the same time to have provided an immunity which is co-extensive with the obligation it seeks to impose" (*Pinochet III*).

[145] *Ferrini* v. *Republica Federale di Germania*, Corte di Cassazione, Joint Sections, Judgment 6 November 2003-11 March 2004, n.5044, paras. 9, 9.1. This case, like the *Al-Adsani* case in the European Court of Human Rights, concerned the immunity of a State and not that of its officials. At the same time, the Court also considered the judgments of certain other domestic courts in criminal cases against foreign officials and held that it shows that the functional immunity of such persons is invalid in cases where they are charged with international crimes. This position of the Italian Supreme Court was developed in the judgment in the *Milde* civil case (Corte di Cassazione — First Section Judgment 21 October 2008-13 January 2009, n. 1072). (See F. Moneta, State immunity for international crimes: The case of Germany versus Italy before the ICJ, available at: www.haguejusportal.net. See also the *Prefecture of Voiotia* v. *Germany* case in the Supreme Court of Greece, no 11/2000 of 4 May 2000, http://www.haguejusticeportal.net/Docs/NLP/Greece/Voiotia_SupremeCourt_4-5-2000.pdf; AJIL, v. 85, p. 198.)

In the opinion of Lord Bingham of Cornhill, "[t]he Ferrini decision cannot ... be treated as an accurate statement of international law as generally understood" (*Jones* v. *Ministry of Interior Al-Mamlaka Al-Arabiya AS Saudiya* (the Kingdom of Saudi Arabia), Opinions of the Lords of Appeal, 14 June 2006, para. 22, available at: http://www.publications.parliament.uk/pa/ld200506/ldjudgmt/jd060614/jones.pdf).

prevail". [146] This view is advanced in the doctrine, [147] and was that held by Judge Al-Kasawneh in his dissenting opinion in the *Arrest Warrant* case. [148]

64. However, the majority of the judges in the *Al-Adsani* and *Kalogeropoulou et al.* v. *Greece and Germany* cases in the European Court of Human Rights did not agree with such a position. The judgment in the *Al-Adsani* case stated in this regard: "Notwithstanding the special character of the prohibition of torture in international law, the Court is unable to discern in the international instruments, judicial authorities or other materials before it any firm basis for concluding that, as a matter of international law, a State no longer enjoys immunity from civil suit in the courts of another State where acts of torture are alleged." [149] The position of the European

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[146] *Lozano* v. *Italy*, Appeal Judgment, Case No. 31171/2008. Here, the English wording of the Judgment cited in Oxford Reports on International Law, ILDC 1085 (IT 2008) is used, available at http://ildc.oxfordlawreports.com. In this Judgment, the Court recognized, despite the quoted wording, that the Italian courts are unable to exercise jurisdiction in respect of the crime alleged to have been committed by Lozano because it is not a war crime, and therefore the exception referred to does not extend to it and a foreign serviceman enjoys the immunity *ratione materiae* which State organs enjoys under customary international law. With regard to immunity *ratione materiae*, the Judgment stated the following (to judge from the account used): "Under a well-established rule of customary international law, which was universally accepted both in the prevailing legal literature and in domestic and international judicial decisions … *acta iure imperii* performed by organs of a state in the discharge of their functions were covered by immunity and therefore could not be subjected to the civil or criminal jurisdiction of a foreign state. The rule of immunity *ratione materiae*, which had to be distinguished from that concerning immunity *ratione personae* enjoyed by certain state officials, was simply a corollary to the customary international rule establishing the immunity of a state from the jurisdiction of a foreign state in relation to acta iure imperii of its organs. Since each sovereign state was free to determine its internal structure and to designate the individuals acting as state organs, it followed that acts performed by state organs constituted the exercise of state functions and therefore were to be attributed to the state. Consequently, only the state could be held responsible for such acts." Ibid.

[147] See, for example, R. Taylor: "Because torture violates *jus cogens* norms, it may be an implied waiver of immunity. Jus cogens norms are internationally accepted rules of conduct for sovereign states. They have the highest status in international law. Sovereign immunity, on the other hand, stems from customary international law and is not a *jus cogens* norm. Sovereign immunity may therefore be unavailable for violators of *jus cogens* — in effect, the violations may be implied waivers of immunity". Taylor R.H. "Pinochet, Confusion, and Justice: the Denial of Immunity in U.S. Courts to Alleged Torturers Who Are Former Heads of State", Thomas Jefferson Law Review 24 (Fall 2001), p. 114. K. Parlett explains the basis of this approach thus: "Although the trumping argument has not been generally accepted, the reasoning behind it has some validity. First, the effects of a *jus cogens* norm are not limited to treaties, but extend to customary international law and to domestic law and practice. Secondly, to give proper effect to a *jus cogens* norm, it must override not only contrary rules of substance, but rules which prevent its enforcement. In the context of torture, this would mean the *jus cogens* prohibition overrides not only domestic law permitting the practice of torture, but also the operation of immunity to prevent enforcement of rights related to the norm itself. As the rules of immunity are not *jus cogens*, they must yield to the effect of the hierarchically superior norm". in "Immunity in Civil Proceedings for Torture: the Emerging Exception", European Human Rights Review, 2006, No. 1, p. 51.

[148] *Arrest Warrant*, Judgment, Dissenting opinion of Judge Al-Khasawneh, para. 7, at p. 98. ("The effective combating of grave crimes has arguably assumed a *jus cogens* character reflecting recognition by the international community of the vital community interests and values it seeks to protect and enhance. Therefore when this hierarchically higher norm comes into conflict with the rules on immunity, it should prevail.")

[149] *Al-Adsani* v. *The United Kingdom*, European Court of Human Rights Judgment, 21 November

Court of Human Rights in these cases has been supported in the doctrine.[150] At the same time, it must be borne in mind that in the cases mentioned the European Court was dealing with the immunity of the State from civil jurisdiction and not with the immunity of State officials from foreign criminal jurisdiction.[151] The memorandum by the Secretariat notes that "it may not seem to be self-evident that a substantive rule of international law criminalizing certain conduct is incompatible with a rule preventing under certain circumstances, prosecution for that conduct in a foreign criminal jurisdiction". It does, however, appear that the situation is more definite. Peremptory norms criminalizing international crimes lie within the sphere of substantive law. The norm concerning immunity is, as noted above, procedural in character, does not affect criminalization of the acts under discussion, does not abrogate liability for them and does not even fully exclude criminal jurisdiction in respect of these acts, where they were committed by a foreign official (immunity provides protection only from certain acts). Since the norm concerning immunity on the one hand and the norms criminalizing certain conduct or establishing liability for it on the other regulate different matters and lie in different areas of law (procedural and substantive respectively), they can scarcely conflict with one another, even in spite of the fact that one of them is peremptory and the other dispositive.[152]

2001, para. 61. This position was also reflected in the judgment in the *Karogelopoulou* case: "The Court does not find it established, however, that there is yet acceptance in international law of the proposition that States are not entitled to immunity in respect of civil claims for damages brought against them in another State for crimes against humanity".

[150] See, for example, L. M. Caplan, note 152 below; Markus Rau, After Pinochet: Sovereign Immunity in Respect of Serious Human Rights Violations — The Decision of the European Court of Human Rights in the Al-Adsani Case, 3 German Law Journal No. 6 (2002) (available at: http://www.germanlawjournal.com).

[151] See memorandum by the Secretariat, para. 195.

[152] A. Zimmermann, for example, noted in this regard that "it seems to be more appropriate to consider both issues as involving two different sets of rules which do not interact with each other." A. Zimmermann, Sovereign immunity and violations of international *jus cogens* — some critical remarks, 16 Michigan journal of international law 433, 438 (1995). It may be appropriate here also to refer by analogy to the opinion of the International Court of Justice stated in its judgment in the *East Timor* case. In this case, Portugal had asserted *inter alia* that "[t]he rights which Australia allegedly breached were rights *erga omnes* and that accordingly Portugal could require it, individually, to respect them regardless of whether or not another State had conducted itself in a similarly unlawful manner." In response to this, the Court stated the following: "[T]he Court considers that the *erga omnes* character of a norm and the rule of consent to jurisdiction are two different things. Whatever the nature of the obligation invoked, the Court could not rule on the lawfulness of the conduct of a State when its judgment would imply an evaluation of the lawfulness of the conduct of another State which is not party to the case. Where this is so, the Court cannot act, even if the right in question is a right *erga omnes*." *East Timor* (*Portugal* v. *Australia*), Judgment, I.C.J. Reports 1995, para. 29. B. Stern refers to this opinion of the International Court of Justice in the same context. See B. Stern, note 70 above, pp. 546-547. Also critical of the "normative hierarchy" theory, albeit in a somewhat different key, L. M. Caplan writes: "Essentially, the norms of human rights and state immunity, while mutually reinforcing, govern distinct and exclusive aspects of the international legal order. On the one hand, human rights norms protect the individual's "inalienable and legally enforceable rights ... against state interference and the abuse of power by governments". On the other hand, state immunity norms enable state officials "to carry out their public functions effectively and … to secure the orderly conduct of international relations. To demonstrate a clash of international law norms, the normative hierarchy theory must prove the existence of a *jus cogens* norm that prohibits the granting of immunity for violations of human rights by foreign states. However, the normative hierarchy theory provides no evidence of such a peremptory norm". L. M. Caplan, State Immunity, Human Rights, and *Jus Cogens*:

