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Second report on immunity of State officials from foreign criminal jurisdiction by Claudio Grossman Guiloff, Special Rapporteur*

Contents

	<i>Page</i>
I. Introduction	3
II. Purpose and approach of the report	4
III. Comments and observations received from States	6
A. Comments and observations regarding draft article 7 as adopted by the Commission on first reading	6
Part Three: Immunity <i>ratione materiae</i>	6
Article 7: Crimes under international law in respect of which immunity <i>ratione materiae</i> shall not apply	6
B. General comments to Part Four of the draft articles	19
C. Comments and observations regarding the individual draft articles of Part Four as adopted by the Commission on first reading	20
Part Four: Procedural provisions and safeguards	20
Article 8: Application of Part Four	20
Article 9: Examination of immunity by the forum State	22
Article 10: Notification to the State of the official	25
Article 11: Invocation of immunity	29
Article 12: Waiver of immunity	32
Article 13: Requests for information	35
Article 14: Determination of immunity	37
Article 15: Transfer of the criminal proceedings	41

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Article 16: Fair treatment of the State official.....	44
Article 17: Consultations.....	47
Article 18: Settlement of disputes	48
Annexes	
I. Marked-up text of draft articles 7–18 adopted on first reading with proposed modifications.....	52
II. Clean text of draft articles 7–18 with the proposed amendments of the Special Rapporteur	57

I. Introduction

1. The topic “Immunity of State officials from foreign criminal jurisdiction” was included in the programme of work of the International Law Commission at its fifty-ninth session (2007).¹ At the same session, the Commission appointed Mr. Roman A. Kolodkin as Special Rapporteur² and requested the Secretariat to prepare a background study on the topic, which was subsequently made available to the Commission at its sixtieth session.³
2. The Special Rapporteur submitted three reports to the Commission. His preliminary report was received and considered by the Commission at its sixtieth session (2008), and his second and third reports at its sixty-third session (2011).⁴
3. At its sixty-fourth session (2012), the Commission appointed Ms. Concepción Escobar Hernández as Special Rapporteur to replace Mr. Kolodkin, who was no longer a member of the Commission. Ms. Escobar Hernández submitted a total of eight reports: the Commission received and considered her preliminary report at its sixty-fourth session (2012), her second report during its sixty-fifth session (2013), her third report during its sixty-sixth session (2014), her fourth report during its sixty-seventh session (2015), her fifth report during its sixty-eighth (2016) and sixty-ninth (2017) sessions, her sixth report during its seventieth (2018) and seventy-first (2019) sessions, her seventh report during its seventy-first session (2019) and her eighth report during its seventy-second session (2021).⁵ On the basis of the draft articles proposed by the Special Rapporteur in her second, third, fourth, fifth and seventh reports, the Commission had provisionally adopted 13 draft articles and commentaries thereto by the conclusion of its seventy-second session (2021).⁶
4. At its seventy-third session (2022), the Commission adopted a set of 18 draft articles on immunity of State officials from foreign criminal jurisdiction, including an annex, together with commentaries thereto, on first reading.⁷ In accordance with articles 16 to 21 of its statute, the Commission transmitted the draft articles, through the Secretary-General, to Governments for comments and observations, with the request that such comments and observations be submitted to the Secretary-General by 1 December 2023.⁸
5. At its seventy-fourth session (2023), the Commission appointed Mr. Claudio Grossman Guiloff as Special Rapporteur to replace Ms. Escobar Hernández, who was no longer a member of the Commission.⁹ At the seventy-fifth session of the Commission, Mr. Grossman Guiloff submitted his first report on the topic, in which he examined the general comments and observations submitted by Governments on the draft articles, as well as specific comments and observations to draft articles 1 to 6.¹⁰ On the basis of those comments and observations, as well as new developments in international law since the

¹ At its 2940th meeting, on 20 July 2007 (*Official Records of the General Assembly, Sixty-second Session, Supplement No. 10 (A/62/10)*, para. 376). The General Assembly, in paragraph 7 of its resolution 62/66 of 6 December 2007, took note of the decision of the Commission to include the topic in its programme of work. The topic had been included in the long-term programme of work of the Commission during its fifty-eighth session (2006), on the basis of the proposal contained in annex A of the report of the Commission (*Ibid.*, *Sixty-first Session, Supplement No. 10 (A/61/10)*, para. 257).

² *Official Records of the General Assembly, Sixty-second Session, Supplement No. 10 (A/62/10)*, para. 376.

³ *Ibid.*, para. 386. For the memorandum prepared by the Secretariat, see [A/CN.4/596](#) and [Corr.1](#).

⁴ [A/CN.4/601](#), [A/CN.4/631](#) and [A/CN.4/646](#).

⁵ [A/CN.4/654](#), [A/CN.4/661](#), [A/CN.4/673](#), [A/CN.4/686](#), [A/CN.4/701](#), [A/CN.4/722](#), [A/CN.4/729](#) and [A/CN.4/739](#).

⁶ Report of the International Law Commission on the work of its seventy-second session, *Official Records of the General Assembly, Seventy-sixth Session, Supplement No. 10 (A/76/10)*, chap. VI, sect. C.

⁷ Report of the International Law Commission on the work of its seventy-third session, *Ibid.*, *Seventy-seventh Session, Supplement No. 10 (A/77/10)*, para. 64.

⁸ *Ibid.*, para. 66.

⁹ Report of the International Law Commission on the work of its seventy-fourth session, *Ibid.*, *Seventy-eighth Session, Supplement No. 10 (A/78/10)*, para. 250.

¹⁰ [A/CN.4/775](#).

adoption of the draft articles on first reading, the Special Rapporteur made proposals for consideration on second reading in relation to draft articles 1 to 6. Owing to late submissions and the time needed for translation, as well as the need to satisfy the request from some States to have more time to address the topic, the Special Rapporteur considered that dividing the second reading of the topic into two reports would offer more time to achieve the goal of successfully completing the work on the topic and allow for careful and sound consideration of all aspects.¹¹

6. At its seventy-fifth session (2024), the Commission considered the Special Rapporteur's first report. At its 3680th meeting, on 9 July 2024, the Commission decided to refer draft articles 1 to 6 to the Drafting Committee.¹² After devoting seven meetings to the consideration of the topic of immunity of State officials from foreign criminal jurisdiction, the Drafting Committee provisionally adopted draft articles 1, 3, 4 and 5 [6].¹³ At the Commission's 3698th meeting, on 30 July 2024, the Chair of the Drafting Committee presented the report of the Drafting Committee.¹⁴ At the same meeting, the Commission took note of draft articles 1, 3, 4 and 5.¹⁵

7. Also at its seventy-fifth session, the Commission invited Governments to submit further comments and observations on draft articles 7 to 18 and the draft annex to the draft articles on immunity of State officials from foreign criminal jurisdiction, with the request that such comments and observations be submitted to the Secretary-General by 15 November 2024.¹⁶

II. Purpose and approach of the report

8. In keeping with the approach adopted by the Special Rapporteur in his first report, the purpose of the present report is to make proposals for the modification of the draft articles and commentaries, where necessary, on the basis of the comments made by States. It is also intended to complement the draft articles and commentaries with references to new developments in international law that have taken place since the draft articles were adopted on first reading. The scope of the present report will be limited to the text of draft articles 7 to 18 and the draft annex, as well as the commentaries thereto. As noted above, draft articles 1 to 6 were discussed in the first report.

9. The Special Rapporteur would like to note that the Commission is now in the phase of a second reading of this topic – the longest-running topic on its current programme of work; one that has been on the Commission's agenda for almost 20 years. As is the Commission's practice on second reading, the purpose of this phase is to maintain the text and decisions adopted during the first reading, departing from that settled practice only where there are compelling reasons to do so, including new developments of international law, in this case, since 2022, as well as clarifications and corrections as needed.

10. Accordingly, the present report is aimed at addressing the comments and observations made by States on the draft articles and commentaries adopted on first reading. For this purpose, the written responses to the Commission's request for observations and the statements made in the Sixth Committee after the adoption by the Commission of the draft articles on first reading at its seventy-third session have been taken into account. Earlier comments made by States during the consideration of the topic were already taken into account by the Commission in previous sessions and over the past two decades. At its seventy-third session, when the draft articles were adopted on first reading, the Commission

¹¹ *Ibid.*, paras. 12 and 37.

¹² Report of the International Law Commission on the work of its seventy-fifth session, *Official Records of the General Assembly, Seventy-ninth Session, Supplement No. 10 (A/79/10)*, para. 144.

¹³ See [A/CN.4/L.1001](#).

¹⁴ Statement of the Chair available on the website of the Commission, at https://legal.un.org/ilc/guide/4_2.shtml.

¹⁵ *Official Records of the General Assembly, Seventy-ninth Session, Supplement No. 10 (A/79/10)*, para. 145.

¹⁶ *Ibid.*, para. 50.

considered developments in practice up until the date of the issuance of the draft articles and the commentaries thereto.

11. Written comments and observations regarding the draft articles and the commentaries thereto were to be sent to the Secretariat by 1 December 2023. The following States submitted comments (the dates of submission of the comments are shown in brackets): Australia (20 December 2023); Austria (4 December 2023); Brazil (1 December 2023); Czech Republic (11 December 2023); Estonia (1 December 2023); France (28 December 2023); Germany (1 December 2023); Iran (Islamic Republic of) (30 November 2023); Ireland (5 January 2024); Israel (1 December 2023); Japan (27 November 2023); Latvia (5 December 2023); Liechtenstein (30 November 2023); Lithuania (5 December 2023); Luxembourg (30 November 2023); Malaysia (29 November 2023); Mexico (14 December 2023); Morocco (1 December 2023); Netherlands (Kingdom of the) (1 December 2023); Norway (on behalf of the Nordic countries: Denmark, Finland, Iceland, Norway and Sweden) (1 December 2023); Panama (20 November 2023); Poland (22 November 2023); Portugal (4 January 2024); Republic of Korea (12 April 2024); Romania (29 November 2023); Russian Federation (18 December 2023); Saudi Arabia (3 November 2023); Sierra Leone (15 March 2024); Singapore (8 December 2023); Spain (15 March 2024); Switzerland (29 November 2023); Ukraine; United Arab Emirates (1 December 2023); United Kingdom of Great Britain and Northern Ireland (30 November 2023); and United States of America (6 December 2023).¹⁷

12. Additional written comments and observations regarding draft articles 7 to 18, the annex to the draft articles and the commentaries thereto were to be sent to the Secretariat by 15 November 2024. The following States submitted comments (the dates of submission of the comments are shown in brackets): Colombia (26 November 2024); Germany (14 November 2024); and Israel (15 November 2024).¹⁸

13. In the meetings of the Sixth Committee during the seventy-seventh session of the General Assembly, in 2022, the following States made comments on the draft articles on immunity of State officials from foreign criminal jurisdiction, including draft articles 7 to 18: Algeria; Argentina; Armenia; Australia; Austria; Belarus; Brazil; Cameroon; Chile; China; Colombia; Côte d'Ivoire; Cuba; Czech Republic; Egypt; El Salvador; Estonia; Germany; Greece; Iceland (on behalf of the Nordic countries); India; Iran (Islamic Republic of); Ireland; Israel; Italy; Japan; Malaysia; Mexico; Netherlands (Kingdom of the); Papua New Guinea; Peru; Philippines; Poland; Portugal; Republic of Korea; Romania; Russian Federation; Saudi Arabia; Sierra Leone; Singapore; Slovakia; Slovenia; South Africa; Spain; Thailand; Türkiye; United Arab Emirates; United Kingdom; United States; and Viet Nam. In the meetings of the Sixth Committee during the seventy-eighth session of the General Assembly, in 2023, the following States made comments on the draft articles on immunity of State officials from foreign criminal jurisdiction, including draft articles 7 to 18: Argentina; Austria; Belarus; Brazil; Chile; Colombia; Côte d'Ivoire; Cuba; Czech Republic; El Salvador; Estonia; France; Germany; Greece; India; Iran (Islamic Republic of); Ireland; Italy; Jordan; Malaysia; Mexico; Peru; Portugal; Romania; Saudi Arabia; Sierra Leone; Singapore; Slovenia; and Spain. In the 20th to 25th meetings of the Sixth Committee during the seventy-ninth session of the General Assembly, in 2024, the following States made comments on the draft articles on immunity of State officials from foreign criminal jurisdiction, including draft articles 7 to 18: Algeria; Australia; Austria; Belarus; Brazil; Bulgaria; Cameroon; Chile; China; Colombia; Croatia; Cuba; Czech Republic; Egypt; El Salvador; Equatorial Guinea; Eritrea; Estonia; France; Germany; Greece; Iceland (on behalf of the Nordic countries); India; Indonesia; Iran (Islamic Republic of); Ireland; Israel; Italy; Japan; Liechtenstein; Malaysia; Mexico; Morocco; Netherlands (Kingdom of the); Peru; Philippines; Poland; Portugal; Republic of Korea; Romania; Russian Federation; Sierra Leone; Singapore; Slovakia; Slovenia; Spain; Switzerland; Thailand; Türkiye; United Arab Emirates; United Kingdom; United States; and Viet Nam.¹⁹

¹⁷ See [A/CN.4/771](#) and [Add.1–2](#).

¹⁸ See [A/CN.4/771/Add.3](#).

¹⁹ See [A/CN.4/775/SR.20–SR.25](#).

14. The present report addresses comments and suggested amendments to draft articles 7 to 18, the annex to the draft articles and the commentaries thereto, submitted by States after the draft articles were adopted on first reading. In terms of approach, the report begins with a description of the comments and observations made by States under each draft article. These comments and observations are examined by the Special Rapporteur, who then proposes amendments to the draft articles and commentaries thereto, as necessary.

15. The Special Rapporteur emphasizes that the comments of States have been treated equally, and each one has been carefully considered. However, the Special Rapporteur would like to reiterate that it is not the function of the Commission on second reading to merely and automatically adopt the views of States, in particular in cases where there are significant divergences in the comments received. Rather, the Commission's goal on second reading is to carefully assess whether a need exists to modify the draft articles and the commentaries thereto based on the observations received, as well as any new developments that the Commission was not able to consider on first reading. On this point, the Special Rapporteur emphasizes that he fully agrees with comments submitted by States such as Germany, Netherlands (Kingdom of the) and Poland concerning the need to assess the existence and relevance of new developments in the topic.²⁰

16. The Special Rapporteur recalls the general comments contained in his first report,²¹ noting that those general comments are equally relevant to the consideration of the topic in the current report. In presenting draft articles 1 to 6 in his first report, the Special Rapporteur referred to the general comments by States concerning the draft articles adopted on first reading. In that report, he included an assessment of the legal values relevant for the consideration of the topic emphasized by several States, including the need to strike a balance between the principles of sovereign equality and accountability, while maintaining international peace and security.²²

17. Taking into account different States' comments, including that some of the draft articles reflect customary international law while others constitute progressive development,²³ the Special Rapporteur recommends that these draft articles be brought to the attention of the General Assembly for States to take note and, at the appropriate time, consider the draft articles as the basis for negotiating a treaty on the topic. This would create a further opportunity for States to satisfactorily deliberate and conclude the treatment of a topic that reflects important values for the international community.

III. Comments and observations received from States²⁴

A. Comments and observations regarding draft article 7 as adopted by the Commission on first reading

Part Three

Immunity *ratione materiae*

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;

²⁰ Comments and observations by States.

²¹ A/CN.4/775, chap. III, sect. A.

²² Ibid., paras. 16, 20 and 35.

²³ *Official Records of the General Assembly, Seventy-seventh Session, Supplement No. 10 (A/77/10)*, chap. VI, sect. C, general commentary, para. (12).

²⁴ The comments and observations can be found in A/CN.4/771 and Add.1–3.

- (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.

18. The commentary to this draft article and the draft annex are contained in chapter VI, section C, of the report of the Commission on its seventy-third session.²⁵

1. Comments and observations by States

(a) General comments

19. Draft article 7 enumerates crimes under international law to which immunity from foreign criminal jurisdiction *ratione materiae* shall not apply. The draft article comprises two paragraphs. The first paragraph lists the crimes and the second refers to the treaties that contain the definitions of those crimes. Those treaties are enumerated in the annex to the draft articles, entitled “List of treaties referred to in draft article 7, paragraph 2”.

20. Written observations relating specifically to draft article 7 were submitted by the following 35 States: Australia; Austria; Brazil; Czech Republic; Colombia; Estonia; France; Germany; Iran (Islamic Republic of); Ireland; Israel; Japan; Latvia; Liechtenstein; Lithuania; Luxembourg; Malaysia; Mexico; Morocco; Netherlands (Kingdom of the); Norway (on behalf of the Nordic countries); Poland; Portugal; Republic of Korea; Romania; Russian Federation; Saudi Arabia; Sierra Leone; Singapore; Spain; Switzerland; Ukraine; United Arab Emirates; United Kingdom; and United States.

21. In addition, 32 States made oral comments on draft article 7 in the Sixth Committee during the seventy-seventh session of the General Assembly: Algeria; Argentina; Armenia; Australia; Austria; Brazil; Cameroon; China; Czech Republic; Egypt; El Salvador; Germany; Iceland (on behalf of the Nordic countries); India; Iran (Islamic Republic of); Ireland; Israel; Italy; Japan; Malaysia; Peru; Poland; Russian Federation; Saudi Arabia; Slovakia; Slovenia; Sierra Leone; South Africa; Spain; United Arab Emirates; United Kingdom; and United States. Five States made oral comments in the Sixth Committee during the seventy-eighth session of the Assembly: Armenia; Liechtenstein; Poland; Ukraine; and United States. Twenty-eight States made oral comments in the Sixth Committee during the seventy-ninth session of the Assembly: Australia; Austria; Belarus; Brazil; Cameroon; China; Croatia; Czech Republic; Egypt; Eritrea; France; Germany; India; Iran (Islamic Republic of); Israel; Japan; Liechtenstein; Malaysia; Mexico; Netherlands (Kingdom of the); Portugal; Slovakia; Spain; Philippines; Republic of Korea; Russian Federation; United Kingdom; and United States.²⁶

22. When commenting on draft article 7, many States²⁷ underlined the need to ensure accountability for the most serious international crimes. Like many other States, Austria welcomed draft article 7 and considered this “central provision of the draft articles as a compromise, destined to contribute to combating impunity”.²⁸ Also in support of draft article 7, Estonia contended that, although immunity *ratione materiae* was fundamental to the facilitation of inter-State relations, it could not prevent the prosecution of State officials

²⁵ *Official Records of the General Assembly, Seventy-seventh Session, Supplement No. 10 (A/77/10)*.

