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# Draft report of the International Law Commission on the work of its seventy-second session

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# Chapter VI
# Immunity of State officials from foreign criminal jurisdiction

**Addendum**

[…]

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

[…]

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

**Draft 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 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, entitled "Procedural provisions and safeguards". Its purpose is to define the scope of Part Four in relation to Part Two and Part Three, which deal respectively with immunity *ratione personae* and immunity *ratione materiae*.

(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 have nonetheless been differences of interpretation among the members of the Commission with regard to the scope

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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 of the Commission, the title of draft article 7 (Crimes under international law in respect of which immunity *ratione materiae* shall not apply) and the reiteration of that idea in the chapeau of paragraph 1 of the draft article[1] appear to leave any questions relating to exceptions to immunity outside the scope of the draft articles. Consequently, none of the procedural provisions and safeguards set out in Part Four would be applicable in relation to draft article 7, and the necessary balance between that draft article and the procedural safeguards to be afforded to the State of the official would thus be disrupted. This notion of balance has been reflected in the work of the Commission through the inclusion of a footnote to the titles of Part Two and Part Three indicating that "[t]he Commission will consider the procedural provisions and safeguards applicable to the present draft articles at its seventieth session".[2]

(4) Other members of the Commission stated, on the contrary, that there is no reason to conclude that Part Four of the draft articles does not apply to draft article 7. According to these members, draft article 7 is included in Part Three of the draft articles and is subject to the same rules as the rest of the draft articles, including the procedural provisions and safeguards set out in Part Four. It should be borne in mind that, as stated in the commentary to draft article 7, the aforementioned "footnote marker was inserted after the headings of Part Two (Immunity *ratione personae*) and Part Three (Immunity *ratione materiae*) of the draft articles, since procedural provisions and safeguards may refer to both categories of immunity, and should also be considered in relation to the draft articles as a whole".[3] In the view of these members, draft article 7 operates as an exception to the application of the general rules concerning immunity *ratione materiae.* Therefore, in order to determine whether or not exceptions to immunity apply in a particular case, all the procedural provisions and safeguards included in the draft articles must be taken into account.

(5) In light of this divergence of views, the Commission agreed as a compromise to adopt 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".

(6) With the inclusion of 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.

(7) 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

[1] The chapeau is worded as follows: "Immunity *ratione materiae* from the exercise of foreign criminal jurisdiction shall not apply in respect of the following crimes under international law".

[2] The decision to include the footnote was taken at the Commission's sixty-ninth session, 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'".

[3] *Ibid*., paragraph (9) of the commentary to draft article 7.

Part Four would be understood to apply to it, the proposal was rejected in favour of a more general and neutral formulation referring to "the determination of whether immunity applies or does not apply under any of the draft articles".

(8) 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 types of acts that may be performed in order to determine any criminal responsibility of a State official, including outside the context of a trial as such. 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 such acts, 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.

(9) 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".[4] The words "current or former" should therefore be understood in the light of the provisions of draft article 4, paragraphs 1 and 3, for immunity *ratione personae*, and of draft article 6, paragraphs 2 and 3, 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.

(10) Finally, it should be noted that the Commission's understanding is that the adoption of draft article 8 *ante* is without prejudice to the adoption of any procedural safeguards, including the question of the application or non-application of specific safeguards in relation to draft article 7.

**Draft 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

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

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" is dealt with in a separate draft article that has not yet been considered by the Drafting Committee.

(2) Draft article 8 contains two paragraphs that define, respectively, a general rule (para. 1) and a special rule (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 presence of the foreign official is the essential requirement for triggering the obligation to examine the question of immunity. 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 present 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,[5] 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 an individual or group of individuals. These acts may be of different types and are not limited to judicial acts. On the contrary, the term "exercise of criminal jurisdiction" 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; in other words, when the act carried out by the competent authorities of the forum State has a direct impact on the official of another State.

