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**Jurisdictional Immunities of State Officials: The Work of the
ILC on First Reading**

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Abbreviations

AC	Law Reports, Appeal Cases (UK)
AJIL	American Journal of International Law
CUP	Cambridge University Press
DDC	United States District Court for the District of Columbia
ECtHR	European Court of Human Rights
edn	Edition
EHRR	European Human Rights Reports
EJIL	European Journal of International Law
ETS	European Treaty Series
EWHC	England and Wales High Court
GA	General Assembly
ICC	International Criminal Court
ICJ	International Court of Justice
ICLQ	International and Comparative Law Quarterly
ILC	International Law Commission
ILDC	International Law in Domestic Courts
ILM	International Legal Materials
ILR	International Law Reports
No	Number
NYLS J Int'l & Comp L	New York Law School Journal of International and Comparative Law
OUP	Oxford University Press
PCA	Permanent Court of Arbitration
PCIJ	Permanent Court of International Justice
YBILC	Yearbook of the International Law Commission
UK	United Kingdom
UKHL	United Kingdom, House of Lords
UN	United Nations
UNCLOS	United Nations Convention on the Law of the Sea
UNTS	United Nations Treaty Series

US

United States

Vol

Volume

WLR

Weekly Law Reports

Chapter 1: Introductory Elements

1.1 Background of the ILC's work and the present Articles

Following the establishment of the United Nations (hereinafter UN), the General Assembly (hereinafter GA) established the International Law Commission (hereinafter ILC) in 1947 in accordance with article 13(1a) of the UN Charter¹ and with the goal to maintain international peace and security through the peaceful resolution of disputes instead of States waging war. More specifically, the objective of the ILC is dual: first, the promotion of the progressive development of international law and, second, its codification.² The codification of international law was not a novel concept at the time. Jeremy Bentham (1748 - 1832), who is also the inventor of the term 'international law', proposed, in his book 'Principles of International Law' (1786 – 1789), that States should codify the rules of international law.³

The ILC is comprised of 34 highly qualified experts in public international law, who are elected every five years by the UN GA. One of the experts is appointed as Special Rapporteur for each subject on the ILC's agenda. The process followed starts with the Special Rapporteur producing a report that is discussed within the Commission and Governments can submit their written opinions on the subject. The report is, in the end, submitted to the GA for approval, who decides whether the report is going to take the form of draft articles or whether it is going to be introduced to the States as a treaty for signature.

A subject is included in the Commission's programme of work, either by a decision of the ILC or following a referral by the GA or a submission by UN members or specialized agencies of the UN or its principal organs. The ILC meets annually. In 1949, the ILC reviewed 25 topics and conducted a list of 14 topics which, as was agreed, were included in the ILC's long-term programme.⁴ During its first session that year, the ILC included in its agenda four topics: the Nurnberg principles, international criminal jurisdiction, evidence of customary international law and a draft declaration on 'Rights and Duties of States'.⁵

¹ UN, *Charter of the United Nations*, 24 October 1945, 1 UNTS XVI.

² UN, General Assembly, *Statute of the International Law Commission*, 21 November 1947, art 1.

³ UN Office for Legal Affairs, *The Work of the International Law Commission* (10th edn, vol I, United Nations Publication 2023) 1 <<https://www.un-ilibrary.org/content/books/9789210025911#overview>> accessed 29 August 2023.

⁴ *ibid*, 38.

⁵ UN, UN Doc A/CN.4/13 and Corr. 1-3, *Report of the International Law Commission on the work of its first Session, 12 April 1949*, Official Records of the GA, Fourth Session, Supplement No. 10 <https://legal.un.org/ilc/documentation/english/reports/a_cn4_13.pdf> accessed 1 September 2023.

Throughout the 74 years of its functioning, the ILC has worked on many complex topics, including its work on the fragmentation of international law, on State responsibility and on the reservations to treaties - the last one requiring 18 years to complete. For a lot of the topics, the ILC's work has resulted in the signing of international treaties, including the Vienna Convention on the Law of Treaties,⁶ the Vienna Convention on Diplomatic Relations⁷ and the UN Convention on Jurisdictional Immunities of States and their Property.⁸

This year, on its 74th Session, the ILC discussed issues including general principles, piracy and armed robbery at sea, sea-level rise, succession of States in respect of State responsibility and, lastly, the 'Immunity of State officials from foreign criminal jurisdiction'.

The present thesis is going to deal with the last topic of 'Immunity of State officials from foreign criminal jurisdiction'. It was added on the ILC's long-term programme of work in 2006 following a recommendation of the Working Group⁹ and immediately in 2007 Roman A. Kolodkin was appointed as Special Rapporteur for the topic and it was included in its short-term programme of work.¹⁰ Mr. Kolodkin worked on the first 3 reports, as in 2012 Ms. Concepción Escobar Hernández was appointed Special Rapporteur on the subject. In 2013 the first few draft articles were provisionally adopted, namely draft articles 1, 3 and 4.¹¹ In 2021 the last few draft articles were provisionally adopted and in the 73rd Session in 2022 the text of the draft articles as a whole was adopted on first reading.¹² In 2023, Mr. Claudio Grossman Guiloff was appointed as Special Rapporteur on the subject and pending the comments and observations of Governments by 1 December 2023, the second reading of the draft articles will take place at the ILC's 75th session in 2024.¹³ The Commission has already been working for 16 years on the topic, rendering its work

⁶ *Vienna Convention on the Law of Treaties*, signed: 23 May 1969, Vienna, entry into force: 27 January 1980, 1155 UNTS, 331.

⁷ UN, *Vienna Convention on Diplomatic Relations*, signed: 18 April 1961, Vienna, entry into force: 24 April 1964, 500 UNTS, 95.

⁸ *United Nations Convention on Jurisdictional Immunities of States and Their Property*, signed: 2 December 2004, New York <https://treaties.un.org/doc/source/recenttexts/english_3_13.pdf> accessed 1 September 2023.

⁹ UN GA Resolution 61/34 of 4 December 2006, UN Doc A/RES/61/34 <<https://documents-dds-ny.un.org/doc/UNDOC/GEN/N06/496/47/PDF/N0649647.pdf?OpenElement>> accessed 1 September 2023.

¹⁰ UN GA Resolution 62/66 of 6 December 2007, UN Doc A/RES/62/66 <<https://documents-dds-ny.un.org/doc/UNDOC/GEN/N07/467/73/PDF/N0746773.pdf?OpenElement>> accessed 1 September 2023.

¹¹ YBILC 2013, Vol II, pt 2, UN Doc A/68/10, *Report of the International Law Commission on the work of its sixty-fifth session (6 May - 7 June and 8 July - 9 August 2013)*, ch V, 39 <https://legal.un.org/ilc/publications/yearbooks/english/ilc_2013_v2_p2.pdf> accessed 29 August 2023.

¹² UN Doc A/76/10, *Report of the International Law Commission Seventy-second session (26 April-4 June and 5 July-6 August 2021)*, Official Records of the GA, Seventy-sixth Session, Supplement No. 10, ch VI <https://legal.un.org/ilc/reports/2021/english/a_76_10.pdf> accessed 29 August 2023; UN Doc A/77/10, *Report of the International Law Commission Seventy-third session (18 April - 3 June and 4 July - 5 August 2022)*, Official Records of the GA, Seventy-seventh Session, Supplement No. 10, ch VI <<https://documents-dds-ny.un.org/doc/UNDOC/GEN/G22/448/48/PDF/G2244848.pdf?OpenElement>> accessed 29 August 2023.

¹³ UN Doc A/78/10, *Report of the International Law Commission; Seventy-fourth session (24 April-2 June and 3 July-4 August 2023)*, Official Records of the GA, Seventy-eighth Session, Supplement No. 10 <https://legal.un.org/ilc/reports/2023/english/a_78_10_advance.pdf> accessed 1 September 2023.

on the topic the longest-running¹⁴ and highlighting the complexity and contentious nature of the issue.¹⁵

1.2 Brief Historical Overview

As States started forming, each claiming to be independent from any other State or external control, States started promoting friendly international relations, at a time when the monarch of a State and the State itself were synonymous.¹⁶ A characteristic example of this is Louis XIV, the King of France and Navarre from 1643 to 1715, who is well known for saying the phrase “*L'État, c'est moi*” [I am the State].¹⁷

This thinking was expanded to include not only the monarch but also the diplomatic envoy. When Queen Elizabeth I of England wanted to prosecute the alleged conspiracy of the Spanish Ambassador Bernardino de Mendoza, Alberico Gentili and Jean Hotman advised against it, with the argument that the Queen had no jurisdiction over a diplomat and only his own State could decide on a punishment.¹⁸ As a result, Mendoza was simply expelled in 1584.¹⁹ an argument he wrote about more extensively in his book *De Legationibus*, that first explored diplomatic law and diplomatic immunity.²⁰

The book was published during a time of no international consensus on the existence of State and diplomatic immunity. In 1586, the trial of Mary, who was the Queen of Scotland, took place. By Gentili and Hotman's argument Mary should have been sent back to Scotland. Instead, she was tried by an ad hoc Special Commission under an Act of 1584 that referred to the protection of the English queen. Mary, after being denied the help of counsel, argued on her own that the Special Commission had no jurisdiction and that she was protected by immunity by virtue of her

¹⁴ 72nd ILC Report (n 12) para 81.

¹⁵ Michael Wood, "Lessons from the ILC's Work on 'Immunity of State Officials': Melland Schill Lecture, 21 November 2017" (2019) 22 [1] Max Planck Yearbook of United Nations Law, 34, 35; Rosanne van Alebeek, 'The "International Crime" Exception in the ILC Draft Articles on the Immunity of State Officials from Foreign Criminal Jurisdiction: Two Steps Back?' (2018) 112 AJIL Unbound 27; Dire Tladi, 'The international law commission's recent work on exceptions to immunity: Charting the course for a brave new world in international law?' (2019) 32 [1] Leiden Journal of International Law 169, 169-170.

¹⁶ Jerrold L Mallory, 'Resolving the Confusion over Head of State Immunity: The Defined Rights of Kings' (1986) 86 Columbia Law Review 169, 170; Henry Wheaton, *Elements of International Law*, edited by A C Boyd, (3rd English edn, Stevens and Sons, 1889) para 97.

¹⁷ Joanne Foakes, *The Position of Heads of State and Senior Officials in International Law* (OUP 2013) 12; It is interesting to note that on his deathbed Louis XIV said: '*Je m'en vais, mais l'État demeurera toujours*' [I depart, but the State shall always remain].

¹⁸ *ibid* 13.

¹⁹ Merio Scattola, 'Alberico Gentili (1552–1608)' in Bardo Fassbender and Anne Peters (eds), *The Oxford Handbook of the History of International Law* (OUP 2012) 1092.

²⁰ Valentina Vadi, *War and Peace* (Brill | Nijhoff, 2020) 20, 24-25.

royal blood and the fact that she was Queen.²¹ The proceedings moved forward regardless, with the Special Commission in the end deciding her guilt and executing her.

A century later, in 1648 the Treaties of Westphalia were signed, propelling the creation of the modern international law system and the development of the modern concept of sovereignty. The State controls its territory and exercises jurisdiction internally over its citizens and acts committed within its territory. Externally the jurisdiction of the State was minimal, as the jurisdiction of another sovereign and equal State applies, as clearly shown in the maxim *par in parem non habet imperium*.²² This clearly shows the rationale behind the rule of immunity, which, as a bar to the exercise of another State's jurisdiction, serves to preserve principle of equality of States.²³

As international law, or the law of nations as it was then called, evolved, immunity evolved as well to protect not only monarchs and sovereigns but also other heads of State.²⁴ In this way, a general rule on State immunity was formed. In the start and up until the 1970s the approach followed was the absolute doctrine of State immunity, which entailed that a State was immune from the jurisdiction of another State for all acts of the State.²⁵ However, support for this doctrine subsided, due to the States' increased involvement in commercial activities and, thus, the restrictive doctrine of State immunity gained momentum. Accordingly, the nature of the act committed is critical; the State is immune for acts carried out in the exercise of sovereign authority, meaning acts *iure imperii*, whereas private acts, meaning acts *iure gestionis*, are not covered by immunity.²⁶ This is portrayed in the UN Convention on Jurisdictional Immunities of the State and their Property.²⁷

²¹ Horace Kent Tenney, 'The Trial of Mary Queen of Scots' (1931) 17 [5] American Bar Association Journal 285, 289.

²² *Prosecutor v Tihomir Blaškić*, case No. IT-95-14-AR 108 bis, Judgment of 29 October 1997, Appeals Chamber, ICTY, 1 Judicial Reports 1997, 1099, 110 ILR 607, para 41.

²³ Hazel Fox, 'The Restrictive Rule of State Immunity - The 1970s Enactment and Its Contemporary Status' in Tom Ruys, Nicolas Angelet, Luca Ferro (eds) *The Cambridge Handbook of Immunities and International Law* (CUP 2019) 21-22.

²⁴ Foakes (n 17) 15; Hazel Fox, *The Law of State Immunity* (2nd edn, OUP 2008) 204.

²⁵ Malcolm N Shaw, *International Law* (9th edn, CUP 2021) 605; *Parlement Belge* case [1880] Court of Appeal, 5 Probate, Divorce and Admiralty Division 197; *The Schooner Exchange v McFaddon*, 11 US 116 (1812) 137; *Banco Nacional de Cuba v Sabbatino*, US Supreme Court, 23 March 1964, 376 US 398; *I Congreso del Partido*, House of Lords of the UK, 16 July 1981, [1983] AC 244, 3 WLR 328, 64 ILR 307; *Trendtex Trading Corporation v Central Bank of Nigeria*, UK Court of Appeal, 13 January 1977, 2 WLR 356, ILDC 173.

²⁶ Shaw (n 25) 611; *Typaldos, console di Grecia v Manicomio di Anversa*, Corte di Cassazione, Napoli, 16 March 1886.

²⁷ *UN Convention on Jurisdictional Immunities of the State* (n 8); *European Convention on State Immunity*, signed: 16 May 1972, Basel, entry into force: 11 June 1976, 1495 UNTS 181, 74 ETS, 11 ILM 470 (1972) <<https://rm.coe.int/16800730b1>> accessed 2 September 2023.

1.3 State Immunity & Immunity of State Officials

Having presented how the rule on State immunity came into existence, the question now turns to how the rules of immunity of State officials came into existence and why separate rules need to exist. In 1923, the Permanent Court of International Justice declared that ‘States can act only by and through their agents and representatives’, since States are legal abstractions and cannot independently act, if not through a State official.²⁸ This is otherwise known as the theory of ‘act of State’. As such, the immunity of State officials can be understood as an extension of the immunity of the State. This becomes clear in the *Djibouti v France* case, where the International Court of Justice (hereinafter ICJ) equated the claim that the *Procureur de la République* [Attorney General] and the Head of National Security of Djibouti are entitled to immunity to the claim being a claim of immunity of the State of Djibouti.²⁹

The fact that the acts of the State can only be committed through the agents of that State calls attention to the difference between State or collective responsibility and individual criminal responsibility. According to Hans Kelsen, criminal law focuses on the punishment of the individual, whereas the sanctions of international law constitute collective responsibility.³⁰ Nevertheless, as the ICJ has explained “Duality of responsibility continues to be a constant feature of international law”, meaning that State responsibility does not preclude the individual criminal responsibility of the individual.³¹ The latter, though, is a matter that cannot be solved in domestic courts, while immunity applies, but instead through international criminal law.

This close relationship between the two types of immunity (State immunity and immunity of State officials) will become obvious throughout the analysis of the Draft Articles on the immunity of State officials, which will often reference the respective rules on State immunity. Immunity of State officials is divided into two types: immunity *ratione personae* (personal immunity) and immunity *ratione materiae* (functional immunity). An analysis of each type can be found in chapter 2 and chapter 3 respectively.

²⁸ *German Settlers in Poland* [1923] PCIJ, Advisory Opinion, Series B, No 6, 22.

²⁹ *Certain Questions of Mutual Assistance in Criminal Matters* (Djibouti v France) (2008) ICJ Reports, 177, para 188.

³⁰ Hans Kelsen, “Collective and Individual Responsibility in International Law with Particular Regard to the Punishment of War Criminals” (1943) 31 [5] California Law Review, 530, 533-534.