²⁶ See *A/C.6/79/SR.20–SR.25*.

²⁷ For example, Australia, Brazil, Germany, Iran (Islamic Republic of), Ireland, Israel, Morocco, Norway (on behalf of the Nordic countries), the Russian Federation, Saudi Arabia, Switzerland, the United Arab Emirates and the United Kingdom (comments and observations by States).

²⁸ Comments and observations by States.

for the commission of international crimes.²⁹ In their statements to the Sixth Committee during the seventy-seventh session of the General Assembly, Armenia, El Salvador, Italy, Peru and South Africa expressed support for draft article 7. Croatia, Germany, Mexico, Slovakia and Spain also expressed support for draft article 7 in their statements to the Sixth Committee during the seventy-ninth session of the General Assembly.³⁰

23. States also noted that the regime of immunity of State officials from foreign criminal jurisdiction must take into account the developments of international criminal law in previous decades.³¹ In its comments, Spain, for example, highlighted that “account must be taken of the strides made in international criminal law in recent decades, in particular in terms of consolidating the principle of individual criminal responsibility for the commission of the most serious crimes under international law, defining the principle of accountability and identifying the fight against impunity for such crimes as a goal of the international community”.³² Similar views were expressed by Ireland, which argued that, as a result of the advancement of international criminal law in recent decades, international law currently imposed limits to immunity *ratione materiae* from foreign criminal jurisdiction.³³

24. Many States also emphasized a close link between draft article 7 and the procedural provisions and safeguards contained in Part Four of the draft articles.³⁴ In the opinion of Latvia, “the Commission has found and introduced safeguards and procedural provisions that will serve to avoid the possibility to exercise foreign criminal jurisdiction over State officials in a political or abusive manner”.³⁵ Norway (on behalf of the Nordic countries) expressed the view that the procedural guarantees and safeguards could address some of the concerns relating to draft article 7.³⁶

25. Concerning the nature of draft article 7, Austria, the Czech Republic, Lithuania and Spain considered the restrictions contained in the provision to be reflective of customary international law.³⁷ In its statement to the Sixth Committee at the seventy-ninth session of the General Assembly, Chile likewise affirmed that draft article 7 reflected customary international law.³⁸

26. Similarly, Liechtenstein, Luxembourg, Romania and Ukraine recognized the customary basis of draft article 7 in their written comments, at least with respect to the crimes of genocide, crimes against humanity, and war crimes. In the same way as many other States, in proving its position, Liechtenstein referred to the landmark Nuremberg and Tokyo trials, the judgment by the Supreme Court of Israel in *Attorney General of the Government of Israel v. Adolf Eichmann*, the Rome Statute of the International Criminal Court³⁹ and the Commission’s previous work.⁴⁰

²⁹ *Ibid.*

³⁰ See [A/C.6/79/SR.20](#), [A/C.6/79/SR.21](#) and [A/C.6/79/SR.23](#).

³¹ Germany, Ireland, Liechtenstein, Lithuania, Luxembourg, Norway (on behalf of the Nordic countries), Sierra Leone, Spain, Switzerland and Ukraine (comments and observations by States).

³² Comments and observations by States.

³³ “In particular, while acknowledging the difference of opinion within the Commission on draft article 7, in the view of Ireland the absence of a provision such as this would mean that the scope of immunity *ratione materiae* would be much broader than international law currently allows. Its view is that such immunity is in fact subject to important limits imposed by international criminal law as it has developed in recent decades. These limits, Ireland believes, should indeed be the subject of a draft article.” (*Ibid.*)

³⁴ For example, Austria, Norway (on behalf of the Nordic countries), the United Arab Emirates and the United States (comments and observations by States).

³⁵ Comments and observations by States.

³⁶ *Ibid.*

³⁷ *Ibid.*

³⁸ For State comments on the nature of draft article 7 in the Sixth Committee, see [A/C.6/79/SR.20–SR.25](#).

³⁹ Rome Statute of the International Criminal Court (Rome, 17 July 1998), United Nations, *Treaty Series*, vol. 2187, No. 38544, p. 3. For the 2010 amendments, see *ibid.*, vol. 2868, p. 197, and vol. 2922, p. 199. For the Amendment to Article 8 of the Rome Statute of the International Criminal Court (Kampala, 10 June 2010), see *ibid.*, vol. 2868, No. 38544, p. 197.

⁴⁰ Comments and observations by States.

27. Similarly, Australia, France and Germany discerned a trend towards the acceptance of exceptions to immunity *ratione materiae* in terms of the most serious crimes under international law.⁴¹ In support of that view, Germany drew the attention of the Commission to decisions from its national courts from 2021, 2022 and 2024 in which immunity *ratione materiae* was deemed inapplicable in cases involving crimes under customary international law. Germany expressed the view that “the existence of exceptions to functional immunity *ratione materiae* when the most serious international crimes are being committed is a *conditio sine qua non* for the application of international criminal law in national courts, as such crimes are often committed by State officials”.⁴²

28. By contrast, some States expressed reservations about the customary law nature of the non-applicability of immunity *ratione materiae* to international crimes.⁴³ While supporting the need to address impunity for the most serious international crimes, the Republic of Korea emphasized that the exceptions listed in draft article 7 should be “carefully considered based on an accurate analysis of State practice and international jurisprudence”.⁴⁴ Similarly, Singapore noted that it “remains tenuous to conclude that there exists a discernible trend towards limiting the applicability of immunity *ratione materiae* in respect of the specified list of crimes under international law”.⁴⁵

29. The Russian Federation argued that “the international community has yet to develop effective mechanisms to prevent impunity for the most serious crimes under international law”. In that regard, it considered the provision to be a reference to currently non-existent law and suggested its deletion.⁴⁶ Similarly, the United Arab Emirates was of the view that draft article 7 had no foundation in customary international law and should therefore be revised, if not deleted.⁴⁷ Insufficiency of State practice was also noted by Japan, which recommended that the Commission “redouble its efforts in analyzing such State practice to facilitate further in-depth discussion”.⁴⁸

30. Israel underlined the challenge of accessing relevant State practice, “in particular Government decisions not to open an investigation or initiate criminal proceedings against a foreign State official on the basis of a legal conviction that there is immunity”. Israel argued that “judicial proceedings may well be the exception, and the Commission should not lose sight of that”.⁴⁹

31. The Islamic Republic of Iran noted that the commentary to draft article 7 referred to cases and legislation concerning immunity of States, rather than immunity of State officials. Accordingly, it argued that such examples did not evidence a clear trend towards “considering the commission of international crimes as a bar to the application of immunity *ratione materiae* of State officials from foreign criminal jurisdiction”.⁵⁰

32. A few States noted with concern the lack of consensus within the Commission regarding draft article 7.⁵¹ The United States expressed that “the Commission should work by consensus on this difficult topic given the serious issues it implicates and the importance of State practice”.⁵² Similarly, France encouraged the Commission to put every effort into

⁴¹ *Ibid.*

⁴² *Ibid.*

⁴³ For example, Brazil, Israel, the Russian Federation, Saudi Arabia, Singapore and the United States (*ibid.*). See also statements by Algeria, Cameroon, China, Egypt and India to the Sixth Committee during the seventy-seventh session of the General Assembly and statements by Belarus and Eritrea to the Sixth Committee during the seventy-ninth session of the Assembly.

⁴⁴ Comments and observations by States.

⁴⁵ *Ibid.*

⁴⁶ *Ibid.* See also Singapore and Israel (*ibid.*).

⁴⁷ Comments and observations by States.

⁴⁸ *Ibid.*

⁴⁹ *Ibid.*

⁵⁰ *Ibid.*

⁵¹ For example, France, Iran (Islamic Republic of) and the United States (*ibid.*).

⁵² Comments and observations by States.

reaching a consensus on a text for draft article 7 that was reflective of the current status of international law.⁵³

33. A few States further suggested that the lack of consensus regarding draft article 7 be taken into account by the Commission when deciding on the final product of the topic.⁵⁴ Considering the different views existing on the nature of draft article 7, the United Arab Emirates suggested that the topic be addressed in a convention by States.⁵⁵ Norway (on behalf of the Nordic countries), Spain and the United Kingdom, among others, expressed similar views.⁵⁶ The United States expressed the view that the development of law in such a sensitive area belonged to States in the first instance.⁵⁷

(b) Draft article 7, paragraph 1

34. Several States supported paragraph 1 of draft article 7, which lists crimes to which immunity *ratione materiae* shall not apply.⁵⁸ Some of those States noted that the exclusion of certain crimes, including the crime of aggression, and slavery and the slave trade, was inconsistent with the criteria provided by the Commission in the commentary to draft article 7 adopted on first reading.⁵⁹ Other States expressed a preference for a general rule on the non-applicability of immunity *ratione materiae* for international crimes, rather than a list of crimes.⁶⁰

35. France, the United Kingdom and the United States observed that there was no clear criterion for the selection of the crimes listed in the draft article. The United States argued that “without a clear and broadly supported rationale, the draft article lacks a persuasive explanation and justification for the inclusion and exclusion of crimes in the exception”.⁶¹ The United Kingdom noted that draft article 7 covered a wide range of criminal acts and that there was no clearly discernible norm that tied them together.⁶²

36. A few States commented further upon the criteria supporting the crimes included in draft article 7. Lithuania suggested that the inclusion of crimes in draft article 7 should be based on either their *jus cogens* character, their inclusion in the Rome Statute, or gravity.⁶³ In accordance with the views of Germany,⁶⁴ Australia expressed the opinion that “the scope of crimes captured by any exception must be limited to the most serious international crimes”.⁶⁵

37. Some States were concerned about including an exhaustive list and its potential to freeze the development of international law in this area. In its comments, Estonia argued for the adoption of an open-ended list in order to take into account further developments in

⁵³ *Ibid.*

⁵⁴ Sierra Leone, United Arab Emirates and United States (*ibid.*).

⁵⁵ Comments and observations by States.

⁵⁶ *Ibid.* See also the statements by Italy and Mexico to the Sixth Committee during the seventy-ninth session of the General Assembly. In addition, the Czech Republic agreed, at least on the procedural provisions, and the Russian Federation did not believe that the draft articles, as they stood currently, should form the basis for a convention. Sierra Leone, referring to the draft articles as a whole, suggested that the Assembly take note of the draft articles and, at a later stage, consider the possibility of negotiating a convention on the basis of the draft articles. Lastly, Norway (on behalf of the Nordic countries) encouraged the Commission to continue finalizing the draft articles so that they could be used to start negotiations on a convention on immunity (comments and observations by States).

⁵⁷ Comments and observations by States.

⁵⁸ Austria, Australia, Czech Republic, Estonia, Ireland, Latvia, Liechtenstein, Lithuania, Luxembourg, Mexico, Norway (on behalf of the Nordic countries), Poland, Romania, Spain, Sierra Leone, Switzerland and Ukraine (comments and observations by States).

⁵⁹ For example, Switzerland, Lithuania and Poland (comments and observations by States).

⁶⁰ For example, China, Netherlands (Kingdom of the) and the United States (comments and observations by States).

⁶¹ Comments and observations by States.

⁶² *Ibid.*

⁶³ *Ibid.*

⁶⁴ *Ibid.*

⁶⁵ *Ibid.*

international law.⁶⁶ France called upon the Commission to “avoid any enumeration that would have the effect of crystallizing the potential exceptions and to state the reasons for its choices”.⁶⁷

38. The Kingdom of the Netherlands expressed similar concerns with regard to an exhaustive list, voicing instead its preference for having a general reference to “crimes under international law” to which immunity *ratione materiae* did not apply, instead of a list of crimes.⁶⁸ Ireland, although not generally opposed to a list, also saw an advantage in having a general formulation.⁶⁹ If the Commission were to reformulate draft article 7 into a general rule, Poland was of the view that the provision should declare that immunity *ratione materiae* was not applicable to crimes covered by the Principles of International Law recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal.⁷⁰ For its part, China proposed that the Commission replace the list with the phrase “the most serious crimes under international law”.⁷¹

39. Many States commented directly on the crimes listed in draft article 7, including on whether additional crimes needed to be included.⁷² Specifically, States noted the absence of the following international crimes: the crime of aggression, slavery, and the slave trade.

40. Numerous States questioned the reasons provided by the Commission for excluding the crime of aggression from draft article 7 and urged the Commission to include it in the list of exceptions to immunity *ratione materiae*.⁷³

41. On this issue, Switzerland noted that, similar to the other crimes contained in draft article 7, “the prohibition of aggression is a peremptory norm of general international law, recognized as a *jus cogens* norm”. It called upon the Commission “to review recent developments in the practice and *opinio juris* of States”.⁷⁴ Austria affirmed that it was its practice and *opinio juris* that “no functional immunity exists for international crimes, including the crime of aggression, by virtue of customary international law”. According to its view, that exception also applied to the troika (Heads of State, Heads of Government and Ministers for Foreign Affairs) after they left office.⁷⁵

42. States also commented on historical, as well as more recent, developments in this area of international law.⁷⁶ Poland noted the long history of rejecting immunity *ratione materiae* in cases involving these types of international crimes, adding that it specifically doubted the legal basis for omitting the crime of aggression from the list. In support of the inclusion of this crime in draft article 7, it drew the attention of the Commission to a series of trials held before a Polish court in the aftermath of the Second World War in which State officials had been convicted for crimes against peace. It cited recent statements by States indicating that immunity *ratione materiae* did not apply to that crime.⁷⁷ Latvia emphasized that “the international realm has changed significantly since 2017 when draft article 7 was provisionally adopted by the Drafting Committee”, proving that the “accountability gap for

⁶⁶ *Ibid.*

⁶⁷ *Ibid.*

⁶⁸ *Ibid.* See also Germany (*ibid.*).

⁶⁹ Comments and observations by States.

⁷⁰ *Ibid.*

⁷¹ Statement by China to the Sixth Committee during the seventy-ninth session of the General Assembly (A/C.6/79/SR.21, para. 9).

⁷² For example, Australia, Austria, the Czech Republic, Estonia, Ireland, Latvia, Liechtenstein, Lithuania, Portugal, Poland, Romania, Sierra Leone, Spain, Switzerland and Ukraine (comments and observations by States).

⁷³ Austria, Czech Republic, Estonia, Ireland, Latvia, Liechtenstein, Lithuania, Luxembourg, Portugal, Poland, Romania, Sierra Leone, Spain, Switzerland and Ukraine (comments and observations by States). See also the statement by Slovakia to the Sixth Committee during the seventy-seventh session of the General Assembly and the statements by Croatia and Mexico to the Sixth Committee during the seventy-ninth session of the Assembly.

⁷⁴ Comments and observations by States.

⁷⁵ *Ibid.*

⁷⁶ For example, Poland (comments and observations by States).

⁷⁷ *Ibid.*

the crime of aggression still exists and the international community must close this gap to prevent impunity”.⁷⁸

43. In a similar vein, Liechtenstein and Luxembourg advised the Commission to avoid inconsistencies in the treatment of the most serious crimes by extending the scope of draft article 7 to the crime of aggression.⁷⁹ Similarly, Ireland, Lithuania and Ukraine argued that the absence of the crime of aggression could imply a hierarchy between the most serious crimes under international law and undermine attempts at accountability in cases involving the commission of the crime of aggression.⁸⁰

44. Romania noted the apparent inconsistency of including the other core international crimes in draft article 7 while excluding the crime of aggression. In the event that the Commission maintained its decision not to add the crime of aggression, Romania noted that it would favour “a more general wording which mentions that functional immunity does not apply in respect to international crimes, without listing said crimes”.⁸¹ Sierra Leone noted that the crime of aggression fulfilled both reasons given by the Commission for the inclusion of crimes against humanity, war crimes and genocide in paragraph 1 of draft article 7, namely, that they “are the crimes of the greatest concern to the international community as whole” and “are included in article 5 of the Rome Statute”.⁸² Switzerland and Poland similarly remarked that, according to the Commission’s own criteria provided in the commentary to draft article 7, it would be incoherent to exclude the crime of aggression from the provision.⁸³ Several States also underlined the importance of harmonizing the draft articles with the Rome Statute.⁸⁴

45. Addressing the Commission’s argument about the special political dimension of the crime of aggression, Estonia noted that “various other serious crimes may, among other considerations, contain a politically sensitive element, but this does not mean that the perpetrators of such crimes should escape responsibility; moreover, national courts are accustomed to resist political pressure in their practice”.⁸⁵ Luxembourg concurred that the “political dimension” did not convincingly explain the distinction made between the application of immunity *ratione materiae* to the crime of aggression as opposed to other crimes under international law.⁸⁶

46. It was also suggested that the crimes of slavery and the slave trade should be added to the list of crimes in draft article 7. In support of that proposal, Sierra Leone recalled that the prohibition of slavery and the slave trade were peremptory norms of international law. It argued that a broad international consensus existed as to the definitions of those crimes, as well as on the obligation to prevent and punish them.⁸⁷

47. Although not expressly referring to any specific crime, the Nordic countries did not rule out the possibility of adding other categories of crimes to the list, nor of expanding the list of treaty instruments found in the annex.

48. The Russian Federation noted another category of crimes that it believed should be included in the list of limitations in draft article 7. It argued that crimes committed by a foreign official present in the territory of the State exercising jurisdiction without the consent of that State were not covered by immunity and proposed that that be recorded in the draft articles, as also suggested by the Special Rapporteurs.⁸⁸ Also in relation to that category of crimes, the Czech Republic invited the Commission to further address, in the commentaries, the legal consequences of a situation in which the State of the official would assume its

⁷⁸ Comments and observations by States.

⁷⁹ *Ibid.*

⁸⁰ *Ibid.*

⁸¹ *Ibid.*

⁸² *Ibid.*

⁸³ *Ibid.*

⁸⁴ Germany and Norway (on behalf of the Nordic countries) (comments and observations by States).

