Chapter X

IMMUNITY OF STATE OFFICIALS FROM FOREIGN CRIMINAL JURISDICTION

A. Introduction

171. 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.[377] 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.[378]

172. 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).[379] The Commission was unable to consider the topic at its sixty-first session (2009) or its sixty-second session (2010).[380]

173. At its sixty-fourth session (2012), the Commission appointed Ms. Concepción Escobar Hernández as Special Rapporteur to replace Mr. Kolodkin, who was no longer a member of the Commission. The Commission received and considered the preliminary report of the Special Rapporteur at the same session (2012), the second report during the sixty-fifth session (2013) and the third report during the sixth-sixth session (2014).[381] On the basis of the draft articles proposed by the Special Rapporteur in her second and third reports, the Commission has thus far provisionally adopted five draft articles, together with commentaries thereto. Draft article 2 on the use of terms is still a developing text.[382]

B. Consideration of the topic at the present session

174. The Commission had before it the fourth report of the Special Rapporteur (A/CN.4/686). The Commission considered the report at its 3271st to 3278th meetings, on 16 July and 21 to 24 July 2015.

175. At its 3278th meeting, on 24 July 2015, the Commission decided to refer draft article 2 (*f*) and draft article 6,[383] proposed by the Special Rapporteur, to the Drafting Committee.

176. At its 3284th meeting, on 4 August 2015, the Chairperson of the Drafting Committee presented[384] the report of the Drafting Committee on "Immunity of State officials from foreign criminal jurisdiction", containing draft articles 2 (*f*) and 6, provisionally adopted by the Drafting Committee at the sixty-seventh session (A/CN.4/L.865),[385]

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[377] At its 2940th meeting, on 20 July 2007 (see *Yearbook ... 2007*, vol. II (Part Two), 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 a proposal contained in annex I to the report of the Commission (see *Yearbook … 2006*, vol. II (Part Two), para. 257 and pp. 191–200).

[378] *Yearbook ... 2007*, vol. II (Part Two), para. 386. For the memorandum prepared by the Secretariat, see A/CN.4/596 and Corr.1 (mimeographed, available on the Commission's website: documents from the sixtieth session).

[379] *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).

[380] See *Yearbook ... 2009*, vol. II (Part Two), para. 207; and *Yearbook … 2010*, vol. II (Part Two), para. 343.

[381] *Yearbook … 2012*, vol. II (Part One), document A/CN.4/654 (preliminary report); *Yearbook … 2013*, vol. II (Part One), document A/CN.4/661 (second report); and *Yearbook … 2014*, vol. II (Part One), document A/CN.4/673 (third report).

[382] *Yearbook … 2013*, vol. II (Part Two), paras. 48–49. At its 3174th meeting, on 7 June 2013, the Commission received the report of the Drafting Committee and provisionally adopted draft articles 1, 3 and 4, and at its 3193rd to 3196th meetings, on 6 and 7 August 2013, it adopted the commentaries thereto. *Yearbook … 2014*, vol. II (Part Two), paras. 131–132. 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, and at its 3240th to 3242nd meetings, on 6 and 7 August 2014, it adopted the commentaries thereto.

[383] The text proposed by the Special Rapporteur in her fourth report, as corrected, read as follows:

"Draft article 2. *Definitions*

"For the purposes of the present draft articles:

"(*f*) an 'act performed in an official capacity' means an act performed by a State official exercising elements of the governmental authority that, by its nature, constitutes a crime in respect of which the forum State could exercise its criminal jurisdiction.

"Draft article 6. *Scope of immunity* ratione materiae

"1. State officials, when acting in that capacity, enjoy immunity *ratione materiae,* both while they are in office and after their term of office has ended.

"2. Such immunity *ratione materiae* covers exclusively acts performed in an official capacity by State officials during their term of office.

"3. Immunity *ratione materiae* applies to former Heads of State, former Heads of Government and former Ministers for Foreign Affairs, under the conditions set out in paragraphs 1 and 2 of this draft article."

[384] The statement by the Chairperson of the Drafting Committee is available from the Commission's website, http://legal.un.org/ilc.

[385] The text provisionally adopted by the Drafting Committee read as follows:

"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."

which can be found on the website of the Commission. The Commission took note of the draft articles as presented by the Drafting Committee. It is anticipated that commentaries to the draft articles will be considered at the next session.

1. Introduction by the Special Rapporteur of the fourth report

177. The fourth report of the Special Rapporteur represented a continuation of the analysis, commenced in her third report,[386] of the normative elements of immunity *ratione materiae*. Since the subjective scope of such immunity (who are the beneficiaries of such immunity) had already been addressed in the third report, the fourth report was devoted to consideration of the remaining material scope (an "act performed in an official capacity") and the temporal scope. As a consequence of the analysis, the report also contained proposals for draft article 2 (*f*), defining, for the general purpose of immunity, an "act performed in an official capacity", and draft article 6, on the material and temporal scope of immunity *ratione materiae*, which contains a specific reference to the application of immunity *ratione materiae* to former Heads of State, former Heads of Government and former Ministers of Foreign Affairs.

