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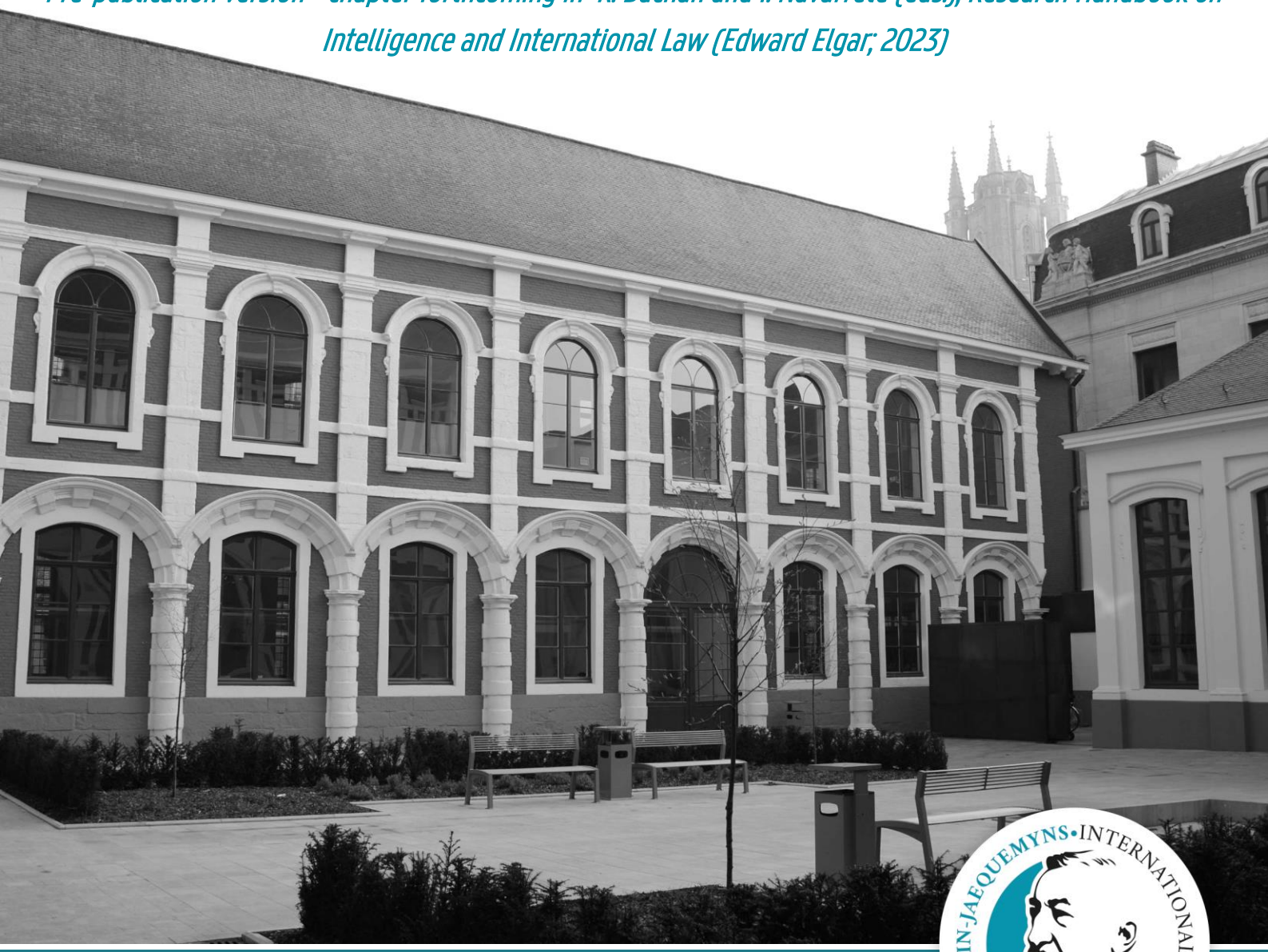

PUTTING A SPY IN THE DOCK

Immunity from Foreign Criminal Jurisdiction for the Crime of Espionage

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Putting a Spy in the Dock: Immunity from Foreign Criminal Jurisdiction for the Crime of Espionage

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Abstract

This chapter will explore whether spies enjoy immunity when prosecuted for the crime of espionage before a foreign domestic court. The discussion will begin by explaining how the rules governing the jurisdictional immunities enjoyed by State officials may apply to the different 'types' of spies. These range from diplomatic or consular personnel engaged in espionage in the receiving State, State agents operating on a clandestine basis, or private citizens on the payroll of a foreign State. The chapter goes on to consider whether international law recognises an exception to personal immunities for the crime of espionage. Two key doctrinal issues are then examined when addressing functional immunities. It will be evaluated whether espionage is an "official act" and therefore attributable to, and carried out on behalf of, the State who may then plead immunity on behalf of an official. In addition, it will be considered whether customary international law recognises an exception to functional immunity when acts of espionage are committed in the territory of the forum State. This part of the discussion will refer to the recent work of the International Law Commission on the topic of the Immunity of State Officials from Foreign Criminal Jurisdiction and associated discussions held in the Sixth Committee of the United Nations General Assembly between States. The chapter will end by exploring whether the doctrine of countermeasures under the law of State responsibility may set aside immunity when raised before a foreign domestic court.

Keywords

Espionage – Immunity - Countermeasures

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1 Introduction

History is replete of examples where persons have been criminally prosecuted and convicted before a domestic court for engaging in espionage on behalf of a foreign State.[3] While not a crime under international law as such,[4] espionage traditionally features as an offence under many domestic criminal laws and criminal codes, and in several countries can entail the imposition of the death penalty.[5] Famous historical cases include the Dreyfus affair in France in the late 19th to early 20th century, the execution of Julius and Ethel Rosenberg (convicted for passing on US atomic secrets to the USSR) in 1953, and the imprisonment of US pilot Francis Gary Powers in 1960 (after his U-2 spy plane was shot down over Soviet territory).[6] More recent examples include the prosecution of Russian celebrity Anna Chapman in the US, the prosecution of former Indian navy officer Kulbushan Jadhav by Pakistan (with a spin-off before the International Court of Justice (ICJ)[7]), and the sentencing to death of the Iranian-Swedish researcher Ahmad Djalali by Iran.[8] Inasmuch as individuals spy on the instruction and on behalf of a State, the question arises to what extent they enjoy some form of immunity under customary or conventional international law that would shield them from domestic prosecution before a foreign court. The above examples might indicate that a negative answer is in order. On closer scrutiny, however, a more nuanced picture emerges, which heavily depends on the position of the persons concerned. The aim of the present chapter is to shed greater light on the immunity from foreign criminal jurisdiction enjoyed by different categories of individuals in respect of the domestic crime of espionage. A few preliminary remarks are nonetheless in order to set the scene.

First, the chapter focusses on espionage committed in peacetime to the exclusion of espionage committed in situations of armed conflict.[9] Contrary to the former,[10] the latter is clearly defined and is

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[3] Note: espionage charges have also (increasingly) been brought against whistleblowers that seek to render public sensitive information, such as Edward Snowdon or Julian Assange. For a critique, see, generally, J. Scahill, 'Biden should end Espionage Act prosecutions of whistleblowers and journalists', *The Intercept*, 21 January 2021. Such cases are, however, beyond the scope of our analysis.

[4] See, further, the discussion below, at notes 92-98.

[5] See e.g., for a critique of the application of the death penalty to peacetime espionage in the US, R. Norwood, 'None Dare Call it Treason: The Constitutionality of the Death Penalty for Peacetime Espionage' (2002) 87 *Cornell L. Rev.*, pp. 820-852.

[6] See also the examples of historical spy cases on the website of the UK security service Mi5 (at https://www.mi5.gov.uk/historical-spy-cases), or the list of espionage cases in the US Homeland Security Digital Library (at https://www.hsdl.org/?view&did=482512).

[7] See *Jadhav case (India v Pakistan)*, Judgment of 17 July 2019, (2019) ICJ Rep. 418. The judgment does not address the immunity of people accused of espionage (or lack thereof), but focuses instead on the question whether Mr. Jadhav was unlawfully denied the right of consular assistance under the Vienna Convention on Consular Relations (VCCR), 596 UNTS 261 (spoiler alert: he was).

