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IMMUNITY OF STATE OFFICIALS FROM FOREIGN CRIMINAL JURISDICTION

Statement of the Chairperson of the Drafting Committee

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3 June 2021

Mr. Chairperson,

I have the pleasure to introduce the third report of the Drafting Committee for the seventy-second 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.953. It reproduces the texts of the draft articles 8 to 11, provisionally adopted by the Drafting Committee so far at the present session.

Before addressing the details of the report, I wish to pay tribute to the Special Rapporteur, Ms. Escobar Hernández, whose knowledge 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 and conference officers.

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Mr. Chairperson,

At this session, the Drafting Committee devoted 12 meetings to the examination of the draft articles, at the 1st to 6th, 13th, and 19th to 23rd meetings, from 27 to 30 April, and on 3, 4 and 14 May, and from 25 to 31 May 2021. In addition, it must be acknowledged with appreciation that the work of the Drafting Committee was greatly facilitated by the informal consultations conducted by the Special Rapporteur before the commencement of the Commission's session, as well as during its session, which helped to deepen the understanding of members on the issues to be addressed.

At the current session, the Drafting Committee continued its consideration of draft articles 8 to 16, as contained in the Special Rapporteur's seventh report (A/CN.4/729), which were referred to the Drafting Committee in 2019, taking into account the proposals made in the Plenary. You may recall that in 2019, the Drafting Committee provisionally adopted draft article 8 *ante* entitled "Application of Part Four", which clarifies that Part Four on procedural provisions and safeguards applies to all the draft articles contained in Parts Two and Three, i.e. to both immunity *ratione personae* and immunity *ratione materiae*. The Special Rapporteur also reordered the draft articles contained in her seventh report in the following way: draft articles 8, 9 [12], 10, 11, 12 [13], 13 [9], 14, 15, and 16. This reordered version formed the basis of the Drafting Committee's work on the remaining provisions in Part Four at the present session, and it was complemented by a series of revised proposals by the Special Rapporteur, taking into account various comments made by members. The Drafting Committee also had before it the draft provisions on the "Use of terms"/"Definitions" in the Second report (A/CN.4/661) of the Special Rapporteur referred to the Drafting Committee in 2013. I would also like to note that at its 3528th meeting, on 21 May 2021,

the Plenary referred draft articles 17 and 18, as proposed by the Special Rapporteur in her eighth report (A/CN.4/739), to the Drafting Committee.

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Mr. Chairperson,

The Drafting Committee managed to complete draft articles 8 to 11, which it provisionally adopted so far and that are contained in document A/CN.4/L.953. Like draft article 8 *ante* before it, contained in document A/CN/4/L.940, of which the Commission took note in 2019, these draft articles, forming Part Four of the draft articles, seek to address questions concerning procedural provisions and safeguards. They deal with the process of examination, notification, invocation and waiver.

During the work of the Drafting Committee, it was noted that at the end of the first reading it would be necessary to consider the order of the draft articles as well as the consistency of the expressions used in the draft articles.

Draft article 8

I shall first turn to the text of the draft article 8. Draft article 8 concerns the "Examination of immunity by the forum State". The purpose of draft article 8 is to draw attention to the obligation of the competent authorities of the forum State to examine the question of whether an official of another State might enjoy immunity in relation to the exercise of criminal jurisdiction by the forum State. The examination of the question of immunity is a closely related to, but a distinct process from the determination of immunity, which takes place at a later stage and is addressed in a separate draft article, which the Drafting Committee is yet to discuss.

Draft article 8 is structured in two paragraphs, containing a general provision in paragraph 1 and more specific scenarios in paragraph 2. It is based on the proposal of the Special Rapporteur

in her seventh report, and subsequent proposals made by the Special Rapporteur taking into account the views expressed in the Drafting Committee.

The general rule in **paragraph 1** emphasizes that an examination must take place without delay. The Drafting Committee agreed that the competent authorities should act swiftly upon becoming aware that a person who is an official of another State might enjoy immunity from foreign criminal jurisdiction. The importance of examining a matter without delay is guided by the advisory opinion of the International Court of Justice in the case of *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights* (*I.CJ. Reports 1999*, par. 63) in which the Court stated that "[q]uestions of immunity are ... preliminary issues which must be expeditiously decided *in limine litis*."

