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

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Chapter VI
Immunity of State officials from foreign criminal jurisdiction

Addendum

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C. Text of the draft articles on immunity of State officials from foreign criminal jurisdiction adopted by the Commission on first reading

2. Text of the draft articles and commentaries thereto

1. The text of the draft articles and commentaries thereto adopted by the Commission on first reading at its seventy-third session is reproduced below.

General commentary

(1) The present draft articles concern the immunity of State officials from foreign criminal jurisdiction.

(2) The International Law Commission has addressed the immunity of State officials before, in the context of diplomatic [1] and consular [2] relations and immunities, special missions,[3] relations between States and international organizations,[4] and immunities of States and their property.[5] In addition, the Commission has taken the question of immunity into consideration when examining other topics related to the criminal responsibility of individuals, especially in the Nürnberg Principles[6] and the different projects that culminated in the adoption of the draft Code of Crimes against the Peace and Security of Mankind[7] and, more recently, the draft articles on prevention and punishment of crimes against humanity.[8]

(3) The present draft articles, which have taken these previous texts into account, reflect a different model, in that they address the immunity of State officials from foreign criminal jurisdiction separately and comprehensively. These draft articles define the general legal regime applicable to this type of immunity, which is distinguished by the following features: (a) it is limited to immunity from criminal jurisdiction; (b) it is limited to foreign jurisdiction and does not affect the legal regime applicable before international criminal courts; and (c) it covers all State officials regardless of their position or the specific functions they perform for the State, with the sole exception of those State officials already covered by special regimes established by treaties.

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[1] See the draft articles on diplomatic intercourse and immunities adopted by the Commission at its tenth session, *Yearbook of the International Law Commission* (*Yearbook …*), *1958*, vol. II, document A/3859, p. 89, para. 53. See, in particular, draft articles 29, 30 and 36–38 and the commentaries thereto, *ibid*., pp. 98–99 and 101–103.

[2] See the draft articles on consular relations adopted by the Commission at its thirteenth session, *Yearbook … 1961*, vol. II, document A/4843, p. 92, para. 37. See, in particular, draft articles 41–45, 53, 57 and 61 and the commentaries thereto, *ibid*., pp. 115–119, 122–123, 125 and 126.

[3] See the draft articles on special missions adopted by the Commission at its nineteenth session, *Yearbook … 1967*, vol. II, document A/6709/Rev.1 and Rev.1/Corr.1, p. 347, para. 35. See, in particular, draft articles 9, 29, 31, 36–41 and 44 and the commentaries thereto, *ibid.*, pp. 351–352, 361, 362, 363–365 and 366.

[4] See the draft articles on the representation of States in their relations with international organizations adopted by the Commission at its twenty-third session, *Yearbook … 1971*, vol. II (Part One), document A/8410/Rev.1, p. 284, para. 60. See, in particular, draft articles 22, 28, 30, 31, 36–38, 50, 53, 59, 61, 62, 67–69 and 74 and the commentaries thereto, *ibid.*, pp. 299–300, 302–305, 308–310, 315–316, 317, 319–321, 322–323 and 326.

[5] See the draft articles on jurisdictional immunities of States and their property adopted by the Commission at its forty-third session, *Yearbook … 1991*, vol. II, (Part Two), p. 13, para. 28. See, in particular, draft articles 2 and 3 and the commentaries thereto, *ibid.*, pp. 14–22.

[6] Principles of International Law recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal (Nürnberg Principles), *Yearbook … 1950*, vol. II, document A/1316, part three, pp. 374–378, paras. 97–127. See, in particular, principle III and the commentary thereto, *ibid.*, p. 375.

[7] *Yearbook … 1996*, vol. II (Part Two), para. 50. See, in particular, draft article 7 and the commentary thereto, *ibid.*, pp. 26–27.

[8] The text of the draft articles adopted by the Commission at its seventy-first session and the commentaries thereto are reproduced in *Official Records of the General Assembly, Seventy-fourth Session, Supplement No. 10* (A/74/10), paras. 44–45. See, in particular, draft article 5 and the commentary thereto.

(4) In preparing the present draft articles, the Commission has taken into account different elements that have served as guiding principles for the content and structure of the draft articles.

(5) The first of these elements is the need to guarantee respect for the principle of the sovereign equality of States, which is the very foundation of immunity of State officials from foreign criminal jurisdiction. Indeed, as affirmed by the International Court of Justice, the immunities accorded to State officials are not granted for their personal benefit, but to protect the rights and interests of the State. Furthermore, the Commission has borne in mind that the principle of the sovereign equality of States applies both to the State of the official and to the forum State which, by virtue of this principle, has the right to exercise its own criminal jurisdiction. Thus the Commission has been fully aware that, as the Court has pointed out, there is a close relationship between jurisdiction and immunity, since immunity from foreign criminal jurisdiction can only be understood *vis-à-vis* a pre-existing criminal jurisdiction, the effective exercise of which is prevented by such immunity in a given case.

(6) In the light of the above considerations, the present draft articles embrace a restrictive notion of the immunity of State officials from foreign criminal jurisdiction, which finds its sole justification in the fact that the official represents the State or exercises official functions. Moreover, in view of the different positions that different State officials may hold, the draft articles distinguish between two overlapping legal regimes, namely immunity *ratione personae* and immunity *ratione materiae.*

(7) The Commission has also borne in mind that the present draft articles are meant to be part of an international legal order that forms a system. Therefore, in the elaboration of these draft articles, consideration must be given to existing norms in different areas of contemporary international law, with a view to avoiding any negative impact on them. In particular, account must be taken of the strides made in international criminal law in terms of defining and punishing the most serious crimes under international law, defining the principle of accountability as one of its constituent elements, and consolidating the fight against impunity as a crucial, non-negotiable goal of the international community in the twenty-first century. Although the Commission is fully aware that the terms “immunity” and “impunity” are neither equivalent nor interchangeable, it has remained mindful, in its work, of the need to guarantee that the immunity of State officials from foreign criminal jurisdiction does not result in impunity for the most serious crimes under international law.

(8) Therefore, the Commission has included several provisions in the draft articles that address exceptions to immunity *ratione materiae* when a State official may have committed a crime under international law; the separation between the rules applicable to immunity from foreign criminal jurisdiction and the rules applicable to international criminal tribunals; and the establishment of mechanisms for the prosecution of State officials, either by the courts of their own State or, where possible, by an international tribunal.

(9) Finally, the Commission has also borne in mind that, under certain circumstances, the exercise of criminal jurisdiction over officials of another State may be politically motivated or abusive, which in turn will create undesirable tension in the relations between the forum State and the State of the official. Consequently, the immunity of State officials from foreign criminal jurisdiction may contribute to the stability of international relations.

(10) The present draft articles include a set of procedural provisions and safeguards aimed at promoting trust, mutual understanding and cooperation between the forum State and the State of the official and offering safeguards against possible abuses and politicization in the exercise of criminal jurisdiction over an official of another State.

(11) These elements are present in both the content and the structure of the present draft articles and contribute to the balance of the text as a whole. The draft articles are divided into four parts dealing, respectively, with the scope of application and definitions (Part One), immunity *ratione personae* (Part Two), immunity *ratione materiae* (Part Three) and procedural provisions and safeguards (Part Four).

(12) As is usual in the work of the Commission, the draft articles contain proposals for both the codification and the progressive development of international law. Reference is made to this question as appropriate in the commentaries to the draft articles, with a view to

providing States with enough information in this regard and ensuring the transparency that must govern the work of the Commission. In this respect, the Commission wishes to recall that its work on immunity of State officials from foreign criminal jurisdiction, like the rest of its outputs, must be understood in the light of both the text of the draft articles and the commentaries pertaining to them.

(13) Finally, it must be borne in mind that the Commission has not yet decided on the recommendation to be addressed to the General Assembly regarding the present draft articles, be it to commend them to the attention of States in general or to use them as a basis for the negotiation of a future treaty on the topic. As is customary, the Commission will take this decision when it adopts the draft articles on second reading, which will enable it to benefit from any comments made by States on this issue.

Part One
Introduction

Commentary

Part One, entitled "Introduction", contains provisions defining the general framework in which the draft articles apply. Draft article 1 defines the scope of the draft articles, and draft article 2 sets out the definitions of "State official" and "act performed in an official capacity", which, by their very nature, are particularly relevant for the correct understanding of the draft articles as a whole and are used throughout the text.

Article 1
Scope of the present draft articles

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

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

3. The present draft articles do not affect the rights and obligations of States parties under international agreements establishing international criminal courts and tribunals as between the parties to those agreements.

…

Commentary

(1) The purpose of draft article 1 is to define the scope of the draft articles on immunity of State officials from foreign criminal jurisdiction. It incorporates in a single provision the dual perspective, positive and negative, that determines the scope. Paragraph 1 explains the cases to which the draft articles apply, while paragraph 2 contains a saving or "without prejudice" clause listing the situations which, under international law, are governed by special regimes that are not affected by the present draft articles. Paragraph 3 contains a "without prejudice" clause referring to international criminal courts and tribunals, which also remain outside the scope of the draft articles. In the past, the Commission has used various techniques for defining this dual dimension of the scope of a set of draft articles,[9] but in this

[9] In the draft articles on jurisdictional immunities of States and their property (*Yearbook … 1991*, vol. II (Part Two), para. 28), the Commission chose to deal with the dual dimension of the scope in two separate draft articles, and this was ultimately reflected in the Convention adopted in 2004 (United Nations Convention on Jurisdictional Immunities of States and Their Property (New York, 2 December 2004), General Assembly resolution 59/38, annex, arts. 1 and 3). On the other hand, in the 1975 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),

case it has thought it preferable to combine both dimensions in a single provision, since this presents the advantage of facilitating the simultaneous treatment of both dimensions of scope under a single title.

Paragraph 1

(2) Paragraph 1 establishes the scope of the draft articles in its positive dimension. To this end, in the paragraph, the Commission has decided to use the phrase "[t]he present draft articles apply to", which is the wording used recently in other draft articles adopted by the Commission that contain a provision referring to their scope.[10] On the other hand, the Commission considered that the scope of the draft articles should be defined as simply as possible, so that it could frame the rest of the draft articles and not affect or prejudge the other issues to be addressed later in other provisions. Accordingly, the Commission decided to make a descriptive reference to the scope, listing the elements comprising the title of the topic itself. For the same reason, the phrase "from the exercise of", initially proposed by the Special Rapporteur, has been left out of the definition of the scope. This phrase was interpreted by various members of the Commission in different and even contradictory ways, in terms of the consequences for the definition of the scope of immunity from foreign criminal jurisdiction. Account was also taken of the fact that the phrase "exercise of" is used in other draft articles. The Commission was therefore of the view that the phrase was not needed to define the general scope of the draft articles and has reserved it for use in other parts of the draft articles in which it is more suitably placed.[11]

(3) Paragraph 1 covers the three elements defining the purpose of the draft articles, namely: (a) who are the persons enjoying immunity? (State officials); (b) what type of jurisdiction is affected by immunity? (criminal jurisdiction); and (c) in what domain does such criminal jurisdiction operate? (the criminal jurisdiction of another State).

(4) As to the first element, the Commission has chosen to confine the draft articles to the immunity from foreign criminal jurisdiction that may be enjoyed by those persons who represent or act on behalf of a State. In the Commission's previous work, the persons enjoying immunity have been referred to using the term "officials".[12] However, the use of this term, and its equivalents in the other language versions, has raised certain problems to which the Special Rapporteur has drawn attention in her reports,[13] and which have also been pointed out by some members of the Commission. It should be noted that the terms used in the various language versions are neither interchangeable nor synonymous. Nonetheless, with a view to simplifying the text, the Commission has decided to retain the term "State official" to refer in general to all persons who benefit from the immunity from foreign criminal jurisdiction contemplated in these draft articles. This term has been defined in draft article 2 (a), to whose text and commentary attention is drawn. The expression "official of another State" used in some draft articles is equivalent to the expression "State official".

(5) Secondly, the Commission has decided to confine the scope of the draft articles to immunity from criminal jurisdiction. Following its practice in other projects in which it has dealt with immunity from criminal jurisdiction, the Commission has not considered it

p. 207, document A/CONF.67/16, and in the Convention on the Law of the Non-navigational Uses of International Watercourses (New York, 21 May 1997, United Nations, *Treaty Series*, vol. 2999, No. 52106, p. 77), the various aspects of the scope are defined in a single article, which also refers to special regimes. Although the draft articles on the expulsion of aliens, adopted by the Commission on first reading in 2014 (*Official Records of the General Assembly, Sixty-ninth Session, Supplement No. 10* (A/69/10), paras. 44–45), also dealt with the scope in a single article consisting of two paragraphs, the same draft articles include other separate provisions whose purpose is to keep certain special regimes within a specific scope.

[10] This wording has been used, for example, in draft article 1 of the draft articles on the expulsion of aliens.

[11] See draft articles 3, 5, 7, 8, 10, 14 and 16.

[12] The words used in the various language versions are as follows: المسؤولون (Arabic), 官员 (Chinese), "officials" (English), "*représentants*" (French), *должностные лица* (Russian) and "*funcionarios*" (Spanish).

[13] Preliminary report, *Yearbook … 2012*, vol. II (Part One), document A/CN.4/654, para. 66; and second report, *Yearbook … 2013*, vol. II (Part One), document A/CN.4/661, para. 32.

necessary to define what immunity and criminal jurisdiction mean. However, for merely descriptive purposes, it should be noted that the present draft articles address cases in which, by virtue of immunity, criminal jurisdiction is blocked, criminal jurisdiction being the power of States to perform acts of varying nature whose ultimate purpose is to contribute to the determination of the criminal responsibility of an individual.

(6) Thirdly, the Commission decided to confine the scope of the draft articles to immunity from "foreign" criminal jurisdiction, i.e. that which reflects the horizontal relations between States. This means that the draft articles will be applied solely with respect to immunity from the criminal jurisdiction "of another State".

(7) It must be emphasized that paragraph 1 refers to "immunity … from the criminal jurisdiction of another State". The use of the word "from" creates a link between the concepts of "immunity" and "foreign criminal jurisdiction" (or jurisdiction "of another State") that must be duly taken into account. On this point, the Commission is of the view that the concepts of immunity and foreign criminal jurisdiction are closely interrelated: it is impossible to view immunity in abstract terms, without relating it to a foreign criminal jurisdiction which, although it exists, will not be exercised by the forum State precisely because of the existence of immunity. Or, as the International Court of Justice has put it, "it is only where a State has jurisdiction under international law in relation to a particular matter that there can be any question of immunities in regard to the exercise of that jurisdiction".[14]

(8) The Commission regards immunity from foreign criminal jurisdiction as being procedural in nature. Consequently, immunity from foreign criminal jurisdiction cannot constitute a means of exempting the criminal responsibility of a person from the substantive rules of criminal law, a responsibility which accordingly is preserved, even in cases where a State cannot, through the exercise of its jurisdiction, determine that such responsibility exists at a specific moment and with regard to a given person. On the contrary, immunity from foreign criminal jurisdiction is strictly a procedural obstacle or barrier to the exercise of a State's criminal jurisdiction against the officials of another State. This position was affirmed by the International Court of Justice in the *Arrest Warrant* case,[15] which is followed in the majority of State practice and in the literature.

Paragraph 2

(9) Paragraph 2 refers to cases in which there are special rules of international law relating to immunity from foreign criminal jurisdiction. This category of special rules has its most well-known and frequently cited manifestation in the regime of privileges and immunities granted under international law to diplomatic agents and to consular officials.[16] However, there are other examples in contemporary international law, both treaty-based and custom-based, which in the Commission's view should likewise be taken into account for the purposes of defining the scope of the present draft articles. Concerning those special regimes, the Commission considers that these are legal regimes that are well established in international law and that the present draft articles should not affect their content and application. It should be recalled that during the preparation of the draft articles on jurisdictional immunities of States and their property, the Commission acknowledged the existence of special immunity regimes, albeit in a different context, and specifically referred to them in article 3, entitled "Privileges and immunities not affected by the present articles".[17] The relationship between the regime for immunity of State officials from foreign criminal jurisdiction set out in the draft articles and the special regimes just mentioned was established

[14] *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium), Judgment, I.C.J. Reports 2002*, p. 3, at p. 19, para. 46. See also the Commission's commentary to article 6 of the draft articles on jurisdictional immunities of States and their property, particularly paragraphs (1)–(3) (*Yearbook … 1991*, vol. II (Part Two), pp. 23–24).

[15] *Arrest Warrant of 11 April 2000* (see footnote 14 above), p. 25, para. 60. The Court has taken the same position regarding State immunity: see *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening), Judgment, I.C.J. Reports 2012*, p. 99, at p. 124, para. 58, and p. 143, para. 100.

[16] See the Vienna Convention on Diplomatic Relations (Vienna, 18 April 1961), United Nations, *Treaty Series*, vol. 500, No. 7310, p. 95, art. 31; and the Vienna Convention on Consular Relations (Vienna, 24 April 1963), *ibid.*, vol. 596, No. 8638, p. 261, art. 43.

[17] *Yearbook … 1991*, vol. II (Part Two), pp. 21–22, draft article 3 and commentary thereto.

by the Commission with the inclusion of a saving clause in paragraph 2, according to which the provisions of the present draft articles are "without prejudice" to what is set out in the special regimes; here the Commission has followed the wording it used before, in the draft articles on jurisdictional immunities of States and their property.

(10) The Commission has used the term "special rules" as a synonym for the words "special regimes" in its earlier work. Although the Commission has not defined the concept of "special regime", attention should be drawn to the conclusions of the Study Group on fragmentation of international law, particularly conclusions 2 and 3.[18] For the purposes of the present draft articles, the Commission understands "special rules" to mean those international rules, whether treaty- or custom-based, that regulate the immunity from foreign criminal jurisdiction of persons connected with activities in specific fields of international relations. The Commission sees such "special rules" as coexisting with the regime defined in the present draft articles, the special regime being applied in the event of any conflict between the two regimes.[19] In any event, the Commission considers that the special regimes in question are only those established by "rules of international law", this reference to international law being essential for the purpose of defining the scope of the "without prejudice" clause.[20]

(11) The special regimes included in paragraph 2 relate to three areas of international practice in which norms regulating immunity from foreign criminal jurisdiction have been identified, namely (*a*) the presence of a State in a foreign country through diplomatic missions, consular posts and special missions; (*b*) the various representational and other activities connected with international organizations; and (*c*) the presence of a State's military forces in a foreign country. Although in all three areas treaty-based norms establishing a regime of immunity from foreign criminal jurisdiction may be identified, the Commission has not thought it necessary to include in paragraph 2 an explicit reference to such international conventions and instruments.[21]

(12) The first group includes special rules relating to the immunity from foreign criminal jurisdiction of persons connected with carrying out the functions of representation, or protection of the interests of the State in another State, whether on a permanent basis or otherwise, while connected with a diplomatic mission, consular post or special mission. The Commission takes the view that the rules contained in the Vienna Convention on Diplomatic Relations, the Vienna Convention on Consular Relations and the Convention on Special Missions,[22] as well as the relevant rules of customary law, fall into this category.

(13) The second group includes special rules applicable to the immunity from criminal jurisdiction enjoyed by persons connected with an activity in relation to or in the framework of an international organization. In this category are included the special rules applicable to persons connected with missions to an international organization or delegations to organs of international organizations or to international conferences.[23] The Commission's understanding is that it is unnecessary to include in this group of special rules those that apply

[18] *Yearbook … 2006*, vol. II (Part Two), para. 251.

[19] In its commentary to article 3 of the draft articles on jurisdictional immunities of States and their property, the Commission referred to this aspect in the following terms: "[t]he article is intended to leave existing special regimes unaffected, especially with regard to persons connected with the missions listed" (*Yearbook … 1991*, vol. II (Part Two), p. 22, para. (5) of the commentary). See also paragraph (1) of the commentary.

[20] The Commission also included a reference to international law in the above-mentioned article 3 of the draft articles on jurisdictional immunities of States and their property. It should be noted that the Commission drew special attention to this point in its commentary to the draft article, particularly paragraphs (1) and (3) thereof.

[21] It must be kept in mind that the Commission also did not list such conventions in the draft articles on jurisdictional immunities of States and their property. However, the commentary to draft article 3 (paragraph (2) thereof) referred to the areas in which there are such special regimes and expressly mentioned some of the conventions establishing those regimes.

[22] Convention on Special Missions (New York, 8 December 1969), United Nations, *Treaty Series*, vol. 1400, No. 23431, p. 231.

[23] This list corresponds to the one already formulated by the Commission in draft article 3, paragraph 1 (*a*), of the draft articles on jurisdictional immunities of States and their property.

in general to the international organizations themselves. However, it considers that this category does include norms applicable to the agents of an international organization, especially in cases when the agent has been placed at the disposal of the organization by a State and continues to enjoy the status of State official during the time when he or she is acting on behalf of and for the organization. Regarding this second group of special regimes, the Commission has taken into account the Vienna Convention on the Representation of States in Their Relations with International Organizations of a Universal Character, the Convention on the Privileges and Immunities of the United Nations[24] and the Convention on the Privileges and Immunities of the Specialized Agencies,[25] as well as other treaty-based and customary norms applicable in this area.

(14) The third group of special rules includes those according immunity from criminal jurisdiction to persons connected with the military forces of a State located in another State. This category includes the whole set of rules regulating the stationing of troops in the territory of a third State, such as those included in status-of-forces agreements and those included in headquarters agreements or military cooperation accords envisaging the stationing of troops. Also included in this category are agreements made in connection with the short-term activities of military forces in a foreign State.

(15) The list of the special rules described in paragraph 2 is qualified by the words "in particular" to indicate that the clause does not exclusively apply to these special rules. In this connection, various members of the Commission drew attention to the fact that special rules in other areas may be found in practice, particularly in connection with the establishment in a State's territory of foreign institutions and centres for economic, technical, scientific and cultural cooperation, usually on the basis of specific headquarters agreements. Although the Commission has accepted in general terms the existence of these special regimes, it has considered that there is no need to mention them in paragraph 2.

(16) Lastly, it should be noted that the Commission considered the possibility of including in paragraph 2 the practice whereby a State unilaterally grants a foreign official immunity from foreign criminal jurisdiction. However, the Commission decided against such inclusion.

(17) On the other hand, the Commission has considered that the formulation of paragraph 2 should parallel the structure of paragraph 1. It must thus be borne in mind that the present draft articles refer to the immunity from foreign criminal jurisdiction of certain persons described as "State officials" and that, consequently, this subjective element should also be reflected in the "without prejudice" clause. This is why paragraph 2 refers expressly to "persons connected with". The phrase "persons connected with" has been used in line with the terminology in the United Nations Convention on Jurisdictional Immunities of States and Their Property (art. 3). The scope of the term "persons connected with" will depend on the content of the rules defining the special regime that applies to them; it is therefore not possible *a priori* to draw up a single definition for this category. This is also true for civilian personnel connected with the military forces of a State, who will be included in the special regime only to the extent that the legal instrument applicable in each case so establishes.

(18) The combination of the terms "persons connected with" and "special rules" is essential in determining the scope and meaning of the "without prejudice" clause in paragraph 2. The Commission considers that the persons covered in this paragraph (diplomatic agents, consular officials, members of special missions, agents of international organizations and members of the military forces of a State) are automatically excluded from the scope of the present draft articles, not by the mere fact of belonging to that category of officials, but by the fact that one of the special regimes referred to in draft article 1, paragraph 2, applies to them under certain circumstances. In such circumstances, the immunity from foreign criminal jurisdiction that these persons may enjoy under the special regimes applicable to them will not be affected by the provisions of the present draft articles.

[24] 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.

[25] Convention on the Privileges and Immunities of the Specialized Agencies (New York, 21 November 1947), *ibid*., vol. 33, No. 521, p. 261.

Paragraph 3

(19) Paragraph 3 addresses the relationship between the present draft articles and international criminal courts and tribunals.

(20) As pointed out in paragraph (6) above, the present draft articles address the immunity of State officials from the criminal jurisdiction of another State. As a result, issues relating to immunity before international criminal courts and tribunals remain outside the scope of the present draft articles, as such issues are governed by a legal regime of their own. In particular, this exclusion must be understood to mean that none of the rules governing immunities before such courts are affected by the content of the present draft article.

(21) However, during the Commission's work on the present topic, different questions have been raised that have a bearing on the activity of international criminal courts and tribunals, including the effect that existing international norms imposing an obligation on States to cooperate with such courts and tribunals may have on the present draft articles. Moreover, during the Commission's debates, attention has repeatedly been drawn to the need to preserve the achievements of recent decades in the field of international criminal law, especially the establishment of international criminal courts and tribunals, in particular the International Criminal Court as a permanent international criminal jurisdiction. Members of the Commission have emphasized the need for the present draft articles not to impair such achievements. For their part, some States in the Sixth Committee have also highlighted the need to preserve such achievements, so that their value and significance are not diminished as a result of the elaboration of the present draft articles.

(22) Paragraph 3 responds to these concerns and has been adopted as a compromise solution between the different positions on the issue held by the members of the Commission, which range from the proposal originally submitted by the Special Rapporteur as draft article 18, according to which "[the] present draft articles are without prejudice to the rules governing the functioning of international criminal tribunals",[26] to the position of those members of the Commission who considered it unnecessary to include any reference to international criminal tribunals in the draft articles. After a long debate, the Commission concluded that an express reference to the issue of international criminal tribunals was necessary in draft article 1, concerning the scope of the draft articles. Paragraph 3 has been drafted as a "without prejudice" clause, modelled on paragraph 2, in order to emphasize the separation and independence of the draft articles and the special legal regimes applicable to international criminal courts and tribunals. The Commission's intention, in adopting paragraph 3, was to reflect the importance attributed by the international community to these courts, in particular the International Criminal Court, and to take into account their relevance for international law in the twenty-first century. At the same time, the Commission has precluded the possibility that the legal regimes pertaining to international criminal courts and tribunals could be interpreted as being hierarchically superior to the present draft articles, or vice versa.

(23) Paragraph 3 is inspired by article 26 of the United Nations Convention on Jurisdictional Immunities of States and Their Property, which, under the title "Other international agreements", reads as follows: "[n]othing in the present Convention shall affect the rights and obligations of States Parties under existing international agreements which relate to matters dealt with in the present Convention". This provision was considered an appropriate means of reflecting and addressing the issues implicit in paragraph 3 of draft article 1. Its purpose is to preserve "the rights and obligations of States parties under international agreements establishing international criminal courts and tribunals as between the parties to those agreements".

(24) The expression "the rights and obligations of States parties" refers to any of the rights and obligations that may derive from a specific international agreement establishing an international criminal court or tribunal. The Commission has preferred this wording over other proposals such as "the question of immunity" regulated in such agreements or "the rules governing the functioning of international criminal tribunals", which were considered,

[26] Eighth report of the Special Rapporteur on immunity of State officials from foreign criminal jurisdiction (A/CN.4/739), para. 32.

respectively, as being too narrow or too broad in relation to the purpose of paragraph 3 of draft article 1.

(25) The phrase "international agreements establishing international criminal courts and tribunals" refers to the international rules considered to be special legal regimes for the purpose of the "without prejudice" clause, bearing in mind the objective pursued by that clause. Therefore, this phrase does not mirror the wording of article 26 of the United Nations Convention on Jurisdictional Immunities of States and Their Property, because the phrase "which relate to matters dealt with in the present Convention" was not sufficiently clear to reflect the relationship between the present draft articles and the legal regimes applicable to international criminal courts and tribunals. The expression "international agreements" means the constituent instrument of each international criminal tribunal, including the Rome Statute of the International Criminal Court.[27] Nevertheless, one member of the Commission has questioned whether the term "international agreements" is adequate to refer to this type of instrument, since some international criminal tribunals, such as the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 and the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States between 1 January and 31 December 1994, have been created by Security Council resolutions, while other tribunals, in particular hybrid or internationalized tribunals, have been created by provisions of domestic law as a result of initiatives originating from universal or regional international organizations.

(26) Paragraph 3 ends with the phrase "as between the parties to those agreements". The intention here is to highlight the special nature of the legal regimes applicable to international criminal tribunals, given that, as a rule, such regimes apply only as between the parties to the agreement establishing a particular international court or tribunal. This does not, however, imply any statement whatsoever in relation to the obligations that can be imposed upon States through the application of other rules of international law.

Article 2
Definitions

For the purposes of the present draft articles:

(a) "State official" means any individual who represents the State or who exercises State functions, and refers to both current and former State officials;

(b) an "act performed in an official capacity" means any act performed by a State official in the exercise of State authority.

Commentary

(1) Draft article 2 sets out the definitions of the expressions "State official" (subparagraph (a)) and "act performed in an official capacity" (subparagraph (b)), two categories that are essential for the draft articles as a whole. The Commission also considered the definitions of "immunity", "criminal jurisdiction", "exercise of criminal jurisdiction" and "inviolability", which were presented by the Special Rapporteur in her second report[28] and in the framework of the Drafting Committee. However, following the practice in its previous work, the Commission has not considered it necessary to include these definitions in draft article 2.

(2) Draft article 2 is entitled "Definitions". This title is regarded as being equivalent to "Use of terms", which has been used by the Commission in other draft articles. The use of a different title does not introduce any different meaning with regard of the nature of this provision.

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

[28] *Yearbook ... 2013*, vol. II (Part One), document A/CN.4/661.

Subparagraph (a)

(3) The purpose of draft article 2, subparagraph (a) is to define the persons to whom the present draft articles apply, namely "State officials". Defining the concept of "State official" facilitates an understanding of one of the normative elements of immunity: the individuals who enjoy immunity. Most members of the Commission thought it would be useful to have a definition of "State official" for the purposes of the present draft articles, given that immunity from foreign criminal jurisdiction is applicable to individuals. Several members of the Commission expressed doubts about the need to include this definition.

(4) The definition of the term "State official" contained in draft article 2, subparagraph (a), is general in nature, applicable to any person who enjoys immunity from foreign criminal jurisdiction under the present draft articles, either immunity *ratione personae* or immunity *ratione materiae*. Consequently, the nature and object of draft article 2, subparagraph (a), must not be confused with the nature and object of draft articles 3 and 5, which define who enjoys each category of immunity.[29] The persons who enjoy immunity *ratione personae* and immunity *ratione materiae* both fall within the definition of "State official", which is common to both categories.

(5) There is no general definition in international law of the term "State official" or "official", although both terms may be found in certain international treaties and instruments.[30] The term "State official", or simply "official", can mean different things in different domestic legal systems. Consequently, the definition of "State official" referred to in this commentary is autonomous, and must be understood to be for the purposes of the present draft articles.

(6) The definition of "State official" uses the term "individual" to indicate that the present draft articles cover only natural persons. The draft articles are without prejudice to the rules applicable to legal persons.

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

(8) As regards the "State officials" to whom immunity *ratione materiae* is applicable, the Commission considers that it cannot use the technique of identification *eo nomine*. In view of both the diversity of the positions of the individuals to whom immunity may apply and the variety of national legal systems that determine which persons are their officials, the

[29] Draft article 3 states that "Heads of State, Heads of Government and Ministers for Foreign Affairs enjoy immunity *ratione personae* from the exercise of foreign criminal jurisdiction". Draft article 5 states that "State officials acting as such enjoy immunity *ratione materiae* from the exercise of foreign criminal jurisdiction".

[30] These terms are used in the following multilateral treaties: the Vienna Convention on Diplomatic Relations; the Vienna Convention on Consular Relations; the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents (New York, 14 December 1973), United Nations, *Treaty Series*, vol. 1035, No. 15410, p. 167; the Convention on the Prevention and Punishment of the Crime of Genocide (Paris, 9 December 1948), *ibid.*, vol. 78, No. 1021, p. 277; the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (New York, 10 December 1984), *ibid.*, vol. 1465, No. 24841, p. 85; the United Nations Convention against Corruption (New York, 31 October 2003), *ibid.*, vol. 2349, No. 42146, p. 41; the Criminal Law Convention on Corruption (Council of Europe) (Strasbourg, 27 January 1999), *ibid.*, vol. 2216, No. 39391, p. 225; the Inter-American Convention against Corruption (Caracas, 29 March 1996), E/1996/99; and the African Union Convention on Preventing and Combating Corruption (Maputo, 11 July 2003), *International Legal Materials*, vol. 43 (2004), p. 5. For an analysis of these instruments for the purposes of defining "State official", see the third report of the Special Rapporteur (A/CN.4/673), paras. 51–93.

Commission does not consider it possible to draw up an exhaustive list that would include all the individuals covered by immunity *ratione materiae*. For the same reasons, the Commission has also considered it neither possible nor suitable to draw up an indicative list in a draft article of the positions of those individuals to whom such immunity may apply. In both cases, the list would inevitably be incomplete, since all the positions of the State officials included in domestic legal systems cannot be catalogued and the list would have to be constantly updated and might be confusing for the government institutions responsible for applying immunity from foreign criminal jurisdiction. Accordingly, the individuals who may be termed "State officials" for the purposes of immunity *ratione materiae* must be identified on a case-by-case basis, applying the criteria included in the definition, which point to a specific link between the State and the official, namely representation of the State or the exercise of State functions.

