

Chapter IX

IMMUNITY OF STATE OFFICIALS FROM FOREIGN CRIMINAL JURISDICTION

A. Introduction

123. 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.⁸⁰⁰ 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.⁸⁰¹

124. 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).⁸⁰² The Commission was unable to consider the topic at its sixty-first (2009) and its sixty-second sessions (2010).⁸⁰³

125. 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).⁸⁰⁴ 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.⁸⁰⁵

⁸⁰⁰ At its 2940th meeting, on 20 July 2007 (see *Yearbook ... 2007*, vol. II (Part Two), p. 98, 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 I of the report of the Commission (see *Yearbook ... 2006*, vol. II (Part Two), p. 185, para. 257, and pp. 191–196).

⁸⁰¹ *Yearbook ... 2007*, vol. II (Part Two), p. 101, para. 386. The memorandum prepared by the Secretariat on the topic is reproduced in document A/CN.4/596 and Corr.1 (mimeographed; available on the Commission’s website, documents of the sixtieth session).

⁸⁰² *Yearbook ... 2008*, vol. II (Part One), document A/CN.4/601 (preliminary report); *Yearbook ... 2010*, vol. II (Part One), document A/CN.4/631 (second report); and *Yearbook ... 2011*, vol. II (Part One), document A/CN.4/646 (third report).

⁸⁰³ See *Yearbook ... 2009*, vol. II (Part Two), p. 145, para. 207; and *Yearbook ... 2010*, vol. II (Part Two), p. 193, para. 343.

⁸⁰⁴ *Yearbook ... 2012*, vol. II (Part One), document A/CN.4/654 (preliminary report); and *Yearbook ... 2013*, vol. II (Part One), document A/CN.4/661 (second report).

⁸⁰⁵ *Yearbook ... 2013*, vol. II (Part Two), pp. 39 *et seq.*, paras. 48–49. 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.

B. Consideration of the topic at the present session

126. 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, from 7 to 11 July 2014.

127. In her third report, the Special Rapporteur commenced with an analysis of the normative elements of immunity *ratione materiae*, focusing on those aspects related to the subjective element. In this context, as was announced at the previous session of the Commission, the general concept of a “State official” was examined in the report, and the substantive criteria that could be used to identify such persons were considered, especially in respect of those who may enjoy immunity *ratione materiae* from foreign criminal jurisdiction. The report further considered a linguistic point concerning the choice of the most suitable term for designating persons who enjoy immunity, given the terminological difficulties posed by the term “official” and its equivalents in the various languages, and suggested instead that “organ” be employed. Following an analysis of relevant national and international judicial practice, treaty practice and the previous work of the Commission, the Special Rapporteur proposed two draft articles relating to the general concept of “an official” for the purposes of the draft articles and the subjective scope of immunity *ratione materiae*. It was envisaged that the material and temporal scope of immunity *ratione materiae* would be the subject of consideration in the Special Rapporteur’s next report.

128. Following its debate on the third report of the Special Rapporteur, the Commission, at its 3222nd meeting, on 11 July 2014, decided to refer the draft articles to the Drafting Committee.

129. 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 (see section C.1 below).

130. At its 3240th to 3242nd meetings, on 6 and 7 August 2014, the Commission adopted the commentaries to the draft articles provisionally adopted 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

131. The text of the draft articles provisionally adopted so far by the Commission is reproduced below.⁸⁰⁶

⁸⁰⁶ For the commentaries to draft articles 1, 3 and 4, see *Yearbook ... 2013*, vol. II (Part Two), pp. 39 *et seq.*, para. 49.

PART ONE

Commentary

INTRODUCTION

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.

Article 2. Definitions

For the purposes of the present draft articles:

...

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

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**Article 5. Persons enjoying immunity ratione materiae*

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

2. TEXT OF THE DRAFT ARTICLES AND COMMENTARIES THERETO PROVISIONALLY ADOPTED BY THE COMMISSION AT ITS SIXTY-SIXTH SESSION

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

Article 2. Definitions

For the purposes of the present draft articles:

...