To better capture the temporal element of immediacy in relation to the requirement to examine the question of immunity, on the basis of a proposal by the Special Rapporteur, the syntax of the initial proposal has been reversed and "as soon as" replaced with "when" at the beginning of the provision. The phrase "are aware" in the original proposal was replaced with "become aware". Moreover, it was specified that the competent authorities should examine the question of immunity "without delay", which is a phrase also used in articles 36 and 37 of the Vienna Convention on Consular Relations. In this context, the term "competent authorities" refers to any authorities of the forum State that might be involved in the exercise of criminal jurisdiction and that may become aware that questions of immunity could be triggered in a given case, including the police, prosecutors and judges.

The Drafting Committee spent significant time discussing the verb "consider" contained in the original proposal by the Special Rapporteur. The Special Rapporteur explained that "considerar" in Spanish meant in the present context that the competent authorities took the necessary steps to ascertain whether or not a case involved the immunity of a foreign official. In that sense, the "consideration" of immunity served as an initial step towards the later determination of immunity. Other members of the Drafting Committee noted that the verb "consider" in English did not convey sufficiently the kind of review that the competent authorities are expected to undertake. It was discussed to replace "consider" with "give due consideration", "duly consider"

and “evaluate”, or to link the paragraph explicitly with the relevant draft article 13 [9] on the determination of immunity as proposed by the Special Rapporteur in her seventh report. A proposal to state that the competent authorities “shall consider the question of immunity without delay in order to determine its applicability” did not find enough support.

Inspired by the use of the verb “examiner” in the French translation of paragraph 1, the Drafting Committee settled on the term “examine” in the English version and agreed that the translations of paragraph 1 would use the most appropriate term for each particular language. In this regard, it was pointed out that “consider” and “examine” had the same meaning in Arabic.

To better align the text of paragraph 1 with the terminology used in previous draft articles, the term “foreign official” was replaced by “official of another State”, which corresponds to the text in paragraph 1 of draft article 1. Moreover, the term “criminal proceeding” in the initial proposal of the Special Rapporteur was replaced by the broader formulation “exercise of criminal jurisdiction”, which is used in draft articles 3, 5 and 7. It was reiterated that the term “criminal jurisdiction” will be defined in draft article 2 [3], subparagraph (b), which is still under consideration by the Drafting Committee.

I shall now turn to **paragraph 2**, which constitutes a safeguard clause in relation to paragraph 1, and addresses two aspects of examination requiring separate treatment. It contains two subparagraphs (a) and (b), which are based on several proposals by the Special Rapporteur for paragraphs 2 and 3 to address specifically two particular situations. I should note that the Drafting Committee discussed the proposals for paragraphs 2 and 3 separately and only arrived at the merger of both paragraphs in the final stages of its deliberations on draft article 8. The decision to merge both paragraphs was based on the reasoning that the two provisions covered more specific situations that were without prejudice to the general rule contained in paragraph 1. Instead of duplicating the same language in both paragraphs 2 and 3 and to clearly signify their relationship with paragraph 1, it was decided to use one common chapeau for both provisions.

The Drafting Committee considered several formulations to link paragraphs 1 with the following provisions, including: “In addition to” and “Subject to” paragraph 1, and “In particular”,

"In any case" and "in any event". The phrase "Without prejudice to paragraph 1" and the addition of the word "always" were deemed most appropriate to relate the more general rule in paragraph 1 to the specific provisions in paragraph 2. While the original proposals by the Special Rapporteur for paragraphs 2 and 3 used a passive sentence structure, the chapeau aligns paragraph 2 with paragraph 1 in using "the competent authorities" as the subject of the sentence. The term "consider" was replaced by "examine" in the English version for the reasons I explained in relation to the drafting of paragraph 1. A reference to "in the following circumstances" at the end of the chapeau to introduce subparagraphs (a) and (b) was seen as redundant.

Subparagraph (a) provides that the competent authorities shall examine the question of immunity "before initiating criminal proceedings". The original proposal by the Special Rapporteur for paragraph 2, had referred to "an early stage of the proceeding, before the indictment and commencement of the prosecution stage". The Drafting Committee discussed the timing of the examination of the question of immunity in great detail. The Special Rapporteur proposed to add "as a preliminary question" before "at an early stage of the proceeding". It was also suggested to change "at an early stage" to "at the earliest stage possible". This discussion on the timing of the examination was intrinsically linked with that of the different stages in a criminal proceeding. Members of the Drafting Committee had an exchange regarding the differences between legal systems and cultures. The term "indictment" was considered too specific to particular legal systems. It was pointed out that it might be sufficient to refer to the before "commencement of the prosecution phase" or to replace the reference to "indictment and commencement of the prosecution stage" with "official charges are filed". A proposal to simply note that the question of immunity should be examined at the earliest stage possible did not find support because it would have reduced the added value of paragraph 2 in relation to paragraph 1.

