# IMMUNITY OF STATE OFFICIALS FROM FOREIGN CRIMINAL JURISDICTION

[Agenda item 5]

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## Second report on the immunity of State officials from foreign criminal jurisdiction, by Ms. Concepción Escobar Hernández, Special Rapporteur

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## Multilateral instruments cited in the present report

| | *Source* |
|---|---|
| Vienna Convention on Diplomatic Relations (Vienna, 18 April 1961) | United Nations, *Treaty Series*, vol. 500, No. 7310, p. 95. |
| Vienna Convention on Consular Relations (Vienna, 24 April 1963) | *Ibid.*, vol. 596, No. 8638, p. 261. |
| Convention on Special Missions (New York, 8 December 1969) | *Ibid.*, vol. 1400, No. 23431, p. 231. |
| Convention on the prevention and punishment of crimes against internationally protected persons, including diplomatic agents (New York, 14 December 1973) | *Ibid.*, vol. 1035, No. 15410, p. 167. |
| United Nations Convention on Jurisdictional Immunities of States and Their Property (New York, 2 December 2004) | *Official Records of the General Assembly, Fifty-ninth Session, Supplement No. 49* (A/59/49 and Corr.1), vol. I, resolution 59/38, annex. |

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Institute of International Law

"Immunities from jurisdiction and execution of Heads of State and of Government in international law", *Yearbook*, vol. 69, Session of Vancouver, 2001, Paris, Pedone, pp. 743–755.

"Resolution on immunity from jurisdiction of the State and of persons who act on behalf of the State in case of international crimes", *Yearbook*, vol. 73, Session of Naples, 2009, Paris, Pedone, pp. 226–228.

## 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 at its fifty-eighth session, in 2006, on the basis of a proposal contained in annex I to the report of the Commission on the work of that session.[1] At its fifty-ninth session, in 2007, the Commission decided to include this topic in its programme of work and appointed Mr. Roman A. Kolodkin as Special Rapporteur.[2] At the same session, the Secretariat was requested to prepare a background study on the topic.[3]

2. The former Special Rapporteur submitted three reports, in which he established the boundaries within which the topic should be considered, analysed a number of substantive issues in connection with the immunity of State officials from foreign criminal jurisdiction, and examined the procedural issues related to this type of immunity.[4] The Commission considered the reports of the Special Rapporteur at its sixtieth and sixty-third sessions, held in 2008 and 2011, respectively. The Sixth Committee of the General Assembly dealt with the topic during its consideration of the report of the Commission, particularly in 2008 and 2011.

3. At its 3132nd meeting, held on 22 May 2012, the Commission appointed Ms. Concepción Escobar Hernández as Special Rapporteur to replace Mr. Kolodkin, who was no longer a member of the Commission.[5] Following her appointment, the Special Rapporteur held a first set of informal consultations with the members of the Commission on 30 May 2012 on the basis of a list of questions which she had submitted in an informal working paper and which were included in the preliminary report.[6]

4. The Special Rapporteur submitted a preliminary report on the immunity of State officials from foreign criminal jurisdiction, which the Commission considered during the second part of its sixty-fourth session, held in 2012.[7]

5. The preliminary report was a "transitional report", in which the Special Rapporteur sought "to help clarify the terms of the debate up to this point and to identify the principal points of contention that remain and on which the Commission may wish to continue to work in the future".[8] To that end, the preliminary report reviewed the consideration of the topic of the immunity of State officials from foreign criminal jurisdiction during the quinquennium 2007–2011 on three levels: (*a*) the work carried out by the former Special Rapporteur; (*b*) the debate in the Commission; and (*c*) the debate in the Sixth Committee.

6. On the basis of these elements, the preliminary report identified a number of issues for consideration, on which no consensus had been reached during the previous quinquennium and which affected almost all of the issues covered in the former Special Rapporteur's three reports. As a result of this review, the Special Rapporteur divided these issues into four groups, to be considered over the current quinquennium:

1. General issues of a methodological and conceptual nature:
   - 1.1 The distinction between immunity *ratione materiae* and immunity *ratione personae* and the implications of that distinction
   - 1.2 Immunity in the system of values and principles of contemporary international law
   - 1.3 The relationship between immunity, on the one hand, and the responsibility of States and the criminal responsibility of individuals, on the other
2. Immunity *ratione personae*:
   - 2.1 The persons who enjoy immunity
   - 2.2 The material scope of immunity: private acts and official acts
   - 2.3 The absolute or restricted nature of immunity and, in particular, the role that international crimes play or should play
3. Immunity *ratione materiae*:
   - 3.1 The persons who enjoy immunity: the remaining terminological controversy and the definition of an "official"
   - 3.2 The definition of an "official act" and its relationship to the responsibility of the State
   - 3.3 The absolute or restricted nature of immunity: exceptions and international crimes
4. Procedural aspects of immunity.[9]

[1] *Yearbook … 2006*, vol. II (Part Two), p. 185, para. 257 and annex I.

[2] *Yearbook … 2007*, vol. II (Part Two), p. 98, para. 376.

[3] *Ibid.*, p. 101, para. 386. For the memorandum by the Secretariat, see A/CN.4/596 and Corr.1 (available from the Commission's website, documents of the sixtieth session; the final text will be published as an addendum to *Yearbook … 2008*, vol. II (Part One)).

[4] The preliminary report appeared in *Yearbook … 2008*, vol. II (Part One), document A/CN.4/601, p. 157; the second report appeared in *Yearbook … 2010*, vol. II (Part One), document A/CN.4/631; and the third report appeared in *Yearbook … 2011*, vol. II (Part One), document A/CN.4/646.

[5] *Yearbook … 2012*, vol. I, 3132nd meeting; and *ibid.*, vol. II (Part Two), para. 84.

[6] *Ibid.*, vol. II (Part One), document A/CN.4/654, para. 73.

[7] *Ibid.*, vol. II (Part Two), paras. 86–139.

[8] *Ibid.*, vol. II (Part One), document A/CN.4/654, para. 5.

[9] *Ibid.*, para. 72.

7. The preliminary report also included certain methodological considerations that must be taken into account in the Commission's work on the topic covered in this report during the present quinquennium. These methodological considerations, which were set out by the Special Rapporteur in introducing her preliminary report to the Commission, can be summarized as follows:

(*a*) Future work on the topic should be based on the reports submitted previously by the former Special Rapporteur and on the Secretariat's study. However, bearing in mind that there are clear differences of opinion among members of the Commission and within the Sixth Committee, it should also take into consideration the various opinions expressed in both forums in order to move forward from the previous work of the Secretariat and the former Special Rapporteur;

(*b*) The topic of the immunity of State officials from foreign criminal jurisdiction must be approached from the perspective of both *lex lata* and *lex ferenda*; in other words, of both codification and progressive development. In any event, owing to the difficult and sensitive nature of the topic, it seems more appropriate to begin with *lex lata* considerations and, at a later date, to consider whether it is necessary and possible to formulate proposals *de lege ferenda*;

(*c*) Consideration of the topic should take a consistently systemic approach, thus ensuring that any normative proposals made by the Commission fit seamlessly into the international legal system as a whole. Therefore, all the norms, principles and values of international law that are relevant to the topic under consideration must be taken into account;

(*d*) Matters related to the immunity of State officials from foreign criminal jurisdiction should be considered in a structured and progressive manner, addressing, step by step, the various issues included in the aforementioned four thematic groups;

(*e*) The Commission's consideration of the topic should include discussion of the draft articles contained in the annual reports prepared by the Special Rapporteur.

8. The Commission held an interesting debate on the preliminary report, covering the main issues raised therein from both a methodological and a substantive perspective.[10] Generally speaking, a methodological approach based on structured handling of the issues received widespread support. The majority also endorsed the systemic approach suggested by the Special Rapporteur, although some members of the Commission voiced reservations regarding inclusion of the principles and values of current international law as an analytical tool. With regard to substantive considerations, the various statements by members of the Commission revealed a broad consensus on the identification of issues that require further consideration during the present quinquennium. However, differences of opinion on substantive aspects of a number of issues raised in the preliminary report remained.

9. On the basis of this debate, the Commission decided to request States

to provide information on their national law and practice on the following questions:

(*a*) Does the distinction between immunity *ratione personae* and immunity *ratione materiae* result in different legal consequences and, if so, how are they treated differently?

(*b*) What criteria are used in identifying the persons covered by immunity *ratione personae*?[11]

The General Assembly also drew States' attention to the benefits of providing the Commission with the above information.[12] The Special Rapporteur would like to thank the States that responded to those questions in November 2012, during the discussions of the Sixth Committee, for their cooperation.

10. The Sixth Committee examined the preliminary report of the Special Rapporteur on the immunity of State officials from foreign criminal jurisdiction as part of its consideration of the report of the Commission during the sixty-seventh session of the General Assembly.[13] The interesting statements made during that discussion show that there is broad support for the methodological approaches outlined in the preliminary report and the workplan contained therein, including the proposal to organize future work around the introduction of draft articles. It should also be noted that many delegations endorsed the use of a dual methodological approach based on both codification and progressive development, including the prudent approach advocated by the Special Rapporteur in her preliminary report, in which she suggested that the work should begin with an analysis of *lex lata* and continue with proposals *de lege ferenda*.

