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Immunity of State officials from foreign criminal jurisdiction

Statement of the Chairman of the Drafting Committee, Mr. Mathias Forteau

4 August 2015

Mr. Chairman,

It gives me great pleasure to introduce the sixth report of the Drafting Committee for the sixty-seventh session of the Commission. This report concerns the topic “Immunity of State officials from foreign criminal jurisdiction” and is contained in document A/CN.4/L.865, which reproduces the text of the draft articles provisionally adopted by the Drafting Committee at the present session.

The Drafting Committee devoted three meetings, from 27 to 29 July, to its consideration of the draft articles relating to this topic. It examined the two draft articles initially proposed by the Special Rapporteur in her fourth report (A/CN.4/686), together with a number of suggested reformulations that were presented by the Special Rapporteur to the Drafting Committee in order to respond to suggestions made, or concerns raised, during the debate in Plenary. The Drafting Committee provisionally adopted, at the present session, the definition of the term “act performed in an official capacity” under draft article 2, paragraph (f), as well as draft article 6 defining the scope of immunity *ratione materiae*.

I would like to draw your attention to the fact that the Drafting Committee worked in English, French and Spanish and that the official text of the draft articles referred by the Plenary to the Drafting Committee has therefore been provisionally adopted in these three languages.

Before addressing the details of the report, let me pay tribute to the Special Rapporteur, Ms Escobar Hernández, whose mastery of the subject, guidance and cooperation greatly facilitated the work of the Drafting Committee. I also thank the members of the Drafting Committee for their active participation and valuable contributions to the successful outcome. Furthermore, I also wish to thank the Secretariat for its valuable assistance.

Mr. Chairman,

I shall introduce in turn the two draft provisions provisionally adopted by the Drafting Committee.

Draft article 2 - Definitions

Draft article 2 constitutes the traditional provision on “Definitions”, which defines the central concepts of the topic for the purposes of the draft articles. You will recall that, last year, the Commission provisionally adopted the definition of the term “State official”, which appears under paragraph (e). Draft article 2, paragraph (f), provides the definition of the term “act performed in an official capacity”. It indicates that: “[a]n ‘act performed in an official capacity’ means any act performed by a State official in the exercise of State authority.”

Pursuing the debate in Plenary, an exchange of views took place as to whether a definition of an “act performed in an official capacity”, was required further to the adoption at the last session of the definition of “State official” as well as of draft article 5, which indicates that, to benefit from immunity *ratione materiae*, the State officials must have acted “as such.” The Drafting Committee concluded that setting forth a definition of an “act performed in an official capacity” at the outset of the draft articles would nevertheless be useful, in view of the centrality of the concept in the *regime* of immunity *ratione materiae*.

An exchange of views also took place in the Drafting Committee as to whether the definition should refer to a “conduct” or to an “act”. The latter term was preferred since it was not seen as overly restrictive and is consistent with the previous work of the Commission on the topic. In

addition, I would like to draw your attention to the commentary of draft article 4 adopted in 2013, whose paragraph (5) provides a detailed explanation of the decision of the Commission to use the term “act” in the context of the present topic. Furthermore, the Drafting Committee has decided to use the term “any act” in draft article 2, paragraph (f), in order to follow the usual practice of the Commission, including in its work on this topic, when it provides for definitions.

As originally proposed by the Special Rapporteur, the definition set out in draft article 2, paragraph (f), enunciated three characteristics of “an act performed in an official capacity”, namely the attribution of the act to the State, the exercise of elements of governmental authority by the State official and the link between the act and the criminal conduct at stake.

The Drafting Committee has considered appropriate to refer to the act “performed by a State official”. Such an indication has the advantage of limiting the range of beneficiaries of the functional immunity to State officials. Moreover, it creates a logical continuity with the definition of “State official” enunciated under the previous sub-paragraph.

