Albeit it does move.
Revolving around a territorial offence exception to State officials' immunity *ratione materiae* from foreign criminal jurisdiction.

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I have long postponed drafting the conclusions to the present work. After so many days and hours spent researching the topic covered by this dissertation, there is a somewhat sense of belonging that I have nurtured towards what I believe to be "my" work now. As I was drafting small pieces of the whole puzzle, I had always nurtured the feeling that I could come back and edit what I was not entirely sure of. I would think things through, re-examine, double-check, amend and rephrase. The time-frame has been so long that I almost felt I could *always* come back to "my" work, come up with new ideas and modify what I had previously written. To approach now the finish line of this journey surely anticipates the beginning of a new one but equally sets up the end of this one.

As I glance back to when I started, I can surely say the journey was worth every moment. It allowed me to study and research the subject I love most – i.e. public international law – and I could do so benefitting from the guidance and the expertise of incredibly inspiring supervisors such as Paolo Benvenuti and Philippa Webb. In the first part of these 3 years I consolidated my knowledge of international law at Università degli Studi Roma Tre and I was able to break down the general basis of what I wanted to analyse further in greater detail; and the last 9 months spent at King's College of London – Dickson Poon School of Law – have had a tremendous impact on this work as they shed light on what I could really contribute to with an original and creative work of my own. Especially during the last 9 months spent in London under the supervision of Philippa Webb and thanks to her more than precious advice and mentoring, I could in fact begin to identify a gap in this field of immunity. I am thankful to Paolo Benvenuti for allowing me to research at King's College while continuing to supervise me with extreme commitment and always in my best interest. I am grateful to Philippa Webb for the inspirational role she has had on this dissertation, and much beyond it.

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***

What I admire about Galileo surpasses his scientific findings, for as much as I do, yet, acknowledge his incomparable and masterful contribution to what we now commonly perceive as "science". I imagine him staring at the starry sky, with scientific questions, faithful hopes and human dreams. I can picture him trying to comprehend what the sky could teach him, before (and so that) he could dare to contend what others had said about that very sky.

I came to the conclusion that if you are humble and curious enough to look up at the sky with interest and emotion, then you will discern something new. Which does not necessarily mean that you will discover a new planet, star or asteroid. Your exploration might, alternatively, lead you to understand how some already-existing astral bodies do actually move, how they are organized within the solar (indeed!) system and maybe also discover that what have been claimed as existing bodies do not in fact exist or, if they do, they do not necessarily classify as proper stars, astral bodies or planets.

I realized that we are all part – an active part – of the amazing process and evolution of international law. I realized that I could somehow be part of it, with my questions and views. That I could go wrong, that maybe I needed to be at times wrong, in order to reach a certain degree of awareness and – for as little as it might be now – experience. That if I approached facts with the necessary expertise and objectivity, my work (for as tiny and very specific as it is) could perhaps help to contribute to the evolution of the bigger system.

For me, for my education, my professional and personal growth, this journey was sure worth the effort. It most certainly posed a challenge in terms of the width and diversity of the sources considered and also in terms of the depth of analysis it had to deliver in order to represent a credible and creative contribution on such issue. While I have absolutely no say as to whether or not this work has reached its goal, I can surely affirm that I have learnt a lot along the way.

Looking back, I can confirm that the choice of the territorial "offence" exception to immunity *ratione materiae* of State officials from foreign criminal jurisdiction as the central topic of this work did in fact satisfy my expectations. Yes, if I had the chance to go back in time, I would undoubtedly make the same choice all over again. And again.

From a personal standpoint, I would make the same choice again and study in detail the territorial "offence" exception for numerous reasons. This choice allowed me to ask myself credible questions and think about feasible and realistic answers, it gave me the opportunity to be confronted with the thoughts of very talented and enlightening scholars and experts, it gave me the chance to bring my own voice and ideas to one tiny bit of the branch of law I love the

most. I grew up a lot, through this journey. And with me also my understanding and comprehension of international law. I learnt not to look at the surface of things, not to judge things from their appearance, or their shiny or dull cover. I learnt that every journey is a discovery and that you can always make the best of it. I learnt that it is wonderful to work with others, to have their support and criticism, to be pushed to give the best you can because they will do the same. I learnt that you can count on others and be confident in yourself.

That if there is a will there is a way.

I learnt that life always offers you other chances and new opportunities and that, while I should never forget where I come from, there are always new places to explore, new people to meet, new experiences to embark on.

Now I know, for a fact, that life is what you make of it, and you always have at least one reason to smile.

Introduction

Galileo's abjuration, 22 Jun. 1633,
Convent of the Minerva,[1] Roman Inquisition[2]

"I, Galileo, son of the late Vincenzo Galilei of Florence, seventy years of age […], kneeling before you Most Eminent and Most Reverend Cardinals Inquisitors-General against heretical depravity in all of Christendom […] after having been judicially instructed with injunction by the Holy Office to abandon completely the false opinion that the sun is at the center of the world and does not move and the earth is not the center of the world and moves […]"[3]

"[…] with a sincere heart and unfeigned faith I abjure, curse, and detest the above-mentioned errors and heresies and in general each and every other error, heresy, and sect contrary to the Holy Church; and I swear that in the future I will never again say or assert, orally or in writing, anything that might cause a similar suspicion against me; on the contrary, if I should come to know any heretic or anyone suspected of heresy, I will denounce him to this Holy Office […]."[4]

And precisely while he was standing up from the
kneeled, subjugated position of the abjuration,
Galileo did dare to mumble:

"Albeit it does move."[5]

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[1] Maurice A. Finocchiaro, *The Galileo Affair. A Documentary History* (University of California Press, 1989) at 292-293.

[2] Finocchiaro (n. 1) at ix, Preface and Acknowledgments.

[3] Finocchiaro (n. 1) at 292; also referred to in: Peter Machamer, 'Introduction', in Peter Machamer (ed.) *The Cambridge Companion to Galileo* (Cambridge University Press, 1998) at 23.

[4] Finocchiaro (n. 1) at 292; also referred to in: Gregory W. Dawes, *Galileo and the Conflict between Religion and Science* (Routledge, Taylor & Francis Group, 2016) at 71.

[5] In Dawes (n. 4) at 71, it is translated as: "And yet it moves"; in Lawrence Lipking, *What Galileo saw. Imagining the Scientific Revolution* (Cornell University Press, 2014) at 8, it is translated as "Nevertheless it moves".

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"Albeit it does move" is the apt phrase for describing the so-called territorial "offence" exception. The territorial "offence" exception, as I have characterized the counterpart for State officials of the territorial tort exception to State immunity, is to be analysed through a magnifying glass, with a purely scientific approach.

International legal scholarship has oftentimes made use of territorial exceptions to immunity. The use of an exception to the immunity bar on a court's exercise of jurisdiction (which summarizes in short the concept of the territorial exception) has been widespread, lavish and varied. It has not however been consistent. There has been inconsistency regarding its key features, the status, the rationale of the exception, even the "official nomenclature" has varied. The employment of the notion has always been vague, inattentive, mostly inaccurate and perfunctory. Both international and national jurisprudence and scholarship struggled with the notion causing it to take the form each legal expert gave to it, as does water in a container. Water will take the shape of an ampoule, of a vase, of a bowl. Because water -as every liquid- does not have any shape of its own. And this may also be true –at least at the beginning- for every legal notion of the international legal system, where international custom is the principal source of law. In fact, even if they do not reach the rank of international customary rules, most international legal norms are first born from the practice of the States, from the reasoning and sentencing of national and international courts, the opinions of respected scholars, and –quintessentially- from the practice of all the rest of international subjects. It is upon the international legal experts to, then, frame such an unstable and uncertain concept into a legal notion, with its own proper features, rationale, scope and status. The time has come for a proper, complete and exhaustive assessment of the territorial "offence" exception.

The present work's principal aim is to determine wheher contemporary international law conceives or could possibly conceive of a territorial "offence" exception to State officials' immunity *ratione materiae* from foreign criminal jurisdiction. With the issue of immunity of State officials from foreign criminal jurisdiction being currently under the magnifying glass of the Internation Law Commission, the international legal scholarship is growing on related questions. However, abundancy does not necessarily equate to accuracy. Even more with regards to the concept of the territorial "offence" exception, widely referred to but not really understood and appreciated.

"Albeit it does move" is perfectly suited to describe the position of the territorial offence exception within the system of public international law. And, in order to explain why such a phrase is meaningful for the present area of research, it must be understood within the context and time-frame for which it first emerged.

Long before the Copernican theory,[6] which challenged the Ptolemaic view of the universe, the ancient philosophers and scientists had already written and discussed heliocentrism.[7] However, *"Galileo's researches in astronomy were more than original, they were unprecedented."*[8] The uniqueness of his *"scientific personality"* and his achievements are undisputed;[9] as is his Scientific Revolution.[10] It is precisely to Galileo Galilei that the scientific community must attribute the discovery of the very evidence of heliocentrism. The decisive physical proof – long looked for – came during one of his habitual trips from Padua to Venice.[11] According to the speed of the flatboat, the water contained on the bottom would splash up and down.[12] The movement resembled that of the tides, with the water gathering in the back of the boat when it accelerated and at the front when it decelerated.[13] The motion of the tides, their accelerating and slowing down necessitated to be explained. It is then that Galileo came up with the *"diurnal and annual revolutions of the Earth"*.[14] Although it was then developed into a more complex theory and despite the analogy between the water shifts and the movement of the tides not being entirely consistent,[15] that is the back story of how where the proof first emerged.

The so-called "Galileo affair"[16] refers both to Galileo's Copernicanism and to the Church's opposition to his views.[17] It is reported that Galileo shared Copernicus's view at least

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[6] On the Copernican Revolution, see, briefly: Dawes (n. 4) at 47-62.

[7] For an overview on the astronomical theories before Copernicus, see: Dawes (n. 4) at 27-46.

[8] Noel. M. Swerdlow, 'Galileo's discoveries with the telescope and their evidence for the Copernican theory', in Peter Machamer (ed.) *The Cambridge Companion to Galileo* (Cambridge University Press, 1998) at 244.

[9] See, for instance: Stillman Drake, *Galileo Studies. Personality, Tradition and Revolution* (University of Michigan Press, 1970) at 63-78.

[10] Lipking (n. 5) at 3, and more generally at 1-6.

[11] William Shea, 'Galileo's Copernicanism: The science and the rethoric' in Peter Machamer (ed.) *The Cambridge Companion to Galileo* (Cambridge University Press, 1998) at 224-225.

[12] Shea, 'Galileo's Copernicanism: The science and the rethoric' (n. 11) at 224-225.

[13] Shea, 'Galileo's Copernicanism: The science and the rethoric' (n. 11) at 225.

[14] Shea, 'Galileo's Copernicanism: The science and the rethoric' (n. 11) at 225; see also, on "The diurnal rotation of the Earth", at 234-236; and on "The annual motion of the Earth" at 236-238 of the same source.

[15] William R. Shea, *Galileo's Intellectual Revolution* (Macmillan, 1972) at 174-175.

[16] For a complete series of documentary history of the Galileo affair, see: Finocchiaro (note 1).

[17] Dawes (n. 4) at 63.

by the time he taught astronomy in Pisa (1589-1592).[18] What Galileo found decisive for his embrace of the Copernican vision was, precisely, its ability to explain some phenomena which would have, otherwise, been left unanswered.[19] A need for pragmatic explanations seems to have marked Galileo's life and works. The trial held against him by the Roman tribunal eventually forced him to withdraw from his position.[20] Kneeling down he is said to have pronounced before judges and witnesses his abjuration for his heresy and his promise not to make the same mistakes again.[21] In the most likely mythical story (but every myth unveils some truth) it has been told that, standing up from the knelt position, he whispered the famous words: *"albeit it does move"*.[22] With a sense of scientific pragmatism and need for truth, Galileo was still fully convinced of his thesis, of its strength and its evidentiary capacity. He kneeled before the Sacred Scripture, not before the Holy Office.[23] He kneeled down as a Christian, as a human being. As man of science, governed by a sense of truthfulness and righteousness, he was standing up and wholly embracing his firm belief that *"albeit it does move"*.

Within the context of the territorial "offence" exception, *"albeit it does move"* entails many different, but related, consequences.

It refers, first and foremost, to the scientific, analytical and empirical methodology that has been applied to this work. To the search for clarity, for evidentiary proof and explanations. To the love for truth and reality. It relates to the need for synthesis, pragmatism and certainty. To the need for a clear set of rules that does not dictate how the universe should be governed, rather describes how it does – already – function. A system where men merely observe and describe the sky above them, with the celestial bodies already fluctuating according to their own, independent movement. Much alike the system of international law, at the very least with

[18] Dawes (n. 4) at 63.
[19] Dawes (n. 4) at 64.
[20] Dawes (n. 4) at 70-71.
[21] Dawes (n. 4) at 70-71.
[22] Also found as: "and yet it moves" or "nevertheless it moves". Dawes (n. 4) at 71; see also: Lipking (n. 5) at 8; see David Wootton, *Galileo. Watcher of the Skies* (Yale University Press, 2010) at 224, explaining that the story was "first told in 1757" and quoting John J. Fahie, *Memorials of Galileo Galilei 1564-1642: Portraits and Paintings, Medals and Medallions, Busts and Statues, Monuments and Mural Inscriptions* (Lemington, privately printed, 1929 – also found elsewhere as: Courier Press, 1929-) at 72-75 which is reported to include the discovery *"in 1911 [of] a picture of Galileo in prison, supposedly painted in the 1640s and bearing the famous phrase"*.
[23] Dawes (n. 4) at 71.

regards to its original and main source –international custom-, which legal experts only observes and translates into words.

This very phrase, also, refers to the place and role of some notions of international law in the international legal systems. To a system which is continuously adjusting to the movements of the universe, where even the tiniest little floating body could perhaps have a tremendous impact on the whole stasis. It entails a metaphor of some kind, which equates the international legal system to the cosmos, where single notions are bodies of different substance, weight and shape which gravitate following different orbits but which, in such trajectories, are steady and consistent. And in the same metaphor, the territorial "offence" exception parallels the Earth, both of which, in fact, kept on moving, rotating and revolving, despite the common belief that they do not move or –to some extent – do not even have a specific role within their own system.

"Albeit it does move" is also something a bit more elaborated than what is stated above. It means that phemomena are, tautologically - from the ancient Greek φαίνομαι: to appear oneself, to reveal oneself - events that render themselves manifest. They happen, purely and simply. They happen notwithstanding the humanity and all the living creatures that, looking up at the sky, might stare at them. Even so, however, those stars will shine anyway, and the planets will move anyways, the task of those men precisely being to describe what such stars, planets and asteroids are doing. It is their mandate to tell other men and women where those planets are heading and where they are coming from, so that all humankind is more aware of where their own Earth came and is, hopefully, going.

For the scope of this work, it is the territorial "offence" exception which *"albeit does move"*, as it is more peculiar and more vivid than what the international scholarship's approach may suggest. Most international jurists, indeed, took the notion for granted, they applied it equally to the civil and criminal sphere, they interchanged it with other similar – not equal – notions. The lack of clarity this topic is currently facing is due to *their* mistake. As this dissertation will attempt to demonstrate, the territorial "offence" has been implicitely oversimplified, in that most jurists assumed it to be *per se* evidence and not deserving to be ruled as an autonomous notion of law.

"Albeit it does move". Albeit, such exception opens up a world of its own, with specific features, role and mandate. *Albeit,* this exception can be employed also to understand other specific notions of international law which are still covered by too much shadow. *Albeit*, the

territorial “offence” exception gives this author the opportunity to shed light on this exception and to other relevant – contended – conterminous issues.

Let me now revolve around it.

Methodology

As already outlined above, this dissertation adopts a scientific, analytical and also empirical methodology. It proceeds with a detailed analysis of the sources, considering them both *per se* and also within the context for which they arose. The final purpose is to assess whether or not a territorial "offence" exception exists, or could possibly exist, within the system of public international law. Consistently, a study on this issue is required to adopt both a close and a wider look to the exception, on one hand, and the role it does or does not play in the overall system, on the other hand. Also comparative, historical and analogical methodologies will be applied, since the exception will be considered in the integrated system of international law, in relation to other established notions, such as the immunity of States from other States' civil jurisdictions.

The first part of this work will be more general, possibly more descriptive and less critical: this is necessitated in order to set out the necessary basis upon which to build an original study on the territorial "offence" exception. The second part of this dissertation will then adopt a more original and critical approach, as it will be aimed at determining whether such notion has a proper rationale and distinctive features within current international law.

This dissertation will make use of numerous sources of a different nature, varying from legislation to case-law and passing through the lenses of the most distinguished scholars in the field. Particular attention will be given, in the second part of this thesis, to United Nations [hereinafter UN] materials and documentation, largely but not exclusively limited to the work of the International Law Commission [hereinafter ILC]. This includes: Reports of the Special Rapporteurs, the Memorandum of the Secretariat, the most recent ILC works and debates and the analysis within the Sixth Committee of the UN General Assembly. Not only will this author consider such sources for their substantive content but attention will be also be given to the methodology and interpretative mechanisms adopted by such bodies. Turning to the detail, I mostly refer to the fragmented and diversified nature of the ILC study, which spans documents of individual and collective bodies, in a time lapse of approximately 10 years (from 2007 to 2017), throughout which the international community has evolved and changed needs and objectives.

A further clarification needs to be made on this point - before this dissertation enters its core topic. This dissertation is aimed at elucidating one issue of the permanently evolving concept of immunity of State officials from foreign criminal jurisdiction. In doing so, it will

take into account the immunity of State officials from foreign criminal jurisdiction which is not treated as a special regime under international law. As a result, as for the subjective scope, the dissertation will only consider State officials who are not addressed by specifically tailored international instruments. This means that immunities of diplomatic agents, consular agents, members of special missions and representatives of States in international organizations will not be considered as such. Indeed, they may be used in terms of comparison in order to provide a better understanding of immunities of State officials from a historical and normative viewpoint; however, they will not be deeply examined *per se*. This is so because immunities of these subjects constitute special regimes, which have already been codified in specific conventions.[24] Diplomatic and consular agents, members of special missions and States representatives to international organizations are, in the first instance, subject to the special regime as identified by the above-mentioned treaty law instruments and, additionally, in cases where they cannot enjoy those special immunities, they are granted the common immunities of other State officials, where applicable.[25] It is also because of the interplay of different regimes, the special ones and the general one, that the issue of immunity of State officials from foreign criminal jurisdiction requires a proper normative framework.[26]

As far as the methodological approach is concerned, one last remark is required. The territorial "offence" exception has been applied by some national courts, legislations and scholars either implicitly or, when explicitly, under different names and definitions. The research carried out in order to assess whether or not this exception exists or could possibly exist in contemporary international law had to take this issue into account. I had to analyse in depth many judgments and case-law so that I could understand whether or not judges or scholars described under different names did in fact substantiate such exception. Or, on the

[24] Vienna Convention on Diplomatic Relations (adopted 18 Apr. 1961, entered into force 24 April 1964) 500 UNTS 95; Vienna Convention on Consular Relations (adopted 24 Apr. 1963, entered into force 19 Mar. 1967) 596 UNTS 261; Convention on Special Missions (adopted 8 Dec. 1969, entered into force 21 June 1985) 1400 UNTS 231; Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character (adopted 14 Mar. 1975, not yet in force) Doc.A/CONF.67/16; plus the provisions of the convention of each organization or headquarters agreement.

[25] Preliminary Report on immunity of State officials from foreign criminal jurisdiction, 29 May 2008, A/CN.4/601, by Special Rapporteur Roman Anatolevich Kolodkin, para 99 at 183 [hereinafter Preliminary Report, Kolodkin]; see also: Steffen Wirth, 'Immunity for core crimes? The I.C.J.'s Judgment in the Congo v Belgium Case', (2002) 13 EJIL 877, at 883-884.

[26] See: Second Report on immunity of State officials from foreign criminal jurisdiction, 4 Apr 4 2013, A/CN.4/661, by Special Rapporteur Conceptiòn Escobar Hernàndez, at 22 [hereinafter Second Report, Escobar Hernàndez].

contrary and more often, I had to read judgments and case-law with a critical eye, so that I was able to discern that what they understood as a territorial exception to State officials' immunity from foreign criminal jurisdiction actually could not be considered as such. In doing so, I have also had to understand the different features and aspects which characterize national jurisdictions around the globe and the approach, methododology and interpretative approach they might take, according to the role and mandate they are given within their own domestic system.

All in all, this variety of sources surely enlarges this dissertation's viewpoint, while, at the same time, I understand and acknowledge that such sources could arguably be considered complete or exhaustive. This is so because the national case-law has not always been accessible (and when it has, it was not always available in English) and because, as explained above, it was not always easy to detect when the exception was applied -under different names or under no definition at all- and when, instead, it was said to be applied but in fact was not.

Structure

The dissertation will proceed as follows.

Part I of the dissertation will broadly assess the general framework of immunity of State officials from foreign criminal jurisdiction.

The first chapter will deal with the natural precedent of immunity, namely: jurisdiction. The different types of jurisdiction will be taken into account, together with an extensive inquiry into the criteria for the assessment of territorial and extraterritorial criminal jurisdiction. In the last section, the relationship between immunity and jurisdiction will be examined, and the procedural nature of the former with respect to the latter will be ascertained. The issues of State immunity and immunity of State officials from foreign criminal jurisdiction may at times be analysed in parallel. This, of course, does not imply that the two concepts have erroneously been conflated or confused but only entails that they share common elements which can be jointly taken into account (for instance, when examining the substantive or procedural nature of immunity of State officials from foreign criminal jurisdiction, attention is also given to doctrine which focuses on State immunity, when such studies can be deemed useful for the analysis of the subject of the present work).

The second chapter examines in more depth immunity of State officials from foreign criminal jurisdiction. A basic outline of the legal sources which regulate the topic will be provided for, and this will show the absence of a universal definition of immunity at present. Additionally, I will consider the relationship between immunity and impunity; the question of whether the employment of immunity does, in practice, lead to *de facto* impunity, as posited by Judge Van Den Wyngaert,[27] will be taken into account. Moreover, attention will be paid to the legal rationale which underlies the topic. I will briefly pinpoint the distinction between immunity *ratione personae* and *ratione materiae,* highlighting the relevance of the partition as used in the international legal scholarship.

Part II will consider the core question posed by this work, namely whether or not international law at present conceives of the concept of territorial "offence" exception or, in the alternative, whether such notion could possibly be conceived of.

The first chapter will be an introduction.

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[27] *Arrest Warrant of 11 April 2000* (Democratic Republic of the Congo v Belgium), Judgment, 14 Feb. 2002, ICJ Reports 2002, p. 3, Dissenting Opinion of Judge Van den Wyngaert, at 160, para 34.

The second chapter will analyze the territorial tort exception to the immunity of States from other States' civil jurisdiction as the counterpart of the territorial "offence" exception to immunity of State officials from foreign criminal jurisdiction. The historical background and the State practice will contextualize the whole topic. The typical features of the territorial tort exception will be highlighted, together with its current status. Additionally, a rationale will be identified for this exception. The overall aim of this chapter is to fully appreciate the concept of the territorial tort exception so that one can determine whether or not a territorial "offence" exception could feasibly be analogically envisaged within the criminal sphere.

The third chapter focuses on answering the core question of this work through the in-depth analysis of the practice of the ILC, including the Reports of the Special Rapporteurs, the Memorandum of the Secretariat, ILC works and debates, particularly in 2016-2017, when the issue was under intense discussion, and the analysis within the Sixth Committee of the UN General Assembly, and on other sources not considered by the ILC Special Rapporteur. In fact, the ILC discussion also characterized the nature of the territorial "offence" exception as "revolving": the discussion was oftentimes uneven, inconsistent and contradictory. This undermined the already unstable and undetermined nature of the exception which – already being a floating body itself – then orbited and fluctuated following even more confused and unpredictable trajectories.

Non-ILC practice will also be considered, mostly with regard to case-law which may be of interest to the present study, but which is not intended to be exhaustive. A case study on Khurts Bat v Investigating Judge of the German Federal Court[28] before domestic United Kingdom [hereinafter UK] courts will be considered. The goal of the following sections will be to determine whether or not a territorial "offence" exception exists as an autonomous concept within the current international legal system and, if that is the case, what status it is granted within such context.

The final conclusion will highlight the results of my study and underscore areas for further research.

[28] *Khurts Bat v Investigating Judge of the Federal Court of Germany*, England, High Court, Queen's Bench Division (Divisional Court), 29 Jul. 2011, [2011] EWHC 2029 (Admin), [2013] QB 349.

PART I

Immunity of State officials from foreign criminal jurisdiction: the broad framework

1. State officials' immunity from whose jurisdiction?

I. A preliminary study on jurisdiction

II. How to assess criminal jurisdiction

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a. The territoriality principle

B. Extraterritorial jurisdiction.

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PART I

Immunity of State officials from foreign criminal jurisdiction: the broad framework

1. State officials' immunity from whose jurisdiction?

I. A preliminary study on jurisdiction

Immunity itself is, by definition, immunity *from* jurisdiction. That is: no immunity exists without jurisdiction.[29] As it has been underpinned by Judges Higgins, Kooijmans and Buergenthal in the *Arrest Warrant* case, "*'immunity' is the common shorthand phrase for 'immunity from jurisdiction'.*"[30] Consistently, since jurisdiction is the fundamental prerequisite of immunity, immunity can only be assessed when a State can effectively exercise its own jurisdiction.[31] In the words of Judge G. Guillaume, President of the International Court of Justice [hereinafter ICJ] in the *Arrest Warrant* case: *"[…] there can only be immunity from*

[29] Preliminary Report, Kolodkin (n. 25) para 43, at 170; ICJ, *Arrest Warrant of 11 April 2000* (n. 27) at 64, para 3.
[30] ICJ, *Arrest Warrant of 11 April 2000* (n. 27) at 64, para 3.
[31] Preliminary Report, Kolodkin (n. 25) para 43 at 170.

jurisdiction where there is jurisdiction".[32] As noted by the international legal scholarship,[33] the establishment of jurisdiction is necessary in order to investigate the issue of immunity. A preliminary analysis on the interplay between immunity and jurisdiction seems, thus, not only appropriate in the present case, but also essential. This is so because both jurisdiction and immunity need to be separately defined and understood in order to be properly analyzed in a common framework.[34]

Even though it can ultimately be understood as a unitary phenomenon shaped by different degrees of applicability,[35] the use of term *"jurisdiction"* covers different concepts under national and also international law.[36] However, since the issue of immunity of State officials from foreign criminal jurisdiction concerns national and not international jurisdiction only the former will be addressed. This analysis must then take into account the multiplicity and the variety of the different jurisdictional systems where the notion of jurisdiction primarily arises as a *"precondition for immunity"*.[37]

Generally speaking, the notion of jurisdiction is closely linked to the exercise of the sovereignty of a State;[38] indeed it displays the State's exercise of its own powers (namely: legislative, executive and judicial powers).[39] *"The power of a sovereign to affect the rights of persons, whether by legislation, by executive decree, or by the judgment of a court, is called*

[32] ICJ, *Arrest Warrant of 11 April 2000* (n. 27) at 36, para 1. See also the joint separate opinion of Judges Higgins, Koojmans and Buergenthal in: ICJ, *Arrest Warrant of 11 April 2000* (n. 27) at 64, para 3.

[33] Jurgen Bröhmer, *State Immunity and the Violation of Human Rights*, International Studies in Human Rights, Volume 47 (Martinus Nijhoff Publishers, l997) at 34; Paul J. Toner, 'Competing concepts of immunity: revolution of the head of state immunity defense' (2004) 108, Penn State Law Review, 899, at 903.

[34] Second Report, Escobar Hernàndez (n. 26) at 11; see also: ICJ, *Arrest Warrant of 11 April 2000* (n. 27) para 46.

[35] Luc Reydams, *Universal Jurisdiction. International and Municipal Legal Perspectives* (Oxford University Press, 2003) at 25; Harold G. Maier, 'Jurisdictional Rules in Customary International Law' in Karl Matthias Meessen (ed). *Extraterritorial Jurisdiction in Theory and Practice* (Kluwer, 1996) at 78; Ian Brownlie, *Principles of Public International Law* (Oxford University Press, 2003) at 308-310.

[36] Michael Akehurst, 'Jurisdiction in International Law' (1972-1973) 46 B.Y.I.L. 145, at 145.

[37] Second Report, Escobar Hernàndez (n. 26) at 13.

[38] For some scholars' definition of "jurisdiction" see: Malcolm N. Shaw, *International Law* (Cambridge University Press, 2014) at 469 et seq.; Brownlie (n. 35) at 297 et seq.

[39] Reydams, *Universal Jurisdiction. International and Municipal Legal Perspectives* (n. 35) at 25; see also: Akehurst (n. 36) at 151.

jurisdiction."[40] Both case-law[41] and scholars[42] tend to distinguish between *prescriptive jurisdiction* and *enforcement jurisdiction*. While the former covers the State legislature's right to create, amend or repeal legislation; the latter concerns the State's power to enforce such legislation. They are also referred to as *legislative jurisdiction* and *executive jurisdiction*, respectively. Some authors also add to the abovementioned categories of jurisdiction a third one, namely *adjudicative/judicial jurisdiction*, identified as *"the ability of national courts, tribunals and other bodies or persons exercising judicial functions to hear and decide on matters"*.[43] Those authors acknowledge that jurisdiction must mirror the tripartite nature of governmental action: since the branches of government are articulated into legislative, executive and judicial powers, they also adopt a tripartite understanding of jurisdiction – legislative, executive and judicial.[44] This tripartite classification can be summarized as follows: "*the power of one State to perform acts in the territory of another State (executive jurisdiction), the power of a State's courts to try cases involving a foreign element (judicial jurisdiction) and the power of a State to apply its laws to cases involving a foreign element (legislative jurisdiction)"*.[45]

However, some international legal scholarship prefer not to include *adjudicative jurisdiction* amongst the categories of jurisdiction, since it shares common features with *prescriptive jurisdiction*.[46] Indeed, both categories concern a criminal rule of law which applies to the case at hand; the only difference being that while *prescriptive jurisdiction* criminalizes a conduct and crystallizes it in a provision, *adjudicative jurisdiction* applies the provision concretely.[47] Although at times *legislative* and *judicial jurisdiction* may not entirely

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[40] Joseph H. Beale, 'The Jurisdiction of a Sovereign State' (1923) 36 Harv. L. Rev. 241, at 241.

[41] *The S. S. Lotus (France v Turkey)*, Judgment, 7 Sep. 1927, PCIJ 1927 Series A. No. 10 at 19-20; ICJ, *Arrest Warrant of 11 April 2000* (n. 27) Dissenting Opinion of Judge Van den Wyngaert, at 168-169.

[42] Akehurst (n. 36) at 145; Vaughan Lowe, 'Jurisdiction', in Malcolm D. Evans (ed.), *International Law* (Oxford University Press, 2006) 335, at 338-339; Roger O'Keefe, 'Universal Jurisdiction, Claryfing the Basic Concept' (2004) 2 JICJ 735, at 735 et seq.; Reydams, *Universal Jurisdiction. International and Municipal Legal Perspectives* (n. 35) at 25.

[43] Ruwanthika Gunaratne, *Prescriptive and Enforcement Jurisdiction: Territorial and Extraterritorial Application, Ruwanthika Gunaratne and Public International Law*, available at: <https: //ruwanthikagunaratne.wordpress.com/2011/04/13/jurisdiction/> last accessed 31 Oct. 2017; see also: Akehurst (n. 36) at 145; Shaw (n. 38) at 472-473.

[44] Shaw (n. 38) at 472-473.

[45] Akehurst (n. 36) at 145.

[46] Preliminary Report, Kolodkin (n. 25) para 45 at 170-171.

[47] O'Keefe, 'Universal Jurisdiction, Claryfing the Basic Concept' (n. 42) at 737; Akehurst (n. 36) at 179.

correspond,[48] they mostly do. Consistently, the most accepted and widespread notion of jurisdiction appreciates the distinction between *prescriptive* and *enforcement jurisdiction* only.

The acceptance of the binary understanding of jurisdiction also implies that the two types of jurisdiction are independent of one another in terms of legitimacy.[49] That is: the legitimacy (or illegitimacy) of *prescriptive jurisdiction* in a specific case does not necessarily imply the legitimacy (or illegitimacy) of *enforcement jurisdiction* and *vice versa*.

In any event, even if the notions of immunity and jurisdiction appear to be, and in fact are, interrelated, they shall be examined on separate grounds: while it is true, especially with regard to immunity, that it cannot be understood if not in relation to the notion of jurisdiction, it must nevertheless be acknowledged that the analysis of immunity shall not affect the substance of jurisdiction and the same can be said in reverse.[50] Also in this context, the judgement of the *Arrest Warrant* case stands as a landmark decision. On the one hand, the ICJ noted that immunity and jurisdiction are ruled by distinct sets of rules and that *"jurisdiction does not imply absence of immunity, while absence of immunity does not imply jurisdiction"* (which, in the reasoning of the Court, lead to determine that jurisdictional immunities remain opposable even when a State is compelled to exercise jurisdiction under treaty law provisions).[51] On the other hand, the joint separated opinion of Judges Higgins, Kooijmans and Buergenthal outlined that *"only if it is fully appreciated that there are two distinct norms of international law in play (albeit that the one - immunity - can arise only if the other - jurisdiction - exists) can the larger picture be seen"*.[52] In this respect, while stressing that *"'immunity' and 'jurisdiction' are inextricably linked"*[53] (which implied, following the joint separate opinion, that immunity must be appreciated not only with regard to a subject's status but also with regard to the type of jurisdiction and to the basis upon which such jurisdiction is invoked) Judges Higgins, Kooijmans and Buergenthal also admitted that a distinct set of norms

[48] Alberto Di Martino, La frontiera e il Diritto Penale. Natura e contesto delle norme di "diritto penale transnazionale" (Giappichelli Editore, 2006) at 28 et seq.
[49] O'Keefe, 'Universal Jurisdiction, Claryfing the Basic Concept' (n. 42) at 741.
[50] Preliminary Report, Kolodkin (n. 25) para 61 at 173.
[51] ICJ, *Arrest Warrant of 11 April 2000* (n. 27) at 24 and 25, para 59.
[52] Joint separate opinion of Judges Higgins, Koojmans and Buergenthal in: ICJ, *Arrest Warrant of 11 April 2000* (n. 27) at 65, para 3.
[53] Joint separate opinion of Judges Higgins, Koojmans and Buergenthal in: ICJ, *Arrest Warrant of 11 April 2000* (n. 27) p. 65, para 5.

applies to the two concepts.[54] In particular, they criticized the ruling of the Court on this matter, emphasizing that the Court, by choosing not to address the issue of jurisdiction as such, promoted the ongoing regrettable tendency to blend two notions, those of immunity and jurisdiction, which, by their nature, remain conceptually and materially distinct one another.[55] As far as this work is concerned, it is noteworthy to say that while an in-depth understanding of jurisdiction seems necessary in order to understand the multi-faceted issue of immunity, jurisdiction and immunity remain two separate concepts, albeit deeply interrelated; so that while, on the one hand, it is correct to state that jurisdiction is the natural legal pre-requisite of immunity, it is likewise correct, on the other hand, to assert that this does not affect the study of the two concepts, since the consideration of one issue does not affect nor is affected by the investigation of the other.[56]

[54] Joint separate opinion of Judges Higgins, Koojmans and Buergenthal in: ICJ, *Arrest Warrant of 11 April 2000* (n. 27) p. 65, para 3.
[55] Joint separate opinion of Judges Higgins, Koojmans and Buergenthal in: ICJ, *Arrest Warrant of 11 April 2000* (n. 27) p. 65, para 4.
[56] Preliminary Report, Kolodkin (n. 25) para 61 at 173.

II. How to assess criminal jurisdiction

Jurisdiction can be divided into civil, administrative and criminal jurisdiction.[57] It should be borne in mind that the present analysis will only consider the latter, since its main subject concerns immunity of State officials from foreign *criminal* jurisdiction. Even with regard to criminal jurisdiction, the intention of this section is not to provide for a universal definition which encompasses *"all types of acts covered by the term 'jurisdiction'"*,[58] but rather to elaborate on a notion of criminal jurisdiction that can apply in the context of immunity of State officials.

The Special Rapporteur of the ILC on the issue, Ms. Concepciòn Escobar Hernàndez, had elaborated, in her 2nd Report, a draft article which entailed the following definition of criminal jurisdiction:

> "Draft article 3.
> Definitions.
> For the purposes of the present draft articles:
> a) the term 'criminal jurisdiction' means all of the forms of jurisdiction, processes, procedures and acts which, under the law of the State that purports to exercise jurisdiction, are needed in order for a court to establish and enforce individual criminal responsibility arising from the commission of an act established as a crime or misdemeanor under the applicable law of that State. For the purposes of the definition of the term 'criminal jurisdiction', the basis of the State's competence to exercise jurisdiction is irrelevant".[59]

The above-mentioned definition already reflects the common understanding that, generally speaking, criminal law is divided into substantive and procedural, the former being the rules of domestic law that identify acts of individuals which constitute crimes and implicate responsibility, the latter being the rules of domestic law which establish the procedures for the implementation of substantive criminal law.

Contrary to civil executive jurisdiction, criminal executive jurisdiction is peculiar in its nature as it *"may begin long before the actual trial phase"*.[60] Indeed, before a case goes to trial and, consequently, before a judicial decision is rendered, a number of actions can be enforced

[57] Preliminary Report, Kolodkin (n. 25) para 48 at 171.
[58] Second Report, Escobar Hernàndez (n. 26) at 12.
[59] Second Report, Escobar Hernàndez (n. 26) at 14.
[60] Preliminary Report, Kolodkin (n. 25) para 51 at 171.

by the police or other agencies as soon as they are notified with an alleged crime. These actions include, but are not limited to: *"drafting reports on the inspection of the crime scene, collection of material evidence, interrogation of witnesses, institution of criminal proceedings"*.[61] All those acts pose questions of immunity too, since the pre-trial phase is not exempt from the application of such privileges.

For as obvious as it may appear, criminal jurisdiction mainly concerns individuals, and to some extent private entities, as opposed to civil jurisdiction, which covers both State entities and individuals. However, whilst criminal jurisdiction still has an "individual approach", when it targets State officials it also affects the State for which the official serves.[62] Not only may the criminal prosecution of a State official directly affect the State's functioning but it may also raise concerns of sovereignty-related issues, as the adjudication of those high-ranked individuals may imply an intrusion on the State's internal affairs.[63]

Criminal jurisdiction is usually assessed as a set of alternative or at times concurrent criteria, namely: the territorial principle, the active personality principle, the passive personality principle, the protective principle and the universality principle. These principles had first been identified and outlined in the Harvard Research of International Law,[64] a study conducted by the members of the Harvard Law School faculty between the 1920s and the 1930s.[65] Although doctrine has identified up to seven principles (namely: the principle of territoriality, the principle of nationality of the offender, the principle of nationality of the victim, the principle of the flag, the principle of protection, the principle of universality and the representation principle),[66] this dissertation will consider five principles set out by the Harvard

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[61] Preliminary Report, Kolodkin (n. 25) para 51 at 172.

[62] Preliminary Report, Kolodkin (n. 25) para 53 at 172.

[63] Preliminary Report, Kolodkin (n. 25) para 53 at 172; *Jones v Ministry of the Interior of the Kingdom of Saudi Arabia and Another (Secretary of State for Constitutional Affairs and Another Intervening) Mitchell and Others v Al-Dali and Others*, England, House of Lords, 14 Jun. 2006, [2006] UKHL 26, 129 ILR 629 [hereinafter *Jones No. 2*] para 31; *Jones v Ministry of Interior Al-Mamlaka Al-Arabiya AS Saudiya (the Kingdom of Saudi Arabia)* England, Court of Appeal, 28 Oct. 2004, [2004] EWCA Civ. 1394, 129 ILR 629 [hereinafter *Jones No. 1*] para 75; *Evgeny Adamov v Federal Office of Justice*, Federal Tribunal, Switzerland. Judgment of 22 December 2005, ATF 132 II 81, para 3.4.3.

[64] Harvard Research on International Law, Codification of International Law: Part II--Jurisdiction with Respect to Crime, Draft Convention on Jurisdiction with Respect to Crime (1935) 29 AJIL Supplement 1, 435 [hereinafter Harvard Research on International Law] at 445.

[65] Maier (n. 35) at 67.

[66] Reydams, *Universal Jurisdiction. International and Municipal Legal Perspectives* (n. 35) at 21; see also: Harvard Research on International Law (n. 64); Christopher L. Blakesley, 'Extraterritorial Jurisdiction' in M. Cherif Bassiouni (ed.) *International Criminal Law. Vol. II : Multilateral and bilateral enforcement mechanisms*

Research of International Law only. These principles present common features to be taken into consideration when studying them: *i)* they do not originate from a centralized source, rather from decentralized sources, such as multilateral and bilateral treaties, domestic laws and States' practice;[67] *ii)* not all of them are acknowledged by all scholarship;[68] *iii)* they can be concurrent or overlapping criteria.[69] More importantly, all of these principles aim at establishing some bonds between the action and the State that may legitimize the exercise of jurisdiction.[70] Despite some inconsistencies in their application, these principles turn out to be useful tools in the assessment of jurisdiction: as outlined by prominent scholars,[71] their function is to offer a secure link between a State and an offence/an offender or other international legal criteria in order to establish or deny jurisdiction to a State-entity over a specific act. Consistently, these principles tie a State's legitimate exercise of jurisdiction to various criteria, precisely: the State's territory, for the territorial principle; the nationality of the individuals involved, for the nationality (active and passive personality) principles;[72] the State's interest for the protective principle; the nature of the crime itself for the universality principle.

Not only do they offer general international law criteria, but, through a balancing of interests (respectively: States' sovereignty and duty of non-interference in each State's domestic affairs) they also provide for case-by-case analysis which perfectly suits the specific case at hand.[73] For what concerns the meaning of these principles, the same scholars agree that

(Martinus Nijhoff Publishers, 2008), at 85 et seq, encompassing the territorial principle (also distinguishing between subjective and objective territoriality), the protective principle, the nationality principle theory, the passive personality theory, universal jurisdiction; see also: Chimène I. Keitner, 'Transnational Litigation: Jurisdiction and Immunities' in: Dinah Shelton (ed.), *The Oxford Handbook of International Human Rights Law* (Oxford University Press, 2013) at 796, identyfing six bases for exercising prescriptive jurisdiction, namely: territory, nationality, objective territoriality/effects jurisdiction, the porotective principle, passive personality and universality.

[67] Reydams, *Universal Jurisdiction. International and Municipal Legal Perspectives* (n. 35) at 22; Geoffrey R. Watson, 'The Passive Personality Principle' (1993) 28 Tex.Int'l L.J., 1 at 42-43; Brownlie (n. 35) at 305.

[68] Reydams, *Universal Jurisdiction. International and Municipal Legal Perspectives* (n. 35) at 22.

[69] Reydams, *Universal Jurisdiction. International and Municipal Legal Perspectives* (n. 35) at 22-23.

[70] William Joseph Davids, 'Territory: a proxy for legittimate contacts on which to found jurisdiction', in: *Un diritto senza terra? Funzioni e limiti del principio di territorialità nel diritto internazionale e dell'Unione Europea, A lackland law? Territory, effectiveness and jurisdiction in International and EU law, Atti e contributi del X Incontro di Studio fra i giovani cultori delle materie internazionalistiche, Catania, 24-25 gennaio 2013*, a cura di Di Stefano Adriana (Giappichelli Editore, 2015) at 398-399.

[71] See, in this respect Reydams Luc's analysis of the work of Pappas Claudia: Reydams, *Universal Jurisdiction. International and Municipal Legal Perspectives* (n. 35) at 23-24 commenting and quoting Pappas Claudia [Pappas Claudia, *Stellvertretende Strafrechtspflege* (Freiburg, Max-Planck-Institut f. ausländ. u. inter. Strafrecht, 1996) at 85-87].

[72] Davids (n. 70) at 398-399; on the concept of nationality, see: Shaw (n. 38) at 479 et seq.

[73] Reydams, *Universal Jurisdiction. International and Municipal Legal Perspectives* (n. 35) at 23-24.

they carry some normative weight in the international legal sphere: they can certainly not be reduced to scholars' cataloguing nor to rules of customary international law.[74] Furthermore, the issue may also be more complex: it may involve the balancing between States' interests and the exercise of proper jurisdiction so that they resolve not only the question of whether a State can legitimately claim jurisdiction, but also over the existence of the most proper form of jurisdiction, if any.[75]

This dissertation will thus offer a summarized study of the above-mentioned criteria, which is preliminary for a correct understanding of the issue of immunity of State officials from foreign criminal jurisdiction and of the territorial "offence" exception.

A. Territorial jurisdiction

a. The territoriality principle

Criminal jurisdiction is usually assessed with respect to the principle of territoriality.[76] This is so because of the principle of sovereignty,[77] according to which each State has a duty to maintain order within its national boundaries [78] and to refrain from exercising such a power in other States' territories. The concept of sovereign State within the international community can be deemed to have existed since a plurality of groups coexisted and established relationships amongst themselves within a social dimension.[79] The concept of territorial supremacy is also expressed by the latin phrase: *"Qui in territorio meo est, etiam meus subditus*

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[74] See, in this respect Reydams Luc's analysis of the work of Pappas Claudia: Reydams, *Universal Jurisdiction. International and Municipal Legal Perspectives* (n. 35) at 23-24 commenting and quoting Pappas (n. 71) at 85-87].

[75] Reydams, *Universal Jurisdiction. International and Municipal Legal Perspectives* (n. 35) at 24.

[76] Akehurst (n. 36) at 152.

[77] Christian Ponti, *Crimini Transnazionali e diritto internazionale* (Giuffrè, 2010) at 142; Riccardo Luzzatto and Ilaria Queirolo, 'Sovranità territoriale, "Jurisdiction" e regole di immunità', in Stefania Bariatti, Sergio M. Carbone, Massimo Condinanzi, Luigi Fumagalli, Gabriella Gasparro, Paola Ivaldi, Riccardo Luzzatto, Francesco Munari, Bruno Nascimbene, Ilaria Quierolo, Alberto Santa Maria, a cura di: Sergio M. Carbone, Riccardo Luzzatto, Alberto Santa Maria, *Istituzioni di diritto internazionale* (Giappichelli, 2006) at 203.

[78] Akehurst (n. 36) at 152.

[79] On the existance of the international juridical community even in ancient times, see: Bruno Paradisi, 'I fondamenti storici della comunità giuridica internazionale', in Bruno Paradisi, *Civitas Maxima, Studi di Storia del diritto internazionale, I* (Olschki Ed., 1974) at 24 et seq. For a complete treatise on the origins of the international community, see: Roberto Ago, 'Caratteri generali e origini storiche della comunità internazionale e del suo diritto, Introduzione al corso di diritto internazionale' (2002) Quad. 6, La Comunità Internazionale, Rivista Trimestrale della Società Italiana per l'Organizzazione Internazionale (Editoriale Scientifica).

est."[80] However, some scholars trace the origins of the modern concept of the international community back to the downfall of the Western Roman Empire;[81] while others trace it to a much later age, namely the late VIII century – early IX century,[82] or even the end of the XII century.[83] After the outbreak of the Thirty Years War,[84] State authority encountered only a few limitations to the exercise of its absolute powers. These limits included a few set of negative international law norms,[85] the most relevant being the principle of non-interference in other States' domestic affairs.[86] A State was only understood as inherently sovereign, where sovereignty was a necessary element of the term "State".[87] Jurisdiction, in this context, was conceived as a function of sovereignty and was, the same as sovereignty, primarily territorial.[88] Under such a view, jurisdiction *"is a central feature of state sovereignty, for it is an exercise of authority which may alter or create or terminate legal relationships and obligations."*[89] Accordingly, *"the principle of domestic jurisdiction is that the state shall be master in its own house"*.[90] Consistently, while the above-mentioned principle protects a State from other entities' intrusion on its own territory and jurisdiction, it nevertheless limits the exercise of its powers to its own national borders. Surprisingly enough, the territoriality principle has acquired the status of most prominent criterion to establish criminal jurisdiction only from the seventeenth century onwards, since the rise of sovereign States attributed more relevance to the States' control of what happened inside national borders.[91] Historically, in fact, before the

[80] Hans Kelsen, *Principles of International Law* (Robert W. Tucker rev. and ed.) (Rinehart & Company, Inc., 1966) at 318. See also: Benedetto Conforti, *Diritto internazionale* (Editoriale Scientifica, 2013) at 201 et seq.

[81] Paradisi (n. 79) at 45 et seq.

[82] Ago (n. 79) at 60.

[83] Angelo Piero Sereni, *Diritto Internazionale, Vol. II, Organizzazione internazionale* (Dott. A. Giuffrè - Editore, 1956) at 20.

[84] Davids (n. 70) at 392-393.

[85] PCIJ, *The S. S. Lotus* (n. 41) at 10-11; *Accordance with international law of the unilateral declaration of independence in respect of Kosovo*, Advisory Opinion, 22 Jul. 2010, ICJ Reports 2010, p. 403.

[86] See: UNGA Res. 25/2625, A/RES/25/2625, 24 Oct. 1970, Declaration of Principles of International Law Concerning Friendly Relations and Co-operation Among States in accordance with the Charter of the United Nations, [Adopted on a Report from the Sixth Committee (A/8082)]; on the notion of intervention by right, see: Lassa Oppenheim, *International Law: A Treatise* (Longmans, Green and Co., 1905) at 183 et seq.

[87] Davids (n. 70) at 394; on the spatial dimension of the exercise of State sovereignty, see: Antonio Cassese, *Diritto Internazionale* (Il Mulino, 2006) at 77 et seq.; Francesco Salerno, *Diritto Internazionale: Principi e Norme* (Cedam, 2011) at 28; on sovereignty as the foundation of States even at present-time, see: Shaw (n. 38) at 352 et seq.

[88] Davids (n. 70) at 394.

[89] Shaw (n. 38) at 469; Davids (n. 70) at 394.

[90] James E. S. Fawcett, 'Human Rights and Domestic Jurisdiction', in Luard Evan (ed.) *The International Protection of Human Rights* (Thames and Hudson, 1967) at 286.

[91] Cedric Ryngaert, *Jurisdiction in International law* (Oxford University Press, 2008) at 42.

rise of the territoriality principle, the principle of personality was the most widely accepted.[92] The system of absolute authority of State parties established by the Peace of Westphalia entrenched the principle of territoriality. Despite the erosion of that concept, which commenced in the aftermath of the Thirty Years War and continued ever since, most of the old State-centric justifications for the exercise of State jurisdiction have remained untouched.[93] Nevertheless, jurisdiction in international law is nowadays a much more limited concept than the one it originally was.[94]

The principle of territoriality has gained much more attention within common law, rather than civil law, countries, where the exercise of personality and universal jurisdiction has been generally accepted.[95] The use of different criteria by the UK/USA system and continental Europe is due to the different approach the two frameworks have with regard to criminal jurisdiction. Indeed, while the former is mainly accusatorial, where the interest of due process prevails over substantive justice, the latter is more inquisitorial, where the interest of unveiling the truth trumps some due process guarantees for the defendant.[96] This explains why the territoriality principle has found more acceptance in the common law countries, as it was felt that the defendant's interests could be less waived if adjudicated right in the place where the acts were perpetrated.[97] This is due to the fact that the members of the jury were requested to adjudicate cases on the basis of their knowledge of the facts, and this restricted the cases upon which they could exercise their jurisdiction to those which took place within their territory.[98] On the contrary, substantive justice and attaining judicial truth could not be limited by territorial constraints in civil law countries.[99]

In England, the territoriality principle has been widely applied by jurisprudence[100] and has mainly found three types of justifications. First, the so-called doctrine of venue requires an

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[92] Ryngaert (n. 91) at 42.

[93] Davids (n. 70) at 394.

[94] Davids (n. 70) at 394; see also: *Republic of Italy thro' Ambassadors and others v Union of India and others* (C) Writ Petition No. 135 of 2012 with Special Leave Petition (Civil) No. 20370 of 2012, *Massimiliano Latorre and others v Union of India and others*, Supreme Court of India, judgment of Judge Chelameswar (18 January 2013), (2013) 4 SCC 721.

[95] Ryngaert (n. 91) at 43.

[96] Ryngaert (n. 91) at 43.

[97] Ryngaert (n. 91) at 43.

[98] Akehurst (n. 36) at 163.

[99] Ryngaert (n. 91) at 43.

[100] See: Ryngaert, *ibid.* (n. 91) at 55; see the following cases, also referred to by Rynagaert e.g.: *The Queen v Keyn*, England, Crown Case Reserved, 13 Nov. 1876, (1876) 2 QBD 90; *MacLeod v Attorney-General for New*

offence to be adjudicated in the place where it occurred for reasons of evidence gathering.[101] This is of course a historical legacy of evidence gathering in ancient times, where evidence could be more easily collected at the scene of the crime.[102] Also, a jury whose origins were the same as those of the defendant, offered more serious warrantees of impartiality.[103] Consistently, extraterritorial offences were rarely tried before English juries.[104] Even when, in the nineteenth century, the evidentiary rules expanded their scope and formal witnesses entered criminal trials, the principle of territoriality remained the most relied-upon in England,[105] with the only exception being cases concerning the law of the sea (Admiralty cases), which were mainly presented as civil-law claims.[106] The second explanation considers the concept of crime as an offence against the society where it takes place or against the sovereign,[107] rather than as an offence against the victim of the single perpetrated crime, as in civil law countries.[108] A third ground for justification is provided for by the principle of non-intervention, as elaborated under customary international law in the twentieth century.[109] According to this principle, territoriality is the only criterion which respects the principle of non-intervention in another State's domestic affairs.[110] Thus, if a conduct did not occur or had harmful consequences within the country's own borders, the exercise of jurisdiction by that State would not be justified under

South Wales, England, Privy Council, 23 Jul. 1891, [1891] AC 455, at 458 (Lord Halsbury LC) mentioning the principle: *"Extra territorium jus dicenti impune non paretur"*; *The Queen v Jameson and others*, England, Divisional Court, 21 Jul. 1896, [1896] 2 QB 425, at 430; *Cox v Army Council*, England, House of Lords, 15 Mar. 1962, [1963] AC 48.

[101] Ryngaert (n. 91) at 56-57.

[102] Ryngaert (n. 91) at 56; Albert Levitt, 'Jurisdiction over Crimes' (1925) 16 J.Crim.L.& Criminology 316, at 327.

[103] Ryngaert (n. 91) at 56.

[104] Ryngaert (n. 91) at 56; see this case also referred to by Ryngaert: *Regina v Page*, Courts-Martial Appeal Court, 10 Nov. 1953, [1954] 1 QB 170, specifically at 175.

[105] Ryngaert (n. 91) at 56, see some examples of jurisprudence quoted by Ryngaert: e.g. *Amsterdam and others v Minister of Finance* Israel, Supreme Court sitting as High Court of Justice, 11 Sep. 1952, 19 ILR 229, 231; *The Queen v Jameson and others* (n. 100) at 430.

[106] Ryngaert (n. 91) at 56-57.

[107] Ryngaert (n. 91) at 57; Michael Kirby, 'Universal Jurisdiction and Judicial Reluctance: A New "Fourteen" Points'', in Stephen Macedo (ed.) *Universal Jurisdiction. National Courts and the Prosecution of Serious Crimes under International Law* (University of Pennsylvania Press, 2004) at 246 et seq.; Walter Wheeler Cook, 'The application of the criminal law of a country to acts committed by foreigners outside the jurisdiction' (1934) 40 WVLQ 303, at 328.

[108] Ryngaert (n. 91) at 57.

[109] Ryngaert (n. 91) at 57; see also, in comparison: Levitt (n. 102) at 328.

[110] Ryngaert (n. 91) at 57, quoting: *Treacy v DPP*, England, House of Lords, 15 Dec. 1970, [1971] AC 537, at 561.

international law. Despite the fact that the *Lotus* case[111] has enormously widened the scope of the English law of jurisdiction,[112] still concerns remain on the role of national bodies like the Parliament in the extension of the criterion of territoriality. It would then be upon the English Parliament to pass a normative instrument which may extend the ambit of the law; in the absence, *"statutes are presumed not to apply extraterritorially, a presumption which is also employed by the US courts."*[113] In most recent times, both England and the United States of Aemrica [hereinafter USA] have resorted to the application of extraterritorial principles, mainly when implementing international conventions fighting terrorist crimes, which required mandatory extraterritorial jurisdiction.[114]

Within the USA, the criterion of territoriality has been vastly applied by the courts in the name of different principles. While at the beginning territoriality was justified by reasons pertaining to public international law itself, throughout the years it started to be conceived as a domestic principle anchored in the USA legislature.[115] Although some exceptions applied mainly in the fields of economic regulation and criminal law,[116] the underlying idea remained the one which inferred that the territorial principle could only be waived by a clear and unequivocal position of the USA Congress.[117]

The territoriality principle poses serious questions of *locus commissi delicti* when it comes to cross-borders offences.[118] Indeed, it is not always the case that a crime is perpetrated entirely within a State's own borders and in these cases some criteria have been elaborated in order to determine which State can exercise legitimate jurisdiction over those acts. The issue

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[111] PCIJ, *The S. S. Lotus* (n. 41).

[112] Ryngaert (n. 91) at 58.

[113] Ryngaert (n. 91) at 58; see the following cases, also referred to by Ryngaert: *Treacy v DPP* (n. 110) at 551; *Air India v Wiggins*, England, House of Lords, 3 Jul. 1980, [1980] 1 WLR 815; *The Queen v Jameson and others* (n. 100); *Lawson v Fox*, England, House of Lords, 12 Feb. 1974, [1974] AC 803; *R (Al Skeini and others) v Secretary of State for Defence*, England, House of Lords, 13 Jun. 2007, [2007] UKHL 26, 133 ILR 499, paras 27-33, at 710-712 (Lord Bingham of Cornhill); *Foley Bros, Inc. et al. v Filardo*, United States, Supreme Court, 7 Mar. 1949, 69 S. Ct. 575 (1949) at 577, para 285 (2); *Equal Employment Opportunity Commission v Arabian American Oil Company and Aramco Services Ali Boursan v Arabian American Oil Company and Aramco Services*, United States, Supreme Court, 26 Mar. 1991, 90 ILR 617.

[114] Ryngaert, (n. 91) at 58; see the following case to which Ryngaert referred (which, in any case, concerns drug trafficking): *Somchai Liangsiriprasert Appellant v Government of the United States of America and Another Respondents*, England, Privy Council, 2 Jul. 1990, [1991] 1 AC 225.

[115] Ryngaert (n. 91) at 59.

[116] Ryngaert (n. 91) at 59.

[117] Ryngaert (n. 91) at 59 and 74.

[118] Ryngaert (n. 91) at 75.

is of primary importance in international criminal law.[119] The criterion which international criminal law has resorted to is that of considering legitimate a State's jurisdiction if at least one constituent element of the crime has been committed on that State's soil.[120] This understanding of the *locus commissi delicti* falls under the definition of *"constitutive elements approach"*.[121] This conclusion finds its theoretical explanation mainly in the intent not to leave untried a considerable number of crimes which occurred across different countries. This approach can be traced back to early ages when the prevailing need was that of assuring that all crimes were adjudicated by a court: the fight against impunity appears to have been the guiding yardstick.[122] Consistently, since the adoption of the *Lotus* judgment,[123] the principle has been applied extensively worldwide.[124] Once it has been established that a State can legitimately exercise jurisdiction over an act if at least one constituent element of the offence has taken place on the State's territory, then the constituent elements of the crime must be defined *per se*. It is thus a widely appreciated principle under international criminal law that the constitutive elements of a crime must be understood under domestic, and not international law.[125] Consistently, whether the domestic law considers the acts or the effects of the act as constituent elements of the offence carries no weight on an international law level, the only consequence being that a State can duly exercise jurisdiction over the conduct that occurred.[126] National systems provide for a domestic notion of constituent elements of the crime and international law makes use of that definition for the sole purpose of recognizing (or otherwise denying) a State's jurisdiction. In any case, public international law does not concur in the elaboration of the concept of constituent elements, which it completely derives from the local legal orders. As for cross-borders crimes, it is noteworthy to underline that the international legal scholarship usually tends to distinguish between *"objective territoriality"* and *"subjective territoriality"*,[127] the

[119] Ryngaert (n. 91) at 75.

[120] Ryngaert (n. 91) at 75.

[121] Ryngaert (n. 91) at 43; Akehurst (n. 36) at 152.

[122] Ryngaert (n. 91) at 75; see also: PCIJ, *The S. S. Lotus* (n. 41) at 23 and 30.

[123] PCIJ, *The S. S. Lotus* (n. 41) at 23-30.

[124] Akehurst (n. 36) at 152-153; Harvard Research on International Law (n. 64) at 480; *Reg v Baxter*, England, Court of Appeal, 11 Feb. 1971, 55 ILR 133; *Treacy v D.P.P.* (n. 110); *People v Robert J. Thomas*, Eire, Supreme Court, 3 Jun. 1954, 22 ILR 295; *Mobarik Ali Ahmed v State of Bombay*, India, Supreme Court 6 Sep. 1957, 24 ILR 156; *Public Prosecutor v D.S.*, Holland, Supreme Court, 4 Feb. 1958, 26 ILR 209; *Cour de Cassation pénale de Vaud*, Switzerland, 27 Feb. 1906 – Bistagne, Bulletin de la Jurisprudence Suisse, (1907) 34 J.D.I. privé 518.

[125] Ryngaert (n. 91) at 75.

[126] Ryngaert (n. 91) at 75.

[127] Ryngaert (n. 91) at 76; International Convention for the Suppression of Counterfeiting Currency (adopted 20 Apr. 1929, entered into force 22 Feb. 1931) 112 LNTS 371, art. 9; Convention for the Suppression of the Illicit

former being the case of an offence whose first act has been performed elsewhere but which has been completed within the State's boundaries,[128] the latter being the opposite option where the act has been started on the State's soil and then has been concluded abroad.[129] *"[…] And the only alternative to granting jurisdiction to neither State […] was to grant jurisdiction to both States."*[130]

Other States prefer to apply the so-called *"effects approach"*[131] rather than the *"constitutive elements approach"*.[132] According to the doctrine of effects, whose extreme interpretation leads to the application of universality principle,[133] a State can legitimately exercise jurisdiction over acts which were not committed on its own soil but whose effects were produced on its territory. The link with territory is not given by the place where the act or the offence took place, rather by the place where the final effects of such conducts were felt. This doctrine can be stretched to the point that a State can exercise jurisdiction over an alleged crime whose effects were produced in the very same State even if the conduct did not entail a crime in that State.[134] According to the doctrine of effects, moreover, only the State where the acts has produced primary, and not just secondary, effects can claim jurisdiction.[135] Primary effects must be intended in comparative terms as: *i)* effects which one State feels more direct than the effects felt by other States and *ii)* effects which one State feels more substantial than

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Traffic in Dangerous Drugs (adopted 26 Jun. 1936 and 11 Dec. 1946, entered into force 10 Oct. 1947) 198 LNTS 301; the first alleged case to have applied the distinction between objective and subjective principle appears to be: John Bassett Moore and US Department of State, 'Report on Extraterritorial Crime and the Cutting Case' (1887) US Foreign Rel L 575 at 770; see also: Maier (n. 35) at 67-68.

[128] Ryngaert (n. 91) at 76.

[129] Ryngaert (n. 91) at 76; see also: Akehurst (n. 36) at 152; Harvard Research on International Law (n. 64) at 484-7.

[130] Akehurst (n. 36) at 152.

[131] Akehurst (n. 36) at 153; Harvard Research on International Law (n. 64) at 493-4, 497; *Re Smith*, Mexico Supreme Court, 6 Feb. 1956, 23 ILR 150; *In Re Francisco Wera Homs*, Argentina, Criminal Court of Appeal of the Capital (Case No. 5) 15 May 1936, 8 ILR 253; *United States ex rel. Majka v Palmer*, United States, Circuit Court of Appeals, Seventh Circuit, 16 Oct. 1933, 67 F.2d 146 (US, Circuit Court of Appeals, Seventh Circuit); *United States v Archer*, United States, S.D. California, Southern Division, 26 Jun. 1943, 51 F. Supp. 708 (US, SD California, Southern Division, 1943); *Rivard et al v United States of America*, United States, Court of Appeals, Fifth Circuit, 18 Apr. 1967, 375 F.2d 882 (US, Court of Appeals, Fifth Circuit, 1967); *Novic v Prosecutor of the Canton of Basel-Stadt*, Switzerland, Court of Cassation, 27 Oct. 1955, 22 ILR 515; Switzerland, Criminal Code (1937) art. 7.

[132] Akehurst (n. 36) at 154.

[133] Akehurst (n. 36) at 153.

[134] Akehurst (n. 36) at 154; see, e.g.: *United States ex rel. Majka v Palmer* (n. 131); see also, e.g.: *People v Chase*, United States, Superior Court of California, Appellate Division, Los Angeles County, 25 Jun. 1931, 6 ILR 138.

[135] Akehurst (n. 36) at 154; Mexico, Federal Criminal Code (1931) art.2; Switzerland, Criminal Code (n. 131) art. 7.

the effects felt in other States.[136] This requirement is usually referred to as the *"requirement of directness"*.[137] The principle limits application to States that have a legitimate interest in exercising jurisdiction over the act and, consistently, some scholars contend that the doctrine of effects is most likely to maintain jurisdiction closer to national boundaries, thus excluding the risk of extraterritoriality which is innate in the constituent elements approach.[138]

To complete the framework, crimes performed through omission must be briefly mentioned. For those acts, in the case of a lack of an overt action, the territoriality principle appears to be most prominent one, as only the State where the agent is present can legitimately request the enforcement of a positive duty to the subject.[139] In doing so, the risk of applying the principle of universality, and thus rendering those acts prosecutable wherever the omission occurs (that is: in every single State of the globe at the very same time) is prevented.[140]

In conclusion, nowadays, the territoriality principle is nowadays the basic principle for the exercise of jurisdiction over criminal offences. However, despite it being the most common ground on which criminal jurisdiction is assessed, it is not always the most reliable one. Indeed, since at times there may be different territorial links to the same act, or there may be actions taking place on different States' soils, the territorial criterion may not suffice as a safe cornerstone to resolve a dispute between jurisdictions. This is precisely the reason why additional, alternative or supplemental means are required to assess which State can effectively exercise jurisdiction in such cases.

B. Extraterritorial jurisdiction

The issue of extraterritorial jurisdiction is of the utmost importance under international law. The leading case on this issue is the *Lotus* case brought before the Permanent Court of International Justice [hereinafter PCIJ] in 1927.[141] Thus, a study on extraterritorial jurisdiction cannot be exempt from considering the findings and reasoning of this landmark decision which has been crucial to the development of criminal jurisdiction. Indeed, not only did the *Lotus*

[136] Akehurst (n. 36) at 154.
[137] Akehurst (n. 36) at 154.
[138] Akehurst (n. 36) at 155.
[139] Akehurst (n. 36) at 156.
[140] Akehurst (n. 36) at 156.
[141] PCIJ, *The S. S. Lotus* (n. 41).

judgment first deal with the issue *per se*, but it also posed a more serious question: *"do we set out to examine whether extraterritorial jurisdiction is permissible or merely not prohibited?"*[142] Moreover, from some authors' viewpoint, the findings of the *Lotus* judgment allowing extraterritorial jurisdiction stem precisely from the idea that the commonality of interests of a people are first of all territorially defined.[143] In order to properly approach the question, a brief summary of the case at hand seems appropriate. On 2 Aug. 1926 a collision occurred between a French mail steamship, the S. S. Lotus, in route to Constantinople, and a Turkish collier, the S. S. Boz-Kourt, between five and six nautical miles north of Cape Sigri (Mitylene, Greece).[144] The collision resulted in the sinking of the Boz-Kourt and the death of eight Turkish nationals. The S. S. Lotus then continued on its course to Constantinople, where it arrived on 3 Aug.. The Turkish authorities, pursuant to art. 6 (1) of the Turkish Penal Code,[145] launched joint criminal proceedings against both the French and Turkish commanders, who were then found guilty of manslaughter.[146] France challenged Turkey's jurisdiction before the PCIJ, contending that Turkey's exercise of jurisdiction over the S. S. Lotus violated general international law. Accordingly, France also claimed damages from Turkey. On the one hand, France maintained that Turkey had to prove to be entitled by some specific international law provision to exercise jurisdiction over the French steamer; on the other hand, Turkey affirmed that, given that there was no overt prohibition under general international law, the exercise of jurisdiction was permissible.[147] The PCIJ, by the President's casting vote, gave judgment to the effect that *"[…] Turkey, by instituting criminal proceedings in pursuance of Turkish law against Lieutenant Demons, officer of the watch on board the Lotus at the time of the collision, has not acted in conflict with the principles of international law, contrary to Article 15 of the Convention of Lausanne of July 24th, 1923, respecting conditions of residence and business and jurisdiction; that, consequently, there is no occasion to give judgment on the question of the pecuniary reparation which might have been due to Lieutenant Demons if Turkey, by prosecuting him as above stated, had acted in a manner contrary to the principles of*

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[142] Luc Reydams, *Universal Jurisdiction, International and Municipal Legal Perspectives* (Oxford University Press, 2004) at 11; see also: Gerald Fitzmaurice, 'The Law and Procedure of the International Court of Justice, 1951-1954: General Principles and Sources of Law' (1953) 30 B.Y.I.L., 1 at 8-18.

[143] Maier (n. 35) at 65-66.

[144] PCIJ, *The S. S. Lotus* (n. 41) at 10.

[145] Reydams, *Universal Jurisdiction, International and Municipal Legal Perspectives* (n. 142) at 11; see: PCIJ, *The S. S. Lotus* (n. 41) para 5, at 14 referring to: Turkish Penal Code, Law No. 765 of Mar. 1st, 1926 (Official Gazette No. 320 of 13 Mar. 1926), art. 6.

[146] Reydams, *Universal Jurisdiction, International and Municipal Legal Perspectives* (n. 142) at 11.

[147] Reydams, *Universal Jurisdiction, International and Municipal Legal Perspectives* (n. 142) at 11.

international law […].”[148] Since most controversies on the issue arose from the *dicta*, rather than from the judgment itself,[149] it seems necessary to proceed with an analysis of the legal reasoning of the Court, which went as follows. Public international law is the law of sovereign States, ruled on the basis of treaties or customary international law, or by both. It stems from the above that States, albeit independent and absolute powers, cannot exercise their power at random in the territory of other States. As affirmed by the PCIJ, jurisdiction is in essence territorial; consistently, it can be legitimately exercised outside a State's own territory only if and to the extent that a permissive rule allows it to do so. Until this point the legal rationale of the PCIJ is largely understood and shared by the international legal arena. But the Court does not limit itself to this assertion; it goes far beyond. Indeed, according to the PCIJ, international law leaves the exercise of jurisdiction in their own territory to the States' discretion as it relates to acts which have been performed abroad and in relation to which no permissive rule of international law binds them. *“Far from laying down a general prohibition to the effect that States may not extend the application of their laws and the jurisdiction of their courts to persons, property and acts outside their territory, it leaves them in this respect a wide measure of discretion which is only limited in certain cases by prohibitive rules; as regards other cases, every State remains free to adopt the principles which it regards as best and most suitable. […] In these circumstances, all that can be required of a State is that it should not overstep the limits which international law places upon its jurisdiction; within these limits, its title to exercise jurisdiction rests in its sovereignty.”*[150] Under the above-mentioned reasoning, the Court sets out the so-called *“Lotus principle”*, according to which a State is entitled to do whatever is not explicitly prohibited under international law.[151] The principle is closely linked to the *“immanence theory”*, as opposed to the *“attribution theory”*.[152] The former theory establishes that States are born free and independent. Their sovereignty pre-exists international law, which merely regulates *a posteriori* the immanent rights of the States. Accordingly, international law is regulative in nature, and not constitutive.[153] This viewpoint very much mirrors the Hegelian understanding of a State as the only creator of law, which falls under the

[148] PCIJ, *The S. S. Lotus* (n. 41) at 32.
[149] Reydams, *Universal Jurisdiction, International and Municipal Legal Perspectives* (n. 142) at 12.
[150] PCIJ, *The S. S. Lotus* (n. 41) at 19.
[151] For an analysis of the Lotus principle, see: Martti Koskenniemi, *From Apology to Utopia: The structure of International Legal Argument* (Cambridge University Press, 2005) at 255 et seq.
[152] Reydams, *Universal Jurisdiction, International and Municipal Legal Perspectives* (n. 142) at 13-14.
[153] Reydams, *Universal Jurisdiction, International and Municipal Legal Perspectives* (n. 142) at 13; Fitzmaurice (n. 142) at 9-18.

definition of *"immanence theory"*.[154] To the contrary, the latter theory predicates that sovereignty is in fact allocated by international law to States and non-State entities and that the legal order precedes the sovereignty of States. It will then be upon the State to prove the existence of a binding legal rule which allows and legitimizes the State's action.[155] The international legal scholarship still remains divided over those issues.[156] It is noteworthy to mention that the reasoning behind the *Lotus* principle has been widely criticized by many scholars.[157] However, some writers share the rationale of the *Lotus* judgment[158] and justify it with the States' will *"to retain freedom of decision"*.[159] Following this reasoning, the very same States' reticence to adopt a universal convention on criminal jurisdiction proves this point.[160] The follow-up of this discussion goes as indicated below. One can draw two conclusions from what was stated above:[161] *i)* that extraterritorial jurisdiction is governed by public international law, rather than by States' domestic systems; and [162] *ii)* that international law accepts concurrent jurisdictions and sets out reasonable criteria on which to rely for the assessment of the final *forum*.[163]

As previously explained with regard to the territoriality principle, continental European and common law countries have different approaches towards the principles of extraterritorial jurisdiction.[164] If the former countries have elaborated introductory provisions on the scope of the territorial and extraterritorial principles in their criminal codes, even though they do not

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[154] Reydams, *Universal Jurisdiction, International and Municipal Legal Perspectives* (n. 142) at 13.

