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Chapter XI
Immunity of State officials from foreign criminal jurisdiction

Addendum

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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

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

Article 2
Definitions

For the purposes of the present draft articles:

[…]

(f) An "act performed in an official capacity" means any act performed by a State official in the exercise of State authority.

Commentary

(1) Draft article 2 (f) is intended to define the concept of an "act performed in an official capacity" for the purposes of the present draft articles. Despite the doubts expressed by some members as to whether this provision was necessary, the Commission thought it would be useful to include the definition in the draft articles given the centrality of the concept of an "act performed in an official capacity" in the regime of immunity *ratione materiae*.

(2) The Commission has included in the definition contained in draft article 2 (f) the elements that make it possible to identify a particular act as being "performed in an official capacity" for the purposes of immunity of State officials from foreign criminal jurisdiction. In so doing, it has essentially followed the Commission's previous work on the topic. For example, the term "act" is used in the definition as it was in draft articles 4 and 6. As noted at the time, the term was previously used by the Commission to refer to both active and passive conduct, and it is also the term generally used to refer to the conduct of individuals in the context of international criminal law.[1]

(3) The Commission has used the expression "in the exercise of State authority" to reflect the need for a link between the act and the State. In other words, the aim is to highlight that it is not sufficient for a State official to perform an act in order for it automatically to be considered an "act performed in an official capacity". On the contrary, there must also be a direct connection between the act and the exercise of State functions and powers, since it is this connection that justifies the recognition of immunity in order to protect the principle of sovereign equality of States.

(4) In this regard, the Commission believes that, in order for an act to be characterized as an "act performed in an official capacity", it must first be attributable to the State. However, this does not necessarily mean that only the State can be held responsible for the act. The attribution of the act to the State is a prerequisite for an act to be characterized as

[1] See paragraph (5) of the commentary to draft article 4, *Official Records of the General Assembly, Sixty-eighth Session, Supplement No. 10* (A/68/10), pp. 68-69.

having been performed in an official capacity, but does not prevent the act from also being attributed to the individual, in accordance with the "single act, dual responsibility" model (double attribution) that the Commission already applied in its 1996 draft Code of Crimes against the Peace and Security of Mankind (article 4),[2] the articles on responsibility of States for internationally wrongful acts (article 58)[3] and the articles on the responsibility of international organizations (article 66).[4] Under the model, a single act can engage both the responsibility of the State and the direct responsibility of the author, especially in criminal matters.

(5) For the purpose of attributing an act to a State, it is necessary to consider, as a point of departure, the rules included in the articles on responsibility of States for internationally wrongful acts adopted by the Commission at its fifty-third session. Nonetheless, it must be borne in mind that the Commission established those rules only in respect of State responsibility, and that their ultimate goal is to provide for the broadest possible range of cases of responsibility, thereby ensuring that the mere invocation of the action of third parties that are not directly involved by the State does not result in that State being able to fraudulently avoid its responsibility. Consequently, the application of the rules to the process of attributing an act to a State in the context of immunity of State officials from foreign criminal jurisdiction should be examined carefully, as they cannot be applied mechanically and automatically. For the purposes of immunity, the criteria for attribution set out in articles 7, 8, 9, 10 and 11 of the articles on responsibility of States for internationally wrongful acts do not seem generally applicable. In particular, the Commission is of the view that, as a rule, *ultra vires* acts and acts performed by an official purely for their own benefit and in their own interests cannot be considered as acts performed in an official capacity, even though they may appear to have been performed officially. In such cases, it is not possible to identify any self-interest on the part of the State, and the recognition of immunity, whose ultimate objective is to protect the principle of the sovereign equality of States, is not justified.[5] In any case, such *ultra vires* acts should be differentiated from unlawful acts; several courts have concluded that unlawful acts are

[2] *Yearbook ... 1996*, vol. II (Part Two), p. 23.

[3] *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, p. 142. The articles on the responsibility of States for internationally wrongful acts adopted by the Commission at its fifty-third session are annexed to General Assembly resolution 56/83 of 12 December 2001.