[8] See e.g., 'Ahmadreza Djalali: Sweden alarmed by Iran's reported plan to execute doctor', BBC News, 4 May 2022; 'Kulbushan Jadhav: death penalty for "Indian spy" in Pakistan', BBC News, 10 April 2017; 'Suspected Russian spies charged in US', BBC News, 29 June 2010.

[9] On which, see the chapters by xxx.

[10] xxx

understood as extending to the "gathering or attempting to gather information in territory controlled by an adverse party through an act undertaken on false pretences or deliberately in a clandestine manner" – in other words, to the collecting of intelligence behind enemy lines by members of the armed forces not wearing their uniform.[11] Article 46 of the First Additional Protocol to the Geneva Conventions confirms that when such a spy is caught in the act, he or she shall not have the right to the status of a prisoner of war (POW) and can be tried under the domestic criminal law of the capturing State.[12] It is noted in the margin, however, that the difference between peacetime and 'wartime' espionage may not always be straightforward. What happens, for example, if, in the absence of a pre-existing armed conflict, a coastal State were to detain uniformed members of the armed forces of another State suspected of spying in its territorial sea? The position of the International Committee of the Red Cross (ICRC) is that "[a]ny unconsented-to military operations by one State in the territory of another State, including its national airspace and territorial sea, should be interpreted as an armed interference in the latter's sphere of sovereignty and thus may be an international armed conflict".[13] And further that "whenever members of the armed forces of a State in dispute with another fall into enemy hands, they are eligible for prisoner-of-war status regardless of whether there is full-fledged fighting between the two States".[14] At the same time, it seems that practice is not always consistent on this point.[15]

Second, the chapter considers the immunity from criminal prosecution of individuals suspected of espionage. It does not, by contrast, delve more deeply into the status of 'spy ships' or 'spy planes'. While it is clear that warships and other ships 'owned or operated by a State and used only on government non-commercial service', as well as 'State aircraft', enjoy far-reaching immunities under conventional and customary international law,[16] it goes without saying that ships and planes cannot be put on the docket.

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[11] J.-M. Henckaert and L. Doswald-Beck, *Customary International Humanitarian Law Volume I: Rules* (CUP: 2005), at 390 (Rule 107 of the ICRC Customary Study. "The definition includes combatants who wear civilian attire or who wear the uniform of the adversary but excludes combatants who are gathering information while wearing their own uniform.").

[12] Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts, 8 June 1977.

[13] ICRC, *Commentary on the Third Geneva Convention* (Cambridge: CUP) (2021), Commentary to Common Article 3, paras. 270 et seq.

[14] Ibid., para. 272. The Commentary does recognize that acts "that are the result of a mistake or of individual ultra vires acts" would not amount to armed conflict. Ibid., at para. 274.

[15] See e.g., L. Arimatsu, 'Classifying Cyber Warfare', in N. Tsagourias and R. Buchan, *Research Handbook on International Law and Cyberspace* (Edward Elgar: Cheltenham) (2021; 2nd ed.), pp. 406-426, at 415, note 44.

[16] With regard to ships, see Articles 32, 95-96, 110 and 236 of the UN Convention on the Law of the Sea (UNCLOS) (1982); Article 16 of the United Nations Convention on Jurisdictional Immunities of States and their Property (UNCSI) (2004, not yet in force); Article 30 of the European Convention on State Immunity (ECSI) (1972). For older instruments, see e.g. International Convention for the Unification of certain rules concerning the immunity of State-owned ships, Brussels, 10 April 1926, 1 LNTS 199. See also: International Tribunal for the Law of the Sea, The "*Ara Libertad*" Case (Argentina v Ghana), Order of 15 December 2012, ITLOS Reports 2012, p. 332, at para. 95 (confirming the immunity of warships under general international law, including in internal waters); International Tribunal for the Law of the Sea, Case concerning the detention of three Ukrainian naval vessels (Ukraine v

Accordingly, the pertinent questions are not whether 'spy ships' or 'spy planes' enjoy immunity from suit, and (relatedly) whether they lose an entitlement to immunity that would otherwise be available to them.[17] Rather, the relevant questions to consider are whether such ships and planes can be boarded, intercepted and arrested in the first place (in other words: are they *inviolable*[18]), as well as whether they can be exposed to measures of constraint in connections with proceedings before a foreign domestic court (in other words: whether they enjoy immunity from execution)?[19] These questions, which also touch upon the law on the use of force and the law of the sea, are beyond the scope of our analysis, and are addressed elsewhere in this volume.[20] Suffice it to note that the permissibility of an arrest or interception is different for spy *ships* as opposed to spy *planes* (since State aircraft can only enter another State's territorial airspace with the latter's consent[21]), and that for spy *ships*, relevant variables include the ship's location (within or without the territorial sea[22]) and its status (e.g., a warship versus a commercial vessel[23]). Of course, what is included

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Russian Federation), Order of 25 May 2019, available at https://www.itlos.org/fileadmin/itlos/documents/cases/26/published/C26_Order_20190525.pdf, at paras. 95-98. For aircraft, see e.g. the Convention relating to the regulation of aerial navigation, Paris, 13 October 1919; Article 3(3) UNCSI. Further: Venice Commission, Opinion on the International Legal Obligations of Council of Europe Member States in respect of secret detention facilities and inter-State transport of prisoners', 17 March 2006, Opinion no. 363/2005, CDL-AD(2006)009, para. 95 ("Under customary international law, state aircraft enjoy immunity from foreign jurisdiction in respect of search and inspection. Accordingly, they cannot be boarded, searched or inspected by foreign authorities, including host State's authorities, without the captain's consent. However, because state aircraft need authorisation to enter another State's airspace, the extent of their immunity is conditioned on such an authorisation pursuant to Article 3(c) of the Chicago Convention."). Consider also the general rules relating to the immunity from execution of State property laid down in Articles 18-19 UNCSI and Article 23 ECSI.

[17] See, in this sense, I. Delupis, 'Foreign Warships and Immunity for Espionage', (1984) 78 *American Journal of International Law*, pp. 53-75, at 54, 72. When discussing Swedish enforcement action against suspected Soviet submarines in their territorial waters, Delupis criticizes the conflation of immunity issues and the right of self-defence ("the immunity of a submarine is not even *relevant* to unlawful intrusions").

[18] On the conflation between the concepts of immunity and inviolability see e.g., T. Ruys, 'Immunity, Inviolability and Countermeasures – A Closer Look at Non-UN Targeted Sanctions,' in T. Ruys and N. Angelet (eds.), *The Cambridge Handbook of Immunities and International Law* (CUP: 2019), pp. 670-710, at 688-690.

[19] Further, see e.g., M. Happold, 'Immunity from execution of military and cultural property', in T. Ruys and N. Angelet (eds.), *op. cit.*, supra n. 18, pp. 307-326, at 310 ff. For a recent case on the immunity from execution of State aircraft, see: Cour d'Appel de Paris, *Congo v Commissimpex*, Judgment of 3 June 2021, N° RG 20/08146 – N° Portalis 35L7-V-B7E-CB6BA.

[20] See the chapters of xxx. See, also, P.J. Kwast, 'Maritime law enforcement and the use of force: reflections on the categorization of forcible action at sea in the light of the *Guyana/Suriname* award, (2008) 13 *Journal of Conflict and Security Law*, 49.

[21] See also M.F. Lafouasse, 'L'espionnage en droit international', (2001) 47 *Annuaire français de droit international*, pp. 63-136 , at 120-1.

[22] Espionage is not listed amongst the activities that trigger the right to visit on the high seas (Art. 110 UNCLOS). Accordingly, in the (admittedly unlikely) scenario were a merchant vessel is conducting espionage on the high seas, it remains subject to the exclusive jurisdiction of its flag State. Nor does espionage constitute one of the activities in respect of which the coastal State may exercise functional jurisdiction within the Exclusive Economic Zone (see also Lafouasse, *loc. Cit.*, supra n. 21, at 78-79). Conversely, while foreign ships enjoy the right of innocent passage in territorial waters, Article 19(2)(c) asserts that acts "aimed at collecting information to the prejudice of the defence or security of the coastal State" are not covered by the concept of innocent passage. What is more, it is plausible that espionage can be regarded as a 'crime of a kind to disturb the peace of the [coastal State]' in the sense of Article 27(1)(b) UNCLOS, over which the coastal State can exercise jurisdiction.