[155] Koskenniemi (n. 151) at 231, who speaks of the "legal" and "pure facts" approaches to sovereignty, at 228 et seq.

[156] See, for all, e.g.: ICJ, *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 8 Jul. 1996, ICJ Reports 1996, p. 266, para 2E of the dispositif.

[157] Reydams, *Universal Jurisdiction, International and Municipal Legal Perspectives* (n. 142) at 14; Frederick A. Mann, 'The Doctrine of Jurisdiction in International Law' (1964) 111 RCADI 1, at 35; ICJ, *Barcelona Traction, Light and Power Company, Limited* (Belgium v Spain), Judgment, 5 Feb. 1970, ICJ Reports 1970, p. 3, separate opinion of Judge Fitzmaurice, para 70.

[158] Reydams, *Universal Jurisdiction, International and Municipal Legal Perspectives* (n. 142) at 14.

[159] Reydams, *Universal Jurisdiction, International and Municipal Legal Perspectives* (n. 142) at 14.

[160] Reydams, *Universal Jurisdiction, International and Municipal Legal Perspectives* (n. 142) at 14-15.

[161] Reydams, *Universal Jurisdiction, International and Municipal Legal Perspectives* (n. 142) at 15.

[162] Reydams, *Universal Jurisdiction, International and Municipal Legal Perspectives* (n. 142) at 15; Kelsen (n. 80) at 178; see also: Mann (n. 157) at 10-11.

[163] Reydams, *Universal Jurisdiction, International and Municipal Legal Perspectives* (n. 142) at 15; Brownlie (n. 35) at 309-310; S. Z. Feller, 'Concurrent Criminal Jurisdiction in the International Sphere' (1981) 16 Is.L.R. 40, at 41 et seq.

[164] Ryngaert (n. 91) at 85.

establish the grounds for personality, protective or universal jurisdiction,[165] the latter ones do not feature general provisions on extraterritorial jurisdiction, but have developed grounds for its application in their widespread practice.[166] This may be traced back to the rationale which underlies the two systems. In fact, civil law countries share the view that the territoriality principle is the main criterion to rely on, and subsequently develop other principles. The territorial principle is of primary importance for those countries, since it is indeed the *locus commissi delicti* which determines whose jurisdiction shall be applied: if one constituent element of the perpetrated crime has been committed within a given territory, then that territorial State can legitimately claim jurisdiction over the act.[167] In this sense, the criminal codes of those countries do not establish territorial exclusivity, where domestic criminal law applies territorially to the exclusion of foreign criminal law, rather they prescribe case by case situations where non-territorial grounds for jurisdiction may apply,[168] namely: acts committed over foreign aircrafts,[169] offences carried out by military personnel or people otherwise subject to the military laws,[170] or cases of so-called *"vicarious jurisdiction"*,[171] where extradition is rendered unfeasible.[172] By contrast, common law countries, typically understood as England and the USA, do not present specific prescriptions on extraterritorial jurisdiction.[173] This may be due to these States' reluctance to applying non-territorial grounds for jurisdiction which finds different explanations: their scarce confidence in the use of hearsay evidence and emphasis on cross-examination, their geographical characterization, with mostly sea rather than land boundaries, which limits the occurrence of transboundary crimes and also the idea that criminal law is mainly retributive, as opposed to the civil law countries concept of preventive criminal law.[174] Indeed, while the retributive concept of criminal law conceives crimes as offences against the territorial sovereign, and thus does not feel the need to punish

[165] Ryngaert (n. 91) at 85-88, referring to: France, Criminal Code (1994), art. 113-2; Netherlands, Criminal Code (1881) art. 2; Germany, Criminal Code (1998), s 3; Belgium, Criminal Code (1867), arts. 3-4.
[166] Ryngaert (n. 91) at 88.
[167] Ryngaert (n. 91) at 86.
[168] Ryngaert (n. 91) at 86.
[169] Ryngaert (n. 91) at 86, mentioning: France, Criminal Code (n. 165), art 113-11; Netherlands, Criminal Code (n. 165) art. 4 (7).
[170] Ryngaert (n. 91) at 86, referring to: Belgium, Criminal Procedure Code (1808) art. 10 bis PT.
[171] Ryngaert (n. 91) at 86.
[172] Ryngaert (n. 91) at 86 and at 102 et seq.
[173] Ryngaert (n. 91) at 86.
[174] Ryngaert (n. 91) at 86-87.

those which occurred on other States' soils, the preventive or *"cosmopolitan"* theory[175] perceives law as *"remedial"*, when persons can be subject to remedial treatment, or otherwise subjects them to permanent detention *"where "cure" is impossible"*.[176] Consistently, common law countries have their substantive provisions defining both the crime and establishing its scope *ratione loci*;[177] contrariwise, civil law countries list the crimes under separate jurisdictional chapters.[178] The following paragraphs will analyze the extraterritoriality principles, as defined above.

a. The active personality principle

The active personality principle, also known as the nationality principle, prescribes that a State can legitimately exercise jurisdiction over crimes perpetrated by its own nationals found outside the territory, even when the perpetrator has acquired a new nationality or has just become a national after the commission of the crime.[179] While, in this respect, some States require the act to be *per se* criminal also under the *lex loci*, or allow jurisdiction only in the event of serious crimes or when the injured party or the governmental authority require prosecution (e.g. France, Turkey), other States do not necessitate similar requirements (e.g. the former USSR, India, South Korea, Austria, Poland).[180] From a historical perspective, the active personality principle has been embraced by countries which then became the civil law ones earlier in the Medieval times. Later on, the first codifications of the principle in States' legislations can be found in mid-nineteenth century in many States of the German Confederation, the Swiss cantons and many former Medieval city States of Northern Italy like Sardinia and Tuscany.[181] Conversely, the Anglo-Saxon countries had developed a system based more on territoriality rather than on nationality.[182] Territoriality played such an essential role in the assessment of jurisdiction for common law countries that it was, at times, and brought to

[175] On the cosmopolitan theory, see: Cook (n. 107) at 329.
[176] Cook (n. 107) at 328; Ryngaert (n. 91) at 87.
[177] Ryngaert (n. 91) at 87.
[178] Ryngaert (n. 91) at 87.
[179] Ryngaert (n. 91) at 88; see also: Akehurst (n. 36) at 156.
[180] Akehurst (n. 36) at 156.
[181] Ryngaert (n. 91) at 90.
[182] Ryngaert (n. 91) at 90; see, as few examples of application of active personality principle, the following England's Acts referred to by Ryngaert: Act of 1541, 33 Henry VIII, c 23; Act of 1813, 43 George III, c 113; Act of 1861, 24 and 25 Victoria c 100; Act of 1883, 46 Victoria c3.

extreme consequences.[183] For example, some States in the USA made it a criminal offence to leave the State with the aim of perpetrating a criminal action outside the national borders.[184] While some authors share belief in the underlying principle of these laws, that is to prevent crimes against the State when the author knowingly leaves the country in order to carry out the act where this is not punished,[185] some scholars underline the unreasonable consequences of that restricted interpretation of the principle, that would imply the State's legitimacy in prosecuting and punishing people who also have just briefly passed through its territory and have conceived that criminal intention precisely therein.[186]

The underlying concept of the active personality principle is that a sovereign State is ultimately an ensemble of persons, subject to the very same set of rules and to the very same authority.[187] Even though the commonality of interests between nationals of the same State usually arises because of the territorial bond among them,[188] the global relationships of our time concede that instead, at times, that very same bond transcends territorial borders.[189] Consequently, subjects need to be treated equally, despite their location inside or outside their own State. It is not the territory itself which determines a State's legitimacy to prosecute and punish, rather the nationality, which comes to be the very bond between a person and the State entity. The international legal scholarship has justified the principle of active personality with different motivations,[190] namely: the necessity to avoid that nationals commit crimes soon after they return to their home country or that they go unpunished, the difficulty, sometimes impossibility, in establishing the exact location where a crime took place,[191] the need to have a territorial State nonetheless represented, even and most of all, when the other State refuses extradition[192] and, also, the need to protect a State's reputation from the outrageous conduct of its nationals abroad. The latter justification has been explained as the offset of the so-called

[183] Akehurst (n. 36) at 157.
[184] Harvard Research on International Law (n. 64) at 485-486.
[185] Akehurst (n. 36) at 157; Henri F. A. Donnedieu de Vabres, *Les principles modernes du droit penal international* (Libraire du Recueil Sirey, 1928) (Reprinted in facsimile edition: Editions Panthéon-Assas, L.G.D.J. Diffuseur, 2004) at 391.
[186] Akehurst (n. 36) at 157.
[187] Ryngaert (n. 91) at 90.
[188] Maier (n. 35) at 65.
[189] Maier (n. 35) at 65.
[190] Ryngaert (n. 91) at 90.
[191] Ryngaert (n. 91) at 90; Donnedieu de Vabres (n. 185) at 80-81.
[192] Ryngaert (n. 91) at 90; Donnedieu de Vabres (n. 185) at 114 et seq.

diplomatic protection States pledge to their own nationals abroad.[193] Indeed, the *"allegiance theory"*[194] puts the State's and its nationals' rights on the same level: if a State can legitimately protect its nationals which are rendered victims of an internationally wrongful act carried out by another State, then it follows that those nationals can be prosecuted and punished by their own State if they engage in criminal activities abroad. As such, the prosecution by a State of its own nationals is universally accepted nowadays.[195] Moreover, while some scholars perceive this type of prosecution as an issue of national, and not international, concern,[196] other authors have contended that each State has a duty under international law to prosecute crimes committed by its own nationals.[197] The nationality principle may also be resorted to in cases where the conduct is not punishable in the territorial State, even where issues of sovereignty may arise.[198] It is also noteworthy to underline that, although the majority of national codified crimes covered by the active personality principle limit the application of the principle to the most serious offences,[199] in practice international law applies it to all types of crimes, regardless of their degree of gravity.[200] At times, as for example in the Italian Criminal Code of 1889,[201] the same conduct is attributed a lighter punishment than the one it would be sentenced if perpetrated within the State's boundaries. Some additional observations are in order. In fact, in some countries the active personality principle shifts the criterion of nationality to that of permanent residence (e.g. Denmark, Iceland, Liberia, Norway and Sweden) or even to simple residence (e.g. a few cases in the UK).[202] Other personal links such as residence are thus equated to that of nationality and jurisdiction is consistently assessed with regard to them. Likewise, some States maintain to hold extraterritorial jurisdiction over members of their

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[193] Ryngaert (n. 91) at 90.

[194] Ryngaert (n. 91) at 90; Donnedieu de Vabres (n. 185) at 62-64, speaking of the Italian "doctrine des nationalités"; Geoffrey R. Watson, 'Offenders Abroad: the case for nationality-based criminal jurisdiction' (1992) 17 Yale J.Int'l L. 41 at 68 et seq.

[195] Akehurst (n. 36) at 156; on the passive personality principle, see: Watson, 'The Passive Personality Principle' (n. 67) at 2 et seq.

[196] See, for all: Harvard Research on International Law (n. 64) at 519.

[197] Ryngaert (n. 91) at 89.

[198] Ryngaert (n. 91) at 89; Watson, 'Offenders Abroad: the case for nationality-based criminal jurisdiction' (n. 194) at 77-79.

[199] Harvard Research on International Law (n. 64) at 523.

[200] Harvard Research on International Law (n. 64) at 531.

[201] Ryngaert (n. 91) at 90; see: Italy, Criminal Code (1889) art. 5; see also, in this respect: Donnedieu de Vabres (n. 185) at 63-64.

[202] Akehurst (n. 36) at 156-157; for some examples of UK acts basing jurisdiction upon residence, see the following, indicated by Akehurst: Slave Trade Act (1824) s 9; Exchange Control Act (1947) s I (I); Strategic Goods (Control) Order (1959); see, more generally: Harvard Research on International Law (n. 64) at 533.

armed forces and over their civilian officials,[203] same as over the members of the crew of their merchant vessels.[204]

The framework would not be complete without a short consideration on corporations. In fact, nationality with respect to corporations operating abroad has always represented an issue in both international and trans-national law. The question concerns whether to use formal or substantive criteria in order to establish the nationality of corporations. The former criteria consider the place of incorporation or the main headquarters of the corporation in determining the corporation's nationality; the latter takes into account the nationality of the majority of the company's shareholders.[205] It is indeed interesting to note that the ICJ, in the leading case on the subject, the *Barcelona Traction Light and Power Co., Ltd.* (Belgium v Spain)[206] and also in a subsequent concurrent judgment, the so-called *Affaire Diallo* (Republic of Guinea v Democratic Republic of the Congo)[207] held in favour of the first theory, thus conceding that formal requirements suffice to determine the nationality of a corporation operating abroad. By doing so, the ICJ rejected the *"control theory"*, which reversely accepts that a State exercises jurisdiction over foreign corporations, if and to the extent that they are controlled by the State's nationals or corporations.[208] As a matter of fact, the theory of the ICJ has been considered the outstanding authority in the determination of the nationality of corporations since its adoption, even though some scholars have predicated that, in the future, international law shall adopt new and more suitable criteria, in light of those adopted by domestic legal systems.[209]

As a concluding remark, one may note that the application of the territoriality principle and of the active personality principle may give rise to two legitimate, thus concurrent, jurisdictions over the same act perpetrated by the same author.[210] Indeed, limitations must be drawn to the principle of nationality, primarily in the name of reasonableness.[211] For instance, in the event that the principle of territoriality may clash with that of nationality, it is a business

[203] See, for instance: Harvard Research on International Law (n. 64) at 539-541.
[204] Akehurst (n. 36) at 157.
[205] Benedetto Conforti, *Diritto internazionale* (Editoriale Scientifica, 2011) at 239 et seq.
[206] ICJ, *Barcelona Traction, Light and Power Company, Limited* (n. 157), para 32, part. 88.
[207] ICJ, *Ahmadou Sadio Diallo* (Republic of Guinea v Democratic Republic of the Congo), Preliminary Objections, Judgment, 24 May 2007, ICJ Reports 2007, p. 582, para 61.
[208] Ryngaert (n. 91) at 91.
[209] Andrea Bianchi, 'Comment on Maier Harold G., Jurisdictional Rules in Customary International Law', in Karl Matthias Meessen (ed.) *Extraterritorial Jurisdiction in Theory and Practice* (Kluwer, 1996) at 93-94.
[210] Maier (n. 35) at 68.
[211] Mann (n. 157) at 90.

of international law to resolve the conflict: scolarship will then purpose *"the test of closeness of connection"*, the application of which will presumably allow municipal, thus territorial, laws to prevail.[212] Once more, a weighing and balancing of different sets of interests will take place, and the most reasonable one will usually turn out to be the most consistent with international law.

b. The passive personality principle

According to the passive personality principle, jurisdiction is assessed on the basis of the victim's nationality.[213] While it is generally accepted that it is the State's interest to have a wrongdoer prosecuted if the victim of the perpetrated crime is one of its nationals,[214] still it is doubtful whether the victim's nationality can arise to a criterion alone for the assessment of jurisdiction.[215] Some scholars contend that this is precisely *"the most aggressive basis for extraterritorial jurisdiction"*[216] and that it is not justified by any aim of repression, nor by the internal organization of the national judicial systems; on the contrary, it seems to foster conflicts of jurisdiction between States, in name of their egoism to adjudicate certain crimes.[217] For those reasons, already at the times of the *Lotus* case, this criterion was rejected in many dissenting opinions.[218] Brought to its extreme length, the principle would subject the author of a crime to the laws of a State they do not even know, provided that it is unlikely that they already know the nationality of the victim of the crime they are about to commit beforehand.[219] This is also more self-evident when compared with the principle of active personality, which correctly assumes that an individual knows and respects the laws of both the territorial and the

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[212] Mann (n. 157) at 90, speaking of *"the test of closeness of connection"*.

[213] Ryngaert (n. 91) at 92.

[214] Ryngaert (n. 91) at 92; Watson, 'The Passive Personality Principle' (n. 67) at 18.

[215] Ryngaert (n. 91) at 92; Harvard Research on International Law (n. 64) at 579.

[216] Eric M. Cafritz and Omer Tene, 'Article 113-7 of the French Penal Code: the Passive Personality Principle' (2003) 41 Colum.J.Transnat'l L. 585, at 599; Ryngaert (n. 91) at 92; on the controversial nature of the passive personality principle, see also: Watson, 'The Passive Personality Principle' (n. 67); Harvard Research on International Law (n. 64) at 579.

[217] Ryngaert (n. 91) at 92-93; Donnedieu de Vabres (n. 185) at 170, claiming that *«Ici se manifeste l'égoïsme des Etats[…] »*.

[218] PCIJ, *The S. S. Lotus* (n. 41) at 14-15; PCIJ, *The S. S. Lotus* (n. 41) Dissenting Opinion of Judge Loder at 36; Dissenting Opinion of Judge Finlay at 55-8; Dissenting Opinion of Judge Nyholm at 62; Dissenting Opinion of Judge Moore at 91-3; see also: Watson, 'The Passive Personality Principle' (n. 67) at 7-8.

[219] Ryngaert (n. 91) at 94; Jürgen Meyer, 'The Vicarious Administration of Justice: An Overlooked Basis of Jurisdiction' (1990) 31 Harv.Int'l L.J., 108 at 113-114.

national State.[220] Contrariwise, by subjecting an individual to laws he is not needed to know nor to respect, the principle of passive personality fails to achieve the very ultimate aim of criminal law, that is the deterrence of crimes.[221] It is precisely for the above-mentioned reasons that some international legal scholarship (mostly from common law countries) contends that the principle of the victim's nationality should be considered as *"an excess of jurisdiction"*[222] and mostly refuses its validity.[223] Precisely for the above-explained reasons, the Harvard Research Project took into account, but then rejected, the principle at stake.[224]

Nevertheless, despite the inconsistencies indicated above and some authors' requests to abandon the principle,[225] State practice authorize it to be applied as a basis for jurisdiction, when some types of crimes, often *"occurred against the background of the explosion of international terrorism"*,[226] are concerned.[227] Also, international conventions encompassing international terrorism and torture accept the use of the passive personality principle.[228] It is, consistently, upon the nature of the crime at hand, or upon its degree of seriousness, that the application of the passive personality principle rests.[229] Even so, one must also acknowledge that State practice today has broadened the scope of the criterion under consideration to the extent that it may be applied, with the required limitations, to crimes not amounting to a degree of gravity similar or comparable to that of terrorism.[230]

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[220] Ryngaert (n. 91) at 93; Watson, 'Offenders Abroad: the case for nationality-based criminal jurisdiction' (n. 194) at 79.

[221] Ryngaert (n. 91) at 93; Watson, 'The Passive Personality Principle' (n. 67) at 19.

[222] Mann (n. 157) at 92; Ryngaert (n. 91) at 94.

[223] Mann (n. 157) at 91-92.

[224] Harvard Research on International Law (n. 64) at 579; Maier (n. 35) at 68; Mann (n. 157) at 92 referring to the fact that *"the Harvard Research itself did not sanction it"*.

[225] Ryngaert (n. 91) at 94; Meyer (n. 219) at 113-114.

[226] Rosalyn Higgins, *Problems and Process: International Law and How we use it* (Oxford University Press, 1994) at 66; see: Ryngaert (n. 91) at 94.

[227] Ryngaert (n. 91) at 94; see also: ICJ, *Arrest Warrant of 11 April 2000* (n. 27) Separate Opinion of Judges Higgins, Kooijmans and Buergenthal, para 47, Separate Opinion of Judge Rezek para 5, Separate Opinion of Judge Guillaume para 4.

[228] See, inter alia: Convention on Offences and Certain Other Acts Committed on Board Aircraft (adopted 14 Sep. 1963, entered into force 4 Dec. 1969) 704 UNTS 219, art. 4(b); Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (adopted 10 Mar. 1988, entered into force 1 Mar. 1992) 1678 UNTS 221, art. 6 (2) (b); Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, (adopted 10 Dec. 1984, entered into force 26 Jun. 1987) 1465 UNTS 85 [hereinafter Convention against Torture] art. 5 (1) (c).

[229] Ryngaert (n. 91) at 94; see also: Restatement (Third) of US Foreign Relations Law (1987), para 402, cmt g; Brownlie (n. 35) at 302.

[230] Ryngaert (n. 91) at 94; Harvard Research on International Law (n. 64) at 579.

Moreover, the application of the criterion at hand poses more serious questions on the interplay of different principles of international criminal law. Indeed, if it is truistic to state that the employment of passive personality strengthens the victims' rights, and thus dignifies them, it also gives rise to a series of imbalances which need to be reconciled.[231] The first imbalance takes place between the principle of passive personality and that of *ne bis in idem*: the exercise of jurisdiction by the State of the victim's nationality would not prevent the accused from being subject to a second trial in his country of origin as well. Additionally, the principle may protect the rights of the victim even when this may lead to a weakening of the rights of the accused, by not guaranteeing the presumption of innocence that must underlie the whole pre-trial and trial phases.[232] Consistently, there appear to be only two possibilities to restore a balancing of interests: the first one would entail the abolition of such a principle, so that inconsistencies would simply not arise; the second, and most realistic one, would request the principle of *ne bis in idem* to reach a transnational degree.[233] While indeed the former alternative, by removing the issue of controversy, would also accept that a certain number of crimes go unpunished, the latter simply extends a principle whose validity is uncontested in most countries. And then the issue would just go back to the question of which and how broad limitations shall be imposed to the passive personality principle.[234]

At present-time, thus, the principle is considered as follows. It certainly has not acquired the status of a customary norm,[235] nor has any agreement been reached on its scope.[236] Following the *Lotus* case,[237] the reasoning would go *a contrario* here: the lack of any explicit provision on the use of such a principle by international law norms does not imply a ban on them.[238] On the other hand, its admissibility is partly confirmed by the absence of any explicit disagreement on its legality.[239] This is so mainly due to the restrictive limitations the principle

[231] Regula Echle, 'The Passive Personality Principle and the General Principle of Ne Bis In Idem' (2013) 9 Utrecht Law Review 56, at 56.
[232] See, in this sense: Opinion of the Committee of the Regions on 'legislative package on victims' rights' [2012] OJ C, 2012/C 113/11.
[233] Echle (n. 231) at 66-67.
[234] Echle (n. 231) at 66-67.
[235] Ryngaert, (n. 91) at 94-95; Watson, 'The Passive Personality Principle' (n. 67) at 13-14.
[236] Ryngaert (n. 91) at 94-95; John G. McCarthy,' The Passive Personality Principle and Its Use in Combatting International Terrorism' (1989) 13 Fordham Int'l L.J. 298, at 318.
[237] PCIJ, *The S. S. Lotus* (n. 41).
[238] Ryngaert (n. 91) at 95; Wendell Berge, Criminal Jurisdiction and the Territorial Principle (1931) 30 Mich.L.Rev. 238, at 268.
[239] Ryngaert (n. 91) at 95.

is subject to,[240] for example: dual criminality, a certain degree of seriousness of the crime,[241] the presence requirements[242] or the requirement of executive consent.[243] As far as the gravest forms of crimes are concerned, some scholars allow the use of the passive personality principle if it is expressly allowed or requested by the territorial State because of its overt will not to prosecute that crime.[244] The counterargument to that view would underline that the prevention of impunity is a common and shared interest of humankind and that, consistently, the employment of the principle of passive personality serves such a purpose.[245] However, in order for the principle to function properly, the perpetrator shall at least be present, with the custodial State's cooperation, in the territory of the adjudging State.[246] And the cooperation between the custodial and the territorial States will only occur when both States agree on the criteria upon which to base jurisdiction. The restrictive conditions necessary to enforce the passive personality principle are countless nowadays. In order to achieve a common agreement on the above-mentioned criteria, those restrictive conditions will need to be clear and strengthened to the extent that the international community as a whole will acquiesce on them.[247] Some scholars suggests that this path towards consistency shall begin from crimes like terrorist crimes, whose atrocious nature is uncontested.[248] Whatever the pathway, the international legal scholarship calls for uniformity.[249]

c. The protective principle

A general norm of public international law entrenches the fundamental concept that States cannot exercise jurisdiction over acts perpetrated abroad by aliens.[250] Two exceptions to this rule are accepted under international law: the principle of protection and the principle of universality. As the following subsection will deal with the latter, the present will focus on the former. However, it is relevant to say that both principles present common features, in so far

[240] Ryngaert (n. 91) at 95.
[241] Ryngaert (n. 91) at 95; Watson, 'The Passive Personality Principle' (n. 67) at 23; McCarthy (n. 236) at 315.
[242] Ryngaert (n. 91) at 95; McCarthy (n. 236) at 313-314.
[243] Ryngaert (n. 91) at 95; Cafritz and Tene (n. 216) at 597-8.
[244] Ryngaert (n. 91) at 95.
[245] Ryngaert (n. 91) at 95; Restatement (Third) of US Foreign Relations Law (n. 229), para 403 (2) (e)-(f).
[246] Ryngaert (n. 91) at 95.
[247] Ryngaert (n. 91) at 95-96.
[248] Ryngaert (n. 91) at 96; McCarthy (n. 236) at 321-327.
[249] Ryngaert (n. 91) at 96; McCarthy (n. 236) at 319 et seq.
[250] Mann (n. 157) at 93.

as they refuse the application of formal and inflexible tests of territoriality and nationality and anchor the exercise of jurisdiction to the closeness between a State and the facts at stake.[251] As far as the protective principle is concerned, it is exactly when the vital interests of a State face the risk of being injured or jeopardized that tests such as territoriality and nationality do not suffice. A more flexible, yet reliable, link between a State's jurisdiction and the acts perpetrated is needed; for those reasons the protective principle has been elaborated.

As anticipated above, the employment of the protective principle is justified by the basic idea that international law is, in fact, the law of sovereign States. As a consequence, each sovereign State is entitled to exercise jurisdiction if an act is carried out outside its national boundaries, when this jeopardizes its political integrity and essence.[252] Those acts, e.g. treason, do not materialize crimes in the territorial States, where they rightly go unpunished, rather they represent an offence only for the non-territorial State against which they are carried out. The protective principle, in other words, fills the gap created by international law and allows the offended States to punish crimes when other States have failed their duty to prevent them.[253] The State's extraterritorial jurisdiction is explained by the State's need to fight *"acts designed to injure its process of government"*.[254] It is precisely when the essential interest or the very survival of a State is at stake that the protective principle may be resorted to.[255] However, for the principle to be applied, there is no need that a real harm was brought about, differently from the objective territorial principle.[256]

The origins of the principle at hand can be traced back as early as in the thirteenth and fourteenth centuries, in the city States of Northern Italy; the practice then overflew all over Europe, where the adjudication of those perpetrators in the damaged State soon became a States' accepted habit.[257] Contrary to the passive personality principle, the legality of the

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[251] Mann (n. 157) at 93-95.

[252] Ryngaert (n. 91) at 96.

[253] Ryngaert (n. 91) at 96; Manuel R. Garcia-Mora, 'Criminal Jurisdiction over Foreigners for Treason and Offences Against the Safety of the State Committed Upon Foreign Territory' (1958) 19 U.Pitt.L.R. 567, at 587; see also: Harvard Research on International Law (n. 64) at 552.

[254] Maier (n. 35) at 68.

[255] Davids (n. 70) at 398-399; see, generally on the protective principle: Monika B. Krizek, 'The Protective Principle of Extraterritorial Jurisdiction: A Brief History and an Application of the Principle to Espionage as an Illustration of Current United States Practice' (1988) 6 B.U.Int'l L.J., 337, at 337 et seq.

[256] Ryngaert (n. 91) at 96; Krizek (n. 255) at 345; cf also: *United States of America v Evans et al*, United States, District Court, S.D. New York, 10 Jul. 1987, 667 F. Supp. 974 (US, Southern District of New York 1987) at 980.

[257] Ryngaert (n. 91) at 96-97; Donnedieu de Vabres (n. 185) at 86, referring in particular to the *«rapports des villes lombardes»*.

protective principle is undisputed and commonly shared.[258] Interestingly enough, it is the legal rationale behind it that raises concerns. European civil law scholarship attempted at justifying such a principle as an externalization of the right to self-defence[259] enshrined under art. 51 of the UN Charter and understood as a circumstance precluding wrongfulness by the Draft Articles on States Responsibility for Internationally Wrongful Acts.[260] The above-explained ground for justification has initially been rejected by the common law countries scholarship both because of its conceptual fallacy and also because of the practical abuse made of it by State entities, given the political nature of the doctrine which encompasses that principle.[261] Indeed, these authors contend that self-defence must take place before a criminal act has been carried out: since, contrariwise, it is oftentimes resorted to *after* the criminal act has been perpetrated, it lacks its basic requirement to be simultaneous to the act itself.[262] Additionally, States may inadvertently abuse the protective principle because of the different concepts of independence, integrity and sovereignty each State defines for itself.[263] The trial itself, therefore, would not respect the fundamental guarantees of impartiality and neutrality, surely not when the State feels to be victim of an outrageous conduct perpetrated against its very same dignity and authenticity. Likewise, the trial will inevitably run without a strict respect of values like trial fairness and objectivity.[264] Besides, political relations amongst States may be affected by the use of such a principle, as States might concurrently claim jurisdiction over the same acts or behave amicably or not, depending on the past relations held with the concurrent State.[265] In those cases, the protective principle would serve as a tool for undermining the

[258] Harvard Research on International Law (n. 64) at 556; Cristopher L. Blakesley, 'United States Jurisdiction over Extraterritorial Crime' (1982) 73 J.Crim.L.& Criminology 1109, at 1138.

[259] Ryngaert (n. 91) at 97; Donnedieu de Vabres (n. 185) at 87; Krizek (n. 255) at 339.

[260] Draft Articles on the Responsibility of States for Internationally Wrongful Acts, 53 UN GAOR Supp. (No. 10) at 43, U.N. Doc. A/56/10 (2001) [hereinafter DARS] art. 21.

[261] Ryngaert (n. 91) at 97; Garcia-Mora (n. 253) at 585; see also: Akehurst (n. 36) at 157; on the opposition of the United Kingdom in 1852, see: Lord McNair, *International Law Opinions Selected and Annotated by Lord NcNair vol. 2, Peace* (Cambridge University Press, 1956) at 149-150; for the USA application of such a principle, see: *Rocha et al v United States of America*, United States, Court of Appeals, Ninth Circuit, 2 Mar. 1961, 288 F.2d 545 (US, Court of Appeals, 9th Circuit, 1961); *United States of America v Jean Philomena Pizzarusso*, United States, Court of Appeals, Second Circuit, 9 Jan. 1968, 388 F.2d 8 (US, Court of Appeals, Second Circuit, 1968) at 10; cf also: *United States v Bowman*, United States, Supreme Court, 13 Nov. 1922, 43 S. Ct. 39 (US Supreme Court, 1922).

[262] See the wording of art. 51 of the Charter of the United Nations: Charter of the United Nations (adopted 26 June 1945, entered into force 24 October 1945) 1 UNTS XVI.

[263] Ryngaert (n. 91) at 97; see: Garcia-Mora (n. 253) at 583; Harvard Research on International Law (n. 64) at 553.

[264] Ryngaert (n. 91) at 97; Garcia-Mora (n. 253) at 588.

[265] Ryngaert (n. 91) at 97-98; see also: Akehurst (n. 36) at 159.

political independence of other States, rather than for strengthening the political independence of the invoking State.[266] Consistently, international dispute settlement mechanisms may be more useful to settle these disputes than the principle itself.[267]

Whilst some international legal scholarship hopes for the elaboration of an international convention which sets out the scope of the protective principle and for the establishment of an international criminal tribunal with jurisdiction over those crimes,[268] at present-time the protective principle must be analyzed for what it is in States' practice and scholars' view. However, nowadays States hardly resort to the use of that criterion in order to justify their exercise of jurisdiction; and when they do so, this encounters no particular difficulty even in cases of concurrent territorial jurisdiction.[269] Mostly, indeed, it has oftentimes been invoked in trials which did not concern hideous crimes[270] such as forgery or counterfeiting of foreign currency,[271] false statements to consular officials abroad for the attainment of a visa[272] or drug smuggling.[273] Additionally, offences which could require the application of the protective principle include:[274] acts against the security of the State,[275] perjury perpetrated in proceedings or processes already pending before a State's courts,[276] disclosure of trade secrets in the hands of a domestic undertaking[277] and cases of a similar nature.[278] Indeed, as remembered above, the principle *per se* does not raise issues of concern, it is rather the *ratio* behind it that ncessitates to be explained.

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[266] Akehurst (n. 36) at 159.

[267] Ryngaert (n. 91) at 97-98; DARS (n. 260) art. 3-11.

[268] Ryngaert (n. 91) at 98; Garcia-Mora (n. 253) at 589-590.

[269] Ryngaert (n. 91) at 98-99.

[270] Ryngaert (n. 91) at 98-99.

[271] Ryngaert (n. 91) at 99, referring to: Belgium, Criminal Procedure Code (n. 170), arts. 10, 2° and 3° PT; Akehurst (n. 36) at 158,

[272] Ryngaert (n. 91) at 99; *United States of America v Francisco da Silva Rodriguez et al*, United States District Court, S.D. California, 29 Mar. 1960, 182 F. Supp. 479 (US, District Court, Southern District of California 1960); *United States of America v Jean Philomena Pizzarusso* (n. 261).

[273] Ryngaert (n. 91) at 99; *United States of America v Keller*, United States, District Court, D. Puerto Rico, 22 May 1978, 451 F. Supp. 631 (US, District Court for the District of Puerto Rico, 1978); *United States v Carlos Newball*, United States, District Court, Eastern District New York, 22 Oct. 1981, 524 F. Supp. 715 (US, District Court E. D.New York).

[274] Mann (n. 157) at 94.

[275] Mann (n. 157) at 94.

[276] Germany, Criminal Code (1871) section 4 (3) n. 6; Mann (n. 157) at 94.

[277] Germany, Criminal Code (n. 276) section 4 (3) n. 5; however, this specific hypothesis for the application of the protective principle raises concerns under international law, see: Mann (n. 157) at 94.

[278] Mann (n. 157) at 94; see, generally: Harvard Research on International Law (n. 64) at 543 et seq.

There is a self-evident risk that States may abuse the principle under consideration and overstep the threshold of serious crimes impairing the vital interests or the very survival of the State;[279] however, in the absence of a more defined set of norms on the protective principle, it rests upon States, solely upon them, not to trespass the boundary.[280] If the principle *per se* can righteously said to be now well-established, controversies then mostly concern the acts covered by the principle.[281] The Harvard Research Draft Convention mentions crimes against security, territorial integrity and political independence of the State and the counterfeiting of stamps, passports, instruments of credit, currency, seals, and other documents issued by State authorities as those upon which the protective principle is to be considered applicable.[282] Nonetheless, States tend to expand the scope identified by those articles.[283] They tend to do so because they make use of the principle for the wrong aim: they use it as a tool in order to intrude themselves in other States' political independence, rather than to protect their own, when it has been jeopardized.[284] In this respect, some authors suggest that the so-called *"effects doctrine"* limit shall be applied to the protective principle, as well as it has been explained with regard to the territory principle in the dedicated paragraph.[285]

The protective principle may also be invoked in order to justify behaviors that fall under the definition of *"secondary boycotts"*, measures taken against foreign subjects which deal with a boycotted State.[286] Those mechanisms expand the scope of the primary boycotts, which are those directed straightly against a boycotted State.[287] The principle is thus employed because of the need to protect the national security of the State involved. Consistently, the effect of the protective principle may take place also in commercial relations between State entities.

Additionally, and a last remark, some scholars noted that the protective principle has been in fact made use of by States belonging to military alliances, in case the national security of one amongst them resulted in being threatened by third States.[288] The underlying concept is

[279] For some examples of the abuses, see: Akehurst (n. 36) at 158.
[280] Mann (n. 157) at 94.
[281] Akehurst (n. 36) at 158.
[282] Harvard Research on International Law (n. 64) arts. 7 and 8.
[283] Akehurst (n. 36) at 158.
[284] Akehurst (n. 36) at 159.
[285] Akehurst (n. 36) at 159.
[286] Ryngaert (n. 91) at 99.
[287] Ryngaert (n. 91) at 99.
[288] Akehurst (n. 36) at 159.

that offence to a State party of the alliance means offence to all and any of them, so that each is entitled to exercise jurisdiction over the wrongdoer. Of course, in order for this criterion to be duly applied in the present circumstance, it requires the consent of the threatened State to its allies' exercise of jurisdiction to the extent that the enforced principle remains the protective one and does not turn into the universal one.[289]

d. The universality principle

Out of all the principles of jurisdiction, there is one which does not operate on the basis of any (real or alleged) link with the State's interests.[290] Indeed, the universality principle disregards links such as the territorial one, the nationality of the subjects involved and the threat rendered to the injured State.[291] It is, contrariwise, the nature of the crime itself, usually a so-called crime *iure gentium*, which justifies the exercise of jurisdiction by a State.[292] Moreover, universal jurisdiction may be exercised irrespective of extradition.[293] While some domestic systems require that this criterion is associated with some minimum standards of territorial link, international law does not.[294] Indeed, some scholars have tried to find some link between the exercise of universal jurisdiction and the State's interests, and submitted that this type of jurisdiction is justified by *"a common interest rationale"* which the international community as a whole shares.[295] With respect to serious crimes, therefore, all States have an interest that those crimes are not performed anywhere on Earth because they could potentially impair values

[289] Akehurst (n. 36) at 159.

[290] Ryngaert (n. 91) at 101; see also, on the acceptance of the universality principle worldwide: Maier (n. 35) at 68.

[291] Ryngaert (n. 91) at 101; on the moral obligation to prosecute the perpetrators of the gravest forms of crimes as the legal basis for the universality principle, see: Christopher C. Joyner, 'Arresting Impunity: The Case for Universal Jurisdiction in Bringing War Criminals to Accountability (1996) 59 LCP 153 at 165; see also: Theodor Meron, International Criminalization of Internal Atrocities (1995) 89 AJIL 554, at 570.

[292] Ryngaert (n. 91) at 101; Principle 1 (1) of the Princeton Principles on Universal Jurisdiction (2001), reprinted in Stephen Macedo (ed.), Universal Jurisdiction: National Courts and the Prosecution of Serious Crimes Under International Law (Philadelphia: University of Pennsylvania Press, 2004) at 21; Institut de droit international, Session of Cracow - 2005, Resolution of the Institute of International Law, 26 Aug. 2005, Universal criminal jurisdiction with regard to the crime of genocide, crimes against humanity and war crimes (Seventeenth Commission, Rapporteur: M Christian Tomuschat) at 2; ICJ *Arrest Warrant of 11 April 2000* (n. 27) diss op Judge Van den Wyngaert paras 44-46; Donnedieu de Vabres (n. 185) at 135 et seq.

[293] Ryngaert (n. 91) at 106.

[294] Ryngaert (n. 91) at 101.

[295] Jonathan H. Marks, 'Mending the Web: Universal Jurisdiction, Humanitarian Intervention and the Abrogation of Immunity by the Security Council' (2004) 42 Colum.J.Transnat'l L. 445, at 465-467.

not only of the offended State but of all States.[296] Consistently, the common interest rationale may serve as a justification for crimes like piracy, drug offences, hijacking, hostage-taking and terrorism-linked crimes,[297] traffic in women and children, falsification of currency and trade in indecent publications.[298] As for other types of crimes, e.g. war crimes, crimes against humanity, genocide, the common interest rationale may not play a central role, and a rationale which points out the propensity for criminal behavior of those perpetrators would not either.[299] Besides, universal jurisdiction may endorse the idea that no space is left blank for impunity and the deterrent rationale would thus take place.[300] Under this view, the employment of the principle of universality would entail, on the one hand, States' cooperation wih the end of securing the perpetrator to justice and, on the other hand, the idea that the presence of a criminal on any State's territory carries social danger.[301] Another ground for the exercise of universal jurisdiction may be one of a more philosophical nature, as it predicates that States have a mission to fulfill the ideals of justice and not only to safeguard their own goals and interests.[302] Indeed, the underlying rationale of *erga omnes* obligations originates from the idea that all States have an interest in prosecuting some crimes precisely because they are so morally reprehensible that any State is allowed, or even compelled, to prosecute them.[303] Oftentimes, in any case, it is the physical presence of the perpetrator in the forum State, and the State's dudgeon for it, that allow the exercise of universal jurisdiction.[304] But the underlying assumption of all the above explained theories is that the act is a crime in all countries, or at least in those claiming jurisdiction.[305] Otherwise, as in Brierly's words, *"[…] the suggestion that every individual is or may be subject to the laws of every State at all times and in all places is intolerable in itself […]"*[306] And it is so intolerable because the laws change from place to place; because we do not deal with one law, but with as many as laws as at least the number of

[296] Ryngaert (n. 91) at 106; Marks (n. 295) at 465-467.

[297] Ryngaert (n. 91) at 107.

[298] Mann (n. 157) at 95, who also enlists piracy; see, for a full list: Harvard Research on International Law (n. 64) at 563.

[299] Ryngaert, (n. 91) at 107; Donnedieu de Vabres (n. 185) at 135-136 and at 143 et seq.

[300] Ryngaert (n. 91) at 107.

[301] Akehurst (n. 36) at 165.

[302] Ryngaert (n. 91) at 107.

[303] Ryngaert (n. 91) at 107-108; Donnedieu de Vabres (n. 185) at 149-153, according to whom the universality principle is based, following some interpretations, on the *"idée de justice"*; Mann (n. 157) at 95.

[304] Ryngaert (n. 91) at 108; Ryan Rabinovitch, 'Universal Jurisdiction In Absentia' (2005) 28 Fordham Int'l L.J. 500, at 518; ICJ, *Arrest Warrant of 11 April 2000* (n. 27) sep. op. Judge Guillaume, para 4.

[305] Akehurst (n. 36) at 165.

[306] James L. Brierly, 'The Lotus Case' (1928) 44, L.Q.R. 154, at 161; see also: Akehurst (n. 36) at 165.

countries.[307] Some solutions predicate that the State exercising jurisdiction employs and applies the laws of the territorial State;[308] despite the fact that this solution has rarely been taken into account, some States prescribe the double criminality requirement[309] and in those cases also require additional guarantees of equal treatment for the accused, like those concerning the periods of limitation, the gravity of the penalty, the respect of *ne bis in idem* principle.[310] Nonetheless, even with regard to the above-mentioned restrictions, controversies have arisen between States.[311]

As for common crimes, the international legal scholarship remained silent on the universality principle until the 1990s; in fact, only some conventions, mostly concerning anti-terrorism, and some pieces of domestic legislations took into account universal jurisdiction.[312] The former mostly justified the employment of the principle on the basis of the *aut iudicare aut dedere* obligation.[313] The latter, on the other hand, mainly covered crimes upon which the exercise of jurisdiction was uncontended, e.g.:[314] sexual offences,[315] immigration offences,[316] corruption,[317] crimes concerning nuclear energy, explosions or radiation,[318] human beings' traffic,[319] trade of narcotics,[320] circulation of pornography,[321] counterfeiting,[322] or subsidy fraud.[323] The universality principle began to be applied in order to determine the forum State only in the late twentieth century (since then, although in theory it was accepted, in practice it

[307] Akehurst (n. 36) at 165.
[308] Akehurst (n. 36) at 165.
[309] Akehurst (n. 36) at 165.
[310] Akehurst (n. 36) at 165-166; Harvard Research on International Law (n. 64) art. 10.
[311] Akehurst (n. 36) at 166.
[312] Ryngaert (n. 91) at 101.
[313] Ryngaert (n. 91) at 101; see, for domestic implementation laws mentioned by Ryngaert, e.g.: Belgium, Criminal Procedure Code (n. 170), art. 12 bis PT; Germany, Criminal Code (n. 165) s. 6 (9).
[314] Ryngaert (n. 91) at 101-102.
[315] Ryngaert (n. 91) at 101, referring to: Belgium, Criminal Procedure Code (n. 170), art. 10 *ter*, 1°-2° PT.
[316] Ryngaert (n. 91) at 101, referring to: Belgium, Criminal Procedure Code (n. 170), art. 10 ter, 3° PT.
[317] Ryngaert (n. 91) at 101, referring to, e. g.: Belgium, Criminal Procedure Code (n. 170), arts. 10 ter and 10 quater PT.
[318] Germany, Criminal Code (n. 165) s. 6, (2).
[319] Germany, Criminal Code (n. 165) s. 6 (4).
[320] Germany, Criminal Code (n. 165) s. 6 (5); see: Ryngaert (n. 91) at 101-102; even so, there is controversy over the application of universal jurisdiction to the distribution of narcotics.
[321] Germany, Criminal Code (n. 165) s. 6 (6).
[322] Germany, Criminal Code (n. 165) s. 6 (7).
[323] Germany, Criminal Code (n. 165) s. 6 (8).

was only applied to the prosecutions which arose out of the atrocities of World War II),[324] with the prosecution of crimes like those perpetrated *pendente bello*, genocide, crimes against humanity and torture.[325] Prior to the twentieth century, for centuries already universal jurisdiction has been invoked to try pirates.[326] For what concerned war crimes, although they were usually mentioned as examples of universal jurisdiction, controversies surrounded the application of this jurisdiction in practice: even after World War II, some States made use of such a ground of jurisdiction for those crimes,[327] while some required an additional link with the State's territory or with the individuals' nationalities.[328] As a matter of fact, the Geneva Convention of 1949 on international humanitarian law,[329] are usually understood as demanding jurisdiction on the basis of the principle of universality, at least for the grave breaches;[330] and so do the national legislations which apply it.[331] Also, from some scholars' works of the 1950s, it appears that some States' practice firmly rejected the universality principle as such,[332] while other countries embraced either the universality and/or the passive personality principles.[333] If

[324] Ryngaert (n. 91) at 102; see also: Diane Orentlicher, 'Whose Justice? Reconciling Universal Jurisdiction with Democratic Principles' (2004) 92 Geo.L.J. 1057, at 1073.

[325] Ryngaert (n. 91) at 102.

[326] Akehurst (n. 36) at 160.

[327] Akehurst (n. 36) at 160.

[328] Akehurst (n. 36) at 160.

[329] Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (First Geneva Convention) (adopted 12 Aug. 1949, entered into force 21 Oct 1950) 75 UNTS 31; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (Second Geneva Convention) (adopted 12 Aug. 1949, entered into force 21 Oct. 1950)75 UNTS 85; Geneva Convention Relative to the Treatment of Prisoners of War (Third Geneva Convention) (adopted 12 Aug. 1949, entered into force 21 Oct. 1950) 75 UNTS 135, Aug. 12, 1949; Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention) (adopted 12 Aug. 1949, entered into force 21 Oct. 1950) 75 UNTS 287.

[330] Akehurst (n. 36) at 160.

[331] Akehurst (n. 36) at 160; see, e.g.: Czechoslovakia, Criminal Code (1961), art. 19.

[332] Akehurst (n. 36) at 164: these States mostly include the common law countries and France; see also: PCIJ, *The S. S. Lotus* (n. 41); *Sentence arbitrale du Conseiller privé Martens dans l'affaire du Baleinier Costa Rica Packet, ayant surgi en 1891 entre la Grande-Bretagne et les Pays-Bas*, (1897) 24 J.D.I. privé 624.

[333] Akehurst (n. 36) at 164, referring to: Argentina, Extradition Law No. 1612 (1885), art. 5; Austria, Penal Code (1852), s 40; Belgium, Law of 17 April 1878, art. 10 (4); Bulgaria, Criminal Code (1951), art. 67; Colombia, Penal Code (1936) art. 7 (3); Czechoslovakia, Criminal Code (n.331), art. 20; Finland, Criminal Code (1889), ch 1, s 2; Germany, Criminal Code (n. 276) art. 4; Greece, Criminal Code (1950) art. 7; Guatemala, Penal Code (1889) art. 6 (6); Hungary, Criminal Code (1950) art. 4; Italy, Criminal Code (1930), art. 10; *The Crown v Yerizano*, Japan, District Court of Saghalien, Case No. 105, 1 Jan. 1925, 3 ILR 149; Mexico, Federal Criminal Code (1931), art. 4; Monaco, Code of Criminal Procedure (1904), art. 8; Peru, Penal Code (1924), art. 5 (3); Romania, Criminal Code (1968), art. 6; San Marino, Criminal Code (1865) art. 3 (3); South Korea, Criminal Code (1953) art. 3; Switzerland, Criminal Code (n. 131) art. 5; Turkey, Criminal Code (1926), art. 6; Uruguay, Penal Code (1889) art. 7; Venezuela, Penal Code (1926) art. 4 (2) and Yugoslavia, Criminal Code (1951) art. 94.

the temporal spectrum extends to ancient times, while in common law countries the principle of universality was not even conceived as a suitable ground for establishing jurisdiction, in continental Europe it was well rooted:[334] medieval Italy,[335] sixteenth century Brittany,[336] seventeenth and eighteenth century France until 1782[337] and seventeenth and eighteenth century Germany[338] all featured the universality principle as a reliable ground. Because of the multiplicity of the above-mentioned sources, some authors contend that the universality principle originates directly within international law, at both conventional and customary level.[339]

Publicists, moreover, have been investigating over the issue of universal jurisdiction for a long time and have elaborated three different notions of the principle, namely: the *"co-operative general universality principle"* (the secondary or subsidiary jurisdiction of the custodial State over all serious offences when extradition is rendered unfeasible or impossible), the *"co-operative limited universality principle"* (the jurisdiction of the custodial State over international offences only) and the *"unilateral limited universality principle"* (the primary right attributed to all States to prosecute international offences, irrespective of the *loci commissi delicti*).[340] Since the scope of my work only covers the issue of immunity from criminal jurisdiction, the analysis of jurisdiction and of the criteria upon which it is assessed cannot go much more in depth. It suffices, at this stage, to know that the universality principle is not a unique concept, and that it has been shaped differently according to various scholars' theories.

The universality principle, moreover, ought to be distinguished from two other jurisdictional grounds which resemble, but do not identify with it: vicarious (or representative) jurisdiction and *aut iudicare aut dedere* clauses.[341]

For what concerns vicarious jurisdiction, at the occurrence of two requirements, a State can prosecute an offence as representative of other States. The requirements entail: *i)* that the act also constitutes an offence in the territorial State (so-called double criminality requirement);

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[334] Akehurst (n. 36) at 163.
[335] Akehurst (n. 36) at 163.
[336] Akehurst (n. 36) at 163.
[337] Akehurst (n. 36) at 163.
[338] Akehurst (n. 36) at 163.
[339] Ida Caracciolo, *Dal diritto penale internazionale al diritto internazionale penale. Il rafforzamento delle garanzie giurisdizionali* (Editoriale Scientifica, 2000) at 81.
[340] Reydams, *Universal Jurisdiction. International and Municipal Legal Perspectives* (n. 35) at 28-42.
[341] Ryngaert (n. 91) at 102-106; more specifically on the vicarious jurisdiction, see: Meyer (n. 219) at 115-116.

ii) that extradition is not feasible because of reasons not related to the nature of the crime.[342] Since the forum State exercises jurisdiction in representation of the territorial State, even if it applies its own laws, it should not exceed what is enshrined under the laws of the latter.[343] In some authors' view, vicarious jurisdiction is based on Kant's vision of the world; a world where the perpetrator subverts the rules not because he aims at threatening the peace of the sovereign,[344] rather because of some personal interests he wants to gain. Besides, the Harvard Research on International Law did not consider it as an independent ground for determining jurisdiction, rather it addressed it as *"a modality of the universality principle"*.[345] The two types of jurisdiction, however, rest upon different rationales: universal jurisdiction allows other States to prosecute crimes in the interest of the international community as a whole whereas vicarious jurisdiction safeguards the particular interests of the territorial State.[346] The distinction carries relevant consequences: first, while universal jurisdiction only covers crimes of a grave seriousness, vicarious jurisdiction extends also to less grave breaches of law; secondly, the recourse to the latter is allowed only if the two conditions indicated above are satisfied.[347] In any event, States have not made an extensive use of vicarious jurisdiction;[348] it was first applied in Germany and Austria in the nineteenth century;[349] also, France, adopted a similar legislation in 2004.[350] States' practice confirms that, notwithstanding its scarce application, vicarious jurisdiction has not been objected by other States, and consistently is to be considered admissible under international law, mainly due to its cooperative nature.[351]

As for the *aut iudicare aut dedere* clause,[352] it sets out that a State must establish its jurisdiction over a wrongdoer who is present in its territory (*aut iudicare*), if it does not extradite him (*aut dedere*).[353] According to some authors, this clause dates back to the fourteenth century and originated from the doctrine of the Italian jurist Baldus de Ubaldis, a

[342] Ryngaert (n. 91) at 102.
[343] Ryngaert (n. 91) at 102; Meyer (n. 219) at 116.
[344] Ryngaert (n. 91) at 102.
[345] Ryngaert (n. 91) at 103; see: Harvard Research on International Law (n. 64) at 573.
[346] Ryngaert (n. 91) at 103.
[347] Ryngaert (n. 91) at 103; Meyer (n. 219) at 115-116.
[348] Ryngaert (n. 91) at 102.
[349] Ryngaert (n. 91) at 103, referring to: Germany, Criminal Code (n. 165) s. 7 (2) n. 2.
[350] Ryngaert (n. 91) at 103, referring to: France, Criminal Code (2004), art. 113-8-1, paras 1 and 2
[351] Ryngaert (n. 91) at 104.
[352] Some scholars refer to the *aut prosequi at dedere* principle, see: Antonio Cassese, 'Is the Bell tolling for Universality? A Plea for a Sensible Notion of Universal Jurisdiction' (2003) 1 JICJ 589 at 593.
[353] Ryngaert (n. 91) at 104.

student of Bartolus.[354] The provision has been included in many conventions, amongst which, in particular, anti-terrorism conventions.[355] The *aut iudicare aut dedere* clause thus imposes a mandatory choice upon States: they must either extradite or prosecute any alleged wrongdoer who is present in their territory. If the choice goes in the sense of the prosecution, then jurisdiction will be assessed on the basis of one of the already explained principles, one of which is the universality principle.[356] As a consequence, the universality principle would then imply that any State could potentially exercise jurisdiction over an offence, irrespective of territoriality or nationality.[357] As a conventional clause enshrined in specific conventions, the *aut iudicare aut dedere* clause has not yet amounted to a norm of customary nature under international law.[358] Notwithstanding its conventional nature, the clause at hand may become mandatory for all subjects of international law if it was crystallized as a norm of customary international law.[359] State practice indeed confirms that the *aut iudicare aut dedere* principle can extend to nationals of States which are not party to the related conventions: despite its non-customary rank, the clause can be applied by States which are not bound by the conventional clause, as well.[360] Some authors claim that *aut iudicare aut dedere* based universal jurisdiction

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[354] Ryngaert (n. 91) at 104; see also: ICJ, *Arrest Warrant of 11 April 2000* (n. 27) sep. op. Judge Guillaume, para 7.

[355] Convention for the Suppression of Unlawful Seizure of Aircraft [Hijacking Convention] (adopted 16 Dec. 1970, entered into force 14 Oct. 1971) 860 UNTS 105, art. 7; Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation [Montreal Convention] (adopted 23 Sep. 1971, entered into force 26 Jan. 1973) 974 UNTS 177, art. 5 (2); International Convention against the Taking of Hostages (adopted 17 Dec. 1979, entered into force 3 Jun. 1983) 1316 UNTS 205, art. 6 (2); International Convention for the Suppression of Terrorist Bombings (adopted 15 Dec. 1997, entered into force 23 May 2001) 2149 UNTS 256, art. 6 (4); International Convention for the Suppression of the Financing of Terrorism (adopted 9 Dec. 1999, entered into force 10 Apr. 2002) 2178 UNTS 197, art. 7 (4).

[356] Ryngaert (n. 91) at 105.

[357] Ryngaert (n. 91) at 105; Higgins (n. 226) at 64; see also: ICJ, *Arrest Warrant of 11 April 2000* (n. 27) joint sep. op. Judges Higgins, Kooijmans and Buergenthal, paras 22 and 39.

[358] See: Report of the International Law Commission on the work of its fifty-eighth session (1 May-9 June and 3 July-11 August 2006) General Assembly Official Records Sixty-first session Supplement No. 10 (A/61/10) [hereinafter: ILC Report, 2006, A/61/10] ch XI, paras 214-232.

[359] Ryngaert (n. 91) at 105; Michel Cosnard, 'La compétence universelle en matière pénale', in Christian Tomuschat and Jean-Marc Thouvenin (eds.), *The Fundamental Rules of the International Legal Order. Jus Cogens and Obligations Erga Omnes* (Martinus Nijhoff Publishers, 2006) at 366-367, predicating that considering the ban of torture a norm of *ius cogens* renders torture a universally prosecutable crime; on the crucial necessity that such norm amounts to a norm of customary nature, see: Malvina Halberstam, 'Terrorism on the High Seas: the Achille Lauro, Piracy and the IMO Convention on Maritime Safety' (1988) 82 AJIL 269, at 271, footnote 10; see, additionally: Michael P. Scharf, 'The ICC's Jurisdiction over the Nationals of non-Party Staes: a Critique of the U.S. Position' (2001) 64 LCP 67, at 99-101.

[360] Ryngaert (n. 91) at 105; see, the USA practice, also cited by Ryngaert: *United States of America v Fawaz* Yunis, United States, District Court, District of Columbia, 12 Feb. 1988, 681 F. Supp. 896 (US, District Court, District of Columbia, 1988); *United States of America v Fawaz Yunis, aka Nazeeh*, United States, Court of Appeals, District of Columbia Circuit, 29 Jan. 1991, 924 F.2d 1086 (US,Court of Appeals for the District of

over hostages-taking and hijacking will soon evolve into customary law,[361] while some object that the exercise of jurisdiction on torture over nationals of States which are not parties to the UN Convention on Torture[362] will encounter more criticism.[363]

Columbia Circuit, 1991); *United States of America v Omar Mohammed Ali Rezaq, aka Omar Marzouki, aka Omar Amr*, United States, District Court, District of Columbia, 20 Sep. 1995, 899 F. Supp. 697 (US, District Court, District of Columbia, 1995); *United States of America v Omar Mohammed Ali Rezaq, aka Omar Marzouki, aka Omar Amr* United States, Court of Appeals, District of Columbia Circuit, 6 Feb. 1998, 134 F.3d 1121 (US, Court of Appeals, District of Columbia Circuit, 1998); *United States v Ni Fa Yi Ni Zhou Neng, aka "Ah Di",* United States, District Court, S.D. New York, 7 Jan. 1997, 951 F. Supp. 42 (US, District Court, Southern District of New York, 1997); *United States of America v Hung Shun Lin*, United States, Court of Appeals, District of Columbia Circuit, 10 Dec. 1996, amended 28 Jan. 1997, 101 F.3d 760 (US, Court of Appeals, District of Columbia Circuit, 1996); *United States of America v Chen De Yian et al,* United States, District Court, S. D. New York, 1 Nov. 1995, 905 F.Supp. 160 (US, District Court, Southern District of New York, 1995); *United States of America v Esteban Marino-Garcia, United States of America v Pablo Emilio Cassalins-Guzman*, United States, Court of Appeals, Eleventh Circuit, 9 Jul. 1982, 679 F.2d 1373 (US, Court of Appeals, Eleventh Circuit) at 1386-1387.

[361] Ryngaert (n. 91) at 105-106; Madeline Morris, 'High Crimes and Misconceptions: the ICC and non-Party States' (2001) 64 LCP 13, at 64.

[362] Convention against Torture (n. 228).

[363] Ryngaert (n. 91) at 106.

III. Nature of immunity with respect to jurisdiction: procedural or substantive?

Having ascertained that jurisdiction is the logical pre-requisite upon which immunity is based, and that, in other words, immunity would simply not even be conceived in the absence of an underlying jurisdiction,[364] this work needs to move a step forward. Thereby, the relationship between immunity and jurisdiction and, more precisely, the nature of immunity with respect to jurisdiction, has to be closely investigated. There is, indeed, a fine line which parts two different concepts. One thing is to say that there would be no immunity without jurisdiction: this implies that jurisdiction is the logical and practical antecedent of immunity, in whose absence immunity would be a meaningless vacuum. Another thing is to say that immunity has (or does not have) a procedural nature with respect to jurisdiction: this, contrariwise, if verified, would imply that immunity – if and when invoked - would just hinder the triggering of a judicial proceeding against a certain individual, but that it would under no circumstance affect the substantial responsibility of the individual. Both lines of thought are juridically valid and worth exploring, but it must be borne in mind that they pertain to two different grounds, although at times they appear to be inextricably linked.

The first approach has to do mostly with a more general view of the notion of immunity. It rests on the idea that, for immunity to be invoked before a national court, that very court needs to have jurisdiction over those acts for which the individual claims immunity. And it is precisely because such court has jurisdiction that immunity can properly be invoked.[365] The fact that jurisdiction is a *"prius that necessarily precedes immunity"*[366] does not suggest its primacy over immunity, but only that, for immunity to prevail over jurisdiction, some jurisdiction must pre-exist. As expressed by the incumbent Special Rapporteur of the ILC on the issue, Ms. Concepciòn Escobar Hernàndez in her fifth report,[367] the idea that immunity operates on a pre-existing power of the forum State bears important implications. Indeed, it implies that immunity is a form of limitation and restriction to the adjudicatory power of the State, which is rendered necessary because of the safeguard of values which are legitimate and

[364] See, for all: Second Report, Escobar Hernàndez (n. 26) at 11-14.
[365] Fifth Report on immunity of State officials from foreign criminal jurisdiction, 14 June 2016, A/CN.4/701, by Special Rapporteur Conceptiòn Escobar Hernàndez, at 63 [hereinafter Fifth Report, Escobar Hernàndez].
[366] Fifth Report, Escobar Hernàndez (n. 365) at 63.
[367] Fifth Report, Escobar Hernàndez (n. 365) at 63-64.

essential for the prosperous being of the entire international community. Besides, this also suggests that a correct understanding of the relationship between immunity and jurisdiction is to be in interpreted in *"dialectical terms"* [368], so that only at the end of a balancing of issues at risk one can determine which State's rights outweigh the other State's interests and can, hence, prevail.

The second approach concerns the way immunity operates in practice, and only slightly deals with the concept of jurisdiction in its pure meaning. In fact, determining whether immunity is procedural or substantive in nature does not impact the notion of jurisdiction as such, rather it explains how immunity functions within a legal order. Positing that immunity is procedural in nature entails that it hinders the beginning of a judicial proceeding only: immunity is here conceived as a procedural obstacle to the ordinary judicial process which would follow the perpetration of a certain act. On the contrary, stating that immunity is substantive in nature necessitates that the application of immunity carries implications on the substantive legal norms which regulate the case at hand: the effects of immunity would not simply halt at the procedural level, but would affect the positive rules underneath it; consistently, immunity would prevent the responsibility of the individual as such, not only their 'mere' prosecution before a judicial authority.

Having clarified those points, this work can now proceed with the analysis of the second layer, namely whether immunity is procedural or substantive in nature. Immunity from jurisdiction only concerns immunity from executive jurisdiction (and also, for those who follow the theory of the tripartite nature of jurisdiction, the adjudicative jurisdiction), and not that from legislative jurisdiction.[369] This means that *"immunity from jurisdiction does not amount to an exception from the legal order of the territorial State"*[370]. In other terms, while the subject enjoying immunity from jurisdiction is still bound to respect the substantive laws of the State, the State must refrain from applying its executive jurisdiction to that subject. As reflected by international legal scholarship, the underlying liability of the individual remains unquestioned and unaffected by the application of immunity, which only prevents the triggering of legal proceedings before national courts.[371] As already noted by the former Special Rapporteur on

[368] Fifth Report, Escobar Hernàndez (n. 365) at 64.

[369] Preliminary Report, Kolodkin (n. 25) para 64 at 174; see also: Sompong Sucharitkul, 'Immunities of foreign states before national authorities' (1976) 149 RCADI 87, at 96.

[370] Helmut Steinberger, 'State Immunity' in Bernhardt Rudolf (ed.) *Encyclopedia of public international law, vol. 4* (Elsevier Science Publisher, 2000) at 616; see: Preliminary Report, Kolodkin (n. 25) para 64 at 174.

[371] Preliminary Report, Kolodkin (n. 25) para 66 at 174-175; regardless of whether immunity attaches States or individuals, scholars agree on the qualification of immunity as a mere exemption from legal proceedings before

Immunity of State officials from foreign criminal jurisdiction, Mr. Roman Anatolevich Kolodkin,[372] both the Vienna Convention on Diplomatic Relations,[373] the Vienna Convention on Consular Relations,[374] as well as the Convention on Special Missions[375] explicitly prescribe that the individuals who are granted immunity from jurisdiction must, immunity notwithstanding, abide by the laws of the host State.[376] Following this theory, the nature of immunity with respect to jurisdiction can only be assessed in procedural terms: it hinders the enforcement of a legal proceeding while it does not affect the rule of law in effect within the granting State's borders. However, one must consider that few authors also contend the existence of a substantive nature of immunity which may pair the procedural one.[377] Despite this minor position, the majority of the international legal scholarship agrees on the procedural nature of immunity with respect to jurisdiction. Being procedural in nature, the individual who enjoys immunity is still subject to criminal responsibility (and, so, to the substantive criminal provisions of the forum State) but is immune from the proceedings which may arise, in line with such conduct, before the national courts of the State.[378] There is a subtle difference between the two concepts, but this difference is not confined to a theoretical relevance. Stating that immunity carries only a procedural weight means that, on practical grounds, the subject who invokes and relies on it is exempt from the criminal proceeding which may arise in relation to certain conducts but is still subject to the criminal liability which underlies such conducts. This has also been appreciated by the ICJ in the *Arrest Warrant* case,[379] where the analysis of the procedural nature of immunity also leads to further considerations on the rationale behind the notion of immunity, which will be subsequently examined in this dissertation.

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courts, not as an exemption from the rule of law as such, see: Clive Parry, John P. Grant, Anthony Parry, Arthur D. Watts, *Encyclopaedic Dictionary of International Law* (Oceana Publications Inc., 1986, printed in 1988) at 165, where the possibility to waive immunity is used to demonstrate that immunity does not entail *"non-amenability to law or non-liability ratione materiae"*; Mizushima Tomonori, 'The individual as beneficiary of State immunity: problems of the attribution of ultra vires conduct' (2001) 29 Denv.J.Int'l L.& Pol'y 261 at 274.

[372] Preliminary Report, Kolodkin (n. 25) para 64 at 174.

[373] Vienna Convention on Diplomatic Relations (n. 24) art. 41.

[374] Vienna Convention on Consular Relations (n. 24), art. 55.

[375] Convention on Special Missions (n. 24) art. 47.

[376] See, additionally: Institut de droit international, Session of Vancouver – 2001, Resolution of the Institute of International Law, 26 Aug. 2001, Immunities from Jurisdiction and Execution of Heads of State and of Government in International Law (Thirteenth Commission, Rapporteur: Mr Joe Verhoeven), Preamble.

[377] Preliminary Report, Kolodkin (n. 25) para 65 at 174.

[378] Preliminary Report, Kolodkin (n. 25) para 66 at 174-175.

[379] ICJ, *Arrest Warrant of 11 April 2000* (n. 27) at 25, para 60.

Given its ascertained procedural nature, thus, immunity must be considered as a preliminary issue, to be addressed by the national court before it examines the substantive merits of the case.[380] As stated by the ICJ, the issue of immunity is a preliminary issue which must *"be expeditiously decided in limine litis"*.[381] It must also be noted that some international treaties which concern the issue of immunity deal with immunity from measures of execution or interim measures of protection.[382] As far as those measures are concerned, it seems relevant to underline that, in this dissertation, criminal jurisdiction will be interpreted in its more extensive acceptation, which includes all kind of the wide-ranging criminal procedural measures applicable within the exercise of criminal jurisdiction.

[380] Preliminary Report, Kolodkin (n. 25) para 68 at 175; Hazel Fox, *The Law of State immunity* (Oxford University Press, 2002) at 13.

[381] ICJ, *Difference relating to immunity from legal process of a Special Rapporteur of the Commission on Human Rights*, Advisory Opinion of 29 Apr. 1999, ICJ Reports 1999, p. 62, para 67.

[382] Vienna Convention on Diplomatic Relations (n. 24) art. 31, paras 1 and 3; Convention on Special Missions (n. 24) art. 31, paras 1 and 4; Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character (n. 24) art. 30, paras 1 and 2, not yet entered into force; however, the Vienna Convention on Consular Relations (n. 24) only mentions, at art. 43 immunity from jurisdiction, and does not address immunity from measures of execution or interim measures of protection.

2. Immunity of a State official from foreign criminal jurisdiction

I. Legal sources

Before the dissertation in-depth analyzes the topic of immunity of State officials from foreign criminal jurisdiction, it seems noteworthy to understand how international law covers the issue. Therefore, international treaties, customary international law, international comity, domestic law on this matter will be explored, together with the developments of the ILC and the Institute of International Law up-to-date.

The issue of immunity has been considered in various international treaties, the most relevant being:[383] the 1961 Vienna Convention on Diplomatic Relations,[384] the 1963 Vienna Convention on Consular Relations,[385] the 1969 Convention on Special Missions,[386] the 1973 Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents,[387] the 1975 Vienna Convention on the Representation of States in Their Relations with International Organizations of a Universal Character,[388] the 2004 UN Convention on Jurisdictional Immunities of States and their Property [hereinafter UNCSI].[389] Moreover, even treaties concerning the privileges and immunities of international

[383] Preliminary Report, Kolodkin (n. 25) para 27 at 166.
[384] Vienna Convention on Diplomatic Relations (n. 24).
[385] Vienna Convention on Consular Relations (n. 24).
[386] Convention on Special Missions (n. 24).
[387] Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents (adopted 14 Dec. 1973, entered into force 20 Feb, 1977) 1035 UNTS 167.
[388] Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character (n. 24) not yet entered into force.
[389] United Nations Convention on Jurisdictional Immunities of States and their Property (adopted 2 Dec. 2004, not yet in force) UN Doc A/59/508.

organizations take into account the issue of immunity;[390] see, for instance: article IV of the 1946 Convention on the Privileges and Immunities of the UN,[391] article V of the 1947 Convention on the Privileges and Immunities of the Specialized -Agencies,[392] part IV of the 1949 General Agreement on Privileges and Immunities of the Council of Europe[393] and others. As for those international conventions which do not cover the issue of immunity directly as such, at least two views have been developed.[394] On the one hand, some support the idea that some of those treaties address nevertheless the issue of immunity in some ways, mostly with regard to the limits and exceptions to immunity.[395] On the other hand, some others, while acknowledging the existence of treaties which address the suppression of some types of crimes, and in doing so randomly cover some aspects of immunity, refuse the idea that those conventions have been elaborated and adopted with the idea of derogating from immunity.[396]

While one must acknowledge that a great part of international treaties which concern different aspects of immunity has not yet entered into force nor has it registered a broad participation by States, some provisions of those conventions explicitly prescribe that the norms arising out of such provisions are merely explanatory of pre-existing norms of customary nature.[397] Additionally, for as obvious as it may seem, the existence of international conventions covering single aspects of immunity does not preclude the emergence and development of international custom on the same matter.[398] Eminent scholars share the view that, given the absence of conventions specifically aimed at regulating the issue of immunity

[390] Preliminary Report, Kolodkin (n. 25) para 28 at 166.

