

Warsaw, 27 April 2015

**Opinion by Legal Advisory Committee to the Minister of Foreign Affairs of the  
Republic of Poland  
on immunities of State officials from foreign criminal jurisdiction**

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The Minister of Foreign Affairs addressed the following questions to the Legal Advisory Committee to the Minister of Foreign Affairs (*hereinafter* the LAC) in connection with work carried out by the International Law Commission (*hereinafter* the ILC) in respect of immunities of State officials from foreign criminal jurisdiction:

1. Who in accordance with international law can enjoy personal immunity (*ratione personae*) from foreign jurisdiction in criminal cases? What is the material scope of this immunity?
2. Who can enjoy functional immunity (*ratione materiae*) from foreign jurisdiction in criminal cases in accordance with international law? Are all State representatives (State organs within the meaning of Article 4 of the Articles on Responsibility of States for Internationally Wrongful Acts) and private entities, if they exercise State authority, entitled to this immunity?
3. What is the material scope of the functional immunity (i.e., in the context of the definition of *official acts* and *ultra vires acts*)?
4. Are there exceptions to the functional immunity in accordance with international law? Which international obligations of the Republic of Poland exclude the functional immunity of a foreign State official when applying Polish jurisdiction in criminal cases?
5. What is the meaning of the term "criminal jurisdiction" used in the work of the ILC? Is it appropriate to make attempts to define the term in the ILC's Articles, and if so, in what way?
6. Are only natural persons entitled to immunity from foreign jurisdiction in criminal cases in accordance with international law?

Opinion of the Legal Advisory Committee is composed of three parts. The first provides terminological comments, the second presents answers to the questions above, and the third contains final remarks.

## I. Terminological comments

The issue of excluding State officials from foreign criminal jurisdiction is considered by the Legal Advisory Committee in a specific context, namely in connection with the work on this topic undertaken by the International Law Commission. As an introduction, the LAC would like to draw attention to the terminological errors fixed in practice, of the ILC as well, related to determination of immunities of State officials, even though it realizes that correcting them at this stage may be difficult.

The issue of immunity of State representatives from foreign jurisdiction in criminal cases should be considered in terms of:

1. the scope of the immunity *ratione personae*,
2. the scope of the immunity *ratione materiae*,
3. the scope of the immunity *ratione temporis*,
4. the scope of the immunity *ratione loci*.

Ad 1. **The scope of the immunity *ratione personae*** defines the persons covered by the immunity. It answers the question of WHO is covered by the immunity. In a particular situation, it allows determining whether a given person is entitled to the immunity. According to the LAC, this scope corresponds to the **concept of personal scope of the immunity**. It includes the **temporal element**, responding to the question of whether it concerns a person who currently occupies an official position or a person who no longer performs an official function. The temporal element can be considered separately, within the scope of the immunity *ratione temporis*. Similarly, the **spatial element**, concerning the place of residence of a given person in relation to whom the question of whether he/she is subject to the immunity arises (e.g. stay in exile), can be considered within the scope of the immunity *ratione loci*.

Ad 2. **The scope of the immunity *ratione materiae*** determines the categories of acts covered by the immunity. It answers the question of WHAT is covered by the immunity. According to the LAC, this scope corresponds to the **concept of material scope of the immunity**.

Classification of an act as covered by the immunity has several aspects:

- a. **the nature of the act**, that is, whether particular acts are official or private acts; it also includes the issue of whether a given act was within the official competence of a

given person, or it was an *ultra vires* act; the nature of an act includes also the fundamental issue of whether the act was an international crime the commitment of which is subject to a separate regulation,

b. **the time of occurrence of the act**, namely when the act was committed: during the person's term of office, or before or after this period. This aspect of an act can be considered separately, within the scope of the immunity *ratione temporis*,

c. **the place of committing the act**, which is an aspect that can be considered separately, within the scope of the immunity *ratione loci*.

Ad 3. **The scope of the immunity *ratione temporis*** consists of two separate matters, as indicated above. It may focus either on the person or on the act. Thus, first of all, it is about the question of whether at the time of invoking the immunity a person occupies an official position, or has already been divested of the position. Secondly, whether the acts to be covered by the immunity were done while performing an official function, or at any other time (before taking up the function or upon termination of the function).

Ad 4. **The scope of the immunity *ratione loci*** also consists of two separate matters – it may concern the place of stay of a person or the place where an act was committed. It can be included among the issues of the personal scope (*ratione personae*) or the material scope (*ratione materiae*).

At some point, terminological confusion with regard to the issues in question took place in the doctrine. The concept of the immunity *ratione personae* started to be used for determining, at the same time, both the personal scope and the material scope; currently, this concept means the full immunity (i.e., the material scope) granted to three persons – the incumbent Head of State, the Head of Government, the Minister of Foreign Affairs (i.e., the personal scope).

The concept of the immunity *ratione materiae* started to be used to determine the limited immunity (restrictive, functional) (i.e., the material scope), granted to State officials other than the above-mentioned three persons (i.e., the personal scope).

As a result, the terms *ratione personae* and *ratione materiae* lost their proper meaning. Contrary to the logic, we discuss the personal scope and the material scope in relation to the immunity *ratione personae* (the term properly denoting solely the personal scope of the immunity) and equally ineptly we discuss the personal scope and the material

scope of the immunity *ratione materiae* (the term properly denoting the material scope of the immunity).

