Chapter V

IMMUNITY OF STATE OFFICIALS FROM FOREIGN CRIMINAL JURISDICTION

A. Introduction

40. The Commission, at its fifty-ninth session (2007), decided to include the topic "Immunity of State officials from foreign criminal jurisdiction" in its programme of work and appointed Mr. Roman A. Kolodkin as Special Rapporteur.[226] At the same session, the Commission requested the Secretariat to prepare a background study on the topic, which was made available to the Commission at its sixtieth session.[227]

41. The Special Rapporteur submitted three reports. The Commission received and considered the preliminary report at its sixtieth session (2008) and the second and third reports at its sixty-third session (2011).[228] The Commission was unable to consider the topic at its sixty-first session (2009) and at its sixty-second session (2010).[229]

42. The Commission, at its sixty-fourth session (2012), appointed Ms. Concepción Escobar Hernández as Special Rapporteur to replace Mr. Kolodkin, who was no longer with the Commission. The Commission received and considered the preliminary report of the newly appointed Special Rapporteur at the same session (2012).[230]

B. Consideration of the topic at the present session

43. The Commission had before it the second report of the Special Rapporteur (A/CN.4/661). The Commission considered the report at its 3164th to 3168th and 3170th meetings, on 15 to 17, 21, 22 and 24 May 2013.

44. In the second report, the Special Rapporteur built upon the methodological approaches and general workplan set out in her preliminary report, taking into account the debates, in 2012, in the Commission and in the Sixth Committee. The report considered (*a*) the scope of the topic and of the draft articles; (*b*) the concepts of immunity and jurisdiction; (*c*) the difference between immunity *ratione personae* and immunity *ratione materiae*; and (*d*) the identification of the normative elements of the regime of immunity *ratione personae*. On the basis of the analysis, six draft articles were presented for the consideration of the Commission. These draft articles addressed the scope of the draft articles (draft article 1);[231] immunities not included in the scope of the draft articles (draft article 2);[232] definitions of criminal jurisdiction, immunity from foreign criminal jurisdiction, immunity *ratione personae* and immunity *ratione materiae* (draft article 3);[233] the subjective scope of immunity *ratione personae* (draft article 4);[234] the material scope of immunity *ratione*

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[226] At its 2940th meeting, on 20 July 2007 (see *Yearbook ... 2007*, vol. II (Part Two), para. 376). The General Assembly, in paragraph 7 of its resolution 62/66 of 6 December 2007, took note of the decision of the Commission to include the topic in its programme of work. The topic had been included in the long-term programme of work of the Commission during its fifty-eighth session (2006), on the basis of the proposal contained in annex I to the report of the Commission (*Yearbook ... 2006*, vol. II (Part Two), para. 257, and pp. 191–200).

[227] *Yearbook ... 2007*, vol. II (Part Two), para. 386. For the memorandum on the topic prepared by the Secretariat, see A/CN.4/596 and Corr.1 (mimeographed; available from the Commission's website, documents of the sixtieth session).

[228] *Yearbook … 2008*, vol. II (Part One), document A/CN.4/601 (preliminary report); *Yearbook … 2010*, vol. II (Part One), document A/CN.4/631 (second report); *Yearbook … 2011*, vol. II (Part One), document A/CN.4/646 (third report).

[229] See *Yearbook ... 2009*, vol. II (Part Two), para. 207; and *Yearbook … 2010*, vol. II (Part Two), para. 343.

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

[231] Draft article 1 read as follows:

"*Scope of the draft articles*

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

[232] Draft article 2 read as follows:

"*Immunities not included in the scope of the draft articles*

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

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

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

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

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

[233] Draft article 3 read as follows:

"*Definitions*

"For the purposes of the present draft articles:

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

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

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

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

[234] Draft article 4 read as follows:

"*The subjective scope of immunity* ratione personae

personae (draft article 5);[235] and the temporal scope of immunity *ratione personae* (draft article 6).[236]

45. Following its debate on the second report of the Special Rapporteur, the Commission, at its 3170th meeting, on 24 May 2013, decided to refer the six draft articles contained therein to the Drafting Committee, on the understanding that it would take into account the views expressed in the plenary debate.

46. At its 3174th meeting, on 7 June 2013, the Commission received the report of the Drafting Committee and provisionally adopted three draft articles (see section C.1 below).

47. At its 3193rd to 3196th meetings, on 6 and 7 August 2013, the Commission adopted the commentaries to the draft articles provisionally adopted at the present session (see section C.2 below).

C. Text of the draft articles on immunity of State officials from foreign criminal jurisdiction provisionally adopted so far by the Commission

1. Text of the draft articles

48. The text of the draft articles provisionally adopted so far by the Commission is reproduced below.

Part One

INTRODUCTION

Article 1. Scope of the present draft articles

1. The present draft articles apply to the immunity of State officials[237] 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.

…

Part Two

IMMUNITY *RATIONE PERSONAE*

***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.

***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*.

2. Text of the draft articles and commentaries thereto provisionally adopted by the Commission at its sixty-fifth session

49. The text of the draft articles, together with commentaries, provisionally adopted by the Commission at the sixty-fifth session is reproduced below.

Part One

INTRODUCTION

Article 1. Scope of the present draft articles

1. The present draft articles apply to the immunity of State officials[238] 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.

…

Commentary

(1) Draft article 1 is devoted to establishing the scope of the draft articles on immunity of State officials from foreign criminal jurisdiction. It incorporates in a single provision the dual perspective originally proposed by the Special Rapporteur in two separate articles.[239] Paragraph 1 explains the cases to which the draft articles apply, while paragraph 2 contains a saving or "without prejudice" clause listing the situations which, under international law, are governed by special regimes that are not affected by the present draft articles. In the past, the Commission has used various techniques for defining this dual dimension of the scope of a set of draft articles,[240]

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

[235] Draft article 5 read as follows:

"*The material scope of immunity* ratione personae

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

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

[236] Draft article 6 read as follows:

"*The temporal scope of immunity* ratione personae

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

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

[237] The use of the term "officials" will be subject to further consideration.

[238] *Idem*.

[239] See the Special Rapporteur's second report (A/CN.4/661), draft articles 1 and 2. See also paras. 19–34 of the same report.

[240] In the draft articles on jurisdictional immunities of States and their property, adopted by the Commission at its forty-third session

(*Continued on next page.*)

but in this case it has thought it preferable to combine both dimensions in a single provision, especially since this presents the advantage of facilitating the simultaneous treatment of both dimensions under a single title. It also avoids the use of expressions such as "do not apply", "exclude" and "do not affect" in the title of a different article, which some members of the Commission see as not entirely compatible with the "without prejudice" clause.

(2) Paragraph 1 establishes the scope of the draft articles in its positive dimension. To this end, in the paragraph, the Commission has decided to use the phrase "the present draft articles apply to", which is the wording used recently in other draft articles adopted by the Commission that contain a provision referring to their scope.[241]

On the other hand, the Commission considered that the scope of the draft articles should be defined as simply as possible, so that it could frame the rest of the draft articles and not affect or prejudge the other issues to be addressed later in other provisions in the text. Accordingly, the Commission decided to make a descriptive reference to the scope, listing the elements comprising the title of the topic itself. For the same reason, the phrase "from the exercise of", initially proposed by the Special Rapporteur, has been left out of the definition of the scope. This phrase was interpreted by various members of the Commission in different and even contradictory ways, in terms of the consequences for the definition of the scope of foreign criminal jurisdiction. Account was also taken of the fact that the phrase "exercise of" is used in other draft articles formulated by the Special Rapporteur.[242] The Commission was therefore of the view that the phrase was not needed to define the general scope of the draft articles and has reserved it for use in other parts of the draft articles in which it will have a better place.[243]

(3) Paragraph 1 covers the three elements defining the purpose of the draft articles, namely (*a*) who are the persons enjoying immunity? (State officials); (*b*) what type of jurisdiction is affected by immunity? (criminal jurisdiction); and (*c*) in what domain does such criminal jurisdiction operate? (the criminal jurisdiction of another State).

(4) As to the first element, the Commission has chosen to confine the draft articles to the immunity from foreign criminal jurisdiction that may be enjoyed by those persons who represent or act on behalf of a State. In the Commission's previous work, the persons enjoying immunity have been referred to using the term "officials".[244] However, the use of this term, and its equivalents in the other language versions, has raised certain problems to which the Special Rapporteur has drawn attention in her reports,[245] and which have also been pointed out by some members of the Commission. It should be noted, first, that the terms used in the various language versions are neither interchangeable nor synonymous. It should also be taken into account that these terms are not necessarily suitable for referring to each and every person to whom the present draft articles apply. The Commission consequently considers that the definition of "official" (and its equivalents in the various language versions), as well as decisions on the terms to be used to refer to the persons to whom immunity applies, are matters requiring detailed consideration, which, the Special Rapporteur has proposed, should be undertaken at a later stage, particularly in connection with the analysis of immunity *ratione materiae*. Consequently, at the present stage of the work, the Commission has decided to continue to use the original terminology, on the understanding that it will be given consideration later. This is reflected by the footnote in the text of draft article 1, paragraph 1. The use of the term "official" in the commentaries must be understood to be subject to the same reservation.