[391] Convention on the Privileges and Immunities of the United Nations (adopted 13 Feb. 1946, entered into force 17 Sep. 1946) 1 UNTS 15.

[392] Convention on the Privileges and Immunities of the Specialized Agencies (adopted 21 Nov. 1947, entered into force 2 Dec. 1948) 33 UNTS 261.

[393] General Agreement on Privileges and Immunities of the Council of Europe (adopted 2 Sept. 1949, entered into force 10 Sept. 1952) ETS n. 002.

[394] Preliminary Report, Kolodkin (n. 25) para 29 at 166.

[395] Preliminary Report, Kolodkin (n. 25) para 29 at 166; Alvaro Borghi, *L'immunité des dirigeants politiques en droit international* (Helbling & Lichtenhahn, Collection latine, Series II, vol. 2, 2003) at 66-67, on the conventions concerning the repression of certain international crimes; see, for example: Convention on the Prevention and Punishment of the Crime of Genocide (adopted 9 Dec. 1948, entered into force 12 Jan. 1951) 78 UNTS 277 and the Convention against Torture (n. 228).

[396] Preliminary Report, Kolodkin (n. 25) para 29 at 166; Joe Verhoeven, 'Les immunités propres aux organes ou autres agents des sujets du droit international', in Joe Verhoeven (dir.), *Le droit international des immunités: contestation ou consolidation?* (Larcier, 2004) at 123.

[397] Preliminary Report, Kolodkin (n. 25) para 30 at 177; see, for instance: Convention on Special Missions (n. 24) art. 21; Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character (n. 24) art. 50.

[398]Preliminary Report, Kolodkin (n. 25) para 30 at 177.

of State officials from foreign criminal jurisdiction, most norms have to be found in international customs.[399] This viewpoint has also been adopted by the ICJ in the *Arrest Warrant* case which represents a leading case on the present matter.[400] Additionally, the practice of Courts proves that immunity of State organs from foreign criminal jurisdiction has been embedded in the two elements of *opinio juris sive necessitatis* and *diuturnitas*, which international custom is made of.[401]

One part of the international legal scholarship and the case-law contends that immunity of State officials from foreign criminal jurisdiction represents a form of international comity, rather than a twofold set of corresponding rights and duties.[402] While there should be no doubt that immunity stands as a right of the holder and an obligation of the host State, the idea that this type of immunity needs to be granted because of rules of international courtesy rather than because of legal obligations of conventional or customary nature proves how demanding the process of elaborating a commonly-shared notion of immunity has been so far and still is at present. Indeed, the international comity can shape much more in detail how the rule of law is

[399] Preliminary Report, Kolodkin (n. 25) para 31 at 167; Hazel Fox, *The Law of State immunity* (n. 380) at 426. See also, with regard to Heads of States: Arthur Watts, 'The legal position in international law of Heads of States, Head of Government and Foreign Ministers' (1994) 247, RCADI 9, at 36-37; Borghi (n. 395) at 71-72, who also acknowledges the limits of international custom on the matter; mostly with regard to immunity *ratione personae*, see: Mark A. Summers, 'Diplomatic Immunity *Ratione personae*: Did the International Court of Justice Create a New Customary Rule in Congo v Belgium?' (2007) 16 Mich. St. J. Int'l L. 459, at 466.

[400] ICJ, *Arrest Warrant of 11 April 2000* (n. 27) at 21, para 52.

[401] Preliminary Report, Kolodkin (n. 25) para 30-34 at 167-168; Borghi (n. 395) at 71-72, who, however, bears in mind that the practice on the matter has not been very extensive and that it is difficult to distinguish international custom and international comity on the subject; see also: *Gaddafi*, France, Court of Appeal of Paris (Chambre d'accusation) 20 October 2000, Court of Cassation, 13 Mar. 2001, 125 ILR 490 at 509; ICJ, *Arrest Warrant of 11 April 2000* (Democratic Republic of the Congo v Belgium), Application Instituting Proceedings, 17 Oct. 2000, at 13, Part IV (B); ICJ, *Arrest Warrant of 11 April 2000* (Democratic Republic of the Congo v Belgium), Democratic Republic of Congo Memorial, 15 May 2001, paras 6, 55, 97 (1); ICJ, *Arrest Warrant of 11 April 2000* (Democratic Republic of the Congo v Belgium), Belgian Counter-Memorial, 28 Sep. 2001, paras 3.4.6, 3.5.144, etc.; *Regina v Bartle and the Commissioner of Police for the Metropolis and Others Ex Parte Pinochet* ("*Pinochet No. 1*"), England, House of Lords, 25 Nov. 1998, (1998) 37 ILM 1302 [hereinafter *Pinochet No. 1*] at 1309-1311; *Regina v Bartle and the Commissioner of Police for the Metropolis and Others Ex Parte Pinochet* ("*Pinochet No. 3*"), England, House of Lords, 24 Mar. 1999, (1999) 38 ILM 581 [hereinafter *Pinochet No. 3*] at 621,622, 641 and 644; *Bouzari and others v Islamic Republic of Iran*, Canada, Ontario Court of Appeal, 30 Jun. 2004, 128 ILR 586, paras 40 and 85; *Gaddafi*, France, Submissions of the Advocate General, France, Court of Appeal of Paris (Chambre d'accusation) 20 October 2000, Court of Cassation, 13 Mar. 2001, 125 ILR 490 at 500.

[402] Preliminary Report, Kolodkin (n. 25) para 35 at 168; see: *The Schooner Exchange v McFaddon & others*, United States, Supreme Court, 24 Feb. 1812, 11 US (7 Cranch) 116; ICJ, *Arrest Warrant of 11 April 2000* (n. 27) Dissenting Opinion of Judge van Den Wyngaert, at 139, para 41; *Jones No. 2* (n. 63) para 101; scholars refer to a "practical courtesy" rationale for State immunity, see, in this respect: Lee M. Caplan., 'State immunity, human rights and jus cogens: a critique of the normative hierarchy theory', (2003) 97 AJIL 741, at 748-755.

applied in practice: it can widen the scope of application to uncertain categories or uncertain situations, given that most of the rules on the issue are norms of customary nature which are not always easy to identify and apply. However, international courtesy alone cannot and does not represent the basis upon which immunity of State officials rests, which is to be found in a proper source of law, be it any of those enlisted under art. 38 of the ICJ Statute.[403]

As noted by Joe Verhoeven, immunity must be primarily understood on the layer of international law, rather than on domestic and national systems.[404] However, it is upon the domestic legal systems to determine how this rule of law is applied and respected by State parties which then act within the international sphere. Therefore, a general understanding of how the legal systems have embraced such norms seems necessary. As provided in the Preliminary Report of the former Special Rapporteur on immunity of State officials from foreign criminal jurisdiction, Mr. Roman Anatolevich Kolodkin,[405] domestic law can only be a subsidiary means through which international law on immunity shall be applied and implemented within the different national legal systems. Generally speaking, some common trends can be found considering how the single State systems apply, misapply or cease to apply the law on immunity of State officials from foreign criminal jurisdiction. The following domestic legal systems have been considered by the former Special Rapporteur on the issue.[406] Some States, e.g. the UK,[407] Singapore,[408] Pakistan,[409] South Africa,[410] Australia[411] and Canada,[412] apply the immunities granted to States as such to their Heads of States, pretty much as in the 2004 UNCSI.[413] As for the Russian Federation system, by virtue of art. 3, paragraph 2, of the Russian Code of Criminal Procedure,[414] an agreement between Russia and the sending State must precede the granting of immunity, with specific information provided for by the

[403] Statute of the International Court of Justice, annexed to the UN Charter, Ch XIV (adopted 26 Jun. 1945, entered into force 24 Oct. 1945) 59 Stat. 1031, art. 38 [hereinafter: ICJ Statute].
[404] Verhoeven (n. 396) at 82; Preliminary Report, Kolodkin (n. 25) para 41 at 169-170.
[405] Preliminary Report, Kolodkin (n. 25) para 41 at 169-170.
[406] Preliminary Report, Kolodkin (n. 25) para 37 at 169.
[407] United Kingdom, State Immunity Act (1978), s 14.
[408] Singapore, State Immunity Act (1979), s 16.
[409] Pakistan, State Immunity Ordinance (1981), s 15.
[410] South Africa, Foreign States Immunity Act (1981), s 1 (2) (a).
[411] Australia, Foreign States Immunities Act (1985), s 3.
[412] Canada, State Immunity Act (1982), art. 2.
[413] United Nations Convention on Jurisdictional Immunities of States and their Property (n. 389).
[414] Russia, Code of Criminal Procedure (2001), art. 3, para 2.

Russian Federation Ministry of Foreign Affairs;[415] notwithstanding, it is the Russian national legislation which assures the preeminence of international law on the matter. The Belgian systems appears a peculiar one, since the original legislation of 1993 was amended in 1999 so that in the end it excluded the applicability of immunity from criminal proceedings,[416] but the landmark judgment on the matter of the ICJ[417] led to another amendment in 2003,[418] which now applies the institute of immunity as it is understood under international law.

Within the above-elucidated framework, immunity of State officials from foreign criminal jurisdictions is widely understood to be the general rule, while its absence represents a peculiar exception to the rule, which must be proven on a case-by-case basis.[419] This is also clear from the reasoning of the *Arrest Warrant* case, where the Court, given the underlying existence of the norm which granted immunity to a State official (the Minister for Foreign Affairs, in the case at hand) verified and concluded that no exception was to be found in the international legal sources (State practice, customary international law, legal instruments creating international criminal tribunals).[420] However, distinguished international legal scholars have challenged the notion of absolute immunity of State officials; in particular, they posited that the ICJ did not prove that the rule exists in international law nor did it rationalize which grounds shall such norm be based upon.[421]

This work will provide for an in-depth analysis of the above-mentioned issues in the following chapters. May the general illustration on the legal sources which rule immunity of State officials from foreign criminal jurisdiction hereby offered suffice to the ends of the present section.

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[415] Preliminary Report, Kolodkin (n. 25) para 38 at 169 fn 79, referring to: Russia, Federal Act No. 26 of 4 Mar. 2008 on amendments to art. 3 of the Code of Criminal Procedure of the Russian Federation.

[416] Belgium, Law of 16 Jun. 1993, as amended by the Law of 10 Feb. 1999 concerning the punishment of grave breaches of international humanitarian law.

[417] ICJ, *Arrest Warrant of 11 April 2000* (n. 27).

[418] Belgium, Law of 5 Aug. 2003 concerning grave breaches of international humanitarian law.

[419] Second Report on immunity of State officials from foreign criminal jurisdiction, June 10, 2010, A/CN.4/631*, by Special Rapporteur Roman Anatolevich Kolodkin, at 10 [hereinafter: Second Report, Kolodkin].

[420] ICJ, *Arrest Warrant of 11 April 2000* (n. 27) at 25, para 58.

[421] Second Report, Kolodkin (n. 419) at 10; see, inter alia: ICJ, *Arrest Warrant of 11 April 2000* (n. 27) Dissenting Opinion of Judge Van den Wyngaert, at 143, para 11; Micaela Frulli, 'The ICJ Judgment on the Belgium v Congo Case (14 February 2002): a Cautious Stand on Immunity from Prosecution for International Crimes', (2002) 3 German Law Journal, paras 3-4; David S. Koller, 'Immunity of foreign ministers: paragraph 61 of the Yerodia judgment as it pertains to the Security Council and International Criminal Court' (2004) 20 Am.U.Int'l L.Rev. 7 at 15.

II. In search of a definition

Besides determining which sources of law rule immunity of State officials from foreign criminal jurisdiction, the concept of this type of immunity must be defined *per se*. While there is not a universal definition of immunity into force at present-time, immunity is much employed in international treaties and conventions. Given the absence of a shared definition of immunity, great effort has been made by the international legal scholarship so to identify the concept in legal terms. Generally speaking, immunity is understood as a jurisdictional bar, as an exception, or an exemption from the exercise of jurisdiction by a State over an entity, an individual or a property.[422] Consistently, if the definition of immunity is yet to come, at least its scope of application can be identified at the present stage.

A jural relationship is the one where a right of one subject matches a duty of another subject.[423] Even though not all publicists agree on the point, immunity is widely understood as a jural relationship,[424] and, more precisely, *"as the correlative of a duty imposed upon the territorial State to refrain from exercising its jurisdiction over a foreign State"*.[425] Such a view of immunity understands it as establishing a balanced relationship where a right is offset by a corresponding duty. Consistently, the issue of immunity from criminal jurisdiction becomes a matter of inter-State relations.[426] Another theory on immunity reconstructs the concept in negative terms only, as it prevents the exercise of jurisdiction over a subject of law: the element of derogation outweighs any other element of the legal relationship. This view finds its source more in international comity, rather than in proper international law.[427] Anyhow, this idea of immunity is not usually applied in absolute terms, because this would render its application subject only to the discretionary powers of the State which can exercise jurisdiction.[428] Contrariwise, a view of immunity in 'negative terms' is used as a complementary mean of interpretation which nurtures and fosters the principle of equality of States and their mutual

[422] Preliminary Report, Kolodkin (n. 25) para 56 at 172; see, inter alia, the definition provided for "State immunity": Steinberger (n. 370) at 615; Wirth (n. 25) at 882.
[423] Preliminary Report, Kolodkin (n. 25) para 58 at 173.
[424] Second report on jurisdictional immunities of States and their property, 11 Apr. and 30 Jun. 1981, A/CN.4/331 and ADD.1 by Special Rapporteur Sompong Sucharitkul, at 204, para 17 [hereinafter: Second Report, Sucharitkul].
[425] Ian Sinclair, 'The law of sovereign immunity: recent developments' (1980) 167 RCADI 113, at 199; Preliminary Report, Kolodkin (n. 25) para 58 at 173 ft. 111.
[426] Preliminary Report, Kolodkin (n. 25) para 69 at 175.
[427] Preliminary Report, Kolodkin (n. 25) para 59 at 173.
[428] Preliminary Report, Kolodkin (n. 25) para 59 at 173.

acknowledgement of sovereign powers.[429] In this sense, for it precludes the exercise of jurisdiction by a State over some subjects, immunity represents an inherent factor of the principle of equal treatment of sovereign States.[430] Moreover, one additional remark seems noteworthy to underline at the present stage. This work focuses on immunity of State officials from foreign criminal jurisdiction and will further analyze the two layers it is composed of, namely: functional and personal immunity. However, in general terms, immunity in international law also involves the notion of immunity of States and their properties. Even though this dissertation is not likely to delve into such matter, its analysis will at times be useful in order to properly understand, by comparison, common or divergent features of the two above-mentioned kinds of immunity. For what concerns the search of a definition of immunity, as noted by the former Special Rapporteur on immunity of State officials from foreign criminal jurisdiction, Mr. Roman Anatolevich Kolodkin, in his Preliminary Report,[431] neither the draft articles elaborated and subsequently adopted by the ILC nor the final UNCSI of 2004[432] offered a comprehensive definition of immunity. However, the Special Rapporteur on the issue of jurisdictional immunities of State and their property, Mr. Sucharitkul, suggested an understanding of immunity as *"the privilege or exemption from, or suspension of, or non-amenability to, the exercise of jurisdiction by the competent authorities of a territorial State"* and of jurisdictional immunities as *"immunities from the jurisdiction of the judicial or administrative authorities of a territorial State"*.[433] Overall, Mr. Sucharitkul applied a notion of immunity which *"connotes the existence of power or non-amenability to the jurisdiction of the national authorities of a territorial State"*.[434]

The search for a correct definition and understanding of immunity of State officials from foreign criminal jurisdiction has been extensive in the last years. This is also shown, besides the academic and jurisprudential efforts, by the work of the ILC and of the Special Rapporteurs appointed with the aim of elaborating a clear regime of application of the notion itself. Indeed, the topic was included in the long-term programme of work of the ILC in 2006, at its fifty-eighth session, pursuant to a proposal in the report of the Commission related to such

[429] Preliminary Report, Kolodkin (n. 25) para 59 at 173; Shaw (n. 38) at 506; generally, on the foundation of immunities, see: Sucharitkul (n. 369) at 115 et seq.
[430] Shaw (n. 38) at 506; Preliminary Report, Kolodkin (n. 25) para 59 at 173.
[431] Preliminary Report, Kolodkin (n. 25) para 60 at 173.
[432] United Nations Convention on Jurisdictional Immunities of States and their Property (n. 389).
[433] Second Report, Sucharitkul (n. 424), at 206, para 33.
[434] Second Report, Sucharitkul (n. 424), at 204, para 17.

session.[435] Later, in 2007, at its fifty-ninth session, the Commission included the subject in its current programme of work and appointed Mr. Roman A. Kolodkin as Special Rapporteur.[436] Also the Secretariat was asked to draft a background paper on the issue at the same session.[437] Mr. Koodkin delivered, as Special Rapporteur, three reports,[438] which outlined the issued to be considered and begun the analysis of the matter. Those reports were taken into consideration by the ILC and also by the Commission and by the Sixth Committee of the General Assembly in the years following their issue.[439] Subsequently, on 22 May 2012, at its 3132nd meeting, the Commission appointed Ms. Concepciòn Escobar Hernàndez as the new Special Rapporteur on the topic, as Mr. Kolodkin was no longer member of the Commission.[440] Ms. Concepciòn Escobar Hernàndez submitted, so far, five reports, between 2012 and 2016,[441] which have profusely been considered by the ILC and by the Sixth Committee of the General Assembly.[442] Besides, an extensive interest for the topic is also proven by the work of the Drafting Committee and the comments sent by the States.[443] The incumbent Special Rapporteur, Ms.

[435] Fifth Report, Escobar Hernàndez (n. 365) at 3; see: Report of the Commission to General Assembly on the work of its fifty-eighth session, A/CN.4/SER.A/2006/Add.l (Part 2) Yearbook of the International Law Commission, 2006, vol. II, Part Two, at 185, para 257 and at 191, annex I.

[436] Fifth Report, Escobar Hernàndez (n. 365) at 3; see: Report of the Commission to General Assembly on the work of its fifty-ninth session, A/CN.4/SER.A/2007/Add.l (Part 2) Yearbook of the International Law Commission 2007, vol. II, Part Two, at 98, para 376.

[437] Fifth Report, Escobar Hernàndez (n. 365) at 3; see: Report of the Commission to General Assembly on the work of its fifty-ninth session (n. 436) at 101, para 386; Memorandum by the Secretariat, Immunity of State officials from foreign criminal jurisdiction, Mar. 31, 2008, A/CN.4/596, International Law Commission, Sixtieth session, Geneva, 5 May-6 June and 7 July-8 August 2008.

[438] Preliminary Report, Kolodkin (n. 25); Second Report, Kolodkin (n. 419); Third Report on immunity of State officials from foreign criminal jurisdiction, May 24, 2011, A/CN.4/646, by Special Rapporteur Roman Anatolevich Kolodkin.

[439] For a complete and detailed analysis of the works of the International Law Commission and of the Sixth Committee of the General Assembly, see: Fifth Report, Escobar Hernàndez (n. 365) at 3.

[440] Fifth Report, Escobar Hernàndez (n. 365) at 3; see: Report of the International Law Commission on the work of its sixty-fourth session (7 May–1 June and 2 July–3 August 2012) General Assembly Official Records Sixty-seventh session Supplement No. 10 (A/67/10), at 93, para 84.

[441] Preliminary Report on immunity of State officials from foreign criminal jurisdiction, May 31, 2012, A/CN.4/654, by Special Rapporteur Conceptiòn Escobar Hernàndez [hereinafter: Preliminary Report, Escobar Hernàndez]; Second Report, Escobar Hernàndez (n. 26); Third Report on immunity of State officials from foreign criminal jurisdiction, June 2, 2014, A/CN.4/673*, by Special Rapporteur Conceptiòn Escobar Hernàndez [hereinafter: Third Report, Escobar Hernàndez]; Fourth Report on immunity of State officials from foreign criminal jurisdiction, May 29, 2015, A/CN.4/686, by Special Rapporteur Conceptiòn Escobar Hernàndez; Fifth Report, Escobar Hernàndez (n. 365).

[442] For a complete and detailed analysis of the works of the International Law Commission and of the Sixth Committee of the General Assembly, see: Fifth Report, Escobar Hernàndez (n. 365) at 3-6.

[443] For a complete and detailed analysis of the works of the Drafting Committee and of the States' comments, see: Fifth Report, Escobar Hernàndez (n. 365) at 3-6.

Concepciòn Escobar Hernàndez, plans to submit a Sixth Report so to conclude the initial programme of work and to allow the Commission to finalize its consideration, with the approximate objective of terminating the whole procedure in 2019.[444] A whole process of understanding and exam of the topic is under way, and this substantiates, on the one hand, that there is a growing interest for the issue of immunity of State officials from foreign criminal jurisdiction at present and, on other hand, that the topic represents a very uncertain matter, whose boundaries and substance urge to be properly defined within a legal framework.

In conclusion, if this dissertation does not, and could not, aim at elaborating a valid definition of immunity, it can, nevertheless, benefitting from the current achievements of the work of the UN and also of the international legal scholarship and jurisprudence, determine its righteous scope of application, so that at least some degree of certainty upon its function and employment can be reached.

[444] Fifth Report, Escobar Hernàndez (n. 365) at 95, paras 249-251.

III. The rationale: is immunity tantamount to impunity? General remarks

"But here, more modestly, it is Slobodan Milosevic's personal responsibility which the Prosecution intends to demonstrate for the crimes ascribed to him, nothing but that, but all of that."[445]

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The question of whether immunity is tantamount to impunity has largely been posited by the international community. The question is whether the application of immunity rules does nothing but duly applies the safeguards which international law grants to State officials or whether it makes void the corresponding safeguards which international law grants to some basic, essential human rights. Or whether, instead, it does both; in which case a balance must be struck between the two layers of safeguards.

The Arrest Warrant case before the ICJ carries outstanding relevance in many instances. Particularly so, with regard to the understanding of the interplay between immunity and impunity. While in her dissenting opinion Judge Van den Wyngaert stated that: *"In theory, the Court may be right: immunity and impunity are not synonymous and the two concepts should therefore not be conflated. In practice, however, immunity leads to de facto impunity"*,[446] the final finding of the court then went in the opposite direction. One passage of the *Arrest Warrant* case reads as follows: *"Immunity from jurisdiction […] does not mean that they enjoy impunity in respect of any crimes they might have committed, irrespective of their gravity. Immunity from criminal jurisdiction and individual criminal responsibility are quite separate concepts. While jurisdictional immunity is procedural in nature, criminal responsibility is a question of substantive law. Jurisdictional immunity may well bar prosecution for a certain period or for certain offences; it cannot exonerate the person to whom it applies from all criminal responsibility."*[447] This passage carries an outstanding legal value because of two reasons. In the first place, it expresses the viewpoint of the ICJ with regard to the procedural nature of

[445] *Prosecutor v Milošević Slobodan*, IT-02-54, ICTY, Transcript (12 Feb. 2002) Carla Del Ponte, Chief Prosecutor, at 11, quoted in Michael J. Kelly, *Nowhere to Hide. Defeat of the Sovereign Immunity Defense for Crimes of Genocide and the Trials of Slobodan Milosevic and Saddam Hussein* (Peter Lang, 2005) at 69.
[446] ICJ, *Arrest Warrant of 11 April 2000* (n. 27) Dissenting Opinion of Judge Van den Wyngaert, at 160, para 34.
[447] ICJ, *Arrest Warrant of 11 April 2000* (n. 27) at 25, para 60.

immunity with respect to jurisdiction, as highlighted in the previous pages. Secondly, it marks a clear boundary between immunity and impunity, by declaring that immunity may impede prosecution for given acts in a given time frame but that the individual who enjoys it remains subject to the criminal responsibility which is likely to arise out of those very acts. In other words, immunity from foreign criminal jurisdiction does not serve as an excuse which justifies all criminal acts perpetrated by the individual who is granted it; rather it responds to a specific function for the well-being of inter-State relations.

Both treaty law and the jurisprudence of the ICJ agree on the point. As for the former, the preambles of the Vienna Convention on Diplomatic Relations,[448] of the Vienna Convention on Consular Relations[449] and of the Convention on Special Missions[450] prescribe, in similar terms, that privileges and immunities are not to be considered benefits granted to the individuals as such, rather they ensure the efficient performance of the functions of the mission (be it diplomatic, consular or special mission) as representing States or, in a different wording, on behalf of their respective States.[451] It is, thus, because of their actions carried out on behalf of their own States that those individuals are exempt from the criminal jurisdiction of the host State. Again, the question of immunity is a matter of inter-State relations, fully conceived in a context of pure public international law. The rationale, thus, seems to be the same for all kinds of immunities, irrespective of whether they are embedded in the special regimes of international conventions or whether they are inferred from the general system of immunity of State officials from foreign criminal jurisdiction, which has not been codified yet.[452] In the words of Shaw, *"the special privileges and immunities related to diplomatic personnel of various kinds grew up partly as a consequence of sovereign immunity and the independence and equality of states, and partly as an essential requirement of an international system."*[453] And this is, ultimately, the basic foundation for all kinds of immunities as granted by general international law.

As for the latter, in the *Arrest Warrant* case the Court expresses the view that: *"In customary international law, the immunities […] are not granted for their personal benefit,*

[448] Vienna Convention on Diplomatic Relations (n. 24), fourth preambular paragraph.
[449] Vienna Convention on Consular Relations (n. 24), fifth preambular paragraph.
[450] Convention on Special Missions (n. 24), seventh preambular paragraph.
[451] See also: Institut de droit international, Session of Vancouver – 2001, Resolution of the Institute of International Law (n. 376) third preambular paragraph.
[452] Preliminary Report, Kolodkin (n. 25) para 101 at 184.
[453] Shaw (n. 38) at 546; see also: Preliminary Report, Kolodkin (n. 25) para 101 at 184.

but to ensure the effective performance of their functions on behalf of their respective States."[454] Eminent scholars observe that the Court refers, in the passage, to the theory of functional necessity in order to justify the applicability of immunity to the case at hand.[455] This theory admits immunities to justify a certain type of acts because this guarantees the effective performance of the official's functions; the immunities *"therefore bar any possible interference with the official activity"*.[456] At the present stage of the dissertation, it seems relevant to note that the Court does not only rely on such theory when it grants immunity to the Minister for Foreign Affairs of the Democratic Republic of the Congo, but it also makes reference to a similar rationale to that explicitly expressed in the wording of the preambles of the above-mentioned conventions.[457] Indeed, it is precisely because the officials act on behalf of their respective States or representing their States, that immunities can be invoked and applied. Not only to warrant that their own functions are duly fulfilled, but also because those functions fall within the tasks demanded to a State's representative or in any case to an official acting on behalf of a sending State.[458] The jurisprudence of the ICJ seems, at least on this point, in line with the literal elaboration of the conventions.

It seems advisable to provide for a general and comprehensive outline of the three main theories which have been advanced by the international legal scholarship in order to provide for a rationale for immunity. The three theories are, as follows: the extraterritoriality theory, the representative theory and the functional necessity theory.

Under the so-called "extraterritoriality theory" a legal fiction is created so that the premises of a mission or of a sovereign in the receiving State are considered as an extension of the territory of the sending State.[459] As Westlake stipulates it, *"then came the desire to find a juridical ground for privileges already enjoyed, which led to the fiction that the precincts of a legation are part of the territory of the state which sends it, and consequently to the term*

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[454] ICJ, *Arrest Warrant of 11 April 2000* (n. 27) at 22, para 53.

[455] Preliminary Report, Kolodkin (n. 25) para 86 at 178; Antonio Cassese, 'When may senior State officials be tried for international crimes? Some comments on Congo v Belgium Case', (2002) 13 EJIL 853, at 855; Koller (n. 421) at 11.

[456] Cassese, 'When may senior State officials be tried for international crimes? Some comments on Congo v Belgium Case' (n. 455) at 855.

[457] Preliminary Report, Kolodkin (n. 25) paras 85-86 at 178-179.

[458] Preliminary Report, Kolodkin (n. 25) para 86 at 178-179.

[459] Intersessional Meeting of Legal Experts to discuss matters relating to international law commission to be held on 10 Apr. 2012 at Aalco secretariat, New Delhi, Immunity of State Officials from Foreign Criminal Jurisdiction, Background Paper, at 4, available at: <www.aalco.int/background%20paper%20ilc%2010%20april%202012.pdf> last accessed 31 Oct. 2017.

'extraterritoriality', indicative of absence or exclusion from the geographical territory, being used to describe the legal position of diplomats and their precincts."[460] While for sovereigns the extra-territoriality theory was mainly based on the principle *par in parem non habet imperium* or *par in parem non habet jurisdictionem*, for diplomatic envoys, it was premised on the necessity that envoys must be independent from the jurisdiction and control of the forum State in order to be able to duly perform the assigned duties.[461] In this framework, immunity is inferred from different principles of public international law regulating inter-State relations,[462] like State equality,[463] as already mentioned, the principles of independence and of dignity of States[464] and of non-interference.[465] The theory of extraterritoriality is now believed to have ceased to exist.[466]

The representative theory is rationalized on the idea that the sending State is in some ways "personified" by the agents within the borders of the receiving State.[467] The theory was easily applied with regard to the sovereign or the Head of State, both of whom, by virtue of the collective powers of the State they "embodied", were considered representatives of the State in every act they fulfilled in the international relations.[468] In a latin phrase, this is expressed by the concept of *"jus repraesentationis omnimodae".*[469] As time passed by, the incumbencies concerning international relations began to be carried out by the foreign Ministers, to whom also the correlated representative character was extended: foreign affairs were performed by the Minister with the consent of the Head of State and, for this reason, on behalf of the State itself.[470]

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[460] John Westlake, *International Law, Part I, Peace* (Cambridge University Press, 1904) at 263-264.

[461] Intersessional Meeting of Legal Experts (n. 459) at 4.

[462] Intersessional Meeting of Legal Experts (n. 459) at 4.

[463] On the relationship between equality of States and State immunity fro jurisdiction, see: Robert Jennings and Arthur Watts (eds.), *Oppenheim's International Law, vol. I, Peace, Introduction and Part 1* (Longman, 1992) at 341 et seq.

[464] Jennings and Watts (eds.) (n. 463) at 342 also mention the principles of independence and dignity of States as a legal basis for jurisdictional immunities of foreign States.

[465] *Pinochet No. 3* (n. 401) at 581, Lord Saville of Newdigate, at 642; Lord Millet, at 645; and Lord Phillips of Worth Matravers, at 658.

[466] Preliminary Report, Kolodkin (n. 25) para 87 at 179 ft. 157; more broadly, for an in-depth analysis of the notion of extraterritoriality, see also: Léo Strisower, 'L' extraterritorialité et ses principales applications' (1923) 1 RCADI 229, at 233 et seq.

[467] Intersessional Meeting of Legal Experts (n. 459) at 4.

[468] Intersessional Meeting of Legal Experts (n. 459) at 4.

[469] Intersessional Meeting of Legal Experts (n. 459) at 4.

[470] Intersessional Meeting of Legal Experts (n. 459) at 4.

The functional necessity theory is closely linked to the idea of the functions which the agent is asked to fulfill, as it stems from the given mission.[471] According to this theory, immunity allows the State official to freely carry out the given functions, because it removes all the constraints that a criminal proceeding would entail.

As it is clear both from the commentaries of the ILC (where the Commission states that it was guided by the functional necessity theory in addressing issues where the common practice offered no help, bearing in mind the representative character of the Head of mission and of the mission itself)[472] and from the reasoning of the ICJ in the *Arrest Warrant* case,[473] the most applied rationale seems to be a combination of the representative and of the functional necessity theories.[474]

Anyhow, as expressed by the incumbent Special Rapporteur of the ILC on the issue, Ms. Concepciòn Escobar Hernàndez, even if the most appropriate methodological mean to examine the subject is to distinguish between immunity *ratione materiae* and immunity *ratione personae*, some assertions are valid for both types of immunity.[475] Amongst these assertions, there is no doubt whatsoever that *"the two types of immunity have the same purpose, namely to preserve principles values and interests of the international community as a whole; […] and they are granted with a view to the continued performance of such functions and to stability in international relations."*[476] This implies that immunity of State officials from foreign criminal jurisdiction as a whole, and not just immunity *ratione materiae*, must be regarded to be functional in nature because it is meant at safeguarding the core values of the international arena. In the words of Ms. Concepciòn Escobar Hernàndez, *"this functional nature of immunity, understood broadly, is the cornerstone of immunity […];"*[477] consistently, when considering the various theories which have been formulated to provide for a rationale to immunity, it must always be borne in mind that the safeguard of the performance of the official's functions underlies the notion of immunity, widely interpreted.

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[471] Intersessional Meeting of Legal Experts (n. 459) at 4.

[472] Documents of the tenth Session, including the report of the Commission to the General Assembly, A/CN.4/SER.A/1958/Add.l, Yearbook of the International Law Commission, 1958, Volume II at 95, General Comments to Section II, Diplomatic Privileges and Immunities, para 3.

[473] ICJ, *Arrest Warrant of 11 April 2000* (n. 27) at 22, para 53.

[474] Preliminary Report, Kolodkin (n. 25) para 87 at 179.

[475] Preliminary Report, Escobar Hernàndez (n. 441) at 12-13.

[476] Preliminary Report, Escobar Hernàndez (n. 441) at 13.

[477] Preliminary Report, Escobar Hernàndez (n. 441) at 13.

IV. The distinction between immunity *ratione personae* and immunity *ratione materiae*

Immunity of State officials other than the so-called troika of Heads of State, Heads of Government and Ministers for Foreign Affairs has traditionally received less attention than other type of immunities.[478] Diplomatic, consular, special missions and troika's immunities usually surpass those of other State officials – let alone those of officials of international organizations.[479] However, despite the confusion which governs the issue of immunity, and within a multitude of practicioners and academics who erroneously conflated State immunity and State officials' immunity, eminent scholars analysed the "immunity of individuals acting on behalf of the State" as a separate and mostly indepenedent topic.[480]

In light of the discussion in the previous sections, the concept is twofold and encompasses, namely: immunity *ratione personae* and immunity *ratione materiae*. The distinction between the two immunities is widely appreciated in the legal scholarship[481] and confirmed by State practice.[482] The current Special Rapporteur of the ILC on the issue, Ms. Concepciòn Escobar Hernàndez, purports that the distinction has been widely endorsed by the international community and provides for the work of the Commission[483] and profuse publicists[484] to support such view. This partition was also acknowledged by the former Special

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[478] Chanaka Wickremasinghe, 'Immunities enjoyed by officials of States and International Organizations' in Malcolm D. Evans (ed.), *International Law* (Oxford University Press, 2014) at 396.

[479] Wickremasinghe, 'Immunities enjoyed by officials of States and International Organizations' (n. 478) at 379-401.

[480] Hazel Fox and Philippa Webb, *The Law of State immunity* (Oxford University Press, 2015) at 543-576.

[481] Cassese, 'When may senior State officials be tried for international crimes? Some comments on Congo v Belgium Case' (n. 455) at 862 et seq.; Micaela Frulli, 'Sull'immunità dalla giurisdizione straniera degli organi statali sospettati di crimini internazionali in Immunità costituzionali e crimini internazionali' in *Atti del Convegno Milano, 8 e 9 febbraio 2007* a cura di Aldo Bardusco, Marta Cartabia, Micaela Frulli e Giulio Enea Vigevani (Giuffrè Editore, 2008) at 6 et seq.; see: Conforti, *Diritto Internazionale* (n. 80) at 255 et seq; Enzo Cannizzaro, *Diritto Internazionale* (Giappichelli Editore, 2012) at 338 et seq.; Riccardo and Queirolo (n. 77) at 209 et seq.

[482] See: Cassese, 'When may senior State officials be tried for international crimes? Some comments on Congo v Belgium Case' (n. 455) at 863.

[483] Second Report, Escobar Hernàndez (n. 26) at 15, para 47, in fine; see also: Preliminary Report, Kolodkin (n. 25) paras 78-83 at 177-178; Memorandum by the Secretariat, A/CN.4/596 (n. 437) at 52 et seq., paras 88 et seq.

[484] Third Report, Escobar Hernàndez (n. 441) at 5; see, amongst others: Borghi (n. 395) at 129-131; Antonio Cassese, Guido Acquaviva, Dapo Akande, Laurel Baig, Jia Bing Bing, Robert Cryer, Urmila Dé, Paola Gaeta, Julia Geneuss, Katrina Gustafson and others, *The Oxford Companion to International Criminal Justice* (Oxford University Press, 2009) at 368; Hazel Fox, *The Law of State immunity* (Oxford University Press, 2004) at 421 et seq; see also, amongst many: Brigitte Stern, 'Vers une limitation dell'«irresponsabilité souveraine» des États et

Rapporteur on the issue, Mr. Roman Anatolevich Kolodkin,[485] who also enlisted the commentaries of the ILC,[486] scholarship[487] and jurisprudence[488] to strengthen the same view. Authors have also referred to the aforementioned distinction in terms of procedural immunity (with regard to immunity *ratione personae*) and substantive immunity (with respect to immunity *ratione materiae*),[489] considering that the former *"relate[s] to procedural law, that is, [it] render[s] the State official immune from civil or criminal jurisdiction (a procedural defence)"*[490] and the latter *"relate[s] to substantive law, that is, amount to a substantive defence (although the state agent is not exonerated from compliance with either international law or the substantive law of the foreign country-if he breaches national or international law, this violation is not legally imputable to him but to his state)"*[491] However, whilst some jurisprudence made use of the distinction in order to corroborate the existence or the absence of immunity in given cases,[492] it must be noted that the ICJ, in the well-known *Arrest Warrant*

chefs d'État en cas de crime de droit international', in Marcelo G. Kohen (ed.), *Promoting Justice, Human Rights and Conflict Resolution through International Law/La promotion de la justice, des droits de l'homme et du règlement des conflits par le droit international. Liber Amicorum Lucius Caflish* (Martinus Nijhoff Publishers, 2007) at 521; see also: Verhoeven (n. 396), at 94 et seq., offering a quadripartite vision of the field of application (*ratione personae, ratione temporis, ratione materiae, ratione loci*).

[485] Preliminary Report, Kolodkin (n. 25) paras 78-83 at 177-178.

[486] Report of the International Law Commission on the work of its forty-third session (29 April – 19 July 1991) A/CN.4/SER.A/1991/Add.l (Part 2), Yearbook of the International Law Commission 1991, Volume II Part Two, (A/46/10) [hereinafter: ILC Report, 1991, A/46/10] at 18 and 19.

[487] Adam Day, 'Crimes against humanity as a nexus of individual and State responsibility: why the ICJ got Belgium v Congo wrong, (2004) 22 Berkeley J.Int'l L. 489, at 490 et seq.; Micaela Frulli, 'The question of Charles Taylor's immunity: still in search of balanced application of personal immunities?', (2004) 2 JICJ 1118, at 1125 et seq.; Wirth (n. 25) at 882 et seq.; Mark A. Summers, 'Immunity or impunity? The potential effect of prosecutions of State officials for core international crimes in States like the United States that are not parties to the Statute of the International Criminal Court', (2006) 31 Brook.J.Int'l L 463, at 464 et seq.; Toner (n. 33) at 902 et seq.; specifically on *"L'immunité du chef d'Etat en function"*, see: Borghi (n. 395) at 53-56; see also: Antonio Cassese, *International Criminal Law* (Oxford University Press, 2008) at 302 et seq.

[488] *Pinochet No. 3* (n. 401) at 600, 601, 605, 606, 644, 645, etc.; ICJ, *Certain Questions of Mutual Assistance in Criminal Matters* (Djibouti v France), 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 France), Verbatim Record, document CR 2008/3, at 15, para 23 and Public sitting held on Friday 25 January 2008, at 10 a.m., at the Peace Palace, President Higgins presiding, in the case concerning Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v France), Verbatim Record, CR 2008/5 at 50 and 51, paras 75-77.

[489] Preliminary Report, Kolodkin (n. 25) para 81 at 177 ft. 147; Cassese, 'When may senior State officials be tried for international crimes? Some comments on Congo v Belgium Case' (n. 455) at 863 et seq.; Koller (n. 421) at 25-26; Day (n. 487) at 493; Frulli, 'The question of Charles Taylor's immunity: still in search of balanced application of personal immunities?' (n. 487), at 1125 and 1126.

[490] Cassese, *International Criminal Law* (n. 487) at 304.

[491] Cassese, *International Criminal Law* (n. 487) at 303-304.

[492] Preliminary Report, Kolodkin (n. 25) para 83 at 178 ft 149; *Pinochet No. 1* (n. 401); *Pinochet No. 3* (n. 401); *Jones No. 1* (n. 63); *Jones No. 2* (n. 63).

case, did not use the categorization of immunities as distinguished in immunity *ratione personae* and immunity *ratione materiae*, though it differentiated acts performed in office or after the end of the office and acts performed in official or private capacity.[493] Additionally, in his analysis,[494] the former Special Rapporteur on Immunity of State officials from foreign criminal jurisdiction, Mr. Roman Anatolevich Kolodkin also pointed out that the main Conventions which concern immunity do not contain such differentiation in clear and explicit terms,[495] with the exception of the 2004 UNCSI.[496] The current Special Rapporteur of the ILC on the issue, Ms. Concepciòn Escobar Hernàndez, underlined that it is useful to distinguish between the two types of immunity, as it aids to build up clarity on the issues and also allows the application of separate regimes to each kind of immunity.[497]

Consistently, when applying the distinction, it has to be considered that immunity *ratione personae* and immunity *ratione materiae* share common features and differentiate themselves for other elements.

As for the shared features, the basis upon which both types of immunities rest is the preservation of international relations, in respect of States' sovereign equality which is ensured by guaranteeing that State officials can perform their functions without interference.[498] This implies, also in light of the rationale which justifies the application of immunity broadly interpreted, that immunity as a whole, irrespective of the two-tiered distinction, has a functional nature which aims at preserving the stability of international affairs also by freeing State officials from any hindrance which may restrict their independent action.[499] Moreover, the two

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[493] Preliminary Report, Kolodkin (n. 25) para 83 at 178; ICJ, *Arrest Warrant of 11 April 2000* (n. 27) at 23, 26, para 54, 55 and 61.

[494] Preliminary Report, Kolodkin (n. 25) para 83 at 178.

[495] Vienna Convention on Diplomatic Relations (n. 24) upon which see also: Cannizzaro (n. 481) at 339; Vienna Convention on Consular Relations (n. 24); Convention on Special Missions (n. 24); Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character (n. 24).

[496] United Nations Convention on Jurisdictional Immunities of States and their Property (n. 389). As noted by the former Special Rapporteur on Immunity of State officials from foreign criminal jurisdiction, Mr. Roman Anatolevich Kolodkin, at Preliminary Report, Kolodkin (n. 25) para 83 at 178 ft 151, art. 3, para 2 of the above-mentioned Convention expressly refers to immunity *ratione personae* whilst art. 1 and art. 2, para 1, (b), (iv) although not mentioning directly immunity *ratione materiae*, seem to have embraced the core meaning of such kind of immunity by aligning the concepts of State and State representatives acting in that capacity, for the purpose of the Convention.

[497] Preliminary Report, Escobar Hernàndez (n. 441) at 12-13.

[498] Second Report, Escobar Hernàndez (n. 26) at 15; Preliminary Report, Escobar Hernàndez (n. 441) at 13.

[499] Second Report, Escobar Hernàndez (n. 26) at 15; Preliminary Report, Escobar Hernàndez (n. 441) at 13; for the functional nature of immunity see also: ICJ, *Arrest Warrant of 11 April 2000* (n. 27) at 22-23, para 53; Institut de droit international, Session of Naples– 2009, Resolution of the Institute of International Law, Immunity of

kinds of immunity feature other elements in common. They are accorded to individuals, even if they ultimately safeguard the State's well-being in the international arena.[500] Furthermore, in both cases, immunity is applied to specifically identified subjects which, in the absence of immunity, would not be exempt from the criminal proceedings.[501]

As for the differences between the types of immunity, in general terms, it may suffice to remind that: *i)* immunity *ratione personae* is not granted to all State officials, but only to those who represent their State in international affairs, because of the prominent function they are requested to perform, while immunity *ratione materiae* is granted to all State officials; *ii)* the former applies to all acts carried out by the official, whereas the latter only covers official acts, that are acts carried out in the exercise of official functions; *iii)* the former is temporary in nature, thus it only concerns those acts performed until the person carries out a certain office, meanwhile the latter continues to be applied even when the officials have ceased to perform their function as State officials.[502]

Following the distinction operated by Chanaka Wickremasinghe,[503] the following chart can be adopted to illustrate the key features of each type of immunity.[504]

Jurisdiction of the State and of Persons Who Act on Behalf of the State in case of International Crimes (Third Commission, Rapporteur: Lady Fox) art. II, para 1.

[500] Second Report, Escobar Hernàndez (n. 26) at 16.

[501] Second Report, Escobar Hernàndez (n. 26) at 16.

[502] Second Report, Escobar Hernàndez (n. 26) at 16; see also, for an analysis of the characteristics of the two types of immunity: Cassese, 'When may senior State officials be tried for international crimes? Some comments on Congo v Belgium Case' (n. 455) at 862 et seq.

[503] Wickremasinghe, 'Immunities enjoyed by officials of States and International Organizations' (n. 478) at 381-383.

[504] For an in-depth analysis of the two types of immunity, see, *inter alia*: Fox and Webb (n. 480) at 543-576; Rosanne Van Alebeek, *The immunity of States and their Officials in International Criminal Law and International Human Rights Law* (Oxford University Press, 2008) at 103-199; Elizabeth H. Franey, *Immunity, Individuals and International Law. Which Individuals are Immune from the Jurisdiction of National Courts under International Law* (LAP Lambert, 2011) at 87-285.

	IMMUNITY ***RATIONE PERSONAE***		**IMMUNITY** ***RATIONE MATERIAE***
Subjective element	is enjoyed by certain categories of officials	≠	is enjoyed by all State officials
Objective element	covers both personal and official acts	≠	covers only official acts
Temporal element	can be invoked only until the official is on duty	≠	can be invoked even when the official has left office
Waiver	can be waived by the authorities of the sending State	=	can be waived by the authorities of the sending State

The current Special Rapporteur of the ILC on the issue, Ms. Concepciòn Escobar Hernàndez, also pinpoints that States' national legislations may appear weak in this sense, but this may mainly be due to the scarcity of State practice concerning the application of immunity from foreign criminal jurisdiction and also to the fact that usually domestic laws do not feature

expressly immunity from foreign jurisdiction.[505] The afore-explained findings are also appreciated by the work of the ILC on the issue.[506]

[505] Second Report, Escobar Hernàndez (n. 26) at 16-17.

[506] Third Report, Escobar Hernàndez (n. 441) at 5-6; Report of the International Law Commission on the work of its sixty-fifth session (6 May to 7 June and 8 July to 9 August 2013) General Assembly Official Records, Sixty-eighth session, Supplement No. 10 (A/68/10), para 49, commentary to draft article 4, paragraph 3, at 66-70, in particular sub-para 7 at 70.

PART II

Is there a territorial "offence" exception to immunity from criminal jurisdiction?

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- **b) *Rainbow Warrior case*, New Zealand, UN Secr. Gen. and Arbitration Trib.**
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- **i) *Ferrini v Federal Republic of Germany*, Italy**
- **j) *Prosecutor v Tihomir Blaškić*, case IT-95-14, ICTY, particularly: *Appeals Chamber, Judgment on the Request of The Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997***

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1. Introduction

Part 2 of the dissertation is aimed at developing a critical and original study on whether or not international law conceives, or could conceive, of a territorial "offence" exception to State officials' immunity from criminal jurisdiction. The territorial tort exception which exempts States from being subject to foreign jurisdiction will be analyzed mainly through analogical thinking in order to assess whether or not the same exception – with all the due terminological requested edits – could also be applied within the context of foreign criminal jurisdiction over State officials.

The chapter is to be construed according to the so-called comparative or analogic reasoning, a method which relies on similarities between different legal systems, jurisprudence or norms.

Legal reasoning is a complex branch of law, to which vast studies have been dedicated.[507] It is usually understood as *"the reasoning pattern of lawyers when they argue a case and judges when they decide one"*.[508] This work has no aim of completeness with respect to issues concerning the legal reasoning as such and, in the detail, analogical reasoning.[509] However, it seems reasonable to provide for some explanation on why I have deemed it useful to rely on the analogical approach and why it is credible for the issue at stake.

First of all, it must be in any case remarked that this work deals with analogy on the international legal plane. This carries relevant consequences in so far as analogy does not operate within the ambit of civil or, even more problematically, criminal law, nor is it developed between the civil and criminal legal spheres. Contrarily, the analogical approach under consideration in the present work always rests on the level of public international law. It operates, in fact, between two norms of the international legal systems which, although concerning issues of domestic (civil and criminal) law,

[507] See, for instance: Edward H. Levi, *An Introduction to Legal Reasoning* (The University of Chicago Press, 1949); for more specific works on interpretation within the international legal system, see: Andrea Bianchi, Daniel Peat and Matthew Windsor (eds.), *Interpretation in International Law* (Oxford University Press, 2015).

[508] Lloyd L. Weinreb, *Legal Reason. The Use of Analogy in Legal Argument* (Cambridge University Press, 2005) at 77.

[509] For some in depth studies on analogical reasoning, see, for instance: Scott Brewer, 'Exemplary Reasoning: Semantics, Pragmatics, and the Rational Force of Legal Argument by Analogy' (1996) 109 Harv.L.Rev. 923; Weinreb (n. 508).

still remain international in nature and substance. This additionally implies that the present analysis of analogy will not address it within the civil or the criminal spheres, with all the consequences of its application to those contexts; rather it will only understand the issue from the perspective of public international law.

Etymologically, the term "analogy"[510] originates from the Ancient Greek ἀναλογία (proportion) which, in turn, derives from the verb ἀναλογίζομαι (to calculate in proportion).[511] The mathematical concept of proportion, where the term was first applied, was originally used to address any four numbers whose ratios were equal.[512] Thanks to the efforts of Plato and Aristotle, the term began to be applied beyond the mathematical sphere and subsequently stretched even more so as to cover also the concept of "relevant similarity", which it is usually conflated with.[513] While in the earlier times, analogy was ideally conceived to operate, with geometrical preciseness, as a pure mathematical proportion, it was subsequently deemed to rely on not only logical but also metalogical and axiological parameters, which clearly do not point at any incontrovertible certainty.[514]

The analogical methodology within the legal field implies, consistently, an assessment of legal concepts, on the basis that a comparison can be drawn between two or more issues[515] and, as it has already been stressed out, it has been then borrowed by the philosophical and scientific discourse from the mathematical one, where it was

[510] For a definition of analogy in current English language, see: the Cambridge Dictionary, available at: http://dictionary.cambridge.org/dictionary/english/analogy; and the Oxford Dictionary, available at: <https://en.oxforddictionaries.com/definition/analogy> last accessed 31 Oct. 2017.

[511] See, amongst many: "Analogia", Dizionario di Filosofia, Enciclopedia Treccani, available at: <www.treccani.it/enciclopedia/analogia_%28Dizionario-di-filosofia%29/>, last accessed 31 Oct. 2017, the translation from Italian into English is of the author of the present dissertation.

[512] Brewer (n. 509) at 949.

[513] Brewer (n. 509) at 949-950.

[514] Giuseppe Zaccaria, Analogy as Legal Reasoning. The hermeneutic foundation of the analogical procedure in Patrick Nerhot (ed.) *Legal Knowledge and Analogy. Fragments of Legal Epistemology, Hermeneutics and Linguistics*, Volume 13 (Kluwer Academic Publishers, 1991) at 56.

[515] On the use of the comparative and analogical reasoning as "a tecnique of legal reasoning", see: Valentina Vadi, *Analogies in International Investment Law and Arbitration* (Cambridge University Press, 2016) at 2.

originally applied.[516] It is the typical type of reasoning which characterizes the Ango-American systems, which are based on the importance of the precedent.[517]

Because it primarily aims at filling and eventually resolving a problem of *lacunae*, analogy represents an *"exceptional hermeneutic means"*, *"whereby the rule given in the law for a case A is transferred to a case B not governed by the law but judged by the interpreter to be similar to A."*[518] Typically, analogy works as an *"argumentum a similibus ad similia"*,[519] in that it applies the principle of legal equality, treating similarly cases which are basically different but present similar features.[520] Ultimately, it rests on the principle of universalizability.[521]

For as trivial as the remark may seem, an analogy cannot be deduced from the mere occurrence of similarities between concepts; a methodology compatible with the system of public international law needs, in fact, to be developed in order to allow the analogical reasoning to be justified.[522]

Let me now consider the key features of analogical reasoning.

Analogical legal reasoning is a derivative of the analogical way of reasoning we are all used to apply to non-legal situations in the first place. It allows the interpreter to depart from a known situation (the source analog) and eventually reason on a new circumstance (the target analog) through different types of steps (namely, as they have been classified: access or retrieval step, the mapping step, the inference step and the learning step).[523] As a cognitive process that moves from the particular to the general and then to another particular, the analogical reasoning needs not to be considered neither as an inductive approach nor as a deductive one.[524] Through the *ratio* or *anima legis* it infers from one particular case, the process is then able to shift to the parallel

[516] For a full description of how the term evolved through the years, see: "Analogia", Dizionario di Filosofia, Enciclopedia Treccani (n. 511).

[517] Edward G. White, 'Analogical Reasoning and Historical Change in Law: The Regulation of Film and Radio Speech' in Austin Sarat and Thomas R. Kearns (eds.), *History, Memory and the Law* (University of Michigan Press, 1999) at 286.

[518] Zaccaria (n. 514) at 49-50.

[519] Zaccaria (n. 514) at 51.

[520] Zaccaria (n. 514) at 55.

[521] Zaccaria (n. 514) at 55.

[522] Vadi (n. 515) at 3.

[523] Keith J. Holyoak and Paul Thagard, 'The Analogical Mind' (1997) 52 American Psychologist, 35, at 35.

[524] Vadi (n. 515) at 35.

case.[525] Analogical reasoning has, thus, been applied as such both in civil law countries (where it has been subdivided into *analogia legis* and *analogia iuris*) and common law countries.[526]

As a matter of fact, analogical reasoning is mainly characterized by the following features: *"principled consistency; a focus on particulars; incompletely theorized judgments; and principles operating at a low or intermediate level of abstraction."*[527] Turning to the detail, they entail that: *i)* there must be coherence and consistency between the two terms of comparison; *ii)* it is a type of "bottom-up" thinking,[528] as it develops from the concrete and particular cases, rather than from the general notions, akin most kinds of legal reasoning; *iii)* it does not rely on any underlying theory; *iv)* it does not depend upon general moral or ethical principles even if it applies some low/intermediate degree of abstraction from the particular case.[529]

Naturally, analogical thinking is prone to criticism. The most three persuasive objections are: *i) "the absence of scientific, external or critical perspectives"*[530] *ii)* its *"indeterminacy [and] dependence on consensus",*[531] *iii) "the search for relevant differences - the inevitable need for criteria never supplied by analogical reasoning"*[532] Indeed, in order for an analogy to be correctly applied, one must first assess what is relevant and what is not between the two comparative terms – as only some differences and some correspondences (though not all) may be relevant.[533]

As a general legal approach, it has unfortunately often been deemed as an inappropriate way of legal reasoning.[534] Nevertheless, it must be acknowledged that it carries several beneficial consequences compared to other types of legal thinking: it is extremely suited for the particular case, to which the general principles are applied only if they suit the peculiar circumstances of the case;[535] it allows people to converge even

[525] Vadi (n. 515) at 35.
[526] For more elucidations, see: Vadi (n. 515) at 36 et seq.
[527] Cass R. Sustein, 'On Analogical Reasoning', (1993) 106 Harv.L.Rev. 741 at 746 and 790.
[528] Sustein (n. 527) at 746.
[529] See, more in depth: Sustein (n. 527) at 746 et seq.
[530] Sustein (n. 527) at 767-769.
[531] Sustein (n. 527) at 767-773.
[532] Sustein (n. 527) at 773-781.
[533] Sustein (n. 527) at 745.
[534] Sustein (n. 527) at 791.
[535] Sustein (n. 527) at 790-791.

if they do not share the same rationale; it perfectly matches the systems governed by the *stare decisis* principle; and it also advances moral evolution.[536]

As far as public international law is concerned, the analogical approach has been widely made use of, also in light of the fact that the international legal system rests on sources of law which eloquently depart from those of traditional civil and common law matrix.[537] Analogy has been used as a tool *"to create new rules or to extend existing rules to new cases in international law."*[538] An illustrative example can be found in the *Lotus* case of the PCIJ[539] and a more recent one is to be traced in the case *Nicaragua v United States of America* of the ICJ,[540] even though one has to take into account that even the ICJ's employment of analogy has been criticized[541] (however, there seems to be no universal agreement as to when a certain methodological reasoning of the ICJ might be considered analogical or not).[542] The ICJ, in particular, has applied analogical deduction as a methodological approach, in addition to normative and functional deduction,[543] in cases like the *Libya/Malta Continental Shelf* case.[544] Even though, indeed, a distinction must be drawn between State immunity and State officials' immunity from criminal jurisdiction, one would still anticipate a consistent approach to both issues by the ICJ.

The analogical approach has also been applied in cases concerning immunity as such, by, for instance, the European Court of Human Rights.[545] Since, additionally, cases concerning international law are rarer than domestic ones, and usually more

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[536] For all such concepts, see: Sustein (n. 527) at 790-791.

[537] See: ICJ Statute (n. 403) art. 38.

[538] Silja Vöneky, Analogy in International Law, Max Planck Encyclopedia of Public International Law, Oxford Public International Law, para 7 (B), available at: <http://opil.ouplaw.com/home/EPIL> last accessed 31 Oct. 2017.

[539] PCIJ, *The S. S. Lotus* (n. 41); see also: Vadi (n. 515) at 41 et seq.

[540] ICJ, *Military and Paramilitary Activities in and against Nicaragua* (Nicaragua v United States of America), Jurisdiction and Admissibility, Judgment, 26 Nov. 1984, I.C.J. Reports 1984, p. 392, para 63, at 420.

[541] See, for instance: ICJ, *Arrest Warrant of 11 April 2000* (n. 27) Dissenting Opinion of Judge Van den Wyngaert, para 14 at 146, para 16 at 146-147, para 20 at 149.

[542] Stefan Talmon, 'Determining Customary International Law: The ICJ's Methodology between Induction, Deduction and Assertion' (2015) 26 EJIL 417 at 425, considering the Arrest Warrant case as a case where the ICJ employed functional deduction.

[543] Talmon (n. 542) at 423 et seq.

[544] ICJ, *Continental Shelf* (Libyan Arab Jamahiriya/Malta), Judgment, 3 June 1985, ICJ Reports (1985) p. 13 at 33, para 34.

[545] *Case of Jones and Others v the United Kingdom* App. Nos. 34356/06 and 40528/06 (ECtHR, 14 Jan. 2014) paras 81-93.

difficult to be dealt with, analogy is a useful tool in order to adjudicate those cases.[546] More closely, while analogy has been applied (and for such use it has, in fact, been criticized) between diplomatic immunity and immunity of heads of State and other State officials,[547] it has also been employed in the context of State and State officials immunity: in fact, the whole issue of immunity of State officials can be deemed to have been developed *"as a corollary of the rule of State immunity"*[548] and, following this line, the former is a consequence of the latter.[549]

All in all, the analogical approach seems a reasonable legal reasoning according to which the issue of a territorial "offence" exception to State officials' immunity from foreign criminal jurisdiction may be in depth analyzed.

At the time being, most studies in this regard have been carried out with respect to the territorial tort exception to States' immunity from foreign (obviously civil) jurisdiction. The exception has been vastly examined by commentators and equally applied by domestic and international courts. The terminology used (territorial *tort* exception) also illustrates the civil sphere to which it must be referred. And for as much as the ILC Special Rapporteur on the issue has applied it to criminal jurisdiction, taking somehow for granted that the exception could equally apply to the civil and criminal branches of law,[550] this extension requires further investigation of its feasibility.

In light of the above and also taking into account the common grounds of the two types of immunity examined in Part 1 of the dissertation, the analogical reasoning seems apt to guide the analysis of the subject-matter of this part. In fact, while in abstract terms one cannot rule out the possibility that the territorial "offence" exception might have some peculiar features of its own not derived from its civil counterpart – for example, it may rest on a self-standing rationale – it makes sense to address it in analogy with the territorial tort exception because of what stated above.

The structure of part 2 will, then, be as follows.

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[546] See also: Vadi (n. 515) at 42.

[547] See, as an example: Ramona Pedretti, *Immunity of Heads of State and State Officials for International Crimes* (Brill Nijhoff, 2015) at 196 et seq.

[548] Van Alebeek, *The immunity of States and their Officials in International Criminal Law and International Human Rights Law* (n. 504) at 103.

[549] Van Alebeek, *The immunity of States and their Officials in International Criminal Law and International Human Rights Law* (n. 504) at 105.

[550] Fifth Report, Escobar Hernàndez (n. 365) at 88-90, paras 225-229.

Chapter 2 will provide for an extensive analysis of the territorial tort exception to State immunity from civil jurisdiction: it will address the issue offering a broad examination, through a study of its historical background and State practice, its current status and key features and its very rationale.

The issue of whether or not a territorial "offence" exception exists as such within international law at present will be developed in the third chapter. The chapter will then be aimed at the assessment of whether or not, analogically, an exception similar to that of the territorial tort exception to immunity from civil jurisdiction can be claimed to exist within the context of criminal jurisdiction. Practice will be vastly examined and a possible rationale in depth studied. Terminological issues related to the binomial territorial tort exception for civil jurisdiction and territorial "offence" exception for criminal jurisdiction will also be developed.

The fourth and fifth sections of the third chapter will also determine whether or not the territorial "offence" exception amounts to a norm of customary nature, offering arguments in support and against this statement. Shall the answer go in the negative, the sections will further determine its status at present.

Bearing in mind all the controversies and the uncertainties within a system of international law constantly *in fieri*, conclusions will be drawn with regard to the territorial "offence" exception.

2. The territorial tort exception to State immunity from civil jurisdiction

I. Historical background and State practice

A. Treaties

a. Travaux préparatoires

b. Codification of art. 12 UNCSI

c. Present wording of art. 12 UNCSI

i. Torts explicitly mentioned by art. 12 UNCSI

ii. Torts implicitly inferred from art. 12 UNCSI

iii. Torts not covered by art. 12 UNCSI and unanswered questions

B. Legislation

C. Case law

a. ICJ

b. ECtHR

c. National case law

II. Status and key features

E. Status

F. Key features

i. Irrelevance of the distinction between acta iure imperii/acta iure gestionis

j. Connection between the act/the author and the territory

k. Territorial State law as the applicable law

l. Torts covered are largely limited to insurable loss – but also extendable to non-insurable risks

III. The rationale for the territorial tort exception

2. The territorial tort exception to State immunity from civil jurisdiction

I. Historical background and State practice

"[…] [E]xceptions to absolute immunity have gradually come to be recognised by national legislators and courts, initially in continental Western Europe and, much later, in common law countries. […] The exceptions in question have also found their way into the international law on State immunity, especially the tort exception."[551]

[551] *Case of McElhinney v Ireland*, App. No 31253/96 (ECtHR, 21 Nov. 2001) Joint Dissenting Opinions of Judges Caflisch, Cabral Barreto and Vajic, para 3; and as it has been recalled in ICJ, *Jurisdictional Immunities of the*

In light of the above, this section is meant at exploring the historical background and the State practice which led to the current state of the territorial tort exception. For this purpose, it has been divided in the following three subsections: Treaties, Legislation and Case Law.

A. Treaties

a. Travaux préparatoires of art. 12 UNCSI

By the use of the term *"treaties"* this subsection is addressing international law treaties as encompassed under the Vienna Convention on the Law of Treaties.[552]

While some earlier elaborations of the territorial tort exception can be found in the Resolution of the Institut de Droit International of 1891[553] – which tentatively drafted an exception for *"delictual or quasi-delictual acts committed within the forum State"*,[554] - State practice has not been consistent.[555]

The territorial tort exception began to be codified in international instruments at the beginning of the XX century;[556] however, it was not embraced in a fully comprehensive *ad hoc* convention, rather it appeared in conventions specialized on other issues.[557]

State (Germany v Italy: Greece intervening), Judgment, 3 Feb. 2012, I.C.J. Reports 2012, p. 99, Dissenting Opinion of Judge Cançado Trindade, para 137.

[552] Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 Jan. 1980) 1155 UNTS 331.

[553] See: Institut de droit international, Session of Hambourg – 1891, Resolution of the Institut de Droit International, Projet de règlement international sur la compétence des tribunaux dans les procès contre les Etats, souverains ou chefs d'Etat étrangers (Comité de rédaction, puis MM. Ludwig von Bar, John Westlake et Adolphe Hartmann) art. 4 (6).

[554] Fox and Webb (n. 480) at 470.

[555] Joanne Foakes and Roger O'Keefe, 'Article 12' in Roger O'Keefe and Christian J. Tams (eds.), Assistant Editor Antonios Tzanakopoulos *The United Nations Convention on Jurisdictional Immunities of States and their Property. A Commentary* (Oxford University Press, 2013) at 210; Fifth Report on jurisdictional immunities of States and their property, 22 Mar. and 11 April 1983, A/CN.4/363 & Corr.1 and Add.1 & Corr.1, by Special Rapporteur Sompong Sucharitkul at 41, para 76 [hereinafter: Fifth Report, Sucharitkul].

[556] For an in-depth study, see: Gerhard Hafner, Marcelo G. Kohen, Susan Breau (eds.), *State Practice Regarding State Immunity. La Pratique des Etats concernant les Immunités des Etats, Council of Europe* (Martinus Nijhoff Publishers, 2006) at 97-112.

[557] For an extensive analysis of such conventions and also of bilateral treaties, contracts and agreements with private parties, see: Bröhmer (n. 33) at 121 et seq. mentioning the following conventions: International Convention for the Unification of Certain Rules Relating to Immunity of State-Owned Vessels (adopted 10 Apr. 1926, entered into force 8 Jan. 1937) 176 LNTS 199; International Convention on Civil Liability for Oil Pollution Damage of (adopted 29 Nov. 1969, entered into force 19 Jun. 1975) 973 UNTS 3; Convention on Third Party Liability in the Field of Nuclear Energy (adopted 29 Jul. 1960, entered into force 1 Apr. 1968) 956 UNTS 251; Convention on

Indeed, the first complete drafting was adopted in the European Convention on State Immunity of 1972.[558] Art. 11 ECSI reflects art. 10 (4) of the Convention on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters,[559] which, rejecting the distinction *acta iure imperii/iure gestionis* for tortious conducts,[560] reads as follows: *"A Contracting State cannot claim immunity from the jurisdiction of a court of another Contracting State in proceedings which relate to redress for injury to the person or damage to tangible property, if the facts which occasioned the injury or damage occurred in the territory of the State of the forum, and if the author of the injury or damage was present in that territory at the time when those facts occurred."*[561]

The provision shall be read jointly with art. 31 of the same Convention, which states that: *"Nothing in this Convention shall affect any immunities or privileges enjoyed by a Contracting State in respect of anything done or omitted to be done by, or in relation to, its armed forces when on the territory of another Contracting State."*[562]

Furthermore, art. 24 ECSI may also be taken into account, in that it seems to allow States to expand the scope of art. 11.[563]

Civil Liability for Nuclear Damage (adopted 21 May 1963, entered into force 12 Nov. 1977) 1063 UNTS 265; Convention on the Liability of Operators of Nuclear Ships and Additional Protocol of 1962 (adopted 25 May 1962, not yet in force) IAEA Legal Series No 4 p 34; Convention for the Unification of Certain Rules Relating to International Carriage by Air (adopted 12 Oct. 1929, entered into force 13 Feb. 1933) 137 LNTS 11; Convention on Damages Caused by Foreign Aircraft to Third Parties on the Surface (adopted 7 Oct. 1952, entered into force 4 Feb. 1958) 310 UNTS 181; Convention for the Unification of Certain Rules Relating to the Precautionary Attachment of Aircraft (adopted 29 May 1933, entered into force 12 Jan. 1937) 192 LNTS 289.

[558] Fox and Webb (n. 480) at 470; see also: Bröhmer (n. 33) at 119-121.

[559] See also: Council of Europe, *Explanatory Reports on the European Convention on State Immunity and the Additional Protocol* (Strasbourg, 1972) para 47, at 20.

[560] Bröhmer (n. 33) at 121.

[561] Convention on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters (adopted 1 Feb. 1971, entered into force 20 Aug. 1979) 1144 UNTS 249, art. 10 (4); for a commentary, see also: Andrew Dickinson, Rae Lindsay and James P. Loonam, *State Immunity, Selected Materials and Commentary* (Oxford University Press, 2004) at 48.

[562] European Convention on State Immunity (adopted 16 May 1972, entered into force 11 Jun. 1976) ETS No. 74 art. 31.

[563] See: Bröhmer (n. 33) at 121; the complete text of art. 24 of the European Convention on State Immunity (n. 562) reads as follows: *"Article 24. 1. Notwithstanding the provisions of Article 15, any State may, when signing this Convention or depositing its instrument of ratification, acceptance or accession, or at any later date, by notification addressed to the Secretary General of the Council of Europe, declare that, in cases not falling within Articles 1 to 13, its courts shall be entitled to entertain proceedings against another Contracting State to the extent that its courts are entitled to entertain proceedings against States not party to the present Convention. Such a declaration shall be without prejudice to the immunity from jurisdiction which foreign States enjoy in respect of acts performed in the exercise of sovereign authority (acta jure imperii). 2. The courts of a State which has made*

According to the ICJ, *"[a]s the Explanatory Report states, the effect of Article 31 is that the Convention has no influence upon that question. Courts in Belgium (judgment of the Court of First Instance of Ghent in Botelberghe v German State, 18 Feb. 2000), Ireland (judgment of the Supreme Court in McElhinney v Williams, 15 December1995, [1995] 3 Irish Reports 382; ILR, Vol.104, p.691), Slovenia (case No.Up-13/99, Constitutional Court, para.13), Greece (Margellos v Federal Republic of Germany, case No.6/2002, ILR, Vol.129, p.529) and Poland (judgment of the Supreme Court of Poland, Natoniewski v Federal Republic of Germany, Polish Yearbook of International Law, Vol. XXX, 2010, p. 299) have concluded that Article 31 means that the immunity of a State for torts committed by its armed forces is unaffected by Article 11 of the Convention."*[564]

The final drafting of art. 11 of the above-mentioned Convention has been mirrored by the wording of art. 12 UNCSI, the only difference being that the former prescribed an additional requirement in that *"the facts which occasioned the injury or damage [shall have] occurred in the territory of the State of the forum."*[565]

Indeed, art. 12 UNCSI, reads as follows: *"Article 12. Personal injuries and damage to property. Unless otherwise agreed between the States concerned, a State cannot invoke immunity from jurisdiction before a court of another State which is otherwise competent in a proceeding which relates to pecuniary compensation for death or injury to the person, or damage to or loss of tangible property, caused by an act or omission which is alleged to be attributable to the State, if the act or omission occurred in whole or in part in the territory of that other State and if the author of the act or omission was present in that territory at the time of the act or omission."*[566]

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the declaration provided for in paragraph 1 shall not however be entitled to entertain such proceedings against another Contracting State if their jurisdiction could have been based solely on one or more of the grounds mentioned in the annex to the present Convention, unless that other Contracting State has taken a step in the proceedings relating to the merits without first challenging the jurisdiction of the court. 3. The provisions of Chapter II apply to proceedings instituted against a Contracting State in accordance with the present article. 4. The declaration made under paragraph 1 may be withdrawn by notification addressed to the Secretary General of the Council of Europe. The withdrawal shall take effect three months after the date of its receipt, but this shall not affect proceedings instituted before the date on which the withdrawal becomes effective."

