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Chapter IX

Immunity of State officials from foreign criminal jurisdiction

Addendum

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C.2 Text of the draft articles and commentaries thereto provisionally adopted by the Commission at its sixty-sixth session

1. The text of the draft articles, together with commentaries, provisionally adopted by the Commission at the sixty-sixth session, is reproduced below.

Draft 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.

Commentary

(1) The purpose of draft article 2, subparagraph (e), is to define the persons who enjoy immunity from foreign criminal jurisdiction, namely “State officials”. The majority of members of the Commission thought it would be useful to have a definition of State official for the purposes of the current draft articles, given that immunity from foreign criminal jurisdiction is applicable to individuals, constituting the subjective element of immunity. In addition, defining the concept of State official helps to make the structure of immunity from foreign criminal jurisdiction understandable by establishing a clear distinction between two of its normative elements, namely the subject to whom immunity applies, and the acts that may be covered by immunity. Nevertheless, some members of the Commission expressed doubts about the need to include this definition.

(2) The definition of the concept of “State official” contained in draft article 2, subparagraph (e), is general in nature, applicable to any person who enjoys immunity from foreign criminal jurisdiction, either immunity *ratione personae* or immunity *ratione materiae*. Consequently, the nature and object of the present draft article 2, subparagraph (e), must not be confused with the nature and object of draft articles 3 and 5, which define who enjoys each category of immunity.¹ The persons who enjoy immunity *ratione personae* and immunity *ratione materiae* are identified based on the definition of “State official”, which is common to both categories.

(3) There is no general definition in international law of the concept of “official” or “State official”, although both terms may be found in certain international treaties and instruments.² The concept of “State official”, or simply “official”, can mean different things

¹ Draft article 3 states that “Heads of State, Heads of Government and Ministers for Foreign Affairs enjoy immunity *ratione personae* from the exercise of foreign criminal jurisdiction” (*Official Records of the General Assembly, Sixty-fifth Session, Supplement No. 10 (A/68/10)*, para. 48, p. 52). Draft article 5 states that “State officials acting as such enjoy immunity *ratione materiae* from the exercise of foreign criminal jurisdiction” (A/CN.4/L.850).

² The terms are used in the following multilateral treaties: Vienna Convention on Diplomatic Relations; Vienna Convention on Consular Relations; Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents; Convention on the Prevention and Punishment of the Crime of Genocide; Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; United Nations Convention against Corruption; Criminal Law Convention on Corruption (Council of Europe); Inter-American Convention against Corruption; African Union Convention on Preventing and Combating Corruption. For an analysis of these instruments for the purposes of defining “State official”, see the third report on the immunity of

in individual domestic legal systems. Consequently, the definition of “State official” referred to in this commentary is autonomous, and must be understood to be for the purposes of the present draft articles.

(4) The term “individual”, as used in the definition of “State official”, is synonymous with natural person and indicates that only natural persons may enjoy immunity from foreign criminal jurisdiction; such immunity does not cover any form of so-called legal person. The Commission considers that there is no basis in practice today to conclude that the immunity referred to in these draft articles is applicable to legal persons, even though in some national legal systems, they may bear criminal responsibility.

(5) As indicated above, the term “State official” must be understood as encompassing persons who enjoy immunity *ratione personae* and those who enjoy immunity *ratione materiae*. In this connection, it must be noted that the technique used by the Commission to identify the persons who enjoy immunity *ratione personae* is the listing of individuals cited *eo nomine* in draft article 3, namely: the Head of State, the Head of Government and the Minister for Foreign Affairs. However, it has been decided not to mention them expressly in draft article 2, subparagraph (e), since they are deemed to be, *per se*, State officials in the sense of the present draft articles; accordingly, they cannot be differentiated from other State officials for the purposes of the definition.

