

Chapter XI

IMMUNITY OF STATE OFFICIALS FROM FOREIGN CRIMINAL JURISDICTION

A. Introduction

190. 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.¹³⁶³ 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.¹³⁶⁴

191. 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).¹³⁶⁵ The Commission was unable to consider the topic at its sixty-first session (2009) or at its sixty-second session (2010).¹³⁶⁶

192. The Commission, at its sixty-fourth session (2012), appointed Ms. Concepción Escobar Hernández as Special Rapporteur to replace Mr. Kolodkin, who was no longer a member of the Commission.¹³⁶⁷ The Commission received and considered the preliminary report of the Special Rapporteur at the same session (2012), her second report during the sixty-fifth session (2013), her third report during the sixty-sixth session (2014) and her fourth report during the sixty-seventh session (2015).¹³⁶⁸ On the basis of the draft articles proposed by the Special Rapporteur in her second, third and fourth reports, the Commission has so far provisionally adopted six draft articles and commentaries thereto. Draft article 2, on the use of terms, is still being developed.¹³⁶⁹

¹³⁶³ At its 2940th meeting, on 20 July 2007 (see *Yearbook ... 2007*, vol. II (Part Two), p. 98, para. 376). The General Assembly, in paragraph 7 of its resolution 62/66 of 6 December 2007, took note of the decision of the Commission to include the topic in its programme of work. The topic had been included in the long-term programme of work of the Commission during its fifty-eighth session (2006), on the basis of the proposal contained in annex I to the report of the Commission (see *Yearbook ... 2006*, vol. II (Part Two), p. 185, para. 257, and p. 191).

¹³⁶⁴ *Yearbook ... 2007*, vol. II (Part Two), p. 101, para. 386. For the memorandum prepared by the Secretariat, see A/CN.4/596 and Corr.1 (available from the Commission’s website, documents of the sixtieth session).

¹³⁶⁵ *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).

¹³⁶⁶ See *Yearbook ... 2009*, vol. II (Part Two), p. 145, para. 207; and *Yearbook ... 2010*, vol. II (Part Two), p. 193, para. 343.

¹³⁶⁷ *Yearbook ... 2012*, vol. II (Part Two), p. 85, para. 266.

¹³⁶⁸ *Ibid.*, vol. II (Part One), document A/CN.4/654 (preliminary report); *Yearbook ... 2013*, vol. II (Part One), document A/CN.4/661 (second report); *Yearbook ... 2014*, vol. II (Part One), document A/CN.4/673 (third report); and *Yearbook ... 2015*, vol. II (Part One), document A/CN.4/686 (fourth report).

¹³⁶⁹ At its 3174th meeting, on 7 June 2013, the Commission received the report of the Drafting Committee and provisionally adopted draft

B. Consideration of the topic at the present session

193. The Commission had before it the fifth report of the Special Rapporteur, analysing the question of limitations and exceptions to the immunity of State officials from foreign criminal jurisdiction (A/CN.4/701). The Commission considered the report at its 3328th to 3331st meetings, from 26 to 29 July 2016. At the time of its consideration, the report was available to the Commission only in two of the six official languages of the United Nations. Accordingly, the debate in the Commission was preliminary in nature, involving members wishing to speak on the topic, to be continued at its sixty-ninth session. In these circumstances, it was understood that the consideration of the report at the present session was exceptional and was not intended to set a precedent. The Commission emphasized that discussions at the current session were only the beginning of the debate, and that the Commission would provide the General Assembly with a complete account of its work on the fifth report only once the debate had been concluded, at the sixty-ninth session.

194. At its 3329th meeting, on 27 July 2016, the Commission provisionally adopted draft articles 2 (*f*) and 6, provisionally adopted by the Drafting Committee and taken note of by the Commission at its sixty-seventh session (see sect. C.1 below).

195. At its 3345th and 3346th meetings, on 11 August 2016, the Commission adopted the commentaries to the draft articles provisionally adopted at the present session (see sect. C.2 below).

1. INTRODUCTION BY THE SPECIAL RAPporteur OF THE FIFTH REPORT

196. The fifth report analysed the question of limitations and exceptions to the immunity of State officials from foreign criminal jurisdiction. It addressed, in particular, the prior consideration by the Commission of the question of limitations and exceptions to the immunity of State officials from foreign criminal jurisdiction, offered an analysis of relevant practice; addressed

articles 1, 3 and 4 and, at its 3193rd to 3196th meetings, on 6 and 7 August 2013, it adopted the commentaries thereto (see *Yearbook ... 2013*, vol. II (Part Two), pp. 39 *et seq.*, paras. 48–49). 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 (see *Yearbook ... 2014*, vol. II (Part Two), pp. 142 *et seq.*, paras. 131–132). At its 3284th meeting, on 4 August 2015, the Chairperson of the Drafting Committee presented the report of the 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, of which the Commission took note (*Yearbook ... 2015*, vol. II (Part Two), pp. 71 *et seq.*, para. 176).

some methodological and conceptual questions relating to limitations and exceptions; and considered instances in which the immunity of State officials from foreign criminal jurisdiction would not apply. It drew the conclusion that it had not been possible to determine, on the basis of practice, the existence of a customary rule that allowed for the application of limitations or exceptions in respect of immunity *ratione personae*, or to identify a trend in favour of such a rule. On the other hand, the report came to the conclusion that limitations and exceptions to the immunity of State officials from foreign criminal jurisdiction did apply to State officials in the context of immunity *ratione materiae*. As a consequence of the analysis, the report contained a proposal for draft article 7 concerning “Crimes in respect of which immunity does not apply”.¹³⁷⁰ The report also noted that the sixth report of the Special Rapporteur, to be submitted in 2017, would address the procedural aspects of immunity of State officials from foreign criminal jurisdiction.

197. In introducing her report, the Special Rapporteur recalled that the topic had been the subject of recurrent debate over the years in the Commission and in the Sixth Committee of the General Assembly, eliciting diverse and often opposing views. The fifth report dealt with limitations and exceptions to immunities, following the Commission’s completion of its consideration of all the normative elements of immunity *ratione personae* and immunity *ratione materiae*.

198. The Special Rapporteur said that, in preparing the report, she had employed the same methodological approaches as in previous reports, consisting of an analysis of judicial practice (both domestic and international) and treaty practice, taking into account the prior work of the Commission, and noted that the fifth report additionally contained an analysis of national legislation, as well as information received from Governments in response to questions posed by the Commission. The Special Rapporteur underlined that the fifth report, like her previous reports, must be read and understood together with prior reports on the topic, as they constituted a whole.

199. Addressing the main substantive and methodological issues reflected in the fifth report, the Special Rapporteur said that its aim was: (a) to analyse whether

¹³⁷⁰ The text of draft article 7, as proposed by the Special Rapporteur in the fifth report, reads as follows:

“Draft article 7

Crimes in respect of which immunity does not apply

1. Immunity shall not apply in relation to the following crimes:

(i) Genocide, crimes against humanity, war crimes, torture and enforced disappearances;

(ii) Corruption-related crimes;

(iii) Crimes that cause harm to persons, including death and serious injury, or to property, when such crimes are committed in the territory of the forum State and the State official is present in said territory at the time that such crimes are committed.

2. Paragraph 1 shall not apply to persons who enjoy immunity *ratione personae* during their term of office.

3. Paragraphs 1 and 2 are without prejudice to:

(i) Any provision of a treaty that is binding on the forum State and the State of the official, under which immunity would not be applicable;

(ii) The obligation to cooperate with an international tribunal which, in each case, requires compliance by the forum State.”

there existed situations in which the immunity of State officials from foreign criminal jurisdiction was without effect, even where such immunity was potentially applicable because all the normative elements addressed in the draft articles provisionally adopted were present; and (b) to identify, if the answer to (a) were in the affirmative, the actual instances in which such immunity would be without effect, addressing in particular: (i) limitations and exceptions to immunity; and (ii) crimes in respect of which immunity did not apply.

200. The Special Rapporteur noted that the phrase “limitations and exceptions” reflected, in her view, a theoretical distinction that suggested that a “limitation” was intrinsic to the immunity regime itself, while an “exception” was extrinsic to it. The distinction had normative implications, as it had consequences for the systemic interpretation of immunity, as suggested in the report. The Special Rapporteur nevertheless stressed that the distinction between limitations and exceptions had no practical significance as each led to the same consequence, namely the non-application of the legal regime of the immunity of State officials from foreign criminal jurisdiction in a particular case. Accordingly, for the purposes of the present draft articles, “immunity shall not apply” had been used to cover both limitations and exceptions.

201. Moreover, the report did not consider waiver of immunity to be a “limitation or an exception”. Waiver of immunity produced the same effect as a limitation or an exception; however, this was not due to the existence of autonomous general rules, but rather to the exercise of the prerogative of the State of the official. Since waiver was procedural in nature, it would be examined in the sixth report, which would be devoted to the procedural aspects of immunity.