⁸⁵ Comments and observations by States.

⁸⁶ *Ibid.*

⁸⁷ *Ibid.*

⁸⁸ *Ibid.*

responsibility under international law for such illegal acts committed by its State official in the territory of another State.⁸⁹

49. Spain remarked that all crimes enumerated in draft article 7, including torture, enforced disappearance and *apartheid*, fell into the category of the most serious crimes under international law. Spain asked the Commission to clearly distinguish between the crimes falling into that category and other crimes of international concern.⁹⁰

50. Other States questioned whether all the crimes listed in paragraph 1 should be retained in the final version of the draft article. Ireland, for example, noted that the inclusion in the draft article of the crimes of *apartheid* and enforced disappearance as separate crimes from crimes against humanity created confusion.⁹¹

(c) Draft article 7, paragraph 2, and annex to the draft articles

51. A few States provided comments and observations with respect to article 7, paragraph 2, and the annex to the draft articles. Norway (on behalf of the Nordic countries) and Spain supported the Commission's approach of identifying the definition of the crimes listed in paragraph 1 through reference to relevant treaties.⁹² Both Morocco and Spain suggested that, for the purposes of defining war crimes, the Geneva Conventions for the protection of war victims⁹³ should be included in the annex.⁹⁴ In the event that the Commission decided to include the crime of aggression in paragraph 1, Sierra Leone recommended that a reference be made in the annex to article 8 *bis* of the Rome Statute.⁹⁵

52. Lastly, Iran (Islamic Republic of), Saudi Arabia and the United Kingdom expressed concern about the fact that some of the treaties listed in the annex lacked universal acceptance.⁹⁶ Malaysia noted that not all States were signatories to the treaties mentioned in the annex and requested the Commission to further clarify how to best apply draft article 7 in those circumstances.⁹⁷

2. Recent State practice

53. Since the adoption on first reading of the draft articles on immunity of State officials from foreign criminal jurisdiction and commentaries thereto, there have been significant developments in the practice of States in the form of judicial decisions and adoption of new legislation, further expanding the significant practice detailed by the previous Special Rapporteur, Ms. Escobar Hernández. These developments have reaffirmed the existence of exceptions to immunity *ratione materiae* in cases involving crimes under international law and further support the need for including a draft article on the exceptions to this type of immunity. In addition to these new legal developments, further examples of State practice are also discussed in the present section in an effort to supplement the existing commentary.

54. In recent years, courts in Belgium, France, Germany, Italy, Lithuania, Sweden and Switzerland have convicted foreign State officials for international crimes, including crimes against humanity and war crimes. In these cases, immunity *ratione materiae* was not a bar to prosecution. The details of these decisions are explained in more detail below.

55. As already reflected in the commentary, on 28 January 2021, the Federal Court of Justice of Germany ruled that, in accordance with customary international law, criminal domestic prosecution for certain war crimes committed by a foreign State official of subordinate rank was not barred by immunity *ratione materiae*.⁹⁸ Following that decision,

⁸⁹ *Ibid.*

⁹⁰ *Ibid.* See also Germany and Netherlands (Kingdom of the) (*ibid.*).

⁹¹ Comments and observations by States.

⁹² *Ibid.*

⁹³ Geneva Conventions for the protection of war victims (Geneva, 12 August 1949), United Nations, *Treaty Series*, vol. 75, Nos. 970–973, p. 31.

⁹⁴ Comments and observations by States.

⁹⁵ *Ibid.*

⁹⁶ *Ibid.*

⁹⁷ *Ibid.*

⁹⁸ Germany, Federal Court of Justice, Case No. 3 StR 564/19, Verdict, 28 January 2021, para. 35.

two judgments handed down by the Koblenz Higher Regional Court, in February 2021 and January 2022, convicted two former members of the Syrian intelligence service for crimes against humanity.⁹⁹ On 21 February 2024, the Federal Court of Justice of Germany, in a case involving a member of the Syrian National Defence Forces, clarified its position by stating that immunity *ratione materiae* of public officials did not apply to crimes under international law, regardless of the status and rank of the perpetrator. The Court further stated that the exclusion of immunity *ratione materiae* of foreign State officials in the case of international crimes was, without a doubt, part of customary international law.¹⁰⁰ On 20 March 2024, in an order concerning the appeal against the judgment of January 2022 of the Koblenz Regional Court, the Federal Court of Justice of Germany confirmed the view that, under customary law, there was no immunity *ratione materiae* in relation to crimes under international law. According to the Court, immunity *ratione materiae* did not apply to acts whose criminality was directly rooted in general customary international law.¹⁰¹

56. On 9 July 2021, the Italian Court of Cassation upheld life sentences for 14 State officials from Chile and Uruguay.¹⁰² The officials, including members of the Government and of military and security forces, were convicted of the voluntary and aggravated multiple homicide of Italian citizens as part of “Operation Condor”, the code name given to the transnational coordination network between Argentina, Bolivia (Plurinational State of), Chile, Paraguay and Uruguay established in 1975 to persecute dissidents beyond each State’s borders.¹⁰³ A second trial related to Operation Condor has been under way since 5 May 2022 concerning Jorge Nestor Troccoli, a former military official from Uruguay.¹⁰⁴ Immunity *ratione materiae* has not been a bar to prosecution in those cases.

57. On 14 July 2022, the Stockholm District Court sentenced a former Iranian prison officer, Hamid Nouri, to life imprisonment for war crimes in connection with his involvement in the mass executions of prisoners ordered by the Government of the Islamic Republic of Iran in 1988.¹⁰⁵ The sentence was upheld by the Court of Appeal of Sweden on 19 December 2023.¹⁰⁶ Although the Swedish courts did not directly address the issue of immunity, they both concluded that there was no limitation to their exercise of jurisdiction in the case.¹⁰⁷ It bears noting that chapter 2, paragraph 12, of the Swedish Criminal Code determines that the exercise of jurisdiction by Swedish courts must observe the applicability of Swedish law that follows from general international law or an international agreement binding on Sweden. As explained in the judgments by the Stockholm District Court and the Court of Appeal of Sweden, this provision primarily refers to rules on immunity.¹⁰⁸

58. In September 2023, the District Court of Rorschach, Switzerland, tried and ultimately acquitted Yuri Harauski, a member of the Special Rapid Response Unit (SOBR), an elite unit of the Interior Ministry of Belarus, of the enforced disappearances of Yury Zakharenka,

⁹⁹ Germany, Koblenz Higher Regional Court, Case No. 1 StE 3/21, Judgment, 24 February 2021; and Germany, Koblenz Higher Regional Court, Case No. 1 St 9/19, Judgment, 13 January 2022.

¹⁰⁰ Germany, Federal Court of Justice, Case No. AK 4/24, Decision, 21 February 2024, para. 53.

¹⁰¹ Germany, Federal Court of Justice, Case No. 3 StR 454/22, Decision, 20 March 2024, para. 32.

¹⁰² Italy, Court of Cassation, *R.G.-Cass. Contro García Meza Tejada Luis ed altri*, Case No. 12167/2020, Sentence, 9 July 2021.

¹⁰³ In those instances, the individuals were prosecuted for homicide due to the fact that torture and enforced disappearance were not criminalized under Italian law. However, the judgments contain numerous references to those crimes. Furthermore, while there are no express references to immunity in the Operation Condor judgments, the courts acknowledge multiple times the official position occupied by the accused when the crimes were committed. Moreover, in the first instance judgment, the Court describes Operation Condor as a political-military plan that could not have been carried out without an agreement made at the highest political summits and the collaboration of the intelligence services of the countries concerned.

¹⁰⁴ Mr. Troccoli was already sentenced to life imprisonment for 26 murders by the Court of Cassation of Italy on 9 July 2021. The second trial against him is based on new evidence.

¹⁰⁵ Sweden, District Court of Stockholm, Case of *Nouri*, Judgment, 7 July 2022, Case No. B 151255-19.

¹⁰⁶ Mr. Nouri has since been released as part of a prisoner exchange with the Islamic Republic of Iran.

¹⁰⁷ Sweden, Svea Court of Appeal, Case of *Nouri*, Case No. B 9704-22, Judgment, 19 December 2023.

¹⁰⁸ Sweden, District Court of Stockholm, Case of *Nouri*, para. 11; and Sweden, Svea Court of Appeal, Case of *Nouri*, para. 11.

Viktar Hanchar and Anatoly Krasouski in Belarus in 1999. The acquittal was granted on grounds other than immunity.¹⁰⁹

59. In December 2023, a jury at the Leuven Assize Court in Belgium found five members of the military junta that had ruled Guatemala in the 1980s guilty on counts of murder, enforced disappearance and torture as crimes against humanity in relation to four Belgian missionaries. They were all sentenced *in absentia* to life imprisonment.¹¹⁰

60. In a decision of 24 April 2024, a criminal court in Paris convicted three high-ranking officials of the Syrian Arab Republic for complicity in crimes against humanity and war crimes committed against two French-Syrian nationals. Ali Mamlouk, Jamil Hassan and Abdel Salam Mahmoud were sentenced *in absentia* to life imprisonment for complicity in imprisonment, torture, enforced disappearance and murder, constituting crimes against humanity, as well as for confiscation of property as a war crime. Similar to the cases discussed above, immunity *ratione materiae* was not a bar to the prosecution of the State officials in question.¹¹¹

61. On 15 May 2024, the Federal Criminal Court of Switzerland convicted former Minister of Interior of the Gambia, Ousman Sonko, of crimes against humanity, sentencing him to 20 years in prison. This case marked the highest-ranking official convicted in Europe for international crimes under the principle of universal jurisdiction.¹¹²

62. In June 2024, a Swedish judge tried and acquitted Mohammed Hamo, a former army general accused of indiscriminate attacks on civilians as a war crime in the Syrian Arab Republic. According to the judge, prosecutors failed to provide evidence of his involvement in the war crimes.¹¹³

63. Authorities in France are pursuing an additional criminal case against a former official of the Syrian Arab Republic accused of international crimes. Adib Mayaleh, the former governor of the Central Bank of the Syrian Arab Republic, has been charged in France with war crimes and crimes against humanity. In a decision relating to the case from 5 June 2024, the Paris Court of Appeal refused to recognize the immunity *ratione materiae* claimed by Mr. Mayaleh, ruling that those international crimes were not protected by that type of immunity.¹¹⁴

64. In addition to the cases described above, Argentina has also brought cases against and ultimately convicted foreign State officials for international crimes, including crimes against humanity and war crimes. In two cases, Argentinian courts have proceeded with charges for crimes against humanity against foreign Heads of State. The details of these cases are explained in more detail below.

65. A case concerning Operation Condor was also brought before Argentinian courts. On 27 May 2016, the First Federal Court of Argentina sentenced a former official of the Uruguayan military, Manuel Juan Cordero Piacentini, to 25 years of imprisonment for participation in crimes, including torture and enforced disappearance, forming part of Operation Condor. Mr. Piacentini had committed crimes in Uruguay in his capacity as a military official and later fled to Brazil. He was extradited to Argentina from Brazil.¹¹⁵

¹⁰⁹ Trial International, “Belarus: acquittal of Lukashenka regime henchman in Switzerland”, 29 September 2023.

¹¹⁰ Guatebelga, “Historic assize trial against those responsible for crimes against humanity committed on Belgian missionaries in Guatemala – civil parties satisfied with life imprisonment and immediate arrest of five accused”, 18 December 2023.

¹¹¹ International Federation for Human Rights, “French court sentences three officials close to Bashar al-Assad to life imprisonment for crimes against humanity”, 24 May 2024.

¹¹² Switzerland, Federal Criminal Court, *The Office of the Attorney General of Switzerland and private claimants against Ousman Sonko* (SK.2023.23), Decision, 15 May 2024.

¹¹³ National Prosecutor’s Office, National Unit Against International and Organized Crime, Application for Subpoena for Mohammed Hamo (2 January 2024); and Malaika Grafe, “Syrian former general cleared of war crimes in Swedish court”, JURIST news, 20 June 2024.

¹¹⁴ International Federation for Human Rights, “The Paris Court of Appeal rejects functional immunity of former Syrian Central Bank Governor Adib Mayaleh”, 6 June 2024.

¹¹⁵ Plan Condor, “Final verdict of the Argentine Operation Condor and Orletti II trial”, 5 April 2018.

66. In October 2022, a federal judge in Argentina opened a criminal case for crimes against humanity committed in 2018 in Nicaragua. The defendants are the President of Nicaragua, Daniel Ortega, his Vice President and wife, Rosario Murillo, and other members of the Government of Nicaragua.¹¹⁶

67. On 5 April 2024, an investigation in Argentina was resumed, having been initially launched in June 2023, into Nicolás Maduro and other State officials of the Bolivarian Republic of Venezuela for alleged crimes against humanity.¹¹⁷

68. On 4 July 2024, Federal Criminal and Correctional Court No. 2 of Buenos Aires admitted a complaint filed on 7 November 2023 against former president of Colombia Álvaro Uribe Vélez. The complaint, based on the principle of universal jurisdiction, concerns allegations of his involvement in extrajudicial executions and enforced disappearances known as “false positives”.¹¹⁸

69. In April 2024, Argentina issued another arrest warrant for Ahmad Vahidi, current Minister of the Interior of the Islamic Republic of Iran, for his alleged involvement in the attack on the Argentine Jewish Mutual Association (AMIA). At the time of the AMIA bombing, he was the head of the Quds Force. Previously, the general secretariat of the International Criminal Police Organization (INTERPOL) upheld the validity of six red notices issued against Iranian officials, including Mr. Vahidi, accused of allegedly perpetrating the attack. On 11 April 2024, the Federal Criminal Appeals Court confirmed that the attack constituted a crime against humanity.¹¹⁹

70. More recently, the United States has charged foreign State officials in its criminal court, which, suggests that immunity *ratione materiae* is not a bar to prosecution there. On 22 October 2024, the Department of Justice announced the unsealing of a superseding indictment against “eight individuals, including an Iranian military official”, a brigadier general in the Islamic Revolutionary Guard Corps and a former intelligence officer of the Islamic Republic of Iran, for charges not amounting to crimes under international law, namely, murder-for-hire, money-laundering and sanctions evasion.¹²⁰

71. Lastly, on 9 December 2024, the United States unsealed an indictment in the Northern District of Illinois against Jamil Hassan and Abdul Salam Mahmoud, former intelligence officers under the regime of Bashar al-Assad in the Syrian Arab Republic. They are charged with conspiracy to commit war crimes, specifically cruel and inhuman treatment of detainees, including regime opponents and citizens of the United States, at Mazzah Prison between 2012 and 2019.¹²¹

¹¹⁶ Mar Centenera, “La justicia argentina ordena la captura de Daniel Ortega y Rosario Murillo por crímenes de lesa humanidad”, *El País*, 31 December 2024; and Federico Jofré, “La justicia de Argentina pide la detención de Daniel Ortega, su esposa y otros funcionarios nicaragüenses”, *CNN*, 30 December 2024.

¹¹⁷ Mr. Maduro, along with 14 other former officials, was also charged with narco-terrorism, corruption, drug trafficking and other criminal charges by the United States in 2020. See, for example, *United States v. Nicolas Maduro Moros*, Case No. 1:11-CR-205 (S.D.N.Y.), Superseding Indictment; *United States v. Guiseppe Luciano Menegazzo Carrasquel et al.*, No. 2:10-CR-01462 (D. Ariz.), Indictment; *United States v. Vladimir Padrino Lopez*, No. 1:19-CR-176 (D.C.C.), Indictment; *United States v. Maikel Jose Moreno Perez*, No. 20-2407JJO (S.D. Fla.), Criminal Complaint; *United States v. Luis Alfredo Motta Dominguez et al.*, No. 1:19-CR-20388 (S.D. Fla.), Indictment; *United States v. Nestor Luis Reverol Torres et al.*, No. 1:15-CR-20 (E.D.N.Y.), Indictment; *United States v. Vassily Kotosky Villaroel Ramirez et al.*, No. 1:11-CR-247 (E.D.N.Y.), Superseding Indictment; *United States v. Tareck Zaidan el Aissami Maddah et al.*, Case No. 1:19-CR-144 (S.D.N.Y.), Superseding Indictment; and *United States v. Luis Carlos de Leon-Perez et al.*, No. 1:17-CR-514 (S.D. Tex.), Indictment.

¹¹⁸ Trial International, *Universal Jurisdiction Annual Review 2024*, p. 19 (2024).

¹¹⁹ Argentina, Ministry of Foreign Affairs, International Trade and Worship, “Argentina demands the arrest of Iranian minister Ahmad Vahidi, responsible for the terrorist attack on AMIA”, 23 April 2024; and Vanessa Buschschlüter, “Argentina seeks arrest of Iranian minister over 1994 bombing”, *BBC News*, 24 April 2024.

¹²⁰ United States, *United States v. Rafat Amirov et al.*, No. 1:22-cr-00438-CM (S.D.N.Y.), Superseding Indictment, 17 October 2024.

¹²¹ United States, *United States v. Jamil Hassan & Abdul Salam Mahmoud*, No. 1:24-cr-00533 (N.D. Ill.), Indictment, 18 November 2024.

72. Furthermore, Austria and Germany recently adopted new legislation that codifies in their national law the non-applicability of immunity *ratione materiae* to certain crimes under international law. Details on those legislative developments are explained below.

73. On 6 June 2024, the parliament of Germany reformed the German Code of Crimes against International Law, stipulating that immunity *ratione materiae* did not bar the exercise of the jurisdiction of Germany to the prosecution of international crimes. That act codified existing court decisions into German law.¹²²

74. On 5 July 2022, Austria issued a decree regarding jurisdiction for war crimes and other international crimes and immunities of the highest officials of foreign States in Austrian criminal proceedings in which it was clarified that foreign officials outside the scope of the troika did not enjoy immunity *ratione materiae* for crimes such as genocide, crimes against humanity, war crimes, aggression and torture. According to the decree, this exception also applies to Heads of State, Heads of Government and Ministers for Foreign Affairs after they have left office.¹²³

3. Recommendations of the Special Rapporteur

75. In their comments, States recognized the value of striking the right balance between the need for accountability for the most serious crimes and the need for the preservation of friendly relations among States, based on respect for sovereign equality. The adoption of draft article 7, along with the safeguards proposed in Part Four, should be seen as an essential step towards achieving this goal. The Special Rapporteur agrees with such an approach, which is also supported by numerous States.¹²⁴

76. The Special Rapporteur considered the comments presented by States regarding draft article 7 and the commentary approved on first reading by the Commission. The Special Rapporteur recognizes that there was extensive support among States for the inclusion of a provision restricting the immunity of State officials from foreign criminal jurisdiction. Numerous States expressed support for a list; a central issue raised was which crimes ought to be listed. Some States expressed concern over the legal grounds for including crimes on the list, and some noted that some serious international crimes, including the crime of aggression and slavery, were absent. Some States expressed preference for the formulation of general criteria, instead of a list. A few States questioned the existence of exceptions to immunity.