(6) As regards the “State officials” to whom immunity *ratione materiae* is applicable, the Commission considers that it cannot use the technique of identification *eo nomine*. In view of both the diversity of the individuals to whom immunity may apply and of the variety of national legal systems that determine which persons are their officials, the Commission does not consider it possible to draw up an exhaustive list that would include all the individuals covered by immunity *ratione materiae*. For the same reasons, the Commission has also considered it neither possible nor suitable to draw up an indicative list of those individuals to whom such immunity may apply. In both cases, the list would inevitably be incomplete, since all the names of the State officials included in domestic legal systems cannot be catalogued and the list would have to be constantly updated and might be confusing for the government institutions responsible for applying immunity from foreign criminal jurisdiction. Accordingly, the individuals who may be termed “State officials” for the purposes of immunity *ratione materiae* must be identified on a case-by-case basis, applying the criteria included in the definition and which point to a link between the State and the official, namely: representation of the State or the exercise of State functions.

(7) Nevertheless, for purely indicative purposes, and without purporting to list the persons who enjoy immunity, below are some examples of “State officials” that have appeared in national and international judicial practice. To make the presentation clearer, these examples have been divided into four groups:

- (i) A former Minister of Defence, military officials of various ranks, a director of a maritime authority and various members of government security forces and institutions, including the Director of Scotland Yard, have been granted immunity *ratione materiae* from criminal jurisdiction.³

State officials from foreign criminal jurisdiction by Concepción Escobar Hernández, Special Rapporteur, A/CN.4/673, paras. 51–97.

³ In *Association des familles des victimes du Joola*, the *Chambre criminelle* of the French *Cour de cassation* acknowledged that a former Senegalese defence minister had immunity from criminal prosecution. In its ruling of 19 January 2010, it concluded that “foreign States and organizations and individuals acting under their direction and on their behalf only enjoy immunity from prosecution

(ii) A Vice-President and Minister of Forestry, a former Minister of Defence, a head of a national security agency, military officials of various ranks, a former Head of State, border guards and a civil servant (retired military officer) have likewise been considered to be “State officials” by various national courts, although they have not been deemed to hold immunity.⁴ Nevertheless, although the claim of

where the act that triggers the dispute, by its nature or purpose, forms part of the exercise of the sovereignty of such States”; see *Association des familles des victimes du Joola, Cour de cassation, Chambre criminelle* (France), judgement of 19 January 2010. The official French text reads, “*les Etats étrangers et les organismes ou personnes agissant par leur ordre et pour leur compte ne bénéficient de l’immunité de juridiction qu’autant que l’acte qui donne lieu au litige participe, par sa nature ou sa finalité, à l’exercice de la souveraineté de ces Etats*”. In *Jones v. Ministry of the Interior of the Kingdom of Saudi Arabia*, a lieutenant-colonel of the army and various members of the Saudi Arabian security forces and agencies were deemed to hold this functional immunity. The House of Lords of the United Kingdom considered in its judgement of 14 June 2006 that all these individuals were State officials and had been performing the acts that had resulted in criminal proceedings in the exercise of their official duties. In its analysis, the House of Lords began by indicating that “all the individual defendants were at the material times acting ... as servants or agents of the Kingdom”: see *Jones v. Ministry of the Interior of the Kingdom of Saudi Arabia*, House of Lords (United Kingdom), judgement of 14 June 2006 (Lord Bingham of Cornhill, paras. 11 and 13). In *Agent judiciaire du trésor v. Malta Maritime Authority et Carmel X*, the *Chambre criminelle* of the French *Cour de cassation* granted the executive director of the Malta Maritime Authority immunity from criminal prosecution. In its ruling of 23 November 2004, the *Cour de Cassation* focused its examination both on the official nature of the acts carried out by the individual and the link that connected him with the State and, in the light of the preceding considerations, concluded that he had carried out “acts which he performed as part of his functions as a public official on behalf and under the control of the State of Malta”: see *Agent judiciaire du trésor v. Malta Maritime Authority et Carmel X, Cour de cassation, Chambre criminelle* (France), judgement of 23 November 2004. The official French text reads, “*d’actes de puissance publique accomplis dans le cadre de ses fonctions pour le compte et sous le contrôle de l’État de Malte*”. In *Schmidt v. Home Secretary of the Government of the United Kingdom*, the Supreme Court of Ireland also recognized this immunity *ratione materiae* for a police officer in its judgement of 24 April 1997. The Supreme Court emphasized the functional nature of this type of immunity in noting that the individual “was purporting and intending to perform and in fact was performing the duties and functions of his office”: see *Schmidt v. Home Secretary of the Government of the United Kingdom*, Supreme Court (Ireland), judgement of 24 April 1997. In the *Church of Scientology* case, the Federal Supreme Court of Germany ruled on the immunity from criminal prosecution of a director of Scotland Yard. In its decision of 16 September 1978 the Court accepted his immunity after concluding that he was “acting as the expressly appointed agent of the British State” and that his acts “constitute direct State conduct” – see *Church of Scientology* case, Federal Supreme Court (Germany), judgement of 16 September 1978 (published in English in *International Law Reports*, vol. 65, p. 198). The text translated into English in the *International Law Reports* reads: “Scotland Yard — and consequently its head — was acting as the expressly appointed agent of the British State ... The acts of such agents constitute direct State conduct”.