65. The highest judicial instance of the United Kingdom of Great Britain and Northern Ireland did not agree in the *Jones* case in 2006 (this case concerned the immunity from foreign jurisdiction both of the State and of its official) that the peremptory norm prohibiting torture prevails over the norm relating to the immunity of a foreign State.[153] In this case, Lord Hoffmann noted, in particular: "The *jus cogens* is the prohibition on torture.… To produce a conflict with state immunity, it is ... necessary to show that the prohibition on torture has generated an ancillary procedural rule which, by way of exception to state immunity, entitles or perhaps requires states to assume civil jurisdiction over other states in cases in which torture is alleged. Such a rule may be desirable and, since international law changes, may have developed. But, contrary to the assertion of the minority in *Al-Adsani*, it is not entailed by the prohibition of torture."[154]

66. Germany considered the judgment directed against it in the *Ferrini* case, as well as several other Italian court decisions in this same vein, to be acts by Italy which violated its immunity and therefore conflicted with international law, and appealed to the International Court of Justice. In its application to the Court, Germany, states *inter alia*: "In the *Ferrini* case and in subsequent cases the Corte di Cassazione has openly acknowledged that it did not apply international law as currently in force, but that it wished to develop the law, basing itself on the rule 'in formation', a rule which does not exist as a norm of positive international law. Through its own formulations, it has thus admitted that by its restrictive interpretation of jurisdictional immunity, i.e. by expanding Italy's jurisdiction, it is violating the rights which Germany derives from the basic principle of sovereign equality."[155] The Ontario Superior Court of Justice in Canada indicated in its judgment in the *Bouzari* case in 2002 that "[a]n examination of the decisions of national courts and international tribunals, as well as state legislation with respect to sovereign immunity, indicates that there is no principle of customary international law which provides an exception from state immunity where an act of torture has been committed outside the forum, even for acts contrary to *jus cogens*. Indeed, the evidence of state practice, as reflected in these and other sources, leads to the conclusion that there is an ongoing rule of customary international law providing state immunity for acts of torture committed outside the forum state".[156] At the same time, in the *Ferrini* and *Bouzari* cases, the courts were exercising civil jurisdiction. In so doing, a distinction was drawn in the *Bouzari* case between situations involving immunity from foreign jurisdiction and concerning the crime of torture, depending on whether civil or criminal jurisdiction was being exercised. Having upheld State immunity in the first case, the Court of Appeal noted that an individual may be held criminally liable for torture committed abroad, without one

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a Critique of the Normative Hierarchy Theory", AJIL, vol. 97 (2003) 741, p. 772.

[153] *Jones* v. *the Ministry of the Interior Al-Mamlaka Al-Arabia as Saudiya* (The Kingdom of Saudi Arabia), House of Lords Judgment 14.06.2006, [2006] UKHL 26.

[154] Ibid, Lord Hoffman, paras. 44-45.

[155] *Case concerning jurisdictional immunities* (Federal Republic of Germany v. Italian Republic), Application of Federal Republic of Germany, 2008, para. 13, available at www.icj-cij.org.

[156] *Bouzari* v. *Iran* [2002] O.J.No. 1624, Ontario Superior Court of Justice, Judgment, para. 63 (available at www.haguejusticeportal.net). This judgment was upheld by the Court of Appeal of Ontario in 2004. Bouzari v. Iran [2004], Court of Appeal of Ontario, Judgment, para. 95 (available at: http://www.canlii.org). The subject matter of this case was a civil claim for compensation by Iran for damages caused as a result of torture committed in the territory of Iran against its citizen.

State being subjected to the jurisdiction of another.[157] The judgment provides certain grounds for presuming that it is possible to bring action against a foreign official for torture in Canada in connection with Canada's obligations under the 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, or, though highly hypothetically, in connection with the fact that torture could not be considered as a function of the State, but in any case not in connection with the existence of a customary peremptory norm of international law prevailing over a dispositive norm with regard to immunity.[158] The question arises as to whether it can in principle be said that the consequences for immunity of prohibiting grave international crimes by *jus cogens* norms may be different depending on what kind of jurisdiction is being exercised — civil or criminal. Neither practice nor logic appear to show that such consequences would differ.[159]

67. There is one further question arising in connection with the rationale for exception to immunity which is under consideration. If norms criminalizing and prohibiting certain acts, being *jus cogens* norms, prevail over the immunity of the State and/or an official, then why only over immunity *ratione materiae*? Immunity *ratione personae* is also dispositive.[160] It would be logical to assume that it, too, would be invalidated by the effect of the peremptory norm conflicting with it. However, even those advocating the view that immunity *ratione materiae* vanishes where grave international crimes are concerned do not generally want to go "that far" and do not contest the validity of the personal immunity of the highest-ranking serving officials.[161]

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[157] *Bouzari* v. *Iran* [2004], Court of Appeal of Ontario, Judgment, paras. 91, 93.

[158] See, in particular, paras. 69-81, 89-91 of the Court of Appeal Judgment, ibid.

[159] The nature of the two types of jurisdiction is the same — the exercise of the prerogatives of authority by the State. If a peremptory norm prevails over immunity, then immunity from which jurisdiction — civil or criminal — is of no account. And vice versa. All the more so since sometimes the two types of jurisdiction exercised are very close — for example, when a civil action is brought and is considered within the scope of a criminal case.

[160] One may also encounter the assertion that immunity of a serving Head of State, i.e. personal immunity, is peremptory in nature (see, for example, the opinion of Lord Hope, referred to in the reference below), but it is difficult to concur with this. It would appear that States are certainly able to conclude an international agreement in pursuance of which their serving Heads of State will not enjoy immunity from the criminal jurisdiction of any of the parties to this agreement. It seems there are no grounds for assuming that such an agreement will be invalid. See article 8 (I) of the resolution of the Institute — 2001, note 40 above: "States may, by agreement, derogate to the extent they see fit, from the inviolability, immunity from jurisdiction and immunity from measures of execution accorded to their own Heads of State."

[161] The following passage from an article by B. Stern is of interest in this regard: "Une autre interrogation concerne le statut du chef d'Etat en exercice, dont l'immunité absolue en matière pénale a été réaffirmée. Si la solution adoptée pour l'ancien chef d'Etat est fondée sur la nature de *jus cogens* de l'interdiction d'un crime qui prévaut sur toute règle accordant l'impunité pour un tel crime, il est difficile de comprendre pourquoi elle ne s'appliquerait pas également aux chefs d'Etat en exercice, à moins que leur immunité absolue soit également considérée comme une règle de *jus cogens*, ce qui est loin d'être évident. C'est pourtant la position adoptée par Lord Hope dans la deuxième décision [in the Pinochet case — R.K.], puisqu'il a invoqué 'the *jus cogens* character of the immunity enjoyed by serving heads of states' précisément pour dire qu'il n'est pas évident que l'immunité ayant cette place dans la hiérarchie des normes doive être facilement enlevée aux chefs d'Etats en fonction.

68. One further rationale for exception to immunity *ratione materiae* is the idea that a customary norm of international law has developed, under which such immunity does not operate where an official has committed a grave crime under international law.[162] The existence of such a norm is substantiated by references to the provisions of the constituent documents and judgments of international criminal tribunals, starting with those of Nuremberg and Tokyo,[163] and to international treaties criminalizing such acts, as, for example, genocide and apartheid. These arguments are set out in considerable detail in the memorandum by the Secretariat.[164] They were also cited by Belgium before the International Court of Justice in the *Arrest Warrant* case.[165] As is well known, the International Court of Justice, did not agree with these arguments either as applied to the immunity *ratione*

Mais le raisonnement inverse est aussi possible et déjà certains considèrent que puisque l'immunité a été levée pour certains actes commis par d'anciens chefs d'Etat, on ne voit pas pourquoi elle ne le serait pas également pour les chefs d'Etat en exercice. Bien sûr, le recul de l'impunité doit être encouragé, mais pas à n'importe quel prix. Personnellement, je pense que la prochaine étape, demandée par certaines ONG, autorisant la poursuite de chefs d'Etat en exercice devant n'importe quelle juridiction nationale exerçant une compétence universelle ne devrait pas être franchie. L'exemple d'une cour de Belgrade condamnant, le 21 septembre 2000, 14 leaders occidentaux parmi lesquels Bill Clinton, Tony Blair et Jacques Chirac, à 20 ans d'emprisonnement pour les actions de l'OTAN en Yougoslavie, montre certains des possibles effets contre productifs qu'il y aurait à ouvrir trop largement cette voie." B. Stern, note 70 above, pp. 525-526.

[162] See memorandum by the Secretariat, paras. 197-204. Itself, the Italian Court of Cassation also refers in the judgments mentioned earlier to a customary rule establishing exemption from immunity *ratione materiae*, but in a narrower sense — there the discussion is of the development, in the Court's view, of a customary rule of international law, according to which peremptory norms prohibiting international crimes prevail over immunity *ratione materiae*.

