Chapter VI
Immunity of State officials from foreign criminal jurisdiction

A. Introduction

53. 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.[310] 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 (2008).[311]

54. 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).[312] The Commission was unable to consider the topic at its sixty-first (2009) and sixty-second (2010) sessions.[313]

55. The Commission, at its sixty-fourth session (2012), appointed Ms. Concepción Escobar Hernández as Special Rapporteur to replace Mr. Kolodkin, who was no longer a member of the Commission.[314] The Commission received and considered the preliminary report of the Special Rapporteur at the same session (2012), her second report during the sixty-fifth session (2013), her third report during the sixty-sixth session (2014), her fourth report during the sixty-seventh session (2015), her fifth report during the sixty-eighth (2016) and sixty-ninth sessions (2017), her sixth report during the seventieth (2018) and seventy-first (2019) sessions, and her seventh report during the seventy-first session (2019).[315] On the basis of the draft articles proposed by the Special Rapporteur in the second, third, fourth and fifth reports, the Commission has provisionally adopted seven draft articles and commentaries thereto. Draft article 2 on definitions is still being developed.[316]

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310 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 paragraph 7 of its resolution 62/66 of 6 December 2007, took note of the decision of the Commission to include the topic in its programme of work. The topic had been included in the long-term programme of work of the Commission during its fifty-eighth session (2006), on the basis of the proposal contained in annex A of the report of the Commission (*Official Records of the General Assembly, Sixty-first Session, Supplement No. 10* (A/61/10), para. 257).

311 *Official Records of the General Assembly, 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.

312 A/CN.4/601, A/CN.4/631 and A/CN.4/646, respectively.

313 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.

314 *Ibid., Sixty-seventh Session, Supplement No. 10* (A/67/10), para. 266.

315 A/CN.4/654, A/CN.4/661, A/CN.4/673, A/CN.4/686, A/CN.4/701, A/CN.4/722, and A/CN.4/729, respectively.

316 See *Official Records of the General Assembly, Sixty-eighth Session, Supplement No. 10* (A/68/10), paras. 48–49.

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 (*ibid., Sixty-eighth Session, Supplement No. 10* (A/68/10), paras. 48–49).

At its 3231st meeting, on 25 July 2014, the Commission received the report of the Drafting Committee and provisionally adopted draft articles 2 (e) and 5 and, at its 3240th to 3242nd meetings, on 6 and 7 August 2014, it adopted the commentaries thereto (*ibid., Sixty-ninth Session, Supplement No. 10* (A/69/10), paras. 130–132).

At its 3329th meeting, on 27 July 2016, the Commission provisionally adopted draft articles 2, subparagraph (f), and 6, provisionally adopted by the Drafting Committee and taken note of by the Commission at its sixty-seventh session, and at its 3345th and 3346th meetings, on 11 August 2016, the Commission adopted the commentaries thereto (*ibid., Seventy-first Session, Supplement No. 10* (A/71/10), paras. 194–195 and 250).

B. Consideration of the topic at the present session

56. The Commission had before it the eighth report (A/CN.4/739) of the Special Rapporteur. The report examined the relationship between the immunity of State officials from foreign criminal jurisdiction and international criminal tribunals; considered a mechanism for the settlement of disputes between the forum State and the State of the official; and considered the issue of good practices that could help to solve the problems that arise in practice in the process of determining and applying immunity. In the light of the treatment of the issues in the report, proposals for draft articles 17 and 18 were also presented.

57. The Commission considered the eighth report at its 3520th, 3521st and 3523rd to 3528th meetings, from 12 to 21 May 2021.

58. Following its debate on the report, the Commission, at its 3528th meeting, on 21 May 2021, decided to refer draft articles 17 and 18, as contained in the Special Rapporteur's eighth report, to the Drafting Committee, taking into account the debate, as well as proposals made, in the Commission.

59. At its 3530th and 3549th meetings, on 3 June and 26 July 2021, the Commission received and considered the reports of the Drafting Committee (A/CN.4/L.940, A/CN.4/L.953 and Add.1), and provisionally adopted draft articles 8 *ante*, 8, 9, 10, 11 and 12 (see sect. C.1 below).

60. At its 3557th to 3561st meetings, from 3 to 5 August 2021, the Commission adopted the commentaries to draft articles 8 *ante*, 8, 9, 10, 11 and 12 (see sect. C.2 below).

1. Introduction by the Special Rapporteur of the eighth report

61. The Special Rapporteur recalled that, in the seventh report, which had been submitted for the consideration of the Commission at its seventy-first session, she had completed her consideration of the questions set forth in the workplan submitted to the Commission in 2012. However, in chapter V of the seventh report, particular attention had been drawn to three general issues that warranted examination by the Commission before the conclusion of the first reading, namely the relationship between the immunity of State officials from foreign criminal jurisdiction and international criminal tribunals, the possibility of establishing a mechanism for the settlement of disputes and the possible inclusion of recommendations of good practices in the draft articles. Those questions were the subject of consideration in the eighth report.

62. The Special Rapporteur explained that the eighth report was divided into an introduction and four chapters. The purpose of the introduction was to describe the treatment of the topic by the Commission. Chapter I examined the relationship between immunity of State officials from foreign criminal jurisdiction and international criminal tribunals. Chapter II considered the problems related to the settlement of disputes and proposed the establishment of a specific mechanism for that purpose. Chapter III addressed the issue of recommended good practices. Chapter IV concerned the future workplan.

63. Regarding the draft articles that the Drafting Committee had yet to examine, the Special Rapporteur stated that she had held two rounds of informal consultations before the start of the present session to review the current status of the Commission's work and to formulate proposals that would allow the Drafting Committee to make progress in the light

At its 3378th meeting, on 20 July 2017, the Commission provisionally adopted draft article 7 by a recorded vote and at the 3387th to 3389th meetings on 3 and 4 August 2017, the commentaries thereto (*ibid.*, *Seventy-second Session, Supplement No. 10* (A/72/10), paras. 74, 76 and 140–141).

At its 3501st meeting, on 6 August 2019, the Chair of the Drafting Committee presented the interim report of the Drafting Committee on "Immunity of State officials from foreign criminal jurisdiction", containing draft article 8 *ante* provisionally adopted by the Drafting Committee at the seventy-first session (A/CN.4/L.940). The Commission took note of the interim report of the Drafting Committee on draft article 8 *ante*, which was presented to the Commission for information only (*ibid.*, *Seventy-fourth Session, Supplement No. 10* (A/74/10), para. 125 and footnote 1469).

of the difficult circumstances of the COVID-19 pandemic and the methods of work adopted for the current session. She thanked the members who had participated in the consultations.

64. Concerning the relationship between the immunity of State officials from foreign criminal jurisdiction and international criminal tribunals, the Special Rapporteur recalled that, in the sixth report, she had referred to the need to address in a subsequent report the possible effect that the obligation to cooperate with international criminal tribunals might have on the immunity of State officials from foreign criminal jurisdiction.[317] Two events had led her not to address the issue in the seventh report. The first was the fact that the question of the relationship between immunity and the obligation to cooperate had been raised before the International Criminal Court in the *Jordan Referral re Al-Bashir* case, which was *sub judice* at the time. The second was that, when the report had been completed, an item had been on the agenda of the General Assembly concerning a potential request for an advisory opinion of the International Court of Justice on the issue of immunity of heads of State and the relationship thereof to the duty to cooperate with the International Criminal Court.[318] The Special Rapporteur noted that the demand for an advisory opinion appeared to have waned and that the International Criminal Court had issued its judgment in the aforementioned case on 6 May 2019.[319] The current state of affairs therefore allowed the Commission to address the relationship of immunity of State officials from foreign criminal jurisdiction and international criminal tribunals from a general perspective.

65. The question of the relationship between immunity of State officials from foreign criminal jurisdiction and international criminal tribunals had been analysed by both the Special Rapporteurs who had dealt with the present topic. It was closely linked to the scope of the draft articles, which had been defined in draft article 1 as adopted by the Commission. It was clear that the topic did not deal with immunities before international criminal tribunals. Nor it could be denied, however, that the discussion of immunity of State officials from foreign criminal jurisdiction could not proceed in the abstract and without regard to the existence of international criminal tribunals created to consider crimes of concern to the international community. Given that international crimes could be committed by State officials, who might then be subject to prosecution before both national and international criminal courts, it seemed impossible to deny that a relationship existed between the present topic and international criminal jurisdiction. The relationship was also closely linked to the principle of accountability and the efforts against impunity for crimes under international law, which had been recurrent themes in the Commission's debates.

66. Specific questions relating to the relationship between international criminal tribunals and the present topic had arisen in two areas. The first was the possible definition of an exception to immunity derived from the obligation to cooperate with an international criminal tribunal. The second was the standing of foreign criminal jurisdiction in the light of the same obligation to cooperate. The Commission had addressed the first question in 2016 and 2017, deciding not to retain such an exception in draft article 7. The second question was addressed by the judgment of the Appeals Chamber of the International Criminal Court in the *Jordan Referral re Al-Bashir* case, in which the Court affirmed that, when a State party to the Rome Statute[320] acts pursuant to a request for assistance by the Court, the State assists the Court in exercising its jurisdiction, rather than exercising national criminal jurisdiction.[321]

67. The Special Rapporteur reiterated her view, expressed orally at the seventy-first session and in her eighth report, that it would neither be useful nor necessary for the Commission to examine the judgment of the International Criminal Court for the purposes of its work. The judgment had to be understood in the context of the specific legal regime

[317] A/CN.4/722, para. 43.

[318] Agenda item 89, entitled "Request for an advisory opinion from the International Court of Justice on the consequences of legal obligations of States under different sources of international law with respect to immunities of Heads of State and Government and other senior officials" (A/73/251 and Add.1).

[319] *Situation in Darfur, Sudan, in the Case of the Prosecutor v. Omar Hassan Ahmad Al-Bashir, Judgment in the Jordan Referral re Al-Bashir Appeal*, judgment of the Appeals Chamber of 6 May 2019 (ICC-02/05-01/09-397-Corr).

[320] Rome, 17 July 1998, United Nations, *Treaty Series*, vol. 2187, No. 38544, p. 3.

[321] See footnote 319 above.

established by the Rome Statute, and it did not seem possible to extrapolate it to the topic before the Commission, which had a general scope and should be applicable to any State with respect to whose criminal jurisdiction a question of immunity might arise.

68. Nevertheless, the Special Rapporteur considered that it did not seem reasonable for the Commission to ignore the existence of international criminal tribunals when considering an issue that bore a certain relationship to those tribunals. While the topic was limited in scope to immunity from foreign criminal jurisdiction, a number of both members of the Commission and States had stated that the ongoing work of the Commission should not ignore the achievements of the international community in the field of international criminal law and that its work should neither alter nor damage the substantive and institutional norms of international criminal law.

69. Draft article 18,[322] proposed for the consideration of the Commission, responded thereto. It was formulated as a without prejudice clause that would safeguard both the separation and the independence of the regimes applicable to immunity before national criminal courts and international criminal tribunals and preserve the special norms that govern the functioning of international criminal tribunals. The Special Rapporteur also noted similarity between draft article 18 and draft article 1, paragraph 2, as without prejudice clauses and proposed that the former might be incorporated as paragraph 3 of draft article 1.

70. Turning to the question of the settlement of disputes, the Special Rapporteur noted, as indicated in the eighth report, that the procedural provisions proposed in the sixth and seventh reports were intended to help build trust between the State of the official and the forum State, thereby facilitating the settlement of disputes that could arise in the process of determining and applying immunity. Nevertheless, it remained possible that a divergence of legal positions between the States involved could give rise to a dispute that could only be resolved through the peaceful means applicable in contemporary international law. In the opinion of the Special Rapporteur, it was therefore necessary to include a specific provision on the settlement of disputes in the present draft articles.

71. It was clear that any dispute that might arise between the forum State and the State of the official could be submitted to a dispute settlement mechanism accepted by States, as had indeed happened in practice. However, those traditional dispute resolution mechanisms had often functioned in an *ex post facto* manner, operating as a last resort for the restoration of international lawfulness. They had not offered States the opportunity to resolve the controversy at an early stage, avoiding a *fait accompli* that would be difficult to reverse later.

72. The consultation mechanism proposed in draft article 15 and the information exchange system provided for in draft article 13 (renumbered as draft article 12) were both intended to facilitate the early resolution of disputes. However, in case neither worked, it could also be appropriate to establish a mechanism to submit the dispute to a neutral and impartial third party. The Special Rapporteur explained that, to be useful, the mechanism should be structured around two basic elements: linking the submission to third-party dispute settlement to the suspension of the exercise of criminal jurisdiction by the forum State; and the binding effect of the decision taken by the third party.

73. The proposal submitted to the Commission opted for arbitration or the International Court of Justice to avoid the long negotiation process necessary to establish an *ad hoc* body. It was considered that both the mechanisms and their procedural rules were well known to States. The status of the International Court of Justice as a common court of international law would also make the Court particularly suitable to rule on the complex questions that might arise in cases relating to immunity from foreign criminal jurisdiction.

[322] The draft article proposed by the Special Rapporteur reads as follows:

"Draft article 18

The present draft articles are without prejudice to the rules governing the functioning of international criminal tribunals."

74. Based on those considerations, the proposed draft article 17[323] submitted to the Commission for its consideration established a system for the settlement of disputes divided into three consecutive phases: consultations, negotiations (both understood as mandatory mechanisms), and recourse to arbitration or the International Court of Justice (as alternative mechanisms of a voluntary nature). That model, which would be subject to the general rules on dispute settlement in force in contemporary international law, would give States a useful instrument for the defence of their respective rights and interests, avoiding situations of *fait accompli*.

75. The Special Rapporteur noted that the Commission had included provisions on the settlement of disputes in much of its recent work, including in projects that did not follow the traditional model of draft articles, for example the work on peremptory norms of general international law (*jus cogens*). However, she acknowledged that dispute settlement mechanisms were especially linked to instruments of a normative nature and that the Commission had not yet decided whether it would recommend to the General Assembly that the draft articles become a treaty. Even if not, draft article 17 would be fully justified in the context of Part Four of the draft articles, which was dedicated to procedural provisions and safeguards.

76. Concerning good practices, the Special Rapporteur recalled that, in the seventh report, she had raised the possibility of incorporating into the draft articles some references to good practices, the adoption of which could be recommended to States. The practices included, in particular, a high-level national authority taking the decisions regarding the determination and application of immunity and States drafting manuals or guides for the use of State bodies involved in the process of determining and applying immunity. The Special Rapporteur explained that that approach was due to the finding that, in a number of cases, the competent State authorities were not familiar with the special problems raised by immunity in international law, its relationship with the fundamental principles of international law, or the influence that decisions on the immunity of a foreign State official might have on the international relations of the forum State.

77. In the debate in the Commission at its seventy-first session, several members had addressed the issue of good practices, and the Special Rapporteur recalled that the opinions expressed differed widely. One proposal had been to transform Part Four of the draft articles into an annex that could be recommended to States as good practices. The Special Rapporteur did not consider that form appropriate. Other members had expressed the view that the inclusion of good practices in the draft articles would not be useful. A third group had considered that, while the inclusion of good practices could be useful, it would take a long time to be drafted and would delay the completion of the work of the Commission on the topic.

78. The Special Rapporteur also noted that only one State had replied to the request in the report of the Commission on the work of its seventy-first session for information "on the existence of manuals, guidelines, protocols or operational instructions addressed to State officials and bodies that are competent to take any decision that may affect foreign officials

[323] The draft article proposed by the Special Rapporteur reads as follows:

"Draft article 17
Settlement of disputes

1. If, following consultations between the forum State and the State of the official, there remain differences with regard to the determination and application of immunity, the two States shall endeavour to settle the dispute as soon as possible through negotiations.

2. If no negotiated solution is reached within a reasonable period of time, which may not exceed [6] [12] months, either the forum State or the State of the official may suggest to the other party that the dispute be referred to arbitration or to the International Court of Justice.

