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Chapter IX
Immunity of State officials from foreign criminal jurisdiction

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Chapter IX
Immunity of State officials from foreign criminal jurisdiction

A. Introduction

1. 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.[1] 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.[2]

2. 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).[3] The Commission was unable to consider the topic at its sixty-first session (2009) and at its sixty-second session (2010).[4]

3. The Commission, at its sixty-fourth session (2012), appointed Ms. Concepción Escobar Hernández as Special Rapporteur to replace Mr. Kolodkin, who was no longer with the Commission. 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)[5] and her third report during the sixth-sixth session (2014). On the basis of the draft articles proposed by the Special Rapporteur in the second and third reports, the Commission has thus far provisionally adopted five draft articles, together with commentaries thereto. Draft article 2 on the use of terms is still a developing text.[6]

B. Consideration of the topic at the present session

4. The Commission had before it the fourth report of the Special Rapporteur (A/CN.4/687). The Commission considered the report at its 3271st to 3278th meetings, on 16 July and 21 to 24 July 2015.

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[1] At its 2940th meeting, on 20 July 2007 (*Official Records of the General Assembly, Sixty-second Session, Supplement No. 10* (A/62/10), para. 376). The General Assembly, in para. 7 of res. 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 A of the report of the Commission (*Official Records of the General Assembly, Sixty-first Session, Supplement No. 10* (A/61/10), para. 257).

[2] *Ibid.*, *Sixty-second Session*, *Supplement No. 10* (A/62/10), para. 386. For the memorandum prepared by the Secretariat, see A/CN.4/596 and Corr.1.

[3] A/CN.4/601 (preliminary report); A/CN.4/631 (second report); and A/CN.4/646 (third report).

[4] See *Official Records of the General Assembly, Sixty-fourth Session, Supplement No. 10* (A/64/10), para. 207; and *ibid*., *Sixty-fifth Session, Supplement No. 10* (A/65/10), para. 343.

[5] A/CN.4/654 (preliminary report) and A/CN.4/661 (second report).

[6] *Official Records of the General Assembly, Sixty-eighth Session, Supplement No. 10* (A/68/10), paras. 48 and 49. At its 3174th meeting, on 7 June 2013, the Commission received the report of the Drafting Committee and provisionally adopted draft articles 1, 3 and 4 and at its 3193rd to 3196th meetings, on 6 and 7 August 2013, it adopted the commentaries thereto. *Official Records of the General Assembly, Sixty-ninth Session, Supplement No. 10* (A/69/10), paras. 48 and 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.

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

6. At its …th meeting, on … July 2015, the Chairman of the Drafting Committee presented the interim report of the Drafting Committee on "Immunity of State officials from foreign criminal jurisdiction", containing the draft articles … provisionally adopted by the Drafting Committee at the sixty-seventh session. The report, together with the draft articles, was presented for information only at this stage, and is available on the Commission's website.[7]

1. Introduction by the Special Rapporteur of the fourth report

7. The fourth report represented a continuation of the analysis, commenced in the third report (A/CN.4/646), of the normative elements of immunity *ratione materiae*. Since the subjective scope of such immunity (who are the beneficiaries of such immunity) was already addressed in the third report, the fourth report was devoted to consideration of the remaining material scope (an "act performed in an official capacity") and the temporal scope. As a consequence of the analysis, the report also contained proposals of draft article 2 (f) defining, for the general purpose of immunity, an "act performed in an official capacity"[8] and draft article 6 on the material and temporal scope of immunity *ratione materiae*, [9] which contains a specific reference to the application of immunity *ratione materiae* to former Heads of State, former Heads of Government and former Ministers of Foreign Affairs.

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

9. The fourth report submitted by the Special Rapporteur, when dealing with the normative elements of immunity *ratione materiae*, started by highlighting the basic

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[7] Located at http://www.un.org/law/ilc.