77. In the light of the comments made by States and the additional State practice mentioned above, the Special Rapporteur recommends maintaining a list in paragraph 1 of draft article 7 and elaborating upon the rationale for including the crimes listed in the draft article in the commentary. In the view of the Special Rapporteur, opting merely for a set of criteria may undermine legal certainty, as it may create conflicting interpretations about which crimes are covered by the draft article, as well as their constitutive elements. In this regard, the Special Rapporteur recommends that the commentary expand upon the basis for the inclusion of the crimes listed in draft article 7, taking into account comments by States.

78. The Special Rapporteur also considers it relevant to clarify in the commentary that the list in paragraph 1 of draft article 7 is non-exhaustive and to provide a clearer basis in the commentary regarding the international crimes to which immunity *ratione materiae* is not applicable.¹²⁵ Elaborating upon these criteria in the commentary will also provide guidance as to the possibility of applying the article to other crimes, if those criteria are satisfied. This also addresses the valid criticism, put forward by some States, that an exhaustive list could freeze the development of international law on such an important topic.

¹²² Comments and observations by States.

¹²³ *Ibid.*

¹²⁴ *Ibid.*

¹²⁵ The commentary will also address whether, at the very least, draft article 7 has to include international crimes that constitute stand-alone offences under international law and undermine the values and principles recognized by the international community as a whole, as evidenced by customary international law.

79. Furthermore, taking into account States' comments and the arguments provided therein, the Special Rapporteur recommends adding the crime of aggression, slavery and the slave trade to the current list of crimes. Including these crimes on the list may also clarify some of the conceptual issues raised by States. Specifically, this will address the apparent inconsistency in the Commission's interpretation of its criteria for inclusion on the list of crimes stated in the commentary adopted on first reading. The annex to the draft articles should also be amended to reflect the addition of the crime of aggression, slavery and the slave trade. For that purpose, the Special Rapporteur recommends the inclusion of a reference to article 8 *bis* of the Rome Statute, as well as article 1 of the Slavery Convention¹²⁶ and article 7 of the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery,¹²⁷ as suggested by States.

80. Furthermore, in the light of the developments in recent State practice expounded upon in the present report, the Special Rapporteur recommends that the commentary for draft article 7 be amended to take into account those developments. In addition, while the vast majority of relevant State practice related to the crimes listed in the draft article was addressed in the commentary for the draft article adopted on first reading, the Special Rapporteur also finds it necessary to reiterate the need to supplement the references to existing State practice to fully account for the relevance of national cases and other State practice to the draft article.

81. The Special Rapporteur agrees with the views presented by States concerning the need to further clarify in the commentary that crimes committed by foreign officials in the territory of the forum State are not covered by immunity and supports expanding the commentary to achieve this goal.

82. In view of the above, the Special Rapporteur proposes the following formulation of draft article 7:

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;
- (g) crime of aggression;
- (h) slavery;
- (i) slave trade.

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.

¹²⁶ Slavery Convention (Geneva, 25 September 1926), League of Nations, *Treaty Series*, vol. LX, No. 1414, p. 253.

¹²⁷ Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices Similar to Slavery (Geneva, 7 September 1956), United Nations, *Treaty Series*, vol. 266, No. 3822, p. 3.

B. General comments to Part Four of the draft articles

1. Comments and observations by States

83. Part Four of the draft articles concerns the procedural provisions and safeguards applicable in relation to the immunity of State officials from foreign criminal jurisdiction, including the examination, determination, invocation and waiver of immunity, the transfer of criminal proceedings, the fair treatment of the State official and dispute settlement. Given that a significant number of States presented general comments to Part Four of the draft articles,¹²⁸ the Special Rapporteur will address those comments before focusing on the comments to specific draft articles contained in Part Four.

84. Several States welcomed the inclusion of the procedural provisions and safeguards contained in Part Four, in particular considering the lack of an international framework on the procedural aspects of immunity.¹²⁹ In that regard, Mexico affirmed that the content of Part Four was highly pertinent and relevant.¹³⁰

85. Ireland and Spain stated that Part Four significantly contributed to ensuring a balance between the different parts of the draft articles and assisted States in the application of the substantive rules contained in Part Two and Part Three.¹³¹ Germany noted that Part Four helped achieve a balance between the interests of the forum State in prosecuting crimes committed by a foreign State official, on the one hand, and the mutual respect for the sovereign equality of States, on the other hand. Australia, Ireland and Norway (on behalf of the Nordic countries) affirmed the necessary role of Part Four in avoiding possible abuse or politicization of the exercise of criminal jurisdiction by one State over an official of another State.¹³²

86. By contrast, Israel was of the view that the procedural provisions and safeguards proposed in Part Four could not sufficiently overcome the myriad difficulties that draft article 7 produced.¹³³

87. Separately, doubts were expressed as to the existence of State practice in support of the provisions contained in Part Four. The United States, for example, underlined the limited State practice in that area and suggested that the Commission consider any relevant international standards and the need for a State to apply principles of immunity consistently across the various organs of its Government.¹³⁴ The United Kingdom noted that there were only a few examples of relevant positive State practice.¹³⁵ Germany noted that the procedural provisions and safeguards constituted, for the most part, propositions of progressive development.¹³⁶

88. Given the lack of universal practice concerning procedural provisions and safeguards to immunity, some States suggested treating Part Four as “recommendations”,¹³⁷ guidelines rather than articles¹³⁸ or “procedural recommendations or good practices, which the States

¹²⁸ The following States submitted general comments on Part Four: Australia, Brazil, Czech Republic, Germany, Ireland, Israel, Malaysia, Mexico, Norway (on behalf of the Nordic countries), Saudi Arabia, Spain, Switzerland, United Arab Emirates, United Kingdom and United States. See also the statements by Australia, Cameroon, the Czech Republic, Egypt, Germany, Iceland (on behalf of the Nordic countries), Portugal, Slovakia, Spain and the United Kingdom to the Sixth Committee during the seventy-seventh session of the General Assembly; and the statements by Australia, Austria, Israel, Malaysia, Mexico, Spain, the United Kingdom and the United States to the Sixth Committee during the seventy-ninth session of the Assembly.

¹²⁹ Australia, Brazil, Germany, Ireland, Malaysia, Mexico, Norway (on behalf of the Nordic countries) and Spain (comments and observations by States).

¹³⁰ Comments and observations by States.

¹³¹ *Ibid.*

¹³² *Ibid.*

¹³³ *Ibid.*

¹³⁴ *Ibid.*

¹³⁵ *Ibid.*

¹³⁶ *Ibid.*

¹³⁷ United States (*ibid.*).

¹³⁸ Ireland and Germany (comments and observations by States).

could take into account in their dealing with the issue of the immunity of State officials from foreign criminal jurisdiction".¹³⁹

89. Colombia emphasized the complexity of regulating the immunity of State officials and urged a cautious approach by the Commission. It noted the need to address gaps, such as mechanisms to prevent retaliatory measures, and clarify the scope of immunity *ratione materiae*. Colombia highlighted that its domestic legal system lacked broad immunity provisions and aligned only with diplomatic immunity under international treaties. It recommended refining procedural timelines for inter-State communication, addressing ambiguities in draft articles (e.g. on the duration of immunity and extradition possibilities) and ensuring alignment with international customary law and existing instruments such as the Vienna Convention on the Law of Treaties.^{140,141}

90. Lastly, a few States underlined the need to distinguish between procedural safeguards applicable to immunity *ratione personae* and immunity *ratione materiae*. In that regard, the Czech Republic, Malaysia and the United Arab Emirates noted that quite different procedures would take place in practice depending on which of the two immunities was in question, in particular with respect to draft articles 9, 11 and 14.¹⁴² The United Kingdom questioned whether identical provisions were suitable for addressing both immunity *ratione personae* and immunity *ratione materiae*, highlighting practical differences, such as the need for express acknowledgment by the State in functional immunity cases.¹⁴³

2. Comments and observations of the Special Rapporteur

91. The general commentary to Part Four is contained in chapter VI, section C, of the report of the Commission on its seventy-third session.¹⁴⁴ The Special Rapporteur notes that most of the States that commented valued the Commission's proposal to include in the draft articles a provision on limitations or exceptions to immunity for international crimes, coupled with a set of procedural safeguards. Most of the States considered the chapter necessary to provide a balance between the values of sovereign equality and peaceful relations between States and the need to combat impunity, while avoiding politicization of the topic. Reference to those themes can also be found in the first report of the Special Rapporteur.¹⁴⁵ The Special Rapporteur concurs with the observations by States that some of the proposals constitute progressive development of international law. However, topics such as fair treatment and due process requirements constitute customary law. The Special Rapporteur stresses that he is willing to considering further proposals that advance the non-politicization of the topic of the immunity of State officials.

C. Comments and observations regarding the individual draft articles of Part Four as adopted by the Commission on first reading

Part Four Procedural provisions and safeguards

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

¹³⁹ Czech Republic (comments and observations by States).

¹⁴⁰ Vienna Convention on the Law of Treaties (Vienna, 23 May 1969), United Nations, *Treaty Series*, vol. 1155, No. 18232, p. 331.

¹⁴¹ Comments and observations by States.

¹⁴² *Ibid.* See also the statement by Egypt to the Sixth Committee during the seventy-seventh session of the General Assembly.

¹⁴³ Comments and observations by States.

¹⁴⁴ *Official Records of the General Assembly, Seventy-seventh Session, Supplement No. 10 (A/77/10)*.

¹⁴⁵ A/CN.4/775, para. 20.

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.

92. The commentary to the draft article is contained in chapter VI, section C, of the report of the Commission on its seventy-third session.¹⁴⁶

1. Comments and observations by States

93. The purpose of the present draft article is to define the scope of application of Part Four in connection with Part Two and Part Three, which deal with the immunity *ratione personae* and the immunity *ratione materiae*, respectively, of State officials, current or former, from foreign criminal jurisdiction.

94. The following eight States submitted written comments specifically on draft article 8: France, Malaysia, Netherlands (Kingdom of the), Norway (on behalf of the Nordic countries), Russian Federation, Spain, United Kingdom and United States.

95. Spain expressed the view that draft article 8 “appropriately establishes the link between Parts Two and Three, on the one hand, and Part Four, on the other”.¹⁴⁷

96. While agreeing with the usefulness of including an introductory clause on the application of Part Four, Norway (on behalf of the Nordic countries) questioned whether the phrase “shall be applicable in relation to any exercise of criminal jurisdiction” was sufficiently broad and accurate in the context of the draft article. In that respect, it noted that several of the provisions from Part Four would be applicable long before the forum State started the exercise of criminal jurisdiction. As an alternative wording, Norway suggested the phrase “be applicable in any instance that may involve the exercise of criminal jurisdiction”.¹⁴⁸

97. In a similar vein, the Russian Federation invited the Commission to further assess the appropriateness of the term “forum State”, in view of the fact that the question of immunity would arise before a criminal case actually reached a forum.¹⁴⁹

98. The Kingdom of the Netherlands noted that, as currently drafted, draft article 8 “gives the impression that Part Four applies to all exercises of jurisdiction over crimes committed by foreign State officials, current and former”. It therefore suggested that the Commission further delimit the scope of the procedural rules and safeguards in Part Four of the draft articles so that they “do not apply when a current or former State official who enjoys functional immunity is suspected of committing a crime in a private capacity”.¹⁵⁰

99. The United Kingdom also expressed concern that the scope of draft article 8 was not sufficiently clear. In particular, it questioned whether the Commission intended for the procedural provisions and safeguards “to apply only where the person whose immunity is in question is also the suspect whose criminal responsibility is to be determined, or whether the exercise of criminal jurisdiction could include other measures such as witness testimony”.¹⁵¹

100. Both Malaysia and the United Kingdom expressed doubts concerning the appropriateness of applying the same procedural provision and safeguards to immunity *ratione personae* and immunity *ratione materiae*.¹⁵² With respect to that, Malaysia observed that, “in practice, the relevant procedures for both these types of immunity are different”.¹⁵³

101. France noted that the Commission had chosen a general formulation for draft article 8 to ensure that the exceptions in draft article 7 were covered in Part Four. At the same time, it argued that that general formulation made draft article 8 complex and difficult to understand.

¹⁴⁶ *Official Records of the General Assembly, Seventy-seventh Session, Supplement No. 10 (A/77/10)*.

¹⁴⁷ Comments and observations by States.

¹⁴⁸ *Ibid.*

¹⁴⁹ *Ibid.*

¹⁵⁰ *Ibid.*

¹⁵¹ *Ibid.*

¹⁵² *Ibid.*

¹⁵³ *Ibid.*

102. The United States suggested that the commentary could be strengthened by additional clarifications on the relationship between draft article 7 and Part Four.

2. Recommendations of the Special Rapporteur

103. The Special Rapporteur notes that draft article 8 was generally well received in the comments by States, *inter alia*, because it establishes a necessary link between Parts Two, Three and Four. Notwithstanding the usefulness of this draft article, the Special Rapporteur agrees that the phrase “shall be applicable in relation to any exercise of criminal jurisdiction” is not clear enough as to the scope of its application in the context of the draft articles. In particular, the provisions of Part Four could be applicable before the forum State exercises criminal jurisdiction. Accordingly, the Special Rapporteur concurs with the suggestion to replace the above-mentioned phrase with the following: “shall be applicable in any instance that may involve the exercise of criminal jurisdiction”. This matter will be further addressed in the commentary.

104. Furthermore, the Special Rapporteur agrees with the concern raised in the comments by States that the current formulation of the draft article creates confusion as to whether Part Four applies to all exercises of jurisdiction over crimes committed by foreign State officials, which could include private acts of officials who only enjoy immunity *ratione materiae*. Accordingly, he proposes replacing the phrase “over an official of another State, current or former,” in the current text with the phrase “that may affect the immunity of an official of another State”.

105. The Special Rapporteur considers that the commentary should address the issue of whether the procedural provisions and safeguards in Part Four apply only when the person whose immunity is in question is suspected of a crime or also to other measures, such as witness testimony.

106. The Special Rapporteur also considers that the doubts expressed by some States about the appropriateness of applying the same procedural provisions and safeguards to the two types of immunity could be further explored in the commentary. In this regard, the Special Rapporteur recognizes that, in most of the cases where immunity *ratione personae* applies and is readily recognized, the applicability of other safeguards becomes superfluous.

107. Furthermore, the Special Rapporteur concurs with the comments that additional clarification on the relationship between draft article 7 and Part Four could be added in the commentary.

108. Lastly, to address the comments raised by States regarding the complexity of the draft article, the Special Rapporteur recommends dividing the draft article into two separate paragraphs. Paragraph 1 would explain the general scope of Part Four and paragraph 2 would confirm that Part Four is applicable to all the articles contained in Part Two and Part Three, including draft article 7.

109. With the changes recommended above, draft article 8 would read as follows:

Article 8 **Application of Part Four**

1. The procedural provisions and safeguards in the present Part shall be applicable in any instance that may involve the exercise of criminal jurisdiction by the forum State that may affect the immunity of an official of another State.

2. The present Part is applicable to all 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.

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.

110. The commentary to this draft article is contained in chapter VI, section C, of the report of the Commission on its seventy-third session.¹⁵⁴

1. Comments and observations by States

111. Draft article 9 concerns the obligation to examine the question of immunity from criminal jurisdiction whenever the authorities of the forum State seek to exercise or do exercise criminal jurisdiction over an official of another State. As explained in paragraph (1) of the commentary to draft article 9, “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. Draft article 9 comprises two paragraphs, the first establishing a general rule and the second outlining a special application of that rule to specific situations.

112. Comments regarding draft article 9 were provided by 16 States: Armenia, Brazil, Colombia, France, Israel, Malaysia, Netherlands (Kingdom of the), Norway (on behalf of the Nordic countries), Republic of Korea, Russian Federation, Saudi Arabia, Singapore, Spain, United Arab Emirates, United Kingdom and United States.

113. The following States addressed draft article 9 in their statements to the Sixth Committee during the seventy-seventh session of the General Assembly: Cameroon, Chile, France, Saudi Arabia, Sierra Leone and Singapore. Armenia also commented on article 9 in its statement to the Sixth Committee during the seventy-ninth session of the Assembly.

114. A number of States, including Brazil, Saudi Arabia and Spain, voiced their support for draft article 9. Saudi Arabia welcomed the wording of draft article 9, noting that the draft article permitted flexibility, allowing for differences in national legal systems, while, at the same time, making clear that in all cases criminal proceedings or coercive measures should not be adopted until the question of immunity had been reviewed.¹⁵⁵ Similarly, Spain noted that examining the question of immunity as soon as possible, and always before exercising jurisdiction or taking coercive measures against an official of another State, “represents an essential element that must guide the actions of said authorities and that constitutes a safeguard for the State of the official”.¹⁵⁶

115. While concurring that it was important that immunity be reviewed without delay and prior to the initiation of criminal proceedings, the Republic of Korea recommended further clarification of the phrase “including those that may affect any inviolability that the official may enjoy under international law” in paragraph 2.¹⁵⁷ Israel similarly emphasized that draft article 9 should explicitly require the examination of immunity to occur at the earliest possible stage and recommended that it be clarified in the commentary that that stage began when authorities were informed of a complaint or were requested to initiate an inquiry or investigation into allegations against a foreign official.¹⁵⁸

116. A few States provided comments concerning the connection between draft article 9 and draft article 14, which will also be reviewed later in this report.¹⁵⁹ In that regard, the United States expressed that the relationship between the two provisions was unclear and needed to be more deeply considered by the Commission. It further argued that, in comparison with draft article 14, the wording used in draft article 9 would be preferable as it

¹⁵⁴ *Official Records of the General Assembly, Seventy-seventh Session, Supplement No. 10 (A/77/10)*.