178. In her introduction of the report, the Special Rapporteur noted that it had to be read with previous reports, as together these reports constituted a unitary whole. It was noted that the present report, like the previous treatment of immunity *ratione personae*, did not address directly the question of limitations and exceptions to immunity, a matter which would be addressed in her fifth report in 2016. The Special Rapporteur pointed to some problems of translation of the report in the various language versions from the original Spanish, concerning which she introduced the appropriate changes through a corrigendum that was distributed to the members of the Commission. The Special Rapporteur requested that the Secretariat prepare a corrigendum with a view to distributing it as an official document of this session.

179. The fourth report submitted by the Special Rapporteur, in dealing with the normative elements of immunity *ratione materiae*, started by highlighting the basic characteristics of this type of immunity, namely that it is granted to all State officials, that it is granted only in respect of "acts performed in an official capacity" and that it is not time-limited. As to the normative elements of immunity *ratione materiae*, the subjective scope having been dealt with in the third report, the fourth report was focused on the material and temporal scope, as indicated above.

180. The concept of an "act performed in an official capacity" was first the subject of some general considerations which emphasized the importance of this concept in the context of immunity *ratione materiae*. Such importance derives from the functional nature of this type of immunity. The report then approached the distinction between "acts performed in an official capacity" and "acts performed in a private capacity". The study of this distinction led, among other things, to the conclusion that it was not equivalent to the distinction between *acta jure imperii* and *acta jure gestionis*, or to the distinction between lawful and unlawful acts.

181. The report then focused on providing criteria for identifying an "act performed in an official capacity", which involves the successive analysis of judicial practice (international and national), treaty practice and previous work of the Commission. The analysis of international judicial practice emphasized the significance of various judgments issued by the International Court of Justice, the European Court of Human Rights and the International Tribunal for the Former Yugoslavia. The study of national judicial practice was based on a large number of national cases referring to several aspects of immunity *ratione materiae* and took into consideration both criminal and civil proceedings, as the forms of conduct that could be identified with "acts performed in an official capacity" manifested themselves in both types of proceedings and elements common to such acts could be inferred from them. The analysis of treaty practice considered various United Nations conventions directly or indirectly referring to immunities, and international criminal law treaties (universal and regional) that include references to the official nature of acts characterized as conduct prohibited by international criminal law. As for the analysis of the previous work of the Commission, emphasis was placed on the articles on responsibility of States for internationally wrongful acts,[387] the Nürnberg Principles,[388] the 1954 draft code of offences against the peace and security of mankind,[389] the 1996 draft code of crimes against the peace and security of mankind[390] and the 2011 articles on the responsibility of international organizations.[391]

182. Having conducted the foregoing research, the Special Rapporteur went on to examine the resulting characteristics of an "act performed in an official capacity" for the purposes of immunity from foreign criminal jurisdiction, namely, the criminal nature of the act, the attribution of the act to the State and the exercise of sovereignty and elements of the governmental authority when the act is performed. Referring to the criminal nature of the act served the purpose of highlighting the link between criminal jurisdiction and the situations in which immunity *ratione materiae* might be invoked. It led to a model of the relationship between individual and State responsibility termed by the Special Rapporteur as "single act, dual responsibility", the possibilities for which were detailed in the report. A consideration of the attribution of the act to the State was necessary, as immunity *ratione materiae* is justified only when a link exists between the State and the act performed by a State official. Of particular interest, in this regard, was the conclusion that certain criteria for

[386] *Yearbook … 2014*, vol. II (Part One), document A/CN.4/673, paras. 10–16.

[387] *Yearbook … 2001*, vol. II (Part Two) and corrigendum, para. 76. The articles on responsibility of States for internationally wrongful acts adopted by the Commission at its 53rd session are contained in the annex to General Assembly resolution 56/83 of 12 December 2001.

[388] Principles of International Law recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal, *Yearbook … 1950*, vol. II, document A/1316, p. 374.

[389] *Yearbook ... 1954*, vol. II, document A/2693, p. 150.

[390] *Yearbook ... 1996*, vol. II (Part Two), para. 50.

[391] *Yearbook … 2011*, vol. II (Part Two), para. 87. The articles on the responsibility of international organizations adopted by the Commission at its sixty-third session are contained in the annex to General Assembly resolution 66/100 of 9 December 2011.

attribution contained in the articles on responsibility of States for internationally wrongful acts were not useful for the purposes of immunity. Finally, a third teleological feature was identified as characterizing "acts performed in an official capacity", namely that such acts are a manifestation of sovereignty and a form of exercise of elements of the governmental authority. Examples of some elements were given in the report. This section concluded with a consideration of the relationship between international crimes and acts performed in an official capacity. The concept of an "act performed in an official capacity" was finally defined as a conclusion to this section of the report.

183. Paragraphs 128 to 131 of the report briefly analysed the temporal element, reflecting the consensus on the indefinite nature of immunity *ratione materiae* and the relevance of considering the distinction between when the act was performed and when immunity is invoked. Paragraphs 132 and 133 of the report focused on the scope of immunity *ratione materiae* and resulted in the proposition of draft article 6 on this issue. The fourth report concluded with a reference to the future work plan on this topic, with the Special Rapporteur announcing a fifth report on the limits and exceptions to immunity.

