28 January 2014

United Nations General Assembly

Sixth Committee

Immunity of State officials from foreign criminal jurisdiction

– Additional comments from Norway

Reference is made to Norway's statement on 28 October 2013 on behalf of the five Nordic countries, including also Denmark, Finland, Iceland and Sweden, in the debate in the Sixth Committee of the Sixty-eighth General Assembly of the United Nations on the Report of the International Law Commission's sixty-fifth session (A/68/10) chapter V, Immunity of State Officials from Foreign Criminal Jurisdiction.

The General Assembly has encouraged States to present concise and focused statements during the debate on the report of the International Law Commission in the Sixth Committee (most recently in operative paragraph 16 of resolution A/68/112). At the same time, the Assembly has drawn the attention of Governments on the importance for the Commission of having their views on various aspects regarding immunity of State officials from foreign criminal jurisdiction (paragraph 4 of the said resolution).

In keeping with this guidance, Norway indicated in the statement of 28 October 2013 the intention to revert to the issue in written form and in a national capacity, in order to provide additional comments on some of the issues raised. The following comments by Norway are therefore not limited to the concrete request for written observations by 31 January 2014 pertaining to information about State practice in this field. Moreover, they are merely intended to supplement the main observations already made in the said statement.

As indicated in the statement, we believe that several of the issues referred to by the Special Rapporteur, Concepción Escobar Hernández' second report (A/CN.4/661) deserve to be explored and discussed in further detail. Moreover, further guidance on these issues may be sought in the jurisprudence of the International Court of Justice.

Against the above background, Norway would like to make to the following additional observations:

1. While the scope of the topic under consideration is restricted to issues pertaining to the immunity of State officials from foreign *criminal* jurisdiction, Norway notes that the concrete examination of several issues tends to raise general questions concerning the scope of immunities for State officials under international law more *generally*, and that it is often discussed in that light.

While we recognize that important developments have indeed taken place in international law that may restrict the scope for immunity of State officials as regards exercise of criminal jurisdiction for certain crimes, we nevertheless believe it is important to clearly distinguish those developments from the state of the law, *lex lata*, as regards other immunities.

This applies not only with regard to immunity from the jurisdiction of international criminal courts or tribunals or from the criminal jurisdiction of the official's own State, or immunities from criminal jurisdiction under special rules, as referred to in draft Article 1 suggested in the second report of the Special Rapporteur. We believe that this also applies notably to immunity from civil jurisdiction and for situations where there may be challenging distinctions, based on different national practice, between the characterizations of acts of authority as representing the exercise of criminal or civil jurisdiction.

In our view, the complexity of some of the questions pertaining to the scope of immunity *ratione personae* or immunity *ratione materiae* may also be lessened somewhat if it is made clear that their consideration is limited to the purposes of immunity from the criminal jurisdiction of another State for certain categories of crimes.

If such an approach is considered worthy of further consideration, it may be noted, in this context, that for instance Article 3 of the 2004 United Nations Convention on Jurisdictional Immunities of States and Their Property contains on certain points formulations indicating disclaimers of a broader or more general nature than the one envisaged in draft Article 1. While the disclaimer suggested in draft Article 1 paragraph 2 only concerns "the immunity from criminal jurisdiction enjoyed under special rules of international law", consideration may also be given to broadening the scope of such a non-prejudice clause to cover also other forms of immunities, including from the civil jurisdiction of another State.

2. As regards the immunities *ratione personae*, we are of the opinion that the general methodic approach undertaken by the International Court of Justice in the 2002 judgment in the *Arrest Warrant* case[1], when considering the current status of customary international law as regards immunities of Ministers for Foreign Affairs is still largely applicable.

   The Court has highlighted the relevance of undertaking a functional need-based analysis in the consideration of immunities. The Court recalled that the immunities accorded to these representatives of States are not granted for their personal benefit, but to ensure the effective performance of their functions on behalf of their respective States. It underlined that *"in order to determine the extent of these immunities, the Court must therefore first consider the nature of the functions exercised by a Minister of Foreign Affairs"* (paragraph 53). It furthermore noted that in the performance of

[1] *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo* v. *Belgium), Judgment, I.C.J. Reports 2002,* p. *3.*

these functions, he or she is frequently required to travel internationally, and thus be in a position freely to do so whenever the need should arise. On the basis of a further analysis of these functions, the Court accordingly concluded that they are such that, throughout the duration of his or her office, he or she when abroad enjoys full immunity and inviolability, "*protecting 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*" (para. 54). This avoids the risk of exposing the individual concerned from legal proceedings that could deter the Minister from travelling internationally when required to do so for the purposes of the performance of his or her official functions. Moreover, this applies irrespective of whether such legal proceedings were to be related to alleged acts performed in an "official" capacity or a "private" capacity.

