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Chapter XI

Immunity of State officials from foreign criminal jurisdiction

Addendum

Contents

Page

- C. Text of the draft articles on immunity of State officials from foreign criminal jurisdiction provisionally adopted so far by the Commission
- [...]
2. Text of the draft articles and commentaries thereto provisionally adopted by the Commission at its sixty-eighth session



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[...]

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

1. The text of the draft articles and commentaries thereto provisionally adopted by the Commission at its sixty-eighth session is reproduced below.

Article 6

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.
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.

Commentary

(1) Draft article 6 is intended to define the scope of immunity *ratione materiae*, which covers the material and temporal elements of this category of immunity of State officials from foreign criminal jurisdiction. Draft article 6 complements draft article 5, provisionally adopted by the Commission in 2014, which refers to the beneficiaries of immunity *ratione materiae*. Both draft articles define the general regime applicable to this category of immunity.

(2) Draft article 6 has a similar structure to that used by the Commission for draft article 4 on the scope of immunity *ratione personae*. However, in draft article 6, the order of the first two paragraphs has been changed, with the reference to the material element appearing first (acts covered by immunity) and the reference to the temporal element (duration of immunity) afterwards. In so doing the intent is to place emphasis on the material element and on the functional dimension of immunity *ratione materiae*, thus reflecting that acts performed in an official capacity are central to this category of immunity. In any case, it should be borne in mind that the scope of such immunity must be understood by looking at the material aspect (paragraph 1) in conjunction with the temporal aspect (paragraph 2). Furthermore, draft article 6 contains a paragraph on the relationship between immunity *ratione materiae* and immunity *ratione personae*, in similar fashion to draft article 4, provisionally adopted by the Commission in 2013, which it complements.

(3) The purpose of paragraph 1 is to indicate that immunity *ratione materiae* applies exclusively to acts performed in an official capacity, as the concept was defined in draft article 2 (f).¹ Consequently, acts performed in a private capacity are excluded from this category of immunity, unlike the immunity *ratione personae* regime, which applies to both categories of acts. When drafting paragraph 1, the words “during their term of office” contained in the original proposal were removed, thereby circumventing a problem peculiar

¹ See above draft article 2 (f) provisionally adopted by the Commission and the commentary thereto.

to the English language version: some members of the Commission warned that the expression “term of office” is not a concept that can be applied to all State officials and could therefore give rise to confusion.

(4) Although the purpose of the paragraph 1 to emphasize the material dimension of immunity *ratione materiae*, the Commission decided to include a reference to State officials to highlight the fact that only such officials may perform one of the acts covered by immunity. This makes clear the need for the two elements (subjective and material) to be present in order for immunity to be applied. It was not considered necessary, however, to make reference to the requirement that the officials be “acting as such”, since such an element does not affect the nature of the act, but rather the subjective element of immunity (the beneficiary) and was thus provided for in draft article 5, provisionally adopted by the Commission in 2014.² Nevertheless the provision was provisionally adopted on the understanding that it might be necessary, at a later date, to formulate more clearly draft article 5, which uses the expression “acting as such”, as well as draft article 6, paragraph 1, which does not use it.

(5) The material scope of immunity *ratione materiae* as set out in draft article 6, paragraph 1 does not prejudice the question of exceptions to immunity, which will be dealt with elsewhere in the present draft articles.

(6) Paragraph 2 of draft article 6 refers to the temporal element of immunity *ratione materiae*, by placing emphasis on the permanent character of such immunity, which continues to produce effects even when the official who has performed an act in an official capacity has ceased to be an official. Such characterization of immunity *ratione materiae* as permanent derives from the fact that its recognition is based essentially on the very nature of the act performed by the official, which remains unchanged regardless of the position held by the author of the act. Thus, although in order to be official, it is necessary for the act to be performed by a State official acting as such, its official nature does not subsequently disappear. Consequently, for the purposes of immunity *ratione materiae* it is irrelevant whether the official who invokes immunity holds such a position when immunity is claimed, or, on the contrary, has ceased to be a State official. In both cases, the act performed in an official capacity will continue to be such and the State official who performed the act may equally enjoy immunity whether or not he or she continues to be an official. The permanent character of immunity *ratione materiae* has already been recognized by the Commission in its work on diplomatic relations,³ has not been challenged in practice and is generally accepted in the literature.⁴

(7) The Commission chose to define the temporal element of immunity *ratione materiae* by stating that such immunity “continues to subsist after the individuals concerned

² See para. (4) of the commentary to draft article 5, *Official Records of the General Assembly, Sixty-ninth Session, Supplement No. 10 (A/69/10)*, p. 237.