[23] Article 32 UNCLOS confirms the immunity of warships and other government ships operated for non-commercial purposes. Pursuant to Article 30, warships that do not comply with the coastal State's laws and regulations may be required 'to leave the territorial sea immediately').

within our analysis is whether the *crew* of an arrested spy ship or spy plane (consider, for instance, the 1960 U-2 incident[24]) is entitled to immunity from criminal jurisdiction – irrespective of the legality of the initial arrest of the ship or plane. Here too, however, two caveats are in order. First, as suggested above, the crew of a warship or military aircraft should normally be granted POW status pursuant to the law of armed conflict (this would be different if members of the armed forces act clandestinely, e.g. by collecting intelligence from an unidentified ship or aircraft and out of uniform).[25] Second, the relevance of this issue should not be overstated as orbiting satellite activities and other new technological advances have rendered the use of spy ships and spy planes in other States' territorial sea or airspace – and *a fortiori* of *manned* spy ships and spy planes – largely obsolete.[26]

The present chapter first examines the immunity *ratione personae* of certain categories of officials, most prominently diplomatic personnel (section 2). It subsequently considers to what extent the (residuary) immunity *ratione materiae* of foreign officials extends to espionage (section 3). A final section assesses whether immunity can be set aside by way of a 'countermeasure' (section 4).

2 Personal Immunity

Personal immunity may be pleaded on behalf of individuals who hold positions symbolically personifying the sovereign State, or those representing the State abroad in its interactions with other States.[27] International law originally granted immunity *ratione personae* to prevent regulatory competence being exercised over foreign sovereigns as this would undermine their dignity and threaten international relations.[28] More recently, it has been granted to allow State representatives to perform their official duties

[24] Ki-Gab Park, 'The U-2 incident – 1960', in T. Ruys and O. Corten (eds.), *The Use of Force in International Law: a Case-based Approach* (Oxford: OUP) (2018), pp. 67-75.

[25] Contrast, for instance, the arrest of the *USS Pueblo* by North Korea in 1968 to the downing of a U-2 spy plane over Soviet territory in 1960. While the *USS Pueblo* was an intelligence ship of the US Navy, whose crew wore US Navy uniforms, the U-2 lacked identification and the pilot was not wearing a uniform. See, further, Delupis, *supra* n. 15, at pp. 65-66. Lafouasse, *loc. cit.*, supra n. 21, at ...

[26] See, also in this sense, Ki-Gab Park, *loc. Cit.*, supra n. 24, at 72. On the legality of espionage from space, see e.g. Lafouasse, *loc. cit.*, supra n. 21, at 79.

[27] Special Rapporteur Escobar Hernández in her seventh report on the topic of the Immunity of Foreign Officials from Criminal Jurisdiction, Seventy-first Session of the ILC, UN Doc. A/CN.4/729, 18 April 2019, at para. 69, proposed a draft article asserting that immunity *ratione personae* ought to be addressed *proprio motu* by the organs competent to determine immunity, regardless of whether the State of the foreign official invoked immunity: see draft article 10(6). This proposal was, however, not adopted by the ILC: see the Commentary to draft article 10 on the invocation of immunity in the Report of the ILC, Seventy-second Session, 26 April–4 June and 5 July–6 August 2021, UN Doc. A/76/10, at p.138. See, further, the discussion below on the invocation of functional immunity, at n.00-00.

[28] See *Re Honecker*, Federal Supreme Court of the Federal Republic of Germany, 80 ILR 366.

overseas.[29] The entitlement to personal immunity is granted throughout the period that the individual holds office. It is therefore temporary in nature and ceases once the office is vacated, albeit that the person concerned may still benefit from a residual immunity *ratione materiae* for any acts performed in representative capacity while in office.[30]

Personal immunities are status-based and enjoyed by the holders of a small number of public offices. The rules governing their scope are established by both customary international law and treaties. Customary international law grants personal immunities from the jurisdiction of foreign States to officials in certain high-ranking offices. It has been widely accepted that heads of State and heads of government personify the sovereign State and fall within this group. In the *Arrest Warrant* case, the International Court of Justice (ICJ) asserted that foreign ministers are similarly entitled to immunity *ratione personae*.[31] Beyond the 'troika', controversy currently surrounds which other officials enjoy such under customary international law.[32] Some judicial decisions have held that the deputy prime minister,[33] the defence minister,[34] and the commerce and international trade minister,[35] would enjoy this right. However, as these are very limited examples of State practice, it is doubtful whether they establish or evidence a crystallised rule of customary international law *obliging* (rather than *permitting*) States to extend immunity *ratione personae* to the officials concerned. Other judgments have denied personal immunity to the solicitor general,[36] the head of

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[29] See *Marcos v. Federal Department of Police*, Federal Tribunal of Switzerland, 2 November 1989, 102 ILR 198, at p. 201; and *Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, Judgment of 14 February 2002, ICJ Reports 2002, p. 3, at [51].

[30] See the discussion on functional immunity below in section 3.

[31] *Arrest Warrant* case, *supra* n. 27, at [54]. While there was limited practice offering support to the existence of such a rule when the *Arrest Warrant* case was decided (see, for example, *Chong Boon Kim v. Kim Yong Shik and David Kim*, Circuit Court of the First Circuit, State of Hawaii, 9 September 1963, 81 ILR 604, at pp. 604-605; and *Tachiona v. Mugabe*, 169 F. Supp. 2d 259 (S.D.N.Y. 2001), at pp. 296-297), numerous States have now endorsed the reference to foreign ministers enjoying personal immunities made in draft article 3 of the Immunity of State Officials from Foreign Criminal Jurisdiction when commenting on this provision in the Sixth Committee of the General Assembly: see, generally, Text of Draft Articles 1, 3 and 4, Provisionally Adopted by the Drafting Committee at the Sixty-fifth Session of the International Law Commission, 4 June 2013, UN Doc. A/CN.4/L.814.

[32] See, generally, M. Ubéda-Saillard, 'Foreign Officials Entitled to Personal Immunity', in T. Ruys and N. Angelet (eds.), op. cit., supra n. 18, pp. 481-495.

[33] *Re Barak*, Westminster Magistrates' Court of England, 29 September 2009, 163 ILR 619.

[34] *Re Mofaz*, Bow Street Magistrates' Court of England, 12 February 2004, 128 ILR 709, at p. 712; *Barak*, *supra* n. 31, at p. 619-620 (holding this office jointly with the office of the deputy prime minister); and *A v. Ministère Public de la Confédération, B and C*, Federal Criminal Court of Switzerland, Case No. BB.2011.140, 25 July 2012, at [5.4.2]. See, similarly, the statements made in the Sixth Committee of the General Assembly by the Russian Federation, Summary Record of the 19th Meeting, Seventy-second Session, A/C.6/72/SR.19, 20 November 2017, at para. 37; and Israel, Summary Record of the 24th Meeting, Seventy-second Session, A/C.6/72/SR.24, 30 November 2017, at para. 110.

[35] *Bo Xilai*, Bow Street Magistrates' Court of England, 8 November 2005, 128 ILR 713, at p. 714. See, similarly, the statements made in the Sixth Committee of the General Assembly by Israel, Summary Record of the 24th Meeting, Seventy-second Session, A/C.6/72/SR.24, 30 November 2017, at para. 110.

[36] *Republic of Philippines v. Marcos*, 665 F.Supp. 793 (N.D. Cal. 1987), at pp. 797-798.

national security,[37] the public prosecutor,[38] and the second vice-president of a foreign State.[39] It is worth noting in any case that the International Law Commission (ILC) limits the enjoyment of immunity *ratione personae* from criminal jurisdiction to just heads of State, heads of government and foreign ministers.[40]

In terms of international treaties, the Vienna Convention on Diplomatic Relations 1961[41] (VCDR) accords immunity *ratione personae* (and inviolability) from the jurisdiction of the receiving State to diplomatic agents[42] as well as their family members.[43] In turn, the Convention on Special Missions 1969[44] (CSM) similarly accords representatives to a special mission and members of its diplomatic staff (as well as their family members[45]) immunity *ratione personae* (and inviolability) from the jurisdiction of the receiving State.[46]

Immunity *ratione personae* creates an absolute bar to criminal jurisdiction and is not subject to any exceptions. For this reason the immunity extends to both official and private acts.[47] The absolute nature of personal immunities from criminal jurisdiction is reflected in both customary international law[48] and the

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[37] *Case Concerning Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France)*, Judgment of 4 June 2008, ICJ Reports 2008, at [194]; and *Khurts Bat v. The Investigating Judge of the German Federal Court* [2011] EWHC 2029 (Admin), at [61] and [108].

