

**IMMUNITY OF STATE OFFICIALS FROM FOREIGN CRIMINAL
JURISDICTION**

**Statement of the Chairman of the Drafting Committee,
Mr. Gilberto Vergne Saboia**

25 July 2014

Mr. Chairman,

I am pleased today to present the fourth report of the Drafting Committee, for the sixty-sixth session of the Commission, on the topic “Immunity of State officials from foreign criminal jurisdiction”. The report is contained in document, A/CN.4/L.850. It contains two provisions, one, a paragraph of a draft article, is contained in Part One, while the other, a draft article, is in Part Three.

At the current session, the Drafting Committee devoted 2 meetings – the 21st and 22nd – on 14 and 15 July 2014, to the consideration of the draft articles referred to it by the Commission on 11 July 2014. Before addressing the details of the draft articles, provisionally adopted, I should like to pay tribute to the Special Rapporteur, Ms. Concepción Escobar Hernández, whose mastery of the subject, guidance and cooperation greatly facilitated the work of the Drafting Committee and made my task as chair easier. I am also most grateful to the members of the Drafting Committee for their active participation and valuable contributions to the successful outcome. I would also wish to

thank the Secretariat for its invaluable assistance. And, as always, the interpreters have continued to perform a difficult task for the Drafting Committee behind the scenes.

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Mr. Chairman,

The Drafting Committee proceeded on the basis of the 2 draft articles referred to it by the Plenary, as proposed by the Special Rapporteur in her third report (A/CN.4/673). The Drafting Committee also had before it a draft article on “Definitions” referred to it by the Plenary in 2013, based on the proposed draft article 3 submitted by the Special Rapporteur in her second report (A/CN.4/661). In addition, working papers were prepared for the Drafting Committee by the Special Rapporteur, which took into account the comments and observations on the third report made in the Plenary, as well as the exchange of views in the Drafting Committee. The submission of these working papers assisted greatly to expedite the work of the Drafting Committee.

At the outset, it should to be mentioned that the present report of the Drafting Committee addresses *two issues*. The first is the general definition of State official. The second is one aspect of immunity *ratione materiae*: the individuals enjoying immunity. As stated by the Special Rapporteur in her third report, the basic characteristics of the immunity *ratione materiae* consists of the subjective scope, the material scope and the temporal scope. The material scope, that is to say, the question of what are “official acts” or acts that could be characterized as “acts performed in an official capacity”, and the temporal scope, namely, that immunity *ratione materiae* is not time-bound and continues to subsist once an official leaves office, would both be subject of separate treatment by the Special Rapporteur next year. The present report, based on the proposals made by the Special Rapporteur in her third report, only addresses the definition of State official and the subjective scope of immunity *ratione materiae*.

I shall now introduce the report of the Drafting Committee, beginning with paragraph (e) of draft article 2, which will be contained in Part One of the Draft articles.

Draft article 2 (e) “Definitions”

Draft article 2 is entitled “**Definitions**”. It will be recalled that the Drafting Committee, last year, reserved draft article 2 for definitions. The title remains as proposed by the Special Rapporteur. Thus far the Drafting Committee has only addressed and adopted paragraph (e) for inclusion in this draft article. The four proposed definitions by the Special Rapporteur in her second report last year, namely paragraphs (a) to (d) which are not being considered this year remain in the Drafting Committee.

As provisionally adopted by the Drafting Committee, paragraph (e) of Draft article 2, defining “State official” for purposes of the Draft articles, provides that: “State official” means any individual who represents the State or who exercises State functions.

This represents a concise reformulation of the proposal of the Special Rapporteur in her third report, which covered the representation of the State and the exercise of governmental authority. General international law does not provide a definition of State official. Even though there were some members who considered it unnecessary for the Commission to attempt to define the term, the Drafting Committee, in the light of a working paper presented by the Special Rapporteur taking into account comments made in the plenary debate, viewed the formulation of such a definition for the purposes of the present draft articles as advisable and feasible. There was particular attention drawn to the need for clarity, precision and consistency in the formulation of any text.

The Drafting Committee elected not to include expressly a reference in definition to Head of State, Head of Government or Minister for Foreign Affairs as their position as State officials was self-evident. It was also considered that such exclusion averted any confusion and provided better coherence in the draft articles as a whole particularly as to the relationship between immunity *ratione personae* and immunity *ratione materiae*.

The definition is broad enough to cover the *troika* and those individuals who exercise a range of other State-related functions in a variety of capacities on behalf of the State.

Given the comments in the plenary debate, in particular the reluctance by members to use “organ” as suggested by the Special Rapporteur, the Drafting Committee decided to retain the usage of the term “State official”, in English; “représentant de l’Etat” in French; and “funcionario del Estado” in Spanish. This decision will be reflected in the commentary.

The definition covers only the individual. It excludes legal persons from the scope of the definition. The use of the word “individual” as opposed to “person”, which may include both natural and legal persons, seeks to underscore this aspect.