202. The report had also taken a broader perspective than merely considering international crimes. It offered an analysis of certain other crimes, such as corruption, which is of great importance to the international community. Moreover, there were instances of State practice on the non-application of immunity in circumstances based on the primacy of territorial sovereignty in the exercise of criminal jurisdiction by the forum State (akin to the “territorial tort exception” in relation to the jurisdictional immunity of the State).

203. The Special Rapporteur further underlined a number of considerations which must be taken into account in assessing the regime for the application of limitations and exceptions to immunity:

(a) Immunity and jurisdiction were inextricably linked. She described the former as an exception to the exercise of jurisdiction by the courts of the forum State. Although both were based on the sovereign equality of States, the exceptional character of immunity had to be taken into account when defining the possible existence of limitations and exceptions;

(b) The procedural nature of immunity meant that it did not absolve a State official from individual criminal responsibility. Accordingly, in a formal sense, immunity could not be equated to impunity. However, it was

underscored that, under certain circumstances, immunity could result, in effect, in the impossibility of determining the individual criminal responsibility of a State official. It was such effect that must be borne in mind when analysing limitations and exceptions to immunity;

(c) The immunity of State officials from foreign criminal jurisdiction had a bearing on criminal proceedings intended to determine, as appropriate, the individual criminal responsibility of the authors of certain crimes. Such immunity was different and distinguishable from State immunity and was subject to a distinct legal regime, including with regard to limitations and exceptions to immunity;

(d) The horizontal application of immunity between States, the subject of the present topic, was distinct and separate from the vertical application of immunity before international criminal courts and tribunals. At the same time, however, the mere existence of international criminal courts and tribunals could not always be considered as an alternative mechanism for determining the criminal responsibility of State officials. Therefore, the existence of international criminal tribunals could not be considered the basis for the absence of exceptions.

204. In the treatment of relevant practice covered by the report, the Special Rapporteur underlined the relevance of such practice in identifying limitations and exceptions to immunity. This was supplemented by a systemic approach to the interpretation of immunity and the limitations and exceptions thereto. Accordingly, although practice varied, it revealed a clear trend towards considering the commission of international crimes as a bar to the application of the immunity *ratione materiae* of State officials from foreign criminal jurisdiction. This was on the basis that: (a) such crimes were not considered official acts, or were an exception to immunity, owing to the serious nature of the crime; or (b) they undermined the values and principles recognized by the international community as a whole.

205. On the first point, it was noted that, even though national courts had sometimes recognized immunity from foreign criminal jurisdiction for international crimes, they had always done so in the context of immunity *ratione personae*, and only in exceptional circumstances in respect of immunity *ratione materiae*. Such practice, coupled with *opinio juris*, led to the conclusion that contemporary international law permitted limitations or exceptions to immunity *ratione materiae* from foreign criminal jurisdiction when international crimes were committed. Further, although there might be doubt as to the existence of a relevant general practice amounting to custom, there was a clear trend that reflected an emerging custom.

206. On the question of “values and legal principles”, the report had sought to address limitations and exceptions to immunity on the basis of a view of international law as a normative system of which the legal regime of immunity of State officials from foreign criminal jurisdiction formed part. In order to avert the negative effects occasioned by the application of an immunity regime, or the nullification of other components of the contemporary system of international law, it was underlined that such

a systemic approach was necessary. This approach also informed the way in which the report addressed the relationship of immunity to other key areas of contemporary international law, such as violations of peremptory norms of international law (*jus cogens*); the attribution of a legal character to the concepts of impunity and accountability and to the fight against impunity; the right of access to justice; the right of victims to reparation; or the obligation of States to prosecute certain international crimes in a similar vein.

207. In the view of the Special Rapporteur, such an approach, which better responded to concerns expressed by some States and members of the Commission in the debates over the years, was consistent with contemporary international law. It did not alter the basic foundations of international criminal law that had been gradually built since the last century, especially the principle of individual criminal responsibility for international crimes and the need to guarantee the existence of effective mechanisms for the fight against impunity for such crimes. At the same time, it took into account other important elements of international law, in particular the principle of sovereign equality of States.

208. The Special Rapporteur also introduced the various elements of the proposed draft article 7. She drew attention to the three categories of crimes to which immunity did not apply; the fact that limitations and exceptions applied only in respect of immunity *ratione materiae*; and the existence of two particular regimes considered *lex specialis*.

2. SUMMARY OF THE DEBATE

(a) General comments

209. The debate at the present session was only the beginning of the discussion of this aspect of the topic. It will be continued at the sixty-ninth session of the Commission. The summary below should be understood bearing these considerations in mind. A summary of the full debate, including the summing up by the Special Rapporteur, will be available after the debate is concluded in 2017.

210. Those members who spoke generally welcomed the Special Rapporteur’s fifth report for its rich, systematic and well-documented examples of State practice as reflected in treaties and domestic legislation, as well as in international and national case law. It was readily recognized that the subject matter, in particular the question of limitations and exceptions, was legally complex and raised issues that were politically highly sensitive and important for States. It was also recalled that disagreements within the Commission, and in the views among States, existed, with some members pointing out that the topic needed to be tackled prudently and cautiously. It was said by some members that the Commission should focus on codification rather than progressive development of new norms of international law in dealing with the issue of limitations and exceptions. Others members stated that this issue should be dealt with taking into account both the codification and the progressive development of international law.

(b) *Comments on methodological and conceptual issues raised in the fifth report*

211. In their comments, the members who spoke addressed various aspects of the report. They referred to those concerning the prior consideration by the Commission of the question of limitations and exceptions, offered comments on the treatment of relevant practice, addressed some methodological and conceptual questions relating to limitations and exceptions, tackled questions concerning the legal nature of the immunity regime, and examined instances in which the immunity of State officials from foreign criminal jurisdiction did not apply, in the context of draft article 7 proposed by the Special Rapporteur. While some members expressed support for the approaches taken, some other members were opposed to them.

Prior consideration by the Commission of limitations and exceptions

212. Some members expressed their appreciation for the lucid and balanced approach taken by the Special Rapporteur in her treatment of limitations and exceptions, for which they expressed their gratitude. This was achieved through a review of the practice and relevant case law and a careful balance between adherence to the immunity of State officials under customary international law and a prudent examination of the possibilities for progressive development, consistent with the approach chosen by the Special Rapporteur from the beginning of her work.

213. Some other members recalled with appreciation the study by the Secretariat,¹³⁷¹ as well as previous work conducted by the former Special Rapporteur.¹³⁷² It was suggested that the point of departure for considering limitations and exceptions should have been the conclusions of the previous Special Rapporteur,¹³⁷³ from which it should have been demonstrated whether the conclusions reached in 2008¹³⁷⁴ could still be justified and maintained in the light of subsequent developments in international law. These members also indicated that the Special Rapporteur had gradually deviated from her own initial approach to the topic, shifting the focus from codification to progressive development, which resulted in a loss of balance.

Study of practice

214. Some members were critical of the report for not faithfully following the analytical process of identification of customary international law referred to therein. Moreover, the conclusions that were sometimes reached were often irreconcilable with certain other assertions made in the report. In particular, concerns were expressed regarding the treatment of case law, which came from various sources and appeared to have been chosen selectively; the reliance in some cases on separate and dissenting opinions; and reliance on a limited sample of national

legislation, some of which, it was suggested, was of limited relevance in the consideration of the topic. It was further noted that a trend towards an exception in domestic courts, even if it existed, did not constitute a general practice for the purpose of establishing a rule of customary international law.

215. Accordingly, these members considered that it was not clear whether the analytical approach taken provided sufficient support for the conclusions drawn in the report, and that in some instances, the case law relating to the exercise of international criminal jurisdiction was unhelpful in determining whether customary international law recognized the existence of an exception to immunity *ratione materiae* before a foreign criminal jurisdiction. The Special Rapporteur's approach resulted in the limitations and exceptions to immunity being extended such that crimes under international law included even ordinary crimes.

216. It was further stated in the same context that, instead of grounding the report in "values and legal principles" of the international community, the focus should have been on following strictly the process of identification of customary international law, supported by normative sources. The proposals made should have been clarified as being by way of progressive development of international law.

217. On the other hand, the members of the Commission who took part in the debate generally considered that the report contained an extensive and deep analysis of practice. Moreover, some members considered that the analysis of practice showed the existence of a clear trend towards admitting certain limitations and exceptions to immunity and provided sufficient basis for the proposals made by the Special Rapporteur.