[163] Of the relatively recent judgments by international tribunals cited in this regard, the judgment of the ICTY in the *Blaskic* case, which states , in particular, that exceptions to the customary norm of international law on the functional immunity of State officials "arise from the norms of international criminal law prohibiting war crimes, crimes against humanity and genocide. Under these norms, those responsible for such crimes cannot invoke immunity from national or international jurisdiction even if they perpetrated such crimes while acting in their official capacity." *Prosecutor v. Blaskic*, case No.IT-95-14, Appeals Chamber Judgment on the Request of The Republic of Croatia for Review of the Decision of Trial Chamber of 18 July 1997 (Issuance of Subpoenae Duces Tecum), 29 October 1997, para. 41 (available at http://www.icty.org/case/blaskic/4). This decision does not state that a customary norm of international law has developed establishing exception to immunity *ratione materiae*, and no explanations at all are put forward as to why exceptions exist. If an attempt is made to suppose which rationale this opinion of the Tribunal most closely approximates, then it is perhaps the rationale considered above, according to which norms prohibiting crimes mentioned in the judgment are *jus cogens* in nature. It is otherwise difficult to see from this judgment why they prevail over immunity.

[164] See memorandum by the Secretariat, paras. 197-204.

[165] See *Arrest Warrant*, Counter-Memorial of Belgium, paras. 3.5.13 et seq. It is worth noting that in para. 3.5.84 of the Counter-Memorial, the Belgian party, responding to possible objections, in essence equates the consequences of applying the norm on exceptions demonstrated by it in respect of immunity *ratione materiae* and immunity *ratione personae*, adopting in this sense a radical position ("... other judges … in the Judgment of 24 March 1999 [in the *Pinochet III* case — R.K.], while considering that Pinochet did not benefit from immunity *ratione materiae*, nevertheless reserved the case of immunity *ratione personae*, that being the immunity of a Head of State in power. In Belgium, this reservation is not founded, given the international rules recalled above, on the exclusion of immunity for crimes of international humanitarian law, rules which make no distinction at all between immunity *ratione materiae* and immunity *ratione personae*.").

personae of an incumbent minister for foreign affairs (and other officials enjoying such immunity),[166] or as applied to the immunity *ratione materiae* of former officials, having acknowledged the existence of such immunity.[167] Nonetheless, the idea of the existence of the aforementioned customary norm continues to be put forward. Apart from those listed, one of the main arguments in its favour, is the reference to a whole range of national court judgments which, in the opinion of the proponents of this point of view, are evidence that immunity is not an obstacle to the exercise of criminal jurisdiction over foreign officials. As one of the most recent expressions of this position, we would cite the submissions to the European Court of Human Rights of three non-governmental organizations — Redress Trust, Amnesty International and the International Centre for the Legal Protection of Human Rights — in the *Jones* v. *United Kingdom* and *Mitchell and others* v. *United Kingdom* cases.[168] These submissions contain references to a number of national court judgments supporting the viewpoint stated. In particular, these concern the national criminal prosecution of foreign officials who committed crimes during the Second World War, the *Pinochet* case, and cases against foreign officials in France, Italy, the Netherlands, Spain, Sweden, Senegal and the United States of America.[169] In order to assess the extent to which these judgments may be considered as demonstrating the existence of the above-mentioned norm of customary international law, it is necessary to dwell in somewhat greater detail upon them, and also on the reaction of interested States which followed in the wake of certain of these judgments.

69. The "thousands of former Axis officials prosecuted for crimes committed during the Second World War", mentioned in the submissions,[170] were punished on the basis of the "Nuremberg law" (article 7 of the Charter of the Nuremberg Tribunal, stated, as is well known, that "the official position of defendants, whether as Heads of State or responsible officials in Government Departments, shall not be considered as freeing them from responsibility or mitigating punishment";[171] the Charter of the Tokyo Tribunal and Control Council Law No. 10 contained analogous provisions),[172] and of national law adopted in development thereof. Materials of which the Special Rapporteur is aware on criminal proceedings against officials who had perpetrated war crimes and crimes against humanity during the Second World War do not provide evidence that the States which these persons served asserted their immunity from foreign criminal jurisdiction as former officials.[173] This may

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[166] *Arrest Warrant*, Judgment, para. 58.

[167] Ibid., para. 61. The International Court of Justice was, of course, also aware of the ICTY judgment in the Blaskic case referred to above (see note 163).

[168] *Jones* v. *United Kingdom* (Application Number 34356/06), *Mitchell and Others* v. *United Kingdom* (Application Number 40528/06), Written comments by Redress, Amnesty International, Interights and Justice, submitted to the Court on 14 and 25 Jan. 2010, available at http://www.interights.org/jones, references 40 and 41).

[169] Ibid., paras. 18-21.

[170] Ibid., note 37.

[171] Charter of the International Military Tribunal, 8 August 1945 (available at: http://avalon.law.yale.edu/imt/imtconst.asp).

[172] Control Council Law No. 10, 20 December 1945 (available at: http://avalon.law.yale.edu/imt/imt10.asp). Charter of the International Military Tribunal for the Far East (available at: http://www.unifi.it/off_form/allegati/uploaded_files/2009/200011/B009965/Tokyo%20Statute.pdf).

[173] The issue of immunity was advanced as a defence in the *Eichmann* case. However, the immunity at issue here was not that of an official but that deriving from A. Eichmann's presence in Argentina as a fugitive in respect of acts which did not fall under a formal extradition act

be viewed as evidence of general agreement between the States exercising jurisdiction and the States which these persons served that in respect of the specified crimes committed by the officials of Axis countries immunity is inapplicable. However, this does not yet seem to confirm the existence of a general customary norm of international law regarding the absence of immunity from foreign criminal jurisdiction in respect of such crimes perpetrated by other officials after the Second World War:[174]

(a) In the case of *Ben Said* (a former Tunisian consular employee) in France in 2008, there is no evidence that his immunity *ratione materiae* (as police commissar, in which capacity he committed the alleged criminal act of torture) was considered. The judgment was reached *in absentia* and has not had any consequences in practice;[175]

(b) Cases in Italy in 2000-2001 against seven former Argentinian servicemen, including General G. Suarez, charged with the murders and kidnapping of Italian citizens, related to the "dirty war" period. Argentina did not request that Italy not exercise criminal jurisdiction over these persons by claiming immunity.[176] It is known that Argentina also plans to try servicemen involved in the "dirty war" under its jurisdiction, for which the relevant laws on amnesty have been revoked, but in the cases of these persons the question now is one of the prevailing jurisdiction, rather than of immunity;[177]

("immunity for a fugitive offender" taking into account the "specialty principle"). See http://www.nizkor.org/ftp.cgi/people/e/eichmann.adolf/transcripts/Judgment.

[174] R. van Alebeek writes: "The legislation enacted by some states after the Second World War was limited to crimes committed in that war and did not provide courts with a general competence to deal with crimes against international law committed abroad. Only in a handful cases did national courts actually exercise universal jurisdiction, and these trials — like the Israeli Eichmann case, the French *Barbie* case, the Canadian *Finta* case and the Australian *Polyukhovich* case — all concerned Nazi crimes." R. van Alebeek, note 51 above, p. 279.

[175] See Khaled Ben Said, at Trial Watch (http://www.trial-ch.org/en/trial-watch/profile/db/legal-procedures/khaled_ben-said_449.html).

[176] See "Disappeared, but not forgotten", Guardian.co.uk, 15 June 2006 (http://www.guardian.co.uk/world/2006/jun/15/worlddispatch.argentina).

[177] See, for example, "Argentina holds 'Dirty War' trial", BBC News, 21 June 2006 (http://news.bbc.co.uk/2/hi/americas/5099028.stm).

(c) The case of the former Head of Intelligence and former Deputy Minister for State Security of Afghanistan (case of the director of the military intelligence service KhAD-e-Nezami) in the Netherlands in 2008[178] did indeed touch upon the issue of immunity (the charge involved war crimes).[179] However, it must be borne in mind that the accused performed the acts during the course of military operations in Afghanistan in the 1980s, and the current Government of Afghanistan did not uphold their immunity;

(d) The *Scilingo* case in Spain (*Conviction of former Argentine naval officer Adolfo Scilingo*) has already been touched upon in this report.[180] It is possible here to talk of a waiver of immunity by Argentina.[181]

70. In respect of the arrest warrants referred to in this context in the submission of three non-governmental organizations to the European Court of Human Rights,[182] the following can be noted:

(a) The French and Spanish warrants in respect of a group of high-ranking Rwandan officials provoked protests from Rwanda and the African Union. In particular, a decision of the eleventh African Union summit declared that those developments violated the sovereignty and territorial inviolability of Rwanda and were an abuse of universal jurisdiction.[183] In November 2006, in connection with this incident, Rwanda broke off diplomatic relations with France, not restoring them

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[178] LJN: BG1476, Hoge Raad , 07/10063 (E), appeal ruling with translation into English — http://zoeken.rechtspraak.nl/resultpage.aspx?snelzoeken=true&searchtype=ljn&ljn=bg1476).