An extensive debate took place within the Drafting Committee as regards the second characteristic. As proposed by the Special Rapporteur in the fourth report, the definition referred to a State official “exercising elements of the governmental authority.” This language was directly inspired by Chapter II of the 2001 Articles on *Responsibility of States for internationally wrongful acts*, relating to the attribution of conduct to a State. It followed from the debate in Plenary that for some members the language of the 2001 Articles was not necessarily the most appropriate in the context of this topic and several proposals were examined in turn by the Drafting Committee to encapsulate better the link with the State in the context of the law of immunities, especially immunity *ratione materiae*. It was felt that the reference to governmental authority was too narrow, since it could be interpreted as restricting the scope of the definition to a particular State function. The same reasoning led the Drafting Committee to set aside the term “sovereign authority”, which was also considered as possibly too limitative. In addition, members of the Drafting Committee considered that it was not the task of the Commission to define sovereignty, something which, in any case, is not an easy task. After a thorough examination of the matter, the Drafting Committee decided to use the expression “State authority”. By referring expressly to the State, this expression has the advantage of not being

overly restrictive. Its meaning is to be understood as covering the functions enunciated under draft article 2, paragraph (e), which refers to any individual “who represents the State or who exercise State functions.” The Drafting Committee has also considered more appropriate to refer to the concept of “authority” rather than “function” to avoid a debate on whether the commission of a crime could be considered as a State function. Furthermore, it provides with a text that does not appear as too similar to the definition provided for in sub-paragraph (e). This wording facilitates the distinction between the definition of “State official” and the definition of “act performed in an official capacity” as well as the autonomy of these definitions.

At this juncture, I should mention that the decision to use the term “State authority” was not unanimous within the Drafting Committee. According to a view, it would have been preferable to use the term “State functions”. Such an expression would have put the emphasis on the concept of functions at the outset, underlining therefore the notion of functional immunities and mirroring more closely the text of the previous sub-paragraph of draft article 2. The Drafting Committee proceeded with the adoption of draft article 2 (f) with the understanding that this view would be reflected in the commentaries.

Further, the Drafting Committee has decided to delete the mention of the link with the crime from the text of the definition of the act performed in an official capacity. Despite its importance in the context of the topic, this element was considered as not necessary to the definition and as introducing some possible ambiguity since it could be construed erroneously as meaning that by nature any official act is a criminal act, which obviously was not the intent of the Special Rapporteur and the Commission. This deletion was also made with the understanding that this element would be developed in the commentary, including by explaining that the criminal nature of an act does not, in principle, disqualify it as an official act.

On the other hand, the expression “in the exercise of” has been retained as proposed by the Special Rapporteur. It is a crucial part of the definition of acts performed in an official capacity, since it puts the emphasis on the fact that to qualify as an act performed in an official capacity, it is not only required that the act is committed by a State official; it is also required that this concrete act has been performed, in the proper circumstances of the case, in the exercise of State authority.

Mr. Chairman,

Let me now turn to draft article 6.

Draft article 6 - Scope of immunity *ratione materiae*

The title of draft article 6 is “Scope of immunity *ratione materiae*”, as originally proposed. The purpose of this provision is to set out the material and temporal elements of immunity *ratione materiae*. As provisionally adopted by the Drafting Committee, draft article 6 reads as follows:

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.

As you can see, the structure of this provision has been refined by the Drafting Committee. The order of paragraphs 1 and 2 has been reverted in order to put first the emphasis on the functional nature of immunity *ratione materiae* and the fact that it depends on the nature of the act performed, before addressing its temporal scope in paragraph 2. The first paragraph addresses the material element of immunity *ratione materiae*, originally dealt with under paragraph 2. The new paragraph 2 deals with the temporal aspect, which was originally addressed under paragraph 1. Paragraph 3 deals with the specific case of individuals who enjoyed immunity *ratione personae* in accordance with draft article 4, in the context here of immunity *ratione materiae*.

Mr. Chairman,

Let me address these three paragraphs in turn.

Paragraph 1, as provisionally adopted by the Committee, constitutes a clear and direct statement on the material scope of immunity *ratione materiae*, which can only apply with respect to acts performed in an official capacity. This provision, which allows for the distinction between the types of acts covered by the functional immunity and those which are not, complements draft article 5 that identified the category of persons who could benefit from this immunity. In addition to its greater clarity, this formulation benefits from the definition of such acts under draft article 2 f). Furthermore, the formulation retained by the Drafting Committee circumvents a particular difficulty proper to the English version of this paragraph. You will recall that, as originally proposed, this provision referred to the concept of “term of office”, a concept that was not applicable to all State officials and was therefore misleading. The provision as currently formulated does not need any more to refer to the nature of the functions or the nature of the office of State officials concerned.

The provision has been provisionally adopted on the understanding that, at a later stage, it could prove necessary to articulate in a clearer way draft article 5, which refers to States officials “acting as such”, with draft article 6, paragraph 1, which does not use this expression and refers to acts performed in an official capacity.