[38] *Mutual Assistance in Criminal Matters* case, *supra* n. 35, at [194].

[39] French Court of Cassation, Case No. 15-83156, 15 December 2015 (concerning the Second Vice-President in charge of Defence and National Security for Equatorial Guinea).

[40] See draft article 3 of the Immunity of State Officials from Foreign Criminal Jurisdiction, provisionally adopted by the ILC.

[41] 500 UNTS 96.

[42] Articles 29 and 31(1) VCDR. This immunity is only owed to the sending State of the diplomat. By way of exception, these immunities are also to be granted by third States when a diplomatic agent passes through its territory in order to take up a diplomatic post, return to a diplomatic post, or return to their own country: Article 40(1) VCDR. For a recent case on the scope of Article 40 VCDR, see Belgian Supreme Court, *AA*, Case Nr. P.18.1301.N, 2 January 2019.

[43] Article 37(1) VCDR provides that family members forming part of the household of a diplomatic agent enjoy the same immunities as those enjoyed by the diplomatic agent. The extension of personal immunities under this provision is subject to the family member not being a national of the receiving State.

[44] 1400 UNTS 231. The CSM only has 40 States Parties (at the time of writing). Nonetheless, in *The Freedom and Justice Party, R (on the Application of) v. The Secretary of State for Foreign and Commonwealth Affairs (Rev 2)* [2018] EWCA Civ 1719, the Court of Appeal for England and Wales held that the personal immunity from criminal jurisdiction of members of a special mission forms part of customary international law. See, also, Council of Europe, Committee of Legal Advisers on Public International Law (CAHDI), Replies by States to the Questionnaire on 'Immunities of Special Missions', 11 July 2018, CAHDI (2018) 6 prov, available at: https://rm.coe.int/replies-by-states-to-the-questionnaire-on-immunities-of-special-missio/168078b199.

[45] Article 39(1) CSM accords family members of representatives to a special mission and members of its diplomatic staff the same immunities as those enjoyed by the officials under the Convention. The extension of personal immunities under this provision is subject to the family member not being a national of, or permanently resident in, the receiving State.

[46] Article 31(1) CSM. Under Article 42(1) CSM, these immunities are also to be granted by third States when a representative of the sending State passes through its territory in order to take up an official function, or to return to the sending State. By way of contrast to the foregoing, Article 43 VCCR provides for immunity "in respect of acts performed in the exercise of consular functions" only.

[47] See draft article 4(2) of the Immunity of State Officials from Foreign Criminal Jurisdiction, provisionally adopted by the ILC.

[48] See, for example, the *Arrest Warrant* case, *supra* n. 27, at [58], in relation to there being no exception to the immunity *ratione personae* enjoyed by a foreign minister when charged with international crimes; and *Freedom and Justice Party*, *supra* n. 42, at [107], similarly finding that special missions immunity existing under customary international law is not subject to any qualification for international crimes.

treaties that have codified this right.[49] As such, a foreign official who is entitled to immunity *ratione personae* cannot be arrested or prosecuted for acts of espionage committed in the forum State.

Diplomatic immunity is of particular relevance in the present context. Indeed, in spite of the widespread public condemnation of espionage, the use of spies acting under the guise of a diplomatic agent has been widespread and persistent over time. Numerous examples exist where States have accused foreign diplomats of being engaged in espionage, and have either requested their recall or declared such persons '*persona non grata*' pursuant to Article 9 VCDR.[50] Suspicion of spying has in fact been considered 'the most common reason' for using these mechanisms.[51] In one sensational example, the British government requested the withdrawal of 105 Soviet officials, arguing that the growth of intelligence gathering activities on British soil constituted a direct threat to the security of the country.[52] The use of the mechanisms provided for in the VCDR confirms that diplomats do not lose their immunity from criminal jurisdiction for engaging in espionage,[53] with the authors being unaware of any judicial practice to the contrary.[54]

For the sake of completeness, it is observed that, *after their posting*, diplomatic agents enjoy immunity only "with respect to acts performed in the exercise of [their] functions as a member of the mission"[55] (i.e. functional immunity). Thus, in a controversial judgment pertaining to the 'extraordinary

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[49] See Article 31(1) VCDR and Article 31(1) CSM.

[50] See E. Denza, *Diplomatic Law: Commentary on the Vienna Convention on Diplomatic Relations* (Oxford: OUP 2016; 4th ed.), at 64-5. When declared a '*persona non grata*', diplomats are granted a 'reasonable period' to leave the territory of the receiving State (a period of 48 hours is generally regarded as the minimum reasonable amount of time for this). It is not uncommon for the sending State to respond with a similar recall request or *non grata* declaration (in a tit-for-tat game), although such requests may be directed to individuals whose posting is about to expire. See, on this point, C. Milo, 'Russian Diplomatic Espionage in Italy', (2021) 1 *Italian Review of International and Comparative Law*, pp. 171-180, at 174-5. Diplomats that have been declared *persona non grata* may also be prohibited from entering the receiving State's territory for a certain period of time. See, further, Lafouasse, *loc. Cit.*, supra n. 21, at 117.

[51] E. Denza, *op. cit.*, supra n. 50, at 64-5. As Denza notes, however, requests for the withdrawal of diplomats from *friendly* countries on the grounds of espionage are extremely rare.

[52] See ibid., at 64-5.

[53] See, however, N. Ward, "Espionage and the Forfeiture of Diplomatic Immunity" (1977) 11 International Lawyer 657, at pp. 665 and 667, suggesting a change to existing laws to deny immunity to a diplomat who commits espionage on the basis that this activity is not a proper diplomatic function.

[54] In *United States v. Enger*, 472 F.Supp. 490 (1978), the United States District Court for New Jersey considered whether two foreign Soviet nationals (Enger and Chernjaev) charged with espionage were entitled to personal immunity under the VCDR. It found that, because the defendants were employees of an international organisation performing functions that were not diplomatic in nature, there was no basis upon which they could be granted diplomatic immunity (at pp. 506-7). See the discussion on whether the defendants were entitled to immunity under the Convention on the Privileges and Immunities of the United Nations 1946, 1 UNTS 15, below at n. 00. The court went on to consider whether classified information that was seized from a co-conspirator (Zinyakin) who – unlike the defendants – was entitled to diplomatic immunity and inviolability should be suppressed and excluded as evidence. In the motion for reconsideration, it was held that a diplomat "cannot claim any interest in the illegally obtained national security information against its owner, the [State]" and complain that he had been deprived of his property (at p. 541). The court went on the interpret Article 29 VCDR to "mean that where a diplomat has abused the hospitality of the receiving State by stealing from that State vital national defence documents, he can be required to return such materials to the receiving State" (at p.545).

[55] Article 39(2) VCDR.

rendition' of Abu Omar, an Egyptian asylee residing in Italy, the Italian Court of Cassation held that several CIA agents that had been attached to the US embassy in Italy at the time of his abduction did not enjoy immunity from criminal jurisdiction.[56] According to the Court, the CIA agents had not acted as members of the diplomatic mission as the organisational structure of the mission itself was not instrumental in committing the act. Instead, the agents had acted as 'high-ranking officials of the CIA in Italy'[57] and were therefore not covered by diplomatic immunity. Even if some States have expressly qualified acts of espionage as *not* being an official diplomatic function,[58] it would seem hard to prove that spies formerly operating under a diplomatic cover acted only as intelligence officials without the technical support of their diplomatic mission.[59] The present authors are in any case unaware of judicial practice contradicting the foregoing. The next section looks more generally at the functional immunity of State officials.