In the final version of subparagraph (a), the Drafting Committee settled on the general phrase "before initiating criminal proceedings", which seeks to capture a moment at which if no prior examination of immunity has been undertaken, the competent authorities of the forum State should undertake such an examination. This does not mean that the question of immunity should not be examined before the initiation of criminal proceedings, as appropriate, as made clear by the

general rule in paragraph 1. The term “criminal proceedings” was preferred over “criminal process” because it is sufficiently broad to cover different legal systems.

Subparagraph (b) states that the competent authorities shall examine the question of immunity “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”. The focus of subparagraph (b) lies on coercive measures, which distinguishes subparagraph (b) from the situations covered by subparagraph (a). For purposes of examining the question of immunity before taking coercive measures, it is immaterial whether criminal proceedings have been initiated. Therefore, the Drafting Committee decided not to connect them by using “and” or “or”. Moreover, the commentaries will make clear that both subparagraphs cover distinct situations.

The phrase “coercive measures” is based on references to “coercive measures” and “measures of constraint” in the relevant case law of the International Court of Justice, notably in the *Arrest Warrant* case (*I.CJ. Reports 2002*, p. 3) and the *Mutual Assistance in Criminal Matters* case (*I.CJ. Reports 2008*, par. 171). The Drafting Committee still discussed whether the qualifier “coercive”, as proposed by the Special Rapporteur, should be dropped in favour of “measures” or “any measure”, but these alternatives were ultimately seen as being too broad. While the members of the Drafting Committee agreed that coercive measures are specific to each particular legal system, the commentaries will explain that the term refers to those measures that limit or constrain foreign officials in the exercise of their rights. The commentaries will also provide examples of coercive measures, such as arrest, detention, search of documents and accommodation, requests that a foreign official serve as a witness and extradition requests.

The first part of subparagraph (b) is based in the Special Rapporteur’s proposal for draft article 8, paragraph 3, for which she presented several revised proposals. While the Drafting Committee considered using the verbs “adopt” or “order the adoption” of coercive measures, it ultimately kept the more generic verb “take” originally proposed by the Special Rapporteur, which is broad and does not necessarily convey formal legal implications. The original proposal by the Special Rapporteur also contained a reference to “the performance of his or her functions”, which reflects the above-mentioned pertinent case law of the International Court of Justice. This

reference was intended to ensure a balance between the forum State's exercise of sovereignty in criminal matters, on the one hand, and certain procedural guarantees related to the immunity of foreign officials, on the other hand. However, the Drafting Committee decided not to include this reference in subparagraph (b) and instead opted for the more general formulation "that may affect an official of another State". It was noted that it would be difficult to examine, at the stage of taking coercive measures, whether such measures would affect the performance of the functions of an official. The provision is merely intended to specify the actions to be taken by the competent authorities with regard to the question of immunity, and it does not prejudice the subsequent determination of immunity.

The second part of subparagraph (b) extends the provision to coercive measures "that may affect any inviolability that the official may enjoy under international law". The Drafting Committee had extensive discussions on the notion of inviolability and its relationship with immunity. It was considered that immunity and inviolability are separate but interrelated concepts. Immunity concerns the legal protection from the exercise of jurisdiction by judges and courts of another State that is enjoyed by certain officials, whereas personal inviolability relates to the physical protection of an official, for example, from arrest and detention. It was suggested to define inviolability more generally in a separate provision, but the discussion of the necessity of such a provision was deferred to a later stage in the work of the Drafting Committee.

While immunity and inviolability are distinct concepts, the Drafting Committee decided to include a reference to inviolability in subparagraph (b) because both concepts overlap when coercive measures that warrant an examination of the immunity of a foreign official may also affect his or her inviolability. The quantifier "any" before "inviolability" is meant to signify that not all foreign officials may enjoy inviolability and that the extent of inviolability depends on the circumstances. The verb "enjoy" corresponds to the language in the Vienna Convention on Diplomatic Relations and the Vienna Convention on Consular Relations, which use "enjoy" in several provisions relating to "inviolability". The verb "enjoy" is also consistent with the terminology generally used in the draft articles with regard to immunity. The phrase "under international law" was added to indicate the applicable legal regime.

The draft article 8 is entitled “Examination of immunity by the forum State”. This is a modified version of the title proposed by the Special Rapporteur, which corresponds to the agreed change from “consider” to “examine” in the English version of the draft article.

