



**INTER-SESSIONAL MEETING OF LEGAL EXPERTS TO DISCUSS MATTERS RELATING TO INTERNATIONAL LAW COMMISSION TO BE HELD ON 10<sup>TH</sup> APRIL 2012 AT AALCO SECRETARIAT, NEW DELHI**

## **Immunity of State Officials From Foreign Criminal Jurisdiction**

### **Background Paper**

#### **I. INTRODUCTION**

The application of international criminal law for the prosecution of State Officials was first witnessed after the Second World War. State Officials from Germany were prosecuted and punished by the Nuremberg tribunal which was established by the Charter of the International Military tribunal. This charter outlawed State Officials' defence of immunity for crimes against peace (aggression), crimes against humanity and war crimes. Similarly, the Tokyo Tribunal, which was established by the Charter of the International Military Tribunal for the Far East, had outlawed the defense of immunity of State Officials in relation to international crimes. Hence, immunity of State Officials has been rejected at least since the days of Nuremberg.

Subsequent to World War II, international law on the doctrine of immunity of State Officials developed further. Different international Conventions, principles and statutes of international criminal tribunals and courts rejected the defence of immunity of State Officials before international courts and tribunals. In all these instruments the official capacity of a person is neither a defence for prosecution nor a mitigating factor in their punishment. The contemporary law on non-recognition of the immunity of state officials for international crimes is embodied in Article 27 of the Rome Statute establishing the International criminal Court which sets out the position in international law for the prosecution of individuals for international crimes before international courts.

Of late, the question as to whether immunity of State Officials should prevail over the duty to prosecute and punish individuals responsible for international crimes has resurfaced in the light of the new developments in the international criminal law. For instance, international and national courts which have prosecuted state officials have

faced challenges in a number of areas including jurisdictional matters, the enforcement of warrants of arrest and subpoenas against sitting State Officials and so on. Furthermore, international courts have held differently regarding the immunity of State Officials in respect of *subpoenas duces tecum* and *subpoenas ad testificandum* –where international crimes are at the core of discussion. The uncertainties that underpin these issues coupled with the recognition of the increasing problem of immunity of State Officials before national courts, triggered the International Law Commission [ILC] to embark on a study on the immunity of State Officials from foreign criminal jurisdiction.

This background paper seeks to examine the legal issues that arise in connection with this topic, both from classical and contemporary perspectives taking into account the recent developments in the field of international criminal law. It tries to analyze answers to the following issues; How has international law evolved since these first bold attempts? To what extent are State Officials held accountable for such serious crimes today? In an effort to find answers to these questions and to highlight the important components of the debates, this Paper will begin with a brief review of the relevant treaty provisions relating to immunity of state officials as they apply to serious international crimes. It will then, go on to examine the issue of potential exception to the immunity rule for state officials beyond the well-known troika. In the Third part, it will narrate how the International Law Commission [ILC] has dealt with this topic, and in the Fourth part, the opinions of Member States of AALCO on this issue are presented with a view to elicit any common positions that they hold. Finally it offers some general comments.

## **II. RELEVANT TREATY LAW**

### **i. Immunity**

Immunity is usually defined as “the exception or exclusion of the entity, individual, or property enjoying it from the jurisdiction of the State; an obstacle to the exercise of jurisdiction; limitation of jurisdiction; a defence used to prevent the exercise of jurisdiction over the entity, individual or property.”<sup>1</sup> The granting of immunity, and the type of immunity granted, depends on whether one is speaking of foreign diplomats, Heads of State, or other high-ranking officials. With respect to the former, Article 31 of the *Vienna Convention on Diplomatic Relations* grants diplomatic agents immunity from the criminal jurisdiction of the receiving state; and Article 32 stipulates that this immunity may be waived by the sending state, but that such waiver must always be expressed<sup>2</sup>. Thus, immunity for diplomats and their entourage is largely governed by

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<sup>1</sup> Preliminary report on immunity of State officials from foreign criminal jurisdiction, A/CN.4/601, by Special Rapporteur Roman Anatolevich Kolodkin. at p.27 [ILC Preliminary Report]. Available on: [www.un.org/law/ilc](http://www.un.org/law/ilc)

<sup>2</sup> Vienna Convention on Diplomatic Relations, 18 April 1961, 500 U.N.T.S. 95-239 at art. 31-32.

treaty law, is specific to the host country, and can be removed if the host state declares the diplomat and/or members of their entourage to be *persona non grata*<sup>3</sup>.

With respect to Heads of State, or other high-ranking officials, immunity *ratione materiae*, or functional immunity (immunity for official acts committed as part of one's duties while in office), is traditionally granted to state officials. When the official leaves office, he or she continues to enjoy immunity *ratione materiae* with regard to acts performed while he or she was serving in an official capacity. In addition to immunity *ratione materiae*, high-ranking officials (traditionally, the "troika") are also granted immunity *ratione personae*, immunity for personal acts committed during the official's time in office. Since the immunity is connected with the post occupied by the official in government service it is of temporary character and becomes effective when the official takes up the post and ceases when he or she leaves that post.

Finally, the immunities attached to the Head of State are often considered qualitatively from those attached to the other two positions. This is because the Head of State is considered the "personification" of that state, someone whose sovereignty is inviolable. For example, Article 21 of the 1969 Convention on Special Missions clearly distinguishes between Heads of State in paragraph 1 and Heads of Government/Foreign Ministers in paragraph 2<sup>4</sup>.