3 Functional Immunity

Functional immunity prevents exercises of jurisdiction being made over acts performed by foreign officials that are carried out in the course of representative duties. International law entitles States to invoke immunity *ratione materiae* in respect of these acts as they are ones that ultimately belong to the State itself.[60] The immunity may be pleaded on behalf of any State official that performs a representative act. Former officials continue to enjoy the benefits of functional immunity when leaving office given that the immunity is conduct-based and attaches to the act rather than the office.

Whether an act has been performed in an official (as opposed to private) capacity is a question of fact that must be determined by a domestic court on a case-by-case basis. The capacity in which an act has been carried out by a representative agent is to be evaluated by asking whether it was performed by the official in the course of their duties and in the name of the State. An official who engages in espionage at the request of the sending State acts in an official capacity and is entitled to have functional immunity pleaded in foreign criminal proceedings that seek to prosecute this crime.[61] By way of contrast, when

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[56] In the matter of criminal proceedings against Medero and ors, Medero and ors v Nasr (aka Abu Omar) and Ghali, Final appeal judgment, No 39788/2014, ILDC 2239 (IT 2014), 25th September 2014, Italy; Supreme Court of Cassation; 5th Criminal Section.

[57] Ibid., para. 2.2.

[58] See e.g. L. Caflisch, 'La pratique suisse en matière de droit international public 2005', in (2006) 16 *Swiss Review of International and European Law*, pp. 605-657, at 629.

[59] C. Milo, *Loc. Cit.,* supra n. 50, at 178.

[60] See, generally, Hazel Fox and Philippa Webb, *The Law of State Immunity*, 2013, 3rd Edition, Oxford University Press, chap 18; and Rosanne van Alebeek, "Functional Immunity of State Officials from the Criminal Jurisdiction of Foreign National Courts", in T. Ruys and N. Angelet (eds.), *op. cit.*, supra n. 18, pp. 496-524.

[61] It is irrelevant for the purposes of pleading immunity that unlawful conduct has been carried out by the State official. The applicability of immunity is not contingent on the legality of the conduct that forms the subject matter of the domestic proceedings. Were this not the case, the plea of immunity would become part of the hearing into the merits of the underlying

nationals of the forum State – whether private individuals or officials of the forum State – gather confidential information and pass this on to a foreign State (be it for financial or political reasons), they are fully exposed to criminal prosecution without any entitlement to immunity and operate on their own risk. This is illustrated, amongst others, by the execution of the Rosenbergs in the United States in 1953.[62] In a similar vein, in the (admittedly unlikely) scenario where a foreign official would be motivated by personal reasons to gather confidential information whilst visiting the forum State, he or she would not be exercising authority conferred by the sending State when carrying out this act. There is accordingly no entitlement for functional immunity to be invoked in criminal proceedings brought against such an individual.[63]

The work of the ILC supports there being no entitlement to immunity *ratione materiae* under international law for acts of espionage. The view put forward does not however consider acts of espionage to be performed in a private capacity. Instead, it believes there to be an exception to immunity for this crime. Special Rapporteur Kolodkin, appointed by the ILC as the first Special Rapporteur on the topic of the Immunity of State Officials from Foreign Criminal Jurisdiction, when evaluating whether international law recognises exceptions to functional immunity concluded in his report that:

> A situation where criminal jurisdiction is exercised by a State in whose territory an alleged crime has taken place, and this State has not given its consent to the performance in its territory of the activity which led to the crime and to the presence in its territory of the foreign official who committed this alleged crime, stands alone in this regard as a special case. It would appear that in such a situation there are sufficient grounds to talk of an absence of immunity.[64]

Espionage was specifically cited by Special Rapporteur Kolodkin as an activity that would be covered by this exception to immunity.[65] A later report published by Special Rapporteur Escobar Hernández put forward a draft article establishing more generally that there be no entitlement to functional immunity

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claim. These are entirely separate parts of the legal process and must remain so. Considerations of immunity are preliminary in nature in order to prevent domestic courts from unnecessarily exercising enforcement jurisdiction over conduct that is attributable to a foreign State. See, in the context of State immunity on this point, *Owners of Cargo Lately Laden on Board the Playa Larga v. Owners of the I Congreso del Partido* [1983] 1 AC 244, at p. 272; and *Case Concerning Jurisdictional Immunities of the State* (*Germany v. Italy: Greece Intervening*), Judgment, ICJ Reports 2012, p. 99, at [60]. See, further, the discussion below, at nn. 109-113.

[62] For other examples, see Lafouasse, *loc. Cit.*, supra n. 21, at 112-3.

[63] Reference can also be made to the case of *United States v. Enger*, *supra* n. 52, where the court found that two Soviet nationals (Enger and Chernjaev) working in the United Nations Secretariat, who had not claimed to have been official representatives of the USSR, could be prosecuted for espionage. As UN employees, they enjoyed immunity from suit only in respect of acts performed by them in their official capacity and falling within their official functions. Espionage for the Soviet Union was "of course, not one of the functions performed in the defendants' official capacities with the United Nations" (at p. 502).

[64] Second Report of Special Rapporteur Kolodkin on the Immunity of State Officials from Foreign Criminal Jurisdiction, UN Doc. A/CN.4/631, 10 June 2010, at para. 94(p).

[65] *Ibid.*, at para. 85. Special Rapporteur Kolodkin also questioned whether immunity was enjoyed for espionage where the receiving State had consented to the presence of a foreign official in its territory to perform an official function that was unrelated to the act of espionage. He commented in this regard that "if an official has come for talks on agriculture, but beyond the scope of the talks engages in espionage …, there are doubts as to whether he enjoys immunity from the criminal jurisdiction of the receiving State in connection with such illegal acts" (*ibid.*, at para. 84).

in criminal proceedings for crimes committed in the territory of the forum State. While the Special Rapporteur referred to cases where the domestic courts had recognised that immunity was unavailable for espionage to support this exception,[66] the wording of the draft article that she proposed did not explicitly mention this act. According to draft article 7(1)(iii), immunity would not apply to:

> 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.[67]

The exception to functional immunity for crimes committed in the territory of the forum State proposed by Special Rapporteur Escobar Hernández proved to be controversial with the ILC members. The ILC ultimately decided that it should not be included alongside the other exception to functional immunity that was provisionally adopted and referred to the Drafting Committee.[68]

The ILC did not however rule out the non-availability of immunity *ratione materiae* in criminal proceedings for acts of espionage committed in the forum State. The ILC Commentaries to the provisionally adopted version of draft article 7(1) provides that functional immunity may not be invoked where the forum State has not consented to the presence of the foreign official nor their spying activities.[69] The relevant part of the ILC Commentaries provides:

> The Commission also considered the case of other crimes committed by a foreign official in the territory of the forum State without that State's consent to both the official's presence in its territory and the activity carried out by the official that gave rise to the commission of the crime (territorial exception). … The Commission considers that certain crimes, [such as] … espionage, committed in the territory of a State in the aforementioned circumstances are subject to the principle of territorial sovereignty and do not give rise to immunity from jurisdiction *ratione materiae*, and therefore there is no need to include them in the list of crimes for which this type of immunity does not apply.[70]

The position that functional immunity is denied in criminal proceedings where acts of espionage have been committed in the forum State finds some support in State practice and *opinio juris*. For instance, when Germany provided information to the ILC on exceptions to the immunity of State officials from foreign criminal jurisdiction, it

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[66] Fifth Report of Special Rapporteur Escobar Hernández on the Immunity of State Officials from Foreign Criminal Jurisdiction, Sixty-eighth Session of the ILC, UN Doc. A/CN.4/701, 14 June 2016, at para. 227.

[67] *Ibid*., Annex III, at p. 99.

[68] Report of the ILC, Sixty-ninth Session, 1 May–2 June and 3 July–4 August 2017, UN Doc. A/72/10, at p. 176. Draft article 7(1) provisionally adopted by the ILC provides that immunity *ratione materiae* from the exercise of foreign criminal jurisdiction shall not apply in respect of certain crimes under international law.

[69] The need for the spy to be present in the territory of the forum State when committing acts of espionage means that the lack of immunity would not apply where (as is often the case) the espionage is carried out through cyberspace. In any event, criminal proceedings may be difficult to bring where espionage is committed through cyberspace as the individual who committed the crime may be hard to identify.