(9) Nevertheless, by way of example, the following "State officials" have appeared in national and international case law regarding immunity from jurisdiction: a former Head of State; a Minister of Defence and a former Minister of Defence; a Vice-President and Minister of Forestry; a Minister of the Interior; an Attorney General and a General Prosecutor; a Head of National Security and a former intelligence service chief; a director of a maritime authority; an Attorney General and various lower-ranking officials of a federal State (a prosecutor and his legal assistants, a detective in the Attorney General's Office and a lawyer in a State agency); military officials of various ranks, and various members of government security forces and institutions, including the Director of Scotland Yard; border guards; the deputy director of a prison; and the head of a State's central archives.[31]

[31] See Association Fédération nationale des victimes d'accidents collectifs «FENVAC SOS Catastrophe»; *Association des familles des victimes du Joola et al.*, Court of Cassation, Criminal Chamber (France), judgment of 19 January 2010 (09-84.818) (*Bulletin des Arrêts, Chambre criminelle*, No. 1 (January 2010), p. 41); *Jones v. Saudi Arabia*, House of Lords (United Kingdom), 14 June 2006, [2006] UKHL 26 (*International Law Reports*, vol. 129, p. 744); *Agent judiciaire du Trésor v. Malta Maritime Authority et Carmel X*, Court of Cassation, Criminal Chamber (France), judgment of 23 November 2004 (*Bulletin criminel 2004*, No. 292, p. 1096); *Norbert Schmidt v. The Home Secretary of the Government of the United Kingdom, The Commissioner of the Metropolitan Police and David Jones*, Supreme Court (Ireland), judgment of 24 April 1997, [1997] 2IR 121; *Church of Scientology*, Federal Supreme Court of Germany, judgment of 26 September 1978 (*International Law Reports*, vol. 65, p. 193); *Teodoro Nguema Obiang Mangue et autres*, Court of Appeal of Paris, Section Seven, Second Investigating Chamber (France), judgment of 13 June 2013; *A. c. Ministère public de la Confédération*, Federal Criminal Court (Switzerland) (BB.2011.140), judgment of 25 July 2012; *Regina v. Bartle and the Commissioner of Police for the Metropolis and Others – Ex Parte Pinochet*, House of Lords (United Kingdom), judgment of 24 March 1999 (*International Legal Materials*, vol. 38 (1999), p. 581); *Khurts Bat v. Investigating Judge of the German Federal Court*, Administrative Court, High Court of Justice (United Kingdom), judgment of 29 July 2011 ([2011] EWHC 2029 (Admin), *International Law Reports*, vol. 147, p. 633); *Public Prosecutor v. Adler et al.*, Tribunal of Milan, Fourth Criminal Division (Italy), judgment of 1 February 2010 (available at http://opil.ouplaw.com, International Law in Domestic Courts [ILDC 1492 (IT 2010)]); *United States of America v. Noriega*, Court of Appeals, Eleventh Circuit (United States of America), judgment of 7 July 1997 (*International Law Reports*, vol. 121, p. 591); *Border Guards Prosecution*, Federal Supreme Court (Germany), judgment of 3 November 1992 (case No. 5 StR 370/92, *ibid*., vol. 100, p. 364); *In re Mr. and Mrs. Doe*, Court of Appeals, Second Circuit (United States of America), judgment of 19 October 1988 (860 F. 2d 40 (1988), *ibid*., vol. 121, p. 567); *R. v. Lambeth Justices ex parte Yusufu*, Divisional Court (United Kingdom), judgment of 8 February 1985 (*ibid*., vol. 88, p. 323); *Estate of the late Zahra (Ziba) Kazemi and Stephan (Salman) Hashemi v. the Islamic Republic of Iran, Ayatollah Ali Khamenei, Saeed Mortazavi and Mohammad Bakhshi*, Superior Court, Commercial Division (Canada), judgment of 25 January 2011; *Ali Saadallah Belhas et al. v. Moshe Ya'alon*, Court of Appeals for the District of Columbia Circuit (United States of America), judgment of 15 February 2008 (*International Legal Materials*, vol. 47 (2008), p. 144); *Ra'Ed Mohamad Ibrahim Matar, et al. v. Avraham Dichter*, District Court, Southern District of New York (United States of America), judgment of 2 May 2007; *Wei Ye, Hao Wang, Does, A, B, C, D, E, F and others similarly situated v. Jiang Zemin and Falun Gong Control Office (A.K.A. Office 6/10)*, Court of Appeals, Seventh Circuit (United States of America), judgment of 8 September 2004 (383F.3d 620); *Jaffe v. Miller and Others*, Ontario Court of Appeal (Canada), judgment of 17 June 1993 (*International Law Reports*, vol. 95, p. 446); *Rukmini S. Kline et al. v.*

(10) Attention must be drawn to the fact that the Head of State, Head of Government and Minister for Foreign Affairs may enjoy both immunity *ratione personae* and immunity *ratione materiae* in accordance with the present draft articles. The first hypothesis is specifically envisaged in draft article 3. The second is reflected in draft article 4, paragraph 3, according to which "[t]he cessation of immunity *ratione personae* is without prejudice to the application of the rules of international law concerning immunity *ratione materiae*". The conditions under which the Head of State, Head of Government and Minister for Foreign Affairs enjoy immunity *ratione personae* or immunity *ratione materiae* will depend on the rules applicable to each of these categories of immunity that are contained in other provisions of the present draft articles.[32]

(11) The definition of "State official", it must be noted, refers solely to the person who enjoys immunity, without prejudging or implying any statement about the question of what acts may be covered by immunity from foreign criminal jurisdiction. From this standpoint, the essential element to be taken into account in identifying an individual as a State official for the purposes of the present draft articles is the existence of a link between that person and the State. This link is reflected in draft article 2, subparagraph (a), through the reference to the fact that the individual in question "represents the State or … exercises State functions". This is a clear and simple statement regarding the criteria for identifying what constitutes an official, and reiterating the proposition that the Commission accepted in relation to the scope under draft article 1, namely that the present draft articles relate to the immunity from foreign criminal jurisdiction that may be enjoyed by those persons who represent or act on behalf of a State.[33] Lastly, attention must be drawn to the fact that a State official may fulfil both requirements or only one of them.

(12) The words "who represents" must be understood in a broad sense, as including any "State official" who performs representational functions. The reference to representation is of special importance with regard to the Head of State, Head of Government and Minister for Foreign Affairs because, as the commentary to draft article 3 states, these three office holders represent the State in its international relations simply by virtue of their office, directly and with no need for specific powers to be granted by the State.[34] However, the reference to representation of the State may also be applicable to State officials other than the so-called "troika", in conformity with the rules or acts of the national systems themselves. Consequently, whether an official is representing the State or not must be determined on a case-by-case basis. Lastly, it must be noted that the separate reference to representation of the State as one of the criteria for identifying a link with the State makes it possible to cover

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Yasuyuki Kaneko et al., Supreme Court of the State of New York (United States of America), judgment of 31 October 1988 (141 Misc.2d 787); and case No. 3 StR 564/19, Federal Court of Justice of Germany (*Bundesgerichtshof*), Judgment of 28 January 2021. With respect to international courts, see *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France), Judgment, I.C.J. Reports 2008*, p. 177; *Jones and Others v. the United Kingdom*, Nos. 34356/06 and 40528/06, European Court of Human Rights, *Reports of Judgments and Decisions* (ECHR) 2014; *Prosecutor v. Tihomir Blaškić*, case No. IT-95-14-AR 108 *bis*, Judgment of 29 October 1997, Appeals Chamber, International Tribunal for the Former Yugoslavia, *Judicial Reports 1997*, vol. 1, p. 1099; and *In the matter of an arbitration before an Arbitral Tribunal constituted under annex VII to the 1982 United Nations Convention on the Law of the Sea (the Italian Republic v. the Republic of India) concerning the "Enrica Lexie" incident*, Permanent Court of Arbitration, case No. 2015-28, award of 21 May 2020, paras. 839 and 841 (available at https://pca-cpa.org/, under "Cases"). See also the declaration of Judge Kittichaisaree in relation to case No. 26 of the International Tribunal for the Law of the Sea, *Detention of three Ukrainian naval vessels (Ukraine v. Russian Federation)*, provisional measures, order of 25 May 2019, *Reports of Judgments, Advisory Opinions and Orders*, vol. 18 (2018–2019), p. 283. The Tribunal's case law is available from its website (www.itlos.org).

[32] In this connection, it must be recalled that paragraph (15) of the commentary to draft article 4 below says: "The Commission considers that the 'without prejudice' clause simply leaves open the possibility that immunity *ratione materiae* might apply to acts carried out in an official capacity and during their term of office by a former Head of State, Head of Government or Minister for Foreign Affairs when the rules governing that category of immunity make this possible. Paragraph 3 does not prejudge the content of the immunity *ratione materiae* regime, which is developed in Part Three of the draft articles."

[33] See paragraph (4) of the commentary to draft article 1 above.

[34] See paragraph (2) of the commentary to draft article 3 below.

certain persons, such as those Heads of State who typically do not perform State functions in a narrow sense, but who most certainly represent the State.

(13) "State functions" must be understood, in a broad sense, to mean the activities carried out by the State. This designation includes the legislative, judicial, executive or other functions performed by the State. Consequently, the "State official" is the individual who is in a position to perform these State functions. The reference to the exercise of State functions defines more precisely the requisite link between the official and the State, allowing for sufficient account to be taken of the fact that immunity is granted to the individual for the ultimate benefit of the State. Although various expressions, such as "elements of the governmental authority", "public functions", "sovereign authority", "governmental authority" or "inherent functions of the State" have been suggested in order to reflect this idea, the Commission has chosen the expression "State functions" as being most suitable. This choice has been made for two reasons: first, it reflects sufficiently well the link between the State and the official, which is related to the latter's duties; and second, the use of the term "functions" rather than "acts performed in the name of the State" avoids potential confusion between the subjective (the official) and objective (the act) elements of immunity. In any case, these terms should be understood in the broadest sense possible, keeping in mind that the exact content of what is understood by "State functions" depends to a large extent on the laws and organizational capacity of the State. Some Commission members stated, however, that the phrase chosen was infelicitous.

(14) It is to be noted that the use of the verbs "represents" and "exercises" in the present tense must not be interpreted as making any statement about the temporal scope of immunity. This verb tense is used in order to identify in general terms the link between the State and the official, and has no bearing on whether the State official must continue to be one at the time when immunity is claimed. The temporal scope of immunity *ratione personae* and of immunity *ratione materiae* is the subject of other draft articles.

(15) For the purposes of defining "State official", what is important is the link between the individual and the State, whereas the form taken by that link is irrelevant. The Commission considers that the link may take many forms, depending upon national legislation and the practice of each State. However, the majority of Commission members are of the view that the link cannot be interpreted so broadly as to cover all *de facto* officials. The term "*de facto* official" is used to refer to many possible cases, and whether or not an individual may be considered a State official for the purposes of the present draft articles will depend on each specific case. In any event, issues relating to *de facto* officials may be more appropriately addressed in connection with a definition of "act performed in an official capacity".

(16) Given that the concept of "State official" rests solely on the fact that the individual in question represents the State or exercises State functions, the hierarchical position occupied by the individual is irrelevant for the sole purposes of the definition. Although, in many cases, the persons who have been recognized as State officials for the purposes of immunity hold a high or middle rank, it is also possible to find examples of such persons at a low level of the hierarchy. Consequently, the hierarchical level is not an integral part of the definition of "State official".

(17) Lastly, it must be borne in mind that the definition of "State official" has no bearing on the type of acts covered by immunity. Consequently, the words "represent" and "exercise State functions" may not be interpreted as defining in any way the substantive scope of immunity.

(18) As to the question of terminology, to refer to persons who enjoy immunity, the Commission has decided to use the terms "مسؤول الدولة" in Arabic, "国家官员" in Chinese, "State official" in English, "*représentant de l'Etat*" in French, "должностное лицо государства" in Russian and "*funcionario del Estado*" in Spanish. Although the Commission is aware that they do not necessarily mean the same thing and are not interchangeable, it has preferred to continue using these terms, especially since the term "State official" in English, used extensively in practice, is suitable for referring to all the categories of persons to which the present draft articles refer. Thus, the fact that different terms are used in each of the language versions is of no semantic significance whatsoever. Rather, the various terms used in each of the language versions have the same meaning for the purposes of the present draft

articles, which bears no relation to the meaning that each term may have in domestic legal systems. The Commission will decide in due course whether a change needs to be made or a saving clause added with respect to the use of these terms in domestic law or international instruments, so as to ensure that institutions charged with applying immunity at the national level correctly interpret the term "State official" within the meaning of the present draft articles.

(19) As indicated in the final sentence of this subparagraph, the term "State official" refers to both current and former State officials. This draws attention to the fact that immunity may apply to an individual who is a State official at the time when the question of immunity arises, and also to an individual who was a State official but no longer holds this position at the time when the question of immunity arises. However, it should be noted that this phrase is merely intended to explicitly mention the temporal situation in which the State official (current or former) may be in relation to the State, and that this does not preclude the possibility that a person may benefit from immunity even if he or she has ceased to be a State official. On the contrary, the inclusion of the reference to "current" and "former" State officials does not alter the temporal scope of immunity from criminal jurisdiction, which must be determined in accordance with the provisions of draft article 4, paragraph 1, with regard to immunity *ratione personae*, and draft article 6, paragraphs 2 and 3, and draft article 4, paragraph 3, with regard to immunity *ratione materiae*. Therefore, although the term "State official" includes "both current and former State officials" for the purpose of its definition, it should be noted that "former State officials" can only benefit from immunity from foreign criminal jurisdiction *ratione materiae*.

(20) In the same vein, it should be noted that the express reference to a State official, "current or former", in draft article 8 is equivalent to the phrase "to both current and former State officials", and must therefore be interpreted as indicated above. The express mention of this circumstance in draft article 8 is warranted only by the special significance that the Commission attaches to that draft article; it does not alter the scope of the immunity of State officials from foreign criminal jurisdiction, which continues to be governed by the articles cited in the preceding paragraph.

Subparagraph (b)

(21) Draft article 2 (b) defines the concept of an "act performed in an official capacity" for the purposes of the present draft articles. Despite the doubts expressed by some members as to whether this provision was necessary, the Commission thought it would be useful to include the definition in the draft articles given the centrality of the concept of an "act performed in an official capacity" in the regime of immunity *ratione materiae*.

(22) The Commission has included in the definition contained in subparagraph (b) the elements that make it possible to identify a particular act as being an "act performed in an official capacity" for the purposes of immunity of State officials from foreign criminal jurisdiction. In so doing, it has essentially followed the Commission's previous work on the topic. For example, the term "act" is used in the definition and in draft articles 4 and 6. The Commission understands the term "acts" to refer both to actions and to omissions. Although the terminology to be employed has been the subject of debate, the Commission has chosen to use the term "acts" in line with the English text of the articles on responsibility of States for internationally wrongful acts, article 1 of which uses the term "acts" on the understanding that an act "may consist in one or more actions or omissions or a combination of both".[35] In addition, the term "act" is commonly used in international criminal law to define conduct (active and passive) that gives rise to criminal responsibility. In the Rome Statute of the International Criminal Court, the term "acts" is used in a general sense in articles 6, 7 and 8, without having elicited questions about whether both actions and omissions are included under that term, since this depends solely on each specific criminal offence. The statutes of

[35] *Yearbook … 2001*, vol. II (Part Two) and corrigendum, p. 32, para. (1) of the commentary to draft article 1. It should be pointed out that although the Spanish and French versions use different terms to refer to the same concept (*hecho* and *fait*, respectively), in the part of the Commission's commentary cited above, the three language versions coincide.

the International Tribunal for the Former Yugoslavia[36] and the International Criminal Tribunal for Rwanda[37] also use the term "act" to refer to conduct, both active and passive, constituting an offence falling within the competence of those tribunals. The term "act" has also been used in various international treaties that are designed to impose obligations upon States but nevertheless specify conduct that may give rise to criminal responsibility. This is the case, for example, with the Convention on the Prevention and Punishment of the Crime of Genocide (art. II) and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (art. 1).

(23) The Commission has used the expression "in the exercise of State authority" to reflect the need for a link between the act and the State. In other words, the aim is to highlight the fact that it is not sufficient for a State official to perform an act in order for it automatically to be considered an "act performed in an official capacity". On the contrary, there must also be a direct connection between the act and the exercise of State functions and powers, since it is this connection that justifies the recognition of immunity in order to protect the principle of the sovereign equality of States.

(24) In this regard, the Commission believes that, in order for an act to be characterized as an "act performed in an official capacity", it must first be attributable to the State. However, this does not necessarily mean that only the State can be held responsible for the act. The attribution of the act to the State is a prerequisite for an act to be characterized as having been performed in an official capacity, but does not prevent the act from also being attributed to the individual, in accordance with the "single act, dual responsibility" model (double attribution) that the Commission already applied in its 1996 draft Code of Crimes against the Peace and Security of Mankind (art. 4),[38] the articles on responsibility of States for internationally wrongful acts (art. 58)[39] and the articles on the responsibility of international organizations (art. 66).[40] Under this model, a single act can engage both the responsibility of the State and the individual responsibility of the author, especially in criminal matters.

(25) For the purpose of attributing an act to a State, it is necessary to consider, as a point of departure, the rules included in the articles on responsibility of States for internationally wrongful acts adopted by the Commission at its fifty-third session. Nonetheless, it must be borne in mind that the Commission established those rules in the context and for the purposes of State responsibility. Consequently, their application to the process of attributing an act of an official to a State in the context of immunity of State officials from foreign criminal jurisdiction should be examined carefully. For the purposes of immunity, the criteria for attribution set out in articles 7–11 of the articles on responsibility of States for internationally wrongful acts do not seem generally applicable. In particular, the Commission is of the view that, as a rule, acts performed by officials purely for their own benefit and in their own interest cannot be considered as acts performed in an official capacity, even though they may appear to have been performed officially. In such cases, it is not possible to identify any self-interest on the part of the State, and the recognition of immunity, whose ultimate objective is to protect the principle of the sovereign equality of States, is not justified.[41] This does not mean,

[36] Statute of the International Tribunal for the Former Yugoslavia, adopted by the Security Council in its resolution 827 (1993) of 25 May 1993 and contained in the report of the Secretary-General pursuant to paragraph 2 of Security Council resolution 808 (1993) (S/25704 and Corr.1 [and Add.1]), annex.

[37] Statute of the International Criminal Tribunal for Rwanda, Security Council resolution 955 (1994) of 8 November 1994, annex.

[38] *Yearbook ... 1996*, vol. II (Part Two), p. 23.

[39] *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, p. 142. The articles on responsibility of States for internationally wrongful acts adopted by the Commission at its fifty-third session are annexed to General Assembly resolution 56/83 of 12 December 2001.

[40] *Yearbook ... 2011*, vol. II (Part Two), p. 104. The articles on the responsibility of international organizations adopted by the Commission at its sixty-third session are annexed to General Assembly resolution 66/100 of 9 December 2011.

[41] The following arguments by a court in the United States, in particular, clarify the reasons for the exclusion of *ultra vires* acts: "Where the officer's powers are limited by statute, his actions beyond those limitations are considered individual and not sovereign actions. The officer is not doing the business which the sovereign has empowered him to do." According to that court, "[the Foreign Sovereign Immunities Act] does not immunize the illegal conduct of government officials" and thus,

however, that an unlawful act as such cannot benefit from immunity *ratione materiae*. Several courts have concluded that unlawful acts are not exempt from immunity simply because they are unlawful,[42] even in cases where the act is contrary to international law.[43]

(26) In order for an act to be characterized as having been "performed in an official capacity", there must be a special connection between the act and the State. Such a link has been defined in draft article 2 (b) using the formulation "State authority", which the Commission considered sufficiently broad to refer generally to acts performed by State officials in the exercise of their functions and in the interests of the State, and is to be understood as covering the functions set out in draft article 2 (a), which refers to any individual who "represents the State or who exercises State functions".

(27) This formulation was considered preferable to the one initially proposed ("exercising elements of the governmental authority") and to others that were successively considered by the Commission, in particular "governmental authority" and "sovereign authority". Although they all equally reflect the requirement that there must be a special connection between the act and the State, there is the difficulty that they may be interpreted as referring exclusively to a type of State activity (governmental or executive), or give rise to the added problem of having to define the elements of governmental authority or sovereignty, which would be extremely difficult and is not considered part of the Commission's mandate. In addition, it was considered preferable not to use the expression "State functions", which is used in draft article 2 (a), in order to make a clear distinction between the definitions contained in subparagraphs (a) and (b) of the draft article. In this regard, it should be recalled that the expression "State functions", together with "represents the State", was used in draft article 2 (a) as a neutral term to define the link between the official and the State, without making any judgment as to the type of acts covered by immunity.[44] The use of the term "authority" rather than "functions" also has the advantage of avoiding the debate on whether or not crimes under international law are "State functions". However, one member was of the view that it would have been more appropriate to use the expression "State functions".

(28) The Commission did not consider it appropriate to include in the definition of an "act performed in an official capacity" a reference to the fact that the act must be criminal in nature. Its aim was to avoid a possible interpretation that any act performed in an official capacity is, by definition, of a criminal nature. In any case, the concept of an "act performed in an official capacity" must be understood in the context of the present draft articles, which concern the immunity of State officials from foreign criminal jurisdiction.

(29) Lastly, although the definition contained in draft article 2 (b) concerns an "act performed in an official capacity", the Commission considered it necessary to include in the definition an explicit reference to the author of the act; in other words, the State official. It

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"[a]n official acting under color of authority, but not within an official mandate, can violate international law and not be entitled to immunity under [the Act]" (In re *Estate of Ferdinand Marcos Human Rights Litigation; Hilao and Others v. Estate of Marcos*, United States Court of Appeals, Ninth Circuit, Judgment of 16 June 1994, 25 F.3d 1467 (9th Cir.1994), *International Law Reports* (ILR), vol. 104, p. 119, at pp. 123 and 125). Similarly, another court concluded that *ultra vires* acts are not subject to sovereign immunity, as the perpetrators acted beyond their authority by violating the human rights of the plaintiffs: if officials commit acts that are not officially sanctioned by the State, that is, if they are not "officials acting in an official capacity for acts within the scope of their authority", they cannot benefit from immunity (In re *Jane Doe I, et al. v. Liu Qi, et al.; Plaintiff A, et al., v. Xia Deren, et al.*, United States District Court for the Northern District of California, C 02-0672 CW (EMC), C 02-0695 CW (EMC)).

[42] *Jaffe v. Miller and Others*, Ontario Court of Appeal, 17 June 1993 (see footnote 31 above); *Argentine Republic v. Amerada Hess Shipping Corporation and Others*, United States Supreme Court, 23 January 1989, *International Law Reports*, vol. 81, p. 658; *McElhinney v. Williams*, Supreme Court of Ireland, 15 December 1995, *ibid.*, vol. 104, p. 691.

[43] *I Congreso del Partido*, House of Lords of the United Kingdom, 16 July 1981, [1983] A.C. 244, *International Law Reports*, vol. 64, p. 307. In *Jones v. Saudi Arabia*, House of Lords of the United Kingdom, 14 June 2006 (see footnote 31 above), Lord Hoffmann rejected the argument that an act contrary to *jus cogens* cannot be an official act.

[44] See paragraph (13) of the present commentary, above. In this context, the Commission has taken the view that State functions include "the legislative, judicial, executive or other functions performed by the State".

thereby draws attention to the fact that only a State official can perform an act in an official capacity, thus reflecting the need for a link between the author of the act and the State. In addition, the reference to the State official creates a logical continuity with the definition of "State official" in draft article 2 (a).

(30) The Commission does not believe that it is possible to draw up an exhaustive list of acts performed in an official capacity. Such acts must be identified on a case-by-case basis, taking into account the criteria examined previously, namely that the act in question has been performed by a State official, is generally attributable to the State and has been performed in "the exercise of State authority". However, there are examples from judicial practice of acts or categories of acts that may be considered as having been performed in an official capacity, regardless of how the courts specifically refer to them. Such examples can help judges and other national legal practitioners to identify whether a particular act falls into this category.

(31) In general, national courts have found that the following acts fall into the category of acts performed in an official capacity: military activities or those related to the armed forces,[45] acts related to the exercise of police power,[46] diplomatic activities and those relating to foreign affairs,[47] legislative acts (including nationalization),[48] acts related to the administration of justice,[49] administrative acts of different kinds (such as the expulsion of aliens or the flagging of vessels),[50] acts related to public loans[51] and political acts of various kinds.[52]

[45] *Empire of Iran*, Constitutional Court of the Federal Republic of Germany, 30 April 1963, *International Law Reports*, vol. 45, p. 57; *Victory Transport Inc. v. Comisaría General de Abastecimientos y Transportes*, US 336 F 2d 354 (Second Circuit, 1964), *ibid.*, vol. 35, p. 110, *Saltany and Others v. Reagan and Others*, United States District Court for the District of Columbia, Judgment of 23 December 1988, *ibid*., vol. 80, p. 19; *Holland v. Lampen-Wolfe* (United Kingdom), [2000] 1 WLR 1573; *Lozano v. Italy*, case No. 31171/2008, Italy, Court of Cassation, Judgment of 24 July 2008 (available at http://opil.ouplaw.com, International Law in Domestic Courts [ILDC 1085 (IT 2008)]). The Arbitral Tribunal constituted within the Permanent Court of Arbitration to consider the *"Enrica Lexie"* case held that acts performed by Italian naval officers to protect a commercial vessel constituted an act performed in an official capacity. See *In the matter of an arbitration before an Arbitral Tribunal constituted under annex VII to the 1982 United Nations Convention on the Law of the Sea* (footnote **Error! Bookmark not defined.** above), paras. 839 and 841.

[46] *Empire of Iran* (see footnote 45 above); *Church of Scientology*, Federal Supreme Court of Germany, 26 September 1978 (see footnote 31 above); *Saudi Arabia and Others v. Nelson*, United States Supreme Court, *International Law Reports*, vol. 100, p. 544; *Propend Finance Pty Ltd. v. Sing*, United Kingdom, Court of Appeal, *ibid.*, vol. 111, p. 611; *Norbert Schmidt v. The Home Secretary of the Government of the United Kingdom, The Commissioner of the Metropolitan Police and David Jones*, Supreme Court of Ireland, 24 April 1997 (see footnote 31 above); *First Merchants Collection v. Republic of Argentina*, United States District Court for the Southern District of Florida, 31 January 2002, 190 F. Supp. 2d 1336 (S.D. Fla. 2002).

[47] *Empire of Iran* (see footnote 45 above); *Victory Transport Inc. v. Comisaría General de Abastecimientos y Transportes* (see footnote 45 above).

[48] *Empire of Iran* (see footnote 45 above); *Victory Transport Inc. v. Comisaría General de Abastecimientos y Transportes* (see footnote 45 above).

[49] *Empire of Iran* (see footnote 45 above); case No. 12-81.676, Court of Cassation, Criminal Chamber (France), Judgment of 19 March 2013, and case No. 13-80.158, Court of Cassation, Criminal Chamber (France), Judgment of 17 June 2014 (see www.legifrance.gouv.fr). The Swiss courts made a similar ruling in case ATF 130 III 136, which concerns an international detention order issued by a Spanish judge.

[50] *Victory Transport Inc. v. Comisaría General de Abastecimientos y Transportes* (see footnote 45 above); *Kline and Others v. Kaneko and Others*, District Court for the Southern District of New York (United States of America), 3 May 1988, US, 685 F Supp. 386 (1988), *International Law Reports*, vol. 101, p. 497; *Agent judiciaire du Trésor v. Malta Maritime Authority et Carmel X*, Court of Cassation, Criminal Chamber (France), 23 November 2004 (see footnote 31 above).

[51] *Victory Transport Inc. v. Comisaría General de Abastecimientos y Transportes* (see footnote 45 above).

[52] *Doe I v. Israel*, US, 400 F. Supp. 2d 86, 106 (DCC 2005) (establishment of Israeli settlements in the occupied territories); *Youming Jin et al. v. Ministry of State Security et al.*, US, 557 F. Supp. 2d 131 (DDC 2008) (hiring of contract killers to threaten members of a religious group).

(32) Moreover, the immunity of State officials has been invoked before criminal courts in relation to the following acts that were claimed to be committed in an official capacity: torture, extermination, genocide, extrajudicial execution, enforced disappearance, forced pregnancy, deportation, denial of prisoner-of-war status, enslavement and forced labour, and acts of terrorism.[53] Such crimes are sometimes mentioned *eo nomine*, while in other cases the proceedings refer generically to crimes against humanity, war crimes, and serious and systematic human rights violations.[54] Second, the courts have considered other acts committed by members of the armed forces or security services that do not fall into the aforementioned categories; such acts include ill-treatment, abuse, unlawful detention, abduction, offences against the administration of justice and other acts relating to policing and law enforcement.[55]

(33) In a number of cases, *a contrario sensu*, national courts have concluded that the act in question exceeded the limits of official functions, or functions of the State, and was therefore not considered an act performed in an official capacity. For example, courts have concluded that the assassination of a political opponent[56] or acts linked to drug trafficking[57] do not constitute official acts. Similarly, national courts have generally denied immunity in cases

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[53] In re *Rauter*, Special Court of Cassation of the Netherlands, Judgment of 12 January 1949, *International Law Reports*, vol. 16, p. 526 (crimes committed by German occupation forces in Denmark); *Attorney General of the Government of Israel v. Adolf Eichmann*, District Court of Jerusalem (case No. 40/61), Judgment of 12 December 1961, and Supreme Court (sitting as a Court of Criminal Appeal), Judgment of 29 May 1962, *ibid.*, vol. 36, pp. 18 and 277 (crimes committed during the Second World War, including war crimes, crimes against humanity and genocide); *Yaser Arafat (Carnevale re. Valente — Imp. Arafat e Salah)*, Italy, Court of Cassation, Judgment of 28 June 1985, *Rivista di diritto internazionale*, vol. 69, No. 4 (1986), p. 884 (sale of weapons and collaboration with the Red Brigades on acts of terrorism); *R. v. Mafart and Prieur/Rainbow Warrior*, New Zealand, High Court, Auckland Registry, 22 November 1985, *International Law Reports*, vol. 74, p. 241 (acts carried out by members of the French armed forces and security forces to mine the ship *Rainbow Warrior*, which led to the sinking of the ship and the death of several people; these were described as terrorist acts); *Former Syrian Ambassador to the German Democratic Republic*, Federal Supreme Court of Germany, Federal Constitutional Court of Germany, Judgment of 10 June 1997, *ibid.*, vol. 115, p. 595 (the case examined legal action against a former ambassador who allegedly stored, on diplomatic premises, weapons that were later used to commit terrorist acts); *Bouterse*, R 97/163/12 Sv and R 97/176/12 Sv, Netherlands, Court of Appeal of Amsterdam, Judgment of 20 November 2000, *Netherlands Yearbook of International Law*, vol. 32 (2001), pp. 266–282 (torture, crimes against humanity); *Gaddafi*, Court of Appeal of Paris, Judgment of 20 October 2000, and Court of Cassation, Judgment No. 1414 of 13 March 2001, *Revue générale de droit international public*, vol. 105 (2001) (English version reproduced in *International Law Reports*, vol. 125, pp. 490 and 508) (ordering a plane to be brought down using explosives, which caused the death of 170 people, considered as terrorism); *Hissène Habré*, Court of Appeal of Dakar (Senegal), Judgment of 4 July 2000, and Court of Cassation, Judgment of 20 March 2001, *International Law Reports*, vol. 125, pp. 571 and 577 (acts of torture and crimes against humanity); *Sharon and Yaron*, Court of Appeal of Brussels, Judgment of 26 June 2002, *ibid.*, vol. 127, p. 110 (war crimes, crimes against humanity and genocide); *A. c. Ministère public de la Confédération*, Federal Criminal Court (Switzerland), 25 July 2012 (see footnote 31 above) (torture and other crimes against humanity); case No. 3 StR 564/19, Federal Court of Justice of Germany, 28 January 2021 (see footnote **Error! Bookmark not defined.** above) (torture as a war crime).

[54] In re *Ye v. Zemin*, United States Court of Appeals, Seventh Circuit, 8 September 2004 (see footnote 31 above) (unlike the cases cited in footnotes 53 above and 55 below, this was a case before a civil court).

[55] *Border Guards Prosecution*, Federal Supreme Court of Germany, 3 November 1992 (see footnote 31 above) (death of a young German as a result of shots fired by border guards of the German Democratic Republic when he attempted to cross the Berlin Wall); *Norbert Schmidt v. The Home Secretary of the Government of the United Kingdom*, The Commissioner of the Metropolitan Police and David Jones, Supreme Court (Ireland), 24 April 1997 (see footnote 31 above) (irregular circumstances during the detention of the plaintiff by State officials); *Khurts Bat v. Investigating Judge of the German Federal Court*, Administrative Court, High Court of Justice (United Kingdom), 29 July 2011 (see footnote 31 above) (kidnapping and unlawful detention).

[56] *Letelier and Others v. The Republic of Chile and Linea Aerea Nacional-Chile*, United States Court of Appeals, Second Circuit, 748 F 2d 790 (1984), *International Law Reports*, vol. 79, p. 561.

[57] *United States of America v. Noriega*, United States Court of Appeals, 7 July 1997 (see footnote 31 above).

linked to corruption, whether in the form of diversion or misappropriation of public funds or money-laundering, or any other type of corruption, on the grounds that such acts "are distinguishable from the performance of State functions protected by international custom in accordance with the principles of sovereignty and diplomatic immunity"[58] and "by their nature, do not relate to the exercise of sovereignty or governmental authority, nor are they in the public interest".[59] Following the same logic, courts have not accepted that acts performed by State officials that are closely linked to a private activity and for the official's personal enrichment, not the benefit of the sovereign, are covered by immunity.[60] The factual reminder of those various examples is without prejudice to the exceptions to immunity.

(34) With regard to the examples of possible acts performed in an official capacity, special mention should be made of the way in which national courts have dealt with crimes under international law, especially torture. While in some cases they have been considered acts performed in an official capacity (although illegal or aberrations),[61] in others they have been qualified as *ultra vires* acts or acts that are not consistent with the nature of State functions,[62] and should therefore be excluded from the category of acts defined in this paragraph. Moreover, attention should be drawn to the fact that such different treatment of crimes under

[58] *Teodoro Nguema Obiang Mangue et autres*, Court of Appeal of Paris, 13 June 2013 (see footnote 31 above).

[59] *Teodoro Nguema Obiang Mangue et autres*, Court of Appeal of Paris, Section Seven, Second Investigating Chamber, application for annulment, Judgment of 16 April 2015.

[60] *United States of America v. Noriega*, United States Court of Appeals, 7 July 1997 (see footnote 31 above); *Jungquist v. Sheikh Sultan Bin Khalifa al Nahyan,* United States District Court for the District of Columbia, Judgment of 20 September 1996, *International Law Reports*, vol. 113, p. 522; *Mellerio c. Isabel de Bourbon*, Court of Appeal of Paris, 3 June 1872, *Recueil général des lois et des arrêts 1872*, p. 293; *Seyyid Ali Ben Hamond, prince Raschid, c. Wiercinski*, Seine Civil Court, Judgment of 25 July 1916, *Revue de droit international privé et de droit pénal international*, vol. 15 (1919), p. 505; *Ex-roi d'Egypte Farouk c. S.A.R.L. Christian Dior*, Court of Appeal of Paris, Judgment of 11 April 1957, *Journal du droit international*, vol. 84, No. 1 (1957), pp. 716–718; *Ali Ali Reza v. Grimpel*, Court of Appeal of Paris, Judgment of 28 April 1961, *Revue générale de droit international public*, vol. 66, No. 2 (1962), p. 418 (reproduced also in *International Law Reports*, vol. 47, p. 275; In re *Estate of Ferdinand E. Marcos Human Rights Litigation; Trajano v. Marcos and Another*, United States Court of Appeals, Ninth Circuit, 21 October 1992, 978 F 2d 493 (1992), *International Law Reports*, vol. 103, p. 521; *Doe v. Zedillo Ponce de León*; *Jimenez v. Aristeguieta et al.*, United States Court of Appeals, Fifth Circuit, 311 F 2d 547 (1962), *ibid.*, vol. 33, p. 353; *Jean-Juste v. Duvalier*, No. 86-0459 Civ., United States District Court for the Southern District of Florida, 8 January 1988, *American Journal of International Law*, vol. 82, No. 3 (1988), p. 594; *Evgeny Adamov v. Office fédéral de la justice*, Federal Tribunal of Switzerland, Judgment of 22 December 2005 (1A 288/2005) (available at http://opil.ouplaw.com, International Law in Domestic Courts [ILDC 339 (CH 2005)]); *Republic of the Philippines v. Marcos and Others*, United States Court of Appeals, Second Circuit, 26 November 1986, *International Law Reports*, vol. 81, p. 581; *Republic of the Philippines v. Marcos and Others (No. 2)*, United States Court of Appeals, Ninth Circuit, 4 June 1987 and 1 December 1988, *ibid.*, vol. 81, p. 608; *Republic of Haiti and Others v. Duvalier and Others*, [1990] 1 QB 2002 (United Kingdom), *ibid.*, vol. 107, p. 491.

