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International Law Commission

Sixty-seventh session (second part)

Provisional summary record of the 3271st meeting

Held at the Palais des Nations, Geneva, on Thursday, 16 July 2015, at 10 a.m.

Contents

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Present:

Chairman:	Mr. Singh
Members:	Mr. Caflisch
	Mr. Candioti
	Mr. El-Murtadi
	Ms. Escobar Hernández
	Mr. Forteau
	Mr. Hassouna
	Mr. Hmoud
	Ms. Jacobsson
	Mr. Kittichaisaree
	Mr. Kolodkin
	Mr. Laraba
	Mr. McRae
	Mr. Murase
	Mr. Murphy
	Mr. Niehaus
	Mr. Nolte
	Mr. Park
	Mr. Peter
	Mr. Petrič
	Mr. Saboia
	Mr. Šturma
	Mr. Tladi
	Mr. Valencia-Ospina
	Mr. Vázquez-Bermúdez
	Mr. Wako
	Mr. Wisnumurti
	Sir Michael Wood

Secretariat:

Mr. Llewellyn	Secretary to the Commission

The meeting was called to order at 10.05 a.m.

Organization of the work of the session (agenda item 1) (*continued*)

The Chairman drew attention to the programme of work proposed by the Bureau for the third and fourth weeks of the second part of the Commission's sixty-seventh session.

Mr. Kittichaisaree, supported by **Ms. Jacobsson**, **Sir Michael Wood**, **Mr. Tladi** and **Mr. Candioti**, proposed that, when allotting meeting time, priority should be given to the Drafting Committee's deliberations rather than to informal consultations.

The Chairman suggested that the Drafting Committee should meet as soon as the speakers' list for a given topic had been exhausted and that informal consultations should be held thereafter, if time permitted. He took it that the Commission wished to approve the programme of work as proposed by the Bureau.

It was so decided.

Mr. Llewellyn (Secretary to the Commission) announced that Ms. Escobar Hernández, Mr. Hassouna, Mr. Hmoud, Ms. Jacobsson, Mr. Kittichaisaree, Mr. Kolodkin, Mr. McRae, Mr. Murase, Mr. Murphy, Mr. Nolte, Mr. Park, Mr. Saboia, Mr. Šturma, Sir Michael Wood, Mr. Tladi (Special Rapporteur) and Mr. Forteau (*ex officio*) had expressed a wish to participate in the informal consultations on *jus cogens*.

Immunity of State officials from foreign criminal jurisdiction (agenda item 2) (A/CN.4/686)

The Chairman invited Ms. Escobar Hernández, Special Rapporteur, to present her fourth report on the immunity of State officials from foreign criminal jurisdiction (A/CN.4/686).

Ms. Escobar Hernández (Special Rapporteur) said that her fourth report focused on and concluded the examination of the two normative elements of immunity *ratione materiae*, namely the concept of an "act performed in an official capacity" (the material element) and the temporal element. The limits and exceptions to immunity *ratione materiae* would be investigated in her fifth report.

When writing the report, she had followed the same methodology as that employed in her third report, in that she had mainly drawn on judicial and treaty practice, the Commission's previous work and States' replies to the Commission's requests for information in 2013 and 2014. Although she had received 22 written replies, she had unfortunately been unable to take account of those from two States, as they had been received after the report's completion.

The report was divided into three sections. Section II, which examined the notion of an "act performed in an official capacity", constituted the nucleus of the report and concluded with a draft article defining that category of acts. As the temporal element of immunity *ratione materiae* was undisputed, less space had been devoted to it. The report also contained a draft article on the scope of immunity *ratione materiae*. The report formed a whole with her three previous reports and should be read in conjunction with them and with the Commission's earlier decisions. She had asked the Secretariat to issue corrigenda in languages other than Spanish in order to rectify errors in those versions of her report.

