

Challenges of Immunities of State Officials from Foreign Criminal Jurisdiction in the Work of the ILC

-Master's Thesis-

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Date of delivery: 19 April 2019

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INTRODUCTION

In the present-day world, some of the most important principles governing international relations are principles of independence, sovereign equality and dignity of the States¹. Under the classical international law, a State enjoys its jurisdiction within its borders, by virtue of its territorial sovereignty, over all persons and property situated upon its land and waters, and over all acts that were done in its territory. Furthermore, it possesses active and passive personal jurisdiction over its citizens and has the right to exercise universal jurisdiction in certain situations. All these types of jurisdiction constitute potential sources of the competence of States to exercise criminal jurisdiction². However, there are special rules and practices which give rise to the exceptions to exercise jurisdiction over foreign nationals and their property³. One of those exceptions is the immunity of State officials from foreign criminal jurisdiction.

In the last decades, this topic of immunity State officials enjoy became the most urgent and important subject of scientific research in the theory of international criminal law and the topic of a relevant nature in the national practice of State. The increased attention to this topic could be explained by the efforts made to limit impunity for gross human rights offenses and violation of international humanitarian law and prosecute these criminal conducts before foreign courts⁴. The concept of the immunities of State official from foreign criminal jurisdiction became a basis problems of correlation of norms under international law granting that immunity and international legal provisions providing for both the principle of the inevitability of punishment of an individual for criminal conducts and the principle of individual responsibility for the commission of crimes under international law⁵. Moreover, different aspects of the applicability of immunities remain unclear, such as, for example, the procedural implications for immunity. In the light of above, in 2007 the International Law Commission included this topic in its agenda with the aim to make a research and to elaborate a set of draft articles with commentaries. However, the discussions in the Commission have not come to end yet.

The main purpose of the present thesis is to study the existing practice on the issue of immunity of State officials from foreign criminal jurisdiction, both international and national one, as well as legal literature, and to answer four main questions: a) which State officials are entitled to that immunity; b) which acts fall under the scope of its applicability; c) whether there are any exceptions to that immunity; and d) what are its procedural aspects.

The present thesis is divided into three chapters. The first one is of an introductory nature and describes the scope and implementation of two different types of immunity of State officials

¹ International Law Commission. Immunity of State officials from foreign criminal jurisdiction. Memorandum by the Secretariat. Geneva, 31 March 2008. p. 8 [consultation: 16.04.2019]. Available in: <<https://undocs.org/en/A/CN.4/596>>.

² International Law Commission. Second report on immunity of State officials from foreign criminal jurisdiction, by Concepción Escobar Hernández, Special Rapporteur. Geneva, 4 April 2013. p. 13 [consultation: 16.04.2019]. Available in: <<http://legal.un.org/docs/?symbol=A/CN.4/661>>.

³ International Law Commission. Immunity of State..., op. cit., p. 8, note 1.

⁴ Caban P., Immunity of State Officials from Foreign Criminal Jurisdiction – Exceptions to Immunity Ratione Materiae. In: Czech Yearbook of Public & Private International Law. 2016. Num. 7, p. 307 [consultation: 16.04.2019]. Available in: <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2858302>.

⁵ Skuratova A., Razvitiye kontseptsii immunitetov dolzhnostnykh lits gosudarstva ot inostrannoy ugolovnoy yurisdiksi. In: Gosudarstvo i pravo. [Moscow]: Publishing house “Nauka”, 2017. Num. 2, p. 80 [consultation: 16.04.2019]. Available in: <https://mgimo.ru/upload/iblock/6d8/79___88%20%D0%A1%D0%BA%D1%83%D1%80%D0%B0%D1%82%D0%BE%D0%B2%D0%B0.pdf>.

from foreign criminal jurisdiction *ratione personae* and *ratione materiae*, in particular, gives the explanations of who enjoys each of the type of immunity, in respect of which acts they are applicable and during what period of time.

The second chapter focuses on possible exceptions to immunity recognized under international law, especially with regard to the commission of international crimes, “territorial tort exception” and performance of the functions of an official nature, but which are, in fact, for the exclusive benefit of the official concerned.

The last third chapter is dedicated to the procedural aspects to the immunity in question, in particular, the point in time, when immunity should be considered; the jurisdictional or other acts that could be affected by immunity; and the question of which organs have the right to determine the applicability or inapplicability of immunity.

In the course of elaboration of the present thesis, mainly international documents, such as, for example, reports, conventions, judgments and examples of different national legislation, and articles from the scope of the theory of international law were used mainly in English and Russian languages. Reports on the immunity of State officials from foreign criminal jurisdiction made by Special Rapporteur Concepción Escobar Hernández for the International Law Commission became the source of study.

CHAPTER I. SCOPE AND IMPLEMENTATION OF IMMUNITIES

1.1. Immunity *ratione personae*

Immunity *ratione personae*, which can also be described as “personal immunity”, is granted under international law to certain State officials as long as they remain in office, and it is attached to the office or status of the official. This immunity is essential for the maintenance of a system of peaceful cooperation between States and the guarantee of their sovereignty. International relations require an effective process of interstate communication. Very important thing is ability of States to cooperate and negotiate with each other freely and without bars, and an ability of State agents, who are responsible for the conduct of such activities, to perform their functions without persecution by foreign domestic courts⁶.

There is a rapid increase in the number of directly relevant judicial pronouncements and related scholarly articles on this matter⁷. It is worth noting that the issue of immunity *ratione personae* is at the core of the decision of the International Court of Justice in the Arrest Warrant case, regarding the dispute on the issue and international distribution by Belgium of an arrest warrant against the incumbent Minister of Foreign Affairs of the Democratic Republic of Congo on the basis of charges in war crimes and crimes against humanity under Belgian law⁸.

⁶ Akande D., Shah S., Immunities of State Officials, International Crimes, and Foreign Domestic Courts. In: The European Journal of International Law. 2011. Num. 21, p. 818 [consultation: 10.01.2019]. Available in: <<http://www.ejil.org/pdfs/21/4/2115.pdf>>.

⁷ International Law Commission. Immunity of State officials..., op. cit., p. 57, note 1.

⁸ International Court of Justice. Arrest Warrant of 11 April 2000 (Democratic Republic of Congo v. Belgium). Judgment, I.C.J. Reports 2002. [consultation: 10.01.2019]. Available in: <<https://www.icj-cij.org/files/case-related/121/121-20020214-JUD-01-00-EN.pdf>>.

1.1.1. Officials entitled to immunity *ratione personae*

Personal immunity necessarily applies to a limited number of people who perform State functions or hold State office at the highest level, and these functions include representation of the State at the international level⁹.

Two interpretations exist in international jurisprudence to define persons who are entitled to immunity *ratione personae*. According to the strict interpretation, this group of State officials consists of Heads of State, Heads of Governments and Ministers of Foreign Affairs¹⁰. Under the norms of international law, these three officials represent the State on the international stage directly and without any need to receive specific authorization from the government. They must also be able to perform their functions without let or hindrance¹¹.

When it comes to Heads of State, traditionally, immunity was motivated by considerations of his or her personal status as a sovereign, a rationale explained by the principle of *par in parem non habet imperium*¹². It was also justified by the requirement to respect the dignity of the Head of State, as a personification of the sovereignty of the State. To arrest and detain the leader of a country effectively means to change its government. This would signify an extreme interference with the independence of that foreign State. The notion of independence and sovereignty means that a State has an exclusive jurisdiction to appoint its own government, and other countries have no right to intervene. If there was no immunity, and criminal proceedings, particularly arrests, were permitted, such interference with the highest level of political administration of a State would violate the principle of sovereign equality and independence¹³. Contemporary international law has moved away from such traditional justification, insisting on the need to ensure the effective performance of his functions on behalf of the State¹⁴. In particular, the Institute of International Law has adopted the same position¹⁵.

There is a need of the determination that an accused person is an incumbent Head of State to grant immunity *ratione personae*, and this, in turn, requires answers to two different questions, namely: whether the relevant entity is a sovereign State; and whether the individual concerned holds the position of Head of State in the structure of that entity¹⁶.

Usually, the first question does not raise any specific difficulties, but there were some cases where the relevant justice authority has had to devote specific attention to this issue. For example, before Montenegro became an independent State in 2006, Italian Court of Cassation had denied Head of State immunity under international customary law to Milo Djukanovic, who at that time was President of the Republic of Montenegro, considering that this entity could not

⁹ International Law Commission. Second report..., op. cit., p. 18, note 2.

¹⁰ Ibidem, p. 22.

¹¹ Skuratova A., op. cit, p. 84, note 5.

¹² Latin for "equals have no sovereignty over each other" - a general principle of international law, forming the basis of State immunity. Because of this principle, a sovereign State cannot exercise jurisdiction over another sovereign State.

¹³ Akande D., Shah S., op. cit., p. 824, note 6.

¹⁴ International Law Commission. Immunity of State officials..., op. cit., p. 62, note 1.

¹⁵ Institut de Droit international. Immunities from Jurisdiction and Execution of Heads of State and of Government in International Law. Vancouver, 2001. p. 1 [consultation: 10.01.2019]. Available in: <http://www.idi-iil.org/app/uploads/2017/06/2001_van_02_en.pdf>.

¹⁶ International Law Commission. Immunity of State officials..., op. cit., p. 64, note 1.

be qualified as a sovereign State¹⁷. In the United States, according to the case law, the judicial determination whether a Head of State enjoys immunity is based on the recognition of the entity concerned as a State by the executive branch¹⁸.

The answer to the second question, whether the individual is a Head of State, can be more complicated due to the fact that international law does not define either the notion of “Head of State” or the procedure for the acquisition of this quality or its inherent functions. Therefore, reference should be made to the internal organization of each State, which may vary considerably¹⁹. For example, in the Gaddafi case in 2000, the French Court of Appeals noted that the defendant was the highest authority in the Libyan Arab Jamahiriya because of his position of the president of the Command Council of the Revolution, and that he also, within the scope of his functions in that capacity, participated in international conferences, including meetings of Arab or African Heads of State, and received representatives of foreign States and credentials of their ambassadors²⁰.

Heads of State in exile are also, usually, granted immunity *ratione personae* in the country where they have found refuge. The most known example is that when British tribunals recognized, on the basis of common law and customary international law, full immunity to foreign Heads of State, e.g., the King of Norway and the President of Poland, who were residing in London during the occupation of their countries in the period of World War II²¹.

As for the Head of Government, in many States this person holds the position of an effective leader. Thus, to arrest and detain him or her is also a violation of the sovereignty of the State as in the case with Heads of State²². Head of Government is also a person, who frequently represents the State in international relations on the highest level, e.g., on international forums and meetings. Therefore, there are good reasons for extending personal immunity from criminal jurisdiction to the Head of Government, and this opinion was supported in the above-mentioned Judgment of the ICJ in the Arrest Warrant case²³.

Most members of ILC declared to extend immunity *ratione personae* to Ministers of Foreign Affairs as well, principally for two reasons: the recognition substantial status of latter in relevant international instruments; and the practice of international courts and tribunals of granting immunity to foreign ministers when cases arose. With respect to international instruments, the recognition that representative functions of Minister of Foreign Affairs are resembling those of the Head of State may be seen in the Vienna Convention on the Law of Treaties, the Convention on the Prevention and Punishment of Crimes against Internationally

¹⁷ Supreme Court of Cassation. Public Prosecutor (Tribunal of Naples) v. Milo Djukanovic, No. 49666, Judgement of 28 December 2004. In: Oxford Reports on International Law. 2015. p. 2 [consultation: 11.01.2019]. Available in: <https://www.academia.edu/33760360/Djukanovic_-_Italian_Court_of_Cassation_28_December_2004>.

¹⁸ International Law Commission. Immunity of State officials..., op. cit., p. 65, note 1.

¹⁹ Ibidem, p. 66.

²⁰ Court of Appeal of Paris (Chambre d'accusation). Affaire Gaddafi, Judgement of 20 October 2000. In: International Law Reports. Num 125 [consultation: 11.01.2019]. Available in: <<http://ebooks.cambridge.org/clr/case.jsf?bid=CBO9781316152577&id=CBO9781316152577A014>>.

²¹ International Law Commission. Immunity of State officials..., op. cit., p. 73, note 1.

²² Akande D., Shah S., op. cit., p. 825, note 6.

²³ “The Court would observe at the outset that in international law it is firmly established that, as also diplomatic and consular agents, certain holders of high-ranking office in a State, such as Head of State, Head of Government and Minister for Foreign Affairs, enjoy immunities from jurisdiction in other States, both civil and criminal. For the purposes of the present case, it is only the immunity from criminal jurisdiction and the inviolability of an incumbent Minister for Foreign Affairs that fall for the Court to consider.” (International Court of Justice. Arrest Warrant..., op. cit., p. 20-21, note 8).

Protected Persons, including Diplomatic Persons, the Convention on Special Missions, the Vienna Convention on the Representation of States in Their Relations with International Organizations of a Universal Character²⁴. The inclusion of Ministers of Foreign Affairs in the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons is especially important, because, while adopting draft articles on this subject, the Commission decided not to include government officials in the list of persons internationally protected, but governments decided to add that official to the final text of the Convention²⁵.

However, as has been already mentioned before, two interpretations exist in international jurisprudence to define persons who are entitled to immunity *ratione personae*. And the second one, broader interpretation implies that immunity might also be enjoyed by other senior State officials²⁶. This interpretation is supported by the fact that nowadays international functions have been extended to a much wider number of State officials than before. Many government ministers exercise such functions and have to make official visits abroad in order to do so. It is now common for ministers responsible for different policies to represent their State internationally²⁷. In national courts, there is no consentaneous practice on this issue. Some of them have accorded personal immunity to other State officials, while others have not²⁸. For example, in the United Kingdom, criminal immunity has been extended to other high-ranking officials than “troika”²⁹, including defense ministers and minister of commerce and international trade³⁰.

In the ILC, it was almost unanimously stated that it was difficult to define which individuals should be categorized as “other high-ranking officials” and, as such, covered by immunity *ratione personae*, since their identification will largely depend on the characteristics of national legal systems and the position they hold³¹. In addition, it should be noted that examples of State practice on this matter are not widespread, nor are coherent or consistent with regard to terms of decisions on particular cases and the arguments advanced by different national courts³². Reasonably foreseeing legal difficulties that such identification of “other State officials” would entail, the Commission concluded that other “senior officials” that the Head of State, the Head of Government and Minister of Foreign Affairs would not enjoy immunity *ratione personae*³³.

²⁴ Murphy S. D., Immunity Ratione Personae of Foreign Government Officials and other Topics: The Sixty-Fifth Session of the International Law Commission. In: American Journal of International Law. 2014. Num. 108, p. 6 [consultation: 11.01.2019]. Available in: <https://scholarship.law.gwu.edu/cgi/viewcontent.cgi?article=2219&context=faculty_publications>.

²⁵ International Law Commission. Report of International Law Commission on sixty-fifth session (6 May–7 June and 8 July–9 August 2013). New York, 2013. pp. 60-61 [consultation: 11.01.2019]. Available in: <<https://documents-dds-ny.un.org/doc/UNDOC/GEN/N13/480/25/PDF/N1348025.pdf?OpenElement>>.

²⁶ International Law Commission. Second report..., op. cit., p. 18, note 2.

²⁷ Foakes J., Immunity for International Crimes? Developments in the Law of Prosecuting Heads of State in Foreign Courts. In: International Law Programme. 2011. Num. 2, p. 6 [consultation: 12.01.2019]. Available in: <https://www.chathamhouse.org/sites/default/files/public/Research/International%20Law/bp1111_foakes.pdf>.

²⁸ Murphy S. D., op. cit., p. 8, note 24.

²⁹ Troika – a Head of State, Head of Government and Minister of Foreign Affairs.

³⁰ Zhou L., “Brief Analysis of a Few Controversial issues in Contemporary International Criminal Law”, in Bergsmo M., Yan L (ed.), *State Sovereignty and International Criminal Law*, Beijing, 2012, p. 51.

³¹ Skuratova A., op. cit., p. 86, note 5.

³² International Law Commission. Second report..., op. cit., p. 21, note 2.

³³ Skuratova A., op. cit., p. 86, note 5.