[61] *Regina v. Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte (No. 3)*, House of Lords, United Kingdom, 24 March 1999, [1999] UKHL 17, [2000] 1 AC 147. Only Lord Goff believed that they were official acts that benefited from immunity. Lord Browne-Wilkinson and Lord Hutton stated that torture cannot be "a public function" or a "governmental function". Lord Goff, dissenting, concluded that it was a "governmental function", while similar statements were made by Lord Hope (criminal yet governmental), Lord Saville (who referred to "official torture"), Lord Millett ("public and official acts") and Lord Phillips (criminal and official). See also *Jones v. Saudi Arabia*, House of Lords (United Kingdom), 14 June 2006 (footnote 31 above) and *FF v. Director of Public Prosecutions* (*Prince Nasser* case), High Court of Justice, Queen's Bench Division, Divisional Court, Judgment of 7 October 2014, [2014] EWHC 3419 (Admin.). See also case No. 3 StR 564/19, Federal Court of Justice of Germany, 28 January 2021 (footnote 31 above).

[62] *Pinochet*, Belgium, Court of First Instance of Brussels, Judgment of 6 November 1998, *International Law Reports*, vol. 119, p. 345; *Bouterse*, Netherlands, Court of Appeal of Amsterdam, 20 November 2000 (see footnote 53 above); *Prefecture of Voiotia v. Federal Republic of Germany*, Court of First Instance of Livadeia (Greece), Judgment of 30 October 1997 (*American Journal of International Law*, vol. 92, No. 4 (1998), p. 765).

international law has arisen both in cases in which national courts have recognized immunity and in those in which they have rejected it.

(35) In any case, it should be borne in mind that the definition of an "act performed in an official capacity" set out in draft article 2 (b) refers to the distinct elements of this category of acts and is without prejudice to the question of limitations and exceptions to immunity that is addressed in draft article 7.

Part Two
Immunity *ratione personae*

Commentary

(1) Although the institution of immunity of State officials from foreign criminal jurisdiction is, in the abstract, a single category, differences can be established in accordance with the different categories of State officials, especially in the light of the different positions that they hold within the State and the different roles that they play. The Commission has taken these circumstances into account in defining two different legal regimes, which are addressed in Parts Two and Three of the draft articles under the titles "Immunity *ratione personae*" and "Immunity *ratione materiae*".

(2) The two categories have been distinguished primarily on the basis of the position that certain State officials hold within the State and the special role of representing the State internationally that is directly conferred, under international law, on certain officials, who for this reason enjoy a materially wider form of immunity (*ratione personae*) that attaches to the Head of State, the Head of Government and the Minister for Foreign Affairs.

(3) Part Two of the draft articles concerns the immunity *ratione personae* of State officials from foreign criminal jurisdiction. This part sets out the normative elements defining the legal regime applicable to this type of immunity, and consists of two draft articles. Draft article 3 addresses the subjective element of immunity *ratione personae* (State officials enjoying immunity), and draft article 4 concerns the substantive element (the acts covered by immunity) and the temporal element (the time during which immunity is applicable). Both draft articles must be read together for a correct understanding of the legal regime applicable to immunity *ratione personae.*

(4) Additionally, paragraph 3 of draft article 4 defines the relationship between the immunity from jurisdiction *ratione personae* and the immunity from jurisdiction *ratione materiae* that apply to Heads of State, Heads of Government and Ministers for Foreign Affairs when they are no longer in office.

Article 3
Persons enjoying immunity *ratione personae*

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

Commentary

(1) Draft article 3 lists the State officials who enjoy immunity *ratione personae* from foreign criminal jurisdiction, namely the Head of State, the Head of Government and the Minister for Foreign Affairs. The draft article confines itself to identifying the persons to whom this type of immunity applies, making no reference to its substantive scope.

(2) The Commission considers that there are two reasons, one representational and one functional, for according immunity *ratione personae* to Heads of State, Heads of Government and Ministers for Foreign Affairs. First, under the rules of international law, these three office holders represent the State in its international relations simply by virtue of their office, directly and with no need for specific powers to be granted by the State.[63] Second, they must

[63] The International Court of Justice has stated that "it is a well-established rule of international law that the Head of State, the Head of Government and the Minister for Foreign Affairs are deemed to represent the State merely by virtue of exercising their functions" (*Armed Activities on the Territory*

be able to discharge their functions unhindered.[64] It is irrelevant whether those officials are nationals of the State in which they hold the office of Head of State, Head of Government or Minister for Foreign Affairs.

(3) The statement that Heads of State enjoy immunity *ratione personae* is not subject to dispute, given that this is established in existing rules of customary international law. In addition, various conventions contain provisions referring directly to the immunity from jurisdiction of the Head of State. In this connection, mention should be made of article 21, paragraph 1, of the Convention on Special Missions, which expressly acknowledges that when the Head of State leads a special mission, he or she enjoys, in addition to what is granted in the Convention, the immunities accorded by international law to Heads of State on an official visit. Similarly, article 50, paragraph 1, of the Vienna Convention on the Representation of States in Their Relations with International Organizations of a Universal Character refers to the other "immunities accorded by international law to Heads of State". Along the same lines, albeit in a different field, the United Nations Convention on Jurisdictional Immunities of States and Their Property includes, in the saving clause in article 3, paragraph 2, an express reference to the immunities accorded under international law to Heads of State.

(4) The immunity from foreign criminal jurisdiction of the Head of State has also been recognized in case law at both the international and national levels. Thus, the International Court of Justice has expressly mentioned the immunity of the Head of State from foreign criminal jurisdiction in the *Arrest Warrant*[65] and *Certain Questions of Mutual Assistance in Criminal Matters*[66] cases. It must be emphasized that examples of national judicial practice, although limited in number, are consistent in showing that Heads of State enjoy immunity *ratione personae* from foreign criminal jurisdiction, both in the proceedings concerning the immunity of the Head of State and in the reasoning that such courts follow in deciding whether other State officials also enjoy immunity from criminal jurisdiction.[67]

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of the Congo (New Application: 2002) (Democratic Republic of the Congo v. Rwanda), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 2006, p. 6, at p. 27, para. 46).

64 See *Arrest Warrant of 11 April 2000* (footnote 14 above), pp. 21–22, paras. 53–54, in which the International Court of Justice particularly emphasized the second element with respect to the Minister for Foreign Affairs.

65 *Arrest Warrant of 11 April 2000* (see footnote 14 above), pp. 20–21, para. 51.

66 *Certain Questions of Mutual Assistance in Criminal Matters* (see footnote 31 above), pp. 236–237, para. 170.

67 National courts have on many occasions cited the immunity *ratione personae* from foreign criminal jurisdiction of the Head of State as grounds for their decisions on substance and their findings that criminal proceedings cannot be brought against an incumbent Head of State. In this regard, see Re *Honecker*, Federal Supreme Court, Second Criminal Chamber (Federal Republic of Germany), Judgment of 14 December 1984 (Case No. 2 ARs 252/84), reproduced in *International Law Reports*, vol. 80, pp. 365–366; *Rey de Marruecos*, National High Court (Spain), Criminal Chamber decision of 23 December 1998; *Gaddafi*, Court of Cassation, Criminal Chamber (France), 13 March 2001 (footnote 53 above); *Fidel Castro*, National High Court (Spain), plenary decision of the Criminal Chamber, 13 December 2007 (the Court had already made a similar ruling in two other cases against Fidel Castro, in 1998 and 2005); and *Case against Paul Kagame*, National High Court, Central Investigation Court No. 4 (Spain), indictment of 6 February 2008. Also in the context of criminal proceedings, but as *obiter dicta*, various courts have on numerous occasions recognized immunity *ratione personae* from foreign criminal jurisdiction in general. In those cases, the national courts have not referred to the immunity of a specific Head of State, either because the person had completed his or her term of office and was no longer an incumbent Head of State or because the person was not and had never been a Head of State. See *Pinochet (solicitud de extradición)*, National High Court, Central Investigation Court No. 5 (Spain), request for extradition of 3 November 1998; *Regina v. Bartle and the Commissioner of Police for the Metropolis and Others – Ex Parte Pinochet*, House of Lords (United Kingdom), 24 March 1999 (footnote 31 above); *H.S.A., et al. v. S.A., et al.* (indictment of Ariel Sharon, Amos Yaron and others), Court of Cassation (Belgium), Judgment of 12 February 2003 (P-02-1139.F), reproduced in *International Legal Materials*, vol. 42, No. 3 (2003), pp. 596–605; *Scilingo*, National High Court, Criminal Chamber, Third Section (Spain), decision of 27 June 2003; *Association Fédération nationale des victimes d'accidents collectifs; Association des familles des victimes du Joola*, Court of Cassation, Criminal Chamber (France), 19 January 2010 (footnote 31

(5) The Commission considers that the immunity from foreign criminal jurisdiction *ratione personae* of the Head of State is accorded exclusively to persons who actually hold that office, and that the title given to the Head of State in each State, the conditions under which he or she acquires the status of Head of State (as a sovereign or otherwise) and the individual or collegial nature of the office are irrelevant for the purposes of the present draft articles.[68]

(6) The recognition of immunity *ratione personae* in favour of the Head of Government and the Minister for Foreign Affairs is a result of the fact that, under international law, their functions of representing the State have become recognized as approximate to those of the Head of State. Examples of this may be found in the recognition of full powers for the Head of State, the Head of Government and the Minister for Foreign Affairs for the conclusion of treaties[69] and the equality of the three categories of officials in terms of their international protection[70] and their involvement in the representation of the State.[71] The immunity of Heads of Government and Ministers for Foreign Affairs has been referred to in the Convention on Special Missions, the Vienna Convention on the Representation of States in Their Relations with International Organizations of a Universal Character and, implicitly, the United Nations Convention on Jurisdictional Immunities of States and Their Property.[72] The inclusion of the

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above); *Khurts Bat v. Investigating Judge of the German Federal Court*, Administrative Court, High Court of Justice (United Kingdom), 29 July 2011 (footnote 31 above); and *A. c. Ministère public de la Confédération*, Federal Criminal Court (Switzerland), 25 July 2012 (footnote 31 above). It should be emphasized that national courts have never stated that a Head of State does not have immunity from criminal jurisdiction, and that this immunity is *ratione personae*. It must also be kept in mind that civil jurisdiction, under which there is a greater number of judicial decisions, consistently recognizes the immunity *ratione personae* from jurisdiction of Heads of State. For example, see *Rukmini S. Kline et al. v. Yasuyuki Kaneko et al.*, Supreme Court of the State of New York, 31 October 1988 (footnote 31 above); *Mobutu v. SA Cotoni*, Civil Court of Brussels, Judgment of 29 December 1988; *Ferdinand et Imelda Marcos c. Office fédéral de la police*, Federal Tribunal (Switzerland), Judgment of 2 November 1989 (ATF 115 Ib 496), partially reproduced in *Revue suisse de droit international et de droit européen* (1991), pp. 534–537 (English version in *International Law Reports*, vol. 102, p. 198); *Lafontant v. Aristide*, District Court for the Eastern District of New York (United States), Judgment of 27 January 1994; *W. v. Prince of Liechtenstein*, Supreme Court (Austria), Judgment of 14 February 2001 (7 Ob 316/00x); *Tachiona v. Mugabe* ("*Tachiona I*"), District Court for the Southern District of New York (United States), Judgment of 30 October 2001 (169 F.Supp.2d 259); *Fotso v. Republic of Cameroon*, District Court of Oregon (United States), order of 22 February 2013 (6:12CV 1415-TC).

[68] In this connection, the provisions of the Vienna Convention on the Representation of States in Their Relations with International Organizations of a Universal Character (art. 50, para. 1) and the Convention on Special Missions (art. 21, para. 1), which refer to the case of collegial bodies acting as Head of State, are of interest. On the other hand, the Commission did not see any need to include a reference to this category in the draft articles on the prevention and punishment of crimes against diplomatic agents and other internationally protected persons (*Yearbook … 1972*, vol. II, document A/8710/Rev.1, pp. 312–313, para. (2) of the commentary to draft article 1), and no reference was accordingly made in the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents.

[69] Vienna Convention on the Law of Treaties (Vienna, 23 May 1969), United Nations, *Treaty Series*, vol. 1155, No. 18232, p. 331, art. 7, para. 2 (a). The International Court of Justice has made a similar statement on the capacity of the Head of State, Head of Government and Minister for Foreign Affairs to make a commitment on behalf of the State through unilateral acts (*Armed Activities on the Territory of the Congo (New Application: 2002)* (see footnote 63 above), p. 27, para. 46).

[70] Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, art. 1, para. 1 (a).

[71] In this connection, see the Convention on Special Missions, art. 21, and the Vienna Convention on the Representation of States in Their Relations with International Organizations of a Universal Character, art. 50.

[72] Article 21 of the Convention on Special Missions, in addition to the Head of State, refers to the Head of Government and Minister for Foreign Affairs, although it does so in separate paragraphs (paragraph 1 refers to the Head of State and paragraph 2 refers to the Head of Government, Minister for Foreign Affairs and other persons of high rank). The same model is followed in the Vienna Convention on the Representation of States in Their Relations with International Organizations of a Universal Character, which also refers to the officials mentioned in separate paragraphs. By contrast, the United Nations Convention on Jurisdictional Immunities of States and Their Property includes

Minister for Foreign Affairs in the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, is particularly significant, since the Commission, in its own draft articles on the subject, decided not to include government officials in the list of internationally protected persons,[73] but the Minister for Foreign Affairs was nevertheless included in the final Convention adopted by States.

(7) All of the above-mentioned examples have emerged from the work of the Commission, which has on several occasions dealt with the question of whether expressly to include Heads of State, Heads of Government and Ministers for Foreign Affairs in international instruments. In this connection, it was noted that article 3 of the United Nations Convention on Jurisdictional Immunities of States and Their Property included a specific mention of the Head of State while excluding any express reference to the Head of Government and Minister for Foreign Affairs. However, there is very little reason to conclude that these examples mean that in the present draft articles the Commission must treat Heads of State, Heads of Government and Ministers for Foreign Affairs differently. It is even less reasonable to conclude that the Head of Government and Minister for Foreign Affairs must be excluded from draft article 3. A number of factors must be taken into account here. First, the present draft articles refer solely to the immunity from foreign criminal jurisdiction of State officials, whereas the Convention on Special Missions and the Vienna Convention on the Representation of States in Their Relations with International Organizations of a Universal Character refer to all the immunities that Heads of State, Heads of Government and Ministers for Foreign Affairs may enjoy. Second, the United Nations Convention on Jurisdictional Immunities of States and Their Property refers to the immunities of States; immunity from criminal jurisdiction remains outside its scope.[74] In addition, far from rejecting the immunities that may be enjoyed by the Head of Government and the Minister for Foreign Affairs, the Commission actually recognized them, but simply did not mention these categories specifically in article 3, paragraph 2, "since it would be difficult to prepare an exhaustive list, and any enumeration of such persons would moreover raise the issues of the basis and of the extent of the jurisdictional immunity exercised by such persons".[75] And third, it must also be borne in mind that all the examples mentioned above preceded the judgment by the International Court of Justice in the *Arrest Warrant* case.

(8) In its judgment in the *Arrest Warrant* case, the International Court of Justice expressly stated that "in international law it is firmly established that, as also diplomatic and consular agents, certain holders of high-ranking office in a State, such as the Head of State, Head of Government and Minister for Foreign Affairs, enjoy immunities from jurisdiction in other States, both civil and criminal".[76] This statement was later reiterated by the Court in the case concerning *Certain Questions of Mutual Assistance in Criminal Matters*.[77] Both of these judgments were discussed extensively by the Commission, particularly with regard to the Minister for Foreign Affairs. Most members expressed the view that the *Arrest Warrant* case reflects the current state of international law and that it must accordingly be concluded that

only a mention *eo nomine* of the Head of State (art. 3, para. 2), and the other two categories of officials must be considered as included in the concept of "representatives of the State" found in article 2, paragraph 1 (b) (iv). See paragraphs (6) and (7) of the commentary to article 3 of the draft articles on jurisdictional immunities of States and their property, *Yearbook … 1991*, vol. II (Part Two), p. 22.

[73] *Yearbook … 1972*, vol. II, document A/8710/Rev.1, p. 313, para. (3) of the commentary to draft article 1. It must be kept in mind that the Commission decided not to make this reference because it could not be based upon any "broadly accepted rule of international law", but it did acknowledge that "[a] cabinet officer would, of course, be entitled to special protection whenever he was in a foreign State in connexion with some official function". (This sentence is included in both the English and French versions of the commentary, but not in the Spanish version.)

[74] The statement that the Convention "does not cover criminal proceedings" was proposed by the Ad Hoc Committee set up on the subject by the General Assembly and was ultimately included in paragraph 2 of General Assembly resolution 59/38 of 2 December 2004, by which the Convention was adopted.

[75] Para. (7) of the commentary to draft article 3 (*Yearbook … 1991*, vol. II (Part Two), p. 22).

[76] *Arrest Warrant of 11 April 2000* (see footnote 14 above), pp. 20–21, para. 51.

[77] *Certain Questions of Mutual Assistance in Criminal Matters* (see footnote 31 above), pp. 236–237, para. 170.

there is a customary rule under which the immunity from foreign criminal jurisdiction *ratione personae* of the Minister for Foreign Affairs is recognized. In the view of these members, the position of the Minister for Foreign Affairs and the special functions he or she carries out in international relations constitute the basis for the recognition of such immunity from foreign criminal jurisdiction. On the other hand, some members of the Commission pointed out that the Court's judgment did not constitute sufficient grounds for concluding that a customary rule existed, as it did not contain a thorough analysis of the practice and several judges expressed opinions that differed from the majority view.[78] One member of the Commission who considers that the Court's judgment does not show that there is a customary rule nevertheless said that, in view of the fact that the Court's judgment in that case has not been opposed by States, the absence of a customary rule does not prevent the Commission from including that official among the persons enjoying immunity *ratione personae* from foreign criminal jurisdiction, as a matter of progressive development of international law.

(9) As to the practice of national courts, the Commission has also found that, while there are very few rulings on the immunity *ratione personae* from foreign criminal jurisdiction of the Head of Government and almost none in respect of the Minister for Foreign Affairs, the national courts that have had occasion to comment on this subject have nevertheless always recognized that those high-ranking officials do have immunity from foreign criminal jurisdiction during their term of office.[79]

(10) As a result of the discussion, the Commission found that there are sufficient grounds in practice and in international law to conclude that the Head of State, Head of Government and Minister for Foreign Affairs enjoy immunity *ratione personae* from foreign criminal jurisdiction. Consequently, it has been decided to include them in draft article 3.

(11) The Commission has also looked into whether other State officials could be included in the list of the persons enjoying immunity *ratione personae*. This has been raised as a possibility by some members of the Commission in the light of the evolution of international relations, particularly the fact that high-ranking officials other than the Head of State, Head of Government and Minister for Foreign Affairs are becoming increasingly involved in international forums and making frequent trips outside the national territory. Some members of the Commission have supported the view that other high-ranking officials should be included in draft article 3 with a reference to the *Arrest Warrant* case, stating that the use of the words "such as" should be interpreted to extend the regime of immunity *ratione personae* to high-ranking State officials, other than the Head of State, Head of Government and Minister for Foreign Affairs, who have major responsibilities within the State and who are involved in representation of the State in the fields of their activity. In this connection, some members of the Commission have suggested that immunity *ratione personae* is enjoyed by a minister of defence or a minister of international trade. Other members of the Commission, however, see the use of the words "such as" as not widening the circle of the persons who enjoy this category of immunity, since the Court uses the words in the context of a specific dispute, the subject of which is the immunity from foreign criminal jurisdiction of a Minister for Foreign Affairs. Lastly, several members of the Commission have drawn attention to the difficulty inherent in determining which persons should be deemed to be "other high-ranking

[78] See in particular, in the *Arrest Warrant of 11 April 2000* case (footnote 14 above), the joint separate opinion of Judges Higgins, Kooijmans and Buergenthal; the dissenting opinion of Judge Al-Khasawneh; and the dissenting opinion of Judge *ad hoc* Van den Wyngaert.

[79] With regard to recognition of the immunity from foreign criminal jurisdiction of the Head of Government and the Minister for Foreign Affairs, see the following cases, both criminal and civil, in which national courts have made statements on this subject, either as the grounds for decisions on substance or as *obiter dicta*: *Ali Ali Reza v. Grimpel*, Court of Appeal of Paris, 28 April 1961 (footnote 60 above) (implicitly recognizes, *a contrario*, the immunity of a Minister for Foreign Affairs); *Chong Boon Kim v. Kim Yong Shik and David Kim*, Circuit Court of the First Circuit, State of Hawaii (United States), Judgment of 9 September 1963, reproduced in *American Journal of International Law*, vol. 58 (1964), pp. 186–187; *Saltany and Others v. Reagan and Others*, United States District Court for the District of Columbia, 23 December 1988 (footnote 45 above); *Tachiona v. Mugabe ("Tachiona I")*, District Court for the Southern District of New York (United States), 30 October 2001 (footnote 67 above); *H.S.A., et al. v. S.A., et al.* (indictment of Ariel Sharon, Amos Yaron and others), Court of Cassation (Belgium), 12 February 2003 (footnote 67 above).

officials", since this will depend to a large extent on each country's organizational structure and method of conferring powers, which differ from one State to the next.[80]

(12) In the case concerning *Certain Questions of Mutual Assistance in Criminal Matters*, the International Court of Justice reverted to the subject of the immunity of high-ranking State officials other than the Head of State, Head of Government and Minister for Foreign Affairs. The Court dealt separately with the immunity of the Head of State of Djibouti and of the two other high-ranking officials, namely the Attorney General (*procureur de la République*) and the Head of National Security. With regard to the Head of State, the Court made a very clear pronouncement that in general, he or she enjoys immunity from criminal jurisdiction *ratione personae*, although that was not applicable in the specific case, since the invitation to testify issued by the French authorities was not a measure of constraint.[81] With regard to the other high-ranking officials, the Court argued that the acts attributed to them were not carried out within the scope of their duties;[82] it considered that Djibouti did not make it sufficiently clear whether it was claiming State immunity, personal immunity or some other type of immunity; and it concluded that "[t]he Court notes first that there are no grounds in international law upon which it could be said that the officials concerned were entitled to personal immunities, not being diplomats within the meaning of the Vienna Convention on Diplomatic Relations of 1961, and the Convention on Special Missions of 1969 not being applicable in this case".[83]

(13) In national judicial practice, a number of decisions deal with the immunity *ratione personae* from foreign criminal jurisdiction of other high-ranking officials. However, the decisions in question are not conclusive. While some of the decisions are in favour of the immunity *ratione personae* of high-ranking officials such as the minister of defence or minister of international trade,[84] in others, the national courts found that the person on trial did not enjoy immunity, either because he or she was not a Head of State, Head of Government or Minister for Foreign Affairs or because he or she did not belong to the narrow

[80] This problem has already been raised by the Commission itself, in paragraph (7) of its commentary to article 3 of the draft articles on jurisdictional immunities of States and their property, *Yearbook ... 1991*, vol. II (Part Two), p. 22. The Commission drew attention to the same problems in paragraph (3) of the commentary to article 1 of the draft articles on the prevention and punishment of crimes against diplomatic agents and other internationally protected persons (*Yearbook ... 1972*, vol. II, document A/8710/Rev.1, p. 313) and in paragraph (3) of the commentary to article 21 of the draft articles on special missions (*Yearbook ... 1967*, vol. II, document A/6709/Rev.1 and Rev.1/Corr.1, p. 359).

[81] See *Certain Questions of Mutual Assistance in Criminal Matters* (footnote 31 above), pp. 236–240, paras. 170–180.

[82] *Ibid.*, p. 243, para. 191.

[83] *Ibid.*, pp. 243–244, para. 194. See, in general, paragraphs 181–197, *ibid.*, pp. 240–244.

[84] In this connection, see the case Re *General Shaul Mofaz* (Minister of Defence of Israel), Bow Street Magistrates' Court (United Kingdom), Judgment of 12 February 2004, reproduced in International and Comparative Law Quarterly, vol. 53, Issue 3 (2004), p. 771; and the case Re *Bo Xilai* (Minister for Commerce and International Trade of China), Bow Street Magistrates' Court, Judgment of 8 November 2005 (reproduced in *International Law Reports*, vol. 128, p. 713), in which the immunity of Mr. Bo Xilai is acknowledged, not just because he was considered to be a high-ranking official, but particularly because he was on special mission in the United Kingdom. A year later, in a civil case, a United States court recognized Mr. Bo Xilai's immunity, again because he was on special mission in the United States: *Suggestion of Immunity and Statement of Interest of the United States*, District Court for the District of Columbia, Judgment of 24 July 2006 (Civ. No. 04-0649). In the *Association Fédération nationale des victimes d'accidents collectifs; Association des familles des victimes du Joola* case, Court of Cassation, Criminal Chamber (France), 19 January 2010 (see footnote 31 above), the Court acknowledged in general terms that an incumbent minister of defence enjoys immunity *ratione personae* from foreign criminal jurisdiction, but in the specific case recognized only immunity *ratione materiae*, since the person on trial no longer held that office. In the *A. c. Ministère public de la Confédération* case, Federal Criminal Court, Switzerland, 25 July 2012 (see footnote 31 above), the Tribunal stated in general that an incumbent minister of defence enjoyed immunity *ratione personae* from foreign criminal jurisdiction, but in the case in question, it did not recognize immunity because Mr. Nezzar had completed his term of office, and the acts carried out constitute international crimes, depriving him also of immunity *ratione materiae.*

circle of officials who deserve such treatment,[85] which illustrates the major difficulty involved in identifying the high-ranking officials other than the Head of State, Head of Government and Minister for Foreign Affairs who can indisputably be deemed to enjoy immunity *ratione personae*. It should also be pointed out, however, that in some of these decisions, the immunity from foreign criminal jurisdiction of a high-ranking official is analysed from various perspectives (immunity *ratione personae*, immunity *ratione materiae*, State immunity, immunity deriving from a special mission), reflecting the uncertainty in determining precisely what immunity from foreign criminal jurisdiction might be enjoyed by high-ranking officials other than the Head of State, Head of Government and Minister for Foreign Affairs.[86]

[85] An example of this is the case of *Khurts Bat v. Investigating Judge of the German Federal Court*, Administrative Court, High Court of Justice (United Kingdom), Judgment of 29 July 2011 (see footnote 31 above), in which the Court admitted, based on the International Court of Justice judgment in the *Arrest Warrant* case (see footnote 14 above), that "in customary international law certain holders of high-ranking office are entitled to immunity *ratione personae* during their term of office" (para. 55) as long as they belong to a narrow circle of specific individuals because "it must be possible to attach to the individual in question a similar status" (para. 59) to that of the Head of State, Head of Government and Minister for Foreign Affairs referred to in the above-mentioned judgment. After analysing the functions carried out by Mr. Khurts Bat, the Court concluded that he "falls outwith that narrow circle" (para. 61). Earlier, the Paris Court of Appeal also failed to recognize the immunity of Mr. Ali Ali Reza because, although he was Minister of State of Saudi Arabia, he was not the Minister for Foreign Affairs (see *Ali Ali Reza v. Grimpel*, Court of Appeal of Paris, 28 April 1961 (footnote 60 above)). In the *United States of America v. Noriega* case (see footnote 31 above), the Court of Appeals for the Eleventh Circuit, in its judgment of 7 July 1997 (appeals Nos. 92-4687 and 96-4471), stated that Mr. Noriega, former Commander in Chief of the Armed Forces of Panama, could not be included in the category of persons who enjoy immunity *ratione personae*, dismissing Mr. Noriega's allegation that at the time of the events, he had been Head of State, or *de facto* leader, of Panama. Another court, in the *Republic of the Philippines v. Marcos* case, District Court for the Northern District of California, Judgment of 11 February 1987 (665 F. Supp. 793), indicated that the Attorney General of the Philippines did not enjoy immunity *ratione personae*. In the case *I.T. Consultants, Inc. v. The Islamic Republic of Pakistan*, United States Court of Appeals for the District of Columbia, Judgment of 16 December 2003 (351 F.3d 1184), the Court did not recognize the immunity of the Minister of Agriculture of Pakistan. Similarly, in the *Fotso v. Republic of Cameroon* case (see footnote 67 above), the Court found that the Minister of Defence and the Secretary of State for Defence did not enjoy immunity *ratione personae*, which it nevertheless acknowledged was enjoyed by the President of Cameroon. It should be kept in mind that the three cases previously cited involved the exercise of civil jurisdiction. It must also be noted that on some occasions, national courts have not recognized the immunity from jurisdiction of persons holding high-ranking posts in constituent units within a federal State. In this connection, see the following cases: *R. (on the application of Diepreye Solomon Peter Alamieyeseigha) v. The Crown Prosecution Service*, Queen's Bench Division (Divisional Court) (United Kingdom), Judgment of 25 November 2005 ([2005] EWHC 2704 (Admin)), in which the Court did not recognize the immunity of the Governor and Chief Executive of Bayelsa State in the Federal Republic of Nigeria; and *Public Prosecutor (Tribunal of Naples) v. Milo Djukanovic*, Court of Cassation, Third Criminal Section (Italy), Judgment of 28 December 2004 (Rivista di diritto internazionale, vol. 89 (2006), p. 568), in which the Court denied immunity to the President of Montenegro before it became an independent State. Finally, in *Evgeny Adamov v. Office fédéral de la justice*, Federal Tribunal of Switzerland, 22 December 2005 (see footnote 60 above), the Tribunal denied immunity to a former Minister of Atomic Energy of the Russian Federation in an extradition case; however, it acknowledged in an *obiter dictum* that it was possible that unspecified high-ranking officials could enjoy immunity.

[86] The decision in the *Khurts Bat v. Investigating Judge of the German Federal Court* case (see footnote 31 above) is a good example of this. In the *Association Fédération nationale des victimes d'accidents collectifs*; *Association des familles des victimes du Joola* case, Court of Cassation, Criminal Chamber (France), 19 January 2010 (see footnote 31 above), the Court ruled simultaneously, and without sufficiently differentiating its ruling, on immunity *ratione personae* and immunity *ratione materiae*. In the *A. c. Ministère public de la Confédération* case, Federal Criminal Court (Switzerland), 25 July 2012 (see footnote 31 above), after making a general statement about immunity *ratione personae*, the Court also considered whether immunity *ratione materiae* or the diplomatic immunity claimed by the person concerned could be applied. The arguments used by national courts in other cases are even more imprecise, as in the case of *Kilroy v. Windsor*, District Court for the Northern District of Ohio, Eastern Division, which, in its judgment of 7 December 1978 in a civil case (Civ. No. C-78-291),

(14) On another level, it must be recalled that the Commission has already referred to the immunity of other high-ranking officials in its draft articles on special missions and its draft articles on the representation of States in their relations with international organizations.[87] It must be recalled that these instruments only establish a regime under which such persons continue to enjoy the immunities accorded to them under international law beyond the framework of those instruments. However, neither in the text of the draft articles nor in the Commission's commentaries thereto is it clearly indicated what these immunities are and whether they do or do not include immunity from foreign criminal jurisdiction *ratione personae*. It must also be emphasized that although these high-ranking officials may be deemed to be included in the category of "representatives of the State" mentioned in article 2, paragraph 1 (b) (iv), of the United Nations Convention on Jurisdictional Immunities of States and Their Property, that instrument – as previously mentioned – does not apply to "criminal proceedings". Nevertheless, some members of the Commission stated that high-ranking officials do benefit from the immunity regime of special missions, including immunity from foreign criminal jurisdiction, when they are on an official visit to a third State as part of their fulfilment of the functions of representing the State in the framework of their substantive duties. It was said that this offers a means of ensuring the proper fulfilment of the sectoral functions of this category of high-ranking officials at the international level.

(15) In view of the foregoing, the Commission considers that "other high-ranking officials" do not enjoy immunity *ratione personae* for the purposes of the present draft articles, but that this is without prejudice to the rules pertaining to immunity *ratione materiae*, and on the understanding that when they are on official visits, they enjoy immunity from foreign criminal jurisdiction based on the rules of international law relating to special missions.

(16) The phrase "from the exercise of" has been used in the draft article with reference both to immunity *ratione personae* and to foreign criminal jurisdiction. The Commission decided not to use the same phrase in draft article 1 (Scope of the present draft articles) so as not to prejudge the substantive aspects of immunity, in particular its scope, that will be taken up in other draft articles.[88] In the present draft article, the Commission has decided to retain the phrase "from the exercise of," since it illustrates the relationship between immunity and foreign criminal jurisdiction and emphasizes the essentially procedural nature of the immunity that comes into play in relation to the exercise of criminal jurisdiction with respect to a specific act.[89]

Article 4
Scope of immunity *ratione personae*

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

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

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recognized the immunity *ratione personae* of the Prince of Wales because he was a member of the British royal family and was heir apparent to the throne, but also because he was on official mission to the United States. Noteworthy in the *Bo Xilai* cases was the fact that, while both the British and United States courts recognized the immunity from jurisdiction of the Chinese Minister for Commerce, they did so because he was on an official visit and enjoyed the immunity derived from special missions.

87 Draft articles on the representation of States in their relations with international organizations, adopted by the Commission at its twenty-third session, *Yearbook … 1971*, vol. II (Part One), document A/8410/Rev.1, p. 284. On other occasions the Commission has used the expressions "*personnalité officielle*" ("official") (draft articles on the prevention and punishment of crimes against diplomatic agents and other internationally protected persons, art. 1, *Yearbook … 1972*, vol. II, document A/8710/Rev.1) and "other persons of high rank" (draft articles on special missions, art. 21, *Yearbook … 1967*, vol. II, document A/6709/Rev.1 and Rev.1/Corr.1, p. 359).

88 See above, paragraph (2) of the commentary to draft article 1.

89 See *Arrest Warrant of 11 April 2000* (footnote 14 above), p. 25, para. 60; and *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)* (footnote 15 above), p. 124, para. 58.

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

Commentary

(1) Draft article 4 deals with the scope of immunity *ratione personae* from both the temporal and material standpoints. The scope of immunity *ratione personae* must be understood by looking at the temporal aspect (para. 1) in conjunction with the material aspect (para. 2). Although each of these aspects is conceptually distinct, the Commission has chosen to cover them in a single article, since this offers a more comprehensive view of the meaning and scope of the immunity enjoyed by Heads of State, Heads of Government and Ministers for Foreign Affairs. The Commission has decided to cover the temporal aspect first, since this gives a better understanding of the scope of immunity *ratione personae*, which is limited to a specific period of time.

(2) With regard to the temporal scope of immunity *ratione personae*, the Commission has thought it necessary to include the adverb "only" so as to emphasize the point that this type of immunity applies to Heads of State, Heads of Government and Ministers for Foreign Affairs exclusively during the period when they hold office. This is consistent with the very reason for according such immunity, which is the special position held by such officials within the State's organizational structure and which, under international law, places them in a special situation of having a dual representational and functional link to the State in the ambit of international relations. Consequently, immunity *ratione personae* loses its significance when the person enjoying it ceases to hold one of those posts.

(3) This position has been upheld by the International Court of Justice, which stated in the *Arrest Warrant* case that "after a person ceases to hold the office of Minister for Foreign Affairs, he or she will no longer enjoy all of the immunities accorded by international law in other States. Provided that it has jurisdiction under international law, a court of one State may try a former Minister for Foreign Affairs of another State in respect of acts committed prior or subsequent to his or her period of office, as well as in respect of acts committed during that period of office in a private capacity".[90] Although the Court was referring to the Minister for Foreign Affairs, the same reasoning applies, *a fortiori*, to the Head of State and the Head of Government. Moreover, the limitation of immunity *ratione personae* to the period of time in which the persons enjoying such immunity hold office is also recognized in the conventions establishing special regimes of immunity *ratione personae*, particularly the Vienna Convention on Diplomatic Relations and the Convention on Special Missions.[91] The Commission itself, in its commentaries to the draft articles on jurisdictional immunities of States and their property, stated that "[t]he immunities *ratione personae*, unlike immunities *ratione materiae* which continue to survive after the termination of the official functions, will no longer be operative once the public offices are vacated or terminated".[92] The strict temporal scope of immunity *ratione personae* is also confirmed by various national court decisions.[93]

[90] *Arrest Warrant of 11 April 2000* (see footnote 14 above), p. 25, para. 61.

