

Immunity *Ratione Materiae* from Foreign Criminal Jurisdiction and the Concept of “Acts Performed in an Official Capacity”

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I. INTRODUCTION

1. The availability under customary international law to a serving or former state official of immunity *ratione materiae* from foreign criminal jurisdiction turns on whether the act at issue was performed in an official capacity. As a matter of customary international law, serving and former state officials may not be prosecuted or subjected to extradition proceedings in a foreign court if the subject matter of the charges or of the alleged offences in respect of which extradition is requested is conduct performed by them in their capacity as a state official, and they may not be compelled to testify as a witness in foreign criminal proceedings in relation to the same. The question, therefore, is what it means to say that an act was one ‘performed in an official capacity’. After sketching in the background, the present contribution addresses this question.

II. BACKGROUND

2. Aside from the immunity *ratione personae*, customary or conventional, that serves to shield a small number of state officials from foreign criminal jurisdiction for the duration of their office or posting, there exist under international law various species of immunity *ratione materiae* that, as a rule, prohibit the forum state from exercising its criminal jurisdiction over serving or former foreign-state officials, as the case may be, in respect of acts performed by them in their capacity as state officials. The *lex generalis* in this regard is represented by the uncodified customary international law of immunity *ratione materiae* from foreign criminal jurisdiction that applies to every serving and former state official in respect of acts performed by them in their official capacity. In addition, there exists a number of treaty-based species of immunity *ratione materiae*¹ which, although in origin and essence simply codifications of the then-prevailing rules on state immunity from foreign criminal jurisdiction,² constitute, in their quality as treaty-law, *lex specialis* among states parties to the treaty in

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¹ See *infra* §5.

² See eg paragraph 2 of the commentary to draft article 42 of ILC’s Draft Articles on Consular Relations (now VCCR, art 43), *Yearbook of the International Law Commission 1961*, vol II, 92, 117: ‘The rule that, in respect of acts performed by

question, even if their content—leaving aside possible customary exceptions to state immunity in the criminal context—remains *prima facie* the same as the *lex generalis*.³ Insofar as a serving or former state official is not the subject of any applicable treaty-based species of immunity *ratione materiae*, he or she benefits only from the customary law of state immunity from foreign criminal jurisdiction. Like immunity *ratione personae*, all species of immunity *ratione materiae* are owed, as a matter of international law, to the state of which the individual beneficiary is or was an official, and can therefore be waived by that state.

3. At the level of abstract principle, the International Court of Justice (ICJ) implied in both *Certain Questions of Mutual Assistance*⁴ and *Jurisdictional Immunities of the State*⁵ that the immunity *ratione materiae* from foreign criminal jurisdiction from which all serving and former state officials benefit under customary international law is, in conceptual terms, a manifestation of state immunity⁶—that is, a function of the immunity from the jurisdiction of the courts of another state of the official’s state itself (of which the official, when acting in that capacity, comprises an organ⁷) and, as such, based on the corollary of the sovereign equality of states summed up in the maxim *par in parem non habet imperium*. The Appeals Chamber of the ICTY implied the same in *Blaškić*.⁸ This characterization, which is in line with the orthodox understanding of state officials’ immunity *ratione*

them in the exercise of their functions (official acts) members of the consulate are not amenable to the jurisdiction of the judicial and administrative authorities of the receiving State ... represents an immunity which the sending State is recognized as possessing in respect of acts which are those of a sovereign State.’ See also *R v Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte (No 3)*, 119 ILR 135, 153 (Lord Browne-Wilkinson) (‘[U]nder article 39(2) [of the VCDR] the ambassador, like any other official of the state, enjoys immunity in relation to his official acts done while he was an official.’) and 223 (Lord Millett) (‘Immunity *ratione materiae* ... operates to prevent the official and governmental acts of one state from being called into question in proceedings before the courts of another. ... It is available to former heads of state and heads of diplomatic missions, and any one whose conduct in the exercise of the authority of the state is afterwards called into question, whether he acted as head of government, government minister, military commander or chief of police, or subordinate public official.’)