Let me now turn to paragraph 2.

According to this paragraph, “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.” Unlike immunity *ratione personae*, immunity *ratione materiae* is not characterized by a strict temporal scope, an important feature captured by this provision. The wording adopted is inspired by the text of other relevant international instruments, in particular Article 39, paragraph 2, of the 1961 Vienna Convention on Diplomatic Relations and Article IV, Section 12, of the 1946 Convention on the Privileges and Immunities of the United Nations. The term “continues to subsist” aims at describing the functioning of immunity *ratione materiae* over time, which will benefit to a State Official as from a certain date and subsist during the period when he is exercising his or her functions. This benefit of the immunity *ratione materiae* will continue to subsist after the end of those functions, since such immunity relates to the act, rather than to the person itself, contrary to immunity *ratione personae*. The terms “have ceased to be State

officials” are also inspired by the same international instruments. Finally, the Drafting Committee decided to use the term “individuals”, to reflect the definition of State officials resulting from Draft Article 2 e) adopted last year by the Commission.

Paragraph 3 refers to the specific case of the regime of immunity applicable to the individuals enjoying immunity *ratione personae*, as defined under draft article 4, after the end of their term of office. According to draft article 6, paragraph 3, “[i]ndividuals 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.” Since this provision appears as the application of the previous provisions to specific circumstances and given that draft article 4, paragraph 3, already contains a provision on the articulation between immunity *ratione personae* and immunity *ratione materiae* (admittedly on the form only of a without prejudice clause), a debate took place as to whether the substance of Draft Article 6, paragraph 3, should be inserted in the text of the draft article itself or explained in the corresponding commentary. While acknowledging that the object of paragraph 3 was not entirely similar to the aspects covered under paragraphs 1 and 2, the Drafting Committee considered that it would be preferable to retain this provision in the draft conclusion itself, in view of its great practical significance.

The text of paragraph 3, as originally proposed by the Special Rapporteur, gave rise to a discussion within the Drafting Committee regarding the relationship between immunity *ratione personae* and immunity *ratione materiae*. Some members were of the view that persons enjoying immunity *ratione personae* can also enjoy immunity *ratione materiae* during their term of office and that in some domestic systems they can have an interest in relying on immunity *ratione materiae* rather than on immunity *ratione personae*. On the other hand, the Special Rapporteur and other members indicated that the situation is different in some other countries and pointed out that the commentaries adopted by the Commission in 2013 and 2014 expressed the view that, according to the Commission, immunity *ratione materiae*, *stricto sensu*, only applies after the end of the term of office of persons enjoying immunity *ratione personae*. The Special Rapporteur recalled that, in accordance with draft article 4, paragraph 2, immunity *ratione personae* covers both acts performed in a private capacity and acts performed in an official capacity. Despite the interest of this question, which is mainly of a pure conceptual and

terminological nature and the different views that members might have on the matter, there was a general sense among the members of the Drafting Committee that the purpose of paragraph 3 was to clarify, in operational terms, the *regime* applicable, after the end of their term of office, to the individuals who enjoyed immunity *ratione personae*. Again, the wording of the aforementioned Convention on the Privileges and Immunities of the United Nations and Vienna Convention on Diplomatic Relations appeared particularly useful to describe this regime. Like the relevant provisions of these conventions, the text of paragraph 3 does not qualify the immunity enjoyed after the term of office. As indicated by the Commission under its commentary to draft article 4, immunity *ratione personae* applies equally to official acts and private acts, while immunity *ratione materiae* covers exclusively acts performed in an official capacity. The continuance of the immunity after the end of the term, which is the object of the present paragraph 3, is, by definition, relevant only for acts performed in an official capacity. This is the reason why Draft Article 6, paragraph 3, eventually provides, using the wordings of the 1946 and 1961 conventions which are quite appropriate in the present context, that the individuals concerned “continue to enjoy immunity with respect to acts performed in an official capacity during such term of office”.

Mr. Chairman,

This concludes my introduction of the sixth report of the Drafting Committee for the sixty-seventh session.

Thank you very much.

Immunity of State officials from foreign criminal jurisdiction

Text of the draft articles provisionally adopted by the Drafting Committee at the sixty-seventh session

Draft 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.

Draft 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.
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