184. The Special Rapporteur noted that the report was modelled on the third report in terms of the methodological approach taken, essentially basing the analysis of the issues on judicial (international and national) and treaty practice, as well as previous work of the Commission. Account had also been taken of comments received from Governments in 2014 and 2015, which had already taken into account, as appropriate, at the time of submission, and of the observations contained in the oral statements made by delegates in the Sixth Committee of the General Assembly. The Special Rapporteur also drew the attention of the Commission to the statements made by the Netherlands and Poland, which were received after the completion of the fourth report.

185. The report centred on the analysis of the concept of an "act performed in an official capacity". The Special Rapporteur noted that the analysis of the temporal element was brief because the matter was mostly uncontroversial in nature; there was broad consensus in the practice and doctrine on the "indefinite" or "permanent" nature of immunity *ratione materiae*. She nevertheless pointed to the need to analyse what the nature of that element (limit or condition) was, as well as to identify the critical moment that must be taken into account for the purposes of determining whether the temporal element was satisfied, i.e. whether it was the moment when the act was committed or when the claim of immunity was made. She also drew attention to the draft article proposed.

186. The Special Rapporteur highlighted the fact that the core of the report was the analysis of the material scope of immunity *ratione materiae*. It therefore constituted a study of an "act performed in an official capacity", which in turn addressed the distinction between "acts performed in an official capacity" and "acts performed in a private capacity"; offered the identifying criteria of an "act committed in an official capacity" and the characteristics thereof; and concluded with a draft article on the definition of this category of acts. Draft article 6, paragraph 2, for its part, referred to acts performed in an official capacity as the only acts performed by State officials that were covered by immunity *ratione materiae*.

187. It was noted that the concept of an "act performed in an official capacity", which is a central issue to the topic as a whole, has special significance for immunity *ratione materiae*: only acts performed by State officials in their official capacity are covered by immunity from foreign criminal jurisdiction. It was acknowledged that a variety of terms have been used to refer to the concept, but in this case the term "act performed in an official capacity" was employed to ensure continuity of terminological usage within the Commission, following the terminology used by the International Court of Justice in the *Arrest Warrant of 11 April 2000* case.[392]

188. The Special Rapporteur observed that the expression had not been defined in contemporary international law. It was often interpreted in opposition to an "act performed in a private capacity", which itself was an undefined category. However, on the basis of an analysis of the relevant practice, the Special Rapporteur offered certain discernible criteria for identifying acts performed in an official capacity. In particular, it was observed that: (*a*) the acts were *inter alia* connected with a limited number of crimes, including crimes under international law, systematic and serious violations of human rights, certain acts performed by the armed forces and law enforcement officials and acts related to corruption; (*b*) some multilateral treaties link the commission of certain acts to the official capacity of the perpetrators of such acts; (*c*) an act was considered to have been performed in an official capacity when committed by a State official acting on behalf of the State, exercising prerogatives of public power or performing acts of sovereignty; (*d*) immunity was generally denied in corruption-related cases, by national courts, the logic advanced being that officials cannot benefit from immunity for activities that are closely linked to private interest and whose objective is the personal enrichment of the official and not the benefit of the sovereign; (*e*) what was meant by "exercising the prerogatives of public power" or "sovereign acts" was not easily defined. Courts, however, have considered as falling into that category activities such as policing, activities of the security forces and of the armed forces, foreign affairs, legislative acts, administration of justice and administrative acts of diverse content; (*f*) the concept of an act performed in an official capacity did not automatically correspond to the concept of *acta jure imperii*. On the contrary, an "act performed in an official capacity" may exceed the limits of an act *jure imperii*, and may also refer to some *acta jure gestionis* performed by State officials while fulfilling their duties and exercising State functions; (*g*) the concept bore no relation to the lawfulness or unlawfulness of the act in question; and (*h*) for the purposes of immunity, the identification of such an act was always done on case-by-case basis.

189. In view of the foregoing criteria, the Special Rapporteur highlighted the following as the characteristics of an act performed in an official capacity: (*a*) it was an act

[392] *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, Judgment, *I.C.J. Reports 2002*, p. 3.

of a criminal nature; (*b*) it was performed on behalf of the State; and (*c*) it involved the exercise of sovereignty and elements of governmental authority.

190. The criminal nature of the act performed in an official capacity had implications for immunity in that the criminal nature of the act could conceivably occasion two different types of responsibility, one criminal in nature attributable to the perpetrator, and another civil in nature attaching to the perpetrator or to a State. The Special Rapporteur placed particular emphasis on the fact that the "single act, dual responsibility" model gave rise to several scenarios relevant to immunity, including: (*a*) exclusive responsibility of the State in cases where the act was not attributable to the individual by whom it was committed; (*b*) responsibility of the State and the individual criminal responsibility of an individual, when the act was attributable to both; (*c*) exclusive responsibility of the individual when the act was solely attributable to such an individual, even though he or she acted as a State official. The Special Rapporteur also observed that on the basis of the three possible scenarios, a claim of immunity might be invoked based on: (*a*) State immunity, in the event that the act could only be attributed to the State and the State alone could be held responsible; (*b*) State immunity and immunity *ratione materiae* of a State official, where the act was attributable to both the State and the individual.