³ The significance in practice of the characterization of the various treaty-based species of immunity *ratione materiae* as *lex specialis* is that, insofar as any exceptions may exist or emerge in future as a matter of customary international law to the state immunity from foreign criminal jurisdiction from which the general body of serving and former state officials benefit, these exceptions would not limit any unencumbered treaty-based immunity *ratione materiae* applicable between states parties to the treaty in question.

⁴ See *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v France)*, Judgment, ICJ Rep 2008, 177, 242, para 188 and 243, paras 191 and 193.

⁵ *Jurisdictional Immunities of the State (Germany v Italy: Greece intervening)*, Judgment, ICJ Rep 2012, 99, 139, para 91.

⁶ See also G Buzzini, ‘Lights and Shadows of Immunities and Inviolability of State Officials in International Law: Some Comments on the *Djibouti v France* Case’ (2009) 22 *Leiden Journal of International Law* 455.

⁷ See Articles on Responsibility of States for Internationally Wrongful Acts, GA res 56/83, 12 December 2001, Annex (‘Articles on Responsibility of States’), art 4(1).

⁸ See *Prosecutor v Blaškić*, IT-95-14, Appeals Chamber, Judgment on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997, 29 October 1997, para 41.

materiae from foreign criminal jurisdiction,⁹ renders at least formally untenable the suggestion¹⁰ that so-called ‘functional immunity’ from foreign criminal jurisdiction is a *sui generis* species of immunity. The Court’s characterization was adopted by the ILC’s first special rapporteur on the immunity of state officials from foreign criminal jurisdiction,¹¹ and has not been disputed by states in their consideration of the ILC’s work in the Sixth Committee.¹²

4. It might be thought to stand to reason that, just as in civil proceedings, serving and former state officials benefit today from immunity from the criminal jurisdiction of foreign courts not in respect of all acts performed by them in their official capacity but only in respect of those of their acts performed in their official capacity that can be characterized as exercises of sovereign authority (*acta jure imperii*). But the problem is how to distinguish in the criminal context between official and inherently sovereign acts, in respect of which state immunity would serve to bar proceedings against a foreign state official, and official acts of a nature such that private persons could perform them (as

⁹ See eg *Pinochet (No 3)* (n 2); *Agent judiciaire du Trésor c Malta Maritime Authority et Camel X*, Cour de cassation (Chambre criminelle), 23 November 2004, no 04-84.265; *Adamov (Evgeny) v Federal Office of Justice*, ILDC 339 (CH 2005), para 3.4.2 (Switzerland); *Lozano (Mario Luiz)*, ILDC 1085 (IT 2008), para 5 (Italy). See also J Crawford, *Brownlie’s Principles of Public International Law* (8th edn, Oxford: Oxford University Press, 2012), 499; P Daillier, M Forteau, and A Pellet, *Droit international public* (8th edn, Paris: LGDJ, 2009), 497–502, paras 289–290; H Fox and P Webb, *The Law of State Immunity* (3rd edn, Oxford: Oxford University Press, 2013); E David, *Éléments de Droit International Pénal et Européen* (Brussels: Bruylant, 2009), 58 (‘[L]’immunité des agents étatiques n’est qu’une application du principe de l’immunité des Etats’); E Decaux and L Trigeaud, ‘Les immunités pénales des agents de l’État et des organisations internationales’ in H Ascensio, E Decaux, and A Pellet (eds), *Droit international pénal* (2nd edn, Paris: Pedone, 2012) 545, 558–9, paras 38–40. The same is the case as regards civil actions against state officials. See eg United Nations Convention on Jurisdictional Immunities of States and Their Property 2004 (not in force) (‘UN Convention on State Immunity’), art 2(1)(b)(iv), defining ‘State’ for the purposes of the Convention to encompass ‘representatives of the State acting in that capacity’. See also *Jones v United Kingdom*, Judgment, European Court of Human Rights (Fourth Section), 14 January 2014, para 200 (‘the immunity which is applied in a case against State officials remains “State” immunity’) and—having referred in para 202 to *Second report on immunity of State officials from foreign criminal jurisdiction by Roman Anatolevitch Kolodkin, Special Rapporteur*, UN doc A/CN.4/631 (10 June 2010), on the immunity *ratione materiae* of state officials from foreign criminal jurisdiction—para 204 (‘The weight of authority at international and national level therefore appears to support the proposition that State immunity in principle offers individual employees or officers of a foreign State protection in respect of acts undertaken on behalf of the State under the same cloak as protects the State itself.’)

