IMMUNITY OF STATE OFFICIALS FROM FOREIGN CRIMINAL JURISDICTION

[Agenda item 3]

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Fifth report on immunity of State officials from foreign criminal jurisdiction, by Ms. Concepción Escobar Hernández, Special Rapporteur*

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CONTENTS

		Paragraphs	Page
Multilateral instruments cited in the present report			102
Works cited in the present report			103
INTRODUCTION		1–9	106
Chapter			
I.	LIMITATIONS AND EXCEPTIONS TO THE IMMUNITY OF STATE OFFICIALS FROM FOREIGN CRIMINAL JURISDICTION: INTRODUCTION	10–21	107
	A. General considerations	10–14	107
	B. Prior consideration by the Commission of limitations and exceptions to the immunity of State officials from foreign criminal jurisdiction	15–21	109
II.	STUDY OF PRACTICE	22–140	112
	A. Treaty practice	23–41	112
	B. National legislative practice	42–59	115
	C. International judicial practice	60–108	119
	1. International Court of Justice	61–86	119
	2. European Court of Human Rights	87–95	123
	3. International criminal courts or tribunals	96–108	124
	D. National judicial practice	109–122	126
	E. Other work of the Commission	123–140	131
III.	LIMITATIONS AND EXCEPTIONS WITHIN THE GENERAL LEGAL CONTEXT OF IMMUNITY FROM FOREIGN CRIMINAL JURISDICTION: METHODOLOGICAL AND CONCEPTUAL ISSUES	141–176	134
	A. Legal nature of immunity	143–155	135
	1. Relationship between immunity and jurisdiction	144–147	135
	2. Relationship between immunity and responsibility	148–152	135
	3. Relationship between immunity of the State and immunity of State officials	153–155	136
	B. National and international criminal courts or tribunals	156–169	137
	C. Concept of limitations and exceptions to immunity	170–176	139

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Chapter		*Paragraphs*	*Page*
IV.	Instances in which the immunity of State officials from foreign criminal jurisdiction does not apply	177–248	140
	A. International crimes	178–224	140
	1. Limitation or exception based on the commission of international crimes as a customary norm	181–189	141
	2. Systemic foundation of international crimes as an exception to immunity	190–217	143
	3. International crimes that constitute a limitation on or exception to immunity	218–224	148
	B. "Territorial tort exception"	225–229	148
	C. Corruption as a limitation on or exception to immunity	230–234	149
	D. Limitations on and exceptions to immunity *ratione personae* and immunity *ratione materiae*	235–242	150
	E. Draft article	243–248	151
V.	Future workplan	249–251	152

Annexes

I.	Draft articles provisionally adopted by the Commission	153
II.	Draft articles provisionally adopted by the Drafting Committee at the Commission's sixty-seventh session, in 2015	153
III.	Draft article proposed for the consideration of the Commission at its sixty-eighth session, in 2016	154

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	Source
Charter of the International Military Tribunal—Annex to the Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis (London Charter) (London, 8 August 1945)	United Nations, *Treaty Series*, vol. 82, No. 251, p. 279.
Convention on the Prevention and Punishment of the Crime of Genocide (Paris, 9 December 1948)	*Ibid.*, vol. 78, No. 1021, p. 277.
Geneva Conventions for the protection of war victims (Geneva, 12 August 1949): Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (Convention I); Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (Convention II); Geneva Convention relative to the Treatment of Prisoners of War (Convention III); Geneva Convention relative to the Protection of Civilian Persons in Time of War (Convention IV)	*Ibid.*, vol. 75, Nos. 970–973, pp. 31 *et seq*.
Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts (Protocol I), and Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of non-international armed conflicts (Protocol II) (Geneva, 8 June 1977); and Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the adoption of an additional distinctive emblem (Protocol III) (Geneva, 8 December 2005)	*Ibid*., vol. 1125, Nos. 17512 and 17513, pp. 3 and 609, and *ibid*., vol. 2404, No. 43425, p. 261, respectively.
Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights) (Rome, 4 November 1950)	*Ibid.*, vol. 213, No. 2889, p. 221.
Vienna Convention on Diplomatic Relations (Vienna, 18 April 1961)	*Ibid.*, vol. 500, No. 7310, p. 95.
Vienna Convention on Consular Relations (Vienna, 24 April 1963)	*Ibid.*, vol. 596, No. 8638, p. 261.
International Covenant on Civil and Political Rights (New York, 16 December 1966)	*Ibid*., vol. 999, No. 14668, p. 171.
American Convention on Human Rights: "Pact of San José, Costa Rica" (San José, 22 November 1969)	*Ibid*., vol. 1144, No. 17955, p. 123.
Vienna Convention on Special Missions (New York, 8 December 1969)	*Ibid.*, vol. 1400, No. 23431, p. 231.
European Convention on State Immunity (Basel, 16 May 1972)	*Ibid.*, vol. 1495, No. 25699, p. 181.
International Convention on the Suppression and Punishment of the Crime of Apartheid (New York, 30 November 1973)	*Ibid*., vol. 1015, No. 14861, p. 243.
Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character (Vienna, 14 March 1975)	United Nations *Juridical Yearbook 1975* (Sales No. E.77.V.3), p. 87.

	Source
Convention on the Elimination of All Forms of Discrimination against Women (New York, 18 December 1979)	United Nations, *Treaty Series*, vol. 1249, No. 20378, p. 13.
African Charter on Human and Peoples' Rights (Nairobi, 27 June 1981)	*Ibid*., vol. 1520, No. 26363, p. 217.
Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (New York, 10 December 1984)	*Ibid.*, vol. 1465, No. 24841, p. 85.
Inter-American Convention to Prevent and Punish Torture (Cartagena, 9 December 1985)	OAS *Treaty Series*, No. 67.
Inter-American Convention on Forced Disappearance of Persons (Belém, 9 June 1994)	ILM, vol. 33, No. 6 (1994), p. 1534.
Inter-American Convention against Corruption (Caracas, 29 March 1996)	E/1996/99, annex. See also ILM, vol. 35, No. 3 (1996), p. 727.
Rome Statute of the International Criminal Court (Rome, 17 July 1998)	United Nations *Treaty Series*, vol. 2187, No. 38544, p. 3.
Criminal Law Convention on Corruption (Strasbourg, 27 January 1999)	*Ibid.*, vol. 2216, No. 39391, p. 225.
African Union Convention on Preventing and Combating Corruption (Maputo, 11 July 2003)	ILM, vol. 43 (2004), p. 5.
United Nations Convention against Corruption (New York, 31 October 2003)	United Nations, *Treaty Series*, vol. 2349, No. 42146, p. 41.
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). vol. I, resolution 59/38, annex.
International Convention for the Protection of All Persons from Enforced Disappearance (New York, 20 December 2006)	United Nations, *Treaty Series*, vol. 2716, No. 48088, p. 3.
Charter of Fundamental Rights of the European Union (Strasbourg, 12 December 2007)	*Official Journal of the European Union*, No. C 83, 30 March 2010, p. 389.
Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights (Malabo Protocol) (Malabo, 27 June 2014)	Available from the website of the African Union: www.au.int/en/treaties.

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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 the proposal in 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 current 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 Special Rapporteur, Mr. Kolodkin submitted three reports, in which he established the boundaries within which the topic should be considered and analysed various aspects of the substantive and procedural questions relating to the immunity of State officials from foreign criminal jurisdiction.[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]

4. At the same session, the Special Rapporteur submitted a preliminary report on the immunity of State officials from foreign criminal jurisdiction.[6] That report helped to clarify the terms of the debate up to that point, identified the principal points of contention which remained, the topics to be considered and the methodology to be followed, and set out a workplan for consideration of the topic over the present quinquennium. The Commission examined the preliminary report at its sixty-fourth session, in 2012,[7] and the Sixth Committee examined it at its sixty-seventh session.[8] In both cases, the Special Rapporteur's proposals were approved.

5. At the Commission's sixty-fifth session, in 2013, the Special Rapporteur submitted a second report on the immunity of State officials from foreign criminal jurisdiction.[9] The report examined the scope of the topic and of the draft articles, the concepts of immunity and jurisdiction, the distinction between immunity *ratione personae* and immunity *ratione materiae*, and the normative elements of immunity *ratione personae*, proposing six draft articles. The Commission considered the second report of the Special Rapporteur[10] and provisionally adopted three draft articles, dealing respectively with the scope of the draft articles (draft art. 1) and the normative elements of immunity *ratione personae* (draft arts. 3 and 4)[11] together with the commentaries thereto. The Drafting Committee decided to keep the draft article on definitions under review and to take action on it at a later stage.[12] The Sixth Committee examined the Special Rapporteur's second report at its sixty-eighth session, held in 2013, welcoming the report and the progress made by the Commission.[13]

6. At the sixty-sixth session of the Commission, in 2014, the Special Rapporteur submitted the third report on the immunity of State officials from foreign criminal jurisdiction.[14] She commenced with an analysis of the normative elements of immunity *ratione materiae*, focusing on the general concept of "State official" in the subjective context of immunity *ratione materiae* (persons enjoying immunity), analysed the terminology to be used in referring to State officials and proposed two draft articles. The Commission considered the third report of the Special Rapporteur at its 3217th to 3222nd meetings[15] and provisionally adopted the draft articles dealing with the general concept of "State official"(draft article 2 (*e*)) and "Persons enjoying immunity *ratione materiae*" (draft article 5),[16] together with the commentaries thereto.[17] At

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[1] See *Yearbook … 2006*, vol. II (Part Two), p. 185, para. 257 and p. 191, annex I.

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

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

[4] The reports of the Special Rapporteur Mr. Kolodkin are contained in *Yearbook … 2008*, vol. II (Part One), p. 157, document A/CN.4/601 (preliminary report); *Yearbook … 2010*, vol. II (Part One), document A/CN.4/631 (second report) and *Yearbook … 2011*, vol. II (Part One), document A/CN.4/646 (third report).

[5] See *Yearbook … 2012*, vol. II (Part Two), p. 59, para. 84.

[6] *Yearbook … 2012*, vol. II (Part One), p. 41, document A/CN.4/654.

[7] For a summary of the debate, see *Yearbook … 2012*, vol. II (Part Two), pp. 60–66, paras. 89–139. See also the summary records of the Commission contained in *Yearbook … 2012*, vol. I, 3143rd to 3147th meetings, pp. 94 *et seq*.

[8] The Sixth Committee considered the topic of immunity of State officials from foreign criminal jurisdiction at the sixty-seventh session of the General Assembly, in 2012 (A/C.6/67/SR.20 to A/C.6/67/SR.23. In addition, two States referred to the topic at another meeting (A/C.6/67/SR.19). See also the topical summary of the discussion held in the Sixth Committee of the General Assembly during its sixty-seventh session (A/CN.4/657, paras. 26–38).

[9] *Yearbook … 2013*, vol. II (Part One), document A/CN.4/661, p. 35.

[10] For a detailed analysis of the issues raised in the discussions and the positions held by members of the Commission, see *Yearbook … 2013*, vol. I, 3164th to 3168th and 3170th meetings, pp. 18–36, and 40–45.

[11] See annex I to the present report for the text of these draft articles.

[12] For the consideration of the topic by the Commission at its sixty-fifth session, see *Yearbook … 2013*, vol. II (Part Two), pp. 38–50, paras. 40–49. See, in particular, the draft articles with the commentaries thereto, contained in para. 49. For the Commission's discussions on the commentaries to the draft articles, see *ibid.*, vol. I, 3193rd to 3196th meetings, pp. 143–157. For the presentation of the report of the Drafting Committee, see *ibid.*, 3174th meeting, pp. 50–53.

[13] See A/C.6/68/SR.17 to A/C.6/68/SR.19. See also the topical summary of the debate held in the Sixth Committee of the General Assembly at its sixty-eighth session (A/CN.4/666) and in particular sect. B.

[14] *Yearbook … 2014*, vol. II (Part One), document A/CN.4/673, p. 81.

[15] For a detailed analysis of the issues raised in the discussions and the positions held by members of the Commission, see *Yearbook … 2014*, vol. I, 3217th to 3222th meetings, pp. 83 *et seq*.

[16] For the texts of the draft articles, see annex I to the present report.

[17] For the consideration of the topic by the Commission at its sixty-sixth session, see *Yearbook … 2014*, vol. II (Part Two), pp. 142–146, paras. 123–132. See, in particular, the draft articles with the commentaries thereto, contained in para. 132. For the Commission's discussions on the commentaries to the draft articles, see *Yearbook … 2014*, vol. I, 3240th to 3242nd meetings, pp. 205 *et seq*. For the report of the Drafting Committee and its presentation in plenary, see document A/CN.4/L.850 (available from the website of the Commission, documents of the sixty-sixth session) and *Yearbook … 2014*, vol. I, 3231st meeting, pp. 160–161. The statement by the Chair of the Drafting Committee can be consulted on the website of the Commission.

its sixty-ninth session, the Sixth Committee examined the topic of immunity of State officials from foreign criminal jurisdiction as part of its consideration of the annual report of the Commission. States welcomed the third report of the Special Rapporteur and the two new draft articles provisionally adopted by the Commission, highlighting the significant progress made on the topic.[18]

7. At the sixty-seventh session of the Commission, in 2015, the Special Rapporteur submitted the fourth report on the immunity of State officials from foreign criminal jurisdiction,[19] which continued the analysis of the normative elements of immunity *ratione materiae*, addressing the substantive and temporal aspects in detail, and proposed two draft articles. The Commission examined the Special Rapporteur's fourth report at its 3271st to 3278th meetings[20] and decided to refer the two draft articles to the Drafting Committee. The Drafting Committee provisionally adopted draft articles 2 (*f*) (definition of "act performed in an official capacity") and 6 (scope of immunity *ratione materiae*).[21] The Commission took note of these draft articles and decided that the commentaries thereto would be considered at that session.[22] At its seventieth session, the Sixth Committee examined the topic of immunity of State officials from foreign criminal jurisdiction as part of its consideration of the annual report of the Commission. States again welcomed the Special Rapporteur's fourth report and the two new draft articles provisionally adopted by the Drafting Committee and highlighted the progress made on the topic by the Commission.[23]

8. Starting in 2013, the Commission has addressed various questions to States on issues of interest to the topic of immunity of State officials from foreign criminal jurisdiction. In 2014, ten States submitted comments: Belgium, Czech Republic, Germany, Ireland, Mexico, Norway, Russian Federation, Switzerland, United Kingdom of Great Britain and Northern Ireland and United States of America.[24] In 2015, the following States submitted contributions: Austria, Czech Republic, Cuba, Finland, France, Germany, Netherlands, Peru, Poland, Spain, United Kingdom and Switzerland.[25] In 2016, at the time when the present report was finalized, written replies had been received from the following States: Australia, Austria, Netherlands, Paraguay, Peru, Spain and Switzerland.[26] In addition, several States referred in their statements in the Sixth Committee to the issues raised in the Commission's requests. The Special Rapporteur wishes to thank those States for their comments, which are invaluable to the work of the Commission. She would also welcome any other comments that States may wish to submit at a later date. The comments received, as well as the observations contained in the oral statements by delegations in the Sixth Committee, were duly taken into account in the preparation of the present report.

9. As already announced in 2015, the present report analyses the limitations and exceptions to the immunity of State officials from foreign criminal jurisdiction. It deals successively with the Commission's consideration of this issue over the two quinquenniums during which it has been dealing with the topic (chap. I), the analysis of relevant practice (chap. II), some methodological and conceptual questions relating to limitations and exceptions (chap. III), and instances in which the immunity of State officials from foreign criminal jurisdiction does not apply (chap. IV). On the basis of this study, a draft article is proposed. The report also contains a reference to the future workplan (chap. V). Lastly, in order to facilitate the Commission's consideration of the present report, it has three annexes containing draft articles provisionally adopted by the Commission (annex I), draft articles provisionally adopted by the Drafting Committee and of which the Commission has taken note (annex II) and a draft article proposed in the present report (annex III).

[18] See A/C.6/69/SR.21 to A/C.6/69/SR.26. See also the topical summary of the debate held in the Sixth Committee of the General Assembly at its sixty-ninth session (A/CN.4/678), sect. D, paras. 37–51.

[19] *Yearbook … 2015*, vol. II (Part One), document A/CN.4/686, p. 3.

[20] For a detailed analysis of the issues raised in the discussions and the positions held by members of the Commission, see *ibid.*, vol. I, 3271st to 3278th meetings, pp. 208 *et seq.*

[21] See A/CN.4/L.865 (available from the Comission's website, documents of the sixty-seventh session) and *Yearbook … 2015*, vol. I, 3284th meeting, pp. 302–304. The statement by the Chair of the Drafting Committee can be consulted on the website of the Commission. The text of the draft articles provisionally adopted by the Drafting Committee is included in annex II to the present report.

[22] For the consideration of the topic by the Commission at its sixty-seventh session, see *Yearbook … 2015*, vol. II (Part Two), A/70/10, pp. 71–79, paras. 174–243.

[23] See A/C.6/69/SR.20 and A/C.6/69/SR.22 to A/C.6/69/SR.25. See also the topical summary of the debate held in the Sixth Committee of the General Assembly at its seventieth session (A/CN.4/689), sect. F, paras. 68–76.

[24] *Yearbook … 2013*, vol. II (Part Two), p. 15, para. 25. The Commission requested States to provide information, by 31 January 2014, on the practice of their institutions, and in particular, on judicial decisions, with reference to the meaning given to the phrases "official acts" and "acts performed in an official capacity" in the context of the immunity of State officials from foreign criminal jurisdiction.

[25] *Yearbook … 2014*, vol. II (Part Two), p. 19, para. 28. The Commission requested States to provide information, by 31 January 2015, on their domestic law and their practice, in particular judicial practice, with reference to the following issues: (*a*) the meaning given to the phrases "official acts" and "acts performed in an official capacity" in the context of the immunity of State officials from foreign criminal jurisdiction; and (*b*) any exceptions to immunity of State officials from foreign criminal jurisdiction.

[26] *Yearbook … 2015*, vol. II (Part Two), p. 14, para. 29. The Commission stated that it would appreciate being provided by States with information on their legislation and practice, in particular judicial practice, relating to limitations and exceptions to the immunity of State officials from foreign criminal jurisdiction.

Chapter I

Limitations and exceptions to the immunity of State officials from foreign criminal jurisdiction: introduction

A. General considerations

10. As already pointed out by the Special Rapporteur, the issue of limitations and exceptions to immunity should be addressed once the analysis of the normative elements of immunity *ratione personae* and immunity *ratione materiae* has been completed. This is for the obvious reason that only after examining the basic elements that define the general

regime applicable in abstract terms to immunity from foreign criminal jurisdiction is it possible to address the complex question of whether that general regime may be subject to limitations and exceptions. In addition, it has been pointed out that the issue of limitations and exceptions to immunity must be analysed both comprehensively and with reference to the two types of immunity referred to above.

11. The issue of limitations and exceptions to immunity has traditionally been considered from the perspective of the acts that can be covered by immunity. Consequently, some publicists and States have focused on the relationship between immunity from foreign criminal jurisdiction and *jus cogens*, serious and systematic violations of human rights, international crimes and efforts to combat impunity. Other publicists and States have concentrated on attribution of the official's act to the State, emphasizing the characterization of the official's immunity as the State's immunity. In addition, the question of limitations and exceptions to immunity has been considered from a different angle, essentially concerning the representative character of persons enjoying immunity *ratione personae*. Nevertheless, also in relation to this category of immunity, the existence or non-existence of limitations and exceptions thereto has been linked in some way to the nature of the act performed by these State officials.

12. The wealth of recent publications on the immunity of the State and its officials has demonstrated that the issue of limitations and exceptions constitutes one of the major concerns of the international legal community.[27] The same concern is reflected in the series of resolutions that have been adopted to date by the Institute of International Law and which contain references to limitations and exceptions to immunity.[28] The same can be said of other indirect contributions to the literature on the present topic, including the Princeton Principles on Universal Jurisdiction.[29]

13. However, this focus on limitations and exceptions to immunity is not only theoretical or doctrinal. On the contrary, the discussion concerning the judgments of the European Court of Human Rights, especially in the *Al-Adsani* and *Jones* cases,[30] demonstrates that the issue of limitations and exceptions to sovereign immunity has a very important practical dimension. In addition, the judgment of the International Court of Justice in the case of *Jurisdictional Immunities of the State*,[31] has placed the close relationship between immunity and several key concepts of contemporary international law, especially *jus cogens*, at the forefront of the debate. Moreover, it should not be forgotten that domestic courts have also ruled on the question of limitations and exceptions to the immunity from criminal jurisdiction of the officials of a foreign State in the regular exercise of their judicial functions, some of which have had an important social and media impact and been extensively covered in legal discussions and writings. The *Pinochet* case, in which Spanish and British courts were involved, can no doubt be considered as having prompted the current discussion on the immunities of State officials and exceptions thereto. Two recent judgments by domestic courts have also complicated the problem. The first is the 22 October 2014 judgment of the Italian Constitutional Tribunal concerning the application in Italy of the judgment of the International Court of Justice in *Jurisdictional Immunities of the State*.[32] The second is the judgment issued in February this year by the Supreme Court of Appeal of South Africa in the case of the request for the arrest of President Al Bashir following the warrant issued by the International Criminal Court.[33] Lastly, it should be remembered that the question of limitations and exceptions to immunity is the crux of the more recent developments concerning international criminal jurisdiction, as exemplified by various decisions of the African Union, particularly the adoption of the Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights, which created an International Criminal Law Section in that Court.[34]

14. Consequently, any work of the Commission on the immunity of State officials from foreign criminal

[27] See, in particular: Bellal, *Immunités et violations graves des droits humains: vers une évolution structurelle de l'ordre juridique international?*; Borghi, *L'immunité des dirigeants politiques en droit international*; Bröhmer, *State immunity and the violation of human rights*; Canadas-Blanc, *La responsabilité pénale des élus locaux*; Frulli, *Inmunità e crimini internazionali. L'esercizio della giuridizione penale e civile nei confronti degli organi statali sospetati di gravi crimini internazionali*; Kelly, *Nowhere to hide: Defeat of the sovereign immunity defense for crimes of genocide and the trials of Slobodan Milosevic and Saddam Hussein*; Otshudi Okondjo Wonyangondo, *L'immunité de juridiction pénale des dirigeants étrangers accusés des crimes contre l'humanité*; Pedretti, *Immunity of Heads of State and State Officials for International Crimes*; Simbeye, *Immunity and International Criminal Law*; Van Alebeek, *The Immunity of States and Their Officials in International Criminal Law and International Human Rights Law*; Verhoeven (ed.), *Le droit international des immunités: contestation ou consolidation?*. Among the general works devoted to the immunity of the State and of State officials which have dealt with the question of limitations and exceptions, see Foakes, *The position of heads of State and senior officials in international law*; Fox and Webb, *The Law of State Immunity*.

[28] See the following resolutions: Immunities from jurisdiction and execution of Heads of State and of Government in international law, Vancouver session, 2001 (art. 11, paras. 1.b and 3; 13, para. 2) (Institute of International Law, *Yearbook*, vol. 69, Session of Vancouver, 2001, Paris, Pedone, 2001, p. 743); Universal criminal jurisdiction with regard to the crime of genocide, crimes against humanity and war crimes, Krakow session, 2005 (art. 6) (Institute of International Law, *Yearbook*, vol. 71-II, Session of Krakow, 2005, Second Part, Paris, Pedone, 2005, p. 297); Immunity from jurisdiction of the State and of persons who act on behalf of the State in case of international crimes, Naples session, 2009 (arts. II. 2 and 3, and III.1) (Institute of International Law, *Yearbook*, vol. 73- I and II, Session of Naples, 2009, First and Second Parts, Paris, Pedone, 2009, p. 226); and Universal civil jurisdiction with regard to reparation for international crimes, Tallinn session, 2015 (art. 5) (Institute of International Law, *Yearbook*, vol. 76, Session of Tallinn, 2015, Paris, Pedone, 2015, p. 263).

[29] See, in particular, principle 5, entitled "Immunities", Princeton Project on Universal Jurisdiction, *The Princeton Principles on Universal Jurisdiction*, Princeton, New Jersey, Program in Law and Public Affairs, 2001.

[30] *Al-Adsani v. the United Kingdom* [GC], No. 35763/97, ECHR 2001-XI; *Jones and Others v. the United Kingdom*, Nos. 34356/06 and 40528/06, ECHR 2014. See also paras. 87–95 below.

[31] *Jurisdictional immunities of the State* (*Germany v. Italy, (Greece intervening)*), Judgment, *I.C.J. Reports 2012*, p. 99. See also paras. 61–86 below.

[32] Judgment No. 238/2014.

[33] See the judgment in the case *The Minister of Justice and Constitutional Development and Others v. The Southern Africa Litigation Centre and Others* (867/15) [2016] ZASCA 17 (15 March 2016). The judgment was in response to the appeal lodged by the Government of South Africa against the judgment issued by the High Court of South Africa (Gauteng Division, Pretoria) on 23 June 2015 in case 27740/2015 (*Southern Africa Litigation Centre v. Minister of Justice and Constitutional Development and Others*).

[34] The Malabo Protocol was adopted at the twenty-third regular session of the Assembly of the African Union. It has not yet entered into force.

jurisdiction would be incomplete without consideration of the limitations and exceptions to such immunity. However, such analysis should not be limited to the relationship between international crimes and immunity of State officials from foreign criminal jurisdiction, even though that issue certainly constitutes the central and most controversial aspect of the question. Indeed, there are other examples in practice that should also be analysed from the perspective of limitations and exceptions to immunity. Moreover, the present report must also take into consideration a series of questions of general import without which the consideration of limitations and exceptions to immunity would be incomplete. The main goal of the report is therefore to consider in detail the issue of limitations and exceptions to immunity, starting with an introductory analysis of prior work by the Commission over the two most recent quinquenniums.

B. Prior consideration by the Commission of limitations and exceptions to the immunity of State officials from foreign criminal jurisdiction

15. The limitations and exceptions to immunity are undoubtedly one of the central issues to be considered by the Commission in its work on this topic, and is also a highly politically sensitive issue. It therefore comes as no surprise that the issue of limitations and exceptions has been covered in the various reports submitted for the Commission's consideration and has been the subject of an ongoing debate within the Commission, to the point where some of its members consider the issue to be the very purpose, and even the only purpose, of the present topic. The importance attached to this issue is also reflected in the statements made by delegations in the Sixth Committee, which have repeatedly referred to the limitations and exceptions to immunity during the consideration of the annual report of the Commission, as well as in the written contributions provided by States in response to questions posed by the Commission.

16. It will be recalled that the subject of limitations and exceptions to the immunity of State officials from foreign criminal jurisdiction was analysed in detail in the memorandum by the Secretariat,[35] as well as in the second report of the former Special Rapporteur, Mr. Kolodkin, one section of which was devoted to a case study of exceptions to immunity.[36] On the basis of that study, Mr. Kolodkin concluded that there is in contemporary international law no customary norm (or trend toward the establishment of such a norm) making it possible to assert that there are exceptions to immunity, apart from the exception concerning harm caused directly in the forum State when that State did not consent to the performance of the act or to the presence of the foreign official in its territory.[37] He added that further restrictions on immunity, even *de lege ferenda*, were not desirable, since they could impair the stability of international relations; he also questioned their effect on efforts to combat impunity.[38]

17. In her preliminary report, the present Special Rapporteur highlighted the lack of consensus within the Commission on the issue of limitations and exceptions to immunity, while drawing attention to the need to analyse the topic during the present quinquennium, in order to identify what place could be given to exceptions to immunity, particularly in the case of international crimes, in the definition of the legal regime applicable both to immunity *ratione personae* and to immunity *ratione materiae*. In addition, emphasis was placed on the need to approach the question in the light of the values and legal principles that are affected by immunity, from the perspective both of the values protected by immunity (sovereign equality of the State, stability of international relations) and of other values and legal principles that could be affected by the existence of immunity of State officials from foreign criminal jurisdiction. Lastly, the preliminary report also referred to the need to approach the issue of immunity—including the question of exceptions—from the perspective of both *lex ferenda* and *lex lata*, thus fulfilling the Commission's dual mandate encompassing both the codification and the progressive development of international law.[39]

18. In her following reports, the Special Rapporteur did not deal directly with the question of limitations and exceptions to immunity, although in the three reports submitted for the Commission's consideration in 2013, 2014 and 2015 she expressed a reservation regarding subsequent consideration of this question. Accordingly, none of the analyses contained in those reports and none of the draft articles included therein should be understood as a pronouncement on the existence or otherwise of exceptions to immunity.[40] In addition, it will be recalled that the fourth report contained an indirect analysis of the issue of limitations and exceptions to immunity in connection with the study of the concept of "acts performed in an official capacity" and already mentioned some of the elements that are developed in detail in the present report.[41]

19. All this prior work shows the context within which the Commission's discussion to date on limitations and exceptions to immunity has taken place. Although the question will again be discussed, this time in the form of a case study, during the consideration of the present report at the current session, it is useful to reiterate the issues and arguments concerning this question that have been raised by Commission members to date. These arguments can be summarized as follows:

(*a*) although some Commission members have maintained that there are no exceptions to immunity, they are in the minority.[42] Indeed, a number of members have

[35] See document A/CN.4/596 and Corr.1 (footnote 3 above), paras. 67–87, 141–153 and 180–212.

[36] *Yearbook … 2010*, vol. II (Part One), document A/CN.4/631, pp. 411–425, paras. 54–93.

[37] *Ibid.*, p. 425, para. 90.

[38] *Ibid.*, paras. 91 and 92.

[39] *Yearbook … 2012*, vol. II (Part One), document A/CN.4/654, pp. 41 *et seq.*, paras. 68 and 72. See also paras. 21, 34 and 45.

[40] *Yearbook … 2013*, vol. II (Part One), document A/CN.4/661, pp. 35 *et seq.*, paras. 18, 55 and 73; *Yearbook … 2014*, vol. II (Part One), document A/CN.4/673, p. 85, para. 15; and *Yearbook … 2015*, vol. II (Part One), document A/CN.4/686, pp. 8 and 33, paras. 20 and 133.

[41] *Yearbook … 2015*, vol. II (Part One), document A/CN.4/686, pp. 31–32 and 34, paras. 121–126, 137 and 138.

[42] See *Yearbook … 2012*, vol. I, 3145th meeting. The reference is to summary records of the Commission dealing with the topics mentioned in the text. The same system has been used in subsequent footnotes.

admitted that there are instances in which the application of immunity is not possible, although their positions are not identical in all respects;[43]

(*b*) the commission of international crimes is considered to be the main instance in which immunity would not be applicable. In addition, other examples of exceptions or limitations have been mentioned by Commission members, including *ultra vires* acts, *acta jure gestionis*, performance of functions that are ostensibly connected with official status but are in fact for the exclusive benefit of the State official (especially acts of corruption and misappropriation of State funds), and instances in which the official's act causes harm to persons or property in the territory of the forum State, usually referred to as the "territorial tort exception";[44]

(*c*) some Commission members have argued that conduct characterized as being contrary to *jus cogens* is a basis for limitations and exceptions to immunity. However, this argument has been put forward not as an autonomous and absolute criterion but in relation to efforts to combat impunity for international crimes, to serious human rights violations and to protection of the fundamental values of contemporary international law;[45]

(*d*) international crimes have been identified mainly as the crime of genocide, crimes against humanity, war crimes and the crime of aggression.[46] One Commission member has referred simply to crimes listed in the Rome Statute of the International Criminal Court as a means of identifying crimes generally viewed as such by the international community;[47]

(*e*) international crimes have been mentioned by some Commission members as exceptions to immunity,[48] while others have seen them as conduct that can never be part of State functions and which therefore cannot even be considered as acts performed in an official capacity.[49] In both cases, however, when Commission members have advanced these arguments, they have done so with the aim of precluding application of the rules concerning immunity of State officials from foreign criminal jurisdiction;

(*f*) with a few exceptions, most of the Commission members who have expressed an opinion on the matter have stated that exceptions to immunity do not apply to persons enjoying immunity *ratione personae* (Head of State, Head of Government and Minister for Foreign Affairs) during their term in office. They would, however, apply after that term has ended;[50]

(*g*) a large number of Commission members have maintained that immunity *ratione materiae* is indeed covered by the above-mentioned exceptions and limitations;[51]

(*h*) some Commission members have stated that there is no norm of international law concerning exceptions to immunity and that international practice is limited and inconsistent. Thus the Commission either cannot take exceptions into account or must deal with them prudently and cautiously;[52]

(*i*) however, those who have been in favour of exceptions and limitations consider that either it is possible to point to the existence of norms allowing exceptions or, even if is debatable whether they exist at the customary level, it is possible to identify a clear and growing trend toward exceptions to immunity, particularly in the case of international crimes.[53] They have also noted that the inconsistent and inconclusive nature of practice cannot be construed to mean solely that there are no exceptions to immunity. Consequently, the Commission can consider them in the exercise of its mandate, which includes both the codification and the progressive development of international law. In this connection, some Commission members have drawn attention to the fact that it is precisely the lack of consistent and conclusive practice that allows the Commission to opt for inclusion of exceptions, particularly in order to ensure consistency of the draft articles with other legal norms and principles enshrined in contemporary international law, which must be viewed as a normative whole;[54]

(*j*) Commission members generally have acknowledged the need to preserve the progress made over the last few decades in international criminal law, especially regarding the consolidation of efforts to combat impunity as a goal of the international community. However, Commission members have drawn varying conclusions from this affirmation. For example, some have emphasized that impunity and immunity are different concepts and that immunity is exclusively procedural and not substantive in nature, concluding that the

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[43] See *Yearbook … 2008*, vol. I, 2983rd to 2985th and 2987th meetings; see also *Yearbook … 2011*, vol. I, 3086th to 3088th and 3113th to 3115th meetings; *Yearbook … 2012*, vol. I, 3143rd to 3145th meetings; *Yearbook … 2013*, vol. I, 3164th to 3168th meetings; *Yearbook … 2014*, vol. I, 3217th, 3219th and 3220th meetings, and *Yearbook … 2015*, vol. I, 3273rd and 3275th meetings.

[44] See *Yearbook … 2008*, vol. I, 2983rd to 2985th meetings; see also *Yearbook … 2011*, vol. I, 3086th to 3088th and 3115th meetings; *Yearbook …2012*, vol. I, 3144th and 3145th meetings; *Yearbook … 2013*, vol. I, 3167th meeting and *Yearbook … 2015*, vol. I, 3275th meeting.

[45] See *Yearbook … 2011*, vol. I, 3086th to 3088th meetings and *Yearbook …2012*, vol. I, 3145th meeting.