⁴ In *Teodoro Nguema Obiang Mangue et al.*, a request by the Vice-President and Minister of Forestry for immunity from criminal prosecution was denied by the *Cour d’appel de Paris* which, in its judgement of 13 June 2013, concluded that the enjoyment of this type of immunity *ratione materiae* from prosecution in criminal matters “is limited to the exercise of official functions”. However, it did not call into question whether or not he was a State official: see *Teodoro Nguema Obiang Mangue et al., Cour d’appel de Paris, Deuxième chambre de l’instruction* (France), judgement of 13 June 2013. The official French text reads, “*trouve ses limites dans l’exercice de fonctions étatiques*”. In *Italy v. Union of India and Massimiliano Latorre et al. v. Union of India*, the Supreme Court of India, in its judgement of 18 January 2013, recognized the jurisdiction of the Indian authorities to investigate and pass judgement on the conduct of several Italian sailors who had fired on a boat in a zone contiguous with India while undertaking anti-piracy surveillance and protection tasks, invoking India’s commitments under the law of the sea and, in particular, the United Nations Convention on the Law of the Sea. This case also did not question whether they were State officials: see *Italy v. Union of*

immunity was not upheld in these specific cases, this does not mean that, in the opinion of the domestic courts, they did not involve “State officials” in the sense of the term used in the present draft articles. Immunity was denied for reasons other than the status of State official, and the explanation of the reasons for rejecting the

