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IMMUNITY OF STATE OFFICIALS FROM FOREIGN CRIMINAL JURISDICTION

Statement of the Chairperson of the Drafting Committee

Mr. Ki-Gab Park

3 June 2022

Mr. Chairperson,

I have the pleasure to introduce the third report of the Drafting Committee for the seventy-third 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.969. It reproduces the texts of the draft articles 1 to 18, provisionally adopted by the Drafting Committee on first reading, including draft articles considered and 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. Concepción Escobar Hernández, whose knowledge of the subject, guidance, and cooperation greatly facilitated the work of the Drafting Committee. I would also like to express the deep appreciation of the Drafting Committee for the valuable contribution of Mr. Roman Kolodkin, who served as the first Special Rapporteur for the topic. 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 16 meetings to the examination of the draft articles, at the 1st to 5th, 17th, 21st, 27th, 28th and 30th to 36th meetings, from 20 to 26 April, and on 12, 16, 19 and 20 May, and from 23 to 30 May 2022. 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 at various occasions during the present session, which helped to deepen the understanding of members of 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, as well as proposals made in plenary. It may be recalled that, at the 2021 session of the Commission, the Special Rapporteur proposed revised and reordered versions of the provisions contained in her seventh report. Accordingly, what was proposed as draft article 9 was renumbered as draft article 13. The reordered version continued to form 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 and proposals 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, as well as draft articles 17 and 18, as proposed by the Special Rapporteur in her eighth report (A/CN.4/739), referred to the Drafting Committee in 2021.

Following the adoption of draft articles 1, paragraph (3) and 14 to 18, the Drafting Committee undertook a *toilett*age *finale* of the entire set of the draft articles. It will be recalled that during the course of its work last year, the Drafting Committee 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.

As a consequence, the draft articles have been renumbered, with the previous number as adopted by the Commission appearing in square brackets as appropriate.

In my introduction of the present report, I will focus on the draft articles provisionally adopted by the Drafting Committee at the present session. Draft articles 1, 2, 3, 4, 5, 6, 7, together with annex, 8 [8 *ante*], 9 [8], 10 [8], 11[10], 12 [11] and 13 [12] were adopted previously, as follows:

Draft articles 1, 3 and 4 were provisionally adopted by the Drafting Committee at the sixty-fifth session (2013), and attention is drawn to the statement of the Chairperson of the Drafting Committee at that session;

Draft articles 2 (e), now 2 (a), and 5 were provisionally adopted by the Drafting Committee at the sixty-sixth session (2014), and attention is drawn to the statement of the Chairperson of the Drafting Committee at that session;

Draft article 2 (f), now 2 (b) and 6 were provisionally adopted by the Drafting Committee at the sixty-seventh session (2015), and attention is drawn to the statement of the Chairperson of the Drafting Committee at that session;

The titles of Parts Two and Three, and texts and titles of draft article 7 and annex were provisionally adopted by the Drafting Committee at the sixty-ninth session (2017), and attention is drawn to the statement of the Chairperson of the Drafting Committee at that session;

The text and title of the draft article 8 *ante*, now 8, were adopted by the Drafting Committee at the seventy-first session (2019), and attention is drawn to the interim report by the Chairperson of the Drafting Committee at that session;

Finally, the texts and titles of draft articles 8, 9, 10, 11 and 12 (now renumbered 9 to 13) were provisionally adopted by the Drafting Committee at the seventy-second session (2021), and attention is drawn to the two statements of 3 June 2021 and 26 July 2021 by the Chairperson of the Drafting Committee at that session.

I recommend that the Commission the Commission adopt the draft articles article-by-article.

I would finally recommend that it adopt the title "draft articles on Immunity of State officials from foreign criminal jurisdiction". I would also recommend that the Commission then adopt, on first reading, the entire set of draft articles as a whole.

