SEMINAR ON STATES' OBLIGATIONS UNDER PUBLIC INTERNATIONAL LAW
IN RELATION TO IMMUNITY OF STATE OFFICIALS

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THE RELEVANT CASE-LAW OF THE INTERNATIONAL COURT OF JUSTICE

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Speaking notes

I would like to start by thanking very warmly the Romanian Ministry of Foreign Affairs, and especially Ms. Alina Orosan, Director General of Legal Affairs, for their kind invitation to participate in this seminar on States' Obligations in Relation to Immunity of State Officials, a subject of great theoretical and practical (as well as, in some respects, ethical) importance, and of great topicality in view of the ever more precise tensions between the traditional international law of immunities and the impunity imperative put forward by international criminal law and human rights law, which are today in constant evolution. I always enjoy coming back to Bucharest and consider it a rare privilege to enjoy the warm hospitality of this country.

I would also like to warmly thank our chairwoman, Ms. Kaija Suvanto, for her efforts to make this meeting run as smoothly as possible, and for the kind words of introduction she has just given.

My task today is to remind you briefly of the content and scope of the relevant case-law of the International Court of Justice (ICJ). Unfortunately, this case-law is both rather limited and relatively old in an area where, as I mentioned a moment ago, ideas and opinions, but also the conscience, if not of States as a whole, at least of an every time less negligible proportion of them, and above all those of civil society, are evolving rapidly.

The two most directly relevant cases in the jurisprudence of the ICJ are, in order, that of the *Arrest warrant of 11 April 2000 (Democratic Republic of the Congo* v. *Belgium)* and that of *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti* v. *France).* I will examine them in turn.

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1) Case concerning the *Arrest warrant of 11 April 2000 (Democratic Republic of the Congo* v. *Belgium)*

The substance of the dispute related to the issuance, by an investigating Judge of the Brussels *tribunal de première instance,* of an "international arrest warrant *in absentia"* against Mr. Abdoulaye Yerodia Ndombasi, charging him with offences constituting grave breaches of the 1949 Geneva Conventions and Additional Protocols thereto, as well as with crimes against humanity. The arrest warrant was circulated internationally through Interpol (without red notice). At the time the arrest warrant was issued, Mr. Yerodia was the Minister of Foreign Affairs of the Democratic Republic of the Congo (DRC).

The DRC instituted proceedings before the Court on 17 October 2000, requesting it to declare that Belgium should annul the arrest warrant on two different grounds. First, it claimed that, by attributing to itself universal jurisdiction under its 1993 law concerning Punishment of grave breaches of the 1949 Geneva Conventions and the Additional Protocols thereto - as amended in 1999 to include punishment of serious violations of humanitarian international law -, Belgium had breached two important principles of international law, i.e. the principle that a State cannot exercise its authority on the territory of another State and the principle of sovereign equality among all Members of the United Nations (UN). Secondly, the DRC claimed that, by issuing an arrest warrant against Mr. Yerodia while in office, Belgium had acted in violation of the "diplomatic immunity" of an incumbent Minister for Foreign Affairs of a sovereign State.

Later on the same day, the DRC also filed a Request for the indication of provisional measures seeking an Order of the Court for the release of the contested warrant. During the hearings on the Request, Belgium, having informed the Court that, on 20 November 2000, Mr. Yerodia had ceased to be Minister of Foreign Affairs and had been appointed Minister of National Education, claimed that, as a result, the Congo's Application and its Request for provisional measures had been rendered moot and that the case had to be struck from the General List. In its Order of 8 December 2000[2], the Court found that the Application had not been rendered moot, since, one the one hand, the arrest warrant was still in force and targeted the same person, despite his new functions, and, on the other hand, the DRC maintained its claims on the merits. Nor did the Court find that the Request had been deprived of purpose, since the Congo contended that Mr. Yerodia continued to enjoy immunities making the arrest warrant unlawful. However the Court held that, because Mr. Yerodia, as a Minister of Education, would be "less exposed to frequent travel abroad"[3] (emphasis added), it was not established that an irreparable prejudice could be caused in the immediate future to the rights of the Congo nor that the degree of urgency would be such as to warrant the protection of these rights by the indication of provisional measures. The Court nevertheless decided that it was appropriate for it to reach a decision on the DRC's Application "as

[2] *I.C.J. Reports 2000*, p. 182. The authoritative text is the French text.
[3] *Id.,* p. 201, para. 72.

soon as possible"[4].

The Court therefore dealt with the issues of jurisdiction, mootness and admissibility, as well as of merits, together, with the agreement of the Parties, in its judgment of 14 February 2002[5]. The Court rejected the Belgian objections according to which the change which had occurred in the situation of Mr. Yerodia had deprived the Application of its object, had fundamentally transformed the dispute or had conferred on the case the character of an action of diplomatic protection without the individual concerned having exhausted local remedies. On the other hand, the Court upheld Belgium's objection to the effect that it lacked jurisdiction, by virtue of the *non ultra petita* rule, to decide the compatibility with international law of the exercise, bv the Belgian investigating judge, of universal jurisdiction, since the Congo had not maintained that claim in its final submissions; the Court explained that this did not mean, however, that it might not deal with certain aspects of the question in the reasoning of its Judgment. But, even if it is only where a State has jurisdiction under international law in relation to a particular matter that there can be any Question of immunities in regard to the exercise of that jurisdiction, the Court, given the final form of the DRC's submissions, decided to address at the outset the question whether, assuming Belgium had jurisdiction under international law to issue and circulate the arrest warrant of 11 April 2000, it violated, by so doing, the immunities of the then Minister for Foreign Affairs of the Congo.

As is well known, the Court began by observing that it was "firmly established in international law"[6] that, as also diplomatic and consular agents, "certain holders of high-ranking office in a State, such as the Head of State. Head of Government and Minister for Foreign Affairs, enjoy immunities from jurisdiction in other States, both civil and criminal"[7] (emphasis added). It further noted that the 1961 Vienna Convention on Diplomatic Relations and the 1969 New York Convention on Special Missions, referred to by the Parties, while providing useful guidance, did not contain any provision specifically defining the immunities enjoyed by Ministers for Foreign Affairs, and that it consequently had to decide the questions raised in the case at hand on the basis of customary international law.