11. With regard to the substantive issues outlined in the preliminary report, there was also extensive discussion of the key points on which there is still disagreement. In particular, the debate focused both directly and indirectly on exceptions to immunity, on the impact that new developments in international criminal law could or should have on the topic, and on the growing importance of this new area within the overall system of contemporary international law. However, it should also be noted that there is still no consensus on the majority of the topic's substantive issues.

12. In any event, it should be noted that the States involved in the work of the Sixth Committee continue to attach great importance to the topic. This was demonstrated once again by General Assembly resolution 67/92, adopted by consensus on 14 December 2012, paragraph 8 of which invites the Commission to continue to give priority to the topic "Immunity of State officials from foreign criminal jurisdiction".

[10] For a summary of that debate, see *ibid.*, vol. II (Part Two), paras. 86–139. See also *ibid.*, vol. I, 3143rd–3147th meetings.

[11] See *ibid.*, vol. II (Part Two), para. 28.

[12] See General Assembly resolution 67/92 of 14 December 2012, para. 4.

[13] The Sixth Committee considered the question of the immunity of State officials from foreign criminal jurisdiction at its 20th–23rd meetings during that session. In addition, two States referred to the question at the 19th meeting (see *Official Records of the General Assembly, Sixty-seventh Session, Sixth Committee*, 19th–23rd meetings (A/C.6/67/SR.19–23). See also Topical summary of the discussion held in the Sixth Committee of the General Assembly during its sixty-seventh session, prepared by the Secretariat, A/CN.4/657, paras. 26–38.

## Chapter I

## Workplan and structure of the present report

13. The present report builds on the methodological approaches and general workplan set out in the preliminary report. It also takes into account the debates in both the Commission and the Sixth Committee in 2012 and, from a practical point of view, the need to provide the Commission with an operational tool so that it can begin discussions at this session. To that end, the report takes into consideration the relevant theoretical studies and the analysis of practice contained in the reports prepared by the former Special Rapporteur and in the Secretariat's study.[14] New developments over the past year, particularly the jurisprudence of ICJ and of one domestic court, have also been taken into account as appropriate. Worthy of particular note is the 25 July 2012 judgment of the Swiss Federal Criminal Court.[15]

14. Based on these considerations, and with the methodological goal of facilitating a structured and systemic discussion of the topic, this report will address, in order, the following issues:

(*a*) The scope of the topic and of the draft articles (chap. II);

(*b*) The concepts of immunity and jurisdiction (chap. III);

(*c*) The distinction between immunity *ratione personae* and immunity *ratione materiae* (chap. IV);

(*d*) Identification of the basic norms comprising the regime of immunity *ratione personae* (chap. V).

15. Thus, the fundamental issues set out in sections 1.1, 2.1 and 2.2 of the thematic groups referred to in the preliminary report will be addressed.[16] In addition, there are three issues that should be considered at the outset: a clear delimitation of the scope of the draft articles to be prepared under the topic, the concept of criminal jurisdiction, and the concept of immunity from foreign criminal jurisdiction.

16. Each of the aforementioned issues is covered in draft articles, the nature of which is necessarily different. Thus, in the draft articles on scope, the terms "immunity" and "jurisdiction" and the terms "immunity *ratione personae*" and "immunity *ratione materiae*" are introductory and descriptive, and should therefore be included in an introductory part one of the draft articles that focuses on establishing their scope and on definitions. On the other hand, the draft articles on the norms governing immunity *ratione personae* are designed to establish the substantive legal regime applicable to this type of immunity, and should therefore be included in a separate and specific part of the draft articles.

17. Lastly, it was deemed unnecessary to consider separately, at this time, sections 1.2 (Immunity in the system of values and principles of contemporary international law) and 1.3 (The relationship between immunity, on the one hand, and the responsibility of States and the criminal responsibility of individuals, on the other), contained in the first group of issues set out in the preliminary report. While it is true that these are cross-cutting issues when considering the topic of the immunity of State officials from foreign criminal jurisdiction as a whole, an in-depth study of them will be most relevant in the context of other issues to be taken up in future reports.

18. The same can be said of the omission from this second report of any consideration of section 2.3 (The absolute or restricted nature of immunity and, in particular, the role that international crimes play or should play), contained in the second group of issues set out in the preliminary report. Although these issues concern immunity *ratione materiae*, their consideration is closely related to the general issues associated with exceptions to immunity; therefore, it is considered more useful to address them at a later stage of the work.

[14] A/CN.4/596 and Corr.1 (see footnote 3 above).

[15] This is the judgment handed down in case No. BB.2011.140, which involved the prosecution of a former minister of defence of Algeria, TPF 2012, p. 97.

[16] See paragraph 6 and footnote 9 above.

## Chapter II

## The scope of the topic and of the draft articles

19. The scope of the topic "Immunity of State officials from foreign criminal jurisdiction" was addressed by the former Special Rapporteur in his preliminary report,[17] in which he identified a number of issues to be considered when establishing that scope, namely, the criminal, the foreign and the national (not international) nature of the jurisdiction from which immunity would be granted. A fourth issue, unrelated to jurisdiction, concerns the person who enjoys immunity, who must be an official of a State other than the one that purports to exercise jurisdiction. Lastly, his report also refers to the special status of diplomatic agents, consular officials, members of special missions and agents or officials of an international organization, although this status is not considered as a criterion for establishing the scope of the topic.

20. On the basis of these issues, the scope of the topic was discussed by both the Commission and the Sixth Committee. It became clear that there was broad support

[17] See *Yearbook … 2008*, vol. II (Part One), document A/CN.4/601, in particular, pp. 184–185, paras. 103–104, and pp. 191–192, para. 130.

for the aforementioned issues, which, moreover, States commonly face in practice when dealing with the question of the immunity of State officials from foreign criminal jurisdiction. The Special Rapporteur therefore considers that these criteria should be borne in mind when establishing the scope of potential draft articles; this will require proposals that clearly establish their scope.

21. To that end, it would seem advisable to take a dual approach, considering both inclusive and exclusive issues, which can be summarized as follows:

(*a*) The draft articles deal only with criminal jurisdiction, not immunity from civil or administrative jurisdiction;[18]

(*b*) The draft articles deal only with immunity from foreign criminal jurisdiction; in other words, jurisdiction exercised by a State other than the State of nationality of the official whose immunity is invoked. Thus, they do not cover immunity granted under the domestic law of the official's own State;

(*c*) The draft articles deal only with immunity from States' domestic criminal jurisdiction, not immunity before international criminal courts;

(*d*) The draft articles do not deal with persons who are subject to a more specific immunity regime, such as diplomatic agents, consular officials, members of special missions, and agents and officials of international organizations;

(*e*) The draft articles deal only with the immunity of State officials.

22. The reasons for limiting the topic in this manner have been largely explained in previous reports, but some of the most important reasons given should be briefly recalled in order to reiterate or strengthen the arguments put forward by the previous Special Rapporteur and by other members of the Commission, and to add new material that may be of interest.

23. With regard to limitation of the scope of the draft articles to the immunities that arise in the context of criminal jurisdiction, the Special Rapporteur would like to point out that this decision was taken by the Commission itself, primarily because it is with respect to this form of jurisdiction that the most serious problems occur in practice. The specificities of criminal jurisdiction, which give rise to issues that are unlikely to arise in connection with civil or administrative jurisdiction, must also be taken into account. These include, for example, the impact that the exercise of criminal jurisdiction can have on the freedom of movement of the persons concerned, not only in the event of a conviction entailing a custodial sentence, but even at an earlier stage if, for example, the accused person is held in custody or pretrial detention as a purely precautionary measure. Other interim measures—such as passport confiscation, house arrest and the obligation to appear before a judicial authority at regular intervals—are common in the exercise of criminal jurisdiction. Lastly, a criminal trial has a devastating impact on a person's credibility, integrity and dignity. It should also be recalled that the primary conventions on the immunity of State authorities from foreign jurisdiction clearly differentiate between immunity from criminal jurisdiction and immunity from civil and administrative jurisdiction; the two are subject to different rules.[19]

24. In the light of the above, the Special Rapporteur still considers it most appropriate to limit the scope of the draft articles to immunity from criminal jurisdiction. This does not mean, however, that the existence of immunity from civil and administrative jurisdiction should be completely ignored. These two types of jurisdiction and criminal jurisdiction have in common the fact that immunity from any of them can be invoked; moreover, in practical terms, there are obviously links between the three forms of jurisdiction. For now, suffice it to note that criminal and administrative penalties are clearly related, as seen in national and international jurisprudence, and, from a broader perspective, that civil compensation suits may be an indirect remedy for serious violations of the law, including criminal offences. Lastly, rulings on immunity in the context of civil jurisdiction, in particular, are common and may be applicable, *mutatis mutandi*, to immunity invoked in the context of criminal jurisdiction.