218. Furthermore, in the view of some members, even though there was bound to be a divergence of views on the legal regime of immunity of State officials from foreign criminal jurisdiction and its nature, the report would have a significant impact on the understanding and treatment of such immunity and would assist States and other relevant actors in the elaboration of an immunity regime that took into account the various legal interests. Accordingly, they expressed support for the approach pursued by the Special Rapporteur and noted that the analysis and conclusions on the doctrine were intrinsically linked to practice and judicial pronouncements, lending specific support to the proposals on limitations and exceptions. The reader of the report would have a comprehensive overall view of the background to the issues involved, the various positions on the matter, the nuances of immunity at the international and the national levels, and the policy considerations involved. These members concurred in the conclusion that the practice analysed in the report showed a trend towards recognition that immunity does not apply when international crimes have been committed.

219. Moreover, it was considered by these members that providing indisputable proof of the existence of a norm of international customary law was not necessarily the only way to address the issue of limitations and exceptions. Accordingly, the reference to "values and legal principles" was considered very useful.

¹³⁷¹ A/CN.4/596 and Corr.1 (see footnote 1364 above).

¹³⁷² See, in particular, the second report of Special Rapporteur Roman A. Kolodkin (*Yearbook ... 2010*, vol. II (Part One), document A/CN.4/631), paras. 54–93.

¹³⁷³ *Ibid.*, paras. 90–93.

¹³⁷⁴ *Yearbook ... 2008*, vol. II (Part Two), pp. 139–141, paras. 294–311.

220. The point was also made that a commendable effort had been made by the Special Rapporteur to bridge differences within the Commission on the question of limitations and exceptions to immunity, while presenting a thoughtful, albeit challenging, approach to addressing the matter for the Commission to consider. By identifying a trend, the Special Rapporteur had offered a middle ground between those who sought concordance of the immunity regime at the vertical and horizontal levels, and those who considered that the Commission should not identify any limitation and exception because customary international law did not provide for such exceptions.

Legal nature of immunity

Relationship between immunity and jurisdiction

221. Some members pointed out, recalling the decision of the International Court of Justice in the *Arrest Warrant of 11 April 2000* case,¹³⁷⁵ that immunity and jurisdiction, even though related, were different regimes. The fact that international instruments seeking to prevent and punish certain serious international crimes required States parties to establish their jurisdiction to investigate, arrest, prosecute or extradite and provided for other forms of cooperation did not affect the immunity of State officials from foreign criminal jurisdiction under customary international law. Such immunities, as noted in the *Arrest Warrant of 11 April 2000* case, remained opposable before the courts of a foreign State, even where such courts exercised jurisdiction under the instruments in question.¹³⁷⁶

222. On the other hand, it was observed that the quest for accountability was not and should not be regarded as a mechanism to disturb peace, interfere in the internal affairs of States or transgress the sovereignty of States or the will of their peoples. On the contrary, the lack of justice and prevalence of impunity contributed to tensions in international relations and undermined the core legal principles of inter-State relations. Accordingly, it was asserted that there was a need to balance the various legitimate interests involved, taking into account the right of the State to protect its sovereignty, including its people, and the sovereign equality of States in international law.

223. It was likewise emphasized that the effect of the Rome Statute of the International Criminal Court on the draft articles being elaborated should not be underestimated. In particular, it was observed in relation to article 27 of the Rome Statute that immunity and individual criminal responsibility were intrinsically linked, and that viewing immunity as a mere procedural bar, in absolute terms, divorced it from the question of individual responsibility, without affording effective redress.

Relationship between immunity and responsibility

224. Some members recalled that case law, including that of the International Court of Justice in the *Arrest Warrant of 11 April 2000* and the *Jurisdictional Immunities of*

*the State*¹³⁷⁷ cases, showed that immunity did not absolve a State official of any individual criminal responsibility on the substance, nor was it intended to foster impunity, given that the *Arrest Warrant of 11 April 2000* case offered possible measures to avoid impunity, consisting of domestic prosecution, waiver of immunity, prosecution after termination of term of office, and prosecution before an international criminal tribunal. Accordingly, it was inaccurate to equate impunity with immunity, as the former involved substantive considerations, addressing issues of individual criminal responsibility, while the latter was concerned with procedural issues.

225. At the same time, some other members endorsed the approach taken by the Special Rapporteur in her fifth report. It was noted that immunity *ratione personae* was distinct from immunity *ratione materiae*, which necessitated a more nuanced view if progress were to be made on the subject. While the fact that a State had established criminal jurisdiction over persons enjoying status-based immunity *ratione personae* would impair the ability of the State of which those persons were agents to function and to exercise its sovereignty, such was not always the case with immunity *ratione materiae*, given its conduct-based nature. The fact that immunity *ratione materiae*, as reflected in draft article 6 provisionally adopted at the present session, was enjoyed only with respect to acts performed in an official capacity meant that there was no automaticity to its application as a procedural bar.

Relationship between State immunity and immunity of a State official

226. Some members said that the immunity of State officials from foreign criminal jurisdiction was rooted in State immunity, which reflected the principle *par in parem non habet imperium*. Any suggestion that norms of *jus cogens* or rules on fighting serious international crimes conflicted with the fundamental rights of States was tantamount to subordinating the principle of sovereign equality of States, a cornerstone of inter-State relations, to other rules, and risked gradually eroding it. Moreover, any exceptions to immunity were likely to undermine the principle of non-intervention in internal affairs, with the attendant risk of politically motivated prosecutions of Heads of State or other high-ranking officials, and could lead to abuse of universal jurisdiction. Instead of helping to fight crime and protect human rights, such developments, it was suggested, would undermine the stability of inter-State relations and hold back the advance of international justice.

227. On the other hand, some members observed that developments in the last century in civil jurisdictional matters had permitted a degree of departure from the concept of absolute immunity of the State. Moreover, sovereign (State) immunity was not the same as the immunity of State officials from foreign criminal jurisdiction. Additionally, although States were responsible for internationally wrongful acts, including acts committed by their officials, a State as such could not commit a crime under the law of State responsibility.

¹³⁷⁵ *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, Judgment, *I.C.J. Reports* 2002, p. 3.

¹³⁷⁶ *Ibid.*, para. 59.

¹³⁷⁷ *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)*, Judgment, *I.C.J. Reports* 2012, p. 99.

Its responsibility was not criminal, whereas its officials, based also on developments in the last century, were capable of being held criminally responsible. These distinctions should be borne in mind when addressing the immunity of State officials, its possible limitations and exceptions, and the overall scheme of balancing legitimate legal interests.

Relationship between national and international jurisdiction

228. The point was made that an appreciation of the issues canvassed in the fifth report under contemporary principles of international law required a balancing of interests, starting with the model established under the Charter of the United Nations, which reflected certain aspirations for humanity, including protection of human rights, the pursuit of justice and respect for obligations consistent with international law, based on certain fundamental principles, not least the sovereign equality of States.

229. On this understanding, it was argued that protecting human rights and fundamental freedoms was not peripheral to sovereign equality; nor was justice incompatible with respect for obligations arising from international law. The report as presented, read together with previous reports, had strived to demonstrate that these principles were not intended to be mutually exclusive, as they complemented each other and ought to be applied in a manner that ensured that one interest did not adversely impact another.

230. Moreover, even though the immunity of officials from international criminal jurisdiction was not at issue in relation to this topic, there were legal policy considerations that should be taken into account, as part of the balancing of interests, including, on the one hand, the interest of the international community as a whole in protecting itself from the commission of international crimes, as well as from violations of *jus cogens* norms and, on the other, the interest of preserving the integrity of the obligations of national and international courts to cooperate with one another.

231. The point was also made that there was a close relationship between the exercise of immunity before *national* courts and before *international* courts, necessitating a systemic interpretation of the two regimes. In this context a reference was made to the system of complementarity under the Rome Statute, which should not be impeded by the rules of immunity.

232. On the other hand, it was recalled that the relationship between a State and an international criminal tribunal, such as the International Criminal Court, was different from the horizontal inter-State relationship involved in the present topic. While article 27 of the Rome Statute had established the irrelevance of official capacity, as a result of which State party officials did not enjoy procedural immunity before the International Criminal Court, this provision could not be cited as evidence of the existence of an exception in a horizontal inter-State relationship, which was preserved under article 98 of the Rome Statute.

233. Moreover, it was recalled by some members that a treaty did not create obligations or rights for a third State without its consent. Accordingly, the inapplicability of immunity agreed upon among States through treaties only applied to the States parties or to the cases provided by the treaties in question, and it would not be appropriate to cite such exceptions as evidence of a customary rule in a horizontal relationship among States if they arose in a vertical relationship with an international criminal tribunal.

234. It was nevertheless observed that instead of disregarding the practice of international criminal tribunals as having no impact on horizontal relations, developments needed to be considered carefully, in the context of each case. For example, in some instances the question submitted to a domestic court was not the question of immunity under international law but that of immunity under domestic law.