The Court thus went on to examine the immunities accorded to Ministers of Foreign Affairs under that law and came *inter alia* to the following conclusions: (i) these immunities are not granted to the Ministers for their personal benefit, but "to ensure the effective performance of their functions on behalf of their respective States"[8] (emphasis added): (¡¡) the extent of the said immunities thus necessarily depends on the nature of the functions exercised by these Ministers; (iii) Foreign Ministers are in charge of their Governments' diplomatic activities and generally act as their representatives; (iv) "there is a presumption that a Minister for Foreign affairs, simply by virtue of that

[4] *Id.,* p. 202, para. 76.
[5] *I.C.J. Reports 2002,* p. 3. The authoritative text is the French text.
[6] *Id.,* pp. 21-22, para. 51.
[7] *Ibid.*
[8] *Id.,* p. 21, para. 53.

office, has full powers to act on behalf of the State"[9] (emphasis added); (v) Foreign Ministers are "frequently required to travel internationally. and...must be in a position freely to do so whenever the need should arise"[10] (emphasis added), and they must also "be capable at any time of communicating"[11] with their Government, their diplomats as well as with representatives of other States (emphasis added); (vi) ultimately, these Ministers occupy "a position such that, like the Head of State or the Head of Government, (they are) recognized under international law as representative(s) of the State solely by virtue of (their) office"[12] (emphasis added); (vii) it results from the foregoing that their functions are such that, throughout the duration of their office. Ministers for Foreign Affairs enjoy, when abroad, "full immunity from criminal jurisdiction and inviolability"[13] (emphasis added); (viii) that immunity and that inviolability "protect the individual concerned against any act of authority of another State which would hinder him or her in the performance of his or her duties"[14] (emphasis added); (ix) such a protection is due whether the acts reproached to the Minister were committed in an "official" or "private capacity[11], "before" or "after" assuming office[15]: and (x) the arrest of a Minister for Foreign Affairs in a third State on a criminal charge, whether when on an "official" or a "private" visit, would clearly prevent him or her from exercising the functions of their office, but so could also be the case of a mere risk of being exposed to legal proceedings by traveling abroad, since such a risk could deter the Minister from traveling internationally when required to do so for the purposes of the performance of his or her official duties[16].

As to Belgium's argument that immunities accorded to incumbent Ministers for Foreign Affairs can in no case protect them where they are suspected of having committed war crimes or crimes against humanity - an issue of particular interest for our discussions of today - the Court, after having carefully examined State practice as it stood at the time (including national legislation and decisions of national higher courts), concluded, as is well known, that it was unable to deduce from that practice that there existed under customary international law "any form of exception to the rule according immunity from criminal jurisdiction and inviolability to incumbent Ministers for Foreign Affairs"[17] (emphasis added). The Court added that the rules concerning the immunity or criminal responsibility of persons having an official capacity contained in the legal instruments creating international criminal tribunals (Military tribunal of Nuremberg, art.7; Military Tribunal of Tokyo, art.6; International Criminal Tribunal for the Former Yugoslavia, art. 7, par. 2; International Criminal Tribunal for Rwanda, art. 6, par.2; International Criminal Court, art. 27) "likewise (did) not enable it to

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[9] *Ibid.*
[10] *Ibid.*
[11] *Ibid.*
[12] *Id.,* p. 22, para. 53.
[13] *Id.,* p. 22, para. 54.
[14] *Ibid.*
[16] *Ibid.*
[16] *Ibid.*
[17] *Id.,* p. 24, para. 58.

conclude that any such exception exist(ed) in customary international law"[18].

Mindful of the ethical problems and other misunderstandings to which this conclusion might give rise, the Court felt it necessary to clarify, in a very famous *obiter,* that "the *immunity* of jurisdiction enjoyed bv incumbent Ministers for Foreign Affairs does not mean that they enjoy *impunity* in respect of any crimes they might have committed, irrespective of their gravity"[19] (emphasis added) and it went on to explain the following: "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"[20] (emphasis added). The Court gave as examples of circumstances in which a Foreign Minister might be subject to criminal prosecution: (i) the trial in his or her own country; (ii) the waiver of immunity by the State he or she represents or has represented; (iii) the loss of immunities granted by international law in other States after he or she has ceased to hold office: a competent foreign court can in such a case try a former Minister for Foreign Affairs "in respect of acts committed prior or subsequent to his or her period of office, as well as in respect of acts committed during that period of office in a private capacity"[21] (emphasis added); and (iv) criminal prosecution before certain international criminal courts, where they have jurisdiction for that purpose.

These pronouncements of the Court call for certain observations. First of all, it should be noted that the Court did not formally refer here to the distinction frequently made by legal scholars (and taken up by certain other courts) between immunities *"ratione personae"* ("ful", constituting a "procedural ba") and *"ratione materiae"* ("functional", constituting a "substantive defence" (?)). Moreover, although it considered that it should determine the nature and extent of the immunities of Ministers for Foreign Affairs under customary international law, the Court did not explicitly refer to the relevant State practice and *opinio juris,* but rather proceeded bv deductive reasoning in view, notably, of the nature and level of the functions performed, the personification of the State attached to them and the freouent travel abroad that they Involve, by making a comparison with the status of Heads of State and Heads of Government. At the same time, the Court wisely left open the still debated question - which was not asked of it - of whether the immunities thus granted to the "members of the troika" could be extended to other high State dignitaries (e.g. other Members of Government, such as Ministers of Commerce or Defence, cf. for example the case-law of British courts). Furthermore, while it did examine State practice in the specific case of the commission of crimes under International law and took care to distinguish between the procedural nature of (personal) immunity issues and the substantive nature of responsibility issues, it did not attempt to determine whether or

[18] *Ibid.*
[19] *Id.,* p. 25, para. 60.
[20] *Ibid.*
[21] *Id.,* p. 25, para. 61.

not such crimes could fall within the category of "official acts" of an incumbent Minister of Foreign Affairs, an issue that continues to divide internationalists (as it divided ICJ Judges, cf. the hereinafter mentioned joint separate opinion of Juges Higgins, Kooijmans and Buergenthal[22] (para. 85) and the dissenting opinion of Judge *ad hoc* Van Den Wijngaert[23] (para. 36), respectively); as is well known, this does not prevent a majority of internationalists and many domestic courts from considering today that immunities *ratione materiae* of former high-ranking officers (like those of any other official acting on behalf of the State) do not cover crimes under international law committed while in office, for variously expressed reasons (acts to be considered as "private" acts or acts *"ultra vires",* tacit waiver of immunities, material conflict of immunities with a norm of *jus cogens,* etc.) but in substance relating to the difference to be made between the (civil) responsibility of the State they represented and their own individual accountability for such crimes[24].

As to the arrest warrant of 11 April 2000, the Court found that its issuance, as such, represented "an act by the Belgian judicial authorities intended to enable the arrest on Belgian territory of an incumbent Minister for Foreign Affairs on charges of war crimes and crimes against humanity"[25] and that, in view of its terms, the warrant was clearly enforceable, even if it made an exception for the case of an official visit by Mr. Yerodia to Belgium; the Court thus concluded that, given the nature and purpose of the arrest warrant, "its mere issue violated the immunity which Mr. Yerodia enjoyed as the Congo's incumbent Minister for Foreign Affairs"[26]. The Court further noted that the international circulation of the arrest warrant, the purpose of which was, according to Belgium itself, "to establish a legal basis for the arrest of Mr. Yerodia...abroad and his subsequent extradition to Belgium"[27], also constituted an infringement of Mr. Yerodia's immunity from criminal jurisdiction and inviolability, "whether or not it significantly interfered with (his) diplomatic activity"[28].