[46] See *Yearbook … 2008*, vol. I, 2984th meeting; see also *Yearbook … 2011*, vol. I, 3087th and 3088th meetings; *Yearbook …2012*, vol. I, 3145th meeting and *Yearbook … 2015*, vol. I, 3275th meeting.

[47] See *Yearbook … 2011*, vol. I, 3087th meeting; *Yearbook …2012*, vol. I, 3145th meeting and *Yearbook … 2013*, vol. I, 3164th meeting.

[48] See *Yearbook … 2008*, vol. I, 2983rd and 2984th meetings; see also *Yearbook … 2011*, vol. I, 3086th to 3088th and 3115th meetings, and *Yearbook …2012*, vol. I, 3144th to 3145th meetings.

[49] See *Yearbook … 2008*, vol. I, 2985th meeting; see also *Yearbook … 2015*, vol. I, 3274th and 3275th meetings.

[50] See *Yearbook … 2008*, vol. I, 2983rd and 2984th meetings; see also *Yearbook … 2011*, vol. I, 3087th, 3088th and 3113th meetings, and *Yearbook …2012*, vol. I, 3143rd to 3145th meetings.

[51] See *Yearbook … 2011*, vol. I, 3086th to 3088th meetings; *Yearbook …2012*, vol. I, 3144th to 3145th meetings; *Yearbook … 2013*, vol. I, 3167th meeting; *Yearbook … 2014*, vol. I, 3219th meeting and *Yearbook … 2015*, vol. I, 3275th meeting.

[52] See *Yearbook … 2011*, vol. I, 3086th meeting; *Yearbook …2012*, vol. I, 3143rd and 3144th meetings; and *Yearbook … 2013*, vol. I, 3167th meeting.

[53] See *Yearbook … 2011*, vol. I, 3086th and 3087th meetings; *Yearbook …2012*, vol. I, 3143rd to 3145th meetings; *Yearbook … 2013*, vol. I, 3165th meeting and *Yearbook … 2015*, vol. I, 3274th meeting.

[54] See *Yearbook … 2008*, vol. I, 2984th meeting; see also *Yearbook … 2011*, vol. I, 3087th, 3088th and 3115th meetings and *Yearbook … 2013*, vol. I, 3167th meeting.

non-existence of exceptions in no way affects efforts to combat impunity. Others, on the contrary, have pointed out that in certain circumstances immunity may have substantive connotations or consequences that would preclude effective individual criminal responsibility. In this context, it is essential to define exceptions or limitations to immunity in order to ensure that immunity does not become a form of impunity;[55]

(*k*) lastly, it should be noted that some Commission members who support the existence of exceptions have mentioned the need for such exceptions to be accompanied by recognition of procedural safeguards to prevent them from being misused.[56]

20. Together with this discussion within the Commission, attention should be drawn to the fact that, when analysing the Commission's work on this subject, States have referred at length to the question of limitations and exceptions to the immunity of State officials from foreign criminal jurisdiction, both in the discussions held in the Sixth Committee and in the written contributions provided in response to questions posed by the Commission. An analysis of the positions maintained by States leads to the following conclusions:

(*a*) States attach considerable importance to questions related to exceptions and limitations to immunity, to which they have referred repeatedly since the first debate on immunity of State officials from foreign criminal jurisdiction was held in 2008.[57] In addition, a number of States have drawn attention to the need to approach the question cautiously,[58] with some delegations emphasizing the need to consider first existing law (*lex lata*) and then proposals for progressive development (*lex ferenda*). However, it is also noteworthy that there is no clear consensus among States as to which questions concerning exceptions would be included in each of the two categories;[59]

(*b*) exceptions to immunity have been viewed by States from two different perspectives: their effect on the goal sought by immunities, on the one hand, and their relationship to efforts to combat immunity for the most serious international crimes, on the other;[60]

(*c*) the proponents of the first perspective have warned of the damage that recognition of any type of exception might do to the exercise of the State's own functions, the risk of submission of politically motivated requests and the harm that limitation of immunity might do to the stability of inter-State relations;[61]

(*d*) from the second perspective, other States have drawn attention to the need to take into account the developments that have occurred in international criminal law in recent decades, as well as the need for the Commission to consider the question of immunities in general, and exceptions in particular, in a manner consistent with the rest of the norms and principles in force in contemporary international law. Those States have mentioned, in particular, the fact that the treatment given to exceptions should not undermine the progress achieved in international criminal law, including the progress that has occurred in the process of creating and establishing international criminal tribunals.[62] Those States believe that international crimes should be considered, *prima facie*, as exceptions to immunity;[63]

(*e*) with one exception, States have supported full or absolute immunity *ratione personae* for the Head of State, the Head of Government and the Minister for

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[55] See *Yearbook … 2008*, vol. I, 2984th, 2985th and 2987th meetings; see also *Yearbook … 2012*, vol. I, 3145th meeting; *Yearbook … 2013*, vol. I, 3165th meeting; *Yearbook … 2014*, vol. I, 3217th meeting and *Yearbook … 2015*, vol. I, 3275th meeting.

[56] See *Yearbook … 2013*, vol. I, 3168th meeting and *Yearbook … 2015*, vol. I, 3275th meeting.

[57] Algeria (A/C.6/67/SR.24); Austria (A/C.6/68/SR.17, A/C.6/63/SR.23, A/C.6/66/SR.26, A/C.6/67/SR.20 and A/C.6/70/SR.24); Belarus (A/C.6/66/SR.27, A/C.6/67/SR.21 and A/C.6/68/SR.18); Belgium (A/C.6/66/SR.26); Canada (A/C.6/67/SR.20); Chile (A/C.6/67/SR.20 and A/C.6/68/SR.18); China (A/C.6/63/SR.23, A/C.6/66/SR.27, A/C.6/67/SR.21, A/C.6/68/SR.19 and A/C.6/69/SR.23); Croatia (A/C.6/70/SR.24); Czech Republic (A/C.6/63/SR.24 and A/C.6/68/SR.18); Denmark (A/C.6/69/SR.22); Ethiopia (A/C.6/69/SR.12); France (A/C.6/66/SR.20 and A/C.6/68/SR.17); Germany (A/C.6/68/SR.18, A/C.6/70/SR.24 and A/C.6/66/SR.24); Greece (A/C.6/68/SR.18 and A/C.6/70/SR.24); Hungary (A/C.6/66/SR.19); India (A/C.6/66/SR.27 and A/C.6/68/SR.19); Indonesia (A/C.6/66/SR.24 and A/C.6/68/SR.19); Iran (Islamic Republic of) (A/C.6/68/SR.19, A/C.6/69/SR.12, A/C.6/69/SR.24 and A/C.6/70/SR.25); Ireland (A/C.6/67/SR.21 and A/C.6/68/SR.18); Israel (A/C.6/68/SR.19); Italy (A/C.6/66/SR.26, A/C.6/67/SR.22 and A/C.6/68/SR.19); Japan (A/C.6/63/SR.23 and A/C.6/70/SR.25); Malaysia (A/C.6/67/SR.22 and A/C.6/68/SR.19); Mexico (A/C.6/66/SR.18); Norway (A/C.6/63/SR.23, A/C.6/66/SR.26, A/C.6/67/SR.20 and A/C.6/70/SR.23); New Zealand (A/C.6/63/SR.24, A/C.6/66/SR.27 and A/C.6/67/SR.22); Netherlands (A/C.6/63/SR.22, A/C.6/67/SR.21, A/C.6/68/SR.18 and A/C.6/69/SR.23); Peru (A/C.6/66/SR.26 and A/C.6/67/SR.21); Poland (A/C.6/66/SR.26 and A/C.6/69/SR.23); Portugal (A/C.6/66/SR.27, A/C.6/67/SR.21, A/C.6/68/SR.17 and A/C.6/69/SR.24); Republic of Korea (A/C.6/67/SR.21 and A/C.6/68/SR.18); Republic of the Congo (A/C.6/67/SR.21); Russian Federation (A/C.6/63/SR.25, A/C.6/66/SR.27 and A/C.6/67/SR.22); Singapore (A/C.6/68/SR.17); Slovenia (A/C.6/67/SR.22 and A/C.6/70/SR.24); Sri Lanka (A/C.6/66/SR.27); South Africa (A/C.6/67/SR.21 and A/C.6/68/SR.18); Spain (A/C.6/66/SR.27, A/C.6/67/SR.22 and A/C.6/68/SR.17); Sudan (A/C.6/63/SR.25); Switzerland (A/C.6/63/SR.24, A/C.6/66/SR.26 and A/C.6/67/SR.21); Thailand (A/C.6/69/SR.24), United States (A/C.6/69/SR.24 and A/C.6/70/SR.25); United Kingdom (A/C.6/63/SR.23, A/C.6/68/SR.18, A/C.6/69/SR.23, and A/C.6/70/SR.24); Viet Nam (A/C.6/70/SR.25).

[58] China (A/C.6/63/SR.23, A/C.6/68/SR.19 and A/C.6/69/SR.23); Cuba (A/C.6/67/SR.22, A/C.6/68/SR.19, A/C.6/69/SR.23 and A/C.6/70/SR.24); El Salvador (A/C.6/63/SR.23); Israel (A/C.6/70/SR.25); Peru (A/C.6/66/SR.26); Republic of Korea (A/C.6/67/SR.21); Romania (A/C.6/70/SR.24); Russian Federation (A/C.6/66/SR.27); Viet Nam (A/C.6/69/SR.25).

[59] Austria (A/C.6/66/SR.26), Belarus (A/C.6/66/SR.27); France (A/C.6/66/SR.20); Iran (Islamic Republic of) (A/C.6/66/SR.27); Mexico (A/C.6/66/SR.18); Russian Federation (A/C.6/66/SR.27 and A/C.6/67/SR.22).

[60] Chile (A/C.6/67/SR.20 and A/C.6/69/SR.24); Denmark (on behalf of the Nordic countries) (A/C.6/69/SR.22); Indonesia (A/C.6/66/SR.24); Jamaica (A/C.6/63/SR.24); Japan (A/C.6/63/SR.23); Mexico (A/C.6/66/SR.18); New Zealand (A/C.6/63/SR.24 and A/C.6/66/SR.27); Norway (A/C.6/63/SR.23, A/C.6/67/SR.20, A/C.6/68/SR.17 and A/C.6/70/SR.23); Portugal (A/C.6/66/SR.27); Republic of Korea (A/C.6/67/SR.21 and A/C.6/68/SR.18); South Africa (A/C.6/68/SR.18); Thailand (A/C.6/68/SR.19).

[61] Algeria (A/C.6/67/SR.22); China (A/C.6/63/SR.23 and A/C.6/66/SR.27); Cuba (A/C.6/66/SR.27); New Zealand (A/C.6/66/SR.27).

[62] Slovenia (A/C.6/70/SR.24), Norway (on behalf of the Nordic countries) (A/C.6/66/SR.26 and A/C.6/67/SR.20).

[63] Republic of Korea (A/C.6/68/SR.18); Canada (A/C.6/67/SR.20); Japan (A/C.6/69/SR.23); Netherlands (A/C.6/67/SR.21 and A/C.6/69/SR.23); Norway (on behalf of the Nordic countries) (A/C.6/66/SR.26); Poland (A/C.6/69/SR.23); Republic of the Congo (A/C.6/67/SR.21).

Foreign Affairs, with no exception, even for international crimes, during their term of office;[64]

(*f*) however, a large number of States have supported the existence of various exceptions to immunity *ratione materiae*, the main one being the commission of the most serious crimes of concern to the international community as a whole,[65] although some States have referred to other exceptions to immunity, such as acts of sabotage, espionage or other harm done by the official of the foreign State in the territory of the forum State;[66]

(*g*) in referring to international crimes, States have made special mention of the crime of genocide, crimes against humanity, war crimes and serious violations of international humanitarian law, torture and enforced disappearance;[67]

(*h*) the commission of international crimes has been considered by some States to be an exception that is already enshrined in contemporary international law, while others have maintained that it reflects a growing trend that could not be ignored by the Commission in its work;[68]

(*i*) lastly, it is worth noting that most States refer to "exceptions to immunity", using the term "limits" or "limitations" residually.

21. In preparing the present report, the Special Rapporteur has taken into account the past history of consideration of the question of limitations and exceptions to immunity of State officials from foreign criminal jurisdiction.

[64] Austria (A/C.6/67/SR.20 and A/C.6/68/SR.17); Belarus (A/C.6/67/SR.21 and A/C.6/66/SR.27); Chile (A/C.6/67/SR.20); China (A/C.6/66/SR.27); Czech Republic (A/C.6/63/SR.24); Germany (A/C.6/68/SR.18); Greece (A/C.6/68/SR.18); Hungary (A/C.6/66/SR.19); Indonesia (A/C.6/66/SR.24); Ireland (A/C.6/67/SR.21 and A/C.6/68/SR.18); Jamaica (A/C.6/63/SR.24 and A/C.6/67/SR.22); Malaysia (A/C.6/68/SR.19); Netherlands (A/C.6/67/SR.21 and A/C.6/68/SR.18); Peru (A/C.6/67/SR.21); Republic of Korea (A/C.6/68/SR.18 and A/C.6/69/SR.25); Republic of the Congo (A/C.6/67/SR.21); Slovenia (A/C.6/67/SR.22); Spain (A/C.6/68/SR.17); Sri Lanka (A/C.6/66/SR.27); Switzerland (A/C.6/63/SR.24); United States (A/C.6/69/SR.24). Opposition to the absolute character of immunity *ratione personae* seemed to be expressed by: Portugal (A/C.6/63/SR.25, A/C.6/67/SR.21 and A/C.6/66/SR.27); Italy (A/C.6/66/SR.26), and Mexico (A/C.6/66/SR.18).

[65] Austria (A/C.6/67/SR.20); Canada (A/C.6/67/SR.20); Chile (A/C.6/67/SR.20); Croatia (A/C.6/70/SR.24); Czech Republic (A/C.6/63/SR.24); Denmark (on behalf of the Nordic countries) (A/C.6/69/SR.22); Greece (A/C.6/68/SR.18); New Zealand (A/C.6/66/SR.27 and A/C.6/67/SR.22); Netherlands (A/C.6/67/SR.21 and A/C.6/69/SR.23); Norway (on behalf of the Nordic countries) (A/C.6/67/SR.27 and A/C.6/70/SR.23); Peru (A/C.6/67/SR.21); Poland (A/C.6/69/SR.23); Republic of the Congo (A/C.6/67/SR.21); Slovenia (A/C.6/67/SR.22). Opposed to consideration of international crimes as exceptions: China (A/C.6/67/SR.21).

[66] Austria (A/C.6/63/SR.23); Iran (Islamic Republic of) (A/C.6/70/SR.25).

[67] China (A/C.6/69/SR.23); Czech Republic (A/C.6/69/SR.23); Denmark (on behalf of the Nordic countries)(A/C.6/69/SR.22); Greece (A/C.6/68/SR.18); Portugal (A/C.6/68/SR.17); Republic of Korea (A/C.6/63/SR.23); South Africa (A/C.6/68/SR.18); United Kingdom (A/C.6/69/SR.23 and A/C.6/70/SR.24).

[68] Canada (A/C.6/67/SR.20); Greece (A/C.6/67/SR.20); Portugal (A/C.6/67/SR.21).

Chapter II

Study of practice

22. As already mentioned in earlier reports submitted by the Special Rapporteur, the study of practice is an essential foundation of this work. Accordingly, the following pages contain an analysis of treaty practice (sect. A), national legislative practice (sect. B), international judicial practice (sect. C), national judicial practice (sect. D) and prior work of the Commission that is of relevance to the present report (sect. E).

A. Treaty practice

23. The various conventions analysed in earlier reports also include provisions that may be germane to the question of limitations and exceptions. However, as a general observation, it should be noted that none of them use this terminology. In fact, they adopt a more general and pragmatic approach to the question, referring to instances in which the convention, or one of its provisions, does not apply.

24. Starting with the conventions that directly or indirectly govern immunity, it is noteworthy that the ones which regulate the exercise of the diplomatic function do not contain provisions contemplating any form of exception or limitation to immunity as regards criminal jurisdiction. On the contrary, they recognize the immunity from criminal jurisdiction of persons enjoying immunity in absolute terms during the person's term in office. This is established in article 31, paragraph 1, of the Vienna Convention on Diplomatic Relations, in article 31, paragraph 1, of the Convention on Special Missions and in articles 30, paragraph 1, and 60, paragraph 1, of the Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character. It is also noteworthy that the provisions mentioned mainly describe a model of immunity *ratione personae* and that immunity therefore covers both acts performed in an official capacity and acts performed in a private capacity. In the case of the first two conventions, however, the forum State has an alternative mechanism that it can use to deal with instances in which an individual enjoying immunity has committed or is committing a crime: designation of the person concerned as "persona *non grata*" or "not acceptable", in which case the person must leave the national territory.[69] In any case, it should be remembered that such immunity is of limited duration and that, after the functions have ended, it is no longer absolute, since it applies solely to acts performed in an official capacity.[70] However, these conventions do not define exceptions applicable to this residual immunity *ratione materiae* as regards criminal jurisdiction.

[69] See Vienna Convention on Diplomatic Relations, art. 9, para. 1; and Convention on Special Missions, art. 12.

[70] See Vienna Convention on Diplomatic Relations, art. 39, para. 2; Convention on Special Missions, art. 43, para. 2; Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character, art. 38. para. 2.

25. The Vienna Convention on Consular Relations, for its part, adopts a different approach, since the system of immunities follows a model of immunity *ratione materiae* linked to acts specific to the consular function and also applies in the case of criminal jurisdiction,[71] where the consular official and the other staff of the consular office enjoy not absolute immunity but immunity limited to acts performed in an official capacity.[72] Lastly, it should be noted that article 43, paragraph 2 (*b*), of the Convention establishes a sort of "territorial tort exception".

26. In concluding this study of the conventions governing immunity, it should be noted that, for the purposes of the present report, the United Nations Convention on Jurisdictional Immunities of States and Their Property is in principle less relevant than the other conventions, since it refers to immunity from jurisdiction of the State and not to immunity from jurisdiction of State officials. Furthermore, it does not apply to immunity from criminal jurisdiction. However, it is of interest for other reasons. Firstly, as regards methodology, it is worth noting that the Convention does not distinguish between limitations and exceptions to immunity, addressing them under the same heading: "Proceedings in which State immunity cannot be invoked".[73] Secondly, it includes the "territorial tort exception" among those instances. Lastly, it does not recognize any exception or limitation based on violation of *jus cogens* norms.

27. Article 12 of the Convention (Personal injuries and damage to property) states that:

> Unless otherwise agreed between the States concerned, a State cannot invoke immunity from jurisdiction before a court of another State which is otherwise competent in a proceeding which relates to pecuniary compensation for death or injury to the person, or damage to or loss of tangible property, caused by an act or omission which is alleged to be attributable to the State, if the act or omission occurred in whole or in part in the territory of that other State and if the author of the act or omission was present in that territory at the time of the act or omission.

28. This precept follows the precedent of the Vienna Convention on Consular Relations[74] and the Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character.[75] It was also contemplated in the European Convention on State Immunity, which provides in its article 11 that:

> A Contracting State cannot claim immunity from the jurisdiction of a court of another Contracting State in proceedings which relate to redress for injury to the person or damage to tangible property, if the facts which occasioned the injury or damage occurred in the territory of the State of the forum, and if the author of the injury or damage was present in that territory at the time when those facts occurred.

29. Article 12 of the Convention on the Jurisdictional Immunities of States and Their Property reproduces almost *verbatim* the draft article adopted at the time by the Commission.[76] In the opinion of the Commission, the above-mentioned rule constitutes an exception to State immunity from jurisdiction,[77] justified by application of the jurisdictional principle of *lex loci delicti commissi* and the preponderance of the role played in this case by the territorial element.[78] In addition, the exception satisfies the requirement that the individuals concerned must be guaranteed access to recourse, which would probably not be the case if there were to be immunity.[79] Lastly, although the "territorial tort exception" established in the Convention is designed to apply to civil jurisdiction, the Commission noted in its commentaries that it could also be used in relation to claims relating to "intentional physical harm such as assault and battery, malicious damage to property, arson or even homicide, including political assassination".[80] If, in addition, one considers the fact that the Commission understood the words "author of the act" to mean agents or officials of a State exercising their official functions and not necessarily the State itself as a legal person",[81] then an exception of this kind can conceivably play some role in the context of immunity from criminal jurisdiction.

30. The idea of incorporating in the United Nations Convention on the Jurisdictional Immunities of States and Their Property an exception connected with violation of *jus cogens* norms was broached at a late stage, at the end of the negotiation process on the Convention, when the General Assembly requested that the Commission review some questions still pending from that process, as well as to consider new elements that had emerged in practice after its draft articles were adopted in 1991. The Commission set up a Working Group for this purpose, which in an annex to its report drew the attention of the General Assembly to:

> the argument increasingly put forward that immunity should be denied in the case of death or personal injury resulting from acts of a State in violation of human rights norms having the character of *jus cogens*, particularly the prohibition on torture.[82]

31. The Commission based its commentary on judicial practice followed in earlier years, especially in relation to the *Pinochet* case, concluding that these facts "are a recent development relating to immunity which should not be ignored".[83] Although the question was discussed in the Working Group of the Sixth Committee conducting the final negotiations on the future Convention, the exception was not incorporated in the text because it was considered

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[71] See Vienna Convention on Consular Relations, arts. 43 and 53, para. 4.

[72] Regarding the exercise of criminal jurisdiction, see arts. 41, 42 and 63 of the Convention.

[73] See Part III of the Convention, arts. 10–17. The instances mentioned in that Part fit into both the category of limitations and the category of exceptions to immunity.

[74] Art. 43, para. 2 (*b*), of the Convention establishes an exception to immunity from civil jurisdiction when the action is brought "by a third party for damage arising from an accident in the receiving State caused by a vehicle, vessel or aircraft".

[75] Art. 60, para. 4, concerning members of delegations to international conferences, states: "Nothing in this article shall exempt such persons from the civil and administrative jurisdiction of the host State in relation to an action for damages arising from an accident caused by a vehicle, vessel or aircraft, used or owned by the persons in question, where those damages are not recoverable from insurance".

[76] See *Yearbook … 1991*, vol. II (Part Two), p. 44.

[77] *Ibid.*, para. (1) of the commentary.

[78] *Ibid.*, pp. 44 and 45, paras. (2), (6) and (8) of the commentary.

[79] *Ibid.*, paras. (3) and (9) of the commentary, pp. 43 and 44. The Commission actually stated that in this case "[t]he injured individual would have been without recourse to justice had the State been entitled to invoke its jurisdictional immunity" (para. (3)).

[80] *Ibid.*, p. 45, para. (4) of the commentary.

[81] *Ibid.*, p. 46, para. (10) of the commentary.

[82] *Yearbook … 1999*, vol. II (Part Two), p. 172; para. 3 of the annex to the report of the Working Group.

[83] *Ibid.*, p. 172, para. 13.

that the issue, "although of current interest, did not really fit into the [draft Convention]" and that "[f]urthermore, it did not seem to be ripe enough for the Working Group to engage in a codification exercise over it".[84] Nevertheless, some States made declarations upon ratifying the Convention, in order to safeguard international protection of human rights in that connection.[85] In any case, the discussion on this exception is ongoing, having picked up steam since the judgment of the International Court of Justice in the case of *Jurisdictional Immunities of the State*.

32. In addition to these conventions referring directly to immunity, there is also an interesting group of treaties falling within the scope of international human rights law and international criminal law with provisions concerning individual criminal responsibility that are relevant to the purposes of the present report. This group includes the Convention on the Prevention and Punishment of the Crime of Genocide, the International Convention on the Suppression and Punishment of the Crime of Apartheid, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the International Convention for the Protection of All Persons from Enforced Disappearance, the Inter-American Convention to Prevent and Punish Torture and the Inter-American Convention on Forced Disappearance of Persons.

33. The Convention on the Prevention and Punishment of the Crime of Genocide indirectly postulates the irrelevance of official status by stating in its article IV that "[p]ersons committing genocide or any of the other acts enumerated in article III shall be punished, whether they are constitutionally responsible rulers, public officials or private individuals". The International Convention on the Suppression and Punishment of the Crime of Apartheid, for its part, states that "[i]nternational criminal responsibility shall apply, irrespective of the motive involved, to individuals, members of organizations and institutions and representatives of the State, whether residing in the territory of the State in which the acts are perpetrated or in some other State" (art. III). On the other hand, the remaining Conventions do not contain similar provisions: the International Convention for the Protection of All Persons from Enforced Disappearance simply refers to "any person" in its enumeration of those who will be held responsible for that crime (art. 6, para. 1 (*a*)). However, both the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and the International Convention for the Protection of All Persons from Enforced Disappearance include "agents of the State" when defining the crime,[86] indicating that they may be held criminally responsible for such acts even when they acted in an official capacity. Consequently, it appears at first sight—and subject to comments to be made below—that the cited conventions provide grounds for concluding that commission of a crime of genocide, apartheid, torture or enforced disappearance may constitute *prima facie* an exception to immunity from criminal jurisdiction.

34. However, this conclusion will be tenable on the basis of the cited conventions only when the State party is expressly obliged to exercise its criminal jurisdiction in order to prosecute persons presumed to have committed the crimes in question, regardless of their nationality. In this connection, it should be noted that all these conventions, with the exception of the Convention on the Prevention and Punishment of the Crime of Genocide and the International Convention for the Suppression and Punishment of the Crime of Apartheid,[87] include provisions requiring States parties to establish jurisdiction when the crimes are committed in any territory under their jurisdiction[88] and when the presumed perpetrator is located in any territory under their jurisdiction, unless the criminal is extradited or surrendered to another State or to a competent international criminal jurisdiction.[89]

35. Lastly, it should be noted that the crimes of genocide,[90] enforced disappearance,[91] and apartheid[92] have been declared to be international crimes or crimes under international law by the conventions analysed above. Torture has also been declared to be "an offense against human dignity and a denial of the principles set forth in the Charter of the Organization of American States and in the Charter of the United Nations", as well as a violation of

[84] See A/C.6/54/L.12, para. 47.

[85] In this connection, it is the understanding of Finland, Liechtenstein, Norway, Sweden and Switzerland that the current regulation provided by the Convention is "without prejudice to any future international legal development concerning the protection of human rights" (the wording varies slightly in each case). Italy, for its part, declared that the Convention should be interpreted "in accordance … with the principles concerning the protection of human rights from serious violations" (United Nations, *Status of Multilateral Treaties Deposited with the Secretary-General*, chap. III, 13).

[86] See Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 1; International Convention for the Protection of All Persons from Enforced Disappearance, art. 2. For a more detailed analysis of this question, see *Yearbook … 2014*, vol. II (Part One), document A/CN.4/673, pp. 96–97, paras. 79–84.

[87] The Convention on the Prevention and Punishment of the Crime of Genocide states in its article VI that persons charged with that crime "shall be tried by a competent tribunal of the State in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction". Similarly, article V of the International Convention on the Suppression and Punishment of the Crime of Apartheid establishes that persons charged with that crime "may be tried by a competent tribunal of any State Party to the Convention which may acquire jurisdiction over the person of the accused or by an international penal tribunal having jurisdiction with respect to those States Parties which shall have accepted its jurisdiction".

[88] See Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 5, para. 1 (*a*); International Convention for the Protection of All Persons from Enforced Disappearance, art. 9, para. 1 (*a*); Inter-American Convention on Forced Disappearance of Persons, article IV, first para., subpara. (*a*).; Inter-American Convention to Prevent and Punish Torture, art. 12, second para.

[89] See Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 5, para. 2; International Convention for the Protection of All Persons from Enforced Disappearance, art. 9, para. 2; Inter-American Convention on Forced Disappearance of Persons, art. IV, first para., subpara. (*a*); Inter-American Convention to Prevent and Punish Torture, art. 12, first para., subpara. (*a*).

[90] See the Convention on the Prevention and Punishment of the Crime of Genocide, art. 1 and first preambular para.

[91] Art. 5 of the International Convention for the Protection of All Persons from Enforced Disappearance states: "The widespread or systematic practice of enforced disappearance constitutes a crime against humanity as defined in applicable international law and shall attract the consequences provided for under such applicable international law". See, in a similar vein, the sixth preambular paragraph of the Inter-American Convention on Forced Disappearance of Persons.

[92] International Convention for the Suppression and Punishment of the Crime of Apartheid, art. I, para. 1.

"the fundamental human rights and freedoms proclaimed in the American Declaration of the Rights and Duties of Man and the Universal Declaration of Human Rights".[93] This is important in order to determine what should be understood to be international crimes for the purposes of the exceptions referred to in the present report.

36. A parallel example is the Rome Statute of the International Criminal Court, which expressly recognizes the irrelevance of official capacity in determining individual criminal responsibility (art. 27, para. 1), the inapplicability to the Court of immunities under national or international law (art. 27, para. 2), as well as the general principle of the irrelevance of compliance with orders of a Government or of a superior in determining individual criminal responsibility (art. 33). The rules cited are designed to avoid instances in which the responsibility of the individual can be evaded as a consequence of the individual's special relationship with the State, in order to eliminate loopholes that would otherwise allow the most serious crimes that concern the international community as a whole to be committed with impunity. This emphasis placed by the Rome Statute on the absolute character of international crimes in order to define the individual criminal responsibility of any person and the consequent declaration of the nonapplicability of immunities cannot be ignored in the present report. However, the cited provisions and their effect on exceptions to the immunity of State officials from foreign criminal jurisdiction will be analysed in greater detail chapter III, section B, below.

37. Lastly, it is noteworthy that the conventions on corruption cover the possibility of acts of corruption being committed by officials of a foreign State,[94] which undoubtedly could give rise to a claim of immunity from foreign criminal jurisdiction when a State's courts attempt to exercise jurisdiction over the officials. However, the cited conventions do not contain general provisions referring to such immunity, the only exceptions being certain provisions included in the Council of Europe Criminal Law Convention on Corruption, in the United Nations Convention against Corruption and in the African Union Convention on Preventing and Combating Corruption, which all contain provisions referring to immunity albeit with clearly different approaches and effects as regards limitations and exceptions.

38. The Council of Europe Criminal Law Convention on Corruption states in its article 16 (Immunity):"The provisions of this Convention shall be without prejudice to the provisions of any Treaty, Protocol or Statute, as well as their implementing texts, as regards the withdrawal of immunity."

Despite the unclear wording, the Explanatory Report to the Convention states that "[t]he Convention recognizes the obligation of each of the institutions concerned to give effect to the provisions governing privilege and immunities", and that "customary international law is not excluded in this field".[95]

39. The United Nations Convention against Corruption, for its part, states in its article 30, paragraph 2, that:

> Each State Party shall take such measures as may be necessary to establish or maintain, in accordance with its legal system and constitutional principles, an appropriate balance between any immunities or jurisdictional privileges accorded to its public officials for the performance of their functions and the possibility, when necessary, of effectively investigating, prosecuting and adjudicating offences established in accordance with this Convention.

Although the Convention refers to immunities under national law protecting national officials, it uses the concept of "appropriate balance", which may also be relevant for the purpose of defining the system of limitations and exceptions to the immunity of State officials from foreign criminal jurisdiction.

40. A similar focus, but with a stronger wording, is to be found in the African Union Convention on Preventing and Combating Corruption, which refers to immunities in the following terms (art. 7, para. 5):"Subject to the provisions of domestic legislation, any immunity granted to public officials shall not be an obstacle to the investigation of allegations against and the prosecution of such officials."

41. Lastly, attention should be drawn to the fact that the Malabo Protocol, establishing an International Criminal Law Section in the Court, includes corruption and money-laundering among the crimes covered by that Section.[96]

B. National legislative practice

42. Immunity of the State or of its officials from jurisdiction is not explicitly regulated in most States. On the contrary, the response to immunity has been left to the courts and, when they did address the issue, the courts have usually done so by applying what they consider to be rules of international law referred to in their judgments and other decisions. Various legal grounds have been invoked for this application of the rules of international law: reference to the general principles of law governing the relationship between international law and national law; application of the intrinsic principles of common law;[97] or application of provisions of a general nature determining the powers of domestic judicial organs and

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[93] Inter-American Convention to Prevent and Punish Torture, second preambular para. A reference to the prohibition of torture in the Universal Declaration of Human Rights is contained in the preamble of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

[94] See, for example, the United Nation Convention against Corruption, arts. 16 and 17; the Criminal Law Convention on Corruption, arts. 5 and 6; and the Inter-American Convention against Corruption, art. VIII. All these provisions make express reference to the participation in an act of corruption of an official of the foreign State. The African Union Convention on Preventing and Combating Corruption does not refer specifically to foreign officials. However, the broad definition of "public official" given in article 1, together with the provisions of article 13 on the establishment of national jurisdiction over acts of corruption, indicates that the Convention can also be applied to foreign officials and that therefore the question of immunity can also be raised before the courts of States parties.

[95] *Explanatory Report*, para. 77, p. 16.

[96] See art. 28A, para. 1 (8) and (9), of the Statute of the African Court as amended by the Malabo Protocol.

[97] This is the case, in particular, in the United States on the basis of the *Samantar* judgment, which established the inapplicability of the Foreign Sovereign Immunities Act to State officials considered individually and stated that their immunity is subject to the rules of common law. See Keitner: "The common law of foreign official immunity".

referring to applicable international law to settle instances in which immunity may be an issue.[98]

43. The present report does not analyse the national norms that simply refer to applicable international law, since they do nothing to shed light on the nature of the limitations and exceptions to immunity, which will necessarily be those established in the international order. There will, however, be an analysis of the practice of the domestic courts responsible for applying those norms, since their decisions show what they understand by "applicable international law". The present section analyses the national laws expressly governing immunity and those other laws which, in regulating the jurisdiction of the State as regards international crimes, refer to immunity.

