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**IMMUNITY OF STATE OFFICIALS FROM FOREIGN CRIMINAL
JURISDICTION**

Statement of the Chair of the Drafting Committee

Mr. Claudio Grossman Guiloff

6 August 2019

Mr. Chair,

It gives me great pleasure to introduce the sixth report of the Drafting Committee for the seventy-first session of the International Law Commission. This report concerns the topic “Immunity of State officials from foreign criminal jurisdiction”, contained in document A/CN.4/L.940. It reproduces the text of the draft article 8 *ante*, provisionally adopted by the Drafting Committee at the present session.

Before addressing the details of the report, I wish to pay tribute to the Special Rapporteur, Ms. Escobar Hernández, whose mastery of the subject, guidance, and cooperation greatly facilitated the work of the Drafting Committee. I also thank the other Members of the Committee for their active participation and significant contributions to the success of our work. Furthermore, I wish to thank the Secretariat for its invaluable assistance. As always, and on behalf of the Drafting Committee, I am pleased to extend my appreciation to the interpreters.

Mr. Chair,

It will be recalled that the Commission, at its 3488th meeting on 23 July 2019, referred draft articles 8 to 16, as contained in the Special Rapporteur's seventh report (A/CN.4/729), to the Drafting Committee, taking into account the proposals offered in the Plenary. The Drafting Committee devoted five meetings to the examination of the draft articles. Due to time constraints, the Drafting Committee only managed to complete draft article 8 *ante*, which it provisionally adopted. The work of the Drafting Committee will continue next year, and the expectation is that the Drafting Committee will complete a first reading of the draft articles on the immunity of State officials from foreign criminal jurisdiction at that time.

After an introduction and proposal by the Special Rapporteur, the Committee held a general discussion on the draft articles referred to it by the Plenary, reordered by the Special Rapporteur as: draft articles 8, 9 [12], 10, 11, 12 [13], 13 [9], 14, 15, and 16. In its discussion, the Committee also considered proposals made by Members in the Plenary debate and the Drafting Committee, taking into account the general interest in the topic, both in the Commission and among States in the Sixth Committee.

As in the Plenary debate on this topic, the Drafting Committee's discussion focused mainly on how to proceed regarding procedural provisions and safeguards, given the importance that is attached to such safeguards and the views expressed by some Members about the need to include a draft article on specific safeguards relating to draft article 7. There was a general consensus among Members of the need to proceed carefully and cautiously, ensuring in particular that the

Drafting Committee would aim at adopting its texts without a vote. A number of Members expressed the view that the draft articles proposed by the Special Rapporteur were a good basis for debate, while also expressing support for the proposals made by other Members.

Overall, the comments related, *inter alia*, to the relationship between the draft articles forming Part Four on procedural guarantees and safeguards and draft article 7. In particular, it was discussed whether the guarantees in Part Four would apply to draft article 7 as presently formulated and whether there were additional issues regarding safeguards that needed to be addressed, without seeking to reopen the discussion on draft article 7.

Members stressed the importance of developing procedural guarantees and safeguards in relation to the topic. It was particularly recalled that draft article 7 was adopted by the Commission on the understanding that procedural provisions and safeguards would be elaborated, as indicated in the footnote included in the title of Part Two and Part Three of the present draft articles. Several statements expressed by members in this general discussion focused on the relationship between procedural safeguards and draft article 7. The sense in the Drafting Committee was that it could be useful to have a general provision on the applicability of Part Four to all the draft articles, affirming that such guarantees and safeguards applied generally, including with respect to draft article 7. Moreover, various proposals were made to strengthen the procedural guarantees and safeguards.

The adoption of specific safeguards applicable to draft article 7 was essential for some members, even though the view was also expressed that any procedural guarantees and safeguards are unlikely to overcome the structural difficulty presented by draft article 7. In the view of some members, such procedural guarantees and safeguards applied only when immunity existed, which seemingly was not the case with respect to draft article 7 as it was couched in absolute terms, stating that immunity *ratione materiae* “shall not apply in respect of the following crimes under international law”.

On the contrary, several members supported a broader interpretation of the draft articles proposed by the Special Rapporteur and envisioned a role for procedural safeguards and guarantees even with respect to situations where draft article 7 was engaged. It was recalled that the commentary to draft article 7 notes that paragraph 1 of the draft article lists the crimes, which, if

committed, would prevent the application of such immunity to a foreign official. Moreover, it was stressed that the central aim of these safeguards remained one of avoiding abuse, particularly in respect of prosecutions of foreign State officials that were politically motivated, and this was bound to affect aspects of both immunity *ratione personae* and *ratione materiae*. Therefore, according to Members sharing this view, specific safeguards applicable only to draft article 7 were neither needed nor desirable.