191. In the view of the Special Rapporteur, the immunity of State officials from foreign criminal jurisdiction *ratione materiae* was individual in nature and distinct from the immunity of the State *stricto sensu*. This differentiation had a maximum effect in the case of immunity from foreign criminal jurisdiction of State officials, in view of the different basis for responsibility, which in the case of the State was civil, while for the State official it was criminal. Moreover, the nature of the jurisdiction from which immunity was invoked was different. The Special Rapporteur noted that this distinction was not always made with sufficient clarity in the literature or in practice, largely as a result of the traditional emphasis on the State (and its rights and interests) as the beneficiary of the protection afforded by immunity. She explained that immunity *ratione materiae* was recognized in the interest of the State, whose sovereignty was to be protected, but directly benefited the official when he or she acted in the manifestation of such sovereignty. In the view of the Special Rapporteur, for the exercise of immunity *ratione materiae* to be justified, there had to be a link between the State and the act carried out by a State official. This link implied the possibility of attributing the act to a State. She nevertheless found it questionable whether all the criteria for attribution contained in the articles on responsibility of States for internationally wrongful acts were useful for the purposes of immunity, singling out as particularly unsuitable the criteria set out in articles 7, 8, 9, 10 and 11.

192. She noted that, although determining the existence of a connection between act and sovereignty was not easy, judicial practice showed that certain activities which, by their nature, were considered as expressions of, or inherent to, the sovereignty of the State (police, administration of justice, activities of the armed forces, or foreign affairs), as well as certain activities that functionally occur pursuant to State policies and decisions involving an exercise of sovereignty, satisfied such connection criteria. She contended for a strict interpretation of an "act performed in an official capacity" which would place immunity where it rightly belonged, namely to protect the sovereignty of the State. She noted that the qualification of such acts performed by State officials in their official capacity as international crimes must not result in the automatic and mechanical recognition of immunity from foreign criminal jurisdiction in respect of such category of acts. The question will be analysed in greater detail in the fifth report.

2. Summary of the debate

(a) *General comments*

193. Members generally welcomed the Special Rapporteur's fourth report for its rich, systematic and well documented examples of treaty practice, as well as its analysis of international and national case law, while managing to establish a clear connection between the analysis and the draft articles proposed. In doing so, the report provided a comprehensive picture of the various considerations relevant for determining the material and temporal scope of immunity *ratione materiae*, a step that had helped to throw more light on an essential element of the topic. It was readily recognized that the subject matter was legally complex and raised issues that were politically sensitive and important for States.

194. A view was expressed that State practice was not uniform and, more crucially, that the direction of State practice was in a "state of flux", such that it was not easy to identify rules that were clearly and unambiguously applicable. The Commission was not only confronting theoretical and doctrinal questions concerning the topic in relation to other fields of law in the overall international legal system, but also the difficulty of making choices in codification and progressive development that would help to advance international law. The view was also expressed that it was necessary to strike a balance between fighting impunity and preserving stability in inter-State relations. In such circumstances, it was considered essential that there be transparency and an informed debate on whatever choices were to be made and on the direction to be taken.

195. It was noted by some members that the report opened up the possibility of conceptually approaching the whole subject from the standpoint that limitations or exceptions to the scope of immunity *ratione materiae* existed, as opposed to the inclusion of all acts, including those constituting international crimes, within the scope of acts performed in an official capacity. It was suggested by some other members that the circumstances presented an opportunity for the Commission to encourage progressive development, given current recourse in the practice of States to restrictive immunity regarding jurisdictional immunities of States.

196. There was general support for the referral of the draft articles proposed by the Special Rapporteur to the Drafting Committee. Some members made comments and observations, including on some of the reasoning and conclusions contained in the report.

197. Attention was drawn by some members to the continuing relevance of the distinction between the status-based immunity *ratione personae* and the conduct-based immunity *ratione materiae*. On some accounts, the two had some basic elements in common and, more fundamentally, the basis of their legal foundation was the same, namely the principle of the sovereign equality of States. At the same time, caution was urged against overreliance on the principle of sovereign equality of States to explain the complicated issues involved in the topic, since the principle did not explain, for instance, the restrictive approach to jurisdictional immunity of States, which allowed a State to exercise jurisdiction over the commercial and other non-public activities of another State. According to this view, the proper test for granting an official immunity for an act performed in an official capacity should depend upon the act being to the benefit of his or her State and upon ensuring the effective exercise of his or her function. While some members recognized the differences existing among the various rules and regimes governing the international legal system, the cautionary point was made that the Commission risked establishing a regime that was inconsistent with the regime under the Rome Statute of the International Criminal Court, which the Commission itself had helped to create. On the other hand, it was recalled that, unlike the present topic, which was based on a "horizontal relationship" among States, the international criminal jurisdiction established a "vertical relationship" among them. This key consideration presented a set of different factors requiring critical review.

198. It was, for instance, suggested that, in determining the scope of immunity *ratione materiae*, there were certain acts that could potentially be beyond the benefit of immunity *ratione materiae*. This was the case for acts involving allegations of serious international crimes, *ultra vires* acts, *acta jure gestionis*, or acts performed in an official capacity but exclusively for personal benefit, as well as acts performed on the territory of the forum State without its consent.