(5) Secondly, the Commission has decided to confine the scope of the draft articles to immunity from criminal jurisdiction. The present draft article is not intended to define the concept of criminal jurisdiction, which is being considered by the Commission in relation to another draft article.[246] Nevertheless, the Commission has debated the scope of "criminal jurisdiction" in relation to the acts that would be covered by the concept, particularly with reference to the extension of immunity to certain acts that are closely linked to the concept of personal inviolability, such as the arrest or detention of an individual. With this in mind, and subject to later developments in the Commission's treatment of this issue, for the purposes of defining the scope of the present draft articles, the reference to foreign criminal jurisdiction should be understood as meaning the set of acts linked to judicial processes whose purpose is to determine the criminal responsibility of an individual, including coercive acts that can be carried out against persons enjoying immunity in this context.

(*Footnote 240 continued.*)

(*Yearbook ... 1991*, vol. II (Part Two), para. 28), the Commission chose to deal with the dual dimension of the scope in two separate draft articles, and this was ultimately reflected in the Convention adopted in 2004 (see United Nations Convention on Jurisdictional Immunities of States and Their Property, General Assembly resolution 59/38 of 2 December 2004, annex, articles 1 and 3). On the other hand, in the Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character (1975), and in the Convention on the Law of the Non-navigational Uses of International Watercourses (1997) (General Assembly resolution 51/229 of 21 May 1997, annex), the various aspects of the scope are defined in a single article, which also refers to special regimes. Although the draft articles on the expulsion of aliens, adopted by the Commission on first reading in 2012 (*Yearbook … 2012*, vol. II (Part Two), para. 45), also dealt with the scope in a single article consisting of two paragraphs, the same draft articles include other separate provisions whose purpose is to keep certain special regimes within a specific scope.

[241] This wording has been used, for example, in draft article 1 of the draft articles on the expulsion of aliens.

[242] See, in particular, draft articles 3 (*b*) and 4, as originally proposed by the Special Rapporteur in her second report (A/CN.4/661, paras. 46 and 67).

[243] See draft article 3, as adopted by the Commission (Persons enjoying immunity *ratione personae*).

[244] The words used in the various language versions are as follows: "المسؤولون" (Arabic), "官员" (Chinese), "officials" (English), "*représentants*" (French), "*должностные лица*" (Russian) and "*funcionarios*" (Spanish).

[245] See the Special Rapporteur's preliminary report, *Yearbook … 2012*, vol. II (Part One), document A/CN.4/654, para. 66; see also her second report (A/CN.4/661), para. 32.

[246] It must be kept in mind that the Special Rapporteur formulated a draft definition of criminal jurisdiction in her second report in the context of a draft article on definitions (A/CN.4/661, draft art. 3. See also paras. 36–41 of the same report). This draft article has been referred to the Drafting Committee, which, after extensive discussion, decided to take it up progressively throughout the quinquennium, and not to take a decision on it now.

(6) Thirdly, the Commission decided to confine the scope of the draft articles to immunity from "foreign" criminal jurisdiction, i.e. that which reflects the horizontal relations between States. This means that the draft articles will be applied solely with respect to immunity from the criminal jurisdiction "of another State". Consequently, the immunities enjoyed before international criminal tribunals, which are subject to their own legal regime, will remain outside the scope of the draft articles. This exclusion must be understood to mean that none of the rules that govern immunity before such tribunals are to be affected by the content of the present draft articles.

Nevertheless, the need to consider the special problem presented by so-called mixed or internationalized criminal tribunals has been raised. Similarly, a question has been raised regarding the effect that existing international obligations imposed on States to cooperate with international criminal tribunals would have on the present draft articles. Although diverse views were expressed with regard to both subjects, it is not possible at this stage to definitively address these aspects.

(7) It must be emphasized that paragraph 1 refers to "immunity … from the criminal jurisdiction of another State". The use of the term "from" creates a link between the concepts of "immunity" and "foreign criminal jurisdiction" (or jurisdiction "of another State") that must be duly taken into account. On this point, the Commission is of the view that the concepts of immunity and foreign criminal jurisdiction are closely interrelated: it is impossible to view immunity in abstract terms, without relating it to a foreign criminal jurisdiction which, although it exists, will not be exercised by the forum State precisely because of the existence of immunity. Or, as the International Court of Justice put it, "it is only where a State has jurisdiction under international law in relation to a particular matter that there can be any question of immunities in regard to exercise of that jurisdiction".[247]

(8) The Commission regards immunity from foreign criminal jurisdiction as being procedural in nature. Consequently, immunity from foreign criminal jurisdiction cannot constitute a means of exempting the criminal responsibility of a person enjoying immunity from the substantive rules of criminal law, a responsibility which accordingly is preserved, independently of the fact that a State cannot, through the exercise of its jurisdiction, determine that such responsibility exists at a specific moment and with regard to a given person. On the contrary, immunity from foreign criminal jurisdiction is strictly a procedural obstacle or barrier to the exercise of a State's criminal jurisdiction against the officials of another State. This position was affirmed by the International Court of Justice in the *Arrest Warrant* case,[248] which is followed in the majority of State practice and in the literature.

(9) Paragraph 2 refers to cases in which there are special rules of international law relating to immunity from foreign criminal jurisdiction. This category of special rules has its most well-known and frequently cited manifestation in the regime of privileges and immunities granted under international law to diplomatic agents and to consular officials.[249] However, there are other examples in contemporary international law, both treaty-based and custom-based, which in the Commission's view should likewise be taken into account for the purposes of defining the scope of the present draft articles. Concerning those special regimes, the Commission considers that these are legal regimes that are well established in international law and that the present draft articles should not affect their content and application. It should be recalled that during the preparation of the draft articles on jurisdictional immunities of States and their property, the Commission acknowledged the existence of special immunity regimes, albeit in a different context, and specifically referred to them in article 3, entitled "Privileges and immunities not affected by the present articles".[250]

The relationship between the regime for immunity of State officials from foreign criminal jurisdiction set out in the draft articles and the special regimes just mentioned was established by the Commission with the inclusion of a saving clause in paragraph 2, according to which the provisions of the present draft articles are "without prejudice" to what is set out in the special regimes; here the Commission has followed the wording it used before, in the draft articles on jurisdictional immunities of States and their property.

(10) The Commission has used the term "special rules" as a synonym for the words "special regimes" in its earlier work. Although the Commission has not defined the concept of "special regime", attention should be drawn to the conclusions of the Study Group on the fragmentation of international law, particularly conclusions 2 and 3.[251] For the purposes of the present draft articles, the Commission understands "special rules" to mean those international rules, whether treaty- or custom-based, that regulate the immunity from foreign criminal jurisdiction of persons connected with activities in specific fields of international relations. The Commission sees such "special rules" as coexisting with the regime defined in the present draft articles, the special regime being applied in the event of any conflict between the two regimes.[252] In any event, the Commission considers that the special regimes in question are only those established by "rules of international law", this reference to international law

[247] *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, *Judgment*, *I.C.J. Reports 2002*, p. 3, at p. 19, para. 46. See also the Commission's commentary to draft article 6 of the draft articles on jurisdictional immunities of States and their property, particularly paragraphs (1)–(3) (*Yearbook ... 1991*, vol. II (Part Two), pp. 23–24).

[248] *Arrest Warrant of 11 April 2000* (see previous footnote), para. 60. The International Court of Justice has taken the same position regarding State immunity: see *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)*, *Judgment*, *I.C.J. Reports 2012*, p. 99, at paras. 58 and 100.

[249] See the Vienna Convention on Diplomatic Relations (1961), art. 31, and the Vienna Convention on Consular Relations (1963), art. 43.

[250] See *Yearbook ... 1991*, vol. II (Part Two), pp. 21–22, commentary to article 3.

[251] See *Yearbook ... 2006*, vol. II (Part Two), para. 251.