³¹ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Bosnia and Herzegovina v Serbia and Montenegro), Judgment, ICJ Reports 2007, 43, para 173; Adil Ahmad Haque, ‘Immunity and Impunity’ in Kevin Heller, Frédéric Mégret, Sarah Nouwen, Jens Ohlin, Darryl Robinson (eds) *The Oxford Handbook of International Criminal Law* (OUP 2020) 428.

Chapter 2: Immunity of State Officials in General

2.1 Scope

In order to delve into the discussion on the immunity of State officials, it is necessary to establish the scope of the Draft Articles on immunity of State officials from foreign criminal jurisdiction (hereinafter Draft Articles). In its positive determination one can pinpoint 3 elements surrounding immunity: “State officials”, “criminal jurisdiction” and lastly that it is the “jurisdiction of another State”.³²

As far as the first element is concerned, the ILC concluded that the term ‘official’ on its own (“*funcionario*” in Spanish and “*représentant*” in French) raises definitional ambiguities and there are terminological differences among different languages, due to the fact that the terms employed in the other languages are not the direct correspondent ones and the national legal regimes on who constitutes an official vary widely.³³ The term “State official” that is currently used signifies the persons who act on behalf of a State or otherwise represent the State.³⁴

Regarding the second element, while criminal jurisdiction is not defined in article 2, it should be understood to mean any action with the goal to determine the responsibility of an individual.³⁵ The third element underlines the fact that the criminal jurisdiction is that of another State alluding to the horizontal character of the international relations of States.³⁶

It becomes obvious that immunity and jurisdiction are closely linked and that discussing the issue of immunity presupposes the existence of jurisdiction; in the case that the foreign State does not have jurisdiction over the State official, any discussion of immunity becomes moot.³⁷ Immunity does not determine whether the conduct in question is lawful or unlawful nor can it exonerate the person to whom it applies from all criminal responsibility. Immunity, once determined, constitutes a procedural bar preventing the examination of the merits of a case. Thus, immunity cannot be dismissed on any substantial basis, regardless of the legality of the act.³⁸

³² 73rd ILC Report (n 12) ch VI, para 68, art 1(1).

³³ UN Doc A/CN.4/654, *Preliminary report on the immunity of State officials from foreign criminal jurisdiction*, by Ms. Concepción Escobar Hernández, Special Rapporteur, para 66 <https://legal.un.org/ilc/documentation/english/a_cn4_654.pdf> accessed 3 September 2023; UN Doc A/CN.4/661, *Second report on the immunity of State officials from foreign criminal jurisdiction*, by Ms. Concepción Escobar Hernández, Special Rapporteur, para 32 <https://legal.un.org/ilc/documentation/english/a_cn4_661.pdf> accessed 3 September 2023.

³⁴ 73rd ILC Report (n 12) ch VI, para 69, commentary 4 to art 1; Text to n 59 in ch 2.2.1 “State official”.

³⁵ 73rd ILC Report (n 12) ch VI, para 69, commentary 5 to art 1.

³⁶ *ibid*, commentary 6 to art 1.

³⁷ *Arrest Warrant of 11 April 2000* (Democratic Republic of the Congo v Belgium) (2002) ICJ Reports, 3, para 46.

³⁸ *ibid*, para 60; *Jurisdictional Immunities of the State* (Germany v Italy: Greece intervening) (2012) ICJ Reports, 99, paras 58, 93, 100.

The negative description of the scope of the Draft Articles, excludes certain special regimes from the present discussion, with the use of the “without prejudice” (to the special regimes) clause.³⁹ Special regimes are understood as constituting *lex specialis* that often have a different legal instrument administering the relevant rules.⁴⁰ In relation to the issue of immunity of State officials, these special regimes refer to immunity connected to activities in specific fields of international relations that simultaneously coexist with the present regime.

The necessary condition is that the regimes are established by “rules of international law”, in order to preserve the existing international rules of immunities accorded by treaties and customary international law.⁴¹ Such treaties refer to diplomatic, consular and special missions immunities.⁴² While the matter of the immunities of international organisations is not relevant to the immunities of States officials in general, it becomes relevant in cases where the agent of the international organisation is, at the same time, an official of the State. As a result, treaties according immunities to agents of international organisations also fall under the “rules of international law” mentioned in article 1 of the Draft Articles.⁴³ Lastly, included in article 1 are treaties concerning the stationing of military forces in a foreign State, such as status-of-forces agreements, headquarters agreements or relevant military cooperation accords.⁴⁴ It must be noted, though, that this is not an exclusive list of relevant rules. As noted in relation to international organisations, the Draft Articles are without prejudice to other rules of international law, as long as the persons under question are officials of the State, leading to the inapplicability of the Draft Articles and the applicability instead of the special regime.⁴⁵

Since the Draft Articles refer to immunity from the criminal jurisdiction of another State, they do not intrude upon issues concerning the jurisdiction of international criminal courts and tribunals.⁴⁶ The reason behind this is that there is a difference in the nature of national and

³⁹ 73rd ILC Report (n 12) ch VI, para 68, art 1(2).

⁴⁰ YBILC 2006, Vol II, pt 2, *Report of the International Law Commission on the work of its fifty-eighth session*, para 251, conclusions b, c <https://legal.un.org/ilc/publications/yearbooks/english/ilc_2006_v2_p2.pdf> accessed 5 September 2023.

⁴¹ 73rd ILC Report (n 12) ch VI, para 69, commentary 10 to art 1; YBILC 1991, Vol II, pt 2, *Report of the Commission to the GA on the work of its forty-third session*, para 28, commentary 1 to art 3 <https://legal.un.org/ilc/publications/yearbooks/english/ilc_1991_v2_p2.pdf> accessed 5 September 2023.

⁴² VCDR (n 7); UN, *Vienna Convention on Consular Relations*, signed: 24 April 1963, Vienna, entry into force: 19 March 1967, 596 UNTS, 261; UN, *Convention on Special Missions*, signed: 8 December 1969, New York, entry into force: 21 June 1985, 1400 UNTS, 231.

⁴³ UN, *Convention on the Privileges and Immunities of the United Nations*, signed: 13 February 1946, New York, entry into force: 17 September 1946, 1 UNTS, 15 and 90 UNTS, 327; *Convention on the Privileges and Immunities of the Specialized Agencies*, signed: 21 November 1947, New York, entry into force: 2 December 1948, 33 UNTS, 261.

⁴⁴ 73rd ILC Report (n 12) ch VI, para 69, commentary 14 to art 1.

⁴⁵ *ibid*, commentaries 17-18 to art 1.

⁴⁶ 73rd ILC Report (n 12) ch VI, para 68, art 1(3); *UN Convention on Jurisdictional Immunities of the State* (n 8) art 26(3).

international jurisdiction, which has been already determined by the constituent instruments of the international criminal courts.⁴⁷ Such constituent instruments include the Rome Statute of the International Criminal Court (hereinafter ICC).⁴⁸ It has been noted by a member of the ILC that there are international criminal courts that have not been founded by an international treaty, but instead by Security Council resolutions in accordance with Chapter VII of the UN Charter or by domestic law, which is the case with hybrid and internationalised tribunals.⁴⁹ The last phrase of article 3 (“as between the parties to those agreements”) reinstates the general rule that treaty regimes are applicable only *inter partes* and does not have any limiting effect on obligations created by other sources of international law.⁵⁰

2.2 Definitions

2.2.1 “State official”

The Draft Articles, very early, include two key definitions: which persons are considered “State officials” in order to be entitled to immunity and which are the “acts performed in official capacity”.⁵¹ The definitions of “immunity”, “criminal jurisdiction” and “exercise of criminal jurisdiction” can be found in the second report of the Special Rapporteur, Ms. Concepción Escobar Hernández, but were not considered necessary to be included in the Draft Articles due to the identical practice, of not including these definitions, of other ILC works and conventions regarding immunity.⁵²

The definition of “State official” is used exclusively for the purposes of the Draft Articles.⁵³ This happens because there is no agreed definition of State officials in public international law and at the same time each domestic legal system uses a different definition. Furthermore, the definition is general in nature and can be used for both types of State officials’ immunity, meaning for both immunity *ratione personae* and immunity *ratione materiae*. Draft articles 3 and 5 respectively deal with which persons enjoy each type of immunity. Both these definitions fall within the definition of article 2.

⁴⁷ Second Report of Ms. Concepción Escobar Hernández (n 33) para 27.

⁴⁸ UN, *Rome Statute of the International Criminal Court*, signed: 17 July 1998, Rome, entry into force: 1 July 2002, 2187 UNTS, 3 <<https://www.icc-cpi.int/sites/default/files/RS-Eng.pdf>> accessed 5 September 2023.

⁴⁹ e.g. the International Criminal Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 (hereinafter ICTY) and the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States between 1 January and 31 December 1994 (hereinafter ICTR).

⁵⁰ 73rd ILC Report (n 12) ch VI, para 69, commentary 26 to art 1.

⁵¹ 73rd ILC Report (n 12) ch VI, para 68, art 2.

⁵² Second Report of Ms. Concepción Escobar Hernández (n 33) paras 35 - 46.

⁵³ 73rd ILC Report (n 12) ch VI, para 69, commentary 5 to art 2.

The first condition for a person to be considered a State official is that they are a natural person; the term “individual” excludes legal persons from the scope of the definition. The second condition is that the official either exercises State functions or represents the State. As is logical, the official may fulfil both these criteria.

The specific definitions for each type of immunity mention the persons enjoying them. Article 3 *eo nomine* lists the three individuals that enjoy immunity *ratione personae*, meaning the Head of State, Head of Government and the Minister of Foreign Affairs. Since they are *per se* State officials, no special mention is made.⁵⁴

In contrast, the ILC avoided proceeding correspondingly in article 5, since the officials enjoying immunity *ratione materiae* cannot be accurately and exhaustively listed, given the variety of positions that can fall under the definition of State official and the differences between each domestic legal system. Their identification must follow a case-by-case basis, where a specific link between the official and their State is proven, meaning the representation of the State of the exercise of State functions.⁵⁵ In the *Djibouti v France* case, Djibouti claimed immunity *ratione materiae* for its *Procureur de la République* and its Head of National Security.⁵⁶ In the *Enrica Lexie Incident* the discussion concerned the immunities of marines of the Italian Navy as State officials⁵⁷ and in the *Prosecutor v Tihomir Blaškić* case, it concerned the Minister of Defence.⁵⁸

It is necessary that the existence of a link between the official and their State is proven. This link can be the representation of the State or the exercise of State functions, as seen above.⁵⁹ The link will be fulfilled for any State official who represents the State. This is especially true for the so called “troika” of Head of State, Head of Government and Minister of Foreign Affairs, who enjoy full powers to represent the State directly, without the need to be granted specific powers.⁶⁰ Other State officials may be specifically granted the right to represent the State in accordance with the rules of each domestic legal order, thus rendering necessary the case-by-case basis of examination. This criterion further serves those Heads of State, who may not perform State functions, but instead mainly represent the State internationally.⁶¹

⁵⁴ *ibid*, commentary 7 to art 2.

⁵⁵ *ibid*, commentary 8 to art 2.

⁵⁶ *Djibouti v France* (n 29) paras 185, 187.

⁵⁷ *The ‘Enrica Lexie’ Incident* (the Italian Republic v the Republic of India), Award of 21 May 2020, Arbitral Tribunal constituted under Annex VII to the 1982 UNCLOS, PCA Case No 2015-28.

⁵⁸ *Prosecutor v Blaškić* (n 22); See also *Regina v Bartle and the Commissioner of Police for the Metropolis and Others – Ex Parte Pinochet*, House of Lords of the UK, 24 March 1999, 38 International Legal Materials 581; *Khurts Bat v Investigating Judge of the German Federal Court*, Administrative Court, High Court of Justice of the UK, 29 July 2011 [2011] EWHC 2029 (Administrative Court), 147 ILR 633.

⁵⁹ text to n 34 in ch 2.1 Scope.

⁶⁰ See text to n 84 in ch 3.1 Subjective element.

⁶¹ 73rd ILC Report (n 12) ch VI, para 69, commentary 12 to art 2.

As far as the exercise of State functions is concerned, any activities of the State are included in the definition, principally the judicial, executive and legislative functions of the State. This link with the State of the official underlines that immunity is awarded to the official ultimately for the benefit of the official's State. This specific terminology was preferred over other expressions in order to emphasize the link between the official and their State and to differentiate between the subjective element of a person being a State official and the objective element of immunity, meaning the "acts performed in an official capacity".⁶²

Turning to the form of the link between the official and their State, the ILC considered that the form is irrelevant and must be broadly understood, given the different approaches of different domestic legal orders and the different practice of States. However, the link cannot include all *de facto* State officials, but shall, instead, be examined on a case-by-case basis and in connection with the definition of "act performed in an official capacity".⁶³ Aside from the form of the link, the hierarchical position of the official within the State has also been considered irrelevant to the subsumption of a person under the definition of State official.⁶⁴ Lastly, the definition of State official does not prejudice the type of acts covered and the substantive scope of immunity.⁶⁵

Although the terms used in other language versions of the Draft Articles are not interchangeable, it bears no significance as they are considered synonymous within the framework of the present articles. Article 2(a) explicitly settles that the term "State official" covers not only current but also former officials of the State, meaning that the person under question may not still be a State official when the competent authorities are examining whether immunity applies. More analysis of the temporal scope of immunity will be presented specifically for each type of immunity.

2.2.2 "Act performed in an official capacity"

While some members of the Commission were doubtful about the necessity of such a provision, the ILC considered the inclusion necessary due to the central position of the "acts performed in an official capacity" within the legal regime of functional immunity. The elements of this definition are the term "act", which is "performed by a State official" and finally the "exercise of State authority".

⁶² *ibid*, commentary 13 to art 2.

⁶³ *ibid*, commentary 15 to art 2.

⁶⁴ *ibid*, commentary 16 to art 2; UN Doc A/CN.4/631, *Second report on immunity of State officials from foreign criminal jurisdiction, by Mr. Roman Anatolevich Kolodkin, Special Rapporteur*, para 21 <https://legal.un.org/ilc/documentation/english/a_cn4_631.pdf> accessed 20 September 2023; *The 'Enrica Lexie' Incident* (n 57) para 849.

⁶⁵ 73rd ILC Report (n 12) ch VI, para 69, commentary 17 to art 2.

The act includes both actions and omissions, regardless of whether it is only one act or more or a combination of acts and omissions.⁶⁶ Furthermore, it includes both active and passive conduct that may result in criminal responsibility. A similar approach is followed in the Rome Statute of the ICC, although the term is used in a general sense,⁶⁷ and in the Statutes of the ICTY⁶⁸ and ICTR.⁶⁹ The same is true for relevant treaties, mainly the Convention on the Prevention and Punishment of the Crime of Genocide and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, which are provided as examples in the Draft Articles.⁷⁰

Moreover, the mere performance of the act does not automatically correspond to an “act performed in an official capacity”, without the necessary direct connection between the act and the “exercise of State authority”. This link between the act and the State is the justification for the entitlement of immunity in order to protect the principle of *par in parem non habet imperium*.⁷¹ The link with the State is satisfied when the act is attributable to the State. This prerequisite does not preclude the dual attribution to both the State and the individual having committed the act. The ILC has already implemented the “single act, dual responsibility” mode in the draft Code of Crimes against the Peace and Security of Mankind, as well as the Articles on Responsibility of States (hereinafter ARSIWA) and the Articles on Responsibility of International Organisations.⁷² This model states that a single act of the official can result in both their own responsibility but at the same time also the responsibility of the State.

ARSIWA and specifically articles 4 – 11 are used for the determination of whether an act is attributed to the State.⁷³ It must be noted that these articles were prepared for the purpose of

⁶⁶ YBILC 2001, Vol II, pt 2, *Report of the International Law Commission on the work of its fifty-third session*, commentary 1 to art 1 <https://legal.un.org/ilc/publications/yearbooks/english/ilc_2001_v2_p2.pdf> accessed 20 September 2023.

⁶⁷ Rome Statute (n 48) arts 6, 7, 8 and 8bis.