Finally, in the last part of its Judgment, the Court decided that those acts had engaged Belgium's international responsibility and that its findings constituted a form of satisfaction making good the moral injury complained of by the Congo. It nevertheless observed that the warrant was still extant and remained unlawful notwithstanding the fact that Mr. Yerodia had ceased to be Minister for Foreign Affairs. Referring to the famous statement of the Permanent Court of International Justice (PCIJ) in the *Factory at Chorzow* case, according to which "reparation must, as far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed"[29] (emphasis added), the

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[22] See footnote 32.
[23] See footnote 33.
[24] On all these points, see for example Ramona Pedretti's richly documented book, *Immunity of Heads of State and State Officials for International Crimes,* Brill, 2015.
[25] *Id.,* p. 29, para. 70.
[26] *Ibid.*
[27] *Id.,* p. 29, para. 71.
[28] *Id.,* p.30, para. 71.
[29] *Series A, No. 17,* p. 47.

Court considered that "Belgium must, by means of its own choosing, cancel the warrant in question and so inform the authorities to whom it was circulated"[30] (emphasis added).

The opinions joined to the Judgment make it possible to read it in context and to better understand its scope. First, we learn from them that the Court was - as it could be expected - deeply divided on the question of the lawfulness, under customary international law, of the exercise of universal jurisdiction by a national judge. Thus, President Guillaume advised, in his separate opinion[31], that the primary aim of criminal law is to enable punishment in each country of offenses committed in the national territory and that, therefore, apart from exceptional cases in which there would be a specific element of connection with the forum State (such as the nationality of the offender or of the victim, or a threat to its internal or external security), general international law does not accept universal jurisdiction, still less *in absentia.* On the contrary, Judges Higgins, Kooijmans and Buergenthal, in their joint separate opinion[32], considered that, while there may be no general rule specifically authorizing the right to exercise jurisdiction, the absence of a prohibitive rule (cf. the *Lotus* case) and the growing international consensus on the need to punish crimes regarded as most heinous by the international community, indicate that the warrant arrest for Mr. Yerodia did not, as such, violate international law. For her part, Judge *ad hoc* Van den Wijngaert, in her dissenting opinion[33], maintained that international law permits and even encourages national judges to assert jurisdiction in order to ensure that suspects of war crimes and crimes against humanity do not find safe havens; the principle of *complementarity* enshrines the role of States as "agents" of the international community, given the fact that international criminal courts will not be able to judge all international crimes.

But the most severe criticisms of the Judgment in the opinions generally concern, as in the literature, the extent of the immunities granted by it to incumbent Foreign Ministers, as well as its treatment of the issue of impunity. Thus, Judges Higgins, Kooijmans and Buergenthal considered[34] as "too expansive" the scope of the immunities attributed by the Court to Ministers for Foreign Affairs and as "too restrictive" the limits imposed on the scope of their personal responsibility in case of serious crimes; for them, the concept of "official acts" must be narrowly interpreted for purposes of immunities and should not apply to such crimes (cf. the *Pinochet* (3) case). Judge Al Khasawneh, for his part, was of the opinion[35] that incumbent Foreign Ministers only enjoy limited immunities (i.e. immunity from enforcement when on an official mission), since, on the one hand, immunity, as an exception to the general rule of accountability, has to be interpreted narrowly and, on the other hand, immunities of Foreign Ministers, contrary to those of diplomats, are not clear in terms of their basis or extent, while, contrary to Heads of State, Foreign Ministers do not personify the State and are therefore not entitled to immunities attaching to their person. According to Judge Al Khasawneh, the

30 *I.C.J. Reports* 2002, p. 32, para. 76.
31 *Id.,* pp. 35 ff.
32 *Id.,* pp. 63 ff.
33 *Id.,* pp. 137 ff.
34 *Loc. cit.*
35 *Id.,* pp. 95 ff.

Judgment of the Court did not deal adequately with the issue of impunity, the distinction made between "procedural immunity" and "substantive impunity" being too artificial: the need to effectively combat grave crime represents, for the Judge, a higher norm than the rules on immunity and, in case of conflict, should prevail. Similarly, Judge *ad hoc* Van den Wijngaert considered, in her dissenting opinion[36], that there was no legal basis, either in conventional or in customary international law, for granting to Foreign Ministers the immunities recognized by the Judgment: indeed, the *opinio juris* of States could not be founded only on a "negative practice"; moreover, the opinion of civil society on the issue of accountability cannot be completely discounted in the formation of customary international law today. According to Judge Van den Wijngaert, the Court has missed an excellent opportunity to contribute to the development of modern international criminal law by failing to properly balance - as it was done by the House of Lords (in the *Pinochet* case) or the European Court of Human Rights (in the *Al-Adsani* case) - the relative normative status of international *jus cogens* crimes, on the one hand, and immunities, on the other. Judge Van den Wijngaert also disagreed with what she considered as a finding of the Court that immunity does not lead to impunity: she maintained that the case at hand was a good example of crimes going unpunished because of the lack of willingness of national authorities to exercise jurisdiction *in presentia.* Moreover, such immunities would often conflict with important human rights rules, such as the right of access to court of the victims. Finally, she expressed the opinion that the Judgment, in an effort to avoid chaos and abuse, might have opened another Pandora's box: indeed, the assimilation of Foreign Ministers with diplomatic agents and Heads of State could easily be extended to other Members of Government who, in present day society, often represent their countries in various meetings abroad and this could in turn lead Governments to appoint persons to cabinet posts in order to shelter them from prosecutions on charges of international crimes.

2) Case concerning *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti* v. *France)*

This case, brought before the Court on the basis of *forum prorogatum* (and entered in the General List on 9 August 2006, the day on which the French consent to the Court's jurisdiction was received), concerned mainly the compatibility, with the Convention on Mutual Assistance in Criminal Matters between the Parties, of the refusal by the French governmental and judicial authorities to execute an international letter rogatory regarding the transmission, to the judicial authorities in Djibouti, of the record relating to the investigation, conducted in France, in the case against X for the murder, in Djibouti, of the French magistrate Bernard Borrel. But it also concerned the lawfulness, under both conventional and customary international law, of the issuing, by the French judicial authorities, of witness summonses to the Djiboutian Head of State, as well as of summonses, as *témoins* assistés, to two Djiboutian senior officials, namely the *Procureur de la République* and the Head of National Security of Djibouti.

[36] *Loc. cit.*

Regarding first the alleged attacks on the immunity from criminal jurisdiction or the inviolability of the Djiboutian Head of State, the Court noted, in its Judgment of 4 June 2008[37]. that Djibouti called into question two witness summonses, issued by the French investigating judge to the President of Djibouti, on 17 May 2005 and 14 February 2007, respectively.