Draft article 9 [12]

Mr. Chairperson,

I now turn to draft article 9 [12], which concerns the “Notification of the State of the official” following the examination of the question of immunity under draft article 8. Draft article 9 is composed of three paragraphs, which are based on the original proposal by the Special Rapporteur in her seventh report and several revised proposals made during the consideration by the Drafting Committee. At the outset, the Drafting Committee considered a suggestion to replace “notifications” with “consultations” as a less finite and formal process to inform the State of the official of a possible exercise of criminal jurisdiction that may affect the immunity of that official. However, the Drafting Committee decided that the notification procedure, as set out in draft article 9, is an essential procedural safeguard, which may trigger other steps such as the invocation or waiver of immunity by the State of the official. It was also recalled that the Special Rapporteur, in her seventh report, had proposed a separate provision on consultations between the forum State and the State of the official regarding the determination of immunity that is yet to be considered by the Drafting Committee.

Paragraph 1 specifies when the competent authorities of the forum State shall notify the State of the official. In her initial proposal, the Special Rapporteur had suggested that the authorities of the State of the official should be notified when they “have sufficient information to conclude that a foreign official could be subject to its criminal jurisdiction”. The Drafting Committee did not consider this temporal standard for notifying the State of the official to be sufficiently clear. A concern was expressed that a premature notification of the State of the official could conceivably hamper investigations of the case. Therefore, the wording of paragraph 1 was aligned with the temporal standard stipulated in subparagraphs (a) and (b) of paragraph 2 of draft

article 8. Accordingly, the forum State has to notify the State of the official before the initiation of criminal proceedings or the taking of coercive measures that may affect an official of another State.

The phrase "that may affect an official of another State" only refers to those officials that might enjoy immunity. To address a concern that the phrase could be too broad, the Drafting Committee considered amending it by adding "who may be entitled to" or "enjoy immunity in respect of those proceedings". However, this amendment raised the question whether additional special procedural safeguards would be necessary to protect those officials that may not be entitled to immunity under the exceptions set out in draft article 7. Discussing this question, the Drafting Committee recalled that draft article 8 *ante* clearly provided that Part Four of the draft articles applies to the Parts Two and Three. The proposed amendment was left out on the understanding that the commentaries will explain that a reference to an official of another State is limited to those officials that might enjoy immunity in accordance with the present draft articles.

The latter part of the first sentence of paragraph 1 is based on the original proposal by the Special Rapporteur. Although, the Drafting Committee considered dropping the phrase "of that circumstance", including by replacing it with "this", the phrase was ultimately kept in order to establish a clear link with the first part of the sentence, i.e. the initiation of criminal proceedings or taking coercive measures that may affect an official of another State.

The second sentence of paragraph 1 provides that "States shall consider establishing appropriate procedures to facilitate such notification." The Special Rapporteur had proposed deleting "For that purpose" at the beginning of the sentence in a revised proposal presented to the Drafting Committee. Moreover, the Drafting Committee omitted the reference to "in their domestic law" to give States flexibility in establishing the necessary procedures. This flexibility is also reflected in the phrase "shall consider". While the Drafting Committee discussed stipulating an obligation that "States shall establish", it agreed that States may already have the requisite notification procedures in place. The commentaries will make clear that States shall only establish such procedures if necessary.

Paragraph 2 provides guidance on the elements to be included in the notification required under paragraph 1. The discussion in the Drafting Committee focused on finding a balance between giving the forum State sufficient discretion in exercising its criminal jurisdiction, on the one hand, and providing the State of the official with the necessary information to consider the invocation or waiver of immunity, on the other hand. In particular, the Drafting Committee discussed whether the provision should provide for a minimum threshold of information to be included in the notification. Considering the differences between legal systems, some members of the Drafting Committee noted it was not possible to specify such a minimum threshold. The obligation to notify in paragraph 1 was sufficient and that paragraph 2 should be deleted. In the alternative, it was suggested that paragraph 2 should not list any specific elements of a notification and only stipulate that "[t]he notification shall, as far as possible, include sufficient information to ensure that the State of the official is in a position to consider the question of immunity". It was added that the "[t]he notification may, as appropriate, be updated from time to time". Other members emphasized that the notification requirement under paragraph 1 made it necessary for the Commission to provide further guidance to States. Paragraph 2 was a crucial part of the notification procedure stipulated in the draft article. It was also suggested that in addition to the elements proposed by the Special Rapporteur, the paragraph refer to the legal provisions that served as a basis for the taking of coercive measures or the exercise of criminal jurisdiction by the forum State.