25. In any event, these arguments do not outweigh the aforementioned reasons for limiting the draft articles to criminal jurisdiction. To include in the draft articles specific provisions relating to civil and/or administrative jurisdiction would introduce a distorting element that could well undermine the final outcome of the Commission's work. However, this does not preclude the Commission from taking State practice concerning immunity from civil or administrative jurisdiction into consideration, to the extent possible and as needed, if it can be used as a basis for conceptual or other arguments supplementing the Commission's work on the topic of immunity from criminal jurisdiction.

26. With regard to limiting the scope of the draft articles to foreign criminal jurisdiction, it suffices, at the outset, to note that immunity granted under domestic law and immunity granted under international law do not necessarily have the same nature, function and purpose, nor are they designed to protect the same values and principles. Therefore, the "foreign" proviso, which ultimately leads to the principle of the sovereign equality of States and the need for the continued maintenance of sustainable and peaceful international relations, is sufficient to justify the Commission's consideration of the topic of immunity from criminal jurisdiction. Furthermore, it should be recalled that granting immunity from foreign criminal jurisdiction to certain State officials or representatives does not automatically imply granting them immunity from domestic

[18] One member of the Commission recently suggested that it would be interesting to consider immunity from civil jurisdiction, and one State reported that its practice was limited to the question of the immunity of State officials from foreign civil jurisdiction. Such comments and reflections, however interesting, cannot be interpreted as a proposal to expand the scope of the draft articles beyond immunity from criminal jurisdiction.

[19] See, in particular, the Vienna Convention on Diplomatic Relations, arts. 31 and 37; the Vienna Convention on Consular Relations, art. 43, *a contrario*; and the Convention on Special Missions, art. 31.

jurisdiction; in fact, as noted by ICJ, the exercise of criminal jurisdiction by the domestic courts of the State of the official is one way of ensuring that the procedural instrument of immunity is not automatically interpreted as an instrument that relieves that person of all substantive criminal responsibility. Consequently, continuing to limit the scope of the draft articles in this manner is fully justified, and a study of State practice on immunity would be relevant to the Commission's work only to the extent that such practice involves the immunity of a foreign official or representative.

27. With regard to the exclusion of immunity before international criminal courts from the scope of the draft articles, the former Special Rapporteur drew attention to the first criterion: the fact that national and international jurisdiction are different in nature. In the Special Rapporteur's opinion, there is also another obvious and equally important reason: immunity before international criminal courts has already been specifically regulated by the international instruments that established and regulated the functioning of the international criminal courts. Therefore, there is no need for the Commission to revert to a matter that has already been sufficiently delimited and clarified, regardless of the differing interpretations that may arise in practice when applying these international legal norms.

28. There is also widespread agreement that immunity before international criminal courts should not be included in the topic. Nevertheless, it should be noted that acceptance of this criterion has been the subject of different views regarding the consequences that it could or should have for the Commission's future work. It should be recalled that some members of the Commission and some States have maintained, either directly or indirectly in their statements in the Sixth Committee, that the exclusion of immunity before international criminal courts would completely exclude the question of international criminal jurisdiction from the Commission's work on the topic.

29. This is, however, a somewhat inconsistent position in terms of methodology. On the contrary, as noted above with regard to civil and administrative jurisdiction, in establishing the scope of the draft articles, it is also necessary to make a distinction between, on the one hand, rejecting the proposal to include specific provisions on immunity from international criminal jurisdiction and, on the other, taking interpretations arising from or related to such jurisdiction into account. But this is not the time to enter into a debate on this issue; suffice it to note that it would be surprising if the Commission decided that it could take the actions of other international courts (such as ICJ and regional human right courts) into account but that it must ignore the very existence of a specifically criminal international court that shares with domestic courts the goal of prosecuting certain particularly serious international crimes.

30. In any event, suffice it to note the need for a clear distinction between direct consideration of international criminal jurisdiction within the framework of this topic (which must not be done) and consideration of such jurisdiction as supplementary, useful and, where appropriate, an aid to interpretation. This cannot and should not result in automatic inclusion in the draft articles of the principles on immunity contained in the instruments that regulate the international criminal courts. However, it should at least allow for study of these courts' own rules and jurisprudence to the extent that they are relevant to or provide clarification of the topic of the immunity of State officials from foreign criminal jurisdiction. This approach does not contradict either the hermeneutic criteria specific to international law or the practice followed by the Commission in considering other topics.

31. With regard to the third of the aforementioned criteria, it seems unnecessary to give a special reason for excluding from the scope of the draft articles the specific regimes governing immunity from criminal jurisdiction on the grounds of the status of the individuals who are deemed to enjoy such immunity or the functions that they perform. Both diplomatic and consular immunities and the immunity of international organizations have been the subject of considerable normative development (in treaty and customary law). Therefore, it seems unnecessary for the Commission to reconsider, let alone modify, these already well-established and generally accepted regimes. However, this does not preclude it from taking these supplementary regimes into account in its work on the immunity of State officials from foreign criminal jurisdiction, especially as the Commission played a significant role in the establishment of those regimes.

32. Lastly, with regard to subjective limitation of the scope of the draft articles, it should be recalled that the title of the topic refers to "officials" in English, "*représentants*" in French and "*funcionarios*" in Spanish. While it is generally agreed that these terms basically refer to individuals who act in the name and on behalf of the State, it is also true that the terminological differences have given rise to debate on the need to define the term "official" for the purposes of this topic and, in particular, of the draft articles in question. This task is certainly essential, but it should be noted that, in the opinion of the Special Rapporteur, it is particularly important in the context of immunity *ratione materiae* and should therefore be addressed in that connection. Consequently, the term "official" will continue to be used on a provisional basis in this report and in the draft articles contained therein, with the proviso that the latter's wording may be modified once a decision on the aforementioned terminological issue has been taken.

33. On the basis of the above, two draft articles that establish the scope of the draft articles from a dual perspective—both positive and negative—may be formulated. The Special Rapporteur is of the view that the scope should be established at the outset of the work in order to avoid gaps that could hinder it in the future. In addition, these draft articles should be placed in part one of the draft articles so as to provide, together with the definitions, a framework for them.

34. To that end, the following draft articles are proposed:

*"Draft article 1. Scope of the draft articles*

"Without prejudice to the provisions of draft article 2, these draft articles deal with the immunity of

certain State officials from the exercise of criminal jurisdiction by another State.

"*Draft article 2. Immunities not included in the scope of the draft articles*

"The following are not included in the scope of the present draft articles:

"(*a*) Criminal immunities granted in the context of diplomatic or consular relations or during or in connection with a special mission;

"(*b*) Criminal immunities established in headquarters agreements or in treaties that govern diplomatic representation to international organizations or establish the privileges and immunities of international organizations and their officials or agents;

"(*c*) Immunities established under other *ad hoc* international treaties;

"(*d*) Any other immunities granted unilaterally by a State to the officials of another State, especially while they are in its territory."

## Chapter III

## The concepts of immunity and jurisdiction

35. Immunity and jurisdiction are the two basic concepts on which consideration of this topic and the draft articles resulting therefrom will be based, since their purpose is, in fact, to identify the situations in which a State's courts may not exercise jurisdiction in criminal matters owing to the immunity enjoyed by certain officials of another State. Consequently, although the concepts are separate from one another, as correctly noted by ICJ in the *Arrest Warrant of 11 April 2000* case,[20] and recalled by the Special Rapporteur, Mr. Kolodkin,[21] only the relationship between them can justify the Commission's consideration of this topic.[22] Therefore, defining the two concepts separately is a precondition for proper handling of the topic and the draft articles. These definitions should, of course, logically be included in part one of the draft articles in order to provide a framework for the rest.

### A. The concept of criminal jurisdiction

36. The concept of immunity is, by necessity, based on the prior existence of the criminal jurisdiction of the State, without which the institution of immunity itself would be meaningless.[23] Consequently, irrespective of the procedural handling of immunity, it is first necessary to determine what we mean by "jurisdiction" for the purposes of these draft articles.

37. It may at first appear unnecessary[24] to define "jurisdiction", since it is a generally accepted term that is an uncontested component of all domestic legal systems under which immunity can be invoked. While this may be true, the fact remains that the concept of jurisdiction has been dealt with on many occasions in connection with international law and that the term can have different meanings in different States' legal systems.[25] In any event, it should be borne in mind that references to jurisdiction in the present report are always made in the context of immunity from criminal jurisdiction; this introduces a distinction that should be duly taken into account.[26] Thus, while the present report does not purport to enter into a theoretical analysis of the matter, it is necessary first to establish that conceptual distinction in order to show that the term "jurisdiction" cannot refer to civil jurisdiction in the context of the topic under consideration, owing not only to the conceptual distinction noted above, but also to the fact that identification of the types of acts that fall into the general category of "jurisdiction" is an important matter that should be taken up by the Commission in due course, particularly when it addresses the issue of immunity from foreign criminal jurisdiction from a procedural standpoint. Consider, for example, the potential impact that the adoption of an executive act—such as the detention of an individual, the confiscation of travel documents or the incorporation into an international system of police cooperation and assistance of a warrant for the arrest and capture of an accused person—prior to or independently of the work of the judiciary, could have on immunity from foreign criminal jurisdiction. Thus, for the purposes of this exercise, it is particularly important to define the term "criminal jurisdiction".