The first one was sent to the President, when he was on an official visit to France, simply by a facsimile to the Djiboutian Embassy in Paris inviting him to appear in person at the judge's office the following day. For Djibouti, the summons was an element of constraint and an attack on the immunity, honour and dignity of the Head of State, which, as no apology had been made and the summons had not been declared void, continued. France, for its part, recognized "the absolute nature of the immunity from jurisdiction and, even more so, from enforcement that is enjoyed by foreign Heads of State"[38], but considered that the summons in question was only an invitation which imposed no obligation on the President and therefore constituted in no sense an infringement to his immunities. The Court, referring to its *Arrest Warrant* Judgment of 2002, confirmed that a Head of State enjoys "full immunity from criminal jurisdiction and inviolability"[39] (emphasis added), which protected him or her "against any act of authority of another State which would hinder him or her in the performance of his or her duties"[40] (emphasis added). The determining factor in assessing whether there had been an attack on the immunities of the President of Djibouti thus lied in his subjection to a constraining act of authority. On this point, the Court found that the disputed summons was not associated with measures of constraint and was indeed a mere invitation that the Head of State could freely accept or decline: it noted that, while the French investigation judge had not respected the formal procedures established by Article 656 of the French Code of Criminal Procedure (concerning the "written statement of the representative of a foreign Power"), and thereby failed to act in accordance with the courtesies due to a foreign Head of State, these "formal defects surrounding the summons under French law"[41] did not, in themselves, constitute a violation by France of its international obligations regarding the immunities of Foreign Heads of State. Lastly, as to the media leak of the issuance of the summons, that had occurred, the Court recalled the customary rule reflected in Article 29 of the 1961 Vienna Convention on Diplomatic Relations, according to which the receiving State is under an obligation to protect the honour and dignity of diplomatic agents, and considered that it "necessarily applied to Heads of State"[42]: the Court however observed that it did not possess any probative evidence that would establish that the French judicial authorities were the source behind the dissemination of the information in question, and concluded that it could thus not uphold Djibouti's submissions that France had violated its international obligations in that respect.

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[37] *I.C.J. Reports 2008,* p. 177. The authoritative text is the French text.

[38] *Id.,* p. 235, para. 166.
[33] *Id.,* p. 237, para. 170.
[43] *Ibid.*
[41] *Id.,* p. 238, para. 173.
[42] *Id.,* p. 238, para. 174.

As to the second summons, the Court came to the same conclusions while noting that, contrary to the first one, it had properly been transmitted by the authorities, in the form prescribed by French law.

Regarding the alleged attacks on the immunities said to be enjoyed by the *Procureur de la République* and the Head of National Security of Djibouti, the Court explained that, under French law, a summons as *témoin assisté* is issued where suspicions exist concerning the person in question, without these being sufficient to proceed to a *mise en examen-,* the person in question is obliged to appear before the judge. It is interesting to note, for the purposes of this seminar, that Djibouti first contended that both senior officials enjoyed "personal immunities" from criminal jurisdiction and inviolability, before apparently abandoning (or at least giving less importance to) this argument during the oral proceedings and arguing in terms of "functional immunity or immunity *ratione materiae".* Indeed, Djibouti then maintained that it is a principle of international law that a person cannot be held as individually criminally liable for acts performed "in their official capacity" (i.e. in the performance of his (or her) duties) "as an organ of State"[43] (emphasis added); it recognized that there may be certain exceptions to this rule, but stated that there was no doubt as to its applicability in the case at hand. France was of the opinion, on the one hand, that the two officials did not enjoy immunities *ratione personae.* "given the essentially internal nature of their functions"[4444] (emphasis added) and, on the other hand, that, as functional immunities are not absolute, "it is for the justice system of each State to assess...whether, in view of the acts of public authority performed in the context of his duties, (the) individual (concerned) should enjoy, as an agent of the State, the immunity from criminal jurisdiction that is granted to foreign States"[45] (emphasis added). The Court considered that the last stage of Djibouti's argument appeared to be, "in essence, a claim of immunity for the Djiboutian State[46] (emphasis added), from which the two senior officials would be said to benefit. It first found that there were no grounds in international law on which it could be said that the two senior officials were entitled to personal immunities (the 1961 Vienna Convention on Diplomatic Relations and the 1969 New York Convention on Special Missions not being applicable). As to immunities *ratione materiae.* the Court observed that it had "not been 'concretely verified' before it that the acts which were the subjects of the summonses as *témoins assistés...* were indeed acts within the scope of their duties as organs of State[47] (emphasis added). It further noted that neither the French courts nor itself had been informed by the Government of Djibouti that the acts of the two senior officials complained of by France - which had caused the issuance of the summonses as *témoins assistés* - "were its own acts[48] (emphasis added) and that these officials "were its organs, agencies or instrumentalities in carrying them out[49] (emphasis added); the Court explained that such an information was necessary

[43] /of., p. 241, para. 185, p. 241, para. 184 and p. 242, para. 187.
[44] *Id.,* p. 242, para. 185.
[45] *Id.,* p. 242, para. 189.
[46] *Id.,* p. 242, para. 188.
[47] *Id.,* p. 243, para. 191.
[48] *Id.,* p. 244, para. 196.
[49] *Ibid.*

to "allow the court of the forum State to ensure that it does not fail to respect any entitlement to immunity and might thereby engage the responsibility of that State[50] (emphasis added). Finally, the Court clarified that "the State notifying a foreign court that judicial process should not proceed, for reasons of immunity, against its State organs, is assuming responsibility for any wrongful act in issue committed by such organs[51] (emphasis added).

A few observations may be made here concerning this judgment. First, it is not clear, contrary to what has sometimes been claimed, that the Court intended formally to enshrine the distinction now generally made and adopted bv Djibouti between "immunities *ratione personae*" and "immunities *ratione materiae";* the fact remains that, in examining the Parties' arguments, the Court did not dispute it and that it also clearly distinguished the status of the President of the Republic from that of the two senior officials. Secondly, the Court ruled out the eligibility of the two senior officials in question for personal immunities by excluding the applicability of two treaty instruments, but without giving explicit additional reasons (for example, with regard to the state of customary law). Thirdly, the Court did not go into detail about the conditions necessary for the implementation and the extent of immunities *ratione materiae:* it merely referred to acts performed by individuals "within the scope of their duties" "as organs of State", without otherwise specifying what exactly was meant by this (cf. Article 4 of the ILC Articles on International Responsibility); moreover, the Court generally equated the immunities of such individuals with those of the State (without considering the problems this might cause in the case of crimes under international law) and (contrary to the Applicant itself) did not specify whether the principle suffered from exceptions: however, it is worth recalling that these questions were not put to the Court in this case. Finally, it seems that, with regard to the information to be communicated to the courts of the forum State, a difference has to be made, pursuant to the Judgment, between the situation of the Heads of State (and thus presumably of the "members of the troika"), whose immunities would *ipso facto* apply, and that of the "other organs" of the State, whose immunities, not always so obvious, would have to be claimed and explained[52].