This terminological confusion makes it difficult, according to the LAC, to determine the rules relating to immunities of State officials from foreign criminal jurisdiction. The Committee realizes, however, that it might be difficult to correct the situation now; such unfortunate terms were fixed by the analysis of the United Nations Secretariat – perfect in every other way – and perhaps we need to accept it.

However, the LAC suggests that the ILC consider substituting the term immunity *ratione personae* with the term **personal immunity** and the term immunity *ratione materiae* with the term **functional immunity**. Those terms were adopted by the Institute of International Law in its work on the subject matter in 2009.

## **II. Answers to the questions raised**

### **1. The immunity *ratione personae* of representatives of States from foreign criminal jurisdiction**

Question 1: Who in accordance with international law can enjoy personal immunity (*ratione personae*) from foreign jurisdiction in criminal cases? What is the material scope of this immunity?

#### **1.1. The personal scope of the immunity *ratione personae***

There is a fairly uniform opinion that three persons are entitled to the immunity *ratione personae*: the incumbent Head of State, the Head of Government and the Minister of Foreign Affairs. All of them have, under international law, an established scope of authority, confirmed, among others, in the Vienna Convention on the Law of Treaties of 1969 (Article 7(2)(a)), namely, they may enter into treaties on behalf of their country in virtue of their position, without the need of presenting full powers. They are the ones who can issue the full powers for other representatives of the State. This fact gives these three persons a special status in the international arena, which should be reflected in the special treatment of these persons with regard to their immunity from criminal jurisdiction of foreign States.

Any doubts as to the inclusion of the Minister of Foreign Affairs within the personal scope should be regarded as unjustified and outworn. Making the position of the Minister of Foreign Affairs equal to the position of the Head of State and the Head of Government as regards the immunity *ratione personae* has a strong foundation in the decision of the International Court of Justice of 14 February 2002 in *Arrest Warrant case of 11 April 2000*,<sup>1</sup> before that – in judgment of the Permanent Court of International Justice of 1933 in *Ihlen case*,<sup>2</sup> and foremost in the Vienna Convention on the Law of Treaties (Article 7(2)(a)); the Minister's privileged position is supported by the well-established practice of States. The rule as to the personal scope should be expressed as clearly as possible: "The Heads of State, the Heads of Government, and the Ministers of Foreign Affairs enjoy immunity from criminal jurisdiction of other States."

That is how, *mutatis mutandis*, the matter is presented as regards a diplomatic agent in Article 31 of the Vienna Convention on Diplomatic Relations of 1961. Such an approach, adopted by almost all the States, has proved its value in practice.

Another problem considered by the LAC was the extension of the immunity from criminal jurisdiction to family members, and even the entourage of the person (e.g. personal secretary, driver). The LAC was not unanimous on the matter of whether such regulation should be of interest to the ILC in relation to the exclusion of State representatives from criminal jurisdiction. However, according to some members of the LAC, it can be concluded that the consideration for undisturbed exercise of the functions by the persons covered by virtue of their position by the immunity *ratione personae* dictates the inclusion within the personal scope of the immunity *ratione personae* of family members staying in one household. The question of whether family members may be excluded from immunity in a situation where they are nationals of a foreign country which wants to enforce its criminal jurisdiction against them remains open (the Vienna Convention on Diplomatic Relations of 1961 allows such an exception in Article 37: "The members of the family of a diplomatic agent forming part of his household shall, if they are not nationals of the receiving State, enjoy the privileges and immunities"). The matter is regulated in a similar fashion by the Convention on Special Missions of 1969 in Article 39.

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<sup>1</sup>*Democratic Republic of the Congo v. Belgium*, ICJ Reports 2002, p. 3.

<sup>2</sup>*Legal Status of Eastern Greenland (Norway v. Denmark)*, PCIJ 1933 (ser. A/B) No. 53 p. 71.

As for the entourage, their immunity will generally be respected if they stay in a foreign country pursuant to the Convention on Special Missions of 1969. However, it should be noted that such regulations apply solely to the States parties to the Convention (38 States as of March 30, 2015). It is unclear whether *ad hoc* arrangements with the host State, satisfactorily guarantee criminal immunity to these persons.

According to some members of the LAC, there is a need for a provision emphasizing that when the absolute immunity of the Head of State, the Head of Government and the Minister of Foreign Affairs expires the members of the family are no longer protected by any immunity (the *ratione temporis* scope); the provision may state as follows: "The immunity covering members of the family or the entourage of the Head of State, the Head of Government and the Minister of Foreign Affairs shall expire along with the termination of the official position of such person."

#### **1. 2. The material scope of the immunity *ratione personae***

The material scope of the immunity is closely related to the **temporal scope** of the immunity's enforceability. In the period when a person is holding a particular position – of the Head of State, the Head of Government, the Minister of Foreign Affairs – the scope of immunity of each of these persons is **absolute** (full): the immunity encompasses all acts performed by a given person, regardless of whether a particular act was within the functions associated with the position held or not (being an *ultra vires* act, or due to the fact that the act was of a private nature).