Paragraph 2, as adopted by the Drafting Committee, constitutes a compromise between these different positions. It is largely based on the initial proposal by the Special Rapporteur in her seventh report, taking into account the different views expressed in the Drafting Committee. The adverb "*inter alia*" was added to provide the forum State with flexibility on the content of the notification, depending on the circumstances and stage of the criminal case. Before settling on "*inter alia*", the Drafting Committee also considered other phrases such as "in any event", "as appropriate", "all the necessary information, including", and "as far as possible, at least the following information".

Turning to the different elements of a notification listed in paragraph 2, the Drafting Committee agreed that the "identity of the official" was an essential part of the notification. While

the initial proposal by the Special Rapporteur referred to "acts of the officials that may be subject to the exercise of criminal jurisdiction", the Drafting Committee preferred the wording "grounds for the exercise of criminal jurisdiction". Concern was expressed that the term "grounds" might not be sufficiently clear across legal systems. The term was adopted on the understanding that the commentaries would explain that "grounds" could refer to legal or factual bases for the taking of coercive measures or the exercise of criminal jurisdiction. The phrase "the competent authority to exercise jurisdiction" is a simplified version of the proposal by the Special Rapporteur "authority competent, in accordance with the domestic law of the forum State, to exercise the jurisdiction". It was understood that the singular "authority" could also refer to several "authorities" of the forum State.

Paragraph 3 deals with the means of communication that may be used to notify the State of the officials. Considering comments made in the plenary debate at the last session and in the Drafting Committee, the Special Rapporteur revised her initial proposal to put more emphasis on "diplomatic channels", which are often the primary means of communication between States on questions of immunity. The reference to "through diplomatic channel" was changed to the plural with reference to the formulation used in article 22, paragraph (1)(c)(i) of the 2004 Convention on Jurisdictional Immunities of States and Their Property and the annex to the 2019 Draft articles on Prevention and Punishment of Crimes Against Humanity.

The phrase "or any other means of communication accepted for that purpose by the States concerned" is based on a revised proposal by the Special Rapporteur. The Drafting Committee added "for that purpose" to specify that not all means of communications are appropriate for notifying the State of the official as set out in paragraphs 1 and 2 of draft article 9.

Paragraph 3 further states that the "other means of communication" "may include those provided for in applicable international cooperation and mutual legal assistance treaties". In the initial proposal by the Special Rapporteur international cooperation and mutual legal assistance agreements were placed as an alternative at the same level as "other means of communication". The Drafting Committee questioned the reference to international cooperation and mutual legal assistance treaties as too broad and unspecific. The Drafting Committee again was driven by

concerns that the notification would not be communicated through the appropriate channels in the State of the official. Nonetheless, it was recognized that such treaties could be useful in some circumstances. Therefore, the reference to "international cooperation and mutual legal assistance treaties" was retained and further narrowed down by adding the adjective "applicable" to the Special Rapporteur's proposal. Moreover, means of communication included in such treaties are considered a subcategory of "other means of communication accepted for that purpose by the States concerned". As stated in paragraph 3, those other means "may include those provided for" in international cooperation and mutual legal assistance treaties. The commentaries will provide further details on the relevant international cooperation and mutual legal assistance treaties. They will also make clear that the draft article 9 does not establish requirements for States regarding means of communication in addition to those that already exist in the applicable treaties.

Discussing the relevant diplomatic practice, the Drafting Committee also considered adding the requirement that the notification should be made "in writing" to prevent abuse of the notification procedure. Paragraph 3 was adopted on the understanding that the commentaries will explain that notifications shall preferably be made in writing but could exceptionally be made orally. It was noted that an initial informal notification may be followed by a formal written notification.

The title of draft article 9 is "Notification of the State of the official", as proposed by the Special Rapporteur in her seventh report. A suggestion was made to formulate the title as "Notification to the State of the official" and the Drafting Committee decided that this was a matter to be looked at during the *toilletage final*.

Draft article 10

Mr. Chairperson,

I now turn to draft article 10, which relates to invocation of immunity. This draft article as originally proposed by the Special Rapporteur in her seventh report was divided into six paragraphs. Following several revised proposals prepared for the consideration of the Drafting

Committee, the draft article now contains four paragraphs, pertaining to the information to be provided by the State of the official to the forum State in relation to immunity being invoked.

Paragraph 1 provides a general statement concerning the right of a State to invoke immunity and the timing of such invocation.