Djibouti v. France was in some ways a replica of an earlier case, *Certain Criminal Proceedings in France (Republic of the Congo* v. *France),* which had been brought before the Court in a similar manner (on the basis of a *forum prorogatum)* in 2003, but which was subsequently withdrawn (in 2010) and in which the Court only ruled on a Request for the indication of provisional measures presented by the Congo. This case had originated in a complaint filed in 2001, on behalf of certain human rights organisations, with the French *Procureur de la République,* "for crimes against humanity and torture allegedly

[50] *Ibid.*
[51] *Id.,* p. 244, para. 194.

[52] For a critique of this position and whether it could amount to acceptance of a tacit waiver of unclaimed immunities, see e.g. Gionata Piero Buzzini, "Lights and Shadows of Immunities and Inviolability of State Officials in International Law: Some Comments on the *Djibouti* vs. *France* Case," *Leiden Journal of International Law,* 22 (2009), pp. 469 ff.

committed in the Congo against individuals having Congolese nationality"[53], expressly naming the Congolese Head of State, the Minister of Interior, the Inspector-General of the Congolese Armed Forces and the Commander of the Presidential Guard. The *Procureur de la République* requested investigation both of crimes against humanity and of torture on the basis of Article 689-2 of the French Code of Criminal Procedure. The investigation was initiated against a non-identified person. The testimony of the Inspector-General of the Armed Forces, who possessed a residence in France, was first taken by judicial police officers, when taken into custody, and then, as *témoin assisté*, by the investigating judge, while he was in France; after he had returned to the Congo, a *mandat d'amener* was issued against him, which was not capable of being executed outside French territory. The French investigating judge sought to obtain evidence from the Congolese President under Article 656 of the French Code of Criminal Procedure (applicable where evidence is sought trough the diplomatic channel from a "representative of a foreign power", see *supra, Certain Questions of Mutual Assistance)]* the President was never *mis en examen* nor called as a *témoin assisté*. No acts of investigation were taken against the Minister of Interior and the Commander of the Presidential Guard.

In its Application, the Congo alleged that France had breached the principle of sovereign equality between States by attributing to itself universal jurisdiction in criminal matters and had violated the criminal immunities of a foreign Head of State. In support of its Request for the indication of provisional measures, the Congo mentioned the publicity accorded to the actions of the investigating judge. "which impugn the honour and the reputation of the Head of State, of the Minister of the Interior and of the Inspector-General of the Armed Forces, and, in consequence, the international standing of the Congo"[54].

The Court explained, in its Order of 17 June 2003 on that Request, that it was not called upon, at that stage, to determine the compatibility, with the rights claimed by the Congo, of the procedures so far followed in France and found that, on the information before it, there was no risk of irreparable prejudice to the right of the Congo to respect, by France, for the immunities of the President and for the alleged immunities of the Minister of the Interior. Similarly, the Court decided that there was no risk of irreparable prejudice in relation to the claim of the Congo that the unilateral assumption by a State of universal jurisdiction in criminal matters constitutes a violation of international law: it observed that the request for a written deposition made by the investigation judge was never transmitted to the President of the Congo by the French Foreign Ministry, and that the Minister of the Interior and the Commander of the Presidential Guard had not been the subject of any procedural measures; as to the Inspector-General of the Congolese Army, the
Court considered that, while France had acknowledged that the criminal proceedings instituted

[53] *Provisional Measure, Order of 17 June 2003, I.C.J. Reports 2003,* p. 104, para. 10. The authoritative text is the French text.
[54] *Id.*, p. 108, para. 26.

against him had had an impact on his legal position in that country, the Congo "had not demonstrated...even the possibility of any irreparable prejudice to the rights it claims resulting from the procedural measures taken"[55] in relation to the Inspector-General.

So far for the cases directly relevant for the purposes of this seminar. However, since the immunities - in particular *ratione materiae* - of State representatives are directly linked to those enjoyed by the States concerned (although they may, arguably, be detached in certain cases such as the commission of crimes under international law), it is worth briefly recalling what the Court had to say on this subject in its Judgment of 3 February 2012 in the famous case concerning *Jurisdictional Immunities of the State (Germany* v. *Italy: Greece intervening)*[56]. *This* case, of which the Court was seized on 23 December 2008, originated in damage compensation proceedings instituted before Italian courts in relation with serious violations of the international law of armed conflicts perpetrated by organs of the German Reich between 1943 and 1945 (large-scale killing of Italian civilians, mass deportation of civilians to Germany to perform "slave labour" and denial of the status of prisoners of war to members of the Italian armed forces, who were also deported and used as forced labourers). In its Application, Germany requested the Court to find: (i) that Italy had failed to respect the jurisdictional immunity which Germany enjoyed under international law by allowing civil claims to be brought against it in the Italian courts; (ii) that Italy had violated its immunity from enforcement under international law by taking measures of constraint against Villa Vigoni, German State property situated in Italian territory and used for governmental purposes that were entirely non-commercial; and (iii) that Italy further had breached Germany's jurisdictional immunity by declaring enforceable in Italy decisions of Greek civil courts rendered against Germany on the basis of acts similar to those which gave rise to the claims brought before the Italian courts.

On the first question - that of the immunities of Germany before the Italian courts -, the Court began by noting the agreement between the Parties to the effect that "immunity is governed by international law and is not a mere matter of comity"[57]. It observed that, "(a)s between the Parties, any entitlement to immunity (could) be derived only from customary international law, rather than treaty"[58]. The Court then referred to the works of the International law Commission (ILC) on what became the United Nations Convention on the Jurisdictional Immunities of States (UN Convention) and to the conclusion reached by the ILC, in 1980, that the rule of State immunity had been "adopted as a general rule of customary international law solidly rooted in the current practice of States"[59] (emphasis added); it further noted, in the light of the survey of State practice effected by the ILC, that "States generally proceed on the basis that there is a right to immunity under international law, together with a corresponding obligation on the part of other States to respect and give effect to that immunity"[60].

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[55] *Id.,* p. 111, para. 38.
[56] *I.C.J. Reports 2012,* p. 99. The authoritative text is the French text.
[57] *Id.,* p. 122, para. 53.
[58] *Id.,* p. 122, para. 54.
[50] *Id.,* p. 123, para. 56.
[60] *Ibid.*

The Parties disagreed, however, as to whether it was the law governing State immunities in force at the time of the events (Germany's argument) or that in force at the time the contested proceedings were instituted before the Italian courts (Italy's argument) that should apply. The Court choose the second option and justified its choice, *inter alia,* by considering that "the law of immunity is essentially procedural in nature...(i)t regulates the exercise of jurisdiction in respect of particular conduct and is thus entirely distinct from the substantive law which determines whether this conduct is lawful or unlawful"[61] (emphasis added). The Parties also disagreed as to the extent of State immunity in respect of *acta jure imperii* (acts committed in the exercise of "sovereign power"[62]). Germany maintained that such immunity applied without relevant limitation to acts committed by the armed forces of a State (and other State organs acting in cooperation with the armed forces) in the course of conducting an armed conflict, while Italy argued that Germany was not entitled to immunity in respect of the cases brought before the Italian courts on two grounds: first, because immunity as to *acta jure imperii* did not extend to torts or delicts occasioning death, personal injury or damage to property committed on the territory of the forum State ("territorial tort principle"); and, secondly, because, independently of where the relevant acts took place, they involved the most serious violations of rules of international law of a peremptory character, for which no alternative means of redress was available.

