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Chapter V
Immunity of State officials from foreign criminal jurisdiction

Addendum

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1. The text of the draft articles and commentaries thereto provisionally adopted by the Commission at its sixty-fifth session is reproduced below.

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Draft article 3
Persons enjoying immunity *ratione personae*

Heads of State, Heads of Government and Ministers for Foreign Affairs enjoy immunity *ratione personae* from the exercise of foreign criminal jurisdiction.

Commentary

(1) Draft article 3 lists the State officials who enjoy immunity *ratione personae* from foreign criminal jurisdiction, namely: the Head of State, Head of Government and Minister for Foreign Affairs. The draft article confines itself to identifying the persons to whom this category of immunity applies, making no reference to the significance of this category, which will be dealt with in other draft articles.

(2) Immunity from jurisdiction *ratione personae* was historically linked to the person of the sovereign, who enjoyed immunity, first, as the holder of sovereignty, and next, as the personification of the State. In the present day, there are two reasons for granting this category of immunity to certain persons. First, there is the high rank of the offices these persons hold in the political system of the State, which places them at the top of the political/administrative hierarchy and which suggests that, symbolically, they are to some extent the "personification of the State". Secondly, there is the fact that, under the rules of international law, the persons who hold these offices represent the State in international relations simply by virtue of their functions, directly and with no need for specific powers to be granted by the State,[1] because they must be able to discharge their functions unhindered.[2] The Commission considers that this dual representational and functional link to the State constitutes the basis for the immunity *ratione personae* of the so-called troika, it being irrelevant for this purpose whether or not the beneficiaries are nationals of the State in which they hold the office of Head of State, Head of Government or Minister for Foreign Affairs.

(3) The statement that the Head of State enjoys immunity *ratione personae* is not subject to dispute, given that this is established in existing rules of customary international law. In addition, various conventions contain provisions referring directly to the immunity from jurisdiction of the Head of State. In this connection, mention must be made of article 21, paragraph 1, of the Convention on Special Missions, which expressly acknowledges

[1] The International Court of Justice has stated that "it is a well-established rule of international law that the Head of State, the Head of Government and the Minister for Foreign Affairs are deemed to represent the State merely by virtue of exercising their functions" (*Armed activities on the territory of the Congo (New application: 2002) (Democratic Republic of the Congo v. Rwanda), Jurisdiction and admissibility, Judgment, I.C.J. Reports 2006*, para. 46).

[2] See the *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium), Judgment, I.C.J. Reports 2002*, paras. 53 and 54, in which the International Court of Justice particularly emphasizes the second element with respect to the Minister for Foreign Affairs.

that when the Head of State leads a special mission, he or she enjoys, in addition to what is granted in the Convention, the immunities accorded by international law to Heads of State on an official visit. Similarly, article 50, paragraph 1, of the Vienna Convention on the Representation of States in Their Relations with International Organizations of a Universal Character refers to the other "immunities accorded by international law to Heads of State". Along the same lines, albeit in a different field, the United Nations Convention on Jurisdictional Immunities of States and Their Property includes, in the saving clause in article 3 (para. 2), an express reference to the immunities accorded under international law to Heads of State. The Institute of International Law, for its part, has expressly referred to the immunity from foreign criminal jurisdiction of the Head of State, in its 2001 resolution entitled "Immunities from Jurisdiction and Execution of Heads of State and of Government in International Law" (art. 2).

The immunity from foreign criminal jurisdiction of the Head of State has also been recognized in case law at both the international and national levels. Thus, the International Court of Justice has expressly proclaimed the immunity of the Head of State from foreign criminal jurisdiction in the *Arrest Warrant*[3] and *Certain Questions of Mutual Assistance in Criminal Matters*[4] cases. As to national courts, it must be emphasized that examples of national judicial practice, although limited in number, are consistent in showing that Heads of State enjoy immunity *ratione personae* from foreign criminal jurisdiction, both in the proceedings concerning the immunity of the Head of State and in the reasoning that such courts follow in deciding whether or not other State officials also enjoy immunity from criminal jurisdiction.[5]

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[3] *Arrest Warrant*, para. 51.