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Mr. Chairperson,

Before I address the draft articles that were adopted at the current session, I propose to deal first with provisions adopted at the present session, which bear on draft articles previously provisionally adopted by the Commission. These relate to four draft articles namely, **draft article 1, 2, 8 [8 *ante*] and 12 [11]**

The first of these is **paragraph 3, of draft article 1**. By way of background, it will be recalled that the Special Rapporteur in her eighth report had proposed a draft article 18, according to which "[t]he present draft articles are without prejudice to the rules governing the functioning of international criminal tribunals." According to the Special Rapporteur, the purpose of the draft article was to safeguard, through a without prejudice clause, both the separation and the independence of the regimes applicable to immunity before national criminal courts and

international criminal tribunals and preserve the special norms that govern the functioning of international criminal tribunals. Some members supported its inclusion in the plenary debate, noting that such a clause would usefully address that relationship, as well as the need not to undermine international criminal courts and tribunals and the developments in international criminal law. Other members opposed the inclusion, noting, in particular that the potential overlap between national and international jurisdictions was not sufficient to make provision for it, that the matter was already addressed in draft article 1 and its commentary and that the absence of a provision was unlikely to undermine developments in international criminal law, as its proponents suggested. It was noted that such a clause risked being interpreted as creating a hierarchical relationship between the norms governing international criminal tribunals and the law of immunity of State officials from national courts, which in turn would raise concerns about the application of the principle of complementarity. In the main, these differences remained in discussions of the Drafting Committee and the arguments for and against were reiterated. After an extensive discussion, the Drafting Committee agreed on the inclusion of such a provision and the focus turned to efforts to reach a compromise text, as members acknowledged that even were such a provision to be included in the text of the draft articles it would have to be altered.

As to placement, views ranged from keeping such a provision as a separate article as a last article, possibly under a separate Part Five, considering that it did not fit perfectly in Part Four, a separate article in the introductory Part One or as part of draft article 1, either as a new paragraph 2 or paragraph 3. Noting that the commentary on draft article 1 had already addressed aspects of the issue and that the present paragraphs 1 and 2 were inter-linked, the Drafting Committee settled on placing the draft paragraph in draft article 1, as a new paragraph 3.

The present formulation of draft paragraph 3 is modelled on article 26 of the United Nations Convention on the Jurisdictional Immunities of States and their Property, according to which "[n]othing in the present Convention shall affect the rights and obligations of States Parties under existing international agreements which relate to matters dealt with in the present Convention as between the parties to those agreements." A similar provision is contained in article 33 of the European Convention on State Immunity, providing that nothing in the present Convention shall

affect existing or future international agreements in special fields which relate to matters dealt with in the present Convention.

In an effort to bring greater clarity to the text, especially as to its scope, the Drafting Committee had a discussion on whether to use another formulation than "rights and obligations of States" such as "the question of immunity" but decided to retain the reference to "rights and obligations". It also considered that an earlier reference "to the rules governing the functioning of international criminal tribunals" was unclear and too broad, and did not address specifically immunity issues. It was also felt that a reference to "international agreements which relate to matters dealt with in the present draft articles, including those establishing international courts and tribunals", as suggested by the Special Rapporteur in a subsequent proposal, was too broad as the focus was on "agreements establishing international criminal courts and tribunals". The qualifier "as between the parties to those agreements" seeks to brings further clarity as to the scope of the provision.

Even though the Drafting Committee adopted the formulation as appears in its present report, the concern was expressed that the formulation did not correspond to recent practice concerning the creation of international criminal courts and tribunals, as some were created through United Nations Security Council resolutions, some were of a hybrid nature and certain regional organizations and arrangements had developed or were developing their own practice could not be necessarily be characterised as "international agreements"

The second issue that the Drafting Committee addressed which relates to draft articles previously adopted relates to **draft article 2**. It will be recalled that in 2013, based on the Special Rapporteur's second report, the Drafting Committee considered draft article 2, on Definitions, which sought to group together concepts, definitions and terms that were to be clarified in the elaboration of the present draft articles, such as (a) "criminal jurisdiction", (b) "Immunity from foreign criminal jurisdiction"; (c) "Immunity *ratione personae*"; and (d) "Immunity *ratione materiae*", without excluding the possibility of defining more terms as the work on the topic progressed. Even though there was then a general recognition that there may be a need for a draft article on "Definitions" or on "Use of terms" for the purposes of the present draft articles, some

members doubted the need to define the terms that the Special Rapporteur had proposed. It was then observed that the Vienna Convention on Diplomatic Relations, the Vienna Convention on Consular Relations and the Convention on Special Missions deal with “criminal jurisdiction” and “immunity from criminal jurisdiction”, and yet none of these had defined such terms. These proposals remained in the Drafting Committee. On 25 May 2022, in the context of informal consultations conducted by the Special Rapporteur, discussions were held on the usefulness of defining terms such as “Criminal jurisdiction", “Exercise of criminal jurisdiction", “Immunity from criminal jurisdiction”, and “Inviolability”.