The Court's treatment of Italy's first argument is not of direct interest to us here, except that it very well exemplifies the traditional tensions between the principle of the sovereign equality of States and that of the exclusivity of the State's jurisdiction on its territory. It will be sufficient, for the purposes of this seminar, to recall that the Court rejected it by finding that neither the UN Convention (Article 12) and the European Convention (Articles 11 and 31) on State Immunities (which, it concluded, do not apply to acts of armed forces and related organs on the territory of another State during an armed conflict), nor State practice in the form of national legislation and of the judgments of national courts, afforded any support to the contention that customary international law denies State immunity in tort proceedings *(instances civiles)* relating to acts of armed forces, conducted in the course of an armed conflict, in the territory of the forum State .

The treatment by the Court of the second argument out forward by Italy is more interesting for us today, insofar as it shows some similarities with the Court's review of the immunities of the Minister for Foreign Affairs of the DRC in the *Arrest Warrant* case. First. Italy contended that international law restricted the right to immunity of a State when that State has committed grave violations of human rights law or the law of armed conflicts. The Court noted at the outset that this proposition presented a "logical problem", for the following reasons. Jurisdictional immunity is an immunity not only from an adverse judgment, but also from being subjected to the trial process. It is therefore necessarily preliminary in nature. Therefore, a national court is required to determine whether or not a foreign

[61] *Id.,* p. 124, para. 58. Cf. *Arrest Warrant, supra,* footnote 20.
[62] *Id.,* p. 125, para. 60.

State is entitled to immunity under international law before it can hear the merits of a case and before the facts have been established. "If immunity were to be dependent upon the State actually having committed a serious violation of international human rights law or the law of armed conflict, then it would become necessary for the national court to hold an enquiry into the merits in order to determine whether it had jurisdiction. If, on the other hand, the mere allegation that the State had committed such wrongful acts were to be sufficient to deprive the State of its entitlement to immunity, immunity could, in effect, be negated simply by skillful construction of the claim"[63]. The Court went on to examine State and international practice (including the case law of the European Court of Human Rights) and concluded that customary international law, as it then stood, did not deprive a State of immunity by reason of the fact that it is accused of serious violations of human rights law or the law of armed conflicts: at the same time, the Court very prudently added that it was only addressing "the immunity of the State itself from the jurisdiction of the courts of other States (and that) the question of whether, and to what extent, immunity might apply in criminal proceedings against an official of the State (was) not in issue in the... case (at hand)"[64] (emphasis added).

Secondly. Italy argued that the rules violated by Germany in 1943-1945 were peremptory norms *(jus cogens)* and that there was a conflict between these norms, on the one hand, and according immunity to Germany, on the other; Italy explained that, since the rules on State immunity did not have the status of *jus cogens*. they must give wav. The Court considered that, even assuming that the rules of armed conflict breached by Germany were rules of *jus cogens,* there could be "no conflict"[65] between these rules and the rules on State immunity, since they "address different matters"[66]. It recalled that the rules on State immunities are "procedural in character and are confined to determining whether or not the courts of one State may exercise jurisdiction in respect of another State"[67]; they "do not bear on the question whether or not the conduct in respect of which proceedings have been brought was lawful or unlawful"[68]. The Court thus concluded that "recognizing the immunity of a foreign State...does not amount to recognizing as lawful a situation created by the breach of a *jus cogens* rule, or rendering aid and assistance in maintaining that situation"[69]. Similarly. State immunity rules could not conflict with rules concerning the duty to make reparation, since the latter rules exist "independently of those rules which concern the means by which it is to be effected"[70]. The Court saw moreover no basis for the proposition that, even in the absence of conflict, "no rule which is not of the status of *jus cogens* may be applied if to do so would hinder the enforcement of a *jus cogens*

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[63] *Id.,* p. 136, para. 82.
[64] *Id.,* p. 139, para. 91. See also the comments of the Court on the House of Lords decision in the *Pinochet* (3) case, *id.,* p. 138, para. 87 and the references made to decisions of the European Court of Human Rights in the *Al-Adsani* as well as the *Kalogeropoulou* cases (State immunity from *civil* suit), *id.,* p. 139, para. 90.
[65] *Id.,* p. 140, para. 93.
[66] *Ibid.*
[67] *Ibid.*
[68] *Ibid.*
[69] *Ibid.*
[70] *Id.,* p. 140, para. 94.

rule"[71].

Thirdly. Italy contended that the alleged shortcomings in Germany's provisions for reparation to Italian victims entitled the Italian courts to deprive Germany of its jurisdictional immunity, because all other attempts to secure compensation for the victims involved had failed. The Court found that there was no support for such a contention in either conventional or customary international law and that, if such a rule existed, its application would be "exceptionally difficult in practice"[72] (emphasis added); it nevertheless recognized that "the immunity from jurisdiction of Germany in accordance with international law (might) preclude judicial redress for the Italian nationals concerned"[73] in this case (emphasis added).
The Court further denied that the three strands of Italy's argument, taken together, would have the cumulative effect of justifying the refusal to accord immunity to Germany; the Court pointed out, *inter alia,* that immunity cannot "be made dependent upon the outcome of a balancing exercise of the specific circumstances of each case to be conducted by the national court before which immunity is claimed"[74].

For the purposes of this seminar, the main point to be drawn from these pronouncements is that, while the State's immunity from civil jurisdiction (which does not prejudge the issue of its responsibility) is absolute, irrespective of the gravity of the alleged violations of international law attributable to it, the Court expressly intended to distinguish from that situation the case of criminal proceedings instituted against State agents, thus leaving open the question of their separate individual responsibility and its treatment by foreign courts. Since the Court did not have to go into the details of the criminal responsibility of individuals, it did not have the opportunity to explain how the "logical problem" it considered to arise, if the gravity of the alleged acts were to be taken into account for the purposes of State immunities, would be resolved in the case of individuals (immunity as a "procedural bar to the exercise of jurisdiction" vs immunity as a "substantive defense to avert the responsibility" ?[75]). The distinction between State and individual responsibility for serious crimes under international law and the question of whether and to what extent international law confers on individuals a direct right to reparation for war damage, as is well known, have been the subject of much commentary in the literature[76].