³ See, *a contrario sensu*, para. (19) of the commentary to draft article 2, para. 1 (b) (v) of the draft articles on jurisdictional immunities of States and their property, adopted by the Commission at its forty-third session: “The immunities *ratione personae*, unlike immunities *ratione materiae* which continue to survive after the termination of the official functions, will no longer be operative once the public offices are vacated or terminated.” (*Yearbook ... 1991*, vol. II (Part Two), p. 18).

⁴ See Institute of International Law, resolution entitled “Immunities from Jurisdiction and Execution of Heads of State and of Government in International Law”, which sets out — *a contrario sensu* — the same position in its art. 13, paras. 1-2 (*Yearbook*, vol. 69 (Session of Vancouver, 2001), pp. 743 *et seq.*, in particular p. 753); and “Resolution on the Immunity from Jurisdiction of the State and of Persons Who Act on Behalf of the State in case of International Crimes” art. III, paras. 1-2, (*ibid.*, vol. 73 (Session of Naples, 2009), pp. 226 *et seq.*, in particular p. 227). The resolutions are available on the website of the Institute: www.idi-iil.org.

have ceased to be State officials”, following the model used in the 1961 Vienna Convention on Diplomatic Relations⁵ and the 1946 Convention on the Privileges and Immunities of the United Nations.⁶ The expressions “continues to subsist” and “have ceased to be State officials” are drawn from those treaties. Furthermore, the Commission used the term “individuals” to reflect the definition of “State official” provisionally adopted in 2014 (draft article 2 (e)).⁷

(8) Lastly, it should be noted that although paragraph 2 deals with the temporal element of immunity, the Commission considered it appropriate to include an explicit reference to acts performed in an official capacity, bearing in mind that such acts are central to the issue of immunity *ratione materiae* and in order to avoid a broad interpretation of the permanent character of this category of immunity which could be argued to apply to other acts.

(9) The purpose of paragraph 3 is to define the model of the relationship that exists between immunity *ratione materiae* and immunity *ratione personae*, on the basis that they are two distinct categories. As a result, draft article 6, paragraph 3 is closely related to draft article 4, paragraph 3, which deals with the relationship, albeit in the form of a “without prejudice” clause.

(10) Pursuant to draft article 4, paragraph 1, provisionally adopted by the Commission in 2013, immunity *ratione personae* has a temporal aspect, since the Commission considered then that “after the term of office of the Head of State, Head of Government or Minister for Foreign Affairs has ended, immunity *ratione personae* ceases”.⁸ However, such “cessation ... is without prejudice to the application of the rules of international law concerning immunity *ratione materiae* ...” (draft article 4, paragraph 3) as, since the Commission stated in the commentary to the paragraph “it must be kept in mind that a Head of State, Head of Government or Minister for Foreign Affairs may, during their term of office, have carried out acts in an official capacity which do not lose that quality merely because the

⁵ Article 39, paragraph 2 of the Convention provides: “When the functions of a person enjoying privileges and immunities have come to an end, such privileges and immunities shall normally cease at the moment when he leaves the country, or on expiry of a reasonable period in which to do so, but shall subsist until that time, even in case of armed conflict. However, with respect to acts performed by such a person in the exercise of his functions as a member of the mission, immunity shall continue to subsist.” (Vienna Convention on Diplomatic Relations, United Nations, *Treaty Series*, vol. 500, No. 7310, p. 95, in particular p. 118).

⁶ Article IV, section 12 of the Convention provides: “In order to secure, for the representatives of Members to the principal and subsidiary organs of the United Nations and to conferences convened by the United Nations, complete freedom of speech and independence in the discharge of their duties, the immunity from legal process in respect of words spoken or written and all acts done by them in discharging their duties shall continue to be accorded, notwithstanding that the persons concerned are no longer the representatives of Members.” (Convention on the Privileges and Immunities of the United Nations, United Nations, *Treaty Series*, vol. 1, No. 4, p. 15, in particular p. 22). The 1947 Convention on the Privileges and Immunities of the Specialized Agencies follows the same model, in article V, section 14, it provides: “In order to secure for the representatives of members of the specialized agencies at meeting convened by them complete freedom of speech and complete independence in the discharge of their duties, the immunity from legal process in respect of words spoken or written and all acts done by them in discharging their duties shall continue to be accorded, notwithstanding that the persons concerned are no longer engaged in the discharge of such duties.” (*ibid.*, vol. 33, No. 521, p. 261, in particular p. 272).

⁷ For the meaning of the term “individual”, see para. (4) of the commentary to draft article 2 (e), *Official Records of the General Assembly, Sixty-ninth Session, Supplement No. 10 (A/69/10)*, p. 232.

