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Chapter XI

Immunity of State officials from foreign criminal jurisdiction

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Chapter XI

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.⁵ The Commission received and considered the preliminary report of the Special Rapporteur at the same session (2012), her second report during the sixty-fifth session (2013), her third report during the sixty-sixth session (2014) and her fourth report during the sixty-seventh session (2015).⁶ On the basis of the draft articles proposed by the Special Rapporteur in the second, third and fourth reports, the Commission has thus far provisionally adopted six draft articles and the commentaries thereto. Draft article 2 on the use of terms is still being developed.⁷

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 paragraph 7 of its 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).

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 *Ibid.*, Sixty-seventh session, Supplement No. 10 (A/67/10), para. 266.

⁶ A/CN.4/654 (preliminary report); A/CN.4/661 (second report); A/CN.4/673 and Corr.1 (third report); and A/CN.4/687 (fourth report).

⁷ See *Official Records of the General Assembly, Sixty-eighth Session, Supplement No. 10 (A/68/10)*, paras. 48-49. At its 3174th meeting, on 7 June 2013, the Commission received the report of the Drafting Committee and provisionally adopted draft articles 1, 3 and 4 and, at its 3193rd to 3196th meetings, on 6 and 7 August 2013, it adopted the commentaries thereto (*ibid.*, Sixty-ninth Session, Supplement No. 10 (A/69/10), paras. 48-49). At its 3231st meeting, on 25 July 2014, the Commission received the report of the Drafting Committee and provisionally adopted draft articles 2 (e) and 5 and, at its 3240th to 3242nd meetings, on 6 and 7 August 2014, it adopted the commentaries thereto. At its 3284th meeting, on 4 August 2015, the Chairperson of the Drafting Committee presented the report of the Drafting Committee on “Immunity of State officials from foreign criminal jurisdiction”, containing draft articles 2 (f) and 6 provisionally adopted by the Drafting Committee at the sixty-seventh session, of which the Commission took note (*ibid.*, Seventieth Session, Supplement No. 10 (A/70/10), para. 176).

B. Consideration of the topic at the present session

4. The Commission had before it the fifth report of the Special Rapporteur analysing the question of limitations and exceptions to the immunity of State officials from foreign criminal jurisdiction (A/CN.4/701). The Commission considered the report at its 3328th to 3331st meetings, from 26 to 29 July 2016. At the time of its consideration, the report was available to the Commission only in two of the six official languages of the United Nations. Accordingly, the debate in the Commission was preliminary in nature, involving members wishing to speak on the topic, and would be continued at its sixty-ninth session. It was understood that the consideration of the report at the present session was exceptional and was not intended to set a precedent. The Commission underlined that the debate at the current session was a partial debate and that a complete basis for consideration by States in the Sixth Committee of the General Assembly would only be available after the debate is finalized at the sixty-ninth session.

5. At its 3329th meeting, on 27 July 2016, the Commission provisionally adopted draft articles 2, subparagraph (f), and 6, provisionally adopted by the Drafting Committee and taken note of by the Commission at its sixty-seventh session (see section C.1, below).

6. At its ... to ... meetings, on ... and ... August 2016, the Commission adopted the commentaries to the draft articles provisionally adopted at the present session (see section C.2, below).

1. **Introduction by the Special Rapporteur of her fifth report** (see A/CN.4/L.889/Add.3)
2. **Summary of the debate** (see A/CN.4/L.889/Add.3)

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

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

Part One **Introduction**

Article 1⁸ **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.

Article 2 **Definitions**

For the purposes of the present draft articles:

⁸ For the commentary to draft article 1, see *Official Records of the General Assembly, Sixty-eighth Session, Supplement No. 10* (A/68/10), para. 49.

...

(e) “State official” means any individual who represents the State or who exercises State functions;⁹

(f) an “act performed in an official capacity” means any act performed by a State official in the exercise of State authority;¹⁰

Part Two

Immunity *ratione personae*

Article 3¹¹

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 4¹²

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*

Article 5¹³

Persons enjoying immunity *ratione materiae*

State officials acting as such enjoy immunity *ratione materiae* from the exercise of foreign criminal jurisdiction.

Article 6¹⁴

Scope of immunity *ratione materiae*

1. State officials enjoy immunity *ratione materiae* only with respect to acts performed in an official capacity.
2. Immunity *ratione materiae* with respect to acts performed in an official capacity continues to subsist after the individuals concerned have ceased to be State officials.

⁹ For the commentary to subparagraph (e), see *ibid.*, Sixty-ninth Session, Supplement No. 10 (A/69/10), para. 132.

¹⁰ Adopted at the present session, for the commentary see section C.2, below.

¹¹ For the commentary to draft article 3, see *Official Records of the General Assembly, Sixty-eighth Session, Supplement No. 10* (A/68/10), para. 49.

¹² *Idem.*

¹³ For the commentary to draft article 5, see, *ibid.*, Sixty-ninth Session, Supplement No. 10 (A/69/10), para. 132.

¹⁴ Adopted at the present session, for the commentary, see section C.2, below.

3. Individuals who enjoyed immunity *ratione personae* in accordance with draft article 4, whose term of office has come to an end, continue to enjoy immunity with respect to acts performed in an official capacity during such term of office.

2. Text of the draft articles and commentaries thereto provisionally adopted by the Commission at its sixty-eighth session (see A/CN.4/L.889/Add.1-2)

8. The text of the draft articles, and commentaries thereto, provisionally adopted by the Commission at its sixty-eighth session, is reproduced below (see A/CN.4/L.889/Add.1-2).
