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

Statement of the Chairperson of the Drafting Committee

Ms. Patrícia Galvão Teles

26 July 2021

Mr. Chairperson,

I have the pleasure to introduce the fifth report of the Drafting Committee for the seventy-second session of the International Law Commission, which concerns the topic “Immunity of State officials from foreign criminal jurisdiction”. You may recall that I introduced an earlier report of the Drafting Committee on this topic during the first part of our current session, on 3 June. That report reproduced the titles and texts of draft articles 8 through 11 provisionally adopted by the Drafting Committee, all of which were subsequently adopted by the Commission.

In that statement, it was mentioned that the Drafting Committee would return to the topic in the second part of the present session if time permitted. It did. At its 26th meeting on 5 July 2021, the Drafting Committee was able to continue the examination of the draft articles. Today, I am introducing a further report, contained in document A/CN.4/L.953/Add.1, which contains the title and text, as provisionally adopted by the Drafting Committee, Draft Article 12.

Before addressing the details of the report, let me, once again, 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.

It must also be acknowledged with appreciation that the work of the Drafting Committee was greatly facilitated by a further round of informal consultations conducted by the Special Rapporteur between the two parts of the Commission's session, which helped to deepen the understanding of members on the issues to be addressed.

Mr. Chairperson,

I draw the Commission's attention to the text of Draft Article 12, as contained in the report of the Drafting Committee.

As with the other draft articles adopted by the Commission at the present session, the Drafting Committee had before it the draft article, originally numbered draft article 13, as contained in the Special Rapporteur's seventh report (A/CN.4/729), which was referred to the Drafting Committee in 2019. Also before the Drafting Committee were the proposals made in the Plenary and the Special Rapporteur's proposal to reorder the draft articles. These, along with revised proposals by the Special Rapporteur, taking into account various comments made by members, including exchange of views during the informal consultations, continued to form the basis of the work of the Drafting Committee. It may be noted in particular that the Drafting

Committee proceeded in its work on the present draft article on the basis of a revised proposal by Special Rapporteur following suggestions during the informal consultations to have a streamlined text.

Draft article 12, like those adopted by the Commission in the first part of the session, is in Part Four of the draft articles, which seeks to address questions concerning procedural provisions and safeguards. The draft article deals with requests for information between the forum State and the State of the official relating to whether or not immunity applies as well as the invocation and waiver of immunity

Draft article 12 is structured in four paragraphs.

Paragraph 1 allows for requests for information directed by the forum State to the State of the official. There was some discussion in the Drafting Committee whether the definite article “the” should be used – as is done in the Spanish text – in place of the quantifier “any” in connection with “information”. The Special Rapporteur explained that, in this context, the phrase “*la información*” in Spanish had the same meaning as “any information” in English or “*toute information*” in French. It was also noted that the proposal of the Special Rapporteur used the criterion “*necesaria*” in Spanish – “*necesaire*” in French – but “relevant” in English. It was considered that, while “relevant” and “necessary” could bear the same meaning, the former was more consistent with general legal usage in English. It was suggested that the word “necessary” could be misinterpreted as implying that determination of immunity could not occur until requested information was provided, which was not the intention of the paragraph. The French and Spanish texts were therefore adjusted to better align them with the English text. The paragraph also uses subjective language to qualify the information that may be requested. This was considered simply to reflect reality, in that a State requesting information will determine for itself what it considers relevant when it makes a request.

The Drafting Committee discussed at length how to refer to the question for which information could be requested. The phrase “in order to” was maintained from the original proposal of the Special Rapporteur, emphasizing that requests for information were linked to a procedure that had a purpose, encompassing both the examination and determination of the question of immunity. It was decided to use the phrase “decide whether immunity applies or not”

instead of “on the application of immunity” for avoiding unnecessary discussions about the legal meaning of the words “application” and “applicability. The commentaries will address the scope of this phrase in greater detail.

Paragraph 2 concerns requests for information made by the State of the official to the forum State for information the former considers relevant in order to decide on the invocation or waiver of immunity. While, at first, the Special Rapporteur proposed dealing with requests in both directions in a single paragraph, the Drafting Committee considered that it would be clearer to address the two kinds of request in separate paragraphs. Paragraph 2 parallels that of paragraph 1. The phrase “in order to” was mirrored in particular to reflect that a decision to invoke or waive immunity could also involve a process that occurs over a period of time.