## ii. Customary International Law

For a principle to attain the status of customary law, two conditions need to be satisfied. It requires widespread state practice coupled with *opinio juris*, i.e, a belief on the part of the state concerned that international law obliges it. The immunity of state officials or persons in their official capacity from jurisdiction or prosecution finds its origin in customary international law, later developing into Conventional law. Eminent Scholar William Schabas has rightly observed that 'customary international law recognizes certain degrees of immunity from criminal prosecution for heads of state and other officials<sup>5</sup>. Hence it exists by virtue of customary international law and it is largely a matter of custom. The customary nature of the immunity of state officials is justified and based on state and certain judicial practices. The International Court of justice [ICJ] has accepted that the immunity of state officials originates from customary international law<sup>6</sup>.

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<sup>3</sup> Once declared *persona non grata*, an individual is no longer protected by diplomatic immunity and must leave the country in order to avoid being prosecuted under the host country's domestic laws.

<sup>4</sup> Vienna Convention on Special Missions. New York, 16 December 1969, Annex to UNGA res. 2530 (XXIV) of 8 December 1969 at Art. 21. It should be noted that there are conflicting opinions as to what extent this Convention in particular may be considered a codification of Customary International law.

<sup>5</sup> William Schabas, *Genocide in international Law* [ 2000]

<sup>6</sup> The Case concerning the Arrest warrant of 11 April 2000 (The Democratic republic of Congo Vs Belgium) 2002 ICJ Reports 14 Feb 2002 , Paras 58-59. A brief overview of this case is given in the next part of this report.

### iii. Rationale for Immunities

Three basic theories have been advanced for the grant of immunities. Under the “extraterritoriality theory” the legal fiction was created whereby the premises of a mission or the temporary premises of a sovereign in a foreign jurisdiction were perceived to be an extension of the territory of the sending State. In the vocabulary of Westlake, “there came [a] desire to find a juridical ground for privileges already enjoyed which led to the fiction that the precincts of a legation are part of the State which sends it, and consequently to the term ‘extraterritoriality’ indicative of absence or exclusion from the geographical territory”<sup>7</sup>.

For diplomatic envoys, extraterritoriality was rationalized on the necessity that envoys must, for purposes of fulfilling their duties, be independent of the jurisdiction and control of the receiving State, while in the case of the sovereigns it was premised on the principle *par in parem non habet imperium* or *par in parem non habet jurisdictionem*. As a consequence of State equality, no State can claim jurisdiction over another<sup>8</sup>. Immunity has also been deduced from the principles of independence and of dignity of States<sup>9</sup> and of non-interference<sup>10</sup>.

The “representative theory” bases immunities on the presupposition that the mission personifies the sending State. In relation to the sovereign or head of State, he represented in his person the collective power of the State<sup>11</sup> and was considered to be its chief organ and representative in the totality of its international relations; all his legally relevant acts were considered acts of his State; and his competence to perform such acts was *jus repraesentationis omnimodae*. The immunities and privileges belonged to the head of State in his representative character. With time, situations in which a head of State would negotiate directly and in person with a foreign power became occasional and the foreign minister began to direct foreign affairs of the State in the name of the head of State and with his consent; he was a middleman, through whose “hands ... all transactions concerning foreign affairs must pass”.

The “functional necessity theory” justifies immunities as being necessary for the mission to perform its functions. In the elaboration of the Vienna Convention on Diplomatic Relations, the Commission was guided by the functional theory “in solving problems on

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<sup>7</sup> John Westlake, *International Law* (Cambridge, Cambridge University Press, 1904), Part I, p. 263.

<sup>8</sup> Robert Jennings and Arthur Watts (eds.), *Oppenheim’s International Law*, 9th edition (London and New York: Longman, 1992), vol. 1, p. 341.

<sup>9</sup> *Ibid.*, p.342.

<sup>10</sup> *Pinochet* case (No. 3), Lord Saville of Newdigate, p. 642; Lord Millet, p. 645; and Lord Phillips of Worth Matravers, p. 658.

<sup>11</sup> Robert Phillimore, *Commentaries upon International Law*, 2nd edition (1871), vol. II, pp. 127- 128. See also Arthur Watts, “The Legal Position in International Law of Heads of States, of Governments and Foreign Ministers”, *Recueil des cours ...*, vol. 247 (1994-III), pp. 9-136.

which practice gave no clear pointers, while also bearing in mind the representative character of the head of the mission and of the mission itself<sup>12</sup>. The functional necessity theory seems to represent a more contemporary rationalization of immunities<sup>13</sup>. In the *Arrest Warrant* case, it was recognized that the immunities of ministers for foreign affairs were accorded to ensure the effective performance of their functions on behalf of their respective States<sup>14</sup>.

#### **iv. Immunities at the Domestic Level**

It may be mentioned at this stage that arising from such functional expediency, it is not unusual for immunities to be granted through national legislation at the domestic level in respect of the head of State, head of Government or other members in the executive branch such as members of the Cabinet, or to members of the legislative branch, including the Speaker and members of legislative assemblies, in particular with respect to utterances made in the performance of their official functions. The rationale behind such immunities is embedded in the constitutional order, in particular the principle of separation of powers. It is essential for the functioning of the various branches of Government that its officials are able to execute their respective functions or to express honest opinions without fear of prosecution or favour.

Customary international law does not seem to contain any rule imposing a general obligation on a State to disregard national legislation that may provide immunity with respect to its own officials. However, any such national legislation may be in conflict with a treaty rule imposing an obligation to try and punish individuals of crimes under international law. France amended its constitutional provisions relating to immunity to ensure compatibility with its obligations assumed under the 1998 Rome Statute of the International Criminal Court.

The present Paper is not as such concerned with immunities under national legislation accruing to State officials to fulfil functions under the internal order. However, the impact of such immunities on the effective prosecution of crimes cannot be underestimated. Other obstacles at the national level that may impede the timely and effective prosecution or jeopardize cooperation in criminal matters include national laws granting a general amnesty; national statutes of limitation; and the application of the *ne bis in idem* rule.

#### **v. United Nations Convention on Jurisdictional Immunities of States and their Property**

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<sup>12</sup> Yearbook of the International Law Commission, 1958, Vol.. II, General Comments on Section II, paras 1-3.