44. Starting with the first category, attention should first be drawn to the fact that national laws regulating jurisdictional immunity are very few in number and, in addition, usually refer basically to immunities of the State. However, some laws contain provisions allowing them to be applied to certain State officials, especially the Head of State. These include legislation of Argentina (Jurisdictional Immunity of Foreign States in Argentine Courts Act, 1995),[99] Australia (Foreign States Immunities Act, 1985),[100] Canada (State Immunity Act, 1985),[101] Japan (Civil Jurisdiction of Japan with respect to a Foreign State Act, 2009),[102] Pakistan (State Immunity Ordinance, 1981),[103] Singapore (State Immunity Act, 1979), South Africa (Foreign States Immunities Act, 1981), Spain (Privileges and Immunities of Foreign States, International Organizations with Headquarters or Offices in Spain and International Conferences and Meetings held in Spain Organic Act, 2015),[104] the United Kingdom (State Immunity Act, 1978),[105] and the United States (Foreign Sovereign Immunities Act, 1976).[106]

45. Most of these laws refer to exceptions and limitations to immunities of the State in two different ways: (*a*) a "territorial tort exception" in the case of damage to persons or property occurring in the forum State;[107] and *(b*) exceptions to certain categories of proceedings concerning claims connected with rights and obligations that may be classified in the category of *jus gestionis* acts, anticipating or applying the provisions of the United Nations Convention on Jurisdictional Immunities of States and Their Property.[108] On the other hand, it is noteworthy that, although all the laws mentioned apply generically to the State, only some of them refer to State officials, mentioning only the Head of State or the representatives of the State acting "in their public capacity"[109] and thus limiting their applicability to such officials *ratione materiae*. Only the Spanish Act of 2015 deals with the immunity of certain officials (Head of State, Head of Government and Minister for Foreign Affairs) from the perspective of both immunity *ratione personae* and immunity *ratione materiae*.[110] Lastly, it should be noted that, because of their content, the cited laws generally regulate exceptions in such a way that they are only indirectly relevant to criminal jurisdictions. In addition, some of the laws in question expressly bar their application to criminal proceedings.[111]

46. Only three laws on immunity contain provisions referring to another type of exception more germane to the subject under consideration. These are the Canadian State Immunity Act, the Spanish Organic Act 16/2015 and the United States Foreign Sovereign Immunities

[98] Among these norms providing for general reference to international law, mention may be made of the following examples: Belgium: Repression of Serious Violations of International Humanitarian Law Act, amended by Act of 23 April 2003, art. 4.3; Germany, Courts Constitution Act, art. 20.2; Kyrgyzstan: Criminal Procedure Code, 1999, art. 16.2; Montenegro, Criminal Procedure Code, 2010, art. 252.1; Netherlands: Penal Code, art. 8; Philippines: Crimes against International Humanitarian Law, Genocide and other Crimes against Humanity Act, No. 9851, of 27 July 2009, sect. 9 (*b*); Russian Federation: Penal Code, 13 July 1996, art. 11.4; Spain: Organic Act 6/1985 on the Judiciary, amended by Organic Act 16/2015, art. 23.4; Uzbekistan: Criminal Procedure Code art. 4. This reference to the applicable norms of international law has created quite a few problems for domestic courts in cases concerning immunity, which is why some States have enacted domestic laws on the subject. For example, after following a system of reference to international law for over 30 years, Spain opted to supplement that system in 2015 with the Immunities Act.

[99] Act 24.488 of 31 May 1995. Approved on 31 May 1995, it was partially promulgated on 22 June that year (www.infoleg.gob.ar).

[100] The Australian legislation was amended in 1987, 2009 and 2010.

[101] See Revised Statutes of Canada, 1985, c. S-18 (updated on 28 April 2016). The Canadian legislation was amended on 13 March 2012 to include an exception in the case of terrorism.

[102] Act No. 24 of 24 April 2009.

[103] Ordinance VI of 1981, dated 12 March 1981.

[104] Organic Act 16/2015, of 27 October 2015 (*Official Gazette*, No. 258, of 28 October 2015).

[105] The United Kingdom legislation was adopted on 20 July 1978 and has not been amended since that date.

[106] The United States legislation was amended in 1991 by the Torture Victim Protection Act of 1991. See sects. 1605 and 1605A of the United States Code.

[107] See the following laws: Argentina, art. 2 (*e*); Australia, sects. 13 and 42 (2); Canada, sect. 6; Japan, art. 10; Singapore, sect. 7; South Africa, sect. 6; Spain, art. 11; United Kingdom, sect. 5; United States, sect. 1605 (*a*) (5) (for convenience, the laws are cited by reference to the adopting State).

[108] These exceptions refer to the following acts: commercial transactions, labour contracts, rights concerning ownership and possession of assets, intellectual and industrial property, membership and participation in legal entities and corporate bodies, submission to commercial arbitration, acts and rights relating to State-owned vessels used for commercial purposes, obligations concerning payment of taxes and charges, rights and obligations derived from shares. See the following laws: Argentina, art. 2 (*c*), (*d*), (*f*), (*g*) and (*h*); Australia, sects. 11, 12, 14, 15, 16, 17, 18, 19 and 20; Canada, sects. 5, 7 and 8; Spain, arts. 9, 10 and 12–16; United States, sect. 1605 (*a*) (2)–(4) and (6) (*b*) and (*d*); Japan, arts. 8, 9 and 11–16; Pakistan, sects. 5–12; United Kingdom, sections 3, 4 and 6–11; Singapore, sects. 5 and 6–13; and South Africa, sects. 4, 5 and 7–12.

[109] The following laws refer in a general way to the Head of State: Australia, sects. 3.1, 3.3 (*a*) and 36; Canada, sect. 2 (*a*); Pakistan, sect. 15; Singapore, sect. 16 (1) (*a*); South Africa, sect. 1 (2) (*a*); and United Kingdom, sect. 14 (*a*). There are references to "representatives of the State when acting in that capacity" in the laws of Spain, art. 2 (*c*) (iv), and Japan, art. 2 (iv). United States courts originally considered that State officials acting in an official capacity were covered by the Foreign Sovereign Immunities Act. However, since the judgment in the *Samantar* case, such immunity is exclusively governed by the norms of common law. On this question, see *Yearbook … 2015*, vol. II (Part One), document A/CN.4/686, p. 155, para. 106.

[110] Organic Act 16/2015 applies both to immunities of "foreign States and their property" (art. 1 (*a*)) and to immunities of "Heads of State and Government and Ministers for Foreign Affairs during the exercise and upon the completion of their functions" (art. 1 (*b*)). Title II of Organic Act 16/2015 is devoted entirely to "privileges and immunities of the Head of State, the Head of Government and the Minister for Foreign Affairs of the foreign State". See also art. 22, para. 2.

[111] See the following laws: Canada, sect. 18; Japan, art. 1; Singapore, sect. 19 (2) (*b*); and South Africa, sect. 2 (3). The United States law also is not applicable to criminal jurisdiction.

Act. The Argentine Act 24.488 should also be considered, although it does not expressly mention any exception related to criminal issues.

47. Although the United States Foreign Sovereign Immunities Act originally used the general version of exceptions described above, it was amended by the Torture Victim Protection Act, which added a section 1605A, entitled "Terrorism exception to the jurisdictional immunity of a foreign State", which provides as follows:

> A foreign State shall not be immune from the jurisdiction of courts of the United States or of the States in any case not otherwise covered by this chapter in which money damages are sought against a foreign State for personal injury or death that was caused by an act of torture, extrajudicial killing, aircraft sabotage, hostage taking, or the provision of material support or resources for such an act if such act or provision of material support or resources is engaged in by an official, employee, or agent of such foreign State while acting within the scope of his or her office, employment, or agency;[112]

providing that the following conditions are met:[113]

(*a*) the foreign State was designated by the Secretary of State as a "State sponsor of terrorism";

(*b*) the claimant or the victim was a national of the United States, a member of its Armed Forces or an employee of the Government;

(*c*) in a case in which the act occurred in the territory of the State against which the claim has been brought, the claimant has afforded the foreign State a reasonable opportunity to arbitrate the claim in accordance with the accepted international rules of arbitration.

48. This exception allowed United States courts to deny a foreign State immunity from jurisdiction in a number of cases that have been confirmed in civil jurisdiction[114] in relation to acts that are unmistakably international crimes. However, it should also be noted that the exception in question is not general in scope and applies only in relation to acts performed by States formally designated by the Secretary of State as sponsors of terrorism, thus making the exception a matter of political discretion.

49. The Canadian State Immunity Act was amended in 2012 to add an exception entitled "Support of terrorism", which is included in the section on damage and injury. Under the Act, a State included on the terrorism support list will not be immune from the jurisdiction of Canadian courts as regards proceedings brought against it for support for terrorism or for terrorist activities.[115] The presentation of this exception is very similar to that of United States law, so that the observations in the preceding paragraph also apply to it.

50. Organic Act 16/2015, recently adopted in Spain, has introduced a somewhat different version of the regime applicable to exceptions. As already noted above, this Act distinguishes between the regime applicable to immunity of the State and the regime applicable to Heads of State, Heads of Government and Ministers for Foreign Affairs, both as regards immunity *ratione personae*[116] and as regards immunity *ratione materiae*.[117] In the latter case, it introduces an exception based on international crimes, establishing that even for "acts performed during a term in office in exercise of official functions … crimes of genocide, forced disappearance, war and crimes against humanity will be excluded from immunity".[118] This is a general exception that does not impose any additional conditions, but it is applicable exclusively in the framework of immunity *ratione materiae*.

51. This exception is supplemented by a provision of general scope, under the heading "International crimes", which establishes the following:"The provisions of this Title shall not affect the international obligations assumed by Spain regarding the prosecution of international crimes, or its commitments to the International Criminal Court."[119] This provision has a different significance from the exception previously mentioned, since it applies both to immunity *ratione materiae* and to immunity *ratione personae*. However, its scope is more limited, since it concerns only instances in which Spain is required by an international norm to prosecute a person for the commission of international crimes and measures to be taken by Spanish courts to respond to a request for cooperation from the International Criminal Court.[120]

52. Lastly, Act 24.488 adopted by the Congress of Argentina contained the following article 3:

> If a complaint is made to Argentine courts against a foreign State, claiming a violation of international human rights law, the court concerned shall simply indicate to the complainant which organ of international protection in the regional or universal sphere would be competent to hear the complaint, if appropriate. In addition, it shall transmit a copy of the complaint to the Ministry of Foreign Affairs, International Trade and Worship so that it can be informed of the request and can take any appropriate measures in the international order.

53. However, this article was deleted ("observed") when the Act was promulgated by Decree 849/95 and is therefore not part of it.[121] The argument put forward in the Decree concerning the deletion of article 3 is of interest in connection with the analysis of exceptions, for two main reasons: (*a*) it states that violations of human rights generally constitute acts performed in the exercise of authority

[112] Sect. 1605 A, (*a*) (1).

[113] Sect. 1605 A, (2) (A).

[114] See sect. D below.

[115] See sect. 6.1 (1) and (11). Regarding the procedure for inclusion of a State on the terrorism support list, see sect. 6.1 (2), (3)–(10), sect. 11 (3) and sect. 13 (2).

[116] See art. 22.

[117] See arts. 23–25.

[118] Art. 23, para. 1, *in fine*.

[119] Art. 29.

[120] This exception was included at the request of the General Council of the Judiciary and the Public Prosecutor's Council (the organs responsible for judges and prosecutors) in order to ensure that, despite recognizing the relevant immunities, Spain can fulfil its international obligations derived from norms of international criminal law and especially that it can comply with requests for cooperation addressed to it by international criminal tribunals. It is important to realize that this provision must be read in the light of the sixth final provision of the Organic Act to the effect that "in the event of a normative conflict between the present Organic Act and the provisions of an international treaty to which the Kingdom of Spain is a party, preference shall be given to the international treaty".

[121] See art. 1 of the above-mentioned Decree. Decree 849/95 of 22 June 1995, adopted by the Council of Government, available from www.infoleg.gob.ar.

(*acta jure imperii*);[122] and (*b*) it notes that the Convention on the Prevention and Punishment of the Crime of Genocide and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (which have constitutional status in Argentina) refer to "crimes that may give rise to civil liability" and that it "seems inappropriate to deny access to justice in order to require compliance with that requirement".[123] Consequently, although Act 24.488 does not contain an explicit exception concerning international crimes, its interpretation in the light of Decree No. 849/95, ordering its partial promulgation, leads to the conclusion that Argentine courts will be competent to hear complaints against a foreign State for violation of international human rights law.

54. Among the domestic laws regulating international crimes, mention should first be made of the Repression of Serious Violations of International Humanitarian Law Act, adopted in Belgium in 1993 and amended in 1999 and 2003. The Act had an interesting history, largely relating to the *Arrest Warrant case of 11 April 2000*.[124] The 1999 version stated that "immunity connected with the official status of a person shall not prevent the application of the … law", but following the 2003 amendment that statement was modified by the phrase "within the limitations established by international law".[125] Moreover, article 13 of the Act, amending the Criminal Code, circumscribes this rule still further by stating that:

> In accordance with international law, exercise of jurisdiction is excluded in relation to: (i) Heads of State, Heads of Government and Ministers for Foreign Affairs, during the period when they are performing their functions, as well as to other persons with immunity recognized in international law; (ii) persons enjoying total or partial immunity under a treaty binding on Belgium.

Consequently, Belgian law recognizes absolute immunity *ratione personae* but does not address immunity *ratione materiae* and this has been interpreted as implicit recognition of the possibility of applying exceptions to it in connection with crimes against humanity, war and genocide.

55. In the Netherlands, the 2003 International Crimes Act uses a similar wording, establishing in its section 16 that

> [c]riminal prosecution for one of the crimes referred to in this Act is excluded with respect to: (*a*) foreign Heads of State, Heads of Government and Ministers for Foreign Affairs, as long as they are in office, and other persons insofar as their immunity is recognized under customary international law; (*b*) persons who have immunity under any convention applicable within the Kingdom of the Netherlands.

Consequently, the Netherlands legislation recognizes the immunity of the "troika" members when they are in office, including with regard to international crimes. However, after their term in office has ended, immunity would apply to them only in respect of acts performed in an official capacity and this, according to information provided by the Government of the Netherlands, would not cover international crimes.[126]

56. The opposite approach is followed in the Penal Code of the Republic of the Niger, amended in 2003, which explicitly states that "immunity linked to the official status of a person does not exempt him or her from [criminal] prosecution for war crimes or crimes against humanity".[127]

57. Lastly, the question of immunity has been regulated in various laws designed to incorporate and develop in domestic legislation the provisions contained in the Rome Statute, both from a substantive viewpoint and from the viewpoint of competence and procedure. These are what are referred to as "implementing laws", which are undeniably of interest for the purposes of the present report. These "implementing laws" have addressed the question of limitations and exceptions to immunity from two different perspectives: (*a*) definition of a general system of exclusion from immunity; and (*b*) definition of a system of exclusion from immunity solely in relation to the general obligation of States parties to cooperate with the International Criminal Court.

58. The first approach is typified by the laws adopted in Burkina Faso, the Comoros, Ireland, Mauritius and South Africa.[128] Under these laws, domestic law recognizes that in general no immunity can be invoked against to the exercise of national criminal jurisdiction regarding crimes within the competence of the International Criminal Court, especially crimes of genocide, crimes against humanity and war crimes.

59. The second approach circumscribes the question of application of immunity to those cases in which national

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[122] See the second preambular paragraph of the Decree.

[123] See the fourth preambular paragraph of the Decree.

[124] *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium), I.C.J. Reports 2002*, p. 3, at p. 46. See also *ICJ Summaries 1997–2002*, p. 153.

[125] See Act amending the Repression of Serious Violations of International Humanitarian Law Act of 16 June 1993 and art. 144 *ter* of the Judicial Code. The text quoted above is from art. 5.3 of the Repression of Serious Violations of International Humanitarian Law Act.

[126] Comments by the Netherlands in reply to questions from the Commission (20 April 2016).

[127] Art. 208.7. This article should be read in conjunction with art. 208.2, second paragraph, which establishes a universal jurisdiction so that the courts of the Niger will be competent even if the crimes were committed abroad.

[128] See Burkina Faso, Act No. 52 of 2009 on the determination of competence and procedures for application of the Rome Statute of the International Criminal Court by the jurisdictions of Burkina Faso, arts. 7 and 15.1 (according to which the courts of Burkina Faso may exercise jurisdiction with respect to persons who have committed a crime within the competence of the court, even in cases where it was committed abroad, provided that the suspect is in their territory; in addition, official status will not be grounds for exception or reduction of responsibility); Comoros, Act No. 11-022/AU of 13 December 2011 concerning the application of the Rome Statute, art. 7.2 ("the immunities or special rules of procedure accompanying the official status of a person by virtue of the law or of international law shall not prevent national courts from exercising their competence with regard to that person in relation to the offences specified in this Act"); Ireland, International Criminal Court Act 2006, art. 61.1 ("In accordance with article 27, any diplomatic immunity or State immunity attaching to a person by reason of a connection with a State party to the Statute is not a bar to proceedings under this Act in relation to the person"); Mauritius, International Criminal Court Act 2001, art. 4; South Africa, Act No. 27 of 18 July 2002 implementing the Rome Statute of the International Criminal Court, art. 4 (2) (*a*) (i) and 4 (3) (*c*), stating that South African courts are competent to prosecute crimes of genocide, crimes against humanity and war crimes when the presumed perpetrator is in South Africa and that any official status claimed by the accused is irrelevant: this exemption from immunity is, in addition, effective "despite any other law to the contrary, including customary and conventional international law" (the Supreme Court of South Africa ruled on this question on 15 March 2016 in connection with the unsuccessful arrest warrant for President Al Bashir).

criminal jurisdiction must be exercised in order to ensure some form of cooperation with the Court, especially as regards arrest and surrender of persons to the Court. This second approach is illustrated by laws adopted in Canada, France, Germany, Kenya, New Zealand, Norway, Switzerland and Uganda, which do not take into consideration immunity or relevance of official status as grounds for non-compliance with the order to surrender.[129] The laws adopted in Iceland, Ireland, Malta, Samoa and the United Kingdom deal only with the irrelevance of immunity and of official status in relation to nationals of States parties to the Rome Statute, establishing a system of consultations with the Court in the case of nationals of States not parties.[130] Lastly, the laws adopted in Argentina, Australia, Austria and Liechtenstein do not provide for non-applicability of immunity in all cases, using systems of consultation with the Court in order to resolve any dispute that may arise as a result of the combined application of articles 27 and 98, paragraph 1, of the Rome Statute.[131] In any case, the non-applicability of immunity for the purpose of ensuring cooperation with the Court is also mentioned in some of the implementing laws following the first approach, as in the case of Burkina Faso and South Africa.[132]

C. International judicial practice

60. The question of limitations and exceptions to immunity from foreign criminal jurisdiction has been considered in various judgments of the International Court of Justice, the European Court of Human Rights, the International Tribunal for the Former Yugoslavia, the Special Court for Sierra Leone and the International Criminal Court.

1. International Court of Justice

61. In the *Arrest Warrant* case, the International Court of Justice was categorical as to the full nature of the immunity from foreign criminal jurisdiction enjoyed by the Minister for Foreign Affairs of the Democratic Republic of the Congo: "Throughout the duration of his or her office, [the Minister for Foreign Affairs] when abroad enjoys full immunity from criminal jurisdiction and inviolability."[133] Such immunity is based on the functions performed by the Minister for Foreign Affairs in international relations. To protect those functions, the immunity covers all acts performed by the Minister, both in an official capacity and in a private capacity.[134] The Court also concluded that it was unable to determine the existence of an exception to such immunity in contemporary international law, not even in cases where the acts in question constitute war crimes or crimes against humanity. According to the Court, such exception cannot be deduced from State practice[135] or from the instruments creating international criminal courts or tribunals.[136]

62. Nonetheless, the Court attempted to safeguard the principle of individual criminal responsibility enshrined in contemporary international law, which, in its view, is not affected by immunity from criminal jurisdiction. The Court used two complementary arguments to that end, namely the distinction between immunity and jurisdiction, on the one hand, and the distinction between immunity and impunity, on the other.

63. With regard to the first argument, the Court said that "jurisdiction does not imply absence of immunity, while absence of immunity does not imply jurisdiction", and that even in cases where certain conventions have imposed on States the obligation to prosecute or extradite a person for international crimes, such extension of jurisdiction "in no way affects immunities under customary international law, including those of Ministers for Foreign Affairs", which "remain opposable before the courts of a foreign State".[137]

64. The argument concerning the distinction between immunity and impunity is of greater interest for the purposes of the present report. In that connection, the Court noted that

> The immunity from jurisdiction enjoyed by incumbent Ministers for Foreign Affairs does not mean that they enjoy impunity in respect of any crimes they might have committed, irrespective of their gravity. Immunity from criminal jurisdiction and individual criminal responsibility are quite separate concepts. While jurisdictional immunity is procedural in nature, criminal responsibility is a question of substantive law. Jurisdictional immunity may well bar prosecution for a certain period or for certain offences; it cannot exonerate the person to whom it applies from al1 criminal responsibility.[138]

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[129] See Canada, 1999 Extradition Act, art. 18; France: Code of Criminal Procedure (under Act No. 2002–268 of 26 February 2002), art. 627.8; Germany, Courts Constitution Act, arts. 20.1 and 21; Kenya: Act No. 16 of 2008 on International Crimes, art. 27; New Zealand, International Crimes and International Criminal Court Act 2000, art. 31.1; Norway, Act No. 65 of 15 June 2001 concerning implementation of the Statute of the International Criminal Court of 17 July 1998 (Rome Statute) in Norwegian law, art. 2; Switzerland, Act on cooperation with the International Criminal Court, art. 6; Uganda, Act No. 18 of 2006 on the International Criminal Court, art. 25 1 (*a*) and (*b*).

[130] See Iceland, 2003 Act on the International Criminal Court, art. 20.1; Ireland, 2006 International Criminal Court Act No. 30, art. 6.1; Malta, Extradition Act, art. 26S; Samoa, Act No. 26 of 2007 on the International Criminal Court, arts. 32.1 and 41.

[131] See Argentina, Act 26200 Implementing the Rome Statute of the International Criminal Court, adopted by Act No. 25390 and ratified on 26 January 2001, arts. 40 and 41; Australia, International Criminal Court Act No. 41 of 13 August 2002, art. 12.4; Austria, Federal Act No. 135 of 13 August 2002 on cooperation with the International Criminal Court, arts. 9.1 and 9.3; Liechtenstein, Act of 20 October 2004 on cooperation with the International Criminal Court and other international tribunals, art. 10.1 (*b*) and (*c*). Denmark is a special case: its Act of 16 May 2001 on the International Criminal Court (art. 2) notes the decision to settle questions on executive immunity without defining a specific system for consultations.

[132] See Burkina Faso, Act No. 52 of 2009, art. 39.2; South Africa, Act No. 27 of 2002, arts. 10.5 and 10.9.

[133] See *Arrest Warrant* (footnote 124 above), p. 22, para. 54.

[134] *Ibid.* For a description of said functions, see *ibid*., pp. 21–22, para. 53. The Court was especially clear in describing the functional dimension of that immunity: "[f]urthermore, even the mere risk that, by travelling to or transiting another State a Minister for Foreign Affairs might be exposing himself or herself to legal proceedings could deter the Minister from travelling internationally when required to do so for the purposes of the performance of his or her official functions" (*ibid*., p. 22, para. 55).

[135] After examining the relevant national laws and a few decisions of national higher courts, the Court stated that it had been unable to deduce "that there exists under customary international law any form of exception to the rule according immunity from criminal jurisdiction and inviolability to incumbent Ministers for Foreign Affairs, where they are suspected of having committed war crimes or crimes against humanity" (*ibid*., p. 24, para. 58, first subpara.).

[136] *Ibid*., second and third subparas.

[137] *Ibid*., pp. 24–25, para. 59.

[138] *Ibid*., p. 25, para. 60.

65. To reinforce the argument, the Court pointed to the existence of an alternative model for deducing an individual's criminal responsibility, which it described as follows:

> First, such persons enjoy no criminal immunity under international law in their own countries, and may thus be tried by those countries' courts in accordance with the relevant rules of domestic law.
>
> Secondly, they will cease to enjoy immunity from foreign jurisdiction if the State which they represent or have represented decides to waive that immunity.
>
> Thirdly, after a person ceases to hold the office of Minister for Foreign Affairs, he or she will no longer enjoy all of the immunities accorded by international law in other States. Provided that it has jurisdiction under international law, a court of one State may try a former Minister for Foreign Affairs of another State in respect of acts committed prior or subsequent to his or her period of office, as well as in respect of acts committed during that period of office in a private capacity.
>
> Fourthly, an incumbent or former Minister for Foreign Affairs may be subject to criminal proceedings before certain international criminal courts, where they have jurisdiction.[139]

66. With these arguments, the Court set out a model of immunity from foreign criminal jurisdiction of Ministers for Foreign Affairs that has become the benchmark, revolving around four basic ideas:

(*a*) all acts performed by the Minister for Foreign Affairs during his or her time in office are covered by absolute immunity;

(*b*) there are no exceptions to such immunity;

(*c*) immunity is a "procedural bar" to the exercise of jurisdiction and not a substantive bar to the deduction of international criminal responsibility, including for acts which might constitute international crimes;

(*d*) individual criminal responsibility is safeguarded by recourse to other means of redress distinct from the exercise of foreign criminal jurisdiction.

67. In any event, it should be noted that even though the judgment in the *Arrest Warrant* case is usually cited as a benchmark for the regime of immunity from foreign criminal jurisdiction for all State officials, the Court's conclusions on this matter have limited scope. For instance, as the Court itself noted in the judgment that, "[f]or the purposes of [the said] case, … it is only the immunity from criminal jurisdiction and the inviolability of an incumbent Minister for Foreign Affairs that fall for the Court to consider",[140] but did not go any further. The Court's response therefore falls within the scope of immunity *ratione personae*, since it is not possible to conclude that said model should apply automatically to other State officials, who the Court seems to admit fall under a different legal regime. In any event, the Court's view on the topic under consideration is conclusive: there are no exceptions to immunity from international criminal jurisdiction for a Minister for Foreign Affairs (and, by extension, to immunity *ratione personae*), not even in respect of such grave crimes as war crimes and crimes against humanity.

68. Although the judgment was approved by a large majority, it must be remembered that various judges took a more nuanced view of the limitations and exceptions to immunity, and even dissented from the judgment. In that connection, although Judges Higgins, Kooijmans and Buergenthal supported the Court's position that there are no exceptions that could apply to immunity in the case under consideration, they drew attention to the increasing claim in the literature "that serious international crimes cannot be regarded as official acts because they are neither normal State functions nor functions that a State alone (in contrast to an individual) can perform".[141] They also pointed to the need for a balanced interpretation of immunity that takes into account the need to protect the principle of sovereign equality and the requirements of international relations, on the one hand, and the need to ensure that said principle does not impede the combating of impunity, on the other. In that regard, they noted the increasing recognition that the notion that "perpetrators of serious international crimes do not go unpunished has had its impact on the immunities which high State dignitaries enjoyed under traditional customary law".[142] For the three judges, immunity is never substantive; it "[h]as given rise to a tendency, in the case of international crimes, to grant procedural immunity from jurisdiction only for as long as the suspected State official is in office".[143] It should be noted that the three judges also expressed doubts as to the viability of the alternative means of redress to which the Court referred in its judgment.[144]

69. The position taken by Judge Al-Khasawneh in his dissenting opinion is more convincing. In his view, the immunity from international criminal jurisdiction of the Minister for Foreign Affairs must remain limited to acts performed in an official capacity and, even more importantly for the purposes of the present report, can under no circumstances apply to war crimes, crimes against humanity and genocide. For him, it does not appear reasonable to admit that State immunity has been gradually restricted to exclude acts that are of a commercial or *jure gestiones* nature. Nonetheless, the immunity of the Minister for Foreign Affairs should be maintained where he or she commits an international crime, especially at a time when the combating of grave crimes has assumed a *jus cogens* character.[145]

70. Lastly, Judge *ad hoc* Van den Wyngaert not only denied that Ministers for Foreign Affairs enjoy immunity *ratione personae*, but also introduced new elements in her argument, which could be summarized as follows: (*a*) extending immunity *ratione personae* to the Minister for Foreign Affairs "would dramatically increase the number of persons enjoying international immunity from jurisdiction. There would be a potential for abuse. *Male fide* Governments could appoint suspects of serious human rights violations to cabinet posts in order to shelter them from prosecution in third States",[146] and

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[139] *Ibid*., p. 25, para. 61.

[140] *Ibid*., p. 21, para. 51, *in fine*.

[141] See joint separate opinion of Judges Higgins, Kooijmans and Buergenthal, p. 88, para. 85.

[142] *Ibid*., p. 85, para. 74.

[143] *Ibid*. See also para. 75.

[144] *Ibid*., p. 86, para. 78.

[145] See dissenting opinion of Judge Al-Khasawneh, in particular p. 98, para. 7.

[146] See dissenting opinion of Judge *ad hoc* Van den Wyngaert, p. 150, para. 21, *in fine*.

"[v]ictims of such violations bringing legal action against such persons in third States would face the obstacle of immunity from jurisdiction … and may even lead to conflict with international human rights rules";[147] (*b*) there is a "general tendency toward the restriction of immunity of the State officials (including even Heads of State), not only in the field of private and commercial law where the *par in parem* principle has become more and more restricted and deprived of its mystique, but also in the field of criminal law, when there are allegations of serious international crimes";[148] and (*c*) the alternative model which, according to the judgment, would help to reduce the individual criminal responsibility of a Minister for Foreign Affairs for international crimes, is not consonant with the reality of the Court's international practice nor with the limited nature of the jurisdictions of international criminal courts.[149]

71. In *Certain Questions of Mutual Assistance in Criminal Matters*, the International Court of Justice also made reference to the limitations and exceptions to immunity, reiterating what it had said in the *Arrest Warrant* case: "A Head of State enjoys in particular 'full immunity from criminal jurisdiction and inviolability' which protects him or her 'against any act of authority of another State which would hinder him or her in the performance of his or her duties."[150] In any event, that assertion was made solely in relation to the immunity *ratione personae* that would be enjoyed by the President of Djibouti. Conversely, by not addressing the immunity claimed by the State Prosecutor (Procureur de la République) and the Head of National Security, the judgment failed to provide conclusive reference as to the limitations and exceptions that could have been alleged in both cases.

72. Lastly, in *Questions Relating to the Obligation to Prosecute or Extradite*, the Court also did not pronounce on the question of immunities, since Chad had communicated to the Court that it had waived the immunity of Mr. Hissène Habré.[151] However, for the purposes of the present report, it is worth noting that the Court stressed in its judgment that "the prohibition of torture is part of customary international law and it has become a peremptory norm (*jus cogens*)".[152] It is also important to note that, for the Court, the oversight system established by the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment is intended "to prevent alleged perpetrators of acts of torture from going unpunished, by ensuring that they cannot find refuge in any State party".[153] The Court thus introduced the argument that combating impunity is one of the objectives pursued by the international community.[154]

73. While in the judgments analysed above the Court addressed the basis on which a State could claim to exercise jurisdiction against an individual (State official), the issue raised in *Jurisdictional Immunities of the State* is different. In that case, what was before the Court was not the immunity of a high-ranking official, but the immunity of the State in a narrow sense. Nonetheless, some of the issues addressed in that case are of considerable interest for the institution of immunity, in abstract terms, especially the procedural nature of immunity, the relationship between immunity and the exercise of jurisdiction, and the relationship between immunity and responsibility. The Court did address two possible exceptions to immunity, however: the "territorial tort exception" and the exception based on the violation of *jus cogens* norms, both in close reference to war crimes and crimes against humanity committed by the Nazi occupying forces in Italian and Greek territories during the Second World War.

74. Given its complex content, it is not surprising that the judgment has given rise to a fascinating academic debate.[155] It should be borne in mind that, owing to that same content, the judgment has also been cited as a reference in identifying the rules pertaining to the regime of immunity in a broad sense. For the purposes of the present report, an analysis of the judgment in *Jurisdictional Immunities of the State* would therefore be useful, in particular with regard to the following aspects: the nature of immunity and its relationship with jurisdiction and the regime of the international responsibility of the State; the effects of *jus cogens* norms on immunity; the scope of the "territorial tort exception", and the question concerning the existence of alternative means of redress.

75. In that judgment, the Court, in line with its previous rulings, put emphasis on the clearly procedural nature of immunity, which does not affect the definition of State responsibility, but only the possibility of such responsibility deriving from the exercise of foreign jurisdiction. In that connection, it stated expressly that: "The law of immunity is essentially procedural in nature … It regulates the exercise of jurisdiction in respect of particular conduct and is thus entirely distinct from the substantive law which determines whether that conduct is lawful or unlawful."[156]

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[147] *Ibid*., p. 150, para. 22.

[148] *Ibid*., p. 151, para. 23.

[149] *Ibid*., pp. 153–159, paras. 34–38; Judges Higgins, Kooijmans and Buergenthal expressed a similar opinion in their joint separate opinion, *ibid*., p. 86, para. 78.

[150] *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France)*, Judgment, *I.C.J. Reports 2008*, p. 177, at p. 236, para. 170.

[151] *Questions Relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, Judgment, *I.C.J. Reports 2012*, p. 422. Only Judge *ad hoc* Sur referred to the topic of immunity, stating in his dissenting opinion that "unlike the Rome Statute for example, the Convention [against Torture] does not state that the immunity of public authorities is unenforceable in proceedings instituted before domestic courts" (*ibid*., p. 620, para. 54). However, that topic was not before the Court.

[152] *Ibid*., p. 457, para. 99. Some of the judges maintained that stance on the prohibition of torture in their separate or dissenting opinions. In her dissenting opinion, for example, Judge Xue expressly identified "the prohibition of torture as *jus cogens*" (*ibid*., p. 575, para. 17), by concluding that "*jus cogens*, by its very nature, does not automatically trump the applicability of these procedural rules" (*ibid*.).

[153] *Ibid*., p. 461, para. 120.

[154] In their separate or dissenting opinions, some of the judges also referred to the fight against impunity and the role that the Convention against Torture plays to that end. In that connection, see the opinions of Judges Cançado Trindade (*ibid*., p. 519, para. 83 and p. 527, para. 103) and Donoghue (*ibid*., p. 584, para. 2).

[155] See, *inter alia*, Ferrer Lloret, "La insoportable levedad del derecho internacional consuetudinario en la jurisprudencia de la Corte Internacional de Justicia …"; Keitner, "*Germany v. Italy* and the limitations of horizontal enforcement: Some reflections from a United States perspective"; McGregor, "State immunity and human rights: Is there a future after *Germany v. Italy*?".

[156] *Jurisdictional Immunities of the State*, Judgment, *I.C.J. Reports 2012*, p. 124, para. 58. See also the separate opinion of Judge Koroma, p. 157, para. 3.