[70] ILC Commentaries to the Draft Articles on the Immunity of State Officials from Foreign Criminal Jurisdiction, Report of the ILC, Sixty-ninth Session, 1 May-2 June and 3 July-4 August 2017, A/72/10, p. 178, at para. 24 (footnotes omitted). The territorial exception for espionage recognised by the ILC Commentaries does not however prejudice the enjoyment of other entitlements to immunity that are established by international law (*ibid*.). See the discussion above on personal immunities being available in foreign criminal proceedings for espionage.

said that there is "an established principle that public international law does not prohibit States from punishing aliens for acts of espionage".[71] An earlier judicial decision had found that, "although espionage is surely an official act, such acts fail to convey functional immunity to the actor".[72] Austria similarly declared in the Sixth Committee of the General Assembly that "[i]t was … possible to argue that all State agents enjoyed immunity *ratione materiae*, unless they were spies or foreign agents carrying out unlawful acts in the territory of a State, in which case international law recognized the right of the receiving State to prosecute".[73] Various authors have similarly voiced the position that secret agents or 'spies in disguise' do not benefit from immunity.[74]

While it is acknowledged that there have been instances where non-nationals of the forum State have been prosecuted for espionage,[75] it remains difficult to assess the above practice, and to determine whether the position set forth by the ILC is reflective of customary international law as it currently stands, or rather belongs to the realm of 'progressive development of international law'.[76]

The view put forward by the ILC would have difficulty in finding support in the general exception to immunity for torts committed in the territory of the forum State that is well-established under the restrictive model of State immunity.[77] This is because the exception is only concerned with immunity from

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[71] Comments of the Federal Republic of Germany to the ILC on the Immunity of State Officials from Foreign Criminal Jurisdiction, 67th Session of the ILC, 2 February 2015 (on file with authors).

[72] *Ibid*., referring to the decision of the Federal Supreme Court, StR 347/92, 30 July 1993; and Federal Constitutional Court, 2 BvL 19/91, 2 BvR 1206/91, 2 BvR 1584/91 and 2 BvR 1601/93 15 May 1995.

[73] Summary Record of the 23rd Meeting, Sixty-third Session, A/C.6/63/SR.23, 3 November 2008, at para. 15.

[74] C. Milo, *Loc. Cit*., *supra* n. 50, at 178 (suggesting there is "general agreement that secret agents are not entitled to immunity"); Delupis, *supra* n. 15, at p. 63 ("Spies in disguise… enjoy no protection by their home state and no immunity for their acts"). In a similar vein, in their expert report for the German Constitutional Court, Wolfrum and Schuster conclude that "*[es ist] allgemeine Praxis der Staaten und auch in der Lehre völlig unbestritten, daß Staaten Spione andere Staaten, die gegen sie tätig waren und derer seie habhaft geworden sind, bestrafen können, sofern nicht spezielle Aschlußgründe, insbesondere solche der diplomatischen Immunität eingreifen*": R. Wolfrum and G. Schuster, *Völkerrechtliche Fragen der Strafbarkeit von Spionen aus der ehemaligen DDR* (Berlin: Springer) (1995), at 8-9.

[75] See, generally, Elizabeth Franey, *Immunity, Individuals and International Law*, 2011, Lambert Academic Publishing, at pp. 265-277.

[76] Article 13(1)(a) of the Charter of the United Nations 1945, 1 UNTS XVI. The same observations may also be made of draft article 7(1) that was provisionally adopted by the ILC and provides that immunity *ratione materiae* shall not apply in respect of certain international crimes.

[77] For the codification of this exception in domestic legislation see: section 1605(a)(5) of the United States Foreign Sovereign Immunities Act 1976, Pub. L. No. 94-583, 90 Stat. 2891; section 5 of the United Kingdom State Immunity Act 1978, c. 33; section 7 of the Singapore State Immunity Act 1979, c. 313; section 6 of the South Africa Foreign State Immunities Act 1981, No. 87 of 1981; Section 7(a) of the Malawi Immunities and Privileges Act 1984, No. 12 of 1984; section 13 of the Australia Foreign States Immunities Act 1985, No. 196 of 1985; section 6 of the Canada State Immunity Act 1985, c. S-18; Article 2(e) of the Argentina Immunidad Jurisdiccional de los Estados Extranjeros ante los Tribunales Argentinos, Ley No. 24.488, del 31 Mayo de 1995 (Jurisdictional Immunities of Foreign States before Argentinean Courts); section 5 of the Israel Foreign State Immunity Law 2008, 5769-2008; Article 10 of the Japan Act on the Civil Jurisdiction with respect to a Foreign State 2009, Act No. 24 of April 24, 2009; and Article 11 of the Spain Ley Orgánica 16/2015, de 27 de Octubre, Sobre Privilegios e Inmunidades de los Estados Extranjeros, las Organizaciones Internacionales con sede u oficina en España y las Conferencias y Reuniones internacionales Celebradas en España (Privileges and Immunities of Foreign States and International Organisations). See, also, the codification of customary law made by Article 11 of the European Convention on State Immunity 1972, 74 ETS 3, 1495 UNTS 182; and Article 12 of the United Nations Convention on Jurisdictional Immunities of States and Their Property 2004, adopted by General Assembly Resolution 59/38 of 2 December 2004, but not yet in force. See, however, the views of Sally El Sawah, "Jurisdictional Immunity of States and

civil jurisdiction and it cannot be assumed that what applies in a civil context will automatically apply by way of analogy in a criminal context.[78] Rules of customary international law (and exceptions to these rules) are not to be deduced in this way. Widespread and consistent State practice that is accepted as law is needed in order to demonstrate the existence of a territorial exception to functional immunity from the criminal jurisdiction of a foreign State. Some cases could effectively be read as indicating that a foreign official who clandestinely enters the forum State's territory with a view to committing wrongful acts that constitute a crime under the forum State's domestic law will not enjoy immunity. While not concerned with espionage, one famous case that comes to mind is the *Rainbow Warrior* case, where two agents of the French Secret Service were (initially) condemned to 10 years in prison for their role in the sinking of a Greenpeace vessel in the port of Auckland, New Zealand.[79] Reference can also be made in this regard to the 10-year prison sentence imposed on Francis Gary Powers, the pilot whose U-2 spy plane was downed over Soviet territory.[80] Yet, notwithstanding these cases, relevant precedents remain few and far between to suggest that international law recognises an exception to immunity when crimes are committed in the territory of the forum State. A further problem with relying on the territorial tort exception recognised by the restrictive model of State immunity is that it only covers acts occasioning death, personal injury or damage to property that are performed in either a sovereign or non-sovereign capacity,[81] and would accordingly not as such apply to acts of espionage. It is further observed that, inasmuch as the territorial tort exception requires that the foreign official be present in the territory of the forum State at the time of the contested act(s), it would in any

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Non-commercial Torts", in T. Ruys and N. Angelet (eds.), *op. cit.*, supra n. 18, pp. 142-166, offering a critical assessment on whether the territorial tort exception is well-established.

[78] A handful of State delegations expressed doubt in the Sixth Committee of the United Nations General Assembly that the territorial exception in draft article 7(1)(iii) proposed by Special Rapporteur Escobar Hernández for harm caused to persons or to property was in accordance with customary international law as the existing practice related to immunity from civil jurisdiction rather than immunity from criminal jurisdiction. See, for example, China (Summary Record of the 24th Meeting, Seventy-first Session, A/C.6/71/SR.24, 29 November 2016, at paras 92 and 94); Malaysia (Summary Record of the 29th Meeting, Seventy-first Session, A/C.6/71/SR.29, 2 December 2016, at para. 34); the United States of America (Summary Record of the 29th Meeting, Seventy-first Session, A/C.6/71/SR.29, 2 December 2016, at para. 72); Italy (Summary Record of the 18th Meeting, Seventy-second Session, A/C.6/72/SR.18, 14 November 2017, at para. 146); Greece (Summary Record of the 23rd Meeting, Seventy-second Session, A/C.6/72/SR.23, 17 November 2017, at para. 79); and Vietnam (Summary Record of the 24th Meeting, Seventy-second Session, A/C.6/72/SR.24, 30 November 2017, at para. 123). *Cf.* the statements made by the delegation for Mexico in the Sixth Committee of the General Assembly (Summary Record of the 22nd Meeting, Seventy-second Session, A/C.6/72/SR.22, 27 November 2017, at para. 94).