[179] The appeal of the defence stated, inter alia, that the court "failed to hold (*ex proprio motu*) that the prosecution … is inadmissible for want of jurisdiction as the defendant enjoyed immunity as a person in authority at that time in Afghanistan [para. 7.1]". The Supreme Court of the Netherlands stated in response to this: "The ground of appeal is unsuccessful if only in that the defendant is not entitled to immunity from jurisdiction as referred to above at 6.6 [in 6.6 it is said, inter alia: "Although article 8 of the Criminal Code [of the Netherlands] does indeed provide that the applicability of the Dutch provisions on jurisdiction is limited by the exceptions recognized in international law this does not amount […] to more than a statutory recognition of immunity from jurisdiction derived from international law."] either in his former capacity of Head of Afghanistan's state intelligence service or in his capacity of deputy minister of state security. [para. 7.2]" Ibid.

[180] See para. 16 above.

[181] "The Spanish courts have jurisdiction to try former Argentine Navy captain Adolfo Scilingo, on trial in Spain for genocide and torture, Argentina's Human Rights Secretary Eduardo Duhalde said in an interview with IPS", see Argentina Recognizes Spain's Jurisdiction to Try Rights Abuser, IPS Inter Press Service, 18 April 2005, (http://ipsnews.net).

[182] *Jones* v. *United Kingdom* (Application Number 34356/06), *Mitchell and Others* v. *United Kingdom* (Application Number 40528/06), Written comments by Redress, Amnesty International, Interights and Justice, submitted to the Court on 14 and 25 Jan. 2010, available at http://www.interights.org/jones, reference 41).

[183] "The political nature and abuse of the principle of universal jurisdiction by judges from some non-African States against African leaders, particularly Rwanda, is a clear violation of the sovereignty and territorial integrity of these States", Decision on the Report of the Commission on the Abuse of the Principle of Universal Jurisdiction Doc. Assembly/Au/14 (XI), para. 5(III) (Assembly/AU/ Dec.199(XI), available at: http://www.africa-union.org/root/au/Conferences/2008/june/summit/summit.htm#). It may be assumed that this situation became one of the reasons for discussions between the African and European Unions on universal jurisdiction. See also "African Presidents Condemn Western Indictments", Radio Nederland Wereldomroep 02.07.2008 (http://static.rnw.nl/migratie/www.rnw.nl/internationaljustice/specials/Universal/080702-rwanda-redirected).

until November 2009,[184] and threatened to bring court actions against French citizens in response.[185] In the meantime, these developments have led only to tension in relations between States,[186] which the parties are attempting to ease (the statements of the President of France, Sarkozy during an official visit to Rwanda in February 2010 are evidence of this).[187] The case in France against Rose Kabuye, the Rwandan President's Chief of Protocol, which was referred to in the non-governmental organizations' submission,[188] has been stopped;[189]

(b) The execution of arrest warrants issued in Spain for former officials of Argentina, Guatemala and other countries who have been charged with grave crimes under international law[190] has run up against the complex situation of conflicting jurisdictions and not against the issue of immunity;

(c) The Swedish arrest warrant relates to the Argentinian A. Astiz, a former Argentinian military intelligence captain, charged with crimes committed during the "Dirty War", who has been sentenced to life imprisonment in France.[191] Argentina has refused to extradite him either to France,[192] or to Sweden.[193] Argentina intends to try him independently, and the issue of immunity will not be considered in this case. As far as cases concerning crimes dating from the "Dirty War" period are concerned, it would appear on the whole that where attempts have been made to consider these in various States, the principle issue has been that of priority jurisdiction;[194]

(d) The *Alvarez* case (*Sosa* v. *Alvarez-Machain*), referred to in the non-governmental organizations' submissions, in the United States of America did not concern the immunity of foreign State officials, and in the *Hissein Habré* case in Senegal, as mentioned above (para. 16), immunity was waived.

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[184] See "On Visit to Rwanda, Sarkozy Admits 'Grave Errors' in 1994 Genocide", The New York Times, 25.02.2010 (http://www.nytimes.com/2010/02/26/world/europe/26france.html).

[185] "Rwandan president Kagame threatens French nationals with arrest", guardian.co.uk, 12.11.2008 (http://www.guardian.co.uk/world/2008/nov/12/rwanda-france).

[186] See http://www.nytimes.com/2010/02/26/world/europe/26france.html; http://hungryoftruth.blogspot.com/2009/10/smear-against-rwanda-unfounded-spanish.html, http://www.expatica.com/be/news/community_focus/Rwanda-and-Spain-discuss-genocide-warrants_57334.html.

[187] http://www.nytimes.com/2010/02/26/world/europe/26france.html.

[188] *Jones* v. *United Kingdom* (Application Number 34356/06), *Mitchell and Others* v. *United Kingdom* (Application Number 40528/06), Written comments by Redress, Amnesty International, Interights and Justice, submitted to the Court on 14 and 25 Jan. 2010, available at http://www.interights.org/jones, ref. 47).

[189] See note 19 above.

[190] "Spanish courts have issued Arrest Warrants for current and former officials from Argentina, Chile, Guatemala, Audiencia Nacional, Juzgado Central de Instruccion Uno, D. Previas 331/1999 (2008)", note 41.

[191] See Alfredo Astiz, Wikipedia (http://en.wikipedia.org/wiki/Alfredo_Astiz).

[192] See "Argentina rejects French Astiz bid", BBC News, 21.09.2003 (http://news.bbc.co.uk/2/hi/americas/3126260.stm).

[193] See "Astiz Freed: Extradition bid fails", MercoPress, 29.01.2002 (http://en.mercopress.com/2002/01/29/astiz-freed-extradition-bid-fails).

[194] A notable example is the case of Argentinian military officer Ricardo Cavallo (charged with genocide and terrorism), which has been examined in Spain. He was handed over to Argentina on 31 March 2008, see www.trial-ch.org/en/trial-watch/profile/db/legal-procedures/ricardo-miguel_cavallo_48.html.

71. The above-cited results of the analysis of a number of criminal cases to which the three non-governmental organizations refer in their submissions to the European Court of Human Rights are, of course, far from exhaustive. However, they do give grounds for substantial doubts as to whether these cases (and all the more so in conjunction with the rulings of national courts and law-enforcement agencies in which immunity has been upheld directly, and also the reactions of the States involved) confirm the existence of a norm of customary international law establishing exception to immunity *ratione materiae*. Rather, they are confirmation of attempts to exercise universal or extraterritorial national criminal jurisdiction with respect to certain crimes under international law and of the fact that these attempts are far from always being fruitful.

72. Nonetheless, the view is also advanced that the immunity *ratione materiae* of an official does not operate in those cases when the crime concerned is one in respect of which universal or simlar extraterritorial national criminal jurisdiction is exercised by a foreign State.[195] No generally recognized definition of universal jurisdiction exists. For the purposes of the present report it is not deemed necessary to examine and define what universal national criminal jurisdiction is and to determine whether it differs, and if so how, from extraterritorial national jurisdiction. It seems sufficient to proceed on the basis of one of the definitions available in the doctrine or in the documents of non-governmental organizations. For instance, in a 2005 resolution, the Institute gives the following definition: "Universal jurisdiction in criminal matters, as an additional ground of jurisdiction, means the competence of a State to prosecute alleged offenders and to punish them if convicted, irrespective of the place of commission of the crime and regardless of any link of active or passive nationality, or other grounds of jurisdiction recognized by international law."[196] The resolution notes that universal criminal jurisdiction is primarily based on customary international law and is exercised over international crimes defined in international law such as genocide, crimes against humanity, serious violations of international humanitarian law, unless agreement is reached otherwise.[197] Thus, the crimes concerned are the same as those for which other rationales of exceptions to immunity *ratione materiae* are cited.

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[195] See memorandum by the Secretariat, paras. 205-207.

[196] Institute of International Law, Krakow session, 2005, Seventeenth Commission, Universal criminal jurisdiction with regard to the crime of genocide, crimes against humanity and war crimes, resolution, para. 1, available from www.idi–iil.org. In 2009, African Union and European Union experts gave it the following definition: "Universal criminal jurisdiction is assertion by one state of its jurisdiction over crimes allegedly committed in the territory of another state by nationals of another state against nationals of another state where the crime alleged poses no direct threat to the vital interests of the state asserting jurisdiction. In other words, universal jurisdiction amounts to the claim by a state to prosecute crimes in circumstances where none of the traditional links of territoriality, nationality, passive personality or the protective principle exists at the time of the commission of the alleged offence." African Union-European Union expert report, note 14 above, para. 8.

[197] See 2005 Institute resolution, paras. 2 and 3 (a), note 196 above. The report by African and European Union experts which has been mentioned also discusses the extension of universal criminal jurisdiction to these same crimes and to piracy. African Union-European Union expert report, para. 9. As F. Jessberger notes, "the range of crimes that may be prosecuted under the universality principle may, at least theoretically, well extend beyond these core crimes under international law". F. Jessberger, Universal jurisdiction, in *The Oxford Companion to International Criminal Justice*, editor-in-chief A. Cassese, 2009, p. 556. Ibid., p. 558, see inexhaustive list of the literature on universal jurisdiction.