The general sense within the consultations was that such an exercise would be unnecessary and difficult to accomplish, particularly under the constraints of time, given the diversity of definitions and practices under different legal systems and traditions, some of whose practices were still evolving, thereby necessitating the need to provide room for flexibility. Moreover, it was reiterated that other instruments on a similar subject had not endeavoured to define the terms as proposed even though they had been used in such texts. Once the Drafting Committee was convened, the Special Rapporteur suggested not to include new definitions and no further discussion was held. Accordingly, the subparagraphs defining “State official” and an “act performed in an official capacity” have been renumbered as (a) and (b) respectively. The commentary would seek to describe any other relevant terms as used in the present draft articles where appropriate.

Another issue that arose within those consultations was whether there was need to make clear that Part Four of the present draft articles covers both current and former officials. For some members, even though draft article 8, previously [8 *ante*] refers to “current or former” such reference did not seem adequate and it was suggested to include additional text. On the other hand, other members noted that draft article 8 [8 *ante*] was quite clear on that matter, and that the suggested addition was unnecessary. As a compromise, on a proposal submitted by the Special Rapporteur, suggesting that the issue be dealt with in draft article 2 dealing with “definitions”, the Drafting Committee agreed to add the phrase, “…and refers to both current and former State officials…” to the definition of the State official, to make certain that “State official” includes former State official when immunity *ratione materiae* is implicated. With this addition, the

Drafting Committee did not consider it necessary to make a consequential change to paragraph 2 of draft article 6, providing that immunity *ratione materiae* "continues to subsist after the individuals concerned have ceased to be State officials", as the context was clear that the article is dealing with the material scope of immunity *ratione materiae.*

It should be noted that the present draft articles employ "State official" in a number different iterations, such as "official of another State", "the official", and "an official." The use of such different terms does not mean any change regarding the definition of "State official".

The change concerning **draft article 8 [8 *ante*]** was intended to make clear that the procedural provisions and safeguards in Part Four are "applicable in relation to any exercise of criminal jurisdiction by the forum State over an official of another State, current or former". This formulation encapsulates a broader understanding than the previous "any criminal proceeding against a foreign State official, current or former," which is narrower.

The final change that was made to previously adopted draft articles relates to **draft article 12 [11]** on waiver of immunity. The changes effected only to the English version and do not change the substance. They only seek to make clearer the text. To this end, in paragraph 1, the phrase "[t]he immunity from foreign criminal jurisdiction of the State official may be waived by the State of the official" now reads "[t]he immunity of a State official from foreign criminal jurisdiction may be waived by the State of the official." Moreover, in paragraph 2, the words "of immunity" have been added to make clear that it is "[w]aiver of immunity".

Mr. Chairperson,

I shall now turn to the draft articles that have been provisionally adopted at the present session. These are draft articles 14 to 18.

Draft article 14

I shall first turn to the text of the **draft article 14**. Draft article 14 concerns the "Determination of immunity". The purpose of draft article 14 is to set out the requirements applicable to a determination by the forum State, whether or not immunity applies before it exercises its criminal jurisdiction over a State official of another State. It is based on the proposal of the Special Rapporteur in her seventh report, where it is numbered draft article 9, and subsequent proposals made by the Special Rapporteur taking into account the views expressed in the Drafting Committee.

The provision is structured in five paragraphs. Paragraph 1 provides general indications as to which authorities should make a determination about the immunity of a State official and how that determination should be made. Paragraph 2 concerns specific elements that must be taken into account in making a determination. Paragraph 3 provides for additional safeguards to prevent the abuse of draft article 7 for political or other motivations. Paragraph 4 concerns the procedural stage at which a determination is to be made. Finally, paragraph 5 provides for the possibility of the review of a determination of immunity by a court or other judicial authority of the forum State.