[8] The text proposed by the Special Rapporteur, as corrected, read as follows:

Draft article 2
Definitions

For the purposes of the present draft articles:

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

[9] The text proposed by the Special Rapporteur, as corrected, read as follows:

Draft article 6
Scope of immunity *ratione materiae*

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

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

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

characteristics of this type of immunity, namely that it is granted to all State officials, that it is granted only in respect of "acts performed in an official capacity" and that it is not time-limited. As to the normative elements of immunity *ratione materiae*, the subjective scope having been dealt with in the third report, the fourth report was focused on the material and temporal scope, as indicated above. The concept of an "act performed in an official capacity" was first the subject of some general considerations which emphasized the importance of this concept in the context of immunity *ratione materiae*. Such importance derives from the functional nature of this type of immunity. The report then approached the distinction between "acts performed in an official capacity" and "acts performed in a private capacity". The study of this distinction led, among other things, to the realization that it was not equivalent to the distinction between *acta iure imperii* and *acta iure gestionis*, or to the distinction between lawful and unlawful acts. The report then focused on providing criteria for identifying an "act performed in an official capacity", which involves the successive analysis of judicial practice (international and national), treaty practice and previous work of the Commission. The analysis of international judicial practice emphasized the significance of various judgments issued by the International Court of Justice, the European Court of Human Rights and the International Criminal Tribunal for the Former Yugoslavia. The study of national judicial practice was based on a high number of national cases referring to several aspects of immunity *ratione materiae*, and took into consideration both criminal and civil proceedings as the forms of conduct that could be identified with "acts performed in an official capacity" manifested themselves in both types of proceedings and elements common to such acts could be inferred from them. The analysis of treaty practice considered various United Nations conventions directly or indirectly referring to immunities, and international criminal law treaties (universal and regional) that include references to the official nature of acts characterized as conduct prohibited by international criminal law. As for the analysis of the previous work of the International Law Commission, emphasis was placed on the articles on responsibility of States for internationally wrongful acts, the Nürnberg Principles, the draft Code of Offences against the Peace and Security of Mankind of 1954, the draft Code of Crimes against the Peace and Security of Mankind of 1996 and the articles on the responsibility of international organizations of 2011. Having conducted the foregoing research, the Special Rapporteur went on to examine the resulting characteristics of an "act performed in an official capacity" for the purposes of immunity from foreign criminal jurisdiction, namely, the criminal nature of the act, the attribution of the act to the State and the exercise of sovereignty and elements of the governmental authority when the act is performed. Referring to the criminal nature of the act served the purpose of highlighting the link with criminal jurisdiction of the situations in which immunity *ratione materiae* might be invoked. It led to a model of relation between individual and State responsibility termed by the Special Rapporteur as "single act, dual responsibility", whose alternatives were detailed in the report. A consideration of the attribution of the act to the State was necessary as immunity *ratione materiae* is justified only when a link exists between the State and the act performed by a State official. Of particular interest, in this regard, was the conclusion that certain criteria for attribution contained in the articles on responsibility of States for internationally wrongful acts were not useful for the purposes of immunity. Finally, a third teleological feature was identified as characterizing "acts performed in an official capacity", namely that such acts are a manifestation of sovereignty and a form of exercise of elements of the governmental authority. Examples of some elements were given in the report. This section concluded with a consideration of the relation between international crimes and acts performed in an official capacity. The concept of an "act performed in an official capacity" was finally defined as a conclusion to Part B of the report. Part C of the report briefly analysed the temporal element, reflecting the consensus on the indefinite nature of

immunity *ratione materiae* and the relevance of considering the distinction between when the act was performed and when immunity is invoked. Part D of the report focused on the scope of immunity *ratione materiae* and resulted in the proposition of draft article 6 on this issue. The fourth report concluded with a reference to the future work plan on this topic, with the Special Rapporteur announcing a fifth report on the limits and exceptions to immunity.

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

11. The report centres on the analysis of the concept of an "act performed in an official capacity". The Special Rapporteur noted that the analysis of the temporal element was brief because the matter was mostly uncontroversial in nature; there was broad consensus in the practice and doctrine on the "indefinite" or "permanent" nature of the immunity *ratione materiae*. She nevertheless pointed to the need to analyse what the nature of that element (limit or condition) was, as well as the critical dates which were to be taken into account for the purposes of determining if the temporal element was met; whether it was at the time of commission of the act or when the claim of immunity was made. She also drew attention to the draft article proposed.