[91] Vienna Convention on Diplomatic Relations, art. 39, para. 2; and Convention on Special Missions, art. 43, para. 2.

[92] It added: "All activities of the sovereigns and ambassadors which do not relate to their official functions are subject to review by the local jurisdiction, once the sovereigns or ambassadors have relinquished their posts" (*Yearbook ... 1991*, vol. II (Part Two), p. 18, paragraph (19) of the commentary to draft article 2, para. 1 (b) (v).

[93] Such decisions have often arisen in the context of civil cases, where the same principle of a temporal limitation for the immunity applies. See, for example, *Mellerio c. Isabel de Bourbon*, Court of Appeal of Paris, 3 June 1872 (footnote 60 above); *Seyyid Ali Ben Hamond, prince Raschid, c. Wiercinski*, Seine Civil Court, 25 July 1916 (footnote 60 above); *Ex-roi d'Egypte Farouk c. S.A.R.L. Christian Dior*, Court of Appeal of Paris, 11 April 1957 (footnote 60 above); *Société Jean Dessès c. prince Farouk et dame Sadek*, Tribunal de Grande Instance de la Seine, 12 June 1963, reproduced in *Revue critique de droit international privé* (1964), p. 689 (English version reproduced in *International Law Reports*, vol. 65, pp. 37–38); *United States of America v. Noriega*, District Court for the Southern District of Florida, 8 June 1990 (746 F. Supp. 1506); In re *Estate of Ferdinand Marcos Human Rights*

(4) Consequently, the Commission considers that after the term of office of the Head of State, Head of Government or Minister for Foreign Affairs has ended, immunity *ratione personae* ceases. The Commission has not thought it necessary to indicate the specific criteria to be taken into account in order to determine when the term of office of the persons enjoying such immunity begins and ends, since this depends on each State's legal order, and practice in this area varies.

(5) During – and only during – the term of office, immunity *ratione personae* extends to all the acts carried out by the Head of State, Head of Government and Minister for Foreign Affairs, both those carried out in a private capacity and those performed in an official capacity. In this way, immunity *ratione personae* is configured as "full immunity"[94] with reference to any act carried out by any of the individuals just mentioned. This configuration reflects State practice.[95]

(6) As the International Court of Justice stated in the *Arrest Warrant* case, with particular reference to a Minister for Foreign Affairs, extension of immunity to acts performed in both a private and an official capacity is necessary to ensure that the persons enjoying immunity *ratione personae* are not prevented from exercising their specific official functions, since "[t]he consequences of such impediment to the exercise of those official functions are equally serious … regardless of whether the arrest relates to alleged acts performed in an 'official' capacity or a 'private' capacity".[96] Thus, "no distinction can be drawn between acts performed by a Minister for Foreign Affairs in an 'official' capacity, and those claimed to have been performed in a 'private capacity'".[97] The same reasoning must apply, *a fortiori*, to the Head of State and Head of Government.

Litigation; Hilao and Others v. Estate of Marcos, United States Court of Appeals, 16 June 1994 (footnote 41 above); and *Pinochet*, National High Court, Central Investigation Court No. 5 (Spain), request for extradition of 3 November 1998 (footnote 67 above). In the area of civil jurisdiction, a British court recently found that the former King of Spain, Juan Carlos de Borbón y Borbón, has no longer enjoyed immunity since his abdication. See *Corinna Zu Sayn-Wittgenstein-Sayn v. HM Juan Carlos Alfonso Víctor María de Borbón y Borbón*, High Court of Justice, Queen's Bench Division (United Kingdom), Judgment of 24 March 2022, [2022] EWHC 668 (QB), para. 58.

94 The International Court of Justice refers to the material scope of immunity *ratione personae* as "full immunity" (*Arrest Warrant of 11 April 2000* (see footnote 14 above), p. 22, para. 54). The Commission itself, for its part, has stated with reference to the immunity *ratione personae* of diplomatic agents that "[t]he immunity from criminal jurisdiction is complete" (*Yearbook … 1958*, vol. II, document A/3859, p. 98, paragraph (4) of the commentary to article 29 of the draft articles on diplomatic intercourse and immunities).

95 See, for example, *Arafat e Salah*, Court of Cassation (Italy), 28 June 1985 (footnote 53 above); *Ferdinand et Imelda Marcos c. Office fédéral de la police*, Federal Tribunal (Switzerland), 2 November 1989 (footnote 67 above); *Regina v. Bartle and the Commissioner of Police for the Metropolis and Others – Ex Parte Pinochet*, House of Lords (United Kingdom), 24 March 1999 (footnote 31 above), at p. 592; *Gaddafi*, Court of Appeal of Paris, 20 October 2000 (footnote 53 above) (English version in *International Law Reports*, vol. 125, p. 490, at p. 509); *H.S.A., et al. v. S.A., et al*. (indictment of Ariel Sharon, Amos Yaron and others), Court of Cassation (Belgium), Judgment of 12 February 2003 (footnote 67 above), at p. 599; *Issa Hassan Sesay a.k.a. Issa Sesay, Allieu Kondewa, Moinina Fofana v. President of the Special Court, Registrar of the Special Court, Prosecutor of the Special Court, Attorney-General and Minister of Justice*, Supreme Court of Sierra Leone, Judgment of 14 October 2005 (S.C. No. 1/2003); and *Case against Paul Kagame*, National High Court, Central Investigation Court No. 4 (Spain), indictment of 6 February 2008 (footnote 67 above), pp. 156–157. Among more recent cases, see *Association Fédération nationale des victimes d'accidents collectifs; Association des familles des victimes du Joola*, Court of Appeal of Paris, Investigating Chamber, Judgment of 16 June 2009, confirmed by the Court of Cassation, Judgment of 19 January 2010 (footnote 31 above); *Khurts Bat v. Investigating Judge of the German Federal Court*, Administrative Court, High Court of Justice (United Kingdom), 29 July 2011 (footnote 31 above), para. 55; and *A. c. Ministère public de la Confédération*, Federal Criminal Court (Switzerland), 25 July 2012 (footnote 31 above), legal ground No. 5.3.1. See also *Teodoro Nguema Obiang Mangue et autres*, Court of Appeal of Paris, 13 June 2013 (footnote 31 above).

96 *Arrest Warrant of 11 April 2000* (see footnote 14 above), p. 22, para. 55.

97 *Ibid*.

(7) The fullness of immunity *ratione personae* is also reflected in the present draft articles, which do not establish any exception applicable to this type of immunity, in contrast to the case of immunity *ratione materiae* by virtue of draft article 7.

(8) As regards the terminology used to refer to acts covered by immunity *ratione personae*, it must be borne in mind that no single, uniform wording is actually in use. For example, the Vienna Convention on Diplomatic Relations makes no express distinction between acts carried out in a private or official capacity in referring to acts to which the immunity from criminal jurisdiction of diplomatic agents extends, although it is understood to apply to both categories.[98] Moreover, the terminology in other instruments, documents and judicial decisions, as well as in the literature, also lacks consistency, with the use, among others, of the expressions "official acts and private acts", "acts performed in the exercise of their functions", "acts linked to official functions" and "acts carried out in an official or private capacity". In the present draft article, the Commission has found it preferable to use the phrase "acts performed, whether in a private or official capacity", following the wording used by the International Court of Justice in the *Arrest Warrant* case.

(9) The definition of an "act performed in an official capacity" is set out in draft article 2, subparagraph (b). The Commission has not considered it necessary to define what is meant by "act performed in a private capacity", as this notion is residual in nature. As a result, it must be understood by default that any act not performed in an official capacity has been performed in a private capacity.

(10) The Commission has used the term "act" in the same sense and for the same reasons explained in the commentary to draft article 2, subparagraph (b), which contains the definition of "act performed in an official capacity".

(11) The acts to which immunity *ratione personae* extends are those that a Head of State, Head of Government or Minister for Foreign Affairs has carried out during or prior to his or her term of office. The reason for this is the purpose of immunity *ratione personae*, which relates both to protection of the sovereign equality of the State and to guarantees that the persons enjoying this type of immunity can perform their functions of representation of the State unimpeded throughout their term of office. In this sense, there is no need for further clarification regarding the applicability of immunity *ratione personae* to the acts performed by such persons throughout their term of office. As regards acts performed prior to the term of office, it must be noted that immunity *ratione personae* applies only if the criminal jurisdiction of a third State is to be exercised during the term of office of the Head of State, Head of Government or Minister for Foreign Affairs. This is because, as the International Court of Justice stated in the *Arrest Warrant* case, "no distinction can be drawn … between acts performed before the person concerned assumed office as Minister for Foreign Affairs and acts committed during the period of office. Thus, if a Minister for Foreign Affairs is arrested in another State on a criminal charge, he or she is clearly thereby prevented from exercising the functions of his or her office. The consequences of such impediment to the exercise of those official functions are equally serious, regardless of whether … the arrest relates to acts allegedly performed before the person became the Minister for Foreign Affairs or to acts performed while in office."[99]

(12) In any event, it must be noted that, as the Court also stated in the same case, immunity *ratione personae* is procedural in nature and must be interpreted, not as exonerating a Head of State, Head of Government or Minister for Foreign Affairs from criminal responsibility for acts committed during or prior to his or her term of office, but solely as suspending the exercise of foreign jurisdiction during the term of office of those high-ranking officials.[100] Consequently, when the term of office ends, the acts carried out during or prior to the term

[98] This is the conclusion to be drawn from reading article 31, paragraph 1, in conjunction with article 39, paragraph 2, of the Vienna Convention on Diplomatic Relations. Articles 31, paragraph 1, and 43, paragraph 2, of the Convention on Special Missions must be construed in the same way.

[99] *Arrest Warrant of 11 April 2000* (see footnote 14 above), p. 22, para. 55.

[100] "Jurisdictional immunity may well bar prosecution for a certain period or for certain offences; it cannot exonerate the person to whom it applies from all criminal responsibility" (*ibid.*, p. 25, para. 60).

of office cease to be covered by immunity *ratione personae* and may, in certain cases, be subject to the criminal jurisdiction that cannot be exercised during the term of office.

(13) Lastly, it should be noted also that immunity *ratione personae* does not in any circumstances apply to acts carried out by a Head of State, Head of Government or Minister for Foreign Affairs after his or her term of office. Since they are now considered "former" Heads of State, Heads of Government or Ministers for Foreign Affairs, such immunity would have ceased when the term of office ends.

(14) Paragraph 3 addresses what happens with respect to acts carried out in an official capacity while in office by the Head of State, Head of Government or Minister for Foreign Affairs after his or her term of office ends. Paragraph 3 proceeds from the principle that immunity *ratione personae* ceases when the Head of State, Head of Government or Minister for Foreign Affairs leaves office. Consequently, immunity *ratione personae* no longer exists after the term of office ends. Nevertheless, it must be kept in mind that a Head of State, Head of Government or Minister for Foreign Affairs may, during his or her term of office, have carried out acts in an official capacity which do not lose that quality merely because the term of office has ended and may accordingly be covered by immunity *ratione materiae*. This matter has not been disputed in substantive terms, although it has been expressed variously in State practice, treaty practice and judicial practice.[101]

(15) In order to address these problems, paragraph 3 sets forth a "without prejudice" clause on the potential applicability of immunity *ratione materiae* to such acts. This does not mean that immunity *ratione personae* is prolonged past the end of the term of office of persons enjoying such immunity, since that is not in line with paragraph 1 of the draft article. Nor does it mean that immunity *ratione personae* is transformed into a new form of immunity *ratione materiae* which applies automatically by virtue of paragraph 3. The Commission considers that the "without prejudice" clause simply leaves open the possibility that immunity *ratione materiae* might apply to acts carried out in an official capacity and during their term of office by former Heads of State, Heads of Government or Ministers for Foreign Affairs when the rules governing that category of immunity make this possible. Paragraph 3 does not prejudge the content of the immunity *ratione materiae* regime, which is developed in Part Three of the draft articles.

Part Three
Immunity *ratione materiae*

Commentary

(1) Part Three of the present draft articles concerns immunity *ratione materiae* from foreign criminal jurisdiction. Immunity from jurisdiction *ratione materiae* is applicable to all State officials, current or former, including those who previously enjoyed immunity *ratione personae* as a Head of State, Head of Government or Minister for Foreign Affairs but are no longer in office. Therefore, immunity *ratione materiae* is the general and residual legal regime governing the immunity of State officials from foreign criminal jurisdiction.

(2) Part Three consists of three draft articles that define the normative elements of the legal regime applicable to immunity from jurisdiction *ratione materiae*. Draft article 5 identifies the subjective element of immunity (State officials enjoying immunity). Draft article 6 is focused on the material element (acts covered by immunity) and the temporal element (duration of immunity). Draft article 7 defines an exception to immunity linked to the commission of crimes under international law. Finally, the draft articles contain an annex

[101] Thus, for example, with reference to the immunity of members of diplomatic missions, the Vienna Convention on Diplomatic Relations expressly states that "with respect to acts performed by such a person in the exercise of his functions as a member of the mission, immunity shall continue to subsist" (art. 39, para. 2); the formulation is repeated in the Convention on Special Missions (art. 43, para. 1). In the judicial practice of States, this has been expressed in a wide variety of ways: reference is sometimes made to "residual immunity", the "continuation of immunity in respect of official acts" or similar wording. On this aspect, see the analysis by the Secretariat in its 2008 memorandum (A/CN.4/596 and Corr.1, available from the Commission's website, documents of the sixtieth session, paras. 137 *et seq.*).

that lists a number of international treaties as references for identifying the crimes under international law enumerated in draft article 7. The annex must therefore be read in conjunction with the present Part Three.

(3) Additionally, paragraph 3 of draft article 6 defines the relationship between immunity from jurisdiction *ratione personae* and the immunity from jurisdiction *ratione materiae* that applies to Heads of State, Heads of Government and Ministers for Foreign Affairs after their term of office has ended.

Article 5
Persons enjoying immunity *ratione materiae*

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

Commentary

(1) Draft article 5 is the first of the draft articles on immunity *ratione materiae* and is intended to define the subjective scope of this category of immunity from foreign criminal jurisdiction. Consequently, this draft article parallels draft article 3, on persons enjoying immunity *ratione personae*. It has the same structure, and it uses, *mutatis mutandis*, the same wording and the terminology already agreed on by the Commission concerning the latter draft article. There is no list of actual persons who enjoy immunity; instead, in the case of immunity *ratione materiae*, they have been referred to as "State officials acting as such".

(2) The expression "State officials", as used in this draft article, is to be understood in the sense given to it in draft article 2, subparagraph (a), namely: "any individual who represents the State or who exercises State functions". In contrast to the situation with persons enjoying immunity *ratione personae*, the Commission did not consider it possible, in the present draft articles, to draw up a list of persons enjoying immunity *ratione materiae*. Rather, the persons in this category must be identified on a case-by-case basis, by applying the criteria set out in draft article 2, subparagraph (a), which highlight the existence of a link between the official and the State. The commentary to draft article 2, subparagraph (a), must be duly kept in mind for the purposes of the present draft article.[102]

(3) The phrase "acting as such" refers to the official nature of the acts of the officials, emphasizing the functional nature of immunity *ratione materiae* and establishing a distinction from immunity *ratione personae*. In view of the functional nature of immunity *ratione materiae*, some members of the Commission have expressed doubts about the need to define the persons who enjoy it, since in their view the essence of immunity *ratione materiae* is the nature of the acts performed and not the individual who performs them. Nevertheless, the majority of members of the Commission thought it would be useful to identify the persons in this category of immunity, since immunity from foreign criminal jurisdiction applies to these individuals. The reference to the fact that the "State officials" must have acted "as such" in order to enjoy immunity *ratione materiae* says nothing about the acts that might be covered by such immunity, which are addressed in draft article 6. For the same reason, the expression "acting in an official capacity" has not been used, to avoid potential confusion with the concept of an "act performed in an official capacity".

(4) In conformity with draft article 4, paragraph 3,[103] immunity *ratione materiae* also applies to former Heads of State, Heads of Government and Ministers for Foreign Affairs "acting as [State officials]". Nevertheless, the Commission does not consider it necessary to refer explicitly to those officials in the present draft article, since immunity *ratione materiae* applies to them, not because of their special status within the State, but in view of the fact that they are State officials who have acted as such during their term of office. Even though the Commission considers that the Head of State, Head of Government and Minister for Foreign Affairs enjoy immunity *ratione materiae stricto sensu* only after they have left office,

[102] See, above, paragraphs (3)–(20) of the commentary to draft article 2.

[103] This provision reads: "The cessation of immunity *ratione personae* is without prejudice to the application of the rules of international law concerning immunity *ratione materiae*." Concerning the scope of this "without prejudice" clause, see above, paragraph (12) of the commentary to draft article 4.

there is no need to mention this in draft article 5. The matter is covered more fully in draft article 6 on the substantive and temporal scope of immunity *ratione materiae*, which is modelled on draft article 4.

(5) Draft article 5 is without prejudice to exceptions to immunity *ratione materiae*, referred to in draft article 7.

(6) Lastly, attention must be drawn to the fact that draft article 5 uses the expression "from the exercise of foreign criminal jurisdiction", as does draft article 3 to refer to persons enjoying immunity *ratione personae*. This expression illustrates the relationship between immunity and foreign criminal jurisdiction and emphasizes the essentially procedural nature of the immunity that comes into play in relation to the exercise of criminal jurisdiction with respect to a specific act.[104]

Article 6
Scope of immunity *ratione materiae*

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

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

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

Commentary

(1) Draft article 6 is intended to define the scope of immunity *ratione materiae*, which covers the material and temporal elements of this category of immunity of State officials from foreign criminal jurisdiction. Draft article 6 complements draft article 5, which refers to the persons enjoying immunity *ratione materiae*. Both draft articles determine the general regime applicable to this category of immunity.

(2) Draft article 6 has content parallel to that used by the Commission in draft article 4 on the scope of immunity *ratione personae*. In draft article 6, the order of the first two paragraphs has been changed, with the reference to the material element (acts covered by immunity) appearing first and the reference to the temporal element (duration of immunity) afterwards. The intent is to place emphasis on the material element and on the functional dimension of immunity *ratione materiae*, thus reflecting the fact that acts performed in an official capacity are central to this category of immunity. Even so, it should be borne in mind that the scope of such immunity must be understood by looking at the material aspect (para. 1) in conjunction with the temporal aspect (para. 2). Furthermore, draft article 6 contains a paragraph on the relationship between immunity *ratione materiae* and immunity *ratione personae*, in similar fashion to draft article 4, paragraph 3, which it complements.

(3) The purpose of paragraph 1 is to indicate that immunity *ratione materiae* applies exclusively to acts performed in an official capacity, as the concept was defined in draft article 2 (b).[105] Consequently, acts performed in a private capacity are excluded from this category of immunity, unlike immunity *ratione personae*, which applies to both categories of acts.

(4) Although the purpose of paragraph 1 is to emphasize the material element of immunity *ratione materiae*, the Commission decided to include a reference to State officials to highlight the fact that only such officials may perform one of the acts covered by immunity under the draft articles. This makes clear the need for the two elements (subjective and material) to be present in order for immunity to be applied. It was not considered necessary, however, to make reference to the requirement that the officials be "acting as such", since the status of

[104] See, above, paragraph (16) of the commentary to draft article 3.
[105] See, above, draft article 2 (b) and paragraphs (21)–(35) of the commentary thereto.

the official does not affect the nature of the act, but rather the subjective element of immunity, and is already provided for in draft article 5.[106]

(5) The material scope of immunity *ratione materiae* as set out in draft article 6, paragraph 1, does not prejudge the question of exceptions to immunity, which is addressed in draft article 7.

(6) Paragraph 2 refers to the temporal element of immunity *ratione materiae* by placing emphasis on the permanent character of such immunity, which continues to produce effects even when the official who has performed an act in an official capacity has ceased to be an official. Such characterization of immunity *ratione materiae* as permanent derives from the fact that its recognition is based on the nature of the act performed by the official, which remains unchanged regardless of the position held by the author of the act. Thus, although it is necessary for the act to be performed by a State official acting as such, its official nature does not subsequently disappear. Consequently, for the purposes of immunity *ratione materiae* it is irrelevant whether the official who invokes immunity holds such a position when immunity is claimed, or, conversely, has ceased to be a State official. In both cases, the act performed in an official capacity will continue to be such an act and the State official who performed the act may equally enjoy immunity whether or not he or she continues to be an official. The permanent character of immunity *ratione materiae* has already been recognized by the Commission in its work on diplomatic relations,[107] has not been challenged in practice and is generally accepted in the literature.[108]

(7) The Commission chose to define the temporal element of immunity *ratione materiae* by stating that such immunity "continues to subsist after the individuals concerned have ceased to be State officials", following the model used in the 1961 Vienna Convention on Diplomatic Relations[109] and the 1946 Convention on the Privileges and Immunities of the United Nations.[110] The expressions "continues to subsist" and "have ceased to be State

[106] See, above, paragraph (3) of the commentary to draft article 5.

[107] See, *a contrario sensu*, paragraph (19) of the commentary to draft article 2, paragraph 1 (b) (v), of the draft articles on jurisdictional immunities of States and their property, adopted by the Commission at its forty-third session: "The immunities *ratione personae*, unlike immunities *ratione materiae* which continue to survive after the termination of the official functions, will no longer be operative once the public offices are vacated or terminated" (*Yearbook … 1991*, vol. II (Part Two), p. 18).

[108] See Institute of International Law, resolution on "Immunities from jurisdiction and execution of Heads of State and of Government in international law", which sets out – *a contrario sensu* – the same position in its article 13, paragraphs 1 and 2 (*Yearbook of the Institute of International Law*, vol. 69 (Session of Vancouver, 2001), p. 743, at p. 753); and "Resolution on the immunity from jurisdiction of the State and of persons who act on behalf of the State in case of international crimes", art. III, paras. 1–2 (*ibid.*, vol. 73 (Session of Naples, 2009), p. 226, at p. 227). The resolutions are available from the website of the Institute: www.idi-iil.org, under "Resolutions".

[109] Article 39, paragraph 2, of the Convention provides: "When the functions of a person enjoying privileges and immunities have come to an end, such privileges and immunities shall normally cease at the moment when he leaves the country, or on expiry of a reasonable period in which to do so, but shall subsist until that time, even in case of armed conflict. However, with respect to acts performed by such a person in the exercise of his functions as a member of the mission, immunity shall continue to subsist."

[110] Article IV, section 12, of the Convention provides: "In order to secure, for the representatives of Members to the principal and subsidiary organs of the United Nations and to conferences convened by the United Nations, complete freedom of speech and independence in the discharge of their duties, the immunity from legal process in respect of words spoken or written and all acts done by them in discharging their duties shall continue to be accorded, notwithstanding that the persons concerned are no longer the representatives of Members." The 1947 Convention on the Privileges and Immunities of the Specialized Agencies follows the same model; in article V, section 14, it provides: "In order to secure for the representatives of members of the specialized agencies at meetings convened by them complete freedom of speech and complete independence in the discharge of their duties, the immunity from legal process in respect of words spoken or written and all acts done by them in discharging their duties shall continue to be accorded, notwithstanding that the persons concerned are no longer engaged in the discharge of such duties."

officials" are based on those treaties. Furthermore, the Commission used the term "individuals" to reflect the definition of "State official" in draft article 2, subparagraph (a).[111]

(8) Lastly, it should be noted that although paragraph 2 deals with the temporal element of immunity, the Commission considered it appropriate to include an explicit reference to acts performed in an official capacity, bearing in mind that such acts are central to the issue of immunity *ratione materiae* and in order to avoid a broad interpretation of the permanent character of this category of immunity which could be argued to apply to other acts.

(9) The purpose of paragraph 3 is to define the model of the relationship that exists between immunity *ratione materiae* and immunity *ratione personae*, on the basis that they are two distinct categories. As a result, draft article 6, paragraph 3, is closely related to draft article 4, paragraph 3, which also deals with that relationship, albeit in the form of a "without prejudice" clause.

(10) Pursuant to draft article 4, paragraph 1, immunity *ratione personae* has a temporal aspect, since the Commission considered that after the term of office of the Head of State, Head of Government or Minister for Foreign Affairs has ended, immunity *ratione personae* ceases. However, such "cessation … is without prejudice to the application of the rules of international law concerning immunity *ratione materiae*" (draft article 4, paragraph 3). As the Commission stated in the commentary to that draft article, "it must be kept in mind that a Head of State, Head of Government or Minister for Foreign Affairs may, during his or her term of office, have carried out acts in an official capacity which do not lose that quality merely because the term of office has ended and may accordingly be covered by immunity *ratione materiae*". The Commission also stated: "This does not mean that immunity *ratione personae* is prolonged past the end of the term of office of persons enjoying such immunity, since that is not in line with paragraph 1 of the draft article. Nor does it mean that immunity *ratione personae* is transformed into a new form of immunity *ratione materiae* which applies automatically by virtue of paragraph 3. The Commission considers that the 'without prejudice' clause simply leaves open the possibility that immunity *ratione materiae* might apply to acts carried out in an official capacity and during their term of office by former Heads of State, Heads of Government or Ministers for Foreign Affairs when the rules governing that category of immunity make this possible."[112]

(11) This is precisely the situation referred to in paragraph 3 of draft article 6. The paragraph proceeds on the basis that, during their term of office, Heads of State, Heads of Government and Ministers for Foreign Affairs enjoy broad immunity known as immunity *ratione personae*, which, in practical terms, includes the same effects as immunity *ratione materiae*. This does not prevent these State officials, after their term in office has ended, from enjoying immunity *ratione materiae, stricto sensu*.

(12) To this end, the requirements for immunity *ratione materiae* will need to be fulfilled, namely: that the act was performed by a State official acting as such (Head of State, Head of Government or Minister for Foreign Affairs in this specific case), in an official capacity and during his or her term of office. The purpose of draft article 6, paragraph 3, is precisely to state that immunity *ratione materiae* is applicable in such situations. The paragraph therefore complements draft article 4, paragraph 3, which the Commission said "does not prejudge the content of the immunity *ratione materiae* regime".[113]

(13) However, regarding the situation described in draft article 6, paragraph 3, some members of the Commission considered that, during their term of office, Heads of State, Heads of Government and Ministers for Foreign Affairs enjoy both immunity *ratione personae* and immunity *ratione materiae*. Other members of the Commission emphasized that, for the purposes of these draft articles, immunity *ratione personae* is general and broader in scope and encompasses immunity *ratione materiae*, since it applies to both private and official acts. For these members, such officials enjoy only immunity *ratione personae* during their term of office, and only after their term of office has come to an end will they enjoy

[111] For the meaning of the term "individual", see, above, paragraph (6) of the commentary to draft article 2.

[112] Paragraphs (14) and (15) of the commentary to draft article 4 above.

[113] Paragraph (15) of the commentary to draft article 4 above.

immunity *ratione materiae, stricto sensu*, as provided for in draft article 4 and reflected in the commentaries to draft articles 4 and 5. While favouring one or the other option might have consequences before the national courts of certain States (in particular with regard to the conditions for invoking immunity), such consequences would not extend to all national legal systems. During the debate, some members of the Commission expressed the view that it was not necessary to include paragraph 3 in draft article 6, and that it was sufficient to refer to the matter in the commentaries thereto.

(14) Although the Commission took account of this interesting debate, which mainly concerned theoretical and terminological issues, it decided to retain draft article 6, paragraph 3, particularly in view of the practical importance of the paragraph, whose purpose is to clarify, in operational terms, the regime applicable, after their term of office has ended, to individuals who previously enjoyed immunity *ratione personae* (the Head of State, Head of Government and Minister for Foreign Affairs).

(15) The wording of paragraph 3 is modelled on the Vienna Convention on Diplomatic Relations (art. 39, para. 2) and the Convention on the Privileges and Immunities of the United Nations (art. IV, sect. 12), which govern situations similar to those covered in the paragraph in question, namely the situation of persons who enjoyed immunity *ratione personae*, after the end of their term of office, with respect to acts performed in an official capacity during such term of office. The Commission has used the expression "continue to enjoy immunity" in order to reflect the link between the moment when the act occurred and the moment when immunity is invoked. Like the treaties on which it is based, draft article 6, paragraph 3, does not qualify immunity, but confines itself to the use of the generic term. Yet although the term "immunity" is used without any qualification whatsoever, the Commission understands that the term is used to refer to immunity *ratione materiae*, since it is only in this context that it is possible to take into consideration the acts of State officials performed in an official capacity after their term of office has ended.

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

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

(a) crime of genocide;

(b) crimes against humanity;

(c) war crimes;

(d) crime of apartheid;

(e) torture;

(f) enforced disappearance.

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

Commentary

(1) The consideration of draft article 7 has given rise to an intense debate in the Commission that has lasted for two sessions and has continued to be present in the work of the Commission since 2016. This debate reflected the different positions held by the members of the Commission on an issue of great relevance, namely the existence or non-existence of limits or exceptions to immunity *ratione materiae*. These positions have been put on record below in paragraphs (10)–(13) of this commentary.

(2) Moreover, the members of the Commission who were not in favour of the inclusion of exceptions to immunity in the draft articles highlighted the fact that no decision could be taken on the issue of limitations and exceptions to immunity until the Commission had taken a position on the issue of procedural safeguards. This opinion was not, however, accepted by the majority of Commission members, who, while recognizing the importance of clearly

defining procedural safeguards to prevent abuse in the exercise of foreign criminal jurisdiction over State officials, took the view that the issue of the crimes to which immunity from jurisdiction *ratione materiae* does not apply could be dealt with separately. Nevertheless, in order to reflect the great importance attached by the Commission to procedural provisions and safeguards in the context of the present topic, it was agreed to include a footnote, which was later deleted when the text of the draft articles was adopted on first reading.[114]

(3) As a result of the foregoing, the Commission provisionally adopted draft article 7 and the annex to which it refers by a recorded vote held during its sixty-ninth session.[115]

(4) After completing its work on the procedural provisions and safeguards contained in Part Four of the present draft articles, the Commission adopted, by consensus, draft article 7 and the annex contained in the text of the draft articles adopted on first reading at the current session. After the adoption of draft article 7, one member of the Commission made a declaration stating that the adoption of the draft article without a vote did not imply any change with respect to his previous position.

(5) Bearing in mind the above-mentioned considerations, as well as the great interest and debate that draft article 7 has raised among States, the present commentary – which reproduces, with minor updates, the commentary adopted in 2017 – seeks to capture the different positions held by the members of the Commission, thus following the Commission's well-established practice of reflecting the various positions expressed by its members on controversial issues in the commentaries adopted on first reading. In so doing, the Commission carries out a necessary exercise in transparency that helps States to acquire a better understanding of the most controversial issues that have arisen in its work, trusting that this will enable them to address such issues in any written observations they may transmit to the Commission in the coming year.

(6) Draft article 7 lists crimes under international law in respect of which immunity from foreign criminal jurisdiction *ratione materiae* shall not apply under the present draft articles. The draft article contains two paragraphs, one that lists the crimes (para. 1) and one that identifies the definition of those crimes (para. 2).

(7) As draft article 7 refers solely to immunity from jurisdiction *ratione materiae*, it is included in Part Three of the draft articles and does not apply in respect of immunity from jurisdiction *ratione personae*, which is regulated in Part Two of the draft articles.

(8) This does not mean, however, that the State officials listed in draft article 3 (Heads of State, Heads of Government and Ministers for Foreign Affairs) will always be exempt from the application of draft article 7. On the contrary, it should be borne in mind that, as the Commission has indicated, Heads of State, Heads of Government and Ministers for Foreign Affairs "enjoy immunity *ratione personae* only during their term of office"[116] and the cessation of such immunity "is without prejudice to the application of the rules of international law concerning immunity *ratione materiae*".[117] In addition, draft article 6, on immunity *ratione materiae*, provides that "[i]ndividuals who enjoyed immunity *ratione personae* ..., whose term of office has come to an end, continue to enjoy immunity with respect to acts performed in an official capacity during such term of office".[118] Accordingly, as this residual immunity is immunity *ratione materiae*, draft article 7 will be applicable to the immunity from jurisdiction enjoyed by a former Head of State, a former Head of Government or a former Minister for Foreign Affairs for acts performed in an official capacity during their term of office. Therefore, such immunity *ratione materiae* will not

[114] The footnote read as follows: "The Commission will consider the procedural provisions and safeguards applicable to the present draft articles at its seventieth session." The footnote marker was inserted after the headings of Part Two and Part Three 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. See *Official Records of the General Assembly, Seventy-second Session, Supplement No. 10* (A/72/10), para. 140.

[115] *Ibid.*, paras. 74–75.

[116] Draft article 4, para. 1. See, above, paragraphs (2) and (3) of the commentary to draft article 4.

[117] Draft article 4, para. 3. See, above, paragraphs (14) and (15) of the commentary to draft article 4.

[118] Draft article 6, para. 3. See, above, paragraphs (9) to (15) of the commentary to draft article 6.

apply to these former officials in connection with the crimes under international law listed in paragraph 1 of draft article 7.

(9) Paragraph 1 of draft article 7 lists the crimes which, if committed, would prevent the application of such immunity from criminal jurisdiction to a foreign official, even if those crimes had been committed by the official acting in an official capacity during his or her term of office. Thus, draft article 7 complements the normative elements of immunity from foreign criminal jurisdiction *ratione materiae* as defined in draft articles 5 and 6.