[4] *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France), Judgment, I.C.J. Reports 2008*, para. 170.

[5] National courts have on many occasions cited the immunity *ratione personae* from foreign criminal jurisdiction of the Head of State as grounds for their decisions on substance and their findings that criminal proceedings cannot be brought against an incumbent Head of State. In this regard, see *Re Honecker*, Federal Supreme Court, Second Criminal Chamber (Federal Republic of Germany), Judgment of 14 December 1984 (Case No. 2 ARs 252/84); *Rey de Marruecos, Audiencia Nacional* (Spain), *Auto de la Sala de lo Penal*, 23 December 1998; *Kadhafi, Cour de cassation (Chambre criminelle)* (France), Judgment No. 1414 of 13 March 2001; *Tatchell v. Mugabe*, Senior District Judge at Bow Street (United Kingdom), Judgment of 14 January 2004; *Fidel Castro, Audiencia Nacional* (Spain), *Auto del Pleno de la Sala de lo Penal*, 13 December 2007 (the tribunal had already made a similar ruling in two other cases against Fidel Castro, in 1998 and 2005); and *Ruanda (Paul Kagame), Audiencia Nacional, Juzgado de Instrucción No. 4* (Spain), Judgment of 6 February 2008. Again in the context of criminal proceedings, but this time as *obiter dicta*, various courts have on numerous occasions recognized immunity *ratione personae* from foreign criminal jurisdiction in general. In these cases, the national courts have not referred to the immunity of a specific Head of State, either because the person being judged had completed his or her term of office and was no longer an incumbent Head of State or because the person facing proceedings was not and had never been a Head of State. See, in this connection, the following cases: *Pinochet* (*solicitud de extradición*), *Audiencia Nacional, Juzgado de Instrucción No. 5* (Spain), request for extradition of 3 November 1998; *Regina v. Bartle and the Commissioner of Police for the Metropolis and Others Ex Parte Pinochet Ugarte* (*Pinochet* (No. 3)), House of Lords (United Kingdom), Judgment of 24 March 1999; *H.S.A. et al. v. S.A. et al. (indictment of Ariel Sharon, Amos Yaron and others)*, Court of Cassation (Belgium), Judgment of 12 February 2003 (P-02-1139); *Scilingo, Audiencia Nacional, Sala de lo penal*, third section (Spain), Judgment of 27 June 2003; *Association Fédération nationale des victimes d'accidents collectifs "FONVAC SOS catastrophe"; Association des familles des victimes du Joola, Cour de cassation, Chambre criminelle* (France), Judgment of 19 January 2010 (09-84818) (this is a particularly interesting ruling, concerning a former Prime Minister and a former Minister of Defence of Senegal and acknowledging that they have immunity *ratione materiae*); *Khurst Bat v.*

With regard to the immunity from foreign criminal jurisdiction *ratione personae* of the Head of State, the Commission considers that it is accorded exclusively to persons who actually hold that office, and that the title given to the Head of State in each country, the conditions under which he or she acquires the status of Head of State (sovereignty or otherwise) and the individual or collegial nature of the office are irrelevant for the purposes of the present draft article.[6]

(4) At a later date, largely as a consequence of the gradual extension to the Head of Government and Minister for Foreign Affairs of the international representational functions recognized under international law as pertaining to the Head of State, it was recognized that Heads of Government and Ministers for Foreign Affairs likewise enjoy immunity *ratione personae*. Examples of this phenomenon may be found in the recognition of full powers for the Head of Government and the Minister for Foreign Affairs for the conclusion of treaties[7] and the equation of the three categories of officials in terms of their international protection[8] and their involvement in the international representation of the State.[9] The inclusion of the Minister for Foreign Affairs in the Convention on the Prevention and