Previous work on the topic, including that done by the previous Special Rapporteur, Mr. Kolodkin, had shown that the notion of an "act performed in an official capacity" was of special relevance in the context of immunity *ratione*

materiae: an analysis of the notion was therefore crucial to the topic. Although her fourth report mentioned a variety of terms used to refer to that category of act, she had opted for the aforementioned expression in order to ensure terminological continuity with language already agreed by the Commission.

The concept of an "act performed in an official capacity" took on its full meaning when contrasted with an "act performed in a private capacity", yet neither concept had been defined in contemporary international law. Therefore, in order to clarify the meaning of "act performed in an official capacity", it was first necessary to analyse the international and national judicial practice, treaty practice and any of the Commission's earlier work which was of relevance to the topic under consideration.

Some of the main findings of that analysis, which was contained in section II.B, were that immunity *ratione materiae* had been invoked in domestic courts in connection with a small number of crimes of the kinds listed in paragraph 50, many of which constituted crimes under international law. Claims of immunity had also been made in respect of acts committed by members of the armed forces or security services and acts linked to corruption and drug trafficking. Generally speaking, acts "performed in an official capacity" were acts carried out while representing the State and exercising elements of governmental authority. Accordingly, they must be acts that could be attributable to the State. Some courts had held that immunity could not be extended to acts that had been performed in connection with official duties, but the official had acted *ultra vires*, for example, the assassination of a political opponent, violations of human rights and torture. Other courts had taken the opposite view, namely that such acts could be covered by immunity, even when they were manifestly contrary to international law. National courts had generally refused to grant immunity in cases involving any form of corruption, or when a State official's acts were linked to a private activity for the official's personal enrichment.

The notion of an "act performed in an official capacity" was not synonymous with an act *jure imperii*, since it could sometimes transcend the limits of such an act and also refer to acts *jure gestionis* performed by a State official in discharge of his or her mandate while exercising functions of the State. Acts performed in an official capacity and acts *jure gestionis* had some common elements, and some national courts had referred to acts *jure imperii* in order to identify the nucleus of acts covered by the immunity of State officials, as they constituted a manifestation of the exercise of elements of governmental authority or of the exercise of sovereignty.

The idea of the act performed in an official capacity was unrelated to the lawful or unlawful nature of the act in question; in the context of immunity of State officials, it meant an unlawful act which could give rise to the exercise of criminal jurisdiction. Lastly, it was necessary to determine on a case-by-case basis whether an act performed in an official capacity was covered by immunity.

In view of the foregoing, it was possible to infer that the act performed in an official capacity to which she was referring was of a criminal nature, was performed on behalf of the State and entailed the exercise of sovereignty and of elements of governmental authority.

Responsibility for a criminal act performed in an official capacity was strictly individual, even if a separate (independent or subsidiary) legal obligation could be imposed on a third party in respect of the same act. Such an obligation would derive from, but could never be confused with, the primary criminal responsibility. Hence the attribution to the State of criminal acts committed by its officials was significantly limited and could be understood only as a legal fiction grounded in the traditional model of attributing acts to the State for the purposes of ascribing responsibility for internationally wrongful acts. Nevertheless, any criminal act covered by immunity

ratione materiae was not, strictly speaking, an act of the State itself, but an act of the individual who committed it.

The initial consequence of the criminal nature of the act was that the latter might entail two different types of responsibility. The first, of a criminal nature, was incurred by the perpetrator. The second, of a civil nature, was incurred by either the perpetrator or a third party. That meant that an act performed by a State official might give rise to criminal responsibility attributable solely to the official and to a subsidiary civil responsibility attributable to both the official and the State. That "single act, dual responsibility" model had already been expressly recognized by the Commission in a number of its texts. Yet the criminal nature of the acts in respect of which immunity was claimed made it impossible mechanically to apply the criteria for attribution defined by the Commission in its articles on the responsibility of States for internationally wrongful acts. Indeed, some of those criteria were particularly unsuitable for the purposes of immunity. The distinction between immunity of State officials and State responsibility offered a three-level model for attributing responsibility: exclusive responsibility of the State when the act could not be attributed to its physical or intellectual perpetrator; simultaneous responsibility of the State and of the individual when the act could be attributed to both; and exclusive responsibility of the individual when the act was solely attributable to the individual, regardless of that fact that he or she had acted as a State official.