⁶⁸ UN SC, *Statute of the International Criminal Tribunal for the Former Yugoslavia*, SC Resolution 827 of 25 May 1993.

⁶⁹ UN SC, *Statute of the International Criminal Tribunal for Rwanda*, SC Resolution 955 (1994) of 8 November 1994.

⁷⁰ 73rd ILC Report (n 12) ch VI, para 69, commentary 22 to art 2; *Convention on the Prevention and Punishment of the Crime of Genocide*, signed: 9 December 1948, Paris, entry into force: 12 January 1951, 78 UNTS 277 <https://www.un.org/en/genocideprevention/documents/atrocities-crimes/Doc.I_Convention%20on%20the%20Prevention%20and%20Punishment%20of%20the%20Crime%20of%20Genocide.pdf> accessed 20 September 2023; *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, signed: 10 December 1984, New York, entry into force: 26 June 1987, 1465 UNTS 85 <https://legal.un.org/avl/pdf/ha/catcidtp/catcidtp_e.pdf> accessed 26 September 2023.

⁷¹ *ibid*, commentary 23 to art 2.

⁷² ARSIWA (n 66) para 77, art 58, p 142; YBILC 1996, Vol II, pt 2, *Report of the International Law Commission on the work of its forty-eighth session*, UN Doc A/51/10, para 50, draft art 4, p 23 <https://legal.un.org/ilc/publications/yearbooks/english/ilc_1996_v2_p2.pdf> accessed 20 September 2023; YBILC 2011, Vol II, pt 2, *Report of the International Law Commission on the work of its sixty-third session*, UN Doc A/66/10, para 88, art 66, p 104 <https://legal.un.org/ilc/publications/yearbooks/english/ilc_2011_v2_p2.pdf> accessed 20 September 2023.

⁷³ ARSIWA (n 66) para 77, ch II: attribution of conduct to a State, arts 4 – 11.

determining State responsibility. Their application on the determination of immunity of State officials is not straightforward. In the cases of articles 4 – 6, that concern *de iure* State organs, entities exercising elements of governmental authority and organs placed at the disposal of a State by another State, the acts of State officials are accepted to constitute acts of the State for the purposes of determining immunity. An official will be considered a *de iure* State organ in accordance with the domestic legal order of the State.⁷⁴

In the cases of articles 7 – 11, the ILC is of the view that they cannot be generally applied on immunity of State officials, as when an act has been performed exclusively for the benefit of the State official and in their own self-interest, then the act cannot be regarded to have been performed in an official capacity, despite contrary appearances. Immunity is awarded for the sole purpose of protecting the sovereign equality of States and in the cases where there is no self-interest of the State, immunity cannot be awarded to the State official.⁷⁵ This means that immunity cannot be justified in the cases of *ultra vires* acts, conduct carried out in the absence or default of official authorities, conduct of insurrectional movements and conduct that may have been adopted by the State as its own without it being attributable in accordance with articles 4 – 6 ARSIWA. Specifically regarding *ultra vires* acts, the actions of the official that go beyond the scope of their duties as provided by the State cannot be considered acts of the sovereign, as the official was not empowered to commit these acts.⁷⁶ This should not be taken to mean that all unlawful acts cannot be covered by immunity, even if it concerns unlawfulness under international law.⁷⁷ This necessary link between the act of the official and the State is expressed in article 2b using the phrase “State authority”.

The ILC has chosen not to indicate a list of examples of acts performed in an official capacity, as such a list could not possibly be exhaustive. The criteria used to identify such an act on a case-by-case basis are that the act of the State official is attributable to the State and can be considered an act performed in the exercise of State authority. As a rule of thumb, military and diplomatic activities, as well as legislative and administrative acts or acts exercising the police

⁷⁴ *ibid*, art 4(2); *Western Sahara*, Advisory Opinion, ICJ Reports 1975, 12, para 94; *The ‘Enrica Lexie’ Incident* (n 57) para 859; *Prosecutor v Blaškić* (n 22) para 41.

⁷⁵ 73rd ILC Report (n 12) ch VI, para 69, commentary 25 to art 2.

⁷⁶ *Hilao v Estate of Marcos (In re Estate of Ferdinand Marcos, Human Rights Litigation) (Estate II)*, US Court of Appeals, 9th Circuit, 16 June 1994, 25 F.3d 1467, 104 ILR 119, 123 and 125; *re Jane Doe I, et al v Liu Qi, et al, Plaintiff A, et al, v Xia Deren, et al*, US District Court for the Northern District of California, 9th Circuit, 8 December 2004, 349 F. Supp.2d 1258.

⁷⁷ *Jaffe v Miller and Others*, Ontario Court of Appeal (Canada), Judgment of 17 June 1993, 95 ILR 446; *Argentine Republic v Amerada Hess Shipping Corporation and Others*, US Supreme Court, 23 January 1989, 488 US 428, 81 ILR 658; *McElhinney v Williams*, Supreme Court of Ireland, 15 December 1995, 104 ILR 691; *I Congreso del Partido* (n 25); *Jones v Saudi Arabia*, House of Lords of the UK, 14 June 2006, [2006] UKHL 26, 129 ILR 744.

powers of the State have been considered as acts performed in an official capacity.⁷⁸ In *The 'Enrica Lexie' Incident*, the arbitral tribunal decided that the acts of the two Italian naval officers, when protecting the commercial vessel *Enrica Lexie* constituted acts performed in an official capacity, since the officers were members of the Italian Navy and of the Italian judicial police, subject to a military chain of command under Italian law and were deployed pursuant to a State mandate.⁷⁹

In other cases, domestic courts have decided that certain acts cannot be considered “acts performed in an official capacity”. Such cases have concerned the assassination of a political opponent and corruption.⁸⁰ Such acts exceed the limits of official functions and cannot be considered a governmental activity. They are private acts that are made for the personal gain of the individual.⁸¹ In the case of crimes under international law, some domestic courts have awarded immunity, while others have considered them to be *ultra vires* acts or more generally acts that cannot be considered to constitute exercises of State functions.⁸²

⁷⁸ *Empire of Iran*, Constitutional Court of the Federal Republic of Germany, 30 April 1963, 45 ILR 57; *Victory Transport Inc. v Comisarva General de Abastecimientos y Transportes*, US Court of Appeal, 2nd Circuit, 9 September 1964, US 336 F.2d 354, 35 ILR 110; *Saltany and Others v Reagan and Others*, US District Court for the District of Columbia, 23 December 1988, 702 F. Supp 319, 80 ILR 19; *Lozano v Italy*, case No. 31171/2008, Italy, Court of Cassation, Judgment of 24 July 2008.

⁷⁹ *The 'Enrica Lexie' Incident* (n 57) paras 850 - 853, 859, 862; Giuseppe Paccione, *Un Mare di Abusi: La Vicenda dell'Enrica Lexie e dei due Marò nel Contesto del Diritto Internazionale* (M. Adda 2015) 205.

⁸⁰ *Letelier v Republic of Chile*, US District Court, District of Colombia, 488 F. Supp. 665 (DDC 1980), 673; *Teodoro Nguema Obiang Mangué et autres*, Court of Appeal of Paris, Section Seven, 2nd Investigating Chamber, 13 June 2013.

⁸¹ *Jimenez v Aristeguieta et al*, US Court of Appeals, 5th Circuit, 12 December 1962, 311 F.2d 547, 33 ILR 353; *Evgeny Adamov v Office fédéral de la justice*, Federal Tribunal of Switzerland, 22 December 2005 (1A 288/2005); *United States of America v Noriega*, US Court of Appeals, 11th Circuit, 7 July 1997, 117 F.3d 1206, 121 ILR 591; *Mellerio c. Isabel de Bourbon*, Court of Appeal of Paris, 3 June 1872, Recueil général des lois et des arrêts 1872, 293; *Ex-roi d'Egypte Farouk c. S.A.R.L. Christian Dior*, Court of Appeal of Paris, 11 April 1957, 84 [1] Journal du droit international (1957) 716–718.

⁸² *Pinochet*, House of Lords of the UK (n 58); *Prefecture of Voiotia v Federal Republic of Germany*, Court of First Instance of Livadeia (Greece), 30 October 1997 92 [4] AJIL (1998), 765; *Hissène Habré*, Court of Appeal of Dakar (Senegal), 4 July 2000, and Court of Cassation, 20 March 2001, 125 ILR 571 and 577; See further ch 4.3 Exceptions to Immunity *Ratione Materiae*.

Chapter 3: Immunity *Ratione Personae*

3.1 Subjective element

3.1.1 Head of State, Head of Government and Minister of Foreign Affairs

Moving on to the first type of immunity, immunity *ratione personae* is going to be analysed in this chapter. Article 3 of the ILC Draft Articles starts the analysis with an *eo nomine* mention of the persons that enjoy immunity *ratione personae*. It serves to remind that these persons were not mentioned in article 2, when the definition of “State official” was provided for the purposes of the present Draft Articles, as it encompasses State officials benefiting from either type of immunity.

According to article 3, three persons enjoy personal immunity. Specifically, the Head of State, the Head of Government and the Minister of Foreign Affairs.⁸³ The reason why these three positions have been differentiated from other positions of State officials is because they have full powers to represent the State internationally.⁸⁴ Moreover, it is important that these three officials have the ability to carry out their official duties without being impeded by criminal proceedings in foreign countries.⁸⁵

It is noteworthy to mention that it first became accepted that Heads of State can benefit from immunity *ratione personae*, before the legal notion was expanded to the Head of Government and the Minister of Foreign Affairs. Historically, as seen above, the Head of State was equated with the State itself.⁸⁶ This synonymy resulted in the need to protect the dignity of the Head of the State, as this meant protecting the dignity of the State. The monarch was believed to be above the law and that he was the person from which law originated.⁸⁷ Various conventions make express reference to the Head of State enjoying immunity *ratione personae* from criminal jurisdiction in addition to immunity deriving from special legal regimes and in separate paragraphs than the Head of Government and the Minister of Foreign Affairs.⁸⁸ Accordingly, domestic courts have all

⁸³ *Arrest Warrant* (n 37) para 51; *Djibouti v France* (n 29) para 170.

⁸⁴ *Armed Activities on the Territory of the Congo* (New Application: 2002) (Democratic Republic of the Congo v Rwanda), Jurisdiction and Admissibility, Judgment, ICJ Reports 2006, 6, para 46; *Nuclear Tests* (Australia v France), Judgment, ICJ Reports 1974, 253, paras 49-51; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Bosnia and Herzegovina v Yugoslavia), Preliminary Objections, Judgment, ICJ Reports 1996 (II), 622, para 44.

⁸⁵ *Arrest Warrant* (n 37) paras 53-54.

⁸⁶ *The Schooner Exchange v McFaddon* (n 25) 137; Hazel Fox, Philippa Webb, *The Law of State Immunity* (3rd edn., OUP 2013) 550; See n 16 in ch.1.2 Brief Historical Overview.

⁸⁷ Elizabeth Helen Franey, ‘Immunity from the criminal jurisdiction of national courts’ in Alexander Orakhelashvili (ed), *Research Handbook on Jurisdiction and Immunities in International Law* (Edward Elgar Publishing 2015) 208.

⁸⁸ *UN Convention on Special Missions* (n 42) art 21(1); *UN Convention on Jurisdictional Immunities of the State* (n 8) art 3(2); UN, *Vienna Convention on the Representation of States in Their Relations with International Organisations of a Universal Character*, signed: 14 March 1975, Vienna, art 50(1) <https://legal.un.org/ilc/texts/instruments/english/conventions/5_1_1975.pdf> accessed 23 September 2023.

showed a consistent practice that Head of States enjoy immunity *ratione personae*.⁸⁹ As holds true with all State officials, international law does not dictate who constitutes a Head of State, as the constitutional structure of a State is a matter of domestic law.⁹⁰

It has been recognised that the Head of Government and the Minister of Foreign Affairs also enjoy immunity *ratione personae* because their functions of representing the State are approximate to the functions of the Head of State.⁹¹ They have the power to conclude treaties, they are considered internationally protected persons and have the power to represent the State.⁹² Attention must be paid to the *Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons*, which avoided extending its protection to other government officials of equivalent rank, as there was not a broadly accepted rule of international law for these officers, but still made explicit reference to the Minister of Foreign Affairs.⁹³

A matter that was discussed within the Commission was the fact that the UN Convention on Jurisdictional Immunities of the State did not mention the Head of Government and the Minister of Foreign Affairs when noting the immunities that are not affected by the Convention.⁹⁴ However, the Convention only refers to State immunity and the immunity of State officials from criminal jurisdiction remains outside of the scope of the Convention.⁹⁵ After all, it was drafted before the release of the ICJ decision on the *Arrest Warrant* case.⁹⁶ There, the Court specifically mentioned that “certain holders of high-ranking office in a State, such as the Head of State, Head of Government and Minister of Foreign Affairs” are entitled to immunity *ratione personae*.⁹⁷

⁸⁹ Re *Honecker*, Federal Supreme Court, Second Criminal Chamber (Federal Republic of Germany), 14 December 1984 (No 2 ARs 252/84), 80 ILR 365–366; *Gaddafi*, Court of Appeal of Paris, 20 October 2000, and Court of Cassation, Judgment No. 1414 of 13 March 2001, 105 *Revue générale de droit international public* (2001), 125 ILR 490 and 508; *Case against Paul Kagame*, National High Court of Spain, Central Investigation Court No 4, 6 February 2008; *Rey de Marruecos*, National High Court of Spain, Criminal Chamber decision of 23 December 1998; *Fidel Castro*, National High Court of Spain, plenary decision of the Criminal Chamber, 13 December 2007.

⁹⁰ *Western Sahara* (n 74) para 94; Foakes (n 17) 29; Ramona Pedretti, *Immunity of Heads of State and State Officials for International Crimes* (Brill Nijhoff, 2015) 9.

⁹¹ 73rd ILC Report (n 12) ch VI, para 69, commentary 6 to art 3.

⁹² VCLT (n 6) art 7(2); *UN Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents*, signed: 14 December 1973, New York, entry into force: 20 February 1977, 1035 UNTS 167, art 1(1a); *UN Convention on Special Missions* (n 42) art 21(2); *Vienna Convention on the Representation of States* (n 88) art 50(2); *Armed Activities on the Territory of the Congo* (n 84) para 46.

⁹³ YBILC 1972, Vol II, UN Doc A/CN.4/SER.A/1972/Add.J, *Documents of the twenty-fourth session including the report of the Commission to the General Assembly*, Document A/8710/Rev.1: Report of the ILC on the work of its twenty-fourth session, ch 3, p 313, commentary 3 to draft article 1 <https://legal.un.org/ilc/publications/yearbooks/english/ilc_1972_v2.pdf> accessed 23 September 2023.

⁹⁴ *UN Convention on Jurisdictional Immunities of the State* (n 8) art 3(2).

⁹⁵ YBILC 1991 (n 41) ch 2, commentary 7 to art 3(2).

⁹⁶ *Arrest Warrant* (n 37) para 51; 73rd ILC Report (n 12) ch VI, para 69, commentary 7 to art 3.

⁹⁷ See also *Djibouti v France* (n 29) para 170.

It must be noted that immunity was first extended from the Head of State to the Head of Government.⁹⁸ It was the *Arrest Warrant* case that extended this immunity to the Minister of Foreign Affairs.⁹⁹ The majority of the ILC members expressed the opinion that this reflects the current state of international law and can be considered a rule of customary law, due to the position that the Minister of Foreign Affairs holds and the representational functions that the Minister is equipped with.¹⁰⁰ However, since the start of the ILC's work on the topic, the members of the Commission were divided.¹⁰¹ Some members pointed out the absence of state practice in the Court's reasoning and the Dissenting Opinions of some Judges that argue that the rationale for immunity should be the personification of the State.¹⁰² It has also been supported that the Minister of Foreign Affairs should not enjoy immunity when on private visits to foreign countries in order to strike a balance between the sovereign equality of States and the rule of law.¹⁰³

Indeed, the Court in the *Arrest Warrant* case did not cite any state practice or *opinio juris* to support the finding of a customary rule, but instead put forward a teleological argument, grounded on the goal of the effective performance of official functions of the Minister of Foreign Affairs.¹⁰⁴ The Minister of Foreign Affairs is required to frequently travel to foreign countries in order to represent their State internationally.¹⁰⁵ This function is one that the Minister of Foreign Affairs performs automatically, without the need to be specifically authorised and has its basis on international law.¹⁰⁶ States seem to be in agreement with this necessity, as the *Arrest Warrant* decision has not been opposed.¹⁰⁷ Furthermore, since then, national court decisions have also recognised immunity for these high-ranking officials.¹⁰⁸ As a result, the *Arrest Warrant* decision

⁹⁸ Institute of International Law, resolution on "Immunities from jurisdiction and execution of Heads of State and of Government in international law", 69 Yearbook of the Institute of International Law, Session of Vancouver, 2000-2001, 755 <https://www.idi-iil.org/app/uploads/2018/09/2000-2001_vol_69_Session_de_Vancouver.pdf> accessed 23 September 2023.