[4] *Official Records of the General Assembly, Sixty-sixth Session, Supplement No. 10* (A/66/10), p. 171. The articles on the responsibility of international organizations adopted by the Commission at its sixty-third session are annexed to General Assembly resolution 66/100 of 9 December 2011.

[5] The following arguments by a court in the United States, in particular, clarify the reasons for the exclusion of *ultra vires* acts: "Where the officer's powers are limited by statute, his actions beyond those limitations are considered individual and not sovereign actions. The officer is not doing the business which the sovereign has empowered him to do." According to that court, the "FSIA [Foreign Sovereign Immunity Act] does not immunize the illegal conduct of government officials" and thus, "an official acting under color of authority, but not within an official mandate, can violate international law and not be entitled to immunity under FSIA". (In re *Estate of Ferdinand Marcos Human Rights Litigation; Hilao and Others v. Estate of Marcos*, United States Court of Appeals, Ninth Circuit, judgment of 16 June 1994, 25 F.3d 1467 (9th Cir.1994), *International Law Reports* (ILR), vol. 104, pp. 119 *et seq*., particularly pp. 123 and 125). Similarly, another court concluded that *ultra vires* acts are not subject to sovereign immunity, as the perpetrators acted beyond their authority by violating the human rights of the plaintiffs: If officials commit acts that are not officially sanctioned by the State, that is, if they are not "officials acting in an official capacity for acts within the scope of their authority", they cannot benefit from immunity (In *Jane Doe I, et al. v. Liu QI, et al., Plaintiff A, et al. v. Xia Deren, et al.*, United States District Court, N.D. California, C 02-0672 CW, C 02-0695 CW).

not exempt from immunity simply because they are unlawful,[6] even in cases when the act is contrary to international law.[7]

(6) In order for an act to be characterized as having been "performed in an official capacity", there must be a special connection between the act and the State. Such a link has been defined in draft article 2 (f) using the formulation "State authority", which the Commission considered sufficiently broad to refer generally to acts performed by State officials in the exercise of their functions and in the interests of the State, and is to be understood as covering the functions set out in draft article 2 (e), provisionally adopted by the Commission in 2014, which refers to any individual who "represents the State or who exercises State functions".[8]

(7) This formulation was considered preferable to the one initially proposed ("exercising elements of the governmental authority") and to others that were successively considered by the Commission, in particular "governmental authority" and "sovereign authority". Although they all equally reflect the requirement that there must be a special connection between the act and the State, there is the difficulty that they may be interpreted as referring exclusively to a type of State activity (governmental or executive), or give rise to the added problem of having to define the concepts of elements of governmental authority or sovereignty, which would be extremely difficult and is not considered part of the Commission's mandate. In addition, it was considered preferable not to use the expression "State functions", which is used in draft article 2 (e), in order to make a clear distinction between the definitions contained in paragraphs (e) and (f) of the draft article. In this regard, it should be recalled that the expression "State functions", together with representation of the State, was used in draft article 2 (e) as a neutral term to define the link between the official and the State, without making any judgment on the type of acts covered by immunity.[9] The use of the term "authority" rather than "functions" also has the advantage of avoiding the debate on whether or not international crimes are "State functions". However, one member was of the view that it would have been more appropriate to use the expression "State functions".

(8) The Commission did not consider it necessary to include in the definition of an "act performed in an official capacity" a reference to the fact that the act must be criminal in nature. In so doing, the aim was to avoid a possible interpretation that any act performed in an official capacity is, by definition, of a criminal nature. Although that was not the intent of the Special Rapporteur, who included the reference to the criminal nature of the act purely for the purposes of the draft articles, the Commission considered it wiser to avoid any risk of a misunderstanding in that regard.

(9) However, the deletion of an explicit reference to the criminal dimension in the definition of an "act performed in an official capacity" does not mean that such a dimension is without relevance for the purpose of the draft guidelines, particularly given that they deal

[6] *Jaffe v. Miller and Others*, Ontario Court of Appeal (Canada), judgment of 17 June 1993, ILR, vol. 95, p. 446; *Argentine Republic v. Amerada Hess Shipping Corporation and Others*, United States Supreme Court, 23 January 1989, ILR, vol. 81, p. 658; *McElhinney v. Williams*, Supreme Court of Ireland, 15 December 1995, ILR, vol. 104, p. 691.