Those three levels of responsibility gave rise to three conclusions that could be used to determine which type of immunity applied to which type of acts. The first scenario, when the act could be attributed only to the State and the State alone bore responsibility for it, was a classic case of State immunity. The second scenario was when the act could be attributed simultaneously to the State and to the official, both bore responsibility, and two distinct types of immunity might be invoked — that of the State and that of the official. The third scenario highlighted the marked difference between those two types of immunity due to the distinct nature of the responsibility attributed — civil, in the case of the State, and criminal, in the case of the State official.

That classification in no way changed the criminal nature of the acts committed or the functional nature of immunity *ratione materiae*. The characterization of immunity from foreign criminal jurisdiction as an autonomous category of immunity could not be interpreted as recognition of an intrinsic, exclusive immunity to be enjoyed by State officials. Rather, State officials were the direct beneficiaries of immunity from foreign criminal jurisdiction, but such immunity was granted in the State's interest, with the chief aim of protecting its sovereignty.

The aim of immunity was thus another characteristic element of an act performed in an official capacity. Since that aim was to ensure respect for the sovereign equality of the State, in keeping with the aphorism *par in parem non habet imperium*, acts that were covered by immunity also needed to be somehow linked to sovereignty. That link, which must not be merely a formal one, was reflected in the requirement that an act performed in an official capacity must not only be attributable to the State and performed on its behalf, but must also be a manifestation of sovereignty, constituting a form of the exercise of governmental authority in the strict sense of the term. That requirement also reflected the distinct nature of the conditions governing the responsibility of the State, on the one hand, and the institution of immunity, on the other, thereby serving to preclude the automatic application to immunity of all the legal categories and criteria that had been defined for State responsibility.

Although demonstrating the existence of the link just described was not easy, an analysis of practice showed that it could be done on the basis of two types of activities: those which, by their very nature, were considered to be inherent

expressions of sovereignty, such as law enforcement or the administration of justice; and those carried out in keeping with State policies and decisions that entailed an exercise of sovereignty and were thus linked to it in functional terms. Such criteria must be applied on a case-by-case basis in order to determine whether a given act could be characterized as having been carried out through the exercise of governmental authority and therefore as constituting an expression of sovereignty.

That technique allowed for a strict interpretation of the notion of an "act performed in an official capacity" that placed immunity in the right spot, namely, at the heart of contemporary international law, as an instrument for protecting State sovereignty, leaving no room for any misuse of that instrument.

International crimes generally belonged in the category of "acts performed in an official capacity" since, in most cases, they could not be committed without the cooperation of the State and they involved State activities and policies from which the corresponding responsibility of the State could be derived. However, the characterization of international crimes as acts performed in an official capacity could not and should not be equated with the automatic recognition of immunity from foreign criminal jurisdiction in respect of that category of acts. It would be best to take up the issue of international crimes in the course of the discussion on issues relating to exceptions to immunity, with which she would deal in her fifth report.

The temporal element of immunity *ratione materiae* was analysed in section II.C of the report. Very little space had been devoted to it chiefly because a broad consensus had arisen on it, both in practice and in the literature. She had analysed the temporal element in terms of whether it was conditional or limited and in order to identify the critical dates in determining whether the temporal dimension had been met. The distinction between the moment when the act that could give rise to immunity was committed and the moment when immunity was invoked was a characteristic element of immunity *ratione materiae*. In section II.C, some of the particular problems relating to the immunity of former Heads of State, former Heads of Government and former Ministers for Foreign Affairs were discussed.