3. If the dispute is referred to arbitration or to the International Court of Justice, the forum State shall suspend the exercise of its jurisdiction until the competent organ issues a final ruling."

and their immunity from criminal jurisdiction in the territory of the forum State."[324] The reply of that State had been that it had no such guide.

79. In view of the considerations expressed, the Special Rapporteur explained that the eighth report contained no specific proposal on recommended good practices. This did not, however, prevent the practices she had identified from being included in the draft articles, either in Part Four, or in the general commentary.

2. Summary of the debate

(a) General comments

80. Members commended the Special Rapporteur for her extensive work on the eighth report, which they considered provided a clear, well-researched, succinct and comprehensive treatment of the questions of the relationship between the topic and international criminal jurisdiction, the possibility of adding a dispute settlement clause and recommended good practices. Members expressed appreciation for her organization of several rounds of informal consultations, both before and during the session. It was noted that the informal consultations had enabled the Drafting Committee to progress in its work at the current session.

81. It was recalled that the Special Rapporteur had now completed her plan of work on the topic, including the additional questions dealt with in the eighth report. A number of members expressed the hope that the Commission would complete its first reading either at the present session or during the quinquennium. The importance of giving States an opportunity to comment on a full set of draft articles at the conclusion of the first reading was emphasized. It was also noted that the topic had been on the current programme of work of the Commission since 2007, making it one of the longest-running topics before the Commission. It was considered that the time that the Commission had taken to work on the topic reflected its complexities and the controversial nature of some of its fundamental aspects. In that respect, it was noted that States had called upon the Commission to come together on a way forward on the topic. In that connection, a number of members suggested that the Commission would need to overcome the divergent views of its members on draft article 7 before completing its first reading on the topic. The need to consider the question of inviolability and the outstanding definitions in draft article 2 (formerly draft article 3) was also recalled.

(b) Specific comments

Draft article 18

82. Members agreed that any question of immunity before international criminal tribunals was outside the scope of the present topic. Several members noted that immunity before a particular international criminal tribunal was governed by the instrument establishing its respective legal regime. Nevertheless, a number of members considered it important for the Commission to address the relationship specifically in the draft articles. It was noted that the two fields of law shared the important goals of promoting accountability and preventing impunity for the most serious crimes under international law. The point was made that international criminal courts must often rely on States to exercise their jurisdiction. Several members expressed the importance of avoiding casting a shadow on the interpretation and application of the substantive and institutional norms of international criminal law. In particular, the importance of the obligation of States parties to the Rome Statute to cooperate with the International Criminal Court and the cooperation obligations of States under Security Council resolutions 955 (1994) and 827 (1993) was recalled. It was also noted by some members that, in its past practice, the Security Council, acting under Chapter VII of the Charter of the United Nations, had created horizontal obligations for States to assist in criminal investigations by other States. However, a number of members also emphasized the

[324] *Official Records of the General Assembly, Seventy-fourth Session, Supplement No. 10* (A/74/10), para. 29.

importance that the draft article be written in a way that would apply equally to States parties and non-parties to the Rome Statute of the International Criminal Court.

83. Several members supported the inclusion of draft article 18, sharing the view of the Special Rapporteur that a without prejudice clause would be useful to address the relationship of the draft articles with the rules governing the functioning of international criminal tribunals. It was considered that the draft articles made clear that they neither applied to nor addressed the autonomous regimes of international criminal tribunals. It was suggested that draft article 18 would clarify to States that the draft articles did not impact any other obligations that States could have previously accepted or undertaken. It was also noted that the Commission had frequently used without prejudice clauses in its previous work, and that they had served to delimit the scope of a topic rather than create hierarchical relationships.

84. A number of other members opposed the adoption of draft article 18. The view was expressed that the potential overlap between national and international jurisdictions was not sufficient to create a relationship between them. Some members considered that the relationship between the topic and international criminal tribunals had been made clear in draft article 1, paragraph 1, and in the commentary. A number of members also doubted that the draft articles, if adopted without draft article 18, could undermine developments in international criminal law. Concern was expressed that a without prejudice clause could be interpreted as creating a hierarchical relationship between the norms governing international criminal tribunals and the law of immunity of State officials from national courts. It was also noted that to give precedence to the jurisdiction of the International Criminal Court over the jurisdictions of national courts would be contrary to the principle of complementarity. It was emphasized that a provision on the relationship between the topic and international criminal tribunals should not create an exception to immunity that did not exist under customary international law. A number of members emphasized that, while States could agree in their relations with each other not to recognize immunities, those States could not extend those rules to other States. With respect to authorizations by the Security Council, the need for close attention to the text of such authorizations to determine their content was recalled. It was noted that previous instruments relating to national jurisdiction over international crimes, including the draft articles on prevention and punishment of crimes against humanity and the International Convention for the Protection of All Persons from Enforced Disappearance,[325] did not contain similar without prejudice clauses. Additionally, a number of members suggested that the complexities of the consideration of draft article 18 could cause unnecessary delays to the completion of the first reading on the topic.

85. Several members addressed the judgment of the Appeals Chamber of the International Criminal Court in the *Jordan Referral re Al-Bashir* case. Some members noted that the judgment had been badly reasoned and controversial. Accordingly, it was suggested by these members that it was important that a without prejudice clause should not be drafted in such a way as to endorse the judgment, adding that no link should be made between the judgment and draft article 18 in the commentary. On the contrary, some members did not agree with this characterization. A view was expressed that it was not for the Commission to sit in judgement over the Appeals Chamber of the International Criminal Court in the *Jordan Referral re Al-Bashir* case ruling in relation to a legal matter that the Chamber solely had the statutory competence to address. In any event, members generally agreed that the Commission does not need to and should not discuss the judgment in its work on the present topic.

86. With respect to the text of draft article 18, several specific proposals were made. To accommodate the existence of hybrid tribunals, which were neither entirely national nor entirely international in character, several members supported a proposal to refer to "internationalized criminal tribunals" instead of "international criminal tribunals". It was also proposed the reference to "the rules governing … international criminal tribunals" be supplemented with "and practices", drawing on the texts of savings clauses in the Vienna Convention on Diplomatic Relations and the Vienna Convention on Consular Relations.[326]

[325] New York, 20 December 2006, United Nations, *Treaty Series*, vol. 2716, No. 48088, p. 3.

[326] Vienna, 18 April 1961, *ibid.*, vol. 500, No. 7310, p. 95, and Vienna, 24 April 1963, *ibid*., vol. 596, No. 8638, p. 261, respectively.

Support was also voiced for an explicit reference to obligations resulting from decisions of the Security Council. Some members expressed concerns that the scope of the rules covered by draft article 18 was too broad or otherwise unclear. It was noted that the without prejudice clause proposed in draft article 18 had a larger scope than the relevant commentary to draft article 1, as the former referred to the "functioning" of international criminal tribunals and the latter referred to immunities before them. A proposal was made to refine the text to read: "[t]he present draft articles are without prejudice to the applicability of immunity before international criminal tribunals under the relevant constituent instruments establishing such international criminal tribunals." Another proposal was to make reference to States' pre-existing obligations under international law. Other members proposed that "jurisdiction" would be the appropriate term, considering that immunities did not exist before international criminal tribunals. In that regard, it was highlighted that the existence of multiple such jurisdictions should be accommodated in the text. It was also suggested that a clause providing that the draft articles "do not deal with" the question of international criminal tribunals would be preferable.

87. Regarding the placement of the proposed text, several members expressed their preference that the provision be included as a new paragraph 3 of draft article 1. That would, in the view of some members, highlight the relationship between the without prejudice clause already contained in draft article 1, paragraph 2, and draft article 18. Other members considered that either placement for the provision would be acceptable. It was emphasized that, in any event, the two provisions would have to be read together.

88. As the Special Rapporteur had not proposed a title for draft article 18, it was suggested that "Relationship with internationalized tribunals" could be adopted if the provision was retained as a standalone draft article. Other suggested titles included "Without prejudice", "Relationship to specialized treaty regimes", "Cases outside the scope of the present draft articles" and "Relationship between the present draft articles and instruments establishing international criminal tribunals."

Draft article 17 (Settlement of disputes)

89. Several members agreed with the inclusion of a draft article relating to the settlement of disputes. It was noted that a dispute resolution clause could be seen as a final procedural safeguard, building on draft articles 8 to 16. The procedural mechanisms proposed in the draft articles could be seen as a whole, intended to finely balance the interests of the forum State and the State of the official. It was noted that the inclusion of such a clause might be welcomed by States, some of which had been contemplating the establishment of an international mechanism to resolve disputes relating to immunity of State officials. Furthermore, on a practical level, several members noted that the inclusion of a dispute settlement clause on first reading would invite potentially useful comments from States. However, the view was also expressed that a dispute resolution clause would be an inappropriate addition to the draft articles in general. In particular, it was suggested that States might be hesitant to commit to a mechanism that could be seen as a restriction of their respective exercise of national criminal jurisdiction.

90. A number of members expressed the view that a dispute settlement clause would only be relevant if the draft articles were intended to become a treaty. Some members considered that the inclusion of a dispute resolution clause did not depend on the nature of the final outcome of the work of the Commission. It was pointed out that it could not yet be ruled out that the draft articles might become a treaty, and it was therefore suggested that a dispute resolution clause would be appropriate. Several members saw a need for more clarity on the intended purpose of the provision, so as to determine its appropriate formulation. In the view of some members, a typical compromissory clause would be more appropriate were the draft articles to become a treaty. If the draft articles were not intended to become a treaty, however, a more general clause regarding procedural recommendations would be appropriate.

91. A number of members considered that provisions relating to dispute settlement adopted by the Commission in its recent work on other topics could serve as models for that provision. In particular, draft conclusion 21 of the draft conclusions on peremptory norms of

general international law (*jus cogens*)[327] and draft article 15 of the draft articles on prevention and punishment of crimes against humanity[328] were cited: the former was noted as a potential model for procedural recommendations to States; the latter as a good model of an effective compromissory clause. However, a number of members recommended the omission under the present draft articles of paragraphs 3 and 4 of draft article 15 of the draft articles on prevention and punishment of crimes against humanity, concerning reservations to dispute settlement. The view was also expressed that draft conclusion 21 would not be an appropriate model as the work of the Commission on peremptory norms of general international law (*jus cogens*) had not yet been finalized. It was also recalled that draft conclusion 21 had been motivated by the particular negotiating history of article 53 of the Vienna Convention on the Law of Treaties,[329] which did not apply to the present topic.

92. Several members expressed views concerning the means of dispute settlement contained in draft article 17. It was noted that the draft article focuses on negotiation, arbitration and judicial settlement, without reference to the other means of peaceful settlement of disputes set forth in Article 33 of the Charter of the United Nations. A number of members supported adding additional means to the draft article. It was suggested that expanding the choice of means would enable closer alignment of the provision with State practice. Part XV of the United Nations Convention on the Law of the Sea[330] was cited as a potential model.

93. The importance was also emphasized of highlighting the obligation of all States under Articles 2, paragraph 3, and 33 of the Charter to settle any differences between them by peaceful means. A number of members highlighted the importance of the freedom of States to choose the means of dispute resolution. It was suggested that either an additional paragraph making express reference to the principle could be incorporated in the draft article or that the point could be explained in the commentary. It was also noted that, rather than being contrary to the principle of free choice of means, draft article 17 could be seen as an exercise of such freedom.

94. With respect to paragraph 1, some members requested further clarification about the distinction between consultations and negotiations. It was proposed that paragraph 1 could be amended to add “through any other means of their own choosing” to “negotiations”. It was suggested to change “as soon as possible” to “as soon as practicable”, to allow States an appropriate degree of flexibility. Alternatively, the addition of time limits for consultations and negotiations was proposed, in order to facilitate the resolution of disputes.

95. Regarding paragraph 2, the view was expressed that it was not clear whether recourse to judicial or arbitral dispute resolution was intended to be compulsory. Some members supported using compulsory language, making draft article 17 a compromissory clause. However, others preferred the current language. It was suggested that, if the provision were to serve as a reminder to States, it should be of a general nature. Thus, some members expressed the view that including a time limit of either 6 or 12 months would only make sense if the provision were made compulsory. It was also stated that, in view of the sensitivities involved in disputes regarding immunity, even 6 months might be too long a delay. Clarification was requested as to whether a dispute could be referred to judicial or arbitral settlement before the expiration of the 6- or 12-month period, for example if negotiations had no reasonable prospect of success. A number of members suggested reference to additional judicial forums, including, where appropriate, the International Tribunal for the Law of the Sea and an eventual African Court of Justice and Human Rights. It was also proposed to add conciliation, mediation and the use of good offices to the list of available means. A number of members proposed that draft article 17 should clarify the consequences if a State did not accept another State’s invitation to dispute settlement. Several members also expressed the view that the creation of a new standing body to deal with disputes regarding immunity would not be advisable.

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[327] *Official Records of the General Assembly, Seventy-fourth Session, Supplement No. 10* (A/74/10), para. 56.

[328] *Ibid.*, para. 44.

[329] Vienna, 23 May 1969, United Nations, *Treaty Series*, vol. 1155, No. 18232, p. 331.

[330] Montego Bay, 10 December 1982, *ibid.*, vol. 1833, No. 31363, p. 3.

96. A number of members supported paragraph 3 of draft article 17. However, some members expressed doubts regarding the provision. It was noted that existing treaties relating to immunities did not provide for the suspension of domestic proceedings pending inter-State dispute resolution. A view was expressed that the suspension of national proceedings pending international dispute settlement would be particularly deferential to the State of the official. Some members considered that the draft article failed to address the situation of the State official whose immunity was being examined. It was proposed that the draft article could instead proscribe the further development of the criminal procedure, leaving open the question of continued detention. Several members suggested that the question of suspension should be treated on a case-by-case basis by the court or arbitral tribunal in the context of provisional measures. It was noted that, in past cases where claims relating to the immunity of State officials had been raised before the International Court of Justice, the Court had not indicated provisional measures ordering the suspension of domestic proceedings. It was also noted that it would be necessary to ensure that domestic legal systems had provisions to give effect to any suspension. Additionally, a number of members suggested that the draft article should specify the effect for the domestic proceedings of an eventual decision of the International Court of Justice or arbitral tribunal. It was also suggested that the dispute resolution clause might establish a form of preliminary reference procedure, to allow national courts to seek guidance from a third-party dispute settlement mechanism.

97. It was noted that there was a risk that draft article 17 as proposed could interfere with existing compromissory clauses. The addition of a without prejudice clause to address that was proposed.

98. With respect to the title of the draft article, it was suggested that "procedural requirements" might be a more appropriate title for the provision, because "settlement of disputes" suggested the creation of a binding obligation on States.

Recommended good practices

99. The members generally agreed with the Special Rapporteur that there was no need to formulate new proposals with respect to recommended good practices. While a number of members supported the idea to reflect good practices in principle, some considered that such inclusion would not be consonant with the form of the draft articles. Other members also considered that to work extensively on recommended good practices would unnecessarily delay the conclusion of the Commission's first reading on the topic. The potential difficulty of developing a set of good practices that would apply easily to diverse national legal systems was also noted. Several members expressed their support for the proposal of the Special Rapporteur to address the good practices that could already be identified in the context of either those draft articles already before the Commission or, more likely, in the commentaries. It was also suggested that States' recommended good practices could be inferred from their comments, so no direct mention of the practices would be necessary in the work of the Commission.

3. Concluding remarks of the Special Rapporteur

100. The Special Rapporteur expressed her appreciation to the members for their comments on the eighth report. In her view, the comments, observations, criticisms and suggestions of members would contribute to the advancement of the work of the Commission.

101. Responding first to the concerns expressed about the development of the work on the topic, the Special Rapporteur noted that several substantive issues were pending before the Commission that would require an additional effort to successfully address before adopting the draft articles on first reading. She noted that some members had mentioned draft article 7 on exceptions to immunity *ratione materiae* in that context. She emphasized, however, that the Commission was making efficient progress in addressing a matter that gave rise to legal difficulties and political sensitivities. That progress was due to a large degree to a workplan and a methodology that had received broad support in the Commission during the current and previous quinquennia. She expressed her confidence that the Commission would be able to resolve the problems, which inevitably arise in the process of progressive development and codification of international law, in line with its characteristic spirit of collegiality.