(c) Comments on draft article 7

235. Several members supported the proposal to identify crimes in respect of which immunity *ratione materiae* did not apply. In this context, some members supported the methodology pursued by the Special Rapporteur in approaching immunity from the standpoint that international law was a complete normative system, in order to ensure that the regime of immunity did not produce negative effects on, or nullify, other components of the contemporary system of international law as a whole. Further, some members agreed with the analysis of the Special Rapporteur that the attribution of *ultra vires* acts of State officials to a State for the purpose of State responsibility was different from the issue of *ultra vires* acts that did not entitle the official concerned to immunity *ratione materiae*.

236. Moreover, the view was expressed that the finding by the International Court of Justice in the *Arrest Warrant of 11 April 2000* case that there was no customary law exception to the rule according immunity from criminal jurisdiction and inviolability to incumbent Ministers for Foreign Affairs, where they were suspected of having committed war crimes or crimes against humanity,¹³⁷⁸ ought to be construed narrowly, as the determination was specific to immunity *ratione personae*.

237. The observation was also made that existing State practice showed that immunity *ratione materiae* was irrelevant when a forum State exercised its legitimate territorial criminal jurisdiction. When a crime was committed in a forum State, it affected that State, which, therefore, had a legitimate interest to prosecute. Further, practice indicated that there was no customary rule granting immunity to State officials for *all* acts performed in an official capacity.

238. Some other members disagreed with the Special Rapporteur's conclusion that an exception to immunity *ratione materiae* existed in respect of certain crimes, recalling that the former Special Rapporteur had concluded that there was no exception to immunity other

¹³⁷⁸ *Arrest Warrant of 11 April 2000* (see footnote 1375 above), para. 58.

than the situation where criminal jurisdiction was exercised by a State in whose territory an alleged crime had taken place and certain conditions were met. These members reiterated that immunity was procedural in nature and was not intended to resolve the substantive question of the lawfulness or unlawfulness of particular conduct, even if a particular act contravened a *jus cogens* norm. It was recalled that the International Court of Justice, in the *Jurisdictional Immunities of the State* case, had noted that rules of State immunity and norms of *jus cogens* were different categories of international law. Consequently, a violation of a *jus cogens* norm did not imply that State immunity could not be invoked. Moreover, it was noted that any differentiation based on the severity of the offence was untenable, as immunity would apply equally to serious and to ordinary crimes. Given that immunity from foreign criminal jurisdiction was preliminary in nature and decided *in limine litis*, it would be odd to consider that its invocation would depend on determining whether a crime was serious or had actually been committed.

239. As regards *paragraph 1*, some members commended the Special Rapporteur for taking the courageous step of presenting a draft article on limitations and exceptions, which was a balanced and unambiguous proposal, though other members found it unconvincing.

240. Concerning *paragraph 1, subparagraph (a)*, some members expressed their support for the specific reference to genocide, crimes against humanity, war crimes, torture and enforced disappearances as international crimes to which immunity did not apply. The specific references to “torture” and “enforced disappearances”, even though they formed part of crimes against humanity, were considered useful. Support was also expressed for the inclusion of the crime of apartheid, which was mentioned in the report among the other crimes included in the present proposal.

241. The reasons advanced by the Special Rapporteur for the exclusion of the crime of aggression from the list were found unconvincing by some members, who considered that it would be remiss were the Commission to exclude it as an exception to immunity under draft article 7. These members would have preferred to include the crime of aggression, given that some States were already enacting domestic implementing legislation following ratification of the Kampala amendments to the Rome Statute¹³⁷⁹ criminalizing it. Moreover, the crime of aggression, considered the most serious and dangerous form of the illegal use of force, was committed by State officials as an act performed in an official capacity.

242. Some other members, however, supported the non-inclusion of the crime of aggression, as it was closely related to and dependent on the acts of the aggressor State, with implications for the sovereignty and immunity of States. It was also noted that the Kampala amendments on the crime of aggression had not yet entered into force.

¹³⁷⁹ See *Official Records of the Review Conference of the Rome Statute of the International Criminal Court, Kampala, 31 May–11 June 2010*, International Criminal Court publication RC/9/11, resolution 6, “The crime of aggression” (RC/Res.6).

243. Regarding “corruption-related crimes”, referred to in *paragraph 1, subparagraph (b)*, while some members supported their inclusion, other members expressed reservations as to their inclusion since this category of crimes was of a character different from serious international crimes. It was considered important, in deciding whether acts of corruption constituted exceptions to immunity, to determine primarily whether the acts of corruption were “acts performed in an official capacity”, and there was doubt as to whether such acts fell within the scope of immunity *ratione materiae*. It also was noted that there was no practice indicating the inapplicability of immunity *ratione materiae* in respect of acts of corruption.

244. Some reservations were expressed regarding the crimes referred to in *subparagraph (c)*, and some members considered the term “territorial tort exception” not to be entirely felicitous for situations involving criminal jurisdiction. Although it was relevant in respect of the jurisdictional immunities of the State, there was limited State practice to warrant its inclusion with respect to the immunity of State officials from foreign criminal jurisdiction. The point was also made that the subparagraph was couched in absolute terms, which risked encompassing all kinds of activities carried out by State officials in the forum State, including conceivably acts of military forces of the State. Nevertheless, some members expressed the view that it was interesting to consider this proposal. Other members only accepted the more limited exception identified by the former Special Rapporteur in his second report.¹³⁸⁰

245. Several members expressed support for the formulation of *paragraph 2*, viewing it as setting out an uncontroversial proposition and reflecting State practice. However, some reservations were expressed, as it was perceived to provide “exceptions to [the] exceptions” in *paragraph 1*, and its deletion was sought. It was suggested that any formulation should be in line with article 27 of the Rome Statute, and that a clear link should be established between draft article 7 and draft articles 4 and 6 already provisionally adopted. An additional suggestion was made to revisit the limitation in draft article 4, on the scope of immunity *ratione personae*, provisionally adopted by the Commission.

246. Some members considered the “without prejudice” clause in *paragraph 3*, reflecting a duty to cooperate arising from other regimes, acceptable.

(d) *Future work*

247. As regards future work, the link between limitations and exceptions and the procedural aspects of immunity was emphasized. In this connection, several members underlined the importance, for the following year, of procedural guarantees to take into account the need to avoid proceedings which were politically motivated or an illegitimate exercise of jurisdiction.

248. The debate on the fifth report will be continued and completed at the next session of the Commission, in 2017.

¹³⁸⁰ A/CN.4/631 (see footnote 1372 above).

C. Text of the draft articles on immunity of State officials from foreign criminal jurisdiction provisionally adopted so far by the Commission

1. TEXT OF THE DRAFT ARTICLES

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

IMMUNITY OF STATE OFFICIALS FROM FOREIGN CRIMINAL JURISDICTION

PART ONE

INTRODUCTION

Article 1. Scope of the present draft articles

1. The present draft articles apply to the immunity of State officials from the criminal jurisdiction of another State.

2. The present draft articles are without prejudice to the immunity from criminal jurisdiction enjoyed under special rules of international law, in particular by persons connected with diplomatic missions, consular posts, special missions, international organizations and military forces of a State.

Article 2. Definitions

For the purposes of the present draft articles:

[...]

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

(f) An “act performed in an official capacity” means any act performed by a State official in the exercise of State authority;

PART TWO

IMMUNITY *RATIONE PERSONAE*

*Article 3. Persons enjoying immunity *ratione personae**

Heads of State, Heads of Government and Ministers for Foreign Affairs enjoy immunity *ratione personae* from the exercise of foreign criminal jurisdiction.

*Article 4. Scope of immunity *ratione personae**

1. Heads of State, Heads of Government and Ministers for Foreign Affairs enjoy immunity *ratione personae* only during their term of office.

2. Such immunity *ratione personae* covers all acts performed, whether in a private or official capacity, by Heads of State, Heads of Government and Ministers for Foreign Affairs during or prior to their term of office.

3. The cessation of immunity *ratione personae* is without prejudice to the application of the rules of international law concerning immunity *ratione materiae*.

PART THREE

IMMUNITY *RATIONE MATERIAE*

*Article 5. Persons enjoying immunity *ratione materiae**

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

*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.

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

250. The text of the draft articles and commentaries thereto provisionally adopted by the Commission at its sixty-eighth session is reproduced below.

IMMUNITY OF STATE OFFICIALS FROM FOREIGN CRIMINAL JURISDICTION

Article 2. Definitions

For the purposes of the present draft articles:

[...]