<sup>13</sup> Ibid. The ILC noted that this theory seems to be “gaining ground in modern times”.

<sup>14</sup> *Case concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, Judgment, I.C.J. Reports 2002, p. 53.

At one time, states had absolute immunity, in that proceedings against foreign states were inadmissible without their consent. But as states became involved in commercial activities, some national courts began to apply a more restrictive law of immunity by reference to the type of activity carried out by the state. The law of state immunity has hence undergone significant changes over the last two centuries and come to make a distinction between *acta jure imperii* that is, acts attributable to the sovereign or public acts of a State and *acta jure gestionis*, that is, acts pertaining to commercial activities. The rules on state immunity are rules of customary international law; that is, they originate in the practice and custom of States. However, the practice of states in giving immunity to states has not been consistent. The international community had been grappling with this issue for many years to agree a treaty on the subject. There was great tussle between the concept of restrictive immunity propounded by major states and those which pursued a more absolutist approach [chiefly followed by Socialist state-trading countries]. Eventually agreement was reached and the United Nations Convention on Jurisdictional Immunities of States and their Property was adopted by the UN General Assembly on the basis of work done by the ILC in December 2004. The adoption of this UN Convention clearly signifies the recent shift that has taken place towards the concept of restrictive immunity.

This UN Convention, which is largely based on current State practice and reflects the so called “restrictive theory” of State immunity, is based on two principles- (i) the need to ensure justice for individuals engaged in commercial transactions with foreign States and (ii) the fact that subjecting such disputes to the adjudicative jurisdiction of national courts would not constitute a challenge to the sovereign authority of the foreign State concerned. It necessarily rests upon the classic distinction in international law between acts **jure imperii** and acts **jure gestionis**. The UN Convention draws a line between those situations in which a state may properly claim immunity and those in which immunity has, over the years, been restricted and denied. It lays down a general rule- that a state has immunity, for itself and its property, from the jurisdiction of other states’ courts – but then provides exceptions to that general rule. The Convention is concerned with civil proceedings against a state in the courts of another state. It is not intended to cover criminal proceedings.

For purposes of immunity, the definition of a State under Article 2 of the UN Convention has a particular meaning. It broadly comprehends immunity for all types or categories of entities and individuals: (a) the State and its various organs of government; (b) constituent units of a federal State or political subdivisions of the State, which are entitled to perform acts in the exercise of sovereign authority, and are acting in that capacity; (c) agencies or instrumentalities of the State or other entities, to the extent that they are entitled to perform and are actually performing acts in the exercise of sovereign authority of the State; and (d) representatives of the State acting in that capacity. The understanding is that sovereigns and heads of State in their public capacity would be embraced by (a) and (d), while it is contemplated that other heads of Government, heads of ministerial departments, ambassadors, heads of mission, diplomatic agents and consular officers, in their representative capacity, are covered by (d).

Article 3 of the Convention makes provision for a safeguard clause<sup>15</sup>. Paragraph 1 expressly provides that the Convention is without prejudice to the privileges and immunities enjoyed by a State under international law in relation to the exercise of the functions of (a) its diplomatic missions, consular posts, special missions, missions to international organizations or delegations to organs of international organizations or to international conferences; and (b) persons connected with them.

Paragraph 2 does not prejudice the extent of immunities granted by States to foreign sovereigns or other heads of State, their families or household staff which may also, in practice, cover other members of their entourage. Likewise, the extent of immunities granted by States to heads of Government and ministers for foreign affairs is not prejudged. This latter category was not expressly included in paragraph 2 on account that it would be difficult to prepare an exhaustive list. Moreover, any such listing would have raised issues regarding the basis and the extent of the jurisdictional immunity accruing to such persons.

## **vi. Individual Criminal Responsibility and Removal of Immunity**

The International Court of Justice [ICJ or the Court] the principal judicial organ of the United Nations, has dealt with the scope of immunity from criminal jurisdiction in national courts for high-ranking State officers in a few cases. The question of holding Foreign Ministers responsible for war crimes was the principal subject of the decision of the ICJ in the Arrest warrant case [Democratic Republic of Congo Vs Belgium] decided by it in 2002. Since this case directly dealt with the subject that we are addressing and this also is an area where the state practice and case law are lacking, an analysis of the basic facts and the issues emanating from the case is in order.

### **Facts**

A dispute arose between the DRC and Belgium when, on April 11, 2000, Judge Damien Vandermeersch of the Brussels court of first instance issued an international arrest warrant for the detention of Mr. Abdulaye Yerodia Ndombasi (Yerodia), who at that time was the DRC Minister for Foreign Affairs. The warrant accused Yerodia of having

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<sup>15</sup> Article 3 reads:

*“Privileges and immunities not affected by the present Convention”*

“1. The present Convention is without prejudice to the privileges and immunities enjoyed by a State under international law in relation to the exercise of the functions of:

“(a) its diplomatic missions, consular posts, special missions, missions to international organizations or delegations to organs of international organizations or to international conferences; and

“(b) persons connected with them.

2. The present Convention is without prejudice to privileges and immunities accorded under international law to heads of State *ratione personae*.

3. The present Convention is without prejudice to the immunities enjoyed by a State under international law with respect to aircraft or space objects owned or operated by a State.”

committed grave breaches of the 1949 Geneva Conventions and crimes against humanity while serving in a non-ministerial post by making speeches in August 1998 that allegedly incited the massacre of Tutsi residents of Kinshasa.