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

(1) The purpose of draft article 2, subparagraph (e), is to define the persons to whom the present draft articles apply, namely “State officials”. Defining the concept of State official helps to understand one of the normative elements of immunity: the individuals who enjoy immunity. Most members of the Commission thought it would be useful to have a definition of State official for the purposes of the present draft articles, given that immunity from foreign criminal jurisdiction is applicable to individuals. Several members of the Commission expressed doubts about the need to include this definition.

(2) The definition of the term “State official” contained in draft article 2, subparagraph (e), is general in nature, applicable to any person who enjoys immunity from foreign criminal jurisdiction under the present draft articles, either immunity *ratione personae* or immunity *ratione materiae*. Consequently, the nature and object of draft article 2, subparagraph (e), must not be confused with the nature and object of draft articles 3 and 5, which define who enjoys each category of immunity.⁸⁰⁷ The persons who enjoy immunity *ratione personae* and immunity *ratione materiae* both fall within the definition of “State official”, which is common to both categories.

(3) There is no general definition in international law of the term “State official” or “official”, although both terms may be found in certain international treaties and instruments.⁸⁰⁸ The term “State official”, or simply “official”, can mean different things in different domestic legal systems. Consequently, the definition of “State official” referred to in this commentary is autonomous, and must be understood to be for the purposes of the present draft articles.

(4) The definition of “State official” uses the term “individual” to indicate that the present draft articles cover only natural persons. The present draft articles are without prejudice to the rules applicable to legal persons.

(5) As indicated above, the term “State official” must be understood as encompassing persons who enjoy immunity *ratione personae* and those who enjoy immunity *ratione materiae*. In this connection, it must be noted that the Commission identified the persons who enjoy

⁸⁰⁷ Draft article 3 states that “Heads of State, Heads of Government and Ministers for Foreign Affairs enjoy immunity *ratione personae* from the exercise of foreign criminal jurisdiction” (*ibid.*, p. 39, para. 48). Draft article 5 states that “State officials acting as such enjoy immunity *ratione materiae* from the exercise of foreign criminal jurisdiction” (A/CN.4/L.850).

⁸⁰⁸ The terms are used in the following multilateral treaties: the Vienna Convention on Diplomatic Relations; the Vienna Convention on Consular Relations; the Convention on the prevention and punishment of crimes against internationally protected persons, including diplomatic agents; the Convention on the Prevention and Punishment of the Crime of Genocide; the Convention against torture and other cruel, inhuman or degrading treatment or punishment; the United Nations Convention against Corruption; Criminal Law Convention on Corruption (Council of Europe); the Inter-American Convention against Corruption; and the African Union Convention on Preventing and Combating Corruption. For an analysis of these instruments for the purposes of defining “State official”, see the third report on the immunity of State officials from foreign criminal jurisdiction by Concepción Escobar Hernández, Special Rapporteur, A/CN.4/673, paras. 51–97.

immunity *ratione personae* by listing the individuals cited *eo nomine* in draft article 3, namely: the Head of State, the Head of Government and the Minister for Foreign Affairs. However, it has been decided not to mention them expressly in draft article 2, subparagraph (e), since they are deemed to be, *per se*, State officials in the sense of the present draft articles; accordingly, they need not be differentiated from other State officials for the purposes of the definition.

(6) As regards the “State officials” to whom immunity *ratione materiae* is applicable, the Commission considers that it cannot use the technique of identification *eo nomine*. In view of both the diversity of the positions of the individuals to whom immunity may apply and of the variety of national legal systems that determine which persons are their officials, the Commission does not consider it possible to draw up an exhaustive list that would include all the individuals covered by immunity *ratione materiae*. For the same reasons, the Commission has also considered it neither possible nor suitable to draw up an indicative list in a draft article of the positions of those individuals to whom such immunity may apply. In both cases, the list would inevitably be incomplete, since all the positions of the State officials included in domestic legal systems cannot be catalogued and the list would have to be constantly updated and might be confusing for the government institutions responsible for applying immunity from foreign criminal jurisdiction. Accordingly, the individuals who may be termed “State officials” for the purposes of immunity *ratione materiae* must be identified on a case-by-case basis, applying the criteria included in the definition and which point to a specific link between the State and the official, namely: representation of the State or the exercise of State functions.

