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## International Law Commission

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### **Draft report of the International Law Commission on the work of its sixty-fifth session**

*Rapporteur:* Mr. Mathias Forteau

### **Chapter V Immunity of State officials from foreign criminal jurisdiction**

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## Chapter V

### Immunity of State officials from foreign criminal jurisdiction

#### A. Introduction

1. The Commission, at its fifty-ninth session (2007), decided to include the topic “Immunity of State officials from foreign criminal jurisdiction” in its programme of work and appointed Mr. Roman A. Kolodkin as Special Rapporteur.<sup>1</sup> At the same session, the Commission requested the Secretariat to prepare a background study on the topic, which was made available to the Commission at its sixtieth session.<sup>2</sup>

2. The Special Rapporteur submitted three reports. The Commission received and considered the preliminary report at its sixtieth session (2008) and the second and third reports at its sixty-third session (2011).<sup>3</sup> The Commission was unable to consider the topic at its sixty-first session (2009) and at its sixty-second session (2010).<sup>4</sup>

3. The Commission, at its sixty-fourth session (2012), appointed Ms. Concepción Escobar Hernández as Special Rapporteur to replace Mr. Kolodkin, who was no longer with the Commission. The Commission received and considered the preliminary report of the newly appointed Special Rapporteur at the same session (2012).<sup>5</sup>

#### B. Consideration of the topic at the present session

4. The Commission had before it the second report of the Special Rapporteur (A/CN.4/661). The Commission considered the report at its 3164th to 3168th and 3170th meetings, on 15, 16, 17, 21, 22 and 24 May 2013.

5. In the second report, the Special Rapporteur built upon the methodological approaches and general workplan set out in the preliminary report (A/CN.4/654), taking into account the debates, in 2012, in the Commission and the Sixth Committee. The report considered: (a) the scope of the topic and of the draft articles; (b) the concepts of immunity and jurisdiction; (c) the difference between immunity *ratione personae* and immunity *ratione materiae*; and (d) identified the basic norms comprising the regime of immunity *ratione personae*. On the basis of the analysis, six draft articles were presented for the consideration of the Commission. These draft articles addressed the scope of the draft articles (draft article 1);<sup>6</sup> immunities not included in the scope of the draft articles (draft

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<sup>1</sup> At its 2940th meeting, on 20 July 2007 (*Official Records of the General Assembly, Sixty-second Session, Supplement No. 10* (A/62/10), para. 376). The General Assembly, in paragraph 7 of resolution 62/66 of 6 December 2007, took note of the decision of the Commission to include the topic in its programme of work. The topic had been included in the long-term programme of work of the Commission during its fifty-eighth session (2006), on the basis of the proposal contained in annex A of the report of the Commission (*Official Records of the General Assembly, Sixty-first Session, Supplement No. 10* (A/61/10), para. 257).

<sup>2</sup> *Ibid.*, Sixty-second Session, Supplement No. 10 (A/62/10), para. 386. For the memorandum prepared by the Secretariat, see A/CN.4/596 and Corr.1.

<sup>3</sup> A/CN.4/601 (preliminary report); A/CN.4/631 (second report); and A/CN.4/646 (third report).

<sup>4</sup> See *Official Records of the General Assembly, Sixty-fourth Session, Supplement No. 10* (A/64/10), para. 207; and *ibid.*, Sixty-fifth Session, Supplement No. 10 (A/65/10), para. 343.

<sup>5</sup> A/CN.4/654 (preliminary report).

<sup>6</sup> Draft article 1 read as follows:

article 2);<sup>7</sup> definitions of criminal jurisdiction, immunity from foreign criminal jurisdiction, immunity *ratione personae* and immunity *ratione materiae* (draft article 3);<sup>8</sup> the subjective scope of immunity *ratione personae* (draft article 4);<sup>9</sup> the material scope of immunity *ratione personae* (draft article 5);<sup>10</sup> and the temporal scope of immunity *ratione personae* (draft article 6).<sup>11</sup>

#### **Scope of the draft articles**

Without prejudice to the provisions of draft article 2, these draft articles deal with the immunity of certain State officials from the exercise of criminal jurisdiction by another State.

<sup>7</sup> Draft article 2 read as follows:

#### **Immunities not included in the scope of the draft articles**

The following are not included in the scope of the present draft articles:

- (a) Criminal immunities granted in the context of diplomatic or consular relations or during or in connection with a special mission;
- (b) Criminal immunities established in headquarters agreements or in treaties that govern diplomatic representation to international organizations or establish the privileges and immunities of international organizations and their officials or agents;
- (c) Immunities established under other *ad hoc* international treaties;
- (d) Any other immunities granted unilaterally by a State to the officials of another State, especially while they are in its territory.