[252] In its commentary to draft article 3 of the draft articles on jurisdictional immunities of States and their property, the Commission referred to this aspect in the following terms: "The article is intended to leave existing special regimes unaffected, especially with regard to persons connected with the missions listed" (*Yearbook ... 1991*, vol. II (Part Two), p. 22, paragraph (5) of the commentary). See also paragraph (1) of the same commentary.

being essential for the purpose of defining the scope of the "without prejudice" clause.[253]

(11) The special regimes included in paragraph 2 relate to three areas of international practice in which norms regulating immunity from foreign criminal jurisdiction have been identified, namely (*a*) the presence of a State in a foreign country through diplomatic missions, consular posts and special missions; (*b*) the various representational and other activities connected with international organizations; and (*c*) the presence of a State's military forces in a foreign country. Although in all three areas treaty-based norms establishing a regime of immunity from foreign criminal jurisdiction may be identified, the Commission has not thought it necessary to include in paragraph 2 an explicit reference to such international conventions and instruments.[254]

The first group includes special rules relating to the immunity from foreign criminal jurisdiction of persons connected with carrying out the functions of representation, or protection of the interests of the State in another State, whether on a permanent basis or otherwise, while connected with a diplomatic mission, consular post or special mission. The Commission takes the view that the rules contained in the Vienna Convention on Diplomatic Relations, the Vienna Convention on Consular Relations and the Convention on special missions, as well as the relevant rules of customary law, fall into this category.

The second group includes special rules applicable to the immunity from criminal jurisdiction enjoyed by persons connected with an activity in relation to or in the framework of an international organization. In this category are included the special rules applicable to persons connected with missions to an international organization or delegations to organs of international organizations or to international conferences.[255] The Commission's understanding is that it is unnecessary to include in this group of special rules those that apply in general to the international organizations themselves. However, it considers that this category does include norms applicable to the agents of an international organization, especially in cases when the agent has been placed at the disposal of the organization by a State and continues to enjoy the status of State official during the time when he or she is acting on behalf of and for the organization. Regarding this second group of special regimes, the Commission has taken into account the Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character, the Convention on the privileges and immunities of the United Nations and the Convention on the privileges and immunities of the specialized agencies, as well as other treaty-based and customary norms applicable in this area.

The third group of special rules includes those according immunity from criminal jurisdiction to persons connected with the military forces of a State located in a foreign State. This category includes the whole set of rules regulating the stationing of troops in the territory of a third State, even those included in status-of-forces agreements and those included in headquarters agreements or military cooperation accords envisaging the stationing of troops. Also included in this category are agreements made in connection with the short-term activities of military forces in a foreign State.

(12) The list of the special rules described in paragraph 2 is qualified by the words "in particular" to indicate that the clause does not exclusively apply to these special rules. In this connection, various members of the Commission drew attention to the fact that special rules in other areas may be found in practice, particularly in connection with the establishment in a State's territory of foreign institutions and centres for economic, technical, scientific and cultural cooperation, usually on the basis of specific headquarters agreements. Although the Commission has accepted in general terms the existence of these special regimes, it has considered that there is no need to mention them in paragraph 2.

(13) Lastly, it should be noted that the Commission considered the possibility of including in paragraph 2 the practice whereby a State unilaterally grants a foreign official immunity from foreign criminal jurisdiction. However, the Commission decided against such inclusion. This issue may be revisited at a later stage in the consideration of the work on the topic.

(14) On the other hand, the Commission has considered that the formulation of paragraph 2 should parallel the structure of paragraph 1 of the draft article. It must thus be borne in mind that the present draft articles refer to the immunity from foreign criminal jurisdiction of certain persons described as "officials" and that consequently, this subjective element should also be reflected in the "without prejudice" clause. This is why paragraph 2 refers expressly to "persons connected with". The phrase "persons connected with" has been used in line with the terminology in the United Nations Convention on Jurisdictional Immunities of States and Their Property (art. 3). The scope of the term "persons connected with" will depend on the content of the rules defining the special regime that applies to them; it is therefore not possible *a priori* to draw up a single definition for this category. This is also true for civilian personnel connected with the military forces of a State, who will be included in the special regime only to the extent that the legal instrument applicable in each case so establishes.

(15) The combination of the terms "persons connected with" and "special rules" is essential in determining the scope and meaning of the saving or "without prejudice" clause in paragraph 2. The Commission considers that the persons covered in this paragraph (diplomatic agents, consular officials, members of special missions, agents of

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[253] The Commission also included a reference to international law in the above-mentioned draft article 3 of the draft articles on jurisdictional immunities of States and their property. It should be noted that the Commission drew special attention to this formulation in its commentary to the draft article, particularly in paragraphs (1) and (3) thereof.

[254] It must be kept in mind that the Commission also did not list such conventions in the draft articles on jurisdictional immunities of States and their property. However, the commentary to draft article 3 (paragraph (2) thereof) referred to the areas in which there are such special regimes and expressly mentioned some of the conventions establishing those regimes.

[255] This list corresponds to the one already formulated by the Commission in draft article 3, paragraph 1 (*a*), of the draft articles on jurisdictional immunities of States and their property.

international organizations and members of the military forces of a State) are automatically excluded from the scope of the present draft articles, not by the mere fact of belonging to that category of officials, but by the fact that one of the special regimes referred to in draft article 1, paragraph 2, applies to them under certain circumstances. In such circumstances, the immunity from foreign criminal jurisdiction that these persons may enjoy under the special regimes applicable to them will not be affected by the provisions of the present draft articles.

Part Two

IMMUNITY *RATIONE PERSONAE*

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.

Commentary

(1) Draft article 3 lists the State officials who enjoy immunity *ratione personae* from foreign criminal jurisdiction, namely the Head of State, Head of Government and Minister for Foreign Affairs. The draft article confines itself to identifying the persons to whom this type of immunity applies, making no reference to its substantive scope, which will be dealt with in other draft articles.

(2) The Commission considers that there are two reasons, representational and functional, for granting immunity *ratione personae* to Heads of State, Heads of Government and Ministers for Foreign Affairs. First, under the rules of international law, these three office holders represent the State in its international relations simply by virtue of their office, directly and with no need for specific powers to be granted by the State.[256] Second, they must be able to discharge their functions unhindered.[257] It is irrelevant whether those officials are nationals of the State in which they hold the office of Head of State, Head of Government or Minister for Foreign Affairs.

(3) The statement that the Heads of State enjoy immunity *ratione personae* is not subject to dispute, given that this is established in existing rules of customary international law. In addition, various conventions contain provisions referring directly to the immunity from jurisdiction of the Head of State. In this connection, mention must be made of article 21, paragraph 1, of the Convention on special missions, which expressly acknowledges that when the Head of State leads a special mission, he or she enjoys, in addition to what is granted in the Convention, the immunities accorded by international law to Heads of State on an official visit. Similarly, article 50, paragraph 1, of the Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character refers to the other "immunities accorded by international law to Heads of State". Along the same lines, albeit in a different field, the United Nations Convention on Jurisdictional Immunities of States and Their Property includes, in the saving clause in article 3, paragraph 2, an express reference to the immunities accorded under international law to Heads of State.

The immunity from foreign criminal jurisdiction of the Head of State has also been recognized in case law at both the international and national levels. Thus, the International Court of Justice has expressly mentioned the immunity of the Head of State from foreign criminal jurisdiction in the *Arrest Warrant*[258] and *Certain Questions of Mutual Assistance in Criminal Matters*[259] cases. It must be emphasized that examples of national judicial practice, although limited in number, are consistent in showing that Heads of State enjoy immunity *ratione personae* from foreign criminal jurisdiction, both in the proceedings concerning the immunity of the Head of State and in the reasoning that such courts follow in deciding whether other State officials also enjoy immunity from criminal jurisdiction.[260]

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[256] The International Court of Justice has stated that "it is a well-established rule of international law that the Head of State, the Head of Government and the Minister for Foreign Affairs are deemed to represent the State merely by virtue of exercising their functions" (*Armed Activities on the Territory of the Congo (New application: 2002) (Democratic Republic of the Congo v. Rwanda), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 2006*, p. 6, at p. 27, para. 46).

[257] See *Arrest Warrant of 11 April 2000* (footnote 247 above), paras. 53–54, in which the International Court of Justice particularly emphasized the second element with respect to the Minister for Foreign Affairs.

[258] *Arrest Warrant of 11 April 2000* (see footnote 247 above), para. 51.

[259] *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France), Judgment, I.C.J. Reports 2008*, p. 177, at pp. 236–237, para. 170.