[7] *I° Congreso del Partido*, House of Lords, United Kingdom, 16 July 1981, [1983] A.C. 244, ILR, vol. 64, p. 307. In *Jones v. Saudi Arabia*, House of Lords, 14 June 2006, [2006] UKHL 26, Lord Hoffmann rejected the argument that an act contrary to *jus cogens* cannot be an official act (see ILR, vol. 129, p. 744).

[8] *Official Records of the General Assembly, Sixty-ninth Session, Supplement No. 10* (A/69/10), p. 231.

[9] See paragraph (11) of the commentary to draft article 2 (e), *ibid*., p. 235. In this context, the Commission has taken the view that "State functions" include "the legislative, judicial, executive or other functions performed by the State" (*ibid*.).

with the immunity of State officials from foreign criminal jurisdiction. In this context, the fact that the immunity sought is from criminal jurisdiction is an element that cannot be ignored and must be duly taken into consideration throughout the draft articles. This criminal nature is reflected in certain elements which differentiate between immunity from criminal jurisdiction and immunity from civil jurisdiction, in particular the central role of the individual under such jurisdiction. Accordingly, it is possible to differentiate between the criminal responsibility of the State official and the responsibility of the State, as well as between the immunity of the State official from criminal jurisdiction and the immunity of the State strictly speaking. On the other hand, the deletion of the reference to the criminal nature of the act from the definition does not preclude an act that constitutes a criminal offence from being qualified as an "act performed in an official capacity".

(10) Lastly, although the definition contained in draft article 2 (f) concerns an "act performed in an official capacity", the Commission considered it necessary to include in the definition an explicit reference to the author of the act, in other words, the State official. It thereby draws attention to the fact that only a State official can perform an act in an official capacity, thus reflecting the need for a link between the author of the act and the State. In addition, the reference to the State official creates a logical continuity with the definition of "State official" in draft article 2 (e).

(11) The Commission does not believe that it is possible to draw up a list of acts performed in an official capacity. Such acts must be identified on a case-by-case basis, taking into account the criteria examined previously, namely that the act in question has been performed by a State official, is generally attributable to the State and has been performed in "the exercise of State authority". However, there are examples from judicial practice of acts or categories of acts that may be considered as having been performed in an official capacity, regardless of how the courts specifically refer to them. Such examples can help judges and other national legal practitioners to identify whether a particular act falls into the category.

(12) In general, national courts have found that the following acts fall into the category of acts performed in an official capacity: military activities or those related to the armed forces,[10] acts related to the exercise of police power,[11] diplomatic activities and those relating to foreign affairs,[12] legislative acts (including nationalization),[13] acts related to the administration of justice,[14] administrative acts of different kinds (such as the expulsion of

[10] *Empire of Iran*, Federal Constitutional Court of Germany, 1963, ILR, vol. 45, p. 57; *Victory v. Comisaría*, US 336 F. 2d 354 (Second Circuit, 1964), ILR, vol. 35, p. 110; *Saltany and Others v. Reagan and Others*, District Court for the District of Columbia, United States, judgment of 23 December 1988, ILR, vol. 80, p. 19; *Holland v. Lampen-Wolf* (United Kingdom), [2000] 1 WLR 1573; *Lozano v. Italy*, case No. 31171/2008, Italy, Court of Cassation, judgment of 24 July 2008 (available at http://opil.ouplaw.com, *International Law in Domestic Courts* [ILDC 1085 (IT 2008)]).

[11] *Empire of Iran* (see footnote 10 above); *Church of Scientology*, Federal Supreme Court of Germany, judgment of 26 September 1978, ILR, vol. 65, p. 193; *Saudi Arabia and Others v. Nelson*, United States Supreme Court, ILR, vol. 100, p. 544; *Propend Finance Pty Ltd. v. Sing*, United Kingdom, Court of Appeal, 1997, ILR, vol. 111, p. 611; *Norbert Schmidt v. The Home Secretary of the Government of the United Kingdom*, High Court of Ireland, judgment of 24 April 1997, [1997] 2IR 121; *First Merchants Collection v. Republic of Argentina*, United States District Court, Southern District of Florida, 31 January 2002, 190 F. Supp. 2d 1336 (S.D. Fla. 2002).

