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, by Mr. Roman Anatolevich Kolodkin, Special Rapporteur

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CONTENTS

Multilateral instruments cited in the present report

	Source
Vienna Convention on Diplomatic Relations (Vienna, 18 April 1961)	United Nations, *Treaty Series*, vol. 500, No. 7310, p. 95.
Convention on Special Missions (New York, 8 December 1969)	*Ibid.*, vol. 1400, No. 23431, p. 231.
European Convention on State Immunity (Basel, 16 May 1972)	*Ibid.*, vol. 1495, No. 25699, p. 181.
Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (New York, 10 December 1984)	*Ibid.*, vol. 1465, No. 24841, p. 85.
Inter-American Convention against Corruption (Caracas, 29 March 1996)	E/1996/99.
Convention on the fight against corruption involving officials of the European Communities or officials of Member States of the European Union (Brussels, 26 May 1997)	*Official Journal of the European Communities*, C 195/1, 25 June 1997.

resolution on universal criminal jurisdiction with regard to the crime of genocide, crimes against humanity and war crimes adopted in 2005 (i.e. within four years of its adoption of a resolution on immunities from jurisdiction and execution of Heads of State and of Government in international law, in which it denied former Heads of State and of Government immunity *ratione materiae* from foreign jurisdiction in the event of their having perpetrated grave crimes under international law),[207] limited itself to the following statement in the final paragraph thereof:

> The above provisions are without prejudice to the immunities established by international law.[208]

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.[209] In the preliminary report on the obligation to extradite or prosecute (*aut dedere aut judicare*) presented to the Commission by the Special Rapporteur Mr. Galicki 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.[210] 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".[211] 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.[212] 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.[213] 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

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[207] "Immunities from Jurisdiction and Execution of Heads of State and of Government in International Law", arts. 13 and 16. Article 13 provides the following:

"1. A former Head of State enjoys no inviolability in the territory of a foreign State.

"2. Nor does he or she enjoy immunity from jurisdiction, in criminal, civil or administrative proceedings, except in respect of acts which are performed in the exercise of official functions and relate to the exercise thereof. Nevertheless, he or she may be prosecuted and tried when the acts alleged constitute a crime under international law, or when they are performed exclusively to satisfy a personal interest, or when they constitute a misappropriation of the State's assets and resources.

"3. Neither does he or she enjoy immunity from execution."

In accordance with article 16, article 13 applies to former Heads of Government.

[208] "Universal criminal jurisdiction with regard to the crime of genocide, crimes against humanity and war crimes" (footnote 192 above), para. 6.

[209] See memorandum by the Secretariat (footnote 5 above), para. 259. Lord Saville noted, in particular: "So far as the states that are parties to the Convention are concerned, I cannot see how, so far as torture is concerned, this immunity can exist consistently with the terms of that Convention. Each state party has agreed that the other state parties can exercise jurisdiction over alleged official torturers found within their territories, by extraditing them or referring them to their own appropriate authorities for prosecution; and thus to my mind can hardly simultaneously claim an immunity from extradition or prosecution that is necessarily based on the official nature of the alleged torture".

[210] *Yearbook … 2006*, vol. II (Part One), document A/CN.4/571, pp. 262–263, para. 14.

[211] Topical summary of the discussion held in the Sixth Committee of the General Assembly during its sixty-second session (A/CN.4/588), para. 161.

[212] "Resolution on the immunity from jurisdiction of the State and of persons who act on behalf of the State in case of international crimes", art. III. This article provides the following:

"1. No immunity from jurisdiction other than personal immunity in accordance with international law applies with regard to international crimes.

"2. When the position or mission of any person enjoying personal immunity has come to an end, such personal immunity ceases."

"At the same time, in accordance with article IV of this resolution, the above provisions "are without prejudice to the issue whether and when a State enjoys immunity from jurisdiction before the national courts of another State in civil proceedings relating to an international crime committed by an agent of the former State".

[213] See memorandum by the Secretariat (footnote 5 above), paras. 162–165. For an analysis of the issue of immunity of the State from the civil jurisdiction of a State in whose territory an activity was carried out, as a result of which damage was caused, see, for example, Yang, "State immunity in the European court of human rights: reaffirmation and misconceptions".

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.[214]

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.[215]

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.[216] 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.[217]

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,[218] or not even asserted.[219] It should also be noted here that, such cases as *Distomo*[220] and *Ferrini*,[221] 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.[222] 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

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[214] See Draft Declaration on Rights and Duties of States, article 2: "Every State has the right to exercise jurisdiction over its territory and over all persons... therein, subject to the immunities recognized by international law". (*The Work of the International Law Commission*, 7th ed., vol. I (United Nations Publication, Sales No. E.07.V.9), New York, 2007, p. 262).

[215] Para. 163.

[216] The Special Rapporteur emphasizes that only the immunity *ratione materiae* of officials is at issue here. The immunities of consular officials or of the personnel of special missions do not fall under this topic, though certain analogies may be useful.

[217] In the opinion of van Alebeek (footnote 49 above, p. 129), in order to assess a situation involving the immunity of a foreign official, it is also of significance whether his activity is of a criminally punishable nature under the law of the State in whose territory it was performed. ("Whether a foreign state official is effectively called to account depends however on whether a particular act in fact constitutes a violation of the national law of the state whose territorial sovereignty has been violated or whether only an interstate norm has been violated." See also the examples cited by the author of national court judgements in cases of foreign officials who had perpetrated crimes in the territory of the State exercising jurisdiction.)

[218] See the case of the United States Central Intelligence Agency (CIA) agents arrested in Italy in connection with charges of abduction of a person in 2003 (memorandum by the Secretariat (footnote 5 above), first footnote of para. 163).

[219] For example, the *Rainbow Warrior* case (*ibid.*, footnote of para. 162). Situations are possible, however, when an official, in exercising official activities, finds himself in the territory of a foreign State without its consent, but not intentionally. The sole criminally punishable activity of the official in this case is the illegal crossing of the border. It seems that in such a case there are grounds for posing the question of immunity. For example, in 2005 during training, a Russian military aircraft found itself unintentionally in Lithuanian airspace and crashed. Criminal proceedings were instituted in Lithuania against the pilot, who had survived. The Russian Federation raised the question of whether the pilot, having in the course of carrying out his work accidentally found himself in the territory of a foreign State, enjoys immunity from the jurisdiction of that State (see commentary of the Ministry of Foreign Affairs of the Russian Federation of 19 September 2005 in connection with this case, available at www.mid.ru/brp_4.nsf/).

[220] *Prefecture of Voiotia v. Germany* (footnote 141 above).

[221] *Ferrini v. Republica Federale di Germania* (footnote 141 above).

[222] The opinion has been advanced in the doctrine that it was precisely this circumstance that was the reason for the non-recognition of immunity for Germany in these (see Yang, "*Jus cogens* and state immunity", pp. 164–169).