⁹⁹ 2nd report on the immunity of State officials, by Ms. Escobar Hernández (n 33) para 58.

¹⁰⁰ 73rd ILC Report (n 12) ch VI, para 69, commentary 8 to art 3.

¹⁰¹ YBILC 2008, Vol I, Summary records of the meetings of the sixtieth session, UN Doc A/CN.4/SER.A/2008, 232, para 29 <https://legal.un.org/ilc/publications/yearbooks/english/ilc_2008_v1.pdf> accessed 23 September 2023; Wood (n 15) 41.

¹⁰² *Arrest Warrant* (n 37) Joint Separate Opinion of Judges Higgins, Kooijmans and Buergenthal; Dissenting Opinion of Judge Al-Khasawneh; and the Dissenting Opinion of Judge *ad hoc* Van den Wyngaert.

¹⁰³ Dapo Akande, Sangeeta Shah, 'Immunities of State Officials, International Crimes, and Foreign Domestic Courts' (2011) 21 [4] EJIL, 815, 825.

¹⁰⁴ Roger O'Keefe 'Jurisdictional Immunities' in Christian J Tams, James Sloan (eds) *The Development of International Law by the International Court of Justice* (OUP 2013) 116.

¹⁰⁵ *Arrest Warrant* (n 37) para 53.

¹⁰⁶ 2nd report on the immunity of State officials, by Ms. Escobar Hernández (n 33) para 59.

¹⁰⁷ 73rd ILC Report (n 12) ch VI, para 69, commentary 8 to art 3.

¹⁰⁸ *H.S.A. et al v S.A. et al* (indictment of Ariel Sharon, Amos Yaron and others), Court of Cassation of Belgium, 12 February 2003 (P-02-1139.F), 42 [3] ILM 596; *Italy v Djukanović*, Italian Court of Cassation, 28 December 2004, ILDC 74 (IT 2004) para 10; *Ali Ali Reza v Grimpel*, Court of Appeal of Paris, 28 April 1961, 66 [2] *Revue générale de droit international public* (1962) 418, 47 ILR 275; *Saltany and Others v Reagan and Others* (n 78); *Tachiona v Mugabe* ("Tachiona P"), US District Court for the Southern District of New York, 30 October 2001, 169 F.Supp.2d 259; *Chong Boon Kim v Kim Yong Shik and David Kim*, US Circuit Court of the First Circuit, State of Hawaii, 9 September 1963, 58 AJIL (1964) 186.

can be considered authoritative in its field in determining the customary rule on immunity of the “troika” from foreign criminal jurisdiction.¹⁰⁹ Following this reasoning, the Commission included the “troika” of Head of State, Head of Government and Minister of Foreign Affairs in the persons enjoying immunity *ratione personae*.

3.1.2 Other officials

Next the Commission considered the question whether other State officials may also enjoy immunity *ratione personae*. In the past decades, the field of international relations has rapidly evolved, resulting in the increase of the trips to foreign countries that State officials are requested to make in an official capacity.¹¹⁰

It has been discussed that a ground for the extension of immunity to other State officials is the wording in the *Arrest Warrant* decision, where the ICJ stated that immunity is awarded to high-ranking officials “such as” the “troika”. The “such as” points towards the idea that the “troika” is an indicative list that should not be strictly interpreted but instead broadened to include other high-ranking State officials.¹¹¹ The members of the Commission that were in favour of such an extension focused on the major responsibilities within the State that the such officials have and their role in the representation of the State in matters relevant to their specific area of expertise as the criteria to decide whether a State official should be awarded immunity *ratione personae*.¹¹² They considered the approach of the Special Rapporteur only to include the “troika” to be restrictive.¹¹³

In the *Congo v Rwanda* case, the ICJ accepted that the circle of officials representing the State is progressively increasing to include State officials that hold “technical ministerial portfolios”.¹¹⁴ The Court, thus, went on to say that the Minister of Justice can in principle bind the State internationally when the Minister of Justice is representing the State internationally and making a statement that falls within the purview of the Minister of Justice.¹¹⁵

¹⁰⁹ UN, *Immunity of State Officials from Foreign Criminal Jurisdiction*, Memorandum by the Secretariat, UN Doc A/CN.4/596, 31 March 2008, para 121 <<https://digitallibrary.un.org/record/647001?ln=en>> accessed 23 September 2023.

¹¹⁰ Foakes (n 17) 128.

¹¹¹ *2nd report on the immunity of State officials*, by Ms. Escobar Hernández (n 33) para 61.

¹¹² 73rd ILC Report (n 12) ch VI, para 69, commentary 11 to art 3; UN GA 6th Committee, ‘Immunity of State Officials from Foreign Criminal Jurisdiction – Additional Comments from Norway’, 28 January 2014, <http://legal.un.org/ilc/sessions/66/pdfs/english/iso_norway.pdf> accessed 24 September 2023; Muriel Ubéda-Saillard, “Foreign Officials Entitled to (Absolute) Personal Immunity during Their Time in Office” in Tom Ruys, Nicolas Angelet and Luca Ferro (eds), *The Cambridge Handbook of Immunities and International Law* (CUP 2019) 485.

¹¹³ Wood (n 15) 49.

¹¹⁴ *Armed Activities on the Territory of the Congo* (n 84) para 47; Fox, Webb (n 86) 565.

¹¹⁵ *Armed Activities on the Territory of the Congo* (n 84) paras 48-49.

In the *Djibouti v France* case, the ICJ had to decide whether to award immunity to the Djiboutian *Procureur de la République* or its Head of National Security. However, the claims on behalf of Djibouti were not clear, as Djibouti in the written proceedings claimed that its State officials enjoy immunity *ratione personae*, whereas during the oral proceedings Djibouti rejected this argument and instead argued that its State officials enjoy immunity *ratione materiae*.¹¹⁶ The Court, having ascertained that the officials did not enjoy diplomatic or special missions immunity, noted that there are no grounds to support the entitlement of immunity *ratione personae*.¹¹⁷ This emphasizes that the pronouncement the Court gave in the *Arrest Warrant* was in the context of that specific dispute. In the subsequent case of *Djibouti v France*, the Court chose not to extend immunity *ratione personae* to other State officials aside from the “troika”.¹¹⁸

The matter has also been discussed before domestic courts. In the *Adamov* case immunity was awarded to a Minister of Atomic Energy.¹¹⁹ Immunity has also been awarded to the Vice-President of the Democratic Republic of the Congo.¹²⁰ National courts have recognised that Ministers of Defence generally enjoy immunity *ratione personae*, but have chosen in the specific cases not to award immunity in the end.¹²¹ Specifically in the *Mofaz* case, the court accepted that not all Ministers enjoy immunity, providing the examples of Home Secretary, Employment Minister, Environment Minister, Culture, Media and Sports Minister and differentiated the Minister of Defence, as a position with frequent travels and intertwined with issues of foreign policy, rendering necessary the non-impediment of the official functions (*ne impediatur officium*).¹²² Immunity has also been awarded in the case of a Minister for Commerce and International Trade with the rationale that the position required similar functions to the Minister of Foreign Affairs.¹²³

In other instances, domestic courts have refused to award immunity to State officials other than the “troika”, with the effect that domestic jurisprudence is not consistent nor conclusive on the matter. In the *Khurts Bat* case, the court analysed the functions that Mr Bat carried out and

¹¹⁶ *Djibouti v France* (n 29) paras 185, 187, 193.

¹¹⁷ *ibid*, para 194.

¹¹⁸ *2nd report on the immunity of State officials, by Ms. Escobar Hernández* (n 33) para 62.

¹¹⁹ *Adamov* (n 81) para 3.4.2.

¹²⁰ Pierre D’Argent, ‘Jurisprudence belge relative au droit international public (2004–07)’ (2007) 40 [1] *Revue Belge De Droit International*, 149, 185-186.

¹²¹ *A. c. Ministère public de la Confédération*, Federal Criminal Court (Switzerland) (BB.2011.140), 25 July 2012, para 5.4.3, 5.3.5; *Re General Shaul Mofaz*, Bow Street Magistrates’ Court of UK, 12 February 2004, 53 [3] *ICLQ* (2004) 771; *Association Fédération nationale des victimes d’accidents collectifs; Association des familles des victimes du Joola et al*, French Court of Cassation, Criminal Chamber, 19 January 2010 (09-84.818) *Bulletin des Arrêts, Chambre criminelle*, No 1 (January 2010) 41;

¹²² *Re General Shaul Mofaz* (n 121); Robert Kolb, ‘Jurisdictional immunities of ministers of defense’ (2014) 24 [2] *Swiss Review of International and European Law*, 179, 185.

¹²³ *Re Bo Xilai*, Bow Street Magistrates’ Court of UK, 8 November 2005, 128 *ILR* 713.

concluded that he did not enjoy a similar status to that of the “troika”, describing him as an administrator rather than a high-ranking official.¹²⁴ The same has been decided for a Minister of State,¹²⁵ Chief of the Armed Forces¹²⁶ and other State officials.¹²⁷ The inconclusiveness of domestic jurisprudence highlights the difficulty of delineating which State officials should be considered as the high-ranking ones that enjoy immunity *ratione personae*.

Hence, the Commission decided to include in draft article 3 only the Head of State, Head of Government and the Minister of Foreign Affairs, without achieving a consensus but only reaching a compromise between its members.¹²⁸

3.2 Scope of immunity *ratione personae*

Draft article 3 should be read in conjunction with article 4 in order to provide a complete picture of the applicable regime. Draft article 4 concerns the scope of immunity *ratione personae*, which can be applied “only during their term of office”. This means that personal immunity starts when the official enters the position in question and ceases to apply when the official stops being in office. This follows the rationale that it is the special position of the “troika”, who represent the State internationally that justifies immunity.¹²⁹

The *Arrest Warrant* decision pronounced that, once the termination of the official functions, the now former Minister of Foreign Affairs can be tried for acts committed before or after the period they were in office. Furthermore, they can be tried for acts committed during this period that were private.¹³⁰ The same should *a fortiori* hold true for the Head of State and the Head of Government. This is portrayed in the relevant conventions,¹³¹ and domestic court decisions.¹³² The criteria for the commencement and termination of official functions are determined in domestic law.¹³³

¹²⁴ *Khurts Bat* (n 58) paras 55-62; *Foakes* (n 17) 129.

¹²⁵ *Ali Ali Reza v Grimpel* (n 108).

¹²⁶ *USA v Noriega* (n 81).

¹²⁷ *Republic of the Philippines v Marcos* case, US District Court for the Northern District of California, 11 February 1987 (665 F. Supp. 793); *Fotso v Republic of Cameroon*, US District Court of Oregon, 22 February 2013 (6:12CV 1415-TC).

¹²⁸ *Wood* (n 15) 50.

¹²⁹ 73rd ILC Report (n 12) ch VI, para 69, commentary 2 to art 4.

¹³⁰ *Arrest Warrant* (n 37) para 61.

¹³¹ VCDR (n 7) art 39(2); *UN Convention on Special Missions* (n 42) art 43(2); YBILC 1991 (n 41) ch 2, commentary 19 to art 2.

¹³² *Mellerio c. Isabel de Bourbon* (n 81); *Seyyid Ali Ben Hamond, prince Raschid, c. Wiercinski*, Seine Civil Court of France, 25 July 1916, 15 *Revue de droit international privé et de droit pénal international* (1919) 505; *Ex-roi d’Egypte Farouk c. S.A.R.L. Christian Dior* (n 81); *Société Jean Dessès c. prince Farouk et dame Sadek*, Tribunal de Grande Instance de la Seine, 12 June 1963, *Revue critique de droit international privé* (1964) 689, 65 *ILR* 37;

¹³³ 73rd ILC Report (n 12) ch VI, para 69, commentary 4 to art 4.

As far as the period during the term of office is concerned, immunity *ratione personae* covers all acts of the official and can, thus, be called “full immunity” (*immunité totale*).¹³⁴ Unlike the subjective element of immunity *ratione personae*, the substantive element has not created lengthy debates within the Commission nor difficulty in practice, as it is generally accepted that both private and official acts are covered.¹³⁵

According to the *Arrest Warrant* case, it is irrelevant whether the act was performed in an official or private capacity, as the hinderance to the exercise of the Minister’s official functions will be the same.¹³⁶ Acts performed in an official capacity have already been defined by virtue of draft article 2; Acts performed in a private capacity are considered *a contrario* those acts that are not considered acts performed in an official capacity. It should be mentioned that immunity *ratione personae* may apply to acts performed before the assumption of office, if the criminal proceedings happen during the term of office.¹³⁷ Immunity should, therefore, be understood as a suspension of the exercise of criminal proceedings for as long as the official is in office. It cannot result in the impunity of the individual, as immunity is a procedural rule, discussed before the examination of the merits.¹³⁸

Following the termination of the term of office, the official does not enjoy immunity *ratione personae* anymore, but enjoys only immunity *ratione materiae*. Consequently, as will be seen below, the official continues to be covered for official acts.¹³⁹

¹³⁴ *Arrest Warrant* (n 37) para 54; *2nd report on the immunity of State officials, by Ms. Escobar Hernández* (n 33) para 72.

¹³⁵ *Pinochet*, House of Lords of the UK (n 58); *Gaddafi* (n 89); *Khurts Bat* (n 58); *H.S.A. et al v S.A. et al* (n 108); *Case against Paul Kagame* (n 89); *Mangue*, 13 June 2013 (n 80); *Yaser Arafat (Carnevale re Valente – Imp Arafat e Salah)*, Italian Court of Cassation, 28 June 1985, 69 [4] *Rivista di diritto internazionale* (1986) 884; *Ferdinand et Imelda Marcos c. Office fédéral de la police*, Federal Tribunal of Switzerland, 2 November 1989 (Arrêts du Tribunal Fédéral Suisse 115 Ib 496) *Revue suisse de droit international et de droit européen* (1991), 534–537, 102 ILR 198.

¹³⁶ *Arrest Warrant* (n 37) para 55.

¹³⁷ *ibid*; 73rd ILC Report (n 12) ch VI, para 69, commentary 11 to art 4.

¹³⁸ Ubéda-Saillard, (n 112) 482; See also text to n 38 in ch 2.1 Scope.

¹³⁹ 73rd ILC Report (n 12) ch VI, para 69, commentary 14 to art 4.

Chapter 4: Immunity *Ratione Materiae*

4.1 Subjective element

Proceeding to the second type of immunity that State officials enjoy, the present chapter analyses the rule of immunity *ratione materiae* from foreign criminal jurisdiction. Immunity *ratione materiae* is awarded to all State officials “acting as such”, making it apparent that an *eo nomine* identification of the interested officials would prove significantly difficult, unlike with immunity *ratione personae*.¹⁴⁰

As succinctly presented in chapter 1.5.2, the identification happens on a case-by-case basis, searching for a link between the State official and their State. The link is deemed to have been established when the act is attributable to the State and was a result of an exercise of State authority. As a result, functional immunity can be awarded to individuals who may not be State officials but are nonetheless acting on behalf of the State.¹⁴¹

The phrase “acting as such” emphasizes that the act under question must have been performed in an official capacity, meaning while the official is discharging their official State functions. This is the important distinguishing feature with immunity *ratione personae*. While some ILC members felt that, for this reason, it is unnecessary to define the persons that enjoy functional immunity, the majority was of the opinion that such a definition retains a degree of usefulness.¹⁴² It should be noted that the persons enjoying immunity *ratione materiae* include the “troika” of the Head of State, Head of Government and Minister of Foreign Affairs, when immunity *ratione personae* does not apply.¹⁴³

4.2 Scope of immunity *ratione materiae*

Draft article 6 is complementary to article 5, furthering the analysis that the official must have acted in an official capacity and excluding acts performed in a private capacity.¹⁴⁴ It has been characterised as a generally uncontroversial article.¹⁴⁵ Since the emphasis on immunity *ratione materiae* is placed on the official act, it has also been characterised as a conduct-based immunity.¹⁴⁶ As far as the temporal element of functional immunity is concerned, this type of immunity has a permanent character, meaning that immunity applies after the termination of the

¹⁴⁰ 73rd ILC Report (n 12) ch VI, para 68, art 5.