Paragraph 1 reflects the general rule that a determination of immunity should 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. The Drafting Committee thoroughly considered the question of what a determination could be. While the original proposal of the Special Rapporteur placed an emphasis on determinations by the courts of the forum State, it was agreed in light of the variety of State practice that a determination about the immunity of a State official of another State could be made far earlier in the process, for example, by a police officer, a prosecutor or a foreign ministry official, before any courts become involved. It was therefore decided to use the term "competent authorities of the forum State", aligning the wording of the provision with that of draft articles 9 [8] and 10 [9]. This allows for flexibility as to who might make a determination and leaves the matter to the forum State to decide according to its own laws and procedures. It was noted, however, that the competent authorities referred in those provisions may not necessarily be the same as those referred to in draft article 14. Furthermore, the courts of the forum State are not necessarily absent from the process of determination, as I will address when I reach paragraph 5.

It was also noted that, while draft article 14 provides for a determination of immunity by the forum State, it does not exclude a determination by another competent body, for example an international court to which the States concerned might submit a dispute.

At the beginning of the paragraph, the word “A” was preferred to “The” in English, as the former better reflected the flexibility in terms of domestic systems that the paragraph was intended to capture. It was decided that the question whether the word “a” should be translated into French as “toute” or “la” would be better appreciated upon consideration of the commentary. It was therefore decided to leave this question to a later stage. It was also noted that the word “*toda*” would not be particularly elegant in Spanish.

The middle part of the paragraph answers in general terms the question how a determination is to be made. In this respect, the Drafting Committee emphasized the importance of accommodating various domestic legal systems and did not consider it appropriate to dictate any procedure to States. The provision therefore makes an explicit reference to the procedures of the forum State. However, it was also decided to refer to the law of the forum State, and not just its procedures, to accommodate those legal systems whose domestic law also provided substantive rules of decision in relation to immunity. Consideration was given to phrasing that referred to the “national” or “internal” laws of the forum State. The current phrasing “its laws and procedures” was preferred as it eliminated a repeated reference to the forum State and elegantly captured the intention of the Drafting Committee.

The last part of the paragraph was added to emphasize that, regardless of the flexibility envisaged with respect to the organs, laws and procedures of the forum State, the determination must nevertheless produce a result consistent with international law. In an earlier version of the paragraph, the Special Rapporteur had proposed the words “taking into account” in connection with the role of international law. It was considered that this phrasing would not be sufficient to ensure respect for international law, especially as regards certain substantive questions. Consideration was also given to the phrase “in accordance with”. The phrase “In conformity with” was chosen instead because it aligns the English text better with the Spanish “de conformidad con” and as a number of members considered it to impose a higher standard than “in accordance with”.

P**aragraph 2**, specifies in further detail elements that must be taken into account in making a determination of immunity. The list is intended to offer useful guidance to the authorities involved in making a determination about immunity to facilitate effective cooperation between the States concerned. The phrase "in making a determination about immunity" in the chapeau links the elements with the broader process of determination.

It was debated whether to include the words "in particular" or "*inter alia*" in the chapeau. The words "in particular" were maintained to emphasize that the list of elements in paragraph 2 is of special importance to a determination but also is not intended to be exhaustive.

Sub-paragraphs (a), (b) and (c) of paragraph 2 correspond to draft articles 10 [9] to 13 [12], which relate to notification, invocation, waiver and requests for information, and their order reflects broadly the chronological ordering of the actions foreseen in those provisions. The Drafting Committee thoroughly considered the question whether these paragraphs should make cross-references to the draft articles to which they are related.

It was decided to make an explicit reference to draft article 10 [9] in sub-paragraph (a) to make it clear that draft article 14 refers to the specific obligations of the forum State to make a notification. An earlier proposal of the Special Rapporteur had referred to the notification of the "intention to exercise jurisdiction over the official". This raised questions as to whether the notification foreseen in draft article 14 might be different from that provided for in draft article 10 [9]. It was also recalled that the purpose of the notification was to enable the State of the official to invoke or waive immunity.

With respect to sub-paragraphs (b) and (c), the Drafting Committee considered whether the omission of a cross-reference in these provisions might imply that the invocation, waiver and exchange of information were not those foreseen in draft articles 11 [10], 12 [11] and 13 [12]. It was decided that cross-references were not necessary for these provisions which, unlike draft article 10 [9], did not impose a condition precedent to the exercise of criminal jurisdiction by the forum State over an official of another State. Draft articles 11 [10], 12 [11] and 13 [12] rather

allowed the State of the official to give information to the forum State that must be taken into account. It was suggested that the distinction could be made clear in the commentary.