76. The basis for immunity, according to that view, is the principle of the sovereign equality of States. However, that principle does not operate autonomously; the Court stated that said principle "has to be viewed together with the principle that each State possesses sovereignty over its own territory and that there flows from that sovereignty the jurisdiction of the State over events and persons within that territory".[157]

77. The Court therefore recognizes the need to balance competing principles, having stated that: "Exceptions to the immunity of the State represent a departure from the principle of sovereign equality. Immunity may represent a departure from the principle of territorial sovereignty and the jurisdiction which flows from it."[158]

78. The Court also used the argument that immunity is a procedural bar to conclude that it does not conflict with the rules of *jus cogens*:

> Assuming … that the rules of the law of armed conflict which prohibit the murder of civilians in occupied territory, the deportation of civilian inhabitants to slave labour and the deportation of prisoners of war to slave labour are rules of *jus cogens*, there is no conflict between those rules and the rules on State immunity. The two sets of rules address different matters. The rules of State immunity are procedural in character and are confined to determining whether or not the courts of one State may exercise jurisdiction in respect of another State. They do not bear upon the question whether or not the conduct in respect of which the proceedings are brought was lawful or unlawful … For the same reason, recognizing the immunity of a foreign State in accordance with customary international law does not amount to recognizing as lawful a situation created by the breach of a *jus cogens* rule, or rendering aid and assistance in maintaining that situation, and so cannot contravene the principle in Article 41 of the International Law Commission's Articles on State Responsibility.[159]

The Court later added:

> A *jus cogens* rule is one from which no derogation is permitted but the rules which determine the scope and extent of jurisdiction and when that jurisdiction may be exercised do not derogate from those substantive rules which possess *jus cogens* status, nor is there anything inherent in the concept of *jus cogens* which would require their modification or would displace their application.[160]

79. The third relevant topic addressed by the Court in that case is the question of whether there is any rule of customary international law that implies the existence of an exception to State immunity based on a serious violation of human rights or international humanitarian law. The Court's answer is that there is not. It stated that "customary international law does not treat a State's entitlement to immunity as dependent upon the gravity of the act of which it is accused or the peremptory nature of the rule which it is alleged to have violated".[161]

80. Still with regard to exceptions, the Court also rejected the argument that the "territorial tort principle" is applicable to the case at hand. However, it should be noted that the Court's response concerning that exception is more nuanced than its comments on a potential exception based on the violation of *jus cogens* rules. It did not deny the existence of that exception or of a certain amount of practice in that respect, but simply stated that it was not applicable to the case at hand because the acts imputable to Germany, despite their gravity, constitute *acta jure imperii* and, as such, are covered by the jurisdictional immunities of the State.[162]

81. In the same judgment, the Court also ruled on the contention by Italy that the exercise of jurisdiction is a "last resort" in view of the impossibility of satisfying the claims of the victims for redress for the harm suffered. The Court concluded that immunity is not dependent upon whether or not there exists a right to redress or alternative means of securing redress.[163]

82. In summary, in that judgment the Court, in line with its previous rulings, maintained its view of immunity as a merely procedural institution. However, it went a step further in strengthening State immunity by concluding that its existence is not in conflict with the rules of *jus cogens*, that no exceptions to such immunity based on a serious violation of human rights, international humanitarian law or other rules of *jus cogens* can be identified, and that the "territorial tort exception" does not apply in the case of State immunity for *acta jure imperii*. Lastly, the Court could also be considered to be moving away from the model of alternative means of redress as a way of preventing impunity that it established in its judgment in *Arrest Warrant*.

83. On first reading, the Court's position could, *a priori*, appear to have a bearing on the immunity of State officials from foreign criminal jurisdiction. The inverted parallelism that the Court itself seems to establish between the *Jurisdictional Immunities of the State* and *Arrest Warrant* cases has no doubt contributed to such an understanding:

> In *Arrest Warrant*, the Court held, albeit without express reference to the concept of *jus cogens*, that the fact that a Minister for Foreign Affairs was accused of criminal violations of rules which undoubtedly possess the character of *jus cogens* did not deprive the Democratic Republic of the Congo of the entitlement which it possessed as a matter of customary international law to demand immunity on his behalf … [T]he same reasoning is applicable to the application of the customary international law regarding the immunity of one State from proceedings in the courts of another.[164]

84. The fact that the Court brought national case law, which at times pertains more to State officials than to the State itself, into its argument may also have contributed to such a reading. It is therefore unsurprising that this judgment is sometimes used to argue that there are no limitations or exceptions to the immunity of State officials from foreign criminal jurisdiction based on the violation of human rights or international humanitarian law or the commission of international crimes.[165]

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[157] *Ibid.*, pp. 123–124, para. 57.

[158] *Ibid.*

[159] *Ibid.*, p. 140, para. 93. See, in general, paras. 92–97.

[160] *Ibid.*, p. 141, para. 95.

[161] *Ibid.*, p. 137, para. 84. *Sed contra*, see the dissenting opinion of Judge Cançado Trindade and the separate opinion of Judge Bennouna.

[162] *Ibid.*, pp.136–137, paras. 83–84. *Sed contra*, see the dissenting opinion of Judge *ad hoc* Gaja.

[163] *Ibid.*, pp. 141–143, paras. 99–101. *Sed contra*, see the dissenting opinions of Judge Cançado Trindade and Judge Yusuf and the separate opinion of Judge Bennouna.

[164] *Ibid.*, p. 141, para. 95.

[165] For example, see in the present section how the European Court of Human Rights cited this judgment as an authority in *Jones* (see footnote 30 above).

85. However, it should be noted that the Court itself clearly set out the scope of the judgment: State immunity *stricto sensu*. Suffice it to note that the Court stated that *Pinochet* is not relevant to *Jurisdictional Immunities of the State* because *Pinochet* relates to the immunity of an individual rather than that of the State, and immunity from criminal jurisdiction rather than immunity from civil jurisdiction.[166] The Court thus seems to establish a clear distinction between State immunity and the immunity of State officials from foreign criminal jurisdiction. That conclusion is even more evident in the following unambiguous statement by the Court:

> The Court concludes that, under customary international law as it presently stands, a State is not deprived of immunity by reason of the fact that it is accused of serious violations of international human rights law or the international law of armed conflict. In reaching that conclusion, the Court must emphasize that it is addressing only the immunity of the State itself from the jurisdiction of the courts of other States; the question of whether, and if so to what extent, immunity might apply in criminal proceedings against an official of the State is not in issue in the present case.[167]

86. It is not the purpose of the present report to analyse the Court's reasoning in its judgment in *Jurisdictional Immunities of the State*. However, while some of the Court's arguments in that judgment may have an abstract value to contribute to the definition of the immunities regime under international law, it should be noted that the conclusions reached in that case cannot automatically be transposed to the regime of limitations and exceptions to the immunity of State officials from foreign criminal jurisdiction.

2. European Court of Human Rights

87. The European Court of Human Rights pronounced on questions that are relevant for the consideration of limitations and exceptions to immunity in its judgments in the cases of *Al-Adsani*,[168] *McElhinney v. Ireland*,[169] *Kalogeropoulou and Others v. Greece and Germany*,[170] and *Jones*.[171]

88. In all those cases, the Court concluded that the application of State immunity in civil court did not *per se* constitute a violation of the right of access to a court as embodied in article 6, paragraph 1 of the European Convention on Human Rights. According to the Court, restrictions on the right of access to a court may be permissible, provided they meet the following requirements: (*a*) that they are provided for in law; (*b*) that there is a relationship of proportionality between the interests to be protected by the restriction and limitations to the right that may arise therefrom; and (*c*) that the restriction does not in fact imply an absolute loss of the right of access to a court.[172] In the Court's view, the rule relating to State immunity will satisfy the three requirements, in that it is a recognized norm of customary international law that pursues a legitimate aim, namely to protect the principle of sovereign equality and maintain stable, conflict-free relations between States, and does not entail the complete loss of the right of access to a court, given that alternative means of redress are available to applicants, including judicial action (action before the courts of another State), diplomatic action and international negotiation through the victim's State of nationality.[173]

89. It must be borne in mind that this declaration of compatibility between immunity from jurisdiction and the right of access to a court is defined by the Court in relation to State immunity from civil jurisdiction, with the sole exception being the case of *Jones*, where it pronounced on the immunity from civil jurisdiction of State officials, applying the same conclusions it had formulated previously in respect of State immunity.[174]

90. The Court has also pronounced on possible exceptions to the rule of immunity, in particular with respect to torture and *jus cogens* norms, on the one hand, and the "territorial tort exception", on the other.

91. With regard to torture and *jus cogens* norms, the Court has concluded that, despite the inherent gravity of any conduct that constitutes a violation of a peremptory norm, and in particular the prohibition of torture, it is not possible to find in existing international law any norm that provides an exception to State immunity from civil jurisdiction based on a violation of a *jus cogens* norm.[175] It should also be noted that in *Kalogeropoulou*, the Court followed *Al-Adsani* in its conclusions without presenting any new arguments, adding that the applicant had alternative means of securing redress.[176] Lastly, with respect to *Jones*, it should be noted that, even though the Court refused to modify its previous position, it used the uncertainty that exists in international law as to the regime of exceptions to justify its decision, to a certain extent. It referred, *inter alia*, to the fact that the Commission is working on the topic without having taken a decision in that regard, and the fact that international practice is constantly changing and reflects divergent positions on a possible exception based on torture.[177] It is also worth noting that the Court cited the judgment of the International Court of Justice in *Jurisdictional Immunities of the State* as precedent.[178] Nonetheless, the Court expressly acknowledged that there seems to be "some emerging support in favour of a special rule or exception in public international law in cases concerning civil claims for torture lodged against foreign State officials", and that, "in light

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[166] See *Jurisdictional Immunities of the State*, Judgment, *I.C.J. Reports 2012*, pp. 137–138, para. 87.

[167] *Ibid*., p. 139, para. 91.

[168] *Al-Adsani* (see footnote 30 above).

[169] *McElhinney v. Ireland* [GC], No. 31253/96, ECHR 2001-XI (extracts).

[170] *Kalogeropoulou and Others v. Greece and Germany* (dec.), No. 59021/00, ECHR 2002-X.

[171] *Jones* (see footnote 30 above).

[172] See *Al-Adsani* (footnote 30 above), para. 53; *Kalogeropoulou* (footnote 170 above); *McElhinney* (footnote 169 above), para. 34; and *Jones* (footnote 30 above), paras. 186–187.

[173] See *Al-Adsani* (footnote 30 above), paras. 54–56; *Kalogeropoulou* (footnote 170 above); *McElhinney* (footnote 169 above), paras. 35–40; and *Jones* (footnote 30 above), paras. 188–189.

[174] See *Jones* (footnote 30 above), paras. 204–206.

[175] See *Al-Adsani* (footnote 30 above), paras. 58, 61 and 63; and *Jones* (footnote 30 above), para. 215.

[176] See *Kalogeropoulou* (footnote 170 above).

[177] See *Jones* (footnote 30 above), paras. 95–154 and 193–195. Conversely, in his dissenting opinion, Judge Kalaydjieva maintained the need to review the case law of the European Court of Human Rights in *Al-Adsani* (see footnote 30 above). See also the concurring opinion of Judge Bianku, albeit to a different end.

[178] See *Jones* (footnote 30 above), para. 198.

of the developments currently underway in this area of public international law, this is a matter which needs to be kept under review by Contracting States".[179]

92. It should be borne in mind that a non-negligible number of members of the Court have disagreed with the assertion that such an exception does not exist, issuing dissenting opinions in *Al-Adsani*, *Kalogeropoulou* and *Jones*, in which they emphasized that, as a *jus cogens* norm, the prohibition of torture trumps any other norm of international law that does not fall into said category, including norms of international law governing immunity from civil jurisdiction. Such opinions carried considerable weight in *Al-Adsani*, considering the narrow majority (nine to eight) of the ruling.[180]

93. The Court addressed the "territorial tort exception" in *McElhinney*, where it concluded that there is no territorial tort exception in respect of the acts under dispute, namely the assault of an Irish national by a member of the Armed Forces of the United Kingdom in the territory of Ireland during incidents that occurred at the border between Northern Ireland and the Republic of Ireland. The Court applied a narrow interpretation of the territorial tort exception in reaching that conclusion, indicating that such exception applied only to "insurable injury" related to activities *jure gestionis*. Conversely, it maintained that the impugned acts were unequivocally acts performed in an official capacity—acts *jus imperii*—for which the United Kingdom was responsible, hence the deduction that it was the immunity from civil jurisdiction of the United Kingdom that was at issue.[181] However, the Court seems to have accorded great importance in its reasoning to the fact that the applicant had other means of redress, including by bringing an action in a court of the United Kingdom.[182]

94. Special attention should be drawn to the fact that, despite refusing to recognize the existence of an exception, the European Court concluded unequivocally that the prohibition of torture was a *jus cogens* norm and that said prohibition was of an absolute nature, permitting no exception to the obligation arising therefrom in the event of a violation of the prohibition against torture and not of any other right that might be related incidentally to the prohibition considered *per se*.[183] It should be noted, therefore, that in *Al-Adsani*, the Court did not define immunity from civil jurisdiction as an institution that prevents the exercise of jurisdiction by British courts to punish perpetrators of acts of torture, but as an institution that can be used to bar British courts from seeking compensation from a foreign State for torture carried out by British officials.[184] This argument undoubtedly deserves to be reaffirmed in the present report.

95. In any event, in the light of the concrete pronouncements of the Court in respect of exceptions to State immunity from civil jurisdiction in the cases analysed, it is possible to identify a number of elements that are relevant for the purpose of the present report:

(*a*) State immunity from civil jurisdiction is considered an exception to or limitation on the right of access to courts, and therefore an exception to the exercise of jurisdiction by the forum State;

(*b*) such restriction, although compatible with the right of access to justice, cannot give rise to a total loss of the right itself, the Court having introduced the formulation "other means of redress", which the International Court of Justice had used in the *Arrest Warrant* case;

(*c*) prohibition against torture is defined *per se* as a *jus cogens* norm; it is an absolute prohibition that does not permit any derogation whatsoever.

In addition, given that the European Court of Human Rights circumscribes, directly or implicitly, its pronouncements on State immunity from civil jurisdiction,[185] it does not seem possible to conclude that the judgments in question constitute a sufficient basis for confirming that the immunity of State officials from foreign criminal jurisdiction is of an absolute nature, or that there are no exceptions to such immunity.

3. International criminal courts or tribunals

96. Various international criminal courts or tribunals have addressed the immunity of State officials from jurisdiction in the performance of their duties. Although the decisions of those tribunals are taken in the context of international criminal jurisdiction, some of the arguments contained therein are relevant for the purposes of the present report, given that they address very broad questions or the manner in which the immunity of State officials from criminal jurisdiction operates in national criminal courts or tribunals.

97. The International Military Tribunal at Nürnberg had already indicated that the official duties of an accused or the fact that the accused was acting on orders could not be used to exempt the accused from responsibility, and that the crimes under its jurisdiction reflected legal obligations that international law imposed directly on individuals, who could not be exonerated from such responsibility or from legal proceedings on the basis of their connection with the State. The Commission took into account both the statute and the judgments of that Tribunal in the development of the Principles of International Law

[179] See *Jones* (footnote 30 above), paras. 213–215.

[180] See the joint dissenting opinion of Judges Rozakis and Caflisch, with Judges Wildhaber, Costa, Cabral Barreto and Vajić concurring. See also the dissenting opinion of Judge Loucaides in *McElhinney* (footnote 169 above).

[181] See *McElhinney* (footnote 169 above), in particular para. 38. By contrast, see dissenting opinion of Judge Rozakis, the joint dissenting opinion of Judges Caflisch, Cabral Barreto and Vajić, and the dissenting opinion of Judge Loucaides.

[182] See para. 39. Some of the judges disputed that affirmation or considered that its existence was not relevant in the case under consideration, given that the acts were committed against an Irish national, in Ireland, which meant that the national should first seek redress in Irish territorial jurisdiction. See the dissenting opinion of Judge Rozakis, joint dissenting opinion of Judges Caflisch, Cabral Barreto and Vajić, and the dissenting opinion of Judge Loucaides.

[183] See *Al-Adsani* (footnote 30 above), para. 59.

[184] *Ibid*., paras. 40–41.

[185] On this topic, see the third report of the Special Rapporteur, *Yearbook … 2014*, vol. II (Part One), document A/CN.4/673, p. 90, para. 43, and the fourth report of the Special Rapporteur, *Yearbook … 2015*, vol. II (Part One), document A/CN.4/686, p. 12, paras. 45–46 and the first footnote in para. 46.

Recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal (Nürnberg Principles), which are analysed below and which the Commission refers to constantly in its work on other topics, including the draft Code of Crimes against the Peace and Security of Mankind.[186] It is also worth remembering that the contributions of the Nürnberg Tribunal to the definition of the principle of individual criminal responsibility also mark a starting point in modern international criminal law. The decisions of international criminal courts or tribunals that have been performing the functions of that Tribunal since the end of the twentieth century are analysed below.

98. The International Tribunal for the Former Yugoslavia has pronounced on the relationship between the immunity enjoyed by State officials and international crimes, asserting that there is an exception to the norms governing immunity *ratione materiae* before both international criminal courts or tribunals and national courts. In the *Blaškić* case, for instance, it stated that the exception:

> arise[s] from the norms of international criminal law prohibiting war crimes, crimes against humanity and genocide. Under these norms, those responsible for such crimes cannot invoke immunity from national or international jurisdiction even if they perpetrated such crimes while acting in their official capacity.[187]

99. The Tribunal has maintained the same position in other cases, including in relation to immunity *ratione personae*. It is worth noting, however, that in those cases the Tribunal seems to limit the exception to the exercise of its jurisdiction, without extending it to cases brought before domestic courts.[188] In addition, relying on the Statute of the Nürnberg Tribunal, the International Tribunal for the Former Yugoslavia formulated that exception in broad terms, indicating that: "it would be incorrect to suggest that such an immunity exists in international criminal courts".[189]

100. The Special Court for Sierra Leone has also held that immunity *ratione personae* cannot be invoked, as it did in the case of *Taylor*, which concerned charges for serious violations of international humanitarian law. In that decision, the Court did not base its assertion on the type of crime committed, but on the very nature of the Special Court, which is considered an international criminal court. In response to the claim that immunity *ratione personae* protected Mr. Taylor, the Appeals Chamber stated that immunity: "derives from the equality of sovereign States and therefore has no relevance to international criminal tribunals which are not organs of a State but derive their mandate from the international community".[190] It therefore concluded that: "the sovereign equality of States does not prevent a Head of State from being prosecuted before an international criminal tribunal or court".[191]

101. The question of the immunity of State officials, in particular but not limited to immunity *ratione personae*, was also raised before the International Criminal Court in relation to the situations in Darfur-Sudan, Kenya and Libya. Many of the accused invoked their official status, and hence their immunity, but were not present (or were not present on a continuous basis) at trial. In other cases, especially in the case of *Al Bashir*,[192] the topic of immunity was raised in relation to the obligation to cooperate with the Court, as provided for in Part IX of the Rome Statute.

102. Although the disputes in all those cases stemmed from the execution of arrest warrants or subpoenas issued by the Court, they ultimately led to the issue of the scope of the Court's jurisdiction and whether or not the exercise of said jurisdiction could be subject to a "procedural bar". In all those cases, the Court concluded that neither immunity *ratione personae* nor immunity *ratione materiae* could be invoked.

103. With regard to the Darfur-Sudan situation, the International Criminal Court held that immunity could not be invoked in the cases of *Al Bashir* (*ratione personae*) and *Abdel Hussein*[193] (*ratione materiae*). In both cases, in issuing its arrest warrant, the Pre-Trial Chamber determined that the immunity of the accused State officials could not be invoked, based on article 27 of the Rome Statute and on the powers of the Security Council to refer a case to the Court pursuant to article 13 (*b*) of the Statute. In a joint interpretation of both provisions, the Court concluded that the irrelevance of official duties and the inability to invoke national and international immunities applied fully in the cases of Darfur, whether said State was a party to the Rome Statute or not. The Court said that:

> by referring the Darfur situation to the Court, pursuant to article 13 (*b*) of the Statute, the Security Council of the United Nations has also accepted that the investigation into the said situation, as well as any prosecution arising therefrom, will take place in accordance with the statutory framework provided for in the Statute, the Elements of Crimes and the Rules as a whole.[194]

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[186] See section E below.

[187] *Prosecutor v. Tihomir Blaškić*, case No. IT-95-14, Judgment, 29 October 1997, International Tribunal for the Former Yugoslavia, Appeals Chamber, *Judicial Reports 1997*, p. 1057, at para. 41.

[188] See the following cases: *Prosecutor v. Radovan Karadžić and Ratko Mladić*, case No. IT-95-5, formal request for deferral of jurisdiction addressed to the Republic of Bosnia and Herzegovina, decision, Trial Chamber, 16 May 1995, *Judicial Reports 1994–1995*, vol. II, p. 851, at para. 24; *Prosecutor v. Slobodan Milošević*, case No. IT-02-54, preliminary motions, decision, Trial Chamber, 8 November 2001, para. 31; *Prosecutor v. Anto Furundžija*, case No. IT-95-17/1-T, judgment, Trial Chamber II, 10 December 1998, *Judicial Reports 1998*, p. 466, at p. 561, para. 140; *Prosecutor v. Dragoljub Kunarac, Radomir Kovać and Zoran Vuković*, cases Nos. IT-96-23-T and IT-96-23/1-T, judgment, Trial Chamber I, 22 February 2001, para. 494.

[189] See *Prosecutor v. Radislav Krstic*, case No. IT-98-33-A, decision on application for subpoenas, Appeals Chamber, 1 July 2003, para. 26.

[190] *Prosecutor v. Taylor*, case No. SCSL 2003-01-I, Appeals Chamber, decision on immunity from jurisdiction, 31 May 2004, ILR, vol. 128, p. 239, at p. 264, para. 51.

[191] *Ibid*., para. 52.

[192] *Prosecutor v. Omar Hasan Ahmad Al Bashir*, case No. ICC-02/05-01/09, International Criminal Court. For decisions in the case, see www.icc-cpi.int/darfur/albashir.

[193] *Prosecutor v. Abdel Raheem Muhammad Hussein*, case No. ICC-02/05-01/12, International Criminal Court. For decisions in the case, see www.icc-cpi.int/darfur/hussein.

[194] See *ibid*., decision on the prosecution's application for a warrant of arrest, 4 March 2009, Pre-Trial Chamber I, para. 45. It is worth noting that the Court had previously declared that it was competent to hear the case of a person who is not a national of a State party but who had allegedly committed crimes under the Court's jurisdiction in the territory of a State not party to the Statute, on the basis of the decision taken by the Security Council pursuant to article 13 (*b*) of the Statute (*ibid*., paras. 41–43). For a similar approach, see *Prosecutor v. Abdel Raheem Muhammad Hussein*, case No. ICC-02/05-01/12, decision on the prosecution's application under article 58, 1 March 2012, Pre-Trial Chamber, para. 8.

104. The Court also confirmed its jurisdiction in purposive terms, relating it to the key goal of combating impunity and ensuring that persons accused of committing serious crimes of concern to the international community as a whole are brought to justice.

105. The Court applied the same reasoning when it ruled on the obligation of the Democratic Republic of the Congo to cooperate by arresting and surrendering President Al Bashir, concluding that Mr. Al Bashir did not enjoy immunity under international law, because that immunity had been implicitly waived by the Security Council, which had also imposed on the Sudan a general obligation to cooperate with the Court.[195] The Court employed a similar argument in the cases of *Muammar Gaddafi, Saif Al-Islam Gaddafi and Al-Senussi* on the Libya situation.[196]

106. By contrast, in the cases of *Kenyatta* and *Ruto*, on the Kenya situation, the Court did not refer expressly to said argument. In both cases, in response to a defence petition for excusal from trial of the accused, to allow them to adequately fulfil their duties as President and Vice-President of Kenya, the Court said that it could not take those circumstances into consideration because, as a consequence of the Second World War: "the norm of immunity was revised in favour of jurisdiction of international courts to try Heads of State and other senior public officials, for violation of international criminal law".[197] In the view of the Court, the chief object of article 27 of the Rome Statute is the incorporation of that principle.[198]

107. A similar approach to the one taken in the cases of *Kenyatta* and *Ruto* can be found in cases which the Court had considered previously concerning the failure by Malawi and Chad to cooperate in the arrest of President Al Bashir. The Court had noted in those cases that: "customary international law creates an exception to Head of State immunity when international courts seek a Head of State's arrest for the commission of international crimes".[199]

108. In short, the decisions analysed above lead to the conclusion that international criminal courts or tribunals, including the International Criminal Court, have unequivocally rejected the possibility of the immunity of State officials, both *ratione personae* and *ratione materiae*, being invoked in said courts. Moreover, some of the courts have also extended said affirmation to domestic courts, on an exceptional basis. It should be noted that the decisions of international criminal courts or tribunals on this topic have brought into play the special issue of cooperation of domestic courts with international courts and the possible incidence of such cooperation on the immunity of State officials from foreign criminal jurisdiction. That issue will be analysed later in the present report.[200]

D. National judicial practice

109. National judicial practice with regard to persons who enjoy immunity and acts that are covered by immunity was analysed in the third and fourth reports of the Special Rapporteur.[201] The present section will look to analyse the decisions of national courts that have pronounced on the applicability or non-applicability of immunity to specific circumstances and that contain rulings that are relevant for the study of the limitations and exemptions to immunity. For the sake of clarity, those judicial decisions will be analysed as they relate to immunity *ratione personae* and to immunity *ratione materiae*. Although the analysis will focus mainly on the decisions of criminal courts or tribunals, the decisions of civil courts will also be taken into account if they are considered useful, as was the case in previous reports.

110. With regard to the decisions concerning immunity *ratione personae*, it should be noted that almost all national criminal courts or tribunals have held that Heads of State (and in some cases other high-ranking officials) enjoy immunity from foreign criminal jurisdiction during their time in office. The courts have admitted the full applicability of immunity to a variety of offences,[202] including international crimes.[203] This assertion is based on

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[195] See *Prosecutor v. Omar Hassam Ahmad Al Bashir*, case No. ICC-02/05-01/09, Pre-Trial Chamber II, decision on the cooperation of the Democratic Republic of the Congo regarding Omar Al Bashir's arrest and surrender to the Court, 9 April 2014, para. 29.

[196] See *Prosecutor v. Muammar Mohammed Abu Minyar Gaddafi, Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, case No. ICC-01/11, decision on the prosecution's petition pursuant to article 58, 27 June 2011, Pre-Trial Chamber, para. 9.

[197] See *Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, case No. ICC-01/09-01/11-777, decision on Mr Ruto's request for excusal from continuous presence at trial, 18 June 2013, Trial Chamber V (A), para. 67. It should be borne in mind that the Trial Chamber drew on precedents of the Nürnberg Tribunal, other international criminal courts or tribunals, the Charter of the United Nations and the work of the Commission for its decision (see paras. 66–70).

[198] *Ibid*., para. 69. See also *Prosecutor v. Uhuru Muigal Kenyatta*, case No. ICC-01/09-02/11-830, decision on defence motion for excusal from continuous presence at trial, 18 October 2013, Trial Chamber V (B), separate concurring opinion of Judge Eboe-Osuji, para. 32.

[199] See *Prosecutor v. Al Bashir*, case No. ICC-02/05-01/09, decision pursuant to article 87 (7) of the Rome Statute on the failure by the Republic of Malawi to comply with the cooperation requests issued by the Court with respect to the arrest and surrender of Omar Hassan Ahmad Al Bashir, 12 December 2011, Pre-Trial Chamber I, para. 43. The same argument was applied in *ibid.*, Decision pursuant to article 87 (7) of the Rome Statute on the refusal of the Republic of Chad to comply with the cooperation requests issued by the Court with respect to the arrest and surrender of Omar Hassan Ahmad Al Bashir, 13 December 2011, Pre-Trial Chamber I, para. 13, *in fine*.

[200] See chap. III, sect. B.

[201] See *Yearbook … 2014*, vol. II (Part One), document A/CN.4/673, pp. 87–89, paras 29–38, and *Yearbook … 2015*, vol. II (Part One), document A/CN.4/686, pp. 13–17, paras. 49–60.

[202] See the following cases: Federal Republic of Germany, *Re Honecker*, Federal Supreme Court, judgment of 14 December 1984, ILR, vol. 80, p. 366 (a criminal case against the then President of the Council of State of the Federal Democratic Republic of Germany—the equivalent of the Head of State—for illegal detention); Germany, *In re Hussein*, Regional Superior Court of Cologne, judgment of 16 May 2000, 2 Zs 1330/99, paras. 10–15, cited in Pedretti, *Immunity of Heads of State* …, p. 151 (a case brought against the Head of State of Iraq, Saddam Hussein, for hostage-taking and use of hostages to defend his objectives during the second Gulf war; the court considered that his actions were not crimes under international law); France, *In re Bouteflika*, Court of Cassation, Criminal Chamber No. 01-83440, judgment of 13 November 2001 (a case of defamation and public insults).

[203] See the following cases: Spain, *Teodoro Obiang Nguema and Hassan II*, National High Court, decision of Central Investigation Court No. 5, 23 December 1998; Spain, *Fidel Castro*, National High Court, Criminal Chamber, decision 1999/2723, 4 March 1999 (also the decisions of Central Investigation Court No. 2 of Spain, National High Court, of 19 November 1998 and 4 November 1999); Spain, *Milosevic*, National High Court, decision of Central Investigating Court No. 1, of 25 October 1999; Spain, *Alan García Pérez and Alberto Fujimori*, National High Court, decision of 15 June 2001; Spain, *Silvio Berlusconi*, National High Court, decision No. 262/97, of 27 May 2002; Belgium, *Re Sharon and Yaron, HSA v. SA (Ariel Sharon) and YA (Amos Yaron)*,

the existence of principles or norms of customary international law. In some cases, the pronouncement in favour of immunity *ratione personae* has also been in the form of an *obiter dictum* in cases concerning immunity *ratione materiae*.[204] In other cases, that declaration stemmed from the exercise of discretionary powers available to the Attorney General of a State or to other organs when their intervention is necessary for criminal proceedings to be initiated.[205] Lastly, it is worth noting that, while national courts have usually pronounced on immunity in cases brought against State officials, in an exceptional situation, a tribunal made its pronouncement in a case in which an advisory opinion was sought.[206]

111. In some cases, the courts have concluded that only immunity *ratione personae* may cease to apply if an international treaty establishes clearly that it has been waived or lifted, or cannot be invoked, or if the treaty establishes an exception in that regard.[207] Exceptionally, one court has ruled in favour of an exception to immunity *ratione personae* in the case of crimes under international law,[208] or referred to the existence of exceptions to said category of immunity that did not subsequently materialize, save for a generic mention in "specific provisions … that oblige the parties concerned".[209] Lastly, it should be noted that a French court has declared that an incumbent Head of State does not enjoy immunity from criminal jurisdiction for acts of corruption and other similar acts.[210]

112. Civil courts have also declared that immunity *ratione personae* is applicable in cases where the claim against a Head of State was for the commission of serious crimes.[211] That declaration was also formulated in the form of an *obiter dictum* in some civil cases.[212] However, exceptionally, one court has circumscribed the immunity *ratione personae* of an incumbent Head of State for official acts, excluding private acts.[213]

113. The judgments of South African courts concerning the argument that the South African authorities should arrest President Al Bashir pursuant to the arrest warrant issued by the International Criminal Court deserve particular consideration. Both the High Court of South Africa and the Supreme Court of Appeal of South Africa ruled that the immunity *ratione personae* of an incumbent

Court of Cassation, 12 February 2003, ILR, vol. 127, p. 123 (the crimes allegedly committed by the accused were genocide, war crimes and serious violations of the Geneva Conventions and the Additional Protocols thereto); Spain, *Hugo Chávez*, National High Court, Central Investigation Court No. 4, 24 March 2003; United Kingdom, *Re Mofaz*, Bow St. Magistrates' Court, judgment of 12 February 2004, ILR, vol. 128, p. 712 (involving a request for an arrest warrant against the Israeli Minister of Defence, who was accused of serious violations of the Geneva Conventions); United Kingdom, *Tatchell v. Mugabe*, Bow St. Magistrates' Court, judgment of 14 January 2004, ILR, vol. 136, p. 573 (request for an arrest warrant against the Head of State of Zimbabwe, who was accused of acts of torture); Netherlands, *The Hague City Party v. Netherlands*, The Hague District Court, judgment, 4 May 2005, LJN AT5152, KG 05/432, para. 3.6 (a curious case in which the President of the United States, George Bush, was accused for the powers granted to him under the American Service-Member's Protection Act of 2001, which allow him to order the use of force, in specific circumstances, in relation to persons under the custody of the International Criminal Court); United Kingdom, *Re Bo Xilai*, Bow St. Magistrates' Court, judgment of 8 November 2005, ILR, vol. 128, p. 714 (request for an arrest warrant against the Chinese Minister of Trade, who was accused of torture); Spain, *Rwanda (Kagame)*, National High Court, decision of case No. 3/2008, of 6 February 2008, *Oxford Reports on International Law in Domestic Courts* (ILDC), 1198 (ES 2008), para. 4 (the National High Court of Spain ruled that President Kagame could not be brought to trial for genocide, war crimes, crimes against humanity and acts of terrorism, whereas it allowed the trial of other persons who qualified as State officials; in so doing, the court implicitly denied them immunity *ratione materiae*).

[204] See Belgium, *Re Pinochet*, Brussels Court of First Instance, judgment, 6 November 1998, ILR, vol. 119, p. 345, at pp. 345–349.

[205] See the following cases: Australia, *In re Rajapaksa*, decision of the Attorney General of Australia, of 25 October 2011, cited in Pedretti, *Immunity of Heads of State* …, p. 139 (case brought against the Head of State of Sri Lanka for war crimes and crimes against humanity); Germany, *In re Jiang*, Chief Prosecutor, Federal Supreme Court, decision, 24 June 2005, 3 ARP 654/03-2, para. 1 (case against the former Head of State of China, Jiang Zemin, accused of genocide, crimes against humanity and torture; the Federal Chief Prosecutor ruled on both immunity *ratione materiae* and immunity *ratione personae*); *Laurent Kabila*, in response to a complaint against the Head of State of the Democratic Republic of the Congo, the Attorney General decided to withdraw the case based on an application for immunity (cited in Pedretti, *Immunity of Heads of State* …, p. 152).

[206] See also Sierra Leone, *Sesay (Issa) and ors v. President of the Special Court for Sierra Leone and ors*, Supreme Court, judgment, 14 October 2005, SC 1/2003, ILDC 199 (SL 2005), para. 52 (the Court concluded that the immunity of a Head of State before the courts of a foreign State is applicable, whether it can be invoked in international courts or not).

[207] See also the following cases: Belgium, *Re Sharon and Yaron* (footnote 203 above), pp. 123–124 (the Belgian Court of Cassation considered that the Convention on the Prevention and Punishment of the Crime of Genocide, the Rome Statute and the Geneva Conventions and the Protocols thereto all did not meet those requirements); Netherlands, *The Hague City Party v. Netherlands* (footnote 203 above), para. 3.6 (in that case, the Court considered that the only exception to immunity for Heads of State was provided by article 27 of the Rome Statute).