¹⁴¹ *Twyecross v Dreyfus*, British Court of Appeal (1877) 5 Law Reports, Chancery Division 605; *Walker v Bank of New York*, Ontario Court of Appeal, 31 January 1994, 69 Ontario Appeal Cases 153; Akande, Shah (n 103) 825.

¹⁴² 73rd ILC Report (n 12) ch VI, para 69, commentary 3 to art 5.

¹⁴³ *ibid*, commentary 4 to art 5; 73rd ILC Report (n 12) ch VI, para 68, art 4(3).

¹⁴⁴ 73rd ILC Report (n 12) ch VI, para 69, commentary 3 to art 6.

¹⁴⁵ Wood (n 15) 51.

¹⁴⁶ Akande, Shah (n 103) 825.

term of office of the State official by virtue of the nature of the act performed.¹⁴⁷ This is portrayed in international jurisprudence and in the relevant conventions.¹⁴⁸ It is a well-established rule of international law that State officials enjoy immunity *ratione materiae*, by virtue of customary international law.¹⁴⁹

Immunity *ratione materiae* has been considered as an aspect of the immunity of the State, as official acts of the State should not be called into question by domestic courts.¹⁵⁰ Functional immunity ensures that the rules of State immunity are not circumvented, since State officials are mere instruments of the State and their acts are acts of the State.¹⁵¹ This rationale can be traced back to the 19th century, when the British government claimed functional immunity as an extension of State immunity regarding the acts of McLeod aboard *The Caroline*.¹⁵²

At this point in the Draft Articles, the members of the Commission discussed the relationship between immunity *ratione personae* and immunity *ratione materiae*. Some argued that the “troika”, during their term of office, enjoy both types of immunity, while others argued that immunity *ratione personae* is more general in scope and encompasses functional immunity, as the former applies to acts performed both in private and official capacity. This would mean that the “troika” enjoys only immunity *ratione personae* while in office and immunity *ratione materiae* is applied after the termination of the term of office. Following this discussion, the Commission concluded that after the termination of the term of office, the “troika” “continues to enjoy immunity with respect to acts performed in an official capacity during the term of office”.¹⁵³

4.3 Exceptions to Immunity *Ratione Materiae*

4.3.1 In general

In contrast to immunity *ratione personae* which is an absolute immunity, immunity *ratione materiae* is accompanied by exceptions regarding certain crimes under international law. This issue has been intensely debated within the ILC but also by the international community since

¹⁴⁷ 73rd ILC Report (n 12) ch VI, para 69, commentary 6 to art 6.

¹⁴⁸ *Arrest Warrant* (n 37) para 61; VCDR (n 7) art 39(2); *Convention on the Privileges and Immunities of the UN* (n 43) art IV, section 12; *Convention on the Privileges and Immunities of the Specialized Agencies* (n 43) art V, section 14.

¹⁴⁹ *The ‘Enrica Lexie’ Incident* (n 57) para 843; *Jones and Others v the United Kingdom*, Nos. 34356/06 and 40528/06, ECtHR, Judgment of 14 January 2014, paras 202-204; *Jones v Saudi Arabia* (n 77); *Jaffe v Miller and Others* (n 77); *Fang v Jiang*, High Court of New Zealand, 21 December 2006, New Zealand Administrative Report 420; *Prosecutor v Blaškić* (n 22) para 38; Andrew Sanger, ‘Immunity of state officials from the criminal jurisdiction of foreign state’ (2013) 62 [1] *International and Comparative Law Quarterly*, 193, 199.

¹⁵⁰ *Holland v Lampen-Wolfe*, House of Lords of the UK, 20 July 2000, 1 *Weekly Law Reports* 1573.

¹⁵¹ *Prosecutor v Blaškić* (n 22) para 38; *Propend Finance Pty Ltd v Sing*, UK Court of Appeal, 17 April 1997, 111 ILR 611; *Franey* (n 87) 210.

¹⁵² *Foakes* (n 17) 138.

¹⁵³ See also VCDR (n 7) art 39(2); *Convention on the Privileges and Immunities of the UN* (n 43) art IV, section 12; *Convention on the Privileges and Immunities of the Specialized Agencies* (n 43) art V, section 14.

2008.¹⁵⁴ Draft article 7 was exceptionally adopted with a vote in 2017 and then in 2022 the whole Draft Articles were adopted on a first reading without a separate vote for article 7.¹⁵⁵ There were twenty-one votes in favour, one abstention and eight votes against.¹⁵⁶ Article 7 serves the function of preserving the systemic unity of international law and avoiding the rules of the Draft Articles clashing with existing standards and legal principles, as the ILC Draft Articles cannot exist in a theoretical vacuum.¹⁵⁷

Draft article 7 provides that State officials do not enjoy immunity *ratione materiae* in relation to six “crimes under international law”, those being genocide, crimes against humanity, war crimes, the crime of apartheid, torture and enforced disappearance.¹⁵⁸ They are considered to be “the most serious crimes of concern to the international community”, whose prohibition and punishments are provided in international treaties and customary norms. This is the reason why the Commission promoted the codification and progressive development of international law and included them in article 7.¹⁵⁹ It is irrelevant whether these crimes have been criminalised under national law, as international law provides the basis for their criminalisation and there exists a general international consensus about the prevention and punishment of the commission of such crimes.¹⁶⁰

While article 7 applies only to functional immunity, this does not mean that it cannot apply to the Head of State, Head of Government and the Minister of Foreign Affairs. After the termination of the term of office, the above officials enjoy residual immunity *ratione materiae* for the official acts committed during their term of office. However, if those acts concern the crimes listed in article 7, then immunity *ratione materiae* cannot be applied either.¹⁶¹

Paragraph 2 of article 7 provides information on how to define the aforementioned crimes and must be read together with the Annex listing the relevant treaties. While all six of these crimes

¹⁵⁴ Wood (n 15) 52.

¹⁵⁵ 73rd ILC Report (n 12) ch VI, para 69, commentary 3 to art 7; UN Doc A/72/10, *Report of the International Law Commission Sixty-ninth session (1 May-2 June and 3 July-4 August 2017)*, Official Records of the GA, Seventy-second Session, Supplement No. 10 <<https://documents-dds-ny.un.org/doc/UNDOC/GEN/G17/237/29/PDF/G1723729.pdf?OpenElement>> accessed 25 September 2023; van Alebeek ‘The “International Crime” Exception’ (n 15) 27.

¹⁵⁶ 69th ILC Report (n 155) para 74.

¹⁵⁷ 73rd ILC Report (n 12) ch VI, para 69, commentary 10 to art 7.

¹⁵⁸ 73rd ILC Report (n 12) ch VI, para 68, art 7(1).

¹⁵⁹ 73rd ILC Report (n 12) ch VI, para 69, commentary 11 to art 7.

¹⁶⁰ 73rd ILC Report (n 12) ch VI, para 69, commentary 18 to art 7; YBILC 1996 (n 72) p 17, art 1(2); YBILC 1950, Vol II, UN Doc A/CN.4/SER.A/1950/Add.1, *Documents of the second session including the report of the Commission to the General Assembly*, p 374, principle I <https://legal.un.org/ilc/publications/yearbooks/english/ilc_1950_v2.pdf> accessed 25 September 2023; YBILC 1954, Vol II, UN Doc A/CN.4/SER.A/1954/Add.1, *Documents of the sixth session including the report of the Commission to the General Assembly*, p 150, art 1 <https://legal.un.org/ilc/publications/yearbooks/english/ilc_1954_v2.pdf> accessed 25 September 2023.

¹⁶¹ 73rd ILC Report (n 12) ch VI, para 69, commentary 7 to art 7.

are well-established in international law, the Commission considered it necessary in order to follow the principles of legal certainty, which is distinctive in criminal law. In this way, subjectivity is avoided when identifying each crime. The ILC chose to refer the reader to treaty instruments that provide these definitions, because it is not part of its mandate for the present Draft Articles to analyse such definitions. The enumeration of certain treaties bears no effect to the analogous customary rules of international law nor to treaties that regulate such crimes, but are not mentioned in the Annex.

For each of the crimes mentioned in article 7, there exist more than one relevant conventions that include a definition of each crime. The Commission enumerated no more than two conventions per crime with a focus on universal conventions that include the most current definition and will not cause confusion by using multiple languages.¹⁶²

4.3.2 Analysis of exceptions to immunity *ratione materiae*

Two interpretations have been developed with regard to crimes under international law and immunity. The first doctrine proposes that the commission of such crimes cannot be considered an official act of the State and thus do not fall under the definition of “act performed in an official capacity”, with the result that there is no immunity *ratione materiae* in favour of the official.¹⁶³ The latter doctrine considers that such crimes require the presence of elements of State authority in order to be committed, such as the crimes of torture and enforced disappearance, rendering them acts committed in an official capacity.¹⁶⁴ In the latter case, it is considered that immunity is not applied, as these crimes constitute an exception to immunity *ratione materiae*.¹⁶⁵ Both doctrines have as a consequence the non-applicability of functional immunity. The article 7 does not answer which doctrine should be applied, but instead it only focuses on the fact that immunity “shall not be applied”.

The Special Rapporteur proposed to analyse the issue through two methods.¹⁶⁶ Firstly, the inductive analysis of State practice may result in the affirmation of a customary rule of limitations or exceptions to immunity. Secondly, the deductive method employs a systemic analysis through

¹⁶² 73rd ILC Report (n 12) ch VI, para 69, commentary 2 to Annex.

¹⁶³ *Pinochet*, House of Lords of the UK (n 58); *Hussein*, Germany, Higher Regional Court of Cologne, 16 May 2000, 2 Zs 1330/99, para 11; *Prefecture of Voiotia v Federal Republic of Germany* (n 82).

¹⁶⁴ 73rd ILC Report (n 12) ch VI, para 69, commentaries 14-15 to art 7; *Germany v Italy* (n 38) para 60.

¹⁶⁵ *Attorney General of the Government of Israel v Adolf Eichmann*, Supreme Court of Israel, 29 May 1962, 36 ILR 277, 309-310; *Ferrini v Repubblica Federale di Germania*, Court of Cassation of Italy, 11 March 2004, 128 ILR 658, 674; *Lozano v Italy* (n 78); *A. c. Ministère public de la Confédération* (n 121).

¹⁶⁶ van Alebeek ‘The “International Crime” Exception’ (n 15) 29.

principles of international law, such as the principle to protect the internal organisation of the State or the non-interference in the constitutional ‘life’ of another State.¹⁶⁷

The ILC separates the six crimes into two categories. Genocide, crimes against humanity and war crimes were included they constitute crimes of concern to the international community as a whole and are considered customary law and more specifically peremptory norms of international law.¹⁶⁸ As a separate second category, the Commission included the crimes of apartheid, torture and enforced disappearance.¹⁶⁹

These crimes are each the subject of a treaty that establishes a special legal regime for their prevention and punishment that require States to take specific measures to incorporate them in their domestic legal order.¹⁷⁰ They provide for horizontal international cooperation and judicial assistance between States for crimes that are knowingly committed through a “widespread system of attack directed against any civilian population”.¹⁷¹ This separate treatment of these crimes regarding the non-applicability of immunity is also supported in domestic court decisions.¹⁷²

The ILC Draft Articles is not the first international instrument to hold that there exists an exception to immunity regarding international crimes; the 2009 Resolution of the Institut de Droit International held that it is *lex lata* that only immunity *ratione personae* that can be awarded for international crimes.¹⁷³

In support of this argument, in the *Eichmann* case, considered the first in which such immunity claim was raised – without employing the term immunity – Eichmann referred to the ‘act of State’ theory, that since the acts were committed by an organ of the State, they were acts

¹⁶⁷ Riccardo Pisillo Mazzeschi, ‘The functional immunity of State officials from foreign jurisdiction: A critique of the traditional theories’ (2015) 17 Questions of International Law 3, 6.

¹⁶⁸ Rome Statute (n 48) art 5(1); 73rd ILC Report (n 12) ch IV, Annex to draft conclusions on identification and legal consequences of peremptory norms of general international law (jus cogens).

¹⁶⁹ Rome Statute (n 48) art 7(1).

¹⁷⁰ *International Convention on the Suppression and Punishment of the Crime of Apartheid*, signed: 30 November 1973, New York, entry into force: 18 July 1976, 1015 UNTS 243 <https://www.un.org/en/genocideprevention/documents/atrocities-crimes/Doc.10_International%20Convention%20on%20the%20Suppression%20and%20Punishment%20of%20the%20Crime%20of%20Apartheid.pdf> accessed 26 September 2023; *Convention against Torture* (n 70); *International Convention for the Protection of All Persons from Enforced Disappearance*, signed: 20 December 2006 New York, entry into force: 23 December 2010, 2716 UNTS 3 <https://treaties.un.org/doc/Publication/CTC/Ch_IV_16.pdf> accessed 26 September 2023.

¹⁷¹ 73rd ILC Report (n 12) ch VI, para 69, commentary 22 to art 7; Rome Statute (n 48) art 7.

¹⁷² *Pinochet*, House of Lords of the UK (n 58); *Jones v Saudi Arabia* (n 77); *FF v Director of Public Prosecutions (Prince Nasser case)*, High Court of Justice, Queen’s Bench Division, Divisional Court, 7 October 2014, [2014] EWHC 3419 (Administrative Court).

¹⁷³ Institute of International Law, resolution on “Immunity from Jurisdiction of the State and of Persons Who Act on Behalf of the State in case of International Crimes”, Napoli Session, 2009, art III(1) <https://www.idi-iiil.org/app/uploads/2017/06/2009_naples_01_en.pdf> accessed 26 September 2023; Institute of International Law, *The Fundamental Rights of the Person and the Immunity from Jurisdiction in International Law*, 73 *Annuaire de l’Institut de Droit International* 219 <<https://www.idi-iiil.org/app/uploads/2017/06/Lady-Fox.pdf>> accessed 26 September 2023.

of the State and there could not be personal responsibility for them. However, the Court denied this claim because of international crimes are entirely outside the “sovereign jurisdiction of the State” and, thus, the person who committed them cannot shelter behind the official nature of the act. Otherwise, the international penal provisions would be undermined.¹⁷⁴

The first domestic court case to refuse to grant immunity because of the commission of international crimes was the *Pinochet* case before the House of Lords.¹⁷⁵ Pinochet, who was the former dictator of Chile made a private visit to the UK and Spain requested his extradition in order to be prosecuted for international crimes. The six out of seven judges voted against granting Pinochet the immunity that the Chilean State claimed, relying on the Convention against Torture. The Convention accepts that torture is necessarily inflicted or acquiesced by a State official and provides that States should prosecute by virtue of the principle of universal jurisdiction.¹⁷⁶ Belgium has observed a stance of being in favour of exceptions to immunity, as, following the *Pinochet* case, a Belgian court requested the extradition of Pinochet, and supported this exception as *lex lata* before the Sixth Committee.¹⁷⁷

The *Prince Nasser* case also followed the above reasoning and denied awarding immunity.¹⁷⁸ In the *Jones v Saudi Arabia* case, Lord Bingham said that international law cannot obligate States to prosecute officials for the commission of torture and require simultaneously that immunity is upheld.¹⁷⁹

Moreover, a Dutch court tried a Surinamese that was head of the army and denied immunity *ratione materiae* because he had committed grave offences that cannot be considered as official functions of the State.¹⁸⁰ The same argument was put forward by Judges in the *Arrest Warrant* case.¹⁸¹ The Dutch government has maintained this position before the ILC.¹⁸² The Swiss courts

¹⁷⁴ *Attorney General v Eichmann* (n 165); Rosanne van Alebeek, ‘Functional Immunity of State Officials from the Criminal Jurisdiction of Foreign National Courts’ in Tom Ruys, Nicolas Angelet, Luca Ferro (eds) *The Cambridge Handbook of Immunities and International Law* (CUP 2019) 510.