199. To address such acts, according to some members of the Commission, two possibilities existed: either to be inclusive, asserting that an act constituting a crime was an act performed in an official capacity and tackling the problem of whether the act was public or private, or both, head on; or to deal with such questions as limitations or exceptions. Some members indicated that, while it was difficult to categorize serious international crimes, *ultra vires* acts, or acts *jure gestionis* as private acts, it was suggested that it was better to address these matters as limitations or exceptions than as part of a definition of official or unofficial acts. This approach seemed to have the advantage that practice has followed similar approaches before with respect to jurisdictional immunities of States. Some members indicated that such an approach would also make it possible to find solutions which combined acceptance of limitations and exceptions with appropriate procedural safeguards and due process guarantees.

(b) *Methodology*

200. The methodical approach taken by the Special Rapporteur, of systematically analysing the available practice in seeking to determine the scope of immunity *ratione materiae,* was generally considered praiseworthy for the wealth of materials reviewed and the pertinence of the analysis made. Some members, however, noted that in some instances the report merely referred to cases, without analysing them in their full context. Moreover, in some situations, categorical statements were made that went further than was needed or justified, while in other parts, it was not always clear how the materials referred to in the report were related to the specific proposals made.

201. It was also noted by some members that there was heavy reliance on cases from particular jurisdictions or regions, or on cases relating to the exercise of civil jurisdiction, even though the topic concerned immunity from criminal jurisdiction. It was suggested that the Special Rapporteur should survey even more widely, so as to include the case law of all legal traditions and the various regions. It was pointed out that caution was needed in relying on such case law. While it was conceivable that there was no material difference between civil or criminal jurisdiction when exercised in determining what constituted an act performed in an official capacity, in some situations it might be critical to analyse the context in which immunity might have been granted or denied. Immunity might differ depending on whether the case was against a foreign sovereign or against an individual in a civil context or a criminal context.

202. Some members also questioned the assertion made in the report about the irrelevance of national law for the purposes of determining acts performed in an official capacity, considering that such law constituted practice in determining customary international law; and indeed the Special Rapporteur had, in her analysis, relied upon case law interpreting and applying such national law. It was also noted that there was need to place more emphasis on analysing the national legislative and executive practice of States, as well as to give more importance to the analysis of international judicial practice, including the full implications of judgments rendered by international courts and tribunals, such as the *Arrest Warrant of 11 April 2000* case[393] and *Certain Questions of Mutual Assistance in Criminal Matters,*[394] which it was contended had dealt with some of the issues with a certain degree of consistency.

(c) *Draft article 2 (*f*): Definition of an "act performed in an official capacity"*

203. While draft article 2 (*f*) is definitional in nature and is briefly formulated, comments were made on it in the light of the extensive analysis that the Special Rapporteur had offered in her report to underpin its formulation.

(i) "Act performed in an official capacity" versus "act performed in a private capacity"

204. It was recognized that an "act of State doctrine" was an entirely different legal concept from immunity *ratione materiae*. In general, there was support for the assertion that an "act performed in an official capacity"

[393] *Ibid.*

[394] *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France)*, Judgment, *I.C.J. Reports 2008,* p. 177.

was defined and appreciated in contradistinction to "acts performed in a private capacity". It was also appreciated that an act performed in a private capacity was not necessarily identical to *acta jure gestionis*, nor was an act performed in an official capacity coterminous with *acta jure imperii*. Moreover, the distinction between an "act performed in an official capacity" and an "act performed in a private capacity" had no relation whatsoever to the distinction between lawful and unlawful acts. The point was however made that these concepts of contrast still provided some useful elements that could be helpful in understanding whether an act was performed in an official capacity or in a private capacity, or indeed whether an act was lawful or unlawful. Well-crafted commentaries capturing the various nuances could facilitate a better understanding of an act performed in an official capacity.

205. Some members were not convinced that there was a need to define an official act or an act performed in an official capacity for the purposes of the present topic. It was noted that legal concepts tended to be indeterminate and did not always lend themselves to legal definition. It was not entirely clear whether it would be helpful to provide a definition beyond the dichotomy between acts performed in an official capacity and acts performed in a private capacity. Any attempt to go beyond the common places would be an impossible task. It was considered that the distinction between acts performed in an official capacity and acts performed in a private capacity was general and sufficient to allow for a case-by-case determination based on the circumstances of each case. This binary opposition was borne out by the practice in international and domestic case law. Some members doubted whether the collection of numerous references to instances where terms like "official act" or an "act performed in official capacity" were employed was useful, as such an exercise was bound to be incomplete and would require deeper analysis to understand the context. It was suggested that the Special Rapporteur should have explored more fully the question of how far a State may determine the range of activities which it considered as constituting acts performed in an official capacity. However, other members maintained that a definition, if properly drafted, could be necessary or useful. It was further suggested that the commentary could cite examples of acts performed in an official capacity.

(ii) Criminal nature of the act

206. Some members observed that, in certain treaties, the participation of a State official in the commission of an act was part of the definition of the crime, whereas in other instances, that participation was not an express element of the crime in question, but the possibility of an official being involved in the crime's commission was not necessarily excluded. However, according to that view, the prescriptive or descriptive nature of a particular definition of a crime did not necessarily have a bearing on the question of whether the person had acted in an official capacity.

207. Some members were of the view that the central issue which was determinative of an act performed in an official capacity for the purposes of immunity was not the nature of the act but the capacity in which one acted.