[20] *Democratic Republic of the Congo v. Belgium, Judgment, I.C.J. Reports 2002*, p. 19, para. 46.

[21] See *Yearbook … 2008*, vol. II (Part One), document A/CN.4/601, p. 173, para. 61.

[22] See *ibid.*, pp. 170–171, para. 43 and footnote 88. As the former Special Rapporteur recalled, ICJ stated in the *Arrest Warrant of 11 April 2000* case that "it is only where a State has jurisdiction under international law in relation to a particular matter that there can be any question of immunities in regard to the exercise of that jurisdiction" (*I.C.J. Reports 2002*, p. 19, para. 46).

[23] In this connection, see the memorandum by the Secretariat (footnote 14 above), paras. 7 and 14. The close relationship between "jurisdiction" and "immunity" is also addressed in art. I, para. 2, of the resolution on immunity from jurisdiction of the State and of persons who act on behalf of the State in case of international crimes, adopted by the Institute of International Law in 2009, which reads: "For the purposes of this Resolution 'jurisdiction' means the criminal, civil and administrative jurisdiction of national courts of one State as it relates to the immunity of another State or its agents conferred by treaties or customary international law" (Institute of International Law, "Resolution on immunity from jurisdiction of the State and of persons who act on behalf of the State in case of international crimes", *Yearbook*, vol. 73, p. 227).

[24] It should be borne in mind that the definitions of the terms "jurisdiction" and "immunity" were also discussed by the Commission during its consideration of the United Nations Convention on Jurisdictional Immunities of States and Their Property, although the Special Rapporteur's proposals in that connection were rejected by the Commission and were not reflected in the Convention adopted by the General Assembly in 2004.

[25] The former Special Rapporteur addressed the concept of jurisdiction in a broad sense in his preliminary report; his analysis may still be considered useful. See *Yearbook … 2008*, vol. II (Part One), document A/CN.4/601, pp. 170–171, paras. 43–47. The concept was also addressed in the memorandum by the Secretariat (footnote 14 above), paras. 7–13.

[26] See *Yearbook … 2008*, vol. II (Part One), document A/CN.4/601, pp. 171–172, paras. 48–55.

38. However, the intention at this stage of the work is not to compile a detailed list of all the types of acts covered by the term "jurisdiction", but rather to provide a definition of the term that is broad enough for it to be effectively compared with the various factors that establish immunity and with the various acts—judicial and executive—in respect of which immunity can be invoked. The Special Rapporteur is of the view that, in the context of the immunity of State officials from foreign jurisdiction, this comparison should be based on the premise that the State already has criminal jurisdiction and is therefore competent to perform a set of judicial and, in some cases, executive acts, the sole purpose of which is to determine whether, or establish that, there is specific individual criminal responsibility for acts that constitute crimes or misdemeanours under the domestic law of the State in question.

39. Thus, the very concept of jurisdiction is closely related to the determination of criminal jurisdiction and should be included therein. In this connection, it should also be borne in mind that the concept of jurisdiction and the legislation on which it is based are not identical in every State; they have their source not only in the norms and principles of international law but in the State's own legislation, which is adopted on the basis of those international norms and principles, and grants jurisdiction to its own courts. In this regard, the Special Rapporteur considers that it is not the purpose of this report to analyse such legal bases for jurisdiction and jurisdictional links or to debate the question of whether and to what extent the granting of such jurisdiction is fully consistent with international law; whether the international norms on which States rely in granting domestic jurisdiction to national courts are norms that impose obligations, or whether they merely enable or authorize the granting of such jurisdiction; and what the implications of this distinction might be in practice. Such a debate falls outside the agreed mandate of the Commission for the consideration of this topic and could have a greater impact on other issues that are included in the Commission's long-term (extraterritorial jurisdiction) or current (the obligation to extradite or prosecute (*aut dedere aut judicare*)) programme of work, or that could be included in its programme of work should the General Assembly so decide (international jurisdiction).

40. At a minimum, however, attention must be drawn to the variety of bases for jurisdiction upon which States have built their systems of domestic criminal jurisdiction, since the issue of immunity will ultimately arise under domestic jurisdiction (in other words, the criminal jurisdiction of a specific State). For now, suffice it to note that such a system may be based on territorial jurisdiction, personality (active or passive), the protection principle or universal jurisdiction. All of these systems are potential sources of States' competence to exercise criminal jurisdiction *stricto sensu* and, with the exception of active personality, any of them may give rise to the exercise of criminal jurisdiction in respect of an alien who might be categorized as an official and could therefore invoke immunity. The use of one or another of these systems is contingent on the will of the State concerned and, in practice, results in a multiplicity of national jurisdictional models that the Commission should not fail to take into account, especially as many of the cases that arise in practice rely heavily on the use of a system of jurisdiction that is based on some form of extraterritorial jurisdiction.[27] However, they should be taken into consideration for the sole purpose of establishing jurisdiction as a precondition for immunity. The Special Rapporteur is therefore of the view that, when defining the term "jurisdiction" for the purposes of this topic and these draft articles, the nature of each of the legal systems on which a State that purports to exercise jurisdiction may rely is irrelevant. To summarize, the existence of a multiplicity of jurisdictional systems, and thus of a multiplicity of jurisdictional models in States' criminal legislation, is a de facto precondition that the Commission should take into account in its work; however, this does not imply any assessment of or pronouncement on any of these jurisdictional systems.

41. Moreover, it should be noted that the term "criminal jurisdiction" refers primarily to a State's competence to exercise its power to prosecute crimes and misdemeanours that are established as such in the applicable provisions of its legislation. This purposive element should therefore be reflected in the definition of "criminal jurisdiction". In any event, care should be taken to ensure that the legal nature of immunity, which is purely procedural, is not affected in any way. Thus, the inclusion in the definition of "criminal jurisdiction" of a reference to the establishment of individual criminal responsibility does not and cannot result in a foreign official who enjoys such immunity being relieved of such responsibility; this issue will be addressed in the future.[28]

42. In the light of the foregoing considerations, the Special Rapporteur considers it useful to include in the draft articles a definition of "foreign criminal jurisdiction" as part of an introductory draft article on "definitions". To that end, the following draft article is proposed:

"*Draft article 3. Definitions*

"For the purposes of the present draft articles:

"(*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 misdemeanour 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."

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[27] In this regard, suffice it to note the recent judgement of the Swiss Federal Criminal Court (Appeals Chamber) of 25 July 2012 (case No. BB.2011.140), in which the Court, in the exercise of universal jurisdiction, ruled on the immunity from foreign criminal jurisdiction of a former Minister of Defence of Algeria.

[28] The jurisprudence of ICJ on this matter has been reiterated and consistent. See the judgment of 14 February 2002 in *Arrest Warrant of 11 April 2000, I.C.J. Reports 2002*, p. 25, para. 60; *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France), Judgment, I.C.J. Reports 2008*, p. 244, para. 196; and the judgment of 3 February 2012 in *Jurisdictional Immunities of the State: Germany v. Italy: Greece intervening, I.C.J. Reports 2012*, p. 124, para. 58 and p. 143, para. 100.

### B. The concept of immunity from foreign criminal jurisdiction

43. Like the term "jurisdiction", the term "immunity" is not usually defined in the international instruments that, in one way or another, have dealt with the immunities of the State and its officials or agents, including the United Nations Convention on Jurisdictional Immunities of States and Their Property, the Vienna Convention on Diplomatic Relations and the Convention on Special Missions. In particular, with regard to "immunity from criminal jurisdiction", normative practice has, in the past, tended simply to mention "immunity from criminal jurisdiction" as one component of the regime of privileges and immunities set out in each of those instruments without defining it. This presents us with a nebulous legal concept, the scope of which must be determined through an analysis of practice and, in particular, State practice.

44. Notwithstanding the aforementioned practice, the task of integrating this nebulous legal concept is not particularly difficult since the concept of immunity from jurisdiction was the subject of lengthy discussion, including within the Commission, during the *travaux préparatoires* of the aforementioned instruments. In addition, the concept—that is, criminal jurisdiction in the context of the topic under consideration—was studied in detail by the Secretariat in its memorandum[29] and by the former Special Rapporteur in his preliminary report.[30]

45. A set of characteristics of the concept of "immunity from foreign criminal jurisdiction" has emerged from all this previous work and can be summarized as follows:

(*a*) Immunity prevents a State from exercising its criminal jurisdiction even though its courts would, in principle, be competent to prosecute a given misdemeanour or crime;

(*b*) Immunity arises only as a result of the existence of a foreign component, referred to generically as an "official" of another State;

(*c*) Immunity from foreign criminal jurisdiction is, by nature, eminently procedural and has no effect on the substantive criminal law of the State that has jurisdiction or on the individual criminal responsibility of the person who enjoys immunity.[31]

46. In the light of the above, a definition of "immunity from foreign criminal jurisdiction" that incorporates these general characteristics can be formulated. The following wording is suggested:

"*Draft article 3. Definitions*

"For the purposes of the present draft articles:

"(*b*) 'Immunity from foreign criminal jurisdiction' means the protection from the exercise of criminal jurisdiction by the judges and courts of another State that is enjoyed by certain State officials."