(f) An “act performed in an official capacity” means any act performed by a State official in the exercise of State authority;

Commentary

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

(2) The Commission has included in the definition contained in draft article 2 (f) the elements that make it possible to identify a particular act as being an “act performed in an official capacity” for the purposes of immunity of State officials from foreign criminal jurisdiction. In so doing, it has essentially followed the Commission’s previous work on the topic. For example, the term “act” is used in the definition as it was in draft articles 4 and 6. As noted at the time, the term was previously used by the Commission to refer to both actions and omissions, and it is also the term generally used to refer to the conduct of individuals in the context of international criminal law.¹³⁸¹

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

¹³⁸¹ See para. (5) of the commentary to draft article 4 provisionally adopted by the Commission at its sixty-fifth session (*Yearbook ... 2013*, vol. II (Part Two), p. 49).

(4) In this regard, the Commission believes that, in order for an act to be characterized as an “act performed in an official capacity”, it must first be attributable to the State. However, this does not necessarily mean that only the State can be held responsible for the act. The attribution of the act to the State is a prerequisite for an act to be characterized as having been performed in an official capacity, but does not prevent the act from also being attributed to the individual, in accordance with the “single act, dual responsibility” model (double attribution) that the Commission has already applied in its 1996 draft code of crimes against the peace and security of mankind (article 4),¹³⁸² the articles on responsibility of States for internationally wrongful acts (article 58)¹³⁸³ and the articles on the responsibility of international organizations (article 66).¹³⁸⁴ Under the model, a single act can engage both the responsibility of the State and the individual responsibility of the author, especially in criminal matters.

(5) For the purpose of attributing an act to a State, it is necessary to consider, as a point of departure, the rules included in the articles on responsibility of States for internationally wrongful acts adopted by the Commission at its fifty-third session. Nonetheless, it must be borne in mind that the Commission established those rules in the context and for the purposes of State responsibility. Consequently, the application of the rules to the process of attributing an act of an official to a State in the context of immunity of State officials from foreign criminal jurisdiction should be examined carefully. For the purposes of immunity, the criteria for attribution set out in articles 7, 8, 9, 10 and 11 of the articles on responsibility of States for internationally wrongful acts do not seem generally applicable. In particular, the Commission is of the view that, as a rule, acts performed by an official purely for their own benefit and in their own interest cannot be considered as acts performed in an official capacity, even though they may appear to have been performed officially. In such cases, it is not possible to identify any self-interest on the part of the State, and the recognition of immunity, whose ultimate objective is to protect the principle of the sovereign equality of States, is not justified.¹³⁸⁵ It does not mean,

however, that an unlawful act as such cannot benefit from immunity *ratione materiae*. Several courts have concluded that unlawful acts are not exempt from immunity simply because they are unlawful,¹³⁸⁶ even in cases when the act is contrary to international law.¹³⁸⁷ The question whether acts *ultra vires* can be considered as official acts for the purpose of immunity from foreign criminal jurisdiction will be addressed at a later stage, together with the limitations and exceptions to immunity.

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

(7) This formulation was considered preferable to the one initially proposed (“exercising elements of the governmental authority”) and to others that were successively considered by the Commission, in particular “governmental authority” and “sovereign authority”. Although they all equally reflect the requirement that there must be a special connection between the act and the State, there is the difficulty that they may be interpreted as referring exclusively to a type of State activity (governmental or executive), or give rise to the added problem of having to define the elements of governmental authority or sovereignty, which would be extremely difficult and is not considered part of the Commission’s mandate. In addition, it was considered preferable not to use the expression “State functions”, which is used in draft article 2 (e), in order to make a clear distinction between the definitions contained in subparagraphs (e) and (f) of the draft article. In this regard, it should be recalled that the expression “State functions”, together with representation of the State, was used in draft article 2 (e) as a neutral term to define the link between the official and the State, without making any judgment as to the type of acts covered by immunity.¹³⁸⁸ The use of the term “authority” rather than “functions” also has

¹³⁸² *Yearbook ... 1996*, vol. II (Part Two), p. 23.

¹³⁸³ *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, p. 142. The articles on responsibility of States for internationally wrongful acts adopted by the Commission at its fifty-third session are annexed to General Assembly resolution 56/83 of 12 December 2001.

¹³⁸⁴ *Yearbook ... 2011*, vol. II (Part Two), p. 104. The articles on the responsibility of international organizations adopted by the Commission at its sixty-third session are annexed to General Assembly resolution 66/100 of 9 December 2011.

¹³⁸⁵ The following arguments by a court in the United States, in particular, clarify the reasons for the exclusion of *ultra vires* acts: “Where the officer’s powers are limited by statute, his actions beyond those limitations are considered individual and not sovereign actions. The officer is not doing the business which the sovereign has empowered him to do.” According to that court, “[the Foreign Sovereign Immunity Act] does not immunize the illegal conduct of government officials” and thus, “[a]n official acting under color of authority, but not within an official mandate, can violate international law and not be entitled to immunity under [the Act]” (United States, *In re Estate of Ferdinand Marcos Human Rights Litigation*; *Hilao and Others v. Estate of Marcos*, Court of Appeals, Ninth Circuit, judgment of 16 June 1994, 25 F.3d 1467 (9th Cir.1994), ILR, vol. 104, p. 119, at pp. 123 and 125). Similarly, another court concluded that *ultra vires* acts are not subject to sovereign immunity, as the perpetrators acted beyond their authority by violating the human rights of the plaintiffs: if officials commit acts that are not officially sanctioned by the State, that is, if they are not

“officials acting in an official capacity for acts within the scope of their authority”, they cannot benefit from immunity (United States, *Jane Doe I, et al., v. Liu Qi, et al.; Plaintiff A, et al., v. Xia Deren, et al.*, District Court for the Northern District of California, C-02-0672 CW (EMC), C-02-0695 CW (EMC)).

¹³⁸⁶ Canada, *Jaffe v. Miller and Others*, Ontario Court of Appeal, judgment of 17 June 1993, ILR, vol. 95, p. 446; United States, *Argentine Republic v. Amerasia Hess Shipping Corporation and Others*, Supreme Court, 23 January 1989, ILR, vol. 81, p. 658; Ireland, *McElhinney v. Williams and Her Majesty’s Secretary of State for Northern Ireland*, Supreme Court, 15 December 1995, ILR, vol. 104, p. 691.

¹³⁸⁷ United Kingdom, *lº Congreso del Partido*, House of Lords (England), 16 July 1981, [1983] A.C. 244, ILR, vol. 64, p. 307. In *Jones v. Saudi Arabia* (House of Lords, 14 June 2006, [2006] UKHL 26), Lord Hoffmann rejected the argument that an act contrary to *jus cogens* cannot be an official act (see ILR, vol. 129, p. 629, at p. 744).

¹³⁸⁸ See paragraph (11) of the commentary to draft article 2 (e) provisionally adopted by the Commission at its sixty-sixth session (*Yearbook ... 2014*, vol. II (Part Two), p. 145). In this context, the Commission has taken the view that “State functions” include “the legislative, judicial, executive or other functions performed by the State” (*ibid.*).

the advantage of avoiding the debate on whether or not international crimes are “State functions”. However, one member was of the view that it would have been more appropriate to use the expression “State functions”.

(8) The Commission did not consider it appropriate to include in the definition of an “act performed in an official capacity” a reference to the fact that the act must be criminal in nature. In so doing, the aim was to avoid a possible interpretation that any act performed in an official capacity is, by definition, of a criminal nature. In any case, the concept of an “act performed in an official capacity” must be understood in the context of the present draft articles, which is devoted to the immunity of State officials from foreign criminal jurisdiction.

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

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

(11) In general, national courts have found that the following acts fall into the category of acts performed in an official capacity: military activities or those related to the armed forces,¹³⁸⁹ acts related to the exercise of police power,¹³⁹⁰ diplomatic activities and those relating to foreign

affairs,¹³⁹¹ legislative acts (including nationalization),¹³⁹² acts related to the administration of justice,¹³⁹³ administrative acts of different kinds (such as the expulsion of aliens or the flagging of vessels),¹³⁹⁴ acts related to public loans¹³⁹⁵ and political acts of various kinds.¹³⁹⁶

(12) Moreover, the immunity of State officials has been invoked before criminal courts in relation to the following acts that were claimed to be committed in an official capacity: torture, extermination, genocide, extrajudicial executions, enforced disappearances, forced pregnancy, deportation, denial of prisoner-of-war status, enslavement and forced labour, and acts of terrorism.¹³⁹⁷ Such crimes

Kingdom, The Commissioner of the Metropolitan Police and David Jones, Supreme Court, judgment of 24 April 1997, [1997] 2 IR 121; United States, *First Merchants Collection Corp. v. Republic of Argentina*, District Court for the Southern District of Florida, 31 January 2002, 190 F. Supp. 2d 1336 (S.D. Fla. 2002).

¹³⁹¹ *Empire of Iran* (see footnote 1389 above); *Victory Transport Inc. v. Comisaría General de Abastecimientos y Transportes* (see footnote 1389 above).