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[71] *Id.,* p. 141, para. 95.
[73] *Id.,* p. 143, para. 102.
[73] *Id.,* p. 144, para. 104.
[74] *Id.,* p. 145, para. 106.
[75] See for example Ramona Pedretti, op. *cit.,* e.g. p. 430.
[76] See for example Christian Tomuschat, "The Case of Germany against Italy before the ICJ", *in Immunities in the Age of Global Constitutionalism,* Brill, 2015, p. 93: "Individuals should never be able to escape the consequences of their acts...However, responsibility of States, which is tantamount to collective responsibility of peoples, requires an assessment which must take into account many factors"; p. 94: "Individualising the settlement of war damages by permitting individual actions to be brought would generally lead to a total judicial impasse"; and p. 97: "such claims presuppose that individual entitlements to reparation arise under international law...To date, the international legal order does not acknowledge such entitlements." *Contra,* see for example Michael Bothe, "Remedies

On the second question - that of the measures taken against State property belonging to Germany and located on Italian territory the Court observed that immunity from enforcement enjoyed by States in regard of their property "goes further than the jurisdictional immunity enjoyed by those same States before foreign courts"[77] (emphasis added). In the words of the Court, even if a State cannot claim jurisdictional immunity *(stricto sensu),* "it does not follow *ipso facto* that the State against which a judgment has been given can be the subject of measures of constraint... with a view to enforcing the judgment in question"[78]. The rules of customary international law governing the two types of immunity "are distinct and must be applied separately"[79] (emphasis added). The Court thus was of the opinion that it did not have to rule on the question whether the decisions of the Greek courts awarding pecuniary damages (for the purposes of whose enforcement the measures against Villa Vigoni were taken) were themselves in breach of that State's jurisdictional immunity. Referring to Article 19 of the UN Convention, the Court considered that it was unnecessary to determine whether all its aspects reflected customary international law, but found that at least one condition had to be met before any measure of constraint may be taken against property belonging to a foreign State: that the property in question must not be used for governmental purposes that are entirely non-commercial. Villa Vigoni, property of the German State, being the seat of a cultural center intended to promote cultural exchanges between Germany and Italy, the Court concluded that the registration of a legal charge on the Villa constituted a violation by Italy of its obligation to respect the enforcement immunity owed to Germany.

As to the third question - the decisions of the Italian courts declaring enforceable in Italy decisions of Greek courts upholding civil claims against Germany -, the Court explained that, when a court is seized of an application for *exequatur* of a foreign judgment against a third State, it is itself being called upon to exercise its jurisdiction in respect of the third State in question: in granting *exequatur,* the court indeed "exercises a jurisdictional power which results in the foreign judgment being given effects corresponding to those of a judgment rendered on the merits in the requested State"[80]. The court seized of an application for *exequatur* has therefore to ask itself whether, in the event that it had itself been requested to deal with the merits of the dispute that was the subject of the foreign judgment, "it would have been obliged, under international law, to accord immunity to the

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of Victims of War Crimes and Crimes against Humanities: Some Critical Remarks on the ICJ's Judgment on the Jurisdictional Immunities of States", *id.,* p. 101: a "fundamental flaw in the approach of the Court...is to treat State immunity as an absolute structural principle of the international order"; p. 108: "why should the wrong-doer State be obliged to leave its agents to the criminal jurisdiction of other States while that State's pecuniary interests are preserved because the State still enjoys immunity?"; and p. 110: intervention of national courts "can correct errors and inequities resulting from intergovernmental dealings and provide legitimacy for the entire system...State immunity as conceived by the ICJ prevents national courts from playing their necessary and salutary role."

[77] *Id.,* p. 146, para. 113.

[78] *Ibid.*

[70] *Id.,* p. 147, para. 113.

[80] *Id.,* p. 151, para. 128.

Respondent State"[81] (emphasis added). The Court concluded that the Italian courts, which had declared enforceable in Italy the decisions of Greek courts rendered against Germany, had violated the latter's immunity. The Court noted that, in order to reach such a conclusion, it was unnecessary to rule on the question - not before it - whether the Greek courts had themselves violated Germany's immunities, something, moreover, that it could not do, since Greece was not a party to the proceedings.

The Court, like in the *Arrest Warrant* case, finally found that the decisions and measures infringing Germany's immunities, which were still in force, must cease to have effects, and that the effects which had already been produced must be reversed, in such a way that the situation which existed before the wrongful acts were committed was reestablished. It added that Italy had the right to choose the means it considered best suited to achieve the required result. However, in conformity with previous jurisprudence, the Court rejected Germany's request for assurances of non-repetition, explaining that, "as a general rule, there (was) no reason to suppose that a State whose act or conduct has been declared wrongful by the Court, will repeat that act or conduct in the future"[82]. It is well known that, since then, the Italian Constitutional Court, in its Judgment 238/2014, rendered on 22 October 2014, subjected the duty of the Italian judge to comply with the ruling of the ICJ to the respect of "the fundamental principle of judicial protection of fundamental rights" under Italian constitutional law. As a result, at least 25 new cases were brought against Germany before Italian civil courts in relation to conduct of the German Reich during WW II and, in at least 15 proceedings, these courts decided upon such claims against Germany, taking or threatening to take, in at least two cases, measures of constraint against German property in order to satisfy the judgments rendered. Germany, therefore, seized the ICJ again, on 29 April of this year[83].

As in the *Warrant Arrest* case, several opinions have been quite critical of the Judgment, and especially of the wav it dealt with the relationship between rules on immunities and peremptory norms of *jus cogens.* Thus, in his dissenting opinion[84], Judge Cangado Trindade considered that immunities cannot be considered *in vacuum* and are "prerogatives" which cannot make abstraction of the evolution of international law. Moreover, States cannot, in his view, waive *inter se* rights which are inherent to human rights. Accordingly, tensions between State immunity and the right of access to justice (as well as the right to reparation) are to be resolved in favour of the latter. On the other hand, impunity should be avoided for State atrocities: the threshold of the gravity of the acts committed should thus remove any bar to jurisdiction. For Judge Cangado, *jus cogens* cannot be deprived of its effects as a result of a wrongfully assumed and formalist lack of conflict between "procedural" and "substantive" rules. This criticism was somehow echoed in Judge Yusuf's dissenting opinion[85], who

[81] *Id.,* p. 152, para. 130.
[82] *Id.,* p. 154, para. 138.
[83] See the text of the German Application on the Court's website, ici-cii.org
[84] *I.C.J. Reports 2012,* pp. 179 ff.
[85] *Id.,* pp. 291 ff.

regretted that the Court had hardly examined the general obligation to make reparations for violations of international humanitarian law and had not sufficiently considered the contracting coverage of State immunity's rules over time. According to Judge Yusuf, when jurisdictional immunities come into conflict with basic rights under human rights or humanitarian law, a balance has to be sought. State immunity should not be used as a screen to avoid reparations. Judge Yusuf also criticized the way in which the Court had used fragmentary and unconvincing State practice to conclude that State immunities are absolute; in his view, both State immunity rules and the rules governing the entitlement of individuals to reparations for international crimes committed by State agents are undergoing transformation: there is an emergent exception to State immunity, based on a widely-held *opinio juris* of ensuring the realization of certain basic rights of human beings, such as the right to an effective remedy in those circumstances where the victims would otherwise remain deprived of remedial avenues. The assertion of jurisdiction by domestic courts in such exceptional circumstances, while contributing to "a better observance of international human rights and humanitarian law", would "not upset the harmonious relations between States"[86].

