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Chapter IX

Immunity of State officials from foreign criminal jurisdiction

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Chapter IX

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.¹ 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.²

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).³ The Commission was unable to consider the topic at its sixty-first session (2009) and at its sixty-second session (2010).⁴

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 Special Rapporteur at the same session (2012) and her second report during the sixty-fifth session (2013).⁵ On the basis of draft articles proposed by the Special Rapporteur in the second report, the Commission provisionally adopted three draft articles, together with commentaries thereto, during same session.⁶

B. Consideration of the topic at the present session

4. The Commission had before it the third report of the Special Rapporteur (A/CN.4/673). The Commission considered the report at its 3217th to 3222nd meetings, on 7 to 11 July 2014.

5. In her third report, the Special Rapporteur focused on aspects concerning the subjective normative elements of immunity *ratione materiae*, addressing in particular the concept of an “official”, offering the substantive criteria that could be used to identify persons who may be covered by immunity *ratione materiae* from foreign criminal jurisdiction, as

¹ 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 para. 7 of res. 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).

² *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.

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

⁴ 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.

⁵ A/CN.4/654 (preliminary report) and A/CN.4/661 (second report).

⁶ *Official Records of the General Assembly, Sixty-fifth Session, Supplement No. 10 (A/68/10)*, paras. 48 and 49. At its 3174th meeting, on 7 June 2013, the Commission received the report of the Drafting Committee and provisionally adopted three draft articles and at its 3193rd to 3196th meetings, on 6 and 7 August 2013, it adopted the commentaries thereto.

well as the addressing the language-related choice of the most suitable term for designating persons who, in general, meet such substantive criteria given the terminological problems posed by the term “official” in the various languages, suggesting instead that “organ” be employed. Following an analysis of relevant national and international judicial practice, as well as treaty and other practice, the Special Rapporteur, without prejudice to a determination by the Commission on whether or not “organ” would be used rather than “official”, presented draft articles on the general concept of “an official” for the purposes of the draft articles⁷ and the subjective scope of immunity *ratione materiae*.⁸ It was envisaged that the material and temporal scope of immunity *ratione materiae* would be subject of consideration in the Special Rapporteur’s next report.

6. Following its debate on the third report of the Special Rapporteur, the Commission, at its 3222nd meeting on 11 July 2014, decided to refer draft article 2 (e), defining State official, and draft article 5, on Beneficiaries of immunity *ratione materiae*, as presented by the Special Rapporteur, to the Drafting Committee, with the understanding that it would take into account the comments and observations made in the plenary debate.

7. At its ... meeting, on ... July 2014, the Commission received the report of the Drafting Committee and provisionally adopted draft articles 2 (e) and 5 (see section C.1 below).

8. At its ... to... meetings, on ... and ... July 2014, the Commission adopted the commentaries to the draft articles provisionally adopted at the at the present 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.⁹

⁷ Draft article 2 read as follows:

Definitions

For the purposes of these draft articles:

- (e) State official means:
 - (i) The Head of State, the Head of Government and the Minister for Foreign Affairs;
 - (ii) Any other person who acts on behalf and in the name of the State, and represents the State or exercises elements of governmental authority, whether the person exercises legislative, executive or judicial functions, whatever position the person holds in the organization of the State.

⁸ Draft article 5 read as follows:

Part Three

Immunity *ratione materiae*

Draft article 5

Beneficiaries of immunity *ratione materiae*

State officials who exercise elements of governmental authority benefit from immunity *ratione materiae* in regard to the exercise of foreign criminal jurisdiction.

⁹ For the commentaries to draft articles 1, 3 and 4, see *Official Records of the General Assembly, Sixty-eighth Session, Supplement No. 10 (A/68/10)*, para. 49.

**Part One
Introduction**

**Article 1
Scope of the present draft articles**

1. The present draft articles apply to the immunity of State officials¹⁰ 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.

**Draft article 2
Definitions**

[Insert text of draft article 2 (e) adopted at the current session]

**Part Two
Immunity *ratione personae***

**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.

**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*.

**Part Three
Immunity *ratione materiae***

**Draft article 5
Persons enjoying immunity *ratione materiae***

[Insert text of draft article 5 adopted at the current session]

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

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

¹⁰ The use of the term “officials” will be subject to further consideration.