[564] ICJ, *Jurisdictional Immunities of the State* (n. 551) para 68.

[565] Ernest K. Bankas, *The State Immunity Controversy in International Law. Private Suits Against Sovereign States in Domestic Courts* (Springer, 2005) at 184.

[566] United Nations Convention on Jurisdictional Immunities of States and their Property (n. 389) art.12; for an early comment on such provision, see: Dickinson, Lindsay and Loonam (n. 561) at 124-127.

As it has been pointed out by some commentators,[567] art. 12 stands out as the 'odd one out' among the exceptions enlisted by the UNCSI because its justification lies solely on the attachment of the conduct to the territory of the forum State and is in no way linked to the non-sovereign characterization of the act or omission, contrarily to the other exceptions considered under Part III of the Convention. It is to be noted that, by virtue of art. 3, paragraph 3, of the UNCSI, immunities enjoyed by a State within the context of aircrafts or space objects owned or operated by a State are not affected by the provisions of the Convention.[568] Even though the UNCSI contains no express provision in such regard, the Commentary of the ILC of 1991 to the then draft art. 12 proscribed the application of the tort exception to wartime scenarios.[569] As recalled by the ICJ, *"[…] in presenting to the Sixth Committee of the General Assembly the Report of the Ad Hoc Committee on Jurisdictional Immunities of States and Their Property (United Nations doc. A/59/22), the Chairman of the Ad Hoc Committee stated that the draft Convention had been prepared on the basis of a general understanding that military activities were not covered (United Nations doc. A/C.6/59/SR.13, p.6, para.36)."*[570]

Although proposals were made during the discussion of the draft articles within the ILC on how broad the territorial tort exception should be, the wider formulation was finally accepted (including, thus: non-contractual damage exception to immunity, and also encompassing situations beyond the mere pecuniary compensation for traffic accidents which involved means of transport owned or operated by State parties).[571] Indeed, the original formulation of art. 12 UNCSI was as such in order to allow victims of a traffic incident to bring to court the sending State of a diplomat who was shielded by diplomatic and consular immunity and privileges[572] provided for by the Vienna Convention on Diplomatic Relations[573] and the Vienna Convention on Consular

[567] Foakes and O'Keefe (n. 555) at 209.

[568] United Nations Convention on Jurisdictional Immunities of States and their Property (n. 389) art. 3 (3); see also: Foakes and O'Keefe (n. 555) at 215.

[569] ILC Draft Articles on Jurisdictional Immunities of States and their Property (1991), Yearbook of the International Law Commission 1991 II (Part two), 13 A/CN.4/SER.A/1991/Add.l (Part 2) at 46, para 28, art. 12, subpara 10; Van Alebeek, *The immunity of States and their Officials in International Criminal Law and International Human Rights Law* (n. 504) at 78.

[570] ICJ, *Jurisdictional Immunities of the State* (n. 551) para 69.

[571] Fox and Webb (n. 480) at 470.

[572] Bankas (n. 565) at 184-185.

[573] Vienna Convention on Diplomatic Relations (n. 24).

Relations.[574] The ILC purposely excluded from the draft article 12 of the UNCSI acts performed outside the State territory and also human rights violations amounting to *ius cogens* nature, also because, amongst other reasons and as stated by the Chairman of the Working Group of the Sixth Committee of the UN General Assembly, Gerhard Hafner, it would have prevented the adoption of the Convention.[575]

b. Codification of art. 12 UNCSI

Let me now turn to a more detailed analysis of the drafting history of art. 12 UNCSI.[576] The first elaboration of the provision was attempted by the Special Rapporteur on the issue of Jurisdictional Immunities of States and their Property, Mr. Sompong Sucharitkul,[577] who, in his Fifth Report, proposed the following draft article 14, entitled *"Personal injuries and damage to property"*: *"Unless otherwise agreed, a State is not immune from the jurisdiction of the courts of another State in respect of proceedings relating to injury to the person or death or damage to or loss of tangible property, if the act or omission which caused the injury in the State of the forum occurred in that territory, and the author of the injury or damage was present therein at the time of its occurrence."*[578]

Much discussion generated from the proposal of the article.[579] While some State parties rejected the adoption of the provision because they maintained that this would have increased the number of litigation cases even when mechanisms of alternative dispute resolution could have sorted out some issues,[580] other members outlined that, even though draft art. 14 was not proposing any new content (in light of the one already

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[574] Vienna Convention on Consular Relations (n. 24).

[575] Fox and Webb (n. 480) at 471, also referring to: Chatham House, 'State Immunity and the New UN Convention', 5 Oct. 2005, Transcripts and summaries of presentations and discussions, at 9, available at: <www.chathamhouse.org/sites/files/chathamhouse/public/Research/International%20Law/ilpstateimmunity.pdf > last accessed 31 Oct. 2017.

[576] For an in-depth discussion, see: Foakes and O'Keefe (n. 555) at 212-214.

[577] For an overall examination of the work of the International Law Commission and the Special Rapporteur on the issue of Jurisdictional Immunities of States and their property, see: Summaries of the Work of the International Law Commission, Jurisdictional immunities of States and their property, <http://legal.un.org/ilc/summaries/4_1.shtml> last accessed 31 Oct. 2017.

[578] Fifth Report, Sucharitkul (n. 555) at 45-46, paras 100-101.

[579] For an in-depth analysis see: Foakes and O'Keefe (n. 555) at 212-214.

[580] Report of the International Law Commission on the work of its Thirthy-fifth session (3 May – 22 July 1983) General Assembly Official Records, Thirty-eighth session, Supplement No. 10 (A/38/10) [hereinafter: ILC Report, 1983 A/38/10] at 19-20, para 91.

formulated in the Resolution of the Institut de Droit International of 1891)[581] the international legal arena was not ready to embrace the concept in a Convention.[582] Additionally, some parties opposed the view that draft art. 14 was not exhaustive nor applicable to all member States.[583] It is noteworthy to mention that *"the view was expressed that the exceptions set forth in the article should indeed be expanded so as to cover also cases of transfrontier torts, including time bombs or letter-bombs."*[584] The Special Rapporteur then proposed to the Drafting Committee a revised version of draft art. 14, which the Drafting Committee amended most relevantly with regard to two issues: *i)* the necessity to explicitly dictate that the act or omission could have occurred 'in whole or in part' in the territory of the State of the forum;[585] and *ii)* that the act or the omission – despite the issue being distant from any question of attribution – needed to be *'allegedly attributable to the State'*.[586] Please find herewith the text delivered by the Special Rapporteur upon revision: *"Article 14. Personal injuries and damage to property" 1. Unless otherwise mutually agreed between the States concerned, a State which, through one of its organs, or agencies or instrumentalities acting in the exercise of governmental authority, maintains an office, agency or establishment in another State or occupies premises therein, or engages therein in the transport of passengers and cargoes either by air or by rail or road, or by waterways, is considered to have consented to the exercise of jurisdiction by a court of that other State in a proceeding relating to compensation for death or injury to the person or loss of or damage to tangible property, if the act or omission which caused the injury or damage in the State of the forum occurred in that territory, and the person responsible for or contributing to the injury or damage was present therein at the time of its occurrence. "2. Paragraph 1 is without prejudice to the rights and duties of individuals in one State vis-a-vis another State which are specifically regulated by treaties, or other*

[581] See: Institut de droit international, Session of Hambourg – 1891, Resolution of the Institut de Droit International, Projet de règlement international sur la compétence des tribunaux dans les procès contre les Etats, souverains ou chefs d'Etat étrangers (Comité de rédaction, puis MM. Ludwig von Bar, John Westlake et Adolphe Hartmann) art. 4 (6).

[582] ILC Report, 1983 A/38/10 (n. 580) at 19, para 88.

[583] ILC Report, 1983 A/38/10 (n. 580) at 19, para 88.

[584] ILC Report, 1983 A/38/10 (n. 580) at 19, para 90.

[585] See: ILC, Summary records of the 1868th meeting, 20 Jul. 1984 at 3.30 pm, International Law Commission, Thirty-Sixth session (1984), Extract from YILC 1984, vol. I, A/CN.4/SR.1868 [hereinafter: ILC, Summary Records 1868th ILC meeting] 321, 324, para 28.

[586] See ILC, Summary Records 1868th ILC meeting (n. 585) 321, 324, para 28.

bilateral agreements, or regional arrangements, or international conventions specifying or limiting the extent of liabilities or compensation"[587] and the text eventually adopted, as edited by the Drafting Committee and also renumbered as art. 13 in 1986 (after its first provisional adoption in 1984)[588] : *""Personal injuries and damage to property" Unless otherwise agreed between the States concerned, the immunity of a State cannot be invoked before a court of another State which is otherwise competent in a proceeding which relates to compensation for death or injury to the person or damage to or loss of tangible property if the act or omission which is alleged to be attributable to the State and which caused the death, injury or damage occurred in whole or in part in the territory of the State of the forum and if the author of the act or omission was present in that territory at the time of the act or omission."*[589]

The provision, even in its newly adopted formulation, did not cease to cause disagreements between members.[590] A new Special Rapporteur was appointed, Mr. Motoo Ogiso, who purported the content of the exception, pointing out that the action or omission needed to be *"attributable to [a] foreign State in accordance with the municipal law of the forum State"*[591] for the exercise of jurisdiction to take place and eliminated the *"criterion of the presence of the author of the act or omission in the territory of the State of the forum at the time of the deed"*,[592] deemed as unnecessary. Nevertheless, the Special Rapporteur subsequently made it clear that this did not render the provision *"applicable to tort[s] committed abroad or to other transboundary injurious acts"*[593] and that he suggested that the provision only covered traffic accidents.[594]

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[587] ILC Report, 1983 A/38/10 (n. 580) at 20, para 96, footnote 59.

[588] See ILC, Summary Records 1868th ILC meeting (n. 585) 325, para 37; for the provisionally adopted text, see: ILC, Summary Records 1868th ILC meeting (n. 585) 324, para 25.

[589] Report of the International Law Commission on the work of its Thirty-eighth session (5 May - 11 July 1986) Official Records of the General Assembly, Forty-first session, Supplement No. 10 (A/41/10) [hereinafter: ILC Report, 1986 A/41/10] at 10.

[590] Foakes and O'Keefe (n. 555) at 213.

[591] Preliminary report on jurisdictional immunities of States and their property, 20 May 1988, A/CN.4/415 and Corr.1 by Special Rapporteur Mr. Motoo Ogiso [hereinafter: Preliminary Report, Ogiso] at 111, para 140.

[592] Preliminary Report, Ogiso (n. 591) at 111, para 141.

[593] Second report on jurisdictional immunities of States and their property, 11 and 24 April 1989, A/CN.4/422 & Corr.1 and Add.1 & Corr.1 by Special Rapporteur Mr. Motoo Ogiso [hereinafter: Second Report, Ogiso] at 65-66, para 20.

[594] Report of the International Law Commission on the work of its Forty-first session (2 May - 21 July 1989) Official Records of the General Assembly, Forty-fourth session, Supplement No. 10 (A/44/10) [hereinafter: ILC Report, 1989, A/44/10) at 111, para 519.

The second reading of the ILC Commission reflected all the contrasts emerged between State parties and led to the conservation of the territorial requirement of the presence of the author in the territory of the forum State at the time of the act or omission, contrary to the suggestion of the Special Rapporteur.[595] Mr. Ogiso also submitted draft art. 13 to the ILC without substantial change, with regard to limiting the exception to traffic accidents, in light of the ongoing discussion on the matter within the Commission.[596] While on final reading, just one unspecified member suggested the deletion of draft art. 13 as a whole.[597] With the Drafting Committee addition of the word *'pecuniary'* before *'compensation'*, the renumbered draft art. 12 was then adopted on second reading and as such inserted in the UNCSI.[598]

c. Present wording of art. 12 UNCSI: analysis

Despite some scholars' disagreement,[599] the exception as a whole stands out as it is not related to the public/private act distinction which characterizes most of the exceptions to the rule of State immunity.[600] Indeed, following the restrictive immunity doctrine, immunity would be waived, regardless of where the tort took place, for *acta iure gestionis*, namely acts of commercial nature, as opposed to *acta iure imperii*, that are acts of governmental nature for which immunity cannot be denied.[601] On the other

[595] ILC Report, 1989, A/44/10 (n. 594) at 111, para 524.

[596] Third report on jurisdictional immunities of States and their property, by Mr. Motoo Ogiso, Special Rapporteur, 11 April 1990, A/CN.4/431 and Corr.1, by Special Rapporteur Mr. Motoo Ogiso [hereinafter: Third Report, Ogiso] at 14, art. 13, paras 2-3.

[597] Report of the International Law Commission on the work of its forty-second session (1 May - 20 July 1990) Official Records of the General Assembly, Forty-fifth session, Supplement No. 10 (A/45/10) [hereinafterat: ILC Report, 1990, A/45/10] at 35, para 187.

[598] Foakes and O'Keefe (n. 555) at 214; see: Draft articles on Jurisdictional Immunities of States and Their Property, with commentaries (1991) Yearbook of the International Law Commission, 1991, vol. II, Part Two, 13 [hereinafter: Draft articles on Jurisdictional Immunities of States and Their Property, with commentaries] draft art. 10, para 10, at 46.

[599] Van Alebeek, *The immunity of States and their Officials in International Criminal Law and International Human Rights Law* (n. 504) at 70, 71.

[600] Van Alebeek, *The immunity of States and their Officials in International Criminal Law and International Human Rights Law* (n. 504) at 59; see also: Bröhmer (n. 33) at 140; Foakes and O'Keefe (n. 555) at 218-219; see also: Draft articles on Jurisdictional Immunities of States and Their Property, with commentaries (n. 598) draft art. 12, para 8, at 45; and: ICJ, *Jurisdictional Immunities of the State* (n. 551) para 64; contrarily, see: *Case of Grosz v France*, App No. 14717/06 (ECtHR, Decision on admissibility, 16 Jun. 2009); see also: James Crawford, *The Law Reform Commission, Report no 24, Foreign State Immunity* (Australian Government Publishing Service, 1984) para 51, at 28.

[601] Bröhmer (n. 33) at 141 and 222-223.

hand, according to the territorial nexus criterion, notwithstanding the nature of the act which generated the tort, the exception to immunity would apply at the occurrence of a tort where a territorial relationship can be established.[602] This would imply the application of *"jurisdictional requirements in a narrow sense."*[603]

That the territorial tort exception applies irrespective of the distinction between acts of governmental and commercial nature has been acknowledged by domestic case-law worldwide,[604] even though some Courts have applied the distinction to territorial torts in earlier times.[605] It is interesting to note that, despite appreciating that the territorial tort exception does not abide by the binomial governmental/commercial acts, distinguished scholars have deemed the exception as *per se* precisely being *"the reflection of the jure imperii-jure gestionis distinction"*.[606]

I will now proceed with a closer examination of the provision.

It might first be noteworthy to recall that art. 12 UNCSI allows States to derogate from its prescription, provided that the forum State and the sued State reach mutual consent on the derogation. Indeed, this is what the formula *"unless otherwise agreed between the States concerned"* – which opens the wording of art. 12 UNCSI – refers to. This could be the case when States might have decided to have the claims adjudicated by an international claims commissions or through process compensation claims by private parties.[607]

Additionally, it must be borne in mind that, as recalled by the ILC Final Draft Articles and Commentary: *"the basis for the assumption and exercise of jurisdiction in*

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[602] Bröhmer (n. 33) at 141.

[603] Bröhmer (n. 33) at 222, 223.

[604] Van Alebeek, *The immunity of States and their Officials in International Criminal Law and International Human Rights Law* (n. 504) at 69 et seq. mentions the following cases: *Isabel Morel De Letelier et al v Republic of Chile et al*, United States, District Court, District of Columbia, 11 Mar. 1980, 488 F Supp 665 (US, DC for the District Court of Columbia, 1980); *Schreiber v Federal Republic of Germany and Attorney-General of Canada*, Canada, Supreme Court, 12 Sep. 2002, 147 ILR 276, paras 29-37; for an analysis of the Letelier case, see also: Bröhmer (n. 33) at 58 et seq.

[605] Van Alebeek, *The immunity of States and their Officials in International Criminal Law and International Human Rights Law* (n. 504) at 69 provides for an example of a national Court which applied the criteria *acta iure imperii*/*acta iure gestionis* to the territorial exception: *Collision with Foreign Governments-Owned Motor Car*, Austria, Supreme Court, 10 Feb. 1961, 40 ILR 73.

[606] Van Alebeek, *The immunity of States and their Officials in International Criminal Law and International Human Rights Law* (n. 504) at 70 et seq.

[607] Foakes and O'Keefe (n. 555) at 215.

cases covered by this exception is territoriality."[608] As a consequence, the *locus commissi delicti* is relevant, notwithstanding the subjective motivational ground underlying the perpetrator's action or omission which, thus, could be *"intentional or even malicious, or […] accidental, negligent, inadvertent, reckless or careless."*[609]

Article 12 of the UNCSI establishes two cumulative conditions for the act to have jurisdictional connection with the forum State.

The following chart may exemplify the above-mentioned conditions.

<table>
<tr><td rowspan="2">*i)* the State must be otherwise competent, which entails that:</td><td>private international law criteria assessing jurisdiction must be met;</td></tr>
<tr><td>the very act must be connected with the forum State's territory.</td></tr>
<tr><td rowspan="2">*ii)* the act/omission and the author must have a strong connection with the State territory, more specifically:</td><td>*ii) i)* the act or omission must have occurred in whole or in part in State territory;</td></tr>
<tr><td>*ii) ii)* the author must have been present in the State territory at the time of the act or the omission.</td></tr>
</table>

The first condition requires the State to be "otherwise competent", which entails not only that the private international law criteria according to which jurisdiction is recognized must be satisfied, but also that the act itself needs to have a further connection with the State's territory.[610] As for the former, it is a matter of domestic law whether or not the State can legitimately claim to have competence over such acts; as

[608] ILC Report, 1991, A/46/10 (n. 486) at 13, art. 12, para 8; Dickinson, Lindsay and Loonam (n. 561) at 126, para 2.025.
[609] ILC Report, 1991, A/46/10 (n. 486) at 13, art. 12, para 8; Dickinson, Lindsay and Loonam (n. 561) at 126, para 2.025.
[610] Fox and Webb (n. 480) at 471-472.

for the latter, the territorial preconditions lay on the international level.[611] This condition is required by the UNCSI for all other exceptions therein encompassed.[612]

The second condition entails two separate requirements: first, the act or the omission must have taken place in whole or in part in the State territory; additionally, its author must have been present in the State territory at the time in which the act or the omission occurred. The provision can also be found in the ECSI, art. 11[613] and also in art 10(4) of the 1971 Hague Convention on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters.[614] Additionally, if compared with the jurisdictional nexus set out by the Brussels Convention on Jurisdiction and Enforcement of Judgments,[615] this connection criterion appears even more stringent than its antecedent.[616]

As previously recalled, the first requirement has been accepted by a large number of national legislations.

The second requirement of the above-stated second condition prescribes that, for the action to be brought before the State's national courts, the author of the alleged tort must be present within the territory of the forum State when the act or the omission took place. By specifically referring to "the author", art. 12 UNCSI points at the material perpetrator of the act or of the omission, who of course remain distinct from *"the State itself as a legal person."*[617] The respondent of the proceeding will, however, still remain the State as such.[618] This requirement has been criticized for unjustifiably

[611] Foakes and O'Keefe (n. 555) at 216.

[612] Foakes and O'Keefe (n. 555) at 216.

[613] Foakes and O'Keefe (n. 555) at 221.

[614] Art. 10 (4) of the Convention (n. 561) prescribes as follows: *"The court of the State of origin shall be considered to have jurisdiction for the purposes of this Convention: [...] (4) in the case of injuries to the person or damage to tangible property, if the facts which occasioned the damage occurred in the territory of the State of origin, and if the author of the injury or damage was present in that territory at the time when those facts occurred."*

[615] Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (Brussels) (adopted 27 Sep. 1968, entered into force 1 Feb. 1973) 1262 UNTS 153, OJ L 299, now replaced by Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters) [2012] OJ L 351/1.

[616] Fox and Webb (n. 480) at 472.

[617] Foakes and O'Keefe (n. 555) at 221; see also: Draft articles on Jurisdictional Immunities of States and Their Property, with commentaries (n. 598) draft art. 12, para 10, at 46.

[618] Foakes and O'Keefe (n. 555) at 221; see also: European Convention on State Immunity (n. 562), art. 11; Council of Europe, *Explanatory Reports on the European Convention on State Immunity and the Additional Protocol* (n. 559) para 49 at 20, 21.

narrowing the applicability of the exception.[619] However, it is to be noted that the ILC has also made use of the exception in order to *"widen […] the scope of the ways in which the personal injuries might be inflicted."*[620]

All in all, the second requirement entrenches the necessity to exclude *"transboundary injuries or trans-frontier torts or damage, such as export of explosives, fireworks or dangerous substances which could explode or cause damage through negligence, inadvertence or accident […] [and] cases of shooting or firing across a boundary or of spill-over across the border of shelling as a result of an armed conflict"*[621] from the scope of art. 12 UNCSI. However, some commentators have deemed imprecise and, subsequently, incorrect, the use by the ILC commentary of terms like *"transboundary injuries"* and *"trans-frontier torts or damage"* as synonyms, which follows from an incorrect interpretation of the phrase *"in whole or in part"*.[622]

The wording of art. 12 UNCSI is quite misleading with regard to the choice of the applicable law and the use of the expression *"attributable to the State"*. Indeed, it seems that the wording of art. 12 UNCSI and the Commentary of the ILC point in two different directions. Art. 12 substantiates an additional requirement for the territorial tort exception to be invoked, namely that the act or the omission is attributable to the State. In contrast, the ILC Commentary links this very article to the applicable law, which, quite reasonably, it further indicates as the *lex loci commissi delicti*.[623] Since the ICJ underpinned that immunity is procedural, and not substantive, in nature[624] the conferral of jurisdiction operated by art. 12 UNCSI is not to be intended as determining any effect on the substantive law. In other words, art. 12 UNCSI does not imply that what falls under the definition of tort in the domestic law, and renders it prosecutable before national Courts, shall then involve State liability on the level of international law.[625]

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[619] Fox and Webb (n. 480) at 473.

[620] Fox and Webb (n. 480) at 473.

[621] Draft articles on Jurisdictional Immunities of States and Their Property, with commentaries (n. 598) draft art. 12, para 7, at 45.

[622] Foakes and O'Keefe (n. 555) at 222; see: Draft articles on Jurisdictional Immunities of States and Their Property, with commentaries (n. 598) draft art. 12, para 7, at 45.

[623] Fox and Webb (n. 480) at 474.

[624] See Part 1, Chapter 1, III of the present dissertation for more elucidations.

[625] Fox and Webb (n. 480) at 474.

The overlap between national and international law is usually avoided because domestic Courts usually prosecute torts carrying a genuine connection with the State's own territory, whilst for the tort to be adjudicated by international *fora* the requirement implying the exhaustion of local remedies must also be met.[626] Even though in some cases the boundaries of national and international law are not clearly defined, the underlying shared assumption is that the territorial tort exception only indicates the applicable law from a procedural viewpoint, without generating consequences on substantive law.[627] According to some commentators, the phrase according to which the act or the omission is alleged to be attributable to the State states nothing but the obvious.[628] From such viewpoint, that the State needs to be allegedly liable under the municipal law of the forum State for the act or the omission is just the natural prerequisite for the proceeding to be instructed before the courts of the State of the forum.[629] In the same vein, this approach justifies why neither art. 11 ECSI nor any other piece of national legislation on State immunity contain the same reference.[630] The terminological choices are also questionable, in this respect. According to public international law, attribution usually refers to the attribution of a conduct to a State within the framework of State responsibility.[631] However much the use of the term "attributable" may lead to the sphere of State responsibility, its use under art. 12 UNCSI is merely aimed at identifying the impleaded State.[632]

As far as the types of tortious acts covered by the territorial tort exception, I will examine them addressing first the torts explicitly mentioned by the wording of art. 12 UNCSI and then those that can be inferred by the very article, as per the distinction applied by Hazel Fox and Philippa Webb.[633]

First of all, it must be borne in mind that art. 12 concerns only *pecuniary compensation* for some types of torts.[634] The main understanding is that, despite

[626] Fox and Webb (n. 480) at 474.
[627] For further elucidations, see: Fox and Webb (n. 480) at 474-475.
[628] Foakes and O'Keefe (n. 555) at 219.
[629] Foakes and O'Keefe (n. 555) at 220.
[630] Foakes and O'Keefe (n. 555) at 220.
[631] Foakes and O'Keefe (n. 555) at 220; see: DARS (n. 260).
[632] Foakes and O'Keefe (n. 555) at 220-221; see also: ILC, Summary Records 1868th ILC meeting (n. 585) 321, 324, para 28; Preliminary Report, Ogiso (n. 591) at 111, para 140; Second Report, Ogiso (n. 593) at 66, para 21.
[633] Fox and Webb (n. 480) at 475 et seq.
[634] Foakes and O'Keefe (n. 555) at 216-217.

national legislations provide no help in this regard,[635] pecuniary compensation as such does not embrace 'exemplary' or 'punitive' damages[636] nor any non-pecuniary type of compensation.[637] Additionally, this excludes from the cloak of art. 12 UNCSI any non-compensatory remedy as restitution or declaratory judgment.[638]

Some torts are expressly referred to by the wording of art. 12 UNCSI, while other can be inferred from the provision, as follows.

i. Torts explicitly mentioned by art. 12 UNCSI

The wording of art. 12 UNCSI refers to: acts allegedly having caused *"death or injury to the person, or damage to or loss of tangible property."*[639] As for the physical damage, case law is quite consistent in agreeing that damage arising out of words is not covered by the territorial tort exception.[640] Consistently, *"damage to reputation, loss of amenity, interference with privacy, or economic loss not consequential upon death or personal injury or damage to or loss of tangible property"*[641] are not covered by the provision. According to the ILC Commentary,[642] the physical injury is mainly related to the sphere of insurable risks, particularly within the field of traffic accidents on rail, road, air or waterways. However, in light of the ILC Commentary, art. 12 UNCSI has also been formulated as to encompass *"intentional physical harm such as assault and battery, malicious damage to property, arson or even homicide, including*

[635] Foakes and O'Keefe (n. 555) at 217; see, for instance: United Kingdom, State Immunity Act (n. 407) s 5; South Africa, Foreign States Immunity Act (n. 410) s 6; Australia, Foreign States Immunities Act (n. 411) , s 13; Canada, State Immunity Act (n. 412), s 6; Singapore, State Immunity Act (n. 408) s 7; United States of America, Foreign States Immunities Act (1976), s 1605 (a) (5); Argentina, Statute on the Immunity of Foreign States from the Jurisdiction of the Argentinean Courts (1995), art. 2 (e).

[636] Foakes and O'Keefe (n. 555) at 217.

[637] Foakes and O'Keefe (n. 555) at 217; see Draft articles on Jurisdictional Immunities of States and Their Property, with commentaries (n. 598) draft art. 12, para 10, at 46.

[638] Foakes and O'Keefe (n. 555) at 217.

[639] United Nations Convention on Jurisdictional Immunities of States and their Property (n. 389) art. 12.

[640] Fox and Webb (n. 480) at 475, referring to: *Yessenin Volpin v Novasti Press Agency, Tass et al*, United States, District Court, Southern District, New York, 23 Jan. 1978, 63 ILR 127*; Krajina v the Tass Agency and another*, England, Court of Appeal, Case No. 37, 27 Jun. 1949, 16 ILR 129; *Grovit v De Nederlandsche Banck NV and others*, England, Court of Appeal, Civil Division, 24 Jul. 2007, 2007 [EWCA] Civ 953, 142 ILR 403.

[641] Foakes and O'Keefe (n. 555) at 217; see also: Draft articles on Jurisdictional Immunities of States and Their Property, with commentaries (n. 598) draft art. 12, para 5, at 45.

[642] Draft articles on Jurisdictional Immunities of States and Their Property, with commentaries (n. 598) draft art. 12, para 4, at 45; see: Fox and Webb (n. 480) at 475.

political assassination […]".[643] It is also quite relevant to point out that, both art. 12 UNCSI and art. 11 ECSI[644] are intended to apply equally, notwithstanding whether the claims has arisen out of the death or injury to the person or damage to or loss of tangible property.[645] However, it might also be added, with regard to the concepts of 'injury to the person' and 'damage to or loss of tangible property', that characterizing an act as such vastly depends on the applicable domestic law and jurisdiction.[646]

ii. Torts implicitly inferred from art. 12 UNCSI

While the ILC Commentary made it clear that all acts meeting the requirements of art. 12 UNCSI are to be eligible for being subject to the territorial tort exception, regardless of whether they are to be understood as intentional, accidental or due to negligence,[647] the wording of the very same provision is quite vague for what concerns any additional criterion the tort must meet, in particular whether it might be one amongst those of commercial nature or which could be carried out by private persons (not acting in an official capacity).[648] Some national case law also points out another important feature: within the private spheres torts committed by State officials are on the same layer of those performed by private individuals.[649] Consistently, the territorial tort exception is applicable to non-contractual civil law-delictual acts / common law-tortious acts, also according to the restrictive doctrine of State immunity.[650]

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[643] Draft articles on Jurisdictional Immunities of States and Their Property, with commentaries (n. 598) draft art. 12, para 4, at 45; see: Fox and Webb (n. 480) at 475; as for the political assassination, it has been pointed out that this mainly refers to the case *Isabel Morel De Letelier et al v Republic of Chile et al* (n. 604), as noted in: Foakes and O'Keefe (n. 555) at 219.

[644] See: Council of Europe, *Explanatory Reports on the European Convention on State Immunity and the Additional Protocol* (n. 559) para 48, at 20.

[645] Foakes and O'Keefe (n. 555) at 218.

[646] Foakes and O'Keefe (n. 555) at 218; see, for example: *Islamic Republic of Iran and Others v Hashemi and Estate of the Late Kazemi, Estate of the Late Kazemi v Islamic Republic of Iran and Others*, Canada, Quebec Court of Appeal, 15 Aug. 2012, 154 ILR 351.

[647] Draft articles on Jurisdictional Immunities of States and Their Property, with commentaries (n. 598) draft art. 12, para 3, at 44; see: Fox and Webb (n. 480) at 476.

[648] Fox and Webb (n. 480) at 476.

[649] Fox and Webb (n. 480) at 476, also referring to: *Collision with Foreign Governments-Owned Motor Car* (n. 605).

[650]Fox and Webb (n. 480) at 476.

Some Canadian case–law underlined that, according to the wording of art. 12 UNCSI, different types of damages arising from physical injury are covered by the territorial tort exception;[651] additionally, it has been underscored that the scope of the personal injury may also depend on the wording of the domestic law through which international law enters the municipal systems.[652] The USA legislation, for instance, also encompasses a broad understanding of the personal damage.[653]

The category has also extended from the area of insurable risks to that of non-insurable risks as well. Indeed, although originally the scope of art. 12 UNCSI was limited to mainly damages to persons or tangible goods arisen out of traffic accidents, it later extended to embrace a much broader variety of non-insurable risks.[654]

The formulation of art. 12 UNCSI is also quite clear in stating that, unless otherwise agreed between the parties, the exception is applicable notwithstanding the distinction between *acta iure imperii* v *acta iure gestionis*.

iii. Torts not covered by art. 12 UNCSI and unanswered questions

Eminent scholars have underlined that, similarly to the exception to immunity which is applied in case of outrageous acts like international crimes, an exception could also become applicable in the case of atrocious torture or civilian loss even when carried out by military forces within the territory of the forum State.[655]

However, if, on the one hand, similar approaches have been developed by both doctrine and jurisprudence, one must also take into account a conflicting trend of both regional and domestic Courts which grants immunity to State entities

[651] *Schreiber v Federal Republic of Germany and Attorney-General of Canada* (n. 604) para 63; *Kazemi Estate v Islamic Republic of Iran*, Canada, Supreme Court, 10 Oct. 2014, [2014] 3 SCR 176, 2014 SCC 62 (CanLII) para 77; Fox and Webb (n. 480) at 476.

[652] Fox and Webb (n. 480) at 476; see also: Dickinson, Lindsay and Loonam (n. 561) at 369.

[653] United States of America, Foreign States Immunities Act (n. 635); see: Fox and Webb (n. 480) at 476.

[654] Draft articles on Jurisdictional Immunities of States and Their Property, with commentaries (n. 598) draft art. 12, para 4, at 45; see: Fox and Webb (n. 480) at 477; see also: Foakes and O'Keefe (n. 555) at 219.

[655] ICJ, *Jurisdictional Immunities of the State* (n. 551) Dissenting Opinion of Judge Ad Hoc Gaja, para 10; Fox and Webb (n. 480) at 478.

with regard to the acts performed by their armed forces.[656] Indeed, whether or not the exception enshrined under art. 12 UNCSI applies to military activities or anyhow to the activities of foreign military forces on the territory of another State still remains one of the unanswered issues concerning art. 12 UNCSI.[657] The "exception to the exception" approach was also followed in an example concerning the UK.[658] As for visiting armed forces on another State's territory in time of peace, no customary law rule granting immunity has been acknowledged[659] and reference must be made to the Status of Forces Agreements or the UN and EU Status of Mission Agreements.[660]

It also seems that the current understanding of the territorial tort exception does not extend its scope to economic and remote types – e.g. defamation issues - of loss.[661]

[656] *Case of McElhinney v Ireland* (n. 551) para 38; in such judgment, the European Court of Human Rights presented, inter-alia, the following municipal case-law in support of its ruling: *Hunting Rights Contamination Claim Case*, Austria, Supreme Court, 13 Jan. 1988, Case No. 3 Nd 511/87, 86 ILR 564, at 569; *Ciniglio v Indonesian Embassy and Compagnia di Assicurazioni Intercontinentali,* Italy, Examining Magistrate (Pretore) of Rome, 16 Dec. 1966, 65 ILR 268, at 278; *S v Socialist Republic of Romania and another*, Switzerland, Federal Tribunal, 19 Jan. 1987, 82 ILR 45, at 48. Such judgment also offered the ECtHR the occasion to emphasize the scarce ratification of the European Convention on State Immunity as a sign of States' unwillingness to accept the exceptions drafted within the Convention, see: Fox and Webb (n. 480) at 478.

[657] Foakes and O'Keefe (n. 555) at 209 and 223-224; for countries which excluded the application of the exception to see the examples of Finland, Italy, Norway, Sweden (declarations and reservations to the Convention) and Japan (national legislation implementing the Convention): UNCSI, depositary notification C.N.222.2014TREATIES-III.13 (Finland: Acceptance) 23 April 2014; UNCSI, depositary notification C.N.269.2013.TREATIES-III.13 (Italy: Accession), 13 May 2013; UNCSI, depositary notifications C.N.280.2006.TREATIES-2 (Norway: Ratification), 6 April 2006; UNCSI, depositary notifications C.N.912.2009.TREATIES-1 (Sweden: Ratification), 24 December 2009, all available on the UNTC website: <https://treaties.un.org/pages/CNs.aspx?cnTab=tab2&clang=_en> last accessed 31 Oct. 2017; Japan, Act on the Civil Jurisdiction of Japan with respect to a Foreign State (2009).

[658] Fox and Webb (n. 480) at 480, referring to: *Case of Fogarty v the United Kingdom*, App. No. 37112/97 (ECtHr, Judgment, 21 Nov. 2001).

[659] ICJ, *Jurisdictional Immunities of the State* (n. 551) para 62-78; Fox and Webb (n. 480) at 480.

[660] Fox and Webb (n. 480) at 480.

[661] Fox and Webb (n. 480) at 477.

At present, it must be recalled that the UNCSI has not yet entered into force[662] and seems far from potentially being considered as customary international law.[663]

B. Legislation

It is, first of all, interesting to note that the terminology "territorial tort" does not originate from the international legal sphere, rather it is borrowed from the national USA legislation.[664] Tort, in the common law systems, is the equivalent for what falls under the definition of delict, in the civil law ones.[665]

As regards national legislation on State immunity, it has been noted that common law countries have enacted statutes on the subject, while civil law ones of Western Europe mainly counted on case-law.[666] Of the common law countries, the UK passed its State Immunity Act in 1978.[667] With the exception of Pakistan,[668] those legislations mostly include the exception and link it to the sole territorial nexus of the performed or failed-to-perform act.[669] However, for the USA[670] and Canadian State Immunities Acts[671] if the harm occurs on the territory of the State of the forum, the territorial nexus is even so satisfied. Also Japan's national legislation[672] embodies the territorial tort principle.

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[662] See current status of United Nations Convention on Jurisdictional Immunities of States and their Property (n. 389), available at: https://treaties.un.org/Pages/ShowMTDSGDetails.aspx?src=UNTSONLINE&tabid=2&mtdsg_no=III-13&chapter=3&lang=en.

[663] Lori Fisler Damrosch, 'Changing the International Law of Sovereign Immunity Through National Decisions', (2011) 44 Vanderbilt Journal Of Transnational Law, 1185, at 1189-1190.

[664] Foakes and O'Keefe (n. 555) at 216; see: United States of America, Foreign States Immunities Act (n. 635) s. 1605 (a) (5) and then also: Israel, Foreign States Immunity Law (2008), s 5.

[665] Foakes and O'Keefe (n. 555) at 216.

[666] Bröhmer (n. 33) at 51.

[667] Bröhmer (n. 33) at 84; see: United Kingdom, State Immunity Act (n. 407).

[668] Pakistan, State Immunity Ordinance (n. 409).

[669] Foakes and O'Keefe (n. 555) at 210; see: United Kingdom, State Immunity Act (n. 407) s 5, which gives effect to art. 11 European Convention on State Immunity (n. 562); South Africa, Foreign States Immunity Act (n. 410), s 6; Australia, Foreign States Immunities Act (n. 411), s 13; Singapore, State Immunity Act (n. 408) s 7; Argentina, Statute on the Immunity of Foreign States from the Jurisdiction of the Argentinean Courts (n. 635), art. 2 (e); Israel, Foreign States Immunity Law (n. 664), s 5; see also: Bröhmer (n. 33) at 88 et seq and at 96 et seq.

[670] See: Bröhmer (n. 33) at 60.

[671] United States of America, Foreign States Immunities Act (n. 635) s 1605 (a)(5); Canada, State Immunity Act (n. 412), s. 6; see: Foakes and O'Keefe (n. 555) at 210.

[672] Japan, Act on the Civil Jurisdiction of Japan with respect to a Foreign State (n. 657), art. 10, mentioned also by: ICJ, *Jurisdictional Immunities of the State* (n. 551) Dissenting Opinion of Judge Ad Hoc Gaja, para 4.

All of the jurisdictions which agree on the doctrine of restrictive immunity require that the act or the omission has occurred in whole or in part within the State's territory for the territorial tort exception to be applied.[673]

The UK includes this requirement in its own legislation[674] and so do – with the exception of Pakistan – all the common law countries whose structure is inspired by that of the UK.[675]

As for the USA, while the same principle has been incorporated into the national legislation,[676] an additional subsection (now repealed)[677] did not require such jurisdictional nexus for the prosecution before USA courts of some terrorism offences against some States perceived by the President as *"sponsors of terrorism"*.[678]

Canada's legislation restricts the jurisdictional connection only to acts causing physical injury within the Canadian borders.[679] This is confirmed by some examples of Canadian case law.[680] Largely reflecting the amendments made to the USA FSIA, some adjustments have been made in the Canadian SIA as well, so as to allow civil actions concerning acts of a terrorist nature carried out anywhere in the world on or after 1st Jan. 1985 to be brought before Canadian courts, the only necessary connection to Canada being one of the following: that the alleged victim of terrorism is a Canadian national or a permanent resident or, notwithstanding the victim's nationality, that the action has a *"real and substantial connection to Canada"*.[681] As in the USA legislation, claims might concern States expressly indicated by the Cabinet.[682]

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[673] Fox and Webb (n. 480) at 472; see also: Foakes and O'Keefe (n. 555) at 221-222 referring to: United Kingdom, State Immunity Act (n. 407) s 5; South Africa, Foreign States Immunity Act (n. 410), s 6; Australia, Foreign States Immunities Act (n. 411), s 13; Singapore, State Immunity Act (n. 408) s 7; Argentina, Statute on the Immunity of Foreign States from the Jurisdiction of the Argentinean Courts (n. 635), art. 2 (g); Israel, Foreign States Immunity Law (n. 664), s 5.

[674] See: United Kingdom, State Immunity Act (n. 407) s 5; Fox and Webb (n. 480) at 472.

[675] Fox and Webb (n. 480) at 472.

[676] United States of America, Foreign States Immunities Act (n. 635) s 1605 (a) (5), analysed in: Fox and Webb (n. 480) at 473.

[677] United States of America, Foreign States Immunities Act (n. 635), s (7) (b) added by the United States of America, Antiterrorism and Effective Death Penalty Act (1996); Fox and Webb (n. 480) at 473.

[678] Fox and Webb (n. 480) at 473.

[679] Canada, State Immunity Act (n. 412), s 6 (a); Fox and Webb (n. 480) at 473.

[680] *Kazemi Estate v Islamic Republic of Iran* (n. 651); Fox and Webb (n. 480) at 473.

[681] Canada, Justice for Victims of Terrorism Act (2012), s 4 (2), see the analysis in Fox and Webb (n. 480) at 473, referring to: Canada, Safe Streets and Communities Act (2012), enacting: Canada, Justice for Victims of Terrorism Act (2012).

[682] Fox and Webb (n. 480) at 473.

This territorial nexus concerns the act or the omission, not the consequential damage arising out of it, as in section 1605 (a) (5) FSIA (US) and section 6 SIA (Can).[683]

Some temporal requirements can also be added to the above-mentioned criteria.[684] Most of the cited national, regional and international legislations (the ECSI, UK and USA legislation and UNCSI) expressly dictate the non-retrospectivity of the provisions therein enclosed – the only exception being a residual case envisaged by the USA Supreme Court allowing the retrospective application of the FSIA, subject to a State Department statement of interest, even if at the time of the losses absolute immunity covered the State's acts.[685]

In addition, some municipal legislation prescribes that the provisions of the State Immunity Acts are not applicable in relation to the armed forces and/or do not affect the norms which concern visiting forces.[686] This also mirrors art. 31 of the European Convention on State Immunity.[687] As it has been correctly underlined, this only implies that the territorial tort exception, as per the above-formulations, does not apply to armed forces but in no way equates to rendering them immune from the territorial State's jurisdiction at all times and for every circumstance.[688]

For what concerns the other countries where norms on State Immunity have not been codified into domestic legislation – mostly civil law countries – the following observations can be inferred.[689] It seems that all such countries (Germany,[690] France,[691]

[683] Foakes and O'Keefe (n. 555) at 222; for the United States of America, Foreign States Immunities Act (n. 635), see also: Bröhmer (n. 33) at 58 et seq.

[684] For a general explanation, see: Fox and Webb (n. 480) at 474.

[685] Fox and Webb (n. 480) at 474.

[686] Foakes and O'Keefe (n. 555) at 210-211; see: United Kingdom, State Immunity Act (n. 407) s 16 (2); Canada, State Immunity Act (n. 412), s 16; Australia, Foreign States Immunities Act (n. 411), s 6; Singapore, State Immunity Act (n. 408) s 19 (2)(a); Israel, Foreign States Immunity Law (n. 664),, s 22; see also: Van Alebeek, *The immunity of States and their Officials in International Criminal Law and International Human Rights Law* (n. 504) at 78.

[687] European Convention on State Immunity (n. 562) art. 31; Foakes and O'Keefe (n. 555) at 211.

[688] For more elucidations, see: Foakes and O'Keefe (n. 555) at 211.

[689] For an in-depth study, see: Bröhmer (n. 33) at 103 et seq.

[690] Bröhmer (n. 33) at 108.

[691] Bröhmer (n. 33) at 109.

Austria,[692] Switzerland,[693] Italy[694] and Spain[695]) have been following the doctrine of restrictive immunity and applying the distinction between *acta iure imperii*/*acta iure gestionis* to the tort exception.

[692] Bröhmer (n. 33) at 111 et seq.
[693] Bröhmer (n. 33) at 115 et seq.
[694] Bröhmer (n. 33) at 116-117.
[695] Bröhmer (n. 33) at 117-119.

C. Case law

a. ICJ case law

On the international level, in the *Jurisdictional Immunities* case, the ICJ held that it was not *"called upon [...] to resolve the question whether there is in customary international law a "tort exception" to State immunity" applicable to acta iure imperii in general."*[696] However, in that adjudication the ICJ established that acts performed by personnel of the military forces within an armed conflict of international character are not subject to the territorial tort exception.[697]

b. ECtHR case law

A Grand Chamber of the European Court of Human Rights also held that this exception is not universal and that immunity can lawfully be granted by a State to another State in proceedings concerning personal injury derived from an act or an omission of governmental nature within the territory of the forum State.[698]

The European Court of Human Rights, and also the UK, jurisprudence upheld the principle according to which the act or the omission must have occurred in whole or in part within the State's territory.[699]

c. National case law

Before it was even embodied in some international convention, the territorial tort exception began to be applied in cases involving personal injuring derived from negligent driving for which the State was held accountable.[700] Continental courts held

[696] ICJ, *Jurisdictional Immunities of the State* (n. 551) para 65; Fox and Webb (n. 480) at 478.

[697] For a study on how the International Court of Justice dealt with the territorial tort exception in such case, see: Andrew Dickinson, 'Germany v Italy and the Territorial Tort Exception. Walking the Tightrope', (2013) 11 J. Int'l Crim. Just. 147.

[698] Foakes and O'Keefe (n. 555) at 211-212; see: *Case of McElhinney v Ireland* (n. 551) para 38.

[699] Fox and Webb (n. 480) at 472; see: *Al-Adsani v Government of Kuwait and Ors*, England, Court of Appeal, 12 Mar. 1996, 107 ILR 536; *Case of Al-Adsani v the United Kingdom*, App. No. 35763/97 (ECtHR, Judgment, 21 Nov. 2001, applied by the House of Lords in *Jones No. 2* (n. 63).

[700] Foakes and O'Keefe (n. 555) at 210.

that the driving of a motor vehicle substantiates an act *iure gestionis*, even when it is performed for governmental reasons.[701]

The USA Courts have narrowed the scope of the exception as embraced by the USA national legislation and usually required that both harm and the act or omission took place within the USA territory for the case to be adjudicated before USA Courts,[702] while Canadian Courts took the opposite approach.[703] It must herewith be taken into account that, in cases before USA courts, oftentimes commercial activities exceptions have been invoked rather than tort exception, because of the courts' *reluctance "to apply the torts exception to out-of-forum torts."*[704] The irrelevance of the distinction between *acta iure imperii* and *acta iure gestionis* for what concerns the territorial tort exception has also been claimed by some national courts.[705]

It is to be noted that some case-law delivered by courts of States without a "codified" territorial tort exception did not apply the exception to acts of governmental nature performed within the territory of the State of the forum.[706]

National case law has also been quite consistent in stating that the exception applies irrespective of the distinction *iure imperii/iure gestionis*. This conclusion has

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[701] Foakes and O'Keefe (n. 555) at 210; see, for example: *Collision with Foreign Government-Owned Motor Car* (n. 605); *Ciniglio v Indonesian Embassy and Compagnia di Assicurazioni Intercontinentali* (n. 656).

[702] Foakes and O'Keefe (n. 555) at 210; Bröhmer (n. 33) at 60 et seq.; see: *McKeel v Islamic Republic of Iran*, United States Courts of Appeal, Ninth Circuit, 30 Dec. 1983, 81 ILR 543; *Persinger v Islamic Republic of Iran (No. 2)*, United States Court of Appeals, District of Columbia Circuit, 13 Mar. 1984, 90 ILR 586; *Frolova v USSR*, United States Court of Appeals, Seventh Circuit, 1 May 1985, 85 ILR 236, at 246-7; *Amerada Hess Shipping Corporation v Argentine Republic*, United States Court of Appeals (Second Circuit), 11 Sep. 1987, 79 ILR 1.

[703] Foakes and O'Keefe (n. 555) at 210; see: *Islamic Republic of Iran and Others v Hashemi and Estate of the Late Kazemi, Estate of the Late Kazemi v Islamic Republic of Iran and Others* (n. 646).

[704] Bröhmer (n. 33) at 64 et seq.; see: *Nelson v Saudi Arabia*, United States Courts of Appeals, Eleventh Circuit, 21 Feb. 1991, 88 ILR 189; *Saudi Arabia and Others v Nelson*, United States Supreme Court, 23 Mar. 1993, 100 ILR 544; for an analysis of the relationship between the immunity exception for commercial transactions and the torts exception in the UK system, see: Bröhmer (n. 33) at 90 et seq.

[705] Foakes and O'Keefe (n. 555) at 210-211; see: *Isabel Morel De Letelier et al v Republic of Chile et al* (n. 604); *Schreiber v Federal Republic of Germany and Attorney-General of Canada* (n. 604) paras 32 and 35, 36 ; in the same direction, although without such legislation, see: *Prefecture of Voiotia v Federal Republic of Germany (Distomo Massacre Case)*, Greece, Court of Cassation (Areios Pagos), 4 May 2000 (case number 11/2000) 129 ILR 513, at 517-519.

[706] Foakes and O'Keefe (n. 555) at 211-212; see: *McElhinney v Williams and Her Majesty's Secretary of State for Northern Ireland*, Ireland, Supreme Court, 15 Dec, 1995, 104 ILR 691, at 703; as far as activities of foreign armed forces on the territory of the forum State are concerned, see: also: *FILT-CGIL Trento and others v United States of America*, Italy, Court of Cassation, Plenary session, 3 Aug. 2000 (Dec. No. 530/2000) 128 ILR 644; *Margellos and others v Federal Republic of Germany*, Greece, Special Supreme Court, 17 Sep. 2002, 129 ILR 526, at 561.

been reached by the Canadian Supreme Court.[707] This, of course, does not imply that each and every act could be adjudicated by national Courts in order to gain redress, but only those falling under the above-explained definition of physical damage.[708] The USA case law goes in the same direction, allowing redress for personal injuries originated by the exercise of sovereign authority.[709]

Some UK jurisprudence, in line with that of the ECtHR, also acknowledged the necessary requirement that the act or the omission must have occurred in whole or in part within the territory of the forum State.[710]

[707] *Schreiber v Federal Republic of Germany and Attorney-General of Canada* (n. 604) paras 13-18; see: Fox and Webb (n. 480) at 477.

[708] *Schreiber v Federal Republic of Germany and Attorney-General of Canada* (n. 604) para 80; see: Fox and Webb (n. 480) at 478.

[709] *Isabel Morel De Letelier et al v Republic of Chile et al* (n. 604); *Helen Liu v Republic of China*, United States, Court of Appeals, Ninth Circuit, 29 Dec. 1989, 892 F.2d 1419 (US, Court of Appeals, Ninth Circuit, 1989); Fox and Webb (n. 480) at 478.

[710] Fox and Webb (n. 480) at 472; see: *Al-Adsani v Government of Kuwait and Ors* (n. 699); *Case of Al-Adsani v the United Kingdom* (n. 699) applied by the House of Lords in *Jones No. 2* (n. 63).

II. Status and key features

A. Status

At present, there is no universally shared legal definition of the "territorial tort exception or principle",[711] even referred to as *"delicts exception."*[712] In fact, even though a general understanding of the exception can be inferred from the articles under which it has been codified, a universal concept of the territorial tort exception has not yet emerged within the international legal scholarship.

However, even though some differences may apply with regard to the wording of its codification, the territorial tort exception implies, in substance, the non-application of State immunity if and when a tort is committed on the territory of the forum State and the author of the act is present on the territory at the time of the act or of the omission. Its application is mainly linked to torts which cause pecuniary compensation and redress for death or injuries of persons or damage to or loss of tangible property.

As already mentioned, the exception has been codified in a number of domestic and international legislation.[713] As for its status, even though it had earlier been purported by the Supreme Court of Poland that the territorial tort exception or principle amounts to a norm of customary nature under international law,[714] the issue was not

[711] As for the terminology, it is equally referred to as 'exception' or 'principle', see, for example: ICJ, *Jurisdictional Immunities of the State* (n. 551) paras 62-79; Foakes and O'Keefe (n. 555) at 209.

[712] ICJ, *Jurisdictional Immunities of the State* (n. 551) Dissenting Opinion of Judge Cançado Trindade, para 80.

[713] Van Alebeek, *The immunity of States and their Officials in International Criminal Law and International Human Rights Law* (n. 504) at 68, ft 261; see the codifications quoted – inter alia - by Van Alebeek: United States of America, Foreign States Immunities Act (n. 635); United Kingdom, State Immunity Act (n. 407) s 5; Australia, Foreign States Immunities Act (n. 411) s 13; Canada, State Immunity Act (n. 412), s 6; Argentina, Statute on the Immunity of Foreign States from the Jurisdiction of the Argentinean Courts (n. 635), art. 2; South Africa, Foreign States Immunity Act (n. 410) s 6; European Convention on State Immunity (n. 562), art. 11; United Nations Convention on Jurisdictional Immunities of States and their Property (n. 389), art. 12 based on: ILC Draft Articles on Jurisdictional Immunities of States and Their Property A/CN.4/SER.A/1991/Add.l (Part 2) (at 569); International Law Association's Draft Articles for a Convention on State Immunity, adopted in Montreal, 29 August-4 September 1982, reproduced in International Law Association, Report of the Sixtieth Conference, (1983) 22 ILM 287, art. III F; Institut de droit international, Session of Basel - 1991, Resolution of the Institut de Droit International, Contemporary Problems Concerning the Immunity of States in Relation to Questions of Jurisdiction and Enforcement (Fourteenth Commission, Rapporteur: Mr Ian Brownlie) art 2, II (e). In the same footnote, Van Alebeek also mentions that the Pakistan Ordinance [Pakistan, State Immunity Ordinance (n. 409)] does not include such exception and that the exception is limited to commercial torts in: Organization of American States, Inter-American Draft Convention on Jurisdictional Immunity of States, (1983) 22 ILM 292, art 6 (e).

[714] *Natoniewski v Federal Republic of Germany*, Poland, Supreme Court, 29 Oct. 2010, 168 ILR 561, (Case No IV CSK 465/09) para 37; Foakes and O'Keefe (n. 555) at 223.

addressed by the ICJ in the landmark case *Jurisdictional Immunities of the State*.[715] At present, in line with the above, it seems difficult to accept that the territorial tort exception has reached the rank of international custom.[716]

B. Key features

The following key features have been identified for the subject at stake.

a. Irrelevance of the distinction between acta iure imperii/acta iure gestionis

As recalled in the previous analysis, the territorial tort exception applies irrespective of the distinction between *acta iure imperii/acta iure gestionis*, the relevant criterion being territoriality.

b. Connection between the act/the author and the territory

It follows from the analysis of art. 12 UNCSI (as per the chart provided in subsection A. that two cumulative conditions must be fulfilled for the applicability of the territorial tort exception, namely that *i)* the State is otherwise competent to exercise jurisdiction and that *ii) i)* the act or omission has occurred in whole or in part in the State territory and that *ii) ii)* the author of the act or the omission must have been present within the State territory at the time when the action or the omission took place.

The jurisdictional connection must be determined with regard to the moment of commission of the act, as it is precisely in light of that moment in time that jurisdiction is assessed. Similarly, the presence of the author on the State territory is required for the moment in which the act takes place.[717]

c. Territorial State law as the applicable law

[715] ICJ, *Jurisdictional Immunities of the State* (n. 551) paras 65.

[716] See, for instance: Damrosch (n. 663) at 1190.

[717] Fox and Webb (n. 480) at 474.

In accordance with art. 12 UNCSI, the territorial State's law must be the applicable law and the use of term "attributable" is a tool which only points at the impleaded State, as per the analysis above.

d. Torts covered are largely limited to insurable loss – but also extendable to non-insurable risks

The territorial tort exception is largely limited to cover pecuniary compensation arising out of acts alleged to have caused *"death or injury to the person, or damage to or loss of tangible property."*[718] This mainly relates to the sphere of insurable risks, particularly within the field of traffic accidents on rail, road, air or waterways, as analyzed in the previous paragraph. However, as previously pointed out, this also encompasses *"intentional physical harm such as assault and battery, malicious damage to property, arson or even homicide, including political assassination […]".*[719] It has to be noted that, even though it was originally intended to cover insurable risks only, it can now be claimed that the exception also covers non-insurable risks.[720]

[718] United Nations Convention on Jurisdictional Immunities of States and their Property (n. 389) art. 12.

[719] Draft articles on Jurisdictional Immunities of States and Their Property, with commentaries (n. 598) draft art. 12, para 4, at 45; see: Fox and Webb (n. 480) at 475; as for the political assassination, it has been pointed out that this mainly refers to the case *Isabel Morel De Letelier et al v Republic of Chile et al* (n. 604) as noted in: Foakes and O'Keefe (n. 555) at 219.

[720] Draft articles on Jurisdictional Immunities of States and Their Property, with commentaries (n. 598) draft art. 12, para 4, at 45; see: Fox and Webb (n. 480) at 477; see also: Foakes and O'Keefe (n. 555) at 219.

III. The rationale for the territorial tort exception

As explained in the introduction to part 2, the methodology applied herewith is analogical reasoning: this dissertation first addresses the territorial tort exception to State immunity from civil jurisdiction and, only once it has properly understood it, assesses, by analogy, if the same key features and rationale could apply to a territorial "offence" exception to State officials' immunity *ratione materiae* from foreign criminal jurisdiction. A clear understanding of the rationale of the territorial tort exception is, within this perspective, of paramount importance.

It has to be noted that it is hard, if not impossible, to account for only one rationale for the exception I am now considering. Indeed, several rationales have been proposed by the international legal scholarship. The most relevant ones are the following.

The most captivating rationale for the territorial tort exception to States' immunity from civil jurisdiction is that States have a moral, not yet legal, obligation to protect persons and goods within their own territories.[721] According to such rationale, it appears that States are bound by an obligation to provide protection and assistance to people and their belongings, when on their own territory. This theory relies on the natural bond between the State and its own territory, upon which basis sovereignty is primarily accorded.

Within the search of a juridical justification for the exception, it has also been claimed that the rationale for art. 12 UNCSI is *"solely the locus of the impleaded State's act or omission."*[722]

Other scholars have pondered that the reason why art. 12 UNCSI privileges acts which generate tangible, rather than intangible, harm may only be residual in that while tangible damages are in principle covered by other exceptions enshrined under Part III of the Convention, non-tangible ones are not.[723]

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[721] Fox and Webb (n. 480) at 469.

[722] Foakes and O'Keefe (n. 555) at 219; see also: Draft articles on Jurisdictional Immunities of States and Their Property, with commentaries (n. 598) draft art. 12, para 8, at 45; and: James Crawford, 'International Law and Foreign Sovereigns: Distinguishing Immune Transactions' (1983) 54 BYIL 75, at 111.

[723] Foakes and O'Keefe (n. 555) at 222-223.

However, although it is a truism to say that not many studies have been carried out on the precise rationale which inspires the territorial tort principle, it can nonetheless at the very least be inferred from existing works on the issue.

The jurisprudence of the ICJ in this respect is of no particular aid, as in the leading case *Jurisdictional Immunities of the State*[724] the rationale upon which some discussion took place was specifically tailored with regard to military activities.[725] Nevertheless, it is precisely in relation to such judgment that some findings have been reached in the matter at hand. Judge Yussuf's dissenting opinion is quite clear in stating that *"[…] the tort exception to immunity has been conceived for the protection of individual rights against States."*[726]

The ILC Commentary of 1991[727] is important in assessing the rationale. And it is clear in expressing the view that *"the exception […] is therefore designed to provide relief or possibility of recourse to justice for individuals who suffer personal injury, death or physical damage to or loss of property caused by an act or omission which might be intentional, accidental or caused by negligence attributable to a foreign State."*[728] It follows from the above that, be it for a matter of practicality or for a matter of expedition, for a claimant to sue a State on those grounds before a court of the *locus* where the tort took place and according to that domestic legal system is simply the most reasonable thing to do. The exception, thus, substantiates the right to a remedy of the tort's victim.[729] Consistently, it seems that the underlying rationale of the territorial tort exception arises from the combination of two different principles, namely: the principle of territoriality, for which there is a subtended bond between States and individuals, on the one hand, and the territory where their actions/omissions are discharged, on the other hand, and the right to a remedy, which entitles victims of violations to have access to justice.

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[724] ICJ, *Jurisdictional Immunities of the State* (n. 551).

[725] ICJ, *Jurisdictional Immunities of the State* (n. 551) para 65; see also, for instance: Dissenting Opinion of Judge Ad Hoc Gaja, para 9, 10.

[726] ICJ, *Jurisdictional Immunities of the State* (n. 551) Dissenting Opinion of Judge Yussuf, para 22.

[727] ILC Draft Articles on Jurisdictional Immunities of States and Their Property A/CN.4/SER.A/1991/Add.l (Part 2) (at 569) at 44-46.

[728] ILC Draft Articles on Jurisdictional Immunities of States and Their Property A/CN.4/SER.A/1991/Add.l (Part 2) (at 569) at 44, para 3.

[729] See, as a reference: UNGA Res. 60/147, A/RES/60/147, 16 Dec. 2005, [on the report of the Third Committee (A/60/509/Add.1)], Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law.

The first Special Rapporteur appointed by the ILC on the issue, Mr. Sompong Sucharitkul, was of the same view, claiming that the legal basis for jurisdiction in that case was, *sic et simpliciter*, the territory where the tort took place. [730] Mr. Sucharitkul outlined *"that national legislation and regional conventions containing provisions on this particular exception invariably specify the pre-existence of legitimate jurisdiction based on the locus delicti commissi and the eventual and justifiable exercise of such jurisdiction"*[731] notwithstanding the distinction between *acta iure imperii* and *acta iure gestionis*.[732] It was also emphatized that the basis for the exercise of jurisdiction, at the time being, could not be found in norms of customary international law, even though a trend in that respect was emerging in countries which had enacted national legislation supporting restrictive immunity.[733]

As already stressed above, *"the main purpose is the protection of the injured parties, whether they happen to be nationals or residents of the State of the forum, or indeed aliens or tourists temporarily in the territory, which is nevertheless bound to afford a reasonable measure of legal protection for the safety and security of their persons as well as their tangible belongings."*[734] The Special Rapporteur further elucidates that it is not a question of governmental authority or sovereignty being jeopardized when the State is called to respond of its own torts to one or more damaged victims; on the contrary, it is precisely in name of such sovereignty that States shall afford protection primarily to individuals and to their properties.[735] And, clearly, this does not raise any question of whether or not sovereignty outweighs humanity or *vice versa*.[736] In fact, to establish that any State is bound to protect individuals allegedly impaired by a foreign State's tort in no way imperils any of those States' sovereignty. If any relationship between the State's exercise of jurisdiction and sovereignty can be drawn, it would point at the opposite direction, that is: the application of the territorial tort exception strengthens, rather than undermining, States' supremacy.

[730] Fifth Report, Sucharitkul (n. 555) at 39, para 66.
[731] Fifth Report, Sucharitkul (n. 555) at 39, para 67.
[732] Fifth Report, Sucharitkul (n. 555) at 39, para 67.
[733] Fifth Report, Sucharitkul (n. 555) at 39, para 68.
[734] Fifth Report, Sucharitkul (n. 555) at 40, para 71.
[735] Fifth Report, Sucharitkul (n. 555) at 40, para 75.
[736] Fifth Report, Sucharitkul (n. 555) at 40, para 75.

This entails that the exception aims at the safeguard of the territorial link and also of the accessibility to justice. The two concepts, raised altogether, are more than sufficient to justify why the territorial tort exception shall trump the application of immunity of State entities. This of course does not imply that the principle of the territorial tort supersedes State immunity at all times. It just means that there are satisfying reasons on the international legal plane upon which the territorial tort principle rests.

3. Is there a territorial "offence" exception to State officials' immunity from criminal jurisdiction?

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a) Judgment, 15 May 1995, Germany, Federal Constitutional Court
b) *Rainbow Warrior case*, New Zealand, UN Secr. Gen. and Arbitration Trib.
c) *The Abu Omar case*, Italy
d) *Isabel Morel De Letelier et al v Republic of Chile cases*, United States
e) *Jimenez v Aristeguieta et al.*, United States, Court of Appeals
f) *Jane Doe I et al v Liu Qi et al v Xia Deren et al*, United States, Northern District of California
g) *Khurts Bat v Investigating Judge of the German Federal Court*, United Kingdom
h) *Prefecture of Voiotia v Federal Republic of Germany (Distomo Massacre Case)*, Greece
i) *Ferrini v Federal Republic of Germany*, Italy
j) *Prosecutor v Tihomir Blaškić*, case IT-95-14, ICTY, particularly: *Appeals Chamber, Judgment on the Request of The Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997*

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Methodological Remarks

Following the previous investigation of the historical background, status, key features and rationale of the territorial tort exception to State immunity from civil jurisdiction, and on the credibility and benefits of the analogical reasoning for this study, this chapter can now address the core question of this dissertation. On the basis of a close analysis of State practice, this work can now aim at determining whether or

not a counterpart to the territorial tort exception can be claimed to exist within the context of State officials' immunity from foreign criminal jurisdiction. As already mentioned, it will do so on the basis of past practice both in favour and against the applicability of the analogy and also through a closer examination of the rationale which may or may not justify a territorial "offence" exception to State officials' immunity from foreign criminal jurisdiction. On the one hand, the reasoning will follow an analogical pattern, in parallel with the territorial tort exception; on the other hand, this work will also investigate the feasibility – or not – of a self-standing rationale for a territorial "offence" exception. It is, indeed, in light of some author's understanding that *"[…] State officials do not have immunity ratione materiae for criminal charges in respect of acts committed on the territory of the forum state, or the territory of a third state, unless that immunity is accorded by a special regime such as that afforded diplomats and consuls, or by agreement such as that accorded to special missions, or by ad hoc agreement."*[737]

As I proceed with the analysis of whether or not a territorial "offence" exception could be conceived of, two methodological remarks are to be noted.

First and foremost, one must take into account that *"[…] a factor in the integration and fragmentation of the law on immunities is the involvement of national courts in applying and developing the law."*[738] National courts have an essential role in the making of public international law; much more, one cannot disagree, within the context of State officials' immunities from *foreign* criminal jurisdiction. *"[…] Some types of questions that are frequently the subject-matter of inter-state litigation […] would simply not normally arise in a national court."*[739] *"Yet other international law matters arise almost solely in domestic courts."*[740] The law of state immunities –broadly considered – is *"immunity from local territorial jurisdiction."*[741] Consequently, as explained by Rosalyn Higgins, the great part of the international legal knowledge of the

[737] Franey, *Immunity, Individuals and International Law. Which Individuals are Immune from the Jurisdiction of National Courts under International Law* (n. 504) at 284.
[738] Philippa Webb, *International Judicial Integration and Fragmentation* (Oxford University Press, 2013) at 65.
[739] Higgins (n. 226) at 208.
[740] Higgins (n. 226) at 208.
[741] Higgins (n. 226) at 208-209.

issue is developed by local courts.[742] Indeed, precisely when a domestic adjudicatory body grants – or does not grant – immunity, what was first placed on the theoretical plane – technically stimulating, though practically intangible - takes on a life of its own. Immunity is only manifest – and, as a matter of fact, real - when it is invoked in order to bar the exercise of jurisdiction. Until that moment, immunity, despite having been seeded, has not yet bloomed. Still within the metaphor, national courts are the trees upon which the immunities blossom. Those trees are vital to the flowering of the plant: if they are weak, poorly watered or not sufficiently exposed to sunlight, their flowers do not grow, or if they do, they are most likely to be frail. It is essential, as a consequence, that national courts properly appreciate and apply the concept of immunities as it is understood by public international law: whether the whole law of immunities fails or succeeds, this mainly rests upon national courts. In Higgins' words, *"[i]n a decentralized legal order it is important that [national courts contribute to international law], and efforts must be made to overcome a cultural resistance to international law."*[743]

If one agrees, and I do, with the assumption that *"[i]t is the special feature of State immunity that it is at the point of intersection of international law and national procedural law",*[744] if, moreover, one accepts a *lato sensu* notion of State immunity in this regard, and I do, then also the immunity of State officials must be placed precisely at the point where the interplay between international and domestic procedures takes place, where both end and both begin. In the authoritative words of Fox and Webb, *"[i]ts requirements are governed by international law, but the individual national law of the State before whose courts a claim against another State is made determines the precise extent and manner of application."*[745] Even though the diverse nature of the sources of the law of the immunity make the whole subject extremely interesting, intriguing – and worth studying – this inevitably implies that those sources may become entangled.

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[742] Higgins (n. 226) at 81 (dealing with State immunity at 78-86 in the chapter "Exceptions to jurisdictional competence: immunities from suit and enforcement" at 78-94") and at 209; for an extensive examination of: "The role of national courts in the international legal process", see: Higgins (n. 226) at 205-218.

[743] Higgins (n. 226) at 218.

[744] Burkhard Hess, 'The International Law Commission's Draft Convention on the Jurisdictional Immunities of States and their Property' (1993) 4 EJIL 269 at 271.

[745] Fox and Webb, The law of State Immunity (n. 480) at 1.

The consequences of this first remark are that: *i)* the sources may collide one with another, they may create inconsistencies and clashes, and it may not always be the case that they shall reconcile – one may oftentimes supersede the other or in other cases the sources would simply coexist; *ii)* it would take tremendous amounts of time for international custom or even simple State practice without the authoritativeness of the *opinio juris sive necessitatis* to emerge and for the legal practitioner to observe and notice it with some degree of certainty or probability.

Secondly, as it has already been remarked in previous sections, the law of immunity pertains to the procedural legal domain, not the substantive one.[746] The – not so evident – consequence of this assumption is that dealing with immunity entails dealing with the procedural aspects of – potentially – any substantial dispute amongst any parties before any type of courts. Again, this complicates the whole subject at stake, because the law of immunity is required to be apt to any kind of legal proceeding. However, no "one size fits all" approach was embraced by domestic and international courts. For the legal practitioner who has to operate within the field of immunities this means that he/she will deal with the procedural step of a substantive legal dispute. While the substantive law underneath the procedural layer may extend to the most diverse issues under the cloak of domestic and international issues, the procedural law of immunity will not extend as much. But it may nevertheless be challenged with substantial issues related to the peculiar case at hand. For the purpose of this dissertation, and, particularly, of this chapter, it is important to remind that I am only concerned with the procedural aspect – that is: with immunity -, not with the different substantive legal matters which each court may have taken into account in the case under their consideration. And it is precisely because my examination does not touch upon any substantive matter that it can properly address the field of immunity, without the constraints and the influence of the core legal issues at stake before each court. Whilst the court needs to address, case by case, both the procedural and the substantive issues, in order to find a juridical answer to the case at hand, the strength of this study is that it aims at understanding the territorial "offence" exception on the procedural plane only – thus, deprived of the factual circumstances of the single case.

[746] ICJ, *Jurisdictional Immunities of the State* (n. 551) paras 58, 93; ICJ, *Arrest Warrant of 11 April 2000* (n. 27) para 60; Fox and Webb, The law of State Immunity (n. 480) at 21.