(7) Nevertheless, by way of example, the following “State officials” have appeared in national and international caselaw regarding immunity from jurisdiction: a former Head of State; a Minister of Defence and a former Minister of Defence; a Vice-president and Minister of Forestry; a Minister of Interior; an Attorney-General and a General Prosecutor; a Head of National Security; a former Intelligent Service Chief; a director of a Maritime Authority; an Attorney-General and various lower-ranking officials of a federal State (a prosecutor and his legal assistants, a detective in the Attorney-General’s office and a lawyer in a State agency); military officials of various ranks, and various members of government security forces and institutions, including the Director of Scotland Yard; border guards; the deputy director of a prison; and the Head of a State archives.⁸⁰⁹

⁸⁰⁹ See *Association Fédération nationale des victimes d'accidents collectifs “Fenvac SOS Catastrophe”*; *Association des familles des victimes du Joola*, et al., Case No. 9, Judgment of 19 January 2010 (09-84.818), Cour de Cassation, Chambre criminelle (France) (see *Bulletin des Arrêts*, No. 1 (January 2010), pp. 41 *et seq.*); *Jones v. Ministry of Interior Al-Mamlaka Al-Arabiya AS Saudiya*, Judgment of 14 June 2006, House of Lords, [2006] UKHL 26 (see ILR, vol. 129 (2007), pp. 744 *et seq.*); *Agent judiciaire du Trésor v. Malta Maritime Authority et Carmel X*, Judgment of 23 November 2004 (04.84-265), Cour de cassation, Chambre criminelle (France) (see *Bulletin criminel 2004*, No. 292, p. 1096); *Norbert Schmidt v. The Home Secretary of the Government of the United Kingdom*, Judgment of 24 April 1997, Supreme Court (Ireland), [1997] 2 IR 121; *Church of Scientology*, Judgment of 26 September 1978, Federal Supreme Court (Germany) (see ILR, vol. 65, pp. 193 *et seq.*); *Teodoro Nguema Obiang Mangue*

(8) Attention must be drawn to the fact that the Head of State, Head of Government and Minister for Foreign Affairs may enjoy both immunity *ratione personae* and immunity *ratione materiae* in accordance with the present draft articles. The first hypothesis is specifically envisaged in draft article 3, provisionally adopted by the Commission at its sixty-fifth session. The second is reflected in draft article 4, paragraph 3, likewise provisionally adopted by the Commission at the same session, according to which “[t]he cessation of immunity *ratione personae* is without prejudice to the application of the rules of international law concerning immunity *ratione materiae*”.⁸¹⁰ The conditions under which the Head of State, Head of Government and Minister for Foreign Affairs enjoy immunity *ratione personae* or immunity *ratione materiae* will depend on the rules applicable to each of these categories of immunity that are contained in other provisions of the present draft articles.⁸¹¹