73. It is asserted, in particular, that universal or extraterritorial jurisdiction over the gravest international crimes and the immunity of officials from foreign criminal jurisdiction are incompatible. Lords Phillips, Brown-Wilkinson and Hope spoke about this in the *Pinochet III* case (the issue there was jurisdiction on the basis of the 1984 Torture Convention).[198] Such a viewpoint is encountered in the doctrine.[199] It is also reflected in the Final Report on the Exercise of Universal Jurisdiction in Respect of Gross Human Rights Offences, produced by the International Law Association in 2000. It noted, in particular that "it would appear that the notion of immunity from criminal liability for crimes under international law perpetrated in an official capacity, whether by existing or former office holders, is fundamentally incompatible with the proposition that gross human rights offences are subject to universal jurisdiction".[200] (We would point out in respect of the cited provision of the Association's report that the issue is not about immunity from criminal *liability* as there simply is none. Immunity, as previously noted, is merely a procedural obstacle to certain criminal-procedure measures.)

74. At first sight, the possibility of exercising universal jurisdiction in respect of grave international crimes is enshrined in the legislation of many States. At the same time, close consideration often reveals that this is not fully universal jurisdiction since, in order to exercise jurisdiction, a connection of some kind to the State exercising jurisdiction is required.[201] The adoption of such legislation is carried out, in particular, in order to implement the Statute of the International Criminal Court and/or in order to ensure application of the principle of complementarity. There are cases here, very few in number, it is true, where such legislation directly repudiates the immunity of foreign officials.[202] (The question arises as to what extent such

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198 See memorandum by the Secretariat, para. 205, note 590.

199 Ibid., note 593.

200 Final Report on the Exercise of Universal Jurisdiction in Respect of Gross Human Rights Offences, International Law Association, Committee on International Human Rights Law and Practice, London Session (2000), p. 14 (available at: http://www.ila-hq.org).

201 For example, concerning the legislation of the member states of the African Union and of the member states of the European Union providing for universal criminal jurisdiction and the limitations thereof, see African Union-European Union expert report, paras. 16-18 and 22-25. As K. Ambos notes, with reference to the study of the Max Planck Institute for Foreign and International Criminal Law (see Nationale Strafverfolgung Völkerrechtlicher Verbrechen (Albin Eser et al. Eds., 2003-2006), "extraterritorial jurisdiction on the basis of universal jurisdiction is 'practically always limited by one way or other'. Either it depends on an international (treaty-based) duty to prosecute (in Austria, Belarus, China, Croatia, England and Wales, Estland Estonia, Poland, Greece, Russia) or on the presence of the suspect in the forum State (Canada, Croatia, Serbia [, Montenegro], Spain, the Netherlands, Switzerland, the U.S.). Only in exceptional cases does universal jurisdiction apply to all international core crimes (Australia, Germany, Slovenia) or for some of them (Finland, Italy, Israel, Sweden)." K. Ambos, Prosecuting Guantanamo in Europe: Can and Shall the Masterminds of the "Torture Memos" Be held Criminally Responsible on the Basis of Universal Jurisdiction? 42 Case W. Res. J.Int'l L., 2009, pp. 445-446, note 230.

202 The African Union-European Union expert report (note 14 above) refers in paragraph 17 to at least three such States in Africa — the Democratic Republic of the Congo, Niger and South Africa. The Special Rapporteur has no information on cases of the application of this legislation and the reaction of interested States to it.

Belgium's Act Concerning the Punishment of Grave Breaches of International Humanitarian Law 1999 r. contained an article 5(3): "L'immunité attachée à la qualité officielle d'une personne n'empêche pas l'application de la présente loi". However, in 2003, after the judgment of the International Court of Justice in the *Arrest Warrant* case, the law indicated was changed.

legislation repudiating immunity conforms to international law.)[203] Though not in all these cases, this legislation rejecting immunity has withstood the test of practice. In Belgium, for example, it was changed, in particular, in order to take account of the existence of the immunity of foreign officials in accordance with international law. The immunity which officials possess under international law is an obstacle to the exercise of universal criminal jurisdiction not only under Belgian law, but also under the law of a number of other States.[204]

75. Considered above were a number of domestic criminal cases resulting from the exercise of universal or extraterritorial jurisdiction which are cited to support the notion of the existence of a customary norm of international law providing for exceptions to immunity. The report of the African Union-European Union Technical Ad hoc Expert Group on the Principle of Universal Jurisdiction contains references to a whole range of cases in which universal criminal jurisdiction has been exercised in respect of foreign officials.[205] Some of these cases featured persons who enjoyed personal immunity while others featured persons who enjoyed functional immunity (including Heads of State and Government, Ministers for Foreign Affairs, Defence, etc., and former officials). The report notes: "There have been differing outcomes in these proceedings. Some prosecutions have led to convictions. The majority of cases have been discontinued on various grounds, including the recognition of immunities accorded by international law."[206]

76. It is not difficult to see that attempts to exercise universal criminal jurisdiction are, in the absolute majority of cases, undertaken in developed countries with respect to serving or former officials of developing States. This is perceived by the latter not as the exercise of justice but as a political instrument for resolving various issues, a manifestation of a policy of double standards, and leads not so much to the results sought by justice as to complications in inter-State relations.[207] It is precisely this that led to the dialogue between the African Union and the European

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The new article 5(3) appeared thus: "L'immunité internationale attachée à la qualité officielle d'une personne n'empêche l'application de la présente loi que dans les limites établies par le droit international". (see Pierre d'Argent, Les nouvelles règles en matière d'immunités selon la loi du 5 août 2003, http://www.law.kuleuven.be/jura/art/40nl/dargent.html). In the same year, this law, too was changed, and its provisions included in Belgium's Criminal and Criminal Procedure Codes. Article 1bis of the latter contained the following provision on immunity: "Conformément au droit international, les poursuites sont exclues à l'égard: — des chefs d'Etat, chefs de gouvernement et ministres des affaires étrangères étrangers, pendant la période où ils exercent leur fonctions, ainsi que des autres personnes dont l'immunité est reconnue par le droit international: — des personnes qui disposent d'une immunité, totale ou partielle, fondée sur un traité qui lie la Belgique." (Available at: http://www.ejustice.just.fgov.be).

[203] See preceding note.

[204] African Union-European Union expert report, paras. 18 and 25. European Arrest Warrant 2002, the scope of which covers *inter alia* crimes to which ICC jurisdiction extends, also contains an article on privileges and immunities and the waiver of these. Council framework decision of 13 June 2002 on the European Arrest Warrant and the surrender procedures between Member States (2002.584/JHA), article 20, available at http://www.eur-lex.europa.eu. Legislation of the Russian Federation also provides directly for the immunity of officials of foreign States from criminal proceedings (Article 3(2) Code of Criminal Procedure of the Russian Federation. See para. 38 of the Preliminary Report).

[205] African Union-European Union expert report, note 14 above, paras. 24 and 26.

[206] Ibid., para. 26.

[207] See, for example, the section "African concerns" in the African Union-European Union expert report, paras. 33-38, and also notes 14 and 196 above; K. Ambos, note 201 above, pp. 444-445.

Union on universal jurisdiction, one outcome of which has been the report cited in this section. One of the recommendations of this report states: "Those national criminal justice authorities considering exercising universal jurisdiction over persons suspected of serious crimes of international concern are legally bound to take into account all the immunities to which foreign state officials may be entitled under international law and are consequently obliged to refrain from prosecuting those officials entitled to such immunities."[208] This recommendation circumvents the issue of whether the immunity *ratione materiae* of an official is preserved if foreign criminal jurisdiction is exercised over him. However, neither the content of the report, which sums up the practices and anxieties of many African and European States, nor this recommendation speak in favour of universal criminal jurisdiction precluding such immunity.

77. If it is argued that immunity is not compatible with universal jurisdiction, then it is not fully clear why this should not relate not only to functional but also to personal immunity. In considering the relationship between universal jurisdiction and immunity as a whole or immunity *ratione materiae* alone, the position of the International Court of Justice in this regard, which has already been cited in the preliminary report presented at the sixtieth session of the Commission but which is important in this context, should also be recalled: "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 the 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 foreign State, even where those courts exercise such a jurisdiction under these conventions."[209]

78. In the light of the foregoing, it would appear that there are no satisfactory arguments in place in favour of the rationale under consideration for exception to immunity. At least, the Institute of International Law, in a resolution on universal criminal jurisdiction with regard to the crime of genocide, crimes against humanity and war crimes adopted in 2005 (i.e. within four years of its adoption of a resolution on immunities from jurisdiction and execution of Heads of State and of Government in international law, in which it denied former Heads of State and of Government immunity *ratione materiae* from foreign jurisdiction in the event of their having perpetrated grave crimes under international law),[210] limited itself to the following

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[208] African Union-European Union expert report, para. 46, R.8.

[209] *Arrest Warrant*, Judgment, para. 59.