After the end of the term of office, the material scope of immunity of the Head of State, the Head of Government and the Minister of Foreign Affairs is subject to the following changes:

- a. acts being within the functions associated with the position/office held – official acts (with the exclusion of *ultra vires* acts) – are still covered by the absolute immunity,
- b. acts *ultra vires* and acts of a private nature are excluded from the immunity from the criminal jurisdiction of a foreign State.

Regardless of the nature of the act, if the Head of State, the Head of Government or the Minister of Foreign Affairs has committed an international crime, the person whose official

functions have terminated shall not enjoy immunity from criminal jurisdiction of a foreign State (see further point 4.1. of the Opinion).

Due to the above-mentioned changes in the material scope of the immunity *ratione personae* after the end of the period of occupying the position of the Head of State, the Head of Government and the Minister of Foreign Affairs, there might be a need to:

- a. distinguish between the official acts, *ultra vires* acts, and private acts; and
- b. define the concept of international crimes.

## **2. The immunity *ratione materiae* of representatives of States from foreign criminal jurisdiction**

Question 2: Who can enjoy functional immunity (*ratione materiae*) from foreign jurisdiction in criminal cases in accordance with international law? Are all State representatives (State organs within the meaning of Article 4 of the Articles on Responsibility of States for Internationally Wrongful Acts) and private entities, if they exercise State authority, entitled to this immunity?

The issues falling within the scope of this question have not yet been regulated in general international law, and the practice of States in this regard lacks uniformity. The matter is thus not so much the subject of codification, as "the progressive development of international law" within the meaning of Article 15 of the Statute of the ILC. While the full immunity (*ratione personae*) enjoyed by the Head of State, the Head of Government and the Minister of Foreign Affairs follows from the customary international law, no universal treaty or customary norms concerning the immunity from foreign criminal jurisdiction of State officials other than the listed persons, exist. These other officials do not enjoy full immunity. Arguably, they enjoy under customary norms functional immunity, i.e. immunity limited to official acts.

The definition of a State official seems crucial for the issue of the status and scope of the immunity *ratione materiae*. In the absence of regulations in the general international law defining and determining the legal status of State officials other than the Head of State, the Head of Government and the Minister of Foreign Affairs, in this respect national law remains decisive, as it results from the right of each State, fixed in the general international law, not only to choose the political, economic and social system, but also to determine the structure



of national authorities. At the same time, it seems advisable to combine the definition of the State official with the definition of the State organ within the meaning of Article 4 of the ILC's Articles on Responsibility of States for Internationally Wrongful Acts (*hereinafter* the ILC's Articles). Within the meaning of Article 4, "State organ" is "any person or entity which has that status in accordance with the internal law of the State" (para. 2). The Article defines the State organ widely enough to extend it to all kinds of public authorities (including other than the legislative, executive and judicial ones) and regardless of whether the organ is an organ of central Government or of a territorial unit of the State (para. 1).

For the regulation of the functional immunity of a State official from foreign criminal jurisdiction, it seems advisable to closely connect the status of the State official with the State functions. From this point of view, definition of the "State official" adopted so far by the ILC is too broad, because it gives such a status to individuals both representing the State and exercising State functions (Part I. Article 2(e); "State official" means any individual who represents the State or who exercises State functions"). Definition of the Special Rapporteur proposed in 2014 is based on a similar alternative (*represents the State or exercises State functions*) (Draft Article 2(e)(ii)). The *State officials* understood this way enjoy, in the light of the draft Article 5 adopted by the ILC in July 2014, the immunity *ratione materiae* from foreign criminal jurisdiction. This definition is – as mentioned – too broad, because representation of the State and the exercise of State functions cannot be expressed as an alternative, but rather as parts of one whole being the status of the State official. The exercise of State functions is a necessary consequence of the status of the State official held under the relevant regulations of the national law. The criticized broader definition of the *State official*, proposed by the ILC, gives unfunded protection to persons who do not represent a State; the bases of such protection are raised in practice often *post factum* as an attempt of validation of specific actions of given persons.

This Opinion clearly opposes granting the immunity *ratione materiae* to private entities exercising State functions. Thereby, persons and entities referred to in Article 5 of the ILC's Articles, i.e. those exercising some functions of the executive authority, but having no status of an organ of the State within the meaning of Article 4 of the ILC's Articles, could not enjoy this immunity.

The LAC is favourable to the position presented at the forum of the VIth Committee in 2014 by those States which clearly objected to including private persons within the scope of

this immunity. It is also worth supporting the position taken, *inter alia*, by Poland saying that the *ultra vires* acts of a State official do not justify granting the immunity *ratione materiae*, because, having a functional nature, the immunity includes within its scope only official acts. Thus, the immunity *ratione materiae* does not exclude criminal liability of a State official before a court of another State as a result of attributing an international crime to this person, the commitment of which cannot be regarded as the exercise of State functions. In the light of the ILC's Articles the possibility of attributing responsibility to the State for a wrongful act or acts as a result of activities of an organ exceeding its authority or violating its instructions has no significance in this respect.