[260] National courts have on many occasions cited the immunity *ratione personae* from foreign criminal jurisdiction of the Head of State as grounds for their decisions on substance and their findings that criminal proceedings cannot be brought against an incumbent Head of State. In this regard, see *Re Honecker*, Federal Supreme Court (Second Criminal Chamber) (Federal Republic of Germany), Judgment of 14 December 1984 (Case No. 2 ARs 252/84), reproduced in ILR, vol. 80, pp. 365–366; *Rey de Marruecos*, National High Court, Criminal Division (Spain), decision of 23 December 1998; *Kadhafi*, Court of Cassation (Criminal Division) (France), Judgment No. 1414 of 13 March 2001, reproduced in *Revue générale de droit international public*, vol. 105 (2001), p. 473 (English version in ILR, vol. 125, pp. 508–510); *Fidel Castro*, National High Court, Criminal Division (Spain), decision of 13 December 2007 (the tribunal had already made a similar ruling in two other cases against Fidel Castro, in 1998 and 2005); and *Case against Paul Kagame*, National High Court, Central Investigation Court No. 4 (Spain), Judgment of 6 February 2008. Again in the context of criminal proceedings, but this time as *obiter dicta*, various courts have on numerous occasions recognized immunity *ratione personae* from foreign criminal jurisdiction in general. In those cases, the national courts have not referred to the immunity of a specific Head of State, either because the person had completed his or her term of office and was no longer an incumbent Head of State or because the person was not and had never been a Head of State. See: *Pinochet* (*solicitud de extradición*), National High Court, Central Investigation Court No. 5 (Spain), request for extradition of 3 November 1998; *Regina v. Bartle and the Commissioner of Police for the Metropolis and Others Ex Parte Pinochet Ugarte* (*Pinochet No. 3*), House of Lords (United Kingdom), Judgment of 24 March 1999, reproduced in ILM, vol. 38 (1999), pp. 581–663; *H.S.A., et al. v. S.A., et al.* (decision related to the indictment of Ariel Sharon, Amos Yaron and others), Court of Cassation (Belgium), Judgment of 12 February 2003 (P.02.1139.F), reproduced in ILM, vol. 42, No. 3 (2003), pp. 596–605; *Scilingo*, National High Court, Criminal Division, third section (Spain), Judgment of 27 June 2003; *Association Fédération nationale des victimes d'accidents collectifs "FENVAC SOS Catastrophe"; Association des familles des victimes du Joola et al.*, Court of Cassation, Criminal Division (France), Judgment of 19 January 2010 (09-84.818); *Khurts Bat v. Investigating*

(*Continued on next page.*)

The Commission considers that the immunity from foreign criminal jurisdiction *ratione personae* of the Head of State is accorded exclusively to persons who actually hold that office, and that the title given to the Head of State in each State, the conditions under which he or she acquires the status of Head of State (as a sovereign or otherwise) and the individual or collegial nature of the office are irrelevant for the purposes of the present draft article.[261]

(4) The recognition of immunity *ratione personae* in favour of the Head of Government and the Minister for Foreign Affairs is a result of the fact that, under international law, their representative functions of the State have become recognized as approximate to those of the Head of State. Examples of this may be found in the recognition of full powers for the Head of Government and the Minister for Foreign Affairs for the conclusion of treaties[262] and the equality of the three categories of officials in terms of their international protection[263] and their involvement in the representation of the State.[264] The immunity of Heads of Government and Ministers for Foreign Affairs has been referred to in the Convention on special missions, the Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character, and, implicitly, in the United Nations Convention on Jurisdictional Immunities of States and Their Property.[265] The inclusion of the Minister for Foreign Affairs in the Convention on the prevention and punishment of crimes against internationally protected persons, including diplomatic agents, is particularly significant, since in its own draft articles on the subject, the Commission decided not to include government officials in the list of persons internationally protected,[266] but the Minister for Foreign Affairs was nevertheless included in the final Convention adopted by States.

All of the above-mentioned examples have emerged from the work of the Commission, which has on several occasions dealt with the question of whether expressly to include Heads of State, Heads of Government and Ministers for Foreign Affairs in international instruments. In this connection, it was noted that there was specific mention of the Head of State in article 3 of the United Nations Convention on Jurisdictional Immunities of States and Their Property while excluding any express reference to the Head of Government and Minister for Foreign Affairs. However, there is very little reason to conclude that these examples mean that in the present draft article, the Commission must treat Heads of State, Heads of Government and Ministers for Foreign Affairs differently. It is even less reasonable to conclude that the Head of Government and Minister for Foreign Affairs must be excluded from draft article 3. A number of factors must be taken into account here. First, the present draft articles refer solely to the immunity from foreign criminal jurisdiction of State officials, whereas the Convention on special missions and the Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character refer to all the immunities that Heads of State, Heads of Government and Ministers for Foreign Affairs may enjoy. Second, the United Nations Convention on Jurisdictional Immunities of States and Their Property refers to the immunities of States, while immunity from criminal jurisdiction remains outside

(*Footnote 260 continued.*)

Judge of the German Federal Court, High Court of Justice, Queen's Bench Division Administrative Court (United Kingdom), Judgment of 29 July 2011 ([2011] EWHG 2029 (Admin)), reproduced in ILR, vol. 147, p. 633; and *Nezzar*, Federal Criminal Tribunal (Switzerland), Judgment of 25 July 2012 (BB.2011.140). It should be emphasized that national courts have never stated that a Head of State does not have immunity from criminal jurisdiction, and that this immunity is *ratione personae*. It must also be kept in mind that civil jurisdiction, under which there is a greater number of judicial decisions, consistently recognizes the immunity *ratione personae* from jurisdiction of Heads of State. For example, see: *Kline v. Kaneko*, Supreme Court of the State of New York (United States), Judgment of 31 October 1988 (141 Misc.2d 787); *Mobutu v. SA Cotoni*, Civil Court of Brussels, Judgment of 29 December 1988; *Ferdinand et Imelda Marcos c. Office fédéral de la police*, Federal Tribunal (Switzerland), Judgment of 2 November 1989 (ATF 115 Ib 496), reproduced in part in *Revue suisse de droit international et de droit européen* (1991), pp. 534–537 (English version in ILR, vol. 102, pp. 198–205); *Lafontant v. Aristide*, United States District Court for the Eastern District of New York (United States), Judgment of 27 January 1994; *W. v. Prince of Liechtenstein*, Supreme Court (Austria), Judgment of 14 February 2001 (7 Ob 316/00x); *Tachiona v. Mugabe ("Tachiona I")*, District Court for the Southern District of New York (United States), Judgment of 30 October 2001 (169 F. Supp. 2d 259); *Fotso v. Republic of Cameroon*, District Court of Oregon (United States), Judgment of 22 February 2013 (6:12CV 1415-TC).

[261] In this connection, the provisions of the Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character (art. 50, para. 1) and the 1969 Convention on special missions (art. 21, para. 1), which refer to the case of collegial bodies acting as Head of State, are of interest. On the other hand, the Commission did not see any need to include a reference to this category in the draft articles on the prevention and punishment of crimes against diplomatic agents and other internationally protected persons (see *Yearbook ... 1972*, vol. II, document A/8710/Rev.1, pp. 312–313, paragraph (2) of the commentary to draft article 1), and no reference was accordingly made in the Convention on the prevention and punishment of crimes against internationally protected persons, including diplomatic agents.

[262] 1969 Vienna Convention, art. 7, para. 2 (*a*). The International Court of Justice has made a similar statement on the capacity of the Head of State, Head of Government and Minister for Foreign Affairs to make a commitment on behalf of the State through unilateral acts (*Armed Activities on the Territory of the Congo (New Application: 2002)* (see footnote 256 above), para. 46).

[263] Convention on the prevention and punishment of crimes against internationally protected persons, including diplomatic agents (1973), art. 1, para. 1 (*a*).

[264] In this connection, see the Convention on special missions, art. 21, and the Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character, art. 50.

[265] Article 21 of the Convention on special missions, in addition to the Head of State, refers to the Head of Government and Minister for Foreign Affairs, although it does so in separate paragraphs (para. 1 refers to the Head of State and para. 2 refers to the Head of Government, Minister for Foreign Affairs and other persons of high rank). The same model is followed in the Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character, which also refers to the officials mentioned in separate paragraphs. By contrast, the United Nations Convention on Jurisdictional Immunities of States and Their Property includes only a mention *eo nomine* of the Head of State (art. 3, para. 2), and the other two categories of officials must be considered as included in the concept of "representatives of the State" found in art. 2.1 (*b*) (iv). See paragraphs (6)–(7) of the commentary to article 3 of the draft articles on jurisdictional immunities of States and their property, *Yearbook ... 1991*, vol. II (Part Two), para. 28.