208. Some members noted that, while the criminal nature of the act did not alter its official character, that did not mean that the criminality of the act could be considered as an element of the definition of the act performed in an official capacity. It was also noted that the characterization as criminal of an act performed in an official capacity, which appeared to be incorporated in the proposed definition, would lead to a surprising result, since it considered any act performed in an official capacity as a crime. This was tantamount to suggesting that every "act performed in an official capacity", by definition, constituted a crime, and necessarily that State officials always committed crimes when they acted in an official capacity. An act was a crime not by its nature but rather by its criminalization at the levels of national or international criminal law.

209. The view was expressed that the whole point of the international law of immunity was for a court of the forum State to determine, as a procedural matter, whether a particular act performed by an official was amenable to its jurisdiction. These matters were considered *in limine litis*. If the lawfulness of the act, as such, would be a relevant criterion for determining the existence of jurisdiction, the law of immunity *ratione materiae* would to that extent be rendered superfluous. Such an approach would also have implications for the presumption of innocence.

210. For some members, the reference to "criminal nature" of the act merely sought to reflect a descriptive notion for the purposes of the present draft articles. It was not intended to mean that all official acts were "criminal". Some members observed that they did not understand the logic that immunity applied because the act had been performed in an official capacity and not because it had a criminal element. In this regard, it was recalled that suggestions had been made in the past for a definition of criminal conduct. It was also wondered what the point would be of arresting an official if it was not for having allegedly committed a criminal act, and indeed at that point it was doubted that the presumption of innocence would be engaged.

211. It was countered, in turn, that draft article 1, on scope, provisionally adopted by the Commission in 2013, already provided that the draft articles were focused on criminal jurisdiction.

212. A variety of proposals were made to qualify and remove from the text of the proposed definition any connotation that an act performed in an official capacity *per se* was a crime. In particular, it was suggested that draft article 2 (*f*) should be recast in such a way as to remove the requirements of criminality.

213. On the question of "single act, dual responsibility", it was, in the view of some members, well established in international law. It was clear that any act of a State official performed in an official capacity was attributable not only to the person (for the purpose of his or her individual criminal responsibility) but also to the State (for the purpose of State responsibility). For other members, even though not opposed to such a description, it was not entirely apparent how the "single act, dual responsibility" model related to the conclusion that acts performed in an official capacity must be criminal in nature. It was

suggested that there seemed to be some confusion of understanding between the issues of jurisdiction and immunity, themselves different concepts, albeit interrelated, and responsibility, whether individual criminal responsibility or State responsibility.

(iii) Attribution of the act to the State

214. Some members considered it important that the report had addressed the question of attribution, as it helped to clarify certain questions concerning the scope of immunity *ratione materiae*.

215. For other members, the reference, in the context of immunity *ratione materiae*, to the rules of attribution for State responsibility was only logical, as the immunity in question, in their view, belonged solely to the State. They therefore expressed doubts regarding the assertion of the Special Rapporteur that "any criminal act covered by immunity *ratione materiae* [was] not, strictly speaking, an act of the State itself, but an act of the individual by whom it was committed" (para. 97 of her fourth report), which they considered was confusing and complicated matters.

216. It was also recalled that rules of the immunity of the State are procedural in nature and are confined to determining whether or not a forum State may exercise jurisdiction over another. They do not bear upon the question of whether the conduct in respect of which the proceedings are brought is lawful or unlawful.

217. Several members were not prepared to concede that the immunity of a State official from the criminal jurisdiction of another State was aligned with the immunity of the State. In their view, the differentiation was useful and needed to be further explored. As developments in international criminal law, particularly since the end of the Second World War, had shown, immunity *ratione materiae* need not always be aligned with State immunity. Other members pointed to the right of a State to waive the immunity of its officials, which demonstrated the connection between all forms of State-based immunity.

218. Some members also shared the view of the Special Rapporteur that not all criteria of attribution, as set out in articles 4 to 11 of the draft articles on responsibility of States for internationally wrongful acts,[395] were relevant for the purposes of immunity. It was noted, for instance, that the conduct of persons attributed under certain circumstances to the State under articles 7, 8, 9, 10 and 11 of the draft articles on responsibility of States did not constitute acts performed in an official capacity for the purpose of the immunity of such persons.

219. Considering that there seemed to be scant State practice or pertinent case law, several members wondered about the basis on which the Special Rapporteur had made the assertion that the term "State official" excluded, for the purposes of immunity, individuals who were usually regarded as *de facto* officials. Some members thought it necessary to take a broader approach that would cover acts of a person acting under governmental direction and control. The point was also made that the trend in recently concluded agreements and elaborated principles on private contractors was in favour of restricting or denying immunity to such actors.

220. According to another view, the law of immunity and the law of State responsibility were different regimes that existed for different reasons, with the consequent result that they provided different solutions and remedies.

221. In specific relation to the draft definition as proposed, some members welcomed the fact that the Special Rapporteur had not introduced the attribution of the act to the State in the text, as it was not a helpful criterion when determining what constituted an act performed in an official capacity.