¹⁰ See eg A Cassese, ‘When May Senior State Officials be Tried for International Crimes? Some Comments on the *Congo v Belgium* Case’ (2002) 13 *EJIL* 853, 862; R Van Alebeek, *The Immunity of States and Their Officials in International Criminal Law and International Human Rights Law* (Oxford: Oxford University Press, 2008), chap 3; D Akande and S Shah, ‘Immunities of State Officials, International Crimes, and Foreign Domestic Courts’ (2011) 21 *European Journal of International Law* 815, 826–7.

¹¹ See *Second report Kolodkin* (n 9), 12–13, para 23.

¹² For explicit endorsement, see UN docs A/C.6/66/SR.26 (7 December 2011), 3, para 7 (Norway, on behalf of the Nordic countries) and A/C.6/68/SR.17 (8 November 2013), 8, para 34 (Norway, on behalf of the Nordic countries). See also UN doc A/C.6/66/SR.27 (8 December 2011), 4, para 23 (Sri Lanka) (‘sovereign immunity’); UN doc A/C.6/67/SR.22 (4 December 2012), 6, para 31 (UK).

distinct from acts in fact performed in a private capacity). In the civil context, the abstract distinction has been rendered concrete over the years via the general recognition of a set of exceptions to a foreign state's immunity from proceedings framed in every case bar one around an understanding of the essentially commercial nature of a state's non-sovereign conduct.¹³ In the criminal context, no such set of accepted exceptions has emerged to the otherwise absolute immunity from jurisdiction from which foreign state officials have traditionally benefited in respect of acts performed by them in their official capacity, and it is not obvious what such exceptions might in principle be. Instead, when it comes to state practice,¹⁴ those few municipal courts that have had to grapple with the immunity *ratione materiae* from criminal proceedings owed under international law in respect of a foreign state official or ex-official have tended to speak of immunity from criminal jurisdiction in respect of acts performed in an official capacity or, synonymously but less desirably, in respect of official acts.¹⁵ As for the ICJ, in a brief dictum in *Arrest Warrant* it spoke, conversely, of the unavailability to the accused of immunity *ratione materiae* from foreign criminal jurisdiction in respect of acts performed 'in a private capacity',¹⁶ the implication *a contrario* being that such immunity extends, at least *prima facie*, to all acts performed by the accused in a public, *viz* official, capacity.¹⁷ The same was similarly implied in *Certain Questions of Mutual Assistance*, where the Court 'observe[d] that it ha[d] not been "concretely verified" before it that the acts which were the subject of the summonses as *témoins assistés* issued by France were indeed acts within the scope of [the relevant officials'] duties as organs of State'.¹⁸ For his part, the ILC's first special rapporteur on the immunity of state officials from foreign criminal jurisdiction expressly concluded that the immunity *ratione materiae*, or state immunity, from foreign criminal jurisdiction from which a serving or former state official benefits is not restricted by reference to the distinction between *acta jure imperii* and *acta jure gestionis*,¹⁹ and

¹³ See eg UN Convention on State Immunity, Part III.

¹⁴ It is worth noting that, although the various codification conventions cited *infra* §5 regulate the immunity *ratione materiae*—in essence, the state immunity—available to consular officers, former diplomatic agents, and so on, they remain uninformative on point, since they were all concluded while, as a matter of customary international law, the doctrine of absolute state immunity, according to which a serving or former state official enjoyed immunity *ratione materiae* in respect of all acts performed in an official capacity, prevailed even in respect of civil proceedings.