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Investigating Judge of the German Federal Court, High Court of Justice, Queen's Bench Division Administrative Court (United Kingdom), Judgment of 29 July 2012 ([2011] EWHG 2020 (Admin)); *Nezzar*, Federal Criminal Tribunal (Switzerland), Judgment of 25 July 2012 (BB.2011-140). It should be emphasized that national courts have never stated that a Head of State does not have immunity from criminal jurisdiction, and that this immunity is *ratione personae*. In only one case has a court ruled that the immunity from criminal jurisdiction of the Head of State is limited to acts carried out in an official capacity and recognized solely immunity *ratione materiae*, while denying the immunity from criminal jurisdiction requested, on the grounds that the acts that were the subject of the proceedings did not fall into this category. This was the case of *Teodoro Nguema Obiang Mangue et al., Cour d'Appel de Paris, Pôle 7, Deuxième chambre d'instruction* (France), Judgment of 13 June 2013 (see above, paragraph (4) of the commentary to draft article 4, particularly footnote 7). It must also be kept in mind that civil jurisdiction, under which there is a greater number of judicial decisions, consistently recognizes the immunity *ratione personae* from jurisdiction of Heads of State. For example, see the following cases: *Kline v. Kaneko*, Supreme Court of the State of New York, Judgment of 31 October 1988 (141 Misc.2d 787); *Mobutu v. SA Cotoni*, Civil Court of Brussels, Judgment of 29 December 1988; *Ferdinand et Imelda Marcos v. Office fédéral de la police*, Federal Tribunal (Switzerland), Judgment of 2 November1989; *Lafontant v. Aristide*, United States District Court for the Eastern District of New York (United States) Judgment of 27 January 1994; *W. v. Prince of Liechtenstein*, Supreme Court (Austria), Judgment of 14 February 2001 (7 Ob 316/00x); *Tachiona v. Mugabe* ("*Tachiona I*"), District Court for the Southern District of New York, Judgment of 30 October 2001 (169 F.Supp.2d 259); *Fotso v. Republic of Cameroon*, District Court of Oregon (United States), Judgment of 22 February 2013 (6:12CV 1415-TC).

[6] In this connection, the provisions of the Vienna Convention on the Representation of States in Their Relations with International Organizations of a Universal Character (art. 50, para. 1) and the Convention on Special Missions (art. 21, para. 1), which refer to the case of collegial bodies acting as Head of State, are of interest. On the other hand, the Commission did not see any need to include a reference to this category in the draft articles on the prevention and punishment of internationally protected persons, including diplomatic agents (see *Yearbook … 1972*, vol. II, para. (2) of the commentary to article 1), and no reference was accordingly made in the Convention.

[7] Vienna Convention on the Law of Treaties, art. 7, para. 2 (a). The International Court of Justice has made a similar statement on the capacity of the Head of State, Head of Government and Minister for Foreign Affairs to make a commitment on behalf of the State through unilateral acts (*Armed activities …*, para. 46).

[8] Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, art. 1, para. 1 (a).

[9] In this connection, see the Convention on Special Missions, art. 21, and the Convention on the Representation of States in Their Relations with International Organizations of a Universal Character, art. 50.

Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, is particularly significant, since in its own draft articles on the subject, the Commission decided not to include government officials in the list of persons internationally protected,[10] but the Minister for Foreign Affairs was nevertheless included in the final Convention adopted by States.

As regards the way in which the immunity of members of the troika is recognized in various conventions, it must be noted that it varies from one instrument to another. Thus, article 21 of the Convention on Special Missions refers to the Head of State as well as to the Head of Government and the Minister for Foreign Affairs, even though it does so in separate paragraphs.[11] The same pattern is followed in the Vienna Convention on the Representation of States in Their Relations with International Organizations of a Universal Character.[12] By contrast, in the United Nations Convention on Jurisdictional Immunities of States and Their Property, it was decided to refer to the Head of State alone, *eo nomine*,[13] the other categories being referred to as "representatives of the State" in article 2, paragraph 1 (a) (iv), which implies that they enjoy only immunity *ratione materiae*.[14]