(10) The Commission has included this draft article for the following reasons. First, it considers that there has been a discernible trend towards limiting the applicability of immunity from jurisdiction *ratione materiae* in respect of certain types of behaviour that constitute crimes under international law. This trend is reflected in judicial decisions taken by national courts which, even though they do not all follow the same line of reasoning, have not recognized immunity from jurisdiction *ratione materiae* in relation to certain international crimes.[119] In rare cases, this trend has also been reflected in the adoption of

[119] See the following cases, which are presented in support of such a trend: *Regina v. Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte (No. 3)*, House of Lords, United Kingdom, 24 March 1999 (footnote 61 above); *Pinochet*, Belgium, Court of First Instance of Brussels, 6 November 1998 (footnote 62 above), p. 349; *Hussein*, Germany, Higher Regional Court of Cologne, Judgment of 16 May 2000, 2 Zs 1330/99, para. 11 (makes this assertion in relation to the hypothesis that the then President Hussein had ceased to hold office); *Bouterse*, Netherlands, Amsterdam Court of Appeal, 20 November 2000 (footnote 53 above) (although the Supreme Court subsequently quashed the verdict, it did not do so in relation to immunity but because of the violation of the principle of non-retroactivity and the limited scope of universal jurisdiction; see judgment of 18 September 2001, International Law in Domestic Courts [ILDC 80 (NL 2001)]); *Sharon and Yaron*, Belgium, Court of Appeal of Brussels, 26 June 2002 (footnote 53 above), p. 123 (although the Court granted immunity *ratione personae* to Ariel Sharon, it tried Amos Yaron, who, at the time the acts were committed, was head of the Israeli armed forces that took part in the Sabra and Shatila massacres) (see also *H.S.A., et al. v. S.A., et al.* (footnote **Error! Bookmark not defined.** above)); *H. v. Public Prosecutor*, Netherlands, Supreme Court, Judgment of 8 July 2008, ILDC 1071 (NL 2008), para. 7.2; *Lozano v. Italy*, Italy, Court of Cassation, 24 July 2008 (footnote 45 above), para. 6; *A. c. Ministère public de la Confédération*, Federal Criminal Court (Switzerland), 25 July 2012 (footnote 31 above); *FF v. Director of Public Prosecutions*, High Court of Justice, Queen's Bench Division, Divisional Court, 7 October 2014 (footnote 61 above) (the significance of this ruling lies in the fact that it was issued as a "consent order", that is to say, based on an agreement reached between the plaintiffs and the Director of Public Prosecutions, in which the latter agrees that the charges of torture against Prince Nasser are not covered by immunity *ratione materiae*). In a civil proceeding, the Italian Supreme Court has also asserted that State officials who have committed international crimes do not enjoy immunity *ratione materiae* from criminal jurisdiction (*Ferrini v. Federal Republic of Germany*, Italy, Court of Cassation, Judgment of 11 March 2004, *International Law Reports*, vol. 128, p. 658, at p. 674). In *Jones*, although the House of Lords recognized immunity from civil jurisdiction, it reiterated that immunity from criminal jurisdiction is not applicable in the case of torture (*Jones v. Saudi Arabia*, 14 June 2006 (see footnote 31 above). Lastly, it should be noted that the Federal High Court of Ethiopia, albeit in the context of a case pursued against an Ethiopian national, affirmed the existence of a rule of international law preventing the application of immunity to a former Head of State accused of international crimes (*Special Prosecutor v. Hailemariam*, Federal High Court, Judgment of 9 October 1995, ILDC 555 (ET 1995)). National courts have in some cases tried officials of another State for international crimes without expressly ruling on immunity. This occurred, for example, in the *Barbie* case before the French courts: *Fédération Nationale des Déportés et Internés Résistants et Patriotes and Others v. Barbie*, France, Court of Cassation, Judgments of 6 October 1983, 26 January 1984 and 20 December 1985, *International Law Reports*, vol. 78, p. 125; *Fédération Nationale des Déportés et Internés Résistants et Patriotes and Others v. Barbie*, Rhone Court of Assizes, Judgment of 4 July 1987, *ibid.*, p. 148; and Court of Cassation, Judgment of 3 June 1988, *ibid.*, vol. 100, p. 330. Meanwhile, the National High Court of Spain has tried various foreign officials for international crimes without deeming it necessary to rule on immunity, in the *Pinochet*, *Scilingo*, *Cavallo*, *Guatemala*, *Rwanda* and *Tibet* cases. In the *Rwanda* case, however, the National High Court ruled against the prosecution of President Kagame on the grounds that he enjoyed immunity. Similarly, in the *Tibet* case, the National High Court ruled against the prosecution of the then President Hu Jintao; however, following the end of the latter's term as President of China, the Central Court of Investigation No. 2 of the National High Court allowed his prosecution by order of 9 October 2013, claiming that he no longer enjoyed "diplomatic immunity".

national legislation that provides for exceptions to immunity *ratione materiae* in relation to the commission of international crimes.[120] This trend has also been highlighted in the

A last relevant example is the judgment of the German Federal Court of Justice on 28 January 2021 (case No. 3 StR 564/19) (see footnote 31 above) condemning a former lieutenant of the Afghan Army for torture as a war crime committed in that country against Taliban members in 2013 and 2014. This judgment expressly ruled that immunity *ratione materiae* from foreign criminal jurisdiction does not apply with regard to war crimes under customary international law, when committed by subordinate State officials (para. 18); see also paragraphs 11, 13, 23 and 35. The Court held that there is international custom supporting this finding, and analysed the relevant practice in paragraphs 19 to 43. This judgment largely follows the legal opinion issued by the German Federal Public Prosecutor General about the applicability of immunity to crimes under international law, in which the Federal Public Prosecutor General, after analysing both national and international case law, concluded that immunity *ratione materiae* does not apply to an official of another State accused of crimes under international law. Like the judgment of the Federal Court of Justice, the legal opinion of the Federal Public Prosecutor General also examines the work of the Commission on the present topic. It has an added value, given that, under German law, the Federal Public Prosecutor General has exclusive competence to introduce criminal proceedings under the German Code of Crimes against International Law. The legal opinion is available in English in C. Kreß, P. Frank and C. Barthe, "Functional immunity of foreign State officials before national courts: a legal opinion by Germany's Federal Public Prosecutor General", *Journal of International Criminal Justice*, vol. 19, No. 3 (July 2021), pp. 697–716.

[120] In support of this position, attention has been drawn to 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, which establishes a separate regime of immunity for Heads of State, Heads of Government and Ministers for Foreign Affairs, according to which, in respect of "acts performed in the exercise of official functions [by the officials in question] during a term in office, genocide, forced disappearance, war crimes and crimes against humanity shall be excluded from immunity" (art. 23, para. 1, *in fine*). Also of interest is Act No. 24488 of Argentina, on foreign State immunity, article 3 of which was excluded by Decree No. 849/95 promulgating the Act, with the result that the Argentine courts may not decline to hear a claim against a State for violation of international human rights law. Meanwhile, from a far more limited perspective, the United States Foreign Sovereign Immunities Act, as amended by the Torture Victim Protection Act, establishes a "[t]errorism exception to the jurisdictional immunity of a foreign state" (sect. 1605A), which makes it possible to exclude the application of immunity for certain types of acts such as torture or extrajudicial executions, provided that they were carried out by officials of a State previously designated by the competent authorities of the United States as a "state sponsor of terrorism". A similar exception is contained in the State Immunity Act of Canada. Lastly, it should be borne in mind that some limitations or exceptions to immunity in relation to international crimes are contained in national legislation concerning such crimes, either in separate laws (see the Repression of Serious Violations of International Humanitarian Law Act of Belgium, as amended in 2003; the 2003 International Crimes Act of the Netherlands; and the Criminal Code of the Republic of the Niger, as amended in 2003) or in legislation implementing the Rome Statute of the International Criminal Court. For implementing legislation that establishes a general exception to immunity, see Burkina Faso, Act No. 50 of 2009 on the determination of competence and procedures for application of the Rome Statute of the International Criminal Court by the courts of Burkina Faso, arts. 7 and 15.1 (according to which the Burkina Faso courts may exercise jurisdiction with respect to persons who have committed a crime that falls within the competence of the Court, even in cases where it was committed abroad, provided that the suspect is in their territory. Moreover, official status shall not be grounds for exception or reduction of responsibility); Comoros, Act No. 11-022 of 13 December 2011 concerning the application of the Rome Statute, art. 7.2 ("the immunities or special rules of procedure accompanying the official status of a person by virtue of the law or of international law shall not prevent national courts from exercising their competence with regard to that person in relation to the offences specified in this Act"); Ireland, International Criminal Court Act 2006, art. 61.1 ("In accordance with Article 27, any diplomatic immunity or state immunity attaching to a person by reason of a connection with a state party to the Statute is not a bar to proceedings under this Act in relation to the person"); Mauritius, International Criminal Court Act 2001, art. 4; South Africa, Implementation of the Rome Statute of the International Criminal Court Act (No. 27 of 18 July 2002), arts. 4 (2) (a) (i) and 4 (3) (c) (stating that South African courts are competent to prosecute crimes of genocide, crimes against humanity and war crimes when the alleged perpetrator is in South Africa and that any official status claimed by the accused is irrelevant). For implementing legislation that establishes procedures for consultation or limitations only in relation to the duty to cooperate with the International Criminal Court, see: Argentina, Act No. 26200 implementing the Rome Statute of the

literature, and has been reflected to some extent in proceedings before international tribunals.[121]

(11) Second, the Commission also took into account the fact that the draft articles on immunity of State officials from foreign criminal jurisdiction are intended to apply within an international legal order whose unity and systemic nature cannot be ignored. Therefore, the Commission should not overlook other existing standards or clash with the legal principles enshrined in such important sectors of contemporary international law as international humanitarian law, international human rights law and international criminal law. In this context, the consideration of crimes to which immunity from foreign criminal jurisdiction does not apply must be careful and balanced, taking into account the need to preserve respect for the principle of the sovereign equality of States, to ensure the implementation of the principles of accountability and individual criminal responsibility and to end impunity for the most serious international crimes, which is one of the primary objectives of the international community. Striking this balance will ensure that immunity fulfils the purpose for which it was established (to protect the sovereign equality and legitimate interests of States) and that it is not turned into a procedural mechanism to block all attempts to establish the criminal responsibility of certain individuals (State officials) arising from the commission of the most serious crimes under international law.

(12) In the light of the above two reasons, the Commission considers that it must pursue its mandate of promoting the progressive development and codification of international law by applying both the deductive method and the inductive method. It is on this premise that the Commission has included in draft article 7 a list of crimes to which immunity *ratione materiae* shall not apply for the following reasons: (a) they are crimes which in practice tend to be considered as crimes not covered by immunity *ratione materiae* from foreign criminal jurisdiction; and (b) they are crimes under international law that have been identified as the most serious crimes of concern to the international community, and there are international, treaty-based and customary norms relating to their prohibition, including an obligation to take steps to prevent and punish them.

(13) However, some members disagreed with this analysis. First, they opposed draft article 7, which had been adopted by vote, stating that: (a) the Commission should not portray its work as possibly codifying customary international law when, for reasons indicated in the

International Criminal Court, adopted by Act No. 25390 and ratified on 16 January 2001, arts. 40 and 41; Australia, International Criminal Court Act 2002 (No. 41 of 2002), art. 12.4; Austria, Federal Act No. 135 of 13 August 2002 on cooperation with the International Criminal Court, arts. 9.1 and 9.3; Canada, 1999 Extradition Act, art. 18; France, Code of Criminal Procedure (under Act No. 2002-268 of 26 February 2002), art. 627.8; Germany, Courts Constitution Act, arts. 20.1 and 21; Iceland, 2003 International Criminal Court Act, art. 20.1; Ireland, International Criminal Court Act 2006 (No. 30), art. 6.1; Kenya, International Crimes Act, 2008 (No. 16 of 2008), art. 27; Liechtenstein, Act of 20 October 2004 on cooperation with the International Criminal Court and other international tribunals, art. 10.1 (b) and (c); Malta, Extradition Act, art. 26S.1; Norway, Act No. 65 of 15 June 2001 concerning implementation of the Rome Statute of the International Criminal Court of 17 July 1998 in Norwegian law, art. 2; New Zealand, International Crimes and International Criminal Court Act 2000, art. 31.1; Samoa, International Criminal Court Act 2007 (No. 26 of 2007), arts. 32.1 and 41; Switzerland, Act on Cooperation with the International Criminal Court, art. 6; Uganda, International Criminal Court Act 2006 (No. 18 of 2006), art. 25.1 (a) and (b); and United Kingdom, International Criminal Court Act 2001, art. 23.1. Denmark is a special case: its International Criminal Court Act of 16 May 2001, art. 2, attributes the settlement of questions on immunity to the executive branch without defining a specific system for consultations.

[121] The existence of a trend towards limiting immunity for international crimes was noted by Judges Higgins, Kooijmans and Buergenthal in their joint separate opinion in *Arrest Warrant of 11 April 2000* (see footnote 14 above), p. 88, para. 85. For its part, the European Court of Human Rights, in *Jones and Others*, expressly recognized that there appeared to be "some emerging support in favour of a special rule or exception in public international law in cases concerning civil claims for torture", and that, "in light of the developments currently underway in this area of public international law, this is a matter which needs to be kept under review by Contracting States" (*Jones and Others v. the United Kingdom* (see footnote 31 above), paras. 213 and 215).

footnotes below, it is clear that national case law,[122] national statutes,[123] and treaty law[124] do not support the exceptions asserted in draft article 7; (b) the relevant practice shows no

[122] Those members noted that only nine cases are cited (see footnote 119 above) that purportedly expressly address the issue of immunity *ratione materiae* of a State official from foreign criminal jurisdiction under customary international law, and that most of those cases actually provide no support for the proposition that such immunity is to be denied. For example, in the United Kingdom case of *Regina v. Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte (No. 3)* (see footnote **Error! Bookmark not defined.** above), immunity was denied only with respect to acts falling within the scope of a treaty in force that was interpreted as waiving immunity (the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment). The German case of *Hussein* (see footnote 119 above) did not concern any of the crimes listed in draft article 7, and the judgment did not assert, in relation to the hypothesis that the then President Hussein had ceased to hold office, that immunity *ratione materiae* from jurisdiction was not or should not be recognized in that instance. The *Bouterse* case (see footnote 53 above) was not upheld by the Netherlands Supreme Court and the reasoning of the lower court on immunity remained an untested *obiter dictum*. The Belgian decision in *Sharon and Yaron* (see footnote 53 above) was controversial and led the Parliament thereafter to alter Belgian law, resulting in a ruling by the Court of Cassation (*H.S.A., et al. v. S.A., et al.*, 12 February 2003 (see footnote 67 above)) affirming a lack of jurisdiction over the case. The same law was at issue in *Pinochet* before the Court of First Instance of Brussels (see footnote 62 above). In the case of *Lozano v. Italy* (see footnote 45 above), the foreign State official was accorded, not denied, immunity *ratione materiae.* The case *Special Prosecutor v. Hailemariam* (see footnote 119 above) concerned prosecution by Ethiopia of one of its own nationals, not of a foreign State official. Other cases cited concern situations where immunity has not been invoked, or has been waived; they provide no support for the proposition that a State official does not enjoy immunity *ratione materiae* from foreign criminal jurisdiction under customary international law if such immunity is invoked. Further, those members noted that the relevance for the topic of *civil* cases in national courts must be carefully considered; to the extent they are relevant, they tend not to support the exceptions asserted in draft article 7. For example, the case *Ferrini v. Federal Republic of Germany* (see footnote 119 above) was found by the International Court of Justice to be inconsistent with the obligations of Italy under international law. See *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)* (footnote 15 above). In the case of *Jones v. Saudi Arabia* (see footnote 31 above), the House of Lords recognized the immunity of the State official. By contrast, in addition to those cases indicated above, those members pointed to several cases where immunity *ratione materiae* has been invoked and accepted by national courts in criminal proceedings. See, for example, *Hissène Habré*, Senegal, Court of Appeal of Dakar, 4 July 2000, and Court of Cassation, 20 March 2001 (footnote 53 above) (immunity accorded to former Head of State); and *Jiang Zemin*, decision of the Federal Prosecutor General of Germany, 24 June 2005, 3 ARP 654/03-2 (same).

[123] These members noted that very few national laws address the issue of immunity *ratione materiae* of a State official from foreign criminal jurisdiction under customary international law. As acknowledged in the Special Rapporteur's fifth report on immunity of State officials from foreign criminal jurisdiction (A/CN.4/701), para. 42: "Immunity of the State or of its officials from jurisdiction is not explicitly regulated in most States. On the contrary, the response to immunity has been left to the courts". Of the few national laws that purportedly address such immunity (Burkina Faso, Comoros, Ireland, Mauritius, Niger, South Africa, Spain), none support draft article 7 as it is written. For example, the Spanish 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, art. 23, para. 1, only addresses the immunity *ratione materiae* of former Heads of State, Heads of Government and Ministers for Foreign Affairs. Statutes such as the Repression of Serious Violations of International Humanitarian Law Act, as amended in 2003, of Belgium or the 2003 International Crimes Act of the Netherlands only provide that immunity shall be denied as recognized under international law, without any further specification. Further, those members observed that national laws implementing an obligation to surrender a State official to the International Criminal Court, arising under the Rome Statute or a decision by the Security Council, are not relevant to the issue of immunity of a State official under customary international law from foreign criminal jurisdiction. Also irrelevant are national laws focused on the immunity of States, such as Act No. 24488 of Argentina, the Foreign Sovereign Immunities Act of the United States, and the State Immunity Act of Canada (further, it was noted that the Foreign Sovereign Immunities Act was not amended by the Torture Victim Protection Act, which has nothing to do with terrorism).

[124] These members noted that none of the global treaties addressing specific types of crimes (e.g., genocide, war crimes, apartheid, torture, enforced disappearance) contain any provision precluding immunity *ratione materiae* of State officials from foreign criminal jurisdiction, nor do any of the global treaties addressing specific types of State officials (e.g., diplomats, consular officials, officials on special mission).

"trend", temporal or otherwise, in favour of exceptions to immunity *ratione materiae* from foreign criminal jurisdiction; (c) immunity is a procedural matter and, consequently, (i) it is not possible to assume that the existence of criminal responsibility for any crimes under international law committed by a State official automatically precludes immunity from foreign criminal jurisdiction; (ii) immunity does not depend on the gravity of the act in question or on the fact that such act is prohibited by a peremptory norm of international law; (iii) the issue of immunity must be considered at an early stage of the exercise of jurisdiction, before the case is considered on the merits;[125] (d) the lack of immunity before an international criminal court is not relevant to the issue of immunity from the jurisdiction of national courts; and (e) the establishment of a new system of exceptions to immunity, if not agreed upon by treaty, will likely harm inter-State relations and risks undermining the international community's objective of ending impunity for the most serious international crimes. Furthermore, these members took the view that the Commission, by proposing draft article 7, was conducting a "normative policy" exercise that bore no relation to either the codification or the progressive development of international law. For those members, draft article 7 is a proposal for "new law" that cannot be considered as either *lex lata* or desirable progressive development of international law. Second, those members of the Commission also stressed the difference between procedural immunity from foreign jurisdiction, on the one hand, and substantive criminal responsibility, on the other, and maintained that the recognition of exceptions to immunity was neither required nor necessarily appropriate for achieving the required balance. Rather, in the view of those members, impunity can be avoided in situations where a State official is prosecuted in his or her own State; is prosecuted in an international court; or is prosecuted in a foreign court after waiver of the immunity. Asserting exceptions to immunity that States have not accepted by treaty or through their widespread practice risks creating severe tensions, if not outright conflict, among States whenever one State exercises criminal jurisdiction over the officials of another based solely on an allegation that a heinous crime has been committed.

Paragraph 1

(14) Paragraph 1 (a)–(f) of draft article 7 lists the crimes under international law which, if allegedly committed, would prevent the application of immunity from criminal jurisdiction to a foreign official, even if the official committed those crimes while acting in an official capacity during his or her term of office. The crimes are as follows: the crime of genocide, crimes against humanity, war crimes, the crime of apartheid, torture and enforced disappearance.

(15) The chapeau of the draft article uses the phrase "shall not apply" in order to reflect the fact that in both practice and doctrine two different interpretations have been followed with regard to whether or not such crimes are to be considered "acts performed in an official capacity". One view is that the commission of such crimes can never be considered a function of the State and they therefore cannot be regarded as "acts performed in an official capacity". The contrary view holds that crimes under international law either require the presence of a State element (torture, enforced disappearance) or else must have been committed with the backing, express or implied, of the State machinery, so that there is a connection with the State, and such crimes can therefore be considered in certain cases as "acts performed in an official capacity".[126] Although the Commission did not find it necessary to come down in favour of one or the other of these interpretations, it noted that some national courts have not applied immunity *ratione materiae* in the exercise of their criminal jurisdiction in respect of these crimes under international law, either because they do not regard them as an act

[125] See, for example, *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)* (footnote 15 above), p. 137, para. 84 ("customary international law does not treat a State's entitlement to immunity as dependent upon the gravity of the act of which it is accused or the peremptory nature of the rule which it is alleged to have violated"); and *Arrest Warrant of 11 April 2000* (footnote 14 above), p. 25, para. 60 ("Immunity from criminal jurisdiction and individual criminal responsibility are quite separate concepts. While jurisdictional immunity is procedural in nature, criminal responsibility is a question of substantive law").

[126] See, for example, *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)* (footnote 15 above), p. 125, para. 60 (discussing *acta jure imperii* in the context of State immunity).

performed in an official capacity or a characteristic function of the State,[127] or because they take the view that, although crimes under international law may constitute such an act or function, such crimes (by virtue of their gravity or because they contravene peremptory norms) may not give rise to recognition of the perpetrator's immunity from criminal jurisdiction.[128]

(16) Therefore, bearing in mind that, in practice, the same crime under international law has sometimes been interpreted as a limitation (absence of immunity) or as an exception (exclusion of existing immunity), the Commission considered it preferable to address the topic in terms of the effects resulting from each of these approaches, namely, the non-applicability to such crimes of immunity *ratione materiae* from foreign criminal jurisdiction that otherwise might be enjoyed by a State official. The Commission opted for this formulation for reasons of clarity and certainty, in order to provide a list of crimes which, even if committed by a State official, would preclude the possibility of immunity from foreign criminal jurisdiction.

(17) To that end, the Commission used the phrase "immunity ... shall not apply", following, *mutatis mutandis*, the technique once used by the Commission in relation to jurisdictional immunity of the State, when it used the phrase "proceedings in which State immunity cannot be invoked" in a similar context.[129] However, in draft article 7, the Commission decided not to use the phrase "cannot be invoked" in order to avoid the procedural component of that phrase, preferring instead to use the neutral phrase "shall not apply".

(18) The expression "from the exercise of foreign criminal jurisdiction" is included in the chapeau for consistency with the formulation used in draft articles 3 and 5.

(19) The expression "crimes under international law" refers to conduct that is criminal under international law whether or not such conduct has been criminalized under national law. The crimes listed in draft article 7 are the crimes of greatest concern to the international community as a whole; there is a broad international consensus on their definition as well as on the existence of an obligation to prevent and punish them. These crimes have been addressed in international treaties and are also prohibited by customary international law.

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[127] See, for example, the following cases: *Pinochet*, Court of First Instance of Brussels, 6 November 1998 (footnote 62 above), p. 349; and *Hussein*, Germany, Higher Regional Court of Cologne, 16 May 2000 (footnote 119 above), para. 11 (makes this assertion in relation to the hypothesis that the then President Hussein had ceased to hold office). A similar argument has also been used in some cases when the question of immunity has been raised before the civil courts. See, for example, *Prefecture of Voiotia v. Federal Republic of Germany*, Court of First Instance of Livadeia, 30 October 1997 (footnote 62 above).

[128] As happened, for example, in the case of *Attorney General of the Government of Israel v. Adolf Eichmann*, Israel, Supreme Court, 29 May 1962 (see footnote 53 above), pp. 309–310. In the *Ferrini* case, the Italian courts based their ruling on both the gravity of the crimes committed and the fact that the conduct in question was contrary to *jus cogens* norms (*Ferrini v. Federal Republic of Germany*, Court of Cassation, 11 March 2004 (see footnote 119 above), p. 674). In the *Lozano* case, the Italian Court of Cassation based its denial of immunity on the violation of fundamental rights, which have the status of *jus cogens* norms and must therefore take precedence over the rules governing immunity (*Lozano v. Italy*, 24 July 2008 (see footnote 45 above), para. 6). In *A. c. Ministère public de la Confédération*, the Federal Criminal Court of Switzerland based its decision on the existence of a customary prohibition of international crimes that the Swiss legislature considers to be *jus cogens*; it also pointed out the contradiction between prohibiting such conduct and continuing to recognize immunity *ratione materiae* that would prevent the launch of an investigation (*A. c. Ministère public de la Confédération*, 25 July 2012 (see footnote 31 above)).

[129] Draft articles on jurisdictional immunities of States and their property, adopted by the Commission at its forty-third session, *Yearbook ... 1991*, vol. II (Part Two), p. 33. The Commission used the phrase cited above as the title of part III of those draft articles and reiterated a variant in articles 10 to 17 in the same part. For an explanation of the reasons that led the Commission to use this phrase, see, in particular, paragraph (1) of the commentary to part III (p. 33) and paragraphs (1) to (5) of the commentary to article 10 (pp. 33–34). The United Nations Convention on Jurisdictional Immunities of States and Their Property likewise uses the phrase "[p]roceedings in which State immunity cannot be invoked" in the title of part III and similar wording in articles 10 to 17.

(20) The expression "crimes under international law" was used previously by the Commission in the Nürnberg Principles[130] and in the 1954 draft Code of Offences against the Peace and Security of Mankind.[131] In this context, the Commission took the view that the use of the expression "crimes under international law" means that "international law provides the basis for the criminal characterization" of such crimes and that "the prohibition of such types of behaviour and their punishability are a direct consequence of international law".[132] What follows from this is "the autonomy of international law in the criminal characterization" of such crimes[133] and the fact that "the characterization, or the absence of characterization, of a particular type of behaviour as criminal under national law has no effect on the characterization of that type of behaviour as criminal under international law".[134] Accordingly, the use of the expression "crimes under international law" directly links the list of crimes contained in paragraph 1 of draft article 7 to international law and ensures that the definition of such crimes is understood in accordance with international standards, and any definition established under domestic law to identify cases in which immunity does not apply is irrelevant.

(21) The category of crimes under international law includes (a) the crime of genocide, (b) crimes against humanity and (c) war crimes. The Commission included these crimes among the crimes in respect of which immunity does not apply for two basic reasons. First, these are crimes about which the international community has expressed particular concern, resulting in the adoption of treaties that are at the heart of international criminal law, international human rights law and international humanitarian law, and the international courts have emphasized not only the gravity of these crimes, but also the fact that their prohibition is customary in nature and that committing them may constitute a violation of peremptory norms of general international law (*jus cogens*).[135] Second, these crimes arise, directly or indirectly, in the judicial practice of States in relation to cases in which the issue of immunity *ratione materiae* has been raised. Lastly, it should be noted that these three crimes are included in article 5 of the Rome Statute, where they are described as "the most serious crimes of concern to the international community as a whole".[136] Some members noted, however, that the inclusion of those crimes in draft article 7 found little if any support in practice, in national and international jurisprudence or in national legislation.

(22) The Commission decided not to include the crime of aggression at this time, even though it too is included in article 5 of the Rome Statute and is characterized as a crime under the amendments adopted at the Review Conference of the Rome Statute held in Kampala in

[130] See principle I of the Principles of International Law recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal: "Any person who commits an act which constitutes a crime under international law is responsible therefor and liable to punishment" (*Yearbook ... 1950*, vol. II, document A/1316, p. 374).

[131] See article 1 of the draft Code of Offences against the Peace and Security of Mankind adopted in 1954: "Offences against the peace and security of mankind, as defined in this Code, are crimes under international law, for which the responsible individuals shall be punished" (*Yearbook ... 1954*, vol. II, document A/2693, p. 150). For its part, article 1, paragraph 2, of the draft Code of Crimes against the Peace and Security of Mankind adopted by the Commission in 1996 states that "[c]rimes against the peace and security of mankind are crimes under international law and punishable as such, whether or not they are punishable under national law" (*Yearbook ... 1996*, vol. II (Part Two), p. 17).

[132] See paragraph (6) of the commentary to article 1 of the 1996 draft Code of Crimes against the Peace and Security of Mankind, *Yearbook... 1996*, vol. II (Part Two), p. 17.

[133] *Ibid.*, para. (9), p. 18.

[134] *Ibid.*, para. (10). It should be borne in mind that the Commission, in commenting on principle I of the Nürnberg Principles, had stated that "[t]he general rule underlying Principle I is that international law may impose duties on individuals directly without any interposition of internal law" (*Yearbook ... 1950*, vol. II, document A/1316, p. 374).

[135] The Commission itself has declared that the prohibition of genocide, the prohibition of crimes against humanity, the basic rules of international humanitarian law, the prohibition of apartheid and the prohibition of torture are *jus cogens* norms. See the annex to the draft conclusions on peremptory norms of general international law (*jus cogens*) adopted by the Drafting Committee on second reading at the current session (A/CN.4/L.967).

[136] Rome Statute, art. 5, para. 1, and preamble, fourth paragraph.

2010.[137] The Commission took this decision in view of the nature of the crime of aggression, which would require national courts to determine the existence of a prior act of aggression by the foreign State, as well as the special political dimension of this type of crime,[138] given that it constitutes a "crime of leaders". However, some members stated that the crime of aggression should have been included in paragraph 1 of draft article 7, as it is the most serious of the crimes under international law, it was previously included by the Commission itself in the 1996 draft Code of Crimes against the Peace and Security of Mankind[139] and it is one of the crimes covered by the Rome Statute. Furthermore, a substantial number of States have included the crime of aggression within their national criminal law.[140] Accordingly, they expressed their opposition to the majority decision of the Commission and reserved their position on the matter.

(23) On the other hand, the Commission considered it necessary to include in paragraph 1 of draft article 7 the crimes of apartheid, torture and enforced disappearance as separate categories of crimes under international law in respect of which immunity does not apply. Although these crimes are included in article 7 of the Rome Statute under the category of crimes against humanity,[141] the Commission took into account the following elements to consider them as separate crimes. First, the crimes of apartheid, torture and enforced

[137] See the definition of aggression in article 8 *bis*, *Official Records of the Review Conference of the Rome Statute of the International Criminal Court, Kampala, 31 May–11 June 2010*, publication of the International Criminal Court, RC/9/11, resolution 6, "The crime of aggression" (RC/Res.6).

[138] In this regard, it should be borne in mind that in the commentaries to the 1996 draft Code of Crimes against the Peace and Security of Mankind, the Commission stated the following: "The aggression attributed to a State is a *sine qua non* for the responsibility of an individual for his participation in the crime of aggression. An individual cannot incur responsibility for this crime in the absence of aggression committed by a State. Thus, a court cannot determine the question of individual criminal responsibility for this crime without considering as a preliminary matter the question of aggression by a State. The determination by a national court of one State of the question of whether another State had committed aggression would be contrary to the fundamental principle of international law *par in parem imperium non habet*. Moreover, the exercise of jurisdiction by the national court of a State which entails consideration of the commission of aggression by another State would have serious implications for international relations and international peace and security" (*Yearbook … 1996*, vol. II (Part Two), p. 30, paragraph (14) of the commentary to article 8).

[139] *Ibid.*, pp. 42–43 (art. 16).

[140] The following are examples of national legislation that includes the crime of aggression: Austria, Criminal Code No. 60/1974 of 23 January 1974, as amended by BGBl. I No. 112/2015 of 13 August 2015, sect. 321k; Azerbaijan, Criminal Code of 2000, arts. 100–101; Bangladesh, International Crimes (Tribunals) Act, art. 3, International Crimes (Tribunals) Act No. XIX of 1973, as amended by the International Crimes (Tribunals) (Amendment) Act No. LV of 2009 and Act No. XXI of 2012; Belarus, Criminal Code, arts. 122–123, Law No. 275-Z of 9 July 1999 (as amended on 28 April 2015); Bulgaria, Criminal Code, arts. 408–409, *State Gazette*, No. 26 of 2 April 1968, as amended by *State Gazette*, No. 32 of 27 April 2010; Croatia, Criminal Code, arts. 89 and 157, *Official Gazette of the Republic of Croatia "Narodne novine"*, No. 125/11; Cuba, Criminal Code, arts. 114–115, Act No. 62 of 29 December 1987, as amended by Act No. 87 of 16 February 1999; Ecuador, Criminal Code, art. 88; Estonia, Criminal Code, sects. 91–92; Finland, Criminal Code, Act No. 39/1889, as amended by Act No. 1718/2015, sects. 4 (a), 4 (b) and 14 (a); Germany, Criminal Code of 13 November 1998 (BGBl); Luxembourg, Criminal Code, art. 136; Macedonia, Criminal Code, art. 415; Malta, Criminal Code, sect. 82(C), Criminal Code of the Republic of Malta (1854, as amended in 2004); Mongolia, Criminal Code (2002), art. 297; Montenegro, Criminal Code, art. 442, *Official Gazette of the Republic of Montenegro*, No. 70/2003, Correction, No. 13/2004; Paraguay, Criminal Code of the Republic of Paraguay, art. 271, Act No. 1160/97; Poland, Criminal Code, art. 17, Law of 6 June 1997; Republic of Moldova, Criminal Code of the Republic of Moldova, arts. 139–140, adopted by Law No. 985-XV on 18 April 2002 (as amended in 2009); Russia, Criminal Code, Criminal Code of the Russian Federation, arts. 353–354, Federal Law No. 64-FZ of 13 June 1996 (as amended); Samoa, International Criminal Court Act 2007, as amended by the International Criminal Court Amendment Act 2014, No. 23, sect. 7A; Slovenia, Criminal Code of 2005, arts. 103 and 105; Tajikistan, Criminal Code of the Republic of Tajikistan, arts. 395–396; Timor-Leste, Criminal Code of the Democratic Republic of Timor-Leste, Decree Law No. 19/2009, art. 134. See, for discussion, A. Reisinger Coracini, "National legislation on individual responsibility for conduct amounting to aggression", in R. Bellelli (ed.), *International Criminal Justice: Law and Practice from the Rome Statute to Its Review*, London and New York, Routledge, 2016.

[141] Rome Statute, art. 7, para. 1, subparas. (j), (f) and (i), respectively.

disappearance have been the subject of international treaties that establish a special legal regime for each crime for the purposes of prevention, suppression and punishment,[142] which imposes specific obligations on States to take certain measures in their domestic legislation, including the obligation to define such crimes in their national criminal legislation and to take the necessary measures to ensure that their courts are competent to try such crimes.[143] It should be added that the treaties in question establish systems of horizontal international cooperation and judicial assistance between States.[144] Second, the Commission also noted that the crimes of apartheid, torture and enforced disappearance are subject under the Rome Statute to a specific threshold that is defined as the commission of such crimes "as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack",[145] which, however, does not exist in the instruments specifically related to these crimes. Third, the Commission observed that the conventions against torture and enforced disappearance expressly establish that such acts can only be committed by State officials or at their instigation or with their support or acquiescence.[146] In addition, the Commission took into account the fact that, in many cases, when national courts have dealt with these crimes in relation to immunity, they have done so by treating them as separate crimes. The treatment of torture is a good example of this.[147] Some members noted, however, that the inclusion of those crimes in draft article 7 found little if any support in practice, in national and international jurisprudence or in national legislation.

(24) While some members of the Commission suggested that the list should include other crimes such as slavery, terrorism, human trafficking, child prostitution and child pornography, and piracy, which are also the subject of international treaties that establish special legal regimes for each crime for the purposes of prevention, suppression and punishment, the Commission decided not to include them. In doing so, it took into account the fact that these crimes either are already covered by the category of crimes against humanity or do not fully correspond to the definition of crimes under international law *stricto sensu*, being more correctly described in most cases as transnational crimes. In addition, such crimes are usually committed by non-State actors and are not reflected in national judicial practice relating to immunity from jurisdiction. In any event, the non-inclusion of other international crimes in draft article 7 should not be taken to mean that the Commission underestimates the seriousness of such crimes.

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142 See International Convention on the Suppression and Punishment of the Crime of Apartheid (New York, 30 November 1973), United Nations, *Treaty Series*, vol. 1015, No. 14861, p. 243; Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; and International Convention for the Protection of All Persons from Enforced Disappearance (New York, 20 December 2006), United Nations, *Treaty Series*, vol. 2716, No. 48088, p. 3.

143 International Convention on the Suppression and Punishment of the Crime of Apartheid, art. IV; Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, arts. 4–6; and International Convention for the Protection of All Persons from Enforced Disappearance, arts. 4, 6 and 9.