¹⁵⁵ Comments and observations by States.

¹⁵⁶ *Ibid.*

¹⁵⁷ *Ibid.*

¹⁵⁸ *Ibid.*

¹⁵⁹ For example, Malaysia, the Russian Federation, the United Arab Emirates and the United States (*ibid.*).

“provides forum States with more flexibility in determining when and how to consider immunity in light of their domestic criminal process”.¹⁶⁰

117. The Russian Federation noted a lack of clarity as to the difference between the “examination” of the question of immunity under draft article 9 and the “determination” of immunity under draft article 14, including whether the two procedures occurred together (the “examination” serving as the basis for the “determination”) or whether they could occur separately from each other. The Russian Federation also questioned the relationship between those two safeguards and the procedures under draft articles 10 and 13. As a possible solution to that confusion, it suggested combining draft article 9 and 14 into a single provision.¹⁶¹

118. The Russian Federation took note of the need for clear terminology with regard to the phrase “initiating criminal proceedings”, particularly considering that, in the Russian text, the phrase had been translated to have a meaning synonymous with “instituting criminal proceedings”. In the English version, however, the terms were used to refer to different stages of the criminal proceedings.¹⁶²

119. While Singapore did not oppose the general rule established in draft article 9, it underlined that practical realities must be taken into account to ensure that the immunity of foreign officials did not hinder the forum State’s ability to act in urgent situations that required the forum State’s authorities to act quickly, as in cases where a State official’s behaviour posed an imminent threat to safety. For those reasons, Singapore was of the view that paragraph 2 (b) of draft article 9 was too restrictive and should be amended “to provide competent authorities with the necessary flexibility and margin of discretion to fulfil their duties effectively”. One possible way of amending the provision would be to include the qualifier “as far as practicable”.¹⁶³

120. France indicated that the content of the obligation to “examine” immunity was imprecise, noting that although the Commission clarified that the obligation comprised “preparatory acts”, it did not specify what “examination” entailed. In view of that, France recommended that the Commission provide relevant examples in the commentary and state whether it was an obligation of means or of result.¹⁶⁴

121. In the same vein, Chile, speaking to the Sixth Committee during the seventy-seventh session of the General Assembly, remarked that it was not clear from the provision, or the commentary thereto, what minimum requirements should be followed by the competent authorities when examining the immunity of an official.

122. The United Kingdom, similarly to other States, appreciated the generic reference to “competent authorities of the forum State”, which took into account the fact that the process and division of responsibilities within States varied and, consequently, different authorities might be responsible for the various steps identified by the Commission in articles 9 to 14. At the same time, the United Kingdom thought that paragraph 1 of draft article 9 created uncertainty, considering that it would not always be evident at what point a competent authority had become aware that an official of another State might be affected by the exercise of its criminal jurisdiction.¹⁶⁵

123. The United Kingdom also questioned the reasons for including both a general and a specific rule in the draft article. It noted that “the underlying principle for both is the same, namely that a forum State should not take coercive measures against a person having immunity, absent a specific waiver of that immunity, and so the question of immunity must be examined before such coercive measures are undertaken”.¹⁶⁶

¹⁶⁰ Comments and observations by States.

¹⁶¹ *Ibid.*

¹⁶² *Ibid.* See also the statement by Armenia to the Sixth Committee during the seventy-ninth session of the General Assembly, welcoming further clarification of the phrases “criminal jurisdiction” and “immunity” in the commentary.

¹⁶³ Comments and observations by States.

¹⁶⁴ *Ibid.*

¹⁶⁵ *Ibid.*

¹⁶⁶ *Ibid.*

124. Some States addressed the link between inviolability and draft article 9, paragraph 2 (b).¹⁶⁷ The Kingdom of the Netherlands agreed with the importance of distinguishing between immunity and inviolability and stated that, in its view, individuals entitled to immunity *ratione materiae* did not enjoy inviolability.¹⁶⁸ In the opinion of France, draft article 9, paragraph 2 (b), created confusion between immunity from jurisdiction, immunity from execution and inviolability, which was not resolved in the commentary.¹⁶⁹

125. Lastly, France also recommended that, similarly to draft article 14, draft article 9 should provide that the forum State may take “any other relevant information from other sources” into account for the purposes of the examination of immunity under draft article 9.¹⁷⁰

2. Recommendations of the Special Rapporteur

126. On the basis of the comments received, the Special Rapporteur, taking into account the need for a degree of flexibility, as presented by different States, recommends modifying the text of draft article 9 by adding “as far as practicable”. This modification is aimed, *inter alia*, at addressing the concern expressed by States for situations in which urgent actions are required by the forum State, as it is necessary to provide competent authorities with flexibility and a margin of discretion to fulfil their duties effectively. In addition, the Special Rapporteur suggests addressing other issues raised by States in the commentary, including: the relationship between this provision and other draft articles, such as draft article 8, which results in the addition of the words “the immunity of” where indicated below; issues of terminology, translation and their implications; clarification of what “examination” entails; and the fact that inviolability applies only to officials enjoying immunity *ratione personae*.

127. Accordingly, the Special Rapporteur proposes the following new formulation of draft article 9:

Article 9

Examination of immunity by the forum State

1. When the competent authorities of the forum State become aware that the immunity of an official of another State may be affected by the exercise of its criminal jurisdiction, they shall examine, as far as practicable, the question of immunity without delay.
2. Without prejudice to paragraph 1, the competent authorities of the forum State shall always examine the question of immunity:
 - (a) before initiating criminal proceedings;
 - (b) before taking coercive measures that may affect an official of another State, including those that may affect any inviolability that the official may enjoy under international law.

Article 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,

¹⁶⁷ France, Netherlands (Kingdom of the) and United Kingdom (*ibid.*).

¹⁶⁸ Comments and observations by States.

¹⁶⁹ *Ibid.*

¹⁷⁰ *Ibid.*

which may include those provided for in applicable international cooperation and mutual legal assistance treaties.

128. The commentary to this draft article is contained in chapter VI, section C, of the report of the Commission on its seventy-third session.¹⁷¹

1. Comments and observations by States

129. Draft article 10 concerns the obligation of the forum State to notify the State of the official that the forum State intends to exercise criminal jurisdiction over an official belonging to the latter.

130. Comments on draft article 10 were presented by 13 States: Brazil, Colombia, France, Mexico, Netherlands (Kingdom of the), Norway (on behalf of the Nordic countries), Republic of Korea, Russian Federation, Singapore, Spain, Switzerland, United Kingdom and United States.

131. Speaking to the Sixth Committee during the seventy-seventh session of the General Assembly, Austria, Cameroon, Cuba and Italy addressed draft article 10. Speaking to the Sixth Committee during the seventy-ninth session of the Assembly, Cuba and Malaysia also addressed draft article 10.

132. A number of States were supportive of the safeguard contained in draft article 10.¹⁷² The Republic of Korea welcomed the adoption of draft article 10 and, in particular, the use of non-prescriptive wording on the notification measures, and the recognition that it was not limited to diplomatic channels.¹⁷³ Mexico argued that the provision “could be extremely useful for interpretation and the general practice of States regarding the methods of notification or service to be used in judicial proceedings against States or State officials”.¹⁷⁴ While of the view that draft article 10 constituted a proposal of progressive development, Spain thought that the provision represented “a good example of the Commission fulfilling its mandate in a comprehensive manner”. In its statements to the Sixth Committee during the seventy-seventh and seventy-ninth sessions of the General Assembly, Cuba was of the opinion that the notification should be considered a first safeguard for a State, aiming at protecting its interests, to invoke or waive immunity.

133. The Russian Federation expressed its overall agreement with draft article 10. However, it asked the Commission to consider aligning the obligation of notification with the requirement to examine immunity as prescribed in draft article 9, paragraph 1. In its view, an obligation to notify the authorities of the State of the official would also arise when the forum State first recognized that an official from another State might be subject to its criminal jurisdiction.

134. The Kingdom of the Netherlands, on the other hand, opposed the inclusion of an obligation of notification. According to it, there was no practice in support of such obligation, nor in support of the requirement of providing a description of the procedure to be followed in the event that criminal proceedings were initiated, or coercive measures were taken against an official of another State.¹⁷⁵

135. Some States expressed concern regarding the possible undesirable effects of a notification under draft article 10 on ongoing investigations.¹⁷⁶ With respect to that, France questioned what impact such a notification could have on the confidentiality of an ongoing investigation, as well as on the proper conduct of criminal proceedings.¹⁷⁷ Similarly, the

¹⁷¹ *Official Records of the General Assembly, Seventy-seventh Session, Supplement No. 10 (A/77/10).*

¹⁷² Brazil, Mexico, Republic of Korea, Russian Federation, Spain and Switzerland (comments and observations by States).

¹⁷³ Comments and observations by States.

¹⁷⁴ Comments and observations by States.

¹⁷⁵ *Ibid.*

¹⁷⁶ France, Netherlands (Kingdom of the), Switzerland, United Kingdom and United States.

¹⁷⁷ Comments and observations by States.

United States argued that a notification would pose a significant risk that the individual being investigated could become aware of the investigation and compromise it.¹⁷⁸

136. Although supportive of draft article 10, Switzerland remarked that a prior notification of the exercise of criminal jurisdiction could give rise to the possibility of evidence being destroyed or witnesses being influenced before the police or the public prosecutor's office could intervene. In order to minimize those negative effects, Switzerland suggested that notification be made "promptly", as provided for in article 42 of the Vienna Convention on Consular Relations.^{179,180}

137. The United Kingdom emphasized that notification should be considered in the light of the purposes of an investigation and should not compromise it or lead to a suspect evading justice. While supporting the overall purpose of draft article 10, it concluded that, as currently drafted, it was more broadly drawn than required by that rationale and might imply that a notification should be given even in cases of a former State official being prosecuted for private acts.¹⁸¹

138. Regarding paragraph 2, on the content of notifications, and, in particular, the requirement to indicate the competent authority to exercise jurisdiction, the United Kingdom "does not believe that it is necessary to require such information to list the competent authorities within the forum State that may be responsible for the exercise of jurisdiction". According to it, what is important is that the notification "should contain sufficient information for the State of the official to consider whether to invoke or waive immunity".¹⁸²

139. Other States commented on the challenges of the practical application of notification obligations. Norway (on behalf of the Nordic countries) noted that the nature of coercive measures in certain circumstances might be particularly urgent. Accordingly, it asked the Commission "to assess if there is a need to include an exception to the requirement of notification for urgent needs for coercive measures".¹⁸³ Singapore similarly recommended that draft article 10, paragraph 1, be "amended to provide competent authorities with the necessary flexibility and margin of discretion to fulfil their duties effectively", for example through the addition of a qualifier such as "as far as practicable".¹⁸⁴

140. Singapore also suggested that the phrases "when the competent authorities of the forum State become aware" and the "without prejudice" language, found in draft article 9, be included in draft article 10 as a way of excluding situations where the competent authorities were unaware that issues of immunity could be implicated.¹⁸⁵

141. Speaking to the Sixth Committee during the seventy-seventh session of the General Assembly, Austria expressed concern that the wording "coercive measures that may affect an official of another State" might be too broad as notification should only be required if the measures might affect the immunity of an official. In addition, it suggested that there always be an obligation to notify if an official claimed immunity. In its written comments, Colombia expressed concerns that the phrase "initiate criminal proceedings" was too broad because determining what actions were covered and the moment at which the procedure was initiated would likely vary based on the penal system.¹⁸⁶

142. France questioned the relationship between notification, provided in draft article 10, and invocation, described in draft article 11. In particular, France stressed that the failure to respond to the notification by the State of the official should not have any impact on the invocation of immunity. France also wondered whether the notification under draft article 10

¹⁷⁸ *Ibid.*

¹⁷⁹ Vienna Convention on Consular Relations (Vienna, 24 April 1963), United Nations, *Treaty Series*, vol. 596, No. 8638, p. 261.

¹⁸⁰ Comments and observations by States.

¹⁸¹ *Ibid.*

¹⁸² *Ibid.*

¹⁸³ *Ibid.*

¹⁸⁴ *Ibid.*

¹⁸⁵ *Ibid.*

¹⁸⁶ *Ibid.*

would be possible in respect of States with which diplomatic relations and mutual legal assistance had broken down.

143. Specifically, with regard to paragraph 3 of draft article 10, the United States expressed the opinion that it was not “appropriate for notification of immunity to be through the procedures established in cooperation or mutual legal assistance treaties”. As such, it suggested that paragraph 3 should end after the phrase “States concerned”.¹⁸⁷

2. Observations and recommendations of the Special Rapporteur

144. The Special Rapporteur notes the general appreciation of States regarding draft article 10 and the need for notification, while also recognizing that the draft article represents an expression of progressive development of international law. As noted by Spain, this draft article is a prime example of the Commission fulfilling that equally important portion of its mandate. In recognizing the progressive nature of the draft article, States noted the importance of permitting a level of flexibility, accounting for the need for effective investigations or the potential for the existence of exigent circumstances or a breakdown of diplomatic relations between States. States also stressed that the notification should not compromise investigations or lead to a suspect evading justice.

145. The Special Rapporteur concurs with those arguments and, accordingly, will propose modifications of draft article 10, paragraph 1, as presented below. Specifically, the Special Rapporteur proposes adding to draft article 10, paragraph 1, the phrase “unless such notification would jeopardize the confidentiality of an ongoing investigation or the proper conduct of criminal proceedings”. Furthermore, the Special Rapporteur notes that, in his opinion, aligning the text of this paragraph with proposed draft article 9, paragraph 1, is not needed as the draft articles deal with different situations. Draft article 9, paragraph 1, regulates a situation where the State is considering whether to begin an investigation, whereas draft article 10, paragraph 1, refers to a situation where a forum State is proposing to initiate criminal proceedings. Needless to say, these proposed norms are without prejudice to binding obligations by States acquired under international treaties.¹⁸⁸

146. Concerning paragraph 2 of draft article 10, the Special Rapporteur agrees that notification should contain sufficient information for the State of the official to consider whether to invoke or waive immunity. Accordingly, the Special Rapporteur considers it prudent to clarify in the commentary what is meant by “competent authority to exercise jurisdiction”, taking into account that not doing so may introduce unnecessary complications into the process of notification. The Special Rapporteur would also consider the possibility of deleting paragraph 2 and addressing the content of the notification in the commentary only.

147. Concerning paragraph 3, the Special Rapporteur concurs with the observation that the last phrase, “which may include those provided for in applicable international cooperation and mutual legal assistance treaties” could be removed, as all possible means of communication accepted by the States concerned are covered in the first phrase of the paragraph. In the same vein, the Special Rapporteur suggests that “for that purpose” also be removed, thereby satisfying the general preference for flexibility raised by a number of States.

148. Accordingly, the new proposed text of draft article 10 is as follows:

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, unless such notification would jeopardize the confidentiality of an ongoing investigation or the

¹⁸⁷ *Ibid.*

¹⁸⁸ For example, the Vienna Convention on Consular Relations, art. 36, in accordance with which States parties are obliged to put defendants in contact with their consulate after arrest. This concept will be further explored in the commentary.

proper conduct of criminal proceedings. 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 by the States concerned.

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.

149. The commentary to this draft article is contained in chapter VI, section C, of the report of the Commission on its seventy-third session.¹⁸⁹

1. Comments and observations by States

150. Draft article 11 recognizes the right of the State of the official to invoke immunity and the procedural aspects relating to the timing, content and means of communication of the invocation of immunity.

151. Written observations relating to this draft article were submitted by the following 11 States: Austria; France; Israel; Malaysia; Netherlands (Kingdom of the); Norway (on behalf of the Nordic countries); Russian Federation; Saudi Arabia; Spain; United Kingdom; and United States.

152. Comments on draft article 11 were also made to the Sixth Committee during the seventy-seventh session of the General Assembly by the following States: Austria, Cameroon, Egypt, El Salvador, Greece, Romania and Saudi Arabia.

153. On the question of the invocation of immunity, Brazil, Israel, the Russian Federation, Saudi Arabia and the United Kingdom expressed the view that the invocation of immunity was not a prerequisite for its application and that the forum State must determine the existence and effect of immunity regardless of its invocation.¹⁹⁰ The Kingdom of the Netherlands also suggested that the Commission explicitly clarify in the commentary that “the forum State is obliged to examine *proprio motu* the issue of immunity”.¹⁹¹

154. In its statement to the Sixth Committee during the seventy-seventh session of the General Assembly, Greece remarked that neither draft article 11 nor the commentary thereto reflected the fact that the invocation of immunity was not, and should not, be considered as a precondition to the application of immunity. It therefore invited the Commission to examine the possibility of elaborating upon the effects of invocation or non-invocation of immunity on the obligation of the forum State to examine and determine immunity. Also speaking to

¹⁸⁹ *Official Records of the General Assembly, Seventy-seventh Session, Supplement No. 10 (A/77/10)*.

¹⁹⁰ Comments and observations by States.

¹⁹¹ *Ibid.*

the Sixth Committee at the same session, Romania suggested that the Commission provide more clarity on the consequences of failing to invoke immunity within a reasonable time.

155. Malaysia sought clarification on the distinction in the procedure of invoking the two different types of immunity, immunity *ratione personae* and immunity *ratione materiae*, by the State of the official.¹⁹²

156. On paragraph 1 of draft article 11, States agreed that only the State of the official was entitled to invoke immunity for its official. However, some States raised concerns about the practical application of the invocation of immunity in specific instances.