1.1.2. *Scope of immunity ratione personae*

Once it has been established which State officials are entitled to enjoy immunity *ratione personae*, it is necessary to determine which types of acts are covered by such immunity and what is its temporal scope.

Undoubtedly, arrest or detain in a foreign State of senior officials who are accorded personal immunity will be considered as a significant obstacle in the exercise of their international functions. Consequently, this type of immunity is commonly regarded as prohibiting absolutely the exercise of criminal jurisdiction by State authorities³⁴. The absolute nature of the immunity *ratione personae* means that it protects State official not only in cases involving the acts on behalf of the State or, in other words, acts in an official capacity, but also makes him absolutely immune from the criminal jurisdiction of foreign domestic courts in cases regarding private acts³⁵.

This solution is consistent with the provisions of various international instruments, for example, the material scope of immunity *ratione personae* of State officials from foreign criminal jurisdiction is often compared to the material scope of the similar immunity granted to diplomatic agents under customary international law, as reflected article 31, paragraph 1, of the Vienna Convention on Diplomatic Relations 1961³⁶. Rather than invoking a simple analogy, this reasoning is based on the fact that, given the functions of the Head of State as the highest representative of the State and his superior position on the hierarchy in relation to diplomatic agents, he should enjoy immunities at least comparable to those provided by the Vienna Convention³⁷.

Also, the absolute nature of personal immunity is supported by the resolution of the International Law Institute about immunities from jurisdiction and execution of Heads of State and Heads of Government. Article 2 of this resolution states, that “in criminal matters, the Head of State shall enjoy immunity from jurisdiction before the courts of a foreign State for any crime he or she may have committed, regardless of its gravity”³⁸. It should also be borne in mind that international jurisprudence adheres to a similar position and considers this type of immunity as “full”, “total”, “complete”, “integral” or “absolute” immunity precisely in order to indicate that it applies to any action carried out by an individual who enjoys immunity. Along with that, the practice of national courts has traditionally been following similar lines³⁹.

Accordingly, it can be concluded that immunity from foreign criminal jurisdiction *ratione personae* is full immunity and, therefore, there is no need to analytically examine which particular types of acts should be considered as “official acts” or as “private acts”, as well as ask, as the matter of principle, when and under which circumstances these actions were committed or where the beneficiaries of that immunity were when the acts covered by such immunity were performed or when an attempt to exercise jurisdiction over them was made. Thus, the “fullness”

³⁴ Akande D., Shah S., op. cit., p. 819, note 6.

³⁵ Izmailova P. R., Problemy Immuniteta Dolzhnostnykh Lits Gosudarstva V Mezhdunarodnom Prave. In: *Proceedings of the Institute of State and Law of the RAS*. [Moscow]: Publishing house “Institute of State and Law of the RAS”, 2010. Num. 1, p. 71 [consultation: 17.01.2019]. Available in: <<https://cyberleninka.ru/article/n/problemy-immuniteta-dolzhnostnykh-lits-gosudarstva-v-mezhdunarodnom-prave>>.

³⁶ “A diplomatic agent shall enjoy immunity from the criminal jurisdiction of the receiving State.” (Vienna Convention on Diplomatic Relations 1961. Vienna, 18 April 1961. p. 9 [consultation: 17.01.2019]. Available in: <http://legal.un.org/ilc/texts/instruments/english/conventions/9_1_1961.pdf>).

³⁷ International Law Commission. Immunity of State officials..., op. cit., p. 91, note 1.

³⁸ Institut de Droit international, op. cit., p. 2, note 15.

³⁹ International Law Commission. Second report..., op. cit., p. 24, note 2.

of personal immunity means its applicability to any act performed by the Head of State, Head of Government or Minister of Foreign Affairs, regardless of the nature of the act, the location where it was performed and the nature of foreign travel (official or private visit), made by the individual concerned at the time of an attempt to exercise foreign criminal jurisdiction by a specific State⁴⁰.

Regarding the temporal scope of immunity *ratione personae*, it is unequivocally temporary in nature and is contingent on the term of office of the individual who enjoys such immunity. This opinion is supported, in particular, by the International Court of Justice in the article 61 of the judgment on the Arrest Warrant case of 11 April 2000, which states that the Minister of Foreign Affairs enjoys personal immunity “in respect of acts committed prior or subsequent to his or her period of office, as well as in respect of acts committed during that period of office in a private capacity”⁴¹. The same statement could be used *mutatis mutandis* to describe and explain the position of the Head of State or the Head of Government.

This distinctive feature of immunity *ratione personae* has been consistently reflected in the national practice of States, in international and national jurisprudence of States. Notwithstanding, it is also true that, in some situations, there is a certain terminological ambiguity and/or confusion, which may in some way affect the legal nature of this type of immunity. Thus, it was noted that in a number of cases, there is a certain “residual immunity”, which remains with regard to official acts performed by persons who enjoy personal immunity after they have left office. On the other hand, it sometimes maintained that immunity *ratione personae* extends beyond the term of office of the beneficiaries of such immunity in respect of acts of an official nature performed by them while in office. These statements pursue an obvious goal: to grant the above-mentioned persons some form of immunity from foreign criminal jurisdiction in respect of official acts after they have left office. This, in turn, requires the act to be recognized as “official” before immunity can be granted, which is foreign to the very nature of immunity *ratione personae* and, conversely, is one of the characteristics of immunity *ratione materiae*, which will be discussed later⁴².

It is worth to mention here that immunity *ratione personae* is procedural in nature and should not be interpreted as an exemption from criminal liability for acts performed by Heads of State, Heads of Government or Ministers for Foreign Affairs before or during their term of office. It is only a postponement of the exercise of foreign criminal jurisdiction for the period when such individuals hold the office. The responsibility of a person is a matter of substantive law and the question of immunities is strictly procedural. Accordingly, after the end of the office, actions committed before or during this period no longer fall under the scope of personal immunity and may, in some cases, become a subject to criminal jurisdiction⁴³.

In this regard, the International Court of Justice stated that immunity *ratione personae* do not represent a bar to criminal prosecution in certain cases. First, such individuals do not enjoy criminal immunity under international law in their own countries and as such, they may be tried by national courts of those countries in accordance with the relevant rules of domestic law. Secondly, the State which they represent can decide to waive that immunity. Also, a person will no longer enjoy all the immunities accorded by international law in other States, if he or she ceases to hold the office. Moreover, the presence of the immunities does not prevent the

⁴⁰ Ibidem, p. 24.

⁴¹ International Court of Justice, Arrest Warrant..., op. cit., p. 26, note 8.

⁴² International Law Commission. Second report..., op. cit., pp. 25-26, note 2.

⁴³ Skuratova A., op. cit., p. 87, note 5.

prosecution of the incumbent high State officials in some bodies of international criminal justice, such as the International Penal Court⁴⁴.

In conclusion, immunity *ratione personae* is granted to the highest State officials and covers acts both of official and private nature, during the period of time when the person holds the office and also before taking up his or her functions. With the end of the term of the office, this immunity expires, followed by complete inviolability⁴⁵.

1.2. Immunity *ratione materiae*

Immunity *ratione materiae* known as “functional” or “conduct-based” immunity is characterized by covering acts performed by State officials exclusively in their official capacity or, in other words, acts performed by them on behalf of the State. That means, this type of immunity does not provide any protection with respect to private acts of State officials, compared to personal immunity⁴⁶. Another contradistinction to immunity *ratione personae* is that functional immunity is attached not to the office of the individual concerned, but to the official act performed. Consequently, it can be granted not only to the incumbent officials but to former officials as well⁴⁷. The nature of immunity *ratione materiae* is connected to the fact that a person could not be legally responsible and be the subject of national jurisdiction of a foreign State for the official acts, since these acts are attributed to the State, in which this person holds the office, because these acts are carried out behalf of a State in accordance with certain State policy⁴⁸.

The dignity of the State is the paramount legal value protected by functional immunity. It is believed that the initiation of proceeding against a State official for actions committed in the performance of his official duties can be regarded as bringing a claim against the State itself, which is a clear infringement of its sovereignty⁴⁹.

1.2.1. Individuals covered by immunity *ratione materiae*

In the case of immunity *ratione personae*, the list of individuals entitled to it is clear and restricted: Head of State, Head of Government and Minister of Foreign Affairs. However, when it comes to immunity *ratione materiae*, it does not seem possible to draw up a list of all office or post holders who would be covered by it. This appears to be impossible for the simple reason that there is a wide variety of models in different national systems⁵⁰. In the view of the International Law Commission, there appears to be wide doctrinal support for the proposition that functional

⁴⁴ International Court of Justice, Arrest Warrant..., op. cit., p. 26, note 8.

⁴⁵ Majos M., Immunitet głowy państwa w międzynarodowym prawie karnym – wybrane zagadnienia, in Nowakowska-Małusecka J., Topa I. (ed.), *Międzynarodowe i europejskie prawo karne: osiągnięcia, kierunki rozwoju, wyzwania*, Katowice, University of Silesia publishing house, 2015, p. 64 [consultation: 18.01.2019]. Available in: <https://rebus.us.edu.pl/bitstream/20.500.12128/4057/1/Majos_Immunitet_glowy_panstwa_w_miedzynarodowym.pdf>.

⁴⁶ Caban P., op. cit., p. 309, note 4.

⁴⁷ Foakes J., op. cit., p. 8, note 27.

⁴⁸ Caban P., op. cit., pp. 309-310, note 4.

⁴⁹ Izmailova P. R., op. cit., p. 71, note 35.

⁵⁰ International Law Commission. Third report on immunity of State officials from foreign criminal jurisdiction, by Concepción Escobar Hernández, Special Rapporteur. Geneva, 2 June 2014. p. 8 [consultation: 30.01.2019]. Available in: <<http://undocs.org/A/CN.4/673>>.

immunity is enjoyed by State officials in general, regardless of their position in the State hierarchy⁵¹.

This opinion was supported as well by the International Criminal Tribunal for the former Yugoslavia. In the *Blaskic* case, the Appeals Chamber stated that State officials who act in their official capacity are only instruments of a State and their official acts can only be attributed to the State. Accordingly, they cannot be responsible for the consequences of wrongful acts which are not attributable to them personally, but to the State on whose behalf they act and due to that fact they enjoy immunity *ratione materiae*. This statement was made with the acknowledgement that it is “is a well-established rule of customary international law going back to the eighteenth and nineteenth centuries, restated many times since”⁵².

The principle that State officials, in general, are entitled to functional immunity was also supported by the counsel for Djibouti in the *Djibouti v. France* case. While describing the differences between personal and functional types of immunity, counsel said that the acts of an organ of a State acting in his official capacity must be attributed to that State and not to the individual possessing the status of the organ⁵³.

In addition, the same principle finds support in the case law of different national courts. It is important to mention that in those criminal proceedings in which national courts have upheld the immunity of foreign officials from the jurisdiction, individuals who have been granted immunity *ratione materiae* have held various posts and performed various functions within the State structure. They have included a former Prime Minister, a Minister of Defense, a Minister of the Interior, head of Scotland Yard – senior official, members of governmental security forces and institutions, such as a police officer and a military officer, and an executive director of a maritime authority among others⁵⁴.

This case practice shows that immunity was granted to officials irrespective of their position in the hierarchy of the State structure. In the view of the Special Rapporteur of the ILC Concepción Escobar, those State officials can be divided into two main groups. The first one includes officials who occupy positions of the highest level in the State structure, both civil and military, who head ministerial or other departments or administrative bodies within the State. They have also extensive power to make decisions and, on occasion, they are authorized to represent the State both at the domestic and international levels. The second category includes those officials who do not have the authority to make decisions and their functions simply include the implementation of decisions taken by higher-level officials. These two groups can be described as “high-ranking officials” and “other officials”. The majority of State officials who were granted immunity *ratione materiae* in the national judicial practice occupy the high or middle levels of the administrative structure and there is a small number of cases in which

⁵¹ International Law Commission. Immunity of State officials..., op. cit., p. 109, note 1.

⁵² International Criminal Tribunal for the former Yugoslavia. Prosecutor v. Tihomir Blaskic. Judgment on the Request on the Republic of Croatia for Review for the Decision of Trial Chamber II of 18 July 1997. Judgment of 29 October 1997. para. 38 [consultation: 30.01.2019]. Available in: <<http://www.icty.org/x/cases/blaskic/acdec/en/71029JT3.html>>.

⁵³ “What Djibouti requests of the Court is to acknowledge that a State cannot regard a person enjoying the status of an organ of another State as individually criminally liable for acts carried out in that official capacity, that is to say in the performance of his duties. Such acts, indeed, are to be regarded in international law as attributable to the State on behalf of which the organ acted and not to the individual acting as that organ”. (International Court of Justice. Public sitting held on Tuesday 22 January 2008, at 3 p.m., at the Peace Palace, President Higgins presiding, in the case concerning Certain Questions of Mutual Assistance in Criminal Matters (*Djibouti v. France*). p. 6-9 [consultation: 30.01.2019]. Available in: <<https://www.icj-cij.org/files/case-related/136/136-20080122-ORA-02-01-BI.pdf>>).

⁵⁴ International Law Commission. Third Report..., op. cit., p. 11-12, note 50.

immunity has been invoked with respect to low-ranking officials. In addition, they fall into diverse categories as to the nature of their relationship with the State. For example, some of them have a purely political connection owing to the political mandate they have obtained, like ministers or other members of government, the head of national security agency, etc., the connection with others is administrative in nature because they belong to the civil or military structure of the State, like diplomatic and consular agents, police officers, members of the armed forces, etc⁵⁵.

However, there is an opinion among international scholars, according to which principle that functional immunity is granted to all State officials in general is now considered to be obsolete. On the contrary, it seems more comprehensible that only some categories of State officials can enjoy immunity *ratione materiae* due to the significance of their duties performed in the context of international relations of their State. For example, Riccardo Mazzeschi, professor of International Law in the University of Siena, while analyzing practice of application of the functional immunity, has stated that there is no norm of customary international law which allows all State officials to enjoy functional immunity from foreign criminal jurisdiction and has distinguished four categories of State officials who undoubtedly have a right to this immunity: diplomatic agents, high ranking officials, consular agents and members of special missions⁵⁶.

With respect to the first category – diplomatic agents, it is commonly acknowledged and codified in the 1961 Vienna Convention on Diplomatic Relations that these officials enjoy immunity *ratione personae*. But it contains also certain provisions that confirm that they enjoy functional immunity as well. For example, article 38 states that diplomatic agents who are national or permanent residents of receiving State have the right to immunity from jurisdiction in respect of official acts performed in the exercise of their functions, which is immunity *ratione materiae*. Moreover, paragraph 2 of article 39 informs that when the functions of diplomatic agent have come to end, this particular immunity continues to subsist⁵⁷.

Second category which includes high ranking officials refers to the opinion, that those persons who enjoy personal immunity during the period when they hold the office, namely Head of State, Head of Government and Minister of Foreign Affairs, also have the right to enjoy functional immunity after the end of their functions with regard to official acts performed during their mandates. This opinion finds support, for example, in the resolution of the Institute of International Law on immunities from jurisdiction and execution of Heads of State and of Government in international law⁵⁸. Also, it was supported by the International Court of Justice in the judgment in the Arrest Warrant case, where it stated that former Minister of Foreign Affairs can be subject to foreign criminal jurisdiction in respect of acts committed during the period of his or her mandate only in a private capacity⁵⁹. Moreover, the same opinion is presented in the practice of different national courts⁶⁰.

Consular agents, who constitute the third category, have the right to functional immunity as well, but it is very restrictive. Article 43 of the Vienna Convention on Consular Relations has

⁵⁵ Ibidem, p. 15.

⁵⁶ Mazzeschi R. P., The functional immunity of State officials from foreign jurisdiction: A critique of the traditional theories. In: Questions of International Law. 2015. Num. 3-31, pp. 10-15 [consultation: 31.01.2019]. Available in: <http://www.qil-qdi.org/wp-content/uploads/2015/05/02_Functional-Immunity_PISILLO_FIN.pdf>.

⁵⁷ Vienna Convention on Diplomatic Relations..., op. cit., p. 12, note 36.

⁵⁸ Institut de Droit international, op. cit., pp. 4-5, note 15.

⁵⁹ International Court of Justice. Arrest Warrant..., op. cit., p. 26, note 8.