Paragraph 2 contains two further sub-paragraphs, namely sub-paragraph (d), relating to information provided by authorities of the forum State other than the authority making the determination, and sub-paragraph (e) relating to other relevant information from other sources.

Concerning **sub-paragraph (d)**, the original proposal of the Special Rapporteur dealt with information provided by the State of the official and by other authorities of the forum State in the same sentence. The Drafting Committee discussed whether it was necessary for the provision to deal with sharing of information within the forum State. It was considered important, in light of the variety of domestic legal systems and practices to reflect that information from other authorities within the forum State, for example the ministry of foreign affairs, could be relevant to a determination and to provide a balance between such information and the information provided by the State of the official. However, for the sake of clarity, it was decided to deal with information from other authorities of the forum State in a separate sub-paragraph.

Sub-paragraph (e) emerged from the Drafting Committee's discussions of several other potential sources of information. These included third States, international organizations, including INTERPOL, international investigative mechanisms, courts and tribunals, the International Committee of the Red Cross and non-governmental organizations. In practice, such sources had provided information that had been valuable to forum States in determining whether immunity applies. While a number of members considered that the words "in particular" in the chapeau allowed the forum State to take such information into account, the Drafting Committee decided that the inclusion of a specific provision would be preferable. The wording of the sub-paragraph was the subject of a detailed discussion. The terms "actors", "entities" and "international actors or international institutions" were proposed to describe the potential sources. However, the Drafting Committee settled on the general term "sources", which accommodates various potential sources of information, as described.

The wording of sub-paragraphs (c), (d) and (e), which refer to "any other relevant information" reflects that paragraph 2 is not intended to imply any hierarchy between relevant sources of information.

Paragraph 3, establishes safeguards to be applied by the forum State when it is considering the prosecution of an official of another State for one of the crimes enumerated in draft article 7. Its purpose is to balance the interests of the States concerned, reducing the potential for political abuse of draft article 7 without overly inhibiting its application in good faith. It was recalled that, under draft article 8 [8 *ante*] all of the procedural safeguards in the present part applied to cases involving draft article 7. Concerns were raised that, because immunity does not apply in cases covered by draft article 7, the previous safeguards would be of less relevance to such cases. It was also considered that the safeguards foreseen in paragraph 3 might not be appropriate to apply in cases involving less serious crimes. It was therefore decided that safeguards specific to draft article 7 were necessary. The Drafting Committee further considered whether the inclusion of a paragraph in Part Four applicable only in cases involving draft article 7 would be inconsistent with draft article 8 [8 *ante*], reaching the conclusion that it was not.

The structure of the paragraph corresponds generally to that of paragraphs 1 and 2, in the sense that it provides a more precise indication in sub-paragraph (a) of who should make a determination in cases where the application of draft article 7 is contemplated and in sub-paragraph (b) of additional elements to be considered by such an authority. In earlier proposals for the provision, the level of authority criterion in sub-paragraph (a) was included under the same chapeau as the elements in sub-paragraph (b). The draft article was ultimately structured in its current form in recognition of the need to separate the answers to the questions of who should make the determination and how it should be made.

As I mentioned, **sub-paragraph (a)** concerns the hierarchical level of the authority making the determination. In light of the gravity of the decision by the forum State to proceed with the exercise of criminal jurisdiction against a State official of another State with respect to a crime under international law and the serious potential for a negative impact on international relations, it was agreed that it was important that the authorities making a determination that immunity does

not apply under draft article 7 were of an appropriately high level. The need for the level of the authority making the determination to correspond to the level of the official against whom the forum State sought to exercise criminal jurisdiction was also discussed. The phrasing adopted was considered clearer and more appropriate than the original text of the provision, which referred to the "highest level of authority". The phrasing "an appropriately senior level" was also considered.