The present definition combines the “representative” and “functional” approaches. It will be recalled that the commentary on the draft articles provisionally adopted last year also justified immunity on representational and functional grounds.

The definition is not concerned with the nature of the acts performed. It is anticipated that the discussion on the material scope of immunity *ratione materiae* next year would provide the substance of any limitations to the scope of such immunity.

The term “State functions” is not a term of art. It is nevertheless intended to be more specific than the general reference to “functions” which had been suggested in the Drafting Committee. As is known, in general, international law does not govern the structure of the State and the functions of its organs. It is within the province of each State to determine how it structures, internally, its administration and functions that may be assumed by its government. This does not mean that international law is unconcerned in matters concerning certain activities, which may for example be public in nature or relate to an exercise of public power appertaining to the State. This state of affairs only suggests the need to take a broad view of the import of “State functions”. What constitutes “State functions” would depend on the circumstances of each case. Both

internal law and practice and international law may bear on determining whether the functions in question appertain to the State or to the exercise of the functions of government. Indeed, the elaboration of the material elements of immunity *ratione materiae* in future may shade further light on essential parameters of this matter. The commentary will seek to provide further information on what is intended by “State functions”.

The commentary would also note that some members considered that the expression “State functions” was not entirely felicitous. Since differing views were expressed regarding its import, it was suggested that it should be construed as broadly as possible at the current stage of consideration of the topic.

It should also be noted that the use of the present tense of the verb “represents” and “exercises” in the definition of State official is without prejudice to the application of immunity *ratione materiae* to former State officials. This will be reflected in the commentary.

Draft article 5: Persons enjoying immunity *ratione materiae*

Draft article 5 is entitled “**Persons enjoying immunity *ratione materiae***”. The title tracks the language of corresponding draft article 3, provisionally adopted last year, which appears in Part Two dealing with Immunity *ratione personae*. Draft article 5 is the first of the articles to be comprised in Part Three, which is entitled “Immunity *ratione materiae*”. As indicated by the Special Rapporteur in her third report, subsequent proposals will seek to address the material and temporal scope of immunity *ratione materiae*.

It will be recalled that in her proposal the Special Rapporteur had suggested that State officials who exercise elements of governmental authority benefit from immunity *ratione materiae* in regard to the exercise of foreign criminal jurisdiction. It was considered that this formulation combines the subjective and material elements of

immunity *ratione materiae*. Indeed, there were doubts expressed regarding the use of the phrase “exercise elements of governmental authority”, despite its usage in the Commission’s 2001 articles on the Responsibility of States for internationally wrongful acts.

In this connection, the Special Rapporteur presented a working paper which sought to suppress the material aspects of immunity *ratione materiae*. It provided that State officials enjoy immunity *ratione materiae* from the exercise of foreign criminal jurisdiction, leaving open in English version the question whether State officials should be further qualified by “acting as such” or “acting in an official capacity”. This option was only applicable to English, while Spanish and French versions were drafted in a unique formula.

It is widely acknowledged that State officials enjoy immunity *ratione materiae* for their official acts or for acts performed in an official capacity. However, one has to be regarded to be a State official in order to enjoy such immunity. Conversely, the fact that one is a State official does not mean that he would enjoy immunity *ratione materiae* for acts that may be performed in a private capacity. Even though some members raised the issue whether, for a draft article which only deals with the subjective scope, there was a need to flag the importance of a link, the majority of members of the Drafting Committee expressed their views that such a link must be retained. Of the two options suggested by the Special Rapporteur in the English version, “acting as such” and “acting in an official capacity”, the former was considered to more appropriately refer to the State official as an individual who represents the State or who exercises State functions than whether or not the act was performed in an official capacity. Furthermore, the terms “acting as such” are closer to the Spanish and French versions.

The commentary will also indicate that some members felt that it was not necessary to refer to the subjective scope in this draft article, as what was essential for immunity *ratione materiae* was the nature of the acts and not the individual who carried them out on behalf of the State.

As presently formulated draft article 5 provides that State officials acting as such enjoy immunity *ratione materiae* from the exercise of foreign criminal jurisdiction. Draft article 5 corresponds to draft article 3, provisionally adopted by the Commission last year. It will also be recalled that paragraph 3 of draft article 4 on the Scope of Immunity *ratione personae* also provisionally adopted last year provides that the cessation of immunity *ratione personae* is without prejudice to the rules of international law concerning immunity *ratione materiae*. When the material scope of immunity *ratione materiae* is addressed the question of immunity *ratione materiae* of former Heads of States, Heads of Government and Minister for Foreign Affairs will be one of the issues to be taken into account.

Mr. Chairman,

This concludes my introduction of the fourth report of the Drafting Committee for the sixty-sixth session of the Commission. It is my sincere hope that the Plenary will be in a position to adopt the draft articles presented.

Thank you.