The arrest warrant was issued under a Belgian law (Belgian Law) that establishes its universal applicability and the universal jurisdiction of the Belgian courts in relation to alleged grave violations of international humanitarian law regardless of where they were committed, the presence of the accused in Belgium, or the nationality or legal status of either the victim/complainant or the accused. The Belgian Law does not recognize any immunities that defendants might enjoy due to their "official capacity." In this case, it was uncontested that (i) the arrest warrant referred to acts committed outside of Belgium; (ii) Yerodia was the DRC Foreign Minister at the time the warrant was issued; (iii) the accused was neither Belgian nor had he been present in Belgium when the warrant was issued; and (iv) no Belgian national was a direct victim of the alleged crimes. After November 2001, Yerodia ceased being the DRC Foreign Minister. At the time of the judgment, he no longer held any ministerial office. After Yerodia left office, the DRC brought the case before the ICJ and presented the Court with an opportunity to clarify existing international law on immunity of state officials and universal jurisdiction.

### **The Judgment**

The ICJ ruled that Belgium has violated international law by allowing a Belgian judge to issue and circulate an arrest warrant *in absentia* against the then Foreign Minister of the Democratic Republic of the Congo (DRC). The ICJ held, by 13 votes to three, that Belgium thereby failed to respect the immunity from Criminal Jurisdiction and the inviolability which the incumbent Foreign Minister enjoyed under Customary International Law. By way of remedy, the Court found, by 10 votes to six, that Belgium must, by means of its own choosing, cancel the arrest warrant and so inform all the authorities to whom that warrant was circulated.

The ICJ held that an incumbent Minister for Foreign Affairs enjoys immunity from criminal jurisdiction while abroad and inviolability for acts performed either in an 'official' or in a 'private' capacity whether those acts were done before assuming office or during the term of the office, even when the crime alleged is a war crime or crime against humanity. The Court went on to add in an obiter dictum that immunity from foreign jurisdiction does not mean impunity. It noted 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.*

The Court's view that a Minister for Foreign Affairs (and implicitly any other state official) who has committed an international crime may not, after leaving office, be



subjected to the criminal jurisdiction of another state if the crime was committed while acting in an official capacity, has been rightly criticized by commentators who stress that this aspect of the judgment seems to be at variance with developments in contemporary international law<sup>16</sup>.

There is a close relationship between immunity and individual criminal responsibility. In particular, two developments in international criminal law in the twentieth century seem to have had an impact on the discussions concerning the development of immunities: The establishment of international criminal jurisdiction and the development of the substantive law relating to irrelevance of official position, each of which effectively raising the bar of accountability for egregious offences.

The creation of the International Criminal Court was a result of the challenge to orthodoxy that started at the beginning of the twentieth century. The internationalization of the criminal jurisdiction allowed the international community to overcome the constrictions of sovereignty. At the same time, it allowed States to continue to take measures domestically to implement international obligations. These developments should be seen as supplementing and not supplanting the national criminal jurisdiction; indeed, as we know the Rome Statute is complementary to national jurisdictions.

### **III. SCOPE OF IMMUNITY OF STATE OFFICIALS FROM FOREIGN CRIMINAL JURISDICTION**

In considering matters relating the scope of immunity of State Officials from foreign criminal jurisdiction, three main questions are to be addressed, namely: (a) which State officials enjoy immunity from foreign criminal jurisdiction; (b) which acts are covered by such immunity; and (c) whether international law recognizes any exceptions or limitations to that immunity (in particular, in the case of international crimes). These questions appear to have received different answers depending on the type of immunity considered and the large body of literature that exists in this area does not share a common and consistent definition on immunity of state officials.

With respect to content, it needs to be pointed out that immunity *ratione personae* has a broader material scope, in that it extends to any conduct of the State Official concerned, while immunity *ratione materiae* is limited to those acts performed in the discharge of official functions. In other words, the former immunity is accorded by reference to the status of the person concerned (*ratione personae*), while the latter is granted by reference to the characteristics of the conduct at issue (*ratione materiae*). The main issues arising in this context concern the definition of “official acts” covered by immunity *ratione*

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<sup>16</sup> Antonio Cassese, ‘When May Senior State officials Be Tried for International Crimes? Some Comments on the Congo Vs Belgium case’ *EJIL*, Vol.13, 2002.

*materiae* and how these acts should be distinguished from conduct performed by the State official in a private capacity.

**i. Immunity *ratione personae***

Immunity *ratione personae* is characterized by its broad material scope and is granted under international law to a limited number of officials, most notably the head of State, while in office. Although there exists a fair amount of State practice (including numerous national judicial decisions) on the issue with respect to civil suits, criminal proceedings where the question of immunity has been considered before domestic jurisdictions are infrequent.

One may observe an upsurge in the number of directly relevant judicial pronouncements and related scholarly articles on the matter<sup>17</sup>. It is noteworthy that the issue of immunity *ratione personae* was at the core of the judgment rendered by the ICJ in the *Arrest Warrant* case, as we have seen before. Although the Court thereby made a clear pronouncement on the scope of the immunity enjoyed by a minister for foreign affairs, the debate surrounding immunity *ratione personae* appears to persist.

The determination of the personal scope of immunity *ratione personae* entails essentially an identification of those categories of State officials that are covered by such immunity and justification of the latter. In the light of State practice and the legal literature, State officials that are candidates to the enjoyment of immunity *ratione personae* could be classified under three different categories: (a) the head of State; (b) the head of Government and minister for foreign affairs; and (c) other high-ranking officials. It should be emphasized, from the outset, that this immunity is restricted to the period in which the State official concerned is in office: its broad material scope is justified by the aim of protecting the holder and enabling him to carry out his official duties.

The recognition of immunity *ratione personae* to incumbent Heads of State in foreign criminal jurisdiction appears to be unchallenged. The United Nations Convention on Jurisdictional Immunities of States and their Property specifies, in Article 3, paragraph 2, that it “is without prejudice to privileges and immunities accorded under international law to heads of State *ratione personae*”. In the *Arrest Warrant* case, the International Court of Justice stated that “that in international law it is firmly established that ... certain holders of high-ranking office in a State, such as the Head of State ... enjoy immunities from jurisdiction in other States, both civil and criminal”<sup>18</sup>.