102. With respect to the future outcome of the Commission's work on the topic, the Special Rapporteur was of the view that the topic had been developed in the form of draft articles, whose purpose was to offer States a proposal on the general regulation of the topic, in accordance with the mandate of the Commission to promote the progressive development and codification of international law. She saw no reason to change the format of the work of the Commission at the current stage, especially in the light of the normative dimension of the work, and expressed her belief that the Commission shared that opinion. For that reason, the work of the Commission on the topic would take the form of draft articles, regardless of whether the Commission recommended on second reading that the General Assembly use them as the basis for a possible treaty. In her view, the nature of the instrument being prepared and the potential recommendation to be made to the General Assembly on further treatment of the draft articles were two issues that should remain separate.

103. With respect to draft article 18, the Special Rapporteur remarked that the statements of members, while revealing diverse opinions, reflected the importance of the issue.

104. Regarding the scope of the draft articles, the Special Rapporteur recalled that a number of members considered it unnecessary for the Commission to examine the relationship between the topic and international criminal tribunals, as the issue was outside the scope of the topic. However, she also noted that the majority of members had spoken in favour of examining the issue and retaining draft article 18. The Special Rapporteur agreed with the latter approach and considered that it would be difficult to justify the purposeful exclusion of a reference to the autonomy of the regimes applicable to international criminal tribunals in the light of the evolution of international law. That was especially so considering the number of cases in practice in which the issue of immunity from foreign criminal jurisdiction had been raised in connection with the same crimes that fell within the jurisdiction of international criminal tribunals. To acknowledge that connection and to formally declare the autonomy of the legal regimes applicable to such courts would not prejudice the scope of the topic and would allow the Commission to avoid entering into the debate on immunity before national criminal courts and international criminal tribunals.

105. Concerning the judgment of the International Criminal Court in the *Jordan Referral re Al-Bashir* case, the Special Rapporteur recalled that some members expressed opposition to draft article 18 because of concerns that it had a direct connection to the Court's judgment and could be read as validation or support for it. The Special Rapporteur did not think such concerns were justified. While she had waited for the International Criminal Court to issue its judgment before addressing the question, she had always reserved the right to return to the question of the relationship between the topic and international criminal tribunals. As she had already indicated in 2019, it was not necessary for the Commission to consider the judgment, as it was not relevant to the topic. For that reason, her reference to the judgment in the eighth report was limited to recalling the main conclusions of the judgment and explaining why it was irrelevant to the work of the Commission. She reiterated her view that draft article 18 could not be viewed as validating, endorsing or supporting the judgment of the International Criminal Court and was confident that the Drafting Committee would take the concerns of members in mind when considering the draft article.

106. Additionally, the Special Rapporteur noted that, while several members had seized upon the phrasing in the English translation of the eighth report the reception of the judgment "has not been kind",[331] in her view a preferable translation would have been "has been contentious".

107. On the question of the effect of the proposed without prejudice clause, the Special Rapporteur noted the view expressed that the text proposed for draft article 18 would amount to a recognition that the rules governing the functioning of international criminal tribunals were hierarchically superior to those governing the immunity of State officials from foreign criminal jurisdiction. The Special Rapporteur shared the view that the conventional norms governing an international criminal tribunal were generally only applicable to the States parties to the relevant convention, but disagreed that draft article 18 would in any way affect that principle. She recalled that the Commission had frequently used without prejudice

[331] A/CN.4/739, para. 23.

clauses in its work and that the Commission had not understood such clauses to give rise to hierarchical relationships. Rather, she agreed with the members who considered that draft article 18 merely separated different legal regimes whose validity and separate fields of application were intended to be preserved.

108. Concerning the placement of draft article 18, the Special Rapporteur noted that practically all of the members who supported the inclusion of draft article 18 were of the view that the provision would be best included as draft article 3, paragraph 1. That placement was more appropriate because draft article 18 was closely related to the scope of the draft articles and could complement the without prejudice clause contained in draft article 1, paragraph 2. The Special Rapporteur expressed her intention to make appropriate proposals to the Drafting Committee in that regard.

109. In response to specific drafting proposals made by members, the Special Rapporteur underscored in particular the suggestion to refer to "internationalized" rather than "international" criminal tribunals, but considered that the study of all such proposals would be more appropriately left to the Drafting Committee.

110. With respect to draft article 17, the Special Rapporteur emphasized that the proposal to include a draft article dedicated to dispute settlement had received support from a majority of Commission members. She also noted that some members had linked the inclusion of a draft article on dispute settlement to the idea that the final outcome of the work of the Commission would be a treaty. Others, however, had considered that a dispute settlement provision could also be understood as an extension of the procedural guarantees included in Part Four of the draft articles and that it would therefore be appropriate to include such a clause regardless of the final outcome of the work. Draft article 17 corresponded to the latter perspective, which also explained the placement of the provision directly after the other provisions proposed in Part Four. Nevertheless, the Special Rapporteur agreed that the final outcome of the work of the Commission could be relevant to the content of draft article 17. A traditional compromissory clause could be more appropriate for a draft treaty, and a provision offering guidance to States on how to resolve a dispute would be more appropriate if the Commission did not intend to propose a treaty. The Special Rapporteur had not intended for the draft article to become a compromissory clause but was open to discussing the observations and suggestions of members in the Drafting Committee. She also recalled that, regardless of the final decision of the Commission on the nature of its work on the topic, it would be useful to include a dispute resolution clause at first reading to allow for feedback thereon from States.

111. With respect to the means of dispute resolution included in draft article 17, the Special Rapporteur took note of proposals to include other means of dispute settlement or other judicial forums in the draft article. However, she considered that the provision was intended to provide a simple and useful model for dispute settlement. While it was obvious that States could use any other means of dispute settlement, it would not add value to reiterate that list of choice of means in the provision. The Special Rapporteur was nevertheless open to the possibility of including other specific means that would be particularly useful for the purpose pursued in draft article 17. She also considered it appropriate to limit the reference to judicial means to the International Court of Justice, in view of the general approach of the draft articles. With respect to the reference to arbitration, the Special Rapporteur explained that a general reference was appropriate to respect the principle of free choice of means, while it was obvious from the context that the reference pertained to inter-State arbitration. The Special Rapporteur also took note of the view shared by members that it would not be useful to create a specialized body.

112. Concerning the characteristics of the proposed dispute settlement mechanism and in response to a question raised in the debate, the Special Rapporteur explained that her proposal was structured in three phases: consultation, negotiation and judicial or arbitral settlement. Noting that consultations and negotiations might overlap, she clarified that the two were distinguished by the level of formality and by the particular aim of negotiation to find a solution bilaterally. The Special Rapporteur also noted the points raised by members relating to the suspension of the exercise of national jurisdiction should the States concerned decide to submit a dispute to arbitration or to the International Court of Justice. However, she explained that the provision was intended to serve as a safeguard for the State of the official

against abusive or politically motivated prosecutions. She noted that it would be necessary to take into account the need to guarantee an adequate balance between the protection of the interests of the forum State and those of the State of the official, in order to avoid a *fait accompli* that could deprive the forum State of the right to exercise criminal jurisdiction or the State of the official of immunity. With respect to the issues raised concerning the legal effect of the outcome of a dispute settlement mechanism in the legal order of the forum State, the Special Rapporteur expressed her view that the issue was important and should be considered by the Drafting Committee, along with the practical consequences that might arise from the optional nature of recourse to the International Court of Justice or to arbitration.

113. Regarding the question of good practices, the Special Rapporteur noted that the members had been practically unanimous in their support of her proposal not to include a provision on the question in the draft articles. She indicated her intention, in line with the suggestion of some members, to include reference to the examples of good practices in the commentary that she would submit to the Commission.

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

1. Text of the draft articles

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

Immunity of State officials from foreign criminal jurisdiction

Part One
Introduction

Article 1
Scope of the present draft articles

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

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

Article 2
Definitions

For the purposes of the present draft articles:

…

(*e*) "State official" means any individual who represents the State or who exercises State functions;

(*f*) an "act performed in an official capacity" means any act performed by a State official in the exercise of State authority;

Part Two
Immunity *ratione personae**

Article 3
Persons enjoying immunity *ratione personae*

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

* The Commission is considering the procedural provisions and safeguards applicable to the present draft articles in Part Four.

Article 4
Scope of immunity *ratione personae*

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

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

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

Part Three
Immunity *ratione materiae***

Article 5
Persons enjoying immunity *ratione materiae*

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

Article 6
Scope of immunity *ratione materiae*

1. State officials enjoy immunity *ratione materiae* only with respect to acts performed in an official capacity.

2. Immunity *ratione materiae* with respect to acts performed in an official capacity continues to subsist after the individuals concerned have ceased to be State officials.

3. Individuals who enjoyed immunity *ratione personae* in accordance with draft article 4, whose term of office has come to an end, continue to enjoy immunity with respect to acts performed in an official capacity during such term of office.

Article 7
Crimes under international law in respect of which immunity *ratione materiae* shall not apply

1. Immunity *ratione materiae* from the exercise of foreign criminal jurisdiction shall not apply in respect of the following crimes under international law:

(*a*) crime of genocide;

(*b*) crimes against humanity;

(*c*) war crimes;

(*d*) crime of *apartheid*;

(*e*) torture;

(*f*) enforced disappearance.

2. For the purposes of the present draft article, the crimes under international law mentioned above are to be understood according to their definition in the treaties enumerated in the annex to the present draft articles.

Part Four***

Article 8 *ante*
Application of Part Four

The procedural provisions and safeguards in this Part shall be applicable in relation to any criminal proceeding against a foreign State official, current or former,

** The Commission is considering the procedural provisions and safeguards applicable to the present draft articles in Part Four.

*** The Commission has yet to adopt the title of this part.

that concerns any of the draft articles contained in Part Two and Part Three of the present draft articles, including to the determination of whether immunity applies or does not apply under any of the draft articles.

Article 8
Examination of immunity by the forum State

1. When the competent authorities of the forum State become aware that an official of another State may be affected by the exercise of its criminal jurisdiction, they shall examine the question of immunity without delay.

2. Without prejudice to paragraph 1, the competent authorities of the forum State shall always examine the question of immunity:

(*a*) before initiating criminal proceedings;

(*b*) before taking coercive measures that may affect an official of another State, including those that may affect any inviolability that the official may enjoy under international law.

Article 9
Notification of the State of the official

1. Before the competent authorities of the forum State initiate criminal proceedings or take coercive measures that may affect an official of another State, the forum State shall notify the State of the official of that circumstance. States shall consider establishing appropriate procedures to facilitate such notification.

2. The notification shall include, *inter alia*, the identity of the official, the grounds for the exercise of criminal jurisdiction and the competent authority to exercise jurisdiction.

3. The notification shall be provided through diplomatic channels or through any other means of communication accepted for that purpose by the States concerned, which may include those provided for in applicable international cooperation and mutual legal assistance treaties.

Article 10
Invocation of immunity

1. A State may invoke the immunity of its official when it becomes aware that the criminal jurisdiction of another State could be or is being exercised over the official. Immunity should be invoked as soon as possible.

2. Immunity shall be invoked in writing, indicating the identity of and the position held by the official, and the grounds on which immunity is invoked.

3. Immunity may be invoked through diplomatic channels or through any other means of communication accepted for that purpose by the States concerned, which may include those provided for in applicable international cooperation and mutual legal assistance treaties.

4. The authorities before which immunity has been invoked shall immediately inform any other authorities concerned of that fact.

Article 11
Waiver of immunity

1. The immunity from foreign criminal jurisdiction of the State official may be waived by the State of the official.

2. Waiver must always be express and in writing.

3. Waiver of immunity may be communicated through diplomatic channels or through any other means of communication accepted for that purpose by the States concerned, which may include those provided for in applicable international cooperation and mutual legal assistance treaties.

4. The authorities to which the waiver has been communicated shall immediately inform any other authorities concerned that immunity has been waived.

5. Waiver of immunity is irrevocable.

Article 12 [13]****
Requests for information

1. The forum State may request from the State of the official any information that it considers relevant in order to decide whether immunity applies or not.

2. The State of the official may request from the forum State any information that it considers relevant in order to decide on the invocation or the waiver of immunity.

3. Information may be requested through diplomatic channels or through any other means of communication accepted for that purpose by the States concerned, which may include those provided for in applicable international cooperation and mutual legal assistance treaties.

4. The requested State shall consider any request for information in good faith.

Annex

List of treaties referred to in draft article 7, paragraph 2

Crime of genocide

- Rome Statute of the International Criminal Court, 17 July 1998, article 6;
- Convention on the Prevention and Punishment of the Crime of Genocide, 9 December 1948, article II.

Crimes against humanity

- Rome Statute of the International Criminal Court, 17 July 1998, article 7.

War crimes

- Rome Statute of the International Criminal Court, 17 July 1998, article 8, paragraph 2.

Crime of *apartheid*

- International Convention on the Suppression and Punishment of the Crime of *Apartheid*, 30 November 1973, article II.

Torture

- Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 10 December 1984: article 1, paragraph 1.

Enforced disappearance

- International Convention for the Protection of All Persons from Enforced Disappearance, 20 December 2006, article 2.

2. Text of the draft articles and commentaries thereto provisionally adopted by the Commission at its seventy-second session

115. The text of the draft articles and commentaries thereto provisionally adopted by the Commission at its seventy-second session is reproduced below.

Article 8 *ante*
Application of Part Four

The procedural provisions and safeguards in this Part shall be applicable in relation to any criminal proceeding against a foreign State official, current or former, that concerns any of the draft articles contained in Part Two and Part Three of the

**** The number between square brackets indicates the original number of the draft article in the report of the Special Rapporteur.

present draft articles, including to the determination of whether immunity applies or does not apply under any of the draft articles.

Commentary

(1) Draft article 8 *ante* is the first of the draft articles in Part Four. Its purpose is to define the scope of application of Part Four in connection with Part Two and Part Three, which deal respectively with immunity *ratione personae* and immunity *ratione materiae* of State officials, current or former, from foreign criminal jurisdiction. By referring to the links between Part Four, on one hand, and Part Two and Part Three, on the other, draft article 8 *ante* takes into account the notion of balance reflected in the previous work of the Commission, which included a footnote to the titles of Part Two and Part Three indicating that "[a]t its seventieth session, the Commission will consider the procedural provisions and safeguards applicable to the present draft articles".[332]

(2) As Part Four is an integral part of the draft articles, its provisions are intended to be generally applicable to the other provisions of the draft articles. There was nonetheless a divergence of views among the members of the Commission with regard to the scope of Part Four, in particular its relationship to draft article 7, which was provisionally adopted by the Commission at its sixty-ninth session (2017).

(3) In the view of some members, the procedural guarantees and safeguards contained in Part Four applied only when immunity might exist, which seemingly was not the case with respect to the crimes listed in draft article 7, as it was couched in absolute terms, stating that immunity *ratione materiae* "shall not apply in respect of the following crimes under international law". On the contrary, several members supported a broader interpretation of the draft articles proposed by the Special Rapporteur and envisioned a role for procedural safeguards and guarantees even with respect to situations where draft article 7 was engaged.

(4) In light of this divergence of views, the Commission provisionally adopted draft article 8 *ante*, which expressly states that all the procedural provisions and safeguards in Part Four of the draft articles "shall be applicable in relation to any criminal proceeding against a foreign State official, current or former, that concerns any of the draft articles contained in Part Two and Part Three of the present draft articles, including to the determination of whether immunity applies or does not apply under any of the draft articles". Draft article 8 *ante* does not prejudge and is without prejudice to the adoption of any additional procedural guarantees and safeguards, including whether specific safeguards apply to draft article 7.

(5) With the phrase "including to the determination of whether immunity applies or does not apply under any of the draft articles", the Commission has confirmed that Part Four, in its entirety, also applies to draft article 7. This is made especially clear by the reference to the determination of immunity, understood as the process for deciding whether immunity applies or does not apply, which is the subject of draft article 13, currently under consideration by the Drafting Committee. In determining the applicability of immunity *ratione materiae*, account should be taken both of the normative elements listed in draft articles 4, 5 and 6, as provisionally adopted by the Commission, and of the exceptions set out in draft article 7. In addition, under draft article 8 *ante*, all the procedural provisions and safeguards set out in Part Four must be respected in the process of determining whether exceptions are applicable.