¹⁵ See the cases mentioned *infra*. But cf *Adamov* (n 9), para 3.4.2, by way of obiter dictum ("funktionalen" Immunität für offizielle amtliche Hoheitsakte); *Lozano* (n 9), para 5 ('sono sottratti alla giurisdizione civile o penale di uno Stato estero i fatti e gli atti eseguiti *iure imperii* dagli individui-organi di un altro Stato nell'esercizio dei compiti e delle funzioni pubbliche ad essi attribuiti').

¹⁶ *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium)*, ICJ Rep 2002, 3, 25, para 61.

¹⁷ Consider also the implication *a contrario* from the Court's explanation in *Arrest Warrant* (n 16), 22, para 55, that, in relation to the immunity *ratione personae* from foreign criminal jurisdiction of a serving minister for foreign affairs, 'no distinction can be drawn between acts performed ... in an "official" capacity, and those claimed to have been performed in a "private capacity"'.

¹⁸ *Certain Questions of Mutual Assistance* (n 4), 243, para 191. See also *ibid*, 244, para 196.

¹⁹ *Second report Kolodkin* (n 9), 16, para 28 and 58, para 94(e).

there appears to have been no dissent from this position either within the Commission or, more significantly, within the Sixth Committee of the General Assembly. In short, it would appear that, as a general rule, as argued by the ILC's first special rapporteur, state officials, serving and former, are entitled under customary international law to immunity from foreign criminal jurisdiction 'in respect of acts performed in an official capacity'.²⁰

II. 'ACTS PERFORMED IN AN OFFICIAL CAPACITY'

5. The availability to a serving or former state official of immunity *ratione materiae* from foreign criminal jurisdiction depends, to reiterate, on whether the impugned act was 'performed in an official capacity'. There is little municipal judicial practice directly on point. Guidance can be looked for, however, in municipal case-law on cognate immunities *ratione materiae*, such as the immunity *ratione materiae* from foreign criminal jurisdiction of serving and former consular officers,²¹ former diplomatic agents,²² former representatives of a state in a special mission and former members of the mission's diplomatic staff,²³ and so on, although the express formulation of the various treaty provisions may on occasion make a difference.²⁴ One can look also to the municipal case-law on the immunity *ratione materiae* of serving and former state officials from foreign civil proceedings insofar as this case-law examines, as a first step in the analysis, whether the act the subject of the proceedings was performed in an official capacity.²⁵ In addition, in *Certain Questions of Mutual Assistance*, the ICJ appeared to signal by implication²⁶ that the question whether, for the purposes of immunity *ratione materiae* from foreign criminal jurisdiction, a serving or former state official can be said to

²⁰ Ibid, 58, para 94(b). The first special rapporteur's conclusion has been implicitly adopted by the second. See *Preliminary report on immunity of State officials prepared by Ms Concepción Escobar Hernández, Special Rapporteur*, UN doc A/CN.4/654 (31 May 2012), 15, para 65; *Second report on the immunity of State officials from foreign criminal jurisdiction by Concepción Escobar Hernández, Special Rapporteur*, UN doc A/CN.4/661 (4 April 2013), 16, para 50.

²¹ See Vienna Convention on Consular Relations 1963 ('VCCR'), arts 43(1) ('acts performed in the exercise of consular functions'), 44(3) ('matters connected with the exercise of their functions'), and 53(4) ('acts performed ... in the exercise of his functions').

²² See Vienna Convention on Diplomatic Relations 1961 ('VCDR'), art 39(2) ('acts performed ... in the exercise of his functions as a member of the mission').

²³ See Convention on Special Missions 1969 ('CSM'), CSM, art 43(2) ('acts performed ... in the exercise of his functions').

²⁴ Consider, for example, the reliance in the context of consular immunity on the specific wording of VCCR, arts 5(m) and 43(1) in *General Prosecutor at the Court of Appeals of Milan v Adler*, ILDC 1960 (IT 2012), para 23.4 (Italy).