The LAC is favourable to the position presented at the forum of the VIth Committee by those States which criticize as too broad the definition of the "State official" in the work to date of the ILC and believes that the term "State official" should be replaced with the term "representative of the State", because the immunity *ratione materiae* remains closely connected with the representative status of a given person. Supplementing the term "representative of the State" with the phrase "acting in that capacity" could also serve to emphasize the functional nature of the immunity *ratione materiae*. Such position was adopted by States speaking in the VIth Committee and should be taken into account in further work on these issues. At the same time, it would be advisable for the ILC to consider substituting the phrase "acting as such" with the expression "acting in that capacity" in the drafted Article 5, since the latter seems to be more precise. It is also more consistent with the position expressed above, supporting the strictly functional nature of the immunity *ratione materiae*, and limiting this immunity only to persons having the status of State representatives.

### **3. The *ultra vires* acts**

Question 3: What is the material scope of the functional immunity (i.e., in the context of the definition of *official acts* and *ultra vires* acts)?

While answering this question, the LAC distinguished two situations: the protection under the immunity *ratione personae* and that under immunity *ratione materiae*. In the first situation, the issue whether a given act was a part of official functions of a given person or was an act of *ultra vires* nature, does not arise in the period when the person in question

holds a position guaranteeing full immunity. Persons covered by the immunity *ratione personae* are not subject to the criminal jurisdiction of foreign States in respect of any activities, including private activities.

The issue of the *ultra vires* acts may arise only when a given person does not hold the position any more, and is accused in another State of committing a crime there. Then, since such a person may still be entitled to immunity when he/she proves that those acts were committed as a part of official functions, a foreign State may challenge such defence invoking the doctrine of the *ultra vires* acts. Here, we touch upon procedural matters; it can be concluded that in reality the burden of proving that a given act formed a part of official functions, and thus was not the *ultra vires* act, will fall on the accused. The evidence problems will be very difficult in such cases; the knowledge of the law of the State in which the persons concerned exercised their functions of the Head of State, the Head of Government or the Minister of Foreign Affairs will be required.

The acts classified as *ultra vires* will be subject to the criminal jurisdiction of foreign States against persons covered by the immunity *ratione personae*, after the expiry of their functions.

The LAC is of the opinion that it will not be possible to precisely define the concept of *ultra vires* acts, except for saying that these acts are not a part of the official functions of a given person in the light of law of the State in which the person occupied his/her position (exercised authority, functions).

As for the second situation, regarding persons protected by the immunity *ratione materiae*, the issue of *ultra vires* acts will arise even in the period a given person is holding the official position, representing an important element in the assessment whether the acts are within the scope of official functions of the person (*official acts*). The same difficulties as indicated above will arise. Moreover, the conduct of proceedings in the course of exercising an official function may interfere with the person's performance, especially that abuses are possible.

In addition, it needs to be resolved who should evaluate whether the acts are within the scope of the function exercised, the court of the forum State or the State on behalf of which the person concerned is acting.

#### 4. International crimes as exceptions to the possibility of invoking the immunity effectively

Question 4: Are there exceptions to the functional immunity in accordance with international law? Which international obligations of the Republic of Poland exclude the functional immunity of a foreign State official when applying Polish jurisdiction in criminal cases?

##### 4.1. Are there exceptions to the functional immunity in accordance with international law?

Referring to exception to the immunity *ratione materiae* we limit the problem to situations in which a given person is actually entitled to this immunity. The lack of immunity in regard, for example, to private actions of a given person, is yet another issue. Practice also shows that the "State officials" (in a broad sense of the term) do not enjoy the immunity *ratione materiae* in respect of crimes committed on the territory of a forum State or a third country involving, e.g., a serious breach of the territorial sovereignty of a State (sabotage, kidnapping, murder committed by a secret service agent)<sup>3</sup>, if their immunity does not arise, e.g., from a special regime for diplomats, consuls, special mission or *ad hoc* agreement (consent of the forum State).<sup>4</sup> The exception is understood as a situation in which, as a rule, a person enjoying the functional immunity for some reasons is not protected by the immunity. Furthermore, to talk about exceptions in relation to criminal jurisdiction, one must assume that functional immunity protects against the jurisdiction of the forum State with regard to crimes committed in relation to the exercise of official functions.<sup>5</sup> The problem whether this is an exception or a situation not covered by the immunity will require clarification in the work of the ILC, especially that the argument that the commission of

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<sup>3</sup> This is demonstrated by, among others, the following cases: *Locerbie* – well-known case of the decision of the Scottish court operating in the Netherlands, judgment of 31 January 2001 (*Al-Megrahi and Fhima*); a high-profile case *Rainbow Warrior*; *Osman Bin Haji Mohamed Ali and Others*, judgments of the Privy Council UK of 1968 [1 AC 430] and 1968 [AC 829]; *Mohammed Yusufu* [1985] CrimLR 510, *Khurts Bat v. Investigating Judge of the Federal Court of Germany* [2011] EWHC 2029 (Admin), [2012] 3 WLR 180.

<sup>4</sup> The ICJ seems to confirm this. In the case concerning *Certain Questions of Mutual Assistance in Criminal Matters* (Djibouti v. France), in relation to *procureur de la République* and the Head of the National Security Service of Djibouti, the Court noted that: "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" (ICJ Reports 2008, para. 196).