144 International Convention on the Suppression and Punishment of the Crime of Apartheid, art. XI; Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, arts. 6–9; and International Convention for the Protection of All Persons from Enforced Disappearance, arts. 10–11 and 13–14.

145 Rome Statute of the International Criminal Court, art. 7, para. 1. The definition of the threshold is contained in article 7, paragraph 2 (a).

146 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 1, para. 1; and International Convention for the Protection of All Persons from Enforced Disappearance, art. 2.

147 As, for example, in the United Kingdom, where cases relating to immunity from jurisdiction *ratione materiae* which raised the question of the non-applicability of such immunity to acts of torture have been based on the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. See *Regina v. Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte (No. 3)*, House of Lords, United Kingdom, 24 March 1999 (footnote 61 above); and *FF v. Director of Public Prosecutions*, High Court of Justice, Queen's Bench Division, Divisional Court, 7 October 2014 (footnote 61 above). The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment also served as the basis of a matter related to immunity from civil jurisdiction: *Jones v. Saudi Arabia*, House of Lords, 14 June 2006 (see footnote 31 above).

(25) Lastly, it should be noted that the Commission did not include in draft article 7, paragraph 1, the crimes of corruption or crimes affected by the so-called "territorial tort exception" proposed by the Special Rapporteur.[148] This does not mean, however, that the Commission considers that immunity from foreign criminal jurisdiction *ratione materiae* should apply to these two categories of crimes.

(26) With regard to corruption (understood as "grand corruption"), several members of the Commission pointed out that crimes of corruption are especially serious as they directly affect the interests and stability of the State, the well-being of its population and even its international relations. Consequently, those members were in favour of including an exception to immunity *ratione materiae*. However, other members of the Commission argued that, while the seriousness of the crime of corruption cannot be called into question, its inclusion in draft article 7 posed a problem, related essentially to the general nature of the term "corruption" and the wide range of acts that can be included in this category, as well as the fact that, in their view, treaty practice and case law do not provide sufficient grounds for including such crimes among the limitations and exceptions to immunity. Other members questioned whether corruption met the test of gravity of the other crimes listed in draft article 7. Lastly, several members of the Commission pointed out that corruption cannot under any circumstances be regarded as an act performed in an official capacity and therefore need not be included among the crimes for which immunity does not apply.

(27) Especially in view of that last argument, the Commission decided not to include crimes of corruption in draft article 7, on the grounds that they do not constitute "acts performed in an official capacity", but are acts carried out by a State official solely for his or her own benefit.[149] Although some members of the Commission pointed out that the involvement of State officials in such acts cannot be ignored, because it is precisely their official status that facilitates and makes possible the crime of corruption, some members of the Commission took the view that the fact that the crime is committed by an official does not change the nature of the act, which remains an act performed for the official's own benefit even if the official uses State facilities that might give the act a semblance of official status. Accordingly, since the normative element contained in draft article 6, paragraph 1, does not apply to the crime of corruption, several members of the Commission took the view that immunity from jurisdiction *ratione materiae* does not exist in relation to the crime of corruption and therefore the latter does not need to be included in the list of crimes for which immunity does not apply.

(28) The Commission also considered the case of other crimes committed by a foreign official in the territory of the forum State without that State's consent to both the official's presence in its territory and the activity carried out by the official that gave rise to the commission of the crime (territorial exception). This scenario differs in many respects from the crimes under international law included in paragraph 1 of draft article 7 or the crime of corruption. Although the view was expressed that immunity could exist in these circumstances and the exception should not be included in draft article 7 because there was insufficient practice to justify doing so, the Commission decided not to include it in the draft article for other reasons. The Commission considers that certain crimes, such as murder, espionage, sabotage or kidnapping, committed in the territory of a State in the aforementioned circumstances are subject to the principle of territorial sovereignty and do not give rise to immunity from jurisdiction *ratione materiae*, and therefore there is no need to include them in the list of crimes for which this type of immunity does not apply. This is without prejudice to the immunity from criminal jurisdiction enjoyed under special rules of international law, as set forth in draft article 1, paragraph 2.

Paragraph 2

(29) Paragraph 2 of draft article 7 establishes a link between paragraph 1 of the article and the annex to the draft articles, entitled "List of treaties referred to in draft article 7, paragraph

[148] See the fifth report of the Special Rapporteur on immunity of State officials from foreign criminal jurisdiction (A/CN.4/701), paras. 225–234.

[149] In the same vein, see, above, paragraphs (23), (25) and (33) of the commentary to draft article 2, dealing with the definition of an "act performed in an official capacity".

2". While the concept of "crimes under international law" and the concepts of "crime of genocide", "crimes against humanity", "war crimes", "crime of apartheid", "torture" and "enforced disappearance" belong to well-established categories in contemporary international law, the Commission is mindful that the fact that draft article 7 refers to "crimes" means that the principle of legal certainty characteristic of criminal law must be preserved and tools must be provided to avoid subjectivity in identifying what is meant by each of the aforementioned crimes.

(30) However, the Commission did not consider it necessary to define the crime of genocide, crimes against humanity, war crimes, the crime of apartheid, torture and enforced disappearance, as this is not part of its mandate within the framework of the present draft articles. On the contrary, the Commission found it preferable to simply identify the treaty instruments that define the aforementioned categories, for inclusion in a list that will enable the competent authorities of the forum State to act with greater certainty in applying draft article 7. The outcome of this exercise is the list contained in the annex to the draft articles.

(31) As indicated in paragraph 2 of draft article 7, the linkage of each crime with the treaties listed in the annex is only for the purposes of draft article 7 on the immunity of State officials from foreign criminal jurisdiction, in order to identify the definitions of the crimes listed in paragraph 1 of the article without assuming or requiring that States must be parties to those instruments.

(32) On the other hand, it should be borne in mind that the listing of certain treaties has no effect on the customary nature of these crimes, as recognized under international law, or on the specific obligations that may arise from those treaties for States parties. Similarly, the inclusion of only some of the treaties that define the crimes in question has no effect on other treaties that define or regulate the same crimes, whose definitions and legal regimes remain intact for States parties in their application of those treaties. In conclusion, the reference to a specific treaty for the definition of each of the crimes listed in paragraph 1 of draft article 7 is included for reasons of convenience and appropriateness and solely for the purposes of draft article 7, and in no way affects the other rules of customary or treaty-based international law that refer to such crimes and that contain legal regimes of general scope for each of them.

(33) The criteria used by the Commission to select the treaties included in the annex, as well as the explanations relating to each of them, have been included in the commentary to the annex, to which the reader is referred. The commentaries to paragraph 2 of draft article 7 and to the annex should be read together.

Part Four
Procedural provisions and safeguards

Commentary

(1) Part Four of the draft articles concerns the procedural provisions and safeguards to be applied in connection with the immunity of State officials from foreign criminal jurisdiction.

(2) International instruments that refer to the immunity of State officials from foreign criminal jurisdiction have generally been confined to stating that immunity exists, identifying those who enjoy immunity, defining its scope and, in certain cases, establishing rules on the waiver of immunity, without including provisions of a procedural nature.

(3) Nevertheless, the Commission has considered that the present draft articles should include procedural provisions and safeguards supplementing the substantive provisions included in Parts One, Two and Three. This is explained, first, by the need to maintain a balance between the rights and interests of the State of the official and the rights and interests of the forum State, as in both cases such rights and interests are directly linked to the principle of the sovereign equality of States. Second, the inclusion of procedural provisions and safeguards is conceived as a means of offering the States involved (the forum State and the State of the official) some useful instruments to facilitate reciprocal communication and cooperation on a particularly sensitive issue. In this context, the procedural provisions and safeguards are intended to promote mutual trust and the stability of international relations. Last but not least, the procedural provisions and safeguards are meant to ensure that the exercise of criminal jurisdiction with regard to an official of another State is not abusive or

politically motivated. For all these reasons, the Commission takes the view that the inclusion of procedural provisions and safeguards gives an added value to the draft articles and helps to strike a balance among the different provisions contained therein.

(4) The procedural provisions and safeguards apply generally to all cases where the question of immunity of State officials from foreign criminal jurisdiction arises, but they are especially important in cases where immunity from foreign criminal jurisdiction may be affected by the provisions of draft article 7, which defines, as exceptions to the application of immunity *ratione materiae*, cases in which the crimes under international law listed in that draft article have been committed. The Commission has duly taken this circumstance into account, which is adequately reflected in the text of the draft articles contained in Part Four.

(5) Part Four consists of 11 draft articles dealing, respectively, with the scope of Part Four and its relationship to the rest of the draft articles (draft article 8), the procedural provisions and safeguards that apply in the direct relations between the forum State and the State of the official (draft articles 9–15), the application of the rules pertaining to the right to a fair trial and the procedural safeguards applicable to the official of another State in respect of whom the question of immunity arises (draft article 16), and the establishment of mechanisms for facilitating consultations and the settlement of any dispute that may arise between the forum State and the State of the official with regard to the immunity from foreign criminal jurisdiction of an official of the latter State (draft articles 17 and 18).

Article 8
Application of Part Four

The procedural provisions and safeguards in the present Part shall be applicable in relation to any exercise of criminal jurisdiction by the forum State over an official of another State, 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 present draft articles.

Commentary

(1) Draft article 8 is the first of the draft articles in Part Four. Its purpose is to define the scope of application of Part Four in connection with Part Two and Part Three, which deal respectively with immunity *ratione personae* and immunity *ratione materiae* of State officials, current or former, from foreign criminal jurisdiction. By referring to the links between Part Four, on the one hand, and Part Two and Part Three, on the other, draft article 8 takes into account the notion of balance between the substantive provisions of the present draft articles and the procedural provisions and safeguards contained therein.

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

(3) In the view of some members, the procedural guarantees and safeguards contained in Part Four applied only when immunity might exist, which seemingly was not the case with respect to the crimes listed in draft article 7, as it was couched in absolute terms, stating that immunity *ratione materiae* "shall not apply in respect of the following crimes under international law" (referring to the crimes listed in paragraph 1 (a)–(f) of that draft article). On the contrary, several members supported a broader interpretation of the draft articles proposed by the Special Rapporteur and envisioned a role for procedural safeguards and guarantees even with respect to situations where draft article 7 was engaged.

(4) In light of this divergence of views, the Commission adopted draft article 8, which expressly states that all the procedural provisions and safeguards in Part Four of the draft articles "shall be applicable in relation to any exercise of criminal jurisdiction by the forum State over an official of another State, 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 present draft articles". Draft article 8 does not prejudge and is without prejudice to the adoption of any

additional procedural guarantees and safeguards, including whether specific safeguards apply to draft article 7.

(5) With the phrase "including to the determination of whether immunity applies or does not apply under any of the present 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 14. 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 and of the exceptions set out in draft article 7. In addition, under draft article 8, all the procedural provisions and safeguards set out in Part Four must be respected in the process of determining whether exceptions are applicable.

(6) Although the Commission discussed a proposal to include an express reference to draft article 7 in draft article 8, in order to ensure that the provisions and safeguards in Part Four would be understood to apply to it, the proposal was rejected in favour of a more general and neutral formulation referring to "the determination of whether immunity applies or does not apply under any of the present draft articles".

(7) Part Four is applicable "in relation to any exercise of criminal jurisdiction by the forum State over an official of another State". The term "exercise of criminal jurisdiction" is used in draft article 8 to refer broadly to different steps that may be taken by the forum State to determine, where appropriate, the criminal responsibility of an individual. In view of the differences in practice between States' various legal systems and traditions, it was not considered necessary to refer specifically to the nature of these steps, which may include both acts of the executive and acts performed by judges and prosecutors.

(8) Draft article 8 uses the phrase "over an official of another State, current or former". This reflects the need for there to be a connection between the foreign State official and the exercise of criminal jurisdiction by the forum State 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) follows draft article 2 (a), which establishes that the concept of "State official" refers to "both current and former State officials".[150] Nevertheless, this reference 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, "[t]he temporal scope of immunity *ratione personae* and of immunity *ratione materiae* is the subject of other draft articles".[151] The words "current or former" should therefore be understood in the light of the provisions of draft article 4, for immunity *ratione personae*, and of draft article 6, for immunity *ratione materiae*.

Article 9
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 9 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

[150] See, above, paragraphs (19)–(20) of the commentary to draft article 2.
[151] Paragraph (14) of the commentary to draft article 2, above.

the measures necessary to assess whether or not an act of the authorities of the forum State involving the exercise of its criminal jurisdiction may affect the immunity from criminal jurisdiction of an official 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 addressed in draft article 14.

(2) Draft article 9 contains two paragraphs that define, respectively, a general rule (para. 1) and a special rule that is applicable to specific situations (para. 2). In both cases the obligation to examine the question of immunity is attributed to the "competent authorities" of the forum State. The Commission decided not to specify which State organs fall into this category, since the identification of such organs will depend on the time when the question of immunity arises and on the legal system of the forum State. Since such organs may differ from one domestic legal system to another, it was considered preferable to use a term that encompasses organs of different types, including administrative bodies, executive organs, 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 term "official of another State" is used as an equivalent of "State official", which is used in the title of the topic (in the plural) and whose definition is contained in draft article 2 (a). 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 enjoy immunity from foreign criminal jurisdiction in accordance with the provisions of Part Two and Part Three of the draft articles.

(5) The obligation to examine the question of immunity will arise only when an official of another State may be affected by the exercise of the criminal jurisdiction of the forum State. For the general rule, the Commission has used the expression "exercise of ... criminal jurisdiction", which it considered preferable to "criminal proceeding", an expression that was considered too narrow. The term "exercise of … criminal jurisdiction" is also used in draft articles 3, 5, 7, 8, 10, 14 and 16. For the purposes of draft article 9, "exercise of … criminal jurisdiction" should be understood to mean such acts carried out by the competent authorities of the forum State as may be necessary to establish the criminal responsibility, if any, of one or several individuals. These acts may be of different types and are not limited to judicial acts, and may include governmental, police, investigative and prosecutorial acts.

(6) However, not all acts that may fall within the generic category "exercise of criminal jurisdiction" will give rise to an obligation to examine the question of immunity. Rather, such an obligation arises only when the official of another State may be "affected" by any of the acts in this category. As follows from the judgments of the International Court of Justice in the case concerning the *Arrest Warrant of 11 April 2000*[152] and in *Certain Questions of Mutual Assistance in Criminal Matters*,[153] a particular criminal procedure measure may affect the immunity of a foreign official only if it hinders or prevents the exercise of the functions of that person by imposing obligations upon him or her. For example, the commencement of a preliminary investigation or institution of criminal proceedings, not only in respect of the alleged fact of a crime but also actually against the person in question, cannot be seen as a violation of immunity if it does not impose any obligation upon that person under the national law being applied. The forum State is also able to carry out at least the initial collection of

[152] *Arrest Warrant of 11 April 2000* (see footnote 14 above), p. 22, paras. 54–55.

[153] *Certain Questions of Mutual Assistance in Criminal Matters* (see footnote 31 above), pp. 236–237, paras. 170–171.

evidence for the case (to collect witness testimonies, documents, material evidence, etc.), using measures which are not binding or constraining on the foreign official.

(7) The general rule set out in paragraph 1 attaches particular importance to the time at which the competent authorities of the forum State should examine the question of immunity, emphasizing that it should be done at an early stage, since otherwise the effectiveness of the institution of immunity could be undermined. Although treaties addressing various forms of immunity of State officials from foreign criminal jurisdiction have not included specific rules in this regard, the International Court of Justice has expressly stated that the question of immunity should be examined at an early stage and considered *in limine litis*.[154] 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,[155] and is intended to emphasize that the question of immunity should be examined as soon as possible, without the need to wait until formal judicial proceedings have begun. To reinforce this idea, the phrase "without delay" has been used, contained in articles 36 and 37 of the Vienna Convention on Consular Relations.

(8) Paragraph 2 of draft article 9 sets out a special rule covering two particular cases in which the competent authorities of the forum State should examine the question of immunity. The special regime set out in this paragraph is framed as a "without prejudice" clause, in order to preserve the applicability of the general rule contained in paragraph 1. In this context, the words "without prejudice" are used to emphasize that the general rule applies in all circumstances and cannot be affected or prejudiced by the special rule contained in paragraph 2. The special rule in paragraph 2 is intended to draw the attention of the competent authorities of the forum State to their obligation to examine the question of immunity before taking any of the special measures set forth in this paragraph, if they have not done so earlier under the general rule. The use of the adverb "always" is intended to reinforce this idea.

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

[154] 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 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)).

[155] 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 (see footnote 108 above), p. 747.

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

(11) The phrase "coercive measures that may affect an official of another State" refers to acts of the competent authorities of the forum State that are directed at the official and that may be carried out at any time as part of the exercise of criminal jurisdiction, regardless of whether or not criminal proceedings have been initiated. These are essentially *in personam* measures that may affect, *inter alia*, the official's freedom of movement, his or her appearance in court as a witness or his or her extradition to a third State. These measures do not necessarily imply that "criminal proceedings against the official" are taking place, but they may fall under the category "exercise of criminal jurisdiction". Since such measures may differ from one domestic legal system to another, it was considered preferable to use the general wording "coercive measures" to refer to "act of authority", which was used by the International Court of Justice in the case concerning the *Arrest Warrant of 11 April 2000*, and is inspired by the reasoning of the Court in *Certain Questions of Mutual Assistance in Criminal Matters*.[156]

(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".[157] The Commission therefore considered it necessary to address this issue in connection with the examination of immunity.

(13) With regard to this question, it should be noted that the scope of the draft articles is limited to immunity from foreign criminal jurisdiction and thus does not include the question of inviolability. However, while immunity from jurisdiction and inviolability are two distinct categories that are not interchangeable, it is nevertheless true that both are dealt with at the same time in various international treaties, such as the Vienna Convention on Diplomatic Relations, 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)[158] and that "[n]o measures of execution may be taken in respect of a diplomatic agent" (art. 31, para. 3).[159] In a similar vein, reference may be made to the resolution of the Institute of International Law on immunities

[156] *Arrest Warrant of 11 April 2000* (see footnote 14 above), p. 22, para. 54; *Certain Questions of Mutual Assistance in Criminal Matters* (see footnote 31 above), pp. 236–237, para. 170.

[157] *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".

[158] Similar provisions can be found in the Convention on Special Missions, art. 29, and the Vienna Convention on the Representation of States in Their Relations with International Organizations of a Universal Character, arts. 28 and 58. A more nuanced reference to this idea can be found in the Vienna Convention on Consular Relations, art. 41, paras. 1–2.

[159] 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.

from jurisdiction and execution of Heads of State and of Government in international law (arts. 1 and 4).[160]

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

Article 10
Notification to 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 10 concerns the notification that the forum State must provide to another State to inform it that the forum State intends to exercise criminal jurisdiction over one of that State's officials.

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

(3) The Commission has found that treaty instruments providing for some form of immunity of State officials from foreign criminal jurisdiction do not contain any rule imposing on the forum State an obligation to notify the State of the official of its intention to exercise criminal jurisdiction over the official, with the sole exception of article 42 of the Vienna Convention on Consular Relations.[161] The Commission also took account of the fact that the United Nations Convention on Jurisdictional Immunities of States and Their Property assumes that the forum State must give notice of its intention to exercise jurisdiction over another State. To this end, article 22 of the Convention specifies the means by which "[s]ervice 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

[160] *Yearbook of the Institute of International Law*, vol. 69 (see footnote 108 above), pp. 745 and 747.

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

mind, the Commission decided to include notification among the procedural safeguards set out in Part Four of the draft articles.

(4) Notification is an essential requirement for ensuring that the State of the official receives reliable information on the forum State's intention to exercise criminal jurisdiction over one of its officials and, consequently, for enabling it to decide whether to invoke or waive immunity. At the same time, notification facilitates the opening of a dialogue between the forum State and the State of the official and thus becomes an equally basic requirement for ensuring the proper determination and application of the immunity of State officials from foreign criminal jurisdiction. The Commission therefore regards notification as one of the procedural safeguards set out in Part Four of the draft articles. The concepts of "notification" and "consultation" should not be conflated, since consultations take place at a later stage and are dealt with in draft article 17.

(5) Draft article 10 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 9, 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 9.

(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 (a). As noted in the commentary to that draft article, the use of the term "State official" does not affect the temporal scope of immunity, which is subject to the special rules applicable to immunity *ratione personae* and immunity *ratione materiae*. 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 enjoy some form of immunity.

(8) The second sentence of paragraph 1 is based on the understanding that some domestic systems may not have procedures in place to allow for communication between executive, judicial or prosecutorial authorities.[162] 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

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

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 that might be enjoyed by one of its officials 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 10.

(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 the individual in question 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" was not sufficient. The phrase "grounds for the exercise of criminal jurisdiction" has therefore been used. This more general wording allows for the inclusion in the notification of not only factual elements relating to the official's conduct, but also information on the law of the forum State on which the exercise of jurisdiction would be based. Finally, the Commission deemed it appropriate to include, in the list of basic items of information, an indication of the authority competent to exercise jurisdiction in the specific case referred to in the notification. This reflects the fact that the State of the official may have an interest in identifying the organs responsible for deciding on the initiation of criminal proceedings or the adoption of coercive measures so that, as the case may be, it can contact them and make such arguments on immunity as it deems appropriate. Since the organs with competence to carry out this type of action and to 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 foreign 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.[163] 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.[164] 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.

(14) In addition to “diplomatic channels”, the text reflects the possibility that States may use other means of communication to provide notifications concerning immunity, some of which are mentioned in article 22 of the United Nations Convention on Jurisdictional Immunities of States and Their Property. This is the reason for the inclusion, in paragraph 3, of the phrase “any other means of communication accepted for that purpose by the States concerned”. This wording thus provides for an alternative, the use of which will have to be decided upon by the States concerned on a case-by-case basis; such alternatives may be reflected in either international treaties that are general in scope or any other agreements reached by the States concerned. Since the means of communication between States may be addressed in instruments dealing with a wide variety of issues, the phrase “for that purpose” has been included to emphasize that the agreements concerned should in any event be relevant to and applicable in cases where the question of immunity of State officials from foreign criminal jurisdiction arises. This does not mean, however, that such agreements must 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 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 10. 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

[163] 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”.

[164] 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.

Convention on Mutual Assistance in Criminal Matters[165] and its two additional protocols;[166] the European Convention on the Transfer of Proceedings in Criminal Matters; [167] the European Convention on Extradition [168] and its four additional protocols; [169] the Inter-American Convention on Mutual Assistance in Criminal Matters; [170] the Inter-American Convention on Extradition;[171] the Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union; [172] Council Framework Decision 2009/948/JHA of 30 November 2009 on prevention and settlement of conflicts of exercise of jurisdiction in criminal proceedings;[173] the Convention on Mutual Assistance in Criminal Matters between the Member States of the Community of Portuguese-speaking Countries;[174] the Convention on Extradition among the States Members of the Community of Portuguese-speaking Countries;[175] the Minsk Convention on Legal Assistance and Legal Relations in Civil, Family and Criminal Matters;[176] and the Chisinau Convention on Legal Assistance and Legal Relations in Civil, Family and Criminal Matters.[177] 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 following instruments adopted within the United Nations framework: the Model Treaty on Mutual Assistance in Criminal Matters, [178] the Model Treaty on the Transfer of Proceedings in Criminal Matters [179] and the Model Treaty on Extradition. [180] 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 10.

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

166 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.

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

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

169 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.

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

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

172 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.

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

174 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.

175 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.

176 Convention on Legal Assistance and Legal Relations in Civil, Family and Criminal Matters (Minsk, 22 January 1993), *The Informational Reporter of the CIS Council of Heads of State and Council of Heads of Government "Sodruzhestvo"*, No. 1 (1993).

177 Convention on Legal Assistance and Legal Relations in Civil, Family and Criminal Matters (Chisinau, 7 October 2002), *ibid.*, No. 2 (41) (2002).

178 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).

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

180 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).

(17) The means of communication provided for in international cooperation and mutual legal assistance treaties are defined in draft article 10 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 immunity of State officials from foreign criminal jurisdiction may arise.

(18) In any event, it should be emphasized that draft article 10, paragraph 3, does not impose on States any new requirements concerning means of communication other than those already established in the applicable treaties.

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

Article 11
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 11 addresses the issue of invocation of immunity from a twofold perspective: recognition of the right of the State of the official to invoke immunity, on the one hand; and the procedural aspects relating to the timing, content and means of communication of the invocation of immunity, on the other. Draft article 11 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.

(2) Paragraph 1 of draft article 11 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 customary 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 for the purpose 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.[181] It is thus for the State itself, and not for its officials, to invoke immunity and to take all decisions relating to its possible invocation. In any event, it is a right of a discretionary nature, which is why the phrase "[a] State may invoke the immunity of its official" has been used.

(4) The power to invoke immunity is attributed to the State of the official, though it has not been considered necessary to identify the authorities competent to take decisions relating to the invocation or the authorities competent to invoke immunity. Which authorities those are depends on the domestic law, it being understood that this category includes those with responsibility for international relations under international law. However, this does not mean that immunity cannot be invoked by a person specifically mandated to do so by the State, especially in the context of criminal proceedings.

(5) The invocation of immunity must therefore be understood as an official act whereby the State of the official informs the State seeking to exercise criminal jurisdiction that the individual in question is its official and that, in its view, he or she enjoys immunity, with the consequences that follow from that circumstance. Therefore, the earlier immunity is invoked, the more useful it will be. This is reflected by the indication that the State of the official may invoke immunity "when it becomes aware that the criminal jurisdiction of another State could be or is being exercised over the official". The term "another State" was considered preferable to "forum State" as being broader and more comprehensive, especially since immunity may be invoked prior to the initiation of criminal proceedings *stricto sensu*. The phrase "when it becomes aware" reproduces the expression used in draft article 9. 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 10 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.

[181] 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 108 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).

(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 over "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, regardless of the moment when it is made, which does not mean its effect may not vary depending on this temporal element.

(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".[182]

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

(13) Paragraph 4 is intended to ensure that the invocation of immunity by the State of the official will be made known to the authorities of the other State that are competent to deal with the question of immunity and with the examination or determination of its application. The purpose of this paragraph is to prevent a situation where an invocation of immunity is ineffective simply because it has not been made before the authorities responsible for examining or deciding on immunity. The paragraph reflects the principle that the obligation to examine and determine the question of immunity rests with the State, which must take the necessary measures to comply with this obligation. It is thus defined as a procedural safeguard benefiting both the State of the official and the State seeking to exercise criminal jurisdiction. However, in view of the diversity of States' legal systems and practices, as well

[182] Paragraph (16) of the commentary to draft article 2, above.

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 administrative bodies, authorities of the executive, the judiciary or the prosecution service, or even police authorities.

Article 12
Waiver of immunity

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

2. Waiver of immunity must always be express and in writing.

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

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

5. Waiver of immunity is irrevocable.

Commentary

(1) Draft article 12 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 12 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 12 is modelled on that of draft article 11, 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[183] 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

[183] 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).

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.[184] The same is true of the waiver of State immunity, which is addressed both in the United Nations Convention on Jurisdictional Immunities of States and Their Property[185] and in national laws on State immunity.[186]

(3) The waiver of immunity by the State of the official is a formal act whereby that State waives its right to claim immunity, thus removing this obstacle to the exercise of jurisdiction by the courts of the forum State. The waiver of immunity therefore invalidates any debate on the application of immunity or on limits and exceptions to immunity. This effect of a waiver was confirmed by the judgment of the International Court of Justice in the case of the *Arrest Warrant of 11 April 2000*, in which the Court stated that officials "will cease to enjoy immunity from foreign jurisdiction if the State which they represent or have represented decides to waive that immunity".[187]

(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 12, paragraph 1, indicates that "[t]he immunity of a State official from foreign criminal jurisdiction 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,

[184] 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 108 above), p. 749). Article 8 of the resolution states: "1. States may, by agreement, derogate to the extent they see fit, from the inviolability, immunity from jurisdiction and immunity from measures of execution accorded to their own Heads of State. 2. In the absence of an express derogation, there is a presumption that no derogation has been made to the inviolability and immunities referred to in the preceding paragraph; the existence and extent of such a derogation shall be unambiguously established by any legal means" (*ibid*.). This approach remained the same in the Institute's 2009 resolution on the immunity from jurisdiction of the State and of persons who act on behalf of the State in case of international crimes, although the resolution incorporates a new element by stipulating, in article II, paragraph 3, that "States should consider waiving immunity where international crimes are allegedly committed by their agents". This recommendation mirrors the provisions of paragraph 2 of the same article II, according to which, "[p]ursuant to treaties and customary international law, States have an obligation to prevent and suppress international crimes. Immunities should not constitute an obstacle to the appropriate reparation to which victims of crimes addressed by this Resolution are entitled" (*Yearbook of the Institute of International Law*, vol. 73-I-II (see footnote 108 above), p. 227.

[185] 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.

[186] See United States, Foreign Sovereign Immunities Act 1976, sects. 1605 (a) (1), 1610 (a) (1), (b) (1) and (d) (1), and 1611 (b) (1); United Kingdom 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.

[187] *Arrest Warrant of 11 April 2000* (see footnote 14 above), p. 25, para. 61.

only that State can waive immunity and thus consent to the exercise by another State of criminal jurisdiction over one of its officials. The verb "may" is used to indicate that the waiver of immunity is a right, not an obligation, of the State of the official. This is in line with the previous practice of the Commission, which, in the various draft articles in which it has dealt with the immunity of State officials from foreign criminal jurisdiction, has reflected the view that there is no obligation to waive immunity.

(5) The power to waive immunity is attributed to the State of the official, though it has not been considered necessary to identify the authorities competent to take decisions relating to the waiver or the authorities competent to communicate the waiver. Neither the conventions nor the national laws referred to above deal with this issue in a specific manner, instead referring to the State in abstract terms.[188] The Commission itself, in its previous work, has already considered it preferable not to refer expressly to the State organs that are competent to waive immunity.[189] Moreover, State practice is scant and inconclusive.[190] Which authorities are competent to waive immunity depends on the domestic law, it being understood that this category includes those with responsibility for international relations under international law. However, this does not mean that the waiver of immunity cannot be communicated by any other person specifically mandated to do so by the State, especially in the context of court proceedings.

(6) In contrast to draft article 11 on the invocation of immunity, 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

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188 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).

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

190 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 (see footnote 53 above). In Switzerland, in the case of *Ferdinand et Imelda Marcos c. Office fédéral de la police* (Federal Court, 2 November 1989 (see footnote 67 above)), 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.

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,[191] and is reflected in both relevant international treaties[192] and national laws.[193] For this reason, the Commission did not retain paragraph 4 of the draft article originally proposed by the Special Rapporteur in her seventh report, which was worded as follows: "A waiver that can be deduced clearly and unequivocally from an international treaty to which the forum State and the State of the official are parties shall be deemed an express waiver".[194] While members of the Commission generally considered that the waiver of immunity may be expressly provided for in a treaty,[195] 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,[196] 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 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."[197]

(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 11, paragraph 2, this draft article contains no express reference to the content of the waiver, as the Commission

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[191] See footnote 183 above.

[192] 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.

[193] 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.

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

[195] 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 108 above), p. 749).

[196] *Regina v. Bow Street Metropolitan Stipendiary Magistrate*, ex parte *Pinochet Ugarte (No. 3)*, United Kingdom, House of Lords, 24 March 1999 (see footnote 61 above).

[197] *Arrest Warrant of 11 April 2000* (see footnote 14 above), pp. 24–25, para. 59.

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

(12) Paragraph 3 concerns the means by which the State of the official may communicate the waiver of immunity of its official. As this paragraph is thus the counterpart to draft article 11, 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 12, 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 11, reference is made to the commentary to draft article 11 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 "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 11, paragraph 4, with some drafting changes only. Since both paragraphs follow the same logic and serve the same

[198] Three examples of clear statements of waiver, which appear in the memorandum by the Secretariat on immunity of State officials from foreign criminal jurisdiction (A/CN.4/596 and Corr.1, available from the Commission's website, documents of the sixtieth session, paras. 252 and 253), are reproduced below. In *Paul v. Avril*, the Minister of Justice of Haiti stated that "Prosper Avril, ex-Lieutenant-General of the Armed Forces of Haiti and former President of the Military Government of the Republic of Haiti, enjoys absolutely no form of immunity, whether it be of a sovereign, a chief of 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 190 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 67 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).

purpose, the commentary to draft article 11 in this regard also applies to paragraph 4 of the present draft article.

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

(15) This debate relates not to the basis for concluding that the waiver of immunity is irrevocable, but to possible exceptions to irrevocability. First, it should be noted that the members of the Commission generally agree that paragraph 5, as currently drafted, reflects a general rule that manifests the principle of good faith and addresses the need to respect legal certainty. However, some members also expressed the view that exceptions to this general rule might be warranted in some situations, such as when new facts not previously known to the State of the official come to light after immunity has been waived; when it is found in a particular case that the basic rules of due process have not been observed during the exercise of jurisdiction by the forum State; or when exceptional circumstances of a general nature arise, such as either a change of government or a change in the legal system, that could result in a situation where the right to a fair trial is no longer guaranteed in the State seeking to exercise its criminal jurisdiction.

(16) These considerations gave rise to a debate on the usefulness and desirability of including this paragraph in draft article 12. Some members expressed support for its deletion, particularly since neither the relevant treaties nor the domestic laws of States have expressly referred to the irrevocability of waivers of immunity, and the practice on this issue is limited.[199] 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".[200] 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 12. In this connection, a view was expressed

[199] On waiver of immunity and submission of the foreign State to the jurisdiction of the forum State, see: United States, Foreign Sovereign Immunities Act 1976, 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, sect. 10; Canada, State Immunity Act 1985, sect. 4; Israel, Foreign States Immunity Law 2008, sects. 9 and 10; Japan, Act on the Civil Jurisdiction of Japan with respect to a Foreign State 2009, arts. 5 and 6; and Spain, Organic Act No. 16/2015 of 27 October on privileges and immunities of foreign States, international organizations with headquarters or offices in Spain and international conferences and meetings held in Spain, arts. 5–8. Only the laws of Australia and Spain provide for the irrevocability of the waiver of immunity. Under the Foreign States Immunities Act 1985 of Australia, "[a]n agreement by a foreign State to waive its immunity under this Part has effect to waive that immunity and the waiver may not be withdrawn except in accordance with the terms of the agreement" (sect. 10.5). For its part, Organic Act No. 16/2015 of Spain establishes that "[t]he consent of the foreign State referred to in articles 5 and 6 may not be revoked once the proceedings have been initiated before a Spanish court" (art. 8 (Revocation of consent)).

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

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.[201] Finally, the difficulty of identifying exceptional circumstances that could justify the revocation of a waiver of immunity was highlighted, although it was reiterated that a change of government or a change of legal system that could be prejudicial to the respect for the official's human rights and right to a fair trial could fall into this category. On the other hand, doubts were expressed as to whether the emergence of new facts that were not known at the time of the waiver, or the exercise of jurisdiction by the forum State in respect of facts not covered by the waiver, could be categorized as exceptional circumstances, since they were not exceptions, but matters in respect of which the State of the official had not waived immunity, with the result that immunity could be applied under the general rules contained in the draft articles.

(18) In view of the discussion summarized in the preceding paragraphs and the practice generally followed in similar cases where there is a divergence of views among the members during the first reading of a draft text, the Commission decided to retain paragraph 5 in draft article 12, thus enabling States to become duly aware of the debate and to provide comments.