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

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

14. The Special Rapporteur observed that the expression had not been defined in contemporary international law. It was often interpreted in opposition to an "act performed in a private capacity", which itself was an undefined category. However, on the basis of an analysis of the relevant practice, the Special Rapporteur offered certain discernible criteria for identifying acts performed in an official capacity. In particular, it was observed that: (a) the acts were *inter alia* connected with a limited number of crimes, including crimes under international law, systematic and serious violations of human rights, certain acts performed by the armed forces and law enforcement officials and acts related to corruption; (b) some multilateral treaties link the commission of certain acts to the official capacity of the perpetrators of such acts; (c) an act was considered to have been performed in an official capacity when committed

by a State official acting on behalf of the State, exercising prerogatives of public power or performing acts of sovereignty; (d) immunity was generally denied in corruption-related cases, by national courts, the logic advanced being that officials cannot benefit from immunity for activities that are closely linked to private interest and whose objective is the personal enrichment of the official and not the benefit of the sovereign; (e) what was meant by "exercising the prerogatives of public power" or "sovereign acts" was not easily defined. Courts, however, have considered as falling into that category activities such as policing, activities of the security forces and of the armed forces, foreign affairs, legislative acts, administration of justice and administrative acts of diverse content; (e) the concept of an act performed in an official capacity did not automatically correspond to the concept of *acta jure imperii*. Far from that, an "act performed in an official capacity" may exceed the limits of an act *iure imperii*, and may also refer to some *acta iure gestionis* performed by State officials while fulfilling their duties and exercising State functions. (f) the concept bore no relation to the lawfulness or unlawfulness of the act in question; and (g) For the purposes of immunity, the identification of such an act was always done on case by case basis.

15. In view of the foregoing criteria, the Special Rapporteur, highlighted the following as the characteristics of an act performed in an official capacity: (a) it was an act of a criminal nature; (b) the act was performed on behalf of the State; and (c) it involved the exercise of sovereignty and elements of governmental authority.

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

17. In the view of the Special Rapporteur, the immunity of State officials from foreign criminal jurisdiction *ratione materiae* was individual in nature and distinct from the immunity of the State *stricto sensu*. This differentiation had a maximum effect in the case of immunity from foreign criminal jurisdiction of State officials, in view of the different basis for responsibility, in the case of the State was civil, while for the official it was criminal. Moreover, the nature of the jurisdiction from which immunity was invoked was different. The Special Rapporteur noted that this distinction was not always made with sufficient clarity in the literature and in practice, largely as a result of the traditional emphasis on the State (and its rights and interests) as the beneficiary of the protection afforded by immunity. She explained that immunity *ratione materiae* was recognized in the interest of the State, whose sovereignty is to be protected, but directly benefits the official when he or she acted in the manifestation of such sovereignty. In the view of the Special Rapporteur, for the exercise of immunity *ratione materiae* to be justified, there had to be a link between the State and the act carried out by a State official. This link implies the possibility of attributing the act to a State. She nevertheless found questionable whether all the

criteria for attribution contained in the articles on responsibility of States for internationally wrongful acts were useful for the purposes of immunity, singling out as particularly unsuitable the criteria set out in articles 7, 8, 9, 10 and 11.

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

2. Summary of the debate

(a) General comments

19. Members generally welcomed the Special Rapporteur's fourth report for its rich, systematic and well documented examples of treaty practice, as well as an analysis of international and national case law, while managing to establish a clear connection between the analysis and the draft articles proposed. In doing so, the report provided a comprehensive picture of the various considerations relevant for determining the material and temporal scope of immunity *ratione materiae*; a step that had helped to throw more light on an essential element of the topic. It was readily recognized that the subject matter was legally complex and raised issues that were politically sensitive and important for States. More crucially, the direction of State practice was in a "state of flux" such that it was not easy to identify the clear and unambiguous applicable rules. The Commission was not only confronting theoretical and doctrinal questions concerning the topic in relation with other fields of law in the overall international legal system, but also the difficulty of making choices in the codification and progressive development that would help to advance international law, while at the same time preserve stability in inter-State relations. In such circumstances, it was considered essential that there be transparency and an informed debate on whatever choices were to be made and on the direction to be taken.