[208] See Germany, *In re Hussein* (footnote 202 above) (even though the Court considered that the President of Iraq enjoyed immunity *ratione personae*, it stated that said immunity could be bypassed upon the commission of crimes under international law, although it found that no such crime had been committed in that case).

[209] See France, *Gaddafi*, Court of Cassation, judgment, 13 March 2001, Criminal Chamber No. 1414, ILR, vol. 125, p. 509. In its judgment, the Court of Cassation stated, in relation to crimes of terrorism such as those with which the Head of State of Libya was charged, that "in the current state of international law, the alleged crimes, although serious, do not constitute an exception to the principle of immunity from jurisdiction of an incumbent foreign Head of State". The judgment does not indicate what those exceptions would be; it merely affirms that "international custom protects incumbent Heads of State from foreign criminal jurisdiction, in the absence of specific binding provisions to the contrary for the parties concerned". In any event, the Court declared that Mr. Gaddafi enjoyed immunity *ratione personae*. With regard to that case, it is worth noting that the Court of Appeal of Paris had rejected the immunity, alleging that there is "a generally accepted practice in law in all States, including France, whereby immunity from prosecution covers only government or administrative acts carried out by the Head of State, and those acts could not possibly include international crimes" (Court of Appeal of Paris, judgment of 20 October 2000, ILR, vol. 125, p. 498).

[210] See France, *Teodoro Nguema Obiang Mangue*, Court of Appeal of Paris, *Pôle* 7, Investigating Chamber II, Judgment, 13 June 2013, and Court of Appeal of Paris, *Pôle* 7, Investigating Chamber II, application for annulment of judgment, 16 April 2015.

[211] See Belgium, *Mobutu v. SA Cotoni*, Civil Court of Brussels, judgment, 29 December 1988, ILR, vol. 91, p. 260 (case against President Mobutu, Head of State of Zaire).

[212] See Greece, *Margellos v. Federal Republic of Germany*, Special Supreme Court, judgment, 17 September 2002, ILR, vol. 129, p. 525, at p. 532 (application for damages and prejudice against Germany for acts committed during the Second World War; the court held that despite developments in international law, high-ranking officials of a foreign State continued to enjoy immunity, including when they are accused of war crimes and crimes against humanity).

[213] See France, *Mobutu and Republic of Zaire v. Société Logrine*, Court of Appeal of Paris, judgment, 31 May 1994, ILR, vol. 113, p. 481, at p. 484.

foreign Head of State was not applicable.[214] However, those rulings were based on the obligation to cooperate with the International Criminal Court and on South African legislation, which expressly provides that no foreign State official who has committed the crime of genocide, crimes against humanity or war crimes may be granted immunity. An appeal against the judgment of the Supreme Court of Appeal has been filed with the Constitutional Court of South Africa; the case was pending determination when the present report was finalized.

114. The immunity *ratione materiae* of foreign State officials has given rise to a greater number of judgments by national criminal courts. The positions adopted by States in those judgments are less uniform, although it can be concluded that domestic courts, in a certain number of cases, have accepted the existence of limitations and exceptions to immunity in circumstances relating to the commission of international crimes,[215] crimes of corruption or related crimes,[216] and other crimes of international concern, such as terrorism, sabotage, or causing the destruction of property and the death and injury of persons in relation to such crimes.[217] Furthermore, it should be borne in mind that national courts have in some cases tried officials of another State for international crimes without expressly ruling on immunity.[218]

115. However, national courts have used various arguments to conclude that immunity *ratione materiae* is not applicable. For example, while some courts have held that immunity should not apply owing to the gravity of the acts committed by the State official,[219] in other cases, the denial of immunity has been based on the violation of *jus cogens* norms,[220] or even on the consideration that the acts in question cannot be regarded as acts performed in an official capacity since the commission of such crimes

[214] See *Southern Africa Litigation Centre* (see footnote 33 above), sect. 28.

[215] See the following cases: United Kingdom, *R. v. Bow Street Metropolitan Stipendiary Magistrate ex parte Pinochet Ugarte (No. 3)*, House of Lords (UKHL) 17, [2000] 1 A.C. 147; Belgium, *Re Pinochet* (footnote 204 above), p. 349; Germany, *In re Hussein* (footnote 202 above), para. 11 (it makes this assertion in relation to the hypothesis that the then President Hussein had ceased to hold office); Netherlands, *Bouterse*, Court of Appeal of Amsterdam, judgment, 20 November 2000 (although the Supreme Court subsequently set aside the judgment, it did not do so in connection with immunity but on the grounds of a violation of the principle of non-retroactivity and the limited scope of universal jurisdiction; see judgment of 18 September 2001); Belgium, *Re Sharon and Yaron* (footnote 203 above) (although the Court granted immunity *ratione personae* to Ariel Sharon, it tried Amos Yaron, who, at the time the acts were committed, was head of the Israeli Armed Forces that took part in the Sabra and Shatila massacres); Chile, *Fujimori*, case No. 5646-05, Supreme Court, judge of first instance, judgment, 11 July 2007, paras. 15–17 (the decision was taken in relation to a request for extradition for serious human rights violations and corruption); Netherlands, *H. v. Public Prosecutor*, Supreme Court, judgment, 8 July 2008, ILDC 1071 (NL 2008), para. 7.2; Italy, *Lozano v. Italy*, Court of Cassation, judgment, 24 July 2008, ILDC 1085 (IT 2008), para. 6; Switzerland, *A. v. Office of the Public Prosecutor of the Confederation*, Federal Criminal Court, judgment, 25 July 2012, BB.2011.140; United Kingdom, *FF v. Director of Public Prosecutions* (*Prince Nasser* case), High Court of Justice, Queen's Bench Division, Divisional Court, judgment, 7 October 2014 [2014] EWHC 3419 (Admin.) (The significance of this ruling lies in the fact that it was issued as a "consent order", that is to say, based on an agreement reached between the plaintiffs and the Director of Public Prosecutions, in which the latter agrees that the charges of torture against Prince Nasser are not covered by immunity *ratione materiae*). In a civil proceeding, the Italian Supreme Court also asserted that State officials who have committed international crimes do not enjoy immunity *ratione materiae* from criminal jurisdiction (Italy, *Ferrini v. Federal Republic of Germany*, Court of Cassation, judgment of 11 March 2004, ILR, vol. 128, p. 674). In *Jones*, although the House of Lords recognized immunity from civil jurisdiction, it reiterated that immunity from criminal jurisdiction is not applicable in the case of torture (United Kingdom, *Jones v. Ministry of Interior Al-Mamlaka Al-Arabiya AS Saudiya (Kingdom of Saudi Arabia)*, House of Lords, judgment of 14 June 2006 [2006] UKHL 26, [2007] 1 A.C.). Lastly, it should be noted that the Federal High Court of Ethiopia, albeit in the context of a case pursued against an Ethiopian national, affirmed the existence of a rule of international law preventing the application of immunity to a former Head of State accused of international crimes (*Special Prosecutor v. Hailemariam*, Federal High Court, judgment of 9 October 1995, ILDC 555 (ET 1995)).

[216] See the following cases: Switzerland, *Evgeny Adamov v. Federal Office of Justice*, Federal Tribunal, judgment, 22 December 2005, *Decisions of the Federal Tribunal* 132 II (this is a case of misappropriation of public funds); Chile, *Fujimori* (previous footnote), paras. 15–17 (the decision was taken in relation to a request for extradition for serious human rights violations and corruption); France, *Teodoro Nguema Obiang Mangue*, judgment of 13 June 2013 and application for annulment, judgment of 16 April 2015 (footnote 210 above).

[217] See the following cases: France, *DC 10 UTA*, Special Court of Assizes of Paris, judgment, 10 March 1999 (six Libyan officials of various ranks were sentenced *in absentia* to life imprisonment as the perpetrators of the 1989 attack against a UTA DC 10 aircraft, which caused the plane to crash in the Ténéré desert, killing 170 people); New Zealand, *R. v. Mafart and Prieur* (*Rainbow Warrior* case), High Court, Auckland Registry, judgment, 22 November 1985 (acts carried out by members of the French Armed Forces and security forces to mine the ship *Rainbow Warrior*, which led to the sinking of the ship and the death of several people; these were described as terrorist acts); France, *Association des familles des victimes du Joola* case, case No. 09-84818, Court of Cassation, judgment, 19 January 2010 (this confirmed the arrest warrant against the Transport Minister, the Chief of Staff of the Armed Forces and the Navy Chief of Staff in connection with the events that caused the vessel *Joola* to sink).

[218] This occurred, for example, in the *Barbie* case before the French courts: France, *Federation Nationale des Déportés et Internés Résistants et Patriotes and others v. Barbie*, Court of Cassation, judgments of 6 October 1983, 26 January 1984 and 20 December 1985, ILR, vol. 78, p. 125; *Federation Nationale des Déportés et Internés Résistants et Patriotes and others v. Barbie*, Rhone Court of Assizes, judgment of 4 July 1987, ILR, vol. 78, p. 148; and Court of Cassation, judgment of 3 June 1988, ILR, vol. 100, p. 330. Previously, the District Court of Jerusalem had found Eichmann guilty of crimes against humanity, war crimes and crimes against the Jewish people, rejecting the accused's argument that, in his capacity as Head of the Gestapo Department for Jewish Affairs, he should be considered to have been performing "acts of State" (Israel, *Attorney General v. Eichmann*, Supreme Court, judgment, 29 May 1962, ILR, vol. 36, pp. 309–310). Meanwhile, the National High Court of Spain has tried various foreign officials for international crimes without deeming it necessary to rule on immunity, in the *Pinochet, Scilingo, Cavallo, Guatemala, Rwanda* and *Tibet* cases. In the *Rwanda* case, however, the National High Court ruled against the prosecution of President Kagame on the grounds that he enjoyed immunity. Similarly, in the *Tibet* case, the National High Court ruled against the prosecution of the then President Hu Jintao; however, following the end of Hu Jintao's term as President of China, the Central Court of Investigation No. 2 of the National High Court allowed his prosecution by order of 9 October 2013, claiming that he no longer enjoyed "diplomatic immunity".

[219] Israel, *Eichmann* (see previous footnote). In the *Ferrini* case, the Italian courts based their ruling both on the gravity of the crimes committed and the fact that the conduct in question is contrary to *jus cogens* (*Ferrini* (footnote 215 above)).

[220] In the *Lozano* case, the Italian Court of Cassation based its denial of immunity on the violation of fundamental rights, which have the status of *jus cogens* norms and must therefore take precedence over the rules governing immunity (*Lozano v. Italy* (footnote 215 above), para. 6). In *A. v. Office of the Public Prosecutor of the Confederation*, the Federal Criminal Court of Switzerland based its decision on the existence of a customary prohibition concerning the commission of international crimes that the Swiss legislator considers to be *jus cogens*; it also pointed out the contradiction between prohibiting such conduct while continuing to recognize immunity *ratione materiae* that would prevent the launch of an investigation (Switzerland, *A. v. Office of the Public Prosecutor of the Confederation* (see footnote 215 above)).

cannot, under any circumstances, be considered an ordinary function of the State or of a State official.[221]

116. Meanwhile, civil courts have also been holding immunity to be non-applicable in the same scenarios as those mentioned in the previous paragraph, basing their decisions mainly on the *jus cogens* nature of the international norms violated (essentially human rights norms and the prohibition of certain types of conduct such as torture) and the categorization of the acts giving rise to the civil suit as *ultra vires* acts of the official that cannot be described as official acts or that are outside the ordinary scope of a State function.[222]

117. Lastly, it should be noted that national courts, both civil and criminal, have denied immunity in cases involving acts performed by State officials that are closely linked to private interest and whose objective is the personal enrichment of the official and not the benefit of the sovereign, or in corruption-related cases.[223]

118. In any event, national courts have granted immunity *ratione materiae* even in relation to the aforementioned crimes in a small number of cases;[224] contradictory positions have sometimes been evident in the case law of a given State's courts. However, in some of those cases, the differences in position are attributable to differences in the treatment of immunity in relation to the same facts, depending on whether the case is before the criminal or civil courts.[225]

119. Separate analysis is warranted regarding the practice of the United States courts, which have ruled on the immunity *ratione materiae* of State officials both through application of the Foreign Sovereign Immunities Act (in relation only to civil jurisdiction) and through application of the common law doctrine (in relation to both civil and criminal jurisdiction), although the second formula has generally been applied only since the judgment in the *Samantar* case, in which the Supreme Court held that the Foreign Sovereign Immunities Act applies only when the suit is brought against the State *stricto sensu* and not against one of its individual officials.[226] Under the first formula (Foreign Sovereign Immunities Act), the courts have exclusive responsibility for determining the question of immunity, while under the second formula (common law) the executive has the power to state whether an individual may enjoy immunity or not, through a "suggestion of immunity" that the courts must respect; they are able to decide the matter themselves only if the State Department does not issue a suggestion of immunity.[227]

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[221] See the following cases: Belgium, *Re Pinochet* (footnote 204 above), p. 349; Germany, *In re Hussein* (footnote 202 above), para. 11 (it made this assertion in relation to the hypothesis that the then President Hussein had ceased to hold office). Lastly, it should be pointed out that, in some cases, German courts have concluded that immunity is not applicable based on the fact that the State of the official no longer exists and that, therefore, the accused no longer has the status of official. Among the cases referring to former officials of the German Democratic Republic are: *Border Guards*, Federal Criminal Court, judgment, 3 November 1992, ILR, vol. 100, p. 373; *Stoph*, Federal Constitutional Court, judgment, 21 February 1992, 2BvR 1661/91, para. 4; *Mauerschützen*, Federal Constitutional Court, judgment of 24 October 1996, 2 BvR 1851/94, 2 BvR 1853/94, 2 BvR 1875/94, 2 BvR 1852/94, para. 127.

[222] In that regard, a Greek court found that crimes committed by armed forces are acts attributable to the State for the purposes of international responsibility but cannot be regarded as sovereign acts for the purposes of State immunity (*Prefecture of Voiotia v. Federal Republic of Germany*, Court of First Instance of Livadia, judgment, 30 October 1997).

[223] United States, *United States v. Noriega*, United States Court of Appeals, Eleventh Circuit, judgment, 7 July 1997; United States, *Jungquist v. Sheikh Sultan Bin Khalifa al Nahyan*, United States District Court, District of Columbia, judgment, 20 September 1996; France, *Melleiro v. Isabelle de Bourbon, ex-Reine d'Espagne* case; France, *Seyyid Ali Ben Hammoud, Prince Rashid v. Wiercinski*, Tribunal civil de la Seine, judgment, 25 July 1916; France, *Ex-roi d'Egypte Farouk v. S.A.R.L. Christian Dior* case, Court of Appeal of Paris, judgment, 11 April 1957; France, *Ali Ali Reza v. Grimpel*, Court of Appeal of Paris, judgment, 28 April 1961; United States, *Trajano v. Marcos*, 978 F.2d 493 (Ninth Circuit, 1992), ILR, vol. 103, p. 521; United States, *Doe v. Zedillo Ponce de León*, United States Court of Appeals, Second Circuit, No. 13-3122, 16 August 2013; United States, *Jiménez v. Aristeguieta*, 311 F.2d 547, United States Court of Appeals, Fifth Circuit, 1962 ILR, vol. 32, p. 353; *JeanJuste v. Duvalier* (1988), No. 86-0459 Civ, United States District Court, SD Fla; Switzerland, *Adamov* (see footnote 216 above); United States, *Republic of the Philippines v. Marcos et al.* (1986), ILR, vol. 81, p. 581; United States, *Republic of the Philippines v. Marcos et al. (No. 2)* (1987, 1988), ILR, vol. 81, p. 609; United Kingdom, *Republic of Haiti v. Duvalier* [1990] 1 QB 2002; United States, *Islamic Republic of Iran v. Pahlavi* (1984), ILR, vol. 81, p. 557: in this case, it was the United States Government that informed the Court that the claim should not be barred either by application of the sovereign immunity principle or by the act of State doctrine; France, *Teodoro Nguema Obiang Mangue*, judgment of 13 June 2013 and judgment of 16 April 2015 (footnote 210 above).

[224] See Switzerland, *Marcos and Marcos v. Federal Office of Police*, Federal Tribunal, judgment, 2 November 1989, Decisions of the Federal Tribunal 115 Ib 496. See also *Revue suisse de droit international et européen* (1991), p. 535, and ILR, vol. 102, p. 201 (this case related to financial activities undertaken by Ferdinand Marcos and his wife when he was President of the Philippines); Senegal, *Prosecutor v. Hissène Habré*, Court of Appeal of Dakar, judgment, 4 July 2000, and Court of Cassation, judgment, 20 March 2001, ILR vol. 125, pp. 571–577 (acts of torture and crimes against humanity); Germany, *In re Jiang Zemin* (see footnote 205 above) (the Prosecutor General accorded the former Chinese Head of State the same treatment as an incumbent Head of State, based on the need to guarantee the exercise of the functions of a high-ranking State official); United Kingdom, *Jones v. the Kingdom of Saudi Arabia* (footnote 215 above).

[225] There have been particular differences in the treatment of immunity *ratione materiae* by civil and criminal courts in the United Kingdom: see *R. v. Bow Street Metropolitan Stipendiary Magistrate ex parte Pinochet Ugarte (No. 3)* (footnote 215 above); *Jones v. Kingdom of Saudi Arabia* (footnote 215 above), and *Prince Nasser* case (footnote 215 above). Regarding this difference in practice, see *Yearbook … 2015*, vol. II (Part One), document A/CN.4/686, para. 56. In *Bouzari v. Islamic Republic of Iran*, the Court of Appeal for Ontario granted immunity from civil jurisdiction for the Islamic Republic of Iran in a case of torture, although it referred in that regard to the doctrine established by the House of Lords in the *Pinochet* case for the purpose of distinguishing between immunity from civil jurisdiction and immunity from criminal jurisdiction (2004 CarswellOnt 2681, 243 D.I.R. (4th) 406, 71 O.R. (3d) 675, 122 C.R.R. (2d) 26, 220 O.A.C. 1, para. 91). Similarly, in *Fang v. Jiang Zemin*, the High Court of New Zealand expressly declared that immunity from criminal jurisdiction would not apply in the case of acts of torture (judgment, 21 December 2006, ILR, vol. 141, p. 717). In a radically different approach, the Italian Court of Cassation stated that the fact that the immunity *ratione materiae* of State officials from criminal jurisdiction was not applicable in cases concerning the commission of war crimes and crimes against humanity should be interpreted to mean that State immunity was also not applicable when a civil suit was brought against the State for the same acts (*Ferrini* (footnote 215 above)).

[226] United States, *Samantar v. Yousuf*, 130 S. Ct. 2278 (2010). In relation to the position previously held by the said courts, see United States, *Chuidian v. Philippine National Bank*, 912 F.2d 1095 (Ninth Circuit, 1990), ILR, vol. 92, p. 480.

[227] Regarding the changes in the way in which the United States courts treat the immunity of State officials, see, *inter alia*, Bellinger, "The dog that caught the car: observations on the past, present, and future approaches of the Office of the Legal Adviser to official acts immunities"; Koh, "Foreign official immunity after *Samantar*: a United States Government perspective"; Keitner, "Annotated brief of Professors of Public International Law and Comparative Law as *Amici Curiae* in support of respondents in *Samantar v. Yousuf*".

120. However, in many cases analysed in accordance with the Foreign Sovereign Immunities Act, the United States courts have ruled that immunity from jurisdiction is not applicable in cases concerning international crimes and human rights violations, which are generally regarded as *ultra vires* acts that are performed for the exclusive benefit of the official, do not form part of the regular functions of the State and violate *jus cogens* norms.[228] Nonetheless, this has not prevented the United States courts from granting immunity *ratione materiae* in some cases, even when the acts in respect of which immunity has been claimed constitute international crimes or serious human rights violations.[229] Immunity *ratione materiae* has been granted with greater frequency in cases where courts have had to make a decision based solely on common law rules, owing essentially to the considerable weight that the Executive's opinion, reflected in the "suggestion of immunity", carries in the common law system.[230] That said, there are also some cases where a suggestion of immunity has been issued and the courts have subsequently denied immunity, either in line with the suggestion or because the court, despite the suggestion, has examined the merits of the claim and found the contested acts to be *ultra vires* or contrary to peremptory norms of international law.[231]

121. In short, the above analysis demonstrates that national courts almost unanimously acknowledge that no limitations or exceptions are applicable to immunity *ratione personae*. However, with regard to immunity *ratione materiae*, it can be concluded that the majority trend is to accept the existence of certain limitations on and exceptions to such immunity, either in view of the gravity of the crimes, because they violate peremptory norms or undermine values of the international community as a whole, or because the crimes in question cannot be regarded as acts performed in an official capacity since they go beyond or do not correspond to the ordinary functions of the State.

122. To conclude this analysis of domestic case law, reference must be made to the judgment of the Italian Constitutional Court of 22 October 2014, the significance of which was mentioned in the Special Rapporteur's fourth report.[232] That judgment refers to the questions arising from the incorporation into the Italian legal system of the judgment of the International Court of Justice in *Jurisdictional Immunities of the State* and, consequently, contains arguments pertaining to the jurisdictional immunity of the State *stricto sensu*. However, the Constitutional Court focuses its arguments to a major extent on jurisdictional immunity and its relationship with the right of access to justice and to effective judicial protection of fundamental rights.[233] Such arguments may be of interest for the present report and are therefore summarized as follows:

(*a*) the right of access to justice and to effective judicial protection of inviolable human rights is "is one of the greatest principles of legal culture in democratic systems of our times", which can be limited only under specific circumstances;

(*b*) the jurisdictional immunity of the State may "justify … the sacrifice of the principle of judicial protection of inviolable rights guaranteed by the [Italian] Constitution" but only when it "is connected—substantially and not just formally—to the sovereign functions of the foreign State, i.e. to the exercise of its governmental powers";

(*c*) some acts "such as deportation, forced labour and massacres, recognized to be crimes against humanity [cannot] justify the absolute sacrifice in the domestic legal order of the judicial protection of inviolable rights of the victims of those crimes". "State actions [that] can be considered war crimes and crimes against humanity, [or as] violations of inviolable human rights, … [as such] are excluded from the lawful exercise of governmental powers";

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[228] See United States, *Letelier v. Chile*, 748 F.2d 790 (Second Circuit 1984), ILR, vol. 79, p. 561; *Jiménez v. Aristeguieta* (see footnote 223 above); *United States v. Noriega* (footnote 223 above); *Hilao and others v. Estate of Marcos*, United States Court of Appeals, Ninth Circuit, judgment of 16 June 1994 (in the court's opinion, the acts of torture, execution and disappearance were acts performed by Marcos that did not come within any official mandate and could not be considered acts of an agency or instrumentality of a foreign State); *In Re Jane Doe I, et al. v. Liu Qi, et al., Plaintiff A, et al. v. Xia Deren et. al.*, United States District Court, Northern District of California (C 02-0672 CW, C 02-0695 CW); *Rukmini S. Kline et al. v. Yasuyuki Kaneko et al.*, Supreme Court of the State of New York, judgment of 31 October 1988; *Chuidian v. Philippine National Bank* (see footnote 226 above); *Maximo Hilao, et. al., Vicente Clemente et al., Jaime Piopongco et al. v. Estate of Ferdinand Marcos*, United States Court of Appeals, Ninth Circuit, judgment, 16 June 1994; *Teresa Xuncax, Juan Diego-Francisco, J. Doe, Elizabet Pedro-Pascual, Margarita Francisco-Marcos, Francisco Manuel-Méndez, Juan Ruiz Gómez, Miguel Ruiz Gómez and José Alfredo Callejas v. Héctor Gramajo and Diana Ortiz v. Héctor Gramajo*, United States District Court, District of Massachusetts, judgment, 12 April 1995; and *Bawol Cabiri v. Baffour Assasie-Gyimah*, United States District Court, Southern District of New York, judgment, 18 April 1996.

[229] See United States, *Saltany v. Reagan and others*, United States District Court, District of Columbia, judgment, 23 December 1988; *Saudi Arabia v. Nelson*, United States Supreme Court, ILR, vol. 100, p. 544; *Lafontant v. Aristide*, United States District Court, Eastern District of New York, judgment, 27 January 1995; *A, B, C, D, E, F v. Jiang Zemin*, October 2002: this case is significant because, once Jiang Zemin's term as President ended in 2003, a group of Democratic members of the United States Congress attempted to reopen the case, though without success, as the State Department maintained its suggestion of immunity; *Ye v. [Jiang] Zemin*, 383 F.3d 620 (Seventh Circuit, 2004); *Matar v. Dichter*, 563 F. 3d 9 (Second Circuit, 2009).

[230] On the State Department's practice in relation to the suggestion of immunity, see Smith, "Immunity games: How the State Department has provided courts with a post-*Samantar* framework for determining foreign official immunity".

[231] See United States, *Enahoro v. Abubakar*, 408 F. 3d 877 (Seventh Circuit, 2005); *Yousuf v. Samantar*, 699 F, 3d 763 (Fourth Circuit, 2012) (although in this case the State Department had opposed immunity, the court held that the suggestion was not binding and considered the merits of the case, concluding that there is a growing trend in current international law not to grant immunity to a State official for acts that violate *jus cogens* norms, regardless of whether the act may also be attributed to the State).

[232] The interest generated by this judgment goes far beyond the topic of State immunities and has implications for issues of great relevance, especially those concerning the relationship between international and national law. As an example of such interest, see the in-depth analysis of decision No. 238/2014 in Kolb, "The relationship between the international and the municipal legal order: reflections on the decision No. 238/2014 of the Italian Constitutional Court"; De Sena, "The judgment of the Italian Constitutional Court on State immunity in cases of serious violations of human rights or humanitarian law: a tentative analysis under international law"; Pinelli, "Decision No. 238/2014 of the Constitutional Court: Between undue fiction and respect for constitutional principles"; Palchetti, "Judgment 238/2014 of the Italian Constitutional Court: In search of a way out", .

[233] See, in particular, section 3.4 of the judgment.

(*d*) consequently, immunity "does not protect behaviours that do not represent the typical exercise of governmental powers, but are explicitly considered and qualified unlawful, since they are violations of inviolable rights";

(*e*) immunity cannot be regarded as an acceptable reason to sacrifice the aforementioned rights when, as in the case in question, there is no other effective recourse for gaining access to the courts and obtaining effective judicial protection.

E. Other work of the Commission

123. The Commission has in the past taken up a number of topics of relevance to the present report, in particular the Principles of International Law recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal, the draft Code of Crimes against the Peace and Security of Mankind and the articles on responsibility of States for internationally wrongful acts. Each of these instruments contains provisions that are pertinent for determining the scope of the limitations and exceptions to immunity, which are analysed below. The Commission also dealt with issues related to limitations and exceptions to immunity in the draft statute for an international criminal court[234] and the draft articles on jurisdictional immunities of States and their property.[235] These last two instruments, however, are discussed elsewhere in this report.[236]

124. The Principles of International Law recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal were adopted by the Commission in 1950[237] in response to an express mandate from the General Assembly,[238] which took note of the Principles in its resolution 488 (V) of 12 December 1950. As is well known, these Principles served as a foundation for the Commission's subsequent work on crimes against the peace and security of mankind and on the development of a draft statute for an international criminal court.

125. The Principles adopted by the Commission includes three basic principles that are relevant for the purposes of the present report: (*a*) the principle of individual criminal responsibility, which derives from international law regardless of the provisions of national laws;[239] (*b*) the principle that official position is irrelevant to the determination of responsibility;[240] and (*c*) the principle that orders received cannot be invoked as a ground for exemption from responsibility.[241] These three principles are closely interrelated and are intended to ensure that perpetrators of international crimes do not go unpunished. Under these principles, any individual who has committed an international crime is responsible therefor, without regard to his or her official position or to whether he or she has acted *proprio motu* or pursuant to an order received from the Government of a State or from a superior.

126. The above-mentioned principles encompass a series of elements of particular interest, which were highlighted by the Commission in its commentaries thereto. These elements can be summed up as follows:

(*a*) international law may impose duties and liabilities on individuals directly, without the need for intermediation, just as it does in respect of States; as noted in the fourth report, the Commission thus confirmed the dual responsibility of the State and the individual for the commission of international crimes, recalling in that regard the well-known finding of the Nürnberg Tribunal that "[c]rimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced";[242]

(*b*) international law has supremacy over domestic law, given that, as noted by the Nürnberg Tribunal, "individuals have international duties which transcend the national obligations of obedience imposed by the individual State";[243]

(*c*) the fact of having acted in an official capacity or pursuant to orders cannot be used to preclude the establishment of individual responsibility for the commission of crimes under international law.[244]

127. Lastly, it should be noted that the Nürnberg Principles, as formulated by the Commission, are essentially substantive in nature and that the adopted text thus does not expressly refer to immunity as a procedural bar to the exercise of jurisdiction by either a national or an international court. This substantive dimension of the Principles should nonetheless be understood in the light of their connection to the Charter of the Nürnberg Tribunal and the Judgment of the Tribunal, in which the Tribunal is assumed to have jurisdiction and the invocation of official capacity or the duty of obedience is seen essentially as a form of substantive defence whose validity is ruled out in the Charter and the Judgment of the Tribunal. This does not mean that the Tribunal never referred, directly or indirectly, to immunity in its Judgment, as shown by the following statements quoted by the Commission in its commentary to Principle III:[245]

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[234] *Yearbook … 1994*, vol. II (Part Two), p. 26, para. 91.

[235] *Yearbook … 1991*, vol. II (Part Two), p. 13, para. 28.

[236] See chap. II, sect. A, above.

[237] Principles of International Law recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal, and commentaries thereto (*Yearbook … 1950*, vol. II, pp. 374–378, document A/1316, paras. 95–127, in particular paras. 103–104. Text reproduced in *Yearbook … 1985*, vol. II (Part Two), p. 12, para. 45.

[238] Resolution 177 (II) of 21 November 1947.

[239] Principle I reads as follows: "Any person who commits an act which constitutes a crime under international law is responsible therefor and liable to punishment". Principle II establishes that "[t]he fact that internal law does not impose a penalty for an act which constitutes a crime under international law does not relieve the person who committed the act from responsibility under international law" (*Yearbook … 1985*, vol. II (Part Two), p. 12, para. 45).

[240] Principle III establishes that "[t]he fact that a person who committed an act which constitutes a crime under international law acted as Head of State or responsible Government official does not relieve him from responsibility under international law" (*ibid.*).

[241] Principle IV provides that "[t]he fact that a person acted pursuant to order of his Government or of a superior does not relieve him from responsibility under international law, provided a moral choice was in fact possible to him" (*ibid.*).

[242] See the commentary to principle I, *Yearbook … 1950*, vol. II (footnote 237 above), p. 374, para. 99.

[243] *Ibid.*, p. 375, para. 102.

[244] See the commentaries to principles III and IV, especially paras. 103–105, *ibid.*

[245] *Ibid.*, para. 103.

The principle of international law which, under certain circumstances, protects the representatives of a State cannot be applied to acts which are condemned as criminal by international law. The authors of these acts cannot shelter themselves behind their official position in order to be freed from punishment. He who violates the laws of war cannot obtain immunity while acting in pursuance of the authority of the State if the State in authorizing action moves outside its competence under international law.

128. In a similar vein, the Commission took up the aforementioned issues in both the draft Code of Offences against the Peace and Security of Mankind, adopted in 1954,[246] and the draft Code of Crimes against the Peace and Security of Mankind, adopted in 1996,[247] although the analysis below refers chiefly to the latter Code. In that text, the Commission again reiterates the principles of individual criminal responsibility,[248] irrelevance of official position[249] and the inability to invoke orders received from a Government or a superior.[250]

129. Like the 1950 formulation, the text adopted by the Commission defines these principles in essentially substantive terms and does not expressly refer to immunity in the procedural sense. It should nevertheless be pointed out that the Commission's commentaries to the draft Code go into more detail with respect to immunity in relation to crimes against the peace and security of mankind, which it rejects in both substantive and procedural terms. For example, in the commentary to article 7, on the irrelevance of official position, the Commission affirms as follows:

A government official who plans, instigates, authorizes or orders such crimes not only provides the means and the personnel required to commit the crime, but also abuses the authority and power entrusted to him. He may, therefore, be considered to be even more culpable than the subordinate who actually commits the criminal act. It would be paradoxical to allow the individuals who are, in some respects, the most responsible for the crimes covered by the Code to invoke the sovereignty of the State and to hide behind the immunity that is conferred on them by virtue of their positions particularly since these heinous crimes shock the conscience of mankind, violate some of the most fundamental rules of international law and threaten international peace and security.[251]

130. In the commentary to this same article it concludes that State officials can invoke neither substantive nor procedural immunity, arguing as follows:

Article 7 is intended to prevent an individual who has committed a crime against the peace and security of mankind from invoking his official position as a circumstance absolving him from responsibility or conferring any immunity upon him, even if he claims that the acts constituting the crime were performed in the exercise of his functions. As recognized by the Nürnberg Tribunal in its Judgment, the principle of international law which protects State representatives in certain circumstances does not apply to acts which constitute crimes under international law. Thus, an individual cannot invoke his official position to avoid responsibility for such an act. As further recognized by the Nürnberg Tribunal in its Judgment, the author of a crime under international law cannot invoke his official position to escape punishment in appropriate proceedings. The absence of any procedural immunity with respect to prosecution or punishment in appropriate judicial proceedings is an essential corollary of the absence of any substantive immunity or defence. It would be paradoxical to prevent an individual from invoking his official position to avoid responsibility for a crime only to permit him to invoke this same consideration to avoid the consequences of this responsibility.[252]

131. These statements in the commentaries are also of particular interest in relation to the topic of the present report, given that the Commission views the rule on the irrelevance of official position as applying to both national and international courts. While it is true that the Commission indicated that "[j]udicial proceedings before an international criminal court would be the quintessential example of appropriate judicial proceedings in which an individual could not invoke any substantive or procedural immunity based on his official position to avoid prosecution and punishment",[253] it is also true that it expects the draft Code to have a particular bearing on domestic laws and courts. Thus, it not only makes the general statement that "national courts are expected to play an important role in the implementation of the Code",[254] but also includes the following remark in its commentary to article 8, on the establishment of jurisdiction over the crimes in question: "The Commission considered that the effective implementation of the Code required a combined approach to jurisdiction based on the broadest jurisdiction of national courts together with the possible jurisdiction of an international criminal court."[255] It goes on to say that "the provision and indeed the Code do not apply to those [international] tribunals which are governed by their respective statutes".[256]

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[246] *Yearbook … 1954*, vol. II, document A/2693, p. 151.