⁶⁰ International Law Commission. Immunity of State officials..., op. cit., p. 113, note 1.

limited to acts performed in the exercise of consular functions⁶¹. This statement found support also in the judgment of the Italian Court of Cassation in the Abu Omar case⁶².

The last category covers the members of a special mission. Immunity from criminal jurisdiction which is granted to those State officials is regulated by article 31 of the 1969 Convention on Special Missions⁶³. However, it does not say anything about the type of acts covered jurisdictional immunity and it can be assumed that it keeps in view immunity *ratione personae*, which covers acts performed both in an official and private capacity.

In conclusion, there is no coherent practice and common consensus on the issue of immunity *ratione materiae* in the international or domestic law of States and it is impossible to list all categories of individuals who are entitled to this immunity. Nevertheless, in the opinion of the above-mentioned Special Rapporteur of the ILC there are determined criteria for identifying what constitutes an “official” for the purposes of application functional immunity. Consequently, in order to identify a given person as an official for further granting of immunity, it must be determined in each particular case if all following criteria are met:

- the official has a connection with the State both temporary or permanent, that can be of different nature (constitutional, statutory or contractual) and can be either *de jure* or *de facto*;
- the official represents the State at the international level or performs official functions both internationally and internally;
- the official exercises elements of governmental authority, acting on behalf of the State, and those elements include executive, legislative and judicial functions⁶⁴.

1.2.2. Scope of immunity ratione materiae

As it has already been mentioned before, immunity *ratione materiae* covers acts performed by the incumbent and former State officials in the exercise of their official functions or, in other words, acts performed on behalf of the State and it does not extend to private acts. However, in practice, it is not that easy to differentiate acts performed in the official capacity and acts performed in the personal capacity of an individual, particularly where the related conduct contains an element of unlawfulness⁶⁵.

The first question to be considered when determining the legal regime of functional immunity is related to the identification of the criteria for distinguishing between the nature of “official” and “private” conduct. On this issue, the criteria for the attribution of conduct in the context of State responsibility might be really useful, although it does not exist any specific rule that regime on the immunities of State officials should be aligned with the norms on attribution of

⁶¹ Vienna Convention on Consular Relations, Vienna, 24 April 1963, p, 17 [consultation 31.01.2019]. Available in: <http://legal.un.org/ilc/texts/instruments/english/conventions/9_2_1963.pdf>.

⁶² General Prosecutor at the Court of Appeals of Milan v Adler and others, Final appeal judgment, No 46340/2012; ILDC 1960 (IT 2012), 29 November 2012. In: Oxford Reports on International Law in Domestic Courts, 2013, p. 2 [consultation: 31.01.2019]. Available in: <https://www.academia.edu/3854342/Criminal_Proceedings_v_Adler_and_ors_Abu_Omar_case_Final_Appeal_Judgment_No_46340_2012_ILDC_1960_IT_2012_>.

⁶³ The representatives of the sending State in the special mission and the members of its diplomatic staff shall enjoy immunity from the criminal jurisdiction of the receiving State (Convention on Special Missions, New York, 8 December 1969, p. 11 [consultation 31.01.2019]. Available in: <http://legal.un.org/ilc/texts/instruments/english/conventions/9_3_1969.pdf>).

⁶⁴ International Law Commission. Third Report..., op. cit., p. 38, note 50.

⁶⁵ Foakes J., op. cit., p. 8, note 27.

conduct for purposes of State responsibility⁶⁶. For example, in the commentary to article 4 of the document on the responsibility of States for internationally wrongful acts adopted by the ILC is said that personal motives of an individual who is a State organ are irrelevant in order to determine whether that particular official acts in his or her official capacity. While that individual acts in an apparently official capacity, those actions will be attributable to the State⁶⁷. Nevertheless, the opinion of the Institute of International Law is opposite and in article 13 related to the immunity of the former Head of State, which is applicable to the Head of Government, is stated that the individual concerned has no right to functional immunity if the acts alleged were performed “exclusively to satisfy a personal interest”⁶⁸. The same opinion is supported by the legal literature⁶⁹.

Immunity *ratione materiae* is closely connected to the State, however, it should be noted that functional immunity of State officials and immunity of the State itself are different legal concepts. These immunities have different objectives, functions and scope and, consequently, it means that immunity *ratione materiae* of State officials is, for example, broader than the State immunity. This statement derives from the fact that official has the right to immunity in respect of all acts performed on behalf of the state, and it does not matter whether these official acts belong to the category of *acta jure imperii* (sovereign acts) or *acta jure gestionis* (non-sovereign acts), while the State is protected by the immunity, in general, only with respect to acts *jure imperii*⁷⁰. The same opinion was supported by the Supreme Court of Austria, which held that the immunity of Heads of State extends to *acta jure gestionis* carried out in an official capacity, contrary to the State immunity⁷¹.

Moreover, it should be mentioned that the functional immunity of State officials does not depend on the lawfulness or unlawfulness of the acts performed by them in their official capacity. On the contrary, when acts in an official capacity are used in the context of immunity *ratione materiae*, it is implied that these acts are to be considered criminally unlawful. And if the unlawfulness was one of the characteristics of official acts for purposes of that immunity, there would be no cause for the exercise of the criminal jurisdiction of the State of the court from which immunity is claimed⁷².

The practice of different national courts is particularly important for defining the notion of an “act performed in an official capacity” because these courts have to decide cases whose outcome may be affected by the application of the functional immunity of State officials from foreign criminal jurisdiction. The national courts gave various answers to the question about the applicability of immunity, as such, there is no consistent principle that they follow uniformly in their decisions. On the contrary, national courts base such decisions on different legal approaches

⁶⁶ International Law Commission. Immunity of State officials..., op. cit., pp. 102-103, note 1.

⁶⁷ “A particular problem is to determine whether a person who is a State organ acts in that capacity. It is irrelevant for this purpose that the person concerned may have had ulterior or improper motives or may be abusing public power. Where such a person acts in an apparently official capacity, or under colour of authority, the actions in question will be attributable to the State” (International Law Commission. Yearbook of the International Law Commission 2001 Volume Two Part II. New York and Geneva, 2007. p. 42 [consultation: 02.02.2019]. Available in: <http://legal.un.org/ilc/publications/yearbooks/english/ilc_2001_v2_p2.pdf>).

⁶⁸ Institut de Droit international, op. cit., pp. 4-5, note 15.

⁶⁹ International Law Commission. Immunity of State officials..., op. cit., p. 103, note 1.

⁷⁰ Caban P., op. cit., p. 310, note 4.

⁷¹ International Law Commission. Immunity of State officials..., op. cit., pp. 106-107, note 1.

⁷² International Law Commission. Fourth report on immunity of State officials from foreign criminal jurisdiction, by Concepción Escobar Hernández, Special Rapporteur. Geneva, 29 May 2015. p. 11 [consultation: 02.02.2019]. Available in: <<http://undocs.org/en/A/CN.4/686>>.

and they are guided by various considerations. The majority of judicial decisions on this issue has been based on the status of the State official and attribution to the State of acts performed by that official. However, in some cases, the decisions of national courts were based on the fact that the acts were carried out in the exercise of governmental authority or were sovereign acts and it was specifically noted that they constituted performance of public functions⁷³. For example, in the case *Saltany v. Reagan et al*, a United States court ruled that the civilian and military officials involved in the planning or conducting a bombing in Libya did so in their official capacities and in accordance with the orders of the President Reagan, who was the Commander in Chief, or superior officer and, consequently, each of them was entitled to immunity⁷⁴.

On the other hand, it is worth to mention that national courts usually refuse to grant immunity in cases linked to corruption, misuse and misappropriation of budget funds, money-laundering and other forms of corruption. Likewise, national jurisprudence from different States points out that courts do not consider those financial crimes for personal benefit as acts for which individuals can be entitled to immunity. For example, in a case involving Second Vice President of the Republic of Equatorial Guinea, Nguema Obiang Mangué, the French Court of Cassation stated that acts of misappropriating public funds cannot be considered as the performance of State functions⁷⁵.

Multilateral treaties can also help in the understanding the concept of “act performed in an official capacity”, because sometimes these documents include references, phrased in different ways, to said concept. In accordance with the Vienna Convention on Diplomatic Relations, an “act performed in an official capacity” is an act that occurs in “the exercise of the functions” of members of the mission⁷⁶. Another important treaty is the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, which refers to an official nature of the act as one of the elements of the definition of torture. It is stated that for the purposes of the Convention only public official or any other person acting in an official capacity can cause pain or suffering. It can be done by official himself or his or her with the consent or acquiescence⁷⁷.

The Special Rapporteur of the ILC, who was mentioned above, identified the following characteristics of “acts performed in an official capacity”:

- the act is of criminal nature;
- the act is performed on behalf of the State;
- the act involves the exercise of sovereignty and element of the governmental authority⁷⁸.

⁷³ Ibidem, pp. 17-24.

⁷⁴ US District Court for the District of Columbia. *Saltany v. Reagan*, 702 F. Supp. 319 (D.D.C. 1988), 23 December 1988 [consultation: 03.02.2019]. Available in: <<https://law.justia.com/cases/federal/district-courts/FSupp/702/319/2252600/>>.

⁷⁵ Allard P.A., *Accountability in Foreign Courts for State Officials’ Serious Illegal Acts: When Do Immunities Apply?* In: *International Justice and Human Rights Clinic*, Vancouver, 2016. pp. 16-17 [consultation: 03.02.2019]. Available in: <http://www.allard.ubc.ca/sites/www.allard.ubc.ca/files/uploads/IJHR/when_do_immunities_apply_final.pdf>.

⁷⁶ Vienna Convention on Diplomatic Relations..., op. cit., p. 12, note 36.

⁷⁷ Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, New York, 4 February 1985 [consultation: 03.02.2019]. Available in: <<https://www.ohchr.org/en/professionalinterest/pages/cat.aspx>>.

⁷⁸ International Law Commission. Fourth report..., op. cit., p. 42, note 72.

With respect to the first characteristics, it should be noted that the main consequence of the criminal nature of the act is the possibility that the act can entail two different types of responsibility. In the first case, criminal responsibility attaches to the individual who committed the act, but in the second case, civil liability can be imposed both on the performer of the act and on the third party. This means that the same act performed by State official can become the basis for the emergence of both criminal responsibility, which is attributable solely to the official, and subsidiary civil responsibility attributable to both official and the State. This principle is supported by the statement of the International Court of Justice that the same conduct could give rise to two different types of responsibility, established through legal procedures that are likewise different⁷⁹.

It should be mentioned as well that the immunity of State officials is often regarded as a form of State immunity and is conflated with that concept. Therefore, in legal practice, there are relatively frequent indications that State officials enjoy the same immunity as the State itself. However, a direct link exists between immunity from foreign criminal jurisdiction and the individual, because the object to which the jurisdictional claims in such cases directly relate is the individual and any consequences that may arise, depending on the circumstances, as a result of the criminal proceedings are individual and strictly personal. Moreover, the State can never be prosecuted in national criminal courts, since the responsibility it may have for the wrongful acts committed by its officials will always be of a civil nature within the framework of a claim for compensation for the harm caused by such acts. For that reason, it can be said that immunity *ratione materiae* is recognized in the interest of the State, but its direct beneficiary is an official when he or she acts in the expression of State sovereignty⁸⁰.

When it comes to the temporal element of immunity *ratione materiae*, it is necessary to distinguish between two points at the time: the moment when the act is performed and the moment when immunity is invoked. While the first must have taken place during the period of the term of office of the individual concerned, the second will occur while bringing that person to criminal jurisdiction and it is irrelevant whether it happens during the term of office of the official or after it has ended. Therefore, the temporal element of functional immunity is a condition rather than a limitation. If the condition is met at a certain moment, there is no time limit on the effect of immunity. This principle can be justified by the very nature of immunity *ratione materiae*, which is connected to the concept of an “act performed in an official capacity”, the nature of which does not become something different or disappear when the official leaves the office⁸¹.

⁷⁹ International Court of Justice. Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro) Judgment of 26 February 2007. p. 80 [consultation: 03.02.2019]. Available in: <<https://www.icj-cij.org/files/case-related/91/091-20070226-JUD-01-00-EN.pdf>>.

⁸⁰ International Law Commission. Fourth report..., op. cit., pp. 45-47, note 72.

⁸¹ Ibidem, p. 55.

CHAPTER II. EXCEPTIONS TO IMMUNITY OF STATE OFFICIALS FROM FOREIGN CRIMINAL JURISDICTION

2.1. General considerations

The topic of the immunity of State officials arouses an increasing interest among the international legal community and a considerable number of publications made on that issue have clearly demonstrated that the problem of exceptions to immunity constitutes one of its major concerns⁸². The focus on that issue is not purely theoretical or doctrinal but also has a very significant practical dimension. The need for exceptions to immunity can be justified by the importance of avoidance of the most serious human rights violations and fight against impunity, as well as protection of the interests of the international community as a whole⁸³.

Both international tribunals and national courts have ruled on that question, and some of their decisions had an important social and media impact and been extensively raised in legal discussion and literature, which will be further elaborated in the present chapter. It should also be mentioned that the topic of exceptions to immunity was the essence of different recent developments concerning international criminal jurisdiction, a good example of which are the various decisions taken within the African Union⁸⁴, and in particular the Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights, which created an International Criminal Law Section in the Court⁸⁵.

That question was raised also on repeated occasions in the work of the International Law Commission. The minority of the Commission members have maintained the absence of exceptions to immunity. On the contrary, a significant number of members recognized that there are instances in which the application of immunity is impossible. The commission of international crimes was regarded as the main of those instances, but members of the Commission also mentioned other examples of exceptions, including *ultra vires* acts⁸⁶, *acta jure gestionis*, performance of functions of an allegedly official nature but are, in fact, for exclusive benefit of the State official in question, such as acts of corruption and misappropriation of State funds, and instances in which an official causes harm to persons or property in the territory of the forum State (“territorial tort exception”)⁸⁷.

In order to better understand the possibility to exceptions to immunity, it is absolutely necessary to study the existing practice on this issue. At the beginning, it should be noted that not only domestic practice has been used for the purposes of the present chapter, but also

⁸² International Law Commission. Fifth report on immunity of State officials from foreign criminal jurisdiction, by Concepción Escobar Hernández, Special Rapporteur. Geneva, 14 June 2016. p. 7 [consultation: 20.03.2019]. Available in: <<https://undocs.org/en/A/CN.4/701>>.

⁸³ Evdokimova O. N., Isklyucheniya iz immunitetov dolzhostnykh lits ot mezhdunarodnoy i natsional'noy ugolovnoy yurisditsii. In: *Matters of Russian and International Law*. [Moscow]: Publishing house “ANALITIKA RODIS”, 2017. Num. 7, p. 273 [consultation: 20.03.2019]. Available in: <<http://publishing-vak.ru/file/archive-law-2017-3/24-evdokimova.pdf>>.

⁸⁴ International Law Commission. Fifth report..., op. cit., pp. 7-8, note 82.

⁸⁵ African Union. Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights. Malabo, 27 June 2014. p. 11 [consultation: 20.03.2019]. Available in: <https://au.int/sites/default/files/treaties/7804-treaty-0045_-_protocol_on_amendments_to_the_protocol_on_the_statute_of_the_african_court_of_justice_and_human_rights_e.pdf>.

⁸⁶ *Ultra vires* acts are those performed beyond the powers of the authority.

⁸⁷ International Law Commission. Fifth report..., op. cit., p. 10, note 82.

international one. Domestic practice is very limited and it is hardly possible to come to conclusions on the topic concerned without previous examination of the practice of the International Criminal Court and different hybrid and *ad hoc* tribunals, such as, for example, the International Criminal Tribunal for the former Yugoslavia or the Special Court for Sierra Leone. Their finding could be also relevant in order to better understand the present situation on the exceptions of immunity with regard to those acts, such as international crimes, and their importance cannot be underestimated.