[266] See *Yearbook ... 1972*, vol. II, document A/8710/Rev.1, p. 313, paragraph (3) of the commentary to draft article 1. It must be kept in mind that the Commission decided not to make this reference because it could not be based upon any "broadly accepted rule of international law", but it did acknowledge that "[a] cabinet officer would, of course, be entitled to special protection whenever he was in a foreign State in connexion with some official function". (This sentence is included in both the English and French versions of the commentary, but not in the Spanish version.)

its scope;[267] in addition, far from rejecting the immunities that might be enjoyed by the Head of Government and the Minister for Foreign Affairs, the Commission actually recognized them, but simply did not mention these categories specifically in article 3, paragraph 2, "since it would be difficult to prepare an exhaustive list, and any enumeration of such persons would moreover raise the issues of the basis and of the extent of the jurisdictional immunity exercised by such persons".[268] And third, it must also be borne in mind that all the examples mentioned above preceded the judgment by the International Court of Justice in the *Arrest Warrant* case.

(5) In its judgment in the *Arrest Warrant* case, the International Court of Justice expressly stated that "in international law it is firmly established that, as also diplomatic and consular agents, certain holders of high-ranking office in a State, such as the Head of State, Head of Government and Minister for Foreign Affairs, enjoy immunities from jurisdiction in other States, both civil and criminal".[269] This statement was later reiterated by the Court in the case concerning *Certain Questions of Mutual Assistance in Criminal Matters*.[270] Both of these judgments were discussed extensively by the Commission, particularly with regard to the Minister for Foreign Affairs. During the discussion, most members expressed the view that the *Arrest Warrant* case reflects the current state of international law and that it must accordingly be concluded that there is a customary rule under which the immunity from foreign criminal jurisdiction *ratione personae* of the Minister for Foreign Affairs is recognized. In the view of these members, the position of the Minister for Foreign Affairs and the special functions he or she carries out in international relations constitute the basis for the recognition of such immunity from foreign criminal jurisdiction. On the other hand, some members of the Commission pointed out that the Court's judgment does not constitute sufficient grounds for concluding that a customary rule existed, as it did not contain a thorough analysis of the practice and several judges expressed opinions that differed from the majority view.[271] One member of the Commission who considers that the Court's judgment does not show that there is a customary rule nevertheless said that, in view of the fact that the Court's judgment in that case has not been opposed by States, the absence of a customary rule does not prevent the Commission from including that official among the persons enjoying immunity *ratione personae* from foreign criminal jurisdiction, as a matter of progressive development of international law.

(6) As to the practice of national courts, the Commission has also found that, while there are very few rulings on the immunity *ratione personae* from foreign criminal jurisdiction of the Head of Government and almost none in respect of the Minister for Foreign Affairs, the national courts that have had occasion to comment on this subject have nevertheless always recognized that those high-ranking officials do have immunity from foreign criminal jurisdiction during their term of office.[272]

(7) As a result of the discussion, the Commission found that there are sufficient grounds in practice and in international law to conclude that the Head of State, Head of Government and Minister for Foreign Affairs enjoy immunity *ratione personae* from foreign criminal jurisdiction. Consequently, it has been decided to include them in draft article 3.

(8) The Commission has also looked into whether other State officials could be included in the list of the persons enjoying immunity *ratione personae*. This has been raised as a possibility by some members of the Commission in the light of the evolution of international relations, particularly the fact that high-ranking officials other than the Head of State, Head of Government and Minister for Foreign Affairs are becoming increasingly involved in international forums and making frequent trips outside the national territory. Some members of the Commission have supported the view that other high-ranking officials should be included in draft article 3 with a reference to the *Arrest Warrant* case, stating that the use of the words "such as" should be interpreted to extend the regime of immunity *ratione personae* to high-ranking State officials, other than the Head of State, Head of Government and Minister for Foreign Affairs, who have major responsibilities within the State and who are involved in representation of the State in the fields of their activity. In this connection, some members of the Commission have suggested that immunity *ratione personae* is enjoyed by a minister of defence or a minister of international trade. Other members of the Commission, however, see the use of the words "such as" as not widening the circle of the persons who enjoy this category of immunity, since the Court uses the words in the context of a specific dispute, the subject of which is the immunity from foreign criminal jurisdiction of a Minister for Foreign Affairs. Lastly, several members of the Commission have drawn attention to the difficulty inherent in determining which persons should be deemed to be "other high-ranking officials", since this will depend to a large extent on each country's

[267] The statement that the Convention "does not cover criminal proceedings" was proposed by the Ad Hoc Committee set up on the subject by the General Assembly and was ultimately included in paragraph 2 of General Assembly resolution 59/38 of 2 December 2004, by which the Convention was adopted.

[268] Paragraph (7) of the commentary to article 3 of the draft articles on jurisdictional immunities of States and their property (*Yearbook ... 1991*, vol. II (Part Two), para. 28).

[269] *Arrest Warrant of 11 April 2000* (see footnote 247 above), para. 51.

[270] *Certain Questions of Mutual Assistance in Criminal Matters* (see footnote 259 above), para. 170.

[271] See in particular, in the *Arrest Warrant of 11 April 2000* case (footnote 247 above), the joint separate opinion of Judges Higgins, Kooijmans and Buergenthal; the dissenting opinion of Judge Al-Khasawneh; and the dissenting opinion of Judge *ad hoc* Van den Wyngaert.

[272] With regard to recognition of the immunity from foreign criminal jurisdiction of the Head of Government and the Minister for Foreign Affairs, see the following cases, both criminal and civil, in which national courts have made statements on this subject, either as the grounds for decisions on substance or as *obiter dicta*: *Ali Ali Reza v. Grimpel*, Court of Appeal of Paris (France), Judgment of 28 April 1961 (implicitly recognizes, *a contrario*, the immunity of a Minister for Foreign Affairs), *Revue générale de droit international public*, vol. 66(2) (1962), p. 418, also reproduced in ILR, vol. 47, p. 275; *Chong Boon Kim v. Kim Yong Shik and David Kim*, Circuit Court of the First Circuit (State of Hawaii) (United States), Judgment of 9 September 1963, reproduced in *American Journal of International Law*, vol. 58 (1964), pp. 186–187; *Saltany and Others v. Reagan and Others*, District Court for the District of Columbia (United States), Judgment of 23 December 1988, 702 F. Supp. 319, reproduced in ILR, vol. 80, p. 19; *Tachiona v. Mugabe ("Tachiona I")* (see footnote 260 above); and *H.S.A., et al. v. S.A., et al.* (see footnote 260 above).

organizational structure and method of conferring powers, which differ from one State to the next.[273]

(9) In the case concerning *Certain Questions of Mutual Assistance in Criminal Matters*, the International Court of Justice reverted to the subject of the immunity of high-ranking State officials other than the Head of State, Head of Government and Minister for Foreign Affairs. The Court dealt separately with the immunity of the Head of State of Djibouti and of the two other high-ranking officials, namely the Attorney-General (*procureur de la République*) and the Head of National Security. With regard to the Head of State, the Court made a very clear pronouncement that in general, he or she enjoys immunity from foreign criminal jurisdiction *ratione personae*, although that was not applicable in the specific case, since the invitation to testify issued by the French authorities was not a measure of constraint.[274] With regard to the other high-ranking officials, the Court argued that the acts attributed to them were not carried out within the scope of their duties;[275] it considered that Djibouti did not make it sufficiently clear whether it was claiming State immunity, personal immunity or some other type of immunity; and it concluded that "[t]he Court notes first that there are no grounds in international law upon which it could be said that the officials concerned were entitled to personal immunities, not being diplomats within the meaning of the Vienna Convention on Diplomatic Relations of 1961, and the Convention on Special Missions of 1969 not being applicable in this case".[276]

(10) In national judicial practice, a number of decisions deal with the immunity *ratione personae* from foreign criminal jurisdiction of other high-ranking officials. However, the decisions in question are not conclusive. While some of the decisions are in favour of the immunity *ratione personae* of high-ranking officials such as the minister of defence or minister of international trade,[277] in others, the national courts found that the person under trial did not enjoy immunity, either because he or she was not a Head of State, Head of Government or Minister for Foreign Affairs or because he or she did not belong to the narrow circle of officials who deserve such treatment,[278] which illustrates the major difficulty involved in identifying the high-ranking officials other than the Head of State, Head

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[273] This problem has already been raised by the Commission itself, in paragraph (7) of its commentary to article 3 of the draft articles on jurisdictional immunities of States and their property (*Yearbook ... 1991*, vol. II (Part Two), para. 28). The Commission drew attention to the same problems in paragraph (3) of the commentary to article 1 of the draft articles on the prevention and punishment of crimes against diplomatic agents and other internationally protected persons (*Yearbook ... 1972*, vol. II, document A/8710/Rev.1, p. 313), and in paragraph (3) of the commentary to article 21 of the draft articles on special missions adopted by the Commission at its nineteenth session (*Yearbook ... 1967*, vol. II, document A/6709/Rev.1 and Rev.1/Corr.1, p. 359).