All of the above-mentioned examples have emerged from the work of the Commission, which has on several occasions dealt with the question of whether or not expressly to include Heads of State, Heads of Government and Ministers for Foreign Affairs in international instruments. In the end, as just mentioned, a different solution was adopted in each case. In this connection, some members of the Commission have referred specifically to the individualized treatment given to the Head of State in selecting the special regimes to be covered by the saving clause in article 3 of the United Nations Convention on Jurisdictional Immunities of States and Their Property while excluding any reference to the Head of Government and Minister for Foreign Affairs. However, there is very little reason to conclude that these precedents mean that in the present draft article, the Commission must treat Heads of State, Heads of Government and Ministers for Foreign Affairs differently. It is even less reasonable to conclude that the Head of Government and Minister for Foreign Affairs must be excluded from draft article 4. A number of factors must be taken into account here. First, the present set of draft articles refers solely to the immunity from foreign criminal jurisdiction of State officials, whereas the 1969 and 1975 Conventions refer to all the immunities from which Heads of State, Heads of Government and Ministers for Foreign Affairs may benefit. Secondly, the 2004 Convention refers to the immunities of States; immunity from criminal jurisdiction remains outside its scope.[15] In addition, far from rejecting the immunities that might be enjoyed by the Head of Government and the Minister for Foreign Affairs, the Commission actually recognized them, but simply did not mention these categories specifically in article 3, paragraph 2,

[10] See *Yearbook … 1972*, vol. 2, paragraph (3) of the commentary to article 1. It must be kept in mind that the Commission decided not to make this reference because it could not be based upon any "broadly accepted rule of international law", but it did acknowledge that "A cabinet officer would, of course, be entitled to special protection whenever he was in a foreign State in connexion with some official function" (*Yearbook … 1972*. This sentence is included in both the English and French versions of the commentary, but not in the Spanish version).

[11] Paragraph 1 refers to the Head of State, whereas paragraph 2 refers to the Head of the Government, the Minister for Foreign Affairs and other persons of high rank.

[12] See article 50, paragraphs 1 and 2, respectively.

[13] See article 3, paragraph 2.

[14] See paragraphs (6) and (7) the Commission's commentary to article 3 of the draft articles on jurisdictional immunities of States and their property (*Yearbook … 1991*, vol. II (Part Two)).

[15] The statement that the Convention "does not cover criminal proceedings" was proposed by the Ad Hoc Committee set up on the subject by the General Assembly and was ultimately included in paragraph 2 of resolution 59/38 of 2 December 2004, by which the Convention was adopted.

"since it would be difficult to prepare an exhaustive list, and any enumeration of such persons would moreover raise the issues of the basis and of the extent of the jurisdictional immunity exercised by such persons".[16] And thirdly, it must also be borne in mind that all the examples mentioned above preceded the judgment by the International Court of Justice in the *Arrest Warrant* case.

(5) In its judgment in the *Arrest Warrant* case, the International Court of Justice has expressly stated 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 the Head of State, Head of Government and Minister for Foreign Affairs, enjoy immunities from jurisdiction in other States, both civil and criminal."[17] This statement was later reiterated by the Court in the case concerning *Certain Questions of Mutual Assistance in Criminal Matters*.[18] Both of these judgments were discussed extensively by the Commission, particularly with regard to the Minister for Foreign Affairs. During the discussion, most members expressed the view that the judgment of the International Court of Justice in the *Arrest Warrant* case reflects the current state of international law and that it must accordingly be concluded that there is a customary rule under which the immunity from foreign criminal jurisdiction *ratione personae* of the Minister for Foreign Affairs is recognized. In the view of these members, the position of the Minister for Foreign Affairs and the special functions he or she carries out in international relations constitute the basis for the recognition of such immunity from foreign criminal jurisdiction. On the other hand, some members of the Commission pointed out that the Court's judgment was not sufficient grounds for concluding that there is a customary rule, arguing that it does not analyse practice thoroughly enough and that several judges expressed opinions that differed from the majority view.[19] One member of the Commission who considers that the Court's judgment does not show that there is a customary rule nevertheless said that, in view of the functions the Minister for Foreign Affairs performs in international relations, the lack of a customary rule does not prevent the Commission from including that official among the beneficiaries of immunity *ratione personae* from foreign criminal jurisdiction, as part of progressive development.