²⁵ Recall eg, reflecting customary international law on point, UN Convention on State Immunity, art 2(1)(b)(iv), defining 'State' for the purposes of the Convention to encompass 'representatives of the State acting in that capacity'. Insofar as the case-law on civil jurisdiction asks additionally whether the act was one *jure imperii* or *jure gestionis* or, alternatively but to the same effect, falls within one of the enumerated exceptions to state immunity provided for in the applicable municipal statute, this is to be factored out in the criminal context. See *supra* §4 and *infra* §6.

²⁶ See *Certain Questions of Mutual Assistance* (n 4), 243, para 191 and 244, para 196.

have acted in his or her official capacity is at least at a basic level the same as the question whether, for the purposes of the attribution of conduct to a state in the context of the law of state responsibility, an individual occupying the position of an organ of the state within the meaning of article 4(1) of the Articles on Responsibility of States for Internationally Wrongful Acts ('Articles on Responsibility of States') can be said to have acted in his or her capacity as an organ of the state.²⁷ This approach whereby the law relating to the immunity *ratione materiae* from foreign criminal jurisdiction of serving and former state officials draws upon the rules governing the attribution to a state of the conduct of persons considered organs of the state was adopted and applied by the ILC's first special rapporteur on the immunity of state officials from foreign criminal jurisdiction,²⁸ and its gist has found favour with nearly all of the delegations that have had cause to refer to it in the Sixth Committee.²⁹ While it is to be employed with a degree of circumspection,³⁰ the approach is essentially sound.³¹

6. Whether the act was performed in an official rather than a private capacity is not the same as whether the act was an act *jure imperii* rather than *jure gestionis*. In other words, it is not necessary to ask, as it is in relation to civil proceedings against a serving or former state official or any other organ of state, whether the act was inherently sovereign in character, meaning the sort of thing that only a state can do rather than the sort of thing a private person could have done.³² It pays to emphasize³³

²⁷ Consider also *Blaškić*, IT-95-14, Appeals Chamber, Judgment on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997, 29 October 1997, para 41, responding to the arguments recalled *ibid*, para 39; *Former Syrian Ambassador to the German Democratic Republic*, 115 ILR 595, 605, citations omitted (Germany 1997) ('According to Article 39(2), second sentence, of the VCDR, diplomatic immunity for official acts continues to exist after the termination of the diplomat's position. What is to be understood as an official act follows from the purpose of this rule: The official acts of diplomats are attributable to the sending state. Judicial proceedings against [former] diplomats come, in their effects, close to proceedings against the sending State. Continuing diplomatic immunity for official acts thus serves to protect the sending State itself. ... The complainant acted in the exercise of his official functions as a member of the mission, within the meaning of Article 39(2), second sentence, of the VCDR, because he is charged with an omission that lay within the sphere of his responsibility as ambassador, and which is to that extent attributable to the sending State.'). See too, in the civil context, *Jones v Ministry of the Interior of the Kingdom of Saudi Arabia*, 129 ILR 629, 718–19, para 12 (Lord Bingham) and 742–3, paras 74–79 (Lord Hoffmann) (UK 2006).

²⁸ *Second report Kolodkin* (n 9), 12–16, paras 23–27, especially 14, para 24. See also *Immunity of State officials from foreign criminal jurisdiction. Memorandum by the Secretariat*, UN doc A/CN.4/596 (31 March 2008), 102, para 156.

²⁹ See UN doc A/C.6/66/SR.26 (7 December 2011), 3, para 8 (Norway, on behalf of the Nordic countries); UN doc A/C.6/66/SR.27 (8 December 2011), 10, para 71 (Portugal); UN doc A/C.6/67/SR.20 (7 December 2012), 18, para 111 (Austria); UN doc A/C.6/67/SR.21 (4 December 2012), 6, para 29 (Belarus), 12, para 60 (Republic of the Congo), 15, para 83 (Portugal); UN doc A/C.6/67/SR.22 (4 December 2012), 13, para 82 (Italy).

³⁰ See also UN doc A/C.6/66/SR.26 (n 145), 3, para 8 (Norway, on behalf of the Nordic countries).

³¹ See also Buzzini (n 6), 465–6.