⁸ *Official Records of the General Assembly, Sixty-eighth Session, Supplement No. 10 (A/68/10)*, p. 67 (para. (2) of the commentary to draft article 4).

term of office has ended and may accordingly be covered by immunity *ratione materiae*”.⁹ The Commission also stated at that juncture: “This does not mean that immunity *ratione personae* is prolonged past the end of term of office of persons enjoying such immunity, since that is not in line with paragraph 1 of the draft article. Nor does it mean that immunity *ratione personae* is transformed into a new form of immunity *ratione materiae* which applies automatically by virtue of paragraph 3. The Commission considers that the ‘without prejudice’ clause simply leaves open the possibility that immunity *ratione materiae* might apply to acts carried out in an official capacity and during their term of office by a former Head of State, Head of Government or Minister for Foreign Affairs when the rules governing that category of immunity make this possible.”¹⁰

(11) This is precisely the situation referred to in paragraph 3 of draft article 6. The paragraph proceeds on the basis that, during their term of office, Heads of State, Heads of Government and Ministers for Foreign Affairs enjoy broad immunity known as immunity *ratione personae* which, in practical terms, has the same effects as immunity *ratione materiae*. It does not prevent the State officials, after their term in office has ended, from enjoying immunity *ratione materiae*, *stricto sensu*. This reflects the understanding of the Commission in the commentary to draft article 5, provisionally adopted in 2014, in which it states: “Even though the Commission considers that the Head of State, Head of Government and Minister for Foreign Affairs enjoy immunity *ratione materiae stricto sensu* only once they have left office, there is no need to mention this in draft article 5. The matter will be covered more fully in a future draft article on the substantive and temporal scope of immunity *ratione materiae*, to be modelled on draft article 4.”¹¹

(12) To this end the requirements for immunity *ratione materiae* will need to be fulfilled, namely: that the act was performed by a State official acting as such (Head of State, Head of Government or Minister for Foreign Affairs in this specific case), in an official capacity and during their term of office. The purpose of draft article 6, paragraph 3, is precisely to state that immunity *ratione materiae* is applicable in such situations. The paragraph therefore complements draft article 4, paragraph 3, which the Commission said “does not prejudge the content of the immunity *ratione materiae* regime, which will be developed in Part III of the draft articles”.¹²

(13) However, regarding the situation described in draft article 6, paragraph 3, some members of the Commission consider that, during their term of office, Heads of State, Heads of Government and Ministers for Foreign Affairs enjoy both immunity *ratione personae* and immunity *ratione materiae* (*stricto sensu*) and not only immunity *ratione personae*. On the contrary, other members of the Commission consider that immunity *ratione personae* is general and broader in scope and encompasses the legal effects of immunity *ratione materiae*, since it applies to both private and official acts. Consequently, the Head of State, Head of Government and Minister for Foreign Affairs enjoy immunity *ratione personae* only during their term of office and, after their term of office has come to an end, they will enjoy immunity *ratione materiae*, as provided for in draft article 4, provisionally adopted by the Commission and reflected in the commentaries to draft articles 4 and 5. While favouring one or other option might have consequences before the national courts of certain States, such consequences would not extend to all national legal systems. During the debate, some members of the Commission expressed the view that it was not

⁹ *Ibid.*, p. 70 (para. (7) of the commentary).

¹⁰ *Ibid.*

¹¹ *Official Records of the General Assembly, Sixty-ninth Session, Supplement No. 10 (A/69/10)*, p. 237 (para. (4) of the commentary).

¹² *Official Records of the General Assembly, Sixty-eighth Session, Supplement No. 10 (A/68/10)*, p. 70 (para. (7) of the commentary to draft article 4).

necessary to include paragraph 3 in draft article 6, and that it was sufficient to refer to the matter in the commentaries thereto.

(14) Although the Commission took account of this interesting debate, which mainly concerned theoretical and terminological issues, it decided to retain draft article 6, paragraph 3, particularly in view of the practical importance of the paragraph, whose purpose is to clarify, in operational terms, the regime applicable to individuals who enjoyed immunity *ratione personae*, after their term of office has ended (Head of State, Head of Government and Minister of Foreign Affairs).

(15) The wording of paragraph 3 is modelled on the Vienna Convention on Diplomatic Relations (article 39, paragraph 2) and the Convention on the Privileges and Immunities of the United Nations (article IV, section 12), which at one time governed similar situations to those covered in the paragraph in question, namely: the situation of persons who enjoyed immunity *ratione personae*, after the end of their term of office, with respect to acts performed in an official capacity during such term of office.¹³ The Commission has used the expression “continue to enjoy immunity” in order to reflect the link between the moment when the act occurred and when immunity is invoked. Like the treaties on which it is based, draft article 6, paragraph 3 does not qualify immunity, but confines itself to the use of the generic term. Yet although the term immunity is used without any qualification whatsoever, the Commission understands that the term is used to refer to immunity *ratione materiae*, since it is only in this context that it is possible to take into consideration the acts of State officials performed in an official capacity after their term of office has ended.

¹³ See notes 5 and 6 above.