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<sup>17</sup> It is obvious that the publicity surrounding cases that involved former high-ranking officials (most notably, the *Pinochet* case in Spain and the United Kingdom), which technically speaking fall under the scope of immunity *ratione materiae*, has also triggered an increased interest on the issue of immunity *ratione personae*, inspiring judicial proceedings against incumbent officials and more careful treatment of immunity *ratione personae* in the legal literature.

<sup>18</sup> *Arrest Warrant* case, pp. 20-21 , para 51.

The immunity *ratione personae* of a Head of State was recognized by both parties in the *Djibouti v. France* case before the ICJ<sup>19</sup>. In its recent judgment in this case, the Court reaffirmed the “full immunity from criminal jurisdiction and inviolability” of a Head of State<sup>20</sup>. Moreover, this immunity is sometimes expressly accorded under national legislation, as for example in Section 20 of the United Kingdom State Immunity Act of 1978, applicable to “a sovereign or other Head of State. Several judicial instances in which such immunity was enforced can be found in national jurisprudence<sup>21</sup>.”

The Judgment of the International Court of Justice in the *Arrest Warrant* case contains a categorical pronouncement in favour of the immunity *ratione personae* of heads of Government and ministers for foreign affairs: .

*“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<sup>22</sup>”.*

In other words, the Court followed a functional justification of the immunity *ratione personae* granted to the minister for foreign affairs: in light of the latter’s diplomatic and representative functions, which are recognized to him under international law solely by virtue of his office, he was found to be required to frequently travel internationally and to be in constant need to communicate with his Government and representatives of other States. The findings of ICJ constitute an authoritative assessment of the state of customary international law with respect to the immunity *ratione personae* of the Minister for Foreign Affairs, which could be used, *mutatis mutandis*, to justify the immunity of the incumbent head of Government. They have indeed been followed in subsequent national judicial decisions.

It needs to be mentioned here that the United Nations Convention on Jurisdictional Immunities of States and their Property contains a provision that safeguards the privileges and immunities accorded under international law to heads of State *ratione personae*, but remains silent as to immunities of other State officials. Instances of State practice on the

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<sup>19</sup> See, for example: *Memorial of the Republic of Djibouti*, 15 March 2007, para. 133.

<sup>20</sup> *Djibouti v. France*, p. 53, para. 170.

<sup>21</sup> For a reference to traditional case law granting sovereign immunity, see the Second report by Sompong Sucharitkul, Special Rapporteur, who concluded: “That a foreign sovereign enjoys jurisdictional immunity, including immunity from personal arrest and detention within the territory of another State, has been firmly established in State practice” (*Yearbook ... 1980*, vol. II (Part One), document A/CN.4/331, p. 207, para. 36). In addition to the cases described below, reference could be made to the civil proceedings in Switzerland, *Ferdinand et Imelda Marcos c. Office fédéral de la police*, pp. 535-536, where the Federal Tribunal, while considering the question of immunity *ratione materiae* of a former head of State, confirmed the customary character of the immunity *ratione personae* from foreign criminal jurisdiction of the incumbent head of State.

<sup>22</sup> *Arrest Warrant Case*, Para 52.

immunity of heads of Government and ministers for foreign affairs are scarce. The national laws that explicitly contemplate the immunity of the head of State generally do not contain a similar provision applying to the head of Government or minister for foreign affairs.

It has been suggested that other high-ranking State officials (particularly, other ministers or members of the cabinet) would enjoy immunity *ratione personae* from foreign criminal jurisdiction while in office. In its general statement referred to above, according to which “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”, the International Court of Justice seemed to leave the door open for this possibility.

Its subsequent reasoning with respect to the minister for foreign affairs, however, makes it clear that, in the opinion of the Court, the criterion of “high rank” is not conclusive as such, and that the nature of the functions performed by the State official and the circumstances in which such functions are carried out play a determinant role in granting immunity: in reaching its conclusion, the Court insisted on the foreign minister’s diplomatic and representative duties at the international level and on the fact that he is frequently called to travel abroad. As it was noted for heads of Government and ministers for foreign affairs, the provision of the United Nations Convention on Jurisdictional Immunities of States and their Property safeguarding the immunity *ratione personae* of the heads of State does not make any reference to other officials, but the preparatory works show that the Commission had left the question open. In general, national laws that explicitly contemplate the immunity of the head of State do not extend a similar immunity to other State officials.

As regards the acts covered, Immunity *ratione personae* from foreign criminal jurisdiction covers all acts carried out by the State official concerned, both in his official or private capacity and including conduct preceding his term of office. The material scope of this immunity is well settled both in judicial decisions and the legal literature which often express this idea by qualifying immunity *ratione personae* as “complete”, “full”, “integral” or “absolute”. The material scope of immunity *ratione personae* of State officials from foreign criminal jurisdiction is often compared to that of the similar immunity granted to heads of diplomatic missions under customary international law, as reflected in article 31, paragraph 1, of the Vienna Convention on Diplomatic Relations.

Although the broad scope of immunity *ratione personae* as regards the acts covered remains unchallenged, the question has arisen, especially in recent years, whether the absolute character of such immunity would find an exception in the case of crimes under international law. It needs to be noted here that this exception remains controversial with respect to criminal proceedings before foreign domestic jurisdictions: it is generally accepted that even an incumbent high-ranking official would not be covered by immunity

when facing similar charges before certain *international* criminal tribunals where they have jurisdiction. This was confirmed in the *Arrest Warrant* case.