³² As codified, this question amounts to asking whether one of the enumerated exceptions to the *prima facie* availability of state immunity applies, although it is worth noting that the exception in relation to acts causing death or personal injury *etc* in the forum state does not correspond to the *jure imperii/jure gestionis* distinction.

that the distinction between acts *jure imperii* and acts *jure gestionis* is inapplicable in the criminal context, where the question is the more straightforward, logically prior one as to whether state officials perform the relevant acts in their capacity as state officials or in their capacity as private persons.

7. Equally, the question to be asked as regards prosecution and extradition is not whether the crime as such was committed in an official capacity. Framing the inquiry this way is to have impermissible regard to the merits of the case in order to determine the prior, procedural question of the accused's immunity from the proceedings.³⁴ Rather, as with immunity *ratione materiae* from civil jurisdiction (*mutatis mutandis*),³⁵ the question is whether the bare acts alleged to have been performed by the official, rather than the alleged acts as legally characterized by the prosecution, were performed in an official capacity—that is, whether the killing, rather than the murder, crime against humanity, or genocide, or whether the appropriation of property, rather than the theft or pillage, was done in an official capacity.

8. Whether the act was performed in an official capacity is a descriptive, not normative inquiry. The question is not whether the official acted in some notionally proper official capacity as measured by the standards of the public policy of the forum state or international public policy. One asks simply whether the official acted in what was in fact an official capacity, meaning in the exercise of actual, rather than ideal, state authority.³⁶

³³ Recall *supra* §4.

³⁴ The availability or otherwise of immunity from prosecution or extradition proceedings must be determined 'at the outset of the proceedings, before consideration of the merits', in the words of *Jurisdictional Immunities* (n 5), 145, para 106, speaking in the civil context. See also *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights, Advisory Opinion*, ICJ Rep 1999, 62, 88, para 63. See too, recalling and applying the ICJ's dictum in the latter case, *A v Ministère public de la Confédération, B and C*, Swiss Federal Criminal Court, 25 July 2012, para 5.2 ('Nezzar').

³⁵ None of the exceptions to the immunity *ratione materiae* of a state, including of its officials acting in that capacity, from foreign civil proceedings presupposes the legal wrongfulness of the facts alleged. For example, the 'commercial transaction' exception (see eg UN Convention on State Immunity, art 10) posits merely that the alleged state conduct the subject of the proceedings arose out of a commercial transaction, rather than that it constituted a breach of contract, a tort, or some other municipal private-law wrong. Equally, what is known in some quarters as the 'territorial tort' or 'domestic tort' exception (see eg UN Convention on State Immunity, art 12) is in fact without regard to the possible legal characterization of the state's alleged conduct as tortious. The exception pertains, rather, to proceedings relating to compensation for death or personal injury or for damage to or loss of tangible property caused by the defendant state's alleged act or omission in the forum state.

³⁶ But cf, implicitly, *Pinochet*, 119 ILR 345, 349 (Belgium 1998); *R v Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte (No 1)*, 119 ILR 50 (UK 1998). Note that *Pinochet (No 1)* was subsequently annulled in *R v Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte (No 2)*, 119 ILR 112 (UK 1999), with the result that it cannot be counted for the purposes of state practice.

9. Analogy with the customary international rules on the attribution to a state of the acts of organs of the state codified in articles 4 and 7 of the Articles on Responsibility of States suggests that the notion of state authority relevant to the question of official capacity for immunity *ratione materiae* from criminal proceedings is not limited to actual authority but extends to mere ‘colour of authority’.³⁷ In other words, as accepted by the ILC in relation to the immunity *ratione materiae* from foreign criminal jurisdiction of consular officers and employees,³⁸ as argued by the ILC’s first special rapporteur on the immunity of state officials from foreign criminal jurisdiction,³⁹ and as emphasized by the UK’s House of Lords in *R v Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte (No 3)*,⁴⁰ one of the few cases directly on point, the fact that officials act in excess of authority or instructions, contrary to instructions, or contrary to the general law, including the criminal law, of the state of which they are officials does not of itself mean that their acts are not performed in an official capacity.⁴¹ Only ‘where the conduct is so removed from the scope of their official functions

