IMMUNITY OF STATE OFFICIALS FROM FOREIGN CRIMINAL JURISDICTION

[Agenda item 9]

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Second report on immunity of State officials from foreign criminal jurisdiction,
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Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (New York, 10 December 1984) Ibid., vol. 1465, No. 24841, p. 85.


The above provisions are without prejudice to the immunities established by international law.

79. The rationale which is under consideration for exception to immunity with reference to universal jurisdiction is similar to another, admittedly less widespread, rationale, according to which immunity does not operate if, in respect of a crime allegedly perpetrated by a foreign official, the principle of *aut dedere aut judicare* operates. The memorandum by the Secretariat notes that such a position was endorsed by Lord Saville in the *Pinochet* III case. In the preliminary report on the obligation to extradite or prosecute (*aut dedere aut judicare*) presented to the Commission by the Special Rapporteur Mr. Gallick in 2006, immunities were spoken of as one of the obstacles to the effectiveness of prosecution systems for crimes under international law that is not appropriate to such crimes. At the same time, it was noted during discussion of this topic in the Sixth Committee of the General Assembly that the application of this obligation “should not... affect the immunity of State officials from criminal prosecution”. The Special Rapporteur does not have at his disposal evidence of any widespread practice of States, including judicial practice, or their *opinio juris*, which would confirm the existence of exception to the immunity of foreign officials where the exercise of national criminal jurisdiction over them on the basis of the *aut dedere aut judicare* rule is concerned. The position of ICJ, reproduced above (para. 77) in the context of the issue of universal jurisdiction, which was formulated in the judgement in the *Case Concerning the Arrest Warrant of 11 April 2000* as it applied not only to the relationship between immunity and universal jurisdiction but also to that with the obligation *aut dedere aut judicare*, seems fully convincing.

80. In practice, to substantiate exceptions to the immunity of State officials from foreign criminal jurisdiction, where the latter is being exercised in connection with the commission of a grave crime under international law, it is customary for several of the rationales cited above to be used, possibly in consideration of the fact that each of them is by no means undisputed. What is more, the proponents of exceptions are far from always in agreement among themselves as to the correctness of one rationale or another. The question of exceptions to immunity *ratione materiae* in cases of grave crimes under international law continues to be raised by lawyers and NGOs. This position has been reflected in two Institute of International Law resolutions. As previously mentioned, the 2001 resolution contains articles 13 and 16, which provide for such exceptions as they apply to former Heads of State and of Government. The resolution on the immunity from jurisdiction of the State and of persons who act on behalf of the State in case of international crimes adopted by the Institute in 2009 states that in accordance with international law no immunity other than personal immunity applies in respect of international crimes to persons acting on behalf of a State and that when the position or mission of any person enjoying personal immunity has come to an end, such immunity ceases. However, as we can see, not only is this not the prevailing viewpoint in the doctrine but it would also appear that it is not as yet exerting a decisive influence on the practice and positions of States.

81. The posing of the question of whether immunity *ratione materiae* is absent where a crime is perpetrated in the territory of the State which exercises jurisdiction stands apart. Here, the case does not necessarily concern grave international crimes. The priority of jurisdiction of the State in whose territory a crime has been perpetrated over immunity may hypothetically be supported by the factor that, in accordance with the principle...
of sovereignty, a State has absolute and supreme power and jurisdiction in its own territory. However, it should be remembered that this supremacy is exercised taking into account exemptions established by international law and, in particular, the immunity of a foreign State and its officials.  

82. As noted in the memorandum by the Secretariat:

It has been suggested that, in determining whether acts carried out by a State official in the territory of a foreign State are covered by immunity ratione materiae, the crucial consideration would be whether or not the territorial state had consented to the discharge in its territory of official functions by a foreign State organ.  

The consent of the receiving State not only to the discharge of functions but also to the very presence of a foreign official in its territory may be of importance. In the context of the topic under consideration, several types of situation can be distinguished. For instance, a foreign official may be present and perform an activity resulting in a crime in the territory of a State exercising jurisdiction with the consent of the latter. In addition, an analogous situation is possible, but with the distinction that no consent was given by the receiving State to the activity which led to the crime. Finally, there are situations where not only the activity but also the very presence of the foreign official in the territory of the State exercising jurisdiction take place without the consent of that State.

83. Applied to the first type of situation, no special problems appear to arise. In essence, the State in whose territory the alleged crime has occurred, consented in advance that the foreign official located and operating in its territory would have immunity in respect of acts performed in an official capacity. For instance, if a foreign official had come for talks and en route to the talks committed a violation of the traffic rules entailing a criminal punishment in the receiving State, then it would appear that this person must enjoy immunity.

84. In the second situation, the question seems to be whether immunity arises in a case where the scope of activity of the official has been determined in advance and the consent of the receiving State was given to such activity, but there was no consent by that State to the activity which resulted in the crime. For example, if an official has come for talks on agriculture, but beyond the scope of the talks engages in espionage or terrorist activity, there are doubts as to whether he enjoys immunity from the criminal jurisdiction of the receiving State in connection with such illegal acts. Here, however, what is evidently important is the extent to which the activity which led to the crime is connected with the activity to which the State gave its consent. In this situation, the acts of the official are on the one hand of an official nature and are attributed to the State which the person is (was) serving, and correspondingly there are grounds for raising the question of the immunity of this person, based upon the sovereignty of that State. On the other hand, this State, in the person of its official, has engaged in activity in the territory of the other State without its consent to do so, i.e. in violation of the sovereignty of the latter State.

85. If a State did not give its consent to the presence of a foreign official and his activity, which led to the commission of a criminally punishable act, in its territory, there would appear to be sufficient grounds for assuming that the official does not enjoy immunity ratione materiae from the jurisdiction of that State. In the situation considered in the preceding paragraphs, the State, consenting to the presence and activity of a foreign official in its territory, consented in advance to the immunity of that person, in connection with his official activity. If, though, there was no such consent, and the person is not only acting illegally but is present in the State territory illegally, then it is fairly difficult to assert immunity. Examples of this type of situation include espionage, acts of sabotage, kidnapping, etc. In judicial proceedings concerning cases of this kind, immunity has either been asserted but not accepted, or not even asserted. It should also be noted here that, such cases as Distomo and Ferrini where Greek and Italian courts did not recognize the immunity of Germany from Italian jurisdiction, concerned crimes perpetrated in the territory of the State exercising jurisdiction. The judgement in the Bouzari case, in which a Canadian court recognized immunity in spite of the fact that torture is prohibited by a peremptory norm, contains passages from which, interpreting them a contrario, it can be concluded that the judgement may have been different.