<sup>5</sup> This problem is indicated, *inter alia*, in the Memorandum by the Secretariat "Immunity of State officials from foreign criminal jurisdiction," A/CN.4/596, 31 March 2008, pt. 160.

international crimes do not fall within the scope of official functions protected by the immunity appears, among others, in the case law (e.g. in cases *Pinochet No. 3*,<sup>6</sup> *Bouterse*,<sup>7</sup> *Samantar*<sup>8</sup>). It is also worth noting that the Institute of International Law in its Resolution on the Immunity from Jurisdiction of the State and of Persons Who Act on behalf of the State in case of International Crimes of 2009 accepted that international crimes are not covered by immunity.

There is no doubt that States can conclude international agreements excluding the effect of the functional immunity in their mutual relations. The immunity *ratione materiae* can be excluded in case an individual is tried before an international court for committing international crimes, provided the court has jurisdiction.

When it comes to exceptions based on customary law, the only clearly established exception is waiver of immunity by the State on behalf of which an official is acting.<sup>9</sup>

There is no doubt that a tendency to exclude the immunity *ratione materiae* in case of committing international crimes, such as genocide, crimes against humanity, war crimes, torture, enjoys increasing support. It is based on the belief that the perpetrators of the most serious international crimes cannot go unpunished. A convincing argument along those lines was presented in a joint separate opinion of judges Higgins, Kooijmans and Buergenthal in the *Arrest Warrant case*.<sup>10</sup>

However, currently, the exemption referred to herein cannot be considered to be based on a well-established norm of international customary law. The works of the ILC clearly note

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<sup>6</sup> Judgment of the House of Lords of 24 March 1999 in *Regina v. Bartle and the Commissioner of Police for the Metropolis and Others Ex Parte Pinochet*, see the position of Lord Hutton, p. 639, Lord Browne-Wilkinson, p. 593.

<sup>7</sup> Judgment of the Court of Appeal in Amsterdam of 20 November 2000., para. 4 2.

<sup>8</sup> Judgment of the USA Court of Appeals in *Yousuf v. Samantar*, 552 F.3d 371 (4th Cir. 2009), judgment of the Supreme Court in *Samantar v. Yousuf*, 130 S.Ct. 2278 (2010).

<sup>9</sup> Arrest Warrant of 11 April 2000, *op.cit.*, para. 61.

<sup>10</sup> Para. 79 of the opinion: "We wish to point out, however, that the frequently expressed conviction of the international community that perpetrators of grave and inhuman international crimes should not go unpunished does not ipso facto mean that immunities are unavailable whenever impunity would be the outcome. The nature of such crimes and the circumstances under which they are committed, usually by making use of the State apparatus, makes it less than easy to find a convincing argument for shielding the alleged perpetrator by granting him or her immunity from criminal process. But immunities serve other purposes which have their own intrinsic value and to which we referred in paragraph 77 above. International law seeks the accommodation of this value with the fight against impunity, and not the triumph of one norm over the other. A State may exercise the criminal jurisdiction which it has under international law, but in doing so it is subject to other legal obligations, whether they pertain to the non-exercise of power in the territory of another State or to the required respect for the law of diplomatic relations or, as in the present case, to the procedural immunities of State officials. In view of the worldwide aversion to these crimes, such immunities have to be recognized with restraint, in particular when there is reason to believe that crimes have been committed which have been universally condemned in international conventions."

the existing differences of opinion and practice of States. The case law of national courts is not uniform, and the ICJ is temperate.

Nevertheless, the exception to the immunity *ratione materiae* is confirmed by the decisions of national courts, pointing to the practice or *opinio iuris*, e.g., in *Eichmann*,<sup>11</sup> *Pinochet*, *Bouterse*, *Habré*,<sup>12</sup> *Qaddafi*,<sup>13</sup> by agreements obligating States parties to prevent and punish international crimes, by the establishment of the Nuremberg Tribunal, and then other international tribunals to prosecute international crimes (for the former Yugoslavia, Rwanda, and above all the ICC) and judgments of these courts.<sup>14</sup>

It is also worth recalling the above-mentioned Resolution of the Institute of International Law of 2009 giving expression to the views of "the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law."<sup>15</sup> Article II of the Resolution confirms the obligation of States arising from treaties and customary law to prevent and suppress international crimes,<sup>16</sup> while Article III, referring specifically to the immunity of a person who acts on behalf of a State, provides that with regard to international crimes no immunity from jurisdiction applies, with the exception of personal immunity (*ratione personae*) (however, the exception ceases to exist when the function of the person has ended).<sup>17</sup>

**The LAC is in favour of this trend. After the end of official functions/termination of the official position, the persons covered by the immunity *ratione personae* may be held criminally responsible by foreign States for committing international crimes; the functional**

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<sup>11</sup> Judgment of the District Court of Jerusalem of 12 December 1961 in *Attorney-General of the Government of Israel v. Adolf Eichmann*.

<sup>12</sup> Judgment of the Court of Appeal of Dakar of 4 July 2000 in *Hissène Habré*, cassation judgment of 20 March 2001.

<sup>13</sup> Judgment of Cour de Cassation of 13 March 2001.

<sup>14</sup> See, e.g., the Memorandum, *op. cit.*, pt. 199.

<sup>15</sup> Article 38(1)(d) of the Statute of the International Court of Justice.