[79] On the facts of the case and the subsequent arbitration between France and New Zealand, see C. Hoss and J. Morgan-Foster, 'The Rainbow Warrior', *Max Planck Encyclopaedia of Public International Law*, April 2010.

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[81] This is one of the main reasons why it cannot be said that the restrictive model of State immunity is based upon a distinction between *jure imperii* and *jure gestionis* activities. The territorial tort exception does not however apply to *jure imperii* acts taking place in the territory of the forum State that are committed by foreign armed forces during an armed conflict. See, on this point, *Jurisdictional Immunities of the State* case, *supra* n. 27, at [77].

case be of no avail for cyber espionage,[82] and the crew of spy ships might also be 'out of reach' inasmuch as they are situated outside the State's territory.[83]

An alternative factor that may explain many, if not most, of the cases where secret agents were convicted for espionage is that the foreign State refrained from invoking functional immunity for its representative agent in the proceedings and claiming that the acts were performed on its behalf.[84] Practice indeed indicates that States are likely to distance themselves from such activities and not – or at least not openly – accept responsibility for acts of espionage so that diplomatic relations may be maintained. It is noted that there is considerable practice involving the exchange of spies (post-arrest or post-conviction) through bilateral arrangements.[85] Such practice entails an implicit recognition of responsibility of the State or States concerned for their participation in acts of espionage.[86] Nonetheless, the silence on the part of the foreign State can lead to a domestic court prosecuting a spy not needing to consider whether there is an entitlement to immunity under international law. In the *Mutual Assistance in Criminal Matters* case, the ICJ effectively found that it was necessary for a foreign State to invoke its entitlement to immunity on behalf of an official when observing that:

> The State which seeks to claim immunity for one of its State organs is expected to notify the authorities of the other State concerned. This would 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.[87]

The same approach is also found in the draft articles provisionally adopted by the ILC, although the ILC stresses that it is incumbent on the authorities of the forum State to notify the State of the foreign official of its intention to exercise criminal jurisdiction so that the foreign State may invoke (or, as the case

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[82] See the discussion on cyber espionage above, at n. 67.

[83] In the *Enrica Lexie* case, the Arbitral Tribunal examined whether India could lawfully prosecute two Italian marines suspected of shooting and killing two fishermen whilst aboard an Italian-flagged vessel off the Indian coast (the marines reportedly mistook the fishermen for pirates). Leaving aside whether the territorial tort exception was part of customary law, the Arbitral Tribunal noted that, in any case, one precondition for its application was "the presence of a foreign official in the territory of the forum State without the State's consent". In the present case, however, it was "undisputed that the Marines were on board the 'Enrica Lexie', and not on Indian territory, when they committed the acts." Permanent Court of Arbitration, *The "Enrica Lexie" Incident* (*Italy v. India*), PCA Case No. 2015-28, Award of 21 May 2020, at [870]-[871] (the Award continued to declare that: "As such, there was no situation in which the Indian government's consent for the discharge of the Marine's official functions could have been required or sought, and no intentional breach of India's sovereignty can be imputed to the Marines or the Italian State." (at [871])). While the case was not concerned with espionage, the *dictum* appears to suggest more broadly that the acts of State officials aboard a foreign ship in the territorial sea are beyond the reach of the territorial tort exception – a position that may sit uneasily with the axiom that the coastal State's sovereignty extends beyond its land territory and internal waters to the territorial sea (Article 2 UNCLOS).

[84] See, similarly, Delupis, *supra* n. 15, at p. 63.

[85] See, generally, Lafouasse, *loc. Cit.*, *supra* n. 21, at pp. 118-9, referring to the exchanges involving US pilot Francis Gary Powers and those involving the Soviet nationals Enger and Chernajev.

[86] *Ibid.*, at 119.

[87] *Mutual Assistance in Criminal Matters* case, *supra* n. 35, at [196].

may be, waive) the immunity of its official.[88]As the immunity of foreign officials was neither raised nor considered in many cases where non-nationals of the forum State have been prosecuted for acts of espionage, it becomes difficult to read these decisions as evidencing an *opinio juris* believing there to be no functional immunity for this crime.[89]

A final point worth mentioning is that the exception to immunity *ratione materiae* recognised by the ILC providing that it may not be invoked where the forum State has neither consented to the presence of the foreign official nor their spying activities, perceives immunity to be a privilege that the forum State is able to confer or withhold. This understanding of immunity is not however in keeping with how the doctrine operates under international law. The rules on immunity derive from international law and are binding on States. To this end, we are reminded by the ICJ in the *Jurisdictional Immunities of the State* case that when "claiming immunity for themselves or according it to others, 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".[90] A lack of consent on the part of the forum State towards the activities of a foreign State has not been a justification for denying immunity that has been recognised by international law to date.[91]

4 Countermeasures

Assuming that an individual suspected of spying enjoys (personal or functional) immunity from criminal jurisdiction, can the forum State rely on the doctrine of countermeasures under the law of State responsibility – as codified in the ILC Articles on State Responsibility (ARSIWA)[92] – to set aside such immunity? Several arguments suggest that a negative answer is in order.

First, it is recalled that countermeasures are essentially measures of self-help undertaken against another State in response to a prior internationally wrongful act on the part of the latter, aimed at inducing it to cease its wrongful conduct.[93] It follows that a State must first establish (in good faith) that another State has committed a breach of international law before it can impose countermeasures. A complicating factor in the present context is that, even if some concept of 'espionage' features in most domestic criminal laws and codes, the (il)legality of espionage *under public international law* remains a matter for discussion.

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[88] See draft articles 9-11 on the immunity of State officials from foreign criminal jurisdiction in Report of the ILC, Seventy-second Session, 26 April–4 June and 5 July–6 August 2021, UN Doc. A/76/10, at pp. 124-125.
[89] *Cf.* Franey, *supra* n. 73, at p. 284.
[90] *Jurisdictional Immunities of the State* case, *supra* n. 27, at [56].
[91] It is of course well-established that a State enjoying an entitlement to immunity under international law may consent to the waiver of this right.
[92] ILC, Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, (2001) *Yb. ILC* vol. II, Part Two, Articles 49-54.
[93] Art. 49(1) ARSIWA.

On the one hand, authors like Wright and Delupis have taken the position that espionage in peacetime is contrary to international law,[94] essentially because it is thought to constitute an infringement of territorial sovereignty[95] and the principle of non-intervention. On the other hand, a second group of authors – 'the majority opinion' according to Dubuisson and Verdebout[96] – find that there is no general rule prohibiting espionage under international law.[97] More recently, several authors have argued that there is no monolithic answer to the legality of peacetime espionage, but that it is governed by a 'patchwork of norms'[98] governing the conduct underlying espionage.[99] This patchwork includes not only the principles of territorial sovereignty and non-intervention, but also 'sectorial' rules (e.g. diplomatic and consular law, human rights law, etc). The purpose of the present chapter is not to unravel the patchwork[100] but to instead draw attention to the fact that the *illegality* of espionage under international law, which would be a *sine qua non* to resort to countermeasures, cannot be readily assumed.

Second, resorting to 'countermeasures' to justify the prosecution of suspected spies should be tested against the other substantive and procedural requirements that are identified in the ARSIWA.[101] Leaving aside the requirement that countermeasures be proportionate to the initial wrongful act (which is notoriously difficult to apply[102]), and that they should normally be reversible in nature,[103] a State intending to adopt a countermeasure must first notify the responsible State of its intention to do so and call upon the responsible State to comply. In other words, the State intending to deny the immunity that it ordinarily owes to the foreign official will call upon the foreign State to cease the espionage activities before taking the countermeasure. What is more, Article 50(2)(b) ARSIWA expressly asserts that a State taking countermeasures must 'respect the inviolability of diplomatic or consular agents'. Although the provision only speaks of 'inviolability', the ILC Commentary makes clear that it also covers the jurisdictional

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[94] See eg Q. Wright, 'Espionage and the doctrine of non-intervention in internal affairs', in R.J. Stanger (ed.), *Essays on Espionage and International Law* (Ohio State University Press)(1962), pp. 3-28; Delupis, *supra* n. 15.