A note on terminology

An additional remark has a terminological natural. Territorial "offence" exception seemed to be the best possible linguistic choice to describe the counterpart, in criminal proceedings, of the territorial tort exception to State immunity from civil proceedings. Under the common law of England and Wales, a crime is, by definition, a criminal *offence*.[747] Even within the peculiarity of international criminal law, crime is equally synonymous with offence.[748] This dissertation considers all types of domestic criminal jurisdiction and it would, thus, be impossible to provide for an understanding of crime that perfectly fits all of them. It is preferable, however, to assume the terminology of the common law systems for two reasons. In the first place, the dissertation is written in English, and I shall –then- adopt a terminology which makes sense within the English language. Secondly, characterizing the territorial "offence" exception as such drives the attention of the interpreter towards the dual nature of the exception, which is territorial and at the same time concerns the criminal sphere. On the other hand, the use of the term *"tort"* within criminal proceedings cannot be upheld. Indeed, for as much as tort and criminal law may overlap *"in that the core of criminal law […] exists to punish people who deliberately or recklessly violate the basic rights that we are supplied with by tort law"*,[749] *"torts are civil wrongs for which law will provide a remedy"*.[750] The distinction is well explained in the following terms: while a crime is a wrong punished by the State so that the parties become the State and the wrongdoer, a tort creates a relationship between a victim and the wrongdoer; additionally, while the aim of the former is to punish the wrongdoer, the purpose of the tort is to provide compensation to the victim for the harm they suffered.[751] That the very same act may trigger both civil and criminal proceedings confirms the separate and distinct nature of tort and criminal prosecution.[752]

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[747] See, for example: Richard Card and Jill Molloy, *Card, Crass & Jones Criminal Law* (Oxford University Press, 2016) at 1, definying a criminal offence as "a legal wrong for which the offender is liable to be prosecuted on behalf of the State, and if found guilty is liable to be punished"; Jonathan Herring, *Criminal Law. Text, Cases and Materials* (Oxford University Press, 2016) at 2.

[748] See, for instance: Roger O'Keefe, *International Criminal Law* (Oxford University Press, 2015) at 48.

[749] Nicholas J. McBride and Roderick Bagshaw, *Tort Law* (Pearson Education Limited, 2015) at 24.

[750] Jenny Steele, *Tort Law. Text, Cases and Materials* (Oxford University Press, 2014) at 3.

[751] Catherine Elliott and Francis Quindd, *Tort Law* (Pearson Education Limited, 2015) at 2.

[752] Elliott and Quindd, at 2.

As it will be examined later in the present section, reservations on the use of "territorial tort exception" in the context of criminal proceedings have also been expressed in the discussion held within the ILC.[753]

[753] See, for example: Report of the International Law Commission, Sixty-eighth session (2 May-10 June and 4 July-12 August 2016) General Assembly, Official Records, Seventy-first session, Supplement No. 10 (A/71/10) [hereinafter: ILC Report, 2016, A/71/10] Chapter XI, para 244, at 351; the position of Mr. Huang of China in: CDI, Comptu rendu analytique provisoire de la 3330e séance, Tenue au Palais des Nations, à Genève, le jeudi 28 juillet 2016, à 10 heures, Commission du droit international, Soixante-huitième session (Seconde partie), 26 septembre 2016, A/CN.4/SR.3330, at 14 [CDI, Comptu rendu, 3330e séance, 28 juillet 2016, A/CN.4/SR.3330]; of Mr. Singh of India in: ILC, Provisional summary record of the 3331th meeting, Held at the Palais des Nations, Geneva, on Friday, 29 July 2016, at 10 a.m., International Law Commission, Sixty-eight session (second part), September 21, 2016, A/CN.4/SR.3331, at 7 [hereinafter: ILC, Provisional summary record, 3331st meeting, 29 July 2016, A/CN.4/SR.3331]; of Mr. Hmoud of Jordan in: ILC, Provisional summary record, 3331st meeting, 29 July 2016, A/CN.4/SR.3331 (n. 753) at 11; Report of the International Law Commission, Sixty-ninth session, (1 May-2 June and 3 July-4 August 2017), General Assembly Official Records Seventy-second session Supplement No. 10 (A/72/10) [hereinafter: ILC Report, 2017, A/72/10] para 126, at 172-173; of Mr. Tladi of South Africa in: ILC, Provisional summary record of the 3361st meeting, Held at Palais des Nations, Geneva, on Friday, 19 May 2017, at 10 a.m., International Law Commission, Sixty-ninth session (first part), 14 Jun. 2017, A/CN.4/SR.3361 [hereinafter: ILC, Provisional summary record, 3361st meeting, 19 May 2017, A/CN.4/SR.3361] at 3; of Mr. Hassouna of Egypt in: ILC, Provisional summary record, 3361st meeting, 19 May 2017, A/CN.4/SR.3361 (n. 753) at 13; of Mr. Murphy, the USA representative, in: ILC, Provisional summary record of the 3362nd meeting, Held at the Palais des Nations, Geneva, on Tuesday, 23 May 2017, at 10 a.m., International Law Commission, Sixthy-ninth session (first part), 19 June 2017, A/CN.4/SR.3362 [hereinafter: ILC, Provisional summary record, 3362nd meeting, 23 May 2017, A/CN.4/SR.3362] at 5, 7; and of Mr. Jalloh of Sierra Leone in: ILC, Provisional summary record, 3362nd meeting, 23 May 2017, A/CN.4/SR.3362 (n. 753) at 14; of Mr. Nolte of Germany: ILC, Provisional summary record of the 3365th meeting, Held at the Palais des Nations, Geneva, on Tuesday, 30 May 2017, at 10 a.m., International Law Commission, Sixthy-ninth session (first part), 13 July 2017, A/CN.4/SR.3365 [ILC, Provisional summary record, 3365th meeting, 30 May 2017, A/CN.4/SR.3365] at 6.

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c) *The Abu Omar case*, Italy
d) *Isabel Morel De Letelier et al v Republic of Chile cases*, United States
e) *Jimenez v Aristeguieta et al.*, United States, Court of Appeals
f) *Jane Doe I et al v Liu Qi et al v Xia Deren et al*, United States, Northern District of California
g) *Khurts Bat v Investigating Judge of the German Federal Court*, United Kingdom
h) *Prefecture of Voiotia v Federal Republic of Germany (Distomo Massacre Case)*, Greece
i) *Ferrini v Federal Republic of Germany*, Italy
j) *Prosecutor v Tihomir Blaškić*, case IT-95-14, ICTY, particularly: *Appeals Chamber, Judgment on the Request of The Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997*

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That there is an inherent, overarching friction between immunity of States and their representatives and the principle of full territorial jurisdiction has been widely established.[754] In a similar fashion, the territorial "offence" exception proposes again all such inconsistencies and imbalances.

Whether a territorial "offence" exception has a self-standing justification or whether it does, in fact, infer its own rationale from the territorial tort exception to State immunity, it is time to assess if the exception is feasibly conceivable in the international legal plane in the first plane. To this end, I will first take into account the practice of the ILC, including the reports of the Special Rapporteurs on the issues and the Memorandum of the Secretariat. Also within the same practice, I will examine the practice cited by the Special Rapporteur, Ms. Escobar Hernandez, the findings of the Sixth Committee of the UN General Assembly, the latest developments within the ILC discussion and also the final proposal under draft article 7. In the following subsections I will make use of this practice in order to assess whether or not a territorial "offence" exception exists and, if so, what are its core features and status in the international legal order.

As I consider the ILC approach to the territorial "offence" exception to immunity of State officials from foreign criminal jurisdiction one must bear in mind the role the Commission had in the discussion and final drafting of the UNCSI.[755] The topic has been selected by the ILC as one of those which needed to be codified since as early as its first session in 1949[756] but it was not until 1977 that the General Assembly required the Commission to include it on its agenda.[757] At its 30th session, 1502th meeting, in 1978, the Commission then instructed a Working Group to consider the issue of future work of the ILC on the matter[758] and, on the basis of the Working Group

[754] ILC Report, 2006, A/61/10 (n. 358) Annex A, Immunity of State officials from foreign criminal jurisdiction (Mr. Roman A. Kolodkin) A. A topical issue, para 8 at 438.

[755] United Nations Convention on Jurisdictional Immunities of States and their Property (n. 389) art. 12.

[756] Report of the International Law Commission on the work of its first Session, 12 Apr. 1949 , Official Records of the General Assembly, Fourth Session, Supplement No. 10, A/CN.4/13 and Corr. 1-3, Extract from the Yearbook of the International Law Commission:- 1949 ,vol. I, pages. 277-290, para 16, at 281.

[757] UNGA Res. 32/151, A/RES/32/151, 19 Dec. 1977 on Report of the International Law Commission, para 7, at 214-215.

[758] Report of the International Law Commission on the work of its Thirtieth session, 8 May - 28 July 1978, Official Records of the General Assembly, Thirty-third session, Supplement No. 10, A/33/10, Extract from the Yearbook of the International Law Commission:- 1978, vol. II(2) [hereinafter: ILC Report, 1978, A/33/10] para 10 at 6 and

analysis, appointed Mr. Sompong Sucharitkul as Special Rapporteur on the topic,[759] who was replaced in this capacity by Mr. Motoo Ogiso in 1987.[760] Briefly, the Commission considered the issue throughtout a quite long time frame (from the 31st to the 38th sessions and from the 41st to the 43rd sessions),[761] during which it took into account several reports delivered by the Special Rapporteurs.[762] In 1991, at its 43rd session, the ILC submitted to the General Assembly the final text of twenty-two draft articles on the jurisdictional immunities of States and their property, with commentaries.[763] An intense discussion followed within the General Assembly,

paras 179-190 at 152-153 and Annex "Report of the Working Group on jurisdictional immunities of States and their property" A/CN.4/L.279/Rev.1, paras 11-31, at 153-155.

[759] ILC Report, 1978, A/33/10 (n. 758) paras 188-190, at 153.

[760] Report of the International Law Commission on the work of its thirty-ninth session, 4 May - 17 July 1987, Official Records of the General Assembly, Forty-second session, Supplement No. 10, Extract from the Yearbook of the International Law Commission:- 1987, vol. II(2) (A/42/10) para 221 at 53.

[761] Report of the International Law Commission on the work of its Thirty-first session, 14 May - 3 August 1979, Official Records of the General Assembly, Thirty-fourth session, Supplement No. 10, ILC Report, A/34/10, 1979, chap. VII, paras 166–183; Report of the International Law Commission on the work of its Thirty-second session, 5 May - 25 July 1980, Official Records of the General Assembly, Thirty-fifth session, Supplement No. 10, ILC Report, A/35/10, 1980, chap. VI, paras 99–122; Report of the International Law Commission on the work of its Thirty-third session, 4 May - 24 July 1981, Official Records of the General Assembly, Thirty-sixth session, Supplement No. 10, ILC Report, A/36/10, 1981, chap. VI, paras 200–227; Report of the International Law Commission on the work of its Thirty-fourth session, 3 May - 23 July 1982, Official Records of the General Assembly, Thirty-seventh session, Supplement No. 10, ILC Report, A/37/10, 1982, chap. V, paras 157–198; ILC Report, 1983 A/38/10 (n. 580), chap. III, paras 70–96; Report of the International Law Commission on the work of its thirty-sixth session, 7 May - 27 July 1984, Official Records of the General Assembly, Thirty-ninth session, Supplement No. 10, ILC Report, A/39/10, 1984, chap. IV, paras 195–214; Report of the International Law Commission on the work of its thirty-seventh session, 6 May - 26 July 1985, Official Records of the General Assembly, Fortieth session, Supplement No. 10, ILC Report, A/40/10, 1985, chap. V, paras 205–247; ILC Report, 1986 A/41/10 (n. 589) chap. II, paras 10–22; ILC Report, 1989, A/44/10 (n. 594) chap. VI, paras 398–613; ILC Report, 1990, A/45/10 (n. 597) chap. III, paras 159–243; ILC Report, 1991, A/46/10 (n. 486) chap. II, paras 17–28.

[762] Preliminary Report on the topic of jurisdictional immunities of States and their property, by Mr. Sompong Sucharitkul, Special Rapporteur (31st session of the ILC (1979)), A/CN.4/323, 18 Jun. 1979 (in Yearbook, 1979, vol. II(1)); Second Report, Sucharitkul (n. 424); Third report on jurisdictional immunities of States and their property by Mr. Sompong Sucharitkul, Special Rapporteur, A/CN.4/340 & Corr.1 and Add.1* & Corr.1, 27 Mar. and 18 May 1981, (in Yearbook, 1981, vol. II(1)); Fourth report on jurisdictional immunities of States and their property, by Mr. Sompong Sucharitkul, Special Rapporteur, A/CN.4/357* and Corr.1, 31 Mar.1982, (in Yearbook, 1982, vol. II(1)); Fifth Report, Sucharitkul (n. 555); Sixth report on jurisdictional immunities of States and their property, by Mr. Sompong Sucharitkul, Special Rapporteur, A/CN.4/376 and Add.1 and 2, 31 Jan. and 18 Apr. 1984, (in Yearbook, 1984, vol. II(1)); Seventh report on jurisdictional immunities of States and their property, by Mr. Sompong Sucharitkul, Special Rapporteur, A/CN.4/388* and Corr.1 (E only) & Corr.2 (F only), 28 Mar. 1985, (in Yearbook, 1985, vol. II(1)); Eighth report on jurisdictional immunities of States and their property, by Mr. Sompong Sucharitkul, Special Rapporteur, A/CN.4/396* and Corr.1, 3 Mar. 1986, (in Yearbook, 1986, vol. II(1)); Preliminary Report, Ogiso (n. 591); Second report, Ogiso (n. 593); Third report, Ogiso (n. 596).

[763] ILC Draft Articles on Jurisdictional Immunities of States and Their Property A/CN.4/SER.A/1991/Add.l (Part 2) (at 569) at 13-62, para 28.

working-groups of the Sixth Committee, the Sixth Committee itself and Ad Hoc Committee on Jurisdictional Immunities of States and Their Property.[764] The UNCSI was finally adopted by the General Assembly on 2 Dec. 2004.[765] It remains, up to date, the most comprehensive codified instrument on jurisdictional immunities of States and their Property. It has 28 signatories and 21 State parties and has not yet entered into force.[766] What follows from the above is that the ILC has been having, through this time span, a very important role both when dealing with State and State officials' immunities. While, obviously, this does not entail that the Commission could have conflated the two subjects, it might explain why, at times, it seems to have applied similar or analogical approaches to the two topics.

As for the territorial "offence" exception to immunity of State officials from foreign criminal jurisdiction, the chart provided below will assist the reader in the identification of the different and varied sources I referred to, within the vast practice of the ILC.

Source	**Date**	**Position with regard to territorial "offence" exception**
Memorandum by the Secretariat - A/CN.4/596	31 Mar. 2008	**Not considered.** Took into account only exceptions based on the nature of the criminal conduct.
	Distr. 21 Jan. 2009	**Not expressly considered.**

[764] For a short but comprehensive summary, see: Summaries of the Work of the International Law Commission, Jurisdictional immunities of States and their property (n. 577).

[765] UNGA Res. 59/38, A/RES/59/38, 2 Dec. 2004 on the report of the Sixth Committee (A/59/508), United Nations Convention on Jurisdictional Immunities of States and Their Property, Fifty-ninth session [hereinafter: UNGA Res. 59/38] Agenda item 142, at 1-14.

[766] The information has been checked on 31 Oct. 2017 on the Website of the UN Treaty Collection, which provides for up-to-date information: <https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=III-13&chapter=3&lang=en>, last accessed 31 Oct. 2017.

Topical summary of the discussion held in the 6th Committee of the General Assembly during its sixty-third session – A/CN.4/606		Reference to spies and foreign agents performing crimes in the territory of another State do not enjoy immunity.
Second Report by Special Rapporteur Mr. Anatolevich Kolodkin – A/CN.4/631*	10 Jun. 2010	**Against the existance of a customary norm or trend towards its development.** Considered the case of dual absence of consent by the territorial State (to the official's activity and their presence on the State's territory) as an option where the territorial "offence" exception could possibly apply.
Topical summary of the discussion held in the 6th Committee of the General Assembly during its sixty-sixth session – A/CN.4/650	Distr. 20 Jan. 2012	**Not espressly considered.**
Topical summary of the discussion held in the 6th Committee of the General Assembly during its sixty-seventh session – A/CN.4/657	Distr. 18 Jan. 2013	**Generally mentioned with request of further investigation.**
	Distr. 21 Jan. 2015	**Generally mentioned.**

Topical summary of the discussion held in the 6th Committee of the General Assembly during its sixty-ninth session – A/CN.4/678		
Fifth Report by Special Rapporteur Ms. Concepción Escobar Hernández – A/CN.4/701	14 Jun. 2016	**In favour.** Referred to the exception as "territorial *tort* exception".
ILC, Provisional summary record of the 3328th meeting – A/CN.4/SR.3328	26 Jul. 2016	Ms. Escobar Hernández identified it as an exception; Mr. Murase showed some uncertainties.
ILC, Provisional summary record of the 3330th meeting – A/CN.4/SR3330	28 Jul. 2016	Mr. Saboia examined it within the context of State immunity; Mr. Huang criticized the overlap of criminal and civil spheres on this issue.
ILC, Provisional summary record of the 3331st meeting – A/CN.4/SR.3331	29 Jul. 2016	Mr. Singh suggested a further study on what he defined a "territorial crime exception"; Mr. Hmoud agreed, in principle, with the idea of the exception but rejected the civil law connotation.
Topical summary of the discussion held in the 6th Committee of the General	Distr. 28 Jan. 2016	**Generally mentioned.**

Assembly during its seventieth session – A/CN.4/689		
Report of the ILC, Sixty-eighth session, A/71/10	2 May-10 Jun. and 4 Jul.-12 Aug. 2016	Some members highlighted and criticized the civil connotation of the territorial tort exception.
ILC, Provisional summary record of the 3360th meeting – A/CN.4/SR.3360	18 May 2017	Mr. Park accepted the exception; Sir Wood expressed the controversy around the territorial "crime" exception; Mr. Nguyen suggested that the level of harm required should be specified.
ILC, Provisional summary record of the 3361th meeting – A/CN.4/SR.3361	19 May 2017	Mr. Tladi criticized the application of the territorial tort exception to the criminal sphere and rejected the exception; Ms. Galvão Teles commended the inclusion of the exception but suggested more specific criteria for its identification; Mr. Hassouna accepted the exception in principle but contented the civil connotation given to it.
ILC, Provisional summary record of the 3362nd meeting – A/CN.4/SR.3362	23 May 2017	Mr. Vásquez-Bermúdez shared the civil connotation given to the esception; Mr. Murphy rejected the civil connotation and the exception; Mr. Šturma

		accepted the exception; Mr. Jalloh rejected it.
ILC, Provisional summary record of the 3363rd meeting – A/CN.4/SR.3363	24 May 2017	**Not considered.**
ILC, Provisional summary record of the 3364th meeting – A/CN.4/SR.3364	26 May 2017	Mr. Grossman Guiloff and Mr. Ruda Santolaria supported the inclusion of the exception.
ILC, Provisional summary record of the 3365th meeting – A/CN.4/SR.3365	30 May 2017	Mr. Nolte rejected the terminology of "territorial tort exception" but said it had acquired customary status; Mr. Šturma agreed with his position; Ms. Escobar Hernández maintained her position. The Commission referred draft art. 7, as formulated by the Special Rapporteur, to the Drafting Committee, so that it could also take into account the comments made during the discussion.
Draft art. 7 provisionally adopted by the Drafting Committee – A/CN.4/893	10 Jul. 2017	**Not considered.**
	20 Jul. 2017	Adoption of draft art. 7 (no territorial "offence"

ILC, Provisional summary record of the 3378th meeting – A/CN.4/SR.3378		exception included). Mr. Murphy opposed the inclusion of the exception; Mr. Nolte also did too.
Topical summary of the discussion held in the 6th Committee of the General Assembly during its seventy-first session – A/CN.4/703	Distr. 22 Feb. 2017	**No relevant submissions** but it was highlighted that the territorial element characterized the exception.
Report of the ILC, Sixty-ninh session, A/72/10	1 May-2 Jun. and 3 Jul.-4 Aug. 2017	Summarized the discussion at the 3387th and 3389th meetings and the provisional adoption of the commentaries.
ILC, Provisional summary records of the 3387th, 3388th and 3389th meetings – A/CN.4/SR.3387 A/CN.4/SR.3388 and A/CN.4/SR.3389	3 and 4 Aug. 2017	Adoption of commentary to draft art. 7. According to the commentary, the non-inclusion of the exception does not imply that the Commission deems immunity applicable and states that it has considered only crimes perpetrated in the absence of State's consent to the official activity and presence on its territory
ILC, Provisional summary Record of the 3387th meeting - A/CN.4/SR.3387	3 Aug. 2017	**Not considered.**

ILC, Provisional summary Record of the 3388th meeting - A/CN.4/SR.3388	3 Aug. 2017	**Not considered.**
ILC, Provisional summary Record of the 3389th meeting - A/CN.4/SR.3389	4 Aug. 2017	Debate between members as to what to include in the commentary of draft art. 7 as to the territorial "offence" exception.

A. Memorandum by the Secretariat, Reports of Special Rapporteurs on the topic and related ILC Reports

a. Memorandum by the Secretariat
b. Mr. Kolodkin's Second Report
c. Ms. Escobar Hernandez's Fifth Report

The question of whether or not a territorial "offence" exception exists in the first place and of what are the criteria according to which it shall be applied has been considered by the ILC in different contexts, more specifically: by the Memorandum of the Secretariat of 2007, by the former Special Rapporteur on the issue, Mr. Roman Anatolevich Kolodkin and by the current Special Rapporteur on the same matter, Ms. Concepción Escobar Hernández.

It is noteworthy to underline that, of the three above-mentioned studies, while the first two deal with the issue without naming the exception, the latter qualifies the exception as a "territorial *tort* exception", which in any case must be deemed inappropriate because *"tort"* by definition applies to the civil law sphere only, not the criminal one.

a. Memorandum by the Secretariat

The Memorandum by the Secretariat developed the issue in the section of *"III. Part Two Scope and implementation of immunity of State officials from foreign criminal jurisdiction, B. immunity ratione materiae, 1) "official" versus "private" acts, (b) official acts carried out in the territory of a foreign State."*[767] The Memorandum first stated that State practice on the point was very exiguous.[768] It gave account of the Rainbow Warrior case, analyzed, for some aspects, in parallel with the Caroline case.[769] It also introduced the relevance of the State's consent as a criterion on which basis the exception could be applied, also in light of some commentators' views,[770] specifying that the *"immunity ratione materiae does not cover acts [representing gross violations*

[767] Memorandum by the Secretariat, A/CN.4/596 (n. 437) paras 162-165, at 107-108.
[768] Memorandum by the Secretariat, A/CN.4/596 (n. 437) para 162 at 107.
[769] Memorandum by the Secretariat, A/CN.4/596 (n. 437) para 162 at 107, footnote 465.
[770] Memorandum by the Secretariat, A/CN.4/596 (n. 437) para 163 at 108, footnote 466, 467.

of another State's sovereignty] such as sabotage, kidnapping, murder committed by a foreign secret service agent or aerial intrusion."[771] The Memorandum additionally took into account the oral pleading of *Djibouti v France*, where counsel for Djibouti purported that in case of crimes of war and acts of espionage and sabotage perpetrated in the territory of another State, immunity *ratione materiae* could not be granted.[772] Similarly, the Secretariat relied on the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia [hereinafter ICTY] in *Prosecutor v Blaškić* to exclude spies' enjoyment of immunity *ratione materiae*.[773]

All in all, the Memorandum did pose the question of whether or not immunities other than crimes of an international degree may, likewise, exclude the application of immunity *ratione materiae*.[774] The result of such consideration only pointed at crimes like misappropriation of States' assets and resources,[775] or embezzlement and drug trafficking,[776] which could be deemed capable of excluding immunity. These examples were identified by the nature of the crime they involved, not by the territorial link, and cannot therefore be considered under the realm of a territorial "offence" exception. Separate consideration was given to the exemption of immunity in the event of crimes of corruption and of common crimes performed in a private, rather than official, capacity.[777] After all, the very title of section 3 of section B. on immunity *ratione materiae* of part Two (III) on *"Scope and implementation of immunity of State officials from foreign criminal jurisdiction"* is entitled: *"Possible exceptions, based on the nature of the criminal conduct"*, thus restricting the criterion according to which those exceptions should be identified to the nature of the crime, not to the modalities of its performance.

b. Mr. Kolodkin's Second Report

The ILC former Special Rapporteur on Immunity of State officials from foreign criminal jurisdiction, Mr. Kolodkin, took the issue into account in his Second Report.[778]

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[771] Memorandum by the Secretariat, A/CN.4/596 (n. 437) para 163 at 108.
[772] Memorandum by the Secretariat, A/CN.4/596 (n. 437) para 164 at 108.
[773] Memorandum by the Secretariat, A/CN.4/596 (n. 437) para 165 at 108.
[774] Memorandum by the Secretariat, A/CN.4/596 (n. 437) paras 208-212, at 137-138.
[775] Memorandum by the Secretariat, A/CN.4/596 (n. 437) para 209 at 137-138.
[776] Memorandum by the Secretariat, A/CN.4/596 (n. 437) para 211 at 138.
[777] Memorandum by the Secretariat, A/CN.4/596 (n. 437) para 212 at 138.
[778] Second Report, Kolodkin (n. 419) para 81, at 52.

He justified the non-applicability of immunity *ratione materiae* with the principle of sovereignty and treated it as a separate question from that of grave international crimes.[779] What seems most relevant in Mr Kolodkin's understanding of the issue is the role of consent,[780] according to which three different scenarios are identified:[781] *i)* the foreign State gave its consent both to the presence of the official on its territory and to the discharge of a certain activity; *ii)* the foreign State gave its consent to the presence of the official on the territory but not to the exercise of the activity in question which led to the performance of a crime; *iii)* the State did not give its consent neither to the presence of the official on its own territory, nor to its activity on its own territory. As for the first case, the applicability of immunity *ratione materiae* is uncontested.[782] In the second envisaged scenario, one must consider to what extent the act which led to the crime is connected to the consented activity.[783] In the third given case, it is quite blatant to state that immunity *ratione materiae* would not apply.[784] Examples of the third situations could be – but are not limited to - all cases involving espionage, sabotage, kidnapping, *et similia*.[785] The former Special Rapporteur mentions, with regard to the third situation, cases where immunity had been invoked but not granted,[786] and others where it was not even claimed.[787] The former Special Rapporteur also mentioned *Ferrini* and *Distomo* as cases where immunity was not accepted because of the territorial nexus.[788] In addition to this, the case of *Bouzari v Islamic Republic of Iran* was mentioned not because of its final finding, rather because of what could be inferred from the legal pattern followed by the Court, which, reasoning *a contrario*, seemed to point at the existence of a customary rule accepting the territorial "offence"

[779] Second Report, Kolodkin (n. 419) para 81-86, at 52-54.
[780] Second Report, Kolodkin (n. 419) paras 82, at 52-53.
[781] Second Report, Kolodkin (n. 419) para 82, at 52-53.
[782] Second Report, Kolodkin (n. 419) para 83, at 53.
[783] Second Report, Kolodkin (n. 419) para 84, at 53.
[784] Second Report, Kolodkin (n. 419) para 85, at 53.
[785] Second Report, Kolodkin (n. 419) para 85, at 53.
[786] Second Report, Kolodkin (n. 419) para 85, at 53, referring to: Abu Omar, as quoted in the Memorandum by the Secretariat, A/CN.4/596 (n. 437) para 163 at 108 ft. 466.
[787] Second Report, Kolodkin (n. 419) para 85, at 53, referring to: Rainbow Warrior, as quoted in the Memorandum by the Secretariat, A/CN.4/596 (n. 437) para 161 at 107 ft. 465.
[788] Second Report, Kolodkin (n. 419) para 85, at 54.

exception.[789] All *pendente bello* situations were excluded from the realm of the territorial exception into consideration.[790]

Whilst concluding that at the time being no established customary norm or trend towards its development on immunity's exception could be claimed to exist,[791] Mr. Kolodkin also qualified the situation described by territorial "offence" exception in cases where a State had not consented to the activity of the foreign State official nor to its very presence on its own territory as *"a special case."*[792] The effect of this classification differentiated it from the realm of all the other envisaged exceptions so that – in the former Special Rapporteur's words: *"[i]t would appear that in such a situation there are sufficient grounds to talk of an absence of immunity."*[793] While the terminological choice of "absence of immunity" may not have been the most pertinent (as recalled many times, exceptions to immunity and absence of immunity do not technically embrace the very same concept), it surely conveys the idea that a territorial "offence" exception in cases of dual absence of consent by the territorial State (to the official's activity and presence on its soil) is a feasible and realistic option.

Also the ILC Report duly reported Kolodkin's viewpoint on the possibility of exceptions to immunity,[794] underlying the inconsistency between the development of the topic and the absence of any existing trend towards its establishment.[795] It was, however, clear that surely a study on immunity had to touch also upon its exceptions, which could not be denied to exist.[796] While some attention was paid to underlining the difference between *lex lata* and *lex ferenda*,[797] a general agreement on the necessity of a further, detailed study on the exceptions to immunity *ratione materiae* and their rationales was endorsed.[798]

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[789] Second Report, Kolodkin (n. 419) para 85, at 54.

[790] Second Report, Kolodkin (n. 419) para 86, at 54.

[791] Second Report, Kolodkin (n. 419) para 94, lett. o), at 59.

[792] Second Report, Kolodkin (n. 419) para 94, lett. p), at 59-60.

[793] Second Report, Kolodkin (n. 419) para 94, lett. p), at 60.

[794] Report of the International Law Commission, Sixty-third session (26 April-3 June and 4 July-12 August 2011) General Assembly, Official Records, Sixty-sixth session, Supplement No. 10 (A/66/10) [hereinafter: ILC Report, 2011, A/66/10] Chapter VII, particularly paras 121-131 at 222-224.

[795] ILC Report, 2011, A/66/10 (n. 794) Chapter VII, para 121 at 222.

[796] ILC Report, 2011, A/66/10 (n. 794) Chapter VII, para 121 at 222.

[797] See, for example: ILC Report, 2011, A/66/10 (n. 794) Chapter VII, para 114 at 220-221 and para 128 at 223.

[798] See, for example: ILC Report, 2011, A/66/10 (n. 794) Chapter VII, para 114 at 220-221, para 128 at 223 and para 130 at 224.

c. Ms. Escobar Hernandez's Fifth Report

The current Special Rapporteur of the ILC on the matter considered the territorial "offence" exception throughout her fifth report.[799] Within the section dedicated to the *"Prior consideration by the Commission of limitations and exceptions to the immunity of State officials from foreign criminal jurisdiction"*[800] she frequently addressed the issue under the nomenclature of *"territorial tort exception"* as a potential exception to immunity which was mentioned by Member States,[801] considered by the Vienna Convention on Consular Relations[802] at art. 43, paragraph 2 b)[803] and by the UNCSI[804] which encompasses both limitations and exceptions to immunity under those instances/proceedings where immunity cannot be invoked as in Part III, arts. 10 to 17 of the Convention.[805] Even though in one remark the Special Rapporteur appreciates that the "territorial tort exception" applies to civil jurisdiction only, she also adds that, according to the ILC Commentary to the Convention,[806] the exception could also cover criminal charges. However, it would require too much of an effort to stretch the wording of the ILC Commentary so that it could extend to the criminal sphere as well. All the Commission stated in the paragraphs cited by Ms. Escobar Hernandez can be summarized as follows: that art 12. of the Convention – as for the physical injury requirement - can also embrace *"intentional physical harm such as assault and battery, malicious damage to property, arson or even homicide, including political assassination"*[807]; and that the author of the act can be identified with an agent/official acting on the State's behalf and not necessarily the State as a legal entity.[808] As explained in the above, all those assumptions do pertain to the civil jurisdiction concerning State immunity and can in no way be stretched to the extent that they could also cover criminal jurisdiction on State officials.

[799] Fifth Report, Escobar Hernàndez (n. 365).
[800] Fifth Report, Escobar Hernàndez (n. 365) paras 15-21 at 9-17.
[801] Fifth Report, Escobar Hernàndez (n. 365) para 19 b), at 10.
[802] Vienna Convention on Consular Relations (n. 24).
[803] Fifth Report, Escobar Hernàndez (n. 365) para 25 at 18.
[804] United Nations Convention on Jurisdictional Immunities of States and their Property (n. 389).
[805] Fifth Report, Escobar Hernàndez (n. 365) para 26 at 18-19.
[806] ILC Report, 1991, A/46/10 (n. 486) paras 4 and 10 at 45-46.
[807] ILC Report, 1991, A/46/10 (n. 486) para 4 at 45.
[808] ILC Report, 1991, A/46/10 (n. 486) para 10 at 46.

Within her study of the national legislative practice, the Special Rapporteur highlighted that most of the domestic legislations which expressly rule on the issue of State immunity do refer to a territorial tort exception *"in the case of damage to persons or property occurring in the forum State."*[809] She referred to the practice of Argentina, Australia, Canada, Japan, Singapore, South Africa, Spain, UK, USA.[810] Reference was also made to the analysis of the exception given by the ICJ within the context of State immunity.[811]

Ms. Escobar Hernandez considered the exception at hand more in the detail in a specific section of the fifth report.[812] She commenced her examination by briefly tracing the history of the exception within the context of civil jurisdiction.[813] Because of the terminological choice of the Special Rapporteur it is however difficult to understand when she employs it properly as an exception from civil jurisdiction and when, on the contrary, she erroneously uses the phrase within the ambit of criminal jurisdiction. As for the rationales, she mostly identified them with: *i)* a historically established preference for the jurisdiction of the territorial State and *ii)* a better and more tailored means of redress and remedy for the victims of the violations.[814] Reference was also made to the study of the Secretariat and of Mr. Kolodkin.[815] By referring to an uneven and unclassified array of judgments of domestic and international courts and tribunals, the Special Rapporteur definitely asserts the applicability of the exception to the immunity of State officials, especially in cases related to *"acts constituting injury, political assassination, espionage or sabotage"*.[816] The continuous swing between the analysis of civil and criminal jurisdiction also affects the investigation of the territorial "offence" exception, which is even more blurry if one considers that the same expression "territorial tort exception" is employed by the

[809] Fifth Report, Escobar Hernàndez (n. 365) para 45 at 26.
[810] Fifth Report, Escobar Hernàndez (n. 365) para 45 at 26 ft 123.
[811] Fifth Report, Escobar Hernàndez (n. 365) para 73-74 at 36, para 80 at 37-38, para 82 at 38, para 90 at 40, 93 at 41.
[812] Fifth Report, Escobar Hernàndez (n. 365) Part IV, B, "Territorial tort exception", paras 225-229 at 88-90.
[813] Fifth Report, Escobar Hernàndez (n. 365) Part IV, B, "Territorial tort exception", para 225 at 88.
[814] Fifth Report, Escobar Hernàndez (n. 365) Part IV, B, "Territorial tort exception", para 226 at 88-89.
[815] Fifth Report, Escobar Hernàndez (n. 365) Part IV, B, "Territorial tort exception", para 226 at 88-89.
[816] Fifth Report, Escobar Hernàndez (n. 365) Part IV, B, "Territorial tort exception", para 227 at 89.

Special Rapporteur, notwithstanding the type of jurisdiction (civil or criminal) under examination.[817]

The final remarks of the Special Rapporteur are somewhat astonishing. In fact, she affirmed that: *"[…] State practice, although limited, seems to be consistent in recognizing the application of this limitation or exception to the immunity of State officials from foreign criminal jurisdiction. The Special Rapporteur considers that this conclusion, together with the importance to be accorded the principle of territoriality in this case, justifies the inclusion of the "territorial tort exception" as a limitation or exception to immunity from jurisdiction in the draft articles currently being formulated."*[818] Ms. Escobar Hernandez considered State practice which supported her argument, mostly within the fields of acts of injury, political assassination, espionage or sabotage.[819]

In addition to this, attention should be given to some final considerations of the fifth Report. Ms. Escobar Hernandez mentions that she could find no such case of domestic courts which applied the territorial exception so as to prevent the applicability

[817] See, for example, the implicit shift of jurisdiction made by the Special Rapporteur from paragraph 227 to paragraph 228: Fifth Report, Escobar Hernàndez (n. 365) Part IV, B, "Territorial tort exception", paras 227-228 at 89-90.

[818] Fifth Report, Escobar Hernàndez (n. 365) para 229 at 90.

[819] Fifth Report, Escobar Hernàndez (n. 365) para 227 at 89, footnote 351, referring to the following cases, here cited with the citation style used in the present work: Judgment, Germany, Federal Constitutional Court, 15 May 1995, 48 (III) *NJW* 1811, 2 *BvL* 19/91 (immunity denied to intelligence officials of the former German Democratic Republic); *R v Mafart and Prieur*, New Zealand, High Court, Auckland Registry, 22 Nov. 1985, 74 ILR 241 (attack on a Greenpeace ship that resulted in the death of a Dutch citizen and the sinking of the ship; the Court did not raise the issue of immunity; *Abu Omar*, Italy (as cited by Paola Gaeta: 'Extraordinary renditions e inmunità della giurisdizione penale degli agenti di Stati esteri: il caso Abu Omar' (2006) 89 Riv Dir Intern, 126, at 126-130 (abduction and illegal transfer of a person) (for further elucidation, see n. 867); *Isabel Morel De Letelier et al v Republic of Chile, also doing business as Linea Aerea Nacional-Chile and Linea Aerea Nacional-Chile*, United States, Court of Appeal, Second Circuit, 20 Nov. 1984, 748 F.2d 790 (US, Court of Appeals, Second Circuit); *Jimenez v Aristeguieta et al.*, United States, Court of Appeals, Fifth Circuit, 12 Dec. 1962, 33 ILR 353; *Jane Doe I et al v Liu Qi et al v Xia Deren et al*, United States, Northern District of California, 8 Dec. 2004, 349 F Supp 2d 1258 (2004); *Khurts Bat v Investigating Judge of the Federal Court of Germany* (n. 28) (abduction and illegal transfer of a person in Germany) (this decision provides an interesting analysis of the issue of exceptions in paragraphs 86 to 101). The courts of Italy and Greece have also accepted this exception, in *Ferrini v Federal Republic of Germany*, Italy, Court of Cassation (Plenary Session), (Decision No. 5044/2004) 11 Mar. 2004, 128 ILR 659, and *Prefecture of Voiotia v Federal Republic of Germany (Distomo Massacre Case)* (n. 705) [see also judgment of the International Court of Justice in ICJ, *Jurisdictional Immunities of the State* (n. 551)]. The International Criminal Tribunal for the former Yugoslavia has also referred to exceptions to State officials' immunity, in *Prosecutor v Tihomir Blaškić (Appeals Chamber, Judgment on the Request of The Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997)* IT-95-14, ICTY (29 Oct. 1997) para 41.

of immunity to the troika composed of Heads of State, Heads of Governments and Ministers for Foreign Affairs.[820]

Despite the considerable attention given by the Special Rapporteur to the issue of the territorial "offence" exception, the related ILC Report did not deal with the matter in much depth.[821] The only exceptions being the following. On the one hand, the ILC Report mentioned instances of State practice on the non-applicability of immunity to criminal jurisdiction for territorial sovereignty reasons similar to those included under the territorial tort exception to State immunity.[822] On the other hand, some comments were made on draft article 7.[823] A general reference to the "irrelevance" of immunity *ratione materiae* in the case of a State exercising its territorial criminal jurisdiction was made.[824] Additionally, some members' concern on the unfitting terminological choice of "territorial tort exception" for criminal jurisdiction cases was reported.[825]

In any case, it must be noted that Ms. Escobar Hernandez did eventually propose the following provision to the Drafting Committee for adoption:

"Draft article proposed for the consideration of the Commission at its sixty-eighth session, in 2016. Draft article 7. Crimes in respect of which immunity does not apply
1. Immunity shall not apply in relation to the following crimes:
(i) Genocide, crimes against humanity, war crimes, torture and enforced disappearances;
(ii) Corruption-related crimes;
(iii) Crimes that cause harm to persons, including death and serious injury, or to property, when such crimes are committed in the territory of the forum State and the State official is present in said territory at the time that such crimes are committed.
2. Paragraph 1 shall not apply to persons who enjoy immunity ratione personae during their term of office.
3. Paragraphs 1 and 2 are without prejudice to:
(i)Any provision of a treaty that is binding on the forum State and the State of the official, under which immunity would not be applicable;
(ii)The obligation to cooperate with an international tribunal which, in each case, requires compliance by the forum State."[826]

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[820] Fifth Report, Escobar Hernàndez (n. 365) Part IV, B, "Territorial tort exception", para 237 at 92.
[821] ILC Report, 2016, A/71/10 (n. 753) Chapter XI.
[822] ILC Report, 2016, A/71/10 (n. 753) Chapter XI, para 202, at 343-344.
[823] ILC Report, 2016, A/71/10 (n. 753) Chapter XI, paras 235-246, at 350-351.
[824] ILC Report, 2016, A/71/10 (n. 753) Chapter XI, paras 237, at 350.
[825] ILC Report, 2016, A/71/10 (n. 753) Chapter XI, para 244, at 351.
[826] Fifth Report, Escobar Hernàndez (n. 365) Annex III, at 99.

According to the latest developments of the Drafting Committee and of the plenary session of the ILC, draft art. 7 was adopted without any territorial "offence" exception, with the following wording:

"Immunity of State officials from foreign criminal jurisdiction Titles of Parts Two and Three, and texts and titles of draft article 7 and annex provisionally adopted by the Drafting Committee at the sixty-ninth session Draft article 7 Crimes under international law in respect of which immunity ratione materiae shall not apply
1. Immunity ratione materiae from the exercise of foreign criminal jurisdiction shall not apply in respect of the following crimes under international law:
(a) crime of genocide;
(b) crimes against humanity;
(c) war crimes;
(d) crime of apartheid;
(e) torture;
(f) enforced disappearance.
2. For the purposes of the present draft article, the crimes under international law mentioned above are to be understood according to their definition in the treaties enumerated in the annex to the present draft articles."[827]

[827] ILC, Immunity of State officials from foreign criminal jurisdiction, Titles of Parts Two and Three, and texts and titles of draft article 7 and annex provisionally adopted by the Drafting Committee at the sixty-ninth session, 69th session of the International Law Commission (2017), 10 July 2017, A/CN.4/L.893 [hereinafter: ILC, Draft art. 7 provisionally adopted by the Drafting Committee, 10 July, 2017, A/CN.4/L.893]; ILC, Provisional summary record of the 3378th meeting, Held at the Palais des Nations, Geneva, on Thursday, 20 July 2017, at 10 a.m., International Law Commission, Sixthy-ninth session (second part), 18 August 2017, A/CN.4/SR.3378 [hereinafter: ILC, Provisional summary record, 3378th meeting, 20 July 2017, A/CN.4/SR.3378] at 13; ILC Report, 2017, A/72/10 (n. 753) para 74, at 164.

B. Practice cited by Special Rapporteur Ms. Escobar Hernandez

a. **Judgment, 15 May 1995, Germany, Federal Constitutional Court**
b. ***Rainbow Warrior case*, New Zealand, UN Secr. Gen. and Arbitration Trib.**
c. ***The Abu Omar case*, Italy**
d. ***Isabel Morel De Letelier et al v Republic of Chile cases*, United States**
e. ***Jimenez v Aristeguieta et al.*, United States, Court of Appeals**
f. ***Jane Doe I et al v Liu Qi et al v Xia Deren et al*, United States, Northern District of California**
g. ***Khurts Bat v Investigating Judge of the German Federal Court*, United Kingdom**
h. ***Prefecture of Voiotia v Federal Republic of Germany (Distomo Massacre Case)*, Greece**
i. ***Ferrini v Federal Republic of Germany*, Italy**
j. ***Prosecutor v Tihomir Blaškić*, case IT-95-14, ICTY, particularly: *Appeals Chamber, Judgment on the Request of The Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997***

The work delivered by the current ILC Special Rapporteur on the issue at hand provides for an extensive analysis of what she deemed to be the most relevant case law on the exception under consideration. Consistently, it seems reasonable to take those cases into account, in order to offer a more comprehensive understanding of the subject matter *per se* and also of national courts' approaches towards such exception. The cases below have been scrutinized following the order in which they were cited by Ms. Escobar Hernandez in her fifth Report.[828] Out of the nine cases cited, it is fair to say that a territorial "offence" exception was considered in just one of them (the Khurts Bat decision, discussed below), while the others either did not consider the issue at all – despite being criminal proceedings-, or did not bear any relevance for the present case, since they were proceedings of civil nature. I will now consider them in the order they were approached by the Special Rapporteur. [829]

[828] Fifth Report, Escobar Hernàndez (n. 365) para 227 at 89, footnote 351.
[829] Fifth Report, Escobar Hernàndez (n. 365) para 227 at 89, footnote 351.

a. Judgment, 15 May 1995, Germany, Federal Constitutional Court[830]

This case arose in the context of activities of espionage carried out during the existence of the two separate States of German Democratic Republic GDR (East Germany) and Federal Republic of Germany FRG (West Germany) before their unification in 1990.[831] In particular, the case related to the prosecution of a group of spies who had operated from the territory of the GDR or third parties and who became punishable under Section 5 No. 4 StGB for the espionage activity carried out against the FRG.[832] The modified version of art. 315 of the EGStGB after the Unification Treaty establishes that acts criminalized under the StGB before the reunification would still be punishable even after it.[833] The compatibility of the above with the principles of public international law and with the domestic German principles of equality, prohibition against retroactive punishment and the rule of law was challenged.[834] It was then upon the Federal Supreme Court, Appellate Courts and the Federal Constitutional Court to rule out on the issue.[835] The debate, within academia and courts, mostly originated by the failure of a bill which restricted amnesty for GDR spies only to those who had not engaged in other serious crimes in the course of their acts.[836] The issue raised some issues concerning public international law,[837] including: *"the status of peacetime espionage in public international law"*,[838] *"the extraterritorial reach of German anti-espionage laws"*,[839] *"State succession and the punishment of GDR spies"*,[840] the question of the *"[…] analogy to article 31 of the Hague Convention respecting the Law and Customs of War on Land of 1907[…]"*,[841] *"the principle of nullum crimen, nulla poena sine lege"*,[842] the issue of *"legitimate expectations,*

[830] Judgment, 15 May 1995, Germany, Federal Constitutional Court (n. 819).
[831] Ryszard W. Piotrowicz and Sam K. N. Blay, *The unification of Germany in international and domestic law* (Rodopi, 1997) at 139.
[832] Piotrowicz and Blay (n. 831) at 139.
[833] Piotrowicz and Blay (n. 831) at 139.
[834] Piotrowicz and Blay (n. 831) at 140.
[835] Piotrowiczand Blay (n. 831) at 140-141.
[836] Piotrowicz and Blay (n. 831) at 140.
[837] Piotrowicz and Blay (n. 831) at 141-142.
[838] Piotrowicz and Blay (n. 831) at 142-144.
[839] Piotrowicz and Blay (n. 831) at 144-147.
[840] Piotrowicz and Blay (n. 831) at 147-149.
[841] Piotrowicz and Blay (n. 831) at 149-151.
[842] Piotrowicz and Blay (n. 831) at 151-152.

proportionality and rechtsstaatsprinzip".[843] The most relevant issue for the present analysis is, of course, the one concerning the extraterritorial reach of German anti-espionage laws. However, because of the acceptation of the State's jurisdiction as extended to crimes committed "in whole or in part" on its territory, the crimes of the GDR spies (which also resulted in ordering those activities on the phone or via mail or in the instigation, training or otherwise development of espionage activities) are to be considered committed, at least in part, on the FRG territory.[844] In line with the above, no issue of extraterritoriality arises in such respect. Alternatively, jurisdiction could be attracted by the protective principle.[845] However, as recalled by Piotrowicz and Blay, none of the issues pertaining to the GDR spies has been taken into account from the public international law perspective, but rather from the domestic (mainly constitutional) legal viewpoint.[846] Under international law, it can certainly be stated that a State has a right to prosecute spies which engaged in clandestine activities against them.[847]

The above notwithstanding, it is not the purpose of this chapter to indulge into the principles which form the basis for States' jurisdiction. It seems, however, that no further analysis of the case at hand is meaningful within the context of the territorial "offence" exception, which was neither formally invoked nor implicitly assumed to be applicable.

b. *Rainbow Warrior case,* New Zealand, UN Secr. Gen. and Arbitration Trib.

By admission of the ILC Special Rapporteur on the matter herself, with regard to the *"attack on a Greenpeace ship that resulted in the death of a Dutch citizen and the sinking of the ship"*,[848] *"the Court did not raise the issue of immunity"*[849] The Rainbow Warrior case is a paramount case on secret service officials engaging in

[843] Piotrowicz and Blay (n. 831) at 152-155.
[844] Piotrowicz and Blay (n. 831) at 144, referring to: Harvard Research on International Law (n. 64) at 480, art. 3.
[845] Piotrowicz and Blay (n. 831) at 145-146; see also: Judgment, 15 May 1995, Germany, Federal Constitutional Court (n. 819) at 1813.
[846] Piotrowicz and Blay (n. 831) at 146.
[847] Piotrowicz and Blay (n. 831) at 144-147.
[848] Fifth Report, Escobar Hernàndez (n. 365) para 227 at 89, footnote 351.
[849] Fifth Report, Escobar Hernàndez (n. 365) para 227 at 89, footnote 351.

criminal activities in other States' territories.[850] As for the well-known facts, let me just recall that the Greenpeace vessel "Rainbow Warrior", at the time anchored in the harbor of Auckland, in New Zealand, was the scene of two violent explosions caused by French agents, in 1985, which provoked the death of a Dutch photographer.[851] The ship was expected to leave the harbor to protest against the nuclear testing carried out by France in the Pacific Ocean.[852] The French agents were members of an operation of the DGSE (Directorate General of External Security) – part of the French Ministry of Defence – for which France itself acknowledged responsibility.[853] In particular, it is of some interest that Mr. Mafart and Mr. Prieur, two French agents involved in the operation, flew to New Zealand on 22 Jun. 1985, travelling under false identities on counterfeit Swiss passports.[854] They were then arrested and kept under custody for their fundamental role in planning and executing the bombing attack.[855] In that phase of the proceeding, France did not claim that the officials enjoyed immunity and they were both condemned to imprisonment for their acts of manslaughter and willful damage by explosions.[856] Despite acknowledging that the agents had acted under governmental orders, the judge did not rule on such basis.[857] A dispute arose between New Zealand and France as for the restitution the former requested to the latter.[858] Only in this phase, France advanced that, since the officers had acted under military orders, upon their surrender to their State, France would be willing to pay compensation for the damage

[850] Van Alebeek, *The immunity of States and their Officials in International Criminal Law and International Human Rights Law* (n. 504) at 126.
[851] Van Alebeek, *The immunity of States and their Officials in International Criminal Law and International Human Rights Law* (n. 504) at 126.
[852] Andrew Sanger, 'Immunity of State Officials from the Criminal Jurisdiction of a Foreign State' in Dominic McGoldrick and Sarah Williams (eds.) *Current Developments, Public International Law* (2013) 62 ICLQ 193, at 214.
[853] Franey, *Immunity, Individuals and International Law. Which Individuals are Immune from the Jurisdiction of National Courts under International Law* (n. 504) at 212.
[854] Franey, *Immunity, Individuals and International Law. Which Individuals are Immune from the Jurisdiction of National Courts under International Law* (n. 504) at 212.
[855] Franey, *Immunity, Individuals and International Law. Which Individuals are Immune from the Jurisdiction of National Courts under International Law* (n. 504) at 212.
[856] Franey, *Immunity, Individuals and International Law. Which Individuals are Immune from the Jurisdiction of National Courts under International Law* (n. 504) at 212, referring to: *R v Mafart and Prieur* (n. 819).
[857] Joanne Foakes, *The position of heads of state and senior officials in international law* (Oxford University Press, 2014) at 161.
[858] Franey, *Immunity, Individuals and International Law. Which Individuals are Immune from the Jurisdiction of National Courts under International Law* (n. 504) at 213.

and give an apology to New Zealand.[859] New Zealand replied to the request adding that the two agents could be released if only France ascertained that they would complete to serve the rest of their sentences.[860] The dispute was then referred to the UN Secretary General on 19 Jun. 1986.[861] The UN Secretary General established the transfer of the prisoners to a French military facility in an island outside Europe and their detainment for three years in prison.[862] However, France violated the agreement on 30 Apr. 1990.[863]

According to some authors, the Rainbow Warrior case supports the idea that international law does not necessarily supersede national law; the opposite is true, in the sense that domestic law is applicable to the State official who acted on the territory of the forum State without such State's consent.[864] This is so regardless of the qualification of the acts of the official.

Moreover, also – but of course not only - in parallel with other case studies,[865] Rainbow Warrior is oftentimes cited to support State practice against the acknowledgement of immunity of State officials for criminal activity.[866]

c. *The Abu Omar case*, Italy [867]

Again, the case concerning Abu Omar seems to have quite superficially been included in the list of domestic jurisprudence which applied the territorial "offence"

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[859] Foakes (n. 857) at 161.

[860] Franey, *Immunity, Individuals and International Law. Which Individuals are Immune from the Jurisdiction of National Courts under International Law* (n. 504) at 213.

[861] Franey, *Immunity, Individuals and International Law. Which Individuals are Immune from the Jurisdiction of National Courts under International Law* (n. 504) at 213; *Rainbow Warrior (New Zealand v France),* United Nations, Secretary General, 6 Jul. 1986, 74 ILR 241, at 256 et seq.

[862] Sanger (n. 852) at 214.

[863] Franey, *Immunity, Individuals and International Law. Which Individuals are Immune from the Jurisdiction of National Courts under International Law* (n. 504) at 213, referring to: *Rainbow Warrior, New Zealand v France*, France-New Zealand Arbitration Tribunal, 30 Apr. 1990, 82 ILR 499.

[864] Van Alebeek, *The immunity of States and their Officials in International Criminal Law and International Human Rights Law* (n. 504) at 128.

[865] Franey, *Immunity, Individuals and International Law. Which Individuals are Immune from the Jurisdiction of National Courts under International Law* (n. 504) at 215-232; see also: Van Alebeek, *The immunity of States and their Officials in International Criminal Law and International Human Rights Law* (n. 504) at 127-128; Sanger (n. 852) at 214-215.

[866] Franey, *Immunity, Individuals and International Law. Which Individuals are Immune from the Jurisdiction of National Courts under International Law* (n. 504) at 214 and at 232.

[867] By *"Abu Omar case"* I refer to the line of judgments explained below.

exception by the current ILC Special Rapporteur.[868] Even omitting any comment on the inaccuracy of the reference made by the Special Rapporteur generally to *"Abu Omar, Italy (cited by Gaeta, P: "Extraordinary renditions e inmunità della giurisdizione penale degli agenti di Stati esteri: il caso Abu Omar", Rivista di diritto internazionale, vol. 89, 2006, pp. 126-130 (abduction and illegal transfer of a person)"*[869] (too vague and imprecise, with absolutely no reference to specific judgments and case law) it is very doubtful that the case – regardless of which specific phase of the proceeding one takes into account – has any relevance with regard to the territorial "offence" exception.

As for the facts and legal proceedings, they can be summarized as follows. The case concerned Abu Omar (Mr. Osama Mustafa Hassan Nasr) who was an Imam in Milan, Italy, from 2000. He was given the status of political refugee from 2001; however, he was subjected to investigations because of its alleged involvement in an international terrorist association. He was then kidnapped by CIA (Central Intelligence Agency) and SISMI (Italian Military Intelligence and Security Service) agents on 12 Feb. 2003. After having being transferred to other cities in Italy and Germany, he was eventually tortured in Egypt, where he was released, then re-arrested and finally released in Feb. 2007.[870] Criminal proceedings concerning the abduction of Abu Omar were then triggered in Italy, in the aftermath of those events. 23 American citizens and the former USA CIA station chief in Milan, Mr. Lady, were sentenced *in absentia* by the Court of First Instance in Milan on 4 Nov. 2009,[871] respectively, to 3 and 8 years of imprisonment for their involvement in the abduction.[872] Other agents could not be prosecuted for different reasons: some American citizens because of diplomatic immunities, other Italian nationals because of State secret grounds; while other Italian officers were convicted for post-facto abetting.[873] The State secret privilege triggered a so-called "conflict of powers" between the government and the judicial authorities,

[868] Fifth Report, Escobar Hernàndez (n. 365) para 227 at 89, footnote 351.

[869] Fifth Report, Escobar Hernàndez (n. 365) para 227 at 89, footnote 351.

[870] Irene Wieczorek, 'Analysis And Opinion Italian Court Of Cassation Delivers Its Ruling On The Abu Omar Case What to Expect from the Decision?' (2012) 3 NJECL 412, at 413; Arianna Vedaschi, 'State Secret Privilege versus Human Rights: Lessons from the European Court of Human Rights Ruling on the Abu Omar Case', (2017) 13 EuConst, 166 at 168.

[871] Judgment No. 12428/2009, Italy, Tribunal of Milan, Fourth Criminal section, 4 Nov. 2009, ILDC 1492 (IT 2010).

[872] Wieczorek (n. 870) at 413.

[873] Wieczorek (n. 870) at 413-414.

settled by the Constitutional Court with its decision No. 106/2009[874] in favour of the executive branch.[875] The sentence was also upheld by the Court of Appeal, with just some change in the penalties.[876] The case was then brought before the Italian Court of Cassation, which delivered its judgment in 2012[877] and departed from the decision of the Court of Appeal only in the part where it assessed that the state secret exception could not bar the prosecution of five Italian officers.[878] The Court of Appeal then rendered a second decision,[879] convicting the Italian SISMI officers, even before the Constitutional Court could deliver its ruling on a new clash between the Government and the Court of Cassation on the issue of secrecy.[880] Without indulging in the further analysis on the reasoning of the Italian Constitutional Court, it has to be noted that the Italian Government then challenged the judgment of the Italian Court of Cassation.[881] The judgment of the Italian Constitutional Court[882] ruled in favour of the Governmental branch represented by the Prime Minister.[883] The final judgment of the Italian Court of Cassation[884] abided by the position of the Constitutional Court and rejected the conviction of the Italian agents of SISMI[885] while another judgment upheld the conviction of three American agents.[886] The case eventually reached the European

[874] *Giudizio per Conflitto di Attribuzione tra Poteri Dello Stato*, Italy, Constitutional Court, 11 Mar. 2009 (dep. 3 Apr. 2009) (No. 106/2009), G. U. 08/04/2009 n. 14.
[875] Vedaschi (n. 870) at 169.
[876] *Adler and others v Tribunale di Milano*, Italy, Court of Appeals of Milan, Fourth Criminal Section, 15 Dec. 2010, No. 3688 (2011) 21 IYIL 351; Wieczorek (n. 870) at 414.
[877] ***G****eneral Prosecutor at the Court of Appeals of Milan v Adler and others*, Italy, Supreme Court of Cassation, (Fifth Criminal Section) 29 Nov. 2012, No 46340/2012, ILDC 1960 (IT 2012).
[878] Pietro Insolera and Irene Wieczorek, 'The Italian Court Of Cassation Delivers Its Ruling In The Abu Omar Case. The Court's Decision', (2013) 4 NJECL 180, at 181.
[879] *Adler and others v Tribunale di Milano*, Italy, Court of Appeals of Milan, Fourth Criminal Section, 12 Apr. 2013 No. 985.
[880] Vedaschi (n. 870) at 170.
[881] Insolera and Wieczorek (n. 878) at 181.
[882] *Giudizio per Conflitto di Attribuzione tra Poteri Dello Stato*, Italy, Constitutional Court, 10 Feb. 2014 (dep. 13 Feb. 2014) (No. 24/2014), G. U. 19/02/2014 n. 9.
[883] Vedaschi (n. 870) at 170.
[884] Judgment No. 20447/2014, Italy, Supreme Court of Cassation, (First Criminal Section) 24 Feb. 2014 (dep. 16 May 2014).
[885] Vedaschi (n. 870) at 170.
[886] *General Prosecutor at the Court of Appeals of Milan v Adler and others*, Italy, Supreme Court of Cassation, (Fifth Criminal Section), 11 Mar. 2014 (dep. 25 Sep. 2014) No. 39788.

Court of Human Rights,[887] which held Italy accountable for violations of the European Convention on Human Rights.[888]

Scholars have been quite profuse in the analysis of the case;[889] however, it seems that the territorial "offence" exception was not an issue – it was neither explicitly invoked nor was it implicitly assumed.

The case at hand, even if not always in overt terms, has been deemed to fall under the cloak of international crimes.[890] Moreover, most issues have been addressed on the one hand within the context of diplomatic and consular immunities, and on the other hand within the sphere of military troops abroad.[891]

d. *Isabel Morel De Letelier et al v Republic of Chile cases*, United States

The case concerns a car bombing in 1976 which resulted in the death of Orlando Letelier, former Ambassador for Chile to the USA and of his aide's wife, Mrs. Moffitt.[892] In 1980, the USA District Court for the District of Columbia issued a default judgment in favour of Letelier and Mrs. Moffitt representatives, which condemned the Chilean Republic to pay compensatory and punitive damages.[893] The Court denied the discretionary authority – and, consequently, any qualification of official act for granting immunity.[894] The USA District Court for the Southern District of New York then

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[887] *Case of Nasr and Ghali v Italy* App. No. 44883/09 (ECtHR, Judgment, 23 Feb. 2016).

[888] Vedaschi (n. 870) at 166.

[889] See, for example: Paola Gaeta, 'Extraordinary renditions e giurisdizione italiana nei confronti degli agenti statunitensi coinvolti nel c.d. caso Abu Omar', (2013) 96 Riv Dir Intern, 530; Gaeta, 'Extraordinary renditions e inmunità della giurisdizione penale degli agenti di Stati esteri: il caso Abu Omar' (2006) (n. **Errore. Il segnalibro non è definito.**); Francesco Messineo, ''Extraordinary Renditions' and State Obligations to Criminalize and Prosecute Torture in the Light of the Abu Omar Case in Italy' (2009) 7 JICJ 1023; Chris Jenks and Eric Talbot Jensen, 'All Human Rights Are Equal, But Some Are More Equal Than Others: The Extraordinary Rendition Of A Terror Suspect In Italy, the NATO SOFA, and Human Rights', (2010) 1 Harv. Nat'l Sec. J. 171; Micaela Frulli, 'Some Reflections on the Functional Immunity Of State Officials', (2009) 19 Ital.Y.B.Int'l L. 91.

[890] Fox and Webb, The law of State Immunity (n. 480) at 595; Andrea Atteritano, Immunity Of States And Their Organs: The Contribution Of Italian Jurisprudence Over The Past Ten Years, (2009) 19 Ital.Y.B.Int'l L. 33, at 55-56.

[891] Atteritano (n. 890) at 49-50; Insolera and Wieczorek (n. 878) at 181-184.

[892] *Isabel Morel De Letelier et al v Republic of Chile, also doing business as Linea Aerea Nacional-Chile and Linea Aerea Nacional-Chile* (n. 819).

[893] *Isabel Morel De Letelier et al v Republic of Chile et al*, United States, District Court, District of Columbia, 5 Nov. 1980, 502 F.Supp. 259 (US, DC for the District Court of Columbia, 1980); *Isabel Morel De Letelier et al v Republic of Chile, also doing business as Linea Aerea Nacional-Chile and Linea Aerea Nacional-Chile* (n. 819).

[894] Scott A. Gilmore, 'Immunity Disorders: The Conflict of Foreign Official Immunity and Human Rights Litigation' (2012) 80 Geo.Wash.L.Rev. 918 at 930, footnote 91.

accepted the appellees request to execute the judgment on the Chilean assets of the appellant, namely the national airline of Chile – which had also been used to perpetrate the assassination.[895] These finding was then reversed by the Court of Appeals, in light of the joint participation of Chile and LAN airlines[896] to the tort, of the assumption that LAN's assets were not used for commercial purposes and also on the basis of further considerations on State immunity.[897]

The inclusion of the case within the realm of those confirming State practice in favour of a territorial "offence" exception is of some surprise. I see no particular link between the judgment and the issue at hand. It is reasonable to say that it dealt with immunity, even though that immunity was in fact, more precisely, State immunity from civil jurisdiction. Moreover, immunity mainly covered execution, not suit itself.[898] In a similar vein, if it is true that an exception was considered, one shall also recall to mind that the exception at hand was the territorial tort one.[899] Indeed, the judgment also shed light on the relationship between the territorial tort exception and the distinction between *acta iure imperii*/*acta iure gestionis*, refusing to apply the binomial as a criterion for the application of the exception.[900] Additionally, it *"[formulated limits] on the discretionary function exception to the territorial tort exception of the FSIA."*[901] But in any case all those findings pertain to the sphere of the territorial *tort* exception, not the "offence" one, the failed quest for extradition remaining a secondary and

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[895] *Isabel Morel De Letelier et al v Republic of Chile, also doing business as Linea Aerea Nacional-Chile and Linea Aerea Nacional-Chile*, United States, District Court, S. D. New York, 28 Jul. 1983, 567 F.Supp. 1490 (US, S.D.N.Y., 1983); *Isabel Morel De Letelier et al v Republic of Chile, also doing business as Linea Aerea Nacional-Chile and Linea Aerea Nacional-Chile* (n. 819).

[896] LAN airlines (now LATAM Airlines) was the former flag carrier of Chile; see: Brian F. Havel and Gabriel S. Sanchez, *The principles and practice of international aviation law* (Cambridge University Press, 2014) at 143, ft. 76.

[897] *Isabel Morel De Letelier et al v Republic of Chile, also doing business as Linea Aerea Nacional-Chile and Linea Aerea Nacional-Chile* (n. 819) at 795, 798; see also: Fox and Webb, The law of State Immunity (n. 480) at 244.

[898] *Isabel Morel De Letelier et al v Republic of Chile, also doing business as Linea Aerea Nacional-Chile and Linea Aerea Nacional-Chile* (n. 819).

[899] See, for instance: Bröhmer (n. 33) at 60; see also: Fox and Webb, The law of State Immunity (n. 480) at 475, 478, referring to: *Isabel Morel De Letelier et al v Republic of Chile et al* (n. 604).

[900] Van Alebeek, *The immunity of States and their Officials in International Criminal Law and International Human Rights Law* (n. 504) at 69, 70, referring to: *Isabel Morel De Letelier et al v Republic of Chile et al* (n. 604).

[901] Van Alebeek, *The immunity of States and their Officials in International Criminal Law and International Human Rights Law* (n. 504) at 121 and 337, referring to: *Isabel Morel De Letelier et al v Republic of Chile et al* (n. 604).

marginal instance.[902] Indeed, it is here argued that, once the request of extradition was refused, the judicial mechanism which was triggered featured all typical formal and substantial elements of a civil, rather than criminal, proceeding. Consistently, I find it hard to analyze the case at hand in the present section, not because the undisputable novelties it purports, but mainly because those findings do not touch upon the sphere of the territorial "offence" exception.

e. *Jimenez v Aristeguieta et al.,* United States, Court of Appeals[903]

This case is relevant mostly for its implications on the political offence exception to extradition.[904] In the previous proceedings, Perez Jimenez the former Chief Executive from Venezuela, was eventually extradited by a Judge of a District Court on the grounds that *"the proof submitted by Venezuela showed probable cause on charges of financial crimes, but did not show probable cause on charges of murder and participation in murder."*[905] Chile requested him from the USA for financial crimes and murder.[906] The reasoning of the District Court established a very peculiar precedent. The court found that extradition could be granted for the financial crimes only, while the murder charge fell under the political offence exception and, for such instance, was non-extraditable.[907] Consistently, at the occurrence of multiple charges, with only some of them being extraditable, extradition prevails over the exception unless the political nature or connection of the act can be proven.[908] Filing a habeas corpus, Jimenez mainly sustained that those acts were political in nature or in any case

[902] For some studies on the extradition issue in the Letelier case, see: Michael E. Tigar, 'The Foreign Sovereign Immunities Act and the Pursued Refugees: Lessons from Letelier v Chile', (1982) 3 Michigan Y.B.Int'l Leg.Stud. 421, at 424; Eric H. Singer, 'Terrorism, Extradition, and FSIA Relief: the Letelier case, (1986) 19 Vand.J.Transnat'l L., 57 at 59-65.

[903] *Jimenez v Aristeguieta et al.* (n. 819).

[904] M. Cherif Bassiouni, *International Extradition. United States Law and Practice* (Oxford University Press, 2014) at 690.

[905] *Jimenez v Aristeguieta et al.* (n. 819) at 353.

[906] Bassiouni (n. 904) at 690; for a remark on the peculiar situation where it is the State of nationality which requests the extradition, see also: Micaela Frulli, 'On the Consequence of a Customary Rule Granting Functional Immunity to State Officials and Its Exceptions: Back to Square One' (2016) 26 Duke J.Comp.& Int'l L. 479 at 491.

[907] Bassiouni (n. 904) at 690.

[908] Bassiouni (n. 904) at 690; see also: Sarah L. Nagi, 'Political Offense Exceptions to United States Extradition Policy: Aut Dedere Aut Judicare (Either Extradite or Prosecute)', (1991) 1 Ind.Int'l &Comp.L.Rev. 109, at 116, footnote 28.

connected with political offence.[909] The District Court rejected Jimenez's contentions and dismissed the petition for habeas corpus.[910] The case was differentiated from the sovereign immunity invoked in *Underhill v Hernandez*[911] because of the personal and private motives underlying Jimenez's acts.[912] Within the field of immunities, this can be interpreted as a rejection of immunity from civil/criminal proceedings of former Heads of State (Chief Executive, in the present case) for acts for personal profit.[913] The Court sustained that such acts performed in private capacity are *"as far from being an act of state as rape."*[914] It is believed that the private nature of some acts exempts them from the applicability of immunity as they are exceptions to the act of State doctrine.[915] However, not much more than this can follow from the judgment at hand with regard to the law of immunities and, more closely, to the territorial "offence" exception. In the opposite fashion, this only shows that other grounds different from the exception (namely the private nature of the acts)[916] barred immunity. Immunity *ratione materie* would, thus, not be applied *"to a former head of state for criminal acts committed 'for the private benefit' of that person."*[917] The territorial "offence" exception is not mentioned and not even taken into consideration.

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[909] *Jimenez v Aristeguieta et al.* (n. 819) at 353.

[910] *Jimenez v Aristeguieta et al.* (n. 819) at 353.

[911] *Underhill v Hernandez*, United States, Supreme Court, 29 Nov. 1897, 18 S.Ct. 83, also quoted in: *Jimenez v Aristeguieta et al.* (n. 819) at 354.

[912] *Jimenez v Aristeguieta et al.* (n. 819) at 355.

[913] Fox and Webb, *The law of State Immunity* (n. 480) at 555-556; on the private nature of crimes, see also: Van Alebeek, *The immunity of States and their Officials in International Criminal Law and International Human Rights Law* (n. 504) at 115; Charles Pierson, 'Pinochet and the end of immunity: England's house of Lords holds that a former Head of State is not immune for torture', (2000) 14 Temp.Int'l & Comp.L.J. 263, at 291, footnote 215, referring to: *Jimenez v Aristeguieta et al.* (n. 819); Michele Iafrate Werton, 'The grant of jurisdiction in United States v Noriega', (1992) 9 Ariz.J.Int'l & Comp.L., 587 at 608.

[914] *Jimenez v Aristeguieta et al.* (n. 819) at 558 quoted by Gilmore (n. 894) at 930, footnote 90.

[915] Tracie A. Sundack, 'Republic of Philippines v Marcos: The Ninth Circuit Allows a Former Ruler to Invoke the Act of State Doctrine against a Resisting Sovereign', (1988) 38 Am.U.L.Rev., 225 at 227, footnote 7; Chimene I. Keitner, 'Annotated Brief of Professors of Public International Law and Comparative Law as Amicus Curiae in Support of Respondents in *Samantar v Yousuf*', (2011) 15 Lewis & Clark L. Rev. 609, at 615, footnote 17, both referring to: *Jimenez v Aristeguieta et al.* (n. 819) at 557-558.