[247] *Yearbook … 1996*, vol. II (Part Two), p. 17, para. 50.

[248] Under article 2, para. 1, of the 1996 draft Code, "[a] crime against the peace and security of mankind entails individual responsibility" (*ibid*., p. 18), which, under article 3, shall result in "punishment" that "shall be commensurate with the character and gravity of the crime" (*ibid*., p. 2). In a similar vein, see article 1 of the 1954 draft Code, which establishes that "[o]ffences against the peace and security of mankind, as defined in this Code, are crimes under international law, for which the responsible individuals shall be punished" (*Yearbook … 1954*, vol. II, p. 151).

[249] Under article 7 of the 1996 draft Code, "[t]he official position of an individual who commits a crime against the peace and security of mankind, even if he acted as head of State or Government, does not relieve him of criminal responsibility or mitigate punishment" (*Yearbook … 1996*, vol. II (Part Two), p. 26). The 1954 draft Code, meanwhile, establishes in its article 3 that "[t]he fact that a person acted as Head of State or as responsible government official does not relieve him of responsibility for committing any of the offences defined in this Code" (*Yearbook … 1954*, vol. II, p. 152).

[250] The 1996 draft Code enshrines this principle in article 5, which stipulates that "[t]he fact that an individual charged with a crime against the peace and security of mankind acted pursuant to an order of a Government or a superior does not relieve him of criminal responsibility, but may be considered in mitigation of punishment if justice so requires" (*Yearbook … 1996*, vol. II (Part Two), p. 23). The 1954 draft Code reflected this principle in article 4, which provides that "[t]he fact that a person charged with an offence defined in this Code acted pursuant to an order of his Government or of a superior does not relieve him of responsibility in international law if, in the circumstances at the time, it was possible for him not to comply with that order" (*Yearbook … 1954*, vol. II, p. 152).

[251] *Yearbook … 1996*, vol. II (Part Two), pp. 26–27, para. (1) of the commentary to article 7. In para. (3) of the commentary, the Commission recalls that "the Nürnberg Tribunal rejected the plea of act of State and that of immunity which were submitted by several defendants as a valid defence or ground for immunity" (*ibid*., p. 27).

[252] *Ibid*., p. 27, para. (6) of the commentary to article 7. In the commentary to article 9, concerning the *aut dedere aut judicare* principle, in referring to potential grounds for granting immunity to an alleged offender in exchange for cooperation with the justice system, the Commission also stated that "[i]t would be contrary to the interests of the international community as a whole to permit a State to confer immunity on an individual who was responsible for a crime under international law such as genocide" (*ibid*., p. 31, para. (4) of the commentary).

[253] *Ibid*., p. 27, footnote 69.

[254] *Ibid*., p. 18, para. (13) of the commentary to article 1, para. 2.

[255] *Ibid*., p. 28, para. (5) of the commentary to article 8.

[256] *Ibid*., pp. 29–30, para. (11) *in fine* of the commentary to article 8.

132. It may therefore be concluded that, in the Commission's view, the provisions of the draft Code are intended in particular for national courts.[257] In setting out the requirement that the State "enact any procedural or substantive measures that may be necessary to enable it to effectively exercise jurisdiction",[258] it also includes the obligation to adopt provisions that rule out the applicability of immunity under the terms defined by the Commission in its commentaries to the draft Code.

133. Lastly, it should be borne in mind that both the Nürnberg Principles and the draft Code of Crimes against the Peace and Security of Mankind list a series of crimes under international law. The Nürnberg Principles include what are termed crimes against peace, war crimes and crimes against humanity.[259] The draft Code characterizes the crime of aggression, the crime of genocide, crimes against humanity, crimes against United Nations and associated personnel, and war crimes.[260] The Commission may wish to take this list of crimes, which was developed by the Commission itself, into account in identifying acts which, in principle, could be classified as international crimes for the purpose of determining limitations or exceptions to immunity.

134. While the articles on responsibility of States for internationally wrongful acts[261] do not, for obvious reasons, deal with possible limitations and exceptions to the immunity of State officials from foreign criminal jurisdiction, they do contain a number of concepts that may be useful for the purposes of the present report, as they are closely related to certain arguments that have been put forward and debated in the literature and in practice as grounds for such limitations or exceptions. Additionally, in its commentaries to the articles, the Commission contributes elements that could be useful for this study, insofar as they help to situate crimes under international law more appropriately in the international legal system. These elements essentially consist of the following:

(*a*) the establishment of the primacy of peremptory norms;

(*b*) the affirmation of the existence of obligations to the international community as a whole;

(*c*) the definition of a specific model for responding to cases involving a serious breach of an obligation arising under a peremptory norm; and

(*d*) the identification of the most serious crimes under international law as breaches of peremptory norms.

135. The Commission deals with the first of these issues in its commentary to article 26 (Compliance with peremptory norms), which seeks to preserve the primacy of such norms, even in cases involving "circumstances precluding wrongfulness".[262] In this context, the Commission addresses the relationship between a peremptory norm and a non-peremptory norm, concluding that the former must prevail. In the Commission's view, this primacy is evident when there is a conflict between two primary norms, but it also holds true when the conflict is between primary and secondary norms, with the result that—in the Commission's words—the application of secondary rules (in respect of rules precluding wrongfulness) does "not authorize or excuse any derogation from a peremptory norm of general international law".[263] The example given by the Commission in this connection is telling: "a State taking countermeasures may not derogate from such a norm: for example, a genocide cannot justify a counter-genocide".[264]

136. In its reasoning, the Commission also includes another element of considerable interest in relation to the primacy of peremptory norms, noting that sometimes a conflict between primary norms need not be resolved by means of the secondary rules concerning responsibility. On the contrary, "[w]here there is an apparent conflict between primary obligations, one of which arises for a State directly under a peremptory norm of general international law, it is evident that such an obligation must prevail. The processes of interpretation and application should resolve such questions", given that "peremptory norms of general international law generate strong interpretative principles which will resolve all or most apparent conflicts".[265] This type of "conforming interpretation" could therefore be of particular importance in relation to the topic of the present report, for the purpose of finding an appropriate balance among various primary norms.

137. It should be noted that, in its commentary to Part Two, chapter III, of the articles (Serious breaches of obligations under peremptory norms of general international law), the Commission refers to the existence of "a qualitative distinction … between different breaches of international law"[266] and to the existence of "the notion of obligations to the international community as a whole",[267] both of which are categories dealt with in the case law of the International Court of Justice. The Commission does not take a position as to whether or not "peremptory norms of general international law and obligations to the international community as a whole are aspects of a single basic idea", but concludes that "there is at the very least substantial overlap between them", as shown by the fact that the examples which the Court has given of obligations towards the international community as a whole "all concern obligations which, it is generally accepted, arise under peremptory norms of general international law".[268]

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[257] In its commentaries, the Commission also conducts an interesting analysis of the relationship between international criminal courts and national courts, which will be examined in more detail in chap. III, sect. B, below.

[258] *Ibid*., p. 29, para. (10) of the commentary to article 8.

[259] See principle VI (*Yearbook … 1985*, vol. II (Part Two), p. 12, para. 45).

[260] *Yearbook … 1996*, vol. II (Part Two), pp. 42 *et seq.*, arts. 16–20. See also article 2 of the 1954 draft Code (*Yearbook … 1954*, vol. II, pp. 151–152).

[261] General Assembly resolution 56/83 of 12 December 2001, annex. The draft articles adopted by the Commission and the commentaries thereto are reproduced in *Yearbook … 2001*, vol. II (Part Two) and corrigendum, pp. 26 *et seq.*, paras. 76–77.

[262] This article provides that "[n]othing in this chapter precludes the wrongfulness of any act of a State which is not in conformity with an obligation arising under a peremptory norm of general international law" (*ibid*., p. 84).

[263] *Ibid*., p. 85, para. (4) of the commentary to article 26.

[264] *Ibid.*

[265] *Ibid*., para. (3) of the commentary to article 26.

[266] *Ibid*., p. 110, para. (2) of the commentary to chap. III.

[267] *Ibid*., p. 111, para. (3) of the commentary to chap. III.

[268] *Ibid*., pp. 111–112, para. (7) of the commentary to chap. III.

In any event, the Commission takes the view that "[t]he obligations referred to in article 40 arise from those substantive rules of conduct that prohibit what has come to be seen as intolerable because of the threat it presents to the survival of States and their peoples and the most basic human values".[269]

138. Also of note is the fact that the Commission mentions, in its commentaries, the existence of a purposive difference between the concepts of *jus cogens* and obligations to the international community as a whole, which is worth repeating here:

> While peremptory norms of general international law focus on the scope and priority to be given to a certain number of fundamental obligations, the focus of obligations to the international community as a whole is essentially on the legal interest of all States in compliance – i.e. … in being entitled to invoke the responsibility of any State in breach.[270]

139. The consideration of the special nature of obligations towards the international community as a whole that arise under peremptory norms leads the Commission to discern a different regime with respect to the legal action to be taken in response to serious breaches of obligations under peremptory norms of international law, which can be summed up as follows: (*a*) "[these] breaches … can attract additional consequences, not only for the responsible State but for all other States" (art. 41); and (*b*) "all States are entitled to invoke responsibility for breaches of obligations to the international community as a whole" (art. 48).[271] This third strand of the Commission's thinking is also of relevance to the present report, especially as it refers to the possibility of establishing a different legal regime for the immunity of State officials from foreign criminal jurisdiction when such immunity is invoked with respect to acts that can be characterized as breaches of obligations towards the international community as a whole that arise under peremptory norms of international law.

140. Lastly, in relation to these articles, the Commission describes as "peremptory norms that are clearly accepted and recognized" several types of prohibited conduct that correspond to acts in respect of which the immunity of State officials from foreign criminal jurisdiction has been invoked,[272] namely: "the prohibitions of … genocide, slavery, racial discrimination, crimes against humanity and torture",[273] together with the basic rules of international humanitarian law applicable in armed conflict[274] and the "principles and rules concerning the basic rights of the human person".[275] The Commission can take this list of crimes, which was developed by the Commission itself in 2001, into account in identifying crimes that could be classified as international crimes for the purpose of determining exceptions to immunity.

[269] *Ibid*., p. 112, para. (3) of the commentary to article 40.

[270] *Ibid*., p. 112, para. (7) of the commentary to chap. III. The Commission does not define the concept of "international community as a whole", but the mere fact of its use is of considerable interest, given that it stresses the collective dimension of the values and interests to be protected. The Commission moreover points out that this phrase is frequently used in treaties and other international instruments (*ibid*., p. 84, para. (18) of the commentary to article 25), and the list of treaties cited by the Commission as using this expression is significant: "third preambular paragraph of the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents; fourth preambular paragraph of the International Convention Against the Taking of Hostages; fifth preambular paragraph of the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation; third preambular paragraph of the Convention on the Safety of United Nations and Associated Personnel; tenth preambular paragraph of the International Convention for the Suppression of Terrorist Bombings; ninth preambular paragraph of the Rome Statute of the International Criminal Court; and ninth preambular paragraph of the International Convention for the Suppression of the Financing of Terrorism" (*ibid*., p. 84, footnote 404).

[271] *Ibid*., p. 112 para. (7) of the commentary to chap. III.

[272] See *Yearbook … 2015*, vol. II (Part One), document A/CN.4/686, pp. 13–17, paras. 49–60; also *Yearbook … 2001*, vol. II (Part Two) and corrigendum, p. 85, para. (5) of the commentary to art. 26.

[273] *Yearbook … 2001*, vol. II (Part Two) and corrigendum, p. 85, para. (5) of the commentary to art. 26.

[274] *Ibid*., p. 113, para. (5) of the commentary to art. 40.

[275] *Ibid*., p. 127, para. (9) of the commentary to art. 48.

Chapter III

Limitations and exceptions within the general legal context of immunity from foreign criminal jurisdiction: methodological and conceptual issues

141. After the analysis of practice and before the analysis of factors that could determine the inapplicability of immunity in a particular case, it is necessary at this point to consider some methodological and conceptual elements that will enable us to better define the context in which the draft articles contained in the present report are to be understood. To that end, the following general issues are analysed below: (*a*) the legal nature of immunity and its relationship to jurisdiction and criminal responsibility; (*b*) the treatment of immunity in national courts and international criminal courts and its impact on limitations and exceptions to immunity; and (*c*) the concept of limitations and exceptions.

142. These elements are considered on the basis of a view of international law as a normative system that includes, as one of its parts or components, the institution of immunity of State officials from foreign criminal jurisdiction. This approach requires that immunity be analysed not in isolation, but in connection with the rest of the norms and institutions that make up the system. From this standpoint, the immunity of State officials is a useful and necessary institution for ensuring that certain values and legal principles of the international legal order, in particular the principle of sovereign equality, are respected. But at the same time, the immunity of State officials from foreign criminal jurisdiction, as a component of this system, should be interpreted in a systemic fashion to ensure that this institution does not produce negative effects on, or nullify, other components of the contemporary system of international law understood as a whole.[276] This systemic approach requires that

[276] The need to ensure a balance among the various values and norms of the system was clearly expressed in the joint separate opinion

other institutions that are also related to the principle of sovereignty, especially the right to exercise jurisdiction, be taken into account, together with other sectors of the international legal order that reflect and embody other values and principles of the international community as a whole, in particular international human rights law and international criminal law. As international law is a genuine normative system, the Commission's development of a set of draft articles meant to assist States in the codification and progressive development of international law with respect to a problematic but highly important issue for the international community cannot (and should not) have the effect of introducing imbalances in significant sectors of the international legal order that have developed over recent decades and that are now among its defining characteristics.

A. Legal nature of immunity

143. One of the threads that emerge from an analysis of the Commission's debates thus far is the constant presence of three elements that are related to the very nature of immunity and have a bearing on the question of limitations and exceptions: (*a*) the understanding of immunity as a stand-alone right or as an exception to the exercise of the forum State's right to exercise jurisdiction; (*b*) the characterization of immunity as an exclusively procedural institution that does not affect the individual criminal responsibility of State officials; and (*c*) the idea that immunity from foreign criminal jurisdiction is separate from other forms of sovereign immunity, especially State immunity. While some of these issues have been discussed in the Special Rapporteur's previous reports, it is necessary at this point to revert to them in order to analyse briefly, as an aid to understanding and exclusively in connection with the topic of limitations and exceptions, the relationship between three pairs of concepts: (*a*) immunity and jurisdiction; (*b*) immunity and responsibility; and (*c*) immunity of the State and immunity of State officials.

1. Relationship between immunity and jurisdiction

144. The relationship between immunity and jurisdiction has been discussed previously in the course of the Commission's work. In her second report, the Special Rapporteur drew attention to the interaction between these two elements, especially the fact that immunity does not exist in a vacuum and cannot be invoked except in relation to an existing jurisdiction.[277] This echoes the reasoning of the International Court of Justice in *Arrest Warrant*.

145. The existence of jurisdiction is thus the point of departure on which immunity is founded; neither practice nor doctrine has refuted this observation. It suffices to recall that, as a rule, when national courts have taken decisions on claims of immunity, they have not found that they lack jurisdiction in abstract terms, but rather that they are unable to exercise it in respect of an official of a third State who enjoys immunity. There have thus been cases in which, once the circumstance that gave rise to immunity no longer exists, national courts have exercised jurisdiction over the same acts and the same individuals, and no difficulties have arisen with regard to competence.

146. The prior existence of jurisdiction is a logical requirement that does not detract from the importance of immunity as a necessary and useful instrument for protecting certain values and legal principles of the international community, especially the principle of the sovereign equality of States and the maintenance of stable international relations; nor, conversely, can it be understood to mean that the right to exercise jurisdiction has absolute primacy, in all circumstances, over immunity. On the contrary, the purpose of immunity is precisely to freeze or block the exercise of jurisdiction in certain conditions, sometimes on an exclusively temporary basis. Thus, in practice, immunity can prevail over jurisdiction in a particular case.

147. Nonetheless, the view of jurisdiction as a pre-existing power of the State, a prius that necessarily precedes immunity, inevitably has certain consequences of considerable importance at the methodological level. These consequences can be summed up as follows:

(*a*) immunity is understood *ab initio* as a restriction of the exercise of jurisdiction; it is thus in itself a limitation or exception to the adjudicatory jurisdiction of the forum State;

(*b*) like any limitation or restriction of a sovereign power of the State, it should be understood in purposive terms: immunity is recognized in order to safeguard values, interests and principles of the international community which, in this case, are embodied in the principle of sovereign equality, the proper exercise of State functions without undue interference by a third party and the stability of international relations;

(*c*) given that immunity constitutes a restriction of a pre-existing sovereign power, the determination of its scope and its interpretation must remain within the limits defined by the ends sought. In particular, it can be invoked only in the interest of the State whose sovereign equality it claims to preserve, and only for the purpose of safeguarding legitimate rights and interests of the State that are protected under international law;

(*d*) the relationship between the exercise of jurisdiction and immunity must, then, be interpreted in dialectical terms, in order to find an appropriate balance between the rights and interests of the forum State and the rights and interests of the State of the official. Whether the exercise of jurisdiction or immunity prevails in each particular case will depend on the rights and interests at stake and on the set of norms, values and legal principles on which those rights and interests are based.

2. Relationship between immunity and responsibility

148. The analysis of immunity from foreign criminal jurisdiction has traditionally been based on the premise that it is a procedural rather than a substantive instrument, the application of which does not imply that the

of Judges Higgins, Kooijmans and Buergenthal in *Arrest Warrant* (see footnote 124 above), particularly in paras. 71–79.

[277] See *Yearbook … 2013*, vol. II (Part One), document A/CN.4/661, pp. 41–42, paras. 35–42.

responsibility, in this case criminal responsibility, that can arise from unlawful conduct disappears. This view of immunity is closely related to the way in which immunity operates in practice, with the primary goal of blocking and preventing the exercise of criminal jurisdiction in a particular case by the courts of the forum State when they seek to take action against an official of a third State. In strictly theoretical terms, this general description of immunity cannot be denied and must be accepted as the point of departure for any analysis that purports to contribute to the effort to define the legal nature of immunity.

149. This view of immunity as a mere procedural bar has been echoed in the literature and in case law, especially at the international level, as reflected by the foregoing analysis of practice. From this standpoint, immunity and responsibility cannot be confused with each other, and immunity cannot be assumed to give rise to impunity. On the contrary, as the International Court of Justice has made clear, it is possible, in spite of immunity, for individual criminal responsibility to be determined by means other than the exercise of jurisdiction by the courts of the forum State. Consequently, it appears that immunity from jurisdiction has the sole effect of preventing the determination of responsibility by means of a specific legal channel, leaving open the possibility that such responsibility may be established through other procedural mechanisms better suited to the purpose.

150. Nevertheless, this description of immunity as a mere procedural bar and the fundamental distinction between immunity and responsibility are difficult to support in absolute terms, especially in the field of criminal law. The analysis of practice and the necessary teleological interpretation of immunity lead to more nuanced conclusions. One example that comes to mind is the fine line that separates the invocation of official position as a substantive defence to avoid responsibility from its invocation as a procedural defence to avoid the exercise of jurisdiction. It suffices to recall how the Nürnberg Tribunal used the term in both senses and how the polysemic use of the irrelevance of official position has found its way into both case law and quite a few of the international instruments analysed in the present report.

151. The acknowledgement of this issue even prompted the International Court of Justice to offer an alternative model for establishing responsibility that respects immunity and avoids impunity. However, the Court's efforts to overcome the confusion between immunity and impunity are not fully convincing for the purpose of inferring a fundamental separation between immunity and responsibility. This distinction raises no issues whatsoever in cases where there are genuine and accessible means of redress for establishing the criminal responsibility of a particular State official when such responsibility cannot be established before a particular court because immunity has been invoked. Conversely, when such alternative means of redress do not exist or are not effective in achieving this purpose, the distinction between immunity and exemption from criminal responsibility, and even between immunity and impunity, will inevitably become less clear-cut.

152. Thus, the strictly procedural nature of the immunity of State officials from foreign criminal jurisdiction, even when taken as a point of departure, presents certain limitations in practice that must be duly taken into account in analysing the question of limitations and exceptions. This idea is especially relevant in the case of immunity *ratione materiae*, which is closely related to acts that can give rise to the criminal responsibility of an official and which continues even after the State official finishes his or her term of office or loses his or her status as an official. The permanent nature of this type of immunity should also be considered, as it can in some circumstances have additional consequences with respect to the distinction between immunity and impunity.

3. Relationship between immunity of the State and immunity of State officials

153. The final element to be considered at this stage is the distinction between the immunity of State officials from foreign criminal jurisdiction and the immunity of the State *stricto sensu*. This question was analysed in detail in the Special Rapporteur's fourth report, particularly as it relates to the "single act, dual responsibility" approach and the criminal nature of the jurisdiction from which the immunity of State officials can be invoked.[278]

154. Although both elements have a bearing on the question of limitations and exceptions to immunity, it is unnecessary to revert to that topic at this point. For the purposes of the present report, it suffices to reiterate below the main conclusions set forth in the 2015 report:

(*a*) the attribution of an act to the State is the point of departure for determining whether an act has been performed in an official capacity; this attribution is not sufficient in itself, however, to conclude that a State official enjoys immunity in respect of the act.

(*b*) a single act can give rise to two different types of responsibility: international in the case of the State and criminal in the case of the individual; the existence of two types of responsibility translates into two types of immunity (of the State and of its official).

(*c*) while both categories of immunity have the common purpose of protecting State interests, it cannot be concluded that they are subject to identical conditions or to the same legal regime.

155. Accordingly, the regime for limitations and exceptions to immunity may also differ depending on whether the immunity in question is the immunity of the State or the immunity of State officials from foreign criminal jurisdiction, without the possibility of mimetically transposing the first into the second or *vice versa*.[279]

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[278] *Yearbook … 2015*, vol. II (Part One), document A/CN.4/686, pp. 26–30, paras. 96–117.

[279] See, in this regard, article IV of the resolution of the Institute of International Law on the immunity from jurisdiction of the State and of persons who act on behalf of the State in case of international crimes, adopted in 2009 at the session held in Naples: "The above provisions are without prejudice to the issue whether and when a State enjoys immunity from jurisdiction before the national courts of another State in civil proceedings relating to an international crime committed by an

B. National and international criminal courts or tribunals

156. A second general element to be considered in addressing the issue of limitations and exceptions to immunity is the existence of international criminal courts mandated to try cases involving crimes with the greatest international impact. Although these courts have been outside the scope of the present topic, they have a clear relationship with national criminal courts, and this relationship has practical consequences for the invocation of immunity. Thus, for the purpose of defining the limitations and exceptions applicable to immunity from foreign criminal jurisdiction, it is useful to analyse the impact that international criminal courts can have on the institution of immunity.

157. This question may be approached from two opposite viewpoints. The first assumes that the establishment of international criminal courts and the impossibility of invoking immunity before them have no bearing on the regime applicable to the immunity of State officials from foreign criminal jurisdiction. According to this view, the different natures of the two types of courts translate into two different immunity regimes. This means that, even though immunity from jurisdiction cannot be invoked before international courts, it remains fully valid and can be invoked in national courts. The second approach, in contrast, is based on the unity of the objectives and principles applicable to the prosecution of international crimes, regardless of whether their perpetrators are tried before an international criminal court or a domestic court. As both jurisdictions serve the purpose of determining individual criminal responsibility and preventing impunity for the most serious international crimes, the rules concerning immunity must be applied in accordance with the same parameters. Thus, the mere existence of international criminal courts and the impossibility of invoking any type of immunity before them should imply that it is impossible for anyone, including State officials, to invoke immunity from criminal jurisdiction before the courts of a State.

158. These two approaches focus on two different elements: the procedural nature of immunity, in the first case, and the substantive nature of individual criminal responsibility for the commission of international crimes, in the second. Moreover, complementary arguments are often adduced in support of each of these views, especially the difference between national and international courts in terms of their relationship to the principle of sovereignty, and the question of whether or not criminal responsibility can be determined by alternative means. As noted above, all these arguments have even been reflected in decisions adopted by international courts, including the International Court of Justice, the European Court of Human Rights and the Special Court for Sierra Leone.

159. The two approaches described above are highly theoretical, however, and overlook some very important elements that characterize the interconnection between national and international courts. Chief among these elements are the identical nature of the criminal offences or prohibited conduct dealt with by the two types of courts, the definition of a system for the division of competences among competing jurisdictions and the establishment of mechanisms for two-way cooperation and judicial assistance between the two categories of criminal courts.

160. The relevance of this model of interconnection is not theoretical; the model has significant practical consequences in the area of cooperation between courts, as illustrated recently in relation to the attempted arrest of President Al Bashir in South Africa in execution of a warrant issued by the International Criminal Court. But this example, albeit the most high-profile in terms of media coverage, is not unique. It is also important to bear in mind the phenomenon of hybrid and internationalized criminal court or tribunals, the difficulty of categorizing them as either domestic or international tribunals and the consequences that this has for the institution of the immunity of State officials from jurisdiction.[280] It should also be recalled that the exercise of immunity before domestic courts can have an impact on the system for the division of competences in the case of competing jurisdictions, especially under the complementarity principle laid down in the Rome Statute.

161. Given these elements, the relationship between national criminal courts and international criminal courts needs to be considered in a more nuanced and balanced manner that takes into account the distinction between national jurisdiction and international jurisdiction, while also bearing in mind the connections referred to above. This relationship will also need to be taken into account in the present report, albeit without altering the scope of the topic approved by the Commission.

162. To that end, it is useful to analyse, first, the immunity regime applicable before international criminal courts or tribunals, especially the International Criminal Court, the International Tribunal for the Former Yugoslavia, the International Criminal Tribunal for Rwanda, the Special Court for Sierra Leone, the Special Tribunal for Lebanon, the Extraordinary Chambers in the Courts of Cambodia, the Kosovo panels, the Special Panels for Serious Crimes in East Timor, the Extraordinary African Chambers within the Senegalese judicial system and the War Crimes Chamber of the State Court of Bosnia and Herzegovina. As all of these tribunals have specialized jurisdiction for the prosecution of international crimes, the way in which immunity is applied before them can shed light on a possible limitation or exception for crimes under international law in the context of the present topic.

163. As noted previously, the International Criminal Court, the International Tribunal for the Former Yugoslavia and the Special Court for Sierra Leone have ruled that the immunity of State officials from criminal jurisdiction is not applicable before them.[281] Nevertheless, only the Rome Statute includes an express reference to the question of immunity, in its article 27;[282] this model was subsequently followed by the Special Panels for Serious

agent of the former State" (*Yearbook of the Institute of International Law*, vol. 73- I and II (see footnote 28 above), p. 230).

[280] In this regard, see Williams, *Hybrid and Internationalised Criminal Tribunals: Selected Jurisdictional Issues*, pp. 326–348.

[281] See chap. II, sect. C, above.

[282] See chap. II, sect. A, above.

Crimes in East Timor.[283] Meanwhile, the statutes of the *ad hoc* Tribunals contain only a general provision on the irrelevance of official position or orders from a superior as grounds for exemption from or limitation of the scope of individual criminal responsibility;[284] this wording was also followed by the Special Court for Sierra Leone,[285] the Extraordinary Chambers in the Courts of Cambodia,[286] the War Crimes Chamber of the State Court of Bosnia and Herzegovina[287] and the Extraordinary African Chambers within the Senegalese judicial system.[288] The rules governing the special war crimes panels in Kosovo[289] and the Special Tribunal for Lebanon[290] do not contain any provisions on official capacity; they only state that orders from commanders or superiors may not be invoked. This difference in the applicable rules is explained to some extent by the greater or lesser likelihood that officials of the foreign State will be brought before these tribunals, except in the case of the *ad hoc* Tribunals, where, by definition, this was a real possibility, yet they do not refer to immunity (which did not prevent them from considering that it cannot be invoked). In any event, even in the rules governing the International Criminal Court and the Special Panels for East Timor, the ruling-out of immunity is established in close connection with the clause on the irrelevance of official position.

164. It should be borne in mind that the interpretation of the rule that immunities cannot be invoked before international criminal courts is not without controversy. Although this rule is, in theory, a characteristic feature of these jurisdictions, it is useful to recall, in this regard, the debate on the interpretation of article 98, paragraph 1, of the Rome Statute and its relationship to article 27,[291] which took on special importance in connection with Al Bashir as a result of a number of noncooperation decisions taken by some African countries and the International Criminal Court decisions on non-cooperation analysed above in the overview of international judicial practice.[292] In any event, it should be noted that, strictly speaking, article 98, paragraph 1, only limits the obligation to cooperate with the Court in respect of the surrender of a person who enjoys immunity under international law, and this limitation, moreover, applies only to a request for the surrender of a national of a State that is not a party to the Statute.[293] From this standpoint, the limitation introduced by article 98, paragraph 1, does not, strictly speaking, affect the non-inability to invoke immunity from the Court's jurisdiction, but rather the ability to invoke such immunity in respect of measures that must be taken by national courts in order to fulfil the obligation to cooperate with the Court. Furthermore, practice shows that controversy has arisen exclusively in relation to Heads of State (Presidents Al Bashir and Kenyatta), meaning that the issue relates essentially to the topic of immunity *ratione personae*. This, in short, was the issue raised before the South African courts in relation to the arrest of President Al Bashir,[294] revealing the close relationship between the exercise of immunity before national courts and before international courts and the need for a systemic interpretation of both situations.[295]

165. This topic was further complicated by the African Union's adoption, in 2015, of the Malabo Protocol establishing the International Criminal Law Section of the African Court of Justice and Human Rights. The Protocol was intended to resolve, at the regional level, the problems caused by the disputed interpretation of article 98, paragraph 1, of the Rome Statute in relation to two serving African Heads of State by including the following article in the Statute of the African Court:

> No charges shall be commenced or continued before the Court against any serving [African Union] Head of State or Government, or anybody acting or entitled to act in such capacity, or other senior State officials based on their functions, during their tenure of office.[296]

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[283] See sect. 15.2 of United Nations Transitional Administration in East Timor, Regulation No. 2000/15 on the establishment of panels with exclusive jurisdiction over serious criminal offences (UNTAET/REG/2000/15).

[284] See Statute of the International Tribunal for the Former Yugoslavia, document S/25704 and Add.1, annex, approved by the Security Council in its resolution 827 (1993) of 25 May 1993, art. 7, paras. 2 and 4; and Statute of the International Criminal Tribunal for Rwanda, Security Council resolution 955 (2004), annex, art. 6, paras. 2 and 4.

[285] Agreement between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone (with Statute) (Freetown, 16 January 2002), United Nations, *Treaty Series*, vol. 2178, No. 38342, p. 137 (Statute of the Special Court for Sierra Leone), at art. 6, paras. 2 and 4.

[286] Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea, 27 October 2004, with inclusion of amendments as promulgated on 27 October 2004 (NS/RKM/1004/006), art. 29, available from www.eccc.gov.kh/en/documents/legal/law-establishment-extraordinary-chambers-amended.

[287] Bosnia and Herzegovina, Criminal Code, art. 180.

[288] Agreement on the Establishment of the Extraordinary African Chambers within the Senegalese Judicial System between Senegal and the African Union of 22 August 2012, ILM, vol. 52 (2013), p. 1024, and of 30 January 2013, *ibid*., p. 1028, art. 10.3 of the Statute annexed thereto.

[289] See United Nations Interim Administration Mission in Kosovo, Regulation No. 2003/25 of 6 July 2003 (UNMIK/REG/2003/25) on the Provisional Criminal Code of Kosovo, annex, art. 10.

[290] Agreement between the United Nations and the Lebanese Republic on the establishment of a Special Tribunal for Lebanon (Beirut, 22 January 2007, and New York, 6 February 2007), United Nations, *Treaty Series*, vol. 2461, No. 44232, p. 257, and, annexed to Security Council resolution 1757 (2007) of 30 May 2007, art. 3.3.

[291] Under article 98, paragraph 1, of the Rome Statute, "[t]he Court may not proceed with a request for surrender or assistance which would require the requested State to act inconsistently with its obligations under international law with respect to the State or diplomatic immunity of a person or property of a third State, unless the Court can first obtain the cooperation of that third State for the waiver of the immunity".

[292] On the scope of the controversy between the African Union and the International Criminal Court, see Kamto, " 'L'Affaire *Al Bashir*' et les relations de l'Afrique avec la Cour pénale internationale"; and Tehindrazanarivelo, "The African Union principle on the fight against impunity and the arrest warrants for Omar Hassan El-Bashir"; Tladi, "Immunity in the era of 'criminalisation': The African Union, the ICC, and international law"; Abrisketa Uriarte, "Al Bashir: ¿Excepción a la inmunidad del jefe de Estado de Sudán y cooperación con la Corte Penal Internacional?".

[293] See Escobar Hernández, "La progresiva institucionalización de la jurisdicción penal internacional"; Akande, "International law immunities and the International Criminal Court"; Triffterer, "'Irrelevance of official capacity'—Article 27 Rome Statute undermined by obligations under international law or by agreement (Article 98)?"; Kress, "The International Criminal Court and immunities under international law for States not party to the Court's Statute".

[294] See chap. II, sect. D, above.

[295] See Tladi, "The duty on South Africa to arrest and surrender Al-Bashir under South African and international law: Attempting to make a collage from an incoherent framework".

[296] Malabo Protocol, article 46A *bis*. Article 46B sets out the principle of the irrelevance of official position, subject to the special

166. This initiative created a model of regional criminal jurisdiction that breaks, albeit only partially, with the rule that State officials cannot invoke immunity from the exercise of jurisdiction by international criminal courts. While it is not necessary to analyse that provision for the purpose of the present report,[297] the mere fact of its adoption shows how the exercise of international criminal jurisdiction may, in practice, encounter problems related to the immunity of State officials from jurisdiction. It thus appears that the amendment of the Statute of the African Court may represent a turning point in the conception of international criminal jurisdiction as an alternative to the exercise of national criminal jurisdiction with regard to international crimes.