India and Massimiliano Latorre et al. v. Union of India, Supreme Court (India), judgement of 18 January 2013 (Altamas Kabir, para. 101). In *A. v. Office of the Attorney-General of Switzerland, B. and C.*, immunity *ratione materiae* from criminal prosecution was not accorded by the Federal Criminal Tribunal of Switzerland to a former Defence Minister in respect of acts undertaken before and after he had ceased to exercise his official functions. Although the Swiss tribunal accepted the fact the accused had been a State official, in its judgement of 25 July 2012, it also took into consideration the position taken by the House of Lords on this type of functional immunity in *Regina v. Bartle and the Commissioner of Police for the Metropolis and Others Ex Parte Pinochet* in its judgement of 24 March 1999 concerning a former Head of State, and maintained that it would be contradictory to, on the one hand, “state a desire to combat these gross violations of the fundamental values of humankind and, on the other hand, to accept a broad interpretation of the rules governing functional immunity (*ratione materiae*)”: see *A. v. Office of the Attorney-General of Switzerland, B. and C.*, Federal Criminal Tribunal (Switzerland), judgement of 25 July 2012, para. 5.4.3. The official French text reads, “*on affirmait vouloir lutter contre ces violations graves aux valeurs fondamentales de l’humanité, et, d’un autre côté, l’on admettait une interprétation large des règles de l’immunité fonctionnelle (ratione materiae)*”. In *Khurts Bat v. Investigating Judge of the German Federal Court*, a senior national security official was not granted immunity by a court of the United Kingdom, although in its judgement of 19 July 2001 it did not dispute the fact that he might be considered a State official: see *Khurts Bat v. Investigating Judge of the German Federal Court*, High Court of Justice, Queen’s Bench Division Administrative Court (United Kingdom), judgement of 29 July 2011, paragraphs 99–101. In *Public Prosecutor (Tribunal of Milan) v. Adler et al.*, the *Quarta Sezione Penale* of a Tribunal of Milan did not recognize the immunity from criminal prosecution of an American colonel in charge of a military base in Italian territory. In its judgement of 1 February 2010, it concluded that the events could not be subsumed within the ambit of article VII.2 of the Agreement regarding the Status of Forces of parties to the North Atlantic Treaty (19 June 1951), which had been invoked by the defendant: see *Public Prosecutor (Tribunal of Milan) v. Adler et al.*, Tribunal of Milan, *Quarta Sezione Penale* (Italy), judgement of 1 February 2010. In *United States of America v. Noriega*, the Court of Appeals for the Eleventh Circuit refused to accord immunity from prosecution to a former commander-in-chief of the armed forces. It is worth noting that, in its judgement of 7 July 1997, it only considered whether the person enjoyed immunity *ratione personae*, ruling out the possibility of assessing immunity from the perspective of *ratione materiae*, although it recognized the person’s status as a State official: see *United States of America v. Noriega*, Court of Appeals, Eleventh Circuit (United States), judgement of 7 July 1997. In the *Border Guards Prosecution* case, the Federal Supreme Court of Germany, in its judgement of 3 November 1992, rejected the arguments presented by the defendants concerning immunity from prosecution, declaring that they could not be considered to be representatives of a foreign State, since the German Democratic Republic no longer existed: see *Border Guards Prosecution* case, Federal Supreme Court (Germany), judgement of 3 November 1992. In *In re Doe*, the United States Court of Appeals for the Second Circuit declined to grant immunity from criminal prosecution to a former Head of State and his wife. In the light of a legal opinion of the United States Executive, the court concluded, in its judgement of 19 October 1988, that since the immunity from criminal prosecution of both individuals had been revoked, there were sufficient grounds not to grant them any form of immunity whatsoever. In this connection, it is important to note that in its legal opinion, the Executive did not categorically reject the idea that a former Head of State and his wife could benefit from some form of residual immunity – see *In re Doe*, Court of Appeals, Second Circuit (United States), judgement of 19 October 1988. Lastly, in *R. v. Lambeth Justices ex-parte Yusufu*, a court in the United Kingdom denied immunity from criminal prosecution to an official, arguing that in the light of the evidence in the case, it would not be appropriate to grant him immunity as a diplomat, because his status as such had not been adequately proven – see *R. v. Lambeth Justices ex-parte Yusufu*, Divisional Court (United Kingdom), judgement of 8 February 1985.

claim of immunity showed that these courts had examined the issue of whether the persons standing trial had the status of official.

(iii) An Attorney-General, a former intelligence service chief, a former head of a national security agency, a former Head of State, an Attorney-General of a federal State (Florida) and various lower-ranking Florida officials (a prosecutor and his legal assistants, a detective in the Attorney-General's office and a lawyer in a Florida state agency) and a member of the Government have all been considered State officials in civil proceedings in which immunity from jurisdiction has been invoked.⁵ Although these examples do not refer specifically to immunity from criminal jurisdiction, they, too, are relevant from the technical point of view, since in all these decisions, the domestic courts have pronounced themselves on the status as "State official" of the persons for whom immunity from civil proceedings was claimed or to whom it was accorded.

(iv) A *procureur de la République* and a Head of National Security, a Minister of the Interior, a lieutenant colonel, the deputy director of a prison, two police officers, a Minister of Defence and a head of State archives have been considered to be State officials in the term's sense in the present draft articles by the International Court of Justice, the European Court of Human Rights and the International Criminal Tribunal for the former Yugoslavia.⁶

(8) Attention must be drawn to the fact that the Head of State, Head of Government and Minister for Foreign Affairs may enjoy both immunity *ratione personae* and immunity *ratione materiae* in the sense these terms are used in the present draft articles. The first hypothesis is specifically envisaged in draft article 3, provisionally adopted by the Commission at its sixty-fifth session. The second is reflected in draft article 4, paragraph 3, likewise provisionally adopted by the Commission at the same session, according to which "the cessation of immunity *ratione personae* is without prejudice to the application of the rules of international law concerning immunity *ratione materiae*".⁷ The conditions under which the Head of State, Head of Government and Minister for Foreign Affairs enjoy immunity *ratione personae* or immunity *ratione materiae* will depend on the rules