Firstly, it should be noted that conventions which regulate the exercise of diplomatic functions and anyhow govern the applicability of immunities do not contain any specific provisions contemplating any form of exception to immunity from foreign criminal jurisdiction. On the contrary, the immunity of individuals who are entitled to immunity in terms of those conventions is recognized as absolute during the official's term in office⁸⁸. However, it is worth mentioning that the conventions in question mainly regulate the immunity *ratione personae* and that immunity, therefore, extends to acts performed both in an official capacity and in a private capacity. Notwithstanding, it should be remembered that immunity *ratione personae* is of temporary nature, and after the expiration of the term of office of the individuals concerned, it is no longer absolute, since from that point in time they can enjoy only immunity *ratione materiae*, which is applicable solely to acts performed in their official capacity. As such, it could be argued that after the functions of those officials have ended, their prosecution became possible⁸⁹. However, these conventions do not define any exceptions applicable to this residual functional immunity.

The Vienna Convention on Consular Relations, for its part, takes a different approach, since the immunity regime it grants to consular staff corresponds to the immunity *ratione materiae* related to actions inherent in consular functions. That means that the consular officer and other members of the consular office are not entitled to absolute immunity but to immunity limited to acts performed in an official capacity⁹⁰. It should be also noted that the article 43.2 (b) establishes a sort of "territorial tort exception"⁹¹.

In addition to these conventions directly related to the immunity of State officials, there is also another group of conventions from the scope of international human rights law and international criminal law that contain provisions concerning individual criminal responsibility⁹². For example, the Convention on the Prevention and Punishment of the Crime of Genocide lists the acts that must be punishable in accordance with it and in its article IV indirectly determines the irrelevance of official position, stating that persons committing genocide or other of the listed acts "shall be punished, whether they are constitutionally responsible rulers, public officials or private individuals"⁹³. In turn, the International Convention on the Suppression and Punishment of the Crime of Apartheid provides in its article III that, regardless of the motive involved,

⁸⁸ Vienna Convention on Diplomatic Relations..., op. cit., p. 9, note 36; Convention on Special Missions..., op. cit., p. 11, note 63; Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character 1975. Vienna, 14 March 1975. p. 13, 22 [consultation: 20.03.2019]. Available in: <http://legal.un.org/ilc/texts/instruments/english/conventions/5_1_1975.pdf>.

⁸⁹ Evdokimova O. N., op. cit., p. 275, note 83.

⁹⁰ Vienna Convention on Consular Relations 1963..., op. cit., p. 17, note 61.

⁹¹ Ibidem, p. 18.

⁹² International Law Commission. Fifth report..., op. cit., p. 21, note 82.

⁹³ Convention on the Prevention and Punishment of the Crime of Genocide, Paris, 9 December 1948. p. 280 [consultation: 21.03.2019]. Available in: <<https://treaties.un.org/doc/publication/unts/volume%2078/volume-78-i-1021-english.pdf>>.

international criminal responsibility must apply “to individuals, members of organizations and institutions and representatives of the State, whether residing in the territory of the State in which the acts are perpetrated or in some other State”⁹⁴. On the other hand, the International Convention for the Protection of All Persons from Enforced Disappearance does not emphasize the official status of a person, but simply states in article 6.1 (a) that any person can be held responsible for that crime⁹⁵. It should also be mentioned that both the latter Convention and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment include State officials or other persons acting with the consent, support or acquiescence of State in the definition of crimes⁹⁶. As such, it can be concluded that those individuals may be held criminally responsible for committing such acts even when they acted in an official capacity. Consequently, in accordance with the above-mentioned conventions, it may be stated that the commission of a crime of genocide, apartheid, torture or enforced disappearance may constitute an exception to the immunity of State officials from criminal jurisdiction⁹⁷, but this topic will be discussed in more detail further.

It is important to mention the Rome Statute of the International Criminal Court as well, even though it applies to the international criminal jurisdiction and not to the foreign one. The Statute states in its article 27 that it must apply “equally to all persons without distinction based on official capacity” and that immunities granted under international or national law are not applicable to the Court⁹⁸. It also mentions in its article 33 the general principle of the irrelevance of compliance with the orders of a Government or of a superior in terms of individual criminal responsibility⁹⁹. These rules pursue an aim to prevent situations in which the responsibility of the individual may be evaded due to his or her special relationship with the State, in order to eliminate loopholes which permit the impunity for the committing the most serious crimes affecting the international community as a whole¹⁰⁰.

On the other hand, when it comes to the international judicial practice, the International Court of Justice in its judgment in the Arrest Warrant case, which was already mentioned earlier, stated that after analyzing the State practice and the instruments creating international criminal courts and tribunals, the Court could not come to a conclusion that there exists under customary international law any rule of exception to the immunity from criminal jurisdiction that incumbent Minister of Foreign Affairs enjoys, even in cases where the acts in question constitute war crimes or crimes against humanity, which are considered the crimes under international law¹⁰¹. However, it should be noted that, in that case, the Court dealt with the issue of personal immunity of incumbent Ministers of Foreign Affairs, and not with the functional immunity of former State officials¹⁰².

⁹⁴ International Convention on the Suppression and Punishment of the Crime of Apartheid, New York, 30 November 1973. p. 246 [consultation: 21. 03. 2019]. Available in: <<https://treaties.un.org/doc/publication/unts/volume%201015/volume-1015-i-14861-english.pdf>>.

⁹⁵ International Convention for the Protection of All Persons from Enforced Disappearance, Paris, 6 February 2007. p. 2 [consultation: 21.03.2019]. Available in: <https://treaties.un.org/doc/publication/ctc/ch_iv_16.pdf>.

⁹⁶ Ibidem, p. 2; Convention against Torture..., op. cit., pp. 113-114, note 77.

⁹⁷ International Law Commission. Fifth report..., op. cit., p. 21, note 82.

⁹⁸ Rome Statute of the International Criminal Court, Rome, 17 July 1998. p. 19 [consultation: 21.03.2019]. Available in: <<https://www.icc-cpi.int/nr/rdonlyres/add16852-ae9-4757-abe7-9cdc7cf02886/283503/romestatuteng1.pdf>>.

⁹⁹ Ibidem, p. 21.

¹⁰⁰ International Law Commission. Fifth report..., op. cit., p. 23, note 82.

¹⁰¹ International Court of Justice. Arrest Warrant..., op. cit., p. 25, note 8.

¹⁰² Caban P., op. cit., p. 319, note 4.

Notwithstanding, in order to safeguard the principle of individual criminal responsibility, the Court stated that it is not affected by immunity from criminal jurisdiction. Firstly, the ICJ made a distinction between the rules governing the jurisdiction of national courts and those governing jurisdictional immunities and stated that “jurisdiction does not apply absence of immunity, while absence of immunity does not apply jurisdiction”¹⁰³. Consequently, even in the cases where different above-listed conventions on the prevention and punishment of certain serious crimes have imposed on States the obligation of prosecution or extradition a person who has committed those crimes, such extension of jurisdiction “in no way affects immunities under customary international law”¹⁰⁴. Secondly, the Court made a distinction between immunity and impunity and emphasized with regard to the personal immunity of the incumbent Minister of Foreign Affairs that this immunity does not imply the impunity in respect of any crimes that the person might have committed, irrespective of their gravity. The Court also stated that jurisdictional immunity is only procedural in nature, while individual criminal responsibility is a question of substantive law¹⁰⁵. In the first chapter it has been already discussed the possibilities of prosecution the State officials entitled to immunities from foreign criminal jurisdiction.

While considering a possible existence of exceptions to immunity of State officials from foreign criminal jurisdiction, it is absolutely necessary to review national judicial practice with regard to that issue. When it comes to the decisions concerning immunity *ratione personae*, national criminal courts have almost unanimously held that this type of immunity is absolute in nature and individuals entitled to it are immune from foreign criminal jurisdictions during the period when they perform their functions, even with regard to such offenses as international crimes. However, in some cases, the courts have concluded that the only situation when personal immunity may cease to apply is when an international treaty establishes the waiver, revocation or non-applicability of such immunity or establishes an exception in this regard¹⁰⁶.

On the other hand, the positions taken by national criminal courts with regard the immunity *ratione materiae* are less uniform. Nevertheless, it can be concluded that these courts have recognized, in some cases, the existence of exceptions to functional immunity in such situations that relate to the commission of crimes under international law, crimes of corruption or related crimes, as well as in relations to other crimes of international concern, as for example terrorism, sabotage or destruction of property and causing the death or injury of persons in relations to such crimes¹⁰⁷.

It is also interesting to mention a previous work of the International Law Commission on the topics, which may be relevant to the issue of exceptions to immunity of State officials from foreign criminal jurisdiction, in particular The Principles of International Law recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal that were adopted by the Commission in the year 1950¹⁰⁸. Basically, the statements provided in this document can be rephrased in three core principles:

¹⁰³ International Court of Justice, Arrest Warrant, op. cit., p. 25, note 8.

¹⁰⁴ Ibidem, pp. 25-26.

¹⁰⁵ Ibidem, p. 26.

¹⁰⁶ International Law Commission. Fifth report..., op. cit., pp. 46-47, note 82.

¹⁰⁷ Ibidem, pp. 48-49.

¹⁰⁸ International Law Commission. Yearbook of the International Law Commission 1985 Volume Two Part II. New York, 1986 [consultation: 23.03.2019]. Available in: <http://legal.un.org/ilc/publications/yearbooks/english/ilc_1985_v2_p2.pdf>.

- the principle of individual responsibility with regards to international crimes, which arises from the international law, regardless of what is established in national legislation, as provided in Principles I and II;
- the principle of the irrelevance of the official position of the individual to the determination of responsibility, as provided in Principle III;
- and the principle of inapplicability of orders received as a ground for exemption from responsibility, as provided in Principle IV¹⁰⁹.

These principles are closely interrelated and their main intention is to prevent the impunity of perpetrators of international crimes. In accordance with these principles, any individual who has committed an international crime is responsible for it, regardless of his or her official position or regardless of whether the individual concerned has acted on his own impulse or pursuant to an order of his or her Government or of a superior¹¹⁰.

In the light of the above-analyzed practice on the question of exceptions to the immunity of State officials from foreign criminal jurisdiction, it can be concluded that there is no unanimous position on that issue which would allow stating about the existence or absence of such exceptions. However, it is still possible to derive several common points from different opinions regarding the exceptions. Firstly, when it comes to immunity *ratione personae*, it can be characterized as absolute, which means that it is very difficult to find any examples of its non-applicability. In contrary, the vast majority of the statements about possible exceptions was made with respect to immunity *ratione materiae*. Secondly, the main instances in which immunity could be inapplicable are the commission of crimes under international law, “territorial tort exception” and performance of the functions of an official nature, but which are, in fact, for the exclusive benefit of the official concerned, for example, acts of corruption and misappropriation of State funds. Those instances will be further examined in the following parts of the present chapter.

2.2. Commission of international crimes

This part is devoted to the question whether State officials are entitled to enjoy immunities in foreign criminal proceedings in which they are charged with a commission of an international crime. As was stated before, different international legal acts contain provisions about the principle of the irrelevance of the official position of an individual accused of commission of crimes under international law. This principle can also be found in the statutes of the Nürnberg and Tokyo Tribunals and confirmed by the activity of these entities¹¹¹. Subsequently, that principle was consolidated in art. 7 of the Statute of the International Criminal Tribunal for the former Yugoslavia¹¹², in art. 6 of the Statute of the International Criminal Tribunal for Rwanda¹¹³, in art. 6 of the Statute of the Special Court for Sierra Leone¹¹⁴ and in art. 27 of the Rome Statute of the International Criminal Court¹¹⁵.

¹⁰⁹ Ibidem, p. 12.

¹¹⁰ International Law Commission. Fifth report..., op. cit., p. 55, note 82.

¹¹¹ Evdokimova O. N., op. cit., p. 274, note 83.

¹¹² Statute of the International Criminal Tribunal for the Former Yugoslavia, The Hague, 25 May 1993, p. 6 [consultation: 06.04.2019]. Available in: <http://www.icty.org/x/file/Legal%20Library/Statute/statute_sept09_en.pdf>.

¹¹³ Statute of the International Criminal Tribunal for Rwanda, Rwanda, 8 November 1994, p. 47 [consultation: 06.04.2019]. Available in: <http://legal.un.org/avl/pdf/ha/ictr_EF.pdf>.

There are also some examples of domestic legislation regulating international crimes, which deal in somehow with the issue of immunity. For example, in the Netherlands, the 2003 International Crimes Act recognizes the immunity of the Head of State, Head of Government and Minister of Foreign Affairs, who enjoy personal immunity from criminal jurisdiction, including with regard to international crimes. However, after their term in office has ended and they start to enjoy functional immunity, which applies to them only in respect of acts performed in an official capacity and this, in accordance with the information provided by the Netherlands Government, would not cover the commission of international crimes. On the other hand, the Penal Code of the Republic of Niger, amended in 2003, stands by the principle of irrelevance of an official position of the person concerned when it comes to international crimes¹¹⁶.

The non-applicability of immunity, especially immunity *ratione materiae*, in respect of international crimes finds some support in the practice of domestic courts as well. In this context, it should be mentioned the judgment of the Supreme Court of Israel in the Eichmann case. The Court rejected Eichmann's plea of "act of State", by deciding that such defense argument did not apply in respect of crimes under international law. In the Pinochet case, Spanish authorities in their request to extradite Pinochet on 3 November 1998 also expressed their position that former Heads of State were not entitled to the immunity from criminal jurisdiction if they were charged with international crimes¹¹⁷. When former President of Chad, Hissène Habré, was accused of international crimes allegedly committed while in office, the African Union mandated the Republic of Senegal "to prosecute and ensure that Hissène Habré is tried, on behalf of Africa"¹¹⁸. Then the Committee of African Jurists established by the African Union took the position that immunity of a former Head of State could not be applied "to defeat the principle of total rejection of impunity that was adopted by the Assembly"¹¹⁹. Nevertheless, there were also other examples when domestic authorities have not denied immunity to State officials charged with international crimes, such as in the case in France, when the attorney of Paris granted functional immunity to the former United States Secretary of Defense in criminal proceedings concerning allegations of actions that could have amounted to crimes under international law¹²⁰.

It can be found several arguments and considerations in the legal literature and in judicial decisions in favor of the non-applicability of immunity of State officials from foreign criminal jurisdiction in respect of international crimes. First of all, it seems necessary to note that, when it comes to immunity *ratione materiae* that can be granted only regarding acts performed in an official capacity of the individual concerned, State officials can never enjoy that type of immunity from the foreign jurisdiction in respect of international crimes, because these acts would not be considered as "official acts"¹²¹. Second argument could be based on an assumption

¹¹⁴ Statute of Special Court for Sierra Leone, Sierra Leone, 16 January 2002, p. 3 [consultation 06.04.2019]. Available in: <<https://www.refworld.org/docid/3dda29f94.html>>.

¹¹⁵ Rome Statute..., op. cit., p. 19, note 98.

¹¹⁶ International Law Commission. Fifth report..., op. cit., pp. 29-30, note 82.

¹¹⁷ International Law Commission. Immunity of State officials..., op. cit., p. 120, note 1.

¹¹⁸ Assembly of the African Union. Decision on the Hissène Habré Case and the African Union. Banjul, July 2006. p. 21 [consultation 06.04.2019]. Available in: <https://au.int/sites/default/files/decisions/9555-assembly_au_dec_111-133_vii_e.pdf>.

¹¹⁹ African Union. Report of the Committee of Eminent African Jurists on the Case of Hissène Habré. Addis Ababa, July 2006. p. 3 [consultation 06.04.2019]. Available in: <https://www.peacepalacelibrary.nl/ebooks/files/habreCEJA_Repor0506.pdf>.

¹²⁰ International Law Commission. Immunity of State officials..., op. cit., p. 122, note 1.

¹²¹ Ibidem, pp. 123-124.

that international crimes, whether official acts or not, would not be covered by immunity, because these crimes, generally, constitute violations of *jus cogens* norms, and since these norms supersede all other norms, they overcome all inconsistent rules of international law providing for immunity¹²². Another argument in favor of the non-applicability of immunity from foreign criminal jurisdiction is that it is incompatible with the recognition of extraterritorial jurisdiction or universal jurisdiction in respect with certain crimes under international law¹²³.