(6) As to the practice of national courts, the Commission has also found that while there are very few rulings referring to the immunity *ratione personae* from foreign criminal jurisdiction of the Head of Government and almost none in respect of the Minister for Foreign Affairs, the national courts that have had occasion to comment on this subject have nevertheless always recognized that those high-ranking officials do have immunity from foreign criminal jurisdiction during their term of office.[20] In this connection, one member of

[16] See paragraph (7) of the commentary to article 3 of the draft articles (*Yearbook … 1991*).

[17] *Arrest Warrant*, para. 51.

[18] *Certain Questions*, para. 170.

[19] See in particular the joint separate opinion of Judges Higgins, Kooijmans and Buergenthal; the dissenting opinion of Judge Al-Kasawneh; and the dissenting opinion of Judge *ad hoc* Van den Wyngaert.

[20] With regard to recognition of the immunity from foreign criminal jurisdiction of the Head of Government and the Minister for Foreign Affairs, see the following cases, both criminal and civil, in which national courts have made statements on this subject, either as the grounds for decisions on substance or as *obiter dicta*: *Ali Ali Reza v. Grimpel*, Court of Appeal of Paris (France), Judgment of 28 April 1961 (it implicitly recognizes, *a contrario*, the immunity of a Minister for Foreign Affairs); *Chong Boon Kim v. Kim Tong Shik and David Kim*, Circuit Court of the First Circuit (State of Hawaii) (United States), Judgment of 9 September 1963; *Saltany and others v. Reagan and others*, District Court for the District of Columbia (United States), Judgment of 23 December 1988; *Tachiona v. Mugabe ("Tachiona I")*, District Court for the Southern District of New York (United States), Judgment of 30 October 2001 (169 F.Supp.2d.259); *H.S.A. et al. v. S.A. et al. (indictment of Ariel*

the Commission has noted that the lack of cases in which foreign criminal jurisdiction has been exercised in respect of a Minister for Foreign Affairs is a significant area of practice that should be interpreted in favour of the recognition of immunity *ratione personae* for this category of persons. Another member of the Commission has opposed this interpretation.

(7) As a result of the discussion, the Commission found that there are sufficient grounds in practice and in international law to conclude that the Head of State, Head of Government and Minister for Foreign Affairs enjoy immunity *ratione personae* from foreign criminal jurisdiction. Consequently, it has been decided to include them in draft article 4.

(8) The Commission has also looked into whether other categories of State officials could be included in the list of the beneficiaries of immunity *ratione personae*. This has been raised as a possibility by some members of the Commission in the light of the evolution of international relations, particularly the fact that high-ranking officials other than the so-called troika are becoming increasingly involved in international forums and making frequent trips outside the national territory. Some members of the Commission have supported the view that other high-ranking officials should be included in draft article 4 with a reference to the judgment of the International Court of Justice in the *Arrest Warrant* case, stating that the use of the words "such as" should be interpreted as an opening to extend the regime of immunity *ratione personae* to high-ranking State officials, other than the troika, who have major responsibilities within the State and who are involved in international representation of the State in the fields of their activity. In this connection, some members of the Commission have suggested that immunity *ratione personae* might be enjoyed by a Minister of Defence or a Minister of International Trade. Other members of the Commission, however, see the use of the words "such as" as not widening the circle of the persons who enjoy this category of immunity, since the Court uses the words in the context of a specific dispute, the subject of which is precisely the immunity from foreign criminal jurisdiction of a Minister for Foreign Affairs. Lastly, several members of the Commission have drawn attention to the difficulty inherent in determining which persons should be deemed to be "other high-ranking officials," since this will depend to a large extent on each country's organizational structure and method of conferring powers, which differ from one State to the next.[21]

(9) In the case concerning *Certain Questions of Mutual Assistance in Criminal Matters*, the International Court of Justice reverted to the subject of the immunity of high-ranking State officials other than the Head of State, Head of Government and Minister for Foreign Affairs, although the judgment in this case does not lend itself to the conclusion that the Court recognized the immunity *ratione personae* of such high-level officials. It must be recalled that the Court dealt separately with the immunity of the Djiboutian Head of State and that of the two other high-ranking officials, namely the Attorney-General (*procureur de la République*) and the Head of National Security. With regard to the Head of State, the Court made a very clear pronouncement that in general, he or she enjoys immunity from foreign criminal jurisdiction *ratione personae*, although that is not applicable in the specific case, since the invitation to testify issued by the French authorities was not a measure of

Sharon, Amos Yaron and others), Court of Cassation (Belgium), Judgment of 12 February 2003 (P-02-1139.f).