(iv) Sovereignty and exercise of elements of the governmental authority

222. According to some members, it was important, as noted in the report, to distinguish between acts which are performed in an official capacity in the sense that they were in the exercise of a public function, or of the sovereign prerogative of the State, and those which are merely in furtherance of a private interest. They found the extrapolations of the "representative" and "functional" aspects of State functioning well reflected in the Special Rapporteur's formulations. Attention was drawn with approval to the use of "elements of governmental authority" in the draft articles on State responsibility for internationally wrongful acts. Other members viewed the context in which those draft articles dealt with that term to be different. Several members also pointed to the difficulty of defining sovereignty and the exercise of elements of governmental authority.

223. For some members, the argument that an international crime was contrary to international law did not provide any additional element of relevance for the characterization of an act performed in an official capacity, yet the proposition that an act performed in an official capacity was criminal in nature seemed to suggest that the Special Rapporteur had effectively taken a stand on the matter, even though the question of limitations and exceptions would be taken up in the fifth report in 2016. Other members agreed with the Special Rapporteur that, given the nature of international crimes and their gravity, there was an obligation to take them into account for the purposes of defining the scope of immunity from foreign criminal jurisdiction.

224. Some members disagreed with the Special Rapporteur that the relationship between acts performed in an official capacity and international crimes was settled. They pointed to the joint separate opinion by Judges Higgins, Kooijmans and Buergenthal in the *Arrest Warrant of 11 April 2000* case "that serious international crimes cannot be regarded as official acts because they are neither normal State functions nor functions that a State alone … can perform".[396] Other members observed that the Special Rapporteur had concentrated on the question of whether international crimes may ever be "acts

[395] See footnote 387 above.

[396] *Arrest Warrant of 11 April 2000* (see footnote 392 above), p. 88, para. 85.

performed in an official capacity", without addressing the question of limitations or exceptions. It was suggested that the commentaries to be adopted on the draft provision should be prepared in such a way as not to prejudge the discussion of immunities in relation to international crimes.

225. Nevertheless, some members asserted, on the basis of the *Arrest Warrant of 11 April 2000* case, that the "international crime exception" was not applicable with respect to immunity *ratione personae*. On the other hand, it was noted that the case left open the question of possible exceptions with respect to immunity *ratione materiae,* for, when the International Court of Justice had pronounced that it was unable to deduce from practice that there existed under customary international law any form of exception to the rule according immunity from criminal jurisdiction and inviolability to an incumbent Minister of Foreign Affairs, it had confined the finding to immunity *ratione personae*.

226. Some members, questioning the need for a definition, doubted the usefulness of the formulation "act performed by a State official exercising elements of governmental authority", as they considered "elements" to be unclear and "governmental", question-begging. The alternative was to employ the formulation contained in draft article 2 (*e*), provisionally adopted by the Commission in 2014, in which case reference would be made to an "act performed by a State official when representing the State or when exercising State functions". It was recalled that, when the Commission adopted that provision, it had discussed and refrained from using the term "governmental authority". Other members however viewed this term as useful in the context of this topic.

227. Some members noted that, if the Commission were to adopt a definition of an act performed in an official capacity, then it might be appropriate to amend accordingly draft article 5, as provisionally adopted by the Drafting Committee.

(d) *Draft article 6: Scope of immunity* ratione materiae

228. Draft article 6 was found generally acceptable. It was suggested, however, that paragraphs 1 and 2 be reformulated so as to avoid the impression that it only covered elected officials. This could be done by employing the formulation "*while they are representing the State or exercising State functions, and thereafter*". The possibility of reversing the order in which paragraphs 1 and 2 appeared was also raised, as this would clearly distinguish immunity *ratione materiae* from immunity *ratione personae*. The point was also made that, while draft paragraph 2 was acceptable, its acceptance did not prejudge or prejudice the question of possible exceptions.

229. It was noted that paragraph 3 was superfluous, as it stated an aspect already covered by paragraph 3 of draft article 4, and the commentary thereto, provisionally adopted by the Commission in 2013. It ought to be addressed in the commentary but, if retained, the word "former" should be deleted, as immunity *ratione materiae* also covered Heads of State, Heads of Government and Ministers for Foreign Affairs while in office.

(e) *Future workplan*

230. The consideration of limitations and exceptions to immunity was seen as a key aspect of the topic. In this respect, some members stressed the importance of a thorough analysis of the comments received from Governments, not only for the evidence of State practice, but also for the nuance in the positions taken, including whether they viewed international law generally in this area as being settled. Some other members expressed regret that the analysis of limitations and exceptions to immunity would only be addressed in 2016, even though it had often been mentioned in previous reports, with little discussion.

231. The Special Rapporteur was encouraged by some members to address the question of limitations and exceptions together with questions of procedure, not only because the two aspects were interrelated, but also because to do so might ultimately assist the Commission to overcome some of the thorny issues related to the topic as a whole. It was even suggested that procedural issues be taken up first. Some other members noted that it would be premature to deal with limitations and exceptions the following year since there were still some general matters to be dealt with.

3. Concluding remarks by the Special Rapporteur

232. The Special Rapporteur addressed the issues raised during the debate, dividing them into two groups, dealing first with certain methodological issues raised by various members of the Commission and then with issues related to the concept of an "act performed in an official capacity".

233. With regard to the first group of issues, the Special Rapporteur made the general point that some of the Commission members' observations went beyond solely methodological concerns. Nonetheless, in that regard, she addressed their comments concerning the analysis and value of the case law considered, the treatment of national legislation, and the consideration given to statements and communications by States.