157. The Russian Federation emphasized that the draft article explicitly provided that only the State of the official, and not the official himself or herself, was entitled to invoke immunity. It recommended that the Commission identify, in the commentary, which authorities were competent to invoke immunity. Furthermore, it suggested that the effects of a possible declaration of immunity by an official be addressed by the Commission in the commentary.¹⁹³

158. Norway (on behalf of the Nordic countries) also considered this issue and asked for clarification as to whether an exception allowing for the foreign State official to invoke immunity may be envisaged in urgent instances when coercive measures were applied against a foreign State official by the forum State.¹⁹⁴ France similarly questioned whether an official could make a declaration himself or herself while waiting for his or her State to receive notification through the mechanisms provided for in draft article 10.¹⁹⁵

159. Another issue was raised by France, namely, whether there was a time limit beyond which States could no longer invoke immunity for their officials, for example, when criminal proceedings had advanced considerably.¹⁹⁶

160. Speaking to the Sixth Committee during the seventy-seventh session of the General Assembly, Cameroon expressed concern about the language used in paragraph 1. In particular, it was of the view that the phrase “dans les meilleurs délais”, used in the French text, introduced a lot of subjectivity. Cameroon, therefore, proposed that it be replaced by “dès que possible”.

161. On paragraph 2 of draft article 11, some States questioned whether invocation should necessarily be in writing. France noted that, in its view, the requirement for the invocation to be in writing was a subject of progressive development and encouraged the Commission to clarify that in the commentary. Similarly, Israel noted there was not sufficient State practice to affirm that an invocation must be in writing, and the United Kingdom requested that the Commission provide further State practice supporting that requirement.¹⁹⁷ Also on this topic, the United States agreed that the invocation of the immunity of a State official should be in writing.¹⁹⁸

162. Concerning the content of the invocation, the United Kingdom questioned the rationale for including mandatory content requirements for an invocation of immunity of a State official when invocation itself was not required under customary international law.¹⁹⁹

163. On paragraph 3 of draft article 11, the United States recommended the deletion of references to international cooperation and mutual legal assistance treaties since issues of

¹⁹² *Ibid.* Malaysia made similar remarks with respect to the procedures envisaged in draft article 9 and draft article 14.

¹⁹³ Comments and observations by States.

¹⁹⁴ *Ibid.*

¹⁹⁵ *Ibid.*

¹⁹⁶ *Ibid.*

¹⁹⁷ *Ibid.* See, for example, the oral invocation of immunity in respect of immovable property by the Ambassador of Equatorial Guinea (International Court of Justice, *Immunities and Criminal Proceedings (Equatorial Guinea v. France), Preliminary Objections, Judgment, I.C.J. Reports 2018*, p. 292, at pp. 303 and 304, para. 25).

¹⁹⁸ Comments and observations by States.

¹⁹⁹ *Ibid.*

immunity fell outside the scope of such treaties. Consequently, it suggested ending paragraph 3 after “States concerned”.²⁰⁰

164. Lastly, on paragraph 4 of draft article 11, the United States questioned the utility and enforceability of dictating internal domestic processes.²⁰¹ No other State expressed specific concerns regarding paragraph 4.

2. Recommendations of the Special Rapporteur

165. The Special Rapporteur agrees with States that the invocation of the immunity of State officials is not a prerequisite for its application. In this respect, the Special Rapporteur notes that the commentary to draft article 14 adopted on first reading expressly states that: “The competent authorities of the forum State must therefore determine immunity in any case, whether or not it has been invoked”.²⁰² The Special Rapporteur recommends including a similar clarification in the commentary to draft article 11.

166. Regarding the comments by States as to whether the State official concerned can invoke immunity himself or herself, the Special Rapporteur recognizes that States agree that the right to invoke immunity rests with the State itself. At the same time, while the declaration by a foreign State official that he or she has immunity is not legally sufficient in itself to qualify as an invocation of immunity, that does not mean that such a declaration has no significance at all in the context of legal procedures carried out in relation to that person. Such a declaration may be considered by the forum State when examining and determining immunity. The Special Rapporteur recalls that a similar point was made by the first Special Rapporteur on the topic, Mr. Kolodkin, in his third report.²⁰³ Given the continued attention paid to this matter by States in their comments, the Special Rapporteur recommends adding this clarification to the commentary to the draft article.

167. In response to the comment on the temporal element referred to in paragraph 1 of draft article 11, the Special Rapporteur finds the current formulation adequately flexible to allow for differences among national legal systems and sufficiently clear to the extent that immunity should be invoked as early as possible, as this is in the best interests of the State of the official. That said, the Special Rapporteur believes that the commentary could be expanded to address the issue of whether, at a certain point, the State of the official would not be able to invoke immunity, such as when the criminal proceedings had advanced considerably. In the view of the Special Rapporteur, since invocation is not a requirement to apply immunity, and presumably the forum State would have considered the issue of immunity even without the invocation thereof by the State of the official, an invocation of immunity after this stage would be possible, but probably not decisive.

168. Concerning paragraph 2 of draft article 11, the Special Rapporteur agrees with the States that noted that the requirement that invocation be in writing and include specific information is not yet sufficiently rooted in uniform State practice. The Special Rapporteur notes that the requirements proposed in paragraph 2 are aimed at providing more certainty to an act that should have an effective influence in the determination of immunity and in the forum State’s exercise of criminal jurisdiction. In particular, in cases in which immunity *ratione materiae* is in question, invocation in writing will facilitate the identification of the precise acts that would be covered by immunity and the official functions to which they relate. Invocation through other means will tend to be less precise; therefore, the written form should be preferred. In the opinion of the Special Rapporteur, the necessity of the requirements prescribed in paragraph 2 could be expanded upon in the commentary.

169. In addition, for the same reasons as stated with regard to draft article 10, the Special Rapporteur proposes deleting “for that purpose” in paragraph 3 and the ending clause of paragraph 3, which reads “which may include those provided for in applicable international

²⁰⁰ *Ibid*

²⁰¹ *Ibid*.

²⁰² *Official Records of the General Assembly, Seventy-seventh Session, Supplement No. 10 (A/77/10)*, chap. VI, sect. C.

²⁰³ *A/CN.4/646*, para. 15.

cooperation and mutual legal assistance treaties". The new formulation of draft article 11 reads as follows:

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

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.

170. The commentary to this draft article is contained in chapter VI, section C, of the report of the Commission on its seventy-third session.²⁰⁴

1. Comments and observations by States

171. Draft article 12 concerns the waiver of immunity. It recognizes the right of the State of the official to waive immunity and addresses the procedural aspects relating to the form that the waiver should take and the means by which it is communicated. As in draft article 11, draft article 12 refers to the need to inform the competent authorities of the forum State that immunity has been waived.

172. Written observations relating specifically to this draft article were submitted by the following 12 States: Austria; Brazil; France; Iran (Islamic Republic of); Netherlands (Kingdom of the); Norway (on behalf of the Nordic countries); Russian Federation; Saudi Arabia; Singapore; Spain; United Kingdom; and United States.

173. The following States also provided comments on draft article 12 to the Sixth Committee during the seventy-seventh session of the General Assembly: Austria; Greece; Russian Federation; and Türkiye.

174. Some States, including Brazil, Iran (Islamic Republic of), the Russian Federation, the United Kingdom and the United States, reaffirmed that a waiver of immunity could never be presumed and thus must always be express and in writing. In addition, France and the United States stated that the text of the draft article should assert more explicitly that only the State can be the author of the waiver of immunity of its official.²⁰⁵

²⁰⁴ *Official Records of the General Assembly, Seventy-seventh Session, Supplement No. 10 (A/77/10)*.

²⁰⁵ Comments and observations by States.

175. Austria and the United States also asked the Commission to specify that the immunity of a State official from foreign criminal jurisdiction could be waived by the State of the official “either *proprio motu* or upon request by the forum State”.²⁰⁶

176. Furthermore, Brazil asserted that a waiver must be “on a case-by-case basis” and that an amendment to that effect could be made to draft article 12, paragraph 2.²⁰⁷

177. States expressed diverse opinions on the irrevocability of the waiver of immunity provided. France asserted that the irrevocability of a waiver of immunity reflected customary international law and that that followed from the principle of good faith and the need to respect legal certainty. While agreeing with that assertion, Singapore posited that the Commission should not undermine the ability of States to revoke a waiver of immunity in exceptional circumstances, such as when new facts surfaced or when the right to a fair trial in the forum State might be compromised due to a change of government or legal systems.²⁰⁸ Brazil and Netherlands (Kingdom of the) also expressed the latter opinion.²⁰⁹

178. While agreeing that States should be able to revoke the waiver of immunity in exceptional circumstances, the United Kingdom cautioned that any such revocation must not be made arbitrarily. In that respect, it did not find the emergence of new facts by itself sufficient to constitute exceptional circumstances.²¹⁰

179. Speaking to the Sixth Committee during the seventy-seventh session of the General Assembly, Greece stated that, while it believed that a waiver of immunity should not be revoked arbitrarily, it still had concerns about the usefulness and desirability of paragraph 5 of draft article 12, given the absence of State practice in that area. Also speaking to the Sixth Committee during the same session, Türkiye was in favour of deleting paragraph 5 on the grounds that neither relevant treaties nor domestic laws of States had expressly referred to the irrevocability of waivers of immunity, and that practice on the issue was limited.

180. The Russian Federation provided comprehensive observations on draft article 12 and stated that it was necessary to consider which authorities were entitled to waive immunity. In that regard, it noted that a notification from one of the individuals authorized to represent a State in international relations, namely, the troika, or from the ambassador of the State of the official in the forum State, carried more weight than a notification from any other representative. The Russian Federation also noted that a waiver could be partial, from both a substantive and a procedural perspective.²¹¹

181. In its comments, the United States recommended the deletion of references to international cooperation and mutual legal assistance treaties for the reasons mentioned above with regard to draft articles 10 and 11.²¹²

2. Recommendations of the Special Rapporteur

182. The Special Rapporteur notes that, in general, States supported draft article 12 as it is currently written. In general, States also agreed that the waiver of immunity of a State official must always be express and in writing, in order to provide legal certainty.

183. Some States emphasized that immunity may only be waived by the State of the official, a rule that is currently reflected in paragraph 1 of draft article 12. Paragraph (4) of the commentary contains the rationale behind this: “The immunity of State officials from foreign criminal jurisdiction is recognized for the benefit of the rights and interests of the State of the official. Therefore, only that State can waive immunity and thus consent to the exercise by another State of criminal jurisdiction over one of its officials.”

184. In turn, the question of which persons or organs are entitled to represent the State of the official for the purpose of the waiver follows the general rules foreseen in the Vienna

²⁰⁶ *Ibid.*

²⁰⁷ *Ibid.*

²⁰⁸ *Ibid.*

²⁰⁹ *Ibid.*

²¹⁰ *Ibid.*

²¹¹ *Ibid.*

²¹² *Ibid.*

Convention on Diplomatic Relations²¹³ and the Commission's 2006 Guiding Principles applicable to unilateral declarations of States capable of creating legal obligations.²¹⁴ Moreover, as expressed in paragraph (5) of the commentary to draft article 12, a waiver may also be communicated by any other person specifically mandated to do so by the State.

185. An issue that gave rise to different views among States is the question of irrevocability, regulated in paragraph 5 of draft article 12. In this regard, the Special Rapporteur would like to recall that the irrevocability of a waiver derives from the general principle of good faith in international law and that its permanent effect is well established in practice. This rule also contributes to protecting legal certainty. While valid waivers are irrevocable, the Special Rapporteur acknowledges that, in extreme circumstances, a waiver may be invalid for grounds equivalent to those foreseen in articles 46 to 53 of the Vienna Convention on the Law of Treaties, which apply by analogy to unilateral acts. Accordingly, a reference to these general grounds of invalidity could be included in the commentary. However, the Special Rapporteur is of the view that it is not necessary to address this issue in the text of the draft article, as the validity of a waiver should be determined in the light of the general rules governing unilateral acts, and no other multilateral instrument regulating the question of immunity establishes special rules on the matter. Moreover, if a State wishes to make its waiver conditional upon certain special circumstances, it would be free to enter into an agreement with the forum State for this purpose.

186. In relation to the question of partial waivers, the Special Rapporteur notes that this possibility is expressly foreseen in paragraph (11) of the commentary. If a waiver applies only to a limited set of acts, immunity subsists in respect of other acts or omissions that are not covered by the waiver. However, the Special Rapporteur agrees that immunity may also be waived in relation to specific procedural acts and will add a reference to this in the commentary.

187. With regard to the reasons for which the State of the official can waive immunity, the Special Rapporteur recognizes that waiving immunity is the prerogative of the State of the official. The latter can decide to waive immunity for any number of reasons, including a request of the forum State, but to include a list does not seem necessary at this stage.

188. Lastly, a proposal was made to remove the phrase "which may include those provided for in applicable international cooperation and mutual legal assistance treaties" from paragraph 3. For the same reasons stated in relation to draft article 10, the Special Rapporteur agrees with this proposed change and suggests the deletion of this clause. The Special Rapporteur also recommends deleting "for that purpose" from paragraph 3, consistent with draft article 10. Accordingly, the Special Rapporteur proposes the following formulation of the draft article:

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 by the States concerned.
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.

²¹³ Vienna Convention on Diplomatic Relations (Vienna, 18 April 1961), United Nations, *Treaty Series*, vol. 500, No. 7310, p. 95.

²¹⁴ *Yearbook ... 2006*, vol. II (Part Two), paras. 51 and 52.

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.

189. The commentary to this draft article is contained in chapter VI, section C, of the report of the Commission on its seventy-third session.²¹⁵

1. Comments and observations by States

190. Draft article 13 provides that both the forum State and the State of the official may request information from each other. In paragraphs 1 and 2, it addresses the right of the States concerned to request information; in paragraph 3, it addresses the procedure for requesting information; and in paragraph 4, it addresses the manner in which the requested State is to consider the request.

191. Written observations relating specifically to this draft article were submitted by the following seven States: France; Israel; Malaysia; Netherlands (Kingdom of the); Saudi Arabia; United Kingdom; and United States.

192. Specific comments on draft article 13 were provided by Cameroon to the Sixth Committee during the seventy-seventh session of the General Assembly. Malaysia provided comments on draft article 13 to the Sixth Committee during the seventy-ninth session of the General Assembly.

193. Some States expressed views on whether requests for information, as envisaged under draft article 13, were to be of a mandatory or voluntary nature. Saudi Arabia, for example, maintained that the forum State must be obliged to make such a request to the State of the official.²¹⁶ Similar views were expressed by Cameroon in its statement to the Sixth Committee. The United Kingdom, on the other hand, considered that such an exchange of information was neither mandatory nor required in practice.²¹⁷ Other States, such as the United Arab Emirates and the United States, suggested deleting draft article 13, owing to the discretionary nature of such requests for information.²¹⁸ The Kingdom of the Netherlands was also in favour of the deletion of the provision, arguing that draft article 13 suggested a possibility for the forum State to seek information from the State of the official, whereas elsewhere in Part Four, the forum State would be obliged to do so.²¹⁹

194. Israel appreciated that “direct dialogue between States can ensure both the protection of the fundamental legal principle of immunity of State officials and the avoidance of potential abuse of legal proceedings, while combating possible impunity”. However, Israel was careful to note that, in direct dialogues, States should maintain the right to refuse to respond to requests for information. Any such refusal “must not be construed as a ground for declaring that immunity does not apply, particularly if the State makes clear that the acts in question related to official activity and asserts the immunity of the relevant officials”.²²⁰

²¹⁵ *Official Records of the General Assembly, Seventy-seventh Session, Supplement No. 10 (A/77/10)*.

²¹⁶ Comments and observations by States.

²¹⁷ *Ibid.*

²¹⁸ *Ibid.*

²¹⁹ *Ibid.*

²²⁰ *Ibid.*

195. The United Kingdom raised another concern relating to the confidentiality of information requested, in particular in respect of personal data or national security.²²¹ Malaysia, on the other hand, suggested that a binding obligation may exist upon the requesting State to ensure the confidentiality of the information provided by the requested State.²²²

196. As to paragraph 3 of draft article 11, the United States recommended the deletion of references to international cooperation and mutual legal assistance treaties, as issues of immunity fell outside their scope. Consequently, it suggested ending paragraph 3 after “States concerned” and applying the amendment to similar provisions in draft articles 12 and 13.²²³

197. Regarding the obligation of States to act in good faith, France questioned the added value of paragraph 4 of draft article 13, given the Commission’s reference to “the general obligation incumbent upon States to act in good faith in their relations with third parties”.^{224,225}

2. Recommendations of the Special Rapporteur

198. Taking into account the States’ comments on draft article 13, the Special Rapporteur wishes to emphasize that the draft article is drafted in permissive language in order to reflect the discretionary nature of requests for information. In addition, the Special Rapporteur recalls that, as expressed in the commentary to draft article 13 adopted on first reading, this provision is intended to facilitate the exchange of information between the forum State and the State of the official, which might be very useful in the process of determining whether or not immunity applies, or in the process of deciding whether or not to invoke or waive immunity.²²⁶ The Special Rapporteur sees value in retaining paragraphs 1, 2, and 3 of the provision as currently drafted in order to clarify the procedural steps that pertain to requests for information. Accordingly, the Special Rapporteur does not share the opinion that draft article 13 should be deleted because such requests are not mandatory. However, if the Commission decides to delete this provision, the Special Rapporteur would not oppose it if those steps were clarified in the commentary.

199. Moreover, for the same reasons as stated in draft article 10, the Special Rapporteur proposes deleting “for that purpose” in paragraph 3 and the ending clause of paragraph 3, which reads “which may include those provided for in applicable international cooperation and mutual legal assistance treaties”.²²⁷ Accordingly, the text of the draft article would read as follows:

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.

²²¹ *Ibid.*

²²² *Ibid.* In its statement to the Sixth Committee during the seventy-ninth session of the General Assembly, Malaysia also commented that, with regard to draft article 13, it might be prudent to include confidentiality among the elements to be taken into account as a starting point for the examination of any request for information, bearing in mind the potential sensitivity of the information to be requested by, or exchanged between, States on the application or invocation of immunity. Furthermore, the draft article itself was silent on the ability of the requested State to assess whether to formulate conditions as part of the process of “considering in good faith” a request for information, in cases where that could facilitate the provision of the requested information (A/C.6/79/SR.23, para. 53).

²²³ Comments and observations by States.

²²⁴ Para. (11) of the commentary to draft art. 13.

²²⁵ Comments and observations by States.

²²⁶ *Official Records of the General Assembly, Seventy-seventh Session, Supplement No. 10 (A/77/10)*, para. (4) of the commentary to draft art. 13.

²²⁷ See paras. 144–148 above.