[210] Resolution of the Institute — 2001, note 40 above, articles 13 and 16.
"Article 13
1. A former Head of State enjoys no inviolability in the territory of a foreign State.
2. Nor does he or she enjoy immunity from jurisdiction, in criminal, civil or administrative proceedings, except in respect of acts which are performed in the exercise of official functions and relate to the exercise thereof. Nevertheless, he or she may be prosecuted and tried when the acts alleged constitute a crime under international law, or when they are performed exclusively to satisfy a personal interest, or when they constitute a misappropriation of the State's assets and resources.
3. Neither does he or she enjoy immunity from execution."

statement in the final paragraph thereof: "The above provisions are without prejudice to the immunities established by international law."[211]

79. The rationale which is under consideration for exception to immunity with reference to universal jurisdiction is similar to another, admittedly less widespread rationale, according to which immunity does not operate if, in respect of a crime allegedly perpetrated by a foreign official, the principle of *aut dedere aut judicare* operates. The memorandum by the Secretariat notes that such a position was endorsed by Lord Saville in the *Pinochet III* case.[212] In the preliminary report on the obligation to extradite or prosecute (*aut dedere aut judicare*) presented to the International Law Commission by the Special Rapporteur Z. Galicki in 2006, immunities were spoken of as one of the obstacles to the effectiveness of prosecution systems for crimes under international law that is not appropriate to such crimes.[213] At the same time, it was noted during discussion of this topic in the Sixth Committee of the General Assembly that the application of this obligation "should not … affect the immunity of State officials from criminal prosecution".[214] The Special Rapporteur does not have at his disposal evidence of any widespread practice of States, including judicial practice, or their *opinio juris*, which would confirm the existence of exception to the immunity of foreign officials where the exercise of national criminal jurisdiction over them on the basis of the *aut dedere aut judicare* rule is concerned. The position of the International Court of Justice, reproduced above (para. 77) in the context of the issue of universal jurisdiction, which was formulated in the judgment in the *Arrest Warrant* case as it applied not only to the relationship between immunity and universal jurisdiction but also to that with the obligation *aut dedere aut judicare*, seems fully convincing.

80. In practice, to substantiate exceptions to the immunity of State officials from foreign criminal jurisdiction, where the latter is being exercised in connection with the commission of a grave crime under international law, it is customary for several of the rationales cited above to be used, possibly in consideration of the fact that each of them is by no means undisputed. What is more, the proponents of exceptions are far from always in agreement among themselves as to the correctness of one rationale or another. The question of exceptions to immunity *ratione materiae* in cases of grave crimes under international law continues to be raised by lawyers and non-governmental organizations. This position has been reflected in two Institute resolutions. As previously mentioned, the 2001 resolution contains articles 13 and 16 which provide for such exceptions as they apply to former Heads of State and of Government. 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 adopted by the

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In accordance with article 16, article 13 applies to former Heads of Government.

[211] Institute of International Law, Krakow session, note 196 above, para. 6.

[212] See memorandum by the Secretariat, para. 259. Lord Saville noted, in particular: "So far as the states that are parties to the Convention are concerned, I cannot see how, so far as torture is concerned, this immunity can exist consistently with the terms of that Convention. Each state party has agreed that the other state parties can exercise jurisdiction over alleged official torturers found within their territories, by extraditing them or referring them to their own appropriate authorities for prosecution; and thus to my mind can hardly simultaneously claim an immunity from extradition or prosecution that is necessarily based on the official nature of the alleged torture", *Pinochet III*. (http://www.parliament.the-stationery-office.co.uk/pa/ld199899/ldjudgmt/jd990324/pino7.htm).

[213] A/CN.4/571, para. 14.

[214] A/CN.4/588, para. 161.

Institute in 2009 states that in accordance with international law no immunity other than personal immunity applies in respect of international crimes to persons acting on behalf of a State and that when the position or mission of any person enjoying personal immunity has come to an end, such immunity ceases.[215] However, as we can see, not only is this not the prevailing viewpoint in the doctrine but it would also appear that it is not as yet exerting a decisive influence on the practice and positions of States.

81. The posing of the question of whether immunity *ratione materiae* is absent where a crime is perpetrated in the territory of the State which exercises jurisdiction stands apart.[216] Here, the case does not necessarily concern grave international crimes. The priority of jurisdiction of the State in whose territory a crime has been perpetrated over immunity may hypothetically be supported by the factor that, in accordance with the principle of sovereignty, a State has absolute and supreme power and jurisdiction in its own territory. However, it should be remembered that this supremacy is exercised taking into account exemptions established by international law and, in particular, the immunity of a foreign State and its officials.[217]

82. As noted in the memorandum by the Secretariat, "[i]t has been suggested that, in determining whether acts carried out by a State official in the territory of a foreign State are covered by immunity *ratione materiae*, the crucial consideration would be whether or not the territorial state had consented to the discharge in its territory of official functions by a foreign State organ".[218] The consent of the receiving State not only to the discharge of functions but also to the very presence of a foreign official in its territory may be of importance. In the context of the topic under consideration, several types of situation can be distinguished.[219] For instance, a foreign official may be present and perform an activity resulting in a crime in the

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[215] Resolution of the Institute — 2009, note 22 above, art. III.
("Article III Immunity of persons who act on behalf of a State:
1. No immunity from jurisdiction other than personal immunity in accordance with international law applies with regard to international crimes.
2. When the position or mission of any person enjoying personal immunity has come to an end, such personal immunity ceases.")
At the same time, in accordance with article IV of this resolution, the above provisions "are without prejudice to the issue whether and when a State enjoys immunity from jurisdiction before the national courts of another State in civil proceedings relating to an international crime committed by an agent of the former State".
When the present report was being prepared, the Institute yearbook containing materials which would have made it clear how the 2009 resolution was prepared had not yet been published.

[216] See memorandum by the Secretariat, paras. 162-165. For an analysis of the issue of immunity of the State from the civil jurisdiction of a State in whose territory an activity was carried out, as a result of which damage was caused, see, for example, X. Yang, State immunity in the European court of human rights: reaffirmation and misconceptions, British Journal of International Law, vol. 74 (2003), pp. 375-408.

[217] See Draft Declaration on Rights and Duties of States, article 2: "Every State has the right to exercise jurisdiction over its territory and over all persons … therein, subject to the immunities recognized by international law." The Work of the International Law Commission, 6th ed., vol., p. 262.

[218] See memorandum by the Secretariat, para. 163.

[219] We would emphasize that only the immunity *ratione materiae* of officials is at issue here. The immunities of consular officials or of the personnel of special missions do not fall under this topic, though certain analogies may be useful.

territory of a State exercising jurisdiction with the consent of the latter. In addition, an analogous situation is possible, but with the distinction that there no consent was given by the receiving State to the activity which led to the crime. Finally, there are situations where not only the activity but also the very presence of the foreign official in the territory of the State exercising jurisdiction take place without the consent of that State.

83. Applied to the first type of situation, no special problems appear to arise. In essence, the State in whose territory the alleged crime has occurred, consented in advance that the foreign official located and operating in its territory would have immunity in respect of acts performed in an official capacity. For instance, if a foreign official had come for talks and en route to the talks committed a violation of the traffic rules entailing a criminal punishment in the receiving State, then it would appear that this person must enjoy immunity.

84. In the second situation, the question seems to be whether immunity arises in a case where the scope of activity of the official has been determined in advance and the consent of the receiving State was given to such activity, but there was no consent by that State to the activity which resulted in the crime. For example, if an official has come for talks on agriculture, but beyond the scope of the talks engages in espionage or terrorist activity, there are doubts as to whether he enjoys immunity from the criminal jurisdiction of the receiving State in connection with such illegal acts. Here, however, what is evidently important is the extent to which the activity which led to the crime is connected with the activity to which the State gave its consent. In this situation, the acts of the official are on the one hand of an official nature and are attributed to the State which the person is (was) serving, and correspondingly there are grounds for raising the question of the immunity of this person, based upon the sovereignty of that State. On the other hand, this State, in the person of its official, has engaged in activity in the territory of the other State without its consent to do so, i.e. in violation of the sovereignty of the latter State.[220]

85. If a State did not give its consent to the presence of a foreign official and his activity, which led to the commission of a criminally punishable act, in its territory, there would appear to be sufficient grounds for assuming that the official does not enjoy immunity *ratione materiae* from the jurisdiction of that State. In the situation considered in the preceding paragraphs, the State, consenting to the presence and activity of a foreign official in its territory, consented in advance to the immunity of that person, in connection with his official activity. If, though, there was no such consent, and the person is not only acting illegally but is present in the State territory illegally, then it is fairly difficult to assert immunity. Examples of this type of situation include espionage, acts of sabotage, kidnapping, etc. In judicial proceedings concerning cases of this kind, immunity has either been asserted but not accepted,[221] or not even asserted.[222] It should also be noted here that, such cases as

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[220] In the opinion of R. van Alebeek, in order to assess a situation involving the immunity of a foreign official, it is also of significance whether his activity is of a criminally punishable nature under the law of the State in whose territory it was performed ("Whether a foreign state official is effectively called to account depends however on whether a particular act in fact constitutes a violation of the national law of the state whose territorial sovereignty has been violated or whether only an interstate norm has been violated." (see R. van Alebeek, note 51 above, pp. 181-183. Ibid., pp. 167-183, examples are given of national court judgments in cases of foreign officials who had perpetrated crimes in the territory of the State exercising jurisdiction).