Article 13
Requests for information

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

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

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

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

Commentary

(1) Draft article 13 provides that both the forum State and the State of the official may request information from the other State. It is the last of the procedural provisions under Part Four of the draft articles before reference is made to the determination of whether immunity applies or not. This is the subject of draft article 14. Draft article 13 consists of four paragraphs referring to the right of the States concerned to request information (paras. 1 and 2), the procedure for requesting information (para. 3) and the manner in which the requested State is to consider the request (para. 4).

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

(3) The request for information referred to in paragraphs 1 and 2 is made with such an ultimate purpose in mind and should be understood as part of the process that a State must follow in order to decide on immunity in a specific case, from the perspective of either the forum State (examination and determination of immunity) or the State of the official

[201] 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).

(invocation or waiver of immunity). This is why the expression "in order to decide" is used in both paragraphs, to show that in both cases the final decision will be the outcome of a process that may involve different phases and acts.

(4) When it adopted draft article 13, the Commission took account of the fact that, in order to determine whether or not immunity applies, the forum State will need information on the official in question (name, position within the State, scope of authority, etc.) and on the connection between the State of the official and the acts of the official that may give rise to the exercise of criminal jurisdiction. This information is important for enabling the forum State to take a decision on immunity, especially in the case of immunity *ratione materiae*, but it may be known only to the State of the official. The same is true in cases where the State of the official must decide whether to invoke or waive immunity, since that State may need to obtain information on the law or the competent organs of the forum State or on the stage reached in the activity undertaken by the forum State. Draft article 13 is intended to facilitate access to such information.

(5) The information referred to in the preceding paragraph may already be in the possession of the forum State or the State of the official, especially if the provisions of draft articles 10 (on notification), 11 (on invocation) or 12 (on waiver) have been applied prior to the request for information. In acting under those provisions, the forum State and the State of the official undoubtedly will have provided information to each other. However, it is still possible that the information received by those means may in some cases be insufficient for the purposes of the aforementioned objectives. In these circumstances, in particular, requests for information become a necessary and useful tool for ensuring the proper functioning of immunity, while also strengthening cooperation between the States concerned and building trust between them. The system for requesting information provided for in draft article 13 therefore serves as a procedural safeguard for both States.

(6) The request may relate to any item of information that the requesting State considers useful for the purpose of taking a decision concerning immunity. Given the variety of items of information that may be taken into account by States for the purpose of deciding on the application, invocation or waiver of immunity, it is not possible to draw up an exhaustive list of such items. The Commission opted to use the expression "any information that it considers relevant", in preference to "the necessary information", as the adjective "necessary" could be understood in a narrow, literal sense, especially in English. Conversely, the use of the word "relevant" acknowledges that the requesting State (be it the forum State or the State of the official) has the right to decide on the information that it wishes to request in each case, as provided in a number of international instruments.[202]

(7) Paragraph 3 refers to the channels through which information may be requested. This paragraph is modelled on paragraph 3 of draft articles 10, 11 and 12, the wording of which it reproduces *mutatis mutandis.* The commentaries to those draft articles are thus applicable to this paragraph.

(8) The Commission nonetheless wishes to draw attention to its decision not to include in draft article 13 a paragraph on internal communication between authorities of the forum State or the State of the official, similar to paragraph 4 of draft articles 11 and 12. This is because the request for information should be understood to refer essentially to information that, in many cases, will be complementary or additional to the information already in the possession of the forum State or the State of the official, and that therefore will usually be sought at a more advanced stage of the process. Thus, it is likely that the competent decision-making authority in each State will already be known to the other and that it is therefore not necessary to introduce this element, which operates as a safeguard clause. In any event, if the request for information is made at a time when the authorities are only beginning to deal with the

[202] See, for example, European Convention on Mutual Assistance in Criminal Matters, art. 3; Inter-American Convention on Mutual Assistance in Criminal Matters, art. 7; Convention on Mutual Assistance in Criminal Matters between the Member States of the Community of Portuguese-speaking Countries, art. 1, paras. 1 and 2; and Model Treaty on Mutual Assistance in Criminal Matters, art. 1, para. 2.

question of immunity, there is no reason not to apply the principle that the competent authorities of the same State have an obligation to communicate with each other.

(9) Paragraph 4 replaces paragraphs 4 and 5 originally proposed by the Special Rapporteur, which listed the possible grounds for refusal of the request and the conditions to which both the request for information and the information provided could be subject, including confidentiality.[203] The Commission considered it preferable to include in draft article 13 a simpler paragraph merely setting out the principle that any request for information must be considered in good faith by the requested State, be it the forum State or the State of the official. There are several reasons for this. First, the original proposal listing the permitted grounds for refusal could be interpreted *a contrario* as recognizing an obligation to provide the requested information. Such an obligation, however, does not exist in international law, except in respect of specific obligations that may be laid down in international cooperation and mutual legal assistance agreements or other treaties. Second, the original proposal could conflict with any systems for requesting and exchanging information that may be established in international cooperation and mutual legal assistance treaties, which would in any case apply between the States parties. Third, the establishment of a confidentiality rule could conflict with State rules governing confidentiality. Fourth and last but not least, the purpose of draft article 13 is to promote cooperation and the exchange of information between the forum State and the State of the official, but this purpose could be undermined or called into question if the draft article expressly listed grounds for refusal and rules of conditionality.

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

(11) The expression "shall consider ... in good faith" in paragraph 4 refers to the general obligation of States to act in good faith in their relations with third parties. The scope of this obligation, by its very nature, cannot be analysed in the abstract and must be determined on a case-by-case basis. Its inclusion in draft article 13 should be understood in the context defined by the draft article itself: as a procedural tool for promoting cooperation between the forum State and the State of the official to enable each of them to form a sound judgment to serve as a basis for the decisions referred to in paragraphs 1 and 2. Accordingly, the expression "shall consider ... in good faith" should be interpreted in the light of two elements operating together: first, the obligation to examine the request; and second, the requirement to do so with the intention of helping the other State to take an informed and well-founded decision on whether or not immunity applies, or on the invocation or waiver of immunity. The expression "shall consider ... in good faith" thus reflects an obligation of conduct and not an obligation of result.

(12) The requested State should take these elements into account as a starting point for the examination of any request for information, but nothing prevents it from also considering other elements or circumstances in reaching a decision on the request, such as, *inter alia*, concerns of sovereignty, public order, security and essential public interest. In any event, the Commission did not consider it necessary to refer expressly to these elements in draft article 13, recognizing that it is for the requested State to identify the reasons justifying its decision.

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

[203] See the seventh report of the Special Rapporteur on immunity of State officials from foreign criminal jurisdiction (A/CN.4/729), annex II.

Article 14
Determination of immunity

1. A determination of the immunity of a State official from foreign criminal jurisdiction shall be made by the competent authorities of the forum State according to its law and procedures and in conformity with the applicable rules of international law.

2. In making a determination about immunity, such competent authorities shall take into account in particular:

(a) whether the forum State has made the notification provided for in draft article 10;

(b) whether the State of the official has invoked or waived immunity;

(c) any other relevant information provided by the authorities of the State of the official;

(d) any other relevant information provided by other authorities of the forum State; and

(e) any other relevant information from other sources.

3. When the forum State is considering the application of draft article 7 in making the determination of immunity:

(a) the authorities making the determination shall be at an appropriately high level;

(b) in addition to what is provided in paragraph 2, the competent authorities shall:

(i) assure themselves that there are substantial grounds to believe that the official committed any of the crimes under international law listed in draft article 7;

(ii) give consideration to any request or notification by another authority, court or tribunal regarding its exercise of or intention to exercise criminal jurisdiction over the official.

4. The competent authorities of the forum State shall always determine immunity:

(a) before initiating criminal proceedings;

(b) before taking coercive measures that may affect the official, including those that may affect any inviolability that the official may enjoy under international law. This subparagraph does not prevent the adoption or continuance of measures the absence of which would preclude subsequent criminal proceedings against the official.

5. Any determination that an official of another State does not enjoy immunity shall be open to challenge through judicial proceedings. This provision is without prejudice to other challenges to any determination about immunity that may be brought under the applicable law of the forum State.

Commentary

(1) Draft article 14 concerns the determination of immunity. As “determination” means the decision on whether or not immunity applies in a particular case, this is a key provision of Part Four of the present draft articles. Draft article 14 is one of the fundamental procedural safeguards contained in this part.

(2) “Determination” is the final stage of a process in which the competent authorities of the forum State make an assessment of the various elements and circumstances of a particular case. It is to be distinguished from the “examination” of immunity covered in draft article 9, which refers only to the initial consideration of this question. In any case, as determination is the final stage of the process, draft article 14 should be read in conjunction with other provisions of Part Four of the draft articles, in particular draft articles 8 to 13, which deal

with institutions that are relevant to the determination of immunity. In this connection, attention is drawn to the special relevance of draft article 8, which defines the scope of application of Part Four and its relationship to the other parts of the draft articles. Under that draft article, a determination about immunity must be made whenever the question of immunity from the forum State's exercise of criminal jurisdiction arises, including in cases where draft article 7 may be applicable.

(3) Draft article 14 consists of five paragraphs concerning, respectively, the identification of who is to make the determination of immunity and what legal rules must be followed in that process (para. 1); what general criteria must be taken into account by the forum State in determining immunity (para. 2); what special criteria must be taken into account by the State in determining immunity in connection with draft article 7 (para. 3); when immunity must be determined (para. 4); and judicial challenges to the determination of immunity (para. 5).

Paragraph 1

(4) Paragraph 1 begins with the words "A determination". The use of the article "a" is intended to show that the determination is always made with respect to a specific case, the elements and circumstances of which may differ from those of any other case. In each language version of the draft article, the most appropriate word for achieving this purpose has been used.

(5) The determination of immunity is to be made by "the competent authorities of the forum State". In using this expression, the Commission took two considerations into account: first, that the determination of immunity may be made at different times and is not limited exclusively to a judicial procedure *stricto sensu*, and second, that the authorities competent to determine immunity may vary from one State to another, depending on the applicable national rules. The reference to "the competent authorities of the forum State" introduces an element of flexibility that allows these two factors to be taken into account. Authorities with competence to determine immunity may include administrative and executive bodies, prosecutors, judges or other organs to which the national law of the forum State grants such competence. Moreover, it should be borne in mind that several organs of the forum State may be considered successively as competent authorities in cases where the determination of immunity can or must be made at different stages, in particular when the exercise of the criminal jurisdiction of the forum State requires the intervention of judicial authorities. In such cases, the criteria set forth in paragraphs 2, 3 and 4 of draft article 14 must be applied by each of the competent authorities in making a determination of immunity.

(6) The determination of immunity is to be made in accordance with the national law of the forum State. Paragraph 1 uses the phrase "according to its law and procedures" to indicate that the competent authorities must take into account both the substantive rules and the procedural rules applicable to the case. However, while the domestic law of the forum State will be the primary basis for determining immunity, an express reference to "the applicable rules of international law" has also been included, given that immunity is an institution under international law and that States are also bound by both customary and treaty rules that may have a bearing on immunity and its determination. Therefore, both categories of law – national and international – must be applied in tandem.

Paragraph 2

(7) Paragraph 2 sets out the criteria to be taken into account by the competent authorities of the forum State in determining immunity in a particular case. The criteria in this paragraph should be generally taken into account in all cases of determination of immunity, including those in which the application of draft article 7 may be considered. In any event, while these are the basic criteria that should always be taken into account, they are not the only ones which the competent authorities of the forum State may consider in determining immunity. This is reflected by the words "in particular" at the end of the introductory phrase of the paragraph.

(8) The list of criteria to be taken into account by the competent authorities of the forum State includes some essential elements forming part of the procedural *iter* that begins with the examination of immunity and ends with the determination of immunity, in particular the

notification provided for in draft article 10 (referred to in subparagraph (a)), the invocation or waiver of immunity by the State of the official (subparagraph (b)) and the information made available to the forum State (subparagraphs (c), (d) and (e)).

(9) These criteria have been included because of their direct connection to the procedural safeguards referred to in draft articles 10, 11, 12 and 13. However, while all the criteria included in draft article 14, paragraph 2, are related to these other draft articles, the Commission did not consider it necessary to include cross references to them in all cases. Only an express reference to draft article 10 has been included, given that this is the only draft article that imposes an obligation on the forum State, while the other draft articles refer to powers of the State of the official (invocation and waiver) or to optional instruments available to the forum State and the State of the official (requests for information).

(10) It should be borne in mind that the criteria listed in paragraph 2 are not conditions for the determination of immunity, but elements of guidance which are offered to the competent authorities and which they must take into consideration for the purpose of determining immunity. This is particularly relevant with regard to the invocation of immunity, which has not been considered by the Commission as a requirement for the application of either immunity *ratione personae* or immunity *ratione materiae*. The competent authorities of the forum State must therefore determine immunity in any case, whether or not it has been invoked, and irrespective of the different weight that the invocation or non-invocation of immunity may have in the light of the circumstances of each particular case.

(11) With regard to the information available to the competent authorities of the forum State, the Commission considered it useful to refer separately to information from each of the sources from which it may originate. Information provided by the State of the official (subparagraph (c)) is directly related to the system of requests for information provided for in draft article 13, but nothing prevents such information from being provided *proprio motu* outside that system. The reference to information "provided by other authorities of the forum State" reflects the fact that the authorities with competence to determine immunity may receive, and often do receive, information from other authorities of the State that may be useful or necessary for the determination of immunity, including information provided by the police, the Ministry of Foreign Affairs, the Ministry of Justice or others. Finally, the Commission has noted that the competent authorities of the forum State often receive or have access to information from other sources, including third States, international organizations (such as the International Criminal Police Organization (INTERPOL)), international investigative mechanisms, courts, the International Committee of the Red Cross and non-governmental organizations. The Commission considered that this information may be useful for the determination of immunity in a particular case and has therefore referred to it in paragraph 2 (e). However, it did not expressly refer to the various sources mentioned above, preferring instead to use the expression "other sources" so as to refer generally to any source of information that may be useful for the determination of immunity in a particular case.

(12) Lastly, it should be noted that the Commission decided not to establish any hierarchy among the sources from which the available information has originated. Therefore, subparagraphs (c), (d) and (e) begin with the words "any other relevant information". This phrase also means that the information to be taken into consideration in determining immunity must always be "relevant", and it is for the competent authorities of the forum State to assess such relevance.

Paragraph 3

(13) Paragraph 3 applies only in cases where the determination of immunity is related to draft article 7. In other words, it applies only in cases where the forum State considers that the official of another State may have committed one of the crimes under international law listed in that draft article, which may lead the forum State to determine that the official does not enjoy immunity *ratione materiae* even if the acts in question were performed in an official capacity. The Commission has thus taken the view that special criteria for determining immunity must be established for cases of this type to ensure a proper balance between the interests of the forum State and those of the State of the official. These special criteria serve two complementary purposes: first, to reduce the risk of politicization and misuse of the

exception provided for in draft article 7, and second, to ensure that effect can be given to draft article 7 and that its use in good faith is not prevented.

(14) The special criteria listed in paragraph 3 are complementary to those set out in paragraph 2, which will also apply in cases of determination of immunity that may be affected by draft article 7. The special criteria set out in paragraph 3 relate to two distinct questions: which authorities should determine immunity in these circumstances (subparagraph (a)) and what additional elements should be assessed by the competent authorities for the purpose of determining immunity (subparagraph (b)).

(15) Subparagraph (a) requires that the authorities of the forum State that are to determine immunity "be at an appropriately high level". The Commission included this criterion taking into account, in the first place, the seriousness of the crimes alleged to have been committed by the official in such cases, which, owing to their characteristics and specific nature, require assessment by specially qualified State authorities with a special level of competence. The Commission also considered that, in relation to this category of crimes, the exercise of criminal jurisdiction over a foreign official may have a significant impact on the relations between the forum State and the State of the official. This is another reason that the authorities making the determination of immunity should have sufficiently high-level decision-making power.

(16) The Commission understands "appropriately high level" to be the necessary criterion for defining the concept of a "competent authority" for the purpose of this type of determination, and has therefore, in subparagraph (a), used only the term "authorities" rather than "competent authorities", which, however, is used in subparagraph (b). In any event, it should be recalled that, as noted above, the term "authorities" is used to refer to a broad range of State organs, including administrative, executive, prosecutorial and judicial authorities. It should moreover be borne in mind that the determination of which "authorities [are] at an appropriately high level" will depend on each State's legal system. Therefore, "appropriately high level" does not necessarily mean "hierarchically superior", since the existence or not of a hierarchical relationship in each category of organs will depend on the internal system of the forum State.

(17) Paragraph 3, subparagraph (b), sets out two criteria that serve as additional elements to be assessed for the purpose of determining immunity in cases that may be covered by draft article 7. Because they are different in nature, they use different wording to express the obligation imposed on the competent authorities: "assure themselves" with respect to the first criterion and "give consideration" with respect to the second.

(18) Under the first of these criteria, set forth in subparagraph (b) (i), "the competent authorities [must] assure themselves that there are substantial grounds to believe that the official committed any of the crimes under international law listed in draft article 7"; that is, a crime of genocide, a crime against humanity, a war crime, or a crime of apartheid, torture or enforced disappearance. The expression "[must] assure themselves" refers to the competent authorities' obligation to form a reasoned judgment on this point. This should not, however, be confused with the standard of being convinced beyond reasonable doubt, which would be necessary for a court to conclude that the official in question is criminally responsible for the commission of any of these crimes. This distinction is very important, especially since, as will be noted below, the determination of immunity may be made at different times and need not necessarily take the form of a judicial determination.

(19) To prevent the politically motivated or improper use of exceptions to immunity, the criterion contained in subparagraph (b) (i) is intended to ensure that the determination of immunity is not based solely on news reports, complaints or other types of unsubstantiated information. It is therefore essential to define the standard of proof applicable to the information which the competent authorities use as the basis for forming their judgment. After a wide-ranging discussion in which the Commission weighed different possibilities,[204] it was decided that an internationally established standard of proof should be used. The

[204] The Commission considered, among others, the following formulations: "*prima facie* evidence", "clear and convincing evidence" and "the highest standard of proof for the prosecution of crimes in the domestic legal system" of the forum State.

Commission thus decided that the standards defined in the Rome Statute of the International Criminal Court would serve as a useful model, especially as these standards were considered and agreed upon by States at an international conference with broad participation.

(20) In line with this approach, the Commission assessed the different formulations used in the Rome Statute to identify a sufficient basis for the exercise of jurisdiction, namely: (a) a "reasonable basis to believe that a crime ... has been or is being committed", as a sufficient standard of proof for the Prosecutor to decide to initiate an investigation,[205] and, conversely, "substantial reasons to believe that an investigation would not serve the interests of justice";[206] and (b) "reasonable grounds to believe that [an individual] has committed a crime", as the applicable standard for the Pre-Trial Chamber to issue a warrant of arrest,[207] and "whether there is sufficient evidence to establish substantial grounds to believe that the person committed each of the crimes charged", for the Pre-Trial Chamber to confirm the charges.[208]

(21) After analysing each of these ways of describing the standard of proof, the Commission decided to use the expression "substantial grounds to believe", which in its view is precise enough to achieve the objectives pursued by this criterion. This expression is taken from the English version of article 61, paragraph 7, of the Rome Statute. Although the wording of that paragraph is different in the other language versions (for example, "*motivos fundados para creer*" in Spanish), the Commission preferred not to use different wording in each of the official languages, in order to avoid possible misinterpretations on an issue of such importance as the standard of proof required for the application of the exception to immunity *ratione materiae*. However, the Commission decided not to retain the words immediately preceding that phrase in article 61, paragraph 7 ("whether there is sufficient evidence to establish"), to avoid creating the erroneous impression that the authorities competent to determine immunity must examine the evidence as thoroughly as the Pre-Trial Chamber of the International Criminal Court is required to do, through a judicial procedure in which the right of the accused or his or her counsel to participate is recognized.

(22) In connection with the above-mentioned considerations, it should be noted that the use of the phrase "substantial grounds to believe" in the present draft article should not be conflated with the use of the same phrase in article 53, paragraph 1 (c), of the Rome Statute as a basis on which the Prosecutor of the Court may decide that, despite the existence of sufficient information indicating that crimes within the jurisdiction of the Court have been committed, an investigation need not be initiated because it "would not serve the interests of justice". Although the Commission considered this issue, it decided not to include a reference to the interests of justice as part of this criterion because doing so could potentially politicize the determination of immunity.

(23) The standard of proof just discussed refers to the conduct of the official of another State, using the wording "committed any of the crimes under international law listed in draft article 7". The verb "committed" follows the wording of the above-mentioned provisions of the Rome Statute and should be understood in relation to the process of determining immunity, which, as noted above, cannot be confused with the determination of any criminal responsibility that the official may have incurred. Therefore, the use of the verb "committed" does not prejudice the presumption of innocence of the official, respect for which is provided for in draft article 16, entitled "Fair treatment of the official".

(24) Under the criterion set forth in paragraph 3 (b) (ii) of this draft article, the competent authorities must "give consideration to any request or notification by another authority, court or tribunal regarding its exercise of or intention to exercise criminal jurisdiction over the official". The obligation imposed on the competent authorities is less stringent than that referred to in subparagraph (b) (i), since those authorities need only "give consideration to" any such request or notification.

[205] Rome Statute, art. 53, para. 1 (a).
[206] *Ibid*., art. 53, para. 1 (c).
[207] *Ibid*., art. 58, para. 1 (a).
[208] *Ibid*., art. 61, para. 7.

(25) This criterion allows for the fact that proceedings in respect of the crimes under international law listed in draft article 7 may be instituted by a plurality of jurisdictions, both national and international. Such crimes may be submitted to the criminal courts of the official's own State, to the criminal courts of third States by virtue of the jurisdictional powers provided for in their legal systems, and to the competent international and hybrid courts. Criminal jurisdiction may be exercised concurrently or consecutively before more than one of the courts indicated, as well as before the courts of the forum State.

(26) The Commission therefore decided to include this special criterion for the determination of immunity in connection with draft article 7, given that it allows for the operation of the applicable systems of cooperation and mutual legal assistance and, by this means, for the establishment of objective conditions for the exercise of jurisdiction by the forum State, the State of the official, a third State or an international court. The Commission also noted that the official's immunity from criminal jurisdiction will play a different role in each of the jurisdictions mentioned above, being inapplicable before the courts of the official's State and before international criminal tribunals. Consequently, assessing whether a court other than those of the forum State is exercising or intends to exercise jurisdiction may be a useful tool for avoiding a conflict between respect for immunity and establishment of criminal responsibility for the commission of crimes under international law. This amounts to an enhanced procedural safeguard for the purposes of Part Four of the present draft articles.

(27) The use, in paragraph 3 (b) (ii), of the alternative expressions "request or notification", "another authority, court or tribunal" and "its exercise of or intention to exercise" is meant to ensure that the wording is flexible enough to cover the different situations that may arise in practice.

(28) This criterion is clearly related to the transfer of criminal proceedings referred to in draft article 15. However, as its scope is broader, the Commission preferred not to include an express reference to that draft article in this paragraph of draft article 14.

Paragraph 4

(29) Paragraph 4 refers to the moment at which immunity must be determined and applies to any determination made under draft article 14.

(30) Although paragraph 4 was not initially included in draft article 14 as originally proposed, the Commission decided to include it in the light of a general discussion on a proposal, made by one of its members, that the exercise of criminal jurisdiction over a foreign official should not be possible if the official is not present in the territory of the forum State. The Commission decided against that proposal on the grounds that it would excessively limit the forum State's jurisdiction and is not in line with international practice, given that the legal systems of a number of States allow for trials *in absentia*. It should be added that, in general, there is nothing to prevent certain acts characterized as an exercise of jurisdiction, in particular investigations, from being carried out even if the person concerned is not in the territory of the forum State.

(31) The Commission nevertheless considered that this proposal, despite its exclusion from the draft article, had raised the point that the draft article on the determination of immunity should make some provision for protecting the State official until the determination is actually made. The result is paragraph 4 of draft article 14, which constitutes a safeguard for the State of the official and for the official himself or herself by requiring that the determination of immunity always be made before measures that will necessarily affect the official are taken.

(32) Like the examination of immunity, the determination of immunity should take place as early as possible, to avoid a situation where the late determination of immunity prevents it from producing its full effects.[209] However, the Commission did not consider it necessary to indicate, in a general way, when the determination should take place, since this will depend on different circumstances that cannot be listed in an exhaustive manner. Rather, paragraph 4 of this draft article indicates when immunity must necessarily be determined if it has not

[209] See, in particular, paragraph (7) of the commentary to draft article 9 above.

been determined earlier. This is reflected in the use of the word "always" with reference to the obligation to determine immunity that is incumbent on the competent authorities of the forum State.

(33) In indicating when immunity must necessarily be determined, draft article 14, paragraph 4, largely follows the wording of draft article 9, paragraph 2. Accordingly, the authorities must determine immunity "before initiating criminal proceedings" and "before taking coercive measures that may affect the official, including those that may affect any inviolability that the official may enjoy under international law". The meaning and scope of these phrases have been previously analysed in the commentary to draft article 9, paragraph 2, to which reference is made.[210]

(34) However, paragraph 4 (b) of draft article 14 adds a new sentence stating that the fact that immunity must always be determined before coercive measures can be taken against a foreign official "does not prevent the adoption or continuance of measures the absence of which would preclude subsequent criminal proceedings against the official". This clause strikes a balance between the interests of the State of the official, represented by the determination of immunity at a procedurally appropriate time, and the interests of the forum State, represented by the retention of the power to take such coercive measures as are necessary to ensure that, should the forum State subsequently be able to exercise criminal jurisdiction over the foreign official, this will not be impossible in practice. The coercive measures that could be adopted or continued will therefore be measures of a precautionary nature, including, for example, any administrative measures aimed at preventing the official's departure from the territory of the forum State, such as a requirement to surrender his or her passport or an order prohibiting the official from leaving the territory and requiring him or her to report periodically to the national authorities. The retention of the power to adopt and continue such coercive measures even after immunity has been determined is justified, in particular, by the fact that the determination may be made at an early stage of the exercise of jurisdiction and then be reversed at a later stage, especially in the judicial phase.

Paragraph 5

(35) As noted above, the determination of immunity may be made at different times and may be decided upon by administrative, executive, prosecutorial or judicial authorities. This means that the determination of immunity need not necessarily be a judicial determination.

(36) However, because immunity is determined for the purpose of the exercise of criminal jurisdiction by the forum State, there is in practice a strong likelihood that the determination of immunity will lead to a judicial phase, especially in relation to a decision to initiate criminal proceedings against the foreign official or the adoption of certain coercive measures that must be approved by the courts or may be subject to challenge. In addition, the decisions adopted by administrative, executive or prosecutorial authorities on the determination of immunity may be subject to judicial oversight in many cases. With this in mind, the Commission has included in draft article 14 a paragraph 5 on the possibility of challenging a determination regarding immunity by means of judicial proceedings.

(37) Although the Special Rapporteur's initial proposal was broader, the Commission decided to approach the issue of challenging the determination of immunity in terms of the safeguards provided to the State of the official and to the official himself or herself. Consequently, priority has been given to challenges to a "determination that an official of another State does not enjoy immunity", which "shall be open to challenge through judicial proceedings". An obligation is thus imposed on the forum State to ensure that such a challenge is possible. The Commission has used the phrase "challenge through judicial proceedings", which, although the subject of much debate, was considered to be the most appropriate means, owing to its generality, of covering the different legal avenues and remedies established for this purpose in national judicial systems. Paragraph 5 likewise does not address the issue of standing to challenge the determination or other issues of a procedural nature that will depend on each country's national law.

[210] See, in particular, paragraphs (8)–(14) of the commentary to draft article 9 above.

(38) The emphasis placed on cases where the determination concludes that immunity does not apply is also due to other considerations. For example, it has been argued that in some judicial systems a decision by the prosecutor not to exercise jurisdiction, including where the decision is based on a finding that immunity applies, is not subject to legal challenge. However, the priority treatment given to challenges to determinations denying immunity in no way implies that the Commission's intent is to exclude challenges to determinations upholding immunity. On the contrary, paragraph 5 contains a "without prejudice" clause stating that it is "without prejudice to other challenges to any determination about immunity that may be brought under the applicable law of the forum State".

(39) Through this "without prejudice" clause, the Commission recognizes that a determination in favour of immunity may also be challenged in court, thus reflecting the existing practice in a number of States and the need to strike a balance between the rights of the foreign official, on the one hand, and those of the victims of the crimes he or she is alleged to have committed, on the other. In this context, the Commission has taken into account, in particular, the right of access to justice, which is a basic component of the right to effective judicial protection and, as such, is recognized in various international human rights instruments[211] and has been systematically referred to in the case law of regional courts such as the European Court of Human Rights[212] and the Inter-American Court of Human Rights,[213] as well as in the doctrine of the Human Rights Committee.[214] All these elements must be duly taken into account in order to determine whether a challenge "may be brought under the applicable law of the forum State", since the Commission understands that the expression "applicable law" refers both to State law and to the rules of international law that are enforceable against that State.

Article 15
Transfer of the criminal proceedings

1. The competent authorities of the forum State may, acting *proprio motu* or at the request of the State of the official, offer to transfer the criminal proceedings to the State of the official.

2. The forum State shall consider in good faith a request for transfer of the criminal proceedings. Such transfer shall only take place if the State of the official agrees to submit the case to its competent authorities for the purpose of prosecution.

3. Once a transfer has been agreed, the forum State shall suspend its criminal proceedings, without prejudice to the adoption or continuance of measures the absence of which would preclude subsequent criminal proceedings against the official.

4. The forum State may resume its criminal proceedings if, after the transfer, the State of the official does not promptly and in good faith submit the case to its competent authorities for the purpose of prosecution.

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[211] See, in this connection, the following instruments: International Covenant on Civil and Political Rights (New York, 16 December 1966), United Nations, *Treaty Series*, vol. 999, No. 14668, p. 171, and vol. 1057, p. 407, art. 14; Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights) (Rome, 4 November 1950), *ibid.*, vol. 213, No. 2889, p. 221, arts. 6 and 13; Charter of Fundamental Rights of the European Union (Nice, 7 December 2000), *Official Journal of the European Communities*, C 364, 18 December 2000, p. 1, art. 47; American Convention on Human Rights: "Pact of San José, Costa Rica" (San Jose, 22 November 1969), United Nations, *Treaty Series*, vol. 1144, No. 17955, p. 123, art. 8; African Charter on Human and Peoples' Rights (Nairobi, 27 June 1981), *ibid*., vol. 1520, No. 26363, p. 217, art. 7; and Arab Charter on Human Rights (adopted at the Summit of the League of Arab States at its sixteenth ordinary session, held in Tunis in May 2004, CHR/NONE/2004/40/Rev.1, or *Boston University International Law Journal*, vol. 24, No. 2 (2006), p. 147), art. 12.

[212] See, e.g., *Airey v. Ireland*, 9 October 1979, European Court of Human Rights, Series A, No. 32; and *Stanev v. Bulgaria* [GC], No. 36760/06, European Court of Human Rights, ECHR 2012.

[213] See, in particular, *Judicial Guarantees in States of Emergency (arts. 27(2), 25 and 8 American Convention on Human Rights)*, Advisory Opinion OC-9/87, 6 October 1987, Inter-American Court of Human Rights, Series A, No. 9.

[214] See, in particular, Human Rights Committee, general comment No. 32 (2007) on the right to equality before courts and tribunals and to a fair trial.

5. The present draft article is without prejudice to any other obligations of the forum State or the State of the official under international law.

Commentary

(1) Draft article 15 is the last of the provisions of Part Four of the draft articles establishing procedural safeguards that operate directly between the forum State and the State of the official. This draft article provides for the possibility of transferring criminal proceedings to the State of the official and regulates the conditions under which this may occur, as well as its effects.

(2) The transfer of criminal proceedings is one of the mechanisms for cooperation and mutual legal assistance in criminal matters. Although not very widespread, it has been provided for in some multilateral international instruments.[215] Its importance is illustrated by the United Nations General Assembly's adoption of the Model Treaty on the Transfer of Proceedings in Criminal Matters. This mechanism allows a State that is exercising jurisdiction over an individual to transfer the criminal proceedings to another State that also has jurisdiction and that, for various reasons, would be in a better position to exercise jurisdiction. The transfer of proceedings is intended to ensure that jurisdiction is effectively exercised and that, where appropriate, the individual's criminal responsibility can be established.[216]

(3) Although the international instruments governing the transfer of proceedings do not refer to the immunity of State officials from foreign criminal jurisdiction, there is nothing to prevent this mechanism from also being used in a context where the question of immunity arises. Draft article 15 serves this purpose by permitting the transfer, to the State of the official, of proceedings instituted against him or her in the forum State. Recourse to this instrument of cooperation ensures a balance between the rights and interests of the State of the official and those of the forum State, helping to preserve immunity while also ensuring that immunity does not prevent the effective exercise of criminal jurisdiction over the official. This formula is fully compatible with the position taken by the International Court of Justice in the case concerning the *Arrest Warrant of 11 April 2000*, in which it stated that immunity does not affect the international criminal responsibility of a State official, which may be established through the exercise of jurisdiction by the courts of the official's State, by other courts or by an international criminal tribunal.[217]

(4) Draft article 15 refers only to the transfer of criminal proceedings from the forum State to the State of the official, since it is intended as a procedural safeguard operating between the States directly concerned by the present draft articles. This does not mean that the proceedings cannot be transferred to a third State under applicable rules on cooperation and mutual legal assistance in criminal matters, nor does it mean that the proceedings cannot be transferred to a competent international criminal court. However, the transfer of criminal proceedings to a third State or to an international criminal court must be carried out in accordance with the international rules applicable in each case and not in accordance with draft article 15, which establishes special rules for the transfer of criminal proceedings between the forum State and the State of the official in the context of the present draft articles.

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[215] The Council of Europe adopted the 1972 European Convention on the Transfer of Proceedings in Criminal Matters. The European Convention on Mutual Assistance in Criminal Matters refers to the transfer of proceedings in article 21. Of particular importance is the treatment given to the transfer of criminal proceedings in article 21 of the United Nations Convention against Transnational Organized Crime ((New York, 15 November 2000), United Nations, *Treaty Series*, vol. 2225, No. 39574, p. 209), which, moreover, has been the subject of continued discussion within the Conference of the Parties to the Convention. In this regard, see Working Group on International Cooperation of the Conference of the Parties to the Convention, Practical considerations, good practices and challenges encountered in the area of transfer of criminal proceedings as a separate form of international cooperation in criminal matters (CTOC/COP/WG.3/2017/2).

[216] See Council of Europe, Explanatory Report to the European Convention on the Transfer of Proceedings in Criminal Matters, *European Treaty Series*, No. 73.

[217] *Arrest Warrant of 11 April 2000* (see footnote 14 above), pp. 25–26, para. 61.

(5) Draft article 15 consists of five paragraphs, which set out the procedural steps to be followed in transferring criminal proceedings and the effects of such transfer (paras. 1–3) and establish two safeguards concerning the exercise of jurisdiction by the forum State (paras. 4 and 5).