<sup>16</sup> Article II states: "1. Immunities are conferred to ensure an orderly allocation and exercise of jurisdiction in accordance with international law in proceedings concerning States, to respect the sovereign equality of States and to permit the effective performance of the functions of persons who act on behalf of States. 2. Pursuant to treaties and customary international law, States have an obligation to prevent and suppress international crimes. Immunities should not constitute an obstacle to the appropriate reparation to which victims of crimes addressed by this Resolution are entitled. 3. States should consider waiving immunity where international crimes are allegedly committed by their agents."

<sup>17</sup> Article III reads: "Immunity of persons who act on behalf of a State" provides: "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. 3. The above provisions are without prejudice to: (a) the responsibility under international law of a person referred to in the preceding paragraphs; (b) the attribution to a State of the act of any such person constituting an international crime."

immunity (*ratione materiae*) does not cover international crimes under any circumstances.

The ILC should work out a catalogue and definitions of acts regarded as international crimes. In its resolution of 2009, the Institute of International Law adopted only a general definition, recognizing that:

"international crimes" means serious crimes under international law such as genocide, crimes against humanity, torture and war crimes, as reflected in relevant treaties and the statutes and jurisprudence of international courts and tribunals."

Draft of the Commission should, however, refer in this respect to Article 5 of the Statute of the International Criminal Court of 1998.

The crime of aggression requires separate attention. Arrangements in Kampala on the procedure for prosecuting the crime of aggression before the ICC, as well as the elements of the crime of aggression are not clear. The established provisions will not enter into force until after 2017. Moreover, the crime of aggression can be committed only if the aggression is committed by the State represented by the accused. Thus, individual criminal liability is inextricably intertwined with the liability of the State itself, which obviously raises a number of legal problems. It is unlikely that by the way of the regulations drafted by the ILC general solutions to these complex problems may be achieved.

#### **4.2. Which international obligations of the Republic of Poland exclude the functional immunity of a foreign State official when applying Polish jurisdiction in criminal cases?**

The framework of this opinion does not allow for a more thorough analysis of the Polish international obligations, the LAC thus limits itself to pointing to some examples. Poland is bound by international agreements which introduce the obligation to prosecute and punish perpetrators of some, the most serious international crimes or their components (e.g. torture); some of the agreements clearly disregard official capacity of a perpetrator, to wit:

- the Convention on the Prevention and Punishment of the Crime of Genocide of 1948 obliges Poland to punish the crime of genocide, if genocide is committed in its territory, and Article IV states that: "Persons committing genocide or any of the other acts enumerated in article III shall be punished, whether they are constitutionally responsible rulers, public officials or private individuals,"

- the Geneva Conventions for the Protection of War Victims of 1949, e.g., Article 49 of the Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (First Geneva Convention) states: “The High Contracting Parties undertake to enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches of the present Convention defined in the following Article. Each High Contracting Party shall be under the obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and shall bring such persons, regardless of their nationality, before its own courts. It may also, if it prefers, and in accordance with the provisions of its own legislation, hand such persons over for trial to another High Contracting Party concerned, provided such High Contracting Party has made out a prima facie case. (...)”,
- The Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment of 1984 obliges Poland to punish acts referred to in the Convention; Article 1 contains a definition of “torture,” from which it is clear that these are acts committed by State officials.<sup>18</sup> The Convention is based on the *aut dedere aut iudicare* principle (Article 7).

However, it should be kept in mind that in the *Arrest Warrant* case the ICJ stated that international agreements obligating the State to extend its jurisdiction over certain crimes do not affect immunities granted under customary law.<sup>19</sup>

Thus, in the absence of a clear provision on immunity the Polish court deciding the case will have to determine, first, whether it has jurisdiction in the case (territorial, extra-territorial, universal), and second, whether there is an exception to the immunity *ratione materiae*.

Article 113 of the Polish Penal Code confirms that Poland may exercise criminal jurisdiction (or give a person over, e.g., to another State) in relation to international crimes

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<sup>18</sup> Article 1(1): “For the purposes of this Convention, the term “torture” means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions ”

<sup>19</sup> *Arrest Warrant* of 11 April 2000, *op.cit.*, para. 59.



committed abroad when it is obliged to do so under an international agreement or in respect to a crime specified in the Statute of the ICC.

Article 113 reads:

"Notwithstanding regulations in force in the place of the commission of the offence, the Polish penal law shall be applied to a Polish citizen or an alien, with respect to whom no decision on extradition has been taken, in the case of the commission abroad of an offence which the Republic of Poland is obligated to prosecute under international agreements, or an offence covered by the Rome Statute of the International Criminal Court, done at Rome on 17 July 1998 (Journal of Laws of 2003, No. 78, item 708)."

This provision is based on the assumption that Poland may exercise its universal jurisdiction in relation to crimes defined in the Statute of the ICC. It does not refer specifically to immunities, although it is clear that these issues may arise in the application of that provision. Judges will then have to decide on the basis of general international law, and thus either establish the existence of customary law norm or take part in the process of crystallization of the new law.

##### **5. The concept of *criminal jurisdiction of a foreign State***

Question 5: What is the meaning of the term "criminal jurisdiction" used in the work of the ILC? Is it appropriate to make attempts to define the term in the ILC's Articles, and if so, in what way?