[221] See the case of the United States Central Intelligence Agency (CIA) agents arrested in Italy in

Distomo[223] and *Ferrini*,[224] where Greek and Italian courts did not recognize the immunity of Germany from Italian jurisdiction, concerned crimes perpetrated in the territory of the State exercising jurisdiction.[225] The judgment in the *Bouzari* case, in which a Canadian court recognized immunity in spite of the fact that torture is prohibited by a peremptory norm, contains passages from which, interpreting them *a contrario*, it can be concluded that the judgment may have been different if the torture had been committed in the territory of the State exercising jurisdiction.[226]

86. The situations examined may occur with any State officials, including military personnel. At the same time, the issue of the criminal prosecution and immunity of military personnel for crimes perpetrated during military conflict in the territory of a State exercising jurisdiction would seem to be governed primarily by humanitarian law, and to be a special case and should not be considered within the framework of this topic.

87. The 2001 Institute resolution states that a former Head of State (and correspondingly a Head of Government) may be criminally prosecuted if his acts "are performed exclusively to satisfy a personal interest, or when they constitute a misappropriation of the State's assets and resources".[227] Two further instances in which a former Head of State (and correspondingly a Head of Government) do not enjoy immunity *ratione materiae* have thereby been added to the situation of commission of the gravest international crimes. Thus, in the opinion of the authors of the resolution, even if an official who possessed personal immunity was acting in an official capacity but for the purposes of personal enrichment, by departing from his duty he loses the protection of immunity *ratione materiae*. An analogous viewpoint has been expressed in the doctrine by some authors in relation to other similar ways of personal enrichment in the exercise of official activity.[228] If this

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connection with charges of abduction of a person in 2003 (memorandum by the Secretariat, note 466).

[222] For example, the *Rainbow Warrior* case (ibid., note 465). Situations are possible, however, when an official, in exercising official activities, finds himself in the territory of a foreign State without its consent, but not intentionally. The sole criminally punishable activity of the official in this case is the illegal crossing of the border. It seems that in such a case there are grounds for posing the question of immunity. For example, in 2005 during training, a Russian military aircraft found itself unintentionally in Lithuanian airspace and crashed. Criminal proceedings were instituted in Lithuania against the pilot, who had survived. The Russian Federation raised the question of whether the pilot, having in the course of carrying out his work accidentally found himself in the territory of a foreign State, enjoys immunity from the jurisdiction of that State (see commentary of the Ministry of Foreign Affairs of the Russian Federation of 19 September 2005 in connection with this case, available at http://www.mid.ru/brp_4.nsf/).

[223] *Prefecture of Voiotia* v. *Germany* in Supreme Court of Greece, no 11/2000 of 4 May 2000, ibid.

[224] *Ferrini* v. *Republica Federale di Germania*, Corte di Cassazione, Joint Sections, Judgment 6 November 2003-11 March 2004, n.5044.

[225] The opinion has been advanced in the doctrine that it was precisely this circumstance that was the reason for the non-recognition of immunity for Germany in these (see X. Yang, *Jus cogens* and state immunity, New Zealand Yearbook of International Law, 2006, pp. 164-169).

[226] For example: "[T]here is no principle of customary international law which provides an exception from state immunity where an act of torture has been committed outside the forum, even for acts contrary to *jus cogens*. Indeed, the evidence of state practice … leads to the conclusion that there is an ongoing rule of customary international law providing state immunity for acts of torture committed outside the forum state." Bouzari v. Iran [2002] O.J.No. 1624, Court file No. 00-CV-201372, Ontario Superior Court of Justice, Judgment, para. 63.

[227] Article 13 (2) of the resolution. See note 210 above.

[228] See memorandum by the Secretariat, para. 211.

kind of activity by an official were not considered to be official, then this position would be understandable. However, since it continues to be considered the official activity of an official and, correspondingly, of a State, then certain doubts arise as to the soundness of this position. A whole series of international treaties are devoted to combating corruption and the illicit acquisition of personal wealth by officials.[229] They criminalize such acts (including those which may be performed only using the position or service rank) of officials, and lay down the duties and rights of States to establish and exercise criminal jurisdiction in respect of such acts by officials. In some treaties, the issue of the immunity of foreign officials from criminal jurisdiction is not touched upon.[230] Others contain clauses stipulating that their provisions do not prejudice the provisions of other international treaties insofar as the waiving of the immunity of these persons is concerned.[231] It would appear that the simplest way of deciding the issue of the immunity of officials from foreign criminal jurisdiction in cases where they have committed crimes directed toward personal enrichment would be to include appropriate provisions in an international treaty devoted to combating these crimes. However, this has not yet occurred. Unless, of course, these treaties are considered as providing an implicit waiver of immunity.

88. In order to resolve the issue of whether an official enjoys immunity from foreign criminal jurisdiction in the cases considered, it is, however, evidently necessary to consider in each concrete case the question of whether the act which led to illicit enrichment, etc., was an act performed by that person in an official capacity or in a private capacity. Situations are known where foreign jurisdiction has been exercised in connection with crimes of this kind, and a State has not requested immunity for its official. This was the situation, for example, in the *Marcos* case of the former President of the Philippines in the United States of America.[232] At the

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[229] For example, the 2003 United Nations Convention against Corruption (available at: http://www.unodc.org/pdf/corruption/publications_unodc_convention-r.pdf), the 1996 Inter-American Convention against Corruption (available at: http://www.oas.org/juridico/english/treaties/b-58.html), the 1999 Criminal Law Convention on Corruption (European Treaty Series — No. 173), the 2003 African Union Convention on Preventing and Combating Corruption (available at: http://www.africa-union.org/root/AU/Documents/Treaties/Text/Convention%20on%20Combating%20 Corruption.pdf).

[230] At the same time, provisions concerning the immunity of a State's own officials are encountered (see, for example, article 30 para. 2 of the United Nations Convention against Corruption and article 9 para. 5 of the 2003 African Union Convention on Preventing and Combating Corruption).

[231] See, for example, article 16 of the 1999 Criminal Law Convention on Corruption and article 4(4) of the Convention on the fight against corruption involving officials of the European Communities or officials of Member States of the European Union of 26 May 1997 (available at: http://eur-lex.europa.eu/).

[232] In its judgment in the *Marcos* case (Tribunal Federal, Affaire Marcos, 2 Novembre 1989, ref. ATF 115 Ib 496 consid 5 b) the Supreme Court of Switzerland did not go into a detailed analysis of the nature of the activity of this person, having determined that he did not enjoy immunity by virtue of the fact that the Philippines had refused to recognize this activity as official. The situation was similar in the judgment in his case in the United States (*In re Grand Jury Proceedings*, 817 F.2d at 1111): the Government of the Philippines informed the United States State Department within the scope of this case of the waiving of Marcos' immunity. In the case *USA* v. *Noriega* (117 F.3d 1206; 1197 U.S. app. LEXIS 16493, see memorandum by the Secretariat, para. 211, note 605) a United States court denied immunity to Manual Noriega, the former Head of State of Panama, on the grounds that the United States Government had not recognized Noriega as the Head of State at the time of performance by him of the acts in

same time, in the case of the former Minister of Atomic Energy of the Russian Federation, *Adamov*, the issue of whose extradition to the United States or to the Russian Federation was considered by the Swiss Federal tribunal, the Russian Federation asserted the immunity of its former official from United States criminal jurisdiction, noting, inter alia, that the illicit enrichment with which Adamov had been charged had taken place in the Russian Federation as a result of his official activities (abuse of official position).[233]

89. The aforegoing does not give grounds for asserting that the provisions of the 2001 Institute resolution referred to above reflect a customary norm of international law.[234] At the same time, immunity *ratione materiae* does not appear to protect an official from criminal procedure measures taken by a foreign State in relation to his personal assets (for example, funds in foreign banks) within the scope of criminal law proceedings exercised in connection with a crime aimed at personal enrichment allegedly committed by him. Such measures cannot be considered as restricting his official acts.

3. Conclusions concerning exceptions

90. In the opinion of the Special Rapporteur, the arguments set out above demonstrate that the various rationales for exceptions to the immunity of officials from foreign criminal jurisdiction prove upon close scrutiny to be insufficiently convincing. These rationales continue to be discussed in the doctrine. The practice of States is also far from being uniform in this respect. The judgment in the *Pinochet* case, having given an impetus to discussion on this issue, has not led to the establishment of homogeneous court practice. In this respect, it is difficult to talk of exceptions to immunity as having developed into a norm of customary international law, just as, however, it is impossible to assert definitively that there is a trend toward the establishment of such a norm. A situation 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 exercise 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 stands alone in this regard. There would in such a situation appear to be sufficient grounds for talking of an absence of immunity.