[29] See the memorandum by the Secretariat (footnote 14 above), paras. 14–66.

[30] See *Yearbook … 2008*, vol. II (Part One), document A/CN.4/601, pp. 172–175, paras. 56–70.

[31] See footnotes 15 and 27 above.

## Chapter IV

## The distinction between immunity *ratione personae* and immunity *ratione materiae*

47. The distinction between immunity *ratione personae* and immunity *ratione materiae* has been discussed and generally accepted in doctrine, either in those words or as "personal immunity" and "functional immunity". As both types of immunity have also been adequately addressed in the preliminary report of the former Special Rapporteur[32] and in the memorandum by the Secretariat,[33] there is no need to revert to the issues discussed in those documents at this time. It should also be noted that the distinction between immunity *ratione personae* and immunity *ratione materiae* is one of the few matters on which there has been broad consensus during the Commission's discussions on this topic.

48. The two types of immunity have both significant elements in common and elements that clearly differentiate them from one another. The former include their basis and purpose, which is simply to ensure respect for the principle of the sovereign equality of States, prevent interference in their internal affairs and facilitate the maintenance of stable international relations by ensuring that the officials and representatives of States can carry out their functions without external difficulties or impediments.[34] This means that consideration of immunity from criminal jurisdiction must necessarily take a functional point of view or approach, since the protection afforded to persons who enjoy immunity is ultimately granted to them by virtue of the functions or tasks that each of them performs within his or her

[32] See *Yearbook … 2008*, vol. II (Part One), document A/CN.4/601, pp. 177–178, paras. 78–83.

[33] See the memorandum by the Secretariat (footnote 14 above), paras. 88 *et seq*.

[34] In this regard, the Institute of International Law, in its 2009 resolution on immunity from jurisdiction of the State and of persons who act on behalf of the State in case of international crimes (see footnote 23 above), states that "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" (*Yearbook*, vol. 73, art. II, para. 1). ICJ stressed this functional and purposive nature of immunity in its decision of 14 February 2002 in *Arrest Warrant of 11 April 2000, Judgment, I.C.J. Reports 2002*, p. 21, para. 53.

hierarchical official relationship with the State. These tasks are necessarily different depending on the status of the various categories of protected persons; this will result in different manifestations of the functional nature of immunity and, consequently, in the establishment of a different legal regime for each of the aforementioned types of immunity from foreign criminal jurisdiction. Since this "functional" component is common to both types, for the purposes of the present report and of the draft articles it is considered preferable to refer to them as "immunity *ratione personae*" and "immunity *ratione materiae*" in order to avoid terminological confusion that could have an unwanted conceptual effect.

49. In addition, both immunity *ratione personae* and immunity *ratione materiae* protect and are granted to individuals even though the ultimate purpose of granting them is to protect the rights and interests of the State. Therefore, whatever position the State takes with regard to these forms of immunity should be examined, particularly in the context of invocation or waiver of immunity. Thus, it must be borne in mind that immunity from foreign criminal jurisdiction precludes the exercise of criminal jurisdiction; it applies to specific categories of persons who, if they did not enjoy immunity, might be subject to criminal proceedings in order to establish whether they had individual criminal responsibility. Consequently, while this is not the time to address the matter in depth, it should be noted that immunity from foreign criminal jurisdiction (both *ratione personae* and *ratione materiae*) must be distinguished from the immunity of the State, with which it must not be confused, even though they have points in common.[35]

50. However, in addition to the common elements outlined above, there are also significant differences between immunity *ratione personae* and immunity *ratione materiae* that should be noted. It can be concluded from practice that immunity *ratione personae* has the following characteristics:

(*a*) It is granted only to certain State officials who play a prominent role in that State and who, by virtue of their functions, represent it in international relations automatically under the rules of international law;

(*b*) It applies to all acts, whether private or official, that are performed by the representatives of a State;

(*c*) It is clearly temporary in nature and is limited to the term of office of the person who enjoys immunity.[36]

Immunity *ratione materiae*, for its part, has the following characteristics:

(*a*) It is granted to all State officials;

(*b*) It is granted only in respect of acts that can be characterized as "official acts" or "acts performed in the exercise of official functions";

(*c*) It is not time-limited, since immunity *ratione materiae* continues even after the person who enjoys such immunity has left office.

51. Although the distinction between immunity *ratione personae* and immunity *ratione materiae* is widely accepted in doctrine and reflected in judicial practice, it is noteworthy that it is not similarly reflected in national legislation. Of the States that replied to the first of the questions posed by the Commission at its previous session, the majority indicated that their domestic law did not contain any specific provisions establishing such a distinction. However, some of them provided examples showing that the distinction was made indirectly in their domestic law or, more frequently, in their jurisprudence. In reality, this response is not entirely unexpected as it relates to two elements of practice that cannot be ignored: (*a*) State practice concerning immunity from foreign criminal jurisdiction is not very extensive; and (*b*) With the exception of generic references to the applicability of international law, domestic law does not typically include immunity provisions with a foreign component.

52. Nevertheless, for the purposes of this topic and the draft articles that may result from it, it is useful and necessary to make a clear distinction between immunity from foreign criminal jurisdiction *ratione personae* and *ratione materiae*, not only for analytical or descriptive reasons but, above all, because the normative elements of each of these types of immunity must be determined in order to establish the legal regime applicable to it, including the procedural approaches that must be followed in order to give effect to the immunity of State officials from foreign criminal jurisdiction. Furthermore, this distinction is not unrelated to the general issue of the applicable exceptions to immunity from such jurisdiction, which is undoubtedly one of the issues on which there is the greatest degree of uncertainty and disagreement.

53. In the light of these observations, it is considered necessary to define the two types of immunity in general terms as a frame of reference for their further consideration. These definitions, for which the following wording is suggested, should be included in draft article 3 on "definitions":

*"Draft article 3. Definitions*

"For the purposes of the present draft articles:

"(*c*) 'Immunity *ratione personae*' means the immunity from foreign criminal jurisdiction that is enjoyed by certain State officials by virtue of their status in their State of nationality, which directly and automatically assigns them the function of representing the State in its international relations;

"(*d*) 'Immunity *ratione materiae*' means the immunity from foreign criminal jurisdiction that is enjoyed by State officials on the basis of the acts which they perform in the discharge of their mandate and which can be described as 'official acts'."

[35] ICJ referred to the distinction between the immunity of the State and the immunity of State officials from foreign criminal jurisdiction explicitly, in *Jurisdictional Immunities of the State, I.C.J. Reports 2012*, pp. 137–138, para. 87, and implicitly, in the same case, *ibid.*, p. 139, para. 91.

[36] Concerning these characteristics, see chap. V of the present report.

# Chapter V

## Immunity *ratione personae*: normative elements

54. In this report, the term "normative elements" refers to the aspects of immunity *ratione personae* that are relevant in establishing the legal regime applicable to this type of immunity from foreign criminal jurisdiction. On the basis of the definition of immunity *ratione personae* provided in chapter IV above and contained in draft article 3 (*c*), these normative elements can be identified as follows:

(*a*) The subjective scope of immunity *ratione personae*: who enjoys immunity?

(*b*) The material scope of immunity *ratione personae*: what types of acts performed by these individuals are covered by immunity?

(*c*) The temporal scope of immunity *ratione personae*: over what period of time can immunity be invoked and enjoyed?

Each of these elements will be considered separately below.

55. Issues surrounding potential exceptions to immunity *ratione personae* and procedural aspects of such immunity are not dealt with in this chapter as they will be examined at a later stage.

### A. The subjective scope of immunity *ratione personae*

56. Identification of the persons who enjoy immunity is clearly a prerequisite for its exercise and is particularly important in the case of immunity from criminal jurisdiction, where, apart from other considerations, the question is whether, in a given case, the State has jurisdiction to conclude that criminal responsibility lies with the individual, not the State. In the case at hand, the identification of these persons is also of interest since the title of the topic, as chosen by the Commission, refers generically to State "officials" ("*funcionarios*" in Spanish and "*représentants*" in French), which has caused concern regarding the definition of the term "official".

57. This concern is relevant to the consideration of immunity *ratione personae*, which, as noted above, necessarily refers to a small number of people who perform State functions or hold State office at the highest level, by virtue of which they are authorized to represent the State at the international level.[37] Therefore, the definition of "official" may not be relevant to this type of immunity if it is decided to follow a strict interpretation that links and restricts immunity *ratione personae* to Heads of State, Heads of Government and Ministers for Foreign Affairs. On the other hand, that definition could take on greater importance if it is decided to follow a broader interpretation whereby immunity might also be enjoyed by other senior State officials, including, as often suggested, other members of the Government such as ministers of defence, ministers of trade and other ministers whose office requires them to play some role in international relations, either generally or in specific international forums, and who must therefore travel outside the borders of their own country in order to perform their functions. In this case, it would be necessary to define "official" for the purposes of immunity *ratione personae*, although it should be noted that this definition would need to be specific and clearly differentiated from the generic definition of "official" to be used in the context of immunity *ratione materiae* since the legal regimes applicable to the two categories of officials would also necessarily be different.