[274] *Certain Questions of Mutual Assistance in Criminal Matters* (see footnote 259 above), paras. 170–180.

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

[276] *Ibid.*, para. 194. See, in general, paras. 181–197.

[277] In this connection, see the case *Re General Shaul Mofaz* (Minister of Defence of Israel), Bow Street Magistrates' Court (United Kingdom), Judgment of 12 February 2004, reproduced in *International and Comparative Law Quarterly*, vol. 53, part 3 (2004), p. 771; and the case *Re Bo Xilai* (Minister for International Trade of China), Bow Street Magistrates' Court, Judgment of 8 November 2005 (reproduced in ILR, vol. 128, p. 713), in which the immunity of Mr. Bo Xilai is acknowledged, not just because he was considered to be a high-ranking official, but particularly because he was on special mission in the United Kingdom. A year later, in a civil case, a United States court recognized Mr. Bo Xilai's immunity, again because he was on special mission in the United States: *Suggestion of Immunity and Statement of Interest of the United States*, District Court for the District of Columbia, Judgment of 24 July 2006 (Civ. No. 04-0649). In the *Association Fédération nationale des victimes d'accidents collectifs "FENVAC SOS Catastrophe"; Association des familles des victimes du Joola et al.* case, Judgment of 19 January 2010 (see footnote 260 above), the court acknowledged in general terms that an incumbent minister of defence enjoys immunity *ratione personae* from foreign criminal jurisdiction, but in the specific case recognized only immunity *ratione materiae*, since the person on trial no longer held that office. In the *Nezzar* case, Judgment of 25 July 2012 (see footnote 260 above), the tribunal stated in general that an incumbent minister of defence enjoyed immunity *ratione personae* from foreign criminal jurisdiction, but in the case in question, it did not recognize immunity because Mr. Nezzar had completed his term of office, and the acts carried out constitute international crimes, depriving him also of immunity *ratione materiae*.

[278] An example of this is the case of *Khurts Bat v. Investigating Judge of the German Federal Court* (see footnote 260 above), in which the court admitted, based on the International Court of Justice's Judgment in the *Arrest Warrant* case (see footnote 247 above), that "in customary international law certain holders of high-ranking office are entitled to immunity *ratione personae* during their term of office" (para. 55) as long as they belong to a narrow circle of specific individuals because "it must be possible to attach to the individual in question a similar status" (para. 59) to that of the Head of State, Head of Government and Minister for Foreign Affairs referred to in the above-mentioned judgment. After analysing the functions carried out by Mr. Khurts Bat, the court concluded that he "falls outwith that narrow circle" (para. 61). Earlier, the Paris Court of Appeal also failed to recognize the immunity of Mr. Ali Ali Reza because, although he was Minister of State of Saudi Arabia, he was not the Minister for Foreign Affairs (see *Ali Ali Reza v. Grimpel* (footnote 272 above)). In the *United States of America v. Manuel Antonio Noriega* case, the Court of Appeals for the Eleventh Circuit, in its Judgment of 7 July 1997 (appeals Nos. 92-4687 and 96-4471), stated that Mr. Noriega, former Commander in Chief of the Armed Forces of Panama, could not be included in the category of persons who enjoy immunity *ratione personae*, dismissing Mr. Noriega's allegation that at the time of the events, he had been Head of State, or *de facto* leader, of Panama (see ILR, vol. 121, pp. 591 *et seq.*). Another court, in the *Republic of the Philippines v. Marcos* case (District Court of the Northern District of California (United States), Judgment of 11 February 1987 (665 F. Supp. 793)), indicated that the Attorney-General of the Philippines did not enjoy immunity *ratione personae*. In the case *I.T. Consultants, Inc. v. The Islamic Republic of Pakistan*, Court of Appeals, District of Columbia Circuit (United States), Judgment of 16 December 2003 (351 F.3d 1184), the court did not recognize the immunity of the Minister of Agriculture of Pakistan. Similarly, in the recent case *Fotso v. Republic of Cameroon* (see footnote 260 above), the court found that the Minister of Defence and the Secretary of State for Defence did not enjoy immunity *ratione personae*, which it nevertheless acknowledged was enjoyed by the President of Cameroon. It should be kept in mind that the three cases previously cited involved the exercise of civil jurisdiction. It must also be noted that on some occasions, national courts have not recognized the immunity from jurisdiction of persons holding high-ranking posts in constituent units within a federal State. In this connection, see the following cases: *R. (Alamieyeseigha) v. Crown Prosecution Service*, Queen's Bench Division (Administrative Court) (United Kingdom), Judgment of 25 November 2005 ([2005] EWHC 2704 (Admin)), in which the court did not recognize the immunity of the Governor and Chief Executive of Bayelsa State in the Federal Republic of Nigeria; and *Public Prosecutor (Tribunal of Naples) v. Milo Djukanovic*, Court of Cassation (Third Criminal Section) (Italy), Judgment of 28 December 2004, in which the court denied immunity to the President of Montenegro before it became an independent State (see *Rivista di diritto internazionale*, vol. 89 (2006), p. 568). Finally, in *Evgeny Adamov v. Federal Office of Justice*, Federal Tribunal (Switzerland), Judgment of 22 December 2005 (1A 288/2005), the court denied immunity to a former Minister of Atomic Energy of the Russian Federation in an extradition case; however, it acknowledged in an *obiter dictum* that it was possible for high-ranking officials, without stating that they do enjoy immunity (available from http://opil.ouplaw.com/, International Law in Domestic Courts (ILDC) 339 (CH 2005)).

of Government and Minister for Foreign Affairs who can indisputably be deemed to enjoy immunity *ratione personae*. It should also be pointed out, however, that in some of these decisions, the immunity from foreign criminal jurisdiction of a high-ranking official is analysed from various perspectives (immunity *ratione personae*, immunity *ratione materiae*, State immunity, immunity deriving from a special mission), reflecting the uncertainty in determining precisely what might be the immunity from foreign criminal jurisdiction that is enjoyed by high-ranking officials other than the Head of State, Head of Government and Minister for Foreign Affairs.[279]

(11) On another level, it must be recalled that the Commission has already referred to the immunity of other high-ranking officials in its draft articles on special missions and its draft articles on the representation of States in their relations with international organizations.[280] It must be recalled that these instruments only establish a regime under which such persons continue to enjoy the immunities accorded to them under international law beyond the framework of those instruments. However, neither in the text of the draft articles nor in the Commission's commentaries thereto is it clearly indicated what these immunities are and whether they do or do not include immunity from foreign criminal jurisdiction *ratione personae*. It must also be emphasized that although these high-ranking officials may be deemed to be included in the category of "representatives of the State" mentioned in article 2, paragraph 1 (*b*) (iv), of the United Nations Convention on Jurisdictional Immunities of States and Their Property, that instrument—as previously mentioned—does not apply to "criminal proceedings". Nevertheless, some members of the Commission stated that high-ranking officials do benefit from the immunity regime of special missions, including immunity from foreign criminal jurisdiction, when they are on an official visit to a third State as part of their fulfilment of the functions of representing the State in the framework of their substantive duties. It was said that this offers a means of ensuring the proper fulfilment of the sectoral functions of this category of high-ranking officials at the international level.

(12) In view of the foregoing, the Commission considers that "other high-ranking officials" do not enjoy immunity *ratione personae* for the purposes of the present draft articles, but that this is without prejudice to the rules pertaining to immunity *ratione materiae*, and on the understanding that when they are on official visits, they enjoy immunity from foreign criminal jurisdiction based on the rules of international law relating to special missions.

(13) The phrase "from the exercise of" has been used in the draft article with reference both to immunity *ratione personae* and to foreign criminal jurisdiction. The Commission decided not to use the same phrase in draft article 1 (Scope of the present draft articles) so as not to prejudge the substantive aspects of immunity, in particular its scope, that will be taken up in other draft articles.[281] In the present draft article, the Commission has decided to retain the phrase "from the exercise of", since it illustrates the relationship between immunity and foreign criminal jurisdiction and emphasizes the essentially procedural nature of the immunity that comes into play in relation to the exercise of criminal jurisdiction with respect to a specific act.[282]

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*.