[12] *Empire of Iran* (see footnote 10 above); *Victory v. Comisaría* (see footnote 10 above).

[13] *Empire of Iran* (see footnote 10 above); *Victory v. Comisaría* (see footnote 10 above).

[14] *Empire of Iran* (see footnote 10 above); case No. 12-81.676, Court of Cassation, Criminal Chamber (France), judgment of 19 March 2013, and case No. 13-80.158, Court of Cassation, Criminal Chamber (France), judgment of 17 June 2014 (see www.legifrance.gouv.fr). The Swiss courts made a

aliens or the flagging of vessels),[15] acts related to public loans[16] and political acts of various kinds.[17]

(13) More specifically, the immunity of State officials has been invoked before criminal courts in relation to the following conduct: torture, mass killings, genocide, extrajudicial executions, enforced disappearances, forced pregnancy, deportation, denial of prisoner-of-war status, enslavement and forced labour, and acts of terrorism.[18] Such crimes are sometimes mentioned *eo nomine*, while in other cases the proceedings refer generically to crimes against humanity, war crimes, and serious and systematic human rights violations.[19] Second, the courts have been seized of other acts committed by members of the armed forces or security services that do not fall into the aforementioned categories; such acts include ill-treatment, abuse, illegal detention, abduction, offences against the administration of justice and other acts relating to policing and law enforcement.[20]

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similar ruling in the case ATF 130 III 136, which concerns an international detention order issued by a Spanish judge.

[15] *Victory v. Comisaría* case (see footnote 10 above); *Kline and others v. Yasuyuki Kaneko and others*, US, 685 F Supp. 386 (SDNY 1988), ILR, vol. 101, p. 497; *Malta Maritime Authority*, No. 04-84.265, Court of Cassation, Criminal Chamber (France), judgment of 23 November 2004, *Bulletin criminel 2004*, No. 292, p. 1096.

[16] *Victory v. Comisaría* (see footnote 10 above).

[17] *Doe I v. Israel*, US, 400 F. Supp. 2d 86, 106 (DCC 2005) (establishment of Israeli settlements in the occupied territories); *Youming*, US, 557 F. Supp. 2d 131 (DDC 2008) (hiring of contract killers to threaten members of a religious group).

[18] In re *Rauter*, Special Court of Cassation of the Netherlands, judgment of 12 January 1949, ILR, vol. 16, p. 526 (crimes committed by German occupation forces in Denmark); *Attorney General of Government of Israel v. Adolf Eichmann*, District Court of Jerusalem (case No. 40/61), judgment of 12 December 1961, and Appeal Tribunal, judgment of 29 May 1962, ILR, vol. 36, pp. 18 and 277 (crimes committed during the Second World War, including war crimes, crimes against humanity and genocide); *Yaser Arafat (Carnevale re. Valente — Imp. Arafat e Salah)*, Italy, Court of Cassation, judgment of 28 June 1985, *Rivista di diritto internazionale* 69 (1986), No. 4, p. 884 (sale of weapons and collaboration with the Red Brigades on acts of terrorism); *R. v. Mafart and Prieur/Rainbow Warrior (New Zealand v. France)*, New Zealand, High Court, Auckland Registry, 22 November 1985, ILR, vol. 74, p. 241 (acts carried out by members of the French armed forces and security forces to mine the ship *Rainbow Warrior*, which led to the sinking of the ship and the death of several people; these were described as terrorist acts); *Former Syrian Ambassador to the German Democratic Republic*, Federal Supreme Court of Germany, Federal Constitutional Court of Germany, judgment of 10 June 1997, ILR, vol. 115, p. 595 (the case examined legal action against a former ambassador who allegedly stored, in diplomatic premises, weapons that were later used to commit terrorist acts); *Bouterse*, R 97/163/12 Sv and R 97/176/12 Sv, Court of Appeal of Amsterdam, 20 November 2000, *Netherlands Yearbook of International Law*, vol. 32 (2001), pp. 266 to 282 (torture, crimes against humanity); *Gaddafi*, Court of Appeal of Paris, judgment of 20 October 2000, and Court of Cassation, judgment of 13 March 2001, ILR, vol. 125, pp. 490 and 508 (ordering a plane to be brought down using explosives, which caused the death of 170 people, considered as terrorism); *Prosecutor v. Hissène Habré*, Court of Appeal of Dakar (Senegal), judgment of 4 July 2000, and Court of Cassation, judgment of 20 March 2001, ILR, vol. 125, pp. 571 and 577 (acts of torture and crimes against humanity); *Re Sharon and Yaron*, Court of appeal of Brussels, judgment of 26 June 2002, ILR, vol. 127, p. 110 (war crimes, crimes against humanity and genocide); *A. v. Office of the Public Prosecutor of the Confederation* (*Nezzar* case), Federal Criminal Court of Switzerland (case No. BB.2011.140), judgment of 25 July 2012 (torture and other crimes against humanity).