et al., Case No. 2012/07413, Judgment of 13 June 2013, Cour d’appel de Paris, Deuxième chambre d’instruction (France); *A. v. Ministère public de la Confédération*, Judgment of 25 July 2012, Federal Criminal Tribunal (Switzerland) (BB.2011.140); *Regina v. Bartle and the Commissioner of Police for the Metropolis and Others—Ex Parte Pinochet*, Judgment of 24 March 1999, House of Lords (United Kingdom) (see ILM, vol. 38 (1999), pp. 581 *et seq.*); *Khurts Bat v. the Investigating Judge of the German Federal Court*, Case Nos. CO/3672/2011 and CO/1655/2011, Decision of 29 July 2011 ([2011] EWHC 2029 (Admin)), Administrative Court, England and Wales High Court (see ILR, vol. 147 (2012), pp. 633 *et seq.*); *Public Prosecutor at the Tribunal of Milan v. Adler et al.*, Judgment of 1 February 2010, Tribunal of Milan, Court of First Instance (Italy) (available from <http://opil.ouplaw.com>, International Law in Domestic Courts [ILDC 1492 (IT 2010)]); *United States of America v. Noriega*, Judgment of 7 July 1997, Court of Appeals, Eleventh Circuit (United States of America) (see ILR, vol. 121, pp. 591 *et seq.*); *Border Guards Prosecution Case*, Case No. 5 StR 370/92, Judgment of 3 November 1992, Federal Supreme Court (Germany) (see ILR, vol. 100, pp. 364 *et seq.*); *In re Doe*, Judgment of 19 October 1988, Court of Appeals, Second Circuit (United States of America), 860 F. 2d 40 (1988) (see ILR, vol. 121, pp. 567 *et seq.*); *R. v. Lambeth Justices*, ex parte *Yusufu*, Judgment of 8 February 1985, Divisional Court, Queen’s Bench Division (United Kingdom) (see ILR, vol. 88, pp. 323 *et seq.*); *Estate of the late Zahra (Ziba) Kazemi and Stephan (Salman) Hashemi v. the Islamic Republic of Iran, Ayatollah Ali Khamenei, Saeed Mortazavi and Mohammad Bakhshi*, Judgment of 25 January 2011, Superior Court, Commercial Division (Canada); *Belhas et al. v. Ya’alon*, Judgment of 15 February 2008, Court of Appeals for the District of Columbia Circuit (United States of America) (see ILM, vol. 47 (2008), pp. 141 *et seq.*); *Ra’Ed Mohamad Ibrahim Matar, et al. v. Avraham Dichter*, Judgment of 2 May 2007, District Court, Southern District of New York (United States of America); *Wei Ye, Hao Wang, Does, A, B, C, D, E, F and others similarly situated v. Jiang Zemin and Falun Gong Control Office a/k/a Office 610*, Judgment of 8 September 2004, Court of Appeals, Seventh Circuit (United States of America), 383 F.3d 620; *Jaffe v. Miller and Others*, Judgment of 17 June 1993, Ontario Court of Appeal (Canada) (see ILR, vol. 95, pp. 446 *et al.*); *Rukmini S. Kline et al. v. Yasuyuki Kaneko et al.*, Judgment of 31 October 1988, Supreme Court of the State of New York, New York County (United States of America); *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France)*, Judgment, I.C.J. Reports 2008, pp. 177 *et seq.*; *Jones and Others v. the United Kingdom*, Applications nos. 34356/06 and 40528/06, Judgment of 14 January 2014, European Court of Human Rights, *Reports of Judgments and Decisions 2014*; and *Prosecutor v. Blaškić*, Case No. IT-95-14-AR108 bis, Judgment on the request of the Republic of Croatia for review of the Decision of Trial Chamber II of 18 July 1997, Judgment of 29 October 1997, ILR, vol. 110 (1998), pp. 688 *et seq.*

⁸¹⁰ *Yearbook ... 2013*, vol. II (Part Two), p. 39.

⁸¹¹ In this connection, it must be recalled that paragraph (7) of the commentary to draft article 4 says: “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. Paragraph 3 does not

(9) The definition of “State official,” it must be noted, refers solely to the person who enjoys immunity, without prejudging or implying any statement about the question of what are the acts that may be covered by immunity from foreign criminal jurisdiction. From this standpoint, the essential element to be taken into account in identifying an individual as a State official for the purposes of the present draft articles is the existence of a link between that person and the State. This link is reflected in draft article 2, subparagraph (e), through the reference to the fact that the individual in question “represents the State or ... exercises [State] functions”. This is a clear and simple statement regarding the criteria for identifying what constitutes an official,⁸¹² and reiterating the proposition that the Commission accepted in 2013, namely that the present draft articles relate to “the immunity from foreign criminal jurisdiction that may be enjoyed by those persons who represent or act on behalf of a State”.⁸¹³ Lastly, attention must be drawn to the fact that a State official may fulfil both requirements or only one of them.

(10) The phrase “who represents” must be understood in a broad sense, as including any “State official” who performs representational functions. The reference to representation is of special importance with regard to the Head of State, Head of Government and Minister for Foreign Affairs because, as the commentary to draft article 3 states, “these three office holders represent the State in its international relations simply by virtue of their office, directly and with no need for specific powers to be granted by the State”.⁸¹⁴ However, the reference to representation of the State may also be applicable to State officials other than the so-called “troika”, in conformity with the rules or acts of the national systems themselves. Consequently, whether an official is representing the State or not must be determined on a case-by-case basis. Lastly, it must be noted that the separate reference to representation of the State as one of the criteria for identifying a link with the State makes it possible to cover certain persons, such as those Heads of State who typically do not perform State functions in a narrow sense, but who most certainly represent the State.