Commentary

(1) Draft article 4 deals with the scope of immunity *ratione personae* from both the temporal and material standpoints. The scope of immunity *ratione personae* must be understood by looking at the temporal aspect (para. 1) in conjunction with the material aspect (para. 2). Although each of these aspects is conceptually distinct, the Commission has chosen to cover them in a single article, since this offers a more comprehensive view of the meaning and scope of the immunity enjoyed by Heads of State,

[279] The decision in the *Khurts Bat v. Investigating Judge of the German Federal Court* case (see footnote 260 above) is a good example of this. In the *Association Fédération nationale des victimes d'accidents collectifs "FENVAC SOS Catastrophe"; Association des familles des victimes du Joola et al.* case, Judgment of 19 January 2010 (see footnote 260 above), the court ruled simultaneously, and without sufficiently differentiating its ruling, on immunity *ratione personae* and immunity *ratione materiae*. In the *Nezzar* case (see footnote 260 above), after making a general statement about immunity *ratione personae*, the Swiss Federal Criminal Tribunal also considered whether immunity *ratione materiae* or the diplomatic immunity claimed by the person concerned could be applied. The arguments used by national courts in other cases are even more imprecise, as in the case of *Kilroy v. Windsor*, District Court for the Northern District of Ohio, Eastern Division (United States), which, in its Judgment of 7 December 1978 in a civil case (Civ. No. C-78-291), recognized the immunity *ratione personae* of the Prince of Wales because he was a member of the British royal family and was heir apparent to the throne, but also because he was on official mission to the United States. Noteworthy in the Bo Xilai case (see footnote 277 above) was the fact that, while both the British and United States courts recognized the immunity from jurisdiction of the Chinese Minister of Commerce, they did so because he was on an official visit and enjoyed the immunity derived from special missions.

[280] Draft articles on the representation of States in their relations with international organizations, adopted by the Commission at its twenty-third session, *Yearbook ... 1971*, vol. II (Part One), document A/8410/Rev.1, pp. 284 *et seq*. On other occasions the Commission has used the expressions "*personnalité officielle*" ("official") (draft articles on the prevention and punishment of crimes against diplomatic agents and other internationally protected persons, art. 1, *Yearbook ... 1972*, vol. II, document A/8710/Rev.1) and "other persons of high rank" (draft articles on special missions, art. 21, *Yearbook ... 1967*, vol. II, document A/6709/Rev.1 and Rev.1/Corr.1, p. 359).

[281] See above, paragraph (2) of the commentary in question.

[282] See *Arrest Warrant of 11 April 2000* (footnote 247 above), para. 60; and *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)* (footnote 248 above), para. 58.

Heads of Government and Ministers for Foreign Affairs. The Commission has decided to cover the temporal aspect first, since this gives a better understanding of the material scope of immunity *ratione personae*, which is limited to a specific period of time.

(2) With regard to the temporal scope of immunity *ratione personae*, the Commission has thought it necessary to include the term "only" so as to emphasize the point that this type of immunity applies to Heads of State, Heads of Government and Ministers for Foreign Affairs exclusively during the period when they hold office. This is consistent with the very reason for according such immunity, which is the special position held by such officials within the State's organizational structure and which, under international law, places them in a special situation of having a dual representational and functional link to the State in the ambit of international relations. Consequently, immunity *ratione personae* loses its significance when the person enjoying it ceases to hold one of those posts.

This position has been upheld by the International Court of Justice, which stated in the *Arrest Warrant* case that "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".[283] Although the Court was referring to the Minister for Foreign Affairs, the same reasoning applies, *a fortiori,* to the Head of State and the Head of Government. Moreover, the limitation of immunity *ratione personae* to the period of time in which the persons enjoying such immunity hold office is also recognized in the conventions establishing special regimes of immunity *ratione personae*, particularly the Vienna Convention on Diplomatic Relations and the Convention on special missions.[284] The Commission itself, in its commentaries to the draft articles on jurisdictional immunities of States and their property, stated, "The immunities *ratione personae*, unlike immunities *ratione materiae* which continue to survive after the termination of the official functions, will no longer be operative once the public offices are vacated or terminated".[285] The strict temporal scope of immunity *ratione personae* is also confirmed by various national court decisions.[286]

Consequently, the Commission considers that after the term of office of the Head of State, Head of Government or Minister for Foreign Affairs has ended, immunity *ratione personae* ceases. The Commission has not thought it necessary to indicate the specific criteria to be taken into account in order to determine when the term of office of the persons enjoying such immunity begins and ends, since this depends on each State's legal order, and practice in this area varies.

(3) During—and only during—the term of office, immunity *ratione personae* extends to all the acts carried out by the Head of State, Head of Government and Minister for Foreign Affairs, both those carried out in a private capacity and those performed in an official capacity. In this way, immunity *ratione personae* is configured as "full immunity"[287] with reference to any act carried out by any of the individuals just mentioned. This configuration reflects State practice.[288]

As the International Court of Justice stated in the *Arrest Warrant* case, with particular reference to a Minister for Foreign Affairs, extension of immunity to acts performed in both a private and official capacity is necessary to ensure that the persons enjoying immunity *ratione personae* are not prevented from exercising their specific official functions, since "[t]he consequences of such impediment

[283] *Arrest Warrant of 11 April 2000* (see footnote 247 above), para. 61.

[284] See the Vienna Convention on Diplomatic Relations, art. 39, para. 2; and the Convention on special missions, art. 43, para. 2.

[285] It added, "All activities of the sovereigns and ambassadors which do not relate to their official functions are subject to review by the local jurisdiction, once the sovereigns or ambassadors have relinquished their posts" (*Yearbook ... 1991*, vol. II (Part Two), para. 28, at paragraph (19) of the commentary to draft article 2, para. 1 (*b*) (v)).

[286] Such decisions have often arisen in the context of civil cases, where the same principle of a temporal limitation for the immunity applies. See, for example, *Mellerio c. Isabel de Bourbon, ex-Reine d'Espagne*, Paris Court of Appeal (France), 3 June 1872, reproduced in *Recueil général des lois et des arrêts 1872*, vol. II, p. 293; *Seyyid Ali Ben Hamond, Prince Rashid c. Wiercinski*, Tribunal civil de la Seine (France), 25 July 1916, reproduced in *Revue de droit international privé et de droit pénal international*, vol. 15 (1919), p. 505; *Ex-roi d'Égypte Farouk c. S.A.R.L. Christian Dior*, Paris Court of Appeal (France), 11 April 1957, reproduced in *Journal du droit international*, vol. 84(1) (1957), pp. 716–718; *Société Jean Dessès c. Prince Farouk et Dame Sadek*, Tribunal de Grande Instance de la Seine (France), 12 June 1963, reproduced in *Revue critique de droit international privé* (1964), p. 689, and, English version, in ILR, vol. 65, pp. 37–38; *United States of America v. Noriega*, District Court for the Southern District of Florida (United States), 8 June 1990, 746 F. Supp. 1506; *In re Estate of Ferdinand Marcos*, Court of Appeals, Ninth Circuit (United States), 16 June 1994, 25 F.3d 1467, 1471; and the Spanish request for extradition delivered on 3 November 1998 in the *Pinochet* case (see footnote 260 above).

[287] The International Court of Justice refers to the material scope of immunity *ratione personae* as "full immunity" (*Arrest Warrant of 11 April 2000* (see footnote 247 above), para. 54). The Commission itself, for its part, has stated with reference to the immunity *ratione personae* of diplomatic agents that "[t]he immunity from criminal jurisdiction is complete" (*Yearbook ... 1958*, vol. II, document A/3859, p. 98, paragraph (4) of the commentary to article 29 of the draft articles on diplomatic intercourse and immunities).

[288] See, for example, *Arafat e Salah*, Court of Cassation (Italy), 28 June 1985, *Rivista di diritto internazionale*, vol. 69(4) (1986), p. 884; *Ferdinand et Imelda Marcos c. Office fédéral de la police* (footnote 260 above); *Regina v. Bartle and the Commissioner of Police for the Metropolis and Others Ex Parte Pinochet Ugarte (Pinochet No. 3)* (footnote 260 above), at p. 592; *Kadhafi*, Court of Appeal of Paris (Indictments Division) (France), Judgment of 20 October 2000, reproduced in *Revue générale de droit international public*, vol. 105 (2001), p. 475 (English version in ILR, vol. 125, p. 490, at p. 509); *H.S.A., et al. v. S.A., et al.* (footnote 260 above), at p. 599; *Issa Hassan Sesay a.k.a. Issa Sesay, Allieu Kondewa, Moinina Fofana v. President of the Special Court, Registrar of the Special Court, Prosecutor of the Special Court, Attorney-General and Minister of Justice*, Supreme Court of Sierra Leone, Judgment of 14 October 2005, SC No. 1/2003; and *Case against Paul Kagame* (footnote 260 above), pp. 156–157. Among more recent cases, see *Association fédération nationale des victimes d'accidents collectifs "FENVAC SOS Catastrophe"; Association des familles des victimes du Joola et al.*, Paris Court of Appeal, Investigating Division, Judgment of 16 June 2009, confirmed by the Court of Cassation, Judgment of 19 January 2010 (footnote 260 above); *Khurts Bat v. Investigating Judge of the German Federal Court* (footnote 260 above), para. 55; and the *Nezzar* case (footnote 260 above), legal ground No. 5.3.1. See also Paris Court of Appeal, *Pôle 7*, Second Investigating Division (France), Judgment of 13 June 2013.

to the exercise of those official functions are equally serious … regardless of whether the arrest relates to alleged acts performed in an 'official' capacity or a 'private' capacity".[289] Thus, "no distinction can be drawn between acts performed by a Minister for Foreign Affairs in an 'official' capacity, and those claimed to have been performed in a 'private capacity'".[290] The same reasoning must apply, *a fortiori*, to the Head of State and Head of Government.