3. Information may be requested through diplomatic channels or through any other means of communication accepted by the States concerned.
4. The requested State shall consider any request for information in good faith.

Article 14
Determination of immunity

1. A determination of the immunity of a State official from the 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.

200. The commentary to this draft article is contained in chapter VI, section C, of the report of the Commission on its seventy-third session.²²⁸

²²⁸ *Official Records of the General Assembly, Seventy-seventh Session, Supplement No. 10 (A/77/10).*

1. Comments and observations by States

201. Draft article 14 concerns the determination of immunity, meaning the decision on whether or not immunity applies in a particular case. As noted in the commentary, 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. Draft article 14 consists of five paragraphs, concerning which authorities of the forum State are qualified to make the determination of immunity and the legal rules that must be followed in that process (paragraph 1); the general criteria that must be considered by the forum State in determining immunity (paragraph 2); the special criteria that must be considered by the forum State in determining immunity in connection with draft article 7 (paragraph 3); the timeline for when immunity must be determined (paragraph 4); and the process for challenging the determination of immunity (paragraph 5).

202. Written observations relating specifically to this draft article were submitted by the following 17 States: Austria; Colombia; France; Germany; Ireland; Israel; Malaysia; Mexico; Netherlands (Kingdom of the); Norway (on behalf of the Nordic countries); Russian Federation; Saudi Arabia; Singapore; Spain; United Arab Emirates; United Kingdom; and United States.

203. Draft article 14 was addressed in the statements of the following States to the Sixth Committee during the seventy-seventh session of the General Assembly: Austria; Cameroon; Chile; Egypt; France; Iceland (on behalf of the Nordic countries); Israel; Italy; Russian Federation; Saudi Arabia; Sierra Leone; and South Africa. Draft article 14 was also addressed in the statements of Malaysia to the Sixth Committee during the seventy-ninth session of the Assembly.

204. Draft article 14 received extensive attention from States because of its connection to the draft article 7, which has been extensively commented upon. Several States, including Germany, Ireland, Singapore, Spain and the United Kingdom, expressed general support for draft article 14.²²⁹ At the same time, observations were made regarding the wording of the draft article, and more clarity was sought for specific aspects of its application.

205. Israel noted that the distinction between article 9 and article 14 was unclear and requested further clarification.

206. Colombia noted with concern that the scope of draft article 14 was not clear. It stated that, once a forum State had recognized the immunity of a foreign official, the duration of said immunity and who decided when that immunity expired was unclear.

207. The United Kingdom reaffirmed that paragraph 1 of draft article 14 reflected customary international law. It noted that the competent authorities of the forum State were responsible for determining both whether a foreign official enjoyed immunity and the extent of that immunity in accordance with the national law and procedures of that State, and in conformity with applicable rules of international law. Israel expressed that the competent authorities must conduct that immunity analysis at the earliest possible time.²³⁰

208. The Russian Federation noted the necessity of distinguishing between, on the one hand, the existence or absence of immunity as an objective fact arising under international law and, on the other hand, the application or non-application of immunity by the competent authorities of the forum State as a procedural decision taken in the light of the available information. It therefore suggested that a wrongful determination of the absence of immunity by the forum State be acknowledged as contravening the applicable rules of international law.

209. France sought clarification as to whether each provision listed in paragraph 2 of draft article 14 was a *conditio sine qua non* for the determination of immunity. In addition, Colombia recommended the Commission make the phrase “other sources” in paragraph 2 (e)

²²⁹ See also statements by Chile and Italy to the Sixth Committee during the seventy-seventh session of the General Assembly.

²³⁰ Comments and observations by States.

more specific, in order to ensure that only credible and accurate information was used in determinations of immunity.

210. A number of States provided their views on the relationship between draft articles 7 and 14. Ireland and Norway (on behalf of the Nordic countries) expressed their full support for draft article 14, paragraph 3, holding that it fulfilled the purpose of reducing the potential for political abuse posed by draft article 7 without overly inhibiting its application in good faith.²³¹ The Russian Federation, on the other hand, maintained that draft article 14, paragraph 3, should be deleted, flowing from its position on draft article 7.²³²

211. Specifically, regarding draft article 14, paragraph 3 (a), several States commented on the phrase “at an appropriately high level” in reference to the authorities competent to make a determination of immunity.

212. Germany, Ireland and Singapore expressed their support for the phrase, which, in the view of those States, both provided a degree of flexibility to the forum State to determine which authorities were at an appropriately high level and constituted a confidence-building measure,²³³ ensuring that the assessment was done by “specially qualified State authorities with a special level of competence”.²³⁴

213. Mexico, on the other hand, considered the Commission’s explanation of the phrase “appropriately high level” in the commentary to be confusing and lacking in clarity.²³⁵ Similarly, France observed that the English and French formulations of the phrase were not sufficiently clear.²³⁶ The United Kingdom asked the Commission to clarify in the commentary that a “high-level” decision maker should not imply the politicization of a decision that was ultimately a question of law, namely, the determination of immunity.²³⁷

214. Italy, speaking to the Sixth Committee during the seventy-seventh session of the General Assembly, expressed some reservations about the employment of the expression “before initiating criminal proceedings” in draft article 14, paragraph 4, which was also used in draft article 9. Since the two draft articles had different meanings and scope, Italy encouraged the Commission to consider two different wordings, particularly as it believed that the determination of immunity, in particular in relation to immunity *ratione materiae*, required a preliminary search for evidence. Therefore, Italy expressed its preference for an expression that could set the time limit of the determination of immunity later, possibly before the commencement of trial.

215. On another issue, the Russian Federation and the United Kingdom considered that draft article 14, paragraph 4 (b), could legitimize the exercise of coercive measures against an individual enjoying immunity.²³⁸ The Russian Federation suggested that the provision should, at a minimum, be limited to situations in which the competent authorities had *prima facie* reasonable grounds to presume that an individual did not enjoy immunity, as well as to cases in which coercive measures were necessary to prevent a violent crime.²³⁹ By contrast, the United Kingdom emphasized that “if it has been determined that the official enjoys immunity from jurisdiction, then it should not be legally possible for the forum State to exercise that jurisdiction by taking coercive measures against the official”.²⁴⁰

216. In addition, there were several comments on the intersection of personal immunity and inviolability. France, the United Arab Emirates and the United States asked the Commission to provide additional explanations as to how the inviolability of those

²³¹ *Ibid.*

²³² *Ibid.*

²³³ *Ibid.*

²³⁴ *Ibid.*

²³⁵ *Ibid.* See also the statement by Cameroon to the Sixth Committee during the seventy-seventh session of the General Assembly.

²³⁶ Comments and observations by States.

²³⁷ *Ibid.*

²³⁸ *Ibid.*

²³⁹ *Ibid.*

²⁴⁰ *Ibid.*

individuals who enjoyed personal immunity interacted and added to their immunity protections, for example, in cases of arrest.²⁴¹

217. Spain explicitly affirmed the positive value added by draft article 14, paragraph 5, noting that it considered that the determination of immunity was likely to end with a decision by a judicial body and that paragraph 5 envisaged the requisite possibility of lodging an appeal against a negative determination.²⁴²

218. Lastly, Austria suggested that an additional procedural safeguard, to allow for the presence of representatives of the State of the official in the relevant judicial proceedings of the forum State, be envisaged in draft article 14.²⁴³

2. Observations and recommendations of the Special Rapporteur

219. The Special Rapporteur wishes to note that he concurs with the comments by States recognizing that draft article 14, paragraph 1, reflects customary law. While it is essential to recognize the possibility of diverse legal and procedural frameworks at the national level, the Special Rapporteur wishes to reaffirm that the determination of immunity must be in conformity with applicable rules of international law. Accordingly, it seems that the current formulation in draft article 14, paragraph 1, gives effect to this. In addition, since draft article 14, paragraph 1, refers to the national laws and procedures of the forum State, the Special Rapporteur considers that it does not seem practical to provide for an additional procedural safeguard requiring the presence of the representatives of the State of the official in the relevant judicial proceedings.

220. Regarding draft article 14, paragraph 2, the Special Rapporteur considers that the list of criteria established is valuable in ensuring that all relevant information is taken into account for the purposes of determining immunity. The Special Rapporteur recalls that the commentary to draft article 14, paragraph 2, as adopted on first reading, provides that “it should be borne in mind that the criteria listed in paragraph 2 are not prerequisites for the determination of immunity, but elements of guidance which are offered to the competent authorities”.²⁴⁴ In the view of the Special Rapporteur, it is recognized in this passage of the commentary that not all the elements provided for in paragraph 2 are required under customary international law. For example, as discussed in relation to draft article 11 above, the forum State must consider immunity *proprio motu*, regardless of whether the State of the official has invoked immunity. Nevertheless, the Special Rapporteur sees value in providing this helpful guidance to States in the draft article.

221. Concerning draft article 14, paragraph 3, the Special Rapporteur concurs with the statements by States that this paragraph is necessary and that it furthers the important aim of preventing potential abuse based on the exceptions laid out in draft article 7. In addition, the Special Rapporteur agrees that the authorities making such determinations should be of an “appropriately high level”, as the phrase ensures a degree of flexibility, while also ensuring greater confidence in the process. That said, the Special Rapporteur welcomes further clarification of this phrase in the commentary to alleviate the concerns raised by some States.

222. Concerning the comments made on draft article 14, paragraph 3 (b), the Special Rapporteur does not see a need to modify the text. In the view of the Special Rapporteur, paragraph 3 (b) (i), which requires that the competent authorities have “substantial grounds” to believe that the official committed an international crime, together with the requirement in paragraph 3 (b) (ii) to the effect that the competent authorities give consideration to requests by other authorities, courts or tribunals regarding the exercise of criminal jurisdiction, provides sufficient safeguards to avoid abuse.

223. Concerning paragraph 4 of draft article 14, the Special Rapporteur agrees with the comments made by several States regarding the need to provide additional clarity in the

²⁴¹ *Ibid.*

²⁴² *Ibid.* See also the statement by South Africa to the Sixth Committee during the seventy-seventh session of the General Assembly.

²⁴³ Comments and observations by States.

²⁴⁴ *Official Records of the General Assembly, Seventy-seventh Session, Supplement No. 10 (A/77/10)*, para. (10) of the commentary to draft art. 14.

commentary concerning the inviolability of individuals enjoying immunity *ratione personae*. Such clarification will, *inter alia*, explain that inviolability applies only to those who have immunity *ratione personae* and will also address the scope of inviolability, which prevents any form of arrest or detention.

224. In view of the above, the Special Rapporteur proposes retaining the following formulation for draft article 14:

Article 14

Determination of immunity

1. A determination of the immunity of a State official from the 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.

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.

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.

225. The commentary to this draft article is contained in chapter VI, section C, of the report of the Commission on its seventy-third session.²⁴⁵

1. Comments and observations by States

226. Draft article 15 outlines the process of transferring criminal proceedings concerning a State official from the forum State to the State of the official. It is structured in five paragraphs, addressing the offer of transfer, the consideration of a transfer request in good faith, the suspension and resumption of proceedings, and other obligations.

227. Written comments regarding draft article 15 were submitted by the following nine States: Austria; Colombia; France; Israel; Netherlands (Kingdom of the); Russian Federation; Spain; United Kingdom; and United States.

228. Comments on draft article 15 were provided to the Sixth Committee during the seventy-seventh session of the General Assembly by Austria, Cameroon, France, Germany, Greece and Sierra Leone. In addition, comments on draft article 15 were provided to the Sixth Committee during the seventy-ninth session of the Assembly by Sri Lanka.

229. Sri Lanka noted its appreciation for the Commission's efforts to address immunity of State officials in criminal proceedings, particularly with regard to the transfer of criminal proceedings in draft article 15.

230. According to Israel, the "States with the closest and most genuine jurisdictional links to the matter at hand should have primary jurisdiction as they are generally best able to uphold the interests of justice". Accordingly, Israel argued that the forum State should have the obligation to decline the exercise of its jurisdiction where the State of the official was willing to exercise jurisdiction over the case. It further expressed its preference to make reference to this obligation in the text of the draft article, rather than solely in the commentary. Israel proposed the following edits to draft article 15, paragraph 2: "The forum State shall accept a request for transfer of the criminal proceedings by the State of the official if the State of the official agrees to submit the case to its competent authorities for the purpose of assessment of the appropriateness of prosecution in accordance with the applicable law".²⁴⁶ Similarly, Cameroon strongly suggested that the Commission consider changing the wording of draft article 15 so that it established an obligation on the forum State to transfer criminal proceedings to the State of the official upon request by the latter State.

231. The Kingdom of the Netherlands expressed its preference for deleting draft article 15 as "both the consideration of whether criminal proceedings should be transferred and the

²⁴⁵ *Ibid.*, *Seventy-seventh Session, Supplement No. 10 (A/77/10)*.

²⁴⁶ Comments and observations by States.

procedure to be followed should be assessed on a case-by-case basis taking into account the international obligations of the States involved”.²⁴⁷

232. The Russian Federation noted that it was unclear how draft article 15 related to standard legal assistance treaties. In view of that, it proposed that the provision be briefer, to the effect that the draft articles did not preclude treaties allowing the transfer of criminal cases.²⁴⁸ Austria considered that the transfer procedure must be understood as not affecting treaties on judicial cooperation or extradition.²⁴⁹

233. By contrast, the United Kingdom welcomed that “the Commission has acknowledged at paragraph 5 of this draft article that the forum State may have other binding obligations under international law which may affect the possibility to transfer proceedings to the State of the official”.²⁵⁰

234. The United States observed that draft article 15 did not address cases where the forum State decided to transfer the proceedings to a third State or international court or tribunal. Although the issue was discussed in the commentary, the United States thought that the Commission could clarify that the provision was without prejudice to that option in order to solve the existing ambiguity.²⁵¹

235. Spain considered that the system of transfer of criminal proceedings as set out in draft article 15 could be useful in achieving a balance between the rights and interests of the forum State and those of the State of the official. At the same time, Spain noted that “recourse to this system of international legal cooperation must be subject to requirements of effectiveness and must comply with the principles of international criminal responsibility and accountability”. In its view, as currently drafted, paragraph 4 of draft article 15 did not sufficiently meet those requirements. Accordingly, Spain encouraged the Commission to re-examine the wording of the provision to meet those requirements.²⁵²

236. Colombia noted that draft article 15 could include a provision to emphasize the need for timely communication between the States involved, given the timespans of criminal proceedings.²⁵³

237. Lastly, France considered that the draft article could include an obligation on the State of the official to inform the forum State of the outcome of the procedure once the transfer had taken place.²⁵⁴

2. Observations and recommendations of the Special Rapporteur

238. The Special Rapporteur recognizes the value of draft article 15. As indicated by States in the comments, and as noted in the commentary to the draft article adopted on first reading, it is aimed at ensuring a balance between the rights and interests of the State of the official and those of the forum State. He notes that this draft article, along with the other draft articles in Part Four, is aimed at preserving State sovereignty while also ensuring that immunity does not prevent the legitimate exercise of criminal jurisdiction over an official.

239. The Special Rapporteur wishes to stress that issues relating to the transfer of proceedings from the forum State to the State of the official should, as noted by some States, always be considered on a case-by-case basis. Furthermore, as indicated in a number of the State comments on this draft article, the transfer of criminal proceedings may fall within the scope of certain mutual legal assistance treaties. However, the Special Rapporteur sees value in retaining a draft article on the transfer of criminal proceedings for the benefit of providing guidance in situations that may not be covered by other means. Nevertheless, the Special Rapporteur notes that draft article 15 does not supersede or void the international obligations

²⁴⁷ *Ibid.*

²⁴⁸ *Ibid.*

²⁴⁹ *Ibid.*

²⁵⁰ *Ibid.*

²⁵¹ *Ibid.*

²⁵² *Ibid.*

²⁵³ *Ibid.*

²⁵⁴ *Ibid.*

of the States involved and affirms that the application of draft article 15 is without prejudice to other obligations established under international law, including treaties in the field of mutual legal assistance.

240. Concerning paragraph 1 of draft article 15, the Special Rapporteur notes the deference provided to both States involved through the inclusion of a *proprio motu* offer, while recognizing that the forum State may offer to transfer the proceedings on its own initiative or at the request of the State of the official. The Special Rapporteur recalls the decision of the Commission to retain the word “offer” in the first paragraph to reinforce the link between this paragraph and the duty of good faith on behalf of the State of the official provided for in paragraph 2. In the view of the Special Rapporteur, it is important to retain the balance between these two paragraphs. Accordingly, he does not recommend any modifications.

241. Concerning comments presented by States regarding paragraph 4 of draft article 15 and the need to ensure effectiveness in proceedings, the Special Rapporteur notes that this was also considered by the Commission, as expressed in paragraph (17) of the commentary to draft article 15, as adopted on first reading. Accordingly, he sees value in its inclusion insofar as it promotes the interests of both States regarding accountability and State sovereignty. While the Special Rapporteur notes that this issue is already mentioned in the commentary, he is not opposed to further elaborating upon these terms in the commentary.

242. Lastly, the Special Rapporteur also sees merit in the suggestion that the State of the official keep the forum State informed of important developments in the proceedings after the transfer has taken place. In the view of the Special Rapporteur, this addition could further promote confidence in the process, as well as stable relations between States. The Special Rapporteur suggests that this be reflected in the commentary.

243. Accordingly, the Special Rapporteur recommends retaining the text of draft article 15 adopted on first reading and making the aforementioned modifications to the commentary.

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.
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.

Article 16

Fair treatment of the State 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.

244. The commentary to this draft article is contained in chapter VI, section C, of the report of the Commission on its seventy-third session.²⁵⁵

1. Comments and observations by States

245. Draft article 16 concerns the right of the official of another State to be treated fairly by the authorities of the forum State whenever the latter exercises its criminal jurisdiction against him or her. Differently from the other provisions in Part Four, draft article 16 is centred on the recognition of the official's rights, rather than the mere enumeration of obligations owed by the forum State.

246. Comments regarding draft article 16 were submitted by the following nine States: Austria; Colombia; Netherlands (Kingdom of the); Norway (on behalf of the Nordic countries); Russian Federation; Spain; United Arab Emirates; United Kingdom; and United States.