58. First, following the stricter interpretation, it is evident that, generally speaking, the granting of immunity *ratione personae* to Heads of State, Heads of Government and Ministers for Foreign Affairs is established practice. Thus, while it is true that the granting of such immunity was originally limited to Heads of State and subsequently extended to Heads of Government,[38] its extension to Ministers for Foreign Affairs is not in doubt in the light of the judgment of ICJ in the *Arrest Warrant of 11 April 2000* case: "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".[39] Thus, while it is true that there has been some disagreement in the Commission and the Sixth Committee with regard to the granting of immunity to Ministers for Foreign Affairs,[40] it should be recalled that this opposing view regarding such ministers is unusual and, moreover, difficult to reconcile with the judgment of the Court, which can be assumed to reflect the applicable customary law at the time of its issuance.

59. The basis for the view that immunity is enjoyed by Heads of State, Heads of Government and Ministers for Foreign Affairs is the fact that their functions include representing the State in international relations, a function that, it should be borne in mind, is based on international

[37] See *Yearbook … 2008*, vol. II (Part One), document A/CN.4/601, pp. 186–190, paras. 109–121; and the memorandum by the Secretariat (footnote 14 above), paras. 96–136.

[38] In this connection, the origin of this type of immunity, which is linked to the person of the sovereign, should be borne in mind. While this interpretation has been superseded, it is true that various international instruments adopted in the fairly recent past refer exclusively to the Head of State in establishing special personal immunity rules; see, for example, art. 3, para. 2, of the United Nations Convention on Jurisdictional Immunities of States and Their Property. On the other hand, the Convention on Special Missions separates the immunities of the Head of State (art. 21, para. 1) from those of "the Head of the Government, the Minister for Foreign Affairs and other persons of high rank, when they take part in a special mission" (art. 21, para. 2). In the context of private codification, it should be noted that the Institute of International Law, in its resolution in the Session of Vancouver in 2001, focuses first on the Head of State and then extends the immunity and inviolability regime to the Head of Government, but does not grant the same status to the Minister for Foreign Affairs (Institute of International Law, "Immunities from jurisdiction and execution of Heads of State and of Government in international law", *Yearbook*, vol. 69).

[39] *I.C.J. Reports 2002*, pp. 20–21, para. 51.

[40] The case against granting immunity *ratione personae* to Ministers for Foreign Affairs has been made repeatedly by South Africa.

law and performed automatically, without the need for any express authorization by the State that they represent.[41] In essence, their function is to represent the State under its political and administrative model and its domestic law, which, in their respective States, sets the requirements for the post of Head of State, Head of Government or Minister for Foreign Affairs. It is a representational function which international law attributes to these offices, independently of a State's domestic law, the sole function of which is to establish a homogeneous hierarchical model for representation of the State within the international community as a whole, and which promotes and facilitates the maintenance of international relations.[42] It is precisely this automatic representational nature, based on international law, which explains the status that is granted to these three State officials within the framework of international law as a whole (for example, in treaty law and the law of international responsibility) and which is also recognized in the context of immunity from foreign criminal jurisdiction, whereby the regime that applies to such officials (immunity *ratione personae*) differs from the regime that applies to other State officials.

60. From this perspective, once it is acknowledged that the basis of this special regime is the very special representational status of Heads of State, Heads of Government and Ministers for Foreign Affairs, which is specifically based on and recognized by international law, it is undeniable that this is an extraordinary situation that cannot be extrapolated to include other people, including members of Government, regardless of whether they hold senior posts in their States of nationality.[43] It is, of course, possible to identify norms of international law, similar to those applied to members of the "troika", which confer on them a representative function comparable to that of Heads of State, Heads of Government and Ministers for Foreign Affairs, but in the absence of such norms, immunity *ratione personae* cannot be granted to any State official other than Heads of State, Heads of Government and Ministers for Foreign Affairs, even though other senior officials may also play a role in international relations.[44]

61. In contrast to this first approach, a broader interpretation of immunity *ratione personae* would allow certain other senior State officials, in addition to the troika—primarily those who, as a result of their functions under the domestic law that governs their activities, must play a role in international affairs and who travel abroad frequently and even represent the State, albeit in a specific area—to be included in the scope of subjective application of such immunity. Thus, granting these individuals the immunity *ratione personae* that is already enjoyed by Heads of State, Heads of Government and Ministers for Foreign Affairs, whose functions are comparable to theirs, would help to strengthen the secure and sustainable nature of international relations and the sovereign equality of States in the light of new models of diplomacy and international relations.[45] Advocates of this broader interpretation have sought to justify it by a literal reading of the wording of the judgment of ICJ in the aforementioned *Arrest Warrant of 11 April 2000* case, especially the use of the expression "such as", which makes that wording non-restrictive. In addition, there are examples of State judicial practice in which certain domestic courts have granted immunity *ratione personae* to senior State officials other than the troika. This should therefore be taken into consideration.

62. With regard to "broader tendency" described above, it should be noted, first, that the interpretation of the aforementioned wording of the judgment of ICJ should be read in context. Thus, despite its literal meaning, it is difficult to conclude that the Court was referring to the existence of an open-ended list of persons who enjoy immunity *ratione personae*. On the contrary, when the Court has had an opportunity to expand the list of people protected by such immunity, as in *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France)*, it has not done so, limiting its pronouncements in that regard to the Head of State. With respect to the Public Prosecutor and the Chief of National Security, it is clear that the Court has made no explicit pronouncement as to whether they enjoy general immunity *ratione personae*, although it has concluded that these senior officials do not enjoy personal immunity because they are not diplomatic agents and are not covered by the Convention on Special Missions.[46]

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[41] The following statement by ICJ in the *Arrest Warrant of 11 April 2000* case is particularly enlightening; although it refers to the Minister for Foreign Affairs, its basic elements can easily be applied to the Head of State and the Head of Government:

> "He or she is in charge of his or her Government's diplomatic activities and generally acts as its representative in international negotiations and intergovernmental meetings... His or her acts may bind the State represented... The Court further observes that a Minister for Foreign Affairs, responsible for the conduct of his or her State's relations with all other States, occupies a position such that, like the Head of State or the Head of Government, he or she is recognized under international law as representative of the State solely by virtue of his or her office. He or she does not have to present letters of credence: to the contrary, it is generally the Minister who determines the authority to be conferred upon diplomatic agents and countersigns their letters of credence" (*ibid.*, pp. 21–22, para. 53).

[42] The regime of diplomatic and consular relations was established on a similar basis, as was the regime applicable to special missions; both also introduced rules governing immunity from foreign criminal jurisdiction that can be characterized as immunity *ratione personae*.

[43] In this regard, it should also be recalled that various international instruments and laws distinguish between the Head of State, the Head of Government and the Minister for Foreign Affairs, on the one hand, and other senior State officials, including at the ministerial level, on the other; see, in particular, art. 21 of the aforementioned Convention on Special Missions. Similarly, although from a different perspective, the definition of "protected persons" in the Convention on the prevention and punishment of crimes against internationally protected persons, including diplomatic agents, makes a clear distinction between the Head of State, the Head of Government and the Minister for Foreign Affairs, on the one hand (art. 1, para. 1 (*a*)), and "any representative or official of a State", on the other (art. 1, para. 1 (*b*)). Furthermore, the Institute of International Law, in its 2001 resolution, makes a clear distinction between the immunities of the Head of State and Head of Government and the "immunities to which other members of the government may be entitled on account of their official functions" (art. 15, para. 2) (*Yearbook*, vol. 69, see footnote 38 above).

[44] In the Sixth Committee during the most recent session of the General Assembly, the following States indicated that they were in favour of restricting immunity *ratione personae* to the troika: Austria, Belgium, the Congo, Greece, Ireland, Jamaica, Malaysia, the Netherlands, New Zealand, Portugal, Slovenia, Spain and the United States of America.

[45] In this connection, the following States have indicated, to varying degrees, their willingness to explore a non-restrictive interpretation: Algeria, Belarus, Chile, China, France, Israel, Norway, Peru, Portugal, the Russian Federation, Switzerland, the United Kingdom of Great Britain and Northern Ireland and Viet Nam.

[46] *I.C.J. Reports 2008*, p. 244, para. 194. However, it must be borne in mind that in this judgment, ICJ seems, if only partially, to equate the immunity of these senior officials with that of the State (see *ibid.*, p. 242, paras. 187–188, and p. 244, para. 196).