## ii. Immunity *ratione materiae*

Unlike immunity *ratione personae* dealt with in the previous pages, immunity *ratione materiae* covers only official acts, that is, conduct adopted by a State official in the discharge of his or her functions. This limitation to the scope of immunity *ratione materiae* appears to be undisputed in the legal literature and has been confirmed by domestic courts. In its recent judgment in the *Djibouti v. France* case, the International Court of Justice referred in this context to “acts within the scope of [the] duties [of the officials concerned] as organs of State”.

A critical issue to be addressed in determining the legal regime of immunity *ratione materiae* relates to the identification of the criteria for distinguishing between a State organ’s “official” and “private” conduct. The articles on responsibility of States for internationally wrongful acts do not explicitly provide the criteria for determining whether the conduct of a State organ is to be considered as performed in the discharge of the official functions of that organ. A related question is whether acts performed *ultra vires* by State officials are covered by immunity *ratione materiae*. Domestic courts have adopted conflicting positions on the general issue of immunity in connection with *ultra vires* acts. While the plea of immunity has sometimes been rejected in such cases, it has also been held that immunity of State officials in respect of acts performed in the discharge of their functions does not depend on the lawfulness or unlawfulness of such acts.

Another question to be considered is whether the distinction between *acta jure imperii* and *acta jure gestionis*, which appears to be relevant in the context of State immunity, also applies in the context of immunity *ratione materiae* of State officials. Though infrequently and only cursorily addressed, this question has given rise to conflicting opinions in the legal literature. While it has been suggested that the distinction between *acta jure imperii* and *acta jure gestionis* is also relevant in the context of immunity of State officials, it has also been considered that the distinction is irrelevant in the latter context and that *acta jure gestionis* performed by a State organ would still qualify as “official”.

There appears to be wide doctrinal support for the proposition that, contrary to immunity *ratione personae*, which accrues to a limited number of high-ranking State officials, immunity *ratione materiae* is enjoyed by State officials in general, irrespective of their position in the hierarchy of the State. The principle that State officials in general enjoy immunity *ratione materiae* finds support in the jurisprudence of the International Criminal Tribunal for the Former Yugoslavia. In the *Blaškić* case, the Appeals Chamber referred in this context to a “well-established rule of customary international law going back to the eighteenth and nineteenth centuries, restated many times since”. The view that immunity *ratione materiae* applies to State officials in general has also been expressed by the counsel for Djibouti in the *Djibouti v. France* case.

The question arises as to whether immunity *ratione materiae* also covers crimes under international law. As previously mentioned, in the *Arrest Warrant* case the International Court of Justice held that the immunity from criminal jurisdiction of an incumbent minister for foreign affairs was not subject to any exception in the event of crimes under international law. However, the Court did not directly address the question of the possible existence of such an exception in connection with the immunity *ratione materiae* of a *former* minister for foreign affairs. Nevertheless, the judgment of the Court contains an *obiter dictum*, which has been interpreted as implicitly denying the existence of such an exception.

#### **IV. WORK OF ILC IN RELATION TO THE TOPIC**

Recognizing the increasing problem of the immunity of state officials before national courts, the International Law Commission [ILC] has embarked on a study on the immunity of state officials from foreign criminal jurisdiction. At its fifty-eighth session, in 2006, the ILC, on the basis of the recommendation of a Working Group on the long-term programme of work, identified the topic “Immunity of State Officials from Foreign Criminal Jurisdiction” for inclusion in its long-term programme of work. The General Assembly, in resolution 61/34 of 12 December 2000 took note of the Commission’s decision to include the topic in its long-term programme of work. At its fifty-ninth session, in 2007, the Commission decided to include the topic in its programme of work and appointed Roman Kolodkin as special rapporteur on the question of immunity.

The Special Rapporteur submitted his preliminary report on immunity at the sixtieth session of the ILC in 2008 whereby the Commission considered the preliminary report. The ILC also had before it a memorandum of the Secretariat. The preliminary report, which was comprehensive and well-researched, briefly outlined the breadth of prior consideration, by the Commission and the Institute of International Law, of the question of immunity of State officials from foreign jurisdiction as well as the range and scope of issues proposed for consideration by the Commission, in addition to possible formulation of future instruments. The Commission held a debate on the basis of this report which covered key legal questions to be considered when defining the scope of the topic, including the officials to be covered, the nature of acts to be covered and the question of possible exceptions<sup>23</sup>. In the ensuing paragraphs an attempt is made to highlight the most important features of the preliminary report.

#### **Salient features of the Preliminary Report**

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<sup>23</sup> See *Official Records of the General Assembly, Sixty-third Session, Supplement No. 10 (A/63/10)*, paras. 267-311.

In his preliminary report, the Special Rapporteur expressed his intention for the Commission's work in this area to result in either draft guiding principles or draft articles. The first part of the report is a very comprehensive treatment of the history, the sources and of the concepts of immunity and jurisdiction respectively. This useful analysis leads to part 2 of the report which contains the core issues to be considered when defining the scope of the topic.

In delimiting the scope of the topic, the Special Rapporteur underlines the fact that the treatment of the subject concerns only immunity of state officials from foreign criminal jurisdiction and not immunity from international criminal jurisdiction, which is governed by special regimes. This distinction needs to be borne in mind as one approaches the more complex issues that need to be dealt with in the examination of this topic.

The Report pertinently observes in paragraph 111, heads of state, heads of governments and Ministers of Foreign Affairs constitute the "basic threesome" or the triumvirate of state officials who enjoy personal immunity. Under International law, it is these three categories of officials who are accorded special status by virtue of their office and of their functions. Their special status is evidenced by the provisions of key international conventions, in particular the Vienna Convention on the Law of Treaties, which accords these persons, by virtue of their functions, the competence to perform all acts relating to the conclusion of a treaty. The special status of this category is also confirmed, as pointed out in the report, under the Convention on Special Missions, the Convention on the representation of states in their relations with international organisations and the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons.