¹⁷⁵ *Pinochet*, House of Lords of the UK (n 58).

¹⁷⁶ *Convention against Torture* (n 70) arts 1, 5(2).

¹⁷⁷ *Ordonnance Pinochet*, Investigating Judge, Belgium, 6 November 1998 (1999) 118 *Journal des Tribunaux* 308, 310; UN GA 6th Committee, Summary Record of 26th Meeting, UN Doc A/C.6/66/SR.26, 7 December 2011, para 67 <<https://documents-dds-ny.un.org/doc/UNDOC/GEN/N11/574/38/PDF/N1157438.pdf?OpenElement>> accessed 29 September 2023; See also *H.S.A. et al v S.A. et al* (n 108).

¹⁷⁸ *Prince Nasser* case (n 172); van Alebeek, ‘Functional Immunity of State Officials’ (n 174) 511.

¹⁷⁹ *Jones v Saudi Arabia* (n 77); Franey (n 87) 238.

¹⁸⁰ *Bouterse*, R 97/163/12 Sv and R 97/176/12 Sv, Netherlands, Court of Appeal of Amsterdam, 20 November 2000, 32 (2001) *Netherlands Yearbook of International Law* 266.

¹⁸¹ *Arrest Warrant* (n 37) Joint Separate Opinion of Judges Higgins, Kooijmans and Buergenthal; Dissenting Opinion of Judge Al-Khasawneh; and the Dissenting Opinion of Judge *ad hoc* Van den Wyngaert.

¹⁸² ILC, ‘Immunity of State Officials from Foreign Criminal Jurisdiction’, The Netherlands <http://legal.un.org/docs/?path=../ilc/sessions/68/pdfs/english/iso_netherlands.pdf&lang=E> accessed 29 September 2023. See also UN GA 6th Committee, Summary Record of 29th Meeting, UN Doc A/C.6/71/SR.29, 2 December 2016, para 7 <<https://documents-dds-ny.un.org/doc/UNDOC/GEN/N16/358/91/PDF/N1635891.pdf?OpenElement>> accessed 29 September 2023.

also refused immunity with the reasoning that there cannot be immunity for *jus cogens* crimes.¹⁸³ In the *Lozano v Italy* case, the court accepted that there is an emerging rule of customary international law in support of such exceptions.¹⁸⁴ It has also been adjudicated that immunity cannot be upheld when there has been a violation of *jus cogens* norms.¹⁸⁵ More cases are provided in support of such exceptions in the Draft Articles.¹⁸⁶

Aside from the practice of domestic courts, numerous States have made the argument within the Sixth Committee that immunity *ratione materiae* is not awarded in proceedings that relate to the commission of international crimes.¹⁸⁷

4.3.3 Opinion against such an exception

Some members of the ILC opposed article 7 arguing that the ILC should not present its work as codifying customary international law, when there is domestic case law and treaty law that do not support such a finding. They argue that, as immunity has a procedural character, it is not possible to examine the act under question, as it is a matter of substance, which should be examined on the merits stage of the proceedings and not as early as the procedural stage of the proceedings when immunity is examined. Additionally, they argue that the Draft Articles should not assume the individual criminal responsibility for any crime regardless of the gravity of the act under question and that the fact there are exceptions to the immunity before the ICC should not alter in any way the rule of immunity *ratione materiae*. Lastly, they argue that it is possible that inter-State relations and the global effort against impunity are going to be harmed, if the matter is not settled through a treaty signed by States. They expressed the necessity of balancing the fight against impunity and the preservation of the stability inter-State relations.¹⁸⁸ These members

¹⁸³ *A. c. Ministère public de la Confédération* (n 121); See also ILC, ‘Observations relatives aux limites et exceptions à l’immunité de juridiction pénale étrangère des représentants de l’État’ [Comments on the limitations and exceptions to the immunity of State officials from foreign criminal jurisdiction] Switzerland <http://legal.un.org/docs/?path=../ilc/sessions/68/pdfs/french/iso_switzerland.pdf&lang=F> accessed 29 September 2023.

¹⁸⁴ *Lozano v Italy* (n 78); See also UN GA 6th Committee, Summary Record of 22nd Meeting, UN Doc A/C.6/67/SR.22, 4 December 2012, paras 82–83 <<https://documents-dds-ny.un.org/doc/UNDOC/GEN/N12/575/16/PDF/N1257516.pdf?OpenElement>> accessed 29 September 2023.

¹⁸⁵ *Prefecture of Voiotia v Federal Republic of Germany* (n 82); *Prinz v Federal Republic of Germany*, US Court of Appeals, District of Columbia Circuit, 26 F.3d 1166; *Ferrini v Repubblica Federale di Germania* (n 165).

¹⁸⁶ *Hussein* (n 163) para 11; *H. v Public Prosecutor*, Netherlands, Supreme Court, 8 July 2008, ILDC 1071, para 7.2; *Special Prosecutor v Hailemariam*, Federal High Court of Ethiopia, 9 October 1995, ILDC 555.

¹⁸⁷ UN GA 6th Committee, Summary Record of 26th Meeting (n 177) para 61; See also UN GA 6th Committee, Summary Record of 22nd Meeting (n 184) para 115; UN GA 6th Committee, Summary Record of 19th Meeting, UN Doc A/C.6/72/SR.19, 20 November 2017, para 73 <<https://documents-dds-ny.un.org/doc/UNDOC/GEN/N17/343/23/PDF/N1734323.pdf?OpenElement>> accessed 29 September 2023; UN GA 6th Committee, Summary Record of 24th Meeting, UN Doc A/C.6/72/SR.24, 30 November 2017, para 68 <<https://documents-dds-ny.un.org/doc/UNDOC/GEN/N17/350/12/PDF/N1735012.pdf?OpenElement>> accessed 29 September 2023.

¹⁸⁸ UN Doc A/70/10, *Report of the International Law Commission Sixty-seventh session (4 May-5 June and 6 July-7 August 2015)*, Official Records of the GA, Seventieth Session, Supplement No. 10, para 94 <<https://documents-dds-ny.un.org/doc/UNDOC/GEN/G15/180/57/PDF/G1518057.pdf?OpenElement>> accessed 28 September 2023.

consider that the exceptions to immunity cannot be regarded as *lex lata* nor *lex ferenda* and the Commission is exercising a “normative policy” that does not bare any relation to its objective of codification or progressive development of international law.¹⁸⁹

These members relied on the same domestic court cases put forward by the ILC in support of the existence of exceptions to immunity *ratione materiae*.¹⁹⁰ They argued that the *Pinochet* case denied immunity solely because of the Convention against Torture as waiving immunity and not as a general rule.¹⁹¹ In the *Bouterse* case, the court of appeal put forward the argument for an exception only as an *obiter dictum* and the case was later overturned by the Supreme Court of the Netherlands.¹⁹² In the *Lozano* case, the Italian court, in the end, accorded immunity.¹⁹³ Furthermore, the *Hussein* case did not concern any of the draft article 7 crimes and in the *Hailemariam* case the court prosecuted its own national and not a foreign official.¹⁹⁴

At the same time, the theory of normative hierarchy has been developed, according to which peremptory rules of international law (*jus cogens*), by virtue of their normative position within the international legal order, should prevail over other rules of international law, such as those awarding immunity.¹⁹⁵ In the *Prefecture of Voiotia* case, that found that acts violating *jus cogens* cannot be considered as official,¹⁹⁶ was overturned by the Greek Special Supreme Court, while the German courts also refused to find an exception to immunity.¹⁹⁷ The applicants brought the case before the ECtHR, however, the case was found inadmissible.¹⁹⁸ Similarly, the *Ferrini* case was overruled by the ICJ, though it must be noted that the Court delivered its judgement on the basis of State immunity.¹⁹⁹ The same argument has been put forward also by decisions on civil proceedings, such as in the *Al-Adsani v United Kingdom* case, where the Court decided with a majority of 9 votes to 8 that there is no violation of the right of access to a court, when immunity

¹⁸⁹ 73rd ILC Report (n 12) ch VI, para 69, commentary 12 to art 7.

¹⁹⁰ *ibid*, n 1015 in commentary 12 to art 7.

¹⁹¹ *Pinochet*, House of Lords of the UK (n 58).

¹⁹² *Bouterse*, Court of Appeal (n 180); *Bouterse*, Netherlands Supreme Court, 18 September 2001, ILDC 80 (NL 2001).

¹⁹³ *Lozano v Italy* (n 78).

¹⁹⁴ *Hussein* (n 163); *Special Prosecutor v Hailemariam* (n 186); See also *Hissène Habré* (n 82); *Jiang Zemin*, Prosecutor General of the German Supreme Court, 24 June 2005, 3 ARP 654/03-2.

¹⁹⁵ Akande, Shah (n 103) 832; Andrea Bianchi, ‘Immunity versus Human Rights: The Pinochet Case’ (1999) 10 [2] EJIL 237, 265; *Siderman de Blake v Republic of Argentina*, US Court of Appeal, 9th Circuit, 22 May 1992, 965 F.2d 699, at 718.

¹⁹⁶ Elena Vournas, ‘*Prefecture of Voiotia v. Federal Republic Of Germany: Sovereign Immunity and the Exception for Jus Cogens Violations*’, 21 NYLS J Int’l & Comp L (2002) 629; Maria Gavouneli, Ilias Bantekas, ‘*Prefecture of Voiotia v. Federal Republic of Germany*’, 95 AJIL (2001) 198.

¹⁹⁷ *Margellos v Federal Republic of Germany*, Special Supreme Court of Greece, 2002; *Greek Citizens v Federal Republic of Germany (The Distomo Massacre Case)*, Federal Supreme Court of Germany, 26 June 2003, 42 ILM 1030; *Federal Republic of Germany v Miltiadis Margellos*, Special Supreme Court of Greece, Case 6/17-9-2002.

¹⁹⁸ *Kalegoropoulou v Greece and Germany*, No 50021/00, ECtHR, Judgment of 12 December 2002.

¹⁹⁹ *Germany v Italy* (n 38).

is awarded even in cases adjudicating on allegations of torture.²⁰⁰ However, the ECtHR reached this conclusion only for immunity from civil jurisdiction and contrasted it with immunity from criminal jurisdiction.²⁰¹

Sean D Murphy, one of the members of the ILC who voted against the inclusion of article 7 in the Draft Articles, has argued that in the *Arrest Warrant* case, where the Court had the chance to elucidate on the conditions under which a State official may be prosecuted for crimes against humanity, there was mention of the prosecution by foreign domestic courts for an official act committed during the term of office.²⁰² What is more, Murphy criticised the few examples of case law provided by the Commission in support of an exception regarding international crimes.²⁰³ It must be kept in mind that it is difficult to ascertain what counts as State practice and the Special Rapporteur has noted that many cases are not mentioned in the analysis, as they do not expressly rule on the matter of immunity.²⁰⁴

Regarding the issue of whether the article 7 is codifying existing customary international law or constitutes a progressive development of international law, the Special Rapporteur seems to consider the latter, that it is *lex ferenda*, acknowledging the limited State practice and focusing on the ‘trend’ that is evident.²⁰⁵ The phrase “under the present draft articles” in article 7 introduces a caveat regarding the applicability of article 7, in order to placate the dissenting members of the Commission.²⁰⁶ The members of the Commission are split with some having a predominantly positive and others predominantly negative attitude. Some consider article 7 as custom, others as *lex ferenda*, and others are against its inclusion all together, but in all cases the Commission has voted in favour of article 7.²⁰⁷

²⁰⁰ *Al-Adsani v United Kingdom*, No 35763/97, ECtHR, Judgment of 21 November 2001, 34 EHRR (2002) 11, para 61; See also *Grosz v France*, No 14717/06, ECtHR, Decision of 16 June 2009 (admissibility); *Jones v Saudi Arabia* (n 77).

²⁰¹ Alexander Orakhelashvili, *Peremptory Norms in International Law* (OUP 2008) 343; Alexander Orakhelashvili, ‘Immunities of State Officials, International Crimes, and Foreign Domestic Courts: A Reply to Dapo Akande and Sangeeta Shah’ (2011) 22 [3] EJIL 849, 854.

²⁰² *Arrest Warrant* (n 37) para 62; Sean D Murphy, ‘Immunity Ratione Materiae of State Officials from Foreign Criminal Jurisdiction: Where Is the State Practice in Support of Exceptions?’ (2018) 112 AJIL Unbound 4, 5.

²⁰³ *ibid*, 5-7.

²⁰⁴ UN Doc A/CN.4/701, *Fifth report on immunity of State officials from foreign criminal jurisdiction*, by Concepción Escobar Hernández, Special Rapporteur, para 114 <<https://documents-dds-ny.un.org/doc/UNDOC/GEN/N16/174/33/PDF/N1617433.pdf?OpenElement>> accessed 30 September 2023; Alexandre Skander Galand, ‘What Counts as State Practice? The Koblenz Trial and Functional Immunity’ (27 May 2020) <<https://www.justsecurity.org/70394/what-counts-as-state-practice-the-koblenz-trial-and-functional-immunity/>> accessed 2 October 2023.

²⁰⁵ 69th ILC Report (n 155) para 84; 5th Report on immunity of State officials (n 204) para 179.

²⁰⁶ van Alebeek ‘The “International Crime” Exception’ (n 15) 30.

²⁰⁷ Tladi (n 15) 181.

4.3.4 Other crimes

The selective list of only six international crimes for which immunity *ratione materiae* does not apply begs the question of why other crimes were not included. Firstly, one may question about the crime of aggression, as it is the fourth crime listed in article 5 of the Rome Statute, alongside with the crime of genocide, crimes against humanity and war crimes, which were included in article 7. Aggression is, indeed, characterised as a “most serious crime of concern to the international community as a whole”.²⁰⁸ However, it necessitates the ascertainment of the existence of prior acts of aggression, as an individual cannot bear responsibility for such a crime without the existence of the responsibility of the State, as it constitutes a “crime of leaders”.²⁰⁹ This is not something that domestic courts have jurisdiction to rule upon, as it would go against the principle of *par in parem non habet imperium*. Exactly because of the implications that the inclusion of the crime of aggression as an exception to immunity would result in on the international relations of States, its adjudication shall be limited to international tribunals.²¹⁰

The ILC chose not to include a number of crimes in article 7 because they either could be encompassed under the umbrella of crimes against humanity or they cannot be considered *stricto sensu* international crimes, but instead they are transnational crimes; such crimes are slavery, terrorism, human trafficking, child prostitution, child pornography and lastly piracy.²¹¹

Another crime that was not included is corruption, which necessitated its own separate chapter in the report of the Special Rapporteur.²¹² As it has been established above, acts that are performed in a private capacity of the State official are not protected by immunity *ratione materiae*.²¹³ Nevertheless, officials have claimed immunity for crimes that cannot be related to their official capacity, but these crimes would have been unable to have been committed if the individual did not hold the position of State official. Such crimes are corruption and other relevant crimes like embezzlement, money-laundering and misappropriation of public funds. The need to analyse these crimes in the present chapter arises because of the difficulty in practice to differentiate between official and private acts in these cases.²¹⁴ In such cases, domestic courts have chosen not to apply immunity *ratione materiae* relying on the intention of the officials to take advantage of their position for their own benefit and thus harming the interests, the stability and

²⁰⁸ Rome Statute (n 48) art 5(1).

²⁰⁹ YBILC 1996 (n 72) p 30, commentary 14 to art 8; 73rd ILC Report (n 12) ch VI, para 69, commentary 21 to art 7.

²¹⁰ 5th Report on immunity of State officials (n 204) para 222.

²¹¹ 73rd ILC Report (n 12) ch VI, para 69, commentary 23 to art 7.

²¹² 5th Report on immunity of State officials (n 204) ch IV (C).

²¹³ 73rd ILC Report (n 12) ch VI, para 68, art 2(b).