³⁷ See *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)*, Judgment, ICJ Rep 2005, 168, 242, para 214. See also the international cases cited in paragraphs 5 to 7 of the commentary to article 7 of the Articles on Responsibility of States, *Yearbook of the International Law Commission 2001*, vol II/2, 31, 46, as well as the text of paragraph 13 of the commentary to article 4 of the Articles on Responsibility of States, *ibid*, 42, which reads in relevant part: ‘A particular problem is to determine whether a person who is a State organ acts in that capacity. It is irrelevant for this purpose that the person concerned may have had ulterior or improper motives or may be abusing public power. Where such a person acts in an apparently official capacity, or under colour of authority, the actions in question will be attributable to the State. The distinction between unauthorized conduct of a State organ and purely private conduct has been clearly drawn in international arbitral decisions. ... The case of purely private conduct should not be confused with that of an organ functioning as such but acting *ultra vires* or in breach of the rules governing its operation. In this latter case, the organ is nevertheless acting in the name of the State: this principle is affirmed in article 7.’

³⁸ See paragraphs 2 and 3 of the commentary to draft article 43 of the ILC’s Draft Articles on Consular Relations, *Yearbook of the International Law Commission 1961*, vol II, 92, 117, the provision which became article 43(1) of the VCCR and specified that ‘[m]embers of the consulate shall not be amenable to the jurisdiction of the judicial or administrative authorities of the receiving State in respect of acts performed in the exercise of consular functions’. Paragraphs 2 and 3 of the commentary state in relevant part: ‘The rule that, in respect of acts performed by them in the exercise of their functions (official acts) members of the consulate are not amenable to the jurisdiction of the judicial and administrative authorities of the receiving State, is part of customary international law. This exemption represents an immunity which the sending State is recognized as possessing in respect of acts which are those of a sovereign State. ... In the opinion of some members of the Commission, the article should have provided that only official acts within the limits of the consular powers enjoy immunity from jurisdiction. The Commission was unable to accept this view.’

³⁹ See *Second report Kolodkin* (n 9), 15–19, paras 27 and 29–31.

⁴⁰ See *Pinochet (No 3)* (n 2), 154–5 (Lord Browne-Wilkinson), 169 (Lord Goff), 194–5 (Lord Hope), 224 (Lord Millett).

⁴¹ See also, as regards immunity *ratione materiae* from civil proceedings, *Jones v Saudi Arabia* (n 27), 718–19, para 12 (Lord Bingham) and 742–3, paras 74–79 (Lord Hoffmann); *Jaffe v Miller*, 95 ILR 446, 460 (Canada 1993). But cf *contra* the cases cited in *Secretariat Memorandum* (n 27), 104, para 159 n 452. It ought to go without saying that it is immaterial for the purposes of immunity from foreign criminal jurisdiction whether the act was allegedly contrary to the criminal law of the forum state, as opposed to the state served by the official. Were this not so, there would be no point in discussing immunity from foreign criminal jurisdiction in the first place.

that it should be assimilated to that of private individuals, not attributable to the State',⁴² will the *ultra vires* acts of state officials be deemed to have been performed in a private capacity. The acts of state officials 'purportedly or apparently carrying out their official functions'⁴³ remain acts performed in an official capacity. It is for this reason that it is preferable to avoid paraphrasis such as 'in the exercise of duty',⁴⁴ 'within the scope of [the officials'] duties as organs of state',⁴⁵ 'in the discharge of their mandate',⁴⁶ and even 'official acts', all of which, while perhaps not intended to connote a meaning different from 'in an official capacity', are prone to mislead.