(6) Although the Commission discussed a proposal to include an express reference to draft article 7 in draft article 8 *ante*, in order to ensure that the provisions and safeguards in Part Four would be understood to apply to it, the proposal was rejected in favour of a more

[332] The decision to include the footnote was taken at the Commission's sixty-ninth session (2017), when draft article 7 was provisionally adopted. See *Official Records of the General Assembly, Seventy-second Session, Supplement No. 10* (A/72/10), paras. 140–141. See, in particular, paragraph (9) of the commentary to draft article 7, which states that "in order to reflect the great importance attached by the Commission to procedural issues in the context of the present topic, it was agreed that the current text of the draft articles should include the following footnote: 'At its seventieth session, the Commission will consider the procedural provisions and safeguards applicable to the present draft articles.'"

general and neutral formulation referring to "the determination of whether immunity applies or does not apply under any of the draft articles".

(7) Part Four is applicable "in relation to any criminal proceeding against a foreign State official". The term "criminal proceeding" is used in draft article 8 *ante* to refer broadly to different steps that may be taken by the forum State in furtherance of the exercise of its criminal jurisdiction. In view of the differences in practice between States' various legal systems and traditions, it was not considered necessary to refer specifically to the nature of these steps, which may include both acts of the executive and acts performed by judges and prosecutors. In any event, the use of the term "criminal proceeding" should be reviewed in the final revision of the draft articles before their adoption on first reading, in particular to ensure that the use of both this term and the term "exercise of criminal jurisdiction", and their respective meanings, are consistent and systematic throughout the draft articles. Such a review should be carried out once the Commission has decided on the definition of the concept of "criminal jurisdiction", which is currently pending in the Drafting Committee.

(8) Draft article 8 *ante* uses the phrase "against a foreign State official, current or former". This reflects the need for there to be a connection between the foreign State official and the criminal proceeding that the forum State seeks to carry out and in respect of which immunity might be applicable. The express mention of the temporal situation in which the official may be in his or her relationship with the foreign State (current or former) is not intended to alter the temporal scope of immunity from criminal jurisdiction, since, as the Commission points out in the commentary to draft article 2 (*e*), this element is irrelevant to the definition of "official" and "[t]he temporal scope of immunity *ratione personae* and of immunity *ratione materiae* is the subject of other draft articles".[333] The words "current or former" should therefore be understood in the light of the provisions of draft article 4, for immunity *ratione personae*, and of draft article 6, for immunity *ratione materiae*. The term "foreign State official" should also be reviewed before the draft articles are adopted on first reading, in order to decide whether the term to be used consistently and systematically should be this one or the term "official of another State", which is used in other draft articles.

Article 8
Examination of immunity by the forum State

1. When the competent authorities of the forum State become aware that an official of another State may be affected by the exercise of its criminal jurisdiction, they shall examine the question of immunity without delay.

2. Without prejudice to paragraph 1, the competent authorities of the forum State shall always examine the question of immunity:

(*a*) before initiating criminal proceedings;

(*b*) before taking coercive measures that may affect an official of another State, including those that may affect any inviolability that the official may enjoy under international law.

Commentary

(1) Draft article 8 concerns the obligation to examine the question of immunity from criminal jurisdiction when the authorities of the forum State seek to exercise or do exercise criminal jurisdiction over an official of another State. "Examination of immunity" refers to the measures necessary to assess whether or not an act of the authorities of the forum State involving the exercise of its criminal jurisdiction may affect the immunity from criminal jurisdiction of officials of another State. Thus, "examination" of immunity is a preparatory act that marks the beginning of a process that will end with a determination of whether or not immunity applies. Although closely related, "examination" and "determination" of immunity are distinct categories. The "determination of immunity" will be dealt with in a separate draft article that has not yet been considered by the Drafting Committee.

[333] *Yearbook … 2014*, vol. II (Part Two), p. 145, para. (12) of the commentary to draft article 2 (*e*).

(2) Draft article 8 contains two paragraphs that define, respectively, a general rule (para. 1) and a special rule that would be applicable to specific situations (para. 2). In both cases the obligation to examine the question of immunity is attributed to the "competent authorities" of the forum State. The Commission decided not to specify which State organs fall into this category, since the identification of such organs will depend on the time when the question of immunity arises and on the legal system of the forum State. Since such organs may differ from one domestic legal system to another, it was considered preferable to use a term that encompasses organs of different types, including executive organs, police, prosecutors and courts. Determining which State organs fall within the category of "competent authorities" for the purposes of the present draft article is a matter to be considered on a case-by-case basis.

(3) The general rule contained in paragraph 1 defines the obligation of the competent authorities of the forum State to "examine the question of immunity without delay" when they "become aware that an official of another State may be affected by the exercise of its criminal jurisdiction".

(4) The Commission deemed it more appropriate to use the term "official of another State" rather than "foreign official". This term is used as an equivalent of "foreign State official", which is used in draft article 8 *ante*, and "State official", which is used in the title of the topic (in the plural) and whose definition is contained in draft article 2 (*e*) provisionally adopted by the Commission. This term thus covers any State official, regardless of rank, of whether he or she is covered by immunity *ratione personae* or immunity *ratione materiae*, and of whether he or she is still an official at the time when the question of immunity is to be examined. The term "official of another State" therefore includes any official who could benefit from immunity from foreign criminal jurisdiction in accordance with the provisions of Part Two and Part Three of the draft articles.

(5) The obligation to examine the question of immunity will arise only when an official of another State may be affected by the exercise of the criminal jurisdiction of the forum State. For the general rule, the Commission has used the expression "exercise of ... criminal jurisdiction", which it considered preferable to "criminal proceeding", an expression proposed by the Special Rapporteur that was considered too narrow. The term "exercise of criminal jurisdiction" is also used in draft articles 3, 5 and 7, although its scope is not defined in the commentaries thereto. It should be noted that the very concept of "criminal jurisdiction", which was included in the Special Rapporteur's second report,[334] has not yet been considered by the Drafting Committee. In any event, and subject to the definition of "criminal jurisdiction" to be adopted in due course by the Commission, for the purposes of draft article 8, "exercise of criminal jurisdiction" should be understood to mean such acts carried out by the competent authorities of the forum State as may be necessary to establish the criminal responsibility, if any, of one or several individuals. These acts may be of different types and are not limited to judicial acts, and may include governmental, police, investigative and prosecutorial acts.

(6) However, not all acts that may fall within the generic category "exercise of criminal jurisdiction" will give rise to an obligation to examine the question of immunity. Rather, such an obligation arises only when the official of another State may be "affected" by any of the acts in this category. As follows from the judgments of the International Court of Justice in the case concerning the *Arrest Warrant of 11 April 2000*[335] and in *Certain Questions of Mutual Assistance in Criminal Matters*,[336] a particular criminal procedure measure may affect immunity of a foreign official only if it hampers or prevents the exercise of the functions of that person by imposing obligations upon them. For example, the commencement of a preliminary investigation or institution of criminal proceedings, not only in respect of the alleged fact of a crime but also actually against the person in question, cannot be seen as a violation of immunity if it does not impose any obligation upon that person under the national

[334] *Yearbook ... 2013*, vol. II (Part One), document A/CN.4/661, pp. 41–42, paras. 36–42.

[335] See *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium), Judgment, I.C.J. Reports 2002*, p. 3, at p. 22, paras. 54 and 55.

[336] See *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France), Judgment, I.C.J. Reports 2008*, p. 177, at pp. 236-237, paras. 170 and 171.

law being applied. The forum State is also able to carry out at least the initial collection of evidence for this case (to collect witness testimonies, documents, material evidence, etc.), using measures which are not binding or constraining on the foreign official.

(7) The general rule set out in paragraph 1 attaches particular importance to the time at which the competent authorities of the forum State should examine the question of immunity, emphasizing that it should be done at an early stage, since otherwise the effectiveness of the institution of immunity could be undermined. Although treaties addressing various forms of immunity of State officials from foreign criminal jurisdiction have not included specific rules in this regard, the International Court of Justice has expressly stated that the question of immunity should be examined at an early stage and considered *in limine litis*.[337] With this in mind, the Commission decided to indicate explicitly the point at which examination of the question of immunity should begin, defining it as follows: "[w]hen the competent authorities of the forum State become aware that an official of another State may be affected by the exercise of its criminal jurisdiction". The phrase "[w]hen [they] become aware" follows, to some extent, the wording used by the Institute of International Law in its 2001 resolution on immunities from jurisdiction and execution of Heads of State and of Government in international law,[338] and is intended to emphasize that the question of immunity should be examined as soon as possible, without the need to wait until formal judicial proceedings have begun. To reinforce this idea, the phrase "without delay" has been used, contained in articles 36 and 37 of the Vienna Convention on Consular Relations.

(8) Paragraph 2 of draft article 8 sets out a special rule covering two particular cases in which the competent authorities of the forum State should examine the question of immunity. The special regime set out in this paragraph is framed as a "without prejudice" clause, in order to preserve the applicability of the general rule contained in paragraph 1. In this context, the words "without prejudice" are used to emphasize that the general rule applies in all circumstances and cannot be affected or prejudiced by the special rule contained in paragraph 2. The special rule in paragraph 2 is intended to draw the attention of the competent authorities of the forum State to their obligation to examine the question of immunity before taking any of the special measures set forth in this paragraph, if they have not done so earlier under the general rule. The use of the adverb "always" is intended to reinforce this idea.

(9) Under the special rule contained in paragraph 2, the competent authorities must always examine the question of immunity "before initiating criminal proceedings" (subparagraph (*a*)) and "before taking coercive measures that may affect an official of another State" (subparagraph (*b*)). The Commission selected these two cases as examples of acts that would always affect the official of another State and that, if they were to occur, could violate any immunity from foreign criminal jurisdiction that the official might enjoy.

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[337] This question was addressed by the International Court of Justice in the proceedings concerning the *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights*, in which the Court elucidated the applicability of the privileges and immunities set out in the Convention on the Privileges and Immunities of the United Nations (New York, 13 February 1946, United Nations, *Treaty Series*, vol. 1, No. 4, p. 15, and vol. 90, p. 327) in connection with the prosecution in Malaysia of the Special Rapporteur on the independence of judges and lawyers, who had been prosecuted for statements made in an interview. In this context, the Court – at the request of the United Nations Economic and Social Council – issued an advisory opinion in which it stated that "questions of immunity are ... preliminary issues which must be expeditiously decided *in limine litis*", and that this affirmation "is a generally recognized principle of procedural law", the purpose of which is to avoid "nullifying the essence of the immunity rule". Accordingly, the Court concluded by 14 votes to 1 "[t]hat the Malaysian courts had the obligation to deal with the question of immunity from legal process as a preliminary issue to be expeditiously decided *in limine litis*" (*Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights, Advisory Opinion, I.C.J. Reports 1999*, p. 62, at p. 88, para. 63, and p. 90, para. 67 (2) (*b*)).

[338] Article 6 of the resolution of the Institute of International Law states that "[t]he authorities of the State shall afford to a foreign Head of State the inviolability, immunity from jurisdiction and immunity from measures of execution to which he or she is entitled, as soon as that status is known to them" (*Yearbook of the Institute of International Law*, vol. 69 (Session of Vancouver, 2001), p. 747; available from the Institute's website: www.idi-iil.org, under "Resolutions").

The use of the adverb "before" is intended to reinforce the principle that immunity must always be examined as a preliminary issue *in limine litis*.

(10) The term "criminal proceedings" refers to the commencement of judicial proceedings brought for the purpose of determining the possible criminal responsibility of an individual, in this case an official of another State. This term is to be distinguished from the term "exercise of criminal jurisdiction", which, as noted above, has a broader meaning. The Commission preferred to use the expression "initiati[on] [of] criminal proceedings" rather than the terms "prosecution", "indictment" or "accusation", or the expressions "commencement of the trial phase" or "commencement of the oral proceedings", as these terms may have different meanings in different domestic legal systems. For this reason, it decided to use more general terminology encompassing any of the specific acts representing the initiation of criminal proceedings under the domestic law of the forum State. The identification of the time of "initiati[on] [of] criminal proceedings" as the moment at which, in any event, the question of immunity must be examined is consistent with international practice and jurisprudence. This does not mean, however, that the question of immunity cannot also be examined at a later stage if necessary, including at the appeal stage.

(11) The phrase "coercive measures that may affect an official of another State" refers to acts of the competent authorities of the forum State that are directed at the official and that may be carried out at any time as part of the exercise of criminal jurisdiction, regardless of whether or not criminal proceedings have been initiated. These are essentially *in personam* measures that may affect, *inter alia*, the official's freedom of movement, his or her appearance in court as a witness or his or her extradition to a third State. These measures do not necessarily imply that "criminal proceedings against the official" are taking place, but they may fall under the category "exercise of criminal jurisdiction". Since such measures may differ from one domestic legal system to another, it was considered preferable to use the general wording "coercive measures" to refer to "act of authority", which was used by the International Court of Justice in the case concerning the *Arrest Warrant of 11 April 2000*, and is inspired by the reasoning of the Court in *Certain Questions of Mutual Assistance in Criminal Matters*.[339]

(12) In practice, one of the most common coercive measures is the detention of the official. The need to examine the question of immunity before detention is ordered was asserted by the Special Court for Sierra Leone in the *Charles Taylor* case. In its decision of 31 May 2004, the Appeals Chamber stated: "[t]o insist that an incumbent Head of State must first submit himself to incarceration before he can raise the question of his immunity not only runs counter, in a substantial manner, to the whole purpose of the concept of sovereign immunity, but would also assume, without considering the merits, issues of exceptions to the concept that properly fall to be determined after delving into the merits of the claim to immunity".[340] The Commission therefore considered it necessary to address this issue in connection with the examination of immunity.

(13) With regard to this question, it should be noted that the scope of the draft articles is limited to immunity from foreign criminal jurisdiction and thus does not include the question of inviolability. However, while immunity from jurisdiction and inviolability are two distinct categories that are not interchangeable, it is nevertheless true that both are dealt with at the same time in various international treaties, such as the Vienna Convention on Diplomatic Relations,[341] which provides that "[t]he person of a diplomatic agent shall be inviolable [and] shall not be liable to any form of arrest or detention" (art. 29)[342] and that "[n]o measures of

[339] *Arrest Warrant of 11 April 2000* (see footnote 335 above), p. 22, para. 54; *Certain Questions of Mutual Assistance in Criminal Matters* (see footnote 336 above), pp. 236–237, para. 170.

[340] *Prosecutor v. Charles Ghankay Taylor*, Special Court for Sierra Leone, Appeals Chamber, Case No. SCSL-2003-01-I, decision on immunity from jurisdiction, 31 May 2004, para. 30. For the text of the decision, see the website of the Special Court: www.scsldocs.org, under "Documents", "Charles Taylor".

[341] Vienna Convention on Diplomatic Relations (Vienna, 18 April 1961), United Nations, *Treaty Series*, vol. 500, No. 7310, p. 95.

[342] Similar provisions can be found in the Convention on Special Missions (New York, 8 December 1969), *ibid.*, vol. 1400, No. 23431, p. 231, art. 29; and the Vienna Convention on the Representation

execution may be taken in respect of a diplomatic agent" (art. 31, para. 3).[343] In a similar vein, reference may be made to the resolution of the Institute of International Law on immunities from jurisdiction and execution of Heads of State and of Government in international law (arts. 1 and 4).[344]

(14) The Commission also took account of the fact that the detention of an official of another State may, in certain circumstances, affect immunity from jurisdiction. This is the reason for the last phrase of paragraph 2 (*b*) of the draft article, which "includes" among coercive measures "those that may affect any inviolability that the official may enjoy under international law". The phrase "that the official may enjoy under international law" is intended to draw attention to the fact that not every official of another State, by the mere fact of being an official, enjoys inviolability.