167. In any case, this was not the only attempt to seek an African solution to the question of the prosecution of Heads of State or former Heads of State for war crimes or crimes against humanity. On the contrary, the establishment of the Extraordinary African Chambers within the Senegalese judicial system offers another example that is more comparable to the cases of the *ad hoc* tribunals and internationalized tribunals. This arrangement, under which a court within the Senegalese judicial system was able to try a former Head of State for the commission, *inter alia*, of crimes against humanity and war crimes, confirmed that immunity cannot be invoked in cases involving such crimes. This is demonstrated by the fact that the judgment against Hissène Habré, whereby he was found guilty of these crimes and sentenced to life imprisonment, made no reference to immunity.[298]

168. The paragraph of the preamble to the Rome Statute recalling that "it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes"[299] takes on special significance in this context. That statement lays the foundation for the principle of complementarity laid down in the Rome Statute as an instrument for determining the division of competences between the International Criminal Court and national courts. In line with this principle, the role of national courts should be neither underestimated nor sidelined.[300] On the contrary, strengthening the capacity of national courts to try cases involving international crimes is now an essential element of the new model of international criminal justice and has even given rise to the concept of "positive complementarity".[301]

169. Against this backdrop, the recognition of the key role of domestic courts in combating international crimes and the need to ensure the effectiveness of their judicial proceedings are two factors that cannot be overlooked by the Commission. The Commission may therefore find it useful to take this factor into account in its deliberations on the subject of limitations and exceptions to the immunity of State officials from foreign criminal jurisdiction.[302]

C. Concept of limitations and exceptions to immunity

170. Throughout this fifth report, the expression "limitations and exceptions to immunity" has used as if it represents a single category, in reference to cases where the immunity of a State official does not operate before the courts of another State. However, as indicated in the fourth report, the words "limitations" and "exceptions" each represent a separate concept. A "limitation" refers to any element that marks the boundaries of an institution; it must therefore be situated within those boundaries, because it is related to the elements that make up such an institution. An "exception", on the other hand, lies outside the institution; although the institution still retains its boundaries, it may in certain circumstances not apply, owing to existence of elements outside the institution.

171. If we apply this distinction to limitations and exceptions to the immunity of State officials from foreign criminal jurisdiction, the limitations to immunity are necessarily related to the normative elements that define each category of immunity, whereas exceptions are defined by external elements that may derive from other components of the international legal order and in respect of which normative elements play a secondary role. From that perspective, the beneficiaries of immunity, the concept of acts performed in an official capacity and the temporal dimension of immunity should be considered as categories around which the limitations to immunity are established. By contrast, compliance with the values and legal principles of international law as a whole and the need to ensure that immunity does not generate undesired effects on other areas of international law (such as international criminal law, international humanitarian law or international human rights law) would constitute the starting point for the definition of exceptions to immunity.

172. This theoretical distinction is, however, not so neatly reflected in practice. As indicated in chapter II of the present report, the words "limitation" and "exception" are not used systematically by international tribunals, or in the comments and statements of States, or in judicial, legislative or treaty practice. In the majority of cases, the States and legal operators dealing with the phenomenon of immunity have not always used the same words, and sometimes have not even asserted that there is a limitation or exception to immunity; they merely affirm that immunity does not apply or that it cannot be invoked

regime established in article 46A *bis*. The Protocol has not entered into force.

[297] For commentary on this provision, see Ssenyonjo and Nakitto, "The African Court of Justice and Human and Peoples' Rights 'International Criminal Law Section': Promoting impunity for African Union Heads of State and senior State officials?"; and Tladi, "The immunity provision in the AU Amendment Protocol: Separating the (doctrinal) wheat from the (normative) chaff".

[298] Extraordinary African Chambers, *Ministère Public v. Hissein Habré*, Judgment, 30 May 2016, available from the website of the Extraordinary African Chambers: www.chambresafricaines.org.

[299] Preamble, sixth para.

[300] On the principle of complementarity, see, among others, Quesada Alcalá, *La Corte Penal Internacional y la soberanía estatal*; Escobar Hernández, "El principio de complementariedad".

[301] Put forward by the Assembly of States Parties to the Rome Statute of the International Criminal Court, this concept was discussed at the Kampala Review Conference and led to a number of follow-up initiatives within the Assembly itself.

[302] Keitner mentions this idea in a number of papers emphasizing what she calls horizontal enforcement: "*Germany v. Italy* and the Limits of Horizontal Enforcement …". The same approach can be found in her recent contribution to the Symposium on the Immunity of State Officials of the American Society of International Law: "Horizontal enforcement and the ILC's proposed draft articles on the immunity of State officials from foreign criminal jurisdiction".

in national courts. Nevertheless, it should be noted that the use of both words in respect of the same act has not been consistent or conclusive, including when legal operators have referred clearly to the distinction between limitations and exceptions. In this connection, the case of torture or international crimes in general, is significant: while for some legal operators such crimes constitute a limitation, for others they are an exception. However, in all those cases, the ultimate goal is the same: to declare that immunity of State officials from foreign criminal jurisdiction cannot be invoked in relation to a given type of conduct. To put it differently, both cases involve the "non-applicability" of the immunity regime, leaving the jurisdiction of the forum State intact.

173. However, this issue is not new or even exclusive to the present topic. In this connection, it suffices to recall past practice as reflected in some conventions dealing with immunity, which were developed from draft articles that had previously been adopted by the Commission. The Vienna Convention on Diplomatic Relations, the Vienna Convention on Consular Relations, the Convention on Special Missions, the Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character—to name only those that are most closely related to the present topic—do not establish any distinction between limitations and exceptions. They merely list cases in which some of the immunities regulated in those instruments do not apply. The most significant example is still the United Nations Convention on Jurisdictional Immunities of States and Their Property, which does not make any distinction between limitations and exceptions, and which treats under the same heading (Part III of the Convention) causes of nonapplicability based not only on the acts of the State but also on the consequences of said acts, on the property over which jurisdiction is being sought, or the existence of special dispute-settlement mechanisms agreed between the parties.

174. For the purposes of the present topic, a categorical distinction between limitations and exceptions does not appear necessary. In addition, as noted in the fourth report, deciding between the concepts of limitations and exceptions in relation to specific cases may have consequences far beyond the regime of immunity, especially in the case of international crimes and the consequences that the characterization of such crimes as a limitation or exception might have on the regime of international State responsibility.[303] Consequently, in the view of the Special Rapporteur, it is more sensible (and more reflective of practice) to consider the topic from the general perspective of immunity that cannot be invoked in specific circumstances, most prominently in the case of crimes under international law. This will be the focus of draft article 7, which is included in the present report.

175. In any event, it should be noted that limitations and exceptions are not treated as separate elements in the present report, solely to ensure that the draft articles proposed could cover both concepts. Nonetheless, the distinction between limitations and exceptions is of methodological interest, especially in the light of the criteria for interpretation that must be used to determine the existence of a limitation or exception to immunity. For example, the criteria for identifying limitations must be intricately linked to the normative elements of immunity, in particular acts that may be covered by immunity, and must be interpreted essentially in the light of the existing relationship between immunity and jurisdiction. In the case of exceptions, however, the normative elements of immunity are not the only basis on which the nonapplicability of immunity can be established; the non-applicability can be based on other elements outside that institution which, as has been noted above, derive from the international legal order as a whole. While the non-applicability of immunity must be established following an inductive method in the first case, it may be established following a deductive method in the second. Both methods must be duly taken into consideration in the present report.

176. The methodological considerations mentioned above must be considered in addressing the bases of limitations and exceptions, which are analysed on the chapter below.

[303] See *Yearbook … 2015*, vol. II (Part One), document A/CN.4/686, pp. 31–32, paras. 122–126. *Sed contra*, see Dodge, "Foreign official immunity in the International Law Commission: The meaning of "official capacity".

Chapter IV

Instances in which the immunity of State officials from foreign criminal jurisdiction does not apply

177. In the light of the analysis presented above, the present chapter is intended to identify the scope of the limitations or exceptions to immunity from two perspectives: (*a*) determining the concrete areas in which such exceptions might operate; and (*b*) determining whether such exceptions can be invoked in general to both immunity *ratione personae* and immunity *ratione materiae* or only to the latter (sect. D). On the first point, the following scenarios will be examined in turn: international crimes (sect. A); harm caused in the territory of the forum State (sect. B); corruption (sect. C); and draft article 7 (sect. E), which deals with situations in which immunity is not applicable.

A. International crimes

178. As indicated earlier in the present report, the commission of international crimes has been central to the debate on limitations and exceptions to the immunity of State officials from foreign criminal jurisdiction, owing undoubtedly to two factors: the connection between international crimes and *jus cogens*, on the one hand, and the inevitable comparison between immunity and the fight against impunity, on the other. The importance of international crimes in the debate on exceptions to immunity is also related to and influenced by the process of institutionalization of international criminal law that has been

taking place since the end of the twentieth century, as reflected mainly in the establishment of international criminal courts or tribunals.

179. The practice analysed above shows how national courts have in some way addressed international crimes in the context of immunity. Although varied, the practice reveals a clear trend towards considering the commission of international crimes as a bar to the application of the immunity of State officials from foreign criminal jurisdiction, either because such crimes are not considered official acts, or because they are considered an exception to immunity, owing to their gravity or to the fact that they undermine values and principles recognized by the international community as a whole. On the other hand, although national courts have sometimes recognized immunity from foreign criminal jurisdiction for international crimes, it must be remembered that they always did so in the context of immunity *ratione personae*, and only in exceptional circumstances did they do so with regard to immunity *ratione materiae*. In any event, it is worth noting that international criminal courts or tribunals have never recognized the immunity of State officials from foreign criminal jurisdiction in the exercise of their own jurisdiction.

180. Consequently, it may be possible to conclude *prima facie* that contemporary international law recognizes a limitation or exception to the immunity of State officials from foreign criminal jurisdiction in situations where the State official is suspected of committing an international crime, even though some publicists take the opposite view.[304] There are also a few practical examples where national courts have recognized the immunity of officials from criminal jurisdiction, including in cases where they were suspected of committing international crimes. In the sub-section below, the connection between international crimes and the immunity of State officials from foreign criminal jurisdiction is analysed from two separate perspectives: (*a*) the existence of an international custom marking the contours of such limitation or exception; and (*b*) the systematic recognition of international crimes as a limitation or exception to immunity. Although both scenarios are closely related, they are treated separately in the present report for the sake of clarity. This subsection will conclude with a review of the international crimes that might constitute a limitation or exception to the exercise of immunity.

1. Limitation or exception based on the commission of international crimes as a customary norm

181. Although the analysis of practice in chapter II above, which focuses on but is not limited to national legislative and judicial practice, shows that international crimes tend to be considered a limitation or exception to the exercise of foreign criminal jurisdiction, there are doubts as to whether such practice is sufficiently consistent and uniform to constitute a material element of an international custom. Some have also wondered whether such practice is accompanied by a sense of legal obligation that might constitute *opinio juris*. Others have pointed out that there is consistent international jurisprudence indicating that such an exception does not exist, and that international jurisprudence takes precedence over national jurisprudence in the identification of a custom whereby the commission of international crimes is considered a limitation or exception to immunity. In short, what is being called into question is the existence of a customary norm whereby international crimes are considered an exception or limitation to the immunity of State officials from foreign criminal jurisdiction.[305]

182. Determining whether or not such a custom exists is no easy task, and the debate around that issue cannot be ignored. The analysis of the issue in the present report is necessary and useful, to the extent that it can affect the Commission's decision whether or not to include such a limitation or exception in the draft articles that it is currently developing. That decision is undoubtedly one of the most sensitive and difficult aspects of our work, yet it is also of the greatest interest to States and the international community as a whole.

183. It is useful to conduct this analysis in the light of the ongoing work of the Commission on the identification of custom, and especially in the light of the draft conclusions provisionally adopted by the Drafting Committee,[306] which the Commission took note of on first reading during the first part of the current session. The following elements that are relevant for the purposes of the present report may be deduced from the draft conclusions:

(*a*) to determine the existence of an international custom, it is necessary to ascertain whether there is a "general practice that is accepted as law (*opinio juris*)";[307]

(*b*) relevant practice "is primarily the practice of States",[308] which "consists of conduct of the State, whether in the exercise of its executive, legislative, judicial or other functions";[309]

(*c*) practice "may take a wide range of forms" and may, "under certain circumstances, include inaction";[310] the following forms are worth noting for our purposes: "diplomatic acts …; conduct in connection with resolutions adopted by an international organization or at an intergovernmental conference; conduct in connection with treaties; …; legislative and administrative acts; and decisions of national courts";[311]

(*d*) account is to be taken of all available practice of a particular State, which is to be assessed as a whole,[312] considering that "there is no predetermined hierarchy among the various forms of practice";[313]

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[304] See Ingrid Wuerth, "*Pinochet*'s legacy reassessed"; O'Keefe, "An 'international crime' exception to immunity of State officials from foreign criminal jurisdiction: Not currently, not likely".

[305] O'Keefe, "An 'international crime' …". On the other hand, Pedretti, *Immunity of Heads of State* …, pp. 57–98, conducted an interesting study that led her to conclude that such a custom exists.

[306] See A/CN.4/L.872 (available from the website of the Commission, documents of the sixty-eighth session).

[307] *Ibid.*, draft conclusion 2.

[308] *Ibid.*, draft conclusion 4, para. 1.

[309] *Ibid.*, draft conclusion 5.

[310] *Ibid.*, draft conclusion 6, para. 1.

[311] *Ibid.*, draft conclusion 6, para. 2.

[312] *Ibid.*, draft conclusion 7, para. 1.

[313] *Ibid.*, draft conclusion 6, para. 3.

(*e*) in any case, practice "must be general, meaning that it must be sufficiently widespread and representative, as well as consistent";[314]

(*f*) for practice to constitute international custom, it "must be undertaken with a sense of legal right or obligation";[315]

(*g*) in assessing practice and *opinio juris*, "regard must be had to the overall context, the nature of the rule, and the particular circumstances in which […] each of the [two] constituent elements"[316] used to that end;

(*h*) "decisions of international courts and tribunals, in particular of the International Court of Justice … are a subsidiary means for the determination" of customary norms,[317] but they do not constitute practice for the formulation of an international custom.[318]

184. In the light of these guidelines from the Commission, the Special Rapporteur considers that there are sufficient elements pointing to the existence of a customary norm that recognizes international crimes as a limitation or exception to immunity, for the following reasons:

(*a*) Despite the diversity of positions taken by national courts in the cases analysedabove, it is possible to identify a trend in favour of the exception, in particular but not limited to positions taken by national courts in the context of criminal jurisdiction;

(*b*) In cases where national courts have applied any form of limitation or exception based on the commission of international crimes, they have always done so in reference to the incompatibility of such crimes with existing norms or principles of contemporary international law; it is therefore possible to affirm that the decisions of national courts are based on the conviction that they are acting pursuant to international law and not in exercise of an absolute discretion, something that would hardly be compatible with the fulfilment of the judicial function. This conclusion is even more important for decisions taken by judicial bodies in countries which, at the time of the decision, did not have specific norms referring to the exercise of immunity, or in which, even when such norms existed, they did not refer expressly to a possible exception for international crimes. The conclusion is also important for cases where national courts exercised their jurisdiction without any reference to immunity in respect of specific State officials when they should have done so if they had considered it applicable, either because they referred to immunity in respect of other State officials (thereby recognizing such immunity), in the judgment in question, or because they had referred to said immunity in relation to international crimes allegedly committed by State officials in other judgments;

(*c*) The non-applicability of the immunity of State officials from foreign criminal jurisdiction in cases involving the commission of international crimes is reflected not only in judicial practice, but also in national laws adopted over the last two decades, which have gradually expressly incorporated such limitation or exception into domestic laws;

(*d*) State practice outside the judicial and legislative arenas, in particular within international organizations, also shows that most take the position that international crimes constitute a limitation or exception to immunity, as reflected in particular in statements delivered by States in the Sixth Committee in connection with this topic and in the written contributions of States in response to questions from the Commission under the present topic;

(*e*) The existence of a limitation or exception to immunity based on the commission of international crimes has also been recognized in writings by publicists, which must be considered a "subsidiary means" of identification of custom. In this connection, the Institute of International Law deserves special commendation, having referred to the existence of such exception in many of its resolutions since the beginning of the current century.

185. It should be noted, however, that some publicists and States have adduced critical arguments against the conclusions set out above, including (*a*) that there is equally significant practice against the application of a limitation or exception to immunity based on the commission of international crimes; (*b*) that international jurisprudence, in particular the decisions of the International Court of Justice and the European Court of Human Rights, has not recognized the existence of a limitation or exception to immunity based on the commission of international crimes; and (*c*) that State practice which supposedly serves as the basis of a customary norm does not fit in the category of general practice, and is also not sufficiently consistent or representative. Although the importance of these arguments cannot be ignored or minimized, the Special Rapporteur feels that they should be assessed in a nuanced manner.

186. It should be noted that the first objection mentioned above is based on general practice, which refers not only to the immunity of State officials, but also, and more importantly, to the immunity of the State. It is doubtful that such arguments might be considered relevant for the purposes of the current discussion because it is unlikely that they take into account the "overall context, the nature of the rule, and the particular circumstances"[319] of the means for determination mentioned above.

187. Second, even though the decisions of the International Court of Justice and the European Court of Human Rights are of great importance in the international legal order, they can only be considered "subsidiary means" of determination of the existence of a practice accompanied by *opinio juris* that is relevant as evidence of a customary norm and can never replace national courts in the process of formation of custom. Furthermore, the role of national courts is especially important for the topic under consideration, because

[314] *Ibid*., draft conclusion 8, para. 1.

[315] *Ibid*., draft conclusion 9, para. 1.

[316] *Ibid*., draft conclusion 3, para. 1.

[317] *Ibid*., draft conclusion 13, para. 1.

[318] In this connection, see the manner in which draft conclusion 6, para. 2, draft conclusion 10, para. 2, and draft conclusion 13, para. 2 refer to the role of the decisions of national courts and the limited manner in which draft conclusion 13, para. 1 refers to the decisions of international courts and tribunals (*ibid.*).

[319] *Ibid.*, draft conclusion 3.1.

immunity is always invoked before national courts and their decisions are an irrevocable element in ascertaining what a given State considers to be international law. As indicated above, the decisions of the International Court of Justice and the European Court of Human Rights, which are usually cited as authorities, refer directly to State immunity and, when they refer to the immunity of State officials from foreign criminal jurisdiction, they have limited scope (especially those of the International Court of Justice), since they concern immunity *ratione personae* exclusively.

188. Of greater value are the arguments relating to the non-general nature of the practice used to substantiate the existence of a limitation or exception to immunity. In that connection, it is the case that the decisions of national courts, domestic norms and other types of statements by States are limited in number and their content is sometimes not fully consistent or uniform. However, as the Commission itself has just recognized in its work on the identification of customary international law, the relevance of the volume of practice must be assessed in the light of the area in which it is found.[320] In the case at hand, that area is, of necessity, limited by the very nature of the acts to which it refers (international crimes), because, despite their gravity, these acts are carried out exclusively in international society. In addition, the limited number of national orders that allow proceedings to be brought for such crimes when committed on foreign soil or by foreign nationals also limits the volume of practice. It should be noted, however, that the coexistence of judgments that apply a form of limitation or exception alongside judgments that apply immunity even in the presence of international crimes is not entirely unrelated to the process of formation of international custom. Owing to its informal and spontaneous nature, that process allows for the coexistence of divergent practices, at least during the initial stages of formation of the norm, without jeopardizing the emergence thereof. Lastly, with regard to the non-representative nature of practice, it should be noted that manifestations of practice can be identified in various regional areas, and that calling into question the relationship between immunity and international crimes in a given regional area does not affect the applicability of the limitation or exception to any form of immunity, except for immunity from jurisdiction *ratione personae*. The debate that has been taking place in Africa over the past few years and mentioned above[321] is a good example thereof. In any event, even in a situation where there might be doubts as to the existence of a relevant general practice to give rise to an international custom, it does not seem possible under any circumstances to deny the existence of a clear trend that would reflect an emerging custom.

189. Consequently, in the view of the Special Rapporteur, the commission of international crimes may indeed be considered a limitation or exception to State immunity from foreign criminal jurisdiction based on a norm of international customary law.

[320] On the "general" nature of practice, see the second report on identification of customary international law, *Yearbook … 2014*, vol. II (Part One), document A/CN.4/672, p. 163, especially pp. 185–188, paras. 52–57.

[321] See chapter III, sect. B.

2. Systemic foundation of international crimes as an exception to immunity

190. Whether or not there is a customary norm defining international crimes as limitations or exceptions to immunity, a systemic analysis of the relationship between immunity and international crimes in contemporary international law shows that there are various arguments in favour of such a norm.

(a) *Protection of the values of the international community as a whole:* jus cogens *and the fight against impunity*

191. As stated previously, national judicial practice provides examples in which international crimes are treated as limitations or exceptions to immunity. In the first type of case, the commission of international crimes is not covered by immunity, since the acts in question cannot be characterized as acts performed in an official capacity. In the second type of case, the commission of international crimes would constitute an exception to immunity even where those crimes have been committed as part of a State policy or in connection with the performance of State activities and may therefore be deemed to be acts performed in an official capacity. At any rate, both types of case have the same outcome: the immunity of State officials from foreign criminal jurisdiction cannot apply in the case of international crimes.

192. The reasons adduced in both cases are of a substantive nature and are linked to the characterization of international crimes as acts contrary to fundamental values, norms and legal principles of the international community. Ultimately, they are also linked to the assertion that such crimes violate *jus cogens* norms from which there can be no derogation. In both cases, the characterization of international crimes as constituting a limitation or exception to immunity is also connected with the obligations arising from the fact that the international community as a whole has identified impunity for the most serious international crimes as an undesirable phenomenon and therefore cooperates to eliminate it.

193. It is incontrovertible that international crimes are contrary to the fundamental values, norms and legal principles of the international community; this is admitted even by those who consider that immunity from foreign criminal jurisdiction can be applied in the case of international crimes. At any rate, this assertion constitutes the premise for the fight against impunity as one of the values and objectives of society and international law today. However, although this is evident and has not been called into question, the legal status of both assertions has been questioned, and the conclusion has been drawn that both represent mere values and trends that are not embodied in norms of international law. However, this questioning of their legal status is not supported by a systemic analysis of the phenomenon in the context of contemporary international law.

194. Although the concepts of impunity and the fight against impunity have an undeniable sociological dimension, it cannot be denied that both have also become legal concepts as a result of the development of international

law since the Second World War. The fact that both concepts have taken on a legal dimension is a result of the consolidation of two major areas of contemporary international law: international human rights law and international criminal law.[322]

195. The concept of "impunity" has acquired a legal dimension because social values have taken on the character of legal norms. For the current purposes, this legal dimension has been added essentially through the proclamation under international human rights law and international humanitarian law of a set of obligations relating to rights that are inherent in human dignity both in times of war and in times of peace and which, if not respected, have legal effects both on the State and on individuals. Their effects can be felt first through the rules pertaining to the international responsibility that States may incur by violating human rights and the norms of international humanitarian law, and second through the definition of international crimes for which the perpetrators may incur individual criminal responsibility. Both cases are expressions of the generic concept of responsibility, which, in the field of human rights, international humanitarian law and international criminal law, is conveyed by the term "accountability". The concept of impunity, understood in negative terms as an expression of "unaccountability", stands in opposition to the legal concept of accountability and, like accountability, has a legal dimension.[323] Furthermore, the elements to which "accountability" is applied and which are left unprotected as a result of "impunity" are also legal values: internationally recognized human rights, the essential norms for the protection of victims in situations of armed conflict and the prohibition of certain means and methods of combat. No one today would doubt that these values constitute norms of international law.

196. Furthermore, the concept of "the fight against impunity" has also taken on a legal dimension, in particular through the launch of mechanisms for international cooperation whose purpose initially was to determine the State's responsibility for the violation of the aforementioned norms and more recently has been to determine individual criminal responsibility. These mechanisms operate at the international level through the establishment of bodies of various kinds, including judicial bodies, for international human rights protection, and through the establishment of international criminal courts.

197. However, international cooperation is not limited to the establishment of international bodies and procedures. On the contrary, it should be noted that almost all the international treaties that institute systems for the protection of human rights impose on States the obligation to establish appropriate remedies for that purpose under their domestic law.[324] This is even clearer in the case of cooperation for the punishment of international crimes: under the standard model prior to the establishment of the international criminal courts or tribunals, it was left exclusively to States (and their courts) to punish international crimes through their domestic law and institutions. This model persists to a large extent today through the inclusion in international treaties relating to international crimes of an obligation on States to establish, under domestic law, the jurisdiction of their national courts to punish such crimes.[325]

198. Therefore, both the concept of impunity and the concept of the fight against impunity have an unequivocal legal dimension under both international law and States' domestic law. The fact that both terms are polysemous and have a clear sociological meaning does not deprive them of their legal dimension or limit them to being merely non-legal or metalegal concepts.

199. The legal nature of these concepts is also reflected in the link between them and *jus cogens* norms. Suffice

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[322] It is not surprising, therefore, that the relationship between immunity and international crimes, under both international criminal law and international human rights law, has been analysed in studies published in the past 20 years. In this connection, see Van Alebeek, *The Immunity of States and Their Officials* ... On the human rights component of the debate, see Humes-Schulz, "Limiting sovereign immunity in the age of human rights"; Stigen, "Which immunity for human rights atrocities?"; Stephens, "Abusing the authority of the State: Denying foreign official immunity for egregious human rights abuses". It should also be borne in mind that the report prepared by Lady Fox for the Institute of International Law, which served as the basis for the adoption of the Naples resolution (2009) (see footnote 28 above), was entitled "The fundamental rights of the person and the immunity from jurisdiction in international law" (Institute of International Law, *Yearbook*, vol. 73-I and 73-II, Session of Naples, 2009, First and Second Parts, Paris, Pedone, 2009, p. 3).

[323] On accountability and impunity, see Van Ness, "Accountability"; Craig, "Accountability" (who has stated that accountability may have political, legal and financial elements); Thakur and Malcontent, eds., *From Sovereign Impunity to International Accountability: the Search for Justice in a World of States*; Bianchi, "Serious violations of human rights and foreign States' accountability before municipal courts". The important role of accountability in the rule of law has been emphasized by the General Assembly. In the Declaration of the High-level Meeting of the General Assembly on the Rule of Law at the National and International Levels, States "commit to ensuring that impunity is not tolerated for genocide, war crimes and crimes against humanity or for violations of international humanitarian law and gross violations of human rights law, and that such violations are properly investigated and appropriately sanctioned, including by bringing the perpetrators of any crimes to justice, through national mechanisms or, where appropriate, regional or international mechanisms, in accordance with international law, and for this purpose … encourage States to strengthen national judicial systems and institutions" (General Assembly resolution 67/1 of 24 September 2012, para. 22) and "stress the importance of a comprehensive approach to transitional justice incorporating the full range of judicial and non-judicial measures to ensure accountability, serve justice, provide remedies to victims, promote healing and reconciliation, establish independent oversight of the security system and restore confidence in the institutions of the State and promote the rule of law. In this respect, [they] underline that truth-seeking processes, including those that investigate patterns of past violations of international human rights law and international humanitarian law and their causes and consequences, are important tools that can complement judicial processes" (*ibid.*, para. 21).

[324] At the international level, see the International Covenant on Civil and Political Rights, arts. 2, para. 3 (*a*), and 14 (see also general comment No. 32, adopted in 2007) [report of the Human Rights Committee, *Official Records of the General Assembly, Sixty-second Session, Supplement No. 40*, vol. I (A/62/40 (Vol. I)), annex VI]; and the Convention on the Elimination of All Forms of Discrimination against Women, art. 2 (*c*). At the regional level, see the European Convention on Human Rights, arts. 6 and 13; the Charter of Fundamental Rights of the European Union, art. 47; the American Convention on Human Rights, arts. 8 and 25; and the African Charter on Human and Peoples' Rights, art. 7. For its part, the Human Rights Council has affirmed the need to "ensure accountability, serve justice [and] provide remedies to victims": Human Rights Council resolution 27/3 on the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence.

[325] See the Convention on the Prevention and Punishment of the Crime of Genocide, art. V; the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, arts. 5 and 6; the International Convention for the Protection of All Persons from Enforced Disappearance, art. 6; and the International Convention on the Suppression and Punishment of the Crime of Apartheid, art. IV.

it to say that it is generally accepted that many of these norms recognizing human rights or prohibiting certain conduct are unequivocally peremptory norms. For the current purposes, this applies particularly to the crime of genocide, crimes against humanity, the most serious war crimes and torture, which are commonly referred to as violations of peremptory norms. It should also be borne in mind that the Commission itself has characterized them as such in its previous work on the law of treaties, the draft Code of Crimes against the Peace and Security of Mankind and the articles on responsibility of States for internationally wrongful acts. Since international crimes constitute violations of peremptory norms of international law, it is not surprising that some national courts have held that this fact is sufficient to conclude that the immunity of State officials from foreign criminal jurisdiction does not apply in cases in which international crimes have been committed. This explains why article 27 of the Rome Statute states that official capacity and national and international immunities cannot be invoked before the International Criminal Court and therefore cannot be used as a mechanism of procedural defence to bar the Court from exercising its jurisdiction.

200. This understanding of *jus cogens* as the basis for waiving immunity has been accepted by many national courts and a considerable number of States, as shown in the analysis of practice set out in chapter II above. However, it should be remembered that it was expressly rejected by the International Court of Justice in the *Jurisdictional Immunities of the State* case on the grounds that *jus cogens* norms and the norms governing State immunity are distinct sets of rules. Moreover, the European Court of Human Rights has used similar arguments to conclude that the State's immunity from civil jurisdiction is not waived in the case of acts of torture, which are nonetheless expressly recognized as violations of peremptory norms of international law.

201. With regard to the assessment of that judgment in terms of its impact on the definition of *jus cogens* norms—something that does not need to be addressed in the present context—[326] it should be noted that, in the judgment, the Court did not address the interpretative effect of this type of norm, a point of particular interest to which the Commission itself has drawn attention in the past. As the Commission has already stated, the conflict between primary norms, as in the case currently under consideration, should not necessarily be resolved by determining responsibility; it should be borne in mind that all *jus cogens* norms have an interpretative effect that allows possible contradictions to be resolved without the need to consider the issue in relation to the rules of responsibility.

202. This interpretative effect should be borne in mind when addressing the relationship between the immunity of State officials from foreign criminal jurisdiction and international crimes. Thus, insofar as an international crime is a violation of a *jus cogens* norm, as is indisputably the case with regard to torture, this circumstance should be borne in mind by legal professionals in order to arrive at an interpretation that reconciles both norms. Such interpretations will have to be made on a case-by-case basis but, in principle, it would be possible to waive immunity from criminal jurisdiction either on the grounds that such crimes cannot be acts performed in an official capacity or on the grounds that immunity must be waived in certain particularly serious circumstances in which fundamental legal values of the international community are undermined.

203. Furthermore, it should be borne in mind that the conclusion of the International Court of Justice with regard to State immunity cannot be applied automatically and in all respects to the relationship between the immunity of State officials from foreign criminal jurisdiction and *jus cogens* norms. As the Court stated in its 2012 judgment, there is no conflict between immunity and *jus cogens* because immunity is a procedural matter and *jus cogens* is substantive in nature. Therefore, the mere establishment of a bar to the exercise of jurisdiction does not prevent a State from incurring responsibility through another channel and, therefore, does not result in a derogation from the *jus cogens* norm; thus one of the essential characteristics of peremptory norms—namely the impossibility of derogating from them under any norm of international law apart from another *jus cogens* norm—is preserved.

204. Bearing in mind that the Court is referring to immunity from civil jurisdiction, a State's responsibility and, above all, the legal consequences thereof (restitution of a right, payment of compensation, payment of damages, etc.) may be determined through another channel, either domestic (the courts of the State that is alleged to bear civil responsibility) or international (international courts, where possible; exercise of diplomatic protection; arbitration; or negotiation, *inter alia*). Therefore, the Court's assertion that immunity is an exclusively procedural institution cannot be challenged in strictly legal terms.

205. However, this conclusion cannot be applied absolutely to the type of immunity referred to in the present report. The immunity of State officials from foreign criminal jurisdiction has two specific characteristics that must be borne in mind: (*a*) it is exercised before the criminal courts; and (*b*) it has the effect of blocking any legal action whose purpose is to determine individual criminal responsibility for a certain type of crime. Beginning with the second of these characteristics, it cannot be denied that the only way to determine such criminal responsibility and to produce the necessary outcomes (declaration of innocence or guilt and, where appropriate, imposition of a penalty) is through criminal proceedings, which cannot be replaced by any of the alternative mechanisms referred to in the previous paragraph, in particular arbitration, diplomatic protection or inter-State negotiation. Therefore, immunity will fully meet the criteria to be considered a "procedural bar" only where recourse can be had to a criminal law mechanism other than the courts of the forum State in order to determine the possible criminal

[326] With regard to this issue, see, *inter alia*, Bakircioglu, "*Germany v Italy*: The triumph of sovereign immunity over human rights law"; Barker, "International Court of Justice: *Jurisdictional Immunities of the State (Germany v. Italy)* Judgment of 3 February 2012"; Bianchi, "Gazing at the crystal ball (again): State immunity and *jus cogens* beyond *Germany v. Italy*"; Boudreault, "Identifying conflicts of norms: The ICJ approach in the case of the *Jurisdictional Immunities of the State (Germany v. Italy: Greece Intervening)*"; Orakhelashvili, "Jurisdictional Immunities of the State, ICJ, Feb. 3 2012"; Vidmar, "Rethinking *jus cogens* after *Germany v. Italy*: Back to article 53?".

responsibility of a State official, whether that mechanism be the criminal courts of the State of the official, a competent international criminal court or another national court that, through the application of special rules, is competent to try the State official without the possibility of immunity being claimed before that court. However, it cannot be absolutely guaranteed that proceedings may be brought before one of these alternative courts, since this will depend on many circumstances, such as the existence of special norms in the State of the official that prevent him or her from being tried, the absence of jurisdiction of the international court or the existence of treaty norms that unequivocally allow for the intervention of a third State. If none of these alternative courts can try the international crimes, the phenomenon that has already been analysed in chapter III, section A, abovearises: immunity from foreign criminal jurisdiction loses its exclusively procedural nature and acquires a substantive component, so that it becomes both a "procedural bar" and a "substantive bar". The judgment of the International Court of Justice in the *Jurisdictional Immunities of the State* case did not contemplate that possibility and, therefore, it is not possible to conclude that the Court's assertion that there is no conflict between immunity and *jus cogens* norms applies in the case of immunity of State officials from foreign criminal jurisdiction in relation to the commission of international crimes.

(b) *Access to justice and the right of victims to reparation*

206. Closely related to the arguments set out in the preceding paragraphs is the assertion that applying immunity from jurisdiction in relation to international crimes constitutes a denial of victims' right of access to justice and to obtain reparation for the crimes they have endured.

207. Denial of the right of access to justice has traditionally been one of the arguments used to limit the scope of any form of immunity.[327] This right has, without doubt, the benefit of being a basic right without which the right to effective judicial protection and to a fair trial is meaningless.[328] However, as the European Court of Human Rights has stated,[329] the right of access to justice is subject to limitations and, in the case of the relationship between that right and immunity, requires a purposive approach, taking into account the fact that—by definition—immunity serves to "block" judicial proceedings and that it therefore necessarily entails a limitation on the right of access to justice.