⁵ *Estate of the late Zahra (Ziba) Kazemi and Stephan (Salman) Hashemi v. the Islamic Republic of Iran, Ayatollah Ali Khamenei, Saeed Mortazavi and Mohammad Bakhshi*, Superior Court, Commercial Division (Canada), judgement of 25 January 2011, para. 153; *Ali Saadallah Belhas et al., Appellants v. Moshe Ya'alon*, Court of Appeals for the District of Columbia Circuit (United States of America), judgement of 15 February 2008; *Ra'Ed Mohamad Ibrahim Matar, et al. v. Avraham Dichter*, District Court, Southern District of New York (United States), judgement of 2 May 2007; *A, B, C, D, E, F, and Others Similarly Situated, Wei Yu, and Hao Wang v. Jiang Zemin and Falun Gong Control Office (A.K.A. Office 6/10)*, District Court, Northern District of Illinois, Eastern Division (United States), judgement of 8 September 2004; *Jaffe v. Miller and others*, Ontario Court of Appeals, judgement of 17 June 1993; and *Rukmini S. Kline et al. v. Yasuyuki Kaneko et al.*, Supreme Court of the State of New York (United States), judgement of 31 October 1988.

⁶ International Court of Justice, *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France)*, Judgment, I.C.J. Reports 2008. European Court of Human Rights, *Jones and others v. the United Kingdom* (applications Nos. 34356/06 and 40528/06), judgement of 14 January 2014. International Criminal Tribunal for the former Yugoslavia, Appeals Chamber, *Prosecutor v. Tihomir Blaškić*, IT-95-14-AR 108, judgement of 29 October 1997.

⁷ *Official Records of the General Assembly, Sixty-fifth Session, Supplement No. 10, A/68/10*, para. 48, p. 52.

applicable to each of these categories of immunity that are contained in other provisions of the present draft articles.⁸

(9) The definition of “State official,” it must be noted, refers solely to the person who enjoys immunity, without prejudging or implying any statement about the question of what are the acts that may be covered by immunity from foreign criminal jurisdiction. From this standpoint, the essential element to be taken into account in identifying an individual as a State official for the purposes of the present draft articles is the existence of a link between that person and the State. This link is reflected in draft article 2, subparagraph (e), through the reference to the fact that the individual in question “represents the State or [...] exercises State functions.” This is a clear and simple statement, summing up the Special Rapporteur’s proposal regarding the criteria for identifying what constitutes an official,⁹ and reiterating the proposition that the Commission accepted in 2013, namely that the present draft articles relate to “the immunity from foreign criminal jurisdiction that may be enjoyed by those persons who represent or act on behalf of a State”.¹⁰ Lastly, attention must be drawn to the fact that a State official may fulfil both requirements or only one of them.

(10) The phrase “who represents” must be understood in a broad sense, as including any “State official” who performs representational functions. The reference to representation is of special importance with regard to the Head of State, Head of Government and Minister for Foreign Affairs because — as the commentary to draft article 3 states — “these three office holders represent the State in its international relations simply by virtue of their office, directly and with no need for specific powers to be granted by the State.”¹¹ However, the reference to representation of the State may also be applicable to State officials other than the so-called “troika,” in conformity with the rules or laws of the national systems themselves. Consequently, whether an official is representing the State or not must be determined on a case-by-case basis. Lastly, it must be noted that the separate reference to representation of the State as one of the criteria for identifying a link with the State makes it possible to cover certain categories of individuals, particularly parliamentary monarchs, who can hardly be described as performing State functions *stricto sensu*, but who most certainly represent the State.

(11) “State functions” must be understood, in a broad sense, to mean the activities properly carried out by the State. This designation includes the legislative, judicial, executive or other functions properly performed by the State. Consequently, the “State official” is the individual who performs or may perform these State functions. The reference to the exercise of State functions defines more precisely the requisite link between the official and the State, avoiding any broad interpretation of the concept of official that fails to take sufficient account of the fact that immunity is granted to the

⁸ In this connection, it must be recalled that paragraph (7) of the commentary to draft article 4 says: “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. Paragraph 3 does not prejudge the content of the immunity *ratione materiae* regime, which will be developed in Part III of the draft articles.” (*Official Records of the General Assembly, Sixty-fifth Session, A/68/10*, para. 49, p. 70).