As regards the need for extending immunity to those categories of state officials beyond the well-known troika, the report, even while conceding that possibility notes that the Special Rapporteur is not aware that an exhaustive list of such officials exists anywhere.

He mentions that the topic would only cover the question of immunity under international law in particular customary international law as opposed to national legislations. The Report clearly notes that the availability of immunity from foreign criminal jurisdiction to a state official under international law in no way absolves the state official from the general obligation to abide by the laws of the foreign host state and from his responsibility in case of breach of that law.

The Commission did not consider the topic at the sixty-first session. At its sixty-second session in 2010, the Commission was not in a position to consider the second report of the Special Rapporteur, which was submitted to the Secretariat.

At the sixty-third session in 2011, the Commission considered the second<sup>24</sup> and third reports<sup>25</sup> of the Special Rapporteur. The second report reviewed and presented the substantive issues concerning and implicated by the scope of immunity of a State official from foreign criminal jurisdiction, while the third report addressed the procedural aspects, focusing, in particular on questions concerning the timing of consideration of immunity, its invocation and waiver. The debate revolved around, *inter alia*, issues relating to methodology, possible exceptions to immunity and questions of procedure. The debate revolved around, *inter alia*, issues relating to methodology, possible exceptions to immunity and questions of procedure. In the ensuing paragraphs some of the important components of the second report are highlighted.

### **Salient Features of the Second Report**

In the opinion of the Special Rapporteur, immunity of a State Official from foreign criminal jurisdiction was the norm and any exceptions thereto would need to be proven. He observed that State Officials enjoy immunity *ratione materiae* in respect of acts performed in an official capacity since these acts are considered acts of the State, and these included unlawful acts and acts *ultra vires*. He pointed out that these acts are attributed both to the State and to the official and suggested that the criterion for attribution of the responsibility of the State for a wrongful act also determined whether an official enjoys immunity *ratione materiae* and the scope of such immunity, there being no objective reasons to draw a distinction in that regard.

Concerning immunity *ratione personae*, which is enjoyed by the so-called troika, namely incumbent heads of State and Government and ministers for foreign affairs, and possibly by certain other incumbent high-ranking officials, the Special Rapporteur considered such immunity to be absolute and to cover acts performed in an official and a personal capacity, both while in office and prior thereto. In light of the link between the immunity and the particular post, immunity *ratione personae* was temporary in character and ceased upon the expiration of their term in office; such former officials nevertheless continued to enjoy immunity *ratione materiae*.

Turning to the issue of possible exceptions to immunity of a State Official from foreign criminal jurisdiction, the Special Rapporteur observed that in the case of immunity *ratione personae*, the predominant view seemed to be that such immunity was absolute and that no exceptions thereto could be considered. In his opinion, the question of exceptions would thus only be pertinent with regard to immunity *ratione materiae* in the context of crimes under international law. Nevertheless, after having analysed the various rationales put forward in the doctrine and in certain judicial decisions justifying such exceptions (which were in one way or another, interrelated, namely (a) grave criminal

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<sup>24</sup> Document A/CN.4/631. (see Analytical Guide)

<sup>25</sup> Document A/CN.4/646. (see Analytical Guide).



acts cannot be official acts; (b) immunity is inapplicable since the act is attributed both to the State and the official; (c) *jus cogens* prevails over immunity; (d) a customary international law norm has emerged barring immunity; (e) universal jurisdiction; and (f) the concept of *aut dedere aut judicare*), the Special Rapporteur remained unconvinced as to their legal soundness. He further expressed doubt that any justification for exceptions could be considered having emerged as a norm under international law. Upon careful scrutiny, none of the cases referred to by various advocates for exceptions to immunity gave evidence against immunity. At the same time, attention was also drawn to certain cases in which the immunity had been upheld. In this context, the *Belhas v. Moshe Ya'alon* decision could be considered significant in that it upheld the proposition that under customary international law, immunity *ratione materiae* covers acts performed by every official in the exercise of his functions and that a violation of a *jus cogens* norm did not necessarily remove immunity.

While the Special Rapporteur acknowledged the widely held opinion that the issue of exceptions to immunity fell within the sphere of progressive development of international law, he wondered to what extent those exceptions should apply. In his view, the issue raised serious concerns, including in relation to politically motivated prosecutions, trials *in absentia* and evidentiary problems as a result of the lack of cooperation of the State concerned. He cautioned the Commission against drafting provisions *de lege ferenda* and recommended that it should restrict itself to codifying existing law. The Commission would have an important role in harmonizing the application of immunities in national jurisdictions, which would serve to avoid any dubious practice involving disregard of immunity.

While in his preliminary and second reports, the Special Rapporteur considered the substantive aspects of the immunity of the State official from criminal jurisdiction, the third report (A/CN.4/646) — intended to complete the entire picture — addressed the procedural aspects, focusing, in particular on questions concerning the timing of consideration of immunity, its invocation and waiver, including whether immunity can still be invoked subsequent to its waiver. The Special Rapporteur stressed that while the previous reports had been based on an assessment of State practice, the third report, even though there was available practice, was largely deductive, reflecting extrapolations of logic and offering broad propositions, not exactly precise in terms of drafting, for consideration. It was also underscored that the issues considered in the third report were of great importance in that they went some way in determining the balance between the interests of States and safeguarding against impunity by assuring individual criminal responsibility. The third report was less contentious and hence, was less open to debate.

## **V. OPINION OF AALCO MEMBER STATES ON THE TOPIC**

The Member States of AALCO, convinced as they are, about the need to determine the existing basis for immunity of state officials from foreign criminal jurisdiction, specifically its scope of, and approach to, its application, before proceeding to develop it progressively, have been welcoming the introduction of the topic on ILC's agenda. They have also been greatly appreciative of Roman Kolodkin's efforts over the past several

years as the ILC's Special Rapporteur on this issue and for having produced three comprehensive reports on both its substantive and procedural aspects.