Bearing in mind the short time available for the Drafting Committee to consider the draft articles proposed by the Special Rapporteur and the suggestions from other Members, some Members called for the Committee to adopt a decision prioritising the proposals to be considered at the present session. The Committee ultimately agreed to the proposal by the Special Rapporteur to first consider a new draft article on the application of the procedural provisions and safeguards, and to then focus on draft articles more directly linked with procedural safeguards, namely draft articles 13 [9] and 14. The remaining draft articles - 8, 9 [11], 12, 15, and 16 - would be addressed later. Many of these issues will continue to be addressed next year.

Mr. Chair,

You have before you a report containing the text of the draft article 8 *ante*, provisionally adopted by the Drafting Committee, to which I now turn.

Draft article 8 *ante* reads:

“The procedural provisions and safeguards in this Part shall be applicable in relation to any criminal proceeding against a foreign State official, current or former, that concerns any of the draft articles contained in Part Two and Part Three of the present draft articles, including to the determination of whether immunity applies or does not apply under any of the draft articles.”

The Drafting Committee primarily discussed whether a general statement that the procedural provisions and safeguards, as stated in Part Four, were clearly applicable to the draft articles included in Part Two and Part Three was sufficient to show the applicability of such

safeguards to these draft articles or whether a specific reference to determinations that concern draft article 7 was needed. Even though some Members sought such a specific reference, the Drafting Committee settled on a general and neutral formulation in respect to whether immunity applied or did not apply under any of the provisions of the draft articles.

Draft article 8 *ante* clarifies that Part Four applies to all the draft articles contained in Part Two and Part Three. It thus applies to both immunity *ratione personae* and immunity *ratione materiae*. Moreover, it clarifies that its scope includes questions concerning the determination of whether immunity applies or does not apply under any of the draft articles. In addition, draft article 8 *ante* seeks to confirm that the procedural provisions and safeguards in Part Four of the draft articles are applicable in relation to any criminal proceeding against a foreign State official. The formulation “[t]he procedural provisions and safeguards in this Part shall be applicable in relation to any criminal proceeding against a foreign State official...” reflects this operational orientation. Given the nature of the draft articles, and their applicability to immunity *ratione personae* and immunity *ratione materiae*, both current and former State officials are subject to the procedural guarantees and safeguards.

The reference to “in relation to any criminal proceedings” denotes a broad understanding of the range of issues that may come into play, even those outside an actual trial. The commentary will explain the meaning of a “criminal proceeding” bearing in mind the differences in practice among various legal systems and traditions, including whether the processes could be executive, prosecutorial, and/or judicial. The latter part of the draft article is particular to the “determination”, which will be further clarified in the commentary. It clarifies how immunity should be assessed from a procedural perspective, as provided for in Part Four. The phrase “immunity applies or does not apply under any of the draft articles” links these processes to determinations of both immunity *ratione personae* and immunity *ratione materiae*, including the application of immunity in relation to draft article 7.

The adoption of draft article 8 *ante* will not prejudge, and is without prejudice to the adoption of any additional procedural guarantees and safeguards, including whether specific safeguards apply to draft article 7.

The title of draft article 8 *ante* is “Application of Part Four”.

Mr. Chair,

At the current session, the Drafting Committee also considered draft article 13 [9] concerning determination of immunity, as it bears closely upon questions relating to safeguards, including those concerning draft article 7. The work on the draft article proceeded on the basis of various proposals made by the Special Rapporteur and some Members of the Drafting Committee focusing on the appropriate actors and timing requirements leading to the determination of immunity. The Committee's debate predominantly focused on the substantive requirements to be considered by courts and other competent authorities when making a decision on the applicability of immunity. Due to time constraints, the Drafting Committee was not able to reach an agreement on any text, and many of the issues will continue to be addressed next year, including the decision regarding whether specific safeguards to draft article 7 should be adopted.

Mr. Chair,

This concludes my introduction of the sixth report of the Drafting Committee at the seventy-first session devoted to the topic, "Immunity of State officials from foreign criminal jurisdiction". I wish to thank the Special Rapporteur and the Members of the Drafting Committee for their insightful contributions. I also wish to thank the Secretariat for its invaluable assistance. I am particularly grateful to the interpreters who often worked beyond hours to accommodate us in our work.

I once more wish to recall that the work of the Drafting Committee on the proposals submitted by the Special Rapporteur will continue next year, taking into account the debate and the proposals made during this session. At this stage, I would like to recall that the Special Rapporteur has submitted to the Drafting Committee two revised draft articles 13 [9] (determination of immunity) and 14 (transfer of criminal proceedings), in order to take into account the comments and suggestions made by Members, both in the Plenary and in the Drafting

Committee. Those revised draft articles have been circulated as working papers of the Committee and shall be considered next year.

Again, this report is being submitted for informative purposes only, as the Drafting Committee has not yet completed its work on this topic. It is recommended that the Commission consider the adoption of draft article 8 *ante* in next year's session, in light of the provisions that will be proposed by the Drafting Committee at that time. For now, I recommend that the Commission simply take note of this interim oral report.

I thank you for your kind attention.