63. Second, State practice on this matter is not widespread, nor is it coherent or consistent with regard to the remedies provided in a particular case and the arguments advanced by different national courts. In the light of the pronouncements that support the expansion of immunity *ratione personae*, consideration should be given to other cases where the reverse was true[47] or where, while there was no ruling on the type of immunity that was invoked or granted, there was a clear difference between the treatment accorded to a member of the troika and that accorded to other senior State officials. Consequently, given the lack of consistent State practice, it is impossible to find arguments in favour of extending immunity *ratione personae* to include senior State officials other than the troika, as this would amount to giving them the direct, automatic function of representing the State in international relations on the basis of a rule of international law that cannot be shown to exist.[48]

64. Lastly, attention should be drawn to the fact that, even among those who support the expansion of immunity *ratione personae* to include officials other than the troika, there is general agreement on the impossibility of drawing up an exhaustive list of these officials, since very different opinions regarding the nature and range of the senior officials who should enjoy this type of immunity have been expressed.[49] There is, however, a consistent tendency for proponents of the broader interpretation to suggest a more suitable method of identifying the criteria that would justify granting immunity *ratione personae* to these "other senior State officials".[50]

65. It is true that, in practice, it is not unusual to find examples of the granting of general immunity *ratione personae* under international law to State officials other than Heads of State, Heads of Government and Ministers for Foreign Affairs. Undoubtedly, the most important example is the immunity of diplomatic agents from criminal jurisdiction, which could be supplemented by cases involving the granting of immunity *ratione personae* under the rules applicable to special missions, and even some cases in which, under unilateral agreements, the same protection has been granted to certain senior officials on official visit to a specific country. These are, however, special regimes that fall outside the scope of this topic and should therefore also be excluded from the scope of the draft articles that the Commission may eventually adopt. It is precisely within the framework of these special regimes, and particularly under a broad interpretation of the special missions regime, that concerns regarding the immunity of a group of senior State officials, who are required to travel outside their countries more or less permanently and more or less often—and might therefore be subject to foreign criminal jurisdiction that would clearly hinder the performance of their functions and violate the principle of the sovereign equality of the States on whose behalf they perform these functions—can be addressed.

66. Lastly, it should be noted that granting a form of immunity *ratione personae* that equates other senior State officials, including Government officials, to the troika could prevent the competent courts of other States from exercising their jurisdiction, thereby depriving those States of a power that is an aspect of their sovereignty. Only pursuant to a rule of customary international law that so provided could these characteristics have effect. Such a rule has become established for members of the troika, but its applicability to other senior State officials cannot be demonstrated at the present stage in the development of international law.

67. In the light of the above, the Special Rapporteur considers that the subjective scope of immunity from foreign criminal jurisdiction *ratione personae* should be limited to Heads of State, Heads of Government and Ministers for Foreign Affairs. She therefore proposes the following draft article:

"*Draft article 4. The subjective scope of immunity* ratione personae

"Heads of State, Heads of Government and Ministers for Foreign Affairs enjoy immunity from the exercise of criminal jurisdiction by States of which they are not nationals."

68. However, it is true that, in practice, a few examples of the granting of immunity *ratione personae* on a one-time basis to senior officials other than the troika can be found. In addition, some members of the Commission and some States have spoken in favour of considering the expansion of this type of immunity to include senior State officials. The Special Rapporteur would like to point out that if the Commission considers it appropriate to discuss the process of expanding immunity *ratione personae*, this process would, in her opinion, constitute progressive development. In any event, the correct approach to such an expansion would require that this type of immunity be addressed independently of and separately from the immunity of Heads of State, Heads of Government and Ministers for Foreign Affairs, particularly in order to ensure that the factors that distinguish such immunity from the immunity *ratione personae* traditionally granted to members of the troika are taken into account. In this process, particular consideration should be given to the new territorial element that characterizes this specific type of immunity *ratione personae* owing to the inclusion of the concept of the "official visit", which should be central to this discussion and about which some States have recently expressed particular concern.[51]

[47] In this connection, see the recent Swiss Federal Criminal Court judgment of 25 July 2012 (footnote 15 above).

[48] Several States have urged caution in any broad interpretation, since there is a significant difference in the level at which the two categories of senior officials represent the State (Malaysia, Norway and Slovenia).

[49] Some States are of the opinion that immunity *ratione personae* should be granted to ministers of defence and trade (Norway and Switzerland), to ministers responsible for the financial system, in the light of the current international situation (Norway) or to deputy prime ministers, all Government ministers and parliamentary leaders (China, Ireland and the United Kingdom).

[50] The need to establish these criteria has been stressed by, in particular, Chile, China, France, India, Ireland, Israel, Japan, Portugal, the Republic of Korea and the Russian Federation. Some States have especially emphasized that the primary criteria should be the rank, involvement in cooperation and international relations, and need to travel of the person concerned (see, in particular, the statement made by the United Kingdom).

[51] In the Sixth Committee, during the most recent session of the General Assembly, Switzerland maintained that the question of whether a State official was on an official visit to the territory of another State was a methodological criterion that should be borne in mind when considering immunity *ratione personae*. The importance of taking official visits by State representatives into account was also raised by Norway, speaking on behalf of the Nordic countries.

## B. The material scope of immunity *ratione personae*

69. The second normative element that characterizes immunity *ratione personae* is the type of acts that are covered by such immunity. In that regard, it should be noted that, unlike the subjective scope of immunity *ratione personae*, abstract discussion of its material scope has caused no difficulty in practice. Thus, there has been no objection to the expansion of such immunity to include all acts, whether private or official, that are performed by Heads of State, Heads of Government and Ministers for Foreign Affairs. This is largely explained by the aforementioned special basis of this type of immunity from foreign criminal jurisdiction.

70. This solution is consistent with the provisions of various international instruments that establish specific regimes and provide for a type of immunity that corresponds to immunity *ratione personae*, such as the Vienna Convention on Diplomatic Relations and the Convention on Special Missions.[52] Since protection from the exercise of foreign criminal jurisdiction under these Conventions follows the same logic as the immunity granted to Heads of State, Heads of Government and Ministers for Foreign Affairs, it follows that its material scope should also be identical. On the other hand, the various attempts at private codification, particularly by the Institute of International Law, also include both private and official acts under the umbrella of immunity *ratione materiae*.[53]

71. It should be borne in mind that this approach is reflected in international jurisprudence, which refers to this type of immunity as "full", "total", "complete", "integral" or "absolute" immunity precisely in order to show that it applies to any act performed by a person who enjoys immunity. The practice of domestic courts has traditionally been along similar lines.[54]

72. Consequently, it can be concluded that, to use the term employed by ICJ, immunity from foreign criminal jurisdiction *ratione personae* is full immunity. Therefore, there is no need to consider in depth which types of acts constitute "private acts" or "official acts" or to ask, as a matter of principle, when or under which circumstances such acts were performed or where the persons who enjoy immunity *ratione personae* were when the acts covered by such immunity were performed or when an attempt was made to exercise jurisdiction over them.[55] The "fullness" of immunity *ratione personae* means that it is enjoyed in respect of any act performed by a Head of State, Head of Government or Minister for Foreign Affairs, regardless of the nature of the act, the place where it was performed and the nature of the foreign travel (official or private) during which a specific State sought to exercise foreign criminal jurisdiction. In any event, from this point of view and in the opinion of the Special Rapporteur, the term "full immunity" is preferable to "absolute immunity", which could have other meanings in the light of developments in immunity in the context of international law in recent decades.

73. However, it should be noted that this qualification of immunity *ratione personae* as "full" does not imply any pronouncement on potential exceptions thereto. Any such exceptions would, by their very nature, imply a departure from the general rule, which is "full" immunity. In any event, the question of possible exceptions to immunity is not the subject of this report and should therefore not be reflected in the draft articles proposed below. As noted above in chapter I, it will be considered at a later time.

74. In the light of the above, the following draft article on the material scope of immunity *ratione personae* is proposed:

"*Draft article 5. The material scope of immunity* ratione personae

"1. The immunity from foreign criminal jurisdiction that is enjoyed by Heads of State, Heads of Government and Ministers for Foreign Affairs covers all acts, whether private or official, that are performed by such persons prior to or during their term of office.

"2. Heads of State, Heads of Government and Ministers for Foreign Affairs do not enjoy immunity *ratione personae* in respect of acts, whether private or official, that they perform after they have left office. This is understood to be without prejudice to other forms of immunity that such persons may enjoy in respect of official acts that they perform in a different capacity after they have left office."

## C. The temporal scope of immunity *ratione personae*

75. Like the material aspects of immunity *ratione personae*, the temporal scope of this type of immunity is not controversial. On the contrary, there is broad consensus regarding the assertion that immunity from criminal jurisdiction *ratione personae* applies only while the Head of State, Head of Government or Minister for Foreign Affairs holds office. Thus, immunity *ratione personae* begins when the person who enjoys it takes office and ends when that person leaves office.[56] In other words, immunity *ratione personae* is unequivocally temporary in nature and is contingent on the term of office of the person who enjoys such immunity.[57]

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[52] See article 31 and, *a contrario*, article 39, para. 2, of the Vienna Convention on Diplomatic Relations; see also article 31 and, *a contrario*, article 43, para. 2, of the Convention on Special Missions. In both cases, it should be noted that immunity from criminal jurisdiction and immunity from civil and administrative jurisdiction are accorded different treatment since the latter is directly linked to the performance of private acts. Similarly, by establishing the point at which immunity ends, these Conventions make a distinction between official acts and other acts; this is an implicit acknowledgement that unofficial (private) acts are protected by immunity during the period when immunity *ratione personae* is enjoyed by a diplomatic agent or member of a special mission.