⁹ See A/CN.4/673, para. 111, p. 37, and the draft article initially proposed by the Special Rapporteur (*ibid.*, para. 143, p. 53).

¹⁰ See para. (4) of the commentary to draft article 1, provisionally adopted by the Commission at its sixty-fifth session (*Official Records of the General Assembly, Sixty-fifth Session, Supplement No. 10*, para. 49, p. 53).

¹¹ See para. (2) of the commentary to draft article 3, provisionally adopted by the Commission at its sixty-fifth session (*Official Records of the General Assembly, Sixty-fifth Session, Supplement No. 10*, para. 49, p. 58).

individual for the benefit of the State and to preserve the State's sovereignty. Although various terms, such as "prerogatives of public power," "public functions," "sovereign authority," "governmental authority" or "inherent functions of the State" have been suggested in order to reflect this idea, the Commission has chosen the term "State functions" as being the most suitable at the current stage of work. This choice has been made for two reasons: first, it reflects sufficiently well the link between the State and the official, which is related to the latter's duties; and secondly, the use of the term "functions" rather than "acts performed in the name of the State" avoids potential confusion between the subjective (the official) and objective (the act) elements of immunity. At the current stage of the Commission's work, in any case, these terms should be understood in the broadest sense possible, keeping in mind that the exact content of what "State functions" may be depends to a large extent on the situation and organizational capacity of the State. Some Commission members stated, however, that the phrase chosen was infelicitous.

(12) The use of the terms "represents" and "exercises" in this draft article must not be interpreted as making any statement about the temporal scope of immunity. It is motivated by the intention to identify in general terms the link between the State and the official, and has no bearing on whether the State official must continue to be one at the time when immunity is claimed. The temporal scope of immunity *ratione personae* and of immunity *ratione materiae* is the subject of other draft articles.

(13) For the purposes of defining "State official," what is important is the link between the individual and the State, whereas the form taken by that link is irrelevant. The Commission considers that the link may take many forms, depending upon national legislation and the practice of each State. However, the majority of Commission members are of the view that the link cannot be interpreted so broadly as to cover any *de facto* official, including contractors. The term *de facto* official is used to refer to many possible cases, and it will depend on each specific case whether or not the individual may be considered a State official for the purposes of the present draft articles. In particular, the majority of Commission members consider that there is insufficient practice to conclude that contractors who act outside the territory of the State with which they are linked may enjoy immunity from foreign criminal jurisdiction under the general rules of international law. In any event, issues relating to *de facto* officials may be more appropriately addressed in connection with the definition of "act performed in an official capacity".

(14) Given that the concept of "State official" rests solely on the fact that the individual in question represents the State or exercises State functions, the hierarchical position occupied by the latter is irrelevant for the sole purposes of the definition. Although practice shows that in most cases, the persons who have been recognized as State officials for the purposes of immunity hold a high or reasonably high rank, it is also possible to find examples of such persons at a low level of the hierarchy. Consequently, the hierarchical level is not an integral part of the definition of State official, although it may provide some indications for identifying a specific individual as an official for the purposes of the present draft articles.

(15) Lastly, it must be borne in mind that the definition of "State official" has no bearing on the type of acts covered by immunity. Consequently, the terms "represent" and "exercise State functions" may not be interpreted as defining in any way the substantive scope of immunity. Similarly, the definition of "State official" cannot be interpreted as containing a statement about exceptions to immunity. These two issues will be taken up at a later date.

(16) As to the question of terminology, at the present stage of the work on the immunity of State officials from foreign criminal jurisdiction, the Commission has not considered it necessary to change the terms used to refer to persons who enjoy immunity. Consequently, the terms "State official" in English, "*représentant de l'Etat*" in French, "*funcionario del Estado*" in Spanish, "..." in Arabic, "...." in Chinese and "...." in Russian continue to be

employed. Although the Commission is aware that they do not mean the same thing and are not interchangeable, it has preferred to continue using these terms, especially since the term “State official” in English, used extensively in practice, is suitable for referring to all the categories of persons to which the present draft articles refer. Thus, the fact that different terms are used in each of the language versions is of no semantic significance whatsoever. Rather, the various terms used in each of the language versions have the same meaning for the purposes of the present draft articles and have no bearing on the meaning that each term may have in domestic legal systems. The Commission will decide in due course whether a change needs to be made or a saving clause added with respect to the use of these terms in domestic law or international instruments, so as to prevent institutions charged with applying immunity at the national level from erroneously interpreting the term “State official” in the way it is used in the present draft articles.