The need to delineate the contours of the topic has been stressed by a few delegations. This is considered necessary since the progressive development of law in this area needs to be built upon the current and existing state practice, which is considered to be not fully crystallized. In this regard it has also been stressed that the Commission should clearly identify those elements which the Commission considers statements of *lex lata*, and those which the Commission considers statements of *lex ferenda*.

On the issue of immunity *ratione personae* for holders of high office in the States beyond the well-known "troika", many delegations believe that there is a plausible view, *de lege ferenda*, that some high officials beyond the "troika" might enjoy such immunity. Even while agreeing with the opinion of the special rapporteur that there might be a need to establish criteria to determine such categories of officials beyond the well-known troika, many delegations stressed that the issue pertaining to possible exceptions to immunity require deeper analysis bearing in mind *inter alia*, earlier work of the ILC such as Code of Offences Against Peace and Security and established state practice, having regard to the distinction between *lex lata* and *lex ferenda*. The need to proceed cautiously was advocated by many delegations.

Some states also felt that it is difficult to distinguish between setting out the existing rules of international law and embarking on the progressive development thereof. While the International Court of Justice had upheld the absolute immunity of a minister of foreign affairs while that official was in office, it did not recognize an exception with regard to crimes against humanity nor did it clarify whether that minister would enjoy immunity after resignation from office. The Court, additionally, did not distinguish between functional and personal immunity. The ILC should fill those gaps left by the Court, through the scrutiny of subsequent jurisprudence and practice at the international and national levels. The Commission's work should focus on the immunity of Heads of State and Government, foreign affairs ministers, other "highest-ranking officials" and cabinet members. As for crimes that should be excluded from immunity, the Commission should consider only genocide, crimes against humanity and war crimes.

Many delegations, which viewed this issue to contain legal, political and administrative intricacies, were of the considered opinion that a balance needed to be found between the need to maintain international relations through long-established principles of sovereign equality and territorial integrity, while embracing the "evolving nature" and progressive development of international law in the fight against impunity. He said he concurred with the Commission's report that caution was needed in the efforts to achieve such a balance. As stated by the Special Rapporteur, the immunity of State officials should remain the norm and any exceptions should be provided for in international instruments and proven when the need arose, they felt.

As regards the proposal to constitute a Working Group at the next session of the ILC to further consider and analyse these issues before proceeding to the stage of preparing draft articles, it was supported by many countries.

## VI. COMMENTS AND OBSERVATIONS OF AALCO SECRETARIAT

International law confers on *certain* state officials immunities that attach to the office or status of the official. These immunities, which are conferred only as long as the official remains in office, are usually described as ‘personal immunity’ or ‘immunity *ratione personae*’. It has long been clear that under customary international law the Head of State and diplomats accredited to a foreign state possess such immunities from the jurisdiction of foreign states. In addition, treaties confer similar immunities on diplomats, representatives of states to international organizations, and other officials on special mission in foreign states.

The predominant justification for such immunities is that they ensure the smooth conduct of international relations and, as such, they are accorded to those state officials who represent the state at the international level. International relations and international cooperation between states require an effective process of communication between states. It is important that states are able to negotiate with each other freely and that those state agents charged with the conduct of such activities should be able to perform their functions without harassment by other states. As the International Court of Justice (ICJ) has pointed out, there is ‘no more fundamental prerequisite for the conduct of relations between States than the inviolability of diplomatic envoys and embassies<sup>26</sup>’. In short, these immunities are necessary for the maintenance of a system of peaceful cooperation and co-existence among states. Increased global cooperation means that this immunity is especially important.

However, the categories of officials who are to be accorded immunity from foreign criminal jurisdiction has not been clear apart from the fact that the Heads of state, Heads of Governments and the Minister of Foreign Affairs, who are entitled to such immunity not only by virtue of customary international law but also Conventional law as accepted by the ICJ. Moreover, the kind of acts that are covered under the principle of sovereign immunity are also ambiguous, though in general, all activities of an official nature and completed on behalf of the home-state with its recognition whilst performing public functions are covered by immunity *ratione materiae*.

Although the premises of functional immunity seem to be quite easy to understand, there are certain dilemmas broadly reflected in the literature. These mainly concern:

- the relation between state immunity and immunity *ratione materiae* of high state officials,

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<sup>26</sup> *United States Diplomatic and Consular Staff in Tehran case (United States of America v. Iran)* [1980] ICJ Rep 3, at para. 91.

- the problem of defeating the presumption of the state's authority in order to establish individual criminal responsibility,
- issues of determining which acts should be deemed official and which private, and
- distinguishing an official from personal capacity of a state agent.

Furthermore, the legal position in international law of heads of states and other senior state representatives is at the heart of the conflict thrown up by recent changes in the international legal order.

The establishment of the International Criminal Court and the ad hoc criminal tribunals reflects a growing belief that heads of states and other senior state representatives should be held accountable for serious violations of international law. It is now being questioned whether foreign states and their officials still have immunity from proceedings concerning grave human rights abuses in national courts. To solve these dilemmas it is necessary to find a final answer to the question of whether high state officials can be held liable for committing crimes of international relevance and, if so, under what circumstances.

In is precisely in this context, the work of the ILC on this topic assumes immense significance. There is now an opportunity for the Commission to provide real guidance to national prosecuting authorities and courts in identifying the precise contours of an exception to immunity in respect of international crimes; such guidance would resolve the current tension and properly reflect current trends in international law. The members of the ILC, with their varying legal backgrounds, are well placed to do this. It is to be hoped, therefore, that it will take up the challenge and give a constructive lead to national courts that will properly reflect the move towards ending impunity for international crimes, while respecting the need to maintain international relations.