Paragraph 1

(6) Paragraph 1 concerns the first phase of the transfer process, providing that "[t]he competent authorities of the forum State may ... offer to transfer the criminal proceedings to the State of the official". The transfer is therefore understood as a prerogative of the forum State and not as an obligation. Moreover, this prerogative of the forum State is embodied in the offer to transfer and not in the transfer itself, which will take place only if the requirement set forth in the second sentence of paragraph 2 of the draft article is met. Although some Commission members took the view that the use of the verb "offer" was unnecessary and that its deletion would not alter the meaning of the paragraph, the Commission decided to retain it in order to strengthen the connection between paragraph 1 and the condition established in paragraph 2 for the transfer to take place and, therefore, to make clear the consensual nature of the transfer procedure as a whole.

(7) In accordance with paragraph 1, the offer may be made "*proprio motu* or at the request of the State of the official". Although the transfer procedure is likely to be initiated at the request of the State of the official, the Commission did not wish to rule out the possibility that it may be initiated by an authority of the forum State in exercise of its own powers. In any event, the ultimate decision to "offer to transfer" is within the unilateral competence of the authorities of the forum State, subject to the clause contained in the first sentence of paragraph 2. As in other draft articles, the term "competent authorities" includes any authority of the forum State, whether administrative, executive, prosecutorial or judicial.

(8) Paragraph 1 does not mention the rules that should govern the adoption of a decision to offer to transfer the proceedings, but this should not be taken to mean that such a decision is discretionary in absolute terms. Rather, the competent authorities referred to in this paragraph, like all State authorities, will be bound by the law applicable in the State, which includes both the rules of national law and the rules of international law that are enforceable against the forum State. This is particularly relevant in cases where the proceedings to be transferred relate to the commission of crimes under international law in respect of which the State has an obligation to exercise jurisdiction under international law. This circumstance has been particularly taken into account by the Commission, which included paragraph 5 to address this specific problem.

(9) Lastly, it should be noted that the offer to transfer the criminal proceedings is an autonomous act that does not require the authorities of the forum State to first decline to exercise their jurisdiction. The Commission noted that, in a recent case that it examined for the purpose of preparing this draft article, the competent authorities of the forum State took the view that they were delegating, rather than relinquishing, the exercise of their own jurisdiction.[218] For this reason, the Commission decided to retain only the reference to the offer to transfer, on the understanding that this implies that the competent authorities of the forum State will not be obliged to take a prior decision on the exercise of their own jurisdiction. This reflects the diversity of existing models in national legal systems and is consistent with the safeguard clause contained in paragraph 4, which provides for the resumption of criminal proceedings by the forum State.

[218] The decision in question is the judgment of 10 May 2018 of the Lisbon Court of Appeal, handed down in criminal proceedings for corruption involving a former Vice-President of Angola. See Case No. 333/14.9TELSB-U.L1-9, available at http://www.dgsi.pt/jtrl.nsf/33182fc732316039802565fa00497eec/88e2a666e33779ce802582b8003567f3?OpenDocument. The Court's interpretation was probably based on the fact that the transfer of the criminal proceedings to the Angolan courts was based exclusively on Portuguese law (the Code of Criminal Procedure).

Paragraph 2

(10) Although the forum State is not obliged to offer to transfer the proceedings, paragraph 2 imposes an obligation on the forum State to consider any request for transfer in good faith. It is understood that such a request for transfer will have come from the State of the official, in view of the relationship between paragraph 1 and paragraph 2 referred to above. This obligation makes good faith the essential principle that will govern the relations between the State of the official and the forum State with regard to the transfer of criminal proceedings, being equally applicable to both States.

(11) The reference to good faith in the first sentence of paragraph 2 is of special significance when read in conjunction with the second sentence of that paragraph, according to which the transfer will only take place "if the State of the official agrees to submit the case to its competent authorities for the purpose of prosecution". This wording reproduces what is known as the "Hague formula", which appeared for the first time in article 7 of the 1970 Convention for the Suppression of Unlawful Seizure of Aircraft, [219] and which has subsequently been reproduced in many conventions and was examined by the Commission in its work on the obligation to extradite or prosecute (*aut dedere aut judicare*)[220] and on the prevention and punishment of crimes against humanity.[221] The wording of this phrase in draft article 15 is identical to that of article 10 of the draft articles on prevention and punishment of crimes against humanity, although the latter draft article deals with the obligation to extradite or prosecute.

(12) As indicated by the Commission in its work on the aforementioned two topics, the submission of the case to the competent authorities should be understood as a substantive and not merely formalistic measure. This means that the State of the official has an obligation to transmit all available evidentiary and other information to its competent authorities, so that they may evaluate it and conduct an investigation that will enable them to form a judgment on whether to initiate proceedings against the official. However, the submission of the case for prosecution does not amount to an obligation to initiate such proceedings, as the decision on whether to do so will depend on the evaluation of the evidence submitted and other available information, as well as the evidence obtained in the investigation to be carried out by the competent authorities. In any event, the submission of the case to the competent authorities must, at the very least, be done in good faith and not for the purpose of blocking prosecution or preventing the establishment of the official's responsibility; as the International Court of Justice stated in the case concerning *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, the exercise of jurisdiction by the State concerned (in this case the State of the official) must be carried out for the purpose of ensuring that the individual (in this case the official) will not go unpunished.[222] In this regard, it should be recalled that article 10 of the draft articles on prevention and punishment of crimes against humanity expressly provides that the competent authorities to whom the matter is referred "shall take their decision [whether or not to initiate criminal proceedings] in the same manner as in the case of any other offence of a grave nature under the law of that State".[223] The phrase "submit the case ... for the purpose of prosecution" is thus interpreted in a substantive manner and with the ultimate purpose in mind; this interpretation is equally applicable to the present draft article.

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[219] Convention for the Suppression of Unlawful Seizure of Aircraft (The Hague, 16 December 1970), United Nations, *Treaty Series*, vol. 860, No. 12325, p. 105.

[220] See *Official Records of the General Assembly, Sixty-ninth Session, Supplement No. 10* (A/69/10), chap. VI, in particular paras. (10)–(21) of the final report on the topic, which is reproduced in paragraph 65 of the Commission's report.

[221] *Ibid., Seventy-fourth Session, Supplement No. 10* (A/74/10), paras. 44–45, draft articles on prevention and punishment of crimes against humanity, article 10 (*Aut dedere aut judicare*) and commentary thereto.

[222] *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal), Judgment, I.C.J. Reports 2012*, p. 422, at pp. 460 and 461, paras. 115 and 120.

[223] This expression is also found in the judgment of the International Court of Justice in *Questions relating to the Obligation to Prosecute or Extradite* (see footnote 222 above), pp. 454–455, para. 90.

(13) The interpretation of the obligation of the official's State to act in good faith in submitting the case to its national authorities is of particular importance in relation to draft article 15, paragraph 4, to which the above comments apply.

Paragraph 3

(14) Paragraph 3 provides for the suspension of criminal proceedings in the forum State as a consequence of the transfer. Such suspension will only occur when the transfer has been agreed and, in any case, will be limited in scope by the "without prejudice" clause included at the end of the paragraph. The wording of the "without prejudice" clause is identical to that of paragraph 4 (b) of draft article 14 and serves the same purpose. Therefore, reference is made to the commentary to that provision as to the clause's meaning and scope.[224]

Paragraph 4

(15) Paragraph 4 is intended as a safeguard clause in favour of the forum State, which, despite having transferred the criminal proceedings to the State of the official and suspended its own criminal proceedings, may resume them if the State of the official does not adequately fulfil the obligation to submit the case to its competent authorities for the purpose of prosecution.

(16) Although the Commission considered different formulations drawn essentially from article 17, paragraphs 1 and 2, of the Rome Statute of the International Criminal Court,[225] it finally decided to draft the safeguard clause in a simple way that avoids subjective components and allows a direct link to be established with paragraph 2 of this draft article. This ensures that if the State of the official fails to fulfil the obligation it has undertaken to submit the case to its competent authorities for the purpose of prosecution, the forum State will be able to reactivate its criminal proceedings. The expression "may resume" emphasizes the optional nature of this power of the forum State. The aim is to reflect the different situations in which the forum State may find itself depending on the nature of the crime committed by the official and the circumstances of the crime, in particular its gravity and, especially, its possible classification as a crime under international law, a category of crimes that cannot be allowed to go unpunished.

(17) Paragraph 4 expressly mentions, as factors indicating a breach of the obligation, failure to "promptly and in good faith submit the case" to the competent authorities of the State of the official for the purpose of prosecution. This wording is meant to draw attention to the requirement to avoid any delaying tactics or merely formalistic submissions that would be contrary to the purpose of the transfer of proceedings.

Paragraph 5

(18) Paragraph 5 contains a "without prejudice" clause stating that draft article 15 is "without prejudice to any other obligations of the forum State or the State of the official under international law".

[224] See, in particular, paragraphs (32)–(34) of the commentary to draft article 14 above.

[225] Article 17, paragraph 1 (a), of the Rome Statute provides that the Court must find a case inadmissible unless the "State which has jurisdiction over it ... is unwilling or unable genuinely to carry out the investigation or prosecution". Paragraph 2 identifies the circumstances to be taken into account in determining "unwillingness in a particular case", namely: "(a) The proceedings were or are being undertaken or the national decision was made for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court referred to in article 5; (b) There has been an unjustified delay in the proceedings which in the circumstances is inconsistent with an intent to bring the person concerned to justice; (c) The proceedings were not or are not being conducted independently or impartially, and they were or are being conducted in a manner which, in the circumstances, is inconsistent with an intent to bring the person concerned to justice." The final proposal considered by the Commission was worded as follows: "4. The competent authorities of the forum State can resume the exercise of their criminal jurisdiction when the competent authorities of the official's State, after having accepted the transfer, conduct themselves in a manner indicating that: (a) they have no intention to bring the official concerned to justice; (b) they aim at shielding the official concerned from criminal responsibility".

(19) This paragraph is meant to address the concern expressed, during the debate on draft article 15, that the provision on the transfer of criminal proceedings might not be fully compatible or might even be in contradiction with various rules of international law that impose a primary obligation on States to exercise jurisdiction over individuals who have committed certain crimes under international law. The discussion focused, in particular, on the obligation to extradite or prosecute established in article 7 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and the interpretation given to it by the International Court of Justice in the case concerning *Questions relating to the Obligation to Prosecute or Extradite*. Since the Court has defined the obligation to prosecute as an automatic and primary obligation, and extradition as an alternative that comes into play only when the forum State is prevented from exercising its jurisdiction,[226] a question arose as to whether the system for the transfer of criminal proceedings established in draft article 15, which does not make the transfer contingent on an inability of the forum State to exercise its jurisdiction, is in conformity with the obligations voluntarily accepted by the States parties to the Convention against Torture.

(20) In view of this special problem, the Commission has included a "without prejudice" clause to be applied in connection with the transfer of criminal proceedings. This clause applies both to obligations owed by the forum State and to those owed by the State of the official and is not subject to limitations. It therefore applies in respect of any obligation arising under international law, irrespective of its source or the subject matter to which it relates.

Article 16
Fair treatment of the official

1. An official of another State over whom the criminal jurisdiction of the forum State is exercised or could be exercised shall be guaranteed fair treatment, including a fair trial, and full protection of his or her rights and procedural guarantees under applicable national and international law, including human rights law and international humanitarian law.

2. Any such official who is in prison, custody or detention in the forum State shall be entitled:

(a) to communicate without delay with the nearest appropriate representative of the State of the official;

(b) to be visited by a representative of that State; and

(c) to be informed without delay of his or her rights under this paragraph.

3. The rights referred to in paragraph 2 shall be exercised in conformity with the laws and regulations of the forum State, subject to the proviso that the said laws and regulations must enable full effect to be given to the purpose for which the rights referred to in paragraph 2 are intended.

Commentary

(1) Draft article 16 recognizes the right of an official of another State to be treated fairly by the authorities of the forum State that are exercising or have exercised jurisdiction over that official. The Commission has opted for an approach centred on the official, whose rights are recognized, rather than the mere enumeration of obligations owed by the forum State. This more adequately reflects the eminently personal nature of the rights and guarantees set forth in the draft article. This approach is reflected both in the title of the draft article (Fair treatment of the official) and in its paragraphs 1 and 2, which begin, respectively, with the words "[a]n official ... shall be guaranteed" and "[a]ny such official ... shall be entitled". The rights enjoyed by the State official are encompassed under the general heading of "fair treatment", on the understanding that this expression necessarily includes the requirements of impartiality and independence.

[226] *Questions relating to the Obligation to Prosecute or Extradite* (see footnote 222 above), p. 456, paras. 94–95.

(2) The recognition of the official's right to fair treatment is an additional safeguard supplementing those already listed in draft articles 9 to 15. This safeguard applies to the official, insofar as the rights listed in draft article 16 are of an individual nature. It should nonetheless be recalled that these safeguards apply to the official in his or her capacity as such and are therefore also safeguards for the official's State. This draft article thus responds to the concerns expressed by some States regarding the possibility that one of their officials might be subjected to the jurisdiction of a State whose legal system does not provide sufficient guarantees of respect for human rights, especially the rights and guarantees inherent in the notion of a fair trial.

(3) Draft article 16 draws upon and echoes the wording of article 11 of the draft articles on prevention and punishment of crimes against humanity.[227] Like that article, draft article 16 consists of three paragraphs concerning, respectively, the recognition of the general procedural rights and guarantees that any individual may enjoy (para. 1); special recognition of a set of rights enjoyed by a State official who is in prison, custody or detention in the forum State (para. 2); and the rules applicable to the exercise of the special rights set forth in paragraph 2 (para. 3). However, while draft article 16 follows the structure of the aforementioned draft article 11, there are drafting and conceptual differences corresponding to elements that are specific to the present draft articles.

(4) Paragraph 1 provides that "[a]n official of another State ... shall be guaranteed fair treatment, including a fair trial, and full protection of his or her rights and procedural guarantees". This generic statement includes all the rights and guarantees enjoyed by any individual in relation to any measure taken against him or her by the authorities of the forum State. These include rights relating to personal liberty or deprivation thereof and the various components of the right of access to the courts and the right to a fair trial, including the right of a person accused of a crime to be informed of the charges against him or her, to be assisted by counsel of his or her own choosing and to communicate with the authorities of the forum State in a language he or she understands.[228] The category of rights and procedural guarantees also includes the various components of the right to consular assistance recognized in article 36 of the Vienna Convention on Consular Relations. This right is enjoyed by any national of a State whether or not he or she has the status of an official within the meaning of the present draft articles.

(5) The rights and procedural guarantees referred to in draft article 16, paragraph 1, and the conditions in which their exercise must be ensured and protected are those set forth in the national law of the forum State and in international law, including human rights law and international humanitarian law, which define the applicable international standard, the meaning of which has already been established by the Commission in relation to article 11 of the draft articles on prevention and punishment of crimes against humanity. Although the relevant international standards usually refer to "rights" or "rights and guarantees", the term "rights and procedural guarantees" has been used in paragraph 1 to accommodate the variety of circumstances in which these must be ensured in respect of a foreign official, which are not limited to judicial proceedings.

(6) With regard to this last issue, the Commission did not consider it necessary to include in the draft article an express reference to the different stages or points in time at which the authorities of the forum State must ensure respect for the official's rights and procedural guarantees. These rights and guarantees must be safeguarded and protected whenever those authorities take any action with respect to the official of another State, both in the period prior to the determination of immunity and during and after the process of determining immunity, including the prosecution of the official and the enforcement of any sentence imposed on him or her.

(7) Paragraph 2 establishes a new right that is accorded to an official of another State who is under any form of imprisonment, custody or detention in the forum State. Its wording is

[227] *Official Records of the General Assembly, Seventy-fourth Session, Supplement No. 10* (A/74/10), paras. 44 and 45, draft articles on prevention and punishment of crimes against humanity, article 11 (Fair treatment of the alleged offender) and commentary thereto.

[228] For a list of the rights included in this category, see the seventh report of the Special Rapporteur on immunity of State officials from foreign criminal jurisdiction (A/CN.4/729), paras. 159–168.

modelled on article 11, paragraph 2, of the draft articles on prevention and punishment of crimes against humanity, but some significant changes have been introduced, in particular the deletion of any reference to ties of nationality or residence between the official and the official's State. This is because the special rights articulated in paragraph 2 of draft article 16 are distinct from the right to consular assistance, which is understood to be included among the rights and procedural guarantees referred to in paragraph 1 and will apply in all circumstances.

(8) Although the right to consular assistance applies to any State official who is a national of that State, the Commission has borne in mind that, under the definition of "State official" contained in draft article 2, subparagraph (a), the official need not necessarily be a national of the State, in which case he or she would not be covered by the right to consular assistance. It has also taken account of the fact that an official's immunity from foreign criminal jurisdiction is recognized for the benefit of the State and by virtue of the special relationship between the official and the official's State, which should have a special bearing on the rights and procedural guarantees to which the official is entitled. For this reason, the Commission considered it useful to include, in the draft article on fair treatment of the official, a special provision recognizing certain rights that operate solely by virtue of the relationship between the State and its official. These additional rights are linked to cases in which the official is in prison, custody or detention in the forum State, as this is the most extreme scenario in which the forum State's exercise of jurisdiction over a foreign official can have an adverse impact on the performance of his or her State functions or representation of the State and, therefore, on immunity.

(9) Paragraph 2 of the draft article begins with the words "[a]ny such official" to reinforce the link with paragraph 1. The two paragraphs must be read together for a proper understanding of the scope of the concept of "fair treatment of the official". In defining the content of the special rights accorded to an official of another State, article 11 of the draft articles on prevention and punishment of crimes against humanity was used as a model. As noted in the preceding paragraph, the Commission considered that ensuring that the foreign official can communicate with and be visited by the nearest appropriate representative of his or her State, and be informed of these rights, constitutes a safeguard both for the official and for the official's State.

(10) Paragraph 3 reproduces almost verbatim the corresponding paragraph of the above-mentioned draft article 11, which in turn is based on article 36, paragraph 2, of the Vienna Convention on Consular Relations.[229] Pursuant to this paragraph, national law is identified as the applicable law for the exercise of the special rights set forth in paragraph 2, given that the precise manner in which individuals are arrested, detained or imprisoned is, to a large extent, governed by national rules. Therefore, the manner in which such an individual may exercise the rights to receive information and to communicate with or be visited by the appropriate representatives of another State may vary from one State to another. However, the recognition of this diversity and the resulting margin of discretion of the forum State are limited by the last phrase of paragraph 3, which states that the application of national law is "subject to the proviso that the said laws and regulations must enable full effect to be given to the purpose for which the rights referred to in paragraph 2 are intended". This criterion of interpretation in accordance with the intended purpose is designed to ensure that the forum State will not exercise its margin of discretion in an arbitrary manner that would, in practice, impair the rights to which the official of another State is entitled under paragraph 2 of the draft article.

Article 17
Consultations

The forum State and the State of the official shall consult, as appropriate, at the request of either of them, on matters relating to the immunity of an official covered by the present draft articles.

[229] For the sake of consistency with the terminology used in the present draft articles, the term "forum State" has been used instead of "State in the territory under whose jurisdiction the person is present".

Commentary

(1) Draft article 17 concerns consultations between the forum State and the State of the official. Consultations are a mechanism that is commonly used for different purposes in inter-State relations. Consultations are held in particular, though not exclusively, to obtain information on matters of common interest, to seek the views of another State on such matters, to identify joint courses of action to prevent the formalization of a dispute between two States or to facilitate a solution to a dispute that has already been formalized. The obligation for the States concerned to hold consultations has been included in numerous international treaties and in treaties on international cooperation and legal assistance in criminal matters.[230]

(2) The consultations referred to in draft article 17 are not limited to a specific area and may concern all "matters relating to the immunity of an official covered by the present draft articles". Consultations may therefore relate both to the process of determining immunity and to any other issue related to immunity, including the normative elements that define immunity *ratione personae* (Part Two) and immunity *ratione materiae* (Part Three), as well as procedural provisions and safeguards (Part Four). Consultations should thus be distinguished from the "requests for information" provided for in draft article 13, which are limited to the information necessary for the determination of immunity by the forum State and the decision on the invocation or waiver of immunity by the State of the official.

(3) Consultations are a procedural safeguard for both the State of the official and the forum State and may therefore be held at the request of either State. Given that consultations are considered a procedural safeguard, the Commission decided to use the word "shall" to denote the obligatory nature of the consultations. However, the phrase "as appropriate" was also included to introduce an element of flexibility that allows the forum State and the State of the official to adapt to the circumstances of each specific case, including the situation of their diplomatic relations. The use of this flexibility formula does not change the obligatory nature of the consultations, nor does it mean that recourse to such consultations is merely recommended.

(4) The Commission did not consider it necessary to establish any procedure for consultations, preferring instead to preserve the extremely flexible nature of this mechanism.

(5) Lastly, it should be emphasized that consultations do not in themselves constitute a dispute settlement system, nor is their function exclusively related to dispute settlement. However, there is nothing to prevent consultations from being held in the context of an ongoing or emerging dispute between the forum State and the State of the official. For this reason, the draft article on consultations has been placed at the end of Part Four of the draft articles, immediately before the draft article on the settlement of disputes.

Article 18
Settlement of disputes

1. In the event of a dispute concerning the interpretation or application of the present draft articles, the forum State and the State of the official shall seek a solution by negotiation or other peaceful means of their own choice.

2. If a mutually acceptable solution cannot be reached within a reasonable time, the dispute shall, at the request of either the forum State or the State of the official, be submitted to the International Court of Justice, unless both States have agreed to submit the dispute to arbitration or to any other means of settlement entailing a binding decision.

[230] See Convention on Mutual Assistance in Criminal Matters between the Member States of the Community of Portuguese-speaking Countries, art. 18; and Model Treaty on Mutual Assistance in Criminal Matters, art. 21.

Commentary

(1) Draft article 18 is the last of the provisions in Part Four of the draft articles and concerns the settlement of any disputes that may arise between the forum State and the State of the official.

(2) The practice generally followed by the Commission to date has been not to include dispute settlement provisions in its draft articles, leaving the matter to be decided by States at a later stage. However, the recent draft articles on prevention and punishment of crimes against humanity include an article 15 on the settlement of disputes, which was justified by the fact that the draft articles were conceived by the Commission as a draft treaty.

(3) Since the Commission has not yet decided whether to recommend to the General Assembly that the present draft articles be used as a basis for the negotiation of a treaty, different views have been expressed on the advisability of including draft article 18. The Commission nevertheless considered it preferable to include a draft article on dispute settlement, for several reasons. Among them is a wish to encourage States to express their views in this regard by commenting on the draft article, which would not have been possible if it had not been included until the draft articles' adoption on second reading.

(4) A further consideration is that draft article 18 follows the logic underpinning the content and structure of Part Four of the draft articles. The procedural provisions and safeguards contained in Part Four are intended, *inter alia*, to help create conditions of trust between the forum State and the State of the official that will eliminate or reduce the possibility that a dispute may arise in connection with the immunity of a particular official from foreign criminal jurisdiction. If such a dispute were nonetheless to arise, it could only be resolved through the means of peaceful settlement accepted in contemporary international law. The Commission has therefore considered it useful to include draft article 18 as the final step in the *iter* or logical sequence that serves as the common thread running through Part Four of the draft articles.

(5) In order to ensure consistency in its work, the Commission has taken into account the text of article 15 of the above-mentioned draft articles on prevention and punishment of crimes against humanity, the basic elements of which are reflected in draft article 18 of the present draft articles. However, the wording adopted by the Commission differs in some respects from that earlier text, in order to reflect certain features specific to the dispute settlement system applicable in relation to the immunity of State officials from foreign criminal jurisdiction.

(6) Paragraph 1 of the draft article establishes the obligation to settle by peaceful means any dispute arising between the forum State and the State of the official. The dispute has been defined by reference to "the interpretation or application of the present draft articles". This terminology is generally accepted and is found in various dispute settlement clauses contained in treaties, as well as in the jurisprudence of the International Court of Justice and other international tribunals.

(7) Paragraph 1 broadly follows the wording of Article 33 of the Charter of the United Nations, using the expression "shall seek a solution" to refer to an obligation of conduct required of the forum State and the State of the official. The phrase "by negotiation or other peaceful means of their own choice" is intended to emphasize the principle of free choice of means. The specific mention of negotiation follows the generally accepted model in various dispute settlement clauses found in treaties, without implying that other peaceful means of dispute settlement are excluded. On the contrary, the reference to "other peaceful means" is to be understood as including all the means spelled out in Article 33 of the Charter: negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice. In any event, it should be borne in mind that the negotiation referred to in this paragraph should not be confused with the consultations referred to in draft article 17, which are autonomous in nature and are not required to be held as a precondition for the implementation of draft article 18.

(8) Paragraph 2 establishes a dispute settlement system which, following the traditional model, will be triggered only if the States have been unable to resolve their dispute by a means of their own choice, as provided in paragraph 1 of the draft article. This system is

compulsory, as shown by the expression “the dispute shall ... be submitted”. It may be activated unilaterally by either the forum State or the State of the official, on the sole condition that they have been unable to reach “a mutually acceptable solution ... within a reasonable time”. The Commission did not consider it appropriate to set a specific time limit for this purpose, preferring instead to use the term “reasonable time”, the scope of which will need to be determined on a case-by-case basis by the International Court of Justice or other dispute settlement body.

(9) Jurisdiction to settle the dispute in a binding manner is attributed to the International Court of Justice, unless the forum State and the State of the official “have agreed to submit the dispute” to another means of judicial settlement, which must, in any case, lead to “a binding decision”. This recognizes the character of the International Court of Justice as a reference jurisdiction for international law, which has also played a significant role in relation to the immunity of State officials from foreign criminal jurisdiction.

(10) Among the alternative means of binding settlement of disputes relating to immunity, the Commission has included arbitration in the first place, since it is a well-established means that is frequently used by States and is included as an alternative legal means in many international treaties. Paragraph 2 of draft article 18 also provides, as an alternative, for any “other means of settlement entailing a binding decision”. This wording, taken from article 282 of the United Nations Convention on the Law of the Sea,[231] accommodates the possibility that disputes concerning immunity of State officials from foreign criminal jurisdiction may or must be submitted to other international tribunals, especially those established pursuant to treaties or within regional organizations.

(11) It should be emphasized that if the International Court of Justice is replaced with another means of settlement agreed upon by the States concerned, the alternative body chosen must in any case have jurisdiction to settle the dispute by means of a decision that is binding on the parties, be it an arbitral award or a judgment of an international or internationalized court.

(12) To conclude the commentary on the dispute settlement system, attention is drawn to the fact that draft article 18 does not contain an opt-out clause allowing for unilateral derogation from the system of binding settlement of disputes set out in paragraph 2, thus departing from the model of article 15 of the draft articles on prevention and punishment of crimes against humanity. Although some members of the Commission supported the inclusion of such a clause, others preferred not to include one, given that this matter is closely related to the final form of the draft articles and the recommendation to be addressed to the General Assembly in due course. Finally, other members pointed out that the debate on whether or not to include such a clause has no real effect, since unilateral derogation from the binding settlement of disputes could occur under any circumstances. Given this divergence of views, the Commission considered it preferable not to include a unilateral derogation clause in the draft articles adopted on first reading, although it may return to this issue at a later stage in the light of comments from States and the recommendation to be addressed to the General Assembly on the future of the draft articles.

(13) Finally, it should be noted that draft article 18 as adopted by the Commission on first reading does not include the final paragraph originally proposed by the Special Rapporteur, under which, “[i]f the dispute is referred to arbitration or to the International Court of Justice, the forum State shall suspend the exercise of its jurisdiction until the competent organ issues a final ruling”.[232] While some members of the Commission took the view that an obligation to suspend criminal proceedings after submitting the dispute to a binding means of settlement could constitute a useful procedural safeguard, reference to such an obligation was excluded because it was not possible to find precedents, either in existing international treaties or in international jurisprudence, to support this provision. Moreover, the suspension of criminal proceedings in these circumstances could encounter serious difficulties in some State legal systems. Therefore, draft article 18 does not cover this issue, and the possible suspension of

[231] United Nations Convention on the Law of the Sea (Montego Bay, 10 December 1982), United Nations, *Treaty Series*, vol. 1834, No. 31363, p. 3.

[232] Eighth report of the Special Rapporteur on immunity of State officials from foreign criminal jurisdiction (A/CN.4/739), para. 54, draft article 17, para. 3.

domestic proceedings will depend on any relevant agreement between the parties or, where applicable, any provisional measures ordered by the International Court of Justice or other organ having jurisdiction under paragraph 2.

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

Crime of genocide

Rome Statute of the International Criminal Court, 17 July 1998, article 6;

Convention on the Prevention and Punishment of the Crime of Genocide, 9 December 1948, article II.

Crimes against humanity

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

War crimes

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

Crime of apartheid

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

Torture

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

Enforced disappearance

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

Commentary

(1) As established in paragraph 2 of draft article 7, "the crimes under international law mentioned [in paragraph 1] are to be understood according to their definition in the treaties enumerated in the annex to the present draft articles". As indicated in the commentary to the said paragraph 2, the sole purpose of the list included in the annex is to identify the definitions of the crimes under international law in respect of which immunity *ratione materiae* does not apply. The list has no effect whatsoever on the customary nature of these crimes or on any specific obligations that the treaties included in the list may impose on the States parties thereto.

(2) The choice of treaties whose articles are included in the annex to provide a definition of the various crimes under international law was based on three fundamental criteria: (a) the desire to avoid possible confusion when several treaties use different language to define the same crime; (b) the selection of treaties that are universal in scope; and (c) the selection of treaties providing the most up-to-date definitions available.

(3) Genocide was defined for the first time in the Convention on the Prevention and Punishment of the Crime of Genocide [233] and its definition has remained constant in contemporary international criminal law, notably in the statute of the International Tribunal for the Former Yugoslavia (art. 4),[234] the statute of the International Criminal Tribunal for Rwanda (art. 2)[235] and, in particular, the Rome Statute of the International Criminal Court, article 6 of which reproduces the definition contained in the Convention on the Prevention and Punishment of the Crime of Genocide. For its part, the Commission defined genocide in article 17 of the 1996 draft Code of Crimes against the Peace and Security of Mankind.[236] For

[233] Convention on the Prevention and Punishment of the Crime of Genocide, art. II.
[234] See footnote 36 above.
[235] See footnote 37 above.
[236] *Yearbook … 1996*, vol. II (Part Two), p. 44.

the purposes of the present draft articles, the Commission has included in the annex both the Rome Statute (art. 6) and the Convention on the Prevention and Punishment of the Crime of Genocide (art. II), given that the wording used in the two instruments is practically identical and has the same meaning.

(4) With regard to crimes against humanity, it should be recalled that some international treaties have identified certain behaviours as "crimes against humanity" [237] and that international courts have ruled on the customary nature of this category of crimes. The statute of the International Tribunal for the Former Yugoslavia (art. 5) and the statute of the International Criminal Tribunal for Rwanda (art. 3) have also defined this crime. The Commission itself defined this category of crimes in the 1996 draft Code of Crimes against the Peace and Security of Mankind (art. 18).[238] However, the Rome Statute was the first instrument to define this category of crimes separately and comprehensively. For this reason, the Commission considered that article 7 of the Rome Statute should be taken as the definition of crimes against humanity for the purposes of the present draft article. This is consistent with the decision taken earlier by the Commission on the draft articles on prevention and punishment of crimes against humanity, draft article 2 of which reproduces the definition of this category of crimes contained in article 7 of the Rome Statute.[239]

(5) The concept of war crimes has a long tradition that was originally associated with treaties on international humanitarian law. The Geneva Conventions of 12 August 1949 for the protection of war victims and the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), define that category of crimes as "grave breaches".[240] War crimes were defined in the statute of the International Tribunal for the Former Yugoslavia (arts. 2 and 3) and the statute of the International Criminal Tribunal for Rwanda (art. 4), as well as by the Commission itself in the 1996 draft Code of Crimes against the Peace and Security of Mankind (art. 20).[241] The latest definition of war crimes is contained in article 8, paragraph 2, of the Rome Statute, which draws on previous experience and refers comprehensively to war crimes committed in both international and internal armed conflicts, as well as to crimes recognized on the basis of treaties and customary law. For the purposes of the present draft article, the Commission decided to use the definition contained in article 8, paragraph 2, of the Rome Statute, as being the most up-to-date version of the definition of this category of crimes. This does not imply, however, that the importance of the Geneva Conventions of 1949 and Protocol I thereto in relation to the definition of war crimes should be overlooked.

(6) The crime of apartheid was defined for the first time in the International Convention on the Suppression and Punishment of the Crime of Apartheid of 30 November 1973, which, although it describes apartheid as a crime against humanity and a crime under international law (art. I), contains a detailed and separate definition of the crime of apartheid (art. II). For this reason, the Commission decided to use the definition in the 1973 Convention for the purposes of the present draft article.

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[237] International Convention on the Suppression and Punishment of the Crime of Apartheid, art. I; and International Convention for the Protection of All Persons from Enforced Disappearance, preamble, fifth paragraph.

[238] *Yearbook… 1996*, vol. II (Part Two), p. 47.

[239] See *Official Records of the General Assembly, Seventy-fourth Session, Supplement No. 10* (A/74/10), pp. 27–47.

[240] Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of 12 August 1949 (First Geneva Convention), United Nations, *Treaty Series*, vol. 75, No. 970, p. 31, art. 50; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea of 12 August 1949 (Second Geneva Convention), *ibid.*, No. 971, p. 85, art. 51; Geneva Convention relative to the Treatment of Prisoners of War of 12 August 1949 (Third Geneva Convention), *ibid.*, No. 972, p. 135, art. 130; Geneva Convention relative to the Protection of Civilian Persons in Time of War of 12 August 1949 (Fourth Geneva Convention), *ibid.*, No. 973, p. 287, art. 147; Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) (Geneva, 8 June 1977), *ibid.*, vol. 1125, No. 17512, p. 3, art. 85.

[241] *Yearbook … 1996*, vol. II (Part Two), pp. 53–54.

(7) Torture is defined as a violation of human rights in all the relevant international instruments. Its characterization as prohibited conduct liable to criminal prosecution is found for the first time in the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 10 December 1984, which defines it as a separate crime in article 1, paragraph 1. This definition includes, moreover, the significant requirement that an act cannot be characterized as torture unless it is carried out by or at the instigation of or with the consent of public officials, which places this crime squarely within the scope of the present draft articles. A similar definition is contained in the Inter-American Convention to Prevent and Punish Torture (arts. 2 and 3).[242] The Commission considers that, for the purposes of the present draft article, torture is to be understood in accordance with the definition in the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

(8) The enforced disappearance of persons was defined for the first time in the Inter-American Convention on the Forced Disappearance of Persons of 9 June 1994 (art. II).[243] The International Convention for the Protection of All Persons from Enforced Disappearance of 20 December 2006 also defines this crime (art. 2). As in the case of torture, this definition requires that the act be carried out by or at the instigation of or with the consent of public officials, which places this crime squarely within the scope of the present draft articles. The Commission therefore considers that, for the purposes of the present draft article, the definition of enforced disappearance should be understood in accordance with article 2 of the 2006 Convention.

(9) Taking into account its relationship to draft article 7, the commentary to the annex should be read together with the commentary to that draft article, to which the reader is referred.

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[242] Inter-American Convention to Prevent and Punish Torture (Cartagena, Colombia, 9 December 1985), Organization of American States, *Treaty Series*, No. 67.

[243] Inter-American Convention on the Forced Disappearance of Persons (Belem do Pará, Brazil, 9 June 1994), Organization of American States, *Official Records*, OEA/Ser.A/55.