With regard to the first argument, Judges Higgins, Kooijmans and Buergenthal in their separate opinion in the Arrest Warrant case stated that serious international crimes could not be regarded as acts performed in an official capacity since they would not fall within the scope of “normal” functions of the State¹²⁴. It is worth mentioning the case of Jurisdictional Immunities of State brought before the International Court of Justice. Even though the case referred only to the State immunity, it also took into consideration the concept performed in an official capacity¹²⁵. In particular, it is interesting to mention the dissenting opinion of Judge Cañado Trindade, where he indicated that sovereignty cannot be invoked regarding the conduct constituting crimes under international law and stated that “international crimes are not acts of State, nor are they “private acts” either; a crime is a crime, irrespective of who committed it”¹²⁶. The same argument was followed by some Law Lords of the House of Lords in the series of Pinochet cases, in which they held that a former Head of State could not enjoy immunity from jurisdiction in respect of torture and conspiracy to commit torture took place whilst in office¹²⁷.

Nevertheless, the argument that international crimes cannot be considered as acts performed in an official capacity has been criticized as well, both in different national courts and in the legal literature¹²⁸. It has been observed that whether or not acts performed by State officials are regarded as official acts do not depend on the legality of those acts, both under international or domestic law. It rather depends on the purposes for which those acts were done and the means that helped the official concerned to carry out them. In the case when they were done for the reason of purely official nature, were connected to the policies of the State, as opposed to the reasons which pursue exclusively private aims, and were carried out using the State apparatus, those acts should be qualified as official acts. In addition, in the majority of cases acts which constitute crimes under international law are committed by State officials or with their support for State purposes¹²⁹. Moreover, the view that international crimes are private acts by their nature may be difficult to reconcile with the principle that a State must be held responsible for internationally wrongful acts committed by its organs¹³⁰. With regard to that opinion, it is worth to mention the position expressed by the Trial Chamber of the International Criminal Tribunal for the Former Yugoslavia in the case of the Prosecutor v. Kunarac. The Chamber upheld the view

¹²² Akande D., Shah S., op. cit., p. 828, note 6.

¹²³ International Law Commission. Immunity of State officials..., op. cit., p. 135, note 1.

¹²⁴ International Court of Justice. Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium), Judgment, I.C.J. Reports 2002, Joint Separate Opinion of Judges Higgins, Kooijmans and Buergenthal. p. 89 [consultation: 07.04.2019]. Available in: <<https://www.icj-cij.org/files/case-related/121/121-20020214-JUD-01-05-EN.pdf>>.

¹²⁵ International Law Commission. Fourth report..., op. cit., p. 12, note 72.

¹²⁶ International Court of Justice. Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening), Judgment, I.C.J. Reports 2012, Dissenting Opinion of Judge Cañado Trindade. p. 150 [consultation: 07.04.2019]. Available in: <<https://www.icj-cij.org/files/case-related/143/143-20120203-JUD-01-04-EN.pdf>>.

¹²⁷ Akande D., Shah S., op. cit., pp. 831-832, note 6.

¹²⁸ International Law Commission. Immunity of State officials..., op. cit., pp. 125-126, note 1.

¹²⁹ Akande D., Shah S., op. cit., p. 832, note 6.

¹³⁰ International Law Commission. Immunity of State officials..., op. cit., p. 126, note 1.

that international crimes fall within the scope of official acts, but stated that “acting in an official capacity could constitute an aggravating circumstance when it comes to sentencing, because the official illegitimately used and abused a power which was conferred upon him or her for legitimate purposes”¹³¹.

The second argument in favor of the non-applicability of immunity from foreign criminal jurisdiction in respect of international crimes is based on the suggestion that *jus cogens* norms must prevail over the rules providing immunity, because of their superior position in the hierarchy of norms of international law. However, this view could be criticized for several reasons¹³².

To begin with, it is necessary to note that there are opinions recognizing that most norms of international humanitarian law, in particular, those prohibiting crimes against humanity, war crimes and genocide, are *jus cogens* norms¹³³. However, it has never been established in the international law that all rules prohibiting international crimes are prohibitions of peremptory nature. For example, even though some violations of international humanitarian law can be legally described as belligerent reprisals, it is impossible to state that those rules fall within the scope of *jus cogens* norms¹³⁴.

Another counter-argument is that it is difficult to prove that rules governing immunities of State officials actually come in conflict with peremptory norms of international law. The main aim immunities from foreign criminal jurisdiction pursue is to prevent proceeding against its beneficiaries in the domestic courts of other States. As such, to state that rules governing immunity are inconsistent with *jus cogens* norms prohibiting certain international crimes, it should have to be proved that there is an obligation on third States to initiate proceedings in respect of those crimes in their national courts and that this obligation itself is a rule of peremptory nature¹³⁵. With respect to the first point, the existence of rules imposing obligations on third States to prosecute some international crimes is undeniable, as for example those rules prohibiting acts of torture¹³⁶. Notwithstanding, there is no recognized obligation to prosecute crimes against humanity or war crimes. Moreover, even where there is a direct obligation to prosecute those individuals charged with crimes under international law, it is impossible to suggest that the obligation is of *jus cogens* character. It is recognized that some rules prohibiting the act are peremptory obligations, but not the ones requiring a prosecution by third States. Therefore, the suggestion that there is a conflict between rules governing immunities and *jus cogens* norms prohibiting certain international crimes is erroneous¹³⁷. The existence of such conflict between norms has been also denied by the International Court of Justice in the case of Jurisdictional Immunities of the State¹³⁸ and the European Court of Human Rights in the case of

¹³¹ International Criminal Tribunal for the former Yugoslavia. Prosecutor v. Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic. Judgment of 22 February 2001. p. 169 [consultation 07.04.2019]. Available in: <<http://www.icty.org/x/cases/kunarac/tjug/en/kun-tj010222e.pdf>>.

¹³² Akande D., Shah S., op. cit., pp. 832-833, note 41.

¹³³ International Criminal Tribunal for the former Yugoslavia. Prosecutor v. Kupreskic et al. Judgement of 14 January 2000. p. 203 [consultation: 08.04.2019]. Available in: <<http://www.icty.org/x/cases/kupreskic/tjug/en/kup-tj000114e.pdf>>.

¹³⁴ Akande D., Shah S., op. cit., p. 833, note 6.

¹³⁵ Ibidem, p. 834.

¹³⁶ Convention against Torture..., op. cit., p. 115, note 77.

¹³⁷ Akande D., Shah S., op. cit., pp. 835-837, note 6.

¹³⁸ International Court of Justice. Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening), Judgment, I.C.J. Reports 2012, Judgment of 3 February 2012. p. 46 [consultation: 08.04.2019]. Available in: <<https://www.icj-cij.org/files/case-related/143/143-20120203-JUD-01-00-EN.pdf>>.

Al-Adsani¹³⁹. The same position has been held by Lord Hoffmann in the United Kingdom House of Lords in the case of Jones¹⁴⁰.

The last opinion contrary to the applicability of immunity regarding international crimes that will be discussed in the present chapter is that it is inconsistent with the right to exercise extraterritorial jurisdiction or universal jurisdiction in respect of some certain crimes under international law. This opinion was expressed by some Law Lords of the House of Lords in the Pinochet case in relation to the regime introduced by the above-mentioned Convention against Torture of 1984¹⁴¹. The same view about the absolute incompatibility of immunity from criminal liability for international crimes with the establishment of universal jurisdiction regarding gross human rights offenses has been clearly supported by the Committee of the International Law Association¹⁴². It has also been assumed that universal jurisdiction implies equal jurisdiction for all States. That means those States that establish universal jurisdiction for certain international crimes effectively create a web of horizontal jurisdictional interconnections that would make it extremely difficult to justify an immunity plea. Even though this situation is far from being realized in the present time, domestic implementation of the Rome Statute may be an indication of a trend in that direction¹⁴³.

The last issue necessary to be analyzed in order to define the exception from immunity of State officials from foreign criminal jurisdiction is the concept of a “crime under international law”. To begin with, it should be pointed out that the term “crime under international law” or “international crime” refers to criminal conduct that is of international importance, either because it is committed in an international context and has transnational or transboundary dimension, or because it affects international legal values, regardless of the place where it occurs. In both cases, those criminal conducts become subject to international regulation. The first category includes crimes such as piracy, human trafficking, drug trafficking and other forms of international organized crime. In turn, the second category includes the crime of genocide, war crimes, crimes against humanity, the crime of aggression, torture, enforced disappearance and apartheid. However, even though both categories include criminal conducts that affect the values and interests of States and the international community, not all of them constitute a possible exception to the applicability of immunity. International crimes to become the subject of the non-applicability of immunity should be able, in the view of the international community, to give rise to criminal proceedings in international criminal courts and tribunals, in particular in the ICC¹⁴⁴.

Consequently, these crimes should be qualified in the same way as the crime of genocide, war crimes, crimes against humanity and the crime of aggression. Notwithstanding, with regard

¹³⁹ European Court of Human Rights. Case of Al-Adsani v. United Kingdom. Judgment of 21 November 2001. pp. 8-9 [consultation: 08.04.2019]. Available in: <https://documents.law.yale.edu/sites/default/files/al_adsani_v_uk_-_echr_-_2001_0.pdf>.

¹⁴⁰ House of Lords. Opinions of the Lords of Appeal for Judgment in the cause Jones (Respondent) v. Ministry of Interior Al -Mamlaka Al -Arabiya AS Saudiya (the Kingdom of Saudi Arabia) (Appellants) Mitchell and others (Respondents) v. Al-Dali and others and Ministry of Interior Al -Mamlaka Al -Arabiya AS Saudiya (the Kingdom of Saudi Arabia) (Appellants) Jones (Appellant) v. Ministry of Interior Al -Mamlaka Al -Arabiya AS Saudiya (the Kingdom of Saudi Arabia) (Respondents). 14 June 2006. pp. 22-23 [consultation: 08.04.2019]. Available in: <https://www.refworld.org/cases,GBR_HL,449801d42.html>.

¹⁴¹ International Law Commission. Immunity of State officials..., op. cit., p. 135, note 1.

¹⁴² International Law Association. Final report on the Exercise of Universal Jurisdiction in Respect of Gross Human Rights Offenses. London, 2000. p. 14 [consultation: 08.04.2019]. Available in: <<https://ru.scribd.com/document/131960356/ILA-Report-on-Universal-jurisdiction-2000>>.

¹⁴³ International Law Commission. Immunity of State officials..., op. cit., p. 136, note 1.

¹⁴⁴ International Law Commission. Fifth report..., op. cit., p. 87, note 82.

to the last criminal conduct it should be noted that the jurisdiction of the Court over this crime is optional and not automatic, as is the case with the first three crimes. Moreover, it is impossible to find a single case of State practice in which crime of aggression has been characterized as an exception to the applicability of immunity, at either the legislative or the judicial level¹⁴⁵.

To summarize, it can be said that the topic of possible exceptions to the immunity of State officials from foreign criminal jurisdiction is still very controversial. It seems clear that immunity *ratione personae* remain of an absolute nature in the foreign domestic courts even in respect of such instances as crimes under international law. However, opinions concerning immunity *ratione materiae* are unanimous and it is difficult to state about the existence of any rule under international law that implies the non-applicability of this type of immunity in the case of committing an international crime. Notwithstanding, numerous above-mentioned practice, both on the domestic and international level, allows assuming about the presence of certain tendency in that direction.

2.3. Other instances with regard to which immunity could be inapplicable

As it has been already mentioned before, the commission of an international crime is not the only instance, when the immunity from foreign criminal jurisdiction in respect of State officials could be denied. An analysis of existing practice on that issue shows that there also other acts to be considered as possible exceptions to immunity.

First of all, it is necessary to mention “territorial tort exception”¹⁴⁶, which was originally derived from the law of diplomatic immunities and later extended to State immunity¹⁴⁷. It seems to be applicable in the cases where an “official” criminal conduct, or, in other words, crime committed during the performance of official functions and, in principle, covered by functional immunity, is perpetrated in the territory of the State which exercises jurisdiction. This possible exception is characterized by the principle of territoriality, rather than by the gravity of such criminal conduct as it is in the case of crimes under international law¹⁴⁸.

The priority of jurisdiction of the state in whose territory criminal conduct has been committed over the applicability of immunity may, in theory, be supported by the factor that, accordingly to the principle of sovereignty, a State possesses an absolute and supreme power and jurisdiction in its own territory¹⁴⁹. In addition, it provides a remedy for persons who have suffered harm as a result of crimes perpetrated by a State official and who would normally not have access to any other legal means to obtain compensation¹⁵⁰.

However, it should be borne in mind that the supremacy of a State to exercise jurisdiction within its borders is subject to some exceptions established by international law and, in particular, the immunity of foreign States and its officials. In this regard, several different situations should be taken into consideration. For example, a foreign State official may be present and carry out activities resulting in a crime in the territory of a forum State with the consent of the latter. Nevertheless, a similar situation is possible, but with one distinction that this particular activity

¹⁴⁵ Ibidem, pp. 87-88.

¹⁴⁶ A tort, in common law systems, is a civil wrong that causes a claimant to suffer loss or harm resulting in legal liability for the person who commits the tortious act.

¹⁴⁷ Ibidem, p. 88.

¹⁴⁸ Caban P., op. cit., p. 322, note 4.

¹⁴⁹ International Law Commission. Second report on immunity of State officials from foreign criminal jurisdiction, by Roman Anatolevich Kolodkin, Special Rapporteur. Geneva, 10 June 2010. p. 52 [consultation: 10.04.2019]. Available in: <<https://undocs.org/en/A/CN.4/631>>.

¹⁵⁰ International Law Commission. Fifth report..., op. cit., pp. 88-89, note 82.

which led to the crime has been performed with no consent of the receiving State. Finally, it could be a situation where not only the activity itself but also the very presence of the foreign official in the territory of the forum State takes place without the consent of that State¹⁵¹.

It appears that there is no special problem with regard to the first type of situations, because the State in whose territory the alleged crime was committed, in fact, agreed in advance that a foreign State official present and operating in its territory would enjoy functional immunity in respect of acts performed in an official capacity. For example, the individual concerned had arrived for negotiations and on his way to the place of talks committed a violation of the traffic rules entailing a criminal punishment in the host State. In that case, hypothetically, this person would be immune. When it comes to the second situation, there appears a question whether State official concerned enjoys immunity in a case where the scope of his or her activity has been determined in advance and the consent of the receiving State was given in respect of such activity, but there was no consent by that State to the activity which led to the crime¹⁵². For example, a State official visits a foreign State for official talks as a member of a special mission, but beyond the scope of the negotiations commits an act of espionage or terrorist activity. Another example could be when a secret agent enters lawfully the territory of the forum State (for example, on the basis of temporary tourist visa, which implies the consent of that receiving State) and carries out there an activity considered as “official” crime under the direction or instruction of his or her home State without the consent of receiving State¹⁵³. In both situations the activities performed by State official are of an official nature and, as such, are attributed to the home State of this individual. Accordingly, there are all conditions needed to grant immunity to that person, in the view of the principle of sovereignty of that State. However, this State, through its official, by engaging in activity in the territory of another State without the consent of the latter has violated the sovereignty of the receiving State¹⁵⁴. Consequently, it seems that immunity should not be applicable in that case, with regard to the “territorial tort exception”.

While determining whether a State official enjoys immunity in respect of illegal acts committed in the territory of a foreign State, the most important factor would be whether or not the receiving State had consented to the discharge in its territory of official functions by an individual concerned. In this respect, it has been argued that immunity does not extend to acts which led to the gross violation of the territorial sovereignty of another State, such as sabotage, kidnapping, political assassinations, espionage, terrorist attack, murder perpetrated by a foreign secret service agent or aerial intrusion¹⁵⁵.

This opinion finds support in the statement made by the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia in its judgment in the Blaskic case, where it was held that some classes of persons, such as spies, “although acting as State organs, may be held personally accountable for their wrongdoing”¹⁵⁶.

As an example of State practice on the issue of non-applicability of immunity of foreign State official from criminal jurisdiction in respect of crimes committed in the territory of receiving State, reference can be made to the dispute of 1988-1999 between Cyprus and Israel, when Cypriot domestic courts sentenced two Israeli agents suspected of having performed

¹⁵¹ International Law Commission. Second report..., op. cit., pp. 52-53, note 149.

¹⁵² Ibidem, p. 53.

¹⁵³ Caban P., op. cit., p. 323, note 4.

¹⁵⁴ International Law Commission. Second report..., op. cit., p. 53, note 149.

¹⁵⁵ International Law Commission. Immunity of State officials..., op. cit., p. 108, note 1.