[916] Jamison G. White, 'Nowhere to Run, Nowhere to Hide: Augusto Pinochet, Universal Jurisdiction, the ICC, and a Wake-Up Call for Former Heads of State', (1999) 50 Case W. Res. Law Review', 127, at 152, footnote 166, referring to: *Jimenez v Aristeguieta et al.* (n. 819) at 557-558; Jordan J. Paust, 'Genocide in Rwanda, State Responsibility to Prosecute or Extradite, and Nonimmunity for Heads of State and Other Public Officials' (2011) 34 Hous. J. Int'l L. 57, at 82-83, footnote 104, referring to: *Jimenez v Aristeguieta et al.* (n. 819) at 557-558.

[917] Johan D. Van der Vyver, 'Universal Jurisdiction in International Criminal Law', (1999) 24 S. Afr. Y.B. 107, at 121, footnote 62.

f. *Jane Doe I et al v Liu Qi et al v Xia Deren et al*, United States, Northern District of California[918]

As for some of the aforementioned jurisprudence, it does not seem appropriate to mention this case within the analysis of the present topic. The District Court for the Northern District Court of California indeed deemed immunity *ratione materiae* not applicable in cases where international crimes had been performed.[919] However, the Court rejected the proposition that international crimes cannot be qualified as official acts, by their very nature.[920] The case was referred to also by the ILC, with regard to the definition of "act performed in an official capacity", since the judgment assisted in clarifying that immunity cannot be invoked for acts which are not performed in official capacity within authority.[921] China had in fact claimed that immunity could be granted to Chinese State officials for acts involving torture and arbitrary detention and other types of physical harassment.[922] The USA District Court, contrarily, established that acts of a State officials exceeding the authority they are given by the statute which regulates their activity cannot be considered acts of the sovereign State, but rather acts of the official as an individual.[923] Indeed, the judgment assists the assessment of the concept of "act of State", which cannot be denied when a governmental authority does not fully reject the involvement in some officials' acts.[924] The judgment is usually quoted with regard to that part of State practice which rejected immunity in case of *ultra vires* acts.[925]

The case concerned acts of physical threat and offence performed by Chinese police forces against Falun Gong practitioners in a time frame prior to the 2008 Beijing Olympic Games. The plaintiff triggered civil action against Liu Qi, the then mayor of Beijing, because not only had he not prevented nor repressed those acts of violence but

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[918] *Jane Doe I et al v Liu Qi et al v Xia Deren et al* (n. 819).

[919] Webb (n. 738) at 89.

[920] Memorandum by the Secretariat, A/CN.4/596 (n. 437) para 192, at 125, footnote 540.

[921] ILC Report, 2016, A/71/10 (n. 753) Chapter XI, at 354,355, footnote 1413.

[922] Beth Stephens, 'The Modern Common Law of Foreign Official Immunity', (2011) 79 Fordham L. R., 2669, at 2681 referring to: *Jane Doe I et al v Liu Qi et al v Xia Deren et al* (n. 819) at 1271.

[923] Stephens (n. 922) at 2681-2682 referring to: *Jane Doe I et al v Liu Qi et al v Xia Deren et al* (n. 819) at 1282 [quoting *Chuidian v Philippine National Bank and another*, United States, Court of Appeals, Ninth Circuit, 29 Aug. 1990, 92 ILR 480].

[924] Fox and Webb, *The law of State Immunity* (n. 480) at 280, referring to: *Jane Doe I et al v Liu Qi et al v Xia Deren et al* (n. 819) at 1295.

[925] Memorandum by the Secretariat, A/CN.4/596 (n. 437) para 159 at 104, footnote 452.

also because he allegedly encouraged, instigated and directly ordered such behaviors. The process then developed as a default judgment and some of the civil claims of some plaintiffs against Liu Qi were confirmed by the District Court in the judgment of 8 Dec. 2004.[926]

This judgment falls outside the realm of the territorial "offence" exception primarily because the judgment of the District Court is a civil law one. A second reason, which in any case overarches any contrary argument, lies in the fact that no reference whatsoever, neither formally nor substantially, was made to a territorial "offence" exception within the criminal sphere.

In light of the above, notwithstanding the case's relevance within international law *per se*, it remains of no particular aid within the general understanding of the exception I am taking into consideration.

g. *Khurts Bat v Investigating Judge of the German Federal Court*, United Kingdom [927]

Since this case will be extensively examined in section III, with a particular focus on the judgment's analysis of the territorial "offence" exception, no analysis will be provided in this section. I refer to that section for Khurts Bat's argument in favour of the exception.

h. *Prefecture of Voiotia v Federal Republic of Germany (Distomo Massacre Case)*, Greece[928]

and

i. *Ferrini v Federal Republic of Germany*, Italy[929]

Because of the commonality of issues and features, the *Voiotia* and *Ferrini* cases before, respectively, Greek and Italian courts, can be jointly considered. In the former, Germany was compelled to pay damages as a result of the human rights violations perpetrated during the German occupation of the Greek village of Distomo in 1944

[926] For a summary of the case, see: International Crimes Database, Jane Doe I, et al. v Liu Qi, et al. at www.internationalcrimesdatabase.org/Case/991.

[927] *Khurts Bat v Investigating Judge of the Federal Court of Germany* (n. 28).

[928] *Prefecture of Voiotia v Federal Republic of Germany (Distomo Massacre Case)* (n. 705).

[929] *Ferrini v Federal Republic of Germany* (n. 819).

(Distomo massacre),[930] whereas in the latter the Italian Courts established that Germany could not be granted immunity because it had subjected Mr. Ferrini to capture, deportation and forced work during the II World War.[931]

Several reasons stand against the inclusion of both judgments amongst those who recognized and applied a territorial "offence" exception. First and foremost, both of them are civil proceedings and can thus, at the very best, have dealt with territorial *tort* exception, not the territorial "offence" one. Consistently, the Greek and Italian courts development on such grounds do not pertain to the present section. Secondly, in any case, even though some considerations on a territorial exception were provided, those cases *"accepted a human rights exception to the law of state immunity"*,[932] they relied on the *ius cogens* nature of the prohibition of some crimes for the final assessment.[933] And, even so, the overarching judgment of the ICJ on the *Jurisdictional Immunities* case, found that, in cases of *"torts allegedly committed on the territory of another State by its armed forces and other organs of State in the course of conducting an armed conflict",*[934] the territorial tort principle could not justify the decision of the Italian Courts which denied Germany's immunity.[935] In the same vein,[936] the territorial nexus was not even considered by the subsequent judgment of the Italian Constitutional Court n. 238/2014.[937]

In light of the above, the cases of *Voiotia* and *Ferrini* are of no particular aid in the present matter, which concerns State practice in favour of the territorial "offence" exception.

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[930] Van Alebeek, *The immunity of States and their Officials in International Criminal Law and International Human Rights Law* (n. 504) at 314, citing: *Prefecture of Voiotia v Federal Republic of Germany (Distomo Massacre Case)* (n. 705).

[931] Van Alebeek, *The immunity of States and their Officials in International Criminal Law and International Human Rights Law* (n. 504) at 314, citing: *Ferrini v Federal Republic of Germany* (n. **Errore. Il segnalibro non è definito.**).

[932] Van Alebeek, *The immunity of States and their Officials in International Criminal Law and International Human Rights Law* (n. 504) at 3.

[933] See, for example: Van Alebeek, *The immunity of States and their Officials in International Criminal Law and International Human Rights Law* (n. 504) at 342, commenting on *Ferrini* case.

[934] ICJ, *Jurisdictional Immunities of the State* (n. 551) para 78.

[935] ICJ, *Jurisdictional Immunities of the State* (n. 551) para 79.

[936] Riccardo Pavoni, 'How broad is the Principle Upheld by the Italian Constitutional Court in Judgment No. 238?', (2016) 14 JICJ, 573.

[937] *Simoncini and Others v Germany and Presidency of the Council of Ministers*, Italy, Constitutional Court, Judgment No. 238/2014, 22 Oct. 2014, Gazzetta Ufficiale (special series), No. 45, 29 Oct. 2014.

j. *Prosecutor v Tihomir Blaškić,* case IT-95-14, ICTY,[938] particularly: *Appeals Chamber, Judgment on the Request of The Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997*[939]

As a preliminary remark, it is wise to remind that the ICTY does not represent a "foreign criminal jurisdiction." As set out by its own statute,[940] the ICTY has competence over *"persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991 […]"*[941] and has primacy over national courts.[942] Even though the ICTY acts, within its own judgments, in the realm of international, and not domestic, criminal law, its reasoning and findings are paramount for the assessment of the development of customary international law.

The statements of the Court in the judgment under consideration raise a conundrum for their unprecedented stance. Referring to the cases of *Governor Collot* of 1797,[943] *McLeod* of 1827,[944] *Rainbow Warrior* of 1985[945] and *Eichmann* of 1961,[946] the ICTY states that functional immunity is *"a well-established rule of customary international law going back to the eighteenth and nineteenth centuries […], restated*

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[938] *Prosecutor v Tihomir Blaškić (Trial Judgement)* IT-95-14-T, ICTY (3 Mar. 2000); as for the very well-known facts of the case, it might suffice to recall that Tihomir Blaškić was found guilty for his involvement and engagement in the commission of various crimes during the conflict in the Bakans during the 1990s. The trial judgment sentenced him to 45 years of imprisonment [*Prosecutor v Tihomir Blaškić (Trial Judgement)* IT-95-14-T, ICTY (3 Mar. 2000)] which were reduced to 9 years by the Appeals Chamber [*Prosecutor v Tihomir Blaškić (Appeals Chamber Judgment)* IT-95-14-A, ICTY (29 Jul. 2004)]. For more information, visit the website of the ICTY at: <www.icty.org/cases/party/667/4>last accessed 31 Oct. 2017.

[939] *Prosecutor v Tihomir Blaškić (Appeals Chamber, Judgment on the Request of The Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997)* IT-95-14, ICTY (29 Oct. 1997) [even in this case, the citation given by the incumbent Special Rapporteur in her Fifth Report (n. 819) is inaccurate].

[940] Statute of the International Criminal Tribunal for the former Yugoslavia, UNSC Res 827 (25 May 1993), UN Doc S/827/1993, 32 ILM 1192 [hereinafter: ICTY Statute].

[941] ICTY Statute (n. 940) art. 1.

[942] ICTY Statute (n. 940) art. 9 (2).

[943] John Bassett Moore, *A digest of international law: as embodied in diplomatic discussions, treaties and other international agreements, international awards, the decisions of municipal courts, and the writings of jurists, vol II* (G.P.O., 1906) at 23.

[944] *Mc Leod case* in: Foreign Office, '(Inclosure.) – Mr. Webster to Mr. Crittenden. Washington, March 15, 1841' in: *British and Foreign State Papers* vol. 29 (H.M.S.O., 1840-1841) at 1139 et seq.

[945] *Rainbow Warrior (New Zealand v France),* United Nations, Secretary General, 6 Jul. 1986, 74 ILR 241, at 256 et seq..

[946] *Attorney-General of the Government of Israel v Adolf Eichmann*, Israel, District Court of Jerusalem, 12 Dec. 1961, 36 ILR 5.

many times since".[947] According to some author,[948] such cases do not prove that functional immunity for all State officials in the realm of criminal law is a well-accepted rule of customary nature.

Whilst I may agree with the Court acknowledgement that, in substance, State officials are *"instruments of a State"*[949] when they act on States' behalf, in no way this concludes that, because those acts are attributable to the State itself, then the official must not suffer any consequence.[950] This also contradicts art. 7 (2) of the ICTY Statute, which prescribes that *"the official position of any accused person, whether as Head of State or Government or as a responsible Government official, shall not relieve such person of criminal responsibility nor mitigate punishment"*[951] That every State holds sovereign powers which enable them – and only them - to instruct their own officials cannot in any case determine that *"each State is entitled to claim that acts or transactions performed by one of its organs in its official capacity be attributed to the State, so that the individual organ may not be held accountable for those acts or transactions,"*[952] as the Court however stated. The Court further articulates that those officials are subject to its jurisdiction, not because of their criminal responsibility *per se*, but because, for the nature of the perpetrated crimes – and only for that reason -, they cannot invoke immunity.[953]

In conclusion, I could not disagree more with the current ILC Special Rapporteur's proposition that the ICTY has referred to this exception in paragraph 41 of the Judgment on the request of the Republic of Croatia for review of the decision of the Trial Chamber II of 18 Jul. 1997.[954] As underlined above, the ICTY departed from

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[947] *Prosecutor v Tihomir Blaškić (Appeals Chamber, Judgment on the Request of The Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997)* IT-95-14, ICTY (29 Oct. 1997) (n. 939) para 38.
[948] Franey, *Immunity, Individuals and International Law. Which Individuals are Immune from the Jurisdiction of National Courts under International Law* (n. 504) at 215.
[949] *Prosecutor v Tihomir Blaškić (Appeals Chamber, Judgment on the Request of The Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997)* IT-95-14, ICTY (29 Oct. 1997) (n. 939) para 38.
[950] *Prosecutor v Tihomir Blaškić (Appeals Chamber, Judgment on the Request of The Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997)* IT-95-14, ICTY (29 Oct. 1997) (n. 939) para 38.
[951] ICTY Statute (n. 940) art. 7 (2).
[952] *Prosecutor v Tihomir Blaškić (Appeals Chamber, Judgment on the Request of The Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997)* IT-95-14, ICTY (29 Oct. 1997) (n. 939) para 41.
[953] *Prosecutor v Tihomir Blaškić (Appeals Chamber, Judgment on the Request of The Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997)* IT-95-14, ICTY (29 Oct. 1997) (n. 939) para 41.
[954] Fifth Report, Escobar Hernàndez (n. 365) para 227 at 89, footnote 351.

different assumptions and inferred different conclusions from the ones I am developing in the present work.

C. 6th Committee

The Sixth Committee of the UN General Assembly is one of the Assembly's main committees[955] and *"is the primary forum for the consideration of legal questions in the General Assembly."*[956] It was establishe under Rule 98 of the Rules of Procedure of the General Assembly.[957] From the analysis of the most up-to-date documentation provided on the website of the General Assembly Sixth Committee, it looks like no in-depth examination of a territorial "offence" exception to State officials' immunity *ratione materiae* from foreign criminal jurisdiction has been carried out so far. Nor does it seem that the agenda of the Sixth Committee is likely to include it in the near future. Only a few elements –provided below- may be of some interest for the present analysis.

A topical summary of the discussions held in the Sixth Committee shows that a further study on the possible exceptions to immunity of State officials from foreign criminal jurisdiction (including -but theoretically not limited to- international crimes) was encouraged by the delegations.[958] On that occasion, some remarks highlighted that *"spies and foreign agents carrying out unlawful acts in the territory of a State did not enjoy immunity from foreign criminal jurisdiction."*[959] While no express reference was made to the territorial "offence" exception, such elements point, at the very least, at some minimum standards of awareness of the issue, even if in very vague and general terms.

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[955] M. J. Peterson, *The UN General Assembly* (Routledge: 2006) at 59 et seq; Sydney Dawson Bailey, *The General Assembly of the United Nations* (Pall Mall Press, 1964) at 103 et seq; Sydney Dawson Bailey, *The General Assembly of the United Nations: a study of procedure and practice* (Stevens & Sons Limited, 1960) at 113 et seq.

[956] See the website of the General Assembly of the United Nations Legal - Sixth Committee available at: <www.un.org/en/ga/sixth/> last accessed 31 Oct. 2017; see also, amongst others: Marie-Claude Smouts, 'The General Assembly: Grandeur and Decadence' in Paul Taylor and A. J. R. Groom (eds.), *The United Nations at the Millennium. The Principal Organs* (Continuum, 2000) at 50-51.

[957] Rules of Procedure of the General Assembly (embodying amendments and additionsadopted by the General Assembly up to September 2016), XIII. Committees (Rules 96 to 133), reissued for technical reasons on 21 Feb. 2017, A/520/Rev.18*, Rule 98, at 28.

[958] Topical summary of the discussion held in the Sixth Committee of the General Assembly during its sixty-third session, prepared by the Secretariat, Report of the International Law Commission on the work of its sixtieth session (2008), International Law Commission Sixtieth session, Geneva, 4 May-5 June and 6 July-7 August 2009, Distr. 21 Jan. 2009, A/CN.4/606 [hereinafter: Sixth Committee, General Assembly, Topical Summary 2009, A/CN.4/606] paras 106-110, at 20, 21.

[959] Sixth Committee, General Assembly, Topical Summary 2009, A/CN.4/606 (n. 958) para 110, at 21.

In another discussion, it was voiced that exceptions to immunity had to be understood as exceptions to the general rule[960] and additional examination of the rationales for such exceptions was delivered.[961]

In a further discussion carried out within the Legal Committee, it was interestingly noted that what are mostly treated as exceptions to State officials' immunity must not be treated as *"exceptions to the general rule"* as they are, on the contrary, a precise set of norms aimed at ensuring that State officials in breach of criminal law are ensured to justice.[962] In that context, States' and their representatives' responsibilities were erroneously conflated.[963] Some reference was made to some type of territorial exception. Since the phrasing was not clear, it seems advisable to quote the whole passage as it was formulated. It read as follows: *"[i]t was recalled that there might be exceptions to the rule on immunity ratione materiae, where an international agreement constituted a lex specialis for certain crimes or in respect of criminal proceedings for acts committed on the territory of the forum State."*[964] Further discussion mainly addressed the exception of international crimes.[965]

Not too much time later, an exception to the enforcement of immunity *ratione materiae* in *"certain criminal proceedings for acts of a State official committed on the territory of the forum State"*[966] was envisaged, with no further analysis. The same statement was reiterated the following year.[967] The subsequent topical summary does

[960] Topical summary of the discussion held in the Sixth Committee of the General Assembly during its sixty-sixth session, prepared by the Secretariat, Report of the International Law Commission on the work of its sixty-third session (2011), International Law Commission, Sixty-fourth session, Geneva, 7 May-1 June and 2 July-3 August 2012, Distr. 20 Jan. 2012, A/CN.4/650 [hereinafter: Sixth Committee, General Assembly, Topical Summary 2012, A/CN.4/650] para 10, at 4.

[961] Sixth Committee, General Assembly, Topical Summary 2012, A/CN.4/650 (n. 960) para 11 at 5.

[962] Topical summary of the discussion held in the Sixth Committee of the General Assembly during its sixty-seventh session, prepared by the Secretariat, Report of the International Law Commission on the work of its sixty-third and sixty-fourth session, International Law Commission, Sixty-fifth session, Geneva, 6 May-7 June and 8 July-9 August 2013, Distr. 18 Jan. 2013, A/CN.4/657 [hereinafter: Sixth Committee, General Assembly, Topical Summary 2013, A/CN.4/657] para 34, at 10.

[963] Sixth Committee, General Assembly, Topical Summary 2013, A/CN.4/657 (n. 962) para 34, at 10.

[964] Sixth Committee, General Assembly, Topical Summary 2013, A/CN.4/657 (n. 962) para 35, at 10.

[965] Sixth Committee, General Assembly, Topical Summary 2013, A/CN.4/657 (n. 962) para 36, at 10.

[966] Topical summary of the discussion held in the Sixth Committee of the General Assembly during its sixty-ninth session, prepared by the Secretariat, Report of the International Law Commission on the work of its sixty-sixth session, International Law Commission, Sixty-seventh session, Geneva, 4 May-5 June and 6 July-7 August 2015, Distr. 21 Jan. 2015, A/CN.4/678 para 50 at 15.

[967] Topical summary of the discussion held in the Sixth Committee of the General Assembly during its seventieth session, prepared by the Secretariat, Report of the International Law Commission on the work of its sixty-seventh

not report relevant submissions on the territorial "offence" exception.[968] However, on that occasion, it was underscored that the territorial element, not the gravity of the crime, characterized the exception.[969]

The discussion which developed within the context of the Legal Committee should, nonetheless, be considered in the broad context and in relation to the findings of the ILC and the Special Rapporteur. Whilst taking into account the intertwined nature of each of these studies, it is interesting to note, in any case, the achievements and developments which emerged within the UN Legal Committee itself.

D. ILC debates: latest developments

a. Comments by Governments
b. Summary Records
i. Summary Records of 2016
ii. Summary Records of 2017

Some of the latest developments of the ILC debates can be inferred from the reports of the ILC, from the summary records of the discussions which took place in plenary and from comments sent by Governments which responded to the ILC request of information. Since the relevant ILC Reports have been considered in subsection I. A. of the present chapter, this subsection will now address the Governements' comments and the Summary Records of the ILC meetings.

a. Comments by Governments.

As for the comments drafted by Governments and sent to the ILC, the general tendency has been that of giving scarce or no consideration to the territorial

session, International Law Commission Sixty-eighth session Geneva, 2 May-10 June and 4 July-12 August 2016, Distr. 28 Jan. 2016, A/CN.4/689 para 75 at 16.

[968] Topical summary of the discussion held in the Sixth Committee of the General Assembly during its seventy-first session, prepared by the Secretariat, Report of the International Law Commission on the work of its sixty-eighth session (2016), International Law Commission Sixty-eighth session Geneva, 1 May-2 June and 3 July-4 August 2017, Distr. 22 Feb. 2017, A/CN.4/703 [hereinafter: Sixth Committee, General Assembly, Topical Summary 2017, A/CN.4/703] paras 51-61 at 14-16.

[969] Sixth Committee, General Assembly, Topical Summary 2017, A/CN.4/703 (n. 968) para 55 at 15.

"offence" exception.[970] While this does not necessarily equate to a rejection of the territorial "offence" exception *per se*, it certainly highlights a poor degree of development of the very notion.

b. Summary Records.

For what concerns the summary records of the ILC meetings, some interesting analisyses of the topic have emerged.

i. Summary Records of 2016.

During the 3328th meeting,[971] the Special Rapporteur Ms. Escobar Hernandez highlighted a growing interest for limitations and exceptions to immunity of State officials from foreign criminal jurisdiction other than the most common international crimes. In her opinion, this was also proved by the proceeding triggered before the ICJ on *Immunities and Criminal Proceedings*.[972] According to what stated by the Special Rapporteur, it was evident from the analysis of State practice that in some cases it was the link with territoriality – not the nature of the crime – that rendered immunity inapplicable.[973] This approach was defined as a *"holistic"* one,[974] supposedly because it dealt with the exceptions from a broader perspective, not just from that of international crimes. In the same occasion, Ms. Escobar Hernandez identified three exceptions – as per draft article 7 (1) –, namely: international crimes, corruption and what she defined as a "territorial tort exception" – erroneously borrowing the term 'tort' from civil terminology.[975] In the same meeting, Mr. Murase, the Japanese representative, commenting on the issue, showed some uncertainty with regard to the

[970] See the Comments by Governments available on the website of the International Law Commission, Analytical Guide to the Work of the International Law Commission at: http://legal.un.org/ilc/guide/4_2.shtml

[971] ILC, Provisional summary record of the 3328th meeting, Held at the Palais des Nations, Geneva, on Tuesday, 26 July 2016, at 10 a.m., International Law Commission, Sixty-eight session (second part), June 19, 2017, A/CN.4/SR.3328 [hereinafter: ILC, Provisional summary record, 3328th meeting, 26 July 2016, A/CN.4/SR.3328] at 4.

[972] ICJ, *Immunities and Criminal Proceedings* (Equatorial Guinea v France).

[973] ILC, Provisional summary record, 3328th meeting, 26 July 2016, A/CN.4/SR.3328 (n. 971) at 4.

[974] ILC, Provisional summary record, 3328th meeting, 26 July 2016, A/CN.4/SR.3328 (n. 971) at 4.

[975] ILC, Provisional summary record, 3328th meeting, 26 July 2016, A/CN.4/SR.3328 (n. 971) at 7.

inclusion of the exception in the realm of the exceptions to State officials' immunity from foreign criminal jurisdiction under art. 7 (1) (iii).[976] This was so because of two reasons: on the one hand, issues had emerged with regard to its inclusion as an exception to State immunity, on the other hand little practice supported such application within the context of immunity of State officials from criminal jurisdiction.[977]

At the 3330th meeting, while members like Mr. Saboia, of Brazil, examined the issue in the context of territorial tort exception to State immunity,[978] the Chinese member, Mr. Huang, criticized Ms. Escobar Hernandez for confusing the notions of civil and criminal jurisdiction with the goal of applying the same exception to both types of proceedings.[979] Mr. Huang additionally questioned whether or not the exceptions applied by the former and the incumbent Special Rapporteurs were the same, primarily because of the role of 'State consent' which only characterized the exception elaborated by Mr. Kolodkin – and to which, in principle, Mr. Huang seemed to adhere.[980]

At a subsequent meeting, the 3331st, it was suggested by Mr. Singh of India that the ILC should investigate more closely the feasibility of a territorial "offence" exception, considering the crucial role of 'State consent' shared by Mr. Kolodkin and the *Khurts Bat*'s line of judgments.[981] Mr. Singh also identified a *lacuna*, since nothing had been said on the relationship between that exception and military activities.[982] However, as correctly recalled by Mr. Singh himself in the same passage, the territorial exception was traditionally conceived as not to involve that kind of activities. Two additional aspects in Mr. Singh's analysis are worth mentioning. First, he did attempt at providing for a new and more consistent nomenclature of the notion, under the name of "territorial crime exception".[983] Secondly, another criticism was carried out against Ms. Escobar Hernandez's unjustified parallel of State immunity from civil jurisdiction and State officials' immunity from criminal jurisdiction.[984] An agreement with the

[976] ILC, Provisional summary record, 3328th meeting, 26 July 2016, A/CN.4/SR.3328 (n. 971) at 10.
[977] ILC, Provisional summary record, 3328th meeting, 26 July 2016, A/CN.4/SR.3328 (n. 971) at 10.
[978] CDI, Comptu rendu, 3330e séance, 28 juillet 2016, A/CN.4/SR.3330 (n. 753) at 4.
[979] CDI, Comptu rendu, 3330e séance, 28 juillet 2016, A/CN.4/SR.3330 (n. 753) at 14.
[980] CDI, Comptu rendu, 3330e séance, 28 juillet 2016, A/CN.4/SR.3330 (n. 753) at 14.
[981] ILC, Provisional summary record, 3331st meeting, 29 July 2016, A/CN.4/SR.3331 (n. 753) at 7.
[982] ILC, Provisional summary record, 3331st meeting, 29 July 2016, A/CN.4/SR.3331 (n. 753) at 7.
[983] ILC, Provisional summary record, 3331st meeting, 29 July 2016, A/CN.4/SR.3331 (n. 753) at 7.
[984] ILC, Provisional summary record, 3331st meeting, 29 July 2016, A/CN.4/SR.3331 (n. 753) at 7.

theoretical substrate of the territorial "offence" exception can be found in the reasoning of Mr. Hmoud of Jordan, who, nonetheless, would have preferably abandoned the civil law terminological connotion given by the Special Rapporteur.[985]

ii. Summary records of 2017

The discussion was further continued at the 3360th meeting.[986] Within the analysis of Mr. Park (representative for the Republic of Korea), it was said that, having the territorial "offence" exception been vastly accepted and enshrined under paragraph 1 (iii) of draft art. 7, its existence within the system of international law could not be rejected.[987] Sir Wood's remark, as the UK representative, expressed the controversy around the territorial "crime" exception, underlining that it represented a sure element of interest for the ILC.[988] However, he maintained that the Commission would have needed to tackle some important questions which were not addressed by the report delivered by the Special Rapporteur, as, for instance, procedural ones.[989] Sir Wood also agreed with Mr. Singh's opinion of the preceding session, where he reported a lack of analysis on specific issues which deserved consideration as, for example, the situation of military activities.[990] Mr. Nguyen of Vietnam suggested that the level and the precise object of the harm required for the satisfaction of the territorial "offence" exception criteria should be specified more in the detail.[991] He mainly doubted the use of the conjunction "or" in the phrase "Crimes that cause harm to persons, including death and serious injury, or to property" because it creates confusion as to which is the object of the harm (persons, property or both) and which degree of harm is necessary.[992]

The 3361st meeting touched upon the territorial "offence" exception quite diffusely.[993] Mr. Tladi of South Africa pointed out the irrelevance of the reference to

[985] ILC, Provisional summary record, 3331st meeting, 29 July 2016, A/CN.4/SR.3331 (n. 753) at 11.
[986] ILC, Provisional summary record of the 3360th meeting, Held at the Palais des Nations, Geneva, on Thursday, 18 May 2017, at 10 a.m., International Law Commission, Sixty-ninth session (first part), 19 June, 2017, A/CN.4/SR.3360 [hereinafter: ILC, Provisional summary record, 3360th meeting, 18 May 2017, A/CN.4/SR.3360].
[987] ILC, Provisional summary record, 3360th meeting, 18 May 2017, A/CN.4/SR.3360 (n. 986) at 9.
[988] ILC, Provisional summary record, 3360th meeting, 18 May 2017, A/CN.4/SR.3360 (n. 986) at 12.
[989] ILC, Provisional summary record, 3360th meeting, 18 May 2017, A/CN.4/SR.3360 (n. 986) at 12.
[990] ILC, Provisional summary record, 3360th meeting, 18 May 2017, A/CN.4/SR.3360 (n. 986) at 12.
[991] ILC, Provisional summary record, 3360th meeting, 18 May 2017, A/CN.4/SR.3360 (n. 986) at 15.
[992] ILC, Provisional summary record, 3360th meeting, 18 May 2017, A/CN.4/SR.3360 (n. 986) at 15.
[993] ILC, Provisional summary record, 3361st meeting, 19 May 2017, A/CN.4/SR.3361 (n. 753).

the Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character[994] and the European Convention on State Immunity[995] made by the Special Rapporteur in her fifth report[996] with regard to the territorial "offence" exception.[997] He further criticized the Special Rapporteur's venture to apply the territorial tort exception to the criminal sphere and linked it to Ms. Escobar Hernandez's wrong assumption that intentional damage only pertains to criminal jurisdiction.[998] Additionally, the South African representative contended that the State practice cited by the current Special Rapporteur in support of such extension in her report[999] was irrelevant because it only concerned States' – rather than State officials' – immunity and also because it did not account for the Diplomatic Immunities and Privileges Act of South Africa[1000] which, according to Mr. Tladi, does not mention the exception.[1001] He did also contend that the case of *Khurts Bat*[1002] did not, in fact, carry any support in favour of the territorial "offence" exception.[1003] Further in his analysis, Mr. Tladi opposed Ms. Escobar Hernandez's examination of the *Jurisdictional Immunites of the State* case[1004] which, in any case, excluded the applicability of the territorial tort exception to State immunity.[1005] To conclude his remarks, Mr. Tladi clearly expressed his rejection for any support of the territorial "offence" exception *sub* draft art. 7 (1) (iii) mainly because the practice cited pertained to the civil, rather than criminal, jurisdiction.[1006] In the same meeting, Portugal's member, Ms. Galvão Teles, commended the proposal to include a territorial "offence" exception to the immunity of State officials from criminal jurisdiction;[1007] however, she

[994] Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character (n. 24).
[995] European Convention on State Immunity (n. 562).
[996] Fifth Report, Escobar Hernàndez (n. 365) para 28, at 19, available at: legal.un.org/ilc.
[997] ILC, Provisional summary record, 3361st meeting, 19 May 2017, A/CN.4/SR.3361 (n. 753) at 3.
[998] ILC, Provisional summary record, 3361st meeting, 19 May 2017, A/CN.4/SR.3361 (n. 753) at 3.
[999] Fifth Report, Escobar Hernàndez (n. 365) para 225, at 88.
[1000] South Africa, Diplomatic Immunities and Privileges Act, No. 37 (2001) modified by Diplomatic Immunities and Privileges Amendment Act, No. 35 (2008).
[1001] ILC, Provisional summary record, 3361st meeting, 19 May 2017, A/CN.4/SR.3361 (n. 753) at 3
[1002] *Khurts Bat v Investigating Judge of the Federal Court of Germany* (n. 28).
[1003] ILC, Provisional summary record, 3361st meeting, 19 May 2017, A/CN.4/SR.3361 (n. 753) at 3.
[1004] ICJ, *Jurisdictional Immunities of the State* (n. 551).
[1005] ILC, Provisional summary record, 3361st meeting, 19 May 2017, A/CN.4/SR.3361 (n. 753) at 5.
[1006] ILC, Provisional summary record, 3361st meeting, 19 May 2017, A/CN.4/SR.3361 (n. 753) at 6.
[1007] ILC, Provisional summary record, 3361st meeting, 19 May 2017, A/CN.4/SR.3361 (n. 753) at 9.

called for a narrower and more detailed formulation of such exception than its civil counterpart embedded under art. 12 UNCSI.[1008] In addition to this, Ms. Galvão Teles suggested that the general terms under which the exception had been construed needed, in fact, to be substituted by more precise indications; she referred to the role of State consent to the activity and the presence of the official suggested by the former Special Rapporteur in his Second Report[1009] and to the necessity of specifying which acts are to be considered covered by the exception, mentioning *"political assassination, spying, sabotage and abduction"*.[1010] As for the comment of Mr. Hassouna, of Egypt, he reported that the Commission somehow managed to find an agreement on the existence of the territorial "offence" exception, mainly because of the principle of territoriality and bearing in mind Mr. Kolodkin's remark on the role of consent.[1011] Nonetheless, while accepting the exception *per se*, he could not agree with Ms. Escobar Hernandez's methodology to transplant a notion of civil jurisdiction into the criminal one with absolutely no attempt to adjust the concept to the different scenario.[1012] In his view, the current Special Rapporteur should have recalled the absence of the exception in domestic criminal legislations and made an effort towards the elaboration of a more precise notion of territorial "offence" exception to immunity from criminal jurisdiction.[1013] While on the one hand suggesting that the wording adopted by Mr. Kolodkin in his Second Report could be taken into account, the Egyptian representative urged the Special Rapporteur to give the same treatment to all of the sources of the same kind (without preferring those which appear to support her arguments).[1014]

During the 3362th meeting, Mr. Vázquez-Bermúdez of Ecuador shared Ms. Escobar Hernandez's choice to adopt a wording which paralleled the one the Commission used with regard to immunities of States and their property and also uphold the inclusion of the territorial "offence" exception under draft art. 7.[1015] To the contrary, the representative of the USA, Mr. Murphy, opposed the Special Rapporteur's reliance on national laws for the suggestion of a territorial "offence" exception from

[1008] United Nations Convention on Jurisdictional Immunities of States and their Property (n. 389) art. 12.
[1009] Second Report, Kolodkin (n. 419) paras 82-85, at 52-54.
[1010] ILC, Provisional summary record, 3361st meeting, 19 May 2017, A/CN.4/SR.3361 (n. 753) at 10.
[1011] ILC, Provisional summary record, 3361st meeting, 19 May 2017, A/CN.4/SR.3361 (n. 753) at 13.
[1012] ILC, Provisional summary record, 3361st meeting, 19 May 2017, A/CN.4/SR.3361 (n. 753) at 13.
[1013] ILC, Provisional summary record, 3361st meeting, 19 May 2017, A/CN.4/SR.3361 (n. 753) at 13.
[1014] ILC, Provisional summary record, 3361st meeting, 19 May 2017, A/CN.4/SR.3361 (n. 753) at 13.
[1015] ILC, Provisional summary record, 3362nd meeting, 23 May 2017, A/CN.4/SR.3362 (n. 753) at 4.

criminal jurisdiction because of its scarcity and because it concerned only immunity of States, not of State officials.[1016] Mr. Murphy additionally noted that nothing in the national legislations excluded the application of immunity in cases of genocide, crimes against humanity and war crimes; according to him the Special Rapporteur should equally take into account this evidence provided by domestic laws.[1017] In the same vein, he criticized Ms. Escobar Hernandez for the uneven consideration she gave to treaty practice, downplaying it when it did not support her thesis and overplaying it in the opposite case.[1018] According to Mr. Murphy, this was especially true with regard to the issue of the "territorial *tort* exception", which was unjustifiably transplanted from the civil to the criminal context without considering that no such exception is mentioned in treaties which tackle *"genocide, crimes against humanity, war crimes, torture, enforced disappearance or corruption"*.[1019] Mr. Murphy did in fact indulge in the analysis of how the territorial tort exception was translated into the criminal context by the current Special Rapporteur. He suggested that, even assuming that the underlying reason which justifies the exception in the context of civil jurisdiction (and which was omitted by Ms. Escobar Hernandez) is that a State should be liable for insurable risks, this was only relevant within the civil context.[1020] His last remark points out that the application of civil law notions into the criminal sphere should be done evenly: if this was possible for the "territorial *tort* exception"– as per the report of the Special Rapporteur –, then it should be equally done also for issues as immunity for public acts, which – typically - include military acts.[1021] Even when members, such as Mr. Šturma of Czech Republic, did support the inclusion of the territorial "offence" exception, they highlighted the necessity for further investigation of the issue.[1022] The last comment on the matter, by Mr. Jalloh of Sierra Leone, proposed the deletion of the exception from draft art. 7, paragraph 1 (iii).[1023]

[1016] ILC, Provisional summary record, 3362nd meeting, 23 May 2017, A/CN.4/SR.3362 (n. 753) at 5.
[1017] ILC, Provisional summary record, 3362nd meeting, 23 May 2017, A/CN.4/SR.3362 (n. 753) at 5.
[1018] ILC, Provisional summary record, 3362nd meeting, 23 May 2017, A/CN.4/SR.3362 (n. 753) at 5.
[1019] ILC, Provisional summary record, 3362nd meeting, 23 May 2017, A/CN.4/SR.3362 (n. 753) at 5.
[1020] ILC, Provisional summary record, 3362nd meeting, 23 May 2017, A/CN.4/SR.3362 (n. 753) at 7.
[1021] ILC, Provisional summary record, 3362nd meeting, 23 May 2017, A/CN.4/SR.3362 (n. 753) at 7.
[1022] ILC, Provisional summary record, 3362nd meeting, 23 May 2017, A/CN.4/SR.3362 (n. 753) at 8.
[1023] ILC, Provisional summary record, 3362nd meeting, 23 May 2017, A/CN.4/SR.3362 (n. 753) at 14.

Little attention was given to the territorial "offence" exception at the 3363rd meeting – as shown by the summary record.[1024] Mr. Rajput of India, after having recalled the opposite conclusions reached by the former and the current Special Rapporteurs, criticized the latter's understanding of the territorial "offence" exception as it was mainly based on diplomatic and consular related treaties, which did not fall within the scope of immunity of State officials from foreign criminal jurisdiction.[1025]

Other remarks were made at the 3364th session.[1026] Mr. Grossman Guiloff, the Chilean representative, motivated his favour for the inclusion of the territorial "offence" exception in the drafting of art. 7 on the assumption that international practice supported territorial jurisdiction as such.[1027] Mr. Ruda Santolaria of Peru expressed his support for the exception, as formulated under art. 7, paragraph 1 (iii).[1028]

Speaking as Germany's representative, the Chairman Mr. Nolte commented on the territorial "offence" exception at the 3365th meeting.[1029] He proposed a different formulation of art. 7, where, in particular, the exception at hand would not be called a "territorial *tort* exception", rather, under paragraph 1 (ii), *"[i]mmunity shall not apply: […] (ii) [i]n the case of alleged crimes that cause harm to persons … when a crime is alleged to have been committed in the territory of the forum State and the State official is present in said territory at the time that such crime has been committed."*[1030] To Mr. Tladi's contention that Mr. Nolte had criticized the lack of supporting practice in Ms. Escobar Hernandez's arguments and, notwithstanding, had envisaged the possibility to include the same exception in draft art. 7, Mr. Nolte replied that, even though it was thorough that the notion required further analysis, it could be said to be already a norm

[1024] ILC, Provisional summary record of the 3363rd meeting, Held at the Palais des Nations, Geneva, on Wednesday, 24 May 2017, at 10 a.m., International Law Commission, Sixthy-ninth session (first part), 19 June 2017, A/CN.4/SR.3363 [hereinafter: ILC, Provisional summary record, 3363rd meeting, 24 May 2017, A/CN.4/SR.3363].

[1025] ILC, Provisional summary record, 3363rd meeting, 24 May 2017, A/CN.4/SR.3363 (n. 1024) at 6.

[1026] ILC, Provisional summary record of the 3364th meeting, Held at the Palais des Nations, Geneva, on Friday, 26 May 2017, at 10 a.m., International Law Commission, Sixthy-ninth session (first part), 4 July 2017, A/CN.4/SR.3364 [hereinafter: ILC, Provisional summary record, 3364th meeting, 26 May 2017, A/CN.4/SR.3364].

[1027] ILC, Provisional summary record, 3364th meeting, 26 May 2017, A/CN.4/SR.3364 at 6 (n. 1026).

[1028] ILC, Provisional summary record, 3364th meeting, 26 May 2017, A/CN.4/SR.3364 at 6 (n. 1026) at 14.

[1029] ILC, Provisional summary record, 3365th meeting, 30 May 2017, A/CN.4/SR.3365 (n. 753).

[1030] ILC, Provisional summary record, 3365th meeting, 30 May 2017, A/CN.4/SR.3365 (n. 753) at 6.

of customary nature.[1031] Mr. Šturma, too, was aligned with Mr. Nolte position.[1032] The Special Rapporteur herself, rebutting to the copious critics to the national legislative practice she chose to consider – both because of its irrelevance and scarcity – also contended that such practice illuminated on the territorial "offence" exception.[1033] She clearly wanted to defend her understanding of the territorial "offence" exception as a norm of customary nature, [1034] which she claimed to be mainly based on the findings of the Commission on the issue of the indentification of customary international law.[1035] More specific comments followed in turn. While it was noted that the exception was applied also to the immunity of diplomatic and special missions officials, besides that of States, other members relied on territoriality and covered the issue of foreign military acts, not covered in the report of the Special Rapporteur.[1036] It was ultimately reported that, although in different manners and at different degrees, most member States' representatives supported the inclusion of the exception.[1037] As for the terminological choice of the expression "territorial *tort* exception", it was explained that it was taken from Mr. Kolodkin's second report[1038] with Ms. Escobar Hernandez's intention for it to cover relevant crimes like sabotage and espionage, but certainly not minor violations as traffic offences – in response to the issue raised by one member.[1039] It seemed quite clear that the Special Rapporteur intended her analysis not to be final nor exhaustive, as she expected some controversial issues on the territorial "offence" exception to be investigated more in depth by the Drafting Committee.[1040] Then, at the 3365th meeting, the Commission referred draft art. 7, as formulated by the Special Rapporteur, to the Drafting Committee, taking into account the comments made during all discussions.[1041]

[1031] ILC, Provisional summary record, 3365th meeting, 30 May 2017, A/CN.4/SR.3365 (n. 753) at 7.
[1032] ILC, Provisional summary record, 3365th meeting, 30 May 2017, A/CN.4/SR.3365 (n. 753) at 7.
[1033] ILC, Provisional summary record, 3365th meeting, 30 May 2017, A/CN.4/SR.3365 (n. 753) at 10.
[1034] ILC, Provisional summary record, 3365th meeting, 30 May 2017, A/CN.4/SR.3365 (n. 753) at 11.
[1035] See: ILC, Identification of customary international law, Text of the draft conclusions provisionally adopted by the Drafting Committee, Geneva, 2 May-10 June and 4 July-12 August 2016, International Law Commission Sixty-eighth session, 30 May 2016, A/CN.4/L.872, particularly draft conclusions. 2, 3, 4, 8, 10 and 14.
[1036] ILC, Provisional summary record, 3365th meeting, 30 May 2017, A/CN.4/SR.3365 (n. 753) at 15.
[1037]ILC, Provisional summary record, 3365th meeting, 30 May 2017, A/CN.4/SR.3365 (n. 753) at 15.
[1038] Second Report, Kolodkin (n. 419).
[1039] ILC, Provisional summary record, 3365th meeting, 30 May 2017, A/CN.4/SR.3365 (n. 753) at 15.
[1040] ILC, Provisional summary record, 3365th meeting, 30 May 2017, A/CN.4/SR.3365 (n. 753) at 15.
[1041] ILC, Provisional summary record, 3365th meeting, 30 May 2017, A/CN.4/SR.3365 (n. 753) at 18.

At the 3378th meeting,[1042] the Commission, whilst adopting draft art. 7, took into consideration the Drafting Committee report.[1043] The Chairman of the Drafting Committee and Member of the Commission, Mr. Rajput of India, introduced the topic.[1044] Because of the scarce and negative reaction to the Special Rapporteur's proposed exception,[1045] the Drafting Committee did not adopt the provision under draft art. 7.[1046] The negative reaction encompassed both members who considered the exception superfluous, as it only covered acts performed in a non-official capacity, and members who maintained that no exception was involved in that case because immunity would, simply, not arise and thus no exception could apply to something that did not exist in the first place.[1047] Although the provisional summary record here states that *"the commentary would clarify that"*[1048] due to the principle of territorial sovereignty, some acts were not subject to immunity *ratione materiae*,[1049] the commentary actually does not seem to provide for any clarification.[1050] Mr. Murphy, representing the USA, opposed the adoption of the whole draft art. 7 because, in his view, current international law does not support neither the inclusion nor the exclusion of such exceptions: in his opinion, there is a lack of supporting practice on them.[1051] He also firmly objected Ms. Escobar Hernandez's opposite contention and proved it wrong by mentioning the omission of the territorial "offence" exception from the final version of draft art. 7.[1052] Also the view of the Chairman, Mr. Nolte of Germany, speaking as a member of the Commission, underscored that the drafting of draft art. 7 did not rest on any customary norm, nor on any sort of trend in this sense.[1053] The politicized nature of the discussion was often raised as (another) argument of contention.[1054]

[1042] ILC, Provisional summary record, 3378th meeting, 20 July 2017, A/CN.4/SR.3378 (n. 827).
[1043] ILC, Draft art. 7 provisionally adopted by the Drafting Committee, 10 July, 2017, A/CN.4/L.893 (n. 827).
[1044] ILC, Provisional summary record, 3378th meeting, 20 July 2017, A/CN.4/SR.3378 (n. 827) at 3.
[1045] ILC, Provisional summary record, 3378th meeting, 20 July 2017, A/CN.4/SR.3378 (n. 827) at 8.
[1046] ILC, Draft art. 7 provisionally adopted by the Drafting Committee, 10 July, 2017, A/CN.4/L.893 (n. 827).
[1047] ILC, Provisional summary record, 3378th meeting, 20 July 2017, A/CN.4/SR.3378 (n. 827) at 8.
[1048] ILC, Provisional summary record, 3378th meeting, 20 July 2017, A/CN.4/SR.3378 (n. 827) at 8.
[1049] ILC, Provisional summary record, 3378th meeting, 20 July 2017, A/CN.4/SR.3378 (n. 827) at 8.
[1050] ILC Report, 2017, A/72/10 (n. 753) Chapter VII, Commentary para 141, paras 21 and 24, at 187-188.
[1051] ILC, Provisional summary record, 3378th meeting, 20 July 2017, A/CN.4/SR.3378 (n. 827) at 9.
[1052] ILC, Provisional summary record, 3378th meeting, 20 July 2017, A/CN.4/SR.3378 (n. 827) at 10.
[1053] ILC, Provisional summary record, 3378th meeting, 20 July 2017, A/CN.4/SR.3378 (n. 827) at 12.
[1054] ILC, Provisional summary record, 3378th meeting, 20 July 2017, A/CN.4/SR.3378 (n. 827): Mr. Rajput of India and Mr. Gómez Robledo of Mexico at 12, Mr. Jalloh of Sierra Leone at 14, Mr. Ouazzani Chahdi of Morocco at 15.

As also disclosed by the latest Report of the ILC,[1055] at the 3378th meeting held on 20 Jul. 2017, the report of the Drafting Committee was considered by the Commission which adopted draft art. 7 by 21 votes in favour against 8 contrary votes and 1 abstention.

At the 3387th, 3388th and 3389th meetings, commentaries to the draft article were adopted.[1056]

During the debate at the 3387th[1057] and 3388th meetings,[1058] no profuse discussion was carried out with regard to the territorial "offence" exception; yet inconsistencies and disagreement in general on the exceptions emerged among the members of the ILC. For example, Mr. Petrič of Slovenia explained that his vote against the adoption of draft art. 7 was due to his belief that the article did not reflect current international law,[1059] Mr. Murphy of the USA required more caution to be used by the members of the Commission when drafting the commentary to draft art. 7 and postulating the existance of exceptions,[1060] with which position the Indian representative, Mr. Rajput, aligned.[1061]

At the 3389th meeting,[1062] the discussion on the commentary to draft art. 7 continued. As to the territorial "offence" exception, Mr. Murphy suggested to delete the paragraphs of the commentary related to the exception, since it had not been included in the final draft.[1063] The Chairman, Mr. Nolte, of Germany, showed to prefer a more careful approach and said that, since there had not been enough discussion on the

[1055] ILC Report, 2017, A/72/10 (n. 753) para 74, at 164; see: ILC, Provisional summary record, 3378th meeting, 20 July 2017, A/CN.4/SR.3378 (n. 827) at 13.

[1056] ILC Report, 2017, A/72/10 (n. 753) para 76, at 165.

[1057] ILC, Provisional summary record of the 3387th meeting, Held at the Palais des Nations, Geneva, on Thursday, 3 August 2017, at 3 p.m., International Law Commission, Sixthy-ninth session (second part), 4 September 2017, A/CN.4/SR.3387.

[1058] ILC, Provisional summary record of the 3388th meeting, Held at the Palais des Nations, Geneva, on Friday, 4 August 2017, at 10 a.m., International Law Commission, Sixthy-ninth session (second part), 7 September 2017, A/CN.4/SR.3388 [hereinafter: ILC, Provisional summary record, 3388th meeting, 4 August 2017, A/CN.4/SR.3388].

[1059] ILC, Provisional summary record, 3388th meeting, 4 August 2017, A/CN.4/SR.3388 (n. 10581052) at 4-5.

[1060] ILC, Provisional summary record, 3388th meeting, 4 August 2017, A/CN.4/SR.3388 (n. 10581052) at 6-7.

[1061] ILC, Provisional summary record, 3388th meeting, 4 August 2017, A/CN.4/SR.3388 (n. 10581052) at 7.

[1062] ILC, Provisional summary record of the 3389th meeting, Held at the Palais des Nations, Geneva, on Thursday, 3 August 2017, at 3 p.m., International Law Commission, Sixthy-ninth session (second part), 7 September 2017, A/CN.4/SR.3389 [hereinafter: ILC, Provisional summary record, 3389th meeting, 3 August 2017, A/CN.4/SR.3389].

[1063] ILC, Provisional summary record, 3389th meeting, 3 August 2017, A/CN.4/SR.3389 (n. 1062) at 6.

territorial "offence" exception within the Drafting Committee, the Commission should honor the content of the ICJ judgment of *Jurisdictional Immunities of the State – i.d.* that the State on whose territory the act was carried out could not exercise jurisdiction because of immunity.[1064] Mr. Murphy was against the assertion that if a State did not give its consent to the discharge of a certain activity on its own territory, then immunity did not arise.[1065] On that occasion, Ms. Escobar Hernández acknowledged that the formulation proposed by Mr. Kolodkin was more suitable than the one she had presented.[1066] She also added that many ILC members had rejected the exception because, in cases of sabotage and espionage – which are more likely to raise this conundrum – immunity did not apply in the first place, in that such acts could not be said to be performed in official capacity.[1067] Despite remaining open to Mr. Nolte's proposal, she considered the above-mentioned ICJ judgment irrelevant for the present case because it dealt with the hypothesis of armed conflict.[1068] Moreover, while on the one hand members as Mr. Saboia of Brazil urged for the adoption of the paragraph as it was or as in the proposal submitted by Mr. Murphy, other members as the Czech representative, Mr. Šturma, requested the commentary to cointain all the necessary explanation, including reference to the ICJ judgment.[1069] The incumbent Special Rapporteur further explained that the reason why the ILC did not include the exception in the final draft of art. 7 was not the lack of practice in that sense, rather that there is no immunity *ratione materiae* in the first place in the case *of "crimes such as murder, espionage, sabotage or kidnapping"*.[1070] Again Mr. Murphy highlighted that the "territorial *tort* exception" was inappropriate to describe a situation of crime rather than tort and that it had not been properly adjusted to suit the criminal sphere as well.[1071] His suggestion to delete the word "tort" sounded feasible to Ms. Escobar Hernández.[1072] Also Mr. Nolte and Mr Reinisch from Austria debated on whether or not the *Jurisdictional Immunities* case should be mentioned when dealing with this exception,

[1064] ILC, Provisional summary record, 3389th meeting, 3 August 2017, A/CN.4/SR.3389 (n. 1062) at 8.
[1065] ILC, Provisional summary record, 3389th meeting, 3 August 2017, A/CN.4/SR.3389 (n. 1062) at 8.
[1066] ILC, Provisional summary record, 3389th meeting, 3 August 2017, A/CN.4/SR.3389 (n. 1062) at 8.
[1067] ILC, Provisional summary record, 3389th meeting, 3 August 2017, A/CN.4/SR.3389 (n. 1062) at 8.
[1068] ILC, Provisional summary record, 3389th meeting, 3 August 2017, A/CN.4/SR.3389 (n. 1062) at 8.
[1069] ILC, Provisional summary record, 3389th meeting, 3 August 2017, A/CN.4/SR.3389 (n. 1062) at 8.
[1070] ILC, Provisional summary record, 3389th meeting, 3 August 2017, A/CN.4/SR.3389 (n. 1062) at 21-22.
[1071] ILC, Provisional summary record, 3389th meeting, 3 August 2017, A/CN.4/SR.3389 (n. 1062) at 22.
[1072] ILC, Provisional summary record, 3389th meeting, 3 August 2017, A/CN.4/SR.3389 (n. 1062) at 22.

the former being in favour of the link – to be used as a reference for all territorial exceptions to immunities from both civil and criminal jurisdiction -, the latter against – because the case concerned civil, and not criminal law-.[1073] While Mr. Murphy proposed a placement of the reference to the ICJ decision in a way that avoided the misunderstanding that the judgment touched upon crimes such as sabotage and espionage,[1074] Ms. Escobar Hernández adopted a compromised approach, suggesting that reference to the case could be made but that it should nevertheless underscore that the judgment dealt with State immunity.[1075] The Chairman, Mr. Nolte, did not oppose the proposal.[1076]

The ILC Report emphatizes that the Special Rapportuer devoted particular attention to introducing and recalling the achievements made in the previous debates[1077] and specifically to commenting on draft art. 7 which, in the version proposed by her, included a so-called "territorial *tort* exception",[1078] already introduced at the sixty-eighth session.[1079] The debate was generally profuse.[1080] As far as draft art. 7 was concerned, some comments targeted the issue of limitations and exceptions in broad terms, while a few remarks focused on the territorial "offence" exception.[1081] Comments made by members on subparagraph c) encompassing the so-called "territorial *tort* exception", contended, respectively: *i)* that the "territorial *tort* exception" is settled within civil proceedings, but not within criminal ones; *ii)* that Ms. Escobar Hernandez referred mostly to civil cases, without providing for an in-depth explanation on the applicability of the exception to the criminal ambit; *iii)* that the Report of the Special Rapporteur was unclear and did not clarify on some important points, leaving them open to interpretation and that, hence, the subparagraph shall be elaborated more in the detail; iv) that the exception should be narrowed down so that it would encompass only those acts contrary to the exercise of States' sovereign powers,

[1073] ILC, Provisional summary record, 3389th meeting, 3 August 2017, A/CN.4/SR.3389 (n. 1062) at 22.
[1074] ILC, Provisional summary record, 3389th meeting, 3 August 2017, A/CN.4/SR.3389 (n. 1062) at 22.
[1075] ILC, Provisional summary record, 3389th meeting, 3 August 2017, A/CN.4/SR.3389 (n. 1062) at 22.
[1076] ILC, Provisional summary record, 3389th meeting, 3 August 2017, A/CN.4/SR.3389 (n. 1062) at 22.
[1077] ILC Report, 2017, A/72/10 (n. 753) para 78, at 165-166.
[1078] ILC Report, 2017, A/72/10 (n. 753) para 86, at 167.
[1079] ILC Report, 2016, A/71/10 (n. 753) Chapter XI, para 202, at 343-344.
[1080] ILC Report, 2017, A/72/10 (n. 753) Chapter VII, paras 90-130, at 167-173.
[1081] ILC Report, 2017, A/72/10 (n. 753) Chapter VII, paras 116-129, at 171-173.

"such as espionage, political assassination and sabotage".[1082] Leaving aside the latter comment (which would require a more in-depth analysis) this author finds the rest of the comments accurate and agrees with their remarks. The Report further explains that the Special Rapporteur *"illustrated the use of the "territorial tort exception""*[1083] but in fact did not clarify the illustration more in depth. The only response of Ms. Escobar Hernandez simply stated that the application of the exception was not limited to civil proceedings and that, in the current status, its scope extended to major offences, like sabotage and espionage.[1084]

The final version of draft art. 7 adopted by the Commission does not even mention the territorial "offence" exception, neither implicitly, nor explicitly.[1085] The commentary which accompanies the text of draft art. 7[1086] contains a very short comment on the omission of that exception from draft art. 7. It addresses the issue twice. First of all, the commentary ambiguously states that the non-inclusion of the exception under draft art. 7 *"does not mean […] that the Commission considers that immunity from foreign criminal jurisdiction ratione materiae should apply to [this category] of crimes."*[1087] The lack of coherence is self-evident. *Had* the ILC members in fact

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[1082] ILC Report, 2017, A/72/10 (n. 753) Chapter VII, para 126, at 172-173.

[1083] ILC Report, 2017, A/72/10 (n. 753) Chapter VII, para 133, at 173.

[1084] ILC Report, 2017, A/72/10 (n. 753) Chapter VII, para 138, at 174.

[1085] The text of the provisionally adopted art. 7 reads as follows: *"Article 7 Crimes under international law in respect of which immunity ratione materiae shall not apply*

1. Immunity ratione materiae from the exercise of foreign criminal jurisdiction shall not apply in respect of the following crimes under international law: (a) crime of genocide; (b) crimes against humanity; (c) war crimes; (d) crime of apartheid; (e) torture; (f) enforced disappearance.

2. For the purposes of the present draft article, the crimes under international law mentioned above are to be understood according to their definition in the treaties enumerated in the annex to the present draft articles.

Annex List of treaties referred to in draft article 7, paragraph 2

Crime of genocide •Rome Statute of the International Criminal Court, 17 July 1998, article 6; • Convention on the Prevention and Punishment of the Crime of Genocide, 9 December 1948, article II

Crimes against humanity • Rome Statute of the International Criminal Court, 17 July 1998, article 7

War crimes • Rome Statute of the International Criminal Court, 17 July 1998, article 8, paragraph 2.

Crime of apartheid • International Convention on the Suppression and Punishment of the Crime of Apartheid, 30 November 1973, article II.

Torture •Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 10 December 1984: article 1, paragraph 1.

Enforced disappearance • International Convention for the Protection of All Persons from Enforced Disappearance, 20 December 2006, article 2." as in: ILC Report, 2017, A/72/10 (n. 753) Chapter VII, paras 140-141, at 175-178; see also: ILC, Provisional summary record, 3378th meeting, 20 July 2017, A/CN.4/SR.3378 (n. 827) at 13.

[1086] ILC Report, 2017, A/72/10 (n. 753) Chapter VII, Commentary para 141, paras 1-35, at 178-191.

[1087] ILC Report, 2017, A/72/10 (n. 753) Chapter VII, Commentary para 141, para 21, at 187-188.

supported the non-applicability of functional immunity in the event of a territorial "offence" exception, they would have enclosed it under draft art. 7. Such inconsistency is echoed by the second comment in the commentary. The Commission affirms to have considered only criminal acts carried out by a State official in the territory of a foreign State in the absence of that State's consent to both the very presence of the official and the discharge of his functions on its territory.[1088] While this seems to accept –at least in part - Mr. Kolodkin's tripartite proposal,[1089] it does not explain why the theory should be given more weight than others. Furthermore, the following can be inferred from the commentary. It is stated that the reason according to which the Commission did not include the exception under draft art. 7 was not the lack of practice in support of the inclusion.[1090] On the contrary, the Commission's view maintained that the principle of territorial sovereignty applied to specific crimes *"such as murder, espionage, sabotage or kidnapping"*[1091] implies that in these cases immunity *ratione materiae* does not arise in the first place. Consistently, there is no need to elaborate on an exception to an immunity that simply does not exist.[1092]

It seems worth noting that the inclusion of the crime of murder in the list was very abrupt and unexpected. Additionally, it looks like no proper and in depth discussion was carried out specifically with regard to murder within the ILC. Once again, this shows a lack of coherence and consistency in the approach taken by the Commission towards this matter in general.

The commentary also underlines that the absence of immunity *ratione materiae* in the event of the aforementioned crimes is not intended as a prejudice to the immunities granted under special regimes, as per draft art. 1, paragraph 2.[1093] Unfortunately, the reasoning in the commentary is too unripe and rushed to be analysed in greater detail. That immunity *ratione materiae* does not arise in the first place with respect to the above-indicated crimes has not been proven and it looks like it would be very riskful to contend. For the moment, however, the commentary can only be

[1088] ILC Report, 2017, A/72/10 (n. 753) Chapter VII, Commentary para 141, para 24, at 188.
[1089] Second Report, Kolodkin (n. 419) para 81-86, at 52-54.
[1090] ILC Report, 2017, A/72/10 (n. 753) Chapter VII, Commentary para 141, para 24, at 188.
[1091] ILC Report, 2017, A/72/10 (n. 753) Chapter VII, Commentary para 141, para 24, at 188.
[1092] ILC Report, 2017, A/72/10 (n. 753) Chapter VII, Commentary para 141, para 24, at 188.
[1093] ILC Report, 2017, A/72/10 (n. 753) Chapter VII, Commentary para 141, para 24, at 188.

considered as evidence, yet again, of the confusion and uncertainty which governs the topic.

E. Proposal in Draft art. 7

At its sixty-ninth session in 2017, the ILC adopted, amongst other titles and annex, the draft article 7 on the subject of "Immunity of State officials foreign criminal jurisdiction".[1094] Part Three of the draft articles adopted by the ILC deals with "Immunity *ratione materiae*".[1095] Three articles have been adopted so far on the above-mentioned issue: draft art. 5, concerning the *"[p]ersons enjoying immunity ratione materiae"*,[1096] draft art. 6, addressing the *"[s]cope of immunity ratione materiae"*[1097] and draft art. 7, on *"[c]rimes under international law in respect of which immunity ratione materiae shall not apply."*[1098] While draft art. 5 identifies the *"State officials acting as such"*[1099] as the beneficiaries of immunity *ratione materiae*, draft art. 6 dictates the objective scope of this type of immunity, which it restricts to *"acts performed in an official capacity"*[1100] even after the cessation of the office by the State officials[1101] and which also extends to *"acts performed in an official capacity during [the] term of office"* of *"individuals [enjoying] immunity ratione personae […] whose term of office has come to an end."*[1102] According to its own title, draft art. 7 is only meant at covering those crimes under international law at whose occurrence immunity *ratione materiae* should not apply. Paragraph 1 of draft art. 7 indeed excludes the

[1094] ILC, Draft art. 7 provisionally adopted by the Drafting Committee, 10 July, 2017, A/CN.4/L.893 (n. 827); ILC, Provisional summary record, 3378th meeting, 20 July 2017, A/CN.4/SR.3378 (n. 827) at 13; ILC Report, 2017, A/72/10 (n. 753) para 74, at 164.

[1095] ILC, Immunity of State officials from foreign criminal jurisdiction, Text of draft articles 2 (e) and 5 provisionally adopted by the Drafting Committee at the sixty-sixth session, 66th session of the International Law Commission (2014), 14 July 2014, A/CN.4/L.850 [hereinafter: ILC, Draft arts. 2 (e) and 5 provisionally adopted by the Drafting Committee, 14 July, 2014, A/CN.4/L.850]

[1096] ILC, Draft arts. 2 (e) and 5 provisionally adopted by the Drafting Committee, 14 July, 2014, A/CN.4/L.850 (n. 1095) Draft art. 5.

[1097] ILC, Immunity of State officials from foreign criminal jurisdiction, Text of draft articles 2 (f) and 6 provisionally adopted by the Drafting Committee at the sixty-seventh session, 67th session of the International Law Commission (2015), 29 July 2015, A/CN.4/L.865 [hereinafter: ILC, Draft arts. 2 (f) and 6 provisionally adopted by the Drafting Committee, 29 July 2015, A/CN.4/L.865] Draft art. 6.

[1098] ILC, Draft art. 7 provisionally adopted by the Drafting Committee, 10 July, 2017, A/CN.4/L.893 (n. 827).

[1099] ILC, Draft arts. 2 (e) and 5 provisionally adopted by the Drafting Committee, 14 July, 2014, A/CN.4/L.850 (n. 1095) Draft art. 5.

[1100] ILC, Draft arts. 2 (f) and 6 provisionally adopted by the Drafting Committee, 29 July 2015, A/CN.4/L.865 (n. 1097) Draft art. 6, para 1.

[1101] ILC, Draft arts. 2 (f) and 6 provisionally adopted by the Drafting Committee, 29 July 2015, A/CN.4/L.865 (n. 1097) Draft art. 6, para 2.

[1102] ILC, Draft arts. 2 (f) and 6 provisionally adopted by the Drafting Committee, 29 July 2015, A/CN.4/L.865 (n. 1097) Draft art. 6, para 3.

application of functional immunity to a close list of international crimes limited to: crime of genocide, crimes against humanity, war crimes, crime of apartheid, torture and enforced disappearance.[1103] On the other hand, paragraph 2 is only relevant in so far as it elucidates on the interpretation of those crimes, specifying that they must be appreciated in accordance with the treaties listed in the annex.[1104]

No other exception is mentioned under draft art. 7. Nor does it in any case look like future draft articles are going to encompass other exceptions. This is so because of the additional post-scriptum which, at the end of the draft article, reads as follows: *"[t]he commission will consider the procedural provisions and safeguards applicable to the present draft articles at its seventieth session."*[1105] While the ILC might change or update its agenda for the upcoming sessions, it is safe to say that –for the time being- the Commission is envisaging to further consider only additional procedural provisions and safeguards in the next session. No reference has been made to general additional exceptions to immunity *ratione materiae*, nor specifically to the territorial "offence" exception. It is here suggested that, had the ILC accepted the exception as a valid, existing or even feasible bar to immunity *ratione materiae*, it would have drafted a specifically tailored provision aimed at its detailed understanding. And it would have done so most likely in the latest draft articles or it would at least have envisaged their analysis in the upcoming sessions, for it was in the Special Rapporteur's report which was discussed in the last session that the issue has been vastly examined. The fact that the territorial "offence" exception was not mentioned in draft art. 7 and that the post-scriptum only refers to procedural provisions and safeguards – not to additional exceptions – to be considered at the seventieth session, can be interpreted as a rejection of the territorial "offence" exception from the realm of the exceptions to the immunity *ratione materiae* of State officials from foreign criminal jurisdiction. In addition to this, the post-scriptum refers to *"procedural provisions and safeguards applicable to the present draft articles"*,[1106] not to the *present draft article*, which may suggest that those

[1103] ILC, Draft art. 7 provisionally adopted by the Drafting Committee, 10 July, 2017, A/CN.4/L.893 (n. 827) para 1.

[1104] ILC, Draft art. 7 provisionally adopted by the Drafting Committee, 10 July, 2017, A/CN.4/L.893 (n. 827) para 2.

[1105] ILC, Draft art. 7 provisionally adopted by the Drafting Committee, 10 July, 2017, A/CN.4/L.893 (n. 827) at 1; ILC, Provisional summary record, 3378th meeting, 20 July 2017, A/CN.4/SR.3378 (n. 827) at 3.

[1106] ILC, Draft art. 7 provisionally adopted by the Drafting Committee, 10 July, 2017, A/CN.4/L.893 (n. 827), at 1; ILC, Provisional summary record, 3378th meeting, 20 July 2017, A/CN.4/SR.3378 (n. 827) at 3.

provisions might be intended as concluding and final articles that would complete the whole section – not just draft article 7.

The original proposal of the Special Rapporteur to include *"Crimes that cause harm to persons, including death and serious injury, or to property, when such crimes are committed in the territory of the forum State and the State official is present in said territory at the time that such crimes are committed"* [1107] under draft art. 7 (1) (iii) has, thus, been rejected by the Drafting Committee and the ILC in plenary session.

Additionally, one must consider that the commentary to draft art. 7 is of very little assistance – if not of no assistance at all – in explaining the approach taken with regard to the territorial "offence" exception. As analysed in another subsection of this chapter related to the latest developments of the issue within the ILC debates, the commentary shows a lack of coherence. It addresses the territorial "offence" exception twice, and both times it is very inaccurate and superficial. On the one hand, it leaves room for a possible exception stating that its non-inclusion under draft art. 7 does not entail that immunity shall apply at all times.[1108] On the other hand, and equally surprisingly, it explicitly affirms that draft art. 7 only referred to crimes carried out without the territorial State consent to the very act and the presence of the State official within its borders.[1109] This shows a lack of consistency and completeness of the study of the territorial "offence" exception within the discussion that led to the elaboration of draft art. 7 and its commentary.

To assert that the ILC or the Special Rapporteur will not ever come up with a further draft on a territorial "offence" exception would be spurious and unfounded. There are, nonetheless, sufficient grounds to state that the overall approach of the ILC hitherto denies and refuses the existence of a territorial "offence" exception.

[1107] Fifth Report, Escobar Hernàndez (n. 365) Annex III, at 99, available at: legal.un.org/ilc.

[1108] ILC Report, 2017, A/72/10 (n. 753) Chapter VII, Commentary para 141, para 21, at 187-188.

[1109] ILC Report, 2017, A/72/10 (n. 753) Chapter VII, Commentary para 141, para 24, at 188.

II. Practice not considered by Special Rapporteur Ms. Escobar Hernandez

A. ***The Caroline Affair-McLeod Case***
B. ***The Staschynskij case*****, Germany**
C. ***The Lockerbie case***
D. ***R v Lambeth Justices, Ex parte Yusufu*****, United Kingdom**
E. **Philippines case law**
F. ***Pinochet (No 3)*****, United Kingdom**
G. ***Rumsfeld cases***
H. ***Public Prosecutor and Another v Lozano*****, Italy**
I. ***Immunities and criminal proceedings*** **(Equatorial Guinea v France), ICJ**
J. **Acts of espionage**

The following case law was not directly targeted by the study of the current ILC Special Rapporteur on the issue. This author has come across such case law within the study carried out for this dissertation. Regardess of whether it was briefly mentioned by the Special Rapporteur or not mentioned at all, it seems relevant to understand those additional cases in order to ensure a better understanding of the territorial "offence" exception. This, because customary international law is rooted upon State practice and *opinio juris sive necessitatis* – which will be examined more extensively in the last section of this work.

The analysis of the following practice is not intended to be exhaustive nor complete: I have deemed it noteworthy to be considered with a closer approach, although it must be born in mind that it would have been impossible to consider all the available case law of all domestic jurisdictions on the topic. The following should, thus, be considered a selection of the most useful cases for an analysis on the territorial "offence" exception.

The criterion according to which the following practice has been catalogued is the chronological one: from the most ancient case back in time to the most recent one. While it could have also been possible to organize these cases on the basis of their own jurisdiction (i.e.: European/non-European tribunals; domestic/regional/international courts; etc.), on the basis of the civil law/common law systems and –possibly- on the basis of their final outcome (*i.d.*: whether they resulted in a justification of the territorial

"offence" exception or whether, on the contrary, they supported immunity *ratione materiae*) or potentially also according to different criteria, the temporal test seemed to respond better to the research scope of my study. Indeed, by scrutinizing those cases in the order of time they culminated in a court's judgment, I allow myself to observe the historical evolution of the exception and its corresponding immunity through time. Naturally, the present choice of cases does not have the ambition or the presumption to be overarching or to reflect all the jurisprudence that followed in such a wide and extended time-frame. It does, however, show how the same issue has been dealt with by different courts and tribunals, all over the world, in different contexts and at the occurrence of diverse external factors. Thus, it operates as a time-lapse which is exactly what the international legal scholarship is required to do in order to establish whether an international norm of customary nature has – or has not – risen. A selected case-study through time, jurisdictions and approaches which will eventually prove that the exception at hand is certainly not well rooted within current customary international law.