This text replaces and merges in part the previous paragraphs 1 and 2, aiming to clarify the right for the State of the official to invoke immunity and to indicate when and based on what circumstances the State of the official may invoke immunity. The word "may" serves to indicate that the prerogative is with the State of the official regarding whether to invoke immunity or not, that State having the choice to invoke immunity but having no obligation to do so. Moreover, the right to invoke belongs to the State, not the official. The language of "becomes aware" follows the language of draft article 9 on notification. In other words, becoming aware may refer to having been notified by the forum State or to becoming aware by other means. The phrase "could be or is being exercised" is aimed to respond to the fact that immunity could be invoked at any stage of the criminal proceedings in a broad sense and that proceedings might have also in some cases begun before immunity is invoked. It was understood that the paragraph should not create an implication that the forum State would be prevented from exercising jurisdiction or initiating criminal proceedings until it hears back from the State of the official with respect to notification. It was also understood that the commentary could explain that invocation of immunity would not prevent criminal proceedings from advancing once jurisdiction was established. It was noted that the commentary should strike a careful balance between the rights of the forum State and the State of the official in this regard.

The term "as soon as possible" was chosen to provide a degree of certainty regarding the timing of invocation of immunity, also highlighting that it would be in the interest of the State of the official to invoke immunity early on, while acknowledging that the immunity could nonetheless be invoked at any time. It was understood that there is no obligation to invoke immunity at the start of possible criminal proceedings. The Drafting Committee also considered the term "in a reasonable time" in this context, but preferred the formulation "as soon as possible", because it allows for greater flexibility and does not raise questions as to what constituted a

"reasonable" time, with the attendant possible consequences resulting from not invoking immunity within such a reasonable time.

The Drafting Committee preferred the wording "another State" to "forum State" since the former term was more neutral and also used in paragraph 1 of draft article 1. In addition, it reflected the fact that criminal jurisdiction and proceedings are merely a possibility at the stage where a person is detained, for example. As such, whether another State would become a "forum" State, so to speak, would only become clear at a later stage.

Paragraph 2 describes the manner in which immunity should be invoked. The Committee deleted the previously used word "clearly" as unnecessary, since the subsequent language already specifies how the invocation could be clear, and the commentary could also refer to the need for and elements required for clarity.

The Drafting Committee chose to add the words "and the position held by" the official, since the other State in which criminal jurisdiction could be or is being exercised would need to know that position with respect to the determination of immunity. It was noted that the position held by the official could refer to the title, rank, and level of an official, such as describing whether the official is, for example, a Head of State, a Foreign Minister, or a legal advisor. The provision also reflected the fact that officials include higher ranking officials, junior officials, and any officials representing or exercising the functions of the State.

The previous wording "the type of immunity being invoked" was replaced by the more general "the grounds on which immunity is invoked", since it seemed to the Drafting Committee more important that a State be clear with respect to the grounds on which invocation of immunity is based than the type of immunity at that stage of events. This formulation was also seen as providing a parallel with draft article 9, paragraph 2, which speaks of "the grounds for the exercise of criminal jurisdiction". It is understood that the commentary could explain elements relating to the type of immunity, i.e., whether immunity was *ratione materiae* or *ratione personae*, and that it could also clarify that the description may include the type of immunity, but that including that information is not necessary and could also be inferred, for example, with regard to the position

and the grounds. Some members indicated their preference that the commentary explain what is expected when indicating the grounds, noting that such grounds could include not just the type of immunity, whether immunity *ratione personae or* immunity *ratione materiae,* but also with respect to the latter those acts of the official that are regarded as official ones by the State of the official.

Paragraph 3 deals with the means by which the invocation of immunity should be provided and is analogous to paragraph 3 of draft article 9. In comparison to paragraph 3 of draft article 9, the present paragraph 3, introduces the following changes. First, the mention of invocation through diplomatic channels was moved to a more central place since in practice it was the invocation that was material not so much its notification through diplomatic channels, hence the opening "Immunity may be invoked…". Diplomatic channels as a means of communication were placed upfront to highlight the common use of this method to communicate invocation. The other means, such as international cooperation and mutual legal assistance treaties, could be of varying relevance to different States.

Secondly, the Drafting Committee has here used the word "may" instead of "shall", which is used in draft article 9, to give flexibility for States and to reflect the understanding that immunity might be invoked in court, as well as through diplomatic channels. It was understood that the commentary would also explain that sometimes immunity is invoked by other means including before judicial organs. It was noted that some States did not accept such communications from the executive branch in order to maintain a separation of powers.