The Drafting Committee contemplated a textual clarification that the word "level" referred to the hierarchical level of the authorities. It was decided not to include such an explicit reference to hierarchy to preserve the applicability of the sub-paragraph to whatever authorities might make a determination, be they administrative, executive, prosecutorial or judicial. It was also discussed whether the word "competent" should be used in connection with "authorities" in this sub-paragraph, but this was rejected because the sub-paragraph answers the question of which authorities are indeed competent.

Sub-paragraph (b) enumerates elements that authorities making a determination in cases where draft article 7 is to be applied must consider in addition to those enumerated in paragraph 2, as the cross-reference in the chapeau makes clear. As originally proposed, the chapeau would have mirrored that of paragraph 2, ending with the words "take into account". After thorough discussion, it was decided that this approach would not be appropriate for paragraph 3 and that it would allow more precision to specify the appropriate verb for each criterion, respectively. This was considered necessary in order to ensure that the safeguards in paragraph 3 against political abuse of draft article 7 would be effective.

Sub-paragraph (i) provides for the standard of proof to which the competent authorities must be convinced that the official committed a crime under article 7 to determine that immunity does not apply. The sub-paragraph accordingly begins with the words "assure themselves that". These were chosen instead of "take into account" and "assess" after extensive debate that led to the conclusion that this provision should be a necessary condition to function as a safeguard.

The Drafting Committee held an extensive discussion on the standard of proof to be applied. It was recalled that the exercise of determining whether immunity applies was not the

same as that of reaching a conviction, but rather one of establishing that sufficient proof is present that the official committed one of the crimes enumerated in draft article 7 such that the forum State can begin a criminal proceeding. The need for a clear and precise standard was highlighted. *Prima facie* evidence was considered too low to provide an effective safeguard. The standard "clear and convincing evidence" was proposed, but was considered to be too demanding for a pre-trial phase of the proceedings, to which a determination corresponds. It was also discussed whether a reference to the highest standard of proof for the prosecution of crimes in the domestic legal system might be appropriate.

The Drafting Committee ultimately concluded that it would be desirable to use a standard that already exists in international practice. In this respect, inspiration was drawn from the Rome Statute of the International Criminal Court, which contains previously negotiated standards that apply as safeguards at several stages in an international criminal proceeding against often high-level State officials accused of crimes under international law. One standard proposed was "sufficient evidence to establish substantial grounds to believe", taken from article 61 of the Rome Statute, which concerns the confirmation of charges stage. Another was the "reasonable grounds to believe" standard for the issuance of an arrest warrant under article 58 of the Rome Statute. The "reasonable basis" standard applied by the ICC Prosecutor to determine whether to proceed with an investigation was also considered (article 53). It was questioned whether standards relating to investigation were high enough, especially as the present draft articles do not contain similarly stringent procedural rights for the accused during investigations as the Rome Statute does. It was also discussed whether to include the "interests of justice" standard, but the Drafting Commission was worried that this could potentially politicize the determination.

The Drafting Committee opted for the standard "substantial grounds to believe", which it considered to be appropriately high. The words "sufficient evidence to establish", contained in article 61 of the Rome Statute, were omitted to reflect that it was not the intention of the Drafting Committee to require the forum State to conduct as thorough an examination of the evidence as is done by ICC pre-trial chambers in confirmation hearings.

What was important was that the competent authorities of the forum State should believe on the basis of evidence that the foreign official had indeed committed the crime alleged before proceeding with the exercise of criminal jurisdiction, applying draft article 7. The meaning of the standard of proof required will be further elaborated in the commentary.

As was emphasized in the Drafting Committee, this standard was not intended to prejudice the presumption of innocence or the procedural rights of the accused during investigation or trial. In light of this, specific proposals to include language along the lines of "allegedly" or "may have committed" were not retained on the understanding that the relevant procedural rights would be dealt with in draft article 16 and in the commentary.

Sub-paragraph (ii) provides that the competent authority must give consideration to a request or notification from another authority, court or tribunal that is exercising or intends to exercise its own criminal jurisdiction over the official. An earlier proposed text of this provision referred only to the intention of the other authority to exercise jurisdiction. This opens the provisions up to the possibility of international cooperation and the application of mutual legal assistance mechanisms. It also was considered that the provision should refer to a current exercise of jurisdiction to accommodate the possibility that another authority might already have indicted or begun proceedings against the official. The inclusion of both "exercise" and "intention to exercise" accommodates a range of procedural possibilities that could arise in practice, given the diversity of national legal systems.