91. The question arises of the extent to which further restrictions on immunity *de lege ferenda* are desirable. Let us recall in this regard certain recommendations, including some referred to above, contained in the African Union-European Union expert report: “When exercising universal jurisdiction over serious crimes of international concern … states should bear in mind the need to avoid impairing

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question. Panama did not assert Noriega’s immunity. In other words, in this case, the nature of the acts performed by him was not a determining factor. If the United States executive authorities had recognized the legitimacy of Noriega’s authoritative competency, his immunity would evidently also have been recognized. See, for example, Heidi Altman, The Future of Head of State Immunity: The Case against Ariel Sharon, April 2002, p. 6, http://www.indictsharon.net/heidialtman-apr02.pdf.

[233] *Adamov gegen Bundesamt fur Justiz*, Urteil vom 22. Dezember 2005, 1. Offentlichrechtliche Abtellung (1A.288/2005/gij), para. 3.4.2.; see also Comments by the Information and Press Department of the Ministry of Foreign Affairs of the Russian Federation of 18 May 2005, http://www.mid.ru/Brp_4.nsf/arh/61C69CBAC851731AC3257006003264A0?OpenDocument.

[234] See the opinion of Hazel Fox cited in the memorandum by the Secretariat (para. 209) that at issue is the wording of these provisions of article 13 of the resolution *de lege ferenda*.

friendly international relations. … Those national criminal justice authorities considering exercising universal jurisdiction over persons suspected of serious crimes of international concern are legally bound to take into account all the immunities to which foreign state officials may be entitled under international law and are consequently obliged to refrain from prosecuting those officials entitled to such immunities. … In prosecuting serious crimes of international concern, states should, as a matter of policy, accord priority to territoriality as a basis of jurisdiction, since such crimes, while offending against the international community as a whole by infringing universal values, primarily injure the community where they have been perpetrated and violate not only the rights of the victims but also the general demand for order and security in that community. In addition, it is within the territory of the state of alleged commission that the bulk of the evidence will usually be found."[235]

92. It is also questionable whether the emergence of such exceptions in general international law and, correspondingly, of the possibility of exercising national criminal jurisdiction over foreign officials would be desirable, for the purposes of combating impunity, as a supplement to international criminal jurisdiction or to the jurisdiction of the State which an official serves (served), if this State does not carry into effect his criminal prosecution.[236] Such a subsidiary exercise of criminal jurisdiction is provided for under the legislation of certain States.[237] However, the possibility of exercising jurisdiction provided for by legislation does not yet, as evident from the explanations above, signify exceptions to the immunity of foreign officials.

93. That States are undoubtedly entitled to establish restrictions on the immunity of their officials from the criminal jurisdiction of one another by concluding an international treaty is another matter.[238] In this regard, the Commission could consider, alongside the codification of customary international law currently in force, the question of drawing up an optional protocol or model clauses on

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[235] African Union-European Union expert report, note 14 above, p. 42.

[236] See speeches at the sixtieth session of the International Law Commission of Donald McCrae (A/CN.4/SR.2984, p.9), Edmundo Vargas-Carreño (A/CN.4/SR.2987, p.11) and Marie Gotton Jacobsson (A/CN.4/SR.2985, pp. 5-6).

[237] See K. Ambos, note 23 above, pp. 414, 423 and 440.

[238] The 2006 Protocol for the Prevention and the Punishment of the Crime of Genocide, War Crimes and Crimes Against Humanity and all forms of Discrimination contains article 12 on the application of its provisions concerning the combating of genocide, war crimes and crimes against humanity to "official authorities". These provisions "shall apply equally to all persons suspected of committing the offences to which this Protocol applies, irrespective of the official status of such persons. In particular the official status of a Head of State, of Government, or an official member of a Government or parliament, or an elected representative or agent of a State shall in no way shield or bar the criminal liability." International Conference on the Great Lakes Region. Protocol for the Prevention and the Punishment of the Crime of Genocide, War Crimes and Crimes Against Humanity and all forms of Discrimination, available at http://www.icglr.org/key-documents/0of%20the%20Crime% 20of%20Genocide,%20War%20Crimes%20and%20Crimes%20against%20Humanity%20and%20All%20forms%20of%20Discrimination.pdf.

It is possible that this article is viewed by the parties to the treaty as precluding the immunity of their officials from the criminal jurisdiction of any of them, even though the Protocol does not speak directly of the restriction or preclusion of immunity (unfortunately, the Special Rapporteur is not aware of the practical application of the cited provision of the Protocol by the courts of its Member States).

restricting or precluding the immunity of State officials from foreign criminal jurisdiction.

G. Summary

94. The contents of this report can be summarized in the following statements:

(a) On the whole, the immunity of a State official, like that of the State itself, from foreign jurisdiction is the general rule, and its absence in a particular case is the exception to this rule;

(b) State officials enjoy immunity *ratione materiae* from foreign criminal jurisdiction, i.e. immunity in respect of acts performed in an official capacity, since these acts are acts of the State which they serve itself;

(c) There are no objective grounds for drawing a distinction between the attribution of conduct for the purposes of responsibility on the one hand and for the purposes of immunity on the other. There can scarcely be grounds for asserting that one and the same act of an official is, for the purposes of State responsibility, attributed to the State and considered to be its act, and, for the purposes of immunity from jurisdiction, is not attributed as such and is considered to be only the act of an official. The issue of determining the nature of the conduct of an official — official or personal — and, correspondingly, of attributing or not attributing this conduct to the State, must logically be considered before the issue of the immunity of the official in connection with this conduct is considered;

(d) Classification of the conduct of an official as official conduct does not depend on the motives of the person or the substance of the conduct. The determining factor is that the official is acting in a capacity as such. The concept of an "act of an official as such", i.e. of an "official act", must be differentiated from the concept of an "act falling within official functions". The first is broader and includes the second;

(e) The scope of the immunity of a State and the scope of the immunity of its official are not identical, despite the fact that in essence the immunity is one and the same. An official performing an act of a commercial nature enjoys immunity from foreign criminal jurisdiction if this act is attributed to the State;

(f) Immunity *ratione materiae* extends to *ultra vires* acts of officials and to their illegal acts;

(g) Immunity *ratione materiae* does not extend to acts which were performed by an official prior to his taking up office; a former official is protected by immunity *ratione materiae* in respect of acts performed by him during his time as an official in his capacity as an official;

(h) Immunity *ratione materiae* is scarcely affected by the nature of an official's or former official's stay abroad, including in the territory of the State exercising jurisdiction. Irrespective of whether this person is abroad on an official visit or is staying there in a private capacity, he obviously enjoys immunity from foreign criminal jurisdiction in respect of acts performed in his capacity as an official;

(i) Immunity *ratione personae*, which is enjoyed by a narrow circle of high-ranking State officials, extends to illegal acts performed by an official both in an official and in a private capacity, including prior to taking office. This is what is known as absolute immunity;

(j) Being linked to a defined high office, personal immunity is temporary in character and ceases when a person leaves office. Immunity *ratione personae* is affected neither by the fact that acts in connection with which jurisdiction is being exercised were performed outside the scope of the functions of an official, nor by the nature of his stay abroad, including in the territory of the State exercising jurisdiction;

(k) The scope of immunity from foreign criminal jurisdiction of serving officials differs depending on the level of the office they hold. All serving officials enjoy immunity in respect of acts performed in an official capacity. Only certain serving high-ranking officials additionally enjoy immunity in respect of acts performed by them in a private capacity. The scope of immunity of former officials is identical irrespective of the level of the office which they held: they enjoy immunity in respect of acts performed by them in an official capacity during their term in office;

(l) Where charges (of being an alleged criminal, suspect, etc.) have been brought against a foreign official, only such criminal procedure measures as are restrictive in character and prevent him from discharging his functions by imposing a legal obligation on this person, may not be taken when the person enjoys: (a) immunity *ratione personae* or (b) immunity *ratione materiae*, if the measures concerned are in connection with a crime committed by this person in the performance of official acts. Such measures may not be taken in respect of a foreign official appearing in criminal proceedings as a witness when this person enjoys: (a) immunity *ratione personae* or (b) immunity *ratione materiae*, if the case concerns the summoning of such a person to give testimony in respect of official acts performed by the person himself, or in respect of acts of which the official became aware as a result of discharging his official functions;

(m) Immunity is valid both during the period of an official's stay abroad and during the period of an official's stay in the territory of the State which he serves or served. Criminal procedure measures imposing an obligation on a foreign official violate the immunity which he enjoys, irrespective of whether this person is abroad or in the territory of his own State. A violation of the obligation not to take such measures against a foreign official takes effect from the moment such a measure is taken and not merely once the person against whom it has been taken is abroad;

(n) The various rationales for exceptions to the immunity of State officials from foreign criminal jurisdiction are not sufficiently convincing;

(o) It is difficult to talk of exceptions to immunity as a norm of international law that has developed, in the same way as it cannot definitively be asserted that a trend toward the establishment of such a norm exists;

(p) A situation 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,

stands alone in this regard as a special case. It would appear that in such a situation there are sufficient grounds to talk of an absence of immunity.[239]

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[239] The Special Rapporteur would like to express his gratitude to Ms. S. S. Sarenkova and Mr. M. V. Musikhin for their assistance in the preparation of this report.