Article 9
Notification of the State of the official

1. Before the competent authorities of the forum State initiate criminal proceedings or take coercive measures that may affect an official of another State, the forum State shall notify the State of the official of that circumstance. States shall consider establishing appropriate procedures to facilitate such notification.

2. The notification shall include, *inter alia*, the identity of the official, the grounds for the exercise of criminal jurisdiction and the competent authority to exercise jurisdiction.

3. The notification shall be provided through diplomatic channels or through any other means of communication accepted for that purpose by the States concerned, which may include those provided for in applicable international cooperation and mutual legal assistance treaties.

Commentary

(1) Draft article 9 concerns the notification that the forum State must provide to another State to inform it that the forum State intends to exercise criminal jurisdiction over one of that State's officials.

(2) Since it is generally accepted that immunity from foreign criminal jurisdiction is granted to State officials for the benefit of the State, it is for the State, not the official, to decide on the invocation and waiver of immunity, and it is also for the State of the official to decide on the means by which to claim immunity for its official. However, in order for it to be able to exercise those powers, it must be aware that the authorities of another State intend to exercise their own criminal jurisdiction over one of its officials.

(3) The Commission has found that treaty instruments providing for some form of immunity of State officials from foreign criminal jurisdiction do not contain any rule imposing on the forum State an obligation to notify the State of the official of its intention to exercise criminal jurisdiction over the official, with the sole exception of article 42 of the Vienna Convention on Consular Relations.[345] The Commission also took account of the fact

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of States in Their Relations with International Organizations of a Universal Character (Vienna, 14 March 1975), United Nations, *Juridical Yearbook 1975* (Sales No. E.77.V.3), p. 87, or *Official Records of the United Nations Conference on the Representation of States in Their Relations with International Organizations, Vienna, 4 February–14 March 1975*, vol. II, *Documents of the Conference* (United Nations publication, Sales No. E.75.V.12), p. 207, document A/CONF.67/16, arts. 28 and 58. A more nuanced reference to this idea can be found in the Vienna Convention on Consular Relations, art. 41, paras. 1–2.

[343] Similar provisions can also be found in the Convention on Special Missions, art. 31, and the Vienna Convention on the Representation of States in Their Relations with International Organizations of a Universal Character, art. 30 and art. 60, para. 2.

[344] *Yearbook of the Institute of International Law*, vol. 69 (see footnote 338 above), pp. 745 and 747.

[345] Article 42 of the Convention reads as follows: "[i]n the event of the arrest or detention, pending trial, of a member of the consular staff, or of criminal proceedings being instituted against him, the

that the United Nations Convention on Jurisdictional Immunities of States and Their Property[346] assumes that the forum State must give notice of its intention to exercise jurisdiction over another State. To this end, article 22 of the Convention specifies the means by which "service of process by writ or other document instituting a proceeding against a State" must be effected. Although this provision corresponds to a model that differs from that of immunity from foreign criminal jurisdiction, service of process is undeniably indispensable for enabling the State to invoke its immunity. The provision can thus be taken into consideration, *mutatis mutandis*, for the purposes of the present draft article. With this in mind, the Commission decided to include notification among the procedural safeguards set out in Part Four of the draft articles.

(4) Notification is an essential requirement for ensuring that the State of the official receives reliable information on the forum State's intention to exercise criminal jurisdiction over one of its officials and, consequently, for enabling it to decide whether to invoke or waive immunity. At the same time, notification facilitates the opening of a dialogue between the forum State and the State of the official and thus becomes an equally basic requirement for ensuring the proper determination and application of the immunity of State officials from foreign criminal jurisdiction. The Commission therefore regards notification as one of the procedural safeguards set out in Part Four of the draft articles. The concepts of "notification" and "consultation" should not be conflated, since consultations take place at a later stage and are dealt with in draft article 15, which has yet to be considered by the Drafting Committee.

(5) Draft article 9 is divided into three paragraphs dealing, respectively, with the timing of the notification, the content of the notification and the means by which notification may be provided by the forum State.

(6) Paragraph 1 refers to the point in time at which notification should be provided. In view of the purpose of notification, it must be provided at an early stage, since otherwise it will not produce its full effects. However, the fact that notification may have unintended effects on the forum State's exercise of criminal jurisdiction, particularly at the earliest stages, cannot be overlooked. It was therefore considered necessary to strike a balance between the duty to notify the State of the official and the right of the forum State to carry out activities in the context of criminal jurisdiction that may affect multiple subjects and facts but will not necessarily affect the official of another State. To address this concern, the draft article identifies the following points in time as being critical for the provision of notification: (*a*) the initiation of criminal proceedings; and (*b*) the taking of coercive measures that may affect an official of another State. Notification must be provided prior to the occurrence of either of these two circumstances. Paragraph 1 of the present draft article has thus been aligned with draft article 8, paragraph 2 (*a*) and (*b*), so that the timing of the notification to the State of the official coincides with the special cases in which the competent authorities of the forum State must examine the question of immunity if they have not done so earlier. The expressions "criminal proceedings" and "coercive measures that may affect an official of another State" should therefore be understood in the sense already described in the commentary to draft article 8.

(7) As used in the present draft article, the term "official of another State" is equivalent to "State official" and should therefore be understood in accordance with the definition contained in draft article 2 (*e*) provisionally adopted by the Commission. As noted in the commentary to that draft article, the use of the term "State official" does not affect the temporal scope of immunity,[347] which is subject to the special rules applicable to immunity

receiving State shall promptly notify the head of the consular post. Should the latter be himself the object of any such measure, the receiving State shall notify the sending State through the diplomatic channel." The Vienna Convention on Diplomatic Relations, the Vienna Convention on the Representation of States in Their Relations with International Organizations of a Universal Character and the Convention on Special Missions do not contain any similar provisions.

[346] United Nations Convention on Jurisdictional Immunities of States and Their Property (New York, 2 December 2004), *Official Records of the General Assembly, Fifty-ninth Session, Supplement No. 49* (A/59/49), vol. I, resolution 59/38, annex.

[347] See *Yearbook … 2014*, vol. II (Part Two), p. 145, para. (12) of the commentary to draft article 2 (*e*).

ratione personae and immunity *ratione materiae*.[348] The commentary is equally relevant to the present draft article and, accordingly, the category "official of another State" includes any official of another State who may enjoy immunity in accordance with the provisions of Part Two and Part Three of the draft articles. The term "official of another State" may refer both to an official in active service at the time when the forum State seeks to exercise criminal jurisdiction and to a former official, provided that both may benefit from some form of immunity.

(8) The second sentence of paragraph 1 is addressed to States based on the understanding that some domestic systems may not have procedures in place to allow for communication between executive, judicial or prosecutorial authorities.[349] In such cases, compliance with the obligation to notify the State of the official of the initiation of criminal proceedings or the taking of coercive measures against one of its officials may be significantly hampered, especially since, in practice, communications relating to the question of immunity of an official of another State from foreign criminal jurisdiction often take place through diplomatic channels. The Commission therefore considered it necessary to draw the attention of States to this issue by including this final sentence in paragraph 1. However, bearing in mind as well the diversity of domestic legal systems and practices, the Commission opted for non-prescriptive wording that allows States to assess whether or not the above-mentioned procedures exist in their respective legal systems and, if not, to decide on their adoption. The verb "shall consider" has been used for this purpose.

(9) Paragraph 2 refers to the content of the notification. Given the purpose of the notification, while its content may vary from one case to another, it should always include sufficient information to enable the State of the official to form a judgment as to whether the immunity from which one of its officials might benefit should be invoked or waived. Although the Commission debated whether to include this paragraph, it ultimately opted to retain it as a useful means of ensuring that the forum State provides the State of the official with at least a minimum amount of relevant information. At the same time, a margin of discretion is left to the forum State, considering that different State legal systems and practices may have different rules on the permissibility of disclosing certain elements of information that may sometimes be available only to prosecutors or judges. Accordingly, paragraph 2 is intended to strike a balance between giving the forum State sufficient discretion in the exercise of its criminal jurisdiction and ensuring that it provides the State of the official with sufficient information. This is the reason for the use of the Latin adverb "*inter alia*" before the list of elements that must be included, in all cases, in the notification referred to in draft article 9.

(10) The information that must be included in the notification is of three types: (*a*) the identity of the official, (*b*) the grounds for the exercise of criminal jurisdiction and (*c*) the competent authority to exercise jurisdiction. The identity of the official is a basic element for enabling the State of the official to assess whether he or she is indeed one of its officials and to decide on the invocation or waiver of immunity. With regard to the substantive information to be included in the notification to the State of the official, the Commission took the view that limiting such information to "acts of the official that may be subject to the exercise of criminal jurisdiction", as originally proposed by the Special Rapporteur, was not sufficient. The phrase "grounds for the exercise of criminal jurisdiction" has therefore been used. This more general wording allows for the inclusion in the notification of not only factual elements relating to the official's conduct, but also information on the law of the forum State on which the exercise of jurisdiction would be based. Finally, the Commission deemed it appropriate to include, in the list of basic items of information, an indication of the authority competent to exercise jurisdiction in the specific case referred to in the notification. This reflects the fact that the State of the official may have an interest in identifying the organs responsible for deciding on the initiation of criminal proceedings or the adoption of coercive measures so that, as the case may be, it can contact them and make such arguments on immunity as it deems appropriate. Since the organs with competence to carry out this type of action and to

[348] See draft article 4, paragraphs 1 and 3 (immunity *ratione personae*), and draft article 6, paragraphs 2 and 3 (immunity *ratione materiae*).

[349] See the analysis of this issue in the Special Rapporteur's seventh report on immunity of State officials from foreign criminal jurisdiction (A/CN.4/729), paras. 121–126.

examine the question of immunity may differ from one domestic legal system to another, the generic term "competent authority" has been used, which may include judges, prosecutors, police or other governmental authorities of the forum State. The use of "competent authority" in the singular is explained by the fact that such an authority will already have been identified in the case to which the notification relates, but this does not mean that competence may not lie with more than one authority.

(11) Paragraph 3 deals with the means of communication that the forum State may use to transmit the notification to the State of the official. This issue has not been addressed in any of the international treaties dealing with one form or another of immunity of State officials from criminal jurisdiction. However, the United Nations Convention on Jurisdictional Immunities of States and Their Property specifies the means by which service of process by writ or other document instituting a proceeding against a State must be effected. Under article 22, paragraph 1, it "shall be effected: (*a*) in accordance with any applicable international convention binding on the State of the forum and the State concerned; or (*b*) in accordance with any special arrangement for service between the claimant and the State concerned, if not precluded by the law of the State of the forum; or (*c*) in the absence of such a convention or special arrangement: (i) by transmission through diplomatic channels to the Ministry of Foreign Affairs of the State concerned; or (ii) by any other means accepted by the State concerned, if not precluded by the law of the State of the forum".

(12) The Commission considered it useful to indicate, in the present draft article, the means of communication that the forum State may use to effect service. To this end, paragraph 3 sets out a model that includes "diplomatic channels" and "any other means of communication accepted for that purpose by the States concerned".

(13) Communication through diplomatic channels is the means most frequently used in cases where the question of immunity of State officials from foreign criminal jurisdiction arises. This is largely because the question of whether or not immunity from foreign criminal jurisdiction applies to a particular official of another State, which is a sensitive issue, constitutes a case of "official business" and would therefore fall under article 41, paragraph 2, of the Vienna Convention on Diplomatic Relations.[350] For this reason, "diplomatic channels" have been mentioned first in order to highlight their more frequent use in practice. The expression "through diplomatic channels" reproduces the formulation contained in article 22, paragraph 1 (*c*) (i), of the United Nations Convention on Jurisdictional Immunities of States and Their Property, which was used previously by the Commission in the draft articles on prevention and punishment of crimes against humanity.[351] Since that expression is not identical in all official versions of the Convention, the original terms used in the Convention have been retained in the different language versions of the present draft article 9.

(14) In addition to "diplomatic channels", the text reflects the possibility that States may use other means of communication to provide notifications concerning immunity, some of which are mentioned in article 22 of the United Nations Convention on Jurisdictional Immunities of States and Their Property. This is the reason for the inclusion, in paragraph 3, of the phrase "any other means of communication accepted for that purpose by the States concerned". This wording thus provides for an alternative, the use of which will have to be decided upon by the States concerned on a case-by-case basis; such alternatives may be reflected in either international treaties that are general in scope or any other agreements reached by the States concerned. Since the means of communication between States may be addressed in instruments dealing with a wide variety of issues, the phrase "for that purpose" has been included to emphasize that the agreements concerned should in any event be relevant to and applicable in cases where the question of immunity of State officials from foreign criminal jurisdiction arises. This does not mean, however, that such agreements must

[350] Under that article, "[a]ll official business with the receiving State entrusted to the mission by the sending State shall be conducted with or through the Ministry for Foreign Affairs of the receiving State or such other ministry as may be agreed".

[351] For the text of the draft articles adopted by the Commission and commentaries thereto, see *Official Records of the General Assembly, Seventy-fourth Session, Supplement No. 10* (A/74/10), paras. 44–45.

specifically address immunity or include express rules on notification in connection with immunity. Finally, it should be noted that the phrase "accepted ... by the States concerned" refers to the requirement that such other means of communication must have been accepted by both the forum State and the State of the official.

(15) The last phrase of paragraph 3 provides that the other means of communication accepted "for that purpose" by the States concerned "may include those provided for in applicable international cooperation and mutual legal assistance treaties". The use of such means of communication, which had been suggested by the Special Rapporteur in her original proposal, generated an intense debate in which a number of questions were raised, such as the very concept of "international cooperation and mutual legal assistance treaties", the fact that such treaties are not intended to address the question of immunity, and the possibility that, depending on the type of State authorities competent to issue and receive notification under such treaties, Ministries of Foreign Affairs and other organs responsible for international relations could be excluded from the notification process dealt with in draft article 9. However, the Commission decided to retain a reference to such means of communication between States on the understanding that they have, on occasion, been used by States and can be a useful tool for facilitating notification.

(16) For the purposes of the present draft article, "international cooperation and mutual legal assistance treaties" means multilateral or bilateral instruments concluded for the purpose of facilitating cooperation and mutual legal assistance in criminal matters between States. Multilateral treaties of this type include, but are not limited to, the European Convention on Mutual Assistance in Criminal Matters[352] and its two additional protocols;[353] the European Convention on the Transfer of Proceedings in Criminal Matters;[354] the European Convention on Extradition[355] and its four additional protocols;[356] the Inter-American Convention on Mutual Assistance in Criminal Matters;[357] the Inter-American Convention on Extradition;[358] the Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union;[359] Council Framework Decision 2009/948/JHA of 30 November 2009 on prevention and settlement of conflicts of exercise of jurisdiction in criminal proceedings;[360] the Convention on Mutual Assistance in Criminal Matters between the Member States of the Community of Portuguese-speaking Countries;[361] the Convention on Extradition among the States Members of the Community of Portuguese-

[352] European Convention on Mutual Assistance in Criminal Matters (Strasbourg, 20 April 1959), United Nations, *Treaty Series*, vol. 472, No. 6841, p. 185.

[353] Additional Protocol to the European Convention on Mutual Assistance in Criminal Matters (Strasbourg, 17 March 1978), *ibid.*, vol. 1496, No. 6841, p. 350; and Second Additional Protocol to the European Convention on Mutual Assistance in Criminal Matters (Strasbourg, 8 November 2001), *ibid.*, vol. 2297, No. 6841, p. 22.

[354] European Convention on the Transfer of Proceedings in Criminal Matters (Strasbourg, 15 May 1972), *ibid.*, vol. 1137, No. 17825, p. 29.

[355] European Convention on Extradition (Paris, 13 December 1957), *ibid.*, vol. 359, No. 5146, p. 273.

[356] Additional Protocol to the European Convention on Extradition (Strasbourg, 15 October 1975), *ibid.*, vol. 1161, No. 5146, p. 450; Second Additional Protocol to the European Convention on Extradition (Strasbourg, 17 March 1978), *ibid.*, vol. 1496, No. 5146, p. 328; Third Additional Protocol to the European Convention on Extradition (Strasbourg, 10 November 2010), *ibid.*, vol. 2838, No. 5146, p. 181; and Fourth Additional Protocol to the European Convention on Extradition (Vienna, 20 September 2012), Council of Europe, *Council of Europe Treaty Series*, No. 212.