10. A question arguably arises in the context of abuse of authority as to the significance of the purpose or motive of the act. It is one thing to consider an abuse of state authority as nonetheless an act performed in an official capacity if the motive for the abuse is the official's furtherance of the perceived interests of the state. It is arguably something else to consider an abuse of authority as an act performed in an official capacity when its motive is purely or perhaps even just predominantly personal.⁴⁷ Nonetheless, under the customary rules on the attribution of conduct for the purposes of state responsibility, motive is immaterial. An act may be for an ulterior personal purpose and still be attributable to the state as an act of an organ of the state acting in that capacity, provided that the act was purportedly or apparently an exercise of state authority.⁴⁸ For his part, the ILC's first special rapporteur on the immunity of state officials took the firm view, based on a strict identity between the principles applicable to attribution and those applicable to state immunity, that what counts as an act of a state organ acting in that capacity for the purposes of the former counts *ipso facto* as an act performed in an official capacity for the purposes of the latter, with the corollary that the 'classification of the conduct of an official as official conduct does not depend on the motives of the

⁴² Paragraph 7 of commentary to article 7 of Articles on Responsibility of States (n 37), 46.

⁴³ Paragraph 8 of commentary to article 7 of Articles on Responsibility of States (n 37), 46.

⁴⁴ It is for this reason that case-law under article 7(3)(a)(ii) of the Agreement between the Parties to the North Atlantic Treaty regarding the Status of their Forces 1951 ('NATO SOFA') and its analogues, dealing with jurisdiction over 'offences arising out of any act or omission done in the performance of official duty', is not necessarily a reliable guide to the content of the notion of an act performed 'in an official capacity'.

⁴⁵ *Certain Questions of Mutual Assistance* (n 4), 243, para 141.

⁴⁶ Draft article 3(d) proposed by the ILC's second special rapporteur on the immunity of state officials from foreign criminal jurisdiction, *Second report Escobar* (n 20), 17, para 53.

⁴⁷ Indeed, one or two old cases in semi-cognate immunity contexts suggest the second approach, considering such acts to have been performed in a personal capacity.

⁴⁸ Recall *supra* nn 37 and 42, especially *Mallén v United States of America*, 4 RIAA 173, 177, paras 7–9 (Mexico-US General Claims Commission 1927), involving the attribution of an exercise of state authority by way of 'mere pretext for taking private vengeance' (*ibid*, 177, para 8).

person'.⁴⁹ Ultimately, although a teleological distinction between the two contexts has an instinctive attraction, legal principle militates in favour of the special rapporteur's approach.⁵⁰

11. If acting under orders or instructions, pursuant to established state policy, or otherwise with official sanction, a state official is *ipso facto* acting in an official capacity.⁵¹ This is so, following from the above, even if the order, instruction, policy, or other sanction was itself *ultra vires* or unlawful.⁵²

12. The fact that state officials are seconded or otherwise deployed outside their usual line of duty⁵³ does not necessarily mean that they are not acting in an official capacity. If they are deployed as a servant of the state—that is, in the employment and under the instructions of the state—and are acting in that capacity at the relevant time, their acts will be performed in an official capacity.

13. No rule of international law requires the forum state to treat as conclusive a declaration by another state that an official of the latter acted with official sanction. It is a matter for the municipal law of each state to determine the evidentiary weight to be given to such a declaration.

III. CONCLUSION

14. Ultimately whether an act is to be considered one 'performed in an official capacity' will depend on the facts of each case. It is not a question amenable to detailed prescriptive statements. Discerning the line between an official's official and private capacities can be a subtle task of factual appreciation, although it can also be made more complicated than it need be.

⁴⁹ *Second report Kolodkin* (n 9), 15, para 27.

⁵⁰ See also *Buzzini* (n 6), 465–6. As it is, it pays to bear in mind that a state may always waive any immunity from foreign criminal jurisdiction from which one of its officials or former officials would stand to benefit.

⁵¹ See *Former Syrian Ambassador* (n 27), 606; *Re P (No 2)*, 114 ILR 485, 495–6 (UK). See also the 'Bingham' affair (1858), in A McNair (ed), *International Law Opinions, Selected and Annotated, Volume I: Peace* (Cambridge: Cambridge University Press, 1956) 196, 197.

⁵² In this way, the availability under customary international law of immunity *ratione materiae* from foreign criminal process does not correspond to the availability or otherwise under customary international law of the substantive defence of superior orders.

⁵³ Take, for example, military personnel deployed on a private ship as a vessel protection detachment (VPD).