(4) As regards the terminology used to refer to acts covered by immunity *ratione personae*, it must be borne in mind that no single, uniform wording is actually in use. For example, the Vienna Convention on Diplomatic Relations makes no express distinction between acts carried out in a private or official capacity in referring to acts to which the immunity from criminal jurisdiction of diplomatic agents extends, although it is understood to apply to both categories.[291] Moreover, the terminology in other instruments, documents and judicial decisions, as well as in the literature, also lacks consistency, with the use, among others, of the terms "official acts and private acts", "acts performed in the exercise of their functions", "acts linked to official functions" and "acts carried out in an official or private capacity". In the present draft article, the Commission has found it preferable to use the phrase "acts performed, whether in a private or official capacity", following its use by the International Court of Justice in the *Arrest Warrant* case.

However, the Commission has not found it necessary to take a position at the present time on what types of acts should be considered "acts performed in an official capacity", since this is a category of acts which will be taken up at a later stage, in connection with the analysis of immunity *ratione materiae*, and which should not be prejudged now.

It should also be pointed out that, in adopting paragraph 2, the Commission has not concerned itself with the issue of possible exceptions to immunity, a subject that will be taken up at a later stage.

(5) The Commission understands the term "acts" to refer both to acts and to omissions. Although the terminology to be employed has been the subject of debate, the Commission has chosen to use the term "acts" in line with the English text of the articles on responsibility of States for internationally wrongful acts, article 1 of which uses the term "acts" in the sense that an act "may consist in one or more actions or omissions or a combination of both".[292] In addition, the term "act" is commonly used in international criminal law to define conduct (active and passive) from which criminal responsibility is established. In the Rome Statute of the International Criminal Court, the term "acts" has been used in a general sense in articles 6, 7 and 8, without having elicited questions about whether both acts and omissions are included under that term, since this depends solely on each specific criminal offence. The statutes of the International Tribunal for the Former Yugoslavia[293] and the International Tribunal for Rwanda[294] use the term "act" to refer to conduct, both active and passive, constituting an offence falling within the competence of those tribunals. The term "act" has also been used in various international treaties that are designed to impose obligations upon States but nevertheless specify conduct that may give rise to criminal responsibility. This is the case, for example, with the Convention on the Prevention and Punishment of the Crime of Genocide (art. 2) and the Convention against torture and other cruel, inhuman or degrading treatment or punishment (art. 1).

(6) The acts to which immunity *ratione personae* extends are those that a Head of State, Head of Government or Minister for Foreign Affairs has carried out during or prior to their term of office. The reason for this is the purpose of immunity *ratione personae*, which relates both to protection of the sovereign equality of the State and to guarantees that the persons enjoying this type of immunity can perform their functions of representation of the State unimpeded throughout their term of office. In this sense, there is no need for further clarification regarding the applicability of immunity *ratione personae* to the acts performed by such persons throughout their term of office. As regards acts performed prior to the term of office, it must be noted that immunity *ratione personae* applies to them only if the criminal jurisdiction of a third State is to be exercised during the term of office of the Head of State, Head of Government or Minister for Foreign Affairs. This is because, as the International Court of Justice stated in the *Arrest Warrant* case, "no distinction can be drawn … between acts performed before the person concerned assumed office as Minister for Foreign Affairs and acts committed during the period of office. Thus, if a Minister for Foreign Affairs is arrested in another State on a criminal charge, he or she is clearly thereby prevented from exercising the functions of his or her office. The consequences of such impediment to the exercise of those official functions are equally serious, regardless of whether … the arrest relates to acts allegedly performed before the person became the Minister for Foreign Affairs or to acts performed while in office".[295]

In any event, it must be noted that, as the International Court of Justice has also stated in the same case, immunity *ratione personae* is procedural in nature and must be interpreted, not as exonerating a Head of State, Head of Government or Minister for Foreign Affairs from criminal responsibility for acts committed during or prior to their term of office, but solely as suspending the exercise of foreign jurisdiction during the term of office of those

[289] *Arrest Warrant of 11 April 2000* (see footnote 247 above), para. 55.

[290] *Ibid.*

[291] This is the conclusion to be drawn from reading article 31, paragraph 1, in conjunction with article 39, paragraph 2, of the Convention. Articles 31, paragraph 1, and 43, paragraph 2, of the Convention on special missions must be construed in the same way.

[292] *Yearbook … 2001*, vol. II (Part Two) and corrigendum, p. 32, paragraph (1) of the commentary to draft article 1. It should be pointed out that although the Spanish and French versions use different terms to refer to the same category of acts ("*hecho*" and "*fait*", respectively), in the part of the Commission's commentary cited above, the three language versions coincide.

[293] Report submitted by the Secretary-General pursuant to paragraph 2 of Security Council resolution 808 (1993) (S/25704), annex.

[294] Security Council resolution 955 (1994), 8 November 1994, annex.

[295] *Arrest Warrant of 11 April 2000* (see footnote 247 above), para. 55.

high-ranking officials.[296] Consequently, when the term of office ends, the acts carried out during or prior to the term of office cease to be covered by immunity *ratione personae* and may, in certain cases, be subject to the criminal jurisdiction that cannot be exercised during the term of office.

Lastly, it should be noted that immunity *ratione personae* does not in any circumstances apply to acts carried out by a Head of State, Head of Government or Minister for Foreign Affairs after their term of office. Since they are now considered "former" Head of State, Head of Government or Minister for Foreign Affairs, such immunity would have ceased when the term of office ends.

(7) Paragraph 3 addresses what happens with respect to acts carried out in an official capacity while in office by the Head of State, Head of Government or Minister for Foreign Affairs after their term of office ends. Paragraph 3 proceeds on the principle that immunity *ratione personae* ceases when the Head of State, Head of Government or Minister for Foreign Affairs leaves office. Consequently, immunity *ratione personae* no longer exists after their term of office ends. Nevertheless, it must be kept in mind that a Head of State, Head of Government or Minister for Foreign Affairs may, during their term of office, have carried out acts in an official capacity which do not lose that quality merely because the term of office has ended and may accordingly be covered by immunity *ratione materiae*. This matter has not been disputed in substantive terms, although it has been expressed variously in State practice, treaty practice and judicial practice.[297]

Thus paragraph 3 sets forth a "without prejudice" clause on the potential applicability of immunity *ratione materiae* to such acts. This does not mean that immunity *ratione personae* is prolonged past the end of term of office of persons enjoying such immunity, since that is not in line with paragraph 1 of the draft article. Nor does it mean that immunity *ratione personae* is transformed into a new form of immunity *ratione materiae* which applies automatically by virtue of paragraph 3. The Commission considers that the "without prejudice" clause simply leaves open the possibility that immunity *ratione materiae* might apply to acts carried out in an official capacity and during their term of office by a former Head of State, Head of Government or Minister for Foreign Affairs when the rules governing that category of immunity make this possible. Paragraph 3 does not prejudge the content of the immunity *ratione materiae* regime, which will be developed in Part Three of the draft articles.

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[296] "Jurisdictional immunity may well bar prosecution for a certain period or for certain offences; it cannot exonerate the person to whom it applies from all criminal responsibility" (*ibid.*, para. 60).

[297] Thus, for example, with reference to the immunity of members of diplomatic missions, the Vienna Convention on Diplomatic Relations expressly states that "with respect to acts performed by such a person in the exercise of his functions as a member of the mission, immunity shall continue to subsist" (art. 39, para. 2); the formulation is repeated in the Convention on special missions (art. 43, para. 1). In the judicial practice of States, this has been expressed in a wide variety of ways: reference is sometimes made to "residual immunity", the "continuation of immunity in respect of official acts" or similar wording. On this aspect, see the analysis by the Secretariat in its 2008 memorandum (A/CN.4/596 and Corr.1; mimeographed; available from the Commission's website, documents of the sixtieth session, paras. 137 *et seq.*).