The two draft articles contained in the fourth report referred to the definition of an act performed in an official capacity and to the scope of immunity *ratione materiae*, respectively. They were closely interrelated, given that the material scope of that category of immunity could only be understood in terms of the definition of an act performed in an official capacity. However, because of their content and functionality, they had been separated. Thus, the definition of an act performed in an official capacity had been placed in draft article 2 on definitions, whereas the scope of immunity *ratione materiae* was given separate treatment, in keeping with the model for immunity *ratione personae* that had already been adopted by the Commission.

Draft article 2 (f) brought together the characteristic elements of an act performed in an official capacity, namely, the criminal nature of the act, on the one hand, and its attribution to the State and its connection to sovereignty, on the other. To that was added a reference to the jurisdiction of the forum State, which was considered necessary in order to define the act more precisely.

Draft article 6 followed the same structure as that of draft article 4, the parallel provision on immunity *ratione personae*: it included a paragraph on the temporal element, followed by a second paragraph on the material element. The purpose of the third paragraph was to ensure that immunity *ratione materiae* applied to former Heads of State, former Heads of Government and former Ministers for Foreign Affairs in respect of the acts that they had performed in an official capacity during their term of office, in the same way that it did to all other State officials.

Regarding the future plan of work, she said that her fifth report would be devoted to the crucial and highly controversial topic of limits and exceptions to the immunity of State officials from foreign criminal jurisdiction.

Mr. Kittichaisaree asked the Special Rapporteur to state her position on the application of immunity to *ultra vires* acts that were committed by State officials.

Mr. Candioti said that he had doubts about whether the phrase "acts performed in an official capacity" was an accurate translation of its Spanish counterpart, "*actos realizados a título oficial*", which referred to offences or crimes committed in the exercise of governmental authority. It would be useful for the Commission to establish a working definition of immunity, and he did not find the term "*funcionario del Estado*" to be a particularly suitable expression: he agreed with the Member States in the Sixth Committee that had pointed out that it failed to indicate that the individual in question was a government staff member.

Ms. Escobar Hernández (Special Rapporteur) said that she had addressed the subject of *ultra vires* acts in her fourth report; however, the issue warranted further analysis and discussion at the current session. The subject would also come up in the context of her fifth report, on the limits and exceptions to immunity, which was the most appropriate heading under which to deal with the offence of terrorism and other international crimes.

She had always considered the phrase "acts performed in an official capacity" to be a rather infelicitous, compared to the corresponding Spanish. However, the phrase was drawn from the judgment of the International Court of Justice in *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*. Ultimately, what mattered most was not the terms themselves but the meaning ascribed to them. Her fourth report provided clarification for developing a single interpretation of that phrase, which could be decided on following discussion in the Drafting Committee. If necessary, the terminology could be revisited upon adoption of the text on first or second reading on the basis of comments from Member States.

With regard to a working definition of the term "immunity", she had proposed a draft article 3 (Definitions) in her second report (A/CN.4/661) that included working definitions for the various types of immunity. She would be happy to revisit the term in a plenary meeting or in the Drafting Committee, and she would welcome any contributions that Commission members might wish to make in that regard.

The term "*funcionario del Estado*" and its translations had been the subject of intense debate in the plenary Commission and the Drafting Committee. Unless the Commission decided otherwise, she did not think the time was right to reopen the debate. In her fourth report, she had touched on the phenomenon of "*de facto* officials", which the Commission could debate more fully.

Mr. Candioti said that the Commission's progress on the topic could be held back if the three fundamental terms to which he had referred were not clear and did not convey the same meaning to all. Not knowing whether the term "State official" included only government staff or also mercenaries and contractors was problematic, for example. Furthermore, he had doubts about the advisability of relying on a

precedent set by the highly debated and unfortunate judgement of the International Court of Justice in the *Arrest Warrant* case in order to define the concept of acts performed in an official capacity.

The meeting rose at 11.20 a.m. in order to allow the Study Group on the Most-Favoured-Nation clause to meet.