(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,

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

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*.[6] 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,[7] and is intended to emphasize that the question of immunity should be examined immediately, without the need to wait for a later point in time when formal judicial proceedings have begun. Moreover, the need for prompt examination of the question of immunity is reinforced by the requirement that such examination take place "without delay", a phrase already used – albeit in a different context – 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 have a direct effect on the official of another State and that, if they were to occur, could have a negative impact on any immunity from foreign criminal jurisdiction that the official might enjoy. 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,

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[6] 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*)).

[7] 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").

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" rather than to list specific acts. The term "coercive measures" was chosen in order to follow the terminology already used by the International Court of Justice in the case concerning the *Arrest Warrant of 11 April 2000*.[8]

(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".[9] 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 present 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,[10] 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)[11] and that "[n]o

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

[9] *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".

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

[11] 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 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

measures of execution may be taken in respect of a diplomatic agent" (art. 31, para. 3).[12] 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).[13]

(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, since the above-mentioned international treaties only recognize the inviolability of diplomatic agents and other State officials who enjoy immunity *ratione personae*.

**Draft 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 other 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 a third 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.[14] This is explained by the fact that this

Consular Relations (Vienna, 24 April 1963), United Nations, *Treaty Series*, vol. 596, No. 8638, p. 261, art. 41, paras. 1–2.

[12] 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.

[13] *Yearbook of the Institute of International Law*, vol. 69 (see footnote 7 above), pp. 745 and 747.

[14] Article 42 of the Convention reads as follows: "In 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 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

Convention is the only treaty in this category that considers immunity from jurisdiction on the basis of immunity *ratione materiae*. Therefore, since the exercise of criminal jurisdiction is possible in certain circumstances, it establishes the obligation of notification as a safeguard for immunity. The Commission also took account of the fact that the United Nations Convention on Jurisdictional Immunities of States and Their Property[15] assumes that the forum State must give notice of its intention to exercise jurisdiction over another State. To this end, article 22 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 the first of the procedural safeguards set out in Part Four of the draft articles. Although notification may be closely related to the holding of consultations between the forum State and the State of the official, the concepts of "notification" and "consultation" should not be confused, 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

in Their Relations with International Organizations of a Universal Character and the Convention on Special Missions do not contain any similar provisions.

[15] 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.

temporal scope of immunity,[16] which is subject to the special rules applicable to immunity *ratione personae* and immunity *ratione materiae*.[17] 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 a recommendation 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.[18] 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 interim measures so that,

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

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

[18] 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.

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 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.[19] 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.[20] 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

[19] 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".

[20] 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.

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 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[21] and its two additional protocols;[22] the European Convention on the Transfer of Proceedings in Criminal Matters;[23] the European Convention on Extradition[24] and its four additional protocols;[25] the Inter-American Convention on Mutual Assistance in Criminal Matters;[26] the Inter-American Convention on Extradition;[27] the Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union;[28] Council Framework Decision 2009/948/JHA of 30 November 2009 on prevention and settlement of conflicts of exercise of jurisdiction in criminal proceedings;[29] the Convention on Mutual Assistance in Criminal Matters between the Member States of the Community of Portuguese-speaking Countries;[30] and the Convention on Extradition among the States Members of the Community of Portuguese-

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

[22] 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.

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

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

[25] 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.

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

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

[28] 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.

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

[30] 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.[31] 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,[32] the Model Treaty on the Transfer of Proceedings in Criminal Matters[33] and the Model Treaty on Extradition.[34] 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).

**Draft 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.

**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

[31] 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.

[32] 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).

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

[34] 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).

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[35] 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.[36] 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. As the relevant treaties do not address this issue, the competent authorities for this purpose will be those determined by domestic law under the principle of State self-organization. In any case, the State organs having such competence undeniably include, at least, those with responsibility for international relations under international law, such as the Head of State, the Head of Government, the Minister for Foreign Affairs and the heads of diplomatic missions. However, this does not mean that immunity cannot be invoked, in certain circumstances, by

[35] Paragraph 6 of the draft article as originally proposed by the Special Rapporteur in her seventh report read as follows: "In 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).