¹³⁹² *Empire of Iran* (see footnote 1389 above); *Victory Transport Inc. v. Comisaría General de Abastecimientos y Transportes* (see footnote 1389 above).

¹³⁹³ *Empire of Iran* (see footnote 1389 above); France, case No. 12-81.676, Court of Cassation, Criminal Chamber, judgment of 19 March 2013, and case No. 13-80.158, Court of Cassation, Criminal Chamber, judgment of 17 June 2014 (see www.legifrance.gouv.fr). The Swiss courts made a similar ruling in case ATF 130 III 136, which concerns an international detention order issued by a Spanish judge.

¹³⁹⁴ *Victory Transport Inc. v. Comisaría General de Abastecimientos y Transportes* (see footnote 1389 above); United States, *Kline and Others v. Kaneko and Others*, District Court for the Southern District of New York, 685 F. Supp. 386 (S.D.N.Y. 1988), ILR, vol. 101, p. 497; France, *Agent judiciaire du Trésor v. Malta Maritime Authority*, No. 04-84.265, Court of Cassation, Criminal Chamber, judgment of 23 November 2004, *Bulletin criminel 2004*, No. 292, p. 1096.

¹³⁹⁵ *Victory Transport Inc. v. Comisaría General de Abastecimientos y Transportes* (see footnote 1389 above).

¹³⁹⁶ United States, *John Doe I, et al., v. State of Israel, et al.*, District Court for the District of Columbia, 400 F. Supp. 2d 86 (D.C.C. 2005) (establishment of Israeli settlements in the occupied territories), and *Youming*, District Court for the District of Columbia, 557 F. Supp. 2d 131 (D.D.C. 2008) (hiring of contract killers to threaten members of a religious group).

¹³⁹⁷ Netherlands, *In re Rauter*, Special Court of Cassation, judgment of 12 January 1949, ILR, vol. 16, p. 526 (crimes committed by German occupation forces in Denmark); Israel, *Attorney General of Government of Israel v. Adolf Eichmann*, District Court of Jerusalem (case No. 40/61), judgment of 12 December 1961, and Supreme Court (sitting as a Court of Criminal Appeal), judgment of 29 May 1962, ILR, vol. 36, pp. 18 and 277 (crimes committed during the Second World War, including war crimes, crimes against humanity and genocide); Italy, *Yaser Arafat (Carnevale re. Valente—Imp. Arafat e Salah)*, Court of Cassation, judgment of 28 June 1985, *Rivista di diritto internazionale*, vol. 69, No. 4 (1986), p. 884 (sale of weapons and collaboration with the Red Brigades on acts of terrorism); New Zealand, *R. v. Mafart and Prieur/Rainbow Warrior (New Zealand v. France)*, High Court, Auckland Registry, 22 November 1985, ILR, vol. 74, p. 241 (acts carried out by members of the French armed forces and security forces to mine the ship *Rainbow Warrior*, which led to the sinking of the ship and the death of several people—these were described as terrorist acts); Federal Republic of Germany, *Former Syrian Ambassador to the German Democratic Republic*, Federal Supreme Court, Federal Constitutional Court (case No. 2 BvR 1516/96), judgment of 10 June 1997, ILR, vol. 115, p. 595 (the case examined legal action against a former ambassador who allegedly stored, in diplomatic premises, weapons that were later used to commit terrorist acts); Netherlands, *Bouterse*, R 97/163/12 Sv and R 97/176/12 Sv, Court of Appeal of Amsterdam, 20 November 2000, *Netherlands Yearbook of International Law*, vol. 32 (2001), p. 266 (torture, crimes against humanity); France, *Gaddafi*, Court of Appeal of Paris, judgment of 20 October 2000, and Court of Cassation, judgment of 13 March 2001, ILR, vol. 125, pp. 490 and 508 (ordering a plane to be brought down using explosives, which caused the death of 170

¹³⁸⁹ Federal Republic of Germany, *Empire of Iran*, Federal Constitutional Court, judgment of 30 April 1963, ILR, vol. 45, p. 57; United States, *Victory Transport Inc. v. Comisaría General de Abastecimientos y Transportes*, Court of Appeals, Second Circuit, judgment of 9 September 1964, 336 F.2d 354 (2nd Cir. 1964), ILR, vol. 35, p. 110, and *Saltany and Others v. Reagan and Others*, District Court for the District of Columbia, judgment of 23 December 1988, ILR, vol. 80, p. 19; United Kingdom, *Holland v. Lampen-Wolfe*, House of Lords (England), 20 July 2000, [2000] 1 WLR 1573, ILR, vol. 119, p. 367; Italy, *Lozano v. Italy*, case No. 31171/2008, Court of Cassation, judgment of 24 July 2008 (available from <http://opil.ouplaw.com>, *International Law in Domestic Courts* [ILDC 1085 (IT 2008)]).

¹³⁹⁰ *Empire of Iran* (see footnote 1389 above); Federal Republic of Germany, *Church of Scientology*, Federal Supreme Court, judgment of 26 September 1978, ILR, vol. 65, p. 193; United States, *Saudi Arabia and Others v. Nelson*, Supreme Court, ILR, vol. 100, p. 544; United Kingdom, *Propend Finance Pty Ltd. and Others v. Sing and Others*, Court of Appeal, 14 March 1996, ILR, vol. 111, p. 611; Ireland, *Norbert Schmidt v. The Home Secretary of the Government of the United*

are sometimes mentioned *eo nomine*, while in other cases the proceedings refer generically to crimes against humanity, war crimes, and serious and systematic human rights violations.¹³⁹⁸ Second, the courts have considered other acts committed by members of the armed forces or security services that do not fall into the aforementioned categories; such acts include ill-treatment, abuse, illegal detention, abduction, offences against the administration of justice and other acts relating to policing and law enforcement.¹³⁹⁹

(13) In a number of cases, *a contrario sensu*, national courts have concluded that the act in question exceeded the limits of official functions, or functions of the State, and was therefore not considered an act performed in an official capacity. For example, courts have concluded that the assassination of a political opponent¹⁴⁰⁰ or acts linked to drug trafficking¹⁴⁰¹ do not constitute official acts. Similarly, national courts have generally denied immunity in cases linked to corruption, whether in the form of diversion or misappropriation of public funds or money-laundering, or any other type of corruption, on the grounds that such acts “are distinguishable from the performance of State functions protected by international custom in accordance with the principles of sovereignty and diplomatic immunity”¹⁴⁰² and “by their nature, do not relate to the exercise of sovereignty or governmental authority, nor are they in the public interest”.¹⁴⁰³ Following the same logic, courts have not accepted that acts performed by State officials that are closely linked to a private activity and for the official’s personal enrichment, not the benefit of the sovereign, are covered by immunity.¹⁴⁰⁴ The fac-

people, considered as terrorism); Senegal, *Habré*, Court of Appeal of Dakar, judgment of 4 July 2000, and Court of Cassation, judgment of 20 March 2001, ILR, vol. 125, p. 569 (acts of torture and crimes against humanity); *Re Sharon and Yaron*, Court of appeal of Brussels, judgment of 26 June 2002, ILR, vol. 127, p. 110 (war crimes, crimes against humanity and genocide); Switzerland, *A. v. Office of the Public Prosecutor of the Confederation*, Federal Criminal Court (case No. BB.2011.140), judgment of 25 July 2012 (torture and other crimes against humanity).

¹³⁹⁸ United States, *In re Ye v. Zemin*, Court of Appeals, Seventh Circuit, 8 September 2004, 383 F.3d 620 (2004 U.S.App.) (unlike the cases cited in footnotes 1397 above and 1399 below, this was a case before a civil court).

¹³⁹⁹ Federal Republic of Germany, *Border Guards Prosecution*, Federal Criminal Court of Germany, judgment of 3 November 1992 (case No. 5 STR 370/92), ILR, vol. 100, p. 364 (death of a young German, as a result of shots fired by border guards of the German Democratic Republic, when he attempted to cross the Berlin Wall); *Norbert Schmidt v. The Home Secretary of the Government of the United Kingdom* (see footnote 1390 above) (irregular circumstances during the detention of the plaintiff by State officials); United Kingdom, *Khurts Bat v. Investigating Judge of the German Federal Court*, High Court (England), Queen’s Bench Division (Divisional Court), 29 July 2011, [2011] EWHC 2029 (Admin), ILR, vol. 147, p. 633 (kidnapping and illegal detention).

¹⁴⁰⁰ United States, *Letelier and Others v. The Republic of Chile and Linea Aerea Nacional-Chile*, Court of Appeals, Second Circuit, 20 November 1984, 748 F. 2d 790 (1984), ILR, vol. 79, p. 561.

¹⁴⁰¹ United States, *United States of America v. Noriega*, Court of Appeals, Eleventh Circuit, judgment of 7 July 1997, ILR, vol. 121, p. 591.