[95] Implicit support for this view could be read into some of the work of the ILC. See note 70 and accompanying text.

[96] F. Dubuisson and A. Verdebout, 'Espionage in international law', *Oxford Bibliographies*, 2018.

[97] In this sense: J. Stone, 'Legal Problems of Espionage in Conditions of Modern Conflict', in R.J. Stanger (ed.), *op. cit*, supra n. 94, pp. 29-43; G. Cohen-Jonathan and R. Kovar, 'L'espionnage en temps de paix', (1960) 6 *Annuaire français de droit international*, pp. 239-255.

[98] S. Chesterman, 'The Spy who came in from the Cold War: intelligence and international law', (2006) 27 *Michigan Journal of International Law*, pp. 1071-1130, at 1076.

[99] Also in this sense e.g. R. Buchan, *Cyber espionage and international law* (Hart: Oxford) (2019), at 192-3; F. Lafouasse, *L'espionnage dans le droit international* (Paris: Nouveau monde éditions) (2012), 492p.

[100] This point is addressed elsewhere in the edited collection. See xxx

[101] This paragraph is based on the more elaborate discussion in T. Ruys, 'Immunity, inviolability and countermeasures – a closer look at non-UN targeted sanctions,' in T. Ruys and N. Angelet (eds.), *op. cit*, supra n. 18, pp. 670-710, at 702-5.

[102] See further Cannizzaro, 'The Role of Proportionality in the Law of International Countermeasures', 12 EJIL (2001) 889; Franck, 'On Proportionality of Countermeasures in International Law', 102 AJIL (2008) 715.

[103] See also M. Longobardo, 'State immunity and judicial countermeasures', (2021) 32 EJIL, pp. 457-484, at 483.

immunities of diplomatic and consular personnel.[104] The underlying rationale – which is to prevent diplomatic or consular personnel from turning into 'resident hostages'[105] – suggests that this rule ought to be extended to certain other 'individual' immunities. The ILC Commentary itself already confims that the provision applies to representatives of States to an international organisation as well. *Mutatis mutandis*, it is difficult to conceive that countermeasures could justify a breach of the immunity (or inviolability) privileges enjoyed by members of a special mission by the host State, even if the ILC Commentary is silent on this point.

Third, the idea that countermeasures can be adopted by domestic courts is problematic for several reasons.[106] Indeed, as Longobardo points out, domestic courts may be the organs of government least apt to assess the unlawfulness of a prior act of another State, in order to trigger a response by way of a countermeasure, when that act is the object of the very litigation for which immunity is denied.[107] It could be argued that the adoption of countermeasures requires political evaluations which domestic courts are not fit to undertake under international law (as well as domestic constitutional law). The very question on the adoption of countermeasures is one that is subject to political discretion, which is a competence vested to the executive as the actor primarily responsible for representing the State on the international plane.[108] Equally, the procedural requirements of Article 52(1) ARSIWA (e.g. requiring a notification and offering to negotiate *vis-à-vis* the other State) are more suited to the executive function rather than the judicial branch.[109] In all, it is difficult to see how strictly *judicial* countermeasures, undertaken without the involvement of the executive could be lawful under international law.

Fourth and finally, there is a broader and more fundamental difficulty with the idea of invoking countermeasures to justify a breach of the immunity rules.[110] Indeed, as is well-known, the immunity rules

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[104] ILC, 133.
[105] ILC, 134.
[106] See Longobardo, *loc. cit.*, supra n. 103, at 467 ff. But see, however, Moser, 'Non-Recognition of State Immunity as a Judicial Countermeasure to Jus Cogens Violations: The Human Rights Answer to the ICJ Decision on the Ferrini Case', 4 Gottingen Journal of International Law (2012) 809.
[107] Longobardo, *loc. cit.*, supra n. 103, at 472 ("Accordingly, the very rule on sovereign immunity prevents domestic courts from assessing directly the commission of a wrongful act that affects their own State, which is the *conditio sine qua non* of the adoption of every countermeasure").
[108] *Ibid.*, at 473-4.
[109] *Ibid.*, at 478-9.
[110] This paragraph is based on the more elaborate discussion in T. Ruys, *loc. cit.,* supra n. 101, at 706-8. As far as legal doctrine is concerned, some authors have suggested that a domestic court can effectively set aside a foreign State's immunity as a countermeasure in response to breaches of peremptory norms. See, e.g., Moser, 'Non-Recognition of State Immunity as a Judicial Countermeasure to Jus Cogens Violations: The Human Rights Answer to the ICJ Decision on the Ferrini Case', 4 Gottingen Journal of International Law (2012) 809; Franchini, 'Suing Foreign States Before U.S. Courts: Non-Recognition of State Immunity as a Response to Internationally Wrongful Acts', 21 November 2017, available at https://ssrn.com/abstract=3073429. This position was also supported by the Chairperson of the UN Committee against Torture. See Committee Against Torture Summary Record of the Second Part (Public) of the 646th Meeting, 6 May 2005, CAT/C/SR.646/Add 1, para. 67. On the other hand, as Longobardo suggests,

create a procedural bar to the exercise of jurisdiction[111] (albeit with certain built-in exceptions), regardless of the illegality of the underlying conduct of the foreign State or its officials. The suggestion that immunities can be set aside by way of countermeasures in response to a prior unlawful act therefore sits uneasily with the very essence and logic of the immunity doctrine which operates as a procedural hurdle preventing domestic courts from evaluating the legality of the conduct of a foreign State (or its officials) in the first place. It is significant that States have – at least so far – chosen to not go down this path, and have sought to frame the debate in terms of identifying limitations or exceptions to the immunity of States and State officials, rather than by relying on the doctrine of countermeasures. In this respect, it is telling that, while Italy invoked several arguments to deny breaching any entitlement to State immunity enjoyed by Germany in the *Jurisdictional Immunities* case, it never claimed that the denial of immunity constituted a proportionate countermeasure to Germany's wrongful conduct.[112] While this explains why the matter is not expressly mentioned in the judgment, one can hardly imagine that the ICJ, after having found that State immunity is available in proceedings involving gross violations of human rights violations and breaches of *jus cogens*, would somehow have accepted such an argument.[113] Accepting countermeasures to justify a breach of the immunity rules indeed turns the entire logic of immunity law on its head. The fact that States have hitherto chosen to not go down this path – whether in relation to espionage or other activities – and have sought to frame the debate in terms of identifying specific exceptions to the immunity of States and the functional immunity of State officials,[114] may well reflect an *opinio juris* on their part that they perceive the immunity rules as a closed system which does not lend itself to having recourse to countermeasures.[115]

In conclusion, reliance on the doctrine of countermeasures does not seem to be a viable option for setting aside any applicable immunity rules with a view to prosecuting State officials for espionage or other activities.

"[t]he majority of scholars so far have been quite sceptical of the possibility of denying sovereign immunity under the law of countermeasures…" Longobardo, *loc. cit.*, supra n. 103, at 468 (with further references at notes 67 and 68). Fox and Webb note that it is 'questionable' whether the law of countermeasures is relevant to State immunity, without explaining this point any further: Fox and Webb, at 16. Others question whether such countermeasures could meet the ARSIWA requirements. See, e.g., R. Van Alebeek, The Immunity of States and Their Officials in International Criminal Law and International Human Rights Law (2008), at 343–345.

[111] *Case Concerning Jurisdictional Immunities of the State* (*Germany v. Italy: Greece Intervening*), Judgment, ICJ Reports 2012, p. 99, at [92].

[112] *Ibid.* Germany also strongly rebuked the possibility of relying on the countermeasures doctrine during the public hearing. See further M Longobardo, *loc. cit.*, supra n. 103, at 461-462, with references.

[113] It remains to be seen if Italy will develop the argument before the ICJ in the context of the new procedure lodged by Germany and presently pending. See *Case Concerning Questions of Jurisdictional Immunities of the State and Measures of Constraint against State-owned Property (Germany v. Italy)*, documents available at https://www.icj-cij.org/en/case/183.

[114] In a similar vein, Longobardo observes that "to this author's best knowledge states have never advanced this argument explicitly" Longobardo, *loc. cit.*, supra n. 103, at 459.

[115] T. Ruys, *loc. cit.,* supra n. 101, at 707.