According to the proposal of the ILC's Special Rapporteur:

"(a) The term "criminal jurisdiction" means all of the forms of jurisdiction, processes, procedures and acts which, under the law of the State that purports to exercise jurisdiction, are needed in order for a court to establish and enforce individual criminal responsibility arising from the commission of an act established as a crime or misdemeanor under the applicable law of that State. For the purposes of the definition of the term "criminal jurisdiction", the basis of the State's competence to exercise jurisdiction is irrelevant."<sup>20</sup>

The LAC is against defining the concept of *criminal jurisdiction of a foreign State*. Agreeing on such a definition, due to the diversity of solutions in different countries, will not lead to a satisfactory formula. The definition will be inherently vague, and negotiations over

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<sup>20</sup>Second report on the Immunity of State officials from foreign criminal jurisdiction By Concepción Escobar Hernández, Special Rapporteur, International Law Commission, Sixty-fifth session, Geneva, 6 May-7 June and 8 July-9 August 2013, pt. 42, p. 14; Report available at:

<http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N13/280/89/PDF/N1328089.pdf?OpenElement>

its meaning will unnecessarily prolong the work of the Commission. The concept of *criminal jurisdiction of a foreign State* should be left to practice, assuming that its interpretation will remain within a reasonable understanding of this concept.

## **6. Immunity from foreign jurisdiction in criminal cases of legal persons**

Question 6: Are only natural persons entitled to immunity from foreign jurisdiction in criminal cases in accordance with international law?

This question is, in fact, whether the Legal Advisory Committee is in favour of extending the work of the International Law Commission relating to immunity of State representatives from foreign criminal jurisdiction into a completely new issue, namely the immunity of "collective entities" from foreign jurisdiction exercised in relation to acts prohibited under penalty and committed by these collective entities as a part of exercising the State authority. The analysis of the work of the ILC leads to the conclusion that at present the works do not address the immunity of collective entities. The text of the draft articles adopted by the ILC so far clearly document such a conclusion. Moreover, the omission of the immunity of collective entities in the work of the ILC seems to stem from the very definition of "criminal jurisdiction."

### **6.1. Understanding of the concepts of an "individual" and "persons" used in Article 2(e) and Articles 3 and 5 adopted by the ILC**

The ILC defined the term "State official" in Article 2(e), as an "individual" and not as a "person." At the same time, the Chairman of the Drafting Committee, Mr. Gilberto Vergne Saboia, stated that the definition covers only natural persons, while intentionally excluding legal persons from its scope. The Chairman stressed that "the use of the word "individual" as opposed to the word "person," which can include both natural persons and legal persons, seeks to emphasize this aspect," i.e. the exclusion of legal persons from the definition of "State official."<sup>21</sup>

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<sup>21</sup> Cf. IMMUNITY OF STATE OFFICIALS FROM FOREIGN CRIMINAL JURISDICTION, Statement of the Chairman of the Drafting Committee, Mr. Gilberto Vergne Saboia 25 July 2014, text available at: [http://legal.un.org/ilc/sessions/66/DC\\_ChairmanStatement\(Immunity\).pdf](http://legal.un.org/ilc/sessions/66/DC_ChairmanStatement(Immunity).pdf).

In view of the unambiguous clarification in Article 2(e) that the immunity of State representatives covers only natural persons, one cannot derive any contrary consequences of the use of the term “persons” in the title of Articles 3 and 5 of the draft articles. The use of the term “persons” in Article 3 is fully justified, since there is no doubt that the immunity *ratione personae* refers to natural persons, as the functions mentioned in that provision can be performed only by natural persons.

On the other hand, as pointed out by the Chairman of the Drafting Committee, the use of the term “persons” in the title of Article 5 tracks the language of corresponding Article 3. Therefore, it cannot be deduced from Article 5 that the term “State officials” used in that provision could mean also other entities than those defined in Article 2(e), and thus anybody other than natural persons.

#### **6.2. Understanding of the concept of a “person” in Article 2(e) according to the proposal of the Special Rapporteur of 2014, not adopted by the ILC**

In Article 2(e) (ii) of 2014, the Special Rapporteur proposes the following wording: “(e) State official means: “Any other person who acts on behalf (...)”

In the context of the position of the Chairman of the Drafting Committee, Mr. Gilberto Vergne Saboia, cited above, the use of the term “person” should suggest that the proposed definition of the “State official” includes both natural persons and collective entities. **Such a conclusion cannot be approved after reading the comprehensive report of the Special Rapporteur.**<sup>22</sup> The analyses it contains lead to the conclusion that the term “person” included in the Report and in the proposed new wording of Article 2(e) shall refer exclusively to natural persons. The Report provides an analysis of both the case law of international tribunals and national penal courts concerning cases in which the immunity *ratione materiae* was invoked. These cases were related to criminal responsibility of natural persons, or handing natural persons over to another criminal jurisdiction. It should be also concluded from the Report that in the draft articles prepared by the ILC so far the Commission uses the

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<sup>22</sup>Third report on the Immunity of State officials from foreign criminal jurisdiction By Concepción Escobar Hernández, Special Rapporteur, International Law Commission, Sixty-sixth session, Geneva, 5 May-6 June and 7 July-8 August 2014 Report available at:

<http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N14/412/64/PDF/N1441264.pdf?OpenElement>

term "entity" to refer to collective entities, while it reserves the term "person" to natural persons.<sup>23</sup>

**6.3. Does the concept of "criminal jurisdiction" include also jurisdiction with regard to conducting proceedings and ruling on liability of collective entities for acts prohibited under penalty?**

Conducting proceedings against collective entities for acts prohibited under penalty is not the exercise of criminal jurisdiction in the classic sense of this term. It should be emphasized that no international criminal court has jurisdiction over collective entities.<sup>24</sup> When it comes to national criminal jurisdictions, not all States recognize "criminal" liability of collective entities for acts prohibited under penalty. In addition, European countries adopted different models of liability of collective entities for prohibited acts. The analysis of the concepts implemented in this regard goes well beyond the framework of this opinion. It is enough to say that in some countries it is the ancillary liability, dependent on prior attribution of perpetration and guilt to a natural person (as in Poland).

In summary, the issue of immunities of State representatives from foreign criminal jurisdiction is related only to natural persons. At the present time no general standard of exercising the national criminal jurisdiction towards collective entities exists, and thus it seems premature to consider the immunity of collective entities from such jurisdiction.

**III. Final remarks**

The Legal Advisory Committee would like to draw attention to some additional issues.

Firstly, the Committee has no doubt that the issues of immunities – unfortunately referred to as *ratione personae*, and thus immunities granted to the Head of State, the Head of Government and the Minister of Foreign Affairs, are ready for codification in a form of an international instrument. The situation is dramatically different in relation to the issues of immunities – equally unfortunately referred to as *ratione materiae*, relating to other

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<sup>23</sup> Cf. Article 4 of the Draft Articles on Responsibility of States for Internationally Wrongful Acts; Cf. also pts. 106-107 (pp. 36-37) of the Report cited in footnote 20.

<sup>24</sup> On attempts to introduce it to the Statute of the ICC see: A. Clapham, Extending International Criminal Law beyond the Individual to Corporations and Armed Opposition Groups, *Journal of International Criminal Justice* No. 6/2008, pp. 914-915.

representatives of a State. In that area, practice of States is far from being uniform, and there is no *opinio iuris* as to the fundamental matters. Here, the Commission embarks upon the path of creating new law. While the work of the Commission concerning the immunities *ratione personae* may reach a successful and rapid completion, the same cannot be said about the work on the immunities *ratione materiae*. The combination of both topics in one project prevents the establishment of rules where it is achievable.<sup>25</sup> Therefore, the LAC suggests the ILC considering the separation of the issues of immunities, and the division of the Commission's work into two stages: the first, dedicated to the immunity *ratione personae*, and the second, dedicated to the immunity *ratione materiae*. The core of the regulation of the immunity *ratione personae* is, on the one hand, the recognition of the full immunity in criminal cases for three persons – the Head of State, the Head of Government and the Minister of Foreign Affairs and, possibly, the members of their families being a part of the same household – (according to Article 37 of the Vienna Convention on Diplomatic Relations of 1961 – *the members of the family ... forming part of his household*) during the exercise by such persons of their official functions (holding of a specific position in the State Government), and on the other hand, to allow their punishment by a foreign State for international crimes and, what is of a lesser political and practical importance, for crimes done privately, after the end of holding the office. There is a hope that a well-balanced regulation will ensure safe/uninterrupted exercise of the functions by the Head of State, the Head of Government and the Minister of Foreign Affairs, while at the same time, will deprive these persons of impunity for commitment of international crimes or private crimes, when their own State does not exercise its criminal jurisdiction, and as to whom a foreign State has grounds recognized by international law for the exercise of its criminal jurisdiction (subsidiarity of foreign criminal jurisdiction requires confirmation in the drafted rules).

**Secondly**, there is a need to regulate the inviolability of persons covered by the immunity *ratione personae*, following the model of Article 29 of the Vienna Convention on Diplomatic Relations of 1961. The provision should read as follows: "The person of a Head of State, Head of Government or Minister of Foreign Affairs shall be inviolable. Such persons shall not be liable to any form of arrest or detention. Other States shall treat such persons

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<sup>25</sup> A clearly pessimistic assessment of the progress of the work of the ILC on the discussed matter is given by the Minister of Foreign Affairs of the Netherlands in his letter establishing an expert group for analysis of this issue for the needs of the Dutch government – a letter attached to the Report submitted to the members of the LAC at the December meeting in 2014.

within their territory with due respect and shall take all appropriate steps to prevent any attack on such persons, their freedom or dignity.”

**Thirdly**, there is a new project in the International Law Commission by the American member of the Commission (Prof. Sean Murphy) related to crimes against humanity. It will be necessary to coordinate the work on both topics.

**Fourthly**, when it comes to considerations on the immunity *ratione personae* in connection with the recognition or non-recognition of a State or government, it is worth referring to the proposal brought forward by Poland for the Commission to address the legal implications of the non-recognition of a State or government (cf. speech by Ambassador Janusz Stańczyk, during the session of the VIth Committee in October of 2014.).



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(Rapporteurs of the Committee M. Frankowska, R. Kwiecień, M. Wąsek-Wiaderek, A. Wyrozumska)