(11) “State functions” must be understood, in a broad sense, to mean the activities carried out by the State. This designation includes the legislative, judicial, executive or other functions performed by the State. Consequently, the “State official” is the individual who is in a position to perform these State functions. The reference to the exercise of State functions defines more precisely the requisite link between the official and the State, allowing for sufficient account to be taken that immunity is granted to the individual for the benefit of the State. Although various terms, such as “prerogatives of public power,” “public functions,” “sovereign authority,” “governmental

authority” or “inherent functions of the State” have been suggested in order to reflect this idea, the Commission has chosen the term “State functions” as being the most suitable at the current stage of work. This choice has been made for two reasons: first, it reflects sufficiently well the link between the State and the official, which is related to the latter’s duties; and second, the use of the term “functions” rather than “acts performed in the name of the State” avoids potential confusion between the subjective (the official) and objective (the act) elements of immunity. At the current stage of the Commission’s work, in any case, these terms should be understood in the broadest sense possible, keeping in mind that the exact content of what “State functions” may be depends to a large extent on the laws and organizational capacity of the State. Some Commission members stated, however, that the phrase chosen was infelicitous.

(12) It is to be noted that the use of the terms “represents” and “exercises” in this draft article must not be interpreted as making any statement about the temporal scope of immunity. It is motivated by the intention to identify in general terms the link between the State and the official, and has no bearing on whether the State official must continue to be one at the time when immunity is claimed. The temporal scope of immunity *ratione personae* and of immunity *ratione materiae* is the subject of other draft articles.

(13) For the purposes of defining “State official,” what is important is the link between the individual and the State, whereas the form taken by that link is irrelevant. The Commission considers that the link may take many forms, depending upon national legislation and the practice of each State. However, the majority of Commission members are of the view that the link cannot be interpreted so broadly as to cover all *de facto* officials. The term *de facto* official is used to refer to many possible cases, and it will depend on each specific case whether or not the individual may be considered a State official for the purposes of the present draft articles. In any event, issues relating to *de facto* officials may be more appropriately addressed in connection with a definition of “act performed in an official capacity”.

(14) Given that the concept of “State official” rests solely on the fact that the individual in question represents the State or exercises State functions, the hierarchical position occupied by the individual is irrelevant for the sole purposes of the definition. Although in many cases, the persons who have been recognized as State officials for the purposes of immunity hold a high or middle rank, it is also possible to find examples of such persons at a low level of the hierarchy. Consequently, the hierarchical level is not an integral part of the definition of State official.

(15) Lastly, it must be borne in mind that the definition of “State official” has no bearing on the type of acts covered by immunity. Consequently, the terms “represent” and “exercise State functions” may not be interpreted as defining in any way the substantive scope of immunity. Similarly, the definition of “State official” cannot be interpreted as containing a statement about exceptions to immunity. These two issues will be taken up at a later date.

prejudge the content of the immunity *ratione materiae* regime, which will be developed in Part III of the draft articles.” (*ibid.*, p. 50).

⁸¹² See the third report of the Special Rapporteur (A/CN.4/673), para. 111, and the draft article initially proposed by the Special Rapporteur (*ibid.*, para. 143).

⁸¹³ Paragraph (4) of the commentary to draft article 1, provisionally adopted by the Commission at its sixty-fifth session (*Yearbook ... 2013*, vol. II (Part Two), p. 40).

⁸¹⁴ Paragraph (2) of the commentary to draft article 3, provisionally adopted by the Commission at its sixty-fifth session (*ibid.*, p. 43).

(16) As to the question of terminology, at the present stage of the work on the immunity of State officials from foreign criminal jurisdiction, the Commission has not considered it necessary to change the terms used to refer to persons who enjoy immunity. Consequently, the terms “State official” in English, *représentant de l’Etat* in French, *funcionario del Estado* in Spanish, *مسؤول الدولة* in Arabic, 国家官员 in Chinese and *должностное лицо государства* in Russian continue to be employed. Although the Commission is aware that they do not necessarily mean the same thing and are not interchangeable, it has preferred to continue using these terms, especially since the term “State official” in English, used extensively in practice, is suitable for referring to all the categories of persons to which the present draft articles refer. Thus, the fact that different terms are used in each of the language versions is of no semantic significance whatsoever. Rather, the various terms used in each of the language versions have the same meaning for the purposes of the present draft articles and have no bearing on the meaning that each term may have in domestic legal systems. The Commission will decide in due course whether a change needs to be made or a saving clause added with respect to the use of these terms in domestic law or international instruments, so as to ensure that institutions charged with applying immunity at the national level correctly interpret the term “State official” as set out in the present draft articles.