<sup>8</sup> Draft article 3 read as follows:

#### **Definitions**

For the purposes of the present draft articles:

- (a) The term “criminal jurisdiction” means all of the forms of jurisdiction, processes, procedures and acts which, under the law of the State that purports to exercise jurisdiction, are needed in order for a court to establish and enforce individual criminal responsibility arising from the commission of an act established as a crime or misdemeanour under the applicable law of that State. For the purposes of the definition of the term “criminal jurisdiction”, the basis of the State’s competence to exercise jurisdiction is irrelevant;
- (b) “Immunity from foreign criminal jurisdiction” means the protection from the exercise of criminal jurisdiction by the judges and courts of another State that is enjoyed by certain State officials;
- (c) “Immunity *ratione personae*” means the immunity from foreign criminal jurisdiction that is enjoyed by certain State officials by virtue of their status in their State of nationality, which directly and automatically assigns them the function of representing the State in its international relations;
- (d) “Immunity *ratione materiae*” means the immunity from foreign criminal jurisdiction that is enjoyed by State officials on the basis of the acts which they perform in the discharge of their mandate and which can be described as “official acts”.

<sup>9</sup> Draft article 4 read as follows:

#### **The subjective scope of immunity *ratione personae***

Heads of State, Heads of Government and Ministers for Foreign Affairs enjoy immunity from the exercise of criminal jurisdiction by States of which they are not nationals.

<sup>10</sup> Draft article 5 read as follows:

#### **The material scope of immunity *ratione personae***

1. The immunity from foreign criminal jurisdiction that is enjoyed by Heads of State, Heads of Government and Ministers for Foreign Affairs covers all acts, whether private or official, that are performed by such persons prior to or during their term of office.
2. Heads of State, Heads of Government and Ministers for Foreign Affairs do not enjoy immunity *ratione personae* in respect of acts, whether private or official, that they perform after they have left office. This is understood to be without prejudice to other forms of immunity that

6. Following its debate on the second report of the Special Rapporteur, the Commission, at its 3170th meeting on 24 May 2013, decided to refer the six draft articles contained therein to the Drafting Committee with the understanding that it takes into account the views expressed in the plenary debate.

7. At its 3174th meeting, on 7 June 2013, the Commission received the report of the Drafting Committee and provisionally adopted three draft articles (see section C.1. below).

8. At its ... to ... meetings, on ... and ... July 2013, the Commission adopted the commentaries to the draft articles provisionally adopted at the current session (see section C.2 below).

## **C. Text of the draft articles on Immunity of State officials from foreign criminal jurisdiction provisionally adopted so far by the Commission**

### **1. Text of the draft articles**

9. The text of the draft articles provisionally adopted so far by the Commission is reproduced below.

#### **Part I Introduction**

##### **Draft article 1 Scope of the present draft articles**

1. The present draft articles apply to the immunity of State officials\* from the criminal jurisdiction of another State.

2. The present draft articles are without prejudice to the immunity from criminal jurisdiction enjoyed under special rules of international law, in particular by persons connected with diplomatic missions, consular posts, special missions, international organizations and military forces of a State.

...

#### **Part II Immunity *ratione personae***

##### **Draft article 3 Persons enjoying immunity *ratione personae***

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

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such persons may enjoy in respect of official acts that they perform in a different capacity after they have left office.

<sup>11</sup> Draft article 6 read as follows:

##### **The temporal scope of immunity *ratione personae***

1. Immunity *ratione personae* is limited to the term of office of a Head of State, Head of Government or Minister for Foreign Affairs and expires automatically when it ends.

2. The expiration of immunity *ratione personae* is without prejudice to the fact that a former Head of State, Head of Government or Minister for Foreign Affairs may, after leaving office, enjoy immunity *ratione materiae* in respect of official acts performed while in office.

\* The use of the term “officials” will be subject to further consideration.

**Draft article 4****Scope of immunity *ratione personae***

1. Heads of State, Heads of Government and Ministers for Foreign Affairs enjoy immunity *ratione personae* only during their term of office.
2. Such immunity *ratione personae* covers all acts performed, whether in a private or official capacity, by Heads of State, Heads of Government and Ministers for Foreign Affairs during or prior to their term of office.
3. The cessation of immunity *ratione personae* is without prejudice to the application of the rules of international law concerning immunity *ratione materiae*.

**2. Text of the draft articles and commentaries thereto provisionally adopted by the Commission at its sixty-fifth session**

10. Text of the draft articles, together with commentaries, provisionally adopted by the Commission at the sixty-fifth session, is reproduced below.
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