[357] Inter-American Convention on Mutual Assistance in Criminal Matters (Nassau, 23 May 1992), Organization of American States, *Treaty Series*, No. 75.

[358] Inter-American Convention on Extradition (Caracas, 25 February 1981), United Nations, *Treaty Series*, vol. 1752, No. 30597, p. 177.

[359] Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union (Brussels, 29 May 2000), *Official Journal of the European Communities*, C 197, 12 July 2000, p. 3.

[360] *Official Journal of the European Union*, L 328, 15 December 2009, p. 42.

[361] Convention on Mutual Assistance in Criminal Matters between the Member States of the Community of Portuguese-speaking Countries (Praia, 23 November 2005), *Diário da República I*, No. 177, 12 September 2008, p. 6635.

speaking Countries;[362] and the Minsk Convention on Legal Aid and Legal Relations in Civil, Family and Criminal Matters and Chisinau Convention on Legal Assistance and Legal Relations in Civil, Family and Criminal Matters.[363] Bilateral treaties of this type are so numerous that they would be impossible to list in this commentary, but reference may be made, at least, to the model treaties that have been developed by various international organizations and that form the basis for many bilateral agreements, including the Model Treaty on Mutual Assistance in Criminal Matters,[364] the Model Treaty on the Transfer of Proceedings in Criminal Matters[365] and the Model Treaty on Extradition.[366] They all contain provisions relating to means of communication between States that could be used in connection with the notification dealt with in draft article 9.

(17) The means of communication provided for in international cooperation and mutual legal assistance treaties are defined in draft article 9 as a subcategory of "other means of communication" and may be used only if the treaties in question are "applicable". This means that both the forum State and the State of the official must be parties to the treaties and that the system established therein must be capable of producing effects in cases where issues relating to the State's immunity from foreign criminal jurisdiction may arise.

(18) In any event, it should be emphasized that draft article 9, paragraph 3, does not impose on States any new requirements concerning means of communication other than those already established in the applicable treaties.

(19) Finally, with respect to the form of the notification, the Commission members expressed different views as to whether notification should have to be in writing, as they appreciated both the need to avoid abuse in the notification process and the flexibility that the act of notification itself sometimes requires. It was ultimately considered unnecessary to provide expressly that notification must be made in writing. Thus, although the general view is that notification should preferably be in written form, other possibilities have not been excluded, particularly since notification – especially through diplomatic channels – is often given orally at first and later in writing, regardless of the form of such written notification (*note verbale*, letter or the like).

Article 10
Invocation of immunity

1. A State may invoke the immunity of its official when it becomes aware that the criminal jurisdiction of another State could be or is being exercised over the official. Immunity should be invoked as soon as possible.

2. Immunity shall be invoked in writing, indicating the identity of and the position held by the official, and the grounds on which immunity is invoked.

3. Immunity may be invoked through diplomatic channels or through any other means of communication accepted for that purpose by the States concerned, which may include those provided for in applicable international cooperation and mutual legal assistance treaties.

4. The authorities before which immunity has been invoked shall immediately inform any other authorities concerned of that fact.

[362] Convention on Extradition among the States Members of the Community of Portuguese-speaking Countries (Praia, 23 November 2005), *ibid.*, No. 178, 15 September 2008, p. 6664.

[363] Convention on Legal Assistance and Legal Relations in Civil, Family and Criminal Matters (Minsk, 22 January 1993), *The Informational Reporter of the CIS Council of Heads of State and Council of Heads of Government "Sodruzhestvo"*, No. 1 (1993); Convention on Legal Assistance and Legal Relations in Civil, Family and Criminal Matters (Chisinau, 7 October 2002), *ibid.*, No. 2 (41) (2002).

[364] Model Treaty on Mutual Assistance in Criminal Matters, General Assembly resolution 45/117 of 14 December 1990, annex (subsequently amended by General Assembly resolution 53/112 of 9 December 1998, annex I).

[365] Model Treaty on the Transfer of Proceedings in Criminal Matters, General Assembly resolution 45/118 of 14 December 1990, annex.

[366] Model Treaty on Extradition, General Assembly resolution 45/116 of 14 December 1990, annex (subsequently amended by General Assembly resolution 52/88 of 12 December 1997, annex).

Commentary

(1) Draft article 10 addresses the issue of invocation of immunity from a twofold perspective: recognition of the right of the State of the official to invoke immunity, on the one hand; and the procedural aspects relating to the timing, content and means of communication of the invocation of immunity, on the other. Draft article 10 also refers to the need to inform the competent authorities of the forum State that immunity has been invoked. This draft article does not deal with the effects of invocation, which will be addressed later. Accordingly, neither the paragraph 6 originally proposed by the Special Rapporteur concerning the examination *proprio motu* of the question of immunity[367] nor a new proposal made by a member of the Drafting Committee concerning the possible suspensive effect of the invocation of immunity was included in the draft article adopted by the Commission.

(2) Paragraph 1 of draft article 10 reflects the content of paragraphs 1 and 2 of the draft article originally proposed by the Special Rapporteur. It is based on the recognition that the State of the official is entitled to invoke the immunity of its officials when another State seeks to exercise criminal jurisdiction over them. Although treaties addressing one form or another of immunity of State officials from foreign criminal jurisdiction do not expressly refer to the invocation of immunity or the corresponding right of the State of the official, invocation of the immunity of State officials is a common practice that is understood to be covered by international law. The invocation of immunity has a dual purpose: on the one hand, it serves as an instrument with which the State of the official may claim immunity for its official; on the other, it makes the State seeking to exercise jurisdiction aware of this circumstance and enables it to take account of the information provided by the State of the official in the process of determining immunity.

(3) The right to invoke immunity rests with the State of the official. This is easily justified by the fact that the purpose of immunity is to preserve the sovereignty of the State of the official, meaning that immunity is recognized in the interest of the State and not in the interest of the individual.[368] It is thus for the State itself, and not for its officials, to invoke immunity and to take all decisions relating to its possible invocation. In any event, it is a right of a discretionary nature, which is why the phrase "[a] State may invoke the immunity of its official" has been used.

(4) The power to invoke immunity is attributed to the State of the official, though it has not been considered necessary to identify the authorities competent to take decisions relating to the invocation or the authorities competent to invoke immunity. Which are those authorities depends on the domestic law, it being understood that this category includes those with responsibility for international relations under international law. However, this does not

[367] Paragraph 6 of the draft article as originally proposed by the Special Rapporteur in her seventh report read as follows: "[i]n any event, the organs that are competent to determine immunity shall decide *proprio motu* on its application in respect of State officials who enjoy immunity *ratione personae*, whether the State of the official invokes immunity or not" (A/CN.4/729, para. 69).

[368] This is an uncontroversial matter that has even been reflected in various treaties, including, by way of example, the Vienna Convention on Diplomatic Relations, the preamble of which states that "the purpose of such privileges and immunities is not to benefit individuals but to ensure the efficient performance of the functions of diplomatic missions as representing States" (fourth paragraph). Virtually identical wording can be found in the preambles of the Vienna Convention on Consular Relations (fifth paragraph), the Convention on Special Missions (seventh paragraph) and the Vienna Convention on the Representation of States in Their Relations with International Organizations of a Universal Character (sixth paragraph). The Institute of International Law expressed the same view in the preamble of its resolution on immunities from jurisdiction and execution of Heads of State and of Government in international law, in which it states that special treatment is to be given to a Head of State or a Head of Government as a representative of that State, "not in his or her personal interest, because this is necessary for the exercise of his or her functions and the fulfilment of his or her responsibilities in an independent and effective manner, in the well-conceived interest of both the State or the Government of which he or she is the Head and the international community as a whole" (*Yearbook of the Institute of International Law*, vol. 69 (see footnote 338 above), p. 743, third paragraph). The two Special Rapporteurs who have dealt with this topic in the Commission have also expressed this view (see *Yearbook ... 2010*, vol. II (Part One), document A/CN.4/631, p. 395, at p. 402, para. 19; *Yearbook ... 2011*, vol. II (Part One), document A/CN.4/646, p. 223, at p. 228, para. 15; and *Yearbook ... 2013*, vol. II (Part One), document A/CN.4/661, p. 35, at p. 44, para. 49).

mean that immunity cannot be invoked by a person specifically mandated to do so by the State, especially in the context of criminal proceedings.

(5) The invocation of immunity must therefore be understood as an official act whereby the State of the official informs the State seeking to exercise criminal jurisdiction that the individual in question is its official and that, in its view, he or she enjoys immunity, with the consequences that follow from that circumstance. Therefore, the earlier immunity is invoked, the more useful it will be. This is reflected by the indication that the State of the official may invoke immunity "when it becomes aware that the criminal jurisdiction of another State could be or is being exercised over the official". The term "another State" was considered preferable to "forum State" as being broader and more comprehensive, especially since immunity may be invoked prior to the initiation of criminal proceedings in the strict sense. The phrase "when it becomes aware" reproduces the expression used in draft article 8. With regard to the way in which the State of the official may become aware of the situation, the Commission took into account, first, the relationship between "notification" and "invocation". One of the purposes of notification is to inform the State of the official that the competent authorities of the forum State intend to exercise criminal jurisdiction. It is therefore a primary means by which the State of the official may become aware of the situation. However, the Commission did not wish to exclude the possibility that the State of the official might become aware of the situation by another means, either through information received from its official or from any other source of information. Therefore, no reference is made to the notification dealt with in draft article 9 as being the relevant act for determining the point in time at which immunity may be invoked.

(6) Paragraph 1 provides for the possibility that the State of the official may invoke immunity when it becomes aware that "the criminal jurisdiction of another State could be or is being exercised over the official". This alternative wording is intended to reflect the fact that in some cases the State of the official may not become aware of actions taken in respect of its official until a later stage. However, this cannot deprive the State of the official of its right to invoke immunity, especially when acts of jurisdiction that may affect the official have already been carried out.

(7) The last sentence of paragraph 1 provides that "[i]mmunity should be invoked as soon as possible". The expression "as soon as possible" has been used in light of the fact that the State of the official will have to consider various relevant elements (legal and political) in order to decide whether immunity should be invoked and, if so, what the scope of such invocation should be. Since the State of the official will need a period of time in which to do so, which may vary from one case to another, this phrase has been preferred to "as promptly as possible" or "within a reasonable time", the interpretation of which may be ambiguous. Moreover, the phrase "as soon as possible" draws attention to the importance of invoking immunity at an early stage.

(8) In any event, it should be borne in mind that, while the invocation of immunity constitutes a safeguard for the State of the official, which thus has an interest in invoking it "as soon as possible", this does not preclude the State from invoking immunity at any other time. The use of the verb "may" is to be understood in this sense. Such invocation of immunity will be lawful, though it may have different effects, as the case may be.

(9) Paragraph 2 concerns the form in which immunity is to be invoked and the content of the invocation. The Commission took account of the fact that the invocation of immunity by the State of the official is intended to influence the process of determining immunity and the possible blocking of the forum State's exercise of jurisdiction. For this reason, it was considered that immunity must be invoked in writing, regardless of the form that such writing may take. The invocation should explicitly state the identity of the official and the position held by him or her, as well as the grounds on which immunity is invoked.

(10) The words "the position held" refer to the title, rank or level of the official (such as Head of State, Minister for Foreign Affairs or legal adviser). In any event, the reference to the position held by the official should in no way be interpreted as implying that lower-level officials are not covered by immunity from foreign criminal jurisdiction, since, as the Commission itself has stated, "[g]iven 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 individual is irrelevant for the sole purposes of the definition".[369]

(11) The Commission took the view that the State of the official should not be required to identify the type of immunity being invoked (*ratione personae* or *ratione materiae*), since that might constitute an excessive technical requirement. The reference to the position held by the official and the grounds for invoking immunity may provide a basis on which the forum State can assess whether the rules contained in Part Two or Part Three of the present draft articles apply.

(12) Paragraph 3 identifies the means by which immunity may be invoked. This paragraph is modelled on paragraph 3 of draft article 9, the commentary to which may be referred to for clarification of its general meaning. It should be noted, however, that the Commission made some drafting changes to paragraph 3 of the present draft article in order to adapt it to the specific features of invocation. In particular, the wording "[i]mmunity may be invoked" has been used instead of "shall be provided" in order not to exclude the possibility that the official's immunity from criminal jurisdiction may be invoked by other means, especially in criminal proceedings through judicial acts permitted by the law of the forum State.

(13) Paragraph 4 is intended to ensure that the invocation of immunity by the State of the official will be made known to the authorities of the other State that are competent to deal with the question of immunity and with the examination or determination of its application. The purpose of this paragraph is to prevent a situation where an invocation of immunity is ineffective simply because it has not been made before the authorities responsible for examining or deciding on immunity. The paragraph reflects the principle that the obligation to examine and determine the question of immunity rests with the State, which must take the necessary measures to comply with this obligation. It is thus defined as a procedural safeguard benefiting both the State of the official and the State seeking to exercise criminal jurisdiction. However, in view of the diversity of States' legal systems and practices, as well as the need to respect the principle of self-organization, it was not considered necessary to identify which authorities are obliged to report and which authorities should receive notice of the invocation. This is logically predicated on the understanding that, in both cases, the authorities referred to are those of the State that intends to exercise or has exercised its criminal jurisdiction over an official of another State, and that the words "any other authorities" refer to those authorities that are competent to participate in the processes of examining or determining immunity. In both cases, it is irrelevant whether they are authorities of the executive, the judiciary or the prosecution service, or even police authorities.

Article 11
Waiver of immunity

1. The immunity from foreign criminal jurisdiction of the State official may be waived by the State of the official.

2. Waiver must always be express and in writing.

3. Waiver of immunity may be communicated through diplomatic channels or through any other means of communication accepted for that purpose by the States concerned, which may include those provided for in applicable international cooperation and mutual legal assistance treaties.

4. The authorities to which the waiver has been communicated shall immediately inform any other authorities concerned that immunity has been waived.

5. Waiver of immunity is irrevocable.

Commentary

(1) Draft article 11 deals with the waiver of immunity from a twofold perspective: the recognition of the right of the State of the official to waive immunity, on the one hand, and the procedural aspects relating to the form that the waiver should take and the means by

[369] *Yearbook … 2014*, vol. II (Part Two), p. 145, para. (14) of the commentary to draft article 2 (*e*).

which it is communicated, on the other. Draft article 11 also refers to the need to inform the competent authorities of the forum State that immunity has been waived. Although the structure of draft article 11 is modelled on that of draft article 10, the content of the two is not identical, since invocation and waiver are distinct institutions that should not be confused.

(2) In contrast to invocation, the waiver of immunity from jurisdiction has been discussed in detail by the Commission in several of its previous sets of draft articles[370] and has been reflected in the international treaties based on those draft articles, which cover certain forms of immunity from foreign criminal jurisdiction in the case of certain State officials. These include, in particular, the Vienna Convention on Diplomatic Relations (art. 32), the Vienna Convention on Consular Relations (art. 45), the Convention on Special Missions (art. 41) and the Vienna Convention on the Representation of States in Their Relations with International Organizations of a Universal Character (art. 31). It should be added that the question of the waiver of immunity has also been dealt with in private codification projects on this topic, in particular the 2001 and 2009 resolutions of the Institute of International Law.[371] The same is true of the waiver of State immunity, which is addressed both in the United Nations

[370] The Commission addressed the waiver of immunity of certain State officials in the course of its work on diplomatic relations, consular relations, special missions and the representation of States in their relations with international organizations. Article 30 of the draft articles on diplomatic intercourse and immunities is worded as follows: "*Waiver of immunity.* 1. The immunity of its diplomatic agents from jurisdiction may be waived by the sending State. 2. In criminal proceedings, waiver must always be express" (*Yearbook ... 1958*, vol. II, document A/3859, p. 99). Article 45 of the draft articles on consular relations provides as follows: "*Waiver of immunities*. 1. The sending State may waive, with regard to a member of the consulate, the immunities provided for in articles 41, 43 and 44. 2. The waiver shall in all cases be express" (*Yearbook ... 1961*, vol. II, document A/4843, p. 118). Article 41 of the draft articles on special missions is worded as follows: "*Waiver of immunity*. 1. The sending State may waive the immunity from jurisdiction of its representatives in the special mission, of the members of its diplomatic staff, and of other persons enjoying immunity under articles 36 to 40. 2. Waiver must always be express" (*Yearbook ... 1967*, vol. II, document A/6709/Rev.1 and Rev.1/Corr.1, p. 365). Lastly, article 31 of the draft articles on the representation of States in their relations with international organizations reads as follows: "*Waiver of immunity*. 1. The immunity from jurisdiction of the head of mission and members of the diplomatic staff of the mission and of persons enjoying immunity under article 36 may be waived by the sending State. 2. Waiver must always be express" (*Yearbook ... 1971*, vol. II (Part One), document A/8410/Rev.1, p. 304).