[19] In re *Mr and Mrs Doe v. United States of America*, United States Court of Appeal, Second Circuit, 860 F. 2d 40 (1988), ILR, vol. 121, p. 567 (human rights violations committed against Falun Gong members).

[20] *Border Guards Prosecution*, Federal Criminal Court of Germany, judgment of 3 November 1992 (case No. 5 StR 370/92), ILR, vol. 100, p. 364 (death of a young German, as a result of shots fired by border guards of the German Democratic Republic, when he attempted to cross the Berlin Wall);

(14) In a number of cases, *a contrario sensu*, national courts have concluded that the act in question exceeded the limits of official functions, or functions of the State, and was therefore not considered an act performed in an official capacity. For example, courts have concluded that the assassination of a political opponent[21] or acts linked to drug trafficking[22] do not constitute official acts. Similarly, national courts have generally denied immunity in cases linked to corruption, whether in the form of diversion or misappropriation of public funds or money-laundering, or any other type of corruption, on the grounds that such acts "are distinguishable from the performance of State functions protected by international custom in accordance with the principles of sovereignty and diplomatic immunity"[23] and "by their nature, do not relate to the exercise of sovereignty or governmental authority, nor are they in the public interest".[24] Following the same logic, courts have not accepted that acts performed by State officials that are closely linked to a private activity and for the official's personal enrichment, not the benefit of the sovereign, are covered by immunity.[25]

(15) With regard to the examples of possible acts performed in an official capacity, special mention should be made of the way in which national courts have dealt with international crimes, especially torture. While in some cases they have been considered acts performed in an official capacity (although illegal or aberrations),[26] in others they have

Norbert Schmidt v. The Home Secretary of the Government of the United Kingdom (see footnote 11 above) (irregular circumstances during the detention of the plaintiff by State officials); *Khurts Bat v. Investigating Judge of the German Federal Court*, United Kingdom ([2011] EWHC 2029 (Admin)), ILR, vol. 147, p. 633 (kidnapping and illegal detention).

[21] *Letelier and Others v. The Republic of Chile and Linea Aerea Nacional-Chile*, United States Court of Appeals, Second Circuit, 748 F 2d 790 (1984), ILR, vol. 79, p. 561.

[22] *Jimenez v. Aristeguieta et al.*, United States Court of Appeals, fifth circuit, 311 F 2d 547 (1962), 33 ILR 353; *United States of America v. Noriega*, United States Court of Appeals, Eleventh Circuit, judgment of 7 July 1997, ILR, vol. 121, p. 591.

[23] *Teodoro Nguema Obiang Mangue and Others*, Court of Appeal of Paris, *Pôle* 7, Second Investigating Chamber, judgment of 13 June 2013.

[24] *Teodoro Nguema Obiang Mangue and Others*, Court of Appeal of Paris, *Pôle* 7, Second Investigating Chamber, application for annulment, judgment of 16 April 2015.