²¹⁴ 5th Report on immunity of State officials (n 204) para 231.

the international relations of the State.²¹⁵ In light of the above, the ILC opted not to include the crime of corruption in article 7 because the act performed is a private one.²¹⁶

Lastly, the Commission discussed the inclusion in article 7 of the “territorial tort exception”, which is derived from the diplomatic immunities and State immunity.²¹⁷ The conditions for the territorial tort exception are that the act was committed in the foreign State without its consent for the presence of the official in the territory of the State nor for the act committed.²¹⁸ Through the application of this exception individuals who have been inflicted harm from the acts of the State official have access to remedy, whereas otherwise they would not have. This exception usually is applied in cases of injury, kidnapping, political assassination or espionage and sabotage, with the domestic courts denying immunity *ratione materiae*.²¹⁹ In other cases, domestic courts upheld immunity relying on the fact that the act committed is an *acta jure imperii* and otherwise the immunity of the State would be circumvented.²²⁰ In the end, the ILC did not include the territorial tort exception as an exception to immunity *ratione materiae* as types of crimes that are usually under question are “subject to the principle of territorial sovereignty”.²²¹

²¹⁵ *Adamov* (n 81); *Fujimori*, Supreme Court of Chile, 11 July 2007, No 5646-05, paras 15-17; *Mangue*, 13 June 2013 (n 80); *Teodoro Nguema Obiang Mangue et autres*, Court of Appeal of Paris, Section Seven, 2nd Investigating Chamber, application for annulment, 16 April 2015; *Ferdinand et Imelda Marcos c. Office fédéral de la police* (n 135).

²¹⁶ 73rd ILC Report (n 12) ch VI, para 69, commentary 24 to art 7.

²¹⁷ *UN Convention on Jurisdictional Immunities of the State* (n 8) art 12.

²¹⁸ 73rd ILC Report (n 12) ch VI, para 69, commentary 27 to art 7.

²¹⁹ *Letelier v Republic of Chile* (n 80); *Jimenez v Aristeguieta et al* (n 81); *re Jane Doe I, et al* (n 76); *Khurts Bat* (n 58); *Ferrini v Repubblica Federale di Germania* (n 165); *Prefecture of Voiotia v Federal Republic of Germany* (n 82); *R v Mafart and Prieur (Rainbow Warrior, judicial phase)*, New Zealand, High Court of Auckland, 22 November 1985; *Proc. Gen. Appello Milano, Nasr Osama Mustafá Hassan detto Abu Omar e altri*, Corte di Cassazione (Criminal Section V), 29 November 2012, No 46340 (2013) 96 *Rivista di diritto internazionale* 272.

²²⁰ *McElhinney v Ireland*, No 31253/96, ECtHR, Judgment of the Grand Chamber of 21 November 2001.

²²¹ 73rd ILC Report (n 12) ch VI, para 69, commentary 27 to art 7.

Chapter 5: Procedural Provisions and Safeguards

5.1 Application of Part Four

Following the research and discussion within the ILC regarding article 7, the need became apparent to incorporate provisions regarding procedural safeguards.²²² The goal of these provisions is to achieve a balance between the rights and interest of the forum State and the State of the official in order to preserve the principle of sovereign equality of States. Such provisions are aimed to maintain communication and cooperation between States and consequently protect the international relations of States through mutual trust.²²³ In addition, the procedural provisions will result in avoiding politically motivated and abusive criminal proceedings.²²⁴ They might prove helpful with alleviating tensions from the binary approach to article 7, that either there are or there are not exceptions to immunity.²²⁵

These provisions have been characterized “meta-procedural” given that the immunity of State officials is on its own a procedural legal issue.²²⁶ Despite this, the violation of the procedural provisions results in the international responsibility of the State.²²⁷

Article 8 attempts to balance the substantive articles that have been analysed above with the procedural provisions which will be seen below. Even though the procedural provisions apply when immunity might exist, article 8 should be broadly interpreted so that they apply in relation to article 7 as well, as they apply even in the determination of whether the immunity State officials applies.²²⁸ The phrase “exercise of criminal jurisdiction” should be understood as encompassing both executive acts and acts of judges and prosecutors.

²²² Memorandum by the Secretariat (n 109) para 213.

²²³ Isabel Walther, ‘The Current Work of the International Law Commission on Immunity of State Officials from Foreign Criminal Jurisdiction - Comments on the Procedural Safeguards Provisionally Adopted in 2021’ (2022) KFG Working Paper Series, No 54, Berlin Potsdam Research Group “The International Rule of Law - Rise or Decline?”, 1, 9.

²²⁴ 73rd ILC Report (n 12) ch VI, para 69, commentary 3 to pt 4.

²²⁵ Mathias Forteau, ‘Immunities and International Crimes before the ILC: Looking for Innovative Solutions’ (2018) 112 AJIL Unbound 22, 25.

²²⁶ Walther (n 223) 7; See also n 38.

²²⁷ UN Doc A/CN.4/646, *Third report on immunity of State officials from foreign criminal jurisdiction, by Mr. Roman Anatolevich Kolodkin, Special Rapporteur*, para 61(b) <https://legal.un.org/ilc/documentation/english/a_cn4_646.pdf> accessed 2 October 2023.

²²⁸ 73rd ILC Report (n 12) ch VI, para 69, commentary 3 to art 8; Michael Wood, ‘The ILC’s First Reading Draft Articles on “Immunity of State Officials from Foreign Criminal Jurisdiction” (2022)’ (2023) Max Planck Yearbook of United Nations Law, 1, 19.

5.2 Procedural provisions and safeguards that apply in the direct relations between the forum State and the State of the official

5.2.1 Examination of Immunity by the Forum State

The examination of immunity includes all preparatory measures that the forum State needs to take to assess whether the exercise of jurisdiction affects the immunity of the State official, resulting in a determination of whether immunity, either personal or functional, applies. This shall not be confused with the determination of immunity of article 14.²²⁹ This obligation of the competent authorities, whether administrative or executive organs or prosecutors and courts, encompasses a general and a specific rule. The general rule stipulates the examination without delay, the moment the competent authorities become aware of the possibility that the individual may enjoy immunity.²³⁰ There are acts of the competent authorities that do not give rise to this obligation and only acts that may “affect” the State official trigger article 9.²³¹

According to the *Arrest Warrant* case, the immunity of the State official is affected only when it constitutes an impediment to the exercise of their functions. Such an impediment is posed when the acts of the forum State impose an obligation on the State official in accordance with the domestic law of the forum State. The commencement of a preliminary investigation does not constitute such an impediment, allowing for the forum State to proceed to the initial collection of evidence, as long as they are not constraining on the State official.²³² This examination shall happen at an early stage and *in limine litis*.²³³

The specific rule provides that the examination shall happen before the initiation of criminal proceedings and the enforcement of coercive measures.²³⁴ The initiation of criminal proceedings is not the same as the exercise of jurisdiction and is instead encompassed by it. As coercive measures, it shall be understood any *in personam* measures that may impede the State official’s free movement or entail them to appear in court as a witness or their extradition, which may take place without the initiation of criminal proceedings. An example of such a measure is the detention of the State official.²³⁵ Immunity should not be confused with inviolability, which is outside the scope of the Draft Articles, despite a number of treaties addressing these notions

²²⁹ See text to n 267; Walther (n 223) 14.

²³⁰ 73rd ILC Report (n 12) ch VI, para 68, art 9(1).

²³¹ 73rd ILC Report (n 12) ch VI, para 69, commentary 5 to art 9.

²³² *Arrest Warrant* (n 37) paras 54-55; *Djibouti v France* (n 29) paras 170-171.

²³³ *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights*, Advisory Opinion, ICJ Reports 1999, 62, paras 63, 67(2b); Institute of International Law, Session of Vancouver (n 98) 747.

²³⁴ 73rd ILC Report (n 12) ch VI, para 68, art 9(2a, b).

²³⁵ *Prosecutor v Charles Ghankay Taylor*, Special Court for Sierra Leone, Appeals Chamber, No SCSL-2003-01-I, decision on immunity from jurisdiction, 31 May 2004, para 30.

together.²³⁶ The coercive measures may include measures that affect any inviolability of the State official, as there may be overlap between the protection accorded by the rule of immunity and by inviolability.²³⁷

5.2.2 Notification to the State of the Official

State officials are awarded immunity for the benefit of the State and, as such, the State decides whether to invoke or waiver immunity for one of its officials.²³⁸ A necessary prerequisite of this is that the State is aware of any possible criminal proceedings, thus, necessitating the notification of the State of the official by the forum State.²³⁹ This allows the authorities of the forum State to respect any entitlement to immunity. Notification should not be confused with the consultations of article 17.

In order for the notification to serve its purpose, it must be provided at an early stage and more specifically prior to the initiation of criminal proceedings and prior to any coercive measures that may affect the State official.²⁴⁰ In practice the communication of this issue will be conducted through diplomatic channels and States should proceed to establish procedures for such communication.

The notification should provide the necessary information for the State of the official to make a decision between invoking and waiving immunity. The ILC debated whether this paragraph should be included in the Draft Articles, and decided affirmatively due to its usefulness and the balance it creates between the discretion of the forum State regarding the exercise of criminal jurisdiction and the provision of the State of the official with sufficient information.²⁴¹ At the least, the forum State shall provide information on the identity of the official, on the legal grounds upon which criminal jurisdiction is exercised and on the identity of the competent authority.

Aside from diplomatic channels, State may use other means of communication that are accepted by States and suitable for this purpose. States may also use those means of communication included in international cooperation and mutual legal assistance treaties.²⁴² This

²³⁶ VCDR (n 7) arts 29, 31(3); Institute of International Law, Session of Vancouver (n 98) 745, 747.

²³⁷ Walther (n 223) 20-21.

²³⁸ *Djibouti v France* (n 29) para 188.

²³⁹ VCCR (n 42) art 42; *UN Convention on Jurisdictional Immunities of the State* (n 8) art 22.

²⁴⁰ 73rd ILC Report (n 12) ch VI, para 69, commentary 6 to art 10.

²⁴¹ *ibid*, commentary 15 to art 10.

²⁴² See, for example *European Convention on Mutual Assistance in Criminal Matters*, signed: 20 April 1959, Strasbourg, entry into force: 12 June 1962, 472 UNTS 185, 30 ETS <<https://rm.coe.int/16800656ce>> accessed 4 October 2023; *Additional Protocol to the European Convention on Mutual Assistance in Criminal Matters*, signed: 17 March 1978, Strasbourg, entry into force: 12 April 1982, 1496, UNTS 350, 99 ETS

sparked a strong debate within the ILC, as immunity falls outside the scope of such treaties and could result in Ministries of Foreign Affairs and other organs not to be included in the notification process.

5.2.3 Invocation of Immunity

It is accepted that the right of the State to invoke the immunity of its State officials constitutes customary international law.²⁴³ The right of invocation of immunity is found in draft article 11. It is considered the right of the State, as it derives from the fact that immunity is the right of the State on the basis of the principle of sovereignty of the State.²⁴⁴ Moreover, it is at the State's discretion whether it is going to invoke immunity or not. The competent authorities to invoke immunity are set on the domestic law of the State. It should be noted that the invocation of immunity is considered an official act.

Article 11 makes no explicit reference to the prior notification by the forum State, so as not to limit the scope of the right of invocation of immunity, as it is possible that the State of the official is informed about the potential proceedings through other means.²⁴⁵ Nor is the scope of the right limited because of the timing of the invocation, as long as the invocation has taken place as soon as possible from the time that the State was informed of the proceedings, without there being a specific time limit, and thus providing the State with ample time to examine the relevant factors and decide on whether it is going to invoke immunity.

The consequences of the invocation affect the determination of immunity and the potential bar to the exercise criminal jurisdiction by the forum State, rendering it necessary that the invocation is written identifying the official in question, the position the official holds and the grounds of immunity.²⁴⁶ The State of the official does not need to specify the type of immunity invoked, whether it invokes immunity *ratione personae* or immunity *ratione materiae*, as this is going to be adjudged by the court.

<<https://rm.coe.int/1680077975>> accessed 4 October 2023; *Second Additional Protocol to the European Convention on Mutual Assistance in Criminal Matters*, signed: 8 November 2001, Strasbourg, entry into force: 1 February 2004, 2297 UNTS 22, 182 ETS <<https://rm.coe.int/168008155e>> accessed 4 October 2023; *European Convention on the Transfer of Proceedings in Criminal Matters*, signed: 15 May 1972, Strasbourg, entry into force: 30 March 1978, 1137 UNTS 29, 73 ETS <<https://rm.coe.int/1680072d42>> accessed 4 October 2023; *European Convention on Extradition*, signed: 13 December 1957, Paris, entry into force: 18 April 1960, 359 UNTS 273, 24 ETS <<https://rm.coe.int/1680064587>> accessed 4 October 2023; See further 73rd ILC Report (n 12) p 252.

²⁴³ 73rd ILC Report (n 12) ch VI, para 69, commentary 2 to art 11.

²⁴⁴ VCDR (n 7) 4th preamble; VCCR (n 42) 5th preamble; *UN Convention on Special Missions* (n 42) 7th preamble; *Vienna Convention on the Representation of States* (n 88) 6th preamble; Institute of International Law, Session of Vancouver (n 98) 3rd preamble.

²⁴⁵ 73rd ILC Report (n 12) ch VI, para 69, commentary 6 to art 11.

²⁴⁶ 73rd ILC Report (n 12) ch VI, para 68, art 11(2).

Paragraph 3 of article 11 is the equivalent to paragraph 3 of article 10, identifying the means of invocation, which include diplomatic channels and the means included in international cooperation and mutual legal assistance treaties.²⁴⁷ The authorities of the forum State are under an obligation to inform all other organs of the State that is necessary in order for the immunity of the official to be respected. In other words, the forum State has an obligation to examine and determine the question of immunity.

Suffice it to note that when the State of the official notifies the forum State on the immunity of one of its officials, it is assuming responsibility for any internationally wrongful act in question that may have been committed by the official.²⁴⁸

5.2.4 Waiver of immunity

Article 12 refers to the right of the State to waive the immunity of its State official and the relevant procedural aspects. Unlike the invocation of immunity, its waiver has been discussed during the work of the ILC on relevant topics, including on diplomatic relations,²⁴⁹ consular relations,²⁵⁰ special missions immunity,²⁵¹ and the representation of States in their relations with international organisations.²⁵² These topics resulted in the signing of the relevant conventions.²⁵³

The waiver is considered a formal act of the State that has as a consequence the removal of any bar to the exercise of criminal jurisdiction and renders moot any debate on whether immunity applies to the act in question.²⁵⁴ The ILC opted against specifying the competent organs of the State to waive immunity as this is a matter for the domestic law of each State. Article 12 does not refer to the temporal aspect of waiving immunity as this can happen at any point in time. However, it is necessary that the waiver is express and written to provide legal certainty.²⁵⁵

²⁴⁷ See n 242.

²⁴⁸ *Djibouti v France* (n 29) para 196.

²⁴⁹ YBILC 1958, Vol II, UN Doc A/CN.4/SER.A/1958/Add.1, *Documents of the tenth session including the report of the Commission to the General Assembly*, p 99, art 30 <https://legal.un.org/ilc/publications/yearbooks/english/ilc_1958_v2.pdf> accessed 5 October 2023.

²⁵⁰ YBILC 1961, Vol II, UN Doc A/CN.4/SER.A/1961/Add. 1, *Documents of the thirteenth session including the report of the Commission to the General Assembly*, p 118, art 45 <https://legal.un.org/ilc/publications/yearbooks/english/ilc_1961_v2.pdf> accessed 5 October 2023.

²⁵¹ YBILC 1967, Vol II, UN Doc A/CN.4/SER.A/1967/Add.1, *Documents of the nineteenth session including the report of the Commission to the General Assembly*, p 365, art 41 <https://legal.un.org/ilc/publications/yearbooks/english/ilc_1967_v2.pdf> accessed 5 October 2023.

²⁵² YBILC 1971, Vol II, UN Doc A/CN.4/SER.A/1971/Add.1 (Part 1), *Documents of the twenty-third session: Reports of the Special Rapporteurs and report of the Commission to the General Assembly*, p 304, art 31 <https://legal.un.org/ilc/publications/yearbooks/english/ilc_1971_v2_p1.pdf> accessed 5 October 2023.