208. Moreover, in the case of the immunity of State officials from foreign criminal jurisdiction, the right of access to justice has some specific characteristics that should be duly taken into account. First, criminal proceedings will not necessarily be brought by those who were the victims of the crime and, the initiation of proceedings against officials of a third State for international crimes may be subject to certain limits established by national laws that allow the organs of the State to control the exercise of jurisdiction on the grounds, in principle, of defence of the State's public interests. Second, proceedings are not initiated solely in defence of the individual interests and rights of the victims, but also for the benefit of national and international public order, so as to ensure compliance with norms that are considered essential by the international community as a whole. Lastly, the purpose of the proceedings is precisely to determine individual criminal responsibility for the commission of international crimes, which can be achieved only through judicial channels, whether that be the courts of the forum State, the courts of the State of the official or an international criminal court. In this context, it is no simple matter to determine what is meant by the right of access to justice and in what circumstances the right is not guaranteed because immunity from criminal jurisdiction applies, even in cases where international crimes have been committed.

209. It is clear that an individual's right of access to the courts in order to file a complaint or accusation regarding the commission of an international crime will be limited by the application of immunity. However, this right will also be compromised if criminal proceedings are initiated by the competent authorities of the State and those proceedings are stalled by the application of immunity. In order for this limitation to make immunity incompatible with the right of access to justice, it must, as stated by the European Court of Human Rights, amount to a loss of the right itself. In other words, there must be no other means of securing a court decision on whether or not an international crime has been committed and whether, if such a crime has been committed, the State official is criminally responsible for the crime. If no such remedy is available, immunity will not only have the effect of denying the right of access to justice but will also allow the perpetuation of a situation at the root of which is an act—the international crime—that is contrary to peremptory norms of international law. From this perspective, and in these very particular circumstances, the right of access to justice may constitute a sufficient legal basis to conclude that immunity from foreign criminal jurisdiction is inapplicable in the case of international crimes.

210. In the case of the right of victims of international crimes to reparation, it cannot be denied that this is one of the most advanced developments in contemporary international criminal law: the commission of international crimes cannot have as its sole consequence the punishment of the perpetrators of those crimes; there should also be a system of reparations for the harm caused to the victims. This dimension of criminal justice is present in the laws of a number of countries establishing the right to reparation of the victims of a crime. The right is exercised either as an outcome of the criminal proceedings themselves or as a result of civil proceedings for the sole purpose of obtaining reparation for the harm caused by the crime, whether or not a criminal judgment has been issued on the matter.

211. The right to reparation is also a familiar concept in international law. For example, there are decisions of various international bodies that recognize the right to reparation of victims of human rights violations and

[327] See the commentary on the judgment of the Italian Constitutional Court of 22 October 2014 (para. 122 *supra*).

[328] See European Court of Human Rights, *Golder v. the United Kingdom*, 21 February 1975, Series A, No. 18, paras. 28–36.

[329] See chap. II, sect. C.2.

international crimes.[330] The right to reparation was even claimed before the International Court of Justice in the *Jurisdictional Immunities of the State* case, although the Court did not rule on that point.[331] In any case, the right to reparation of the victims of international crimes is expressly recognized in article 75 of the Rome Statute, which has led to significant institutional[332] and jurisprudential[333] developments.

212. However, the characterization of the right of victims to reparation as the basis for an exception to immunity in the case of international crimes requires a nuanced analysis that is to a large extent related to the ability to initiate legal action for compensation. In that context, it should be borne in mind that such legal action may be filed with the criminal or civil courts and, in civil cases, is not dependent on a prior criminal conviction. In both cases, the victim's right to reparation has a different effect on the limitation on or exception to immunity. It is clear that this should be borne in mind as a basis for a limitation or exception when reparation can be obtained only through criminal proceedings, which therefore become an essential condition for obtaining reparation. In this case, the effect that immunity may have on the victims' right to reparation supplements the argument referred to above on the substantive dimension of immunity from foreign criminal jurisdiction.

213. However, the conclusion is not so clear in cases where reparation can be obtained only through proceedings before the civil courts, since in such cases the alternative mechanisms referred to above may come into operation. Furthermore, in these cases there is a renewed risk of confusion between the immunity of the State official and the immunity of the State, which could be considered to bear subsidiary civil responsibility.

214. Consequently, irrespective of the debate on the right of victims to reparation, it does not appear possible to conclude that the right to reparation may constitute in and of itself an autonomous legal basis for an exception to the immunity of State officials from foreign criminal jurisdiction. In any case, this does not prevent the right to reparation from being evaluated as a complementary legal argument in favour of such an exception. In that context, the practice of certain States is particularly relevant; for example, the United States and Canada recognize in their domestic law an exception to immunity from civil jurisdiction in the case of certain claims for damages arising from the commission of international crimes. At a different level, the work of the Institute of International Law should also be borne in mind: in its resolution on universal civil jurisdiction[334] with regard to reparation for international crimes, it proclaimed both the right of victims to reparation and the right to effective access to justice to claim reparation (art. 1, paras. 1 and 2).

(c) *The obligation to prosecute international crimes*

215. The gravity of international crimes has been reflected in the adoption of a number of treaties that impose on States parties the obligation to exercise jurisdiction over such crimes. This treaty obligation has been regarded by some authors as the legal basis for concluding that the commission of international crimes constitutes a limitation or exception to immunity,[335] with reference in some degree to the experience of the *Pinochet* case. Accordingly, the duty of States parties to establish their own jurisdiction over certain international crimes obliges them to exercise jurisdiction in respect of any person who has committed crimes covered by such treaties, with no possibility of applying immunity. In a sense, States parties have implicitly waived the right to exercise of immunity from foreign criminal jurisdiction in respect of such crimes.

216. This is an interesting interpretation that seeks to preserve the duty of national courts to prosecute international crimes without the need to affect the essential elements of immunity from jurisdiction, in particular the consideration of immunity as an autonomous right of the State, and without the need to give a view on the characterization of international crimes as acts performed in an official capacity. It also has the advantage of being based on a treaty obligation that binds both the forum State and the State of the official, thus obviating the need to debate whether or not there is a customary norm that serves as the basis for limitations or exceptions to immunity. However, its value as a basis for limitations or exceptions is limited, since it would apply only to international crimes governed by treaties and does not take into account the existence of other treaties that do not include the obligation to establish jurisdiction. However, above all it is difficult to reconcile with the model of the relationship between jurisdiction and immunity described above, in which immunity can be applied only in respect of a pre-existing jurisdiction and in which, therefore, it is not logical to maintain that immunity does not apply precisely because the State has previously established its jurisdiction with

[330] See General Assembly resolution 60/147 of 16 December 2005 on Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law; Human Rights Council resolution 27/3 on the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence; and general comment No. 3 (2012) of the Committee against Torture on the implementation of article 14 (report of the Committee against Torture, *Official Records of the General Assembly, Sixty-eighth Session, Supplement No. 44* (A/68/44), p. 254). On the treatment of the right to reparation in the doctrine, see, *inter alia*, Cruz, "El derecho de reparación a las víctimas en el derecho internacional …".

[331] See chap. II, sect. C.1, above.

[332] For this purpose, the Assembly of States Parties established the Trust Fund for the benefit of victims, which is playing an important role in the Court's general system. In this regard, see resolution ICC-ASP/1/Res.6 of 9 September 2002 (Establishment of a fund for the benefit of victims of crimes within the jurisdiction of the Court, and of the families of such victims), in ICC-ASP/1/3, and resolution ICC-ASP/4/Res.3 (Regulations of the Trust Fund for Victims).

[333] International Criminal Court, *The Prosecutor v. Thomas Lubanga Dyilo*, Trial Chamber I, Decision establishing the principles and procedures to be applied to reparations of 7 August 2012 (ICC-01/04-01/06-2904). See also Judgment on the appeals against the "Decision establishing the principles and procedures to be applied to reparations" of 7 August 2012 with amended order for reparations of 3 March 2015 (ICC-01/04-01/06-3129). In the judgment, the Appeals Chamber concluded that the victims' right to reparation derived from the personal responsibility of the convicted person and instructed the Trust Fund to award collective reparations. See Val Garijo, *Las víctimas de graves violaciones de los derechos humanos y del derecho internacional humanitario en el derecho internacional penal*.

[334] See footnote 28 above.

[335] See Akande and Shah, "Immunities of State officials, international crimes and foreign domestic courts"; d'Argent, "Immunity of State officials and the obligation to prosecute".

regard to international crimes. In any case, this argument has the value of underlining the important contribution that treaties governing the phenomenon of international crimes have made to the definition of limitations and exceptions to immunity from foreign criminal jurisdiction and of emphasizing the fact that limitations and exceptions to immunity may in some cases have a treaty basis.

217. In sum, the arguments that have been analysed above make it clear that there are sufficient grounds in contemporary international law to conclude that the commission of international crimes may constitute a limitation or exception to the immunity of State officials from foreign criminal jurisdiction. In the Special Rapporteur's view, there are therefore grounds to include such a limitation or exception in the draft articles, whether or not it is concluded that international custom establishes such a limitation or exception.

3. International crimes that constitute a limitation on or exception to immunity

218. In order to define a limitation on or exception to immunity from foreign criminal jurisdiction, it is necessary to define the concept of "international crime" and to identify the criminal acts that may be included within that concept.

219. At the outset, it should be noted that the term "international crime" refers to criminal conduct that is of international concern, either because it is undertaken in an international context and has a transnational or transboundary dimension, or because it undermines international legal values, irrespective of where it occurs. In both cases, these crimes are subject to international regulation. The first category includes crimes such as piracy, drug trafficking, human trafficking, corruption and other forms of international organized crime. The second includes the crime of genocide, crimes against humanity, war crimes, the crime of aggression, torture, enforced disappearance and apartheid. Although both categories generally consist of crimes that undermine the values and interests of States and the international community, only the latter category can, strictly speaking, be considered to constitute "international crimes" or "crimes under international law" that undermine the fundamental legal values of the international community as a whole.

220. Furthermore, a review of the practice analysed in chapter II of the present report shows that there are very few crimes identified in national laws as constituting exceptions to immunity from foreign criminal jurisdiction. Similarly, there are very few national court decisions in which immunity was withheld in connection with the commission of any of the established international crimes. The same pattern may be discerned in treaty practice and the Commission's past work on other topics.

221. After analysing that practice, it is possible to conclude that international crimes that constitute a limitation on or exception to the application of immunity are generally those which, in the view of the international community, can give rise to criminal proceedings in international criminal courts or tribunals, in particular the International Criminal Court. As a result, these crimes should be placed in the same category as the crime of genocide, crimes against humanity and war crimes.

222. On the other hand, it is difficult, for the purposes of the present report, to extend this characterization to the crime of aggression, even though it, too, is a crime that falls under the jurisdiction of the International Criminal Court. There are several reasons for this: the Court's jurisdiction over this crime is optional and not automatic, as is the case with the other international crimes; the Commission itself already indicated in the draft Code of Crimes against the Peace and Security of Mankind of 1996 that the crime of aggression must be entrusted primarily to international courts and tribunals, given the political implications it could have for the stability of relations between States; there are very few pieces of national criminal legislation that address this crime; and, lastly, there do not appear to be any cases of State practice in which the crime of aggression has been characterized as a limitation on or an exception to the exercise of immunity, at either the legislative or the judicial level.

223. There is nothing to prevent the establishment, by means of a treaty, of an exception to immunity from foreign criminal jurisdiction in relation to the first category of international crimes identified above. However, their inclusion in the category of crimes that give rise to the definition of a custom-based limitation or exception is not supported by practice.

224. Finally, it must be borne in mind that the national case law that has given rise to the limitation or exception analysed in the present section was derived primarily from a large number of torture cases. Although the crime of torture may, in principle, be considered to be included under the category of crimes against humanity, it will not always be possible to do so, especially when the acts of torture in question are not part of a plan or policy. Nevertheless, national courts have sometimes withheld immunity from jurisdiction in cases of torture in which this criterion has not always been met. Thus, in view of the seriousness of this crime and the fact that its prohibition has consistently been regarded as a *jus cogens* norm, it seems reasonable to include torture expressly among the international crimes that constitute a limitation on or exception to the immunity of State officials from foreign criminal jurisdiction. Enforced disappearances are in a similar situation, although State practice in relation to them is more limited. In any event, owing to its seriousness, torture has been characterized as a "crime under international law" in various treaties when it is committed in a grave or systematic fashion. Given these circumstances, it seems appropriate to include torture in the list of crimes under international law that constitute a limitation on or exception to the immunity from the jurisdiction referred to in the present report.

B. "Territorial tort exception"

225. The "territorial tort exception" had its origin in the law of diplomatic immunities and was later extended to State immunity. It has been incorporated into all national laws governing immunity, with the exception of those of Pakistan, and into the United Nations Convention on Jurisdictional Immunities of States and Their Property. It can be

considered that the content of this exception is described in article 12 of the Convention (see paragraph 27 above).

226. As indicated by the Commission in its commentary to article 12, this exception is justified by the preferential nature of the jurisdiction of the State in whose territory the acts are carried out. In addition, it provides a remedy for individuals who have suffered harm as a result of acts committed by a State official and who would normally not have access to any other legal means of redress.[336] This exception was also analysed in the 2007 memorandum by the Secretariat[337] and in the second report of the previous Special Rapporteur, Mr. Kolodkin, who concluded that it could constitute an exception to immunity *ratione materiae*, provided that the acts were committed in the territory of the forum State by a foreign official who had been present in the territory of that State without the State's express consent for the discharge of his or her official functions.[338]

227. While the above-mentioned exception was intended to be applied mainly in the context of diplomatic relations and was later extended to the acts of agents and officials of international organizations and to the immunity of the State, it is certainly possible to find examples of State practice in which the courts of the forum State have relied on the "territorial tort exception" to conclude that immunity from jurisdiction is not applicable to the officials of a foreign State. These are cases in which the national courts have applied the territorial tort exception in relation to acts constituting injury, political assassination, espionage or sabotage committed in the territory of the forum State by officials of a foreign State.[339] In such cases, the courts have denied immunity, despite recognizing the person concerned as a State official and establishing a connection between the State of the official and the act in question.

228. In some cases, the courts have concluded that—in spite of everything—immunity would remain applicable, and justified that conclusion by characterizing the acts in question as *acta jure imperii* and immunity as the immunity of the State and not that of its officials. This was the case with the decision of the Irish court in *McElhinney* and that of the European Court of Human Rights on the same set of facts. Similarly, it is worth noting the case of *Jurisdictional Immunities of the State*, in which the International Court of Justice denied the claims of Italy with regard to the application of this exception, on the grounds that, because the acts that had caused the injury had been committed by the Nazi troops during an armed conflict, they should have been characterized as *acta jure imperii*.

229. In short, State practice, although limited, seems to be consistent in recognizing the application of this limitation on or exception to the immunity of State officials from foreign criminal jurisdiction. The Special Rapporteur considers that this conclusion, together with the importance to be accorded the principle of territoriality in this case, justifies the inclusion of the "territorial tort exception" as a limitation on or exception to immunity from jurisdiction in the draft articles currently being formulated.

C. Corruption as a limitation on or exception to immunity

230. As already mentioned in the Special Rapporteur's fourth report, immunity has sometimes been invoked before national courts in relation to certain forms of conduct which, even if they have the appearance of having been performed in an official capacity, were carried out in the exclusive interests of the State official in respect of whom the exercise of jurisdiction is sought. Immunity has also been invoked by State officials in the context of criminal proceedings concerning activities that are unrelated to the functions of the State (misappropriation of funds, money-laundering, etc.) but which can only be performed because of the perpetrator's status as an official and which, moreover, usually cause economic harm to the State of the official. In such cases, the response of national courts has generally been to deny immunity.[340] Such activities constitute a broad category, which includes embezzlement, diversion and misappropriation of public funds, money-laundering and other manifestations of corruption.

231. It can be asserted in general terms that, in the light of the criteria established in the fourth report, all these cases do not involve acts that can be considered as having been carried out in an official capacity. In principle, therefore, there appears to be no need at present to analyse them from the perspective of limitations or exceptions. However, practice shows that, in a number of the cases, it was not easy to determine clearly whether the act concerned was official or private, in particular since the act in question was only capable of being performed because of the official status of its perpetrator and the latter's ability

[336] See chap. II, sect. A above.

[337] See document A/CN.4/596 and Corr.1 (footnote 3 above), paras. 162–165.

[338] See *Yearbook … 2010*, vol. II (Part One), document A/CN.4/631, pp. 422–424, paras. 81–86.

[339] See the following cases: Germany, judgment of 15 May 1995, Federal Constitutional Court (immunity denied to intelligence officials of the former German Democratic Republic); New Zealand, *Rainbow Warrior*, judicial phase (see footnote 217 above) (attack on a Greenpeace ship that resulted in the death of a Dutch citizen and the sinking of the ship; the Court did not raise the issue of immunity); Italy, *Abu Omar* (cited by Gaeta: "*Extraordinary renditions* e inmunità della giurisdizione penale degli agenti di Stati esteri: il caso Abu Omar" (abduction and illegal transfer of a person); United States, *Letelier v. Chile* (see footnote 228 above); United States, *Jiménez v. Aristeguieta* (see footnote 228 above); United States, *In re Jane Doe I, et al. v. Liu Qi, et al., Plaintiff A, et al. v. Xia Deren, et al.* (see footnote 228 above); United Kingdom, England, *Khurts Bat v. Investigating Judge of the German Federal Court*, [2011] EWHC2029 (Admin) (abduction and illegal transfer of a person in Germany) (this decision provides an interesting analysis of the issue of exceptions in paragraphs 86–101). The courts of Italy and Greece have also accepted this exception, in Italy, *Ferrini v. Federal Republic of Germany* (footnote 215 above), and Greece, *Prefecture of Voiotia v. Federal Republic of Germany*, Court of Cassation, judgment, 4 May 2000, ILR, vol. 129, p. 513 (see judgment of the International Court of Justice in *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)*). The International Criminal Tribunal for the Former Yugoslavia has also referred to this exception, in *Blaškić* (see footnote 187 above), para. 41.

[340] See, in particular, the following cases: Switzerland, *Adamov* (see footnote 216 above); Chile, *Fujimori* (footnote 215 above), paras. 15–17 (the decision was adopted in connection with extradition proceedings relating to grave human rights violations and corruption); France, *Teodoro Nguema Obiang Mangue*, judgment of 13 June 2013 and application for annulment, judgment of 16 April 2015 (footnote 210 above) (the Court made the statement cited after re-examining the arguments and statements of the judgment of 13 June 2013); United States, *In re Jane Doe I, et al. v. Liu Qi, et al., Plaintiff A, et al. v. Xia Deren, et al.* (see footnote 228 above). However, a Swiss court has upheld immunity, even in a case concerning the diversion of public funds: *Marcos and Marcos v. Federal Department of Police* (see footnote 224 above).

to take advantage of the State structure, sometimes by means of acts that were ostensibly official. Nevertheless, even in such cases, in which the boundaries are not clear, national courts have as a rule concluded that immunity is not applicable, relying in most cases on the intention of the perpetrators of the acts, namely to make use of their official position exclusively for their own benefit, thereby causing harm to the State of which they are, or were, officials. Such a scenario therefore constitutes a clear case of what has been characterized above as a limitation to immunity, since immunity cannot be invoked in such cases owing to the incompatibility of the alleged act that gives rise to the attempt to exercise jurisdiction with one of the normative elements of immunity.

232. This is particularly clear in respect of acts that may fall under the term "corruption", where the State official acts unlawfully (in contravention of his or her mandate), or *ultra vires* (beyond his or her mandate). As stated in the previous reports, the fact that the act performed by the official is unlawful does not necessarily mean that he or she is not covered by immunity, if it is possible to determine that the act in question, despite being unlawful, was performed in an official capacity, that is to say, in the performance of State duties. However, *ultra vires* acts cannot in principle be covered by immunity, since, by definition, they are presumed not to have been performed in the exercise of State duties and, consequently, can never have been performed in an official capacity.

233. However, these conclusions, while theoretically indisputable, raise a considerable number of questions, and must in any event be reached on a case-by-case basis by the competent national court. This introduces a certain degree of uncertainty into an area—corruption among public officials—which is a focus of great concern for States, as demonstrated by the conclusion of international treaties dealing with this serious issue at both the international and the regional levels. Although such treaties do not generally refer to the question of immunity for the purpose of precluding its application in corruption cases involving foreign public officials, they have established a set of principles whose central aim is to ensure that State jurisdiction can be exercised effectively in order to suppress such conduct.[341]

234. Consequently, taking into account judicial practice and the fact that the suppression of corruption at the national and international levels constitutes a key objective of international cooperation,[342] it might be appropriate to include in the draft articles a provision that expressly defines corruption as a limitation on or exception to the immunity of State officials from foreign criminal jurisdiction.

D. Limitations on and exceptions to immunity *ratione personae* and immunity *ratione materiae*

235. Having identified the circumstances that might constitute a limitation on or exception to immunity, it is necessary to determine if they are generally applicable to all types of immunity of State officials from foreign criminal jurisdiction (*ratione personae* and *ratione materiae*) or only to one (*ratione materiae*). The goal is to determine whether or not Heads of State, Heads of Government and Ministers for Foreign Affairs, during their term of office, are affected by the limitations on or exceptions to immunity analysed above.

236. In making such a determination, it is important to bear in mind three considerations: (*a*) the way in which this matter has been approached in practice; (*b*) the purpose of, and the property protected by, immunity *ratione personae* and immunity *ratione materiae*; and (*c*) the differences between the normative elements of each of these types of immunity, in particular the temporal element. The substantive content of each limitation or exception analysed does not provide the information necessary to reach a decision as to the applicability or non-applicability of said limitation or exception to each type of immunity. In essence, crimes under international law, corruption and harm caused to persons and property are of the same gravity irrespective of who committed them.

237. Having said that, practice shows that national courts have generally recognized the immunity of Heads of State, Heads of Government and Ministers for Foreign Affairs in all circumstances, without taking into consideration the possible existence of one of the limitations or exceptions examined above. This is especially patent in the case of international crimes, where national courts have generally recognized the immunity of the members of the *troika*. Moreover, such immunity has been recognized at the highest jurisdictional levels; indeed, even when a court of first instance has ruled that immunity is not applicable in the case of an international crime, the higher courts have overturned said decision and concluded that immunity is applicable.[343] Similarly, it has not been possible to find cases

[341] In this connection, see United Nations Convention against Corruption, arts. 42 and 44–46; Criminal Law Convention on Corruption, arts. 17 and 25–27; Inter-American Convention against Corruption, art. V; and African Union Convention on Preventing and Combating Corruption, arts. 13, 15, 18 and 19.

[342] In a development closely related to the present report, it should be noted that the African Union has included corruption among the crimes within the jurisdiction of the International Criminal Law Section of the African Court of Justice and Human Rights. On a more general level, international concern about corruption and the need to combat it has been reflected in various activities undertaken by the Organization for Economic Cooperation and Development and the United Nations Office on Drugs and Crime. The General Assembly has affirmed the need for a zero-tolerance approach to corruption, including within the United Nations itself, emphasizing that "the zero-tolerance approach to fraudulent acts and corruption … is indispensable for the strengthening of accountability at all levels" (General Assembly resolution 70/255 of 1 April 2016: Progress towards an accountability system in the United Nations Secretariat, para. 4). This concern has also been reflected in the literature. See Boersma, *Corruption: a Violation of Human Rights and a Crime under International Law?*; American Society of International Law, *Proceedings of the 107th Annual Meeting. April 3–6, 2013*, Panel on "Anti-corruption Initiatives in a Multipolar World"; Bonucci, "The fight against foreign bribery and international law: an exception or a way forward?"; Rose-Ackerman, "International anti-corruption policies and the U.S. national interest" and Dubois, "Remarks"); De la Cuesta Arazmendi, "Iniciativas internacionales contra la corrupción"; Ivory, *Corruption, Asset Recovery, and the Protection of Property in Public International Law: The Human Rights of Bad Guys*; Jiménez García, *La prevención y lucha contra el blanqueo de capitales y la corrupción …*; Kofele-Kale, *"Sed quis custodiet ipsos custodies?* (But who will guard the guardians?) …"; Olaniyan, *Corruption and Human Rights Law in Africa*; Olivares Tramón, "Democracia, buena gobernanza y lucha contra la corrupción en el derecho internacional".

[343] See the case of *Gaddafi* before the French courts (footnote 209 above).

in which a national court has declared non-applicable the immunity of a Head of State, a Head of Government or a Minister for Foreign Affairs during his or her term of office on the grounds of the territorial tort exception or acts of corruption, with the sole exception, in the latter case, of the ruling of the Court of Appeal of Paris in the *Teodoro Nguema Obiang Mangue* case.

238. National laws that provide for limitations or exceptions to immunity for international crimes generally do not apply said limitations or exceptions in respect of members of the *troika* during their term of office. Furthermore, national laws that do not distinguish between Heads of State, Heads of Government and Ministers for Foreign Affairs and other State officials with regard to exceptions to immunity generally do so for the sole purpose of cooperating with the International Criminal Court. Only the laws of Burkina Faso, the Comoros, Ireland, Mauritius and South Africa appear to contemplate an exception in cases of international crimes that applies to all State officials, regardless of rank.[344]

239. In addition, the International Court of Justice has stated expressly that there exists a customary norm that recognizes the complete or absolute immunity of Ministers for Foreign Affairs, which is also applicable to Heads of State and Heads of Government, and which allows no exception, not even for the commission of the most serious crimes, such as genocide, crimes against humanity and war crimes. This limitation on the exception to immunity *ratione materiae* based on the commission of international crimes is also supported by the majority of publicists, especially the Institute of International Law, as seen in its 2009 resolution.[345]

240. Therefore, it has not been possible to determine, on the basis of practice, the existence of a customary rule that allows for the application of limitations on or exceptions to immunity *ratione personae*, or to identify a trend in favour of such a rule. However, the limitations on and exceptions to the immunity of State officials from foreign criminal jurisdiction do apply to State officials in the context of immunity *ratione materiae*.

241. This limitation cannot, however, be construed as a form of immunity. That said, it is important to recall that immunity *ratione personae* is of a highly temporal nature, as established in draft article 4, which was provisionally adopted by the Commission in 2013. Pursuant to that provision, following the end of their term of office, former Heads of State, former Heads of Government and former Ministers for Foreign Affairs enjoy immunity *ratione materiae* in relation to acts carried out in their official capacity during their term of office. Following the end of their term of office, therefore, they are wholly subject to the regime of immunity *ratione materiae*, including the limitations thereon and exceptions thereto. In other words, the exclusion of Heads of State, Heads of Government and Ministers for Foreign Affairs from the regime of limitations on and exceptions to immunity is of a temporal nature, owing primarily to the role that they play as representatives of the State in international affairs.

242. Nevertheless, it is true that in specific circumstances, the exclusion may be permanent rather than temporary, especially in the case of monarchs, who are in office for life and who cannot be removed from office, and Heads of State and Government who, for various reasons, become mandate holders for life. Although in these cases, limitations on and exceptions to immunity are also non-applicable, it would be useful to recommend that the States concerned consider the possibility of lifting the immunity of their officials when requested, especially in the case of the most serious international crimes. Nevertheless, this recommendation will need to be analysed in the sixth report, in the context of the procedural aspects of immunity.

E. Draft article

243. On the basis of the analysis undertaken in this fifth report, a draft article on the limitations on and exceptions to immunity from foreign criminal jurisdiction is proposed below. In addition to the arguments developed above, the Special Rapporteur considered a number of other points when formulating the draft article.

244. Firstly, the distinction between limitations and exceptions, while useful in terms of methodology, had been controversial in normative terms, especially as a result of the discrepancies in the characterization of a particular act as a limitation or an exception in line with the analysis above; this is especially true in the case of international crimes. The Commission was faced with a similar situation when formulating its. At that time, the Commission opted for a cautious formulation which avoided the terms "limitation" and "exception" and instead generically referred to "proceedings in which … immunity cannot be invoked".[346] The Special Rapporteur has used the same formulation in the draft article proposed in the present report.

245. Secondly, the draft article does not cover waivers of immunity by the State of an official. Owing to its highly procedural nature, this issue should be dealt with in the sixth report which, according to the programme of work initially proposed by the Special Rapporteur, will be prepared once the substantive issues have been addressed. Taking such an approach to waivers is consistent not only with the study carried out by the Secretariat but also with the third report of the previous Special Rapporteur, Mr. Kolodkin; it is also in line with the Commission's approach in preparing its draft articles on jurisdictional immunities of States and their property.

246. Thirdly, it is recognized that nothing prevents States from establishing, by means of international treaties, circumstances in which immunity from foreign criminal jurisdiction is not applicable. This has already occurred in practice and is fully consistent with treaty law. Therefore, a specific reference to this possibility has been included in the proposed draft article. For the same reason, a specific reference to the duty to cooperate with international criminal courts or tribunals has also been included.

[344] See chap. II, sect. B, above.

[345] See footnote 28 above.

[346] *Yearbook … 1991*, vol. II (Part Two), p. 13, para. 28, at p. 33, part III of the draft articles on jurisdictional immunities of States and their property.

247. Lastly, the Special Rapporteur wishes to underscore that the application of this draft article should be understood in the light of the procedural rules on the application of immunity that may be established in the future. Although such rules would not change the substantive content of the draft article with regard to the identification of situations in which immunity does not apply, it will be possible at such time to establish specific procedural conditions with a view to ensuring the observance of all the procedural safeguards that protect both States and individuals. However, it does not appear necessary at this time to introduce a specific reference to this issue in the draft article.

248. Bearing these considerations in mind, the Special Rapporteur proposes the following draft article:

"Draft article 7. Crimes in respect of which immunity does not apply

"1. Immunity shall not apply in relation to the following crimes:

"(*a*) genocide, crimes against humanity, war crimes, torture and enforced disappearances;

"(*b*) corruption-related crimes;

"(*c*) crimes that cause harm to persons, including death and serious injury, or to property, when such crimes are committed in the territory of the forum State and the State official is present in said territory at the time that such crimes are committed.

"2. Paragraph 1 shall not apply to persons who enjoy immunity *ratione personae* during their term of office.

"3. Paragraphs 1 and 2 are without prejudice to:

"(*a*) any provision of a treaty that is binding on both the forum State and the State of the official, under which immunity would not be applicable;

"(*b*) the obligation to cooperate with an international court or tribunal which, in each case, requires compliance by the forum State."

Chapter V

Future workplan

249. Following the programme of work initially proposed by the Special Rapporteur, her sixth report will address the procedural aspects of immunity of State officials from foreign criminal jurisdiction. It will also revisit the concepts of jurisdiction and immunity originally proposed by the Special Rapporteur in her second report. These concepts will have to be analysed from a procedural perspective with a view to identifying, in particular, the acts specific to the investigation and prosecution of a given crime in respect of which immunity is applicable.

250. The analysis of the procedural aspects of immunity is the last issue included in the initial programme of work; therefore, the Commission will be in a position to conclude its consideration of the topic and adopt the draft articles on first reading in 2017. Consequently, after the period required for States to submit written comments, the Commission will be able to review any such comments and the Special Rapporteur's proposals in 2019 and, as appropriate, proceed to the final adoption of the draft articles on second reading.

251. In any event, this workplan is subject to the decisions that will be adopted in the next quinquennium by the Commission members to be elected by the General Assembly in November 2016.

Annex I

Draft articles provisionally adopted by the Commission

Part One

INTRODUCTION

Draft article 1. Scope of the present draft articles

1. The present draft articles apply to the immunity of State officials from the criminal jurisdiction of another State.

2. The present draft articles are without prejudice to the immunity from criminal jurisdiction enjoyed under special rules of international law, in particular by persons connected with diplomatic missions, consular posts, special missions, international organizations and military forces of a State.

Draft article 2. Definitions

For the purposes of the present draft articles:

[…]

(*e*) "State official" means any individual who represents the State or who exercises State functions.

Part Two

IMMUNITY *RATIONE PERSONAE*

Draft article 3. Persons enjoying immunity ratione personae

Heads of State, Heads of Government and Ministers for Foreign Affairs enjoy immunity *ratione personae* from the exercise of foreign criminal jurisdiction.

Draft article 4. Scope of immunity ratione personae

1. Heads of State, Heads of Government and Ministers for Foreign Affairs enjoy immunity *ratione personae* only during their term of office.

2. Such immunity *ratione personae* covers all acts performed, whether in a private or official capacity, by Heads of State, Heads of Government and Ministers for Foreign Affairs during or prior to their term of office.

3. The cessation of immunity *ratione personae* is without prejudice to the application of the rules of international law concerning immunity *ratione materiae*.

Part three

IMMUNITY *RATIONE MATERIAE*

Draft article 5. Persons enjoying immunity ratione materiae

State officials acting as such enjoy immunity *ratione materiae* from the exercise of foreign criminal jurisdiction.

Annex II

Draft articles provisionally adopted by the Drafting Committee at the Commission's sixty-seventh session, in 2015

Part One

INTRODUCTION

Draft article 2. Definitions

For the purposes of the present draft articles:

[…]

(*f*) An "act performed in an official capacity" means any act performed by a State official in the exercise of State authority.

Part three

IMMUNITY *RATIONE MATERIAE*

Draft article 6. Scope of immunity ratione materiae

1. State officials enjoy immunity *ratione materiae* only with respect to acts performed in an official capacity.

2. Immunity *ratione materiae* with respect to acts performed in an official capacity continues to subsist after the individuals concerned have ceased to be State officials.

3. Individuals who enjoyed immunity *ratione personae* in accordance with draft article 4, whose term of office has come to an end, continue to enjoy immunity with respect to acts performed in an official capacity during such term of office.

Annex III

Draft article proposed for the consideration of the Commission at its sixty-eighth session, in 2016

Draft article 7. Crimes in respect of which immunity does not apply

1. Immunity shall not apply in relation to the following crimes:

(*a*) genocide, crimes against humanity, war crimes, torture and enforced disappearances;

(*b*) corruption-related crimes;

(*c*) crimes that cause harm to persons, including death and serious injury, or to property, when such crimes are committed in the territory of the forum State and the State official is present in said territory at the time that such crimes are committed.

2. Paragraph 1 shall not apply to persons who enjoy immunity *ratione personae* during their term of office.

3. Paragraphs 1 and 2 are without prejudice to:

(*a*) any provision of a treaty that is binding on the forum State and the State of the official, under which immunity would not be applicable;

(*b*) the obligation to cooperate with an international tribunal which, in each case, requires compliance by the forum State.