[53] See, in particular, the resolution on immunities from jurisdiction and execution of Heads of State and of Government in international law, adopted by the Institute of International Law in Vancouver at its 2001 session (*Yearbook*, vol. 69, p. 743). Article 2 is particularly noteworthy and, for the purposes of this topic, should be read in conjunction with article 3 and article 13, para. 2 (*ibid.*, pp. 745 and 753, respectively).

[54] In this regard, see the interesting analysis contained in the memorandum prepared by the Secretariat (footnote 14 above), paras. 137–140. The recent judgment of the Swiss Federal Criminal Court (see footnotes 15 and 27 above), referred to repeatedly in this report, also endorses the commonly accepted doctrine that immunity covers all acts performed, in this case, by a Head of State (para. 5.3.1).

[55] See the judgment of 14 February 2002 in *Arrest Warrant of 11 April 2000, Judgment, I.C.J. Reports 2002*, p. 22, para. 55.

[56] See *Yearbook … 2008*, vol. II (Part One), document A/CN.4/601, p. 177, para. 79; and the memorandum by the Secretariat (footnote 14 above), para. 90.

[57] This was expressly stated by ICJ in its judgment of 14 February 2002 in *Arrest Warrant of 11 April 2000, I.C.J. Reports 2002*, p. 22, para. 54; see also para. 61 of the same judgment. The same temporal aspect of immunity *ratione personae* was noted by the Institute of

76. This characteristic of immunity *ratione personae* has been consistently reflected in State practice and in international and national jurisprudence. However, it is also true that occasional terminological ambiguity and/or confusion may have an impact on the legal nature of this type of immunity. Thus, it has been reported that, in some cases, there is a certain "residual immunity"[58] in respect of official acts performed by Heads of State, Heads of Government and Ministers for Foreign Affairs after they have left office. Or, to put it differently, it is sometimes maintained that immunity *ratione personae* extends beyond the term of office of the individuals who enjoy such immunity in respect of official acts performed by them while in office. The intended purpose of these positions is clear: to preserve some form of immunity from foreign criminal jurisdiction in respect of official acts after these individuals have left office. However, the nature of the immunity applicable to the aforementioned official acts should be clarified and specified as this may, in some cases, have an impact on the legal regime applicable to such immunity.

77. In that regard, it should be noted, first, that immunity *ratione personae* is justified by the special position held by the persons who enjoy it; as the highest-level representatives of the State, they represent it in international relations automatically and without the need for any specific authorization, and are automatically empowered to express the will and engage the responsibility of the State. In particular, this explains the special legal regime governing immunity *ratione personae*, which allows it to be invoked in respect of any act performed by a Head of State, Head of Government or Minister for Foreign Affairs, and makes it neither possible nor necessary, for the purpose of granting them immunity, to establish the abstract nature of the act performed. In other words, the nature of the act performed by the person who enjoys immunity is irrelevant to the application of this legal institution. In addition, such immunity has a clear time limit that corresponds to the length of the term of office. Thereafter, the nature of the act performed once again becomes relevant: on the one hand, private acts performed by Heads of State, Heads of Government and Ministers for Foreign Affairs are no longer protected by immunity and, on the other, official acts may be so protected but must first be identified as official acts.[59] This requires that an act be recognized as official before immunity can be granted, which is foreign to the very nature of immunity *ratione personae*; it is, however, one of the characteristics of immunity *ratione materiae*.

78. Therefore, in the event that immunity is invoked in respect of an official act performed by a former Head of State, Head of Government or Minister for Foreign Affairs, that individual is presumed to enjoy a type of immunity *ratione materiae* that covers acts performed by State officials in the exercise of their functions, regardless of whether they were representing the State at the highest level at the time when the act was performed and irrespective of whether they had left office at the time when immunity was invoked. Thus, this is not a prolongation of immunity *ratione personae* or a residual enjoyment of any part thereof, but rather an application of the general rules governing immunity *ratione materiae*. Since the distinction between the two types of immunity from foreign criminal jurisdiction has been generally accepted, and since it is also accepted that the two types are governed in part by different legal regimes, the aforementioned distinction with regard to the types of immunity enjoyed by former Heads of State, Heads of Government and Ministers for Foreign Affairs in respect of official acts performed while in office should be clearly established in the draft articles.

79. In the light of the above, the following draft article, which takes the two aforementioned factors into account, is proposed:

"*Draft article 6. The temporal scope of immunity* ratione personae

"1. Immunity *ratione personae* is limited to the term of office of a Head of State, Head of Government or Ministers for Foreign Affairs and expires automatically when it ends.

"2. The expiration of immunity *ratione personae* is without prejudice to the fact that a former Head of State, Head of Government or Ministers for Foreign Affairs may, after leaving office, enjoy immunity *ratione materiae* in respect of official acts performed while in office."

International Law in its 2009 resolution on immunity from jurisdiction of the State and of persons who act on behalf of the State in case of international crimes: "When the position or mission of any person enjoying personal immunity has come to an end, such personal immunity ceases" (art. III, para. 2) (*Yearbook*, vol. 73, p. 227).

[58] The Swiss Federal Criminal Court's judgment of 25 July 2012 (footnote 15 above) appears to be consistent with this position, maintaining that a degree of immunity remains after the term of office has ended even while expressly stating that immunity *ratione personae* is temporary in nature (paras. 5.3.1 and 5.3.2).

[59] In this respect, the Institute of International Law, in its 2001 resolution on immunities from jurisdiction and execution of Heads of State and of Government in international law, stated that a former Head of State does not "enjoy immunity from jurisdiction, in criminal… proceedings, except in respect of acts which are performed in the exercise of official functions and relate to the exercise thereof" (art. 13, para. 2) (*Yearbook*, vol. 69, p. 753).

## Chapter VI

## Future workplan

80. Following the workplan set out in her preliminary report, the Special Rapporteur proposes to devote her third report to a study of the normative elements of immunity *ratione materiae*, focusing primarily on two particularly complex issues: the terms "official" and "official act". This report, which will be submitted to the Commission at its sixty-sixth session, in 2014, will also include draft articles on these issues.

81. The Special Rapporteur will then begin to consider the issue of exceptions to immunity, with the intention of submitting some initial observations to the Commission at its sixty-sixth session.

ANNEX

# PROPOSED DRAFT ARTICLES

## PART ONE

## INTRODUCTION

### *Draft article 1. Scope of the draft articles*

Without prejudice to the provisions of draft article 2, these draft articles deal with the immunity of certain State officials from the exercise of criminal jurisdiction by another State.

### *Draft article 2. Immunities not included in the scope of the draft articles*

The following are not included in the scope of the present draft articles:

(*a*) Criminal immunities granted in the context of diplomatic or consular relations or during or in connection with a special mission;

(*b*) Criminal immunities established in headquarters agreements or in treaties that govern diplomatic representation to international organizations or establish the privileges and immunities of international organizations and their officials or agents;

(*c*) Immunities established under other *ad hoc* international treaties;

(*d*) Any other immunities granted unilaterally by a State to the officials of another State, especially while they are in its territory.

### *Draft article 3. Definitions*

For the purposes of the present draft articles:

(*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 misdemeanour 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;

(*b*) "Immunity from foreign criminal jurisdiction" means the protection from the exercise of criminal jurisdiction by the judges and courts of another State that is enjoyed by certain State officials;

(*c*) "Immunity *ratione personae*" means the immunity from foreign criminal jurisdiction that is enjoyed by certain State officials by virtue of their status in their State of nationality, which directly and automatically assigns them the function of representing the State in its international relations;

(*d*) "Immunity *ratione materiae*" means the immunity from foreign criminal jurisdiction that is enjoyed by State officials on the basis of the acts which they perform in the discharge of their mandate and which can be described as "official acts".

## PART TWO

## IMMUNITY *RATIONE PERSONAE*

### *Draft article 4. The subjective scope of immunity* ratione personae

Heads of State, Heads of Government and Ministers for Foreign Affairs enjoy immunity from the exercise of criminal jurisdiction by States of which they are not nationals.

### *Draft article 5. The material scope of immunity* ratione personae

1. The immunity from foreign criminal jurisdiction that is enjoyed by Heads of State, Heads of Government and Ministers for Foreign Affairs covers all acts, whether private or official, that are performed by such persons prior to or during their term of office.

2. Heads of State, Heads of Government and Ministers for Foreign Affairs do not enjoy immunity *ratione personae* in respect of acts, whether private or official, that they perform after they have left office. This is understood to be without prejudice to other forms of immunity that such persons may enjoy in respect of official acts that they perform in a different capacity after they have left office.

### *Draft article 6. The temporal scope of immunity* ratione personae

1. Immunity *ratione personae* is limited to the term of office of a Head of State, Head of Government or Minister for Foreign Affairs and ends automatically when it expires.

2. The expiration of immunity *ratione personae* is without prejudice to the fact that a former Head of State, Head of Government or Minister for Foreign Affairs may, after leaving office, enjoy immunity *ratione materiae* in respect of official acts performed while in office.