¹⁴⁰² *Teodoro Nguema Obiang Mangue and Others*, Court of Appeal of Paris, *Pôle 7*, Second Investigating Chamber, judgment of 13 June 2013.

¹⁴⁰³ *Teodoro Nguema Obiang Mangue and Others*, Court of Appeal of Paris, *Pôle 7*, Second Investigating Chamber, application for annulment, judgment of 16 April 2015.

¹⁴⁰⁴ *United States of America v. Noriega* (see footnote 1401 above); United States, *Jungquist v. Sheikh Sultan Bin Khalifa al*

tual reminder of those various examples is without prejudice to the position that the Commission may take on the subject of exceptions to immunities.

(14) With regard to the examples of possible acts performed in an official capacity, special mention should be made of the way in which national courts have dealt with international crimes, especially torture. While in some cases they have been considered acts performed in an official capacity (although illegal or aberrations),¹⁴⁰⁵ in others they have been qualified as *ultra vires* acts or acts that are not consistent with the nature of State functions,¹⁴⁰⁶ and should therefore be excluded from the category of acts defined in this paragraph. Moreover, attention should be drawn to the fact that such different treatment of international crimes has arisen both in cases in which national courts have recognized immunity and in those in which they have rejected it.

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

Nahyan, District Court for the District of Columbia, judgment of 20 September 1996, ILR, vol. 113, p. 522; France, *Mellerio v. Isabel de Bourbon*, *Recueil général des lois et des arrêts 1872*, p. 293; *Seyyid Ali Ben Hamoud, Prince Raschid v. Wiercinski*, Seine Civil Court, judgment of 25 July 1916, *Revue de droit international privé et de droit pénal international*, vol. 15 (1919), p. 505; *Ex King Farouk of Egypt v. Christian Dior, s.a.r.l.*, Court of Appeal of Paris, judgment of 11 April 1957, *Journal du droit international*, vol. 84, No. 1 (1957), p. 717; *Ali Ali Reza v. Grimpel*, Court of Appeal of Paris, judgment of 28 April 1961, ILR, vol. 47, p. 275; United States, *In re Estate of Ferdinand E. Marcos Human Rights Litigation; Trajano v. Marcos and Another*, Court of Appeals, Ninth Circuit, 21 October 1992, 978 F. 2d 493 (1992), ILR, vol. 103, p. 521; *Doe v. Zedillo Ponce de León*; United States, *Jimenez v. Aristeguieta et al.*, Court of Appeals, Fifth Circuit, 311 F. 2d 547 (1962), ILR, vol. 33, p. 353; United States, *Jean-Juste v. Duvalier*, District Court for the Southern District of Florida, No. 86-0459 Civ. (U.S. District Court, S.D. Fla.), 8 January 1988, *American Journal of International Law*, vol. 82, No. 3 (July 1988), p. 594; Switzerland, *Evgeny Adamov v. Federal Office of Justice*, Federal Supreme Court, judgment of 22 December 2005 (1A 288/2005) (available from <http://opil.oup.com>, *International Law in Domestic Courts* [ILDC 339 (CH 2005)]); United States, *Republic of the Philippines v. Marcos and Others*, Court of Appeals, Second Circuit, 26 November 1986, ILR, vol. 81, p. 581; United States, *Republic of the Philippines v. Marcos and Others (No. 2)*, Court of Appeals, Ninth Circuit, 4 June 1987 and 1 December 1988, ILR, vol. 81, p. 608; United Kingdom, *Republic of Haiti and Others v. Duvalier and Others*, Court of Appeal (England), 22 July 1988, [1990] 1 QB 2002, ILR, vol. 107, p. 490.

¹⁴⁰⁵ United Kingdom, *R v. Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte (No. 3)*, House of Lords, 24 March 1999, [1999] UKHL 17, [2000] 1 AC 147. Only Lord Goff believed that they were official acts that benefited from immunity. Lord Browne-Wilkinson and Lord Hutton stated that torture cannot be “a public function” or a “governmental function”. Lord Goff, dissenting, concluded that it was a “governmental function”, while similar statements were made by Lord Hope (criminal yet governmental), Lord Saville (who referred to “official torture”), Lord Millett (“public and official acts”) and Lord Phillips (criminal and official). See also *Jones v. Saudi Arabia* (footnote 1387 above) and *FF v. Director of Public Prosecutions (Prince Nasser case)*, High Court, Queen’s Bench Division (Divisional Court), judgment of 7 October 2014, [2014] EWHC 3419 (Admin.).

¹⁴⁰⁶ Belgium, *Re Pinochet*, Court of First Instance of Brussels, judgment of 6 November 1998, ILR, vol. 119, p. 345; *Bouterse* (see footnote 1397 above); Greece, *Prefecture of Voioitia v. Federal Republic of Germany*, Court of First Instance of Leivadia, case No. 137/1997, judgment of 30 October 1997.

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.

Commentary

(1) Draft article 6 is intended to define the scope of immunity *ratione materiae*, which covers the material and temporal elements of this category of immunity of State officials from foreign criminal jurisdiction. Draft article 6 complements draft article 5, which refers to the beneficiaries of immunity *ratione materiae*. Both draft articles determine the general regime applicable to this category of immunity.

(2) Draft article 6 has content parallel to that used by the Commission in draft article 4 on the scope of immunity *ratione personae*. In draft article 6, the order of the first two paragraphs has been changed, with the reference to the material element appearing first (acts covered by immunity) and the reference to the temporal element (duration of immunity) afterwards. In so doing, the intent is to place emphasis on the material element and on the functional dimension of immunity *ratione materiae*, thus reflecting that acts performed in an official capacity are central to this category of immunity. Even so, it should be borne in mind that the scope of such immunity must be understood by looking at the material aspect (paragraph 1) in conjunction with the temporal aspect (paragraph 2). Furthermore, draft article 6 contains a paragraph on the relationship between immunity *ratione materiae* and immunity *ratione personae*, in similar fashion to draft article 4, which it complements.

(3) The purpose of paragraph 1 is to indicate that immunity *ratione materiae* applies exclusively to acts performed in an official capacity, as the concept was defined in draft article 2 (f).¹⁴⁰⁷ Consequently, acts performed in a private capacity are excluded from this category of immunity, unlike immunity *ratione personae*, which applies to both categories of acts.

(4) Although the purpose of paragraph 1 is to emphasize the material element of immunity *ratione materiae*, the Commission decided to include a reference to State officials to highlight the fact that only such officials may perform one of the acts covered by immunity under the draft articles. This makes clear the need for the two elements

(subjective and material) to be present in order for immunity to be applied. It was not considered necessary, however, to make reference to the requirement that the officials be “acting as such”, since the status of the official does not affect the nature of the act, but rather the subjective element of immunity, and was already provided for in draft article 5.¹⁴⁰⁸ Nevertheless, these provisions were provisionally adopted on the understanding that it might be necessary, at a later date, to formulate more clearly draft article 5, which uses the expression “acting as such”, as well as draft article 6, paragraph 1, which does not use it.

(5) The material scope of immunity *ratione materiae* as set out in draft article 6, paragraph 1, does not prejudge the question of exceptions to immunity, which will be dealt with elsewhere in the present draft articles.

(6) Paragraph 2 refers to the temporal element of immunity *ratione materiae* by placing emphasis on the permanent character of such immunity, which continues to produce effects even when the official who has performed an act in an official capacity has ceased to be an official. Such characterization of immunity *ratione materiae* as permanent derives from the fact that its recognition is based on the nature of the act performed by the official, which remains unchanged regardless of the position held by the author of the act. Thus, although it is necessary for the act to be performed by a State official acting as such, its official nature does not subsequently disappear. Consequently, for the purposes of immunity *ratione materiae* it is irrelevant whether the official who invokes immunity holds such a position when immunity is claimed, or, conversely, has ceased to be a State official. In both cases, the act performed in an official capacity will continue to be such an act and the State official who performed the act may equally enjoy immunity whether or not he or she continues to be an official. The permanent character of immunity *ratione materiae* has already been recognized by the Commission in its work on diplomatic relations,¹⁴⁰⁹ has not been challenged in practice and is generally accepted in the literature.¹⁴¹⁰

(7) The Commission chose to define the temporal element of immunity *ratione materiae* by stating that such immunity “continues to subsist after the individuals concerned have ceased to be State officials”, following the model used in the 1961 Vienna Convention on Diplomatic

¹⁴⁰⁸ See para. (4) of the commentary to draft article 5, p. 146).

¹⁴⁰⁹ See, *a contrario sensu*, para. (19) of the commentary to draft article 2, para. 1 (b) (v), of the draft articles on jurisdictional immunities of States and their property, adopted by the Commission at its forty-third session: “The immunities *ratione personae*, unlike immunities *ratione materiae* which continue to survive after the termination of the official functions, will no longer be operative once the public offices are vacated or terminated” (*Yearbook ... 1991*, vol. II (Part Two), p. 18).