[21] This problem has already been raised by the Commission itself, in its commentary to article 3 of the draft articles on jurisdictional immunities of States and their property (see paragraph (7), *Yearbook … 1991*, vol. II (Part Two). The Commission drew attention to the same problems in paragraph (3) of the commentary to article 1 of the draft articles on the prevention and punishment of crimes against internationally protected persons (*Yearbook … 1972*, vol. II) and in paragraph (3) of the commentary to article 21, paragraph 1, of the draft articles on special missions (*Yearbook … 1967*, vol. II).

constraint.[22] With regard to the other high-ranking officials, the Court argued that the acts attributed to them were not carried out within the scope of their duties;[23] it considered that Djibouti did not make it sufficiently clear whether it was claiming State immunity, personal immunity or some other type of immunity; and it concluded that "the Court notes first that there are no grounds in international law upon which it could be said that the officials concerned were entitled to personal immunities, not being diplomats within the meaning of the Vienna Convention on Diplomatic Relations of 1961, and the Convention on Special Missions of 1969 not being applicable in this case".[24]

(10) It should be said with regard to national judicial practice that a number of decisions deal with the immunity *ratione personae* from foreign criminal jurisdiction of other high-ranking officials. However, the decisions in question are not conclusive in favour of or against it. While some of the decisions are in favour of the immunity *ratione personae* of high-ranking officials such as the Minister of Defence or Minister of International Trade,[25] in others, the national court found that the person under trial did not benefit from immunity, either because he or she was not one of the members of the troika or because he or she did not belong to the small circle of officials who deserve such treatment,[26] which illustrates the

[22] *Certain Questions*, paras. 170–180.

[23] *Ibid*., para. 191.

[24] *Ibid*., para. 194. See, in general, paras. 181–197.

[25] In this connection, see the case *Re General Shaul Mofaz* (Minister of Defence of Israel), Bow Street Magistrates' Court (United Kingdom), Judgment of 12 February 2004; and the case *Re Bo Xilai* (Minister for International Trade of China), Bow Street Magistrates' Court, Judgment of 8 November 2005, in which the immunity of Mr. Bo Xilai is acknowledged, not because he was considered to be a high-ranking official, but because he was on special mission in the United Kingdom. A year later, in a civil case, a North American court recognized Mr. Bo Xilai's immunity, again because he was on special mission, in the United States: *Suggestion of Immunity and Statement of Interest of the United States*, District Court for the District of Columbia, Judgment of 24 July 2006 (Civ. No. 04-0649). In the *Association Fédération nationale des victimes d'accidents collectifs "FONVAC SOS catastrophe"; Association des familles des victimes du Joola* case (*Cour de cassation, Chambre criminelle* (France), Judgment of 19 January 2010 (09-84818)), the court acknowledged in general terms that an incumbent Minister of Defence enjoys immunity *ratione personae* from foreign criminal jurisdiction, but in the specific case recognized only immunity *ratione materiae*, since the person under trial no longer held that office. In the *Nezzar* case (Federal Criminal Tribunal, Switzerland, Judgment of 25 July 2012 (BB.2011-140)), the tribunal stated in general that an incumbent Minister of Defence enjoyed immunity *ratione personae* from foreign criminal jurisdiction, but in the case in question, it did not recognize immunity because Mr. Nezzar had completed his term of office, and the acts carried out constitute international crimes, depriving him also of immunity *ratione materiae.*