Paragraph 3, renumbered from paragraph 2 because of the division of the first paragraph into two paragraphs, deals with the means of communication that may be used to request information. The paragraph follows *mutatis mutandis* the previously adopted language in the respective third paragraphs of draft articles 9, 10 and 11. After some discussion on how best to draft the provision, the Drafting Committee opted for the current text, placing the emphasis on the information rather than the request. This allowed the Drafting Committee to avoid the questions of what verb to use in connection with the noun “request” and whether “request” should be in the singular or plural, which had both attracted considerable discussion. It was noted that attention would nevertheless need to be given to the consistency of the provisions relating to means of communication in each of the language versions at the *toillette final* stage.

Paragraph 4 provides that the requested State shall consider any request for information in good faith. It was adopted on the basis of a new proposal of the Special Rapporteur following informal consultations that significantly simplified the text. The original proposal of the Special Rapporteur, as contained in her seventh report, enumerated the reasons why a State might refuse a request for information. This was considered overly burdensome and detailed, and concerns were expressed the provision would interface poorly with relevant domestic laws. It was also considered that the original proposal could give rise to a mistaken impression that it established limitations on the communication of information. The orientation of the paragraph was accordingly altered to emphasize that goal of the paragraph is to encourage cooperation between the forum State and the State of the official.

The simplified text of the paragraph led to further discussion in the Drafting Committee. The view was expressed that the paragraph was unnecessary as it was self-evident that States must act in good faith. However, the concern was also expressed that the simplification may go too far in deleting reference to concerns of sovereignty, public order, security and essential public interest that might justify a refusal to provide information. It was noted that the paragraph provided for an obligation of conduct, rather than result, and that a State could refuse in good faith to provide information for any number of reasons. The relationship between the consideration of a request in good faith and potential limitations or conditions on provision of information will be addressed further in the commentaries.

With respect to the specific wording of the paragraph, the Drafting Committee discussed whether the phrasing “any request” should be made more specific by referring instead to “the” or “such request”. However, it was considered that the word “any” would keep the language of the paragraph consistent with the previous paragraphs and avoid questions as to which request that more specific language might provoke. The phrase “requested State” was also the subject of some discussion. While some members of the Drafting Committee considered it inelegant, it was decided to keep the language as its meaning was clear and consistent with existing treaty practice.

Mr. Chairperson,

Let me now briefly turn to three paragraphs proposed by the Special Rapporteur in her seventh report that no longer appear in text.

Paragraph 3, as originally proposed, concerned the forwarding of requests for information between the authorities of the requested State. Similar paragraphs with respect to the invocation and waiver of immunity have already been adopted as paragraph 4 of draft articles 10 and 11, respectively. However, it was considered that by the stage of requests for additional information, the competent authorities would be known to each State. Therefore, the paragraph was considered unnecessary.

The proposed **paragraph 5** concerned the application of conditions of confidentiality to the provision of information by the requested State. As with the Special Rapporteur’s original proposal for paragraph 4, this provision was considered overly burdensome and detailed, and concerns were expressed that the provision could be interpreted as discouraging cooperation. It

was also noted that confidentiality requirements were often already established by domestic law or regulations. The Drafting Committee therefore decided not to include paragraph 5. As I have already noted, however, the question of conditions on the provision of information will be addressed in the commentaries.

The proposed **paragraph 6** concerned whether a refusal to provide information by the State of the official could be grounds for the forum State not to apply immunity. The Drafting Committee considered that the question was linked to the determination of whether immunity applies or not. It was therefore decided that the paragraph would be deleted from draft article 12 and revisited when the Drafting Committee considers the renumbered draft article 13 (formerly 9), which relates to the determination of immunity.

Draft Article 12 is entitled “Requests for information”. This is a modified version of the title proposed by the Special Rapporteur, which referred to “Exchange of information”. This corresponds to revisions in the text to refer to requests instead of exchange.

Mr. Chairperson,

This concludes my introduction of the fifth report of the Drafting Committee at the seventy-second session, devoted to the topic, “Immunity of State officials from foreign criminal jurisdiction”. The work of the Drafting Committee on the proposals submitted by the Special Rapporteur will continue next year. It is my sincere hope that the Commission will adopt today draft article 12 as presented, contained in document A/CN.4/L.953/Add.1.

I thank you for your kind attention.