¹⁴¹⁰ See Institute of International Law, resolution on “Immunities from jurisdiction and execution of Heads of State and of Government in international law”, which sets out—a *contrario sensu*—the same position in its article 13, paras. 1–2 (*Yearbook of the Institute of International Law*, vol. 69 (Session of Vancouver, 2001), p. 743, at p. 753); and “Resolution on the immunity from jurisdiction of the State and of persons who act on behalf of the State in case of international crimes” art. III, paras. 1–2 (*ibid.*, vol. 73 (Session of Naples, 2009), p. 226, at p. 227). The resolutions are available from the website of the Institute, www.idi-iiil.org.

¹⁴⁰⁷ See draft article 2 (f) provisionally adopted by the Commission and the commentary thereto, above.

Relations¹⁴¹¹ and the 1946 Convention on the Privileges and Immunities of the United Nations.¹⁴¹² The expressions “continues to subsist” and “have ceased to be State officials” are drawn from those treaties. Furthermore, the Commission used the term “individuals” to reflect the definition of “State official” in draft article 2 (e).¹⁴¹³

(8) Lastly, it should be noted that although paragraph 2 deals with the temporal element of immunity, the Commission considered it appropriate to include an explicit reference to acts performed in an official capacity, bearing in mind that such acts are central to the issue of immunity *ratione materiae* and in order to avoid a broad interpretation of the permanent character of this category of immunity which could be argued to apply to other acts.

(9) The purpose of paragraph 3 is to define the model of the relationship that exists between immunity *ratione materiae* and immunity *ratione personae*, on the basis that they are two distinct categories. As a result, draft article 6, paragraph 3, is closely related to draft article 4, paragraph 3, which also deals with that relationship, albeit in the form of a “without prejudice” clause.

(10) Pursuant to draft article 4, paragraph 1, immunity *ratione personae* has a temporal aspect, since the Commission considered that “after the term of office of the Head of State, Head of Government or Minister for Foreign Affairs has ended, immunity *ratione personae* ceases”.¹⁴¹⁴ However, such “cessation ... is without prejudice to the application of the rules of international law concerning immunity *ratione materiae*” (draft article 4, paragraph 3). As the Commission stated in the commentary to the paragraph, “it must be kept in mind that a Head of State, Head of Government or Minister for Foreign Affairs may, during their term of office, have carried out acts in an official capacity which do not lose that quality merely because the term of office has ended and may accordingly be covered by immunity *ratione*

materiae”.¹⁴¹⁵ The Commission also stated: “This does not mean that immunity *ratione personae* is prolonged past the end of term of office of persons enjoying such immunity, since that is not in line with paragraph 1 of the draft article. Nor does it mean that immunity *ratione personae* is transformed into a new form of immunity *ratione materiae* which applies automatically by virtue of paragraph 3. The Commission considers that the ‘without prejudice’ clause simply leaves open the possibility that immunity *ratione materiae* might apply to acts carried out in an official capacity and during their term of office by a former Head of State, Head of Government or Minister for Foreign Affairs when the rules governing that category of immunity make this possible.”¹⁴¹⁶

(11) This is precisely the situation referred to in paragraph 3 of draft article 6. The paragraph proceeds on the basis that, during their term of office, Heads of State, Heads of Government and Ministers for Foreign Affairs enjoy broad immunity known as immunity *ratione personae*, which, in practical terms, includes the same effects as immunity *ratione materiae*. It does not prevent the State officials, after their term in office has ended, from enjoying immunity *ratione materiae, stricto sensu*. This reflects the understanding of the Commission in the commentary to draft article 5, in which it states: “Even though the Commission considers that the Head of State, Head of Government and Minister for Foreign Affairs enjoy immunity *ratione materiae stricto sensu* only once they have left office, there is no need to mention this in draft article 5. The matter will be covered more fully in a future draft article on the substantive and temporal scope of immunity *ratione materiae*, to be modelled on draft article 4.”¹⁴¹⁷

(12) To this end, the requirements for immunity *ratione materiae* will need to be fulfilled, namely: that the act was performed by a State official acting as such (Head of State, Head of Government or Minister for Foreign Affairs in this specific case), in an official capacity and during their term of office. The purpose of draft article 6, paragraph 3, is precisely to state that immunity *ratione materiae* is applicable in such situations. The paragraph therefore complements draft article 4, paragraph 3, which the Commission said “does not prejudice the content of the immunity *ratione materiae* regime, which will be developed in Part Three of the draft articles”.¹⁴¹⁸

(13) However, regarding the situation described in draft article 6, paragraph 3, some members of the Commission considered that, during their term of office, Heads of State, Heads of Government and Ministers for Foreign Affairs enjoy both immunity *ratione personae* and immunity *ratione materiae*. Other members of the Commission emphasized that, for the purposes of these draft articles, immunity *ratione personae* is general and broader in scope and encompasses immunity *ratione materiae*, since it applies to both private and official acts. For these members, such officials enjoy only immunity

¹⁴¹¹ Article 39, paragraph 2, of the Convention provides: “When the functions of a person enjoying privileges and immunities have come to an end, such privileges and immunities shall normally cease at the moment when he leaves the country, or on expiry of a reasonable period in which to do so, but shall subsist until that time, even in case of armed conflict. However, with respect to acts performed by such a person in the exercise of his functions as a member of the mission, immunity shall continue to subsist.”

¹⁴¹² Article IV, section 12, of the Convention provides: “In order to secure, for the representatives of Members to the principal and subsidiary organs of the United Nations and to conferences convened by the United Nations, complete freedom of speech and independence in the discharge of their duties, the immunity from legal process in respect of words spoken or written and all acts done by them in discharging their duties shall continue to be accorded, notwithstanding that the persons concerned are no longer the representatives of Members.” The 1947 Convention on the Privileges and Immunities of the Specialized Agencies follows the same model; in article V, section 14, it provides: “In order to secure for the representatives of members of the specialized agencies at meeting convened by them complete freedom of speech and complete independence in the discharge of their duties, the immunity from legal process in respect of words spoken or written and all acts done by them in discharging their duties shall continue to be accorded, notwithstanding that the persons concerned are no longer engaged in the discharge of such duties.”

¹⁴¹³ For the meaning of the term “individual”, see para. (4) of the commentary to draft article 2 (e) (*Yearbook ... 2014*, vol. II (Part Two), p. 143).

¹⁴¹⁴ *Yearbook ... 2013*, vol. II (Part Two), p. 48 (para. (2) of the commentary to draft article 4).

¹⁴¹⁵ *Ibid.*, p. 50 (para. (7) of the commentary).

¹⁴¹⁶ *Ibid.*

¹⁴¹⁷ *Yearbook ... 2014*, vol. II (Part Two), p. 146 (para. (4) of the commentary).

¹⁴¹⁸ *Yearbook ... 2013*, vol. II (Part Two), p. 50 (para. (7) of the commentary to draft article 4).

ratione personae during their term of office, and only after their term of office has come to an end will they enjoy immunity *ratione materiae*, as provided for draft article 4 and reflected in the commentaries to draft articles 4 and 5. While favouring one or other option might have consequences before the national courts of certain States (in particular with regard to the conditions for invoking immunity before these tribunals), such consequences would not extend to all national legal systems. During the debate, some members of the Commission expressed the view that it was not necessary to include paragraph 3 in draft article 6, and that it was sufficient to refer to the matter in the commentaries thereto.

(14) Although the Commission took account of this interesting debate, which mainly concerned theoretical and terminological issues, it decided to retain draft article 6, paragraph 3, particularly in view of the practical importance of the paragraph, whose purpose is to clarify, in operational terms, the regime applicable to individuals who enjoyed immunity *ratione personae*, after their term of office has ended (Head of State, Head of Government and Minister for Foreign Affairs).

(15) The wording of paragraph 3 is modelled on the Vienna Convention on Diplomatic Relations (article 39, para. 2) and the Convention on the Privileges and Immunities of the United Nations (article IV, section 12), which govern similar situations to those covered in the paragraph in question, namely: the situation of persons who enjoyed immunity *ratione personae*, after the end of their term of office, with respect to acts performed in an official capacity during such term of office.¹⁴¹⁹ The Commission has used the expression “continue to enjoy immunity” in order to reflect the link between the moment when the act occurred and when immunity is invoked. Like the treaties on which it is based, draft article 6, paragraph 3, does not qualify immunity, but confines itself to the use of the generic term. Yet although the term immunity is used without any qualification whatsoever, the Commission understands that the term is used to refer to immunity *ratione materiae*, since it is only in this context that it is possible to take into consideration the acts of State officials performed in an official capacity after their term of office has ended.

¹⁴¹⁹ See footnotes 1411 and 1412 above.