A. *The Caroline Affair-McLeod Case*[1110]

It has frequently been stated that the McLeod case represents *"a confusing example of State practice",*[1111] which has been misleading even for early scholars,[1112] and, in any case, has been surpassed by divergent case law.[1113] Its facts are well-known.[1114] In brief, facts are that in 1837 the Caroline ship, of American flagship, was seized by a British force because of the aid and supplies it rendered to Canadian protesters and because of the attacks against British ships.[1115] The Caroline vessel was captured on 29 Dec. 1837, while it was anchored at Fort Schlosser, on the USA

[1110] McNair (n. 261) at 221 referring to: *The 'Caroline', and MacLeod's case*.

[1111] Sanger (n. 852) at 204; in the same vein, see: Franey, *Immunity, Individuals and International Law. Which Individuals are Immune from the Jurisdiction of National Courts under International Law* (n. 504) at 204.

[1112] See, for instance: Luigi Migliorino, 'Giurisdizione dello Stato territorial rispetto ad azioni8 non autorizzate di agenti di Stati stranieri', (1988) 71 Riv dir intern 784.

[1113] See, for instance: Franey, *Immunity, Individuals and International Law. Which Individuals are Immune from the Jurisdiction of National Courts under International Law* (n. 504) at 210.

[1114] See, more specifically: Robert Y. Jennings, 'The Caroline and McLeod cases', (1938) 32 AJIL 82; Van Alebeek, *The immunity of States and their Officials in International Criminal Law and International Human Rights Law* (n. 504) at 127.

[1115] Fox and Webb, *The law of State Immunity* (n. 480) at 96.

border.[1116] It was then sent to the Niagara Falls,[1117] and two American nationals died.[1118] While the British forces claimed to have acted in self-defence, the USA asked for appropriate reparation.[1119]A backlash of diplomatic intercourse then arose, mostly as a consequence of the arrest of Alexander McLeod, on 12 Nov. 1840, allegedly on the charges of murder and arson related to the destruction of the Caroline.[1120] While the UK maintained that McLeod was acting under the order of the UK[1121] and that the USA could not exercise jurisdiction over those acts,[1122] the affair took longer than expected to be dealt with. After a change of administration in the USA and the continuation of the diplomatic exchanges,[1123] the Supreme Court of New York rejected leave to release the *nolle prosequi* and also the application for a writ of *habeas corpus*.[1124] In order to have the issue dealt with as soon as possible, McLeod then went to trial, refusing to appeal to the Federal Court.[1125] After having spent 12 months in prison, McLeod was finally released in Oct. 1841.[1126] The dispute did not actually cease, as an exchange of diplomatic letters between Lord Ashburton, the British Foreign Secretary, and Webster, the USA Secretary of State, kept the controversy alive.[1127] Eventually, the USA Congress (which is, in fact, in charge of the USA administration, not of the judicial powers)[1128] passed a Statute on 29 Aug. 1842 ordering the transfer of jurisdiction to USA courts of all cases where acts had been performed *"under the commission, order,*

[1116] Sanger (n. 852) at 204.
[1117] Fox and Webb, *The law of State Immunity* (n. 480) at 96.
[1118] Sanger (n. 852) at 204.
[1119] Sanger (n. 852) at 204.
[1120] Sanger (n. 852) at 204; see also: Franey, *Immunity, Individuals and International Law. Which Individuals are Immune from the Jurisdiction of National Courts under International Law* (n. 504) at 207.
[1121] Sanger (n. 852) at 204.
[1122] Franey, *Immunity, Individuals and International Law. Which Individuals are Immune from the Jurisdiction of National Courts under International Law* (n. 504) at 207.
[1123] Franey, *Immunity, Individuals and International Law. Which Individuals are Immune from the Jurisdiction of National Courts under International Law* (n. 504). at 208; Sanger (n. 852) at 204.
[1124] Franey, *Immunity, Individuals and International Law. Which Individuals are Immune from the Jurisdiction of National Courts under International Law* (n. 504) at 209.
[1125] Franey, *Immunity, Individuals and International Law. Which Individuals are Immune from the Jurisdiction of National Courts under International Law* (n. 504) at 209; Sanger (n. 852) at 205.
[1126] Franey, *Immunity, Individuals and International Law. Which Individuals are Immune from the Jurisdiction of National Courts under International Law* (n. 504) at 209; Sanger (n. 852) at 205.
[1127] Sanger (n. 852) at 205.
[1128] Sanger (n. 852) at 206.

or sanction of any foreign state or sovereignty."[1129] A second phase of the proceeding was, then, related to McLeod's attempt to be accorded compensation for the trail and imprisonment he had to undergo.[1130]

Despite the different time-frame of the judgment, and despite the fact that it was related to the rule of war,[1131] one still has to acknowledge its ability to somehow draw a distinction between personal criminal liability and State responsibility.[1132] Even though its validity is limited to the context of armed conflict only, the understanding of the rationale of functional immunity it advances is noteworthy,[1133] also in light of the historic scenario where it was purported. In any case, the principle of non-personal responsibility for acts committed under the orders of a foreign State cannot be stretched, as in some authors' contention,[1134] to the point of stating that it is still the applied rule in State practice.

B. *The Staschynskij case*, Germany[1135]

In 1962, Bogdan Staschvnskij, a Ukrainian national,[1136] was prosecuted by German Courts for the assassination of two political exiles in Munich.[1137] Staschvnskij had been hired by the MGB (the Soviet Ministry of State Security) in order to gather information on the Organization of the Ukrainian Nationalists.[1138] When the MGB became the KGB (Committee for State Security), he was sent to Munich where his task was that of killing two Ukrainian exiles.[1139] Staschvnskij was convicted for murder, for his role as an abettor, by the German Federal Supreme Court.[1140] Despite the case being

[1129] Jennings (n. 1114) at 96, referring to: Foreign Office, 'Act of Congress, "to provide further Remedial Justice in the Courts of the United States.-August 29, 1842"' in: *British and Foreign State Papers* vol. 30 (H.M.S.O., 1841-1842) at 202-203.

[1130] Jennings (n. 1114) at 96.

[1131] Sanger (n. 852) at 207.

[1132] Sanger (n. 852) at 206.

[1133] Foakes (n. 857) at 138.

[1134] Van Alebeek, *The immunity of States and their Officials in International Criminal Law and International Human Rights Law* (n. 504) at 110.

[1135] *The Staschynskij Case*, Germany, Federal Supreme Court, 19 Oct. 1962, 18 BGHSt 87 (1963).

[1136] Alan A. Block, *Space, Time and Organized Crime* (Transaction Publishers, 1994) at 172.

[1137] Sanger (n. 852) at 213.

[1138] Block (n. 1136) at 172.

[1139] Block (n. 1136) at 172.

[1140] Elies Van Sliedregt, *Individual criminal responsibility in international law* (Oxford University Press, 2012) at 82, referring to: *The Staschynskij Case* (n. 1135); see also: Van Alebeek, *The immunity of States and their Officials in International Criminal Law and International Human Rights Law* (n. 504) at 125.

analyzed more for the implications it had on the issue of principal and accessorial liability in international criminal law,[1141] much deeper it may have other sorts of effects. It could be the case that, on that occasion, the German courts, albeit no specific intention to do so, nor any knowledge of it, applied the territorial "offence" exception, or its embryonic antecedent. Indeed, according to some authors, the pivotal factor the court considered in order to assess Mr. Staschvnskij responsibility was not – as one may imagine – the fact that he ultimately abided by orders of a foreign State, but rather *"approached as a question as to the possible scope of the cloak of state authority in general."*[1142] Leaving aside considerations on the individual/official capacity that have usually been linked to such matter,[1143] what is worth observing is that this judgment shows and support the practice of States prosecuting foreign State officials on their own territory.[1144]

C. *The Lockerbie case*[1145]

This case is usually referred to within the context of *"'exceptions' to functional immunity or […] an 'absence of immunity'".*[1146] First of all, this standpoint is not shared by the author of this dissertation. It is hereby submitted that one thing is to contend that immunity could possibly be invoked but its enforcement is barred by the existence of an exception and it is another thing to say that immunity is absent *per se*. One thing is to say that a State official is entitled to immunity but he is anyways prosecutable at the occurrence of a specific exception to such immunity, another thing is to say, with the same metaphor, that no immunity can be invoked by common citizens, who are not in the exercise of any official authority. The facts concerned one Libyan Intelligence Service officer and another Libyan national who engaged in the blowing up of an

[1141] Van Sliedregt (n. 1140) at 81-83; Maria Granik, 'Indirct Perpetration Theory: A Defence' (2015) 28 LJIL 977 at 982, 983, 986.
[1142] Van Alebeek, *The immunity of States and their Officials in International Criminal Law and International Human Rights Law* (n. 504) at 130.
[1143] Van Alebeek, *The immunity of States and their Officials in International Criminal Law and International Human Rights Law* (n. 504) at 130.
[1144] Van Alebeek, *The immunity of States and their Officials in International Criminal Law and International Human Rights Law* (n. 504) at 130.
[1145] *Her Majesty's Advocate v Abdelbaset Ali Mohamed Al Megrahi and Ali Amin Khalifa Fhimah*, The Netherlands, High Court of Justiciary at Camp Zeist, 8 Dec. 1999, 2000 JC 555.
[1146] Foakes (n. 857) at 160-161.

aircraft over the town of Lockerbie in Scotland in 1988.[1147] They were alleged the crimes of conspiracy to murder, murder and violations of the UK Aircraft Security Act 1982 and tried before a Scottish court convened in a special setting in the Netherlands.[1148] Immunity was not invoked by Libya, not even by the two agents themselves.[1149] Eventually, while one of them was sentenced to life imprisonment, the other was released.[1150] The dispute had previously been brought before the ICJ[1151] and then dismissed at the joint request of both parties.[1152]

D. *R v Lambeth Justices, Ex parte Yusufu,* United Kingdom[1153]

Mr. Yusufu was defendant in a case concerning the kidnapping of a former Minister of Trasport for Nigeria, Umaro Dikko, which took place in London.[1154]

The case is cited because, despite the defendant claimed he was entitled to immunity as a diplomat acting and travelling on a Nigerian diplomatic passport, he was not granted diplomatic immunity because he was not accredited at the Nigerian High Commission as a diplomat.[1155] Additionally, no immunity *ratione materiae* was invoked by Nigeria on his behalf.[1156] This gives the opportunity to clarify that only if immunity is formally claimed one can reason on the possibility that a territorial exception bars that immunity. It is my opinion that, consequently, in cases where

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[1147] See also, for a more accurate background: Michael Plachta, 'The Lockerbie Case: The Role of the Security Council in Enforcing the Principle Aut Dedere Aut Judicare' (2001) 12 EJIL 125.

[1148] Foakes (n. 857) at 161.

[1149] Sanger (n. 852) at 215-216.

[1150] Foakes (n. 857) at 161.

[1151] ICJ, *Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie* (Libyan Arab Jamahiriya v United Kingdom), Application Instituting Proceeding, 3 Mar. 1992, General List No. 88/1992; Provisional Measures, Order, 14 Apr. 1992, I.C.J. Reports 1992, p. 3; Preliminary Objections, Judgment, 27 Feb. 1998, I.C.J. Reports 1998, p. 9; ICJ, *Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie* (Libyan Arab Jamahiriya v United States of America), Application Instituting Proceeding, 3 Mar. 1992, General List No. 89/1992; Provisional Measures, Order, 14 Apr. 1992, 1. C.J. Reports 1992, p. 114; Preliminary Objections, Judgment, 27 Feb. 1998, I. C. J. Reports 1998, p. 115.

[1152] ICJ, *Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie* (Libyan Arab Jamahiriya v United Kingdom) Order, 10 Sep. 2003, No 88; ICJ, *Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie* (Libyan Arab Jamahiriya v United States of America), Order, 10 Sep. 2003, No 89.

[1153] *R v Lambeth Justices, ex parte Yusufu*, England, Divisional Court, Queen's Bench Division, 8 Feb. 1985 88 ILR 323.

[1154] Foakes (n. 857) at 161-162.

[1155] Foakes (n. 857) at 162.

[1156] Foakes (n. 857) at 162.

immunity is not even object of contention, the courts could not – and, in fact, did not – assert any statement on the exception as such.

E. Philippines case law

Pretty much in the same vein as in the case of Staschvnskij, there seems to be quite a consistent line of cases from the jurisprudence of the Philippines confirming that approach. One, of course, has to be careful and abstain from qualifying all cases where courts held foreign State officials who committed crimes on the territory of the forum State responsible as cases supporting the territorial "offence" exception. While some examples may point at that direction[1157] one must bear in mind that they concern members of the military forces abroad, which are usually subject to *ad hoc* regimes.

F. *Pinochet (No 3)*, United Kingdom[1158]

Facts concerning the *Pinochet case* are well-established.[1159] To recall the very essential information, it suffices to say that Pinochet was tried for instigating and putting into place acts of torture and murder with the aim of gaining and maintaining control over Chile.[1160] After having addressed the question of whether or not the conduct could classify as an extradition crime,[1161] the House of the Lords could then understand in greater detail the issue of immunity – which it articulated in two separate grounds: *i)* whether or not a former Head of State enjoyed immunity for acts of torture or conspiracy to torture; *ii)* whether or not – even allowing that such immunity shall be acknowledged or regardless of it – the immunity endures for the crimes of murder and

[1157] See the examples referred to by Van Alebeek, *The immunity of States and their Officials in International Criminal Law and International Human Rights Law* (n. 504) at 124-125: *M. H. Wylie and Capt. James Williams v Aurora I. Rarang and the Honorable Intermediate Apellate Court*, Republic of the Philippines, Supreme Court, Manila, Third Division, 28 May 1992, G. R. No. 74135, 209 SCRA 357 and *United States of America and Maxine Bradford v Hon. Luis R. Reyes as Presiding Judge of Branch 22, Regional Trial Court of Cavite and Nelia T. Montoya*, Republic of the Philippines, Supreme Court, Manila, En Banc, 1 Mar. 1993, G. R. No. 79253, 219 SCRA 192.

[1158] *Pinochet No. 3* (n. 401).

[1159] See also: Van Alebeek, *The immunity of States and their Officials in International Criminal Law and International Human Rights Law* (n. 504) at 224-226.

[1160] Franey, *Immunity, Individuals and International Law. Which Individuals are Immune from the Jurisdiction of National Courts under International Law* (n. 504) at 185.

[1161] Franey, *Immunity, Individuals and International Law. Which Individuals are Immune from the Jurisdiction of National Courts under International Law* (n. 504) at 186-191.

conspiracy to murder committed on the Spanish territory.[1162] It is, however, unfortunate that, even in such respect, the distinction between State immunity and immunity of the State officials is still blurred.[1163]

In the *Pinochet case*, despite his position not being supported by the majority, Lord Millet's words were quite unequivocal in stating that when State officials engage in crimes in foreign States, they cannot invoke immunity *ratione materiae* in that respect.[1164] However, by six votes out of seven, the judges deemed Pinochet entitled to immunity for all governmental actions committed when in function, which amounted to ordinary crimes.[1165] The reasoning of the Lord Judges carried, even so, some differences which are worth addressing. Lord Browne Wilkinson – with whom Lord Hutton's and Lord Seville's opinions were aligned, with some brief specification on Lord Saville's part – upheld that a former Head of State is entitled to immunity *ratione materiae* for all acts performed within the scope of governmental acts.[1166] Lord Browne Wilkinson excluded from the realm of immunity those acts of torture carried out after 8 Dec. 1988.[1167] On his part, Lord Hutton rejected immunity only for what concerned the extradition of Pinochet with regard to torture and conspiracy to torture carried out after 29 Sep. 1988.[1168] Lord Saville of Newdigate upheld the impossibility to grant immunity for the crimes of torture and conspiracy to torture perpetrated after 8 Dec. 1988.[1169] Lord Goff of Chieveley underpinned the idea that the criminal nature of the act (even in the case of a serious crime) cannot be the criterion according to which immunity might – or might not – be granted; rather the distinction between private and official acts shall guide the interpreter in the assessment of immunity.[1170] He was in favour of the granting of immunity for those charges which survived the double

[1162] Franey, *Immunity, Individuals and International Law. Which Individuals are Immune from the Jurisdiction of National Courts under International Law* (n. 504) at 191-196.
[1163] See, for example: Sanger (n. 852) at 207-210.
[1164] Foakes (n. 857) at 160-161.
[1165] Franey, *Immunity, Individuals and International Law. Which Individuals are Immune from the Jurisdiction of National Courts under International Law* (n. 504) at 192; Foakes (n. 857) at 148.
[1166] Franey, *Immunity, Individuals and International Law. Which Individuals are Immune from the Jurisdiction of National Courts under International Law* (n. 504) at 192-193.
[1167] *Regina v Bartle and the Commissioner of Police for the Metropolis and Others Ex Parte Pinochet* ("*Pinochet No. 3*"), England, House of Lords, 24 Mar. 1999, reproduced in [2000] 1 A.C. 147, at 205, para G-H.
[1168] *Pinochet No. 3* (n. 1167) at 265, para B.
[1169] *Pinochet No. 3* (n. 1167) at 267-268, para H.
[1170] Franey, *Immunity, Individuals and International Law. Which Individuals are Immune from the Jurisdiction of National Courts under International Law* (n. 504) at 193.

criminality rule.[1171] The position of Lord Hope of Craighead was slightly divergent from the already mentioned ones: he purported that Pinochet was in fact entitled to functional immunity *"from prosecution for all conspiracies in Spain to murder in Spain"*[1172] and acknowledged two exceptions to this immunity under international law: *i)* as for the acts perpetrated by the Head of State for his sole interest, not the State's; and *ii)* as for the acts proscribed by international law which amount to *ius cogens* norms.[1173] He also pointed out that Pinochet was not entitled to immunity from prosecution for charges of torture and of conspiracy of torture occurred after 8 Dec. 1988.[1174] On his part, Lord Phillips of Worth Matravers sustained that Pinochet did not enjoy immunity with regard to any of the conducts attributed to him because they all pertained to an overarching plan which – as a whole – represents a manifest violation of international law.[1175] So he formulated an exception for international crimes[1176] and concluded in favour of the appeal, for what constituted extradition crimes.[1177] The most dissenting voice remain that of Lord Millet.[1178] Lord Millet is quite unequivocal in stating that immunity *ratione materiae* is not conceivable for criminal offences perpetrated in the territory of the forum State.[1179] Even though the equation of this exception to immunity with the Act of State doctrine shall be reproached and despite the fact that Lord Millet does not label the exception as a territorial one, his opinion somehow displays that he implicitly accepted the distinctive features of such an exception.[1180] Their Lords also provided for some considerations on the subjects entitled to that immunity: some also encompassed the ambassador (Lord Browne-

[1171] *Pinochet No. 3* (n. 1167) at 224, para F, Conclusion.
[1172] Franey, *Immunity, Individuals and International Law. Which Individuals are Immune from the Jurisdiction of National Courts under International Law* (n. 504) at 193.
[1173] Franey, *Immunity, Individuals and International Law. Which Individuals are Immune from the Jurisdiction of National Courts under International Law* (n. 504) at 193-194.
[1174] *Pinochet No. 3* (n. 1167) at 248, para G-H, Conclusion.
[1175] Franey, *Immunity, Individuals and International Law. Which Individuals are Immune from the Jurisdiction of National Courts under International Law* (n. 504) at 194-195.
[1176] Franey, *Immunity, Individuals and International Law. Which Individuals are Immune from the Jurisdiction of National Courts under International Law* (n. 504) at 197.
[1177] *Pinochet No. 3* (n. 1167) at 292, para F.
[1178] Franey, *Immunity, Individuals and International Law. Which Individuals are Immune from the Jurisdiction of National Courts under International Law* (n. 504) at 195.
[1179] Franey, *Immunity, Individuals and International Law. Which Individuals are Immune from the Jurisdiction of National Courts under International Law* (n. 504) at 195.
[1180] Franey, *Immunity, Individuals and International Law. Which Individuals are Immune from the Jurisdiction of National Courts under International Law* (n. 504) at 196.

Wilkinson, Lord Hutton and Lord Saville), some referred to even minor officials (Lord Goff); others mentioned all State officials, whatever their rank (Lord Millet); others misleadingly referred to all governmental acts of *one State* not being subject to other courts' jurisdiction (Lord Hope); while Lord Philips accepted the positions of Head of State and State officials (former and incumbent) as all covered by immunity *ratione materiae*.[1181] Overall, the House of Lords maintained that all State officials enjoy such immunity[1182] and allowed the appeal as far as the extradition for offences of torture and conspiracy to torture after 8 Dec. 1988 were concerned.[1183]

While much attention has been paid to the exception of international crimes,[1184] it is my mandate to focus on the territorial "offence" exception. In that regard, it is of tremendous interest to examine the reasoning of Lord Millet in greater detail.[1185] Even though I do not share his basic assumption that State immunity *"is an attribute of the sovereignty of the state",*[1186] which revolves around the idea that States –and States only – are subjects of international law, and, thus, of the international law of immunities,[1187] I very much appreciate his efforts to qualify the issue at hand as it really was: *"whether a parallel [to the bar to the jurisdiction of national courts to entertain civil proceedings against foreign states], though in some respects opposite, development has taken place so as to restrict the availability of state immunity as a bar to the criminal jurisdiction of national courts."*[1188] That immunity *ratione materiae* is indistinguishable from some elements of the act of State doctrine[1189] cannot be shared, in light of the aforementioned position I already supported in this work. Similarly, I could not disagree more with the assumption that *"[…] the non-liability of agents of a state for 'acts of state' must rationally be based on the assumption that no member of the family of nations will order its agents to commit flagrant violations of international*

[1181] Franey, *Immunity, Individuals and International Law. Which Individuals are Immune from the Jurisdiction of National Courts under International Law* (n. 504) at 197-198.
[1182] Franey, *Immunity, Individuals and International Law. Which Individuals are Immune from the Jurisdiction of National Courts under International Law* (n. 504) at 198.
[1183] *Pinochet No. 3* (n. 1167) at 292, para G.
[1184] See, for example: Fox and Webb, *The law of State Immunity* (n. 480) at 557-561, 571-575.
[1185] *Pinochet No. 3* (n. 1167) at 268-279.
[1186] *Pinochet No. 3* (n. 1167) at 268, para B.
[1187] *Pinochet No. 3* (n. 1167) at 268, para C, D, E.
[1188] *Pinochet No. 3* (n. 1167) at 268, para F, G.
[1189] *Pinochet No. 3* (n. 1167) at 269, para G.

and criminal law."[1190] Indeed, a State would not order its agents to commit flagrant violations of international and criminal law simply because a State can engage in activities through the acts of its own agents only, which also implies that the acts of the State are not separate from the acts of the agent. However, with regard to immunity, Lord Millet articulated three different reasonings for the allegations of conspiracy to murder, torture and conspiracy to torture.[1191] As for the former, without going in much greater detail, he explained his position maintaining that *"[he could] deal with the charges of conspiracy to murder quite shortly. The offences are alleged to have taken place in the requesting state. The plea of immunity ratione materiae is not available in respect of an offence committed in the forum state, whether this be England or Spain."*[1192] As for the allegations concerning torture, his shareable opinion was that *"[n]o rational system of criminal justice can allow an immunity which is coextensive with the offence."*[1193] What is also very interesting to note is the partition Lord Millet operates between the immunity in civil proceedings for acts of torture, on the one hand, and the simultaneous acknowledgement of individual criminal liability for the same acts, on the other hand.[1194] From the very same acts one can infer immunity on the civil plane and liability on the criminal sphere, without infringing any rule of the domestic or international legal order.[1195] Lord Millet concluded his submission ruling – despite being an isolated voice – in the sense of allowing the appeal for both the charges related to the offences in Spain and conspiracy to torture and torture, wherever and whenever perpetrated.[1196] However, the diversity of the opinion of the judges in *Pinochet No. 3* limits its usefulness to a mere integrative role within the law of immunities.[1197]

G. *Rumsfeld cases*

[1190] Glueck Sheldon, 'The Nuremberg Trial and Aggressive War' 59 (1946) Harv.L.Rev. 396 at 426, commenting on: *The Schooner Exchange v McFaddon & others* (n. 402), at 135 et seq. (Marshall Ch. J. opinion), also quoted by *Pinochet No. 3* (n. 1167) at 271, para B.

[1191] *Pinochet No. 3* (n. 1167) at 277, para C.

[1192] *Pinochet No. 3* (n. 1167) at 277, para C.

[1193] *Pinochet No. 3* (n. 1167) at 277, D, E.

[1194] *Pinochet No. 3* (n. 1167) at 278, para B, C.

[1195] See also: Webb (n. 738) at 87; see also: Van Alebeek, *The immunity of States and their Officials in International Criminal Law and International Human Rights Law* (n. 504) at 254.

[1196] *Pinochet No. 3* (n. 1167) at 279, para B, C.

[1197] Webb (n. 738) at 173.

The case involving the trial of Donald Rumsfeld, former USA Secretary State of Defence, by German[1198] and French[1199] and also Spanish[1200] courts for the acts of torture he ordered and consented to outside the soil of all such sovereign States, was triggered by the joint complaints of human rights organizations.[1201] Notwithstanding any consideration on immunity or any comment on the principles according to which the cases were eventually dismissed by domestic courts, it raised the question of whether or not universal jurisdiction could apply.[1202] And the territorial "offence" exception falls definitely out of reach of universal jurisdiction.

H. *Public Prosecutor and Another v Lozano*, Italy [1203]

Even the case of Lozano v Italy seems to be, at the very best, *i)* not applicable to the reasoning around the existence or not of a territorial "offence" exception to immunity *ratione materiae* of State officials from criminal jurisdiction; *ii)* in any case, dangerously contradictory in itself as for the precedent it establishes.

As for the facts, on 4 Mar. 2005 Mr. Lozano, a soldier of USA nationality caused the death of an Italian intelligence officer and two other Italian nationals at a checkpoint in Baghdad. While at the beginning he was prosecuted by Italian courts for the alleged crime, he was eventually found not prosecutable before the Italian courts as, according to them, it is upon the State which sends military personnel to adjudge them before its

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[1198] Wolfgang Kaleck, 'From Pinochet to Rumsfeld: Universal Jurisdiction in Europe 1998-2008' (2008-2009) 30 Mich.J.Int'l L. 927, at 952, referring to: Letter and Memorandum from the Federal Prosecutor to Author (Feb. 10, 2005) reprinted in 2005 (60) Juristenzeitung at 311 (regarding the decision of the Federal Prosecutor in the case against Donald Rumsfeld and others); Katherine Gallagher, 'Universal Jurisdiction in Practice Efforts to Hold Donald Rumsfeld and Other High-level United States Officials Accountable for Torture' (2009) 7 JICJ 1087, at 1100-1109; Andreas Fischer-Lescano, 'Torture in Abu Ghraib: The Complaint against Donald Rumsfeld under the German Code of Crimes against International Law' (2005) 6 German L.J. 689.

[1199] Kaleck (n. 1198) at 937, referring to: Complaint Against Mr. Rumsfeld, Tribunal de Grande Instance [T.G.I.] [ordinary court of original jurisdiction] Paris, 25 Oct. 2007; see also: Sanger (n. 852) at 211; Gallagher (n. 1198) at 1109-1112.

[1200] Rosanne Van Alebeek, 'Immunity and Human Rights? A bifurcated Approach' (2010) 104 Am. Soc'y Int'l L. Proc. 67, at 71.

[1201] For further information on the developments of the cases, see also: Website of the European Center for Constitutional and Human Rights available at: <www.ecchr.eu/en/our_work/international-crimes-and-accountability/u-s-accountability/rumsfeld.html> last accessed 31 Oct. 2017.

[1202] Kaleck (n. 1198).

[1203] *Public Prosecutor and Another v Lozano*, Italy, Court of Cassation (First Criminal Section) 24 Jul. 2008, (Case No 31171/2008), 168 ILR 485.

own courts.[1204] Such immunity was granted on different grounds by the Italian court of first instance and the Italian Court of Cassation.[1205]

First of all no territorial "offence" exception was invoked, nor was it even implicit that any such party or the court purported the jurisdiction of the territorial State as a bar to functional immunity.

Furthermore, the position of the court is surprising, to say the least. In line with the analysis of Andrew Sanger, it is my submission that the court went wrong on more than one ground: in its assessment of jurisdiction on the sole basis of the State sending the military offices, in the plane and superficial assumption that immunity of State officials is a mere extension of State immunity, to which the distinction *acta iure imperii*/*acta iure gestionis* applies and, more seriously, in the alignment of civil and criminal immunity.[1206] All those conclusions display, also in light of my previous considerations, an incorrect and flimsy understanding of the issue at stake. Only an *obiter dictum* of the court stating that international crimes may bar the granting of immunity,[1207] along with the court's assumption that State immunity protects, rather than obstructing, the *"substantive fundamental values of the international legal order"*[1208] and that military activities fall under acts covered by immunity[1209] may be of some interest; not so, however, for this study. Even leaving aside the unconvincingly blurred *ratio* followed by the Italian courts, the case deserves no further analysis for what concerns the issue of the territorial "offence" exception.

I. *Immunities and criminal proceedings* (Equatorial Guinea v France), ICJ[1210]

[1204] Sanger (n. 852) at 211-212; see also: Atteritano (n. 890) at 52-54.

[1205] Atteritano (n. 890) at 52.

[1206] Sanger (n. 852) at 212.

[1207] Webb (n. 738) at 89, footnote 151, referring to: *Public Prosecutor and Another v Lozano* (n. 1203); Jarrad Harvey, '(R)evolution of State Immunity Following Jurisdictional Immunities of the State (Germany v Italy) - Winds of Change or Hot Air?' (2013) 32 U Tas LR 208, at 217.

[1208] Rosanne Van Alebeek, 'Jurisdictional Immunities of the State (Germany v Italy): On Right Outcomes and Wrong Terms' (2012) 55, Germ Yrbk Intl L, 281 at 305 referring to, inter alia: *Public Prosecutor and Another v Lozano* (n. 1203).

[1209] See, as a reference: ILC Report, 2016, A/71/10 (n. 753) chap. XI, paras 190–250, 341-363, at 356, para 250, subpara (11), footnote 1418.

[1210] ICJ, *Immunities and Criminal Proceedings* (n. 972).

The case concerning the immunities and criminal proceedings between Euqatorial Guinea and France has come to the attention of the ICJ quite recently. While it is not likely to come to a *ratio decidendi* any soon, it is of interest to provide for a brief analysis of the case as it proves, once again, the up-to-date value of the present work. In fact, even if the case does not deal with the territorial "offence" exception *per se*, it seems relevant to consider because of its implications as far as it concerns immunities and criminal proceedings in general. Also, this case could allow the principal UN judicial body to clarify on the issue of immunity of State officials from domestic criminal jurisdictions.

The proceeding was instituted by the Equatorial Guinea on 13 Jun. 2016.[1211] As it was subsequently explained in a press release,[1212] the case concerns Equatorial Guinea's claim of immunity from French criminal proceeding attaching Mr. Teodoro Nguema Obiang Mangue, Second Vice-President of the Republic of Equatorial Guinea in charge of Defence and State Security.[1213] The case also deals with the legal status to be given to the building which hosts the Embassy of the Equatorial Guinea on the French territory;[1214] however, as this is not relevant to the present topic, I will not be touching upon that. The factual background is as follows. Since 2007 a whole string of proceedings was initiaded against some African Heads of State and their families for misappropriation of public funds.[1215] By effect of French domestic laws and in accordance with national procedures, Mr. Mangue was eventually referred to the Tribunal correctionnel of Paris[1216] on 5 Sep. 2016.[1217] As I apprehend from the Request for the indication of provisional measures submitted by the Government of Equatorial

[1211] ICJ, *Immunities and Criminal Proceedings*, Requete introductive d'instance (French version only), 13 Jun. 2016.

[1212] ICJ, *Immunities and Criminal Proceedings* (Equatorial Guinea v France), Press Release No. 2016/18, Unofficial, The Republic of Equatorial Guinea institutes proceedings against France with regard to "the immunity from criminal jurisdiction of [its] Second Vice-President in charge of Defence and State Security, and the legal status of the building which houses [its] Embassy in France", 14 Jun. 2016 [hereinafter: ICJ, *Immunities and Criminal Proceedings*, Press Release No. 2016/18, Unofficial].

[1213] ICJ, *Immunities and Criminal Proceedings*, Press Release No. 2016/18, Unofficial (n. 1212) at 1.

[1214] ICJ, *Immunities and Criminal Proceedings*, Press Release No. 2016/18, Unofficial (n. 1212) at 1.

[1215] ICJ, *Immunities and Criminal Proceedings*, Press Release No. 2016/18, Unofficial (n. 1212) at 1.

[1216] ICJ, *Immunities and Criminal Proceedings*, Press Release No. 2016/18, Unofficial (n. 1212) at 1.

[1217] ICJ, *Immunities and Criminal Proceedings*, Immunities and Criminal Proceedings (Equatorial Guinea v France), Request for the indication of provisional measures submitted by the Government of Equatorial Guinea, Unofficial translation, 29 Sep. 2016 [hereinafter: ICJ, *Immunities and Criminal Proceedings*, Request for the indication of provisional measures Government of Equatorial Guinea, 29 Sep. 2016] para 11, at 3.

Guinea on 29 Sep. 2016, at the time of the institution of the criminal proceedings within France, Mr. Mangue was serving Equatorial Guinea as State Minister for Agriculture and Forestry and was appointed Second Vice-President in charge of Defence and State Security on 21 May 2012. [1218] The Equatorial Republic of Guinea further requested to the Court, as a provisional measure, *inter alia*, to order France to suspend all criminal proceedings triggered against Mr. Mangue and to refrain from starting any new one against him.[1219] The request was confirmed by Equatorial Guinea at the public hearings held in front of the ICJ.[1220] In the order of 7 Dec. 2016 the ICJ only tackled provisional measures concerning the premises of the diplomatic mission of Equatorial Guinea to France and ordered that they should be treated as inviolable.[1221] The latest development of the proceeding is represented by the order of the 5 Apr. 2017, which fixes new time limits for the submission of written statements.[1222]

J. Acts of espionage

Lastly – and out of any precise historical contextualization - it should be recalled that State practice is quite consistent in acknowledging the criminal liability of State officials who carried out espionage activities.[1223] Such collection of information *"is seen as a hostile act"*[1224] and State practice confirms this approach.[1225] As underpinned by Hazel Fox and Philippa Webb,[1226] espionage in peacetime (as well as acts of sabotage and kidnapping) is understood as a violation of international law which allows the victim State which had not consented to those acts to bring the accused individuals

[1218] ICJ, *Immunities and Criminal Proceedings*, Request for the indication of provisional measures Government of Equatorial Guinea, 29 Sep. 2016 (n. 1217) para 6, at 2.
[1219] ICJ, *Immunities and Criminal Proceedings*, Request for the indication of provisional measures Government of Equatorial Guinea, 29 Sep. 2016 (n. 1217) para 19 a), at 4.
[1220] ICJ, *Immunities and Criminal Proceedings* (Equatorial Guinea v France), Press Release No. 2016/33, Unofficial, Immunities and Criminal Proceedings (Equatorial Guinea v France) Conclusion of the public hearings on the request for the indication of provisional measures made by Equatorial Guinea The Court to begin its deliberation, 19 Oct. 2016, at 1.
[1221] ICJ, *Immunities and Criminal Proceedings* (Equatorial Guinea v France), Request for the indication of Provisional Measures, Order, 7 Dec. 2016, General List No. 163, at 23.
[1222] ICJ, *Immunities and Criminal Proceedings* (Equatorial Guinea v France), Order, 5 Apr. 2017, General List No. 163, at 2.
[1223] Sanger (n. 852) at 212.
[1224] Franey, *Immunity, Individuals and International Law. Which Individuals are Immune from the Jurisdiction of National Courts under International Law* (n. 504) at 265.
[1225] Franey, *Immunity, Individuals and International Law. Which Individuals are Immune from the Jurisdiction of National Courts under International Law* (n. 504) at 265-277.
[1226] Fox and Webb, *The law of State Immunity* (n. 480745) at 97, 574; see also: Sanger (n. 852) at 212-213.

before its own courts.[1227] It is the clandestine nature of acts carried out on behalf of other States that renders those acts prosecutable before the forum State's courts.[1228] Since it is unlikely, if not impossible, that sovereign States may claim that spies acted upon the State's order, the victim State can reasonably prosecute those individuals as performing *ultra vires* actions.[1229] Only rare examples of State practice proved the opposite.[1230] The role of consent, as it has already been explained in the part dedicated to the Second Report of the former ILC Special Rapporteur, becomes crucial in this instance.[1231] Nonetheless, in some cases, even when the State admitted its own liability and involvement in mandating the activity of espionage, individuals were prosecuted for the same acts.[1232]

It seems, however, that in those cases it is the nature of the crime, or some specific features which characterize it, rather than other elements pertaining more specifically to the territorial "offence" exception, which qualify the act as prosecutable before the courts of the forum State. Beside this, it would be inappropriate to take into consideration cases involving espionage where immunity was not even at stake, mainly because it was not claimed by the parties.[1233] When there is no immunity, no exception to that immunity can be considered.

Needless to say, my analysis does not consider espionage within the context of wartime, which, as previously mentioned, remains governed by rules and principles of the law of armed conflicts/international humanitarian law.[1234]

[1227] Sanger (n. 852) at 212.

[1228] Sanger (n. 852) at 212; on whether or not espionage is a crime under international law, see also: Ingrid Delupis, 'Foreign Warship and Immunity for Espionage' (1978) 78 AJIL 53, at 61-69.

[1229] Sanger (n. 852) at 212.

[1230] Sanger (n. 852) at 212-213.

[1231] Fox and Webb, *The law of State Immunity* (n. 480) at 97, 574.

[1232] Sanger (n. 852) at 212-213; see also: Franey, *Immunity, Individuals and International Law. Which Individuals are Immune from the Jurisdiction of National Courts under International Law* (n. 504) at 265-272.

[1233] See, for instance: Franey, *Immunity, Individuals and International Law. Which Individuals are Immune from the Jurisdiction of National Courts under International Law* (n. 504) at 249-256; and Sanger (n. 852) at 213.

[1234] See, for example: Van Alebeek, *The immunity of States and their Officials in International Criminal Law and International Human Rights Law* (n. 504) at 128, 204; Delupis (n. 1228) at 61-69.

III. Landmark case study: *Khurts Bat v Investigating Judge of the German Federal Court*, United Kingdom

A. Facts

The case of Khurts Bat v Investigating Judge of the German Federal Court[1235] represents one of the most relevant judgments – if not the only - where a domestic court denied immunity from foreign criminal jurisdiction to a State official. Because of its reasoning and of the conclusions concerning the territorial "offence" exception from immunity to criminal proceedings, it is of paramount importance for this work. Hence, it seems reasonable to indulge in a short summary of the facts and in an in-depth analysis of its reasoning and final findings. Eventually, in light of the above, this work will determine the effects of such judgment on the discourse concerning the feasibility of a territorial "offence" exception to State officials' immunity from foreign criminal jurisdiction.

In 2003, Mr. Bat worked at the Mongolian Embassy in Budapest. He was entrusted with the mission to bring the Mongolian national, Enkhbat Damiran, back to Mongolia. Damiran was suspected of having been involved in the assassination of the Mongolian Minister of the Interior, Sanjaasuren Zorig, which took place on 2 Oct. 1998.[1236] On 14 May 2003, Damiran was invited by Mr. Bat and other three members

[1235] *Khurts Bat v Investigating Judge of the Federal Court of Germany* (n. 28).
[1236] *Khurts Bat v Investigating Judge of the Federal Court of Germany* (n. 28) para 3, at 355, referring to the European Arrest Warrant.

of the Mongolian secret service to a meeting in Le Havre, where he was attacked and kidnapped and subsequently brought to Berlin, after a layover in Brussels. He was kept, drugged and imprisoned in the Mongolian Embassy in Berlin[1237] until when, four days later, on 18 May 2003, they flew Damiran to Ulaan Baator. The German Federal Court of Justice issued a domestic arrest warrant against Mr. Bat on 30 Jan. 2006 for crimes allegedly perpetrated in France, Belgium and Germany.[1238] Upon his arrival, Damiran was imprisoned and rendered subject to questions about the assassination.[1239] The alleged crimes were those of abduction and serious bodily injury.[1240] It is then reported that Mr. Dimiran, in critical illness, was released on 17 Apr. 2006 and then died five days later.[1241]

A domestic arrest warrant was first issued by the German Federal Court of Justice on 30 Jan. 2006 against Mr. Bat and, on 9 Feb. 2006, the same Court issued a European Arrest Warrant (EAW), then certified by the English Serious and Organised Crime Agency (SOCA) on 13 Apr. 2010.[1242] According to the EAW, the defendant, Mr. Bat, did not enjoy immunity in the Federal Republic of Germany.[1243]

Some UK and Mongolian authorities (on 12 Oct. 2009: Mr. Tsagandaari, the Secretary General to the National Security Council of Mongolia, and Mr. Dickson, the British Ambassador to Mongolia and, on 26 Nov. 2009, Mr. Altangerel, the Ambassador of Mongolia to the UK, and Mr. Nye, the Director of the UK National Security Secretariat) engaged in some discussion around the possibility of cooperation between the UK and Mongolia on the matter.[1244]

On 17 Mar. 2010 a visa application for Mr. Bat was filed to an entry clearance officer (ECO) of the UK Border Agency in Beijing. The day after, on 18 Mar. 2010, SOCA – in the person of one of its officers, Mr. Keogh, was not able to consider the request of Germany for arrest and extradition because Mr. Bat travelled on a diplomatic passport.[1245] After an exchange of information between the Entry Clearance Officer's

[1237] Sanger (n. 852) at 194.
[1238] Sanger (n. 852) at 194.
[1239] *Khurts Bat v Investigating Judge of the Federal Court of Germany* (n. 28) para 3, at 355.
[1240] *Khurts Bat v Investigating Judge of the Federal Court of Germany* (n. 28) para 3, at 355.
[1241] Sanger (n. 852) at 194.
[1242] Sanger (n. 852) at 194.
[1243] *Khurts Bat v Investigating Judge of the Federal Court of Germany* (n. 28) para 3, at 355.
[1244] *Khurts Bat v Investigating Judge of the Federal Court of Germany* (n. 28) para 4, at 356.
[1245] *Khurts Bat v Investigating Judge of the Federal Court of Germany* (n. 28) para 6, at 356.

Support Unit, based in London, ECO based in Beijing and Mr. Keogh of SOCA, which took place from 19 Mar. 2010 to 13 Apr. 2010, on the latter date Mr. Keogh communicated to the ECOs based in Beijing that a full warrant had been issued by Germany to SOCA.[1246] On 15 Apr. 2010 the UK Ambassador in Mongolia was notified by the Management Officer for Visa Operations in Beijing that the visa could only be released after the confirmation from the ambassador.[1247] It is also important to note that the exchange of information concerning the application for a visa did not have any link with that occurred between Oct. and Nov. of 2009 on security co-operation between the UK and Mongolia.[1248] Subsequently, on 31st Aug. 2010 the Mongolian desk at the Foreign & Commonwealth Office (FCO) notified the Ambassador in Mongolia, Mr. Dickson, that a meeting with the Mongolian Ambassador had been held in order to consider the agenda and the delegation. Mr. Bat was not included amongst the names in the list.[1249] Reference was also made to a visit to the UK of the Head of Executive Officer; however, no link was made with the delegation nor was the Officer identified by name.[1250] The discussion concerning the relations between the UK and Mongolia continued.[1251] A further meeting between Mr. Tsagaandari, the Secretary General of the Mongolian National Security Council and Mr. Dickson, the Ambassador in Mongolia, on 6 Sep. 2010, also touched on the issue concerning Mr. Bat's visit to the UK.[1252] As the FCO Desk informed, via e-mail, that Mr. Bat was subject to an International arrest warrant and that, accordingly, he would have been arrested just after his arrival,[1253] on 7 Sep. 2010 Mr. Keogh was given notice by the FCO that Mr. Bat was expected to land in the UK between 13 and 17 Sep.. The arrival was then delayed to 24 Sep. 2010, one day before the round table meeting was scheduled to begin.[1254]

On 17 Sep. 2010 Mr. Bat was arrested on board a Russian plane just when it landed at the airport of Heathrow in London. From what he was carrying with him (documents, gifts and photographs) it is supposed that he was meant to meet UK

[1246] *Khurts Bat v Investigating Judge of the Federal Court of Germany* (n. 28) para 7-9, at 356-357.
[1247] *Khurts Bat v Investigating Judge of the Federal Court of Germany* (n. 28) para 9 at 357.
[1248] *Khurts Bat v Investigating Judge of the Federal Court of Germany* (n. 28) para 10 at 357.
[1249] *Khurts Bat v Investigating Judge of the Federal Court of Germany* (n. 28) para 11 at 357.
[1250] *Khurts Bat v Investigating Judge of the Federal Court of Germany* (n. 28) para 11 at 357-358.
[1251] *Khurts Bat v Investigating Judge of the Federal Court of Germany* (n. 28) para 12 at 358.
[1252] *Khurts Bat v Investigating Judge of the Federal Court of Germany* (n. 28) paras 14-15, at 358-359.
[1253] *Khurts Bat v Investigating Judge of the Federal Court of Germany* (n. 28) para 16, at 359.
[1254] *Khurts Bat v Investigating Judge of the Federal Court of Germany* (n. 28) para 19, at 360.

officials. On 18 Sep. 2010 Mr. Bat was brought before the City of Westminster Magistrates' Court and held in custody.[1255]

From the analysis carried out in the *Khurts Bat* judgment[1256] it appears that the UK officials were aware of Mr. Bat's upcoming visit and willing to encourage it, while the Mongolian authorities conceived the visit as an opportunity to address bilateral international relations between the two States' security councils, despite the visit not being supported by the Ambassador; it also stems from the case that no meeting had already been scheduled for that purpose.

On 18 Feb. 2011 the extradition of Mr. Bat, the Head of the Office of National Security of Mongolia, as requested by the Federal Court of Justice in Germany according to the European Arrest Warrant certified by the SOCA on 13 Apr. 2010,[1257] was ordered by District Judge Purdy.[1258] Mr. Bat resisted the extradition on two grounds, more specifically: *i)* that he enjoyed immunity as a member of a special mission and *ii)* that he enjoyed immunity as he acted as a high-ranking civil servant on behalf of his Government – immunity *ratione personae* -.[1259] Both submissions were rejected.[1260]

Mr. Bat then appealed the extradition order according to section 26 of the Extradition Act 2003.[1261] The appeal added two more grounds to the already mentioned ones (which were reiterated on appeal): *iii)* that the extradition was an abuse of process (upon which the High Court deemed it not necessary to decide); *iv)* that he enjoyed immunity both in Germany and in the UK because the alleged crimes were official acts performed by the defendant on the orders of the Mongolian Government – immunity *ratione materiae* -.[1262] It is noteworthy to stress that this type of immunity was invoked only after the claim on immunity *ratione personae* had been dismissed; in fact, it was

[1255] *Khurts Bat v Investigating Judge of the Federal Court of Germany* (n. 28) para 20, at 360.
[1256] *Khurts Bat v Investigating Judge of the Federal Court of Germany* (n. 28) para 21, at 360.
[1257] *Khurts Bat v Investigating Judge of the Federal Court of Germany* (n. 28) para 1, at 354.
[1258] *Khurts Bat v Investigating Judge of the Federal Court of Germany* (n. 28) para 1, at 354; Sanger (n. 852) at 195.
[1259] *Khurts Bat v Investigating Judge of the Federal Court of Germany* (n. 28) para 1, at 354; Sanger (n. 852) at 195.
[1260] *Khurts Bat v Investigating Judge of the Federal Court of Germany* (n. 28) para 1, at 354; Sanger (n. 852) at 195.
[1261] *Khurts Bat v Investigating Judge of the Federal Court of Germany* (n. 28) para 1, at 354 referring to: United Kingdom, Extradition Act (2003), s 26.
[1262] *Khurts Bat v Investigating Judge of the Federal Court of Germany* (n. 28) para 1, at 354; Sanger (n. 852) at 195.

never resorted to in the previous stages of the case, nor was it mentioned in the exchange of opinions occurred earlier amongst the above-indicated parties.[1263]

On Appeal both the FCO and the Government of Mongolia appeared as interested parties.[1264] Both the defendant and the Home Department contested the Court jurisdiction under section 34 of the 2003 Act, which the Court believed unnecessary to decide upon, [1265] as it did with regard to the defendant's application for *habeas corpus*.[1266] The English High Court eventually dismissed the appeal.[1267]

After a short re-cap of the most relevant key passages of the judgment, it is now possible to investigate a bit more in depth the issue of the ground of immunity *ratione materiae* as invoked by the defendant in *Khurts Bat v Investigating Judge of the German Federal Court*.[1268] Paragraphs 63-101 and 104-105 of the judgment give an account of what has been asserted by the parties in such respect and what has then been ruled by Moses LJ and Foskett J.[1269]

As it has been already recalled, the argument of immunity *ratione materiae* was raised only after the claim of immunity *ratione personae* had been dismissed.[1270] The delay in raising the argument, invoked for the first time in a *"short supplementary opinion"*,[1271] with no prior notification rendered by the Government of Mongolia to the UK or to Germany[1272] originated at very least some concern on the formal consideration of the argument.[1273] This also prevented the parties from taking advantage of written memorials.[1274] A dispute then commenced between the parties as to whether or not the notification was a mandatory requirement.[1275] The Government of Mongolia also contended that it had apologized to the Government of Germany in a letter dated 20

[1263] *Khurts Bat v Investigating Judge of the Federal Court of Germany* (n. 28) para 64, at 369.
[1264] *Khurts Bat v Investigating Judge of the Federal Court of Germany* (n. 28) para 1, at 354.
[1265] *Khurts Bat v Investigating Judge of the Federal Court of Germany* (n. 28) para 1, at 355.
[1266] *Khurts Bat v Investigating Judge of the Federal Court of Germany* (n. 28) para 1, at 354.
[1267] *Khurts Bat v Investigating Judge of the Federal Court of Germany* (n. 28) at 378.
[1268] *Khurts Bat v Investigating Judge of the Federal Court of Germany* (n. 28).
[1269] *Khurts Bat v Investigating Judge of the Federal Court of Germany* (n. 28) paras 63-101 at 369-377 and paras 103-104 at 377.
[1270] *Khurts Bat v Investigating Judge of the Federal Court of Germany* (n. 28) para 64 at 369.
[1271] *Khurts Bat v Investigating Judge of the Federal Court of Germany* (n. 28) paras 65-66 at 369.
[1272] *Khurts Bat v Investigating Judge of the Federal Court of Germany* (n. 28) para 66 at 369.
[1273] *Khurts Bat v Investigating Judge of the Federal Court of Germany* (n. 28) para 66 at 369.
[1274] *Khurts Bat v Investigating Judge of the Federal Court of Germany* (n. 28) para 69 at 370.
[1275] *Khurts Bat v Investigating Judge of the Federal Court of Germany* (n. 28) para 67 at 369.

Oct. 2010.[1276] An official letter was then sent to the public prosecutor in Germany on 21 Jan. 2011 (and translated on 23 Jun. of the same year) and then produced in the proceeding.[1277] The letter explained that Mr. Bat was acting, as for the alleged acts, as a *"Special Secret Service Officer"* on behalf of the Government of Mongolia in the operation concerning the return of Enkhbat Damiran to Mongolia.[1278] The letter deemed the criminal proceeding against such officials as an infringement of the criminal laws of Mongolia.[1279]

The defendant argued, in the first place, that his entitlement to functional immunity derived from the fact that he acted as an official on behalf of the Government of Mongolia.[1280] It is noteworthy to underline that both parties assumed that the claimed immunity concerned both immunity from criminal prosecution in Germany and immunity from extradition.[1281]

Also, the arrest warrant, in that respect, asserted that Mr. Bat was not entitled to immunity and that this denial was also repeated in a letter sent from the office of the Public Prosecutor General of the German Federal Court of Justice of 24 Jun. 2011.[1282] So did, eventually, the Queen's Bench in the appealed case. [1283]

B. Reasoning

The case of *Khurts Bat v Investigating Judge of the German Federal Court*[1284] is relevant for this dissertation in two respects: first of all, it outlines some authorities applicable to the present case; secondly, and more relevantly, it gives the opportunity to examine how such sources have been used and interpreted.

Because of the uniqueness of the *Khurts Bat* decision amongst those which have touched upon the issue of a potential territorial "offence" exception, its reasoning will be appreciated both for its own content and for the rationale behind it. Nevertheless, I

[1276] *Khurts Bat v Investigating Judge of the Federal Court of Germany* (n. 28) para 67 at 369.
[1277] *Khurts Bat v Investigating Judge of the Federal Court of Germany* (n. 28) para 67 at 369.
[1278] *Khurts Bat v Investigating Judge of the Federal Court of Germany* (n. 28) para 67 at 369.
[1279] *Khurts Bat v Investigating Judge of the Federal Court of Germany* (n. 28) para 67 at 369.
[1280] *Khurts Bat v Investigating Judge of the Federal Court of Germany* (n. 28) para 63 at 369.
[1281] *Khurts Bat v Investigating Judge of the Federal Court of Germany* (n. 28) para 63 at 369.
[1282] *Khurts Bat v Investigating Judge of the Federal Court of Germany* (n. 28) para 68 at 369-370.
[1283] *Khurts Bat v Investigating Judge of the Federal Court of Germany* (n. 28) at 378.
[1284] *Khurts Bat v Investigating Judge of the Federal Court of Germany* (n. 28).

will not analyze in close detail the facts of every case quoted therein; rather, those examples of jurisprudence will be appreciated for the role they have played in the assessment of the rationale in *Khurts Bat*.

The judgment of *Khurts Bat* establishes, first of all, that, given the fact that the defendant had been in custody for over one year, the need of celerity outweighed that of a close examination of all the relevant sources.[1285] It is maintained that cases where immunity was accorded on those grounds are very rare.[1286]

The judgment first takes into account immunity from civil suit, claiming that *"there is no want of authority in relation to"*[1287] that type of immunity. LJ Moses, however, states that: *"[a]ll State officials enjoy immunity ratione materiae for the official acts from the civil jurisdiction of the courts of other States"*.[1288] While a specific comment on this will be provided in the following subsection, it is here important to underline that the above-mentioned immunity has been linked, in the decision, to the UN Convention on the Jurisdictional Immunities of States and their Property[1289] and the UK State Immunity Act[1290] and that the case of *Jones v Ministry of the Interior of the Kingdom of Saudi Arabia (Secretary of State for Foreign an Commonwealth Affairs intervening)*[1291] is referred to by the defendant in order to maintain that *"a foreign state's right to immunity cannot be circumvented by suing servants or agents"*[1292] and then apply that type of immunity to the criminal ambit.[1293]

Dr Franey's opinion[1294] is oftentimes mentioned as a relevant viewpoint in this respect. It is interesting to note that the distinction between the civil and the criminal sphere – as provided in Franey's - is mentioned in order to stress that granting of immunity from civil suit does not automatically imply immunity from criminal suit.[1295]

[1285] *Khurts Bat v Investigating Judge of the Federal Court of Germany* (n. 28) para 69 at 370.
[1286] *Khurts Bat v Investigating Judge of the Federal Court of Germany* (n. 28) para 70 at 370.
[1287] *Khurts Bat v Investigating Judge of the Federal Court of Germany* (n. 28) para 71 at 370.
[1288] *Khurts Bat v Investigating Judge of the Federal Court of Germany* (n. 28) para 71 at 370.
[1289] United Nations Convention on Jurisdictional Immunities of States and their Property (n. 389).
[1290] United Kingdom, State Immunity Act (n. 407).
[1291] *Jones v Ministry of Interior Al-Mamlaka Al-Arabiya AS Saudiya (the Kingdom of Saudi Arabia)* England, Court of Appeal, 28 Oct. 2004, [2004] EWCA Civ. 1394 [2007] 1 AC 270, at 280-281.
[1292] *Khurts Bat v Investigating Judge of the Federal Court of Germany* (n. 28) para 72 at 370.
[1293] *Khurts Bat v Investigating Judge of the Federal Court of Germany* (n. 28) para 72 at 370.
[1294] Franey, *Immunity, Individuals and International Law. Which Individuals are Immune from the Jurisdiction of National Courts under International Law* (n. 504).
[1295] *Khurts Bat v Investigating Judge of the Federal Court of Germany* (n. 28) para 74 at 370-371.

The judgment further considers the rare examples of practice where State immunity was invoked in criminal proceedings.[1296] In this respect, with reference to a quotation of Wickremasinghe,[1297] it accounts for the following examples of case law:

- *Italy v Lozano*,[1298] which is only mentioned, without any further analysis being provided for;[1299]
- *R v Bow Street Metropolitan Stipendiary Magistrate, Ex p Pinochet Ugarte (No 3)*,[1300] which is confusedly considered, mostly focused on some of the judges' individual opinions.[1301] According to the analysis of LJ Moses, immunity for crimes of murder and conspiracy to murder was distinct from immunity for torture or conspiracy to torture.[1302] Since no immunity was granted to former heads of State as for the latter crimes, also the former set of crimes was not addressed in the detail.[1303] Additionally, LJ Moses also mentioned Dr Franey's opinion,[1304] in that she purported that all judges in *Pinochet No. 3*, except for Lord Millet, were of the view that immunity was to be accorded for the crimes of murder and conspiracy to murder on the grounds that Pinochet was, in fact, a former Head of State who acted in such capacity when he perpetrated those crimes in Spain.[1305] However, the case concerning Pinochet was not considered by LJ Moses in greater detail, as it was not brought before the English court as binding authority for the issue of Khurts Bat's immunity from criminal prosecution in Germany.[1306]

[1296] *Khurts Bat v Investigating Judge of the Federal Court of Germany* (n. 28) para 74 at 370-371.
[1297] Chanaka Wickremasinghe, 'Immunities enjoyed by officials of States and International Organizations' in Malcolm D Evans (ed.), *International Law* (Oxford University Press, 2010) at 397.
[1298] *Public Prosecutor and Another v Lozano* (n. 1203).
[1299] *Khurts Bat v Investigating Judge of the Federal Court of Germany* (n. 28) para 74 at 370-371.
[1300] *Pinochet No. 3* (n. 401).
[1301] *Khurts Bat v Investigating Judge of the Federal Court of Germany* (n. 28) paras 74-82 at 370-372.
[1302] *Khurts Bat v Investigating Judge of the Federal Court of Germany* (n. 28) para 75 at 371.
[1303] *Khurts Bat v Investigating Judge of the Federal Court of Germany* (n. 28) para 75 at 371.
[1304] Franey, *Immunity, Individuals and International Law. Which Individuals are Immune from the Jurisdiction of National Courts under International Law* (n. 504) at 196.
[1305] *Khurts Bat v Investigating Judge of the Federal Court of Germany* (n. 28) para 81 at 372.
[1306] *Khurts Bat v Investigating Judge of the Federal Court of Germany* (n. 28) para 82 at 372.

The judgment proceeds with a further analysis of the work of Lady Fox and Philippa Webb,[1307] and of Dr Franey[1308] and examines the following cases:[1309]

- *MacLeod case*,[1310] which is considered by LJ Moses as per its alignment with the findings of the case *Prosecutor v Blaškić* before the ICTY,[1311] according to which functional immunity concedes officials non-accountability for acts that they have carried out on behalf of their own State, rather than personally.[1312] Notwithstanding, LJ Moses mentions that the authority of both *MacLeod* and *Prosecutor v Blaškić* have been prone to critics.[1313] It is precisely in the case of MacLeod that the non-accountability of public officials acting on behalf of their own States was appreciated as a *"principle of public law sanctioned by the usage of all civilized nations."*[1314] However, in order to depart from the features of particular case and assess a general rule of law – potentially binding upon the whole international community – one has to verify whether or not State practice and *opinio juris* point at the very same direction;[1315]
- *Rainbow Warrior* case,[1316] which is primarily referred to as one of the authorities taken into account by the ICTY.[1317] According to Dr. Franey,[1318] as mentioned in *Khurts Bat*,[1319] the rule under which State officials are not necessarily immune from criminal jurisdiction when they perform their

[1307] Hazel Fox, *The Law of State Immunity* (Oxford University Press, 2008) at 94.

[1308] Franey, *Immunity, Individuals and International Law. Which Individuals are Immune from the Jurisdiction of National Courts under International Law* (n. 504).

[1309] *Khurts Bat v Investigating Judge of the Federal Court of Germany* (n. 28) paras 84-95 at 372-375.

[1310] McNair (n. 261) at 221 et seq. referring to: *The 'Caroline', and MacLeod's case*.

[1311] *Prosecutor v Tihomir Blaškić (Appeals Chamber, Judgment on the Request of The Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997)* IT-95-14, ICTY (29 Oct. 1997) (n. 939) para 38.

[1312] *Khurts Bat v Investigating Judge of the Federal Court of Germany* (n. 28) para 84 at 372.

[1313] *Khurts Bat v Investigating Judge of the Federal Court of Germany* (n. 28) para 85 at 372-373.

[1314] *Khurts Bat v Investigating Judge of the Federal Court of Germany* (n. 28) para 87 at 373, which referred to: Foreign Office, '(Inclosure.) – Mr. Webster to Mr. Crittenden. Washington, March 15, 1841' in: *British and Foreign State Papers* vol. 29 (H.M.S.O., 1840-1841) at 1139 et seq., also quoted in Franey, *Immunity, Individuals and International Law. Which Individuals are Immune from the Jurisdiction of National Courts under International Law* (n. 504) at 209.

[1315] Franey, *Immunity, Individuals and International Law. Which Individuals are Immune from the Jurisdiction of National Courts under International Law* (n. 504) at 210.

[1316] *Rainbow Warrior, New Zealand v France* (n. 863).

[1317] *Khurts Bat v Investigating Judge of the Federal Court of Germany* (n. 28) para 89 at 374.

[1318] Franey, *Immunity, Individuals and International Law. Which Individuals are Immune from the Jurisdiction of National Courts under International Law* (n. 504) at 214.

[1319] *Khurts Bat v Investigating Judge of the Federal Court of Germany* (n. 28) para 90 at 374.

functions and act under the orders of their State, as expressed by the UN Secretary General, has reached the rank of international custom.[1320] In this respect, it was also added[1321] that Dr. Franey considered that an international customary nature of functional immunity for all types of State officials could not be inferred from the cases quoted in *Prosecutor v Blaškić*.[1322] Eventually, Dr Franey's findings on both *Rainbow Warrior*[1323] and *Pinochet No 3*[1324] were aligned in rejecting the proposition that immunity from criminal jurisdiction must be granted to any State official on duty on a foreign State; contrariwise, the State's consent is considered crucial in such instance because its absence renders the acts of the State officials a violation of the territorial State's sovereignty.[1325]

- *R v Lambeth Justices, Ex p Yusufu*,[1326] which is mentioned just as another example *"of criminal offence where state immunity has not been claimed"*[1327] referred to by Dr Franey;[1328]
- Other examples[1329] concern criminal prosecution (where no immunity was invoked) in case of espionage or collection of information to which no consent was given beforehand.[1330] Dr Franey eventually observes that there appears to be a customary international law norm following which State officials cannot be granted immunity *ratione materiae* from criminal prosecution for what concerns crimes perpetrated on the territory of a foreign State, unless such

[1320] *Khurts Bat v Investigating Judge of the Federal Court of Germany* (n. 28) para 90 at 374.
[1321] *Khurts Bat v Investigating Judge of the Federal Court of Germany* (n. 28) para 91 at 374.
[1322] Franey, *Immunity, Individuals and International Law. Which Individuals are Immune from the Jurisdiction of National Courts under International Law* (n. 504) at 215; *Prosecutor v Tihomir Blaškić (Appeals Chamber, Judgment on the Request of The Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997)* IT-95-14, ICTY (29 Oct. 1997) (n. 939) para 38.
[1323] *Rainbow Warrior, New Zealand v France*, France-New Zealand Arbitration Tribunal (n. 1316).
[1324] *Pinochet No. 3* (n. 401).
[1325] Franey, *Immunity, Individuals and International Law. Which Individuals are Immune from the Jurisdiction of National Courts under International Law* (n. 504) at 231-232.
[1326] *R v Lambeth Justices, Ex parte Yusufu* (n. 1153).
[1327] *Khurts Bat v Investigating Judge of the Federal Court of Germany* (n. 28) para 94 at 374.
[1328] Franey, *Immunity, Individuals and International Law. Which Individuals are Immune from the Jurisdiction of National Courts under International Law* (n. 504) at 244-281.
[1329] Franey, *Immunity, Individuals and International Law. Which Individuals are Immune from the Jurisdiction of National Courts under International Law* (n. 504) at 272 and, generally, 265-277; Fox, The Law of State Immunity (n. 1307) at 96.
[1330] *Khurts Bat v Investigating Judge of the Federal Court of Germany* (n. 28) para 95 at 375.

immunity follows a special regime (e.g. diplomats' and consulars' treatment, special missions, ad hoc agreements, etc.).[1331]

In its final part[1332] LJ Moses submitted some conclusions purported by the former Special Rapporteur on Immunity of State officials from foreign criminal jurisdiction, Mr. Roman Anatolevich Kolodkin,[1333] who basically agreed with Dr Franey's findings. Indeed, while acknowledging that State officials enjoy immunity *ratione materiae* when they act on behalf of their own State,[1334] and besides admitting that the issue of immunity and its exceptions is not straightforward,[1335] he also reached a final point according to which if criminal jurisdiction is exercised by the territorial State and no consent has previously been given by that State to the discharge of the official's functions and to his very presence on its territory, this entails a special case and immunity shall not be granted.[1336] As it had already been recalled in previous analysis, consent constitutes a focal point in the Reports of Mr. Kolodkin.[1337] Further reference is made to the work of Mr. Kolodkin, especially with regard to cases as *Rainbow Warrior*,[1338] *Prefecture of Voiotia v Federal Republic of Germany*[1339] and *Ferrini v Federal Republic of Germany*,[1340] used as reference cases where immunity was not granted, as opposed to the case *Bouzari v Islamic Republic of Iran*[1341] where immunity could be granted since the criminal acts had been carried out outside the forum State.[1342] LJ Moses adjudicates against Mr. Bat's immunity to extradition from to the UK, in objection to the findings of *Pinochet No. 3*[1343] and in line with Kolodkin's and Franey's conclusions,[1344] also with the latter's understanding that State practice

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[1331] Franey, *Immunity, Individuals and International Law. Which Individuals are Immune from the Jurisdiction of National Courts under International Law* (n. 504) at 284.

[1332] *Khurts Bat v Investigating Judge of the Federal Court of Germany* (n. 28) paras 96-99, at 375-376.

[1333] Second Report, Kolodkin (n. 419).

[1334] Second Report, Kolodkin (n. 419) at para 94, b).

[1335] Second Report, Kolodkin (n. 419) at para 90.

[1336] Second Report, Kolodkin (n. 419) at para 94, p).

[1337] Second Report, Kolodkin (n. 419) at paras 82-85; *Khurts Bat v Investigating Judge of the Federal Court of Germany* (n. 28) para 97 at 376.

[1338] *Rainbow Warrior, New Zealand v France*, France-New Zealand Arbitration Tribunal (n. 1316).

[1339] *Prefecture of Voiotia v Federal Republic of Germany (Distomo Massacre Case)* (n. 705).

[1340] *Ferrini v Federal Republic of Germany* (n. **Errore. Il segnalibro non è definito.**).

[1341] *Bouzari and Others v Islamic Republic of Iran*, Canada, Ontario Superior Court of Justice, 1 May 2002, 124 ILR 427.

[1342] *Khurts Bat v Investigating Judge of the Federal Court of Germany* (n. 28) para 98 at 376.

[1343] *Pinochet No. 3* (n. 401).

[1344] *Khurts Bat v Investigating Judge of the Federal Court of Germany* (n. 28) para 99 at 376.

cannot be found – at least not only – in cases as old as the *Caroline* one.[1345] Despite acknowledging that immunity had been accorded in cases as *Prosecutor v Blaškić*,[1346] LJ Moses ruled that *McElhinney v Williams*[1347] was of no relevance for the resolution of the issue at stake because of its civil nature[1348] and concluded by establishing the absence of any rule of customary international law which indiscriminately granted immunity *ratione materiae* to all State officials and in all situations.[1349]

J Foskett's conclusions conform to those of LJ Moses.[1350] Two points are worth remarking: J Foskett underlines that *"the late deployment of the argument [of State immunity] was not explained satisfactorily"*[1351] and that, also in light of Sir Lauterpacht's distinguished argument, deserved to be properly addressed.[1352] Ultimately, J Foskett relied on Dr Franey's conclusions and deemed the case McElhinney v Williams[1353] of no aid in the case at hand.[1354]

C. Comments

a. Immunity *ratione materiae* of State officials and State immunity are different concepts in substance

b. Criminal law applies to individuals only, not to States

c. Concluding remarks

The reasoning and the rationale followed in *Khurts Bat* raise some interest from the perspective of public international law. The position of the English courts in such case gives the opportunity to clarify upon some major issues. Let me now consider them in turn.

[1345] *Khurts Bat v Investigating Judge of the Federal Court of Germany* (n. 28) para 99 at 376.

[1346] *Prosecutor v Tihomir Blaškić (Appeals Chamber, Judgment on the Request of The Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997)* IT-95-14, ICTY (29 Oct. 1997) (n. 939) para 38.

[1347] *McElhinney v Williams and Her Majesty's Secretary of State for Northern Ireland* (n. 706).

[1348] *Khurts Bat v Investigating Judge of the Federal Court of Germany* (n. 28) para 100 at 376-377.

[1349] *Khurts Bat v Investigating Judge of the Federal Court of Germany* (n. 28) para 101 at 377.

[1350] *Khurts Bat v Investigating Judge of the Federal Court of Germany* (n. 28) para 102-103 at 377.

[1351] *Khurts Bat v Investigating Judge of the Federal Court of Germany* (n. 28) para 104 at 377.

[1352] *Khurts Bat v Investigating Judge of the Federal Court of Germany* (n. 28) para 105 at 377.

[1353] *McElhinney v Williams and Her Majesty's Secretary of State for Northern Ireland* (n. 706).

[1354] *Khurts Bat v Investigating Judge of the Federal Court of Germany* (n. 28) para 105 at 377.

a. Immunity *ratione materiae* of State officials and State immunity are different concepts in substance

As it has already been outlined in the first part of this dissertation, the immunity of State officials is related to but not the same as State immunity.[1355] Even though, in fact, the former is oftentimes conceived as *"as a corollary of the rule of State immunity"*[1356] or even a residual type of immunity,[1357] they must be considered separate concepts, each of which carries different features, history and, additionally, a different rationale too. In the words of Zachary Douglas, *"[the jurisdictional immunity of the foreign state] must not be confused, although it often is, with the immunity that is conferred upon a limited number of high-ranking state officials by virtue of their special representative functions while they are in office."*[1358] While it is arguably an uncontended view that *"[t]o sue an envoy in respect of acts done in his official capacity would be, in effect, to sue his government irrespective of whether the envoy had ceased to be 'en post' at the date of the suit"*,[1359] this cannot equate to stating that there shall only be one type of immunity.

Contrarily, and one more time, immunities are tripartite as follows: *i)* individuals' *ratione personae*; *ii)* individuals' *ratione materiae* and *iii)* States' immunity.[1360] Turning to the detail, different State practice manifest a different perception of the relationship between immunity *ratione materiae* and State immunity.[1361]

Uncertainties as to the scope and boundaries of immunities are even exacerbated by the wording of the UNCSI, which obfuscates the concept of State immunity even more.[1362] In line with this blurred understanding offered by the UNCSI, some authors

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[1355] For an in-depth analysis, see: Van Alebeek, *The immunity of States and their Officials in International Criminal Law and International Human Rights Law* (n. 504) at 103-157.

[1356] Van Alebeek, *The immunity of States and their Officials in International Criminal Law and International Human Rights Law* (n. 504) at 103.

[1357] Gaeta, 'Extraordinary renditions e giurisdizione italiana nei confronti degli agenti statunitensi coinvolti nel c.d. caso Abu Omar' (2013) (n. 889) at 537.

[1358] Zachary Douglas, 'State Immunity for the acts of State officials', (2012) 82 BYIL 281, at 282, referring to: ICJ, *Arrest Warrant of 11 April 2000* (n. 27) 20-23.

[1359] *Zoernsch v Waldock and another*, England, Court of Appeal, 24 Mar. 1964, 41 ILR 438, at 451, also cited in: Douglas (n. 1358) at 282.

[1360] See, for example: Webb (n. 738) at 62-102.

[1361] Fox and Webb, *The law of State Immunity* (n. 480) at 570-571.

[1362] See, for example: Douglas (n. 1358) at 309-315.

do in fact – erroneously - argue that the Convention explicitly rules on the immunity of States and, by effect of this, also on that of their officials.[1363] They also maintain that if domestic Courts happened not to have applied those principles (as, for instance, in *Samantar v Yousuf*[1364]) it is because the Convention has not yet entered into force.[1365] However, even within such inadmissible approach, the same authors do in fact appreciate that the Convention does not apply to criminal proceedings.[1366] Consistently, their (wrongful) attempt to prove that *"the Convention incorporates the doctrine of "foreign official immunity""*[1367] does not need to be confuted.[1368]

A clear understanding of the distinction is, therefore, necessitated. It is hereby suggested that the phrase "State immunity" shall be used with regard to the immunities of State entities only, whilst the phrase "immunity of State officials" (instead of "State immunity applied to State officials") shall describe the immunity of those individuals who act in a specific capacity. What is here advanced may not be shared by the majority of the international legal scholarships, or perhaps even by the minority. But I do believe that, especially in the extremely tangled area of immunities, the clearer the better. And clarity starts not even from the first brick of the wall, it starts from the foundation, that is: terminology. It would be blatant to underline that a correct use of terms prevents their wrongful or imprecise interpretation. Which imprecise interpretation, by the way, I must fear not less than a wrongful one, both leading to a land of nowhere.

[1363] David P. Stewart, 'The Immunity of State Officials under the UN Convention on Jurisdictional Immunities of States and their Property', (2011) 44 Vand.J.Transnat'l L. 1047; see also Ramona Pedretti's disapproval of the confusion and conflation of rules concerning State immunity and those concerning immunity of State officials, for example in: Pedretti (n. 547) at 44-45.

[1364] *Samantar v Yousuf and others*, United States, Supreme Court, 1 Jun. 2010, 147 ILR 726.

[1365] Stewart (n. 1363) at 1049.

[1366] Stewart (n. 1363) 1053-1054, referring to: Summary Record of the discussion held in the Sixth Committee of the General Assembly, 13th Meeting, held in New York, on Monday, 25 Oct. 2004, at 10 a.m. U.N. Doc. Distr. 22 Mar. 2005, A/C.6/59/SR.13, Gerhard Hafner, Chairman, Ad Hoc Comm. On Jurisdictional Immunities of States and their Property, Remarks to the United Nations General Assembly Sixth Committee at para 32 (but see also paras 43, 47, 50); and also: ILC, Summary Record of the 2243rd meeting, 15 Jul. 1991, at 3 pm, International Law Commission, Forty-third session (1991), Extract from the YILC 1991 Document, vol. I, A/CN.4/SR.2243, 247-253, at 247-251; UNGA Res. 59/38 (n. 765) Agenda item 142, Distr. 16 Dec. 2004, at Preamble, para 2.

[1367] Stewart (n. 1363) at 1056.

[1368] One must also recall that "foreign official immunity" has been interpreted in many unnecessarily complicated and blurred ways by scholars; see, for example: Chimène I. Keitner, 'Foreign Official Immunity and the "baseline" problem' (2011) 80 Fordham L.Rev., 605-622, particularly at 605-608 and 621.

Even conceding that, historically, State immunity *"[has been extended] to cover some state officials"*[1369] and that the immunity of State officials has evolved from that of States as such, then the two concepts (should) have reached a certain degree of autonomy. Consequently, and still bearing in mind that the scope of my study is not intended to address the relationship between State immunity and immunity of State officials, it is this author's proposition that the expression "State immunity" shall only be employed when a procedural bar to the exercise of jurisdiction over *States*, and *States* only, is concerned. That *"State officials are mere instruments of a State"*[1370] does not change the fact that, when State officials are prosecuted, they are prosecuted because of their *individual* (civil, criminal, administrative) responsibility. However, even some of the most distinguished international law commentators are not always displaying awareness of the outstanding relevance of the distinction.

It is erroneous and inaccurate to consider State immunity and immunity of State officials as two faces of the same coin. The equation is proven wrong as per the following articulation: while from attributing one act to a State one automatically infers the responsibility on the merits of the State to which the acts were attributed, the application of State immunity cannot merely follow the fact that an act, performed by a State official, is deemed to be attributable to the State itself.[1371] More closely with regard to Douglas' analysis of *"State immunity for the acts of State officials",*[1372] even though the present work has much relied on that interesting approach, it has then departed from the majority – though not all – of its findings. In particular, it is not shared with the above-mentioned eminent scholar that (following the letters of his conclusions): a) if a foreign State official is the defendant before the court of a forum State and such acts can be imputed to the foreign State, then the foreign State becomes the proper defendant – that can, thus, invoke immunity – and the official's responsibility is lifted; that: c) the substantive consequences of the application of the rules of State immunity on civil and criminal liability imply that the foreign State substitutes the official as the proper party; that e) since there is no dichotomy between criminal and

[1369] Franey, *Immunity, Individuals and International Law. Which Individuals are Immune from the Jurisdiction of National Courts under International Law* (n. 504) at 16.

[1370] *Prosecutor v Tihomir Blaškić (Appeals Chamber, Judgment on the Request of The Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997)* IT-95-14, ICTY (29 Oct. 1997) (n. 939) para 38.

[1371] See: Douglas (n. 1358) at 319-321.

[1372] Douglas (n. 1358).

civil immunities, also in the name of a holistic approach to wrongful actions, then there is one type of responsibility under international law; that: h) to the same end as in conclusion sub a) the acts performed by an official in the service of the foreign state shall be considered acts of the State, so that such State becomes the defendant and can invoke immunity.[1373]

As for the conclusions sub a), c) and h), it is simply – but steadily – rejected that the application of immunity to the official implies a shift of liability and responsibility to the State itself. The conclusion is not grounded on any principle of international law. It is at the very least controversial to infer responsibility from the application (or non-applicability) of rules on immunity. For what concerns the principle sub e), while one could agree with the assumption that there is one responsibility only under international law (States' responsibility on the international legal plane is, indeed, neither civil nor criminal in nature, but placed on the separate plane of international law), still the responsibility of individuals, even on the international legal level, respects the partition between civil and criminal (and, to confirm this, it is fair to affirm that individuals incur in criminal responsibility under international criminal law and international humanitarian law).

To suggest that State immunity and immunity of State officials cannot be conflated, let me just refer, once and for all, to the ICJ assertion that *"[…] the Court must emphasize that it is addressing only the immunity of the State itself from the jurisdiction of the courts of other States; the question of whether, and if so to what extent, immunity might apply in criminal proceedings against an official of the State is not in issue in the present case"*.[1374] Also the European Court of Human Rights held that immunity rests on separate grounds in civil and criminal liability.[1375] The profuse work of the international legal scholarship in this regard shows the two types of immunities have been analyzed on separate grounds.[1376]

[1373] Douglas (n. 1358) at 346-348.

[1374] ICJ, *Jurisdictional Immunities of the State* (n. 551) para 91.

[1375] See: *Case of Al-Adsani v the United Kingdom* (n. 699) para 61.

[1376] See, for instance: Fox and Webb, *The law of State Immunity* (n. 480) dealing separately with State Immunity, at 1-542 and with Immunity of individuals acting on behalf of State at 543-576 and international organizations and special regimes at 577-614; Antonio Cassese, *International Law* (Oxford University Press, 2005) addressing Immunity of foreign states from courts' jurisdiction at 99-110, Immunities of organs of foreign States at 110-113, Immunities of diplomatic agents at 114-116, Immunities of consular agents at 116, Immunities of Heads of States and Government and senior members of cabinet at 117-118, Duration of Privileges and Immunities at 118-119, Personal immunities and international crimes at 119-120, Limitations upon a State's treatment of foreigners and

Turning to the detail, the distinction between immunity *ratione materiae* of State officials and State immunity has been accurately examined by Hazel Fox and Philippa Webb.[1377] Whilst acknowledging that *"there is a differing practice on whether the immunity of State officials should be treated as another type of immunity separate from State immunity",*[1378] they also affirmed that *"the ICJ expressly confined its ruling to the State, leaving the law on the immunity of State officials in respect of the commission of the same acts to develop independently."*[1379] While following some sources of national,[1380] regional[1381] and international law,[1382] the concept of "State" has been appreciated as encompassing the concept of *"State representative"* as well,[1383] USA courts have, more reasonably, held that the USA FSIA is not applicable to foreign State officials.[1384] It has also been explained[1385] that the USA Supreme Court pinpointed in *Samantar v Yousuf*[1386] that *"foreign state"* could not be interpreted as including *"foreign officials"*,[1387] nor would the term *"agency or instrumentality."*[1388]

The opinion of the author of this work goes as per the following.

It is clear that State practice concerning the alignment of State immunity and immunity of State officials is not straightforward: although the aforementioned authoritative sources have supported their integration, they only represent one part of the international jurisprudence and scholarship. And, in any case, this very part is deemed to be wrong. Indeed, such position is contradictory both from a theoretical and a pragmatic perspective. Let me briefly elucidate on this point.

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individuals at 120-123; Hazel Fox, 'International Law and Restraints on the Exercise of Jurisdiction by National Courts of States' and Wickremasinghe, 'Immunities enjoyed by officials of States and International Organizations' in Malcolm D. Evans (ed.), *International Law* (Oxford University Press, 2014) (n. 478) at, respectively, 336-378 and 379-411.

[1377] Fox and Webb, *The law of State Immunity* (n. 480) at 570-571.

[1378] Fox and Webb, *The law of State Immunity* (n. 480) at 571.

[1379] Fox and Webb, *The law of State Immunity* (n. 480) at 575, referring to ICJ, *Jurisdictional Immunities of the State* (n. 551) para 91.

[1380] *Twycross v Dreyfus*, England, Court of Appeal, 18 Apr. 1877, (1877) 5 Ch D 605; United Kingdom, State Immunity Act (n. 407) s 14(1).

[1381] *Case of Jones and Others v the United Kingdom* (n. 545).

[1382] United Nations Convention on Jurisdictional Immunities of States and their Property (n. 389) art. 2 (1) (b) (IV).

[1383] Fox and Webb, *The law of State Immunity* (n. 480) at 571.

[1384] Fox and Webb, *The law of State Immunity* (n. 480) at 571.

[1385] Fox and Webb, *The law of State Immunity* (n. 480) at 571.

[1386] *Samantar v Yousuf and others* (n. 1364).

[1387] *Samantar v Yousuf and others* (n. 13641386) at 734-740.

[1388] *Samantar v Yousuf and others* (n. 1364) at 732, 733, 741.

A shift has definitely been taking place from the original identification of States' and State officials' immunity;[1389] this is primarily proven by an already mentioned recent judgment of the ICJ.[1390] Also the *Pinochet cases* offer some useful hint for further analysis in this regard.[1391] The opposite position taken by some regional and domestic courts is not consistent nor is it supported by compelling arguments. By reasoning *a contrario*, I will analyze those wrong examples of practice in order to assess their wrongfulness.

As for the regional examples, the European Court of Human Rights the case of *Jones and others v United Kingdom*[1392] is paramount. It is to be noted that this analysis of the judgment will not address the issue of torture and it will only be limited to the question of which relationship immunity of States and that of State officials have. In that decision, the Court departed, with no supporting ground, from even the most extensive interpretation of States' and State officials' immunity. To maintain that *"the starting point must be that immunity ratione materiae applies to the acts of State officials",*[1393] the ECtHR relied on the mere fact that *"an act cannot be carried out by the State itself but only by individuals acting on the State's behalf […]"*[1394] Paragraph 202 then proceeds with inferring unjustified conclusions, such as that *"if it were otherwise, State immunity could always be circumvented by suing named officials"*.[1395] According to some – erroneous - international legal scholarship,[1396] functional immunity would only serve a very narrow aim. Following this approach, if there was no rule as functional immunity, States could easily circumvent the obligation not to interfere in other States' affairs by exercising jurisdiction over the individuals who performed some acts – given that they could not exercise it over States themselves.[1397]

[1389] Fox and Webb, *The law of State Immunity* (n. 480) at 575.

[1390] ICJ, *Jurisdictional Immunities of the State* (n. 551) para 91.

[1391] Douglas (n. 1358) at 326-330.

[1392] *Case of Jones and Others v the United Kingdom* (n. 545).

[1393] *Case of Jones and Others v the United Kingdom* (n. 545) at para 202.

[1394] *Case of Jones and Others v the United Kingdom* (n. 545) at para 202.

[1395] *Case of Jones and Others v the United Kingdom* (n. 545) at para 202.

[1396] See: Gaeta, 'Extraordinary renditions e inmunità della giurisdizione penale degli agenti di Stati esteri: il caso Abu Omar' (2006) (n. **Errore. Il segnalibro non è definito.**) at 130.

[1397] See: Gaeta, 'Extraordinary renditions e inmunità della giurisdizione penale degli agenti di Stati esteri: il caso Abu Omar' (2006) (n. **Errore. Il segnalibro non è definito.**) at 130 (text translated by the author of the present dissertation).

The applicant was quite eloquent in defending that *"there was no symmetry between international rules on State immunity and State responsibility."*[1398] Indeed, highly qualified international legal scholars submit that the immunity of States and the immunity of State officials cannot be reduced to the same concept.[1399] Notwithstanding, the ECtHR's reasoning and ruling went in the opposite direction.

The Court referred to what it defined as a *"pragmatic understanding"* which it then linked to the definitions provided in the UNCSI[1400] and to the second report of the former ILC Special Rapporteur on the issue of Immunity of State Officials from foreign criminal jurisdiction.[1401] The ECtHR provided for some examples of domestic and international courts to support its final conclusion.[1402] However, it has to be noted that these examples prove nothing with respect to the present issue: some of them have indeed been misinterpreted by the ECtHR and stretched far beyond even the most extensive interpretation, in order to imply what the Court wanted to reach – and which, in reality, they never purported -; some of them, on the contrary, despite being correctly interpreted by the Court, were absolutely incorrect in the first place.

Let me begin, in reverse order, from the latter ones.

For what concerns the cases of *Propend Finance Pty Ltd v Sing and another*,[1403] *Jaffe v Miller*,[1404] *Fang v Jiang*,[1405] *Zhang v Zemin*[1406] the decisions of, respectively, domestic courts of UK, Canada, New Zealand, Australia were correctly interpreted by the ECtHR in assuming that the concepts of State immunity and State officials

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[1398] *Case of Jones and Others v the United Kingdom* (n. 545) at para 171; see also, as a general comment on the case: Philippa Webb, 'Jones v UK: The reintegration of State and official immunity?', EJIL: Talk! 14 Jan. 2014, available at: <www.ejiltalk.org/jones-v-uk-the-re-integration-of-state-and-official-immunity/>, last accessed 31 Oct. 2017.

[1399] Dapo Akande, 'US Appeals Court holds that Former Officials Entitled to Immunity in Civil Suit alleging War Crimes', EJIL: Talk!, 3 May 2009, available at: <www.ejiltalk.org/us-appeals-court-holds-that-former-foreign-officials-entitled-to-immunity-in-civil-suit-alleging-war-crimes/>, last accessed 31 Oct. 2017; Webb, 'Jones v UK: The reintegration of State and official immunity?' (n. 1398).

[1400] *Case of Jones and Others v the United Kingdom* (n. 545) at para 202 referring to: United Nations Convention on Jurisdictional Immunities of States and their Property (n. 389) art. 2 (1) (b) (IV).

[1401] *Case of Jones and Others v the United Kingdom* (n. 545) at para 202 referring to: Second Report, Kolodkin (n. 419) at para 18.

[1402] *Case of Jones and Others v the United Kingdom* (n. 545) at paras 203-204.

[1403] *Propend Finance Pty Limited and others v Sing and others*, England, Court of Appeal, 17 Apr. 1997, 111 ILR 611.

[1404] *Jaffe v Miller and others (No. 1)*, Canada, High Court of Justice, Ontario, 17 Sep. 1990, 87 ILR 197; cf also: *Jaffe v Miller and others (No. 2)*, Canada, Ontario Court of Appeal, 17 Jun. 1993, 95 ILR 446.

[1405] *Fang and others v Jiang Zemin and others*, New Zealand, High Court, 21 Dec. 2006, 141 ILR 702.

[1406] *Zhang v Jiang Zemin and others*, Australia, Supreme Court of New South Wales, 14 Nov. 2008 141 ILR 542.

immunity have been equated, but those findings cannot be deemed correct according to public international law. At first blush, if immunity of States and their officials conflated then the international legal scholarship would not have been so profuse in addressing them as separate issues. There would be one immunity only, and I would not even need to deal with the question as posited. However, the question is not hereby limited to answering whether or not State immunity and immunity of State officials are the same thing. The issue can be brought to its extreme and I can affirm that the issue of immunity is not simply "two-tiered" in two "aspects" of immunity;[1407] rather, the opposite is true: they are two different concepts, which happen to share, nonetheless, some underlying justifications and reasons. Moreover, despite much confusion on the issue,[1408] State immunity is immunity from a *tertium genus* of jurisdiction, neither civil nor criminal, but international only,[1409] while immunity of State officials can pertain either to the civil sphere, to the criminal one or even to both.[1410] It is also true to assert that State immunity is necessarily linked to State officials, but only to the extent that any action of the State must be materially performed by an individual. This entails that State immunity is necessarily linked to State officials as such, not to the immunity of State officials. This can also be proven by two additional considerations: *i)* State representatives were not included as beneficiaries of State immunity in the first draft of articles on the issue of Jurisdictional Immunities of States and their Property;[1411] and *ii)* even when they were elaborated as final draft articles, it was clear that *"representatives of States acting in that capacity"* were included amongst the beneficiaries of State immunity only because they were authorized to represent the State and act on its behalf.[1412] The final codification of *"representatives of the State acting in that capacity"* under art. 2 (1), (b), iv) UNCSI[1413] serves the only purpose of

[1407] See below an examples of scholar who – erroneously - consider immunities as enjoyed by States themselves and, in some cases, by their organs: John H. Currie, Craig Forcese, Joanna Harrington, Valerie Oosterveld, *International Law. Doctrine, Practice and Theory* (Irwin Law, 2014) at 539.

[1408] Paola Gaeta, 'Immunities of States and State Officials: a Major Stumbling Block to Judicial Scrutiny?' in Antonio Cassese (ed.), *Realizing Utopia. The future of International Law* (Oxford University Press, 2012) at 227-238.

[1409] DARS (n. 260) with commentaries, art. 12.

[1410] See, for example: Benedetto Conforti, *Diritto Internazionale* (Editoriale Scientifica, 2002) at 240-246 and at 246-256; see also: Anthony Aust, *Handbook of International Law* (Cambridge University Press, 2010) at 145-162.

[1411] Second Report, Sucharitkul (n. 424) para 48, at 211 *"Article 3. Interpretative provisions 1) a)"*.

[1412] Dickinson, Lindsay and Loonam (n. 561) at 87-88, para 2.005.

[1413] United Nations Convention on Jurisdictional Immunities of States and their Property (n. 389) art. 2, 1), b), iv).

"identif[ying] the only category of natural persons to be treated as a 'State' for the purposes of the Convention."[1414]

For what concerns the realm of judgment which the ECtHR has not interpreted correctly, the cases of *Samantar v Yousuf*,[1415] *Prosecutor v Blaškić* [1416] and *Djibouti v France*[1417] support my argumentation, although in different ways. As for the first one of them, I refer to what I have already stated and submit what was therein proposed by the USA Supreme Court. The understanding of *Samantar v Yousuf* by the ECtHR is not compelling. For what concerns the *Blaškić* case, that *"such officials are mere instruments of a State and their official action can only be attributed to the State"*[1418] by no means implies the extension of the State immunity to the official or *vice versa*. As it has already been remarked, the uncontested fact that States ultimately act through the physical acts of their own officials only entails that their material actions are performed by the individuals who, because of their capacity, represent the State. The third amongst those cases, as per the reference to its paragraphs 194 and 196,[1419] carries no weight with regard to the issue at hand: the ECtHr refers to *"the possibility [left] open [by the ICJ] to the Djibuti government to claim that the acts of two State officials were its own acts, and that the officials were its organs, agencies or instrumentalities in carrying them out",*[1420]which, even if embraceable, has no effect on the relationship between immunity of States and that of their officials.

My sympathy goes to the dissenting opinion of Judge Kalaydjieva,[1421] who contends what the ECtHR maintained in paragraph 200 of the judgment, and precisely the statement that *"the immunity which is applied in a case against State officials remains "State" immunity: it is invoked by the State and can be waived by the State.*

[1414] Tom Grant, 'Article 2 (1) (*a*) and (*b*)', in: *The United Nations Convention on Jurisdictional Immunities of States and their Property. A Commentary*, Roger O'Keefe and Christian J. Tams (eds.), Assistant Editor Antonios Tzanakopoulos (Oxford University Press, 2013) at 52; see also: Aust (n. 1410) at 149-150.

[1415] *Samantar v Yousuf and others* (n. 1364).

[1416] *Prosecutor v Tihomir Blaškić (Appeals Chamber, Judgment on the Request of The Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997)* IT-95-14, ICTY (29 Oct. 1997) (n. 939).

[1417] ICJ, *Certain Questions of Mutual Assistance in Criminal Matters* (Djibouti v France), Judgment, 4 Jun. 2008, ICJ Reports 2008, p. 177.

[1418] *Prosecutor v Tihomir Blaškić (Appeals Chamber, Judgment on the Request of The Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997)* IT-95-14, ICTY (29 Oct. 1997) (n. 939) para 38.

[1419] *Case of Jones and Others v the United Kingdom* (n. 545) at paras 203 and at 86-87 referring to: ICJ, *Certain Questions of Mutual Assistance in Criminal Matters* (n. 488) para 194, at 196.

[1420] *Case of Jones and Others v the United Kingdom* (n. 545) at para 203.

[1421] *Case of Jones and Others v the United Kingdom* (n. 545) Dissenting Opinion of Judge Kalaydjieva, 62-64.

Where, as in the present case, the grant of immunity ratione materiae to officials was intended to comply with international law on State immunity, then, as in the case where immunity is granted to the State itself, the aim of the limitation on access to a court is legitimate."[1422] I share the concerns raised by Judge Kalaydjieva in this respect, in particular the *"fear that the views expressed by the majority on a question examined by this Court for the first time not only extend State immunity to named officials without proper distinction or justification, but give the impression of also being capable of extending impunity for acts of torture globally."*[1423]

As explained by Dapo Akande, the reason why immunity of State officials and immunity of State cannot be conflated rests on one of the two reasons which justify the former in the first place.[1424] More precisely, according to Dapo Akande, two reasons underlie the concept of immunity of foreign officials: [1425] *i)* it serves the scope of preventing States from outflanking State immunity by bringing State officials to courts; *ii)* it allows State officials to pursue the State's interests without the burden of being responsible for those acts: they will not be attributed personally to the individual, rather to the State on whose behalf they have been performed.[1426] Precisely in the name of this second function, the official will end up being immune for all acts performed in an official capacity, and such acts will necessarily correspond to the acts for which immunity is granted to the State itself.[1427] Metaphorically speaking, State immunity and immunity of State officials are not different branches of the same tree, they are rather independent rivers happening to originate from a common spring: they have different names, flow rates, riverbeds and mouths. This position accepts, of course, some

[1422] *Case of Jones and Others v the United Kingdom* (n. 545) at para 200.

[1423] *Case of Jones and Others v the United Kingdom* (n. 545) Dissenting Opinion of Judge Kalaydjieva, 62-64, at 63.

[1424] Akande, 'US Appeals Court holds that Former Officials Entitled to Immunity in Civil Suit alleging War Crimes' (n. 1399).

[1425] Akande, 'US Appeals Court holds that Former Officials Entitled to Immunity in Civil Suit alleging War Crimes' (n. 1399) also quoting the *MacLeod case* (n. 100) and *Prosecutor v Tihomir Blaškić (Appeals Chamber, Judgment on the Request of The Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997)* IT-95-14, ICTY (29 Oct. 1997) (n. 939) para 38.

[1426] On this function, see also: Sanger (n. 852) at 199, footnote n. 47, mentioning the following State practice to support such statement: *Twycross v Dreyfus* (n. 1380); *Zoernsch v Waldock and another* (n. 1359) 266; *Propend Finance Pty Limited and others v Sing and others* (n. 1403) at 669; and *Chuidian v Philippine National Bank and another* (n. 923).

[1427] Akande Dapo, 'US Appeals Court holds that Former Officials Entitled to Immunity in Civil Suit alleging War Crimes' (n. 1399).

underlying elements which both types of immunity feature (the spring) but also appreciates the intrinsic authenticity the rivers gain as they flow towards their own deltas. Still within the same metaphor, while there can only be one tree, for as many branches as it may have, contrariwise, the two rivers will flow independently, regardless of their common origin.

In light of the above, considering the customary nature of the issue at present[1428] and bearing in mind that this dissertation will not indulge more in depth into this issue, may the above-stated suffice in order to clarify that the basic assumption of this work is that immunity of States and immunity of State officials are different in nature and substance.

b. Criminal law applies to individuals only, not to States

"Criminal liability is personal. A state does not commit crimes."[1429] While domestic orders usually take it for granted that criminal responsibility is applicable to individuals only,[1430] it seems more difficult to translate the same concept onto the international legal plane. But it is precisely because of the substantive law – not the procedural law of immunities - that a State cannot be adjudicated by another State's criminal court.[1431] In light of the most recent developments, whether a State can engage in the commission of a crime is still debated, if one considers the international legal plane, while it is mostly rejected in so far as the domestic legal orders are concerned.[1432] However, one should remember that there is no such thing as proper "criminal law on the international legal plane"; individual responsibility is considered by international law in specific cases: [1433] within the sphere of international criminal law (which has nowadays developed as an autonomous branch of international law),[1434] with that of

[1428] Douglas (n. 1358) at 283.

[1429] *Pinochet No. 3* (n. 1167) at 152, para H, Alun Jones Q.C., Christopher Greenwood, James Lewis and Campaspe loys- Jacob for the appellants.

[1430] Cf, for example: Italy, Constitution (1947), art. 27 (1).

[1431] Fox and Webb, *The law of State Immunity* (n. 480) at 21.

[1432] See, for instance, the analysis of: Fox and Webb, *The law of State Immunity* (n. 480) at 91-95.

[1433] Douglas (n. 1358) at 324.

[1434] See, as general references: Douglas Guilfoyle, *International criminal law* (Oxford University Press, 2016); O'Keefe, *International Criminal Law* (n. 748); Antonio Cassese, *International Criminal Law* (Oxford University Press, 2013); William Schabas (ed.), *The Cambridge companion to international criminal law* (Cambridge University Press, 2016).

international humanitarian law, with that of international human rights law norms which have gained the status of customary norms or within the domestic criminal order of every national legal system. While both address the responsibility of the individual from the lens of criminal charges, international crimes and domestic criminality must not be conflated.[1435] For the purpose of this work, and of the analysis of *Khurts Bat* judgment in particular, I am focusing on domestic criminal systems. National systems may play a striking role for the advancement of international law – mostly on the side of State practice. Indeed, national courts may oftentimes be requested to make use of concepts of "pure" public international law: and when they will do so, whether they do it consciously or not, they will contribute to the (progressive or regressive) development of public international law.[1436] It is paramount, indeed, that domestic fora fully appreciate and understand the content of public international law norms, in order to apply them correctly in their national legal systems.[1437]

The main underlying assumption is that, for what concerns the responsibility of individuals, there is a strict distinction between civil and criminal law. This is also acknowledged by those authors who suggest that the distinction between criminal and civil proceedings within the context of immunity of State officials is an unnecessary – and unjustified – distinction.[1438]

The reason why I am here taking criminal responsibility into consideration – even if with limited purpose - is because of its interplay with immunity. The assumption, for instance, that a State could be *immune from criminal jurisdiction*[1439] implies the acceptance that, in theory, it could be *subject to criminal jurisdiction* in the first place. Indeed, recalling what has been stated in the first part of this dissertation, jurisdiction precedes immunity.[1440] But since there is no such thing as criminal

[1435] See, for example: Douglas (n. 1358) at 326-330.

[1436] On the difference of immunities in the international legal plane and in the municipal legal systems, see: Roger O' Keefe, 'Khurts Bat v Investigating Judge of the German Federal Court, 29 July 2011, [2011] EWHC 2029 (Admin), [2012] 3WLR 180, 147 ILR 633 (QBD (Div. Ct))' in: 'Decisions of British Courts during 2011 Involving Questions of Public or Private International Law, A. Public International Law' (2012) 82 BYIL, 564, 613 at 626-627.

[1437] For a more in-depth analysis of how international law is deployed in domestic jurisdiction, see: George Slyz, 'International Law in National Courts', in *International Law Decisions in National Courts*, Thomas M. Franck and Gregory H. Fox (eds.) (Transnational Publishers, 1996) at 71-106.

[1438] Douglas (n. 1358) at 302.

[1439] See, for instance: Sanger (n. 852) at 200.

[1440] Cf. Part 1, Chapter 1 of the present dissertation.

jurisdiction over a State, because a sovereign State cannot engage in criminal activities and is not a subject of criminal law,[1441] no room is left for the assessment of its immunity from criminal proceedings.

However, one has to admit that international scholars may have been using the expression *"State immunity from criminal prosecution"*[1442] not in its literal sense.[1443] In that when they did so they did not interpret the immunity of the sovereign State before a criminal court literally, rather they employed the concept of immunity of State officials *"as a corollary of the rule of State immunity".*[1444] In other words, it is this author's understanding that the phrase *"State immunity from criminal prosecution"* more precisely was to be interpreted as "State officials' immunity from criminal prosecution – as a derivative of State immunity."

Anyhow, criminal law is only applicable to individuals, not to States. In the words of Franey: *"[a] state can be liable under civil law, but it cannot be prosecuted, whereas criminal liability is the liability of an individual for his own unlawful actions".*[1445] This is confirmed by State practice, which in some cases expressly excludes the applicability of State immunity from criminal proceedings, [1446] while in other cases implicitly accepts that States are not subjects of domestic criminal law.[1447] Equally, *"international law does not criminalize the conduct of States."*[1448] Or, in

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[1441] Franey, *Immunity, Individuals and International Law. Which Individuals are Immune from the Jurisdiction of National Courts under International Law* (n. 504) at 17.

[1442] Sanger (n. 852) at 200.

[1443] See also: O'Keefe, 'Khurts Bat v Investigating Judge of the German Federal Court, 29 July 2011, [2011] EWHC 2029 (Admin), [2012] 3WLR 180, 147 ILR 633 (QBD (Div. Ct))' in: 'Decisions of British Courts during 2011 Involving Questions of Public or Private International Law, A. Public International Law' (n. 1436) at 626.

[1444] Van Alebeek, *The immunity of States and their Officials in International Criminal Law and International Human Rights Law* (n. 504) at 103.

[1445] Elizabeth Helen Franey, Immunity from the criminal jurisdiction of national courts, in Alexander Orakhelashvili (ed.) *Research Handbook on Jurisdiction and Immunities in International Law* (Edward Elgar, 2015) 205-252, at 207.

[1446] Sanger (n. 852) at 201, referring to: Argentina, Statute on the Immunity of Foreign States from the Jurisdiction of the Argentinean Courts (n. 635); Australia, Foreign States Immunities Act (n. 411) s 3 (1); Canada, State Immunity Act (n. 412); Israel, Foreign States Immunity Law (n. 664), s 2; Japan, Act on the Civil Jurisdiction of Japan with respect to a Foreign State (n. 657), art. 1; Pakistan, State Immunity Ordinance (n. 409) s 17(2)(b); Singapore, State Immunity Act (n. 408) s 19 (2)(b); South Africa, Foreign States Immunity Act (n. 410) s 2(3); United Kingdom, State Immunity Act (n. 407) s 16(4); see also: United Nations Convention on Jurisdictional Immunities of States and their Property (n. 389) art. 2 (e).

[1447] Sanger (n. 852) at 201, mentioning: United States of America, Foreign States Immunities Act (n. 635) s 1605; see also: European Convention on State Immunity (n. 562).

[1448] Sanger (n. 852) at 201, mentioning: ICJ, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Bosnia and Herzegovina v Serbia and Montenegro), Judgment, 26 Feb. 2007, ICJ Reports

others' view, international law does not even fall under the civil/criminal categories and basically implies a *tertium genus* of *"single undifferentiated concept of responsibility".*[1449]

But by no means either position contend that a State is to be held criminally liable.

c. Concluding remarks

Even though the reasoning of their Lordships in the case of Khurts Bat did not approach the issue as a matter of territorial "offence" exception, their final findings show that they *i)* acknowledged its existence; and *ii)* deemed it applicable to the case at hand. By effect of the application of a territorial "offence" exception, Mr. Bat was not granted immunity from criminal prosecution in a foreign country.[1450]

I agree with Professor O'Keefe,[1451] and with their Lordships,[1452] that the analysis of immunity *ratione materiae* could not be properly dealt with for the superficial and time-constrained way it was brought to the court. I cannot take advantage of the reasoning and arguments which the parties would have raised in favour and *contra* immunity. However, the judgment reached a conclusion, whatever way it took to get there. That very conclusion affected the law of immunities on the international plane. And it is precisely that conclusion, and its effects on international law, that I am called to consider.

2007, p. 43, para 170ff; and *Prosecutor v Tihomir Blaškić (Appeals Chamber, Judgment on the Request of The Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997)* IT-95-14, ICTY (29 Oct. 1997) (n. 939) para 25.

[1449] James Crawford, *Brownlie's Principles of Public International Law* (Oxford University Press, 2012) at 542; see also: Sanger (n. 852) at 201; Douglas (n. 1358) at 302; DARS (n. 260) with commentaries, art. 12; James Crawford and Simon Olleson, 'The character and forms of International Responsibility' in Malcolm D Evans (ed.) *International Law* (Oxford University Press, 2014) at 449.

[1450] Thiago Braz Jardim Oliveira, 'State Immunity and Criminal Proceedings: Why Foreign Officials Cannot Enjoy Immunity *Ratione Materiae* from the Legal Process of Extradition', (2014) 57 Germ Yrbk Intl L, 477 at 490.

[1451] O'Keefe, 'Khurts Bat v Investigating Judge of the German Federal Court, 29 July 2011, [2011] EWHC 2029 (Admin), [2012] 3WLR 180, 147 ILR 633 (QBD (Div. Ct))' in: 'Decisions of British Courts during 2011 Involving Questions of Public or Private International Law, A. Public International Law' (n. 1436) at 627.

[1452] *Khurts Bat v Investigating Judge of the Federal Court of Germany* (n. 28) para 69 at 370 and para 105 at 377.

Certainly, the reliance of LJ Moses on the giving of consent by the territorial State,[1453] in line with the former Special Rapporteur on the matter, Mr. Kolodkin,[1454] displays a *lacuna* of absolute criteria according to which a territorial "offence" exception could be applied. The following sections will advance feasible ways to fill – or maybe not fill – the *lacuna*.

[1453] *Khurts Bat v Investigating Judge of the Federal Court of Germany* (n. 28) paras 96-99 at 375-376; see also Professor O'Keefe's contention that the forum State is the State of extradition, as opposed to what assumed in Khurts Bat: Roger O'Keefe, 'Immunity ratione materiae from extradition proceedings: A rejoinder to Thiago Braz Jardim Oliveira' in EJIL: Talk!, 5 Sep. 2013, available at: <www.ejiltalk.org/immunity-ratione-materiae-from-extradition-proceedings-a-rejoinder-to-thiago-braz-jardim-oliveira/>, last accessed 31 Oct. 2017.

[1454] Second Report, Kolodkin (n. 419) para 94 (p) at 59-60.

IV. Does international law conceive of a territorial "offence" exception?

The analysis carried out in the previous sections was meant, ultimately, at the assessment of whether or not: *i)* a rule of territorial "offence" exception could be claimed to exist within the current system of public international law; *ii)* if so, what status the rule has achieved at present – and, more specifically, whether or not it amounts to a norm of customary nature.

It seems that what was in the previous chapters limited to a territorial "offence" exception (where "offence" in inverted commas only implied a possible, vaguely feasible legal concept to be attached to the notion of territorial exception to immunity within the criminal sphere) is legitimately allowed to be understood under such nomenclature. This phrase does in fact comprehend the two fundamental criteria which define the concept: on the one hand, it circumscribes the concept within the sphere of a *territorial* exception, on the other hand it differentiates it from its counter-part in the civil law sphere.

Despite the previous sections showing numerous inconsistencies in the domestic and international courts' stance with regard to the territorial "offence" exception, the exception has been applied in some contexts, and specific features have emerged from its employment. From this to say that the territorial "offence" exception has already evolved into a stable and solid notion would be too much of a hazard, to say the least. Some content is undisputably emerging, but it is emerging in a very slow, blurred and vague way.

While most of its above-described features are derived in analogy with its civil/State immunity counterpart, as for the rationale, the territorial "offence" exception could potentially be able to rest on a self-standing justification. Without claiming to be complete, it might be interesting to note that a possible rationale could be a "remedial" one: the territorial "offence" exception could serve both as a means of "access to justice" and "substantive redress"[1455] for victims of acts falling into a specific category. This is not the right place nor the right time to postulate whether this rationale may make any sense in the present matter: the scientific and pragmatic approach I have chosen to apply demands me to understand the status of the exception at present, not what it could – or will - look like in hypothetical or future places and times.[1456] The international jurist can describe what international law has been, try to

[1455] On "the dual meaning of remedies", see: Dinah Shelton, *Remedies in international human rights law* (Oxford University Press, 2015) at 16-19.

[1456] On the interaction between human rights norms and the law of immunities, see, for instance: Keitner, 'Transnational Litigation: Jurisdiction and Immunities' (n. 66) at 794-814.

understand what it is now and maybe elaborate some options as to what it could (or should) evolve into. That we can discuss about it in no way means that international law does, in fact, conceive of a territorial "offence" exception. Indeed, it is inaccurate to infer, from the existance of an abstract notion of territorial "offence" exception, its concrete existance and application within the up-to-date system of public international law. That I can talk about it in abstract terms cannot – and does not – equate to saying that international law encompasses, understands and applies the concept according to one precise and clear definition.

It would necessarily follow from the above that, because the exception does not exist in the present system of public international law, then similarly and more so, it cannot have reached the rank of customary international law. Which remains correct and uncontended. It seems, notwithstanding, interesting to indulge in a further analysis on why the territorial "offence" exception cannot be treated as international custom. Indeed, by studying why the exception cannot fall under art. 38, let. b) of the ICJ Statute,[1457] I would like to demonstrate the wrongfulness of all attempts aimed at proving that *i)* the exception exists as an unequivocal concept in public international law and that *ii)* it has now become international custom.

[1457] ICJ Statute (n. 403) art. 38, let. b).

V. Does the territorial "offence" exception constitute a norm of a customary nature?

"It is probably a universal characteristic of human societies that many practices which have grown up to regulate day-to-day relationships imperceptibly acquire a status of inexorability: the way things have always been done becomes the way things must be done."[1458] Those many practices then evolved into the juridical notion of international custom, which characterizes a democratic and decentralized international arena, where the participants build and demolish their own rules.[1459]

While this dissertation has no aim of being complete nor exhaustive with regard to the complex issue of the nature and assessment of customary international law, it seems reasonable to analyse at least the most recent developments and understanding of the issue, in order to determine whether or not the territorial "offence" exception amounts to that rank of norm. To this end, the above-illustrated citation seems to summarize the essential rationale which justifies the peculiar role of customary rule amongst the sources of international law.

Customary international law is an expression which indicates both the very process aimed at the formation of some type of rules within the system of international law and the rules themselves which are the result of such process.[1460] Despite being the oldest source of international law, it is also the most suitable to apt to the changes of time and evolution of the system.[1461] It is, thus, fair to say that custom is the most dynamic source of international law[1462] and accepted as its core source.[1463] Art. 38 of the ICJ Statute is quite clear in substantiating the two elements of international custom as: *i)* general practice ("State practice") and *ii)* accepted as law ("*opinio juris sive necessitatis*")[1464] and the dual nature of international customary rules is widely appreciated.[1465] It is this author's opinion that the two pronged understanding of

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[1458] Hugh Thirlway, 'The sources of international law', in Malcolm D. Evans (ed.), *International Law* (Oxford University Press, 2014) at 97.

[1459] Shaw (n. 38) at 52.

[1460] Tullio Treves, 'Customary International Law' in Rüdiger Wolfrum (ed.) *The Max Planck Encyclopedia of Public International Law, Volume II* (Oxford University Press, 2012) at 938.

[1461] Currie, Forcese, Harrington, Oosterveld (n. 1407) at 116.

[1462] Shaw (n. 38) at 52.

[1463] Koskenniemi (n. 151) at 389; for in depth analysis of custom see pages 388-473 of the same book.

[1464] ICJ Statute (n. 403) art. 38, let. b).

[1465] See, for example: Currie, Forcese, Harrington, Oosterveld (n. 1407) at 116-127; Treves (n. 1460) at 941; see also the materials provided in: Martin Dixon, Robert McCorquodale and Sarah Williams, *Cases and Materials on International Law* (Oxford University Press, 2016) at 25-32.

international custom does not clash with the tripartite approach taken by Brownlie, in that the elements identified in the latter theory (namely: *"i) duration and consistency of practice; ii) generality of practice; iii) 'accepted as law': opinio [j]uris sive necessitates"*[1466]) reflect, in substance, the bifurcation proposed by the most accepted doctrinal works. For the purpose of this work and mainly for reasons of simplicity, I will then prefer the bipartite approach.[1467] According to this theory, the elements were traditionalliy identified, respectively, as a material element and a psychological element.[1468] The approach has been defined as "inductive", rather than "deductive", for it derives the elements through an empirical, somewhat "case by case", methodology.[1469] This also implies that evidence must be evaluated carefully and with regard to all available means at a given time[1470] and attention must be paid to the particular circumstances governing a certain situation.[1471] I do also agree with the study of the ILC that the nature of the rule whose assessment is to be made also influences the whole process, particularly when prohibitive rules are dealt with.[1472] It is this author's suggestion, however, that the territorial "offence" exception does not qualify as a prohibitive rule since, when it is applied, it restores the exercise of jursidction which the application of immunity would have barred.

However, those definitions proved hard to be applied and, for this reason, the identification of customary international law has been the object of study of the ILC since 2012.[1473] International custom is displayed in variable and unstable forms. Indeed, the large part of scholars who attempted at identifying those instances, mainly suggested lists of non-exhaustive examples.[1474]

As already said, this study is not meant at providing an overriding understanding of the evolution and the current content of the notion of international custom. However, in order to understand whether or not the territorial "offence" exception has reached such rank of source

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[1466] Crawford, *Brownlie's Principles of Public International Law* (n. 1449) at 24-27.

[1467] On the two-element theory, see also: Thirlway (n. 1458) at 98-100.

[1468] See, for instance: Koskenniemi (n. 151) at 410.

[1469] ILC Report, 2016, A/71/10 (n. 753) Chapter V, paras 50-63, Part 2, para 63, at 84, Commentary to Conclusion 2, at para 5.

[1470] ILC Report, 2016, A/71/10 (n. 753) Chapter V, paras 50-63, Part 2, para 63, at 85, Commentary to Conclusion 3, at para 2.

[1471] ILC Report, 2016, A/71/10 (n. 753) Chapter V, paras 50-63, Part 2, para 63, at 86, Commentary to Conclusion 3, at para 5.

[1472]ILC Report, 2016, A/71/10 (n. 753) Chapter V, paras 50-63, Part 2, para 63, at 86, Commentary to Conclusion 3, at para 4.

[1473] ILC Report, 2016, A/71/10 (n. 753) Chapter V, paras 50-63, at para 50, at 74.

[1474] See, for example: Crawford, *Brownlie's Principles of Public International Law* (n. 1449) at 24.

of international law, some key features of this notion must be appreciated. The most recent developments are to be understood throught the studies undertaken by the ILC in this regard. At present, international custom is to be assessed at the occurrence of two criteria, each of which must be ascertained separately, on the basis of specific evidence.[1475] While, indeed, the same material may provide for hints in favour or against the existence of both elements, yet they must be assessed individually.[1476]

As for the general practice, also understood as the *"material or objective element"*,[1477] this must be *"sufficiently widespread and representative, as well as consistent"*[1478], with no particular requirement as to the temporal duration.[1479] The requirement of generality is, accordingly, articulated in the two above-illustrated requirements: *"[f]irst, the practice must be followed by a sufficiently large and representative number of States [;] [s]econd, such instances must exhibit consistency."*[1480] As for the satisfaction of the requirements, not much can be said in theory on the abstract level, as they need to be established in practice, on a case-by-case basis.[1481] It is interesting to note that consistency does not require completeness, but is rather satisfied by uniformity.[1482] Along the same line, a breach of the customary rule does not necessarily qualify an inconsistency,[1483] rather it can confirm the existence of the very rule in the first place. One may oftentimes be called to the challenging distinction of *"mere abstention from protest"*[1484] towards a settled or settling State practice.

[1475] ILC Report, 2016, A/71/10 (n. 753) Chapter V, paras 50-63, Conclusion 3, para 2, Text of the draft conclusions on identification of customary international law adopted by the Commission, para 62, at 76.

[1476] ILC Report, 2016, A/71/10 (n. 753) Chapter V, paras 50-63, Part 4, para 63, at 99, Commentary to Conclusion 10, at para 3.

[1477] ILC Report, 2016, A/71/10 (n. 753) Chapter V, paras 50-63, Part 4, para 63, at 87, Part 3, Commentary.

[1478] ILC Report, 2016, A/71/10 (n. 753) Chapter V, paras 50-63, Conclusion 8, para 1, Text of the draft conclusions on identification of customary international law adopted by the Commission, para 62, at 77.

[1479] ILC Report, 2016, A/71/10 (n. 753) Chapter V, paras 50-63, Conclusion 8, para 2, Text of the draft conclusions on identification of customary international law adopted by the Commission, para 62, at 77; see also: ICJ, *North Sea Continental Shelf cases* (Federal Republic of Germany v Denmark, Federal Republic of Germany v Netherlands) Judgment, 20 Feb. 1969, I.C.J. Reports 1969, p. 3, at p. 43, para 74; ILC Report, 2016, A/71/10 (n. 753) Chapter V, paras 50-63, Part 4, para 63, at 96, Commentary to Conclusion 8, at para 9; Crawford, *Brownlie's Principles of Public International Law* (n. 1449) at 24-25.

[1480] ILC Report, 2016, A/71/10 (n. 753) Chapter V, paras 50-63, Part 4, para 63, at 94, Commentary to Conclusion 8, at para 2.

[1481] ILC Report, 2016, A/71/10 (n. 753) Chapter V, paras 50-63, Part 4, para 63, at 94, Commentary to Conclusion 8, at paras 3, 4.

[1482] ILC Report, 2016, A/71/10 (n. 753) Chapter V, paras 50-63, Part 4, para 63, at 96, Commentary to Conclusion 8, at para 7; see also, for instance: Richard K. Gardiner, *International Law* (Longman, 2003) at 103.

[1483] ILC Report, 2016, A/71/10 (n. 753) Chapter V, paras 50-63, Part 4, para 63, at 96, Commentary to Conclusion 8, at para 8.

[1484] Crawford, *Brownlie's Principles of Public International Law* (n. 1449) at 25.

General practice is primarily meant as the *"all available"* [1485] State practice, even though in some cases also the practice of international organizations can be considered relevant.[1486] The practice of other actors may only contribute to the assessment of practice of States and international organizations, but not be relevant practice in itself.[1487] Quite obviously, additionally, the ILC commentary explains that the more comparable the conducts considered, the more reliable the assessment of international custom.[1488] On a general basis it is fair to say that the general practice remains primarily assessed on the basis of State practice.[1489] Appying the principle of unity of the State,[1490] the ILC Draft conclusions on identification of customary international law also add that any such exercise of State authority (whether executive, legislative, judicial or of other nature) constitutes State practice.[1491] The most critical issue concerning the notion of State practice is the actual form practice may take to become manifest. Conclusion n. 6 of the Draft conclusions on identification of customary international law adopted by the ILC in 2016 only offers an illustrative – though not exhaustive nor comprehensive - example of what should be considered a form of State practice.[1492] It is important to note that executive conduct, legislative and administrative acts and decisions of national courts are all included in the list.[1493] However, one must consider that national courts' decisions have a dual role, qualifying both as State practice, on the one hand, and as subsidiary means, on the other one.[1494]

[1485] ILC Report, 2016, A/71/10 (n. 753) Chapter V, paras 50-63, Conclusion 7, para 1, Text of the draft conclusions on identification of customary international law adopted by the Commission, para 62, at 77.

[1486] ILC Report, 2016, A/71/10 (n. 753) Chapter V, paras 50-63, Conclusion 4, paras 1-2, Text of the draft conclusions on identification of customary international law adopted by the Commission, para 62, at 76.

[1487] ILC Report, 2016, A/71/10 (n. 753) Chapter V, paras 50-63, Conclusion 4, para 3, Text of the draft conclusions on identification of customary international law adopted by the Commission, para 62, at 76.

[1488] ILC Report, 2016, A/71/10 (n. 753) Chapter V, paras 50-63, Part 4, para 63, at 95, Commentary to Conclusion 8, at para 6.

[1489] ILC Report, 2016, A/71/10 (n. 753) Chapter V, paras 50-63, Part 3, para 63, at 88, Commentary to Conclusion 4, at para 2.

[1490] ILC Report, 2016, A/71/10 (n. 753) Chapter V, paras 50-63, Part 3, para 63, at 90, Commentary to Conclusion 5, at para 1.

[1491] ILC Report, 2016, A/71/10 (n. 753) Chapter V, paras 50-63, Conclusion 5, Text of the draft conclusions on identification of customary international law adopted by the Commission, para 62, at 76.

[1492] ILC Report, 2016, A/71/10 (n. 753) Chapter V, paras 50-63, Conclusion 6, paras 1-3, Text of the draft conclusions on identification of customary international law adopted by the Commission, para 62, at 77.

[1493] ILC Report, 2016, A/71/10 (n. 753) Chapter V, paras 50-63, Conclusion 6, para 2, Text of the draft conclusions on identification of customary international law adopted by the Commission, para 62, at 77.

[1494] ILC Report, 2016, A/71/10 (n. 753) Chapter V, paras 50-63, Part 3, para 63, at 92, Commentary to Conclusion 6, at para 6.

It is interesting to note that it was precisely within the context of the territorial tort exception to State immunity from foreign domestic jurisdiction that the ICJ had the opportunity to recall the importance of considering the practice at hand *"as a whole"*.[1495] Moreover, for as redundant as it may sound, one must also consider that divergent practice within the same State reduces the reliability of that practice for the assessment of international custom.[1496]

As for the *opinio juris sive necessitatis*, this shall be distinguished from *"mere usage or habit"*[1497] because of the sense of legal right or obligation which accompanies State practice.[1498] The concept is characterized by an idea of normativity, even though – in lack of precise requirements – the ICJ itself took at times more stringent or more stretched approaches for the determination of whether or not a certain practice amounted to *opinio juris*.[1499] The acceptance of the right or of the obligation as law is what characterizes the international custom. As for the forms that the legally binding characterization may take, same as for the general practice, the ILC provides for a merely explanatory list of forms of evidence as law, which include, *inter alia*: decisions of national courts and *"conduct in connection with resolutions adopted by an international organization or at an intergovernmental conference"*.[1500] Interestingly enough, also *"failure to react over time practice"*[1501] can be considered evidence of *opinio juris* if the given State was placed in the position to react and the situation required

[1495] ILC Report, 2016, A/71/10 (n. 753) Chapter V, paras 50-63, Part 3, para 63, at 93, Commentary to Conclusion 7, at para 3; see: ICJ, *Jurisdictional Immunities of the State* (n. 551) para 76, at 134; see also: ICJ, *Military and Paramilitary Activities in and against Nicaragua* (Nicaragua v United States of America), Merits, Judgment, 27 Jun. 1986, ICJ Reports 1986, p. 14, at 98, para 186.

[1496] ILC Report, 2016, A/71/10 (n. 753) Chapter V, paras 50-63, Conclusion 7, para 2, Text of the draft conclusions on identification of customary international law adopted by the Commission, para 62, at 77; ILC Report, 2016, A/71/10 (n. 753) Chapter V, paras 50-63, Part 3, para 63, at 93-94, Commentary to Conclusion 7, at paras 4 and 5.

[1497] ILC Report, 2016, A/71/10 (n. 753) Chapter V, paras 50-63, Conclusion 9, para 2, Text of the draft conclusions on identification of customary international law adopted by the Commission, para 62, at 77; on the difference between custom and usage, see also: Crawford, *Brownlie's Principles of Public International Law* (n. 1449) at 23-24.

[1498] ILC Report, 2016, A/71/10 (n. 753) Chapter V, paras 50-63, Conclusion 9, para 1, Text of the draft conclusions on identification of customary international law adopted by the Commission, para 62, at 77; see also, on the idea of a *"conscience juridique internationale"*, see: Giuseppe Barile, 'La structure de l'ordre juridique international. Règles générales et règles conventionnelles' (1978) III 161 RCADI, 19, specifically at 23 et seq. and at 48 et seq.

[1499] Crawford, *Brownlie's Principles of Public International Law* (n. 1449) at 25-27.

[1500] ILC Report, 2016, A/71/10 (n. 753) Chapter V, paras 50-63, Conclusion 10, para 2, Text of the draft conclusions on identification of customary international law adopted by the Commission, para 62, at 77.

[1501] ILC Report, 2016, A/71/10 (n. 753) Chapter V, paras 50-63, Conclusion 10, para 3, Text of the draft conclusions on identification of customary international law adopted by the Commission, para 62, at 77.

some reaction to be taken.[1502] Additional provisions deal with the role specific materials have in the identification of customary international law. While treaties[1503] and resolutions of international organizations and intergovernmental conferences[1504] do not carry much weigh for the preset work, decisions of courts and tribunals,[1505] on the one hand, and teachings,[1506] on the other one, shall be regarded with specific attention. Conclusion n. 13 of the ILC Draft Conclusions on Identification of Customary International Law accepts that the judgments of national and international courts, particularly those of the ICJ, must be considered subsidiary means towards the identification of international custom.[1507] Also the teachings of most eminent scholars may have the same role to the same end.[1508]

Separate consideration is given to persistent objectors[1509] and particular customary international law.[1510]

While the evaluation of State practice is more of a quantitative basis, in that it requires the interpreter to verify how recurrent and consistent a certain practice has been worldwide, major problems arise with regard to establishing what exactly must be understood as *opinio juris*. The perception of normativity one State party attaches to a specific practice requires a subtle investigation which does not rest on stable criteria. While the approach of the ICJ has varied through the years,[1511] even the wording of the ILC seems of little help and, at the very best, tautological. It is first of all very difficult to determine whether or not a State – that, naturally, acts through its State officials – can display precisely a *"subjective" or*

[1502] ILC Report, 2016, A/71/10 (n. 753) Chapter V, paras 50-63, Conclusion 10, para 3, Text of the draft conclusions on identification of customary international law adopted by the Commission, para 62, at 77.
[1503] ILC Report, 2016, A/71/10 (n. 753) Chapter V, paras 50-63, Conclusion 11, Text of the draft conclusions on identification of customary international law adopted by the Commission, para 62, at 78.
[1504] ILC Report, 2016, A/71/10 (n. 753) Chapter V, paras 50-63, Conclusion 12, Text of the draft conclusions on identification of customary international law adopted by the Commission, para 62, at 78.
[1505] ILC Report, 2016, A/71/10 (n. 753) Chapter V, paras 50-63, Conclusion 13, Text of the draft conclusions on identification of customary international law adopted by the Commission, para 62, at 78.
[1506] ILC Report, 2016, A/71/10 (n. 753) Chapter V, paras 50-63, Conclusion 14, Text of the draft conclusions on identification of customary international law adopted by the Commission, para 62, at 78.
[1507] ILC Report, 2016, A/71/10 (n. 753) Chapter V, paras 50-63, Conclusion 13, paras 1-2, Text of the draft conclusions on identification of customary international law adopted by the Commission, para 62, at 78.
[1508] ILC Report, 2016, A/71/10 (n. 753) Chapter V, paras 50-63, Conclusion 14, Text of the draft conclusions on identification of customary international law adopted by the Commission, para 62, at 78.
[1509] ILC Report, 2016, A/71/10 (n. 753) Chapter V, paras 50-63, Conclusion 15, Text of the draft conclusions on identification of customary international law adopted by the Commission, para 62, at 79.
[1510] ILC Report, 2016, A/71/10 (n. 753) Chapter V, paras 50-63, Conclusion 16, Text of the draft conclusions on identification of customary international law adopted by the Commission, para 62, at 79.
[1511] Crawford, *Brownlie's Principles of Public International Law* (n. 1449) at 26-27.

"psychological"[1512] will and, even so, it is much harder to assess whether the element pertains to the individual or to the State itself. In the words of the ICJ, *"the States […] must therefore feel that they are conforming to what amounts to a legal obligation."*[1513] Which, taken to the extreme, entails that a certain rule acquires customary – and, thus, worldwide mandatory – nature, precisely if and when it is perceived to be as such by the States in the first place. So that, quite interestingly, only when they are persuaded to be compelled (or prohibited) to act in a certain way, the underlying obligation becomes mandatory upon themselves and the entire international community. The legal nature of the motives which underlie States' action differentiate *opinio juris sive necessitates* from sources of non-customary nature, which are driven by reason of comity, habit, convenience or political interest.[1514] This has also been confirmed on various occasions by the PICJ[1515] and the ICJ.[1516] Conclusion n. 10 of the Draft Conclusions on Identification of Customary International Law adopted by the ILC is of some assistance in the identification of at least some of the most common forms of *opinio juris*, which also include: decisions of national courts pronouncing on international law matters,[1517] national legislation, particularly where it is expressly stated that it applies international custom[1518] and States' conduct as effect of multilateral drafting and diplomatic processes.[1519]

However, it must also be noted that judicial decisions – both national and international – are also taken into account as the additional material considered for the assessment of international custom amongst treaties, resolutions of internationational organizations and conferences and works of sholars.[1520]

[1512] ILC Report, 2016, A/71/10 (n. 753) Chapter V, paras 50-63, Part 4, para 63, at 96.

[1513] ICJ, *North Sea Continental Shelf cases* (n. 1479) at p. 44, para 77.

[1514] ILC Report, 2016, A/71/10 (n. 753) Chapter V, paras 50-63, Part 4, para 63, at 97, Commentary to Conclusion 9, at para 3.

[1515] PCIJ, *The S. S. Lotus* (n. 41), Judgment of 7 September 1927, at p. 28.

[1516] ICJ, *Colombian-Peruvian asylum case*, Judgment, 20 Nov. 1950, I.C. J. Reports 1950, p. 266, at 277 and 286; ICJ, *Military and Paramilitary Activities in and against Nicaragua*, Merits (n. 1495) at 108-110, paras 206-209.

[1517] ILC Report, 2016, A/71/10 (n. 753) Chapter V, paras 50-63, Part 4, para 63, at 100, Commentary to Conclusion 10, at para 5.

[1518] ILC Report, 2016, A/71/10 (n. 753) Chapter V, paras 50-63, Part 4, para 63, at 100, Commentary to Conclusion 10, at para 5.

[1519] ILC Report, 2016, A/71/10 (n. 753) Chapter V, paras 50-63, Part 4, para 63, at 100, Commentary to Conclusion 10, at para 6.

[1520] ILC Report, 2016, A/71/10 (n. 753) Chapter V, paras 50-63, Part 5, at 101, Commentary, at para 1.

In addition to this, toleration of a certain practice in cases where *i)* a reaction to the practice was to be expected[1521] and *ii)* the State was in the position to react[1522] may display a development of *opinio juris*.[1523] In the *Fisheries case* the ICJ also supported this stance,[1524] aligning with the position of the PICJ in the *Lotus case*.[1525]

Decisions of courts and tribunals are more closely considered under ILC Conclusion n. 13, which regards both as subsidiary means for the identification of international custom.[1526] Consistently, those judgments carry a double role: on the one hand, they may directly contribute to the determination of *opinio juris*, while they may, on a different level, constitute subsidiary means to the same end.[1527] The extent to which such decisions may contribute to the formation of international norms of customary nature depends largely on how reliable the judgments can be deemed to be.[1528]

The auxiliary role of courts' decisions is also shared by the teachings of scholars, which cannot arise to being a source of customary law themselves but may nevertheless provide for reliable and sure guidance in the assessment of the above-mentioned source of law.[1529] What emerges from the study of the ILC is that the work of scholars, international institutions and other relevant bodies can meaningfully contribute to the establishment of international custom only in so far as they display some consistency, stability and uniformity all over the world, besides the fact that they must obviously be quite relevant also from a quantitative viewpoint.[1530]

[1521] ILC Report, 2016, A/71/10 (n. 753) Chapter V, paras 50-63, Part 4, para 63, at 100, Commentary to Conclusion 10, at para 7.

[1522] ILC Report, 2016, A/71/10 (n. 753) Chapter V, paras 50-63, Part 4, para 63, at 101, Commentary to Conclusion 10, at para 7.

[1523] ILC Report, 2016, A/71/10 (n. 753) Chapter V, paras 50-63, Part 4, para 63, at 100, Commentary to Conclusion 10, at para 7.

[1524] ICJ, *Fisheries Case* (United Kingdom v Norway), Judgment, 18 Dec. 1951, ICJ Reports 1951, p. 116, at 139.

[1525] PCIJ, *The S. S. Lotus* (n. 41) at 29.

[1526] ILC Report, 2016, A/71/10 (n. 753) Chapter V, paras 50-63, Part 4, para 63, Conclusion n. 13, with Commentary, at 109-111, paras 1-7.

[1527] ILC Report, 2016, A/71/10 (n. 753) Chapter V, paras 50-63, Part 4, para 63, Commentary to Conclusion n. 13, at 109, at para 1; on the subsidiary role of judicial decisions, see also: ICTY, *Prosecutor v Zejnil Delalić, Zdravko Mucić also known as "Pavo" Hazim Delić, Esad Landžo also known as "Zenga"*, IT-96-21-T, Judgment, (16 Nov. 1998) at para 414, at p. 152.

[1528] ILC Report, 2016, A/71/10 (n. 753) Chapter V, paras 50-63, Part 4, para 63, Commentary to Conclusion n. 13, at 109, at para 3.

[1529] ILC Report, 2016, A/71/10 (n. 753) Chapter V, paras 50-63, Part 4, para 63, Commentary to Conclusion n. 14, at 111, at paras 1-2.

[1530] ILC Report, 2016, A/71/10 (n. 753) Chapter V, paras 50-63, Part 4, para 63, Commentary to Conclusion n. 14, at 111-112, at paras 3-5.

This analysis does not need to go any more in depth in order to establish whether or not the territorial "offence" exception has gained the status of customary norm on the international legal plane. State practice is not enough consistent nor enough widespread to satisfy the first element which characterizes international custom. As for the *opinio juris*, the requirement is not met either. This is also proven by the fact that, despite the Special Rapporteur's proposal to include *"Crimes that cause harm to persons, including death and serious injury, or to property, when such crimes are committed in the territory of the forum State and the State official is present in said territory at the time that such crimes are committed"*[1531] in draft art. 7 (1) (iii), eventually this paragraph was not adopted as such.[1532] While it is fair to say that there is an abstract, indeterminate understanding of the territorial "offence" exception, which, however, has not evolved into a self-standing legal notion, it is equally fair to say that the exception does not exist in current international law and does not meet the requirements set out for the assessment of international custom.

State practice in support of the customary nature of the exception at hand is merely based upon judicial decisions of national and – scarce – international courts and also upon the work of some scholars. However, this practice, as shown in the previous sections, cannot qualify for the requirements of international custom. It is inconsistent, at time contradictory, uncertain, unevenly applied and in no way displays a steady trend on the States' part. It seems that, precisely with regard to this exception, judicial practical paved the way to fragmentation rather than to unification. Even so, this does not necessarily imply a drawback, as I will try to demonstrate in the following analysis.

That the times are not ready for the observation of an already formed and advanced notion of customary territorial "offence" exception to immunity of State officials from foreign criminal jurisdiction has already been ascertained. Its unsteadiness and inconsistency prove that the exception does not exist in international law at present and that it cannot constitute international custom. The assessment of the territorial "offence" exception must be representative of its current status, not of the wishes and aspirations of the interpreter. The scholar must acknowledge what the notion is today, and from that awareness move onto the elaboration of further theories which could contribute to the evolution of such concept. But

[1531] Fifth Report, Escobar Hernàndez (n. 365) Annex III, at 99.

[1532] ILC, Draft art. 7 provisionally adopted by the Drafting Committee, 10 July, 2017, A/CN.4/L.893 (n. 827); ILC, Provisional summary record, 3378th meeting, 20 July 2017, A/CN.4/SR.3378 (n. 827) at 13; ILC Report, 2017, A/72/10 (n. 753) para 74, at 164.

first and foremost, the interpreter must understand, *sic et simpliciter*, what the reality is now in order to assess what it will be tomorrow, and the day after the tomorrow.

In light of what stated above it is fair to say that the territorial "offence" exception does not exist at present and is not likely to exist in the future, unless major developments in State practice and *opinio juris* in the forthcoming decades will prove the opposite.

Conclusions

The law of immunities represents one of the most challenging and intriguing aspects of public international law. It is, first and foremost, a peculiar field, a field which, in itself, represents an exceptionally dense and complicated area of law. The law of immunity is *per se "the reign of exceptions"*, whose application hinders the enforcement of the general rule which allows the exercise of jurisdiction. To be dealing, within this context, with *"an exception to the exception"* posited even more articulate questions and issues. It was, hence, necessary, in the present dissertation, to set out the main substrate upon which to build a more original work.

The first part of this work had to focus on the general framework of domestic criminal jurisdiction and the way immunity of State officials operates within it. A sound knowledge of the criteria according to which criminal jurisdiction is assessed, the relationship between immunity and jurisdiction and, more importantly, the rationale underlying immunity *ratione personae* and *ratione materiae* represented the first step towards the definition of: *i)* what was worth studying much more in the detail and *ii)* what I felt to be driven to give my personal contribution to.

Through the analysis of many different sources, from institutional books, to journals, blogs and official documentation of international bodies (just to mention some examples) I did in fact begin to discern a grey, blurred area within the law of State officials' immunity, namely, what I qualified as: territorial "offence" exception. The work of the ILC displayed inconsistency and lack of coherence and it has (also) been my task to identify when this represented real problems faced by current international law and when it was, rather, a mere misapplication of the law due to the work of the ILC. With regard to the general understanding of immunity and its territorial nexus the ILC seemed to adopt different positions, which varied according to which subject expressed such view. The Reports of the former and incumbent Special Rapporteurs of the ILC on the issue of immunity of State officials from foreign criminal jurisdiction were not aligned with the discussion within the Commission, nor were they consistent between and within themselves. Also, the application of the territorial "offence" exception varied in great substance from jurisdiction to jurisdiction, which fact also undermined any contention of representative State practice on the matter.

Upon these premises, I carried out analogical studies on the territorial tort exception to State immunity from civil jurisdiction, but also tried to identify specific features which could characterize the territorial "offence" exception within the field of domestic criminal

jurisdiction. Through the close analysis of national (and some time international) case law, practice of the ILC and other UN bodies, through an extensive reading of the work of eminent scholars and experts of both common law and civil law backgrounds, I eventually clarified: *i)* that the exception had been applied in many incongruous and confused ways throughout time and space; and *ii)* that the inaccuracy was due to the underlying assumption that characterized the territorial "offence" exception, namely: that a State official carrying out a crime on the territory of a foreign State would not be immune from the forum State's jurisdiction. Even its nomenclature spanned from a civil-connotated definition (the territorial *tort* exception) to cases where it was applied (or misapplied) without a specific name.

International law necessitated to address more in depth the question of this exception's role, rationale and status – if any –. More relevantly, this study proves that international law is a vivid branch of law, which rests upon certain, uncontested principles. To say that a norm is of a customary nature, the norm must meet some parameteres. If international law wants to- and I am persuaded that it most certainly does – free itself from the erroneous and superficial contentions that it does not constitute proper positive law, then it must make the effort to be extremely accurate, specific and meticulous so that it leaves no room for objections. While I am fully aware that no legal system will ever reach such degree of certainty, yet, because of its nature, international law must engage in that effort more than any other branch of law. The question comes down to "what" is international law then. Who, or what, must apply those very rules in a consistent and sensible manner. In this regard, this dissertation also gave the opportunity to manifestly infer that international law is nothing more – but nothing less – than each and every subject which, in the present case, applied or misapplied the territorial "offence" exception. International law is every single domestic court, and every judge in that court, and every lawyer who is called to the bar within domestic jurisdictions. International law is the practicioner and the academic, regardless of their legal background. This is a different question from that concerning the subjects of international law. This question looks, more plainly, at the application of international law, at the hidden substratum which, ultimately, applies international law at the domestic level. The territorial "offence" exception, and the discussion I encouraged on it, is a credible of example of this: precisely of how international law is applied – and is at the same time created – at domestic level.

Because the critique that international law is not proper law has, in fact, some truth. Indeed, international law is not *just* law, it is much more than that. It is not *just* "*rules*", it is

what has been very wisely qualified as "*process*".[1533] There is a heritage of values, interests and principles which international law translates into legal terms and makes of its own. And it comes – not only but also - directly from those domestic legal systems which apply, and at times misapply, international norms, and in doing so certainly make them. This – I will never stress enough– is the richness of public international law, not its weakness.

The analysis of the territorial "offence" exception also suggests areas of further research which could possibly be carried out by doctoral, post-doctoral and academic studies in the coming decades. Some comprehensive studies could deal with the current draft art. 7 on Immunity of State officials from foreign criminal jurisdiction provisionally adopted by the Drafting Committee and the ILC and provide for an in-depth analysis of the exceptions therein included and the rationale for their inclusion. Additionally, when the consideration of the topic by the ILC will be completed, an overarching analysis of the work of the ILC on the subject will be not only of scientific interest, but of practical need. Indeed, while this work only targeted the territorial "offence" exception, it inevitably overlapped with other conterminous issues dealt with by the ILC within the context of immunity of State officials from foreign criminal jurisdiction. It would, thus, seem essential to clarify on other issues which might remain blurred or uncertain at the end of the ILC consideration of the matter, especially in the event they might clash with other branches of international law such as the law of armed conflicts or international human rights law. Moreover, an up-to-date, overall analysis of the role and mandate of the ILC at present would be highly desirable, particularly with regard to the role of the Special Rapporteurs and their influence on the dyad *lex lata*/*lex ferenda* and on the development of international custom.

In addition to this, territorial criminal jurisdiction should, once and for all, be examined in further studies. Particularly, future challenges may target crimes committed within the contexts of warfare and of cyberlaw where the territorial nexus appears to be – at very best – very uncertain and undetermined.

Which brings me back to the original question, to whether or not international law conceives of a territorial "offence" exception, and which I committed to address with scientific precision and Galilean pragmatism. For what concerns the question strictly, I conclude this work by stating that: *i)* the territorial "offence" exception does not exist in current public international law nor has it reached the rank of international custom; and *ii)* the territorial

[1533] Higgins (n. 226) at 2-12; Webb, *International Judicial Integration and Fragmentation* (n. 738) at 4.

"offence" exception is not likely to exist in the coming decades, unless a major change in State practice will prove the opposite.

More generally, I dare to say that I hope to have encouraged further studies in this amazingly intricated and stimulating system which we call public international law. I hope that my work can be appreciated not only for its findings but also for the future challenges it might trigger within international law, for the scientific approach it pursued and the problematic pattern it followed.

Because, as I have tried to prove, the whole system can be affected by a little floating body.

Which, *albeit, does move*.

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