¹⁵⁶ International Criminal Tribunal for the former Yugoslavia. Prosecutor v. Tihomir Blaskic..., op. cit., para. 41, note 52.

espionage activities in the territory of Cyprus¹⁵⁷. Another example is a case of Khurts Bat – the secretary of the executive office of the Mongolian National Security Office who was charged with the commission of the kidnapping of a Mongolian national in France and forcible transportation him to Berlin. He was arrested in London pursuant to the European arrest warrant issued by a German federal court. Firstly, Khurts Bat claimed his immunity *ratione personae*, because at that time he was working at the Mongolian Embassy in Budapest. When this claim was rejected, he claimed for functional immunity based upon the fact that the acts he had committed were the part of the plan by the Mongolian secret service and, as such, they were official acts of Mongolia. The second claim was also rejected by the divisional court, which stated that under customary international law immunity *ratione materiae* is not granted in relation to official acts performed in the territory of the foreign State, when that State has not given its consent to the very presence of the foreign State official concerned¹⁵⁸.

In conclusion, it seems that State practice, even though it is limited on the issue of “territorial tort exception”, consistently recognizes the application of this type of exception to the immunity of State officials in the above-mentioned circumstances. In the examples listed above the courts have denied immunity, despite the fact that the individuals concerned were State officials and the courts have established a direct connection between their home State and the act in question¹⁵⁹.

Another possible exception to immunity of State officials to be examined is the commission of certain acts of an allegedly official or, in other words, acts performed in an official capacity, which were carried out in the exclusive benefit of the State official concerned. Immunity seems not to be applicable also in the context of criminal proceedings related to activities that have nothing to do with the functions of the State, but which are only capable of being performed because of the official status of its perpetrator. Those activities usually cause economic harm to the home State of the official concerned and include embezzlement, diversion and misappropriation of public funds, money-laundering and other forms of corruption¹⁶⁰.

With regard to the issue of that possible type of exception to immunity from foreign criminal jurisdiction, it is interesting to mention several conventions on corruption. For example, the United Nations Convention against Corruption establishes in its article 30(2) that “each State Party shall take such measures as may be necessary to establish or maintain, in accordance with its legal system and constitutional principles, an appropriate balance between any immunities or jurisdictional privileges accorded to its public officials for the performance of their functions and the possibility, when necessary, of effectively investigating, prosecuting and adjudicating offences established in accordance with this Convention”¹⁶¹. Even though it does not contain a direct reference to the exception to immunity, it uses the concept “appropriate balance”, which may also be relevant to the question whether acts of corruption should or should not be covered by immunity. In turn, the African Union Convention on Preventing and Combating Corruption seems to be more explicit on that issue by stating in its article 7(5) that “subject to the provisions

¹⁵⁷ Mazzeschi R. P., op. cit., p. 18, note 56.

¹⁵⁸ Foakes J., op. cit., pp. 12-13, note 27.

¹⁵⁹ International Law Commission. Fifth report..., op. cit., pp. 89-90, note 82.

¹⁶⁰ Ibidem, p. 90.

¹⁶¹ United Nations Convention against Corruption. New York, 9 December 2003. pp. 22-23 [consultation 11.02.2019]. Available in: <https://www.unodc.org/documents/brussels/UN_Convention_Against_Corruption.pdf>.

of domestic legislation, any immunity granted to public officials shall not be an obstacle to the investigation of allegations against and the prosecution of such officials”¹⁶².

It can be suggested that such acts as corruption are not considered as acts performed in an official capacity, because in that case State official acts unlawfully in contravention of his or her mandate or those acts can be defined as *ultra vires*, which means beyond his or her mandate. However, the fact that the conduct in question is illegal does not necessarily mean that State official will no longer enjoy immunity, if it can be established that the act itself, despite its illegality, was performed in an official capacity, that is to say, in order to perform State functions¹⁶³. Nevertheless, with regard to *ultra vires* acts, they would not be covered by immunity due to the fact that they are considered not to have been carried out in the exercise of official functions. Thus, they cannot be perceived as performed in an official capacity¹⁶⁴.

However, it is not always easy to distinguish between official and private act, since it could be performed only because of the official status of the person committed it and his or her ability to take advantage of the State structure. Despite this fact, even in such cases, in which the nature of the act is not clear, domestic courts as a rule concluded about the non-applicability of immunity, relying on the intention of the perpetrators of those acts to make use of their official position for the exclusive benefit of their own, causing harm to the State whose officials they are¹⁶⁵.

Consequently, it can be concluded, taking into account the judicial practice, existing national and international legislation and the fact that the prevention of all forms of corruption constitutes a key objective of international cooperation, that criminal conduct can be considered as a possible exception to the immunities of State officials from foreign criminal jurisdiction. However, in any event, it should be examined in a case-by-case basis by the competent national court¹⁶⁶.

CHAPTER III. PROCEDURAL IMPLICATION FOR IMMUNITY ARISING FROM THE CONCEPT OF JURISDICTION

Traditionally, the majority of specialized literature on the topic of immunity of State officials from foreign criminal jurisdiction focuses on the substantive notions of immunity and gives only indirect consideration to the related procedural aspects¹⁶⁷. However, these aspects of immunity cannot be ignored, nor can their significance be underestimated.

The need to take the procedural aspects into account has been referred to during different discussions in the ILC and the Sixth Committee of the General Assembly. With regard to the ILC, the procedural aspects of such immunity were considered as a need to establish procedural guarantees to avoid politicization and abuse of criminal jurisdiction in respect of foreign officials. The Sixth Committee of the General Assembly showed a similar approach. In that connection, it

¹⁶² African Union Convention on Preventing and Combating Corruption. Maputo, 11 July 2003. p. 12 [consultation: 11.04.2019]. Available in: <https://au.int/sites/default/files/treaties/7786-treaty-0028_-_african_union_convention_on_preventing_and_combating_corruption_e.pdf>.

¹⁶³ Interconnection between illegality of the act and immunity granted in respect to it was discussed in the first chapter. See p. 15.

¹⁶⁴ International Law Commission. Fifth report..., op. cit., p. 91, note 82.

¹⁶⁵ Ibidem, p. 90.

¹⁶⁶ Ibidem, p. 91.

¹⁶⁷ International Law Commission. Immunity of State officials..., op. cit., p. 139, note 1.

should be mentioned that a number of States approved the importance of addressing procedural aspects when considering immunity. Some of them drew attention to the need to prevent the abusive or politically motivated exercise of criminal jurisdiction against foreign officials and referred to the need to establish procedural safeguards regarding limitations and exceptions to immunity, requiring both issues to be considered simultaneously¹⁶⁸.

The definition of the legal regime applicable to the immunity of State officials from foreign criminal jurisdiction must necessarily take into consideration a wide range of issues. This chapter will cover only some of them, including the point in time, when immunity should be considered; the jurisdictional or other acts that could be affected by immunity; and the question of which organs have the right to determine the applicability or inapplicability of immunity.

3.1. Time when immunity should be considered

The immunity of State officials from foreign criminal jurisdiction, for all intents and purposes, results in blocking the exercise of such jurisdiction, therefore the existence or lack of immunity should be considered by the competent organs of the State at an early stage in the process. However, the meaning of the phrase “an early stage” has not been established in any of the various documents on immunity from jurisdiction¹⁶⁹, such as the Vienna Convention on Diplomatic Relations¹⁷⁰, the Vienna Convention on Consular Relations¹⁷¹, the Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character¹⁷² or the Convention on Special Missions¹⁷³. It should be noted, that the same is true when it comes to instruments on State immunity because the United Nations Convention on Jurisdictional Immunities of States and Their Property¹⁷⁴ and the European Convention on State Immunity¹⁷⁵ are also silent on that issue.

The Institute of International Law has indirectly mentioned the topic regarding the point in time at which immunity should be considered in the article 6 of its Resolution on Immunities from Jurisdiction and Execution of Heads of State and of Government in International Law, which states that “the authorities of the State shall afford to a foreign Head of State, the inviolability, immunity from jurisdiction and immunity from measures of execution to which he or she is entitled, as soon as that status is known to them”¹⁷⁶. Notwithstanding, this provision refers only to the point in time when the courts of the forum State become aware that the individual concerned is the Head of State, which, theoretically, could occur at any stage of the criminal proceeding¹⁷⁷. Moreover, the article does not say anything about other State officials¹⁷⁸.

¹⁶⁸ International Law Commission. Sixth report on immunity of State officials from foreign criminal jurisdiction, by Concepción Escobar Hernández, Special Rapporteur. Geneva, 12 June 2018. pp. 13-15 [consultation: 12.02.2019]. Available in: <<https://undocs.org/en/A/CN.4/722>>.

¹⁶⁹ Ibidem, p. 20.

¹⁷⁰ Vienna Convention on Diplomatic Relations..., op. cit., note 36.

¹⁷¹ Vienna Convention on Consular Relations..., op. cit., note 61.

¹⁷² Vienna Convention on the Representation of States..., op. cit., note 88.

¹⁷³ Convention on Special Missions..., op. cit., note 63.

¹⁷⁴ United Nations Convention on Jurisdictional Immunities of States and Their Property. New York, 2 December 2004 [consultation: 13.02.2019]. Available in: <https://treaties.un.org/doc/source/recenttexts/english_3_13.pdf>.

¹⁷⁵ European Convention on State Immunity. Basle, 16 May 1972 [consultation: 13.02.2019]. Available in: <<https://rm.coe.int/16800730b1>>.

¹⁷⁶ Institut de Droit international..., op. cit, p. 3, note 15.

¹⁷⁷ At least theoretically, the competent authorities of the forum State could become aware that an individual concerned is the Head of State not only at the time when they should decide, for example, whether to issue the arrest

The time when immunity should be considered was examined by the International Court of Justice in its advisory opinion in the case of Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights. There was stated that the questions of immunity are considered to be preliminary issues that must be decided *in limine litis*¹⁷⁹. The Court underscored that a generally-recognized principle of procedural law and concluded that “the Malaysian courts had the obligation to deal with the question of immunity from legal process as a preliminary issue to be expeditiously decided *in limine litis*”¹⁸⁰. Consequently, the failure to consider the issue of immunity *in limine litis* may be deemed a violation of the forum State’s obligations arising from the rule on immunity¹⁸¹.

The Appeals Chamber for the Special Court for Sierra Leone reached a similar conclusion in its decision on the immunity from jurisdiction in respect of Charles Taylor. Thus, it was concluded that the question of such immunity should have been considered when the arrest warrant was issued since there was no need to wait for the oral proceedings to start or for the accused to appear in the court. In accordance with the Court, the fact that an incumbent Head of State must first become imprisoned before he can raise the question of his immunity contradicts the whole purpose of the concept of sovereign immunity and assumes, without considering the merits, issues related to exceptions to this concept, which, in fact, should be determined after delving into the merits of the claim to immunity¹⁸².

National courts have reached the same result. Although the practice is not very comprehensive on that matter, it can be stated that the courts have generally tended to consider immunity at the initial stage of judicial proceedings and before taking binding measures in respect of a foreign State official¹⁸³. For example, in the case of Peter Tatchell v. Robert Mugabe, which was considered by a district judge in the United Kingdom, the issue of immunity was considered at the moment of the request for extradition¹⁸⁴. In the judgment in the Application for Arrest Warrant against General Shaul Mofaz in the United Kingdom, the applicant argued that, if the statement that General enjoys any kind of immunity is not accepted by the applicant, it means that the proper time to raise that question would be at the first hearing after the arrest warrant has been issued. However, the judge did not agree with this statement and established that the immunity should be considered at the stage of issuing an arrest warrant¹⁸⁵. In the Pinochet (No. 3)

warrant or not, to extradite or surrender him or her, or to issue the summons to appear before the court, but also, at the time before a court decision is taken, for example during prejudgment attachment or arrest.

¹⁷⁸ International Law Commission. Sixth report..., op. cit., p. 21, note 168.

¹⁷⁹ Latin for “at the start of the procedure”.

¹⁸⁰ International Court of Justice. Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights. Advisory Opinion, 1. C. J. Reports 1999. pp. 88-90 [consultation: 13.02.2019]. Available in: <<https://www.icj-cij.org/files/case-related/100/100-19990429-ADV-01-00-EN.pdf>>.

¹⁸¹ International Law Commission. Third report on immunity of State officials from foreign criminal jurisdiction, by Roman Anatolevich Kolodkin, Special Rapporteur. Geneva, 24 May 2011. pp. 6-7 [consultation: 13.02.2019]. Available in: <<https://undocs.org/en/A/CN.4/646>>.

¹⁸² It should be mentioned, that at the time when this decision was made, Charles Taylor was no longer an incumbent Head of State, but the application with which the decision was concerned had been made when he was a Head of State (Special Court for Sierra Leone. Prosecutor v. Charles Ghankay Taylor. Appeals Chamber, case SCSL-2003-01-I, Decision on Immunity from Jurisdiction, 31 May 2004. pp. 15-16 [consultation: 15.02.2019]. Available in: <<https://www.eccc.gov.kh/sites/default/files/Taylor.pdf>>.

¹⁸³ International Law Commission. Sixth report..., op. cit., p. 22, note 168.

¹⁸⁴ Warbrick C., Current Developments. Public International Law. In: International and Comparative Law Quarterly. 2004. Vol. 53, p. 770 [consultation: 15.02.2019]. Available in: <<https://www.legal-tools.org/doc/ac15e8/pdf>>.

¹⁸⁵ Ibidem, p. 772.

case, the question regarding the immunities was raised at the time when the review of the arrest warrant against former Head of State of Chile was made, which was issued following a request for extradition by Spain, before the extradition request itself was considered¹⁸⁶. In the Honecker case, that question was considered at the most preliminary stage dedicated to assigning the case to the court of competent jurisdiction, and at this stage the application for determination of a competent court on immunity grounds was rejected and the case was not assigned to a court to consider the issue of immunity¹⁸⁷.

In the light of the above, it can be concluded that immunity must be considered by the courts of the forum State at the very beginning of the exercise of its jurisdiction, as early as possible, and, in any case, before they deliver any judgment on the merits of the case. This general rule can help to avoid jurisdictional acts that may violate the principle of sovereign equality, might adversely affect the performance of State functions by the foreign official and which in reality might deprive immunity from criminal jurisdiction of any effect in the case in question. Therefore, it is obvious that the application of the aforesaid criteria inevitably means an obligation to consider the question of immunity at least at the time when charges are brought against foreign State official, or when the prosecution is initiated and, later, at the moment when the oral hearing begins, since these acts always entail the exercise of jurisdiction by the forum State¹⁸⁸.

The more controversial question is whether immunity applies at the stage of inquiry or investigation and whether national courts must, therefore, consider this question at that stage. It is obvious that, throughout this phase, many different acts are carried out, which are not legally binding and cannot always be qualified as acts of jurisdiction and which, what is more important, do not necessarily affect the principle of the sovereign equality of States or prejudice the exercise of State functions by the foreign official¹⁸⁹. This statement was supported by Judges Higgins, Kooijmans and Buergenthal, who stated in their joint separate opinion in the Arrest Warrant case of 11 April 2000 that commencing an investigation on the basis of which an arrest warrant may later be issued does not violate *per se* the principles of inviolability and the immunity of the Minister of Foreign Affairs¹⁹⁰.

The sole purpose of an inquiry or investigation is to establish the facts and identify the persons who may subsequently be subjected to the criminal jurisdiction of the State of the court. It should be borne in mind that these procedures may involve many acts and different persons, only one of whom may perhaps have the status of a State official. Consequently, the requirement for the full and automatic application of immunity, which in fact is a procedural bar, at the investigative stage might disproportionately and without any justification curtail the exercise of the powers of the forum State, creating a paradoxical situation where its authorities would be unable to investigate a general situation. It also should be mentioned that the possibility of carrying out an investigation without prejudicing immunity is of particular importance in the case

¹⁸⁶ House of Lords (United Kingdom). *Regina v. Bartle and the Commissioner of Police for the Metropolis and Others Ex Parte Pinochet; Regina v. Evans and Another and the Commissioner of Police for the Metropolis and Others Ex Parte Pinochet*. Judgment of 24 March 1999 [consultation: 15.02.2019]. Available in: <<https://publications.parliament.uk/pa/ld199899/ldjudgmt/jd990324/pino1.htm>>.