Paragraph 4 concerns the obligation by the authorities receiving the invocation to inform any other relevant authorities of the invocation of immunity. This paragraph was shortened and simplified from the original version to reflect various concerns expressed by members, including that it delved too much into the internal functioning of the State and the determination of immunity contained in draft article 13. The Special Rapporteur underlined that the paragraph seeks to stress that the invocation of immunity has to be communicated in order for it to have practical effect and that competent bodies of a forum State determining the application of immunity need to take action as soon as they become aware of invocation of immunity, so as to avoid potential problems. It was

also noted that its gist was to ensure that the authorities concerned with immunity become immediately aware of the invocation by the information being conveyed to the appropriate authorities if it arrives in the hands of authorities not concerned with immunity. The provision ultimately seeks to allow States to use their discretion with respect to the details of how their competent authorities deal with invocation of immunity. Views diverged in particular on whether the paragraph concerned itself excessively with the internal organization of State affairs or whether it instead helpfully safeguarded the rights of the State of the official.

A reservation was expressed that the paragraph might allow a State to escape its obligation to respond to an invocation by potentially satisfying that obligation through engaging in back and forth between different authorities, none of which would meaningfully take up action on the invocation. Other members, however, considered that the paragraph would precisely counter such a situation in entailing an obligation for authorities to transmit the fact that an invocation has been made to competent authorities concerned so that they may make a decision as soon as possible. It was also requested that the commentary clarify which authorities in particular are concerned and that it make clear that the paragraph concerns just authorities of the forum State, particularly those authorities that would be involved in the determination of immunity.

A proposal by the Special Rapporteur by the terms of which the organs that are competent to determine immunity shall decide *proprio motu* on its application in respect of State officials who enjoy immunity *ratione personae*, whether the State of the official invokes immunity or not was withdrawn on the understanding that matters raised therein could conceivably be addressed in relation to draft article 13, on determination, which the Drafting Committee will deal with at a later stage.

There was a proposal by a member for an addition of a paragraph to deal with the suspensive effect of an invocation of immunity, to which I will revert at the close of my statement.

The title of draft article 10 is “Invocation of immunity”, as proposed by the Special Rapporteur in her seventh report.

Draft article 11

Mr. Chairperson,

I will now turn to draft article 11, which deals with waiver of immunity. This draft article was proposed by the Special Rapporteur in her seventh report and was divided into six paragraphs. Following revised proposals prepared by the Special Rapporteur for the consideration of the Drafting Committee, the draft article now contains five paragraphs, which touch on different elements of waiver of immunity.

Paragraph 1 contains a general statement regarding waiver of immunity. The slightly revised formulation reflects that of paragraph 1 of the article 32, paragraph 1, of the 1961 Vienna Convention on Diplomatic Relations. The paragraph was adopted on the understanding that the language might still undergo further amendments pertaining to stylistic consistency affecting the English version.

Paragraph 2 concerns the form of waiver. Its formulation also reflects that of the 1961 Vienna Convention on Diplomatic Relations, which provides, in paragraph 2 of article 32, that "waiver must always be express". The Drafting Committee elected to add "in writing" inspired by the wording of paragraph 2 of article 45 of the 1963 Vienna Convention on Consular Relations, which states: "The waiver shall in all cases be express, except as provided in paragraph 3 of this article, and shall be communicated to the receiving State in writing". The paragraph also mirrors some aspects of paragraph 2 of draft article 10. One of its objectives is to provide for a careful analysis of the elements of the waiver involved. Some also considered that it should entail elements helpful to the assessment of the acts for which immunity may be waived, since immunity might be waived for certain acts of an official but not for others. However, some members were not sure whether there was a need to mention the acts or other specific elements in the paragraph and considered it may be better to leave such details to the discretion of a State. The previous language that waiver should "mention the official whose immunity is being waived and, where applicable, the acts to which the waiver pertains" was thus deleted. It was additionally noted that it might be

challenging to specify the relevant acts at this stage, at least if the waiver must also be expeditious. However, commentaries should address those elements.

Paragraph 3 follows *mutatis mutandis* the previous language on communication in paragraphs 3 of draft articles 9 and 10. The paragraph seeks to allow as much flexibility as possible for States to decide on how the waiver is to be communicated. The verb "communicate" was preferred to the previous verb "effectuate" here, as the former reflects the language of article 45 of the Vienna Convention on Consular Relations of 1963.

Paragraph 4 parallels a corresponding paragraph 4 of draft article 10. The paragraph describes the need, internally, to transfer any communication received from the State of the official regarding the waiver of immunity to any other competent authorities. The language of this paragraph was simplified to harmonize the text with the previous draft articles, namely draft article 10.