[371] Article 7 of the Institute of International Law resolution on immunities from jurisdiction and execution of Heads of State and of Government in international law is worded as follows: "1. The Head of State may no longer benefit from the inviolability, immunity from jurisdiction or immunity from measures of execution conferred by international law, where the benefit thereof is waived by his or her State. Such waiver may be explicit or implied, provided it is certain. The domestic law of the State concerned determines which organ is competent to effect such a waiver. 2. Such a waiver should be made when the Head of State is suspected of having committed crimes of a particularly serious nature, or when the exercise of his or her functions is not likely to be impeded by the measures that the authorities of the forum may be called upon to take" (*Yearbook of the Institute of International Law*, vol. 69 (see footnote 338 above), p. 749). Article 8 of the resolution states: "1. States may, by agreement, derogate to the extent they see fit, from the inviolability, immunity from jurisdiction and immunity from measures of execution accorded to their own Heads of State. 2. In the absence of an express derogation, there is a presumption that no derogation has been made to the inviolability and immunities referred to in the preceding paragraph; the existence and extent of such a derogation shall be unambiguously established by any legal means" (*ibid.*). This approach remained the same in the Institute's 2009 resolution on the immunity from jurisdiction of the State and of persons who act on behalf of the State in case of international crimes, although the resolution incorporates a new element by stipulating, in article II, paragraph 3, that "States should consider waiving immunity where international crimes are allegedly committed by their agents". This recommendation mirrors the provisions of paragraph 2 of the same article II, according to which, "[p]ursuant to treaties and customary international law, States have an obligation to prevent and suppress international crimes. Immunities should not constitute an obstacle to the appropriate reparation to which victims of crimes addressed by this Resolution are entitled" (*Yearbook of the Institute of International Law*, vol. 73-I-II (Session of Naples, 2009), p. 227; available from the Institute's website: www.idi-iil.org, under "Resolutions").

Convention on Jurisdictional Immunities of States and Their Property[372] and in national laws on State immunity.[373]

(3) The waiver of immunity by the State of the official is a formal act whereby that State waives its right to claim immunity, thus removing this obstacle to the exercise of jurisdiction by the courts of the forum State. The waiver of immunity therefore invalidates any debate on the application of immunity or on limits and exceptions to immunity. This effect of a waiver was confirmed by the judgment of the International Court of Justice in the case of the *Arrest Warrant of 11 April 2000*, in which the Court stated that officials "will cease to enjoy immunity from foreign jurisdiction if the State which they represent or have represented decides to waive that immunity".[374]

(4) Paragraph 1 recognizes the right of the State of the official to waive immunity. This paragraph reproduces, with minor adjustments, the wording of article 32, paragraph 1, of the Vienna Convention on Diplomatic Relations. Draft article 11, paragraph 1, indicates that "[t]he immunity from foreign criminal jurisdiction of the State official may be waived by the State of the official". The emphasis is thus placed on the holder of the right to waive immunity, which is the State of the official rather than the official himself or herself. This is a logical consequence of the fact that the immunity of State officials from foreign criminal jurisdiction is recognized for the benefit of the rights and interests of the State of the official. Therefore, only that State can waive immunity and thus consent to the exercise by another State of criminal jurisdiction over one of its officials. The verb "may" is used to indicate that the waiver of immunity is a right, not an obligation, of the State of the official. This is in line with the previous practice of the Commission, which, in the various draft articles in which it has dealt with the immunity of State officials from foreign criminal jurisdiction, has reflected the view that there is no obligation to waive immunity.

(5) The power to waive immunity is attributed to the State of the official, though it has not been considered necessary to identify the authorities competent to take decisions relating to the waiver or the authorities competent to communicate the waiver. Neither the conventions nor the national laws referred to above deal with this issue in a specific manner, instead referring to the State in abstract terms.[375] The Commission itself, in its previous work, has already considered it preferable not to refer expressly to the State organs that are

[372] Nonetheless, it should be borne in mind that the 2004 Convention addresses the waiver of immunity only indirectly, through the enumeration of a number of cases in which the foreign State is automatically deemed to have consented to the exercise of jurisdiction by the courts of the forum State. See, for example, articles 7 and 8 of the Convention.

[373] See United States of America, Foreign Sovereign Immunities Act 1976, sects. 1605 (a) (1), 1610 (a) (1), (b) (1) and (d) (1), and 1611 (b) (1); United Kingdom of Great Britain and Northern Ireland, State Immunity Act 1978, sect. 2; Singapore, State Immunity Act 1979, sect. 4; Pakistan, State Immunity Ordinance 1981, sect. 4; South Africa, Foreign States Immunities Act 1981, sect. 3; Australia, Foreign States Immunities Act 1985, sects. 10, 3 and 6; Canada, State Immunity Act 1985, sect. 4.2; Israel, Foreign States Immunity Law 2008, sects. 9 and 10; Japan, Act on the Civil Jurisdiction of Japan with respect to a Foreign State 2009, art. 6; and Spain, Organic Act No. 16/2015 of 27 October on privileges and immunities of foreign States, international organizations with headquarters or offices in Spain and international conferences and meetings held in Spain, arts. 5, 6 and 8.

[374] *Arrest Warrant of 11 April 2000* (see footnote 335 above), p. 25, para. 61.

[375] Exceptionally, some national laws refer to waivers communicated by a head of mission. See United Kingdom, State Immunity Act 1978, sect. 2.7; Singapore, State Immunity Act 1979, sect. 4.7; Pakistan, State Immunity Ordinance 1981, sect. 4.6; South Africa, Foreign States Immunities Act 1981, sect. 3.6; and Israel, Foreign States Immunity Law 2008, sect. 9 (c).

competent to waive immunity.[376] Moreover, State practice is scant and inconclusive.[377] Which are the competent authorities to waive immunity depends on the domestic law, it being understood that this category includes those with responsibility for international relations under international law. However, this does not mean that the waiver of immunity cannot be communicated by any other person specifically mandated to do so by the State, especially in the context of court proceedings.

(6) In contrast to draft article 10 on invocation, this draft article does not include any temporal element, as the Commission found it unnecessary, given that immunity may be waived at any time.

(7) Paragraph 2 refers to the form of the waiver, stating that it "must always be express and in writing". This wording is modelled on article 32, paragraph 2, of the Vienna Convention on Diplomatic Relations, according to which "[w]aiver must always be express", and article 45, paragraph 2, of the Vienna Convention on Consular Relations, which provides that "[t]he waiver shall in all cases be express, except as provided in paragraph 3 of this Article [counterclaim], and shall be communicated to the receiving State in writing". The statement that the waiver must be "express and in writing" reinforces the principle of legal certainty.

(8) The requirement that the waiver be express has been consistently reaffirmed by the Commission in previous work,[378] and is reflected in both relevant international treaties[379] and national laws.[380] For this reason, the Commission did not retain paragraph 4 of the draft article originally proposed by the Special Rapporteur in her seventh report, which was worded as follows: "A waiver that can be deduced clearly and unequivocally from an international treaty to which the forum State and the State of the official are parties shall be deemed an express

[376] In the draft articles on diplomatic intercourse and immunities, the Commission already considered it preferable to leave open the question of the organs competent to waive the immunity of diplomatic agents. Thus, in the text of draft article 30 adopted on second reading, it decided to amend the wording of paragraph 2 by deleting the last phrase of the paragraph adopted on first reading, which read "by the Government of the sending State". The Commission explains this decision as follows: "The Commission decided to delete the phrase 'by the Government of the sending State', because it was open to the misinterpretation that the communication of the waiver should actually emanate from the Government of the sending State. As was pointed out, however, the head of the mission is the representative of his Government, and when he communicates a waiver of immunity the courts of the receiving State must accept it as a declaration of the Government of the sending State. In the new text, the question of the authority of the head of the mission to make the declaration is not dealt with, for this is an internal question of concern only to the sending State and to the head of the mission" (*Yearbook ... 1958*, vol. II, document A/3859, p. 99, paragraph (2) of the commentary to article 30). In a similar vein, the Commission stated the following in relation to draft article 45 of the draft articles on consular relations: "The text of the article does not state through what channel the waiver of immunity should be communicated. If the head of the consular post is the object of the measure in question, the waiver should presumably be made in a statement communicated through the diplomatic channel. If the waiver relates to another member of the consulate, the statement may be made by the head of the consular post concerned" (*Yearbook ... 1961*, vol. II, document A/4843, p. 118, paragraph (2) of the commentary to article 45).

[377] For example, in the United States, the waiver was formulated by the Minister of Justice of Haiti in *Paul v. Avril* (United States District Court for the Southern District of Florida, Judgment of 14 January 1993, 812 F. Supp. 207), and, in Belgium, by the Minister of Justice of Chad in the *Hissène Habré* case. In Switzerland, in the case of *Ferdinand et Imelda Marcos c. Office fédéral de la police* (Federal Court, Judgment of 2 November 1989, ATF 115 Ib 496), the courts did not analyse which ministries were competent, but merely noted that it was sufficient that they were government bodies and therefore accepted a communication sent by the diplomatic mission of the Philippines.

[378] See footnote 370 above.

[379] See Vienna Convention on Diplomatic Relations, art. 32, para. 2; Vienna Convention on Consular Relations, art. 45, para. 2; Convention on Special Missions, art. 41, para. 2; and Vienna Convention on the Representation of States in Their Relations with International Organizations of a Universal Character, art. 31, para. 2.

[380] For example, Organic Act No. 16/2015 of 27 October on privileges and immunities of foreign States, international organizations with headquarters or offices in Spain and international conferences and meetings held in Spain provides for such express waiver of immunity in article 27 in relation to the immunity of Heads of State, Heads of Government and Ministers for Foreign Affairs.

waiver".[381] While members of the Commission generally considered that the waiver of immunity may be expressly provided for in a treaty,[382] there was some criticism of the use of the phrase "can be deduced", which was understood by some members as recognizing a form of implicit waiver.

(9) The possibility that a waiver of immunity may be based on obligations imposed on States by treaty provisions arose, in particular, in the *Pinochet (No. 3)* case,[383] although this was not the basis of the decision taken by the House of Lords. It has also arisen, albeit from a different perspective, in relation to the interpretation of articles 27 and 98 of the Rome Statute of the International Criminal Court[384] and the duty of States parties to cooperate with the Court. However, the Commission's view was that there are insufficient grounds for concluding that the existence of such treaty obligations can automatically and generally be understood to waive the immunity of State officials, especially since the International Court of Justice concluded as follows in its judgment in *Arrest Warrant of 11 April 2000*: "Thus, although various international conventions on the prevention and punishment of certain serious crimes impose on States obligations of prosecution or extradition, thereby requiring them to extend their criminal jurisdiction, such extension of jurisdiction in no way affects immunities under customary international law, including those of Ministers for Foreign Affairs. These remain opposable before the courts of a foreign State, even where those courts exercise such a jurisdiction under these conventions."[385]

(10) In addition to being express, the waiver of immunity must be formulated in writing. This does not, however, affect the precise form that such writing should take, which will depend not only on the will of the State of the official, but also on the means used to communicate the waiver and even on the framework in which it is formulated. Thus, nothing prevents the waiver from being formulated by means of a *note verbale*, letter or other non-diplomatic written communication addressed to the authorities of the forum State, by means of a procedural act or document, or even by means of any other document that expressly, clearly and reliably affirms the State's willingness to waive the immunity of its official from foreign criminal jurisdiction.

(11) Finally, attention is drawn to the fact that, in contrast to draft article 10, paragraph 2, this draft article contains no express reference to the content of the waiver, as the Commission did not find it necessary. Although the members' views were divided as to whether a reference to content should be included, in the end it was considered preferable to leave a margin of discretion to the State of the official. Accordingly, the words "and shall mention the official whose immunity is being waived and, where applicable, the acts to which the waiver pertains", which had appeared in the Special Rapporteur's original proposal, were deleted. In any event, the Commission wishes to note that the content of the waiver should be clear enough to enable the State before whose authorities it is submitted to identify the scope of the waiver without ambiguity.[386] For this purpose, it is understood that the State of

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[381] A/CN.4/729, para. 103.

[382] The Institute of International Law expressed a similar view in its 2001 resolution on immunities from jurisdiction and execution of Heads of State and of Government in international law, stating, in article 8, paragraph 1, that "States may, by agreement, derogate to the extent they see fit, from the inviolability, immunity from jurisdiction and immunity from measures of execution accorded to their own Heads of State" (*Yearbook of the Institute of International Law*, vol. 69 (see footnote 338 above), p. 749).

[383] *Regina v. Bow Street Metropolitan Stipendiary Magistrate*, ex parte *Pinochet Ugarte (No. 3)*, United Kingdom, House of Lords, decision of 24 March 1999, [1999] UKHL 17, [2000] 1 AC 147; see also *International Law Reports*, vol. 119 (2002), p. 135.

[384] Rome Statute of the International Criminal Court (Rome, 17 July 1998), United Nations, *Treaty Series*, vol. 2187, No. 38544, p. 3.

[385] *Arrest Warrant of 11 April 2000* (see footnote 335 above), pp. 24–25, para. 59.

[386] Three examples of clear statements of waiver, which appear in the memorandum by the Secretariat on immunity of State officials from foreign criminal jurisdiction (A/CN.4/596 and Corr.1 (available from the Commission's website, documents of the sixtieth session), paras. 252 and 253), are reproduced below. In *Paul v. Avril*, the Minister of Justice of Haiti stated that "Prosper Avril, ex-Lieutenant-General of the Armed Forces of Haiti and former President of the Military Government of the Republic of Haiti, enjoys absolutely no form of immunity, whether it be of a sovereign, a chief of

the official should expressly mention the name of the official whose immunity is waived, as well as, where appropriate, the substantive scope it intends to give to the waiver, especially when the State does not wish to waive immunity absolutely, but to limit it to certain acts or to exclude certain acts alleged to have been performed by the official. If the waiver of immunity is limited in scope, the State of the official may invoke immunity in respect of acts not covered by the waiver, that is, when the authorities of the other State seek to exercise or do exercise their criminal jurisdiction over the same official for acts other than those which gave rise to the waiver or which became known after the waiver was issued.

(12) Paragraph 3 concerns the means by which the State of the official may communicate the waiver of immunity of its official. As this paragraph is thus the counterpart to draft article 10, paragraph 3, it substantially reproduces the wording of that paragraph, with the sole exception of the use of the verb "communicated" in order to align draft article 11, paragraph 3, with article 45 of the Vienna Convention on Consular Relations. In view of the parallels between this paragraph 3 and paragraph 3 of draft article 10, reference is made to the commentary to draft article 10 with regard to the question of which authorities of the State of the official are competent to decide on and to communicate the waiver of immunity. In particular, it should be noted that the use of the verb tense "may", referring to means of communication, is intended to leave open the possibility that the waiver of immunity may be communicated directly to the courts of the forum State.

(13) Paragraph 4 provides that "[t]he authorities to which the waiver has been communicated shall immediately inform any other authorities concerned that immunity has been waived". This paragraph is the equivalent of draft article 10, paragraph 4, with some drafting changes only. Since both paragraphs follow the same logic and serve the same purpose, the commentary to draft article 10 in this regard also applies to paragraph 4 of the present draft article.