¹⁸⁷ International Law Commission. *Immunity of State officials...*, op. cit., p. 144, note 1.

¹⁸⁸ International Law Commission. *Sixth report...*, op. cit., pp. 23-24, note 168.

¹⁸⁹ *Ibidem*, p. 24.

¹⁹⁰ International Court of Justice. *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, Judgment, I.C.J. Reports 2002, Joint Separate Opinion of Judges Higgins, Kooijmans and Buergenthal..., op. cit., p. 80, note 124.

of immunity *ratione materiae*, because in order to decide about the applicability of such immunity, the authorities of the forum State will have to determine whether a person is a State official and whether the acts in question may be qualified as committed in an official capacity, something that would be impossible to do without a minimum investigation¹⁹¹.

Notwithstanding, it must also be noted that during the inquiry or investigation, the courts of the forum State may establish preventive measures in relation to a foreign official, in particular orders to appear in court or arrest warrants. In such situations, immunity from jurisdiction should be taken into account already at the inquiry or investigative stage, since these acts constitute forms of exercising jurisdiction, generate obligations for the foreign official, are clearly coercive and may affect the freedom of an exercise of his or her State functions¹⁹².

In conclusion, the courts of the forum State will have to consider immunity of State officials from foreign criminal jurisdiction: (a) before commencing the prosecution of a foreign official; (b) before bringing charges or initiating proceedings against the official, and (c) before taking any measures expressly directed at the official which impose an obligation on the individual concerned, the failure to fulfill which may lead to the adoption of coercive measures and which may possibly impede the proper performance of his or her State functions. Anyway, there is nothing to prevent courts of the forum State from considering the issue of immunity at a later stage, especially in the form of appeal¹⁹³.

3.2. Categories of acts that are protected by immunity

Analyzing measures, which criminal court may take in the exercise of its jurisdiction and which may concern a direct impact on the foreign State official, first of all it should be noted the bringing of a criminal charge, summons to appear before the court as a person under investigation or to participate in the hearing in order to confirm charges, a decision on the confirmation of charges or a decision on commencing criminal proceeding, a summons to appear as the accused in a criminal trial, a court arrest warrant or an application to extradite or surrender a foreign official concerned. The jurisdictional nature of all of these acts is obvious, and the goal they pursue is to make it possible for the court of the forum State to exercise its jurisdiction over a given person in order to be able to decide whether this person bears criminal responsibility. Consequently, the above-listed acts are certainly affected by the immunity of State officials from foreign criminal jurisdiction¹⁹⁴.

However, the mentioned immunity from jurisdiction must be distinguished from immunity from measures of execution, including both measures of constraint before a court decision is taken such as prejudgment attachment or arrest and post-judgment measures such as confiscation of property of that official¹⁹⁵. This opinion was supported in the commentary to the ILC's Draft Articles on Jurisdictional Immunities of States and their Property, which stated that "immunity from measures of constraint is separate from jurisdictional immunity of the State in the sense that the latter refers exclusively to immunity from the adjudication of litigation"¹⁹⁶.

¹⁹¹ International Law Commission. Sixth report..., op. cit., pp. 24-25, note 168.

¹⁹² Ibidem, p. 25.

¹⁹³ Ibidem, p. 25.

¹⁹⁴ Ibidem, p. 26,

¹⁹⁵ International Law Commission. Immunity of State officials..., op. cit., p. 149, note 1.

¹⁹⁶ International Law Commission. Yearbook of the International Law Commission. 1991. Vol. II, Part Two, Draft articles on Jurisdictional Immunities of States and Their Property, with commentaries. p. 56 [consultation: 16.02.2019]. Available in: <http://legal.un.org/ilc/texts/instruments/english/commentaries/4_1_1991.pdf>.

It is worth mentioning that there is also a distinction between the rules governing immunity from jurisdiction and immunity from executive measures. For example, article 31.1 of the Vienna Convention on Diplomatic Relations states that “a diplomatic agent shall enjoy immunity from the criminal jurisdiction of the receiving State” and article 31.3 states that “no measures of execution may be taken in respect of diplomatic agent”¹⁹⁷. The same distinction is provided in the resolution of the Institute of International Law with respect to the immunities of State officials. The resolution contains a separate provision concerning the immunity from jurisdiction and immunity from execution with respect to incumbent Heads of State¹⁹⁸, former Heads of State¹⁹⁹ and Heads of Government²⁰⁰.

In the view of the foregoing, it should be analyzed the potential impact that the adoption of an executive act, prior to or independently of the work of the judiciary²⁰¹, or other kinds of acts of an authority of the forum State could have on the foreign official and the immunity from foreign criminal jurisdiction, to which he or she is entitled²⁰².

First of all, it is necessary to examine acts that are of an executive nature, but which are not always unconnected with jurisdictional activities, for example, the detention of a foreign official during a police operation in the territory of the forum State, or in pursuance of an international arrest warrant, or the registration of a search or arrest warrant in international police cooperation systems. The problem arising in this case is rather related to the inviolability of some officials than to immunity from criminal jurisdiction²⁰³. This inviolability, in fact, covers persons who enjoy some kind of immunity *ratione personae*²⁰⁴.

The inviolability of the Head of State, Head of Government and Minister of Foreign Affairs is a rule of customary law²⁰⁵. This seems to have been also recognized in the 2001 resolution of the Institute of International Law that was mentioned above, which states that “when in the territory of a foreign State, the person of the Head of State is inviolable. While there, he or she may not be placed under any form of arrest or detention”. In accordance with the resolution, Head of Government enjoys the same inviolability as Head of State²⁰⁶. The inviolability of Minister of Foreign Affairs has been explicitly recognized by the ICJ in the Arrest Warrant case of 11 April 2000. In this case, the Court has clearly indicated that inviolability is required to ensure an unobstructed performance of the Minister’s duties²⁰⁷. Thus, it seems that this concept forms a fundamental basis of the inviolability protecting incumbent Head of State,

¹⁹⁷ Convention provide also exceptions to the latter rule in its article 31.3 (Vienna Convention on Diplomatic Relations..., op. cit., p. 9, note 36).

¹⁹⁸ Article 2 in comparison with article 4.1 (Institut de Droit international..., op. cit., p. 2, note 15).

¹⁹⁹ Article 13.2 in comparison with article 13.3 (Ibidem, p. 4).

²⁰⁰ “The Head of Government of a foreign State enjoys the same inviolability, and immunity from jurisdiction recognised, in this Resolution, to the Head of the State. This provision is without prejudice to any immunity from execution of a Head of Government” (Ibidem, p. 5).

²⁰¹ International Law Commission. Second report..., op. cit., p. 12, note 2.

²⁰² International Law Commission. Sixth report..., op. cit., pp. 26-27, note 168.

²⁰³ Ibidem, p. 27.

²⁰⁴ For example, diplomatic agents, members of special missions, representatives to international organizations, or persons who represent the State in an international body or at a conference (Vienna Convention on Diplomatic Relations..., op. cit., p. 9, note 36; Convention on Special Missions..., op. cit., p. 10, note 63; Vienna Convention on the Representation of States..., op. cit., p. 12, 22, note 88).

²⁰⁵ International Law Commission. Sixth report..., op. cit., p. 28, note 168.

²⁰⁶ Institut de Droit international..., op. cit., p. 2, 5, note 15.

²⁰⁷ International Court of Justice. Arrest Warrant..., op. cit., p. 23, note 8.

Head of Government and Minister of Foreign Affairs from any form of detention and arrest by the authorities of foreign State when they are traveling in both official and private capacity²⁰⁸.

On the other hand, it is hardly possible to find any rules of international law, whether treaty or customary, that recognize the inviolability of State officials who enjoy immunity *ratione materiae*. Consequently, it must be concluded that functional immunity would protect a foreign official from detention only when the detention has been carried out on the basis of a court order, which constitutes an act of the exercise of jurisdiction on which immunity from criminal jurisdiction has been born. In this case, the competent court must consider immunity and rule on it before issuing any arrest warrant. On the contrary, the rules on immunity do not apply when detention is a purely executive act, which is carried out outside the framework of the exercise of criminal jurisdiction by a court in the forum State. Obviously, although an objection could be raised to the unfriendly nature of this measure, its impact on good relations between the forum State and the official's State could be criticized, strictly speaking, such detention will be of no relevance to the rules on the immunity of State officials from foreign criminal jurisdiction²⁰⁹.

It must be also considered whether State officials enjoy immunity only when accused of committing a criminal act, or also in other circumstances, for example, when they are called as a witness in criminal proceedings²¹⁰. As in the case of the detention or arrest of a foreign official, when he or she appears as a witness, international treaty law determines only the regime applicable to officials who enjoy immunity *ratione personae*²¹¹. Thus, article 31.2 of the Vienna Convention on Diplomatic Relations provides that "a diplomatic agent is not obliged to give evidence as a witness"²¹², and the same provision is found in the Convention on Special Missions²¹³ and in the Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character²¹⁴. However, when it comes to consular officials, they can be called upon to attend as witnesses, but the Vienna Convention on Consular Relations defines rules, which must protect the performance of consular functions in its article 44²¹⁵.

Notwithstanding, it is difficult to find any norms of international treaty law or customary international law which lay down general rules regarding the appearance as a witness of a State official who is not covered by the conventions mentioned above, even when it comes to a Head of State, Head of Government or Minister of Foreign Affairs. National legislation relating to immunity does not contain any specific provisions of a general nature on this matter either²¹⁶.

At the same time, provisions on this issue can be found in the cases ruled by the International Court of Justice. For example, in the case of Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France), when ruling on a summons addressed to the President of Djibouti to appear as a witness, Court stated that "the summons addressed to the President of the Republic of Djibouti by the French [...] was not associated with the measures of constraint [...]; it was in fact merely an invitation to testify which the Head of State could freely accept or decline. Consequently, there was no attack by France on the immunities from criminal

²⁰⁸ International Law Commission. Sixth report..., op. cit., pp. 28-29, note 168.

²⁰⁹ Ibidem, p. 29.

²¹⁰ International Law Commission. Immunity of State officials..., op. cit., p. 154, note 1.

²¹¹ International Law Commission. Sixth report..., op. cit., p. 30, note 168.

²¹² Vienna Convention on Diplomatic Relations..., op. cit., p. 9, note 36.

²¹³ Convention on Special Missions..., op. cit., p. 11, note 63.

²¹⁴ Vienna Convention on the Representation of States..., op. cit., p. 13, 22, note 88.

²¹⁵ Vienna Convention on Consular Relations..., op. cit., p. 18, note 61.

²¹⁶ International Law Commission. Sixth report..., op. cit., p. 31, note 168.

jurisdiction enjoyed by the Head of State, since no obligation was placed upon him”²¹⁷. In accordance with this statement, a summons to appear as a witness addressed to a Head of State will be affected by immunity from foreign criminal jurisdiction if the measure in question is mandatory and its non-compliance may entail coercive measures against the Head of State. In this case, the Court emphasized a special position of the Head of State as a person vested with a special title and the right to represent its State at the international level, therefore this rule can be extended to the Head of Government and Minister of Foreign Affairs as well²¹⁸.

Contrariwise, it does not seem possible to automatically reach the same conclusion with respect to summonses addressed to other foreign State officials entitled only to functional immunity. In view of the fact that this type of immunity is closely related to “acts performed in an official capacity”, the requirement to appear as a witness addressed to a foreign official will be affected by immunity only when it is binding and his or her testimony touches on this category of acts²¹⁹.

The nature of the act in which testimony is requested is closely related to a possible request to surrender to the court information or documents in the possession of a foreign official. Once again, in this case, the measure taken by the forum court and addressed to a beneficiary of personal immunity will be automatically affected by that immunity for the same reasons as mentioned on the previous issue. Conversely, in the case of immunity *ratione materiae*, the surrender of documents held by a foreign official will be protected by jurisdictional immunity only when it comes to documents of the official’s State and this individual holds them in his or her official capacity²²⁰.

This provision was supported in the Blaskic case, where the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia considered whether it could issue *subpoena duces tecum* to the Defense Minister of the Republic of Croatia to order him to surrender certain documents relevant to the case. The Appeals Chamber concluded that it may not address binding orders to State officials acting in their official capacity, because of the functional immunity they enjoy²²¹.

Another category of acts that should be considered are measures, usually of a precautionary nature, that can be taken by a court in the context of a criminal trial, even before the indictment or prosecution of an individual. Typically, such measures can affect both the freedom of movement of the foreign official, for example impoundment of passport or other travel documents or an order for regular appearance before the courts or authorities of the forum State, and seizure of the property of that official located in the territory of the State of the court. As regard measures affecting the person, neither special rules nor State practice applicable to them can be found. Nevertheless, the considerations set forth above with regard to detention or arrest can be applied to such measures *mutatis mutandis*, since they have resembling effect, because the freedom of movement of an individual is substantially limited and the possibility of

²¹⁷ International Court of Justice. Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France), Judgment, I.C.J. Reports 2008. p. 237 [consultation: 17.02.2019]. Available in: <<https://www.icj-cij.org/files/case-related/136/136-20080604-JUD-01-00-EN.pdf>>.

²¹⁸ International Law Commission. Sixth report..., op. cit., p. 32, note 168.

²¹⁹ Ibidem, p. 32.

²²⁰ Ibidem, p. 32.

²²¹ Appeals Chamber. Prosecutor v. Tihomir Blaskic. Judgment on the Request on the Republic of Croatia for Review for the Decision of Trial Chamber II of 18 July 1997. para. 38 [consultation: 17.02.2019]. Available in: <<http://www.icty.org/x/cases/blaskic/acdec/en/71029JT3.html>>.

leaving the territory of the State of the court is excluded. On the other hand, it is more difficult to analyze the measures involving the seizure of the foreign official's property²²².

When it comes to immunity *ratione personae*, it is necessary to recall that the conventions, already mentioned above, that govern any type of personal immunity generally state that no measures of execution may be taken in respect of persons enjoying such immunity, including the prohibition against seizing the foreign official's property²²³. Although these provisions relate to special regimes of personal immunity, it seems that there are no reasons preventing the application of the same rule to the property of the Head of State, Head of Government and Minister of Foreign Affairs²²⁴. That statement finds support in the 2001 resolution of the Institute of International Law, in which it recognized immunity from measures of execution²²⁵ and established that property of the Head of State or Head of Government located in the territory of a foreign State may not be subject to any measure of execution except to give effect to a final judgment, rendered against those officials. However, no such measures may be taken against their property when the Head of State or Head of Government is present in the territory of the foreign State in the exercise of their official functions. Notwithstanding, this precautionary regime does not prevent the state of the court from taking provisional measures against such property as are considered necessary for the maintenance of its control while the legality of the appropriation remains insufficiently established²²⁶.

In the case of functional immunity, as regards measures affecting freedom of movement, in principle, they impose obligations on the foreign official and constitute coercive measures. Consequently, they may be subject to immunity from criminal jurisdiction if the enforcement of those measures prevents the foreign official from performing his or her State functions. Nevertheless, it should be analyzed on the case-by-case basis²²⁷.

With regard to the seizure of property as a precautionary measure, it should be taken into account whether the property in question belongs to the official or it is State property under the official's custody, and whether in the latter case it is covered by the State immunity. In the case when the property is owned by the State, an order to seize such property could undoubtedly constitute an encroachment on the State immunity, either in general terms or in special terms governing the inviolability and immunity of diplomatic premises and related property. However, in the case of property belonging to the official, it is difficult to argue that an order to arrest or confiscate this property is affected by immunity, since it cannot be easily concluded that such a measure is a coercive measure against the person of the State official or that it prevents him from the proper performance of his or her functions²²⁸. In this respect, Mr. Kolodkin in his report to the ILC stated that the seizure of personal property, such as bank accounts that were used, for example, in illegal operations or a car, if the crime was committed, for example, with its use, is legal²²⁹.

²²² International Law Commission. Sixth report..., op. cit., p. 34, note 168.

²²³ Vienna Convention on Diplomatic Relations..., op. cit., p. 9, note 36; Convention on Special Missions..., op. cit., p. 11, note 63; Vienna Convention on the Representation of States..., op. cit., p. 13, 22, note 88.

²²⁴ International Law Commission. Sixth report..., op. cit., p. 34, note 168.

²²⁵ Institut de Droit international..., op. cit., p. 3, 5, note 15.