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

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

22. Attention was drawn by some members to the continuing relevance of the distinction between the status-based immunity *ratione personae* and the conduct-based immunity *ratione materiae*. On some accounts, the two had some basic elements in

common, more fundamentally the basis of their legal foundation was the same, namely the principle of the sovereign equality of States. Similarly, it was noted that while distinctions between immunity from civil and criminal jurisdiction needed to be taken into account, both forms of immunity also had the same foundation. At the same time, the observation was made, urging caution against overreliance on the principle of sovereign equality of States to explain the complicated issues involved in the topic that the principle does not explain fully, for instance, the restrictive jurisdictional immunity of States. While some members recognised the asymmetry that exists among the various rules and regimes governing the international legal system, the point was made, in a cautionary tale over the direction in which the topic as a whole was seemingly taking, that the Commission risked establishing a regime that was diametrically opposed to the regime under the Rome Statute of the International Criminal Court, which the Commission itself helped to create. It was on the other hand recalled that unlike the present topic, which was based on a "horizontal relationship" among States, the international criminal jurisdiction established a "vertical relationship" among them. This key consideration presented a set of different factors requiring critical review.

23. It was, for instance, suggested that in determining the scope of immunity *ratione materiae*, there were noticeably certain acts that could potentially be beyond the benefit of immunity *ratione materiae* as they did not fall squarely in the typical analytical dichotomies. This was case for acts involving allegations of serious international crimes, *ultra vires* acts, *acta jure gestionis*, acts performed in an official capacity but exclusively for personal benefit, as well as acts performed on the territory of the forum State without its consent.

24. To address them, according to some members of the Commission, two possibilities existed; either to be inclusive and asserting that an act constituting a crime was an act performed in an official capacity and be confronted with the problem of whether they were public or private, or both, or deal with such questions as limitations or exceptions. Given that it was difficult to pigeonhole serious international crimes, acts *ultra vires*, *acts jure gestionis* as being private acts, it was suggested that it was better to address these matters as limitations or exceptions rather than as part of a definition of official or unofficial acts. This approach seemed to have the advantage that practice has followed similar approaches before with respect to jurisdictional immunities of States. Such an approach would also be amenable to finding solutions which combined acceptance of limitations and exceptions with appropriate procedural safeguards and due process guarantees.

(b) Methodology

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

26. It was also noted by some members that there was heavy reliance on cases from particular jurisdictions or regions, or on cases relating to the exercise of civil jurisdiction, even though the topic concerned immunity from criminal jurisdiction. The Special Rapporteur was suggested to survey even more widely, so as to include the case law of all legal traditions and the various regions. It was pointed out that there was need to be careful about the reliance on such case law; while it was

conceivable that there was no material difference between civil or criminal jurisdiction when exercised in determining what constituted an act performed in an official capacity, in some situations it might be critical to analyse the context in which immunity might have been granted or denied; immunity might differ depending on whether the case was against a foreign sovereign or against an individual in a civil context or a criminal context.

27. Some members also questioned the assertion made in the report about the irrelevance of national law for the purposes of determining acts performed in an official capacity, considering that such law constituted practice in determining customary international law; and indeed the Special Rapporteur had, in her analysis, relied upon case law interpreting and applying such national law. It was also noted that there was need to place more stress on the analysis of national legislative and executive practice of States, as well as to give more importance to the analysis to international judicial practice, including the full implications of judgments such as the *Arrest Warrant* case [10] and *Certain questions of Mutual Assistance in Criminal Matters*[11] rendered by international courts and tribunals, which it was contended had dealt with some of the issues with a certain degree of consistency.

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

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

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

29. It was recognised that an "act of state doctrine" was an entirely different legal concept from immunity *ratione materiae*. In general, there was support for the assertion that an "act performed in an official capacity" was defined and appreciated in contradistinction to "acts performed in a private capacity". It was also appreciated that an act performed in a private capacity was not necessary identical with acta *jure gestionis*, nor was an act performed in an official capacity coterminous with *acta jure imperii*. Moreover, the distinction between an "act performed in an official capacity" and an "act performed in a private capacity" had no relation whatsoever to the distinction between lawful and unlawful acts. The point was however made that these concepts of contrast still provided some useful elements that could be helpful in understanding whether an act was performed in an official capacity or in private capacity, or indeed whether an act was lawful or unlawful. Well-crafted commentaries capturing the various nuances could facilitate a better understanding of an act performed in an official capacity.