[26] A perfect example of this is the case of *Khurst Bat v. Investigating Judge of the German Federal Court*, High Court of Justice Queen's Bench Division Administrative Court (United Kingdom), Judgment of 29 July 2011 ([2011] EWHG 2020 (Admin)), in which the court admits, based on the International Court of Justice's Judgment in the *Arrest Warrant* case, that "in customary international law certain holders of high-ranking office are entitled to immunity *ratione personae* during their term of office" as long as they belong to a narrow circle of specific individuals because "it must be possible to attach to the individual in question a similar status" to that of the Head of State, Head of Government and Minister for Foreign Affairs referred to in the above-mentioned judgment. After analysing the functions carried out by Mr. Khurst Bat, the court concludes that he "falls outwith that narrow circle". Earlier, the Paris Court of Appeal also failed to recognize the immunity of Mr. Ali Ali Reza because although he was Minister of State of Saudi Arabia, he was not the Minister for Foreign Affairs (see *Ali Ali Reza v. Grimpel*, Court of Appeal of Paris (France), Judgment of 28 April 1961). In the *United States of America v. Manuel Antonio Noriega* case, the Court of Appeals for the Eleventh Circuit, in its Judgment of 7 July 1997 (appeals Nos. 92-4687 and 96-4471), stated that Mr. Noriega, former Commander in Chief of the Armed Forces of Panama, could not be included in the category of persons who enjoy immunity *ratione personae*, dismissing Mr. Noriega's allegation that

major difficulty involved in identifying the high-ranking officials other than the troika who can indisputably be deemed to enjoy immunity *ratione personae*. It should also be pointed out, however, that in some of these decisions, the immunity from foreign criminal jurisdiction of a high-ranking official is analysed from various perspectives (immunity *ratione personae*, immunity *ratione materiae*, State immunity, immunity deriving from a special mission), reflecting the uncertainty in determining precisely what might be the immunity from foreign criminal jurisdiction that is enjoyed by high-ranking officials other than the members of the troika.[27]

(11) On another level, it must be recalled that the Commission has already referred to the immunity of other high-ranking officials, in its draft articles on special missions and its draft articles on the representation of States in their relations with international organizations of a universal character.[28] It must be recalled that these instruments only establish a regime under which such persons continue to enjoy the immunities accorded to them under international law beyond the framework of those instruments. However, neither

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at the time of the events, he had been Head of State, or *de facto* leader, of Panama. Another court, in the *Republic of the Philippines v. Marcos* case (District Court of the Northern District of California, Judgment of 11 February 1987 (665 F.Supp. 793)), indicated that the Attorney-General of the Philippines did not enjoy immunity *ratione personae*. In the case *I.T. Consultants, Inc. v. The Islamic Republic of Pakistan* (Court of Appeals, District of Columbia Circuit, Judgment of 16 December 2003, the court did not recognize the immunity of the Ministry of Agriculture of Pakistan. Similarly, in the recent case *Fotso v. Republic of Cameroon*, the court found that the Minister of Defence and the Secretary of State for Defence did not enjoy immunity *ratione personae*, which it nevertheless acknowledged was enjoyed by the President of Cameroon. It should be kept in mind that the three cases previously cited involved the exercise of civil jurisdiction. It must also be noted that on some occasions, national courts have not recognized the immunity from jurisdiction of persons holding high-ranking posts in federal bodies within a federal State. In this connection, see the following cases: *R. (on the application of Diepreye Solomon Peter Alamieyeseigha) v. The Crown Prosecution Service*, Queen's Bench Division (Divisional Court) (United Kingdom), Judgment of 25 November 2005 (EWHC (QB) 2704), in which the court did not recognize the immunity of the Governor and Chief Executive of Bayelsa State in the Federal Republic of Nigeria; and *Public Prosecutor (Tribunal of Naples) v. Milo Djukanovic*, Court of Cassation (Third Criminal Section) (Italy), Judgment of 28 December 2004, in which the court denied immunity to the President of Montenegro before it became an independent State. Finally, in *Evgeny Adamov v. Federal Office of Justice*, Federal Tribunal (Switzerland), Judgment of 22 December 2005, the court denied immunity to a former Minister of Atomic Energy of the Russian Federation in an extradition case; however, it acknowledged in an *obiter dictum* that it is possible for high-ranking officials without stating that they do enjoy immunity.