²²⁶ Ibidem, p. 2, 5.

²²⁷ International Law Commission. Sixth report..., op. cit., p. 35, note 168.

²²⁸ Ibidem, p. 35.

²²⁹ International Law Commission. Third report..., op. cit., p. 24, note 181.

3.3. Determination of immunity

The last question that will be considered in the present chapter relates to the determination of immunity, in particular, the identification of the State organs in the State of the court, which have the right to determine the applicability or inapplicability of immunity of State officials from foreign criminal jurisdiction.

As a starting point and, given the fact that the application of jurisdictional immunity results in the termination of the competent jurisdiction, it seems obvious that this competence belongs to the specific organs of such jurisdiction²³⁰. States in their practice follow different approaches as to which organs are empowered to make determinations of the immunity of foreign State officials. On the one hand, in countries with civil law system, this determination is generally undertaken by the courts alone, without cooperation with the Minister of Foreign Affairs or the executive branch in general²³¹. On the other hand, the statement regarding the competence of the courts of the forum State to determine immunity does not necessarily imply that other organs or authorities cannot express their opinions in this regard, acting together with the judicial branch to settle the question of immunity²³². That happens in the countries with common law system, where courts most often take into account immunity determination made by executive organs²³³.

Undoubtedly the most well-known instrument is the system of “suggestion of immunity”, which has been applied in the United States as a common law institution considering the determination of the immunity of foreign State officials. In accordance with this system, the Department of State, through the Department of Justice, can refer to the national courts its opinion as to whether a foreign official is entitled to immunity or not²³⁴. Despite the fact that courts are certainly capable of deciding questions with regard to immunity of foreign State officials and even the potential foreign policy implications of their decision, the State Department is an organ, which is simply more competent on foreign affairs and can provide the most recent information on the implications of submitting a foreign official the jurisdiction of the court of the United States. Consequently, courts should take into account views of the State Department regarding that issue instead of trying to conduct these international investigations by themselves. It should be also noted, that foreign States will naturally expect to communicate with the State Department regarding the question of official’s immunity and submit their requests for determinations of immunity to that executive organ²³⁵. However, when the Department of State does not issue a “suggestion on immunity”, the courts are able to independently evaluate the request on the immunity of foreign State official and to determine whether or not such immunity exists²³⁶.

²³⁰ International Law Commission. Sixth report..., op. cit., p. 35, note 168.

²³¹ International Law Commission. Immunity of State officials..., op. cit., p. 146, note 1.

²³² International Law Commission. Sixth report..., op. cit., p. 36, note 168.

²³³ International Law Commission. Immunity of State officials..., op. cit., p. 146, note 1.

²³⁴ International Law Commission. Sixth report..., op. cit., pp. 36-37, note 168.

²³⁵ Smith E. E., Immunity Games: How the State Department Has Provided Courts with a Post-Samantar Framework for Determining Foreign Official Immunity. In: *Vanderblit Law Review*. 2014. Vol. 67, No. 2, pp. 605-606 [consultation: 21.02.2019]. Available in: <https://wp0.vanderbilt.edu/lawreview-new/wp-content/uploads/sites/278/2014/03/6-Smith_67_Vand_L_Rev_569.pdf>.

²³⁶ Bederman D. J., The “Common-Law Regime” of Foreign Sovereign Immunity: The Actual Possession Rule in Admiralty. In: *Vanderblit Law Review*. 2012. Vol. 44, No. 4, p. 880 [consultation: 21.02.2019]. Available in: <<https://www.vanderbilt.edu/wp-content/uploads/sites/78/Bederman-cr.pdf>>.

Notwithstanding, despite the high degree of acceptance by the courts of a “suggestion of immunity”, there might be considered a question whether that institution completely deprives the courts of their competence to speak about the immunity of foreign officials. Firstly, because, in the strict sense of the term, there is no formal replacement of a decision of the court, but rather an acceptance by the courts of the judgment of the State Department. Secondly, although the courts generally accept the legitimacy of the “suggestion of immunity”, this does not prevent them on occasion from evaluating on their own whether the several substantive conditions required for recognition of the immunity of foreign State official are present²³⁷.

Alongside the system of “suggestion of immunity”, it is necessary to mention the existence of other mechanisms that have been established, particularly in the countries with common law system. For example, the State Immunities Act of the United Kingdom, which in somehow equates the immunity of a Head of State with diplomatic immunity. Thus, the British courts have specific statutory guidelines on such immunity²³⁸. This mechanism provides the possibility of the Secretary of State issuing certain certificates that must be accepted as compelling and conclusive evidence by a court that must take a decision in a specific case. The information contained in such certificates includes the determination that an individual possesses the status of Head of State or Head of Government²³⁹. Other Commonwealth countries, such as Canada²⁴⁰, Australia²⁴¹, South Africa²⁴², Pakistan²⁴³ and Singapore²⁴⁴ have adopted a similar approach based on the model provided in the State Immunities Act. However, it must be borne in mind that the courts are obliged to accept the validity of such a determination and are not able to deduce from determination any other consequences for the purpose of determining immunity from jurisdiction²⁴⁵.

It is worth to be noted that there are also other rules that allow the courts to seek the opinion of administrative bodies in order to determine the applicability of immunity. Among these, mention should be made of the Austria’s Regulation on Extradition and Mutual Legal Assistance in Criminal Matters, according to which, when a court has doubts as to whether a person is entitled to immunity from criminal jurisdiction, it should seek the opinion of the Ministry of Justice, which will clarify the status of the person concerned in consultation with the Ministry of Foreign Affairs²⁴⁶. Similarly, Ministry of Foreign Affairs and Cooperation of Spain can issue reports on issues relating to the immunity from jurisdiction of a Head of State, Head of Government or Minister of Foreign Affairs upon the request of the competent court, which are

²³⁷ International Law Commission. Sixth report..., op. cit., p. 37, note 168.

²³⁸ International Law Commission. Immunity of State officials..., op. cit., p. 146, note 1.

²³⁹ Parliament of United Kingdom. State Immunity Act, 1978. p. 13 [consultation: 22.02.2019]. Available in: <https://www.legislation.gov.uk/ukpga/1978/33/pdfs/ukpga_19780033_en.pdf>.

²⁴⁰ The Minister of Justice of Canada. State Immunity Act, R.S.C., 1985, c. S-18 [consultation: 22.02.2019]. Available in: <<https://laws.justice.gc.ca/PDF/S-18.pdf>>.

²⁴¹ Attorney-General's Department of Australia. Foreign States Immunities Act, 1985, No. 196 [consultation: 22.02.2019]. Available in: <<https://www.legislation.gov.au/Details/C2016C00947>>.

²⁴² Office of the Prime Minister of the South Africa. Foreign States Immunities Act, 1981, No. 87 [consultation: 22.02.2019]. Available in: <https://www.gov.za/sites/default/files/gcis_document/201503/act-87-1981.pdf>.

²⁴³ The President of Pakistan. The State Immunity Ordinance, 1981 [consultation: 22.02.2019]. Available in: <<http://nasirlawsite.com/laws/sio1981.htm>>.

²⁴⁴ The Statutes of Republic of Singapore. State Immunity Act, 1979, No. 19 [consultation: 22.02.2019]. Available in: <<https://sso.agc.gov.sg/Act/SIA1979?Provlds=legis#legis>>.

²⁴⁵ International Law Commission. Sixth report..., op. cit., p. 37, note 168.

²⁴⁶ Ibidem, pp. 37-38.

required to notify the Ministry about the existence of any proceedings commenced against a foreign State²⁴⁷.

Nevertheless, attention should be drawn to the fact that in some States administrative organs of the executive branch do not have the capacity to express their opinions to the courts, or they may do so only when they have been asked to provide their opinions, as the transmittal of any other information or opinion could be viewed as a form of improper political influence²⁴⁸.

However, it is quite obvious that in some situations the determination of immunity can face practical difficulties, especially in the case of immunity *ratione personae*, the application of which requires the judge to confirm the presence of its constituent normative elements, namely that the person concerned is a foreign official, that the acts in question were performed in an official capacity and that the acts were performed during the official's tenure in office. Sometimes such elements cannot be assessed by the court of the forum State acting autonomously, without the need to request additional information that can be provided either by the authorities of the forum State themselves or by the official's State²⁴⁹.

The question of the validity of information provided by the State of the court regarding the status of an official and the official nature of acts performed is not covered by any international norm, nor has it been the subject of a judgment made by any international court²⁵⁰. However, in the case of Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights International Court of Justice expressed its opinion on that issue. In respect of this case, the Secretary-General of the United Nations stated that, in accordance with the Convention on the Privileges and Immunities of the United Nations, he had exclusive authority to determine whether the Special Rapporteur in question was an expert on mission and whether or not words or acts that led to his prosecution were spoken, written or done during the performance of a mission and whether such words or acts should be identified as acts performed in his official capacity²⁵¹. Although the Court stated that it could not speak out on that issue, since it was not covered by the question submitted to it by the Economic and Social Council, the Court concluded that "the Secretary-General, as the chief administrative officer of the Organization, has the primary responsibility to safeguard the interests of the Organization; to that end, it is up to him to assess whether its agents acted within the scope of their functions and, where he so concludes, to protect these agents, including experts on mission, by asserting their immunity"²⁵². However, this statement did not mean that the power of the Secretary-General was absolute and that his views should prevail absolutely over any actions taken by the courts of a State Member. On the contrary, the Court stated that its finding only created "a presumption which can only be set aside for the most compelling reasons and is thus to be given the greatest weight by national courts"²⁵³.

The same approach can be used to describe the validity of information provided by the official's State. And as such, it can be concluded that a forum court, or any other authority of the foreign State, is not obliged to "blindly accept" the claim of immunity made by the State which

²⁴⁷ Boletín Oficial del Estado. Ley 29/2015, de 30 de julio, de cooperación jurídica internacional en materia civil. p. 65922 [consultation: 22.02.2019]. Available in: <<https://www.boe.es/boe/dias/2015/07/31/pdfs/BOE-A-2015-8564.pdf>>.

²⁴⁸ International Law Commission. Sixth report..., op. cit., p. 38, note 168.

²⁴⁹ Ibidem, p. 38.

²⁵⁰ Ibidem, p. 38.

²⁵¹ International Court of Justice. Difference Relating to Immunity..., op. cit., p. 80, note 12.

²⁵² Ibidem, p. 87.

²⁵³ Ibidem, p. 87.

the official serves, but also the court cannot disregard such claims, unless the circumstances of the case clearly indicate otherwise²⁵⁴.

In conclusion, it is necessary to analyze the determination of immunity from the substantive point of view. Regarding personal immunity, it is enough for the court to judge whether the person concerned possesses the status of incumbent Head of State, Head of Government or Minister of Foreign Affairs at the time when immunity is under consideration in the courts. On the contrary, when it comes to functional immunity, the courts must first assess whether the said person is a State official, whether the acts in question were performed in an official capacity, and whether those acts were performed by that official during his or her term of office. In addition, it is also important to determine whether the acts in question fall within any of the categories of exception to immunity from foreign criminal jurisdiction. Only when the full analysis of these elements is made, the court of the forum State can determine whether or not the foreign official enjoys immunity from criminal jurisdiction²⁵⁵.

CONCLUSION

The topic of immunity of State officials from foreign criminal jurisdiction became very important due to its essential nature for the maintenance of a system of good relations and peaceful cooperation between States. The main purpose of immunity is to protect the State from the infringement of its independence and to guarantee sovereign equality among other States through the protection of persons who act on its behalf. International relations are impossible without an effective process of communication between States. But State itself is only an immaterial and nonphysical social object which can act only with the help of its agents. As such, it is very important that those agents are able to perform their functions without any threat to be persecuted in the foreign State.

In the present thesis, two types of immunity of State officials were distinguished: personal immunity *ratione personae* and functional immunity *ratione materiae*. It was established that personal immunity is absolute in nature, which means it is applicable in respect to all acts performed by State official in question during the entire period of time when he or she holds the office. However, the lists of State officials entitled to that type of immunity is very limited and it seems that it was accorded under international law that only an incumbent Head of State, Head of Government and Minister of Foreign Affairs enjoy it because their posts assume representation of the State on the international level. Notwithstanding, when it comes to functional or conduct-based immunity, it becomes more difficult to establish rules governing it. First of all, there is no list of officials entitled to it because of the existence of a wide variety of models in different national systems. Second, immunity *ratione materiae* exclusively applies with regard to acts performed in an official capacity. However, it is not always easy to draw the line between “official” and “private” acts, because there are acts performed for the exclusive benefit of official committed it that had been done only due to the official status of the individual concerned, such as acts of corruption. It seems that we can consider rules governing personal immunity as well-established rules under international law, but in respect to immunity *ratione materiae*, courts should examine them on a case-by-case basis, and there is no unanimous State practice on that issue.

²⁵⁴ International Law Commission. Third report..., op. cit., p. 18, note 13.

²⁵⁵ International Law Commission. Sixth report..., op. cit., p. 39, note 2.

Another controversial issue examined in the present thesis is the topic of exceptions to the immunity of State officials from foreign criminal jurisdiction. There are different opinions with regard to that topic and the existing practice, both national and international one, shows that there is no unanimous approach that would allow stating about the existence or absence of those exceptions. It seems to be agreed, that foreign courts cannot prosecute an incumbent Head of State, Head of Government and Minister of Foreign Affairs even with regard to acts which constitute crimes under international law. This opinion reflects the support for the absolute nature of personal immunity.

However, it is more complicated to speak about possible exceptions to functional immunity. For example, with regard to international crimes, it is hardly possible to commit such criminal conduct without permission or support given by the State and they often constitute a part of the official State policy. As such, international crimes could be defined as “official” acts, and it has been concluded that acts performed in an official capacity are covered by immunity *ratione materiae*. Consequently, on the one hand, we have rules governing functional immunity of State officials from foreign criminal jurisdiction, and on the other hand, we have gross violations of human rights and international humanitarian law, the fight against impunity and the principle of individual responsibility for international crimes supported by the Rome Statute of the International Criminal Court and statutes of different hybrid and *ad hoc* tribunals. In the contemporary world, when the conception of human rights is of significant importance for the existence of the international community as a whole, it seems incomprehensible the impunity for international crimes irrespective of the official position of its perpetrator. Notwithstanding, there is no established rule in the international law that would state about the existence of exceptions to immunity from foreign criminal jurisdiction with regard to those crimes. Nevertheless, numerous existing practice that was mentioned in the second chapter allows assuming about the presence of a certain tendency in that direction.

The last topic raised in the thesis was the topic of procedural aspects to the immunity of State officials from foreign criminal jurisdiction, which seems to be the least studied issue by the legal literature in this regard. However, its importance cannot be underestimated, nor ignored and in the view of the International Law Commission, the procedural aspects of such immunity are considered as a need to establish procedural guarantees to avoid politicization and abuse of criminal jurisdiction in respect of foreign State officials. It was difficult to examine the issue of procedural aspects due to the limited State practice. Nevertheless, it was established that the courts of the forum State have to consider the immunity of foreign State officials at the initial stage of judicial proceedings and before taking binding measures in respect to an individual concerned which may possibly impede the proper performance of his or her official functions. When it comes to categories of acts that are protected by the immunity in question, personal type of immunity and functional one should be distinguished once again. It is assumed that no mandatory measures are permitted in respect to incumbent Head of State, Head of Government and Minister of Foreign Affairs. In turn, with regard to State officials entitled to immunity *ratione materiae*, they will be protected from the binding measures only if the enforcement of those measures prevents them from performing their State functions or, in the case of summonses to appear at the court as a witness, only when their testimony touches on the category of “official” acts. Two types of immunity of State officials should be also distinguished with regard to the determination of immunity.

The main purpose of the present thesis was to study the existing practice on the issue of immunity of State officials from foreign criminal jurisdiction, both international and national one, as well as legal literature, and to answer several main questions regarding the scope and

implementation of immunities, the existence of possible exceptions to them and procedural aspects of their application. It can be concluded, that even though all of those issues were examined carefully, some of them are still without final answers due to both limited State practice and still present international debate on some of the topics, such as, for example, exceptions to immunity in case of committing a crime under international law. However, it is to be hoped that the rules governing the immunity of State officials from foreign criminal jurisdiction will be established soon allowing all the controversies on that important topic come to naught.

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