30. Some members were far from convinced that there was a need to define an official act or an act performed in an official capacity for the purposes of the present topic. It was noted that legal concepts tend to be indeterminate and did not always lend themselves to legal definition. It was not entirely clear whether it would be helpful to provide a definition beyond the dichotomy between acts performed in an official capacity and acts performed in a private capacity. Any attempt to go beyond the common places would be an impossible task. It was considered that the distinction between acts performed in an official capacity and acts performed in a private capacity was general and sufficient to allow for a case by case determination based on the

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

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

circumstances of each case. This binary opposition was borne out by the practice, in international and domestic case law. It was doubted by some members whether the collection of numerous references of instances where the terms like "official act" or an "act performed in official capacity" were employed was useful, as such collection was bound to be under-inclusive and would require deeper analysis to understand the context. It was suggested that the Special Rapporteur should have explored more fully the question of how far a State may determine the range of activities which it considered as constituting acts performed in an official capacity. However, other members maintained that a definition, if properly drafted, could be necessary or useful. It was further suggested that the commentary could cite examples of acts performed in an official capacity.

(ii) Criminal nature of the act

31. It was recognised by some members that there was practice which treated an act of an official as part of an a definition of a crime, while in other instances the status of the official was not an express element of the crime in question, but that did not necessarily exclude the possibility of an official being involved in that capacity in the commission of the crime in question. However, the prescriptive or descriptive nature of a particular characterization of a crime had no bearing necessarily on the question whether the person had acted in an official capacity.

32. The central issue which was determinative of an act performed in an official capacity for the purposes of immunity was not the nature of the act but the capacity in which one acted. Put differently, this was a factual determination, whether the alleged act, in contrast to its legal characterization was performed in an official capacity.

33. It was noted that the characterization as criminal of an act performed in an official capacity, which appeared to be incorporated in the proposed definition would lead to a surprising result, since it considered any act performed in an official capacity as a crime. This was tantamount to suggesting that every "act performed in an official capacity", by definition, constituted a crime, and necessarily that State officials always commit crimes when they act in an official capacity. An act was a crime not by its nature but rather by its criminalization at the levels of national or international criminal law

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

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

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

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

38. On the question of "single act, dual responsibility", it was, in the view of some members, well established in international law. It was clear that any act of a State official performed in an official capacity was attributable not only to the person (for the purpose of his individual criminal responsibility) but also to the State (for the purpose of State responsibility). For other members, even though not opposed to such a description, it was not entirely apparent how the "single act, dual responsibility" model related to the conclusion that acts performed in an official capacity must be criminal in nature. It was suggested that there seemed to be a confusion of understanding between the question of jurisdiction and of immunity, themselves different albeit interrelated concepts, with responsibility, whether individual criminal responsibility or State responsibility.

(iii) Attribution of the act to the State

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

40. For other members, the assimilation for immunity *ratione materiae* of the rules of attribution for State responsibility was only logical, as the immunity in question, in their view, belonged solely to the State. They therefore expressed doubts regarding the assertion of the Special Rapporteur that "any criminal act covered by immunity *ratione materiae* was not, strictly speaking, an act of the State itself, but an act of the individual by whom it was committed", finding it confusing and complicating matters.

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

42. Several members were not prepared to concede that the immunity of a State official from the criminal jurisdiction of another State was aligned with the immunity of the State. In their view, the disaggregation was useful and needed to be further explored; as developments in international criminal law particularly since the end of the Second World War had shown, immunity *ratione materiae* need not be aligned always with State immunity.

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

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

45. In terms of another view, the law of immunity and the law of State responsibility were different regimes, whose rationale for existence was different with the consequent result, in an asymmetrical international legal system, that they provided different solutions and remedies.

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

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

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

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

49. Some members disagreed with the Special Rapporteur that the relationship between the acts performed in an official capacity and international crimes was settled. They pointed to the joint separate opinion by Judges Higgins, Kooijmans and Buergenthal in the *Arrest Warrant* case that "... that serious international crimes cannot be regarded as official acts because they are neither normal State functions nor functions that a State alone can perform ..."[12] Other members observed that the Special Rapporteur had concentrated on the question whether international crimes may ever be "acts performed in an official capacity" without addressing the question of limitations or exceptions. It was suggested that the commentaries to be adopted on the draft provision should be prepared in such a way so as not to prejudge the discussion about immunities in relation to international crimes.

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

[12] http://www.icj-cij.org/docket/files/121/8136.pdf, para. 85.

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

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

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

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

(e) Future workplan

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

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