Article 5. Persons enjoying immunity *ratione materiae*

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

Commentary

(1) Draft article 5 is the first of the draft articles on immunity *ratione materiae* and is intended to define the subjective scope of this category of immunity from foreign criminal jurisdiction. Consequently, this draft article parallels draft article 3, on persons enjoying immunity *ratione personae*. It has the same structure, and it uses, *mutatis mutandis*, the same wording and the terminology already agreed on by the Commission concerning the latter draft article. There is no list of actual persons who enjoy immunity; instead in the case of immunity *ratione materiae* they have been referred to as “State officials acting as such”.

(2) The expression “State officials”, as used in this draft article, is to be understood in the sense given to it in draft article 2, subparagraph (e), namely: “any individual who represents the State or who exercises State functions”. In contrast to the situation with persons enjoying immunity *ratione personae*, the Commission did not consider it possible, in the present draft articles, to draw up a list of persons enjoying immunity *ratione materiae*. Rather, the persons in this category must be identified on a case-by-case basis, by applying the criteria set out in draft article 2, subparagraph (e), which highlight the existence of a link between the official and the State. The commentary to draft article 2, subparagraph (e), must be duly kept in mind for the purposes of the present draft article.⁸¹⁵

⁸¹⁵ See paragraphs (1) to (16) of the commentary to draft article 2, subparagraph (e), above.

(3) The phrase “acting as such” refers to the official nature of the acts of the officials, emphasizing the functional nature of immunity *ratione materiae* and establishing a distinction with immunity *ratione personae*. In view of the functional nature of immunity *ratione materiae*, some members of the Commission have expressed doubts about the need to define the persons who enjoy it, since in their view, the essence of immunity *ratione materiae* is the nature of the acts performed and not the individual who performs them. Nevertheless, the majority of members of the Commission thought it would be useful to identify the persons in this category of immunity, since immunity from foreign criminal jurisdiction applies to these individuals. The reference to the fact that the “State officials” must have acted “as such” in order to enjoy immunity *ratione materiae* says nothing about the acts that might be covered by such immunity, which are to be covered in a separate draft article. For the same reason, the expression “acting in an official capacity” has not been used, to avoid potential confusion with the concept of an “act performed in an official capacity”.

(4) In conformity with draft article 4, paragraph 3, provisionally adopted by the Commission in 2013,⁸¹⁶ immunity *ratione materiae* also applies to former Head of States, Heads of Government and Ministers for Foreign Affairs “when they have acted in the capacity of State officials”. Nevertheless, the Commission does not consider it necessary to refer explicitly to those officials in the present draft article, since immunity *ratione materiae* applies to them, not because of their status, but in view of the fact that they are State officials who have acted as such during their term of office. 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.

(5) Draft article 5 is without prejudice to exceptions to immunity *ratione materiae*, likewise to be taken up at a later date.

(6) Lastly, attention must be drawn to the fact that draft article 5 uses the expression “from the exercise of foreign criminal jurisdiction,” as does draft article 3, to refer to persons enjoying immunity *ratione personae*. This expression illustrates the relationship between immunity and foreign criminal jurisdiction and emphasizes the essentially procedural nature of the immunity that comes into play in relation to the exercise of foreign criminal jurisdiction with respect to a specific act.⁸¹⁷

⁸¹⁶ This provision reads: “The cessation of immunity *ratione materiae* is without prejudice to the application of the rules of international law concerning immunity *ratione materiae*” (*Yearbook ... 2013*, vol. II (Part Two), p. 39). Concerning the scope of this “without prejudice” clause, see paragraph (7) of the commentary to draft article 4 (*ibid.*, p. 50).

⁸¹⁷ See paragraph (13) of the commentary to draft article 3 (*ibid.*, p. 47).