²⁵³ VCDR (n 7) art 32; VCCR (n 42) art 45; *UN Convention on Special Missions* (n 42) art 41; *Vienna Convention on the Representation of States* (n 88) art 31.

²⁵⁴ *Arrest Warrant* (n 37) para 61.

²⁵⁵ 73rd ILC Report (n 12) ch VI, para 69, commentaries 7-8 to art 12.

The Commission considered whether a waiver of immunity can be provided in a treaty provision,²⁵⁶ but concluded that such provisions do not automatically waive the immunity of a State official and immunity remains opposable to the foreign courts, in accordance with the ICJ Judgment in the *Arrest Warrant* case.²⁵⁷ In contrast to the article on the invocation of immunity, the content of the waiver is not settled by article 12, as it falls to the discretion of the State with the condition that the waiver does not create ambiguity.²⁵⁸ It is logical that when the waiver's scope is limited, the State official can claim immunity for acts that are not included in the waiver.

Paragraph 3 of article 12 follows the same method as paragraph 3 of articles 10 and 11.²⁵⁹ Similarly, paragraph 4 follows the same method as paragraph 4 of article 11. Paragraph 5 provides that the waiver of immunity is irrevocable, because of the consequences and nature of the waiver. The Commission debated on whether there should be exceptions to this irrevocability, in the cases that new facts have come to light, due process is not followed by the forum State or there has been a change of government or of law that puts into question the observance of the right to fair trial.²⁶⁰ However, the irrevocability of the waiver is in line with the principles of good faith and legal certainty. Any exception would render the interpretation of paragraph 5 more complicated. In any case, the waiver is considered as a unilateral act that binds the State, which can be analysed on the basis of the ILC's Guiding Principles on unilateral acts.²⁶¹

5.2.5 Requests for information

By virtue of draft article 13, the forum State and the State of the official have the right to request the provision of information. The Commission split the right of request of information into two paragraphs for the sake clarity, but used similar wording as the same logic applies to both cases. The goal of the forum State will be to determine whether immunity applies and the goal of the State of the official will be whether it should invoke or waive immunity.²⁶² Either State may already have some information on the matter at hand, if articles 10, 11 and 12 were applied prior to the request for information, however this information may not be sufficient. In this way, article 13 strengthens the cooperation and trust between States, constituting an important procedural safeguard for the preservation of the international relations of States. It is not possible to include

²⁵⁶ Institute of International Law, Session of Vancouver (n 98) 749; *Pinochet*, House of Lords of the UK (n 58).

²⁵⁷ *Arrest Warrant* (n 37) para 59 (“in no way affects immunities under customary international law”).

²⁵⁸ *Paul v Avril*, US District Court for the Southern District of Florida, 14 January 1993, 812 F. Supp. 207; *Ferdinand et Imelda Marcos c. Office fédéral de la police* (n 135).

²⁵⁹ See text to n 242, 247.

²⁶⁰ 73rd ILC Report (n 12) ch VI, para 69, commentary 15 to art 12.

²⁶¹ YBILC 2006, Vol II, pt 2, UN Doc A/CN.4/SER.A/2006/Add.1 (Part 2), *Report of the Commission to the General Assembly on the work of its fifty-eighth session*, p 161, para 176, Principle 10 <https://legal.un.org/ilc/publications/yearbooks/english/ilc_2006_v2_p2.pdf> accessed 5 October 2023.

²⁶² 73rd ILC Report (n 12) ch VI, para 69, commentary 2 to art 13.

a complete list of all information that either State may request and thus each State has the right to decide on what type of information is necessary.

Paragraph 3 of article 13 follows the same logic as paragraph 3 of articles 10, 11 and 12.²⁶³ While article 13 does not include a paragraph for the immediate briefing of other competent authorities, as the request of information will take place at a time when States will know which are the competent authorities, there is no reason why this principle would not apply in the present case as well.

The request of information shall be considered in accordance with the principle of good faith, setting an obligation of conduct.²⁶⁴ This was included as there is no rule in international law that obligates the State to provide information, with the exception of such an obligation provided by treaties related to the international cooperation and mutual legal assistance of States.²⁶⁵ The content of the principle of good faith will be determined on a case-by-case basis. Article 13 does not impose any limitations on factors that each State may consider when processing what information it shall provide, such as concerns regarding the sovereignty of the State, its public order, security or any public interest of the State.²⁶⁶

5.2.6 Determination of immunity

Article 14, which is considered one of the most fundamental provisions of this Part, deals with the determination of immunity, meaning whether immunity of the State official from foreign criminal jurisdiction applies in the given case. It constitutes the last stage of the process followed and should not be confused with the examination of article 9 that happens at the initial stage of considering immunity.²⁶⁷ The ILC did not name the domestic courts of each State as the competent authorities to make the determination of immunity, as these authorities may differ according to the State and the domestic law that is applied. It is possible that more than one organ constitute the “competent authorities” mentioned in article 14. The determination shall take place in accordance with both international and national law.²⁶⁸

The criteria set out in paragraph 2 are indicatively mentioned, providing that the stages of the previous draft articles (notification, invocation, waiver, information provided) should be taken into consideration, along with information provided by other authorities of the forum State or also

²⁶³ See text to n 242, 247.

²⁶⁴ 73rd ILC Report (n 12) ch VI, para 68, art 13(4).

²⁶⁵ See n 242.

²⁶⁶ 73rd ILC Report (n 12) ch VI, para 69, commentary 12 to art 13.

²⁶⁷ See text to n 229.

²⁶⁸ 73rd ILC Report (n 12) ch VI, para 69, commentary 6 to art 14.

other sources.²⁶⁹ Information may be provided by other States, international organisations, international investigative mechanisms, courts, the International Committee of the Red Cross and Non-Governmental Organisations. There is no hierarchy among the criteria of paragraph 2.

Paragraph 3 provides complementary criteria to the paragraph 2 ones to make the determination of whether the case in question is an exception to the rule of immunity, as analysed in draft article 7. The goal of these criteria is to maintain a balance between each State and reduce the risk of politicisation and abuse of article 7. The first criterion is that the competent authorities should be “at an appropriately high level”, in accordance with the domestic law of the forum State, due to the serious nature of the alleged crimes and the potential important effect on inter-State relations. The authorities shall form a reasoned judgment on whether the official may have committed the alleged crimes. The standard to be used in this process is to examine whether there are “substantial grounds to believe” that the official committed the alleged crime.²⁷⁰ It should be noted that the authorities do not need to examine the evidence as rigorously as the ICC. Other standards included in the Rome Statute were also examined, due to the fact that they all constitute standards of proof that are internationally established, but instead the “substantial grounds” standard was considered the most appropriate.²⁷¹ The second criterion states that the authorities should take into consideration any other pending criminal proceedings given the fact that more than one jurisdiction can institute proceedings in relation to the crimes of article 7. This criterion serves to bolster the systems of cooperation and mutual legal assistance.

Paragraph 4 of article 14 aims to protect the State official from measures of constraint or any measures that may affect them until the determination of immunity is made by the forum State.²⁷² This became relevant since many domestic jurisdictions provide for trials *in absentia*. Nevertheless, paragraph 4 does not affect measures that are necessary for the continuance of the criminal proceedings.²⁷³

Since the determination of immunity usually takes place at a point in the proceedings that results in a judicial phase, paragraph 5 provides that the determination of immunity can be challenged and, hence, places an obligation on the forum State to ensure that such challenge is possible. The determination of immunity may also be challenged in court in order for the State

²⁶⁹ 73rd ILC Report (n 12) ch VI, para 68, art 14(2).

²⁷⁰ Rome Statute (n 48) art 53(1c).

²⁷¹ 73rd ILC Report (n 12) ch VI, para 69, commentary 20 to art 14.

²⁷² See text to n 234.

²⁷³ 73rd ILC Report (n 12) ch VI, para 69, commentary 34 to art 14.

official to protect their right of access to justice and right to effective judicial protection.²⁷⁴ The protection of these fundamental human rights has been adjudged by the ECtHR.²⁷⁵

5.2.7 Transfer of the criminal proceedings

Article 15 allows for the transfer of criminal proceedings from the forum State to the State official that also has jurisdiction.²⁷⁶ The aim of this provision is to effectively exercise jurisdiction and ensure the establishment of the official's responsibility. In this way, it ensures the balance of rights of each State, while at the same time preserving immunity, without it considering a bar to criminal jurisdiction.²⁷⁷ The proceedings can also be transferred to a third State in accordance with the applicable rules of international law. Article 15 does not impose an obligation upon the forum State.²⁷⁸ The competent authorities of the forum State are bound by domestic and international law that can be enforced against it.

In light of paragraph 2, when the State of the official requests the transfer of criminal proceedings, the forum State is bound to consider it in good faith and only if the State of the official submits the case for the purpose of prosecution. The Commission here used the "Hague formula" used in many international treaties.²⁷⁹ The State of the official is not obliged to prosecute, as this depends on the evaluation of the evidence by the competent authorities, but it does have an obligation to transmit all available information in order to be evaluated.²⁸⁰ This transfer of proceedings entail the suspension of proceedings in the forum State.²⁸¹ If the State official does not fulfil its obligation to submit the case for evaluation by the competent authorities with the aim of prosecution promptly and in good faith, then the forum State has the right to resume criminal

²⁷⁴ UN, *International Covenant on Civil and Political Rights*, signed: 16 December 1966, New York, entry into force 23 March 1976, 999 UNTS 171, art 14 <https://treaties.un.org/doc/Treaties/1976/03/19760323%2006-17%20AM/Ch_IV_04.pdf> accessed 7 October 2023; Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14*, signed: 4 November 1950, entry into force: 3 September 1953, ETS 5, arts 6, 13 <https://www.echr.coe.int/documents/d/echr/convention_ENG> accessed 7 October 2023.

²⁷⁵ *Airey v Ireland*, No 6289/73, ECtHR, Judgment of 9 October 1979, Series A, No 32; *Stanev v Bulgaria*, No 36760/06, ECtHR, Judgment of 17 January 2012.

²⁷⁶ *European Convention on Mutual Assistance in Criminal Matters* (n 242) art 21; *United Nations Convention against Transnational Organized Crime*, signed: 15 November 2000, New York, entry into force: 29 September 2003, 2225 UNTS 209) art 21.

²⁷⁷ *Arrest Warrant* (n 37) para 61.

²⁷⁸ 73rd ILC Report (n 12) ch VI, para 69, commentary 6 to art 15.

²⁷⁹ *Convention for the Suppression of Unlawful Seizure of Aircraft*, signed: 16 December 1970, The Hague, entry into force: 14 October 1971, 860 UNTS 105 <<https://treaties.un.org/doc/db/terrorism/conv2-english.pdf>> accessed 7 October 2023.

²⁸⁰ *Questions relating to the Obligation to Prosecute or Extradite* (Belgium v Senegal), Judgment, ICJ Reports 2012, 422, paras 115, 120.

²⁸¹ 73rd ILC Report (n 12) ch VI, para 68, art 15(3).

proceedings.²⁸² Paragraph 5 serves to alleviate the possible contraction with the Convention against Torture.²⁸³

5.3 Procedural provisions and safeguards for the State official

5.3.1 Fair treatment of the State official

Article 16 provides for the right of the State official to be treated fairly, following the requirements of impartiality and independence. Since these safeguards apply to the individual by virtue of their position as an official of the State, the safeguards are also safeguards of the State. Fair treatment includes fair trial, full protection of the official's rights and procedural guarantees. These may include any rights and guarantees enjoyed by any person and regarding any measure of the forum State, such as the right to personal liberty, access to court, to be informed of the charges, to be assisted by their counsel and to communicate with the competent authorities in a language that they understand.²⁸⁴ These rights of the official are protected in accordance with the domestic law of the forum State and the applicable international law, including international human rights law and international humanitarian law.

Paragraph 2 provides for a new right that is accorded to the official because of their position as an official of the State and when the official is under any form of imprisonment. The official has the right to communicate with and be visited by a representative of the State and to be informed without delay of their rights under paragraph 2. The Commission did not mention the right to consular assistance, because the official of the State does not need to have the State's nationality and in such a case, they would not be able to benefit from consular assistance.²⁸⁵

5.4 Establishment of mechanisms for facilitating consultations and the settlement of any dispute that may arise

5.4.1 Consultations

Consultations between two States aid in the exchange of information, of views, in the avoidance of a dispute and in the facilitation of a solution. Article 17 refers to consultations between the forum State and the State of the official in any matter that concerns the determination of immunity or other issues of immunity, such as the normative elements of each type of immunity

²⁸² *ibid*, 15(4).

²⁸³ *Convention against Torture* (n 70) art 7; *Belgium v Senegal* case (n 280) paras 94-95.

²⁸⁴ UN Doc A/CN.4/729, *Seventh report on immunity of State officials from foreign criminal jurisdiction, by Concepción Escobar Hernández, Special Rapporteur*, paras 159-168 <<https://documents-dds-ny.un.org/doc/UNDOC/GEN/N19/093/83/PDF/N1909383.pdf?OpenElement>> accessed 10 October 2023.

²⁸⁵ 73rd ILC Report (n 12) ch VI, para 69, commentary 8 to art 16.

and the procedural safeguards.²⁸⁶ Consultations is a more general term than the requests of information of article 13. Either State may request the holding of consultations. The Commission used the phrase “as appropriate” to allow States flexibility on the matter. While consultations are not a dispute settlement system, it does not mean that they cannot be held to settle a dispute.

5.4.2 Settlement of disputes

As a matter of rule, the practice of the ILC has been not to include provisions on the settlement of disputes, as it is a matter better decided by States at a later point in time. For the first time, such a provision was included in the draft articles on the prevention and punishment of crimes against humanity, due to the fact that they constitute a draft treaty. While it has not yet been decided whether the Draft Articles will take the form of a treaty, the inclusion of a provision for the settlement of disputes in article 18 aims to encourage States to exchange opinions on the matter.

More specifically, article 18 creates conditions of trust between the State of the official and the forum State, furthering the goal of Part Four regarding the procedural safeguards. Paragraph 1 provides that States have the discretion to choose freely which means to use for the peaceful settlement of a dispute, without establishing an obligation. The wording of article 1 is similar to the wording of article 33 of the UN Charter and indeed, under article 18, States may use any of the means provided in the aforementioned article.²⁸⁷

In the case that States have not managed to achieve a “mutually acceptable solution ... within a reasonable time” on their own, then paragraph 2 applies referring the case to the ICJ for resolution through a binding decision. States can agree to resort to other means of peaceful settlement of disputes, on the condition that they result in a binding decision, such as arbitration.

²⁸⁶ 73rd ILC Report (n 12) ch VI, para 69, commentary 2 to art 17.

²⁸⁷ *UN Charter* (n 1) art 33.

Chapter 6: Concluding Remarks

Following 16 years of work on the topic of immunities of State officials from foreign criminal jurisdiction, the high degree of difficulty surrounding the topic becomes palpable. The changing composition of the Commission throughout these years, has not alleviated the tense discussions. The lack of clarity on whether the provisions constitute *lex lata* or *lex ferenda* continue to spark controversy among the members of the ILC and the international community as a whole. Even to this day, there is disagreement on the issues of the high-ranking officials enjoying immunity *ratione personae* and the exceptions to immunity *ratione materiae*. Opponents of draft article 7 are quick to demonstrate the unevenness of the practice of States and of domestic courts.

Perhaps the dual objective of the ILC limits the discussions on the topic, whereas the open negotiations among States with the objective of signing a treaty would reach better results. Indeed, it is difficult to discern how the Draft Articles could be applied without them constituting an international convention.

For the time being, we await the written observations of States on the Draft articles and their commentaries adopted on first reading, the deadline for which is the 1st of December 2023. Following this, the completion of the topic on second reading could require only one year or more, if it were to follow on the steps of the responsibility of States for internationally wrongful acts, which started in 1997 only to be completed in 2001.

In today's world, plagued by devastating and all-consuming wars that have the capacity to impact the distribution of energy, the global economy and the movement of nations, it becomes more and more imperative to pave the path forward making strides toward justice, accountability and an international society where disputes are resolved peacefully and without the loss of blood.

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