[36] 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 7 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).

a person specifically mandated to do so by the State, especially in the context of criminal proceedings in the strict sense before the courts.

(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. In this regard, it should be borne in mind that the recognition of the right of the State of the official to invoke immunity cannot automatically be interpreted as meaning that the invocation of immunity precludes the continuation of criminal proceedings when jurisdiction has been established.

(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".[37]

(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 spirit of draft article 10, paragraph 5, as proposed by the Special Rapporteur in her seventh report,[38] albeit with simpler and more prescriptive wording, according to which "[t]he authorities before which immunity has been invoked shall immediately inform any other authorities concerned of that fact". This provision 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.

**Draft 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.

[37] *Yearbook … 2014*, vol. II (Part Two), p. 145, para. (14) of the commentary to draft article 2 (*e*).
[38] A/CN.4/729, para. 69.

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 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[39] 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.[40] The same is

[39] 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).

[40] 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 7 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

true of the waiver of State immunity, which is addressed both in the United Nations Convention on Jurisdictional Immunities of States and Their Property[41] and in national laws on State immunity.[42]

(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 any 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 categorically that officials "will cease to enjoy immunity from foreign jurisdiction if the State which they represent or have represented decides to waive that immunity".[43]

(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 general manner, instead referring to the State in abstract terms.[44] The Commission itself, in its previous work, has already considered it preferable not to refer expressly to the State organs that are

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").

[41] 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.

[42] See United States of America, Foreign Sovereign Immunities Act 1976, sect. 1605 (a); 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.

[43] *Arrest Warrant of 11 April 2000* (see footnote 8 above), p. 25, para. 61.

[44] 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.[45] Moreover, State practice is scant and inconclusive.[46] The above commentaries pertaining to invocation are therefore fully applicable to the waiver of immunity, insofar as respect for the principle of State self-organization and the competence of the Head of State, the Head of Government, the Minister for Foreign Affairs and the heads of diplomatic missions to communicate waivers of immunity are concerned. This is without prejudice to the possibility that the waiver may be communicated by a person who is mandated to do so by the State of the official, particularly when immunity is waived in the courts of another State.

(6) In contrast to the draft article 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,[47] and is reflected in both relevant international treaties[48] and national laws.[49] For this reason, the Commission decided to delete paragraph 4 of the draft article originally proposed by the Special Rapporteur in her seventh report, which was

[45] 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 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 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).

[46] 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.

[47] See footnote 39 above.

[48] 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.

[49] 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.

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 waiver".[50] While members of the Commission generally considered that the waiver of immunity may be expressly provided for in a treaty,[51] 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,[52] 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[53] 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."[54]

(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.[55] For this purpose, it is understood that the State of

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

[51] 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 7 above), p. 749).

[52] *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.

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

[54] *Arrest Warrant of 11 April 2000* (see footnote 8 above), pp. 24–25, para. 59.

[55] 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-

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 intense 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 the possibility of defining exceptions to irrevocability. First, it should be noted that the members of the Commission generally agree that paragraph 5, as currently

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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 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 46 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 46 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).

drafted, reflects a general rule that manifests the principle of good faith and addresses the need to respect legal 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 supervening circumstances of a general nature arise, such as a change of government or a change of 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 non-retroactivity of waivers of immunity, and the practice on this issue is limited.[56] 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".[57] 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, one member of the Commission pointed out 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.[58] 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 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 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 present draft articles.

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[56] On the question of the irrevocability of waivers of immunity and the possibility of subjecting it to conditions, see the following domestic laws: United States, Foreign Sovereign Immunities Act 1976, sect. 1605 (a); 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, 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.

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

[58] 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).

(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 any comments they may wish to make.