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The Head of State, the President of the Government, and the Minister of Foreign Affairs

1. INTERNATIONAL COMPETENCES

As an introduction, if we were to carry out a comparative analysis of domestic law, this would show that the Head of State, the President of the Government and the Minister of Foreign Affairs are normally the domestic organs of a State with the highest powers in international relations.

This idea is confirmed by international practice. Thus, in the first place, it can be affirmed that there is a *iuris et de iure* presumption in favour of these State organs to execute any act related to the conclusion of a treaty. In this sense, Article 7(2)(a) of the Convention on the Law of Treaties (Vienna, 23 May 1969) states that: "by virtue of its functions, and without having to produce full powers, shall be deemed to represent their State; Heads of State, Heads of Government and Ministers for



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Co-funded by
the European Union

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Foreign Affairs, for the performance of all acts relating to the conclusion of a treaty".

Secondly, there is also a *rebuttable iuris et de iure* presumption in favour of these three organs to carry out unilateral acts. Thus, the International Court of Justice, in its Judgment of 3 February 2006, in the case concerning armed activities on the territory of the Congo (para. 46), stated that: "The Court observes that, according to its uniform case law, it is a well-established rule of international law that the Head of State, the President of the Government and the Minister for Foreign Affairs are deemed to represent the State merely by virtue of the exercise of their functions, including the performance, on behalf of their State, of unilateral acts which have the force of international commitments".

2. INVIOLABILITY, PRIVILEGES, AND IMMUNITIES

With regard to their inviolability, privileges, and immunities, I must state three ideas. The first idea is that, according to Article 21 of the Convention on Special Missions, when they are abroad, these persons enjoy: (1) personal inviolability, in that they cannot be subject to measures of arrest or coercion either in their person, their residence, their property, their baggage or their correspondence; (2) diplomatic

privileges; and (3) absolute immunity from civil and criminal jurisdiction.

The International Court of Justice has noted the existence of exceptions to immunity from criminal jurisdiction. The Court emphasised, in its Judgment of 14 February 2002 (para. 60), that the immunity from criminal jurisdiction enjoyed by these three State organs when they are in active service "does not mean that they benefit from impunity for crimes which they may commit, however serious they may be".

The Court added that: "The immunities which, under international law, are enjoyed by [persons holding these offices] in active service as well as by those who have ceased to hold office, do not constitute an obstacle to criminal prosecution in certain circumstances". There are four such circumstances.

First, when these persons do not enjoy the privilege of immunity from criminal jurisdiction in their own State and can therefore be tried by the domestic courts of that State according to its own domestic law.

Second, they will not enjoy immunity from jurisdiction in a foreign State when their own State has decided to waive their immunity.

Thirdly, when the person concerned ceases to hold office, he or she ceases to enjoy immunity from jurisdiction in other States. Provided that jurisdiction is available under

international law, the courts of any State may try the person who previously held one of these offices for acts committed before or after his or her term of office, or for acts committed during his or her term of office, but in his or her private capacity.

Fourth and last, one of these active or former persons may be criminally prosecuted before certain International Criminal Tribunals, where these have jurisdiction. Examples include the International Criminal Tribunal for the former Yugoslavia, the International Criminal Tribunal for Rwanda and the International Criminal Court (*ibid.*, para. 61).

The inviolability, privileges, and immunities of these three organs of the State have had a very broad reception in Spanish law. This matter is regulated in Organic Law 16/2015, on privileges and immunities, of which three ideas are worth highlighting.

The first idea consists of pointing out that this Organic Law regulates the privileges and immunities of the Head of State, the Head of Government and Foreign Ministers of foreign States when they are in Spanish territory. On the one hand, these persons will enjoy absolute inviolability, regardless of whether they are on an official mission or a private visit. On the other hand, they shall enjoy absolute immunity from jurisdiction and execution, regardless of whether

they are on official missions or private visits; whether they refer to official or private acts; or whether the acts are carried out before or during their term of office.

The second idea is that this Organic Law also regulates the immunities of former Heads of State and Government and former Foreign Ministers. With regard to these persons, on the one hand, immunity will continue in respect of official acts carried out during their term of office. However, on the other hand, the Spanish courts will have jurisdiction over their private acts performed during their term of office as well as over their acts performed before the beginning of their term of office.

Finally, the third idea to highlight is that, in the two previous cases, the only exception foreseen is the possibility of prosecution for the commission of international crimes.

3. INTERNATIONAL PROTECTION OF THE HEAD OF STATE OR GOVERNMENT, OR OF THE MINISTER OF FOREIGN AFFAIRS

The international protection of the Head of State, President of the Government, or Minister of Foreign Affairs is regulated in the Convention on the Prevention and Punishment of Crimes against Specially Protected Persons, including

Diplomatic Agents, signed in New York on 14 December 1973.

According to its Article 1.1(a), the Head of State, the President of the Government, and the Minister of Foreign Affairs, whenever they are in the territory of another State, as well as the members of their family accompanying them, are specially protected persons.

Special protection consists of three obligations. First, each State Party shall classify as offences under its domestic law, when intentionally committed: (1) the commission of murder, kidnapping or other attack upon the physical integrity or freedom of an internationally protected person; (2) the commission of a violent attack upon the official premises, private residence or means of transport of an internationally protected person that is likely to endanger his physical integrity or freedom; (3) the threat to commit such an attack; (4) the attempt to commit such an attack; and (5) complicity in such an attack.

Secondly, each State Party shall ensure that such offences are punishable by appropriate penalties which take into account their grave nature.

Thirdly, this in no way affects States Parties' obligations under international law to take all appropriate measures to prevent other attacks

on the person, freedom or dignity of an internationally protected person (Art. 2).

In Spanish law, Articles 605 and 606 of the Penal Code provide for aggravated penalties for these cases.