(14) Paragraph 5 provides that "[w]aiver of immunity is irrevocable". This provision is based on the premise that once immunity has been waived, its effect is projected into the future and the question of immunity ceases to act as a barrier to the exercise of criminal jurisdiction by the authorities of the forum State. Therefore, in light of the effects and the very nature of the waiver of immunity, the conclusion that it cannot be revoked seems obvious, since otherwise the institution would lose all meaning. Paragraph 5 of the present draft article nonetheless gave rise to some debate among the members of the Commission.

(15) This debate relates not to the basis for concluding that the waiver of immunity is irrevocable, but to possible exceptions to irrevocability. First, it should be noted that the members of the Commission generally agree that paragraph 5, as currently drafted, reflects a general rule that manifests the principle of good faith and addresses the need to respect legal

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state, a former chief of state; whether it be diplomatic, consular, or testimonial immunity, or all other immunity, including immunity against judgment, or process, immunity against enforcement of judgments and immunity against appearing before court before and after judgment" (*Paul v. Avril* (see footnote 377 above), p. 211). In the *Ferdinand et Imelda Marcos* case, the waiver submitted by the Philippines was worded as follows: "The Government of the Philippines hereby waives all (1) State, (2) head of State or (3) diplomatic immunity that the former President of the Philippines, Ferdinand Marcos, and his wife, Imelda Marcos, might enjoy or might have enjoyed on the basis of American law or international law. ... This waiver extends to the prosecution of Ferdinand and Imelda Marcos in the above-mentioned case (the investigation conducted in the southern district of New York) and to any criminal acts or any other related matters in connection with which these persons might attempt to refer to their immunity" (*Ferdinand et Imelda Marcos c. Office fédéral de la police* (see footnote 377 above), pp. 501–502). In the proceedings conducted in Brussels against Hissène Habré, the Ministry of Justice of Chad expressly waived immunity in the following terms: "The National Sovereign Conference, held in N'djaména from 15 January to 7 April 1993, officially waived any immunity from jurisdiction with respect to Mr. Hissène Habré. This position was confirmed by Act No. 010/PR/95 of 9 June 1995, which granted amnesty to political prisoners and exiles and to persons in armed opposition, with the exception of 'the former President of the Republic, Hissène Habré, his accomplices and/or accessories'. It is therefore clear that Mr. Hissène Habré cannot claim any immunity whatsoever from the Chadian authorities since the end of the National Sovereign Conference" (letter from the Minister of Justice of Chad to the examining magistrate of the Brussels district, 7 October 2002).

certainty. However, some members also expressed the view that exceptions to this general rule might be warranted in some situations, such as when new facts not previously known to the State of the official come to light after immunity has been waived; when it is found in a particular case that the basic rules of due process have not been observed during the exercise of jurisdiction by the forum State; or when exceptional circumstances of a general nature arise, such as either a change of government or a change in the legal system, that could result in a situation where the right to a fair trial is no longer guaranteed in the State seeking to exercise its criminal jurisdiction.

(16) These considerations gave rise to a debate on the usefulness and desirability of including this paragraph in draft article 11. Some members expressed support for its deletion, particularly since neither the relevant treaties nor the domestic laws of States have expressly referred to the irrevocability of waivers of immunity, and the practice on this issue is limited.[387] Conversely, other members considered it useful to retain paragraph 5 for reasons of legal certainty and because the Commission itself, referring to the waiver of immunity contemplated in its draft articles on diplomatic intercourse and immunities, stated that "[i]t goes without saying that proceedings, in whatever court or courts, are regarded as an indivisible whole, and that immunity cannot be invoked on appeal if an express or implied waiver was given in the court of first instance".[388] However, other members pointed out that the irrevocable nature of waivers of immunity cannot be inferred from that statement.

(17) To address the issue of possible exceptions to the irrevocability of waivers of immunity, some members of the Commission suggested that the wording of paragraph 5 should be modified to introduce attenuating language such as "save in exceptional circumstances" or "in principle". In their view, this would acknowledge that a waiver may be revoked in special circumstances such as those referred to above. Other members, on the contrary, took the view that the introduction of such language would further complicate the interpretation of paragraph 5 and that the wording should therefore remain unchanged if the paragraph was ultimately retained in draft article 11. In this connection, a view was expressed that, in the final analysis, a waiver of immunity is a unilateral act of the State, the scope of which should be defined in light of the Commission's 2006 Guiding Principles applicable to unilateral declarations of States capable of creating legal obligations, in particular principle 10.[389] Finally, the difficulty of identifying exceptional circumstances that could justify the revocation of a waiver of immunity was highlighted, although it was reiterated that a change of government or a change of legal system that could be prejudicial to the respect for the official's human rights and right to a fair trial could fall into this category. On the other hand, doubts were expressed as to whether the emergence of new facts that were not known at the time of the waiver, or the exercise of jurisdiction by the forum State in respect of facts not

[387] On waiver of immunity and submission of the foreign State to the jurisdiction of the forum State, see: United States, Foreign Sovereign Immunities Act 1976, sects. 1605 (a) (1), 1610 (a) (1), (b) (1) and (d) (1), and 1611 (b) (1); United Kingdom, State Immunity Act 1978, sect. 2; Singapore, State Immunity Act 1979, sect. 4; Pakistan, State Immunity Ordinance 1981, sect. 4; South Africa, Foreign States Immunities Act 1981, sect. 3; Australia, Foreign States Immunities Act 1985, sect. 10; Canada, State Immunity Act 1985, sect. 4; Israel, Foreign States Immunity Law 2008, sects. 9 and 10; Japan, Act on the Civil Jurisdiction of Japan with respect to a Foreign State 2009, arts. 5 and 6; and Spain, Organic Act No. 16/2015 of 27 October on privileges and immunities of foreign States, international organizations with headquarters or offices in Spain and international conferences and meetings held in Spain, arts. 5, 6, 7 and 8. Only the laws of Australia and Spain provide for the irrevocability of the waiver of immunity. Under the Foreign States Immunities Act 1985, "[a]n agreement by a foreign State to waive its immunity under this Part has effect to waive that immunity and the waiver may not be withdrawn except in accordance with the terms of the agreement" (sect. 10, 5). For its part, Organic Law 16/2015 establishes that "[t]he consent of the foreign State referred to in Articles 5 and 6 may not be revoked once the proceedings have been initiated before a Spanish court" (Article 8. Revocation of consent).

[388] *Yearbook ... 1958*, vol. II, document A/3859, p. 99, paragraph (5) of the commentary to article 30.

[389] Principle 10 reads as follows: "A unilateral declaration that has created legal obligations for the State making the declaration cannot be revoked arbitrarily. In assessing whether a revocation would be arbitrary, consideration should be given to: (*a*) any specific terms of the declaration relating to revocation; (*b*) the extent to which those to whom the obligations are owed have relied on such obligations; (*c*) the extent to which there has been a fundamental change in the circumstances" (*Yearbook ... 2006*, vol. II (Part Two), p. 161, para. 176).

covered by the waiver, could be categorized as exceptional circumstances, since they were not exceptions, but matters in respect of which the State of the official had not waived immunity, with the result that immunity could be applied under the general rules contained in the draft articles.

(18) In view of the discussion summarized in the preceding paragraphs and the practice generally followed in similar cases where there is a divergence of views among the members during the first reading of a draft text, the Commission decided to retain paragraph 5 in draft article 11, thus enabling States to become duly aware of the debate and to provide comments.

Article 12 [13]*
Requests for information

1. The forum State may request from the State of the official any information that it considers relevant in order to decide whether immunity applies or not.

2. The State of the official may request from the forum State any information that it considers relevant in order to decide on the invocation or the waiver of immunity.

3. Information may be requested through diplomatic channels or through any other means of communication accepted for that purpose by the States concerned, which may include those provided for in applicable international cooperation and mutual legal assistance treaties.

4. The requested State shall consider any request for information in good faith.

Commentary

(1) Draft article 12 provides that both the forum State and the State of the official may request information from the other State. It is the last of the procedural provisions under Part Four of the draft articles before reference is made to the determination of whether immunity applies or not. This is the subject of draft article 13, which has not yet been considered by the Drafting Committee. Draft article 12 consists of four paragraphs referring to the right of the States concerned to request information (paras. 1 and 2), the procedure for requesting information (para. 3) and the manner in which the requested State ”shall consider” the request (para. 4).

(2) Paragraphs 1 and 2 indicate that both the forum State and the State of the official may request information. Although the Commission takes the view that requests for information follow the same logic regardless of whether they come from one State or the other, for the sake of clarity it preferred to address the two situations in separate paragraphs. The two paragraphs use similar wording, the only difference being the ultimate objective pursued by the requesting State, which is, for the forum State, “to decide whether immunity applies or not” and, for the State of the official, “to decide on the invocation or the waiver of immunity”.

(3) The request for information referred to in paragraphs 1 and 2 is made with such an ultimate purpose in mind and should be understood as part of the process that a State must follow in order to decide on immunity in a specific case, from the perspective of either the forum State (examination and determination of immunity) or the State of the official (invocation or waiver of immunity). This is why the expression “in order to decide” is used in both paragraphs, to show that in both cases the final decision will be the outcome of a process that may involve different phases and acts.

(4) When it adopted draft article 12, the Commission took account of the fact that, in order to determine whether or not immunity applies, the forum State will need information on the official in question (name, position within the State, scope of authority, etc.) and on the connection between the State of the official and the acts of the official that may give rise to the exercise of criminal jurisdiction. This information is important for enabling the forum State to take a decision on immunity, especially in the case of immunity *ratione materiae*, but it may be known only to the State of the official. The same is true in cases where the State

* The number between square brackets indicates the original number of the draft article in the report of the Special Rapporteur.

of the official must decide whether to invoke or waive immunity, since that State may need to obtain information on the law or the competent organs of the forum State or on the stage reached in the activity undertaken by the forum State. Draft article 12 is intended to facilitate access to such information.

(5) The information referred to in the preceding paragraph may already be in the possession of the forum State or the State of the official, especially if the provisions of draft articles 9 (on notification), 10 (on invocation) or 11 (on waiver) have been applied prior to the request for information. In acting under those provisions, the forum State and the State of the official undoubtedly will have provided information to each other. However, it is still possible that the information received by those means may in some cases be insufficient for the purposes of the aforementioned objectives. In these circumstances, in particular, requests for information become a necessary and useful tool for ensuring the proper functioning of immunity, while also strengthening cooperation between the States concerned and building confidence between them. The system for requesting information provided for in draft article 12 therefore serves as a procedural safeguard for both States.

(6) The request may relate to any item of information that the requesting State considers useful for the purpose of taking a decision concerning immunity. Given the variety of items of information that may be taken into account by States for the purpose of deciding on the application, invocation or waiver of immunity, it is not possible to draw up an exhaustive list of such items. The Commission opted to use the expression "any information that it considers relevant", in preference to "the necessary information", as the adjective "necessary" could be understood in a narrow, literal sense, especially in English. Conversely, the use of the word "relevant" acknowledges that the requesting State (be it the forum State or the State of the official) has the right to decide on the relevant information that it wishes to request in each case, as provided in a number of international instruments.[390]

(7) Paragraph 3 refers to the channels through which information may be requested. This paragraph is modelled on paragraph 3 of draft articles 9, 10 and 11, the wording of which it reproduces *mutatis mutandis.* The commentaries to those draft articles are thus applicable to this paragraph.

(8) The Commission nonetheless wishes to draw attention to its decision not to include in draft article 12 a paragraph on internal communication between authorities of the forum State or the State of the official, similar to paragraph 4 of draft articles 10 and 11. This is because the request for information should be understood to refer essentially to information that, in many cases, will be complementary or additional to the information already in the possession of the forum State or the State of the official, and that therefore will usually be sought at a more advanced stage of the process. Thus, it is likely that the competent decision-making authority in each State will already be known to the other and that it is therefore not necessary to introduce this element, which operates as a safeguard clause. In any event, if the request for information is made at a time when the authorities are only beginning to deal with the question of immunity, there is no reason not to apply the principle that the competent authorities of the same State have an obligation to communicate with each other.

(9) Paragraph 4 replaces paragraphs 4 and 5 originally proposed by the Special Rapporteur, which listed the possible grounds for refusal of the request and the conditions to which both the request for information and the information provided could be subject, including confidentiality.[391] The Commission considered it preferable to include in draft article 12 a simpler paragraph merely setting out the principle that any request for information

[390] See, for example, the European Convention on Mutual Assistance in Criminal Matters (Strasbourg, 20 April 1959), United Nations, *Treaty Series*, vol. 472, No. 6841, p. 185, art. 3; the Inter-American Convention on Mutual Assistance in Criminal Matters (Nassau, 23 May 1992), Organization of American States, *Treaty Series*, No. 75, art. 7; the Convention on Mutual Assistance in Criminal Matters between the Member States of the Community of Portuguese-speaking Countries (Praia, 23 November 2005), *Diário da República I*, No. 177, 12 September 2008, p. 6635, art. 1, paras. 1 and 2; and the Model Treaty on Mutual Assistance in Criminal Matters, General Assembly resolution 45/117 of 14 December 1990, annex (subsequently amended by General Assembly resolution 53/112 of 9 December 1998, annex I), art. 1, para. 2.

[391] See the seventh report of the Special Rapporteur (A/CN.4/729), annex II.

must be considered in good faith by the requested State, be it the forum State or the State of the official. There are several reasons for this. First, the original proposal listing the permitted grounds for refusal could be interpreted *a contrario* as recognizing an obligation to provide the requested information. Such an obligation, however, does not exist in international law, except in respect of specific obligations that may be laid down in international cooperation and mutual legal assistance agreements or other treaties. Second, the original proposal could conflict with any systems for requesting and exchanging information that may be established in international cooperation and mutual legal assistance treaties, which would in any case apply between the States parties. Third, the establishment of a confidentiality rule could conflict with State rules governing confidentiality. Fourth and last but not least, the purpose of draft article 12 is to promote cooperation and the exchange of information between the forum State and the State of the official, but this purpose could be undermined or called into question if the draft article expressly listed grounds for refusal and rules of conditionality.

(10) In the Commission's view, however, the above considerations do not give grounds for ignoring the question of the criteria that States should follow in assessing requests for information. It therefore opted for wording that sets out, in a simple manner, the obligation of the requested State to consider in good faith any request that may be addressed to it. The term "requested State" reflects the terminology commonly used in international cooperation and mutual legal assistance treaties, which is familiar to States.

(11) The expression "shall consider ... in good faith" in paragraph 4 refers to the general obligation of States to act in good faith in their relations with third parties. The scope of this obligation, by its very nature, cannot be analysed in the abstract and must be determined on a case-by-case basis. Its inclusion in draft article 12 should be understood in the context defined by the draft article itself: as a procedural tool for promoting cooperation between the forum State and the State of the official to enable each of them to form a sound judgment to serve as a basis for the decisions referred to in paragraphs 1 and 2. Accordingly, the expression "shall consider ... in good faith" should be interpreted in the light of two elements operating together: first, the obligation to examine the request; and second, the requirement to do so with the intention of helping the other State to take an informed and well-founded decision on whether or not immunity applies, or on the invocation or waiver of immunity. The expression "shall consider ... in good faith" thus reflects an obligation of conduct and not an obligation of result.

(12) The requested State should take these elements into account as a starting point for the examination of any request for information, but nothing prevents it from also considering other elements or circumstances in reaching a decision on the request, such as, *inter alia*, concerns of sovereignty, public order, security and essential public interest. In any event, the Commission did not consider it necessary to refer expressly to these elements in draft article 12, recognizing that it is for the requested State to identify the reasons justifying its decision.

(13) The Commission did not consider it necessary to refer expressly, in paragraph 4, to the possibility of attaching conditions to the provision of the requested information. However, nothing would prevent the requested State from assessing whether to formulate conditions as part of the process of "considering in good faith" a request for information, especially if this would facilitate or encourage the provision of the requested information.