Norway notes that the Court in that judgment did not itself attempt to strictly and definitely circumscribe the number of State representatives that enjoy immunity *ratione personae* to the troika alone. Rather it may discreetly have suggested that there might be scope for some further reflection on the topic, when observing in an often commented dictum that "*in international law it is firmly established that, as also diplomatic and consular agents, certain holders of high-ranking office in a State, such as the Head of State, Head of Government and Minister for Foreign Affairs, enjoy immunities from jurisdiction in other States, both civil and criminal*" (para. 51).

For the sake of good order, we note that the Special Rapporteur has, in her second report, made unspecified references to Norway being in favour of granting such immunity to ministers of defense and trade, as well as to ministers responsible for the financial system (A/CN.4/661, p. 22, footnote 46). While that reference may not be entirely accurate, it is on the other hand correct to point out that Norway has spoken in favour of fully taking into consideration the transformation that has taken place in the exercise of modern intergovernmental relations and functions. The International Court of Justice noted in the 2006 Judgment on Armed Activities[2] that "*with increasing frequency in modern international relations other persons representing a State in specific fields may be authorized by that State to bind it by their statements in respect of matters falling within their purview. This may be true, for example, of holders of technical ministerial portfolios exercising powers in their field of competence in the area of foreign relations*, (…)" (para. 47).

Moreover, the Court set out in its 1979 Order concerning provisional measures in the case of the United States Diplomatic and Consular Staff in Tehran[3] that the obligations assumed, notably for assuring the personal safety of diplomats and their freedom from prosecution are "*essential, unqualified, and inherent in their representative character and their diplomatic function*" (para. 38). Such a consideration may not be strictly limited to diplomats and foreign ministers, but also arise in the context of a holder of a ministerial portfolio authorized to exercise powers in the area of foreign relations, and whose functions may inherently be of a representative and diplomatic character.

Norway therefore takes the view that also such representatives of States may require adequate protections for the individual concerned against any act of authority of

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[2] *Armed Activities on the Territory of the Congo (New Application : 2002)(Democratic Republic of the Congo* v. *Rwanda), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 2006*, p. 6

[3] *United States Diplomatic and Consular Staff in Tehran, Request for the Indication of Provisional Measures, Order 15 December 1979, I. C. J. Reports 1979,* p. *4.*

another State which would hinder him or her in the performance of his or her duties. While immunity *ratione personae* affords a priori an effective protection, this may not to the same extent be the case for immunity *ratione materiae*, as it largely presupposes the possibility of a procedural and even protracted scrutiny of the alleged activity concerned. The same applies to immunity for special missions. Norway is concerned that the formulation of adequate protections duly take into account the legitimate, protected values and interests underpinning the very rationale for immunity *ratione personae* for the troika, when considering the exercise of foreign relations at the highest levels by delegated authority.

A member of Government or another key senior official who represents the State on the international level as a regular part of his or her functions may lack the full identification with the State inherent in the concept of *personae* immunity. Nevertheless, consideration may, for practical purposes, be given to a presumption that such an individual is acting on behalf of the State, unless the opposite is clear or considerably more likely, based on the relevant circumstances.

Against this background we would therefore suggest a careful scrutiny of the possibility for an appropriate formulation of a *prima facie* presumption of immunity *ratione materiae* for such holders of high office as described – as long as the nature of the functions to be protected is manifest. The aim would be to provide an effective and reasonable, including not too resource-consuming, protection in procedural terms of the immunity *ratione materiae* before domestic courts of other States.

The Commission has previously alluded to this issue in its commentary to draft Article 1 in the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons where it stated that "[*a] cabinet minister would, of course, be entitled to special protection whenever he was in a foreign State in connection with some official function*" (see Yearbook 1972, vol. 2 para. (3) of the commentary to draft Article 1).

Norway sees merit in exploring further this issue. With the vast expansion of cross-border contacts in today's interrelated world, and the increased exposure to a variety of foreign judicial systems under many different circumstances, a consideration merely of officials on a special mission may not be sufficient to ensure that key objectives of immunity be fulfilled. Such needs may possibly be taken into full consideration and satisfactorily addressed, in conformity with established principles of international law as described above, as the Special Rapporteur and the Commission move on to consider issues related to immunity *ratione materiae.*