This sub-paragraph has a clear link with draft article 15 on the transfer of the proceedings. While an explicit cross-reference to draft article 15 was suggested, it was decided not to include one to reflect that the sub-paragraph refers to more than just transfer of proceedings to the State of the official. Notifications or requests from the authorities of third States or from international or hybrid criminal courts or tribunals are also within the scope of the provision. This matter will be reflected in the commentary.

Paragraph 4 concerns the moment, in the process of exercising criminal jurisdiction over an official of another State, at which immunity must be determined. Its origin was in a discussion of whether an additional sub-paragraph should be included in paragraph 3 that would require the presence of the official in the territory of the forum State. However, it was considered that to include such a provision with respect to the determination whether immunity applies would be inappropriate in light of the pre-trial stage at which such a determination would occur. The

possibility that such a provision could hinder investigations was raised. It was also noted that such a provision would be inconsistent with those domestic legal systems that allow for trial *in absentia*, as well as with several instances of State practice. The Committee reached the conclusion that what was most important was to protect the official from coercive measures until after the determination of immunity has been made.

To address outstanding concerns about abusive coercive measures, paragraph 4 builds instead on the proposal made by a member in the context of the Committee's discussion of draft article 11 [10] last year, which was referred to in last year's statement of the Chairperson of the Drafting Committee as draft article X. It stated that the competent authorities of the forum State shall always determine immunity either before initiating criminal proceedings or before taking coercive measures that may affect the foreign official or any inviolability the official may enjoy under international law.

The text of paragraph 4 is based on draft article 9 [8], paragraph 2, which provides analogous indications of when the competent authorities of the forum State must examine the question of immunity. The difference between the two provisions lies in the second sentence of sub-paragraph (b), according to which the forum State may take coercive measures against a foreign official the absence of which would preclude subsequent criminal proceedings against the official before a determination of immunity is made. Such measures would include measures intended to prevent the flight of the official from the forum State, for example, the surrender of the official's passport pending trial. This distinction serves to balance the interest of the States concerned.

Finally, **paragraph 5**, concerns the review in a judicial proceeding of a determination that an official does not enjoy immunity from the criminal jurisdiction of the forum State. As I mentioned earlier, the Special Rapporteur's original proposal foresaw that determinations would generally be made by the judiciary of the forum State. When, following discussion in the Drafting Committee, broader language was proposed for paragraph 1, the Special Rapporteur proposed this paragraph to ensure that, as a final safeguard, the determination would still be subject to judicial oversight.

The paragraph has two sentences. The first provides the general rule that such a determination shall be open to challenge through judicial proceedings. The second sentence provides that the paragraph is without prejudice to any other potential challenges of a determination in the sense of draft article 14 that may be possible under the applicable law of the forum State.

The Drafting Committee extensively considered the language to be used to describe the potential recourse before the courts. The original proposal of the Special Rapporteur used the phrase “subject to judicial review”. This was rejected, to avoid any implied reference to the specific procedures called “judicial review” in domestic legal systems. Alternate wording was considered, including “can be challenged” or “can be reviewed before the courts” and “subject to appropriate judicial proceedings”. Whether “subject to” might be more appropriate than “open to” was also discussed. Ultimately, the Committee decided on the phrasing “open to challenge through judicial proceedings”, which was considered broad enough to accommodate the variety of domestic legal systems.

As originally proposed, the requirement of judicial oversight would have applied to any determination about immunity including one that the official enjoyed immunity and that criminal proceedings could not be pursued by the forum State. After further discussion, it was decided to refocus the paragraph to the provision of a further safeguard for the protection of the foreign State and its official. For this reason, the first sentence as adopted refers only to determinations that the official does not enjoy immunity. This reflects a practical concern that it may not be desirable to weigh down a determination by police than an official is immune, for example when stopping a vehicle for a traffic violation, with potential judicial proceedings. It also accommodates the practice of States whose domestic legal systems do not allow for legal challenges to the exercise of prosecutorial discretion not to prosecute, including for reasons of immunity.

Nevertheless, the Drafting Committee considered it important to reflect that other challenges to a determination may be possible and should not be prejudiced by the first sentence. In this connection, importance of the rights of victims of