Let me here also note a previous proposal by the Special Rapporteur for a paragraph 4 concerning the possible deduction of a waiver from an international treaty was deleted. Some members considered it important to reflect that there could be an express waiver in a treaty. However, ultimately the paragraph was viewed as unnecessary since the treaty would presumably already contain the relevant information. It was also deemed that the paragraph reflected an attempt to encapsulate a rather complicated debate regarding the deduction of immunity, which relevant courts had also wrestled with as was the case, for instance in the *Pinochet* (No. 3) case before the UK House of Lords. It was also suggested alternatively that the paragraph could have reflected the fact that the draft article was without prejudice to whether a waiver could be implicit in a treaty. It was decided, however, that this issue could be referred to in the commentaries. Such possibility was also opposed by some members as the draft articles do not contain any provision on the subject. The Special Rapporteur stated that she would include in the commentaries reference to the debate in the Committee regarding the overall debate regarding the inclusion or exclusion of the paragraph.

Paragraph 5 is concerned with the irrevocability of waiver of immunity. The paragraph aims to describe the fact that the waiver could lack validity and be misused if it could be revoked at any stage. The debate in the Drafting Committee was extensive and in some respects divided with regard to this paragraph. Members generally agreed that the text as it stands reflects a general rule manifesting the good faith principle and conveying the need to respect legal certainty, but also that there could be some exceptions to that rule. Some members would have preferred to delete the paragraph altogether since the law on irrevocability of waiver had not been substantially codified in treaties nor was it conclusive with respect to other sources, as also there was paucity of State practice on the matter. The commentaries by the Commission on draft article 30 of the draft articles on diplomatic intercourse and immunities in 1958 stating that "[i]t goes without saying that proceedings, in whatever court or courts, are regarded as an indivisible whole, and that immunity cannot be invoked on appeal if an express or implied waiver was given in the court of first instance" received diverse interpretations by some members. Other members preferred to include an explicit reference to exceptions in the paragraph, such as beginning the paragraph with "save in exceptional circumstances", used in the Convention on the Rights of the Child, or "in principle", contained in article 8 of the Vienna Convention on Diplomatic Relations. This would be an acknowledgment of the existence of possible exceptional circumstances, such as change of government or indeed a change in the legal system that due process would no longer be guaranteed. It was also noted that the commentary could draw on language included in principle 10 of the Guiding Principles applicable to unilateral declarations of States regarding "a fundamental change in the circumstances" that could justify revocation of waiver. Several members considered that it would be beneficial to put the paragraph before the Sixth Committee for State input, since it was the normal practice of the Commission when encountering disagreement on first reading to explain the differences in commentary and thereby invite comments from States. A compromise was reached to adopt the paragraph as is, on the understanding that the commentary would clearly reflect the debate that took place in the Drafting Committee, particularly with respect to exceptions. It was requested that the commentary elaborate on specific exceptional situations where for example new relevant facts were discovered or where an exceptional or fundamental change occurred, for example regarding the human rights situation of a potential forum State, to clarify that the door should not be closed regarding revoking waiver in such circumstances.

The title of draft article 11 is “Waiver of immunity”, as proposed by the Special Rapporteur in her seventh report.

Draft article X

Mr. Chairperson,

Before I conclude, allow me to turn briefly to the proposal made by Mr. Murphy in the context of our discussion of draft article 10, on invocation, for an addition of a new paragraph that would read: “The authorities before which the immunity has been invoked shall suspend any coercive measure until a determination has been made under draft article 13 [9] as to whether immunity applies. Measures whose suspension would likely preclude a subsequent criminal proceeding against the official may remain in place.” The Drafting Committee decided not to include such proposal in draft article 10, but to consider it in the course of its work as it raised important issues of substance concerning procedural provisions and safeguards. From a procedural point of view, some members were of the view that this proposal should be considered after draft article 10 as it related to invocation of immunity, while others deemed that it would be more appropriately discussed together with draft articles 13, 14, and 17. In the final analysis, it was decided that Drafting Committee would consider the proposal, now named draft article X, at a later stage.

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Mr. Chairperson,

This concludes my introduction of the third report of the Drafting Committee at the seventy-second session devoted to the topic, “Immunity of State officials from foreign criminal jurisdiction”. If time permits, the work of the Drafting Committee may continue in the second part of the session. It is my sincere hope that the Commission will adopt today draft articles 8 to 11 as presented, contained in document A/CN.4/L.953, as well as draft article 8 *ante* presented in 2019 contained in document A/CN.4/L.940.

I thank you for your kind attention.

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