Draft article 5

Persons enjoying immunity *ratione materiae*

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

Commentary

(1) Draft article 5 is the first of the draft articles on immunity *ratione materiae* and is intended to define the subjective scope of this category of immunity from foreign criminal jurisdiction. Consequently, this draft article parallels draft article 3, on persons enjoying immunity *ratione personae*. It has the same structure, and it uses, *mutatis mutandis*, the same wording and the terminology already agreed on by the Commission concerning the latter draft article. The reference to the actual persons who enjoy immunity has simply been removed, so that in the case of immunity *ratione materiae*, they have been defined as “State officials acting as such”.

(2) The expression “State officials”, as used in this draft article, is to be understood in the sense given to it in draft article 2, subparagraph (e), namely: “any individual who represents the State or who exercises State functions”. In contrast to the situation with persons enjoying immunity *ratione personae*, the Commission has found it impossible to draw up a list of persons enjoying immunity *ratione materiae*. Rather, the persons in this category must be identified on a case-by-case basis, by applying the criteria set out in draft article 2, subparagraph (e), which highlight the existence of a link between the official and the State. The commentary to draft article 2, subparagraph (e), must be duly kept in mind for the purposes of the present draft article.¹²

(3) The phrase “acting as such” refers to the official nature of the acts of the officials, emphasizing the functional nature of immunity *ratione materiae* and establishing a distinction with immunity *ratione personae*. In view of the functional nature of immunity *ratione materiae*, some members of the Commission have expressed doubts about the need to define the persons who enjoy it, since in their view, the essence of immunity *ratione materiae* is the nature of the acts performed and not the individual who performs them. Nevertheless, the majority of members of the Commission thought it would be useful to identify the persons in this category of immunity, since immunity from foreign criminal jurisdiction applies to all individuals. The reference to the fact that the “State officials” must have acted “as such” in order to enjoy immunity *ratione materiae* says nothing about the acts that might be covered by such immunity, which are to be covered in a separate draft article. For the same reason, the expression “acting in an official capacity” has not

¹² See above, para. ..., p. ...

been used, to avoid potential confusion with the concept of an “act performed in an official capacity”.

(4) In conformity with draft article 4, paragraph 3, provisionally adopted by the Commission in 2013,¹³ immunity *ratione materiae* also applies to former Head of States, Heads of Government and Ministers for Foreign Affairs when they have acted in the capacity of State officials. Nevertheless, the Commission does not consider it necessary to refer explicitly to those officials in the present draft article, since immunity *ratione materiae* applies to them, not because of their status, but in view of the fact that they are State officials who have acted as such during their term of office. 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.

(5) Draft article 5 is without prejudice to exceptions to immunity *ratione materiae*, likewise to be taken up at a later date.

(6) Lastly, attention must be drawn to the fact that draft article 5 uses the expression “from the exercise of foreign criminal jurisdiction,” as does draft article 3, to refer to persons enjoying immunity *ratione personae*. This expression illustrates the relationship between immunity and foreign criminal jurisdiction and emphasizes the essentially procedural nature of the immunity that comes into play in relation to the exercise of foreign criminal jurisdiction with respect to a specific act.¹⁴

¹³ This provision reads: “The cessation of immunity *ratione materiae* is without prejudice to the application of the rules of international law concerning immunity *ratione materiae*” (*Official Records of the General Assembly, Sixty-fifth Session, Supplement No. 10, A/68/10, para. 48, p. 52*). Concerning the scope of this “without prejudice” clause, see para. (7) of the commentary to draft article 4 (*ibid.*, para. 49, p. 70).

¹⁴ See para. (13) of the commentary to draft article 3 (*Official Records of the General Assembly, Sixty-fifth Session, Supplement No. 10, A/68/10, para. 49, p. 66*).