234. Regarding case law, she welcomed the positive response of a large number of Commission members to the analysis of judicial practice contained in the report. With respect to comments by some members of the Commission concerning the usefulness of the analysis of national case law, she reiterated the importance that she attached to national case law in the treatment of immunity *ratione materiae*, particularly in view of the fact that it was national courts that were directly confronted with immunity-related issues. She emphasized that, even if national case law was not consistent and homogeneous, a finding to that effect was in itself relevant to the work of the Commission. The Special Rapporteur also acknowledged the importance of the case law of international courts and tribunals, but she stressed her disagreement with the idea that a sort of hierarchy existed between international case law and national case law. At the same time, she noted that she did not share the view that had been expressed that international case law was fully coherent and consistent.

235. With respect to the weight given to national legislation in defining the concept of an "act performed in an official capacity" for the purposes of the current draft articles, she acknowledged that the word "irrelevant", as used in paragraph 32 of the report, was not the most suitable term. However, she pointed out that her intention was not to deprive national legislation of all value, but to emphasize that it should serve solely as a complementary interpretative tool, especially in view of the considerable differences that could be found in the various national legislations and the difficulty in identifying which national laws were relevant for the purposes of defining the concept of an "act performed in an official capacity". Furthermore, national laws on State immunity contained no definition of an "act performed in an official capacity".

236. Lastly, with regard to the statements and comments submitted by States, the Special Rapporteur reiterated the importance that she had always accorded to such valuable material, which she had used systematically when preparing her reports. She welcomed the fact that members of the Commission considered those statements and comments to be important and useful, not only for the purposes of reporting on national practice but also with a view to ascertaining how States perceived the various legal questions that came within the scope of the current topic.

237. With regard to the comments made concerning the definition of an "act performed in an official capacity", the Special Rapporteur made several concluding remarks on the importance of including such a definition in the draft articles; the link that existed between such an act and sovereignty and the exercise of elements of governmental authority; the criminal dimension linked to the concept of an "act performed in an official capacity"; and the relationship between responsibility and immunity.

238. On the importance of defining an "act performed in an official capacity", the Special Rapporteur reaffirmed her conviction that it was necessary to have such a definition for the purposes of the draft articles, a view which had been endorsed by a considerable number of members of the Commission. In her opinion, such a definition would assist in achieving legal certainty, in particular bearing in mind that the concept could not be defined solely by opposition to an act performed in a private capacity, which also had not been defined, and the diversity and lack of homogeneity of case law, which militated against the view that it was an indeterminate legal concept that could be identified by judicial means. Moreover, its definition would contribute to the codification and progressive development of international law and assist practitioners, including national courts. On that point, the Special Rapporteur expressed her view that repeatedly applying the technique of "deregulation" (in the case in question, failing to adopt a definition) did not appear to be in accordance with the Commission's mandate.

239. On the question of sovereignty and the exercise of sovereign authority, she stressed that qualifying an "act performed in an official capacity" as a material, as opposed to a subjective, element, required a special bond between the State official and the State. Even though "sovereignty" did not lend itself to a precise definition, it was possible to identify examples in the practice of "inherent acts of sovereignty" or "acts inherently sovereign", in particular the examples contained in paragraphs 54 and 58 of the report. Moreover, the term "exercise of governmental authority" had already been employed by the Commission in its earlier work on State responsibility. She recalled that it was a matter that the Commission had set aside for further elaboration.

240. With respect to the relationship between responsibility and immunity, the Special Rapporteur reiterated that, while it was true that the two regimes pursued different aims, they nevertheless had certain elements in common, which precluded a radical separation of the two. A good example in that regard was the question of international crimes and their relationship to immunity, an issue that had been raised by various members of the Commission during the debate. Accordingly, in her view, one could not overlook questions relating to responsibility in dealing with the topic, at least with regard to certain rules concerning the attribution of the act to the State. The Special Rapporteur said that she did not share the view expressed by one member of the Commission that an act was not official because it was attributed to the State, but rather was attributed to the State because it had been carried out by an official of that State.

241. With regard to draft article 6, the Special Rapporteur highlighted the combination of the two elements (material and temporal) and said that she was in favour of considering the option of reversing the order of paragraphs 1 and 2. Regarding paragraph 3 of the draft article, she was of the view that it should be retained, but left open the possibility that the Commission might decide to delete it and to incorporate its content and the reasons for it in the commentaries.

242. The Special Rapporteur responded to various questions raised by some members of the Commission. Lastly, regarding the future workplan, she highlighted the interesting debate in plenary, which was—to a large extent—a repeat of a debate that had previously taken place within the Commission. She recalled that the Commission had endorsed the workplan at the time and that a large number of members of the Commission had supported her proposal to address the issue of limits and exceptions in her next report. She had, however, taken careful note of the suggestions made by a number of Commission members to consider first, or concurrently, the procedural aspects of the topic. In that regard, she indicated that she would, to the extent necessary and possible, deal with procedural issues in her next report.

243. In conclusion, the Special Rapporteur recommended that the Commission should refer the two draft articles to the Drafting Committee, on the understanding that the latter would consider them in the light of the plenary debate.