247. Draft article 16 was also addressed in the statements by Austria and France to the Sixth Committee during the seventy-seventh session of the General Assembly.

248. Norway (on behalf of the Nordic countries) and Spain welcomed the inclusion of a provision recognizing the official's right to fair treatment.²⁵⁶ While admitting that some elements of draft article 16 reflected rights that are normally granted to any individual who is subject to criminal jurisdiction, Spain thought it particularly important to reiterate those rights in the context of the draft articles, considering that jurisdictional acts in respect of State officials "may affect relations between the forum State and the State of the official". Spain further underlined the relevance of paragraph 2, "since it establishes rights that may be especially important when the official is not a national of the State that he or she represents or whose functions he or she exercises".²⁵⁷

249. While the Russian Federation did not disagree with the content of draft article 16, it questioned the appropriateness of having such a provision in the draft articles. In its opinion, it might be better to indicate in a general manner that the draft articles were without prejudice to the obligations of States in the field of human rights and consular relations. Furthermore, it suggested that the Commission consider limiting the scope of draft article 16 to address specific rights governing the relationship between the official and its State, such as the right to communicate with a representative of the official's own State (so that the State of the official was made aware of the situation and could promptly claim immunity) and the right of the State of the official to provide consular-type support, even if the official was not its national.²⁵⁸

250. The United Arab Emirates remarked that "regardless of whether the individual is a foreign official potentially benefiting from immunity *ratione materiae*, any foreign citizen would be entitled to those protections and there should be no need to include them".²⁵⁹

²⁵⁵ *Official Records of the General Assembly, Seventy-seventh Session, Supplement No. 10 (A/77/10)*.

²⁵⁶ Comments and observations by States.

²⁵⁷ *Ibid.*

²⁵⁸ *Ibid.*

²⁵⁹ *Ibid.*

251. The Kingdom of the Netherlands noted that “the procedural rights of the suspect as contained in this draft article are separate from the issue of immunity and are out of place in the context of this topic”.²⁶⁰

252. Colombia remarked that the rights outlined in draft article 16 were already protected by other international instruments and suggested that the Commission reconsider including those provisions in the draft articles.²⁶¹

253. The United Kingdom and the United States also questioned the need for this draft article. The United Kingdom noted that the Vienna Convention on Consular Relations conferred the right to communicate to a State, rather than to the individual from that State.²⁶²

254. The United States suggested that “the language should be altered to adhere closely to the precise formulation used in article 36 [of the Vienna Convention on Consular Relations], or the draft article should simply incorporate article 36 by reference without attempting to paraphrase or rewrite it”.²⁶³

255. Lastly, similar to its comments on draft article 14, Austria suggested that the inclusion of an additional procedural safeguard in the form of the presence of the representatives of the State of the official in the relevant judicial proceedings of the forum State should be considered by the Commission.²⁶⁴

2. Observations and recommendations of the Special Rapporteur

256. The Special Rapporteur considers that there is substantial agreement, as evidenced in the comments by States, on the content of this provision, namely that the obligations of fair treatment listed apply to cases where a foreign State official is subjected to the criminal jurisdiction of another State. The objections raised by some States concern whether this provision is necessary at all, since the obligations would already be covered by the Vienna Convention on Consular Relations or by other norms under international human rights law and international humanitarian law. The Special Rapporteur values the fact that there is a general acceptance of the text of the draft article, including the fact that, as the Commission noted in the commentary, paragraph 2 is proposing these rights also for State officials who are not nationals of the State they are serving.

257. The Special Rapporteur wishes to note that the Commission was of the view that this provision was necessary, as it 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”.²⁶⁵ Accordingly, in the light of the substantive agreement expressed by States on the content of this article, as well as the reasons expressed by the Commission in its commentary, the Special Rapporteur proposes retaining the text of the draft article as approved on first reading.

Article 16

Fair treatment of the State 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:

²⁶⁰ *Ibid.*

²⁶¹ *Ibid.*

²⁶² *Ibid.*

²⁶³ *Ibid.*

²⁶⁴ *Ibid.*

²⁶⁵ *Official Records of the General Assembly, Seventy-seventh Session, Supplement No. 10 (A/77/10)*, para. (2) of the commentary to draft art. 16.

- (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.

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.

258. The commentary to this draft article is contained in chapter VI, section C, of the report of the Commission on its seventy-third session.²⁶⁶

1. Comments and observations by States

259. Draft article 17 outlines the obligation of the forum State to consult with the State of the official, at the request of either, regarding issues related to the immunity of the State official.

260. Specific comments related to this draft article were submitted by the following six States: Israel; Netherlands (Kingdom of the); Norway (on behalf of the Nordic countries); Spain; United Kingdom; and United States.

261. Draft article 17 was also addressed in statements by Estonia, Iceland (on behalf of the Nordic countries) and Ireland to the Sixth Committee during the seventy-seventh session of the General Assembly.

262. Norway (on behalf of the Nordic countries) welcomed draft article 17, on consultations, and draft article, 18 on settlement of disputes. It considered “these two provisions to provide a final procedural safeguard”.²⁶⁷ Similarly, Spain positively valued the inclusion of those two provisions as it believed them to constitute safeguards closely linked to the prevention and resolution of disputes.²⁶⁸

263. By contrast, the United States observed that “there is no basis for obligatory consultation in customary international law”.²⁶⁹ Similarly, the Kingdom of the Netherlands argued that “States are under no obligation to consult each other, but are naturally obliged to respect the immunity of officials of the other State”. It further stated that it was difficult to reconcile draft article 17 with draft article 18. In view of that, the Kingdom of the Netherlands opposed the inclusion of draft article 17,²⁷⁰ while the United States recommended that, in the event of the draft articles taking the form of a treaty, the draft article should say “should” rather than “shall”.²⁷¹

264. The United Kingdom expressed the view that “consultations remain a useful and flexible mechanism by which States can discuss matters of mutual importance”. However, the State questioned whether it was appropriate or necessary to make consultations mandatory in the context of those draft articles.²⁷²

²⁶⁶ *Ibid.*, *Seventy-seventh Session, Supplement No. 10 (A/77/10)*.

²⁶⁷ Comments and observations by States.

²⁶⁸ *Ibid.* See also statement by Ireland to the Sixth Committee during the seventy-seventh session of the General Assembly.

²⁶⁹ Comments and observations by States.

²⁷⁰ *Ibid.*

²⁷¹ *Ibid.*

²⁷² *Ibid.*

265. Lastly, Israel noted that the scope of “matters relating to [...] immunity” in the draft article was ambiguous. It suggested the draft article be amended to specify key matters relating to immunity, such as: “whether complaints were filed in the jurisdiction with the closest links to the alleged offences; whether proceedings are pending elsewhere; and whether the complaint has been investigated or dismissed in another State or the State of the official”.²⁷³

2. Observations and recommendations of the Special Rapporteur

266. The Special Rapporteur notes that, while States valued the need for consultations in their responses, other States pointed out that there was no general obligation for consultations under international law.

267. The Special Rapporteur wishes to stress that the Commission addressed this provision on first reading, stating that the word “shall” denotes the obligatory nature of the consultation, while the phrase “as appropriate” includes an element of flexibility that allows the forum State and the State of the official to adapt to the circumstances of each specific case. The Special Rapporteur wants to note that, as stated in the commentary adopted on first reading, this flexibility formula does not change the obligatory nature of consultations, nor does it mean that recourse to such consultations is merely a recommendation.²⁷⁴

268. The Special Rapporteur wishes to reiterate that, taking into account the observations by States, he recommends that all the draft articles be brought to the attention of the General Assembly for States to take note and, at the appropriate time, consider the draft articles as the basis for negotiating a treaty on the topic. At this point, the Special Rapporteur, in the light of the comments by States and the commentary adopted by the Commission, suggests keeping the text of draft article 17 as is.

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.

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.

269. The commentary to this draft article is contained in chapter VI, section C, of the report of the Commission on its seventy-third session.²⁷⁵

1. Comments and observations by States

270. Draft article 18 outlines the alternatives for dispute settlement in case of disagreement about the interpretation or the application of the draft articles. It stipulates that, should the parties fail to reach an agreement within a reasonable time, the dispute shall be submitted to the International Court of Justice. Nonetheless, the parties may subsequently agree to submit

²⁷³ *Ibid.*

²⁷⁴ *Official Records of the General Assembly, Seventy-seventh Session, Supplement No. 10 (A/77/10)*, para. (3) of the commentary to draft art. 17.

²⁷⁵ *Ibid.*, *Seventy-seventh Session, Supplement No. 10 (A/77/10)*.

the dispute to arbitration or any other means of dispute settlement, provided it results in a binding decision.

271. Specific comments on draft article 18 were submitted by the following 16 States: Austria; Brazil; France; Germany; Iran (Islamic Republic of); Israel; Malaysia; Netherlands (Kingdom of the); Norway (on behalf of the Nordic countries); Republic of Korea; Russian Federation; Singapore; Spain; United Arab Emirates; United Kingdom; and United States.

272. Comments on draft article 18 were also provided in statements to the Sixth Committee during the seventy-seventh session of the General Assembly by the following States: Algeria; Argentina; Armenia; Austria; Brazil; Cameroon; Chile; China; Colombia; Estonia; Greece; Iceland (on behalf of the Nordic countries); Iran (Islamic Republic of); Ireland; Israel; Italy; Mexico; and Russian Federation. During the same session, Malaysia also provided comments on draft article 18.

273. A number of States, including Austria, Italy, Mexico and Norway (on behalf of the Nordic countries) welcomed the inclusion of a dispute resolution clause.²⁷⁶ Cameroon, speaking to the Sixth Committee during the seventy-seventh session of the General Assembly, appreciated the inclusion of a settlement of disputes clause in the draft articles, especially in view of the desirability of elaborating a convention on the basis of the draft articles. At the same time, it suggested clarifying in the text of the draft article 18 that disputes could only be submitted to a court or tribunal after the question of immunity had been finally determined by the competent judicial authority.

274. Similarly, Austria welcomed draft article 18, but requested the Commission to “provide for time limits regarding any dispute settlement in relation to pending criminal proceedings”. Austria noted that any upcoming convention would have to “address the need and the criteria for a suspension of the relevant national proceedings during an ongoing international dispute settlement”.²⁷⁷

275. Brazil, on the other hand, questioned whether “a dispute resolution clause would be appropriate or desirable in the outcome of the work of the Commission”. It suggested that, if a dispute resolution clause was included, it should be general in nature, without the use of compulsory language.²⁷⁸ Speaking to the Sixth Committee during the seventy-seventh session of the General Assembly, Colombia also expressed concern in relation to draft article 18, which it viewed as a form of tacit acceptance of a specific judicial means.

276. On another issue, Germany indicated that, under German law, there was no provision permitting a court to defer the legal determination of whether immunity applied in a specific case to an intergovernmental mediation process after an indictment had been filed in criminal proceedings, nor to consider the results of such a process in those proceedings.²⁷⁹

277. Some States noted that the inclusion of draft article 18 strongly depended on the final outcome of the Commission’s work. With regard to that, France suggested leaving the question of the inclusion of a dispute resolution clause in the draft articles to a later stage of the Commission’s proceedings.²⁸⁰ Similarly, the Russian Federation was of the view that the consideration of the provision was premature and would only make sense if a decision was taken to develop a convention on the basis of the draft articles. The Islamic Republic of Iran reiterated “that a dispute settlement clause would only be relevant if the draft articles were intended to become a treaty”.²⁸¹

278. The United Kingdom expressed the view that “a provision providing for the compulsory adjudication of disputes by the International Court of Justice would only be

²⁷⁶ Comments and observations by States. See also statements by Argentina, Armenia, Italy and Mexico to the Sixth Committee during the seventy-seventh session of the General Assembly.

²⁷⁷ Comments and observations by States.

²⁷⁸ *Ibid.*

²⁷⁹ *Ibid.*

²⁸⁰ *Ibid.*

²⁸¹ *Ibid.* See also Israel (*ibid.*) and the statements by China, Estonia, Greece and Italy to the Sixth Committee during the seventy-seventh session of the General Assembly.

appropriate in a treaty to be negotiated and agreed by States and cannot be considered to be codification of international law".²⁸²

279. Similarly, the United States stated that "this dispute resolution language is only relevant if these draft articles take the form of a treaty, and in such case subject to any reservation by the forum State or the State of the official".²⁸³ The United Arab Emirates mentioned that draft article 18 could only be relevant if it became a part of a convention. It further noted that "dispute settlement clauses are distinct in kind from other procedural safeguards" and recommended the placement of draft article 18 in a separate Part Five.²⁸⁴

280. In its comments, the Kingdom of the Netherlands reiterated its commitment to "work to ensure the inclusion of a clause providing for binding dispute resolution" if the draft articles resulted in a treaty text.²⁸⁵

281. Concerning draft article 18, paragraph 2, a few States expressed opposition to the binding nature of the dispute settlement mechanisms. Singapore mentioned that the compulsory dispute settlement mechanism was not suitable for resolving issues related to immunity of State officials. Accordingly, its preference would be to remove paragraph 2 from draft article 18.²⁸⁶ In its statement to the Sixth Committee during the seventy-seventh session of the General Assembly, Algeria expressed reservations with regard to the compulsory nature of paragraph 2. Israel, on the other hand, recommended the addition of an opt-out clause, as previously suggested by some members of the Commission.²⁸⁷

282. Comments were also provided on other issues related to paragraph 2 of draft article 18. In its statement to the Sixth Committee during the seventy-seventh session of the General Assembly, Chile remarked that the expression "reasonable time", although frequently used in international conventions, did not provide legal certainty and tended to lead to unnecessary delays in that procedure. It therefore recommended that the Commission consider specifying a definite, short but sufficient period to allow for the greatest efforts to reach a mutually acceptable solution before submitting the dispute to a binding forum.

283. The Republic of Korea suggested amending paragraph 2 to list a number of possible dispute resolution procedures, allowing the parties to choose one of them at their discretion on a case-by-case basis, conditioned on mutual consent.²⁸⁸

284. Norway (on behalf of the Nordic countries) expressed agreement with the inclusion of draft article 18 and supported the wording of the draft article and in particular its paragraph 2, as it considered it a final procedural safeguard.²⁸⁹

285. Lastly, Malaysia, noting the decision of the Commission not to include a paragraph concerning the suspension of national proceedings in case of an international dispute, emphasized that there should be recognition that halting national proceedings, pending an international dispute settlement on the matter, would show particular deference to the State of the official.²⁹⁰ In its statement to the Sixth Committee during the seventy-ninth session of the General Assembly, Malaysia noted that suspending domestic proceedings should be carefully negotiated between parties to ensure fairness and balance in the treatment of State officials subject to foreign criminal jurisdiction.

2. Observations and recommendations of the Special Rapporteur

286. The Special Rapporteur notes that States are in agreement that this type of provision is appropriate only if it is part of a treaty. In addition, the Special Rapporteur notes that some

²⁸² Comments and observations by States.

²⁸³ *Ibid.*

²⁸⁴ *Ibid.*

²⁸⁵ *Ibid.*

²⁸⁶ *Ibid.*

²⁸⁷ *Ibid.* See also the statement by China to the Sixth Committee during the seventy-seventh session of the General Assembly.

²⁸⁸ Comments and observations by States.

²⁸⁹ *Ibid.*

²⁹⁰ *Ibid.*

comments related to the scope and specific content of this provision being addressed at the time such a treaty is negotiated.

287. Accordingly, the Special Rapporteur, at this point, does not suggest any modifications to draft article 18.

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.

Annex I

Marked-up text of draft articles 7–18 adopted on first reading with proposed modifications

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;
- (g) crime of aggression;
- (h) slavery;
- (i) slave trade.

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

Part Four

Procedural provisions and safeguards

Article 8

Application of Part Four

1. The procedural provisions and safeguards in the present Part shall be applicable in any instance that may involve the exercise of criminal jurisdiction ~~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 may affect the immunity of an official of another State.~~

2. ~~that~~ The present Part concerns any is applicable to all 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.

Article 9

Examination of immunity by the forum State

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

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

- (a) before initiating criminal proceedings;
- (b) before taking coercive measures that may affect an official of another State, including those that may affect any inviolability that the official may enjoy under international law.

Article 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, unless such notification would jeopardize the confidentiality of an ongoing investigation or the proper conduct of criminal proceedings. States shall consider establishing appropriate procedures to facilitate such notification.
2. The notification shall include, *inter alia*, the identity of the official, the grounds for the exercise of criminal jurisdiction and the competent authority to exercise jurisdiction.
3. The notification shall be provided through diplomatic channels or through any other means of communication accepted ~~for that purpose~~ by the States concerned, ~~which may include those provided for in applicable international cooperation and mutual legal assistance treaties~~.

Article 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.

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.

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.

Article 14**Determination of immunity**

1. A determination of the immunity of a State official from the 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.

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.

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.

Article 16

Fair treatment of the State 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.

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.

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.

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.

Crime of aggression

- Amendments on the crime of aggression to the Rome Statute of the International Criminal Court, 11 June 2010, article 8 *bis*.

Slavery and the slave trade

- Slavery Convention, 25 September 1926, article 1.

Annex II

Clean text of draft articles 7–18 with the proposed amendments of the Special Rapporteur

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;
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- (d) crime of *apartheid*;
- (e) torture;
- (f) enforced disappearance;
- (g) crime of aggression;
- (h) slavery;
- (i) slave trade.

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

Part Four

Procedural provisions and safeguards

Article 8

Application of Part Four

1. The procedural provisions and safeguards in the present Part shall be applicable in any instance that may involve the exercise of criminal jurisdiction by the forum State that may affect the immunity of an official of another State.

2. The present Part is applicable to all 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.

Article 9

Examination of immunity by the forum State

1. When the competent authorities of the forum State become aware that the immunity of an official of another State may be affected by the exercise of its criminal jurisdiction, they shall examine, as far as practicable, 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.

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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, unless such notification would jeopardize the confidentiality of an ongoing investigation or the proper conduct of criminal proceedings. 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 by the States concerned.

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

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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 by the States concerned.
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.

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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.
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1. A determination of the immunity of a State official from the 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:
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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.
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.

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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.

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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.

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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.

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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.

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- Slavery Convention, 25 September 1926, article 1.
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