[27] The decision in the *Khurts Bat* case cited above is a good example of this. In the *Association Fédération nationale des victimes d'accidents collectifs "FONVAC SOS catastrophe"; Association des familles des victimes du Joola* case cited in footnote 25, the court ruled simultaneously, and without sufficiently differentiating its ruling, on immunity *ratione personae* and immunity *ratione materiae*. In the *Nezzar* case, also cited in footnote 25, after making a general statement about immunity *ratione personae*, the Swiss Federal Criminal Tribunal also considered whether immunity *ratione materiae* or a diplomatic immunity claimed by the person concerned could be applied. The arguments used by national courts in other cases are even more imprecise, as in the case of *Kilroy v. Windsor*, District Court for the Northern District of Ohio, Eastern Division, which in its Judgment of 7 December 1978 in a civil case (Civ. No. C-78-291), recognized the immunity *ratione personae* of the Prince of Wales because he was a member of the British royal family and was heir apparent to the throne, but also because he was on official mission to the United States. Noteworthy in the *Bo Xilai* case is the fact that, while both the British and the North American courts recognized the immunity from jurisdiction of the Chinese Minister of Commerce, they did so because he was on official visit and enjoyed the immunity derived from special missions.

[28] On other occasions the Commission has used the expressions "other persons of high rank" (draft articles on the prevention and punishment of crimes against internationally protected persons) and "high official" (draft articles on special missions).

in the text of the draft articles nor in the Commission's commentaries thereto is it clearly indicated what these immunities are and whether they do or do not include immunity from foreign criminal jurisdiction *ratione personae*. It must also be emphasized that although these high-ranking officials may be deemed to be included in the category of "State representatives" mentioned in article 2, paragraph 1 (a) (iv), of the United Nations Convention on Jurisdictional Immunities of States and Their Property, that instrument — as previously mentioned — does not apply to "criminal proceedings". Nevertheless, some members of the Commission stated that high-ranking officials do benefit from the immunity regime of special missions, including immunity from foreign criminal jurisdiction, when they are on an official visit to a third State as part of their fulfilment of the functions of representing the State in the framework of their substantive duties. It was said that this offers a means of ensuring the proper fulfilment of the sectoral functions of this category of high-ranking officials at the international level.

(12) In view of the foregoing, the Commission considers that the so-called "high-ranking officials" do not enjoy immunity *ratione personae*, but that this is without prejudice to the rules pertaining to immunity *ratione materiae*, and on the understanding that when they are on official visits, they enjoy immunity from foreign criminal jurisdiction based on the rules of international law relating to special missions.

(13) The phrase "from the exercise of" has been used in the draft article with reference both to immunity *ratione personae* and to foreign criminal jurisdiction. The Commission decided not to use the same phrase in draft article 1 (Scope of the present draft articles) so as not to prejudge the substantive aspects of immunity, in particular its scope, that will be taken up in other draft articles.[29] In the present draft article, the Commission has decided to retain the phrase "from the exercise of," since it illustrates the relationship between immunity and foreign criminal jurisdiction and emphasizes the essentially procedural nature of the immunity that comes into play in relation to the exercise of criminal jurisdiction with respect to a specific act.[30]

(14) Lastly, it must be noted that a member of the Commission has formulated a general reservation to the present draft article which, in this member's view, does not reflect existing international law relating to immunity *ratione personae* from foreign criminal jurisdiction. For this member of the Commission, solely the Head of State, and perhaps the Head of Government, enjoys immunity *ratione personae* through the application of the relevant principle. On the other hand, by virtue of the functional principle and in the light of the evolution of international relations in the contemporary world, high-ranking officials other than the Minister for Foreign Affairs (such as the Ministers of Defence, Housing and Trade and the Vice-Presidents or Presidents of Parliament) may enjoy the same level of immunity as the Minister for Foreign Affairs.

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[29] See above, paragraph (2) of the above-mentioned commentary.

[30] See *Arrest Warrant*, paragraph 60, and *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)*, Judgment, I.C.J. Reports 2012, paragraph 58.