[25] *United States of America v. Noriega* (see footnote 22 above); *Jungquist v. Sheikh Sultan Bin Khalifa al Nahyan*, United States District Court, District of Columbia, judgment of 20 September 1996, ILR, vol. 113, p. 522; *Mellerio v. Isabelle de Bourbon*, *Recueil général des lois et des arrêts 1872*, p. 293; *Seyyid Ali Ben Hammoud, Prince Rashid v. Wiercinski*, Tribunal civil de la Seine, judgment of 25 July 1916, *Revue de droit international privé et de droit pénal international*, vol. 15 (1919), p. 505; *Ex-roi d'Egypte Farouk v. s.a.r.l. Christian Dior*, Court of Appeal of Paris, judgment of 11 April 1957, *Journal du droit international*, vol. 84, No. 1 (1957), pp. 716-718; *Ali Ali Reza v. Grimpel*, Court of Appeal of Paris, judgment of 28 April 1961, *Revue générale de droit international public*, vol. 66, No. 2 (1962), p. 418; In re *Estate of Ferdinand E. Marcos Human Rights Litigation; Trajano v. Marcos and Another*, United States Court of Appeals, Ninth Circuit, 21 October 1992, 978 F 2d 493 (1992), ILR, vol. 103, p. 521; *Doe v. Zedillo Ponce de León*; *Jiménez v. Aristeguieta et al.* (see footnote 22 above); *Jean-Juste v. Duvalier* (1988), No. 86-0459 Civ. (U.S. District Court, S.D. Fla., 8 January 1988, *American Journal of International Law*, vol. 82, No. 3 (1988), p. 594; *Evgeny Adamov v. Federal Office of Justice*, Federal Tribunal of Switzerland, judgment of 22 December 2005 (1A 288/2005) (available at http://opil.ouplaw.com, *International Law in Domestic Courts* [ILDC 339 (CH 2005)]; *Republic of the Philippines v. Marcos and Others*, United States Court of Appeals, Second Circuit, 26 November 1986, ILR, vol. 81, p. 581; *Republic of the Philippines v. Marcos and Others (No. 2)*, United States Court of Appeals, Ninth Circuit, 4 June 1987 and 1 December 1988, ILR, vol. 81, p. 608; *Republic of Haiti and Others v. Duvalier and Others*, [1990] 1 QB 2002 (United Kingdom), ILR, vol. 107, p. 491; *Islamic Republic of Iran v. Pahlavi and Others*, United States, Supreme Court of New York, Appeals Chamber, 467 NE 2d 245 (1984), ILR, vol. 81, p. 557.

[26] *Regina v. Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte (No. 3)*, House of Lords, United Kingdom, 24 March 1999, [1999] UKHL 17, [2000] 1 AC 147. Only Lord Goff believed that they were official acts that benefited from immunity. Lord Browne-Wilkinson and Lord

been qualified as *ultra vires* acts or acts that are not consistent with the nature of State functions,[27] and should therefore be excluded from the category of acts defined in this paragraph. Moreover, attention should be drawn to the fact that such different treatment of international crimes has arisen both in cases in which national courts have recognized immunity and in those in which they have rejected it.

(16) In any case, it should be borne in mind that the definition of an "act performed in an official capacity" set out draft article 2 (f) refers to the distinct elements of this category of acts and is without prejudice to the question of limits and exceptions to immunity that will be addressed elsewhere in the draft articles.

Hutton stated that torture cannot be "a public function" or a "governmental function". Lord Goff, dissenting, concluded that it was a "governmental function", while similar statements were expressed by Lord Hope ("criminal yet governmental"), Lord Saville (who referred to "official torture"), Lord Millett ("public and official acts") and Lord Philips ("criminal and official"). See also *Jones v. Saudi Arabia (footnote 7 above)* and *FF v. Director of Public Prosecutions* (*Prince Nasser* case), High Court of Justice, Queen's Bench Division, Divisional Court, judgment of 7 October 2014 [2014] EWHC 3419 (Admin.).

[27] *Re Pinochet*, Examining Magistrate of Brussels, judgment of 6 November 1998, ILR, vol. 119, p. 345; *Bouterse* (see footnote 18 above); *Prefecture of Voiotia v. Federal Republic of Germany*, Court of First Instance of Livadia (Greece), judgment of 30 October 1997.