I would like to conclude this presentation by briefly mentioning two advisory opinions of the Court which, while not directly relevant to our discussion today, as they concern the application of Article VI, Section 22, of the Convention on the Privileges and Immunities of the United Nations, are nonetheless of some interest, for example from the point of view of the nature and extent of "functional immunities", their implementation and the logic of the Court's reasoning in that respect. The first one is the Opinion given on 15 December 1989 on the *Applicability of Article VI, Section 22, of the Convention* to Mr. Dumitru Mazilu, as special rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities (a subsidiary organ of the UN Commission on Human Rights, itself a subsidiary organ of the Economic and Social Council), who had ceased to be a Member of the Sub-Commission and was prevented from entering into contact with the United Nations and traveling to Geneva[87]. The Court recalled that the purpose of Section 22, entitled "Experts on Missions for the United Nations", was to enable the UN to entrust missions to persons who do not have the status of "officials" of the Organisation, but serve in a personal capacity (and accordingly not as representatives of States) on one of its many committees or commissions, and to guarantee them, in the terms of that provision, "such privileges and immunities as are necessary for the independent exercise of their functions" (including "immunity from personal arrest or detention" and "immunity from legal process of every kind" "in respect of words spoken or written and acts done by them in the course of the performance of their mission") (emphasis added). The Court clarified that "experts on missions" enjoy these privileges and immunities whether or not they travel and that their independence must be respected by all States, including the State of nationality and the State of residence. The Court also found that special rapporteurs of the Sub-Commission, even if not

[86] *Id.,* p. 308.
[87] *Applicability of Article VI, Section 22, of the Convention on the Privileges and Immunities of the United Nations, Advisory Opinion, I.C.J. Reports 1989,* p. 177.

members thereof, must be regarded as "experts on missions", within the meaning of Section 22, and that they enjoy, in accordance with that Section, the privileges and immunities necessary for the exercise of their functions, and in particular for the establishment of any contacts which may be useful for the preparation and presentation of their reports to the Sub-Commission. The Court considered that Mr. Mazilu at no time had ceased to be an "expert on mission" or to be entitled to enjoy, for the exercise of his functions, the privileges and immunities provided for in Section 22. As to the question whether he was still capable of exercising his functions, the Court found that it was for the United Nations to decide whether it wished to retain Mr. Mazilu as special rapporteur, and took note that decisions to that effect had been taken by the Sub-Commission.

The second Advisory Opinion was given on 29 April 1999 and concerned a *Difference relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights*[88]. That difference had arisen between the United Nations and Malaysia, within the meaning of Section 30 of the Convention on the Privileges and Immunities of the United Nations (i.e. a difference as to the interpretation or application of the Convention, which requires the UN to request an advisory opinion from the Court "that shall be accepted as decisive by the parties"), with respect to the applicability of Article VI, Section 22, of the Convention to Mr. Cumaraswamy - the special rapporteur of the Commission on Human Rights on the independence of judges and lawyers -, and on the legal obligations of Malaysia in that case.

Mr. Cumaraswamy was facing several lawsuits filed in Malaysian courts by plaintiffs who asserted that he had used defamatory language, in an interview published in 1995 in a specialist journal; they were seeking damages for a total amount of US$112 million. However, according to the United Nations Secretary-General, Mr. Cumaraswamy had been speaking in his official capacity as special rapporteur and was thus immune from legal process by virtue of the above-mentioned Convention. The Malaysian Ministry of Foreign Affairs was requested by the UN Secretariat to inform the local courts of the findings of the Secretary-General and of their conclusive effects, but the Ministry failed to do so, as a result of which the special rapporteur's motion was dismissed with costs by the High Court for Kuala Lumpur; the High Court did not pass upon Mr, Cumaraswamv's immunity *in limite litis,* but held that it had jurisdiction to deal with the merits, "including"[89] making a determination on the immunity issue. The UN then requested the Malaysian Government to intervene in the proceedings, so that the burdens of further defence could be assumed by the Government, but the latter refused. Finally, the Federal Court of Malaysia denied Mr. Cumaraswamy's application for leave to appeal, stating that he was neither a sovereign nor a full-fledged diplomat, but merely "an unpaid, part-time provider of information"[90].

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[88] *I.C.J. Reports 1999,* p. 62.
[89] *Id.,* p. 72, para. 17.
[90] *Id.,* p. 70, para. 13.

The Court first noted that Malaysia had recognized that Mr. Cumaraswamy was an "expert on mission" and that such experts enjoy the privileges and immunities provided for by Section 22 of the Convention in their relations with States parties, including those of which they are nationals.

The Court then considered whether the immunities in question applied to Mr. Cumaraswamy in the specific circumstances of the case. It emphasized that it was the Secretary-General, as the chief administrative officer of the Organization, who had the primary responsibility and authority to assess whether its agents had acted within the scope of their functions and, where he so concluded, to protect those agents by asserting their immunity. The Court observed that, in the case concerned, the Secretary-General had been reinforced in his view, that Mr. Cumaraswamy had spoken in his official capacity, by the fact that the contentious interview several times explicitly referred to his capacity as special rapporteur, and that in 1997 the Commission on Human Rights had extended his mandate, thereby acknowledging that he had not acted outside his functions by giving the interview. The Court was therefore of the opinion that the Secretary- General had correctly found that Mr. Cumaraswamy, in speaking the contentious words, was acting in the course of the performance of his mission.

Considering the legal obligations of Malaysia, the Court indicated that, when national courts are seized of a case in which the immunity of a United Nations agent is in issue, they must immediately be notified by governmental authorities of any finding by the Secretary-General concerning such immunity; "that finding creates a presumption which can only be set aside for the most compelling reasons and is thus to be given the greatest weight"[91] (emphasis added). The Court observed that Malaysia had not complied with this obligation. It added that, by "necessary implication", "questions of immunity are ... preliminary issues, which must be expeditiously decided (by national courts) *in limine litis*"[92] (emphasis added) and considered this to be a "generally recognized principle of procedural law"[93]. The Court further observed that the Malaysian courts, by not ruling *in limite litis* on the issue of immunity, had "nullified the essence of the…rule contained in Section 22 (b)"[94] (emphasis added). It concluded that, as the conduct of an organ of a State, Including organs independent of the executive power like courts, must be regarded as an act of that State, Malaysia had not acted in accordance with its obligations under international law in the case concerned. The Court clarified that Mr. Cumaraswamy must be financially harmless for any costs imposed upon him by the Malaysian courts and found that the Malaysian Government was obligated to communicate the advisory opinion to these courts "in order that Malaysia's international obligations be given effect and Mr. Cumaraswamy's immunity be respected"[95].

Thank you very much for your kind attention.

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[91] *Id.,* p. 87, para. 61.
[92] *Id.,* p. 88, par. 63.
[93] *Ibid.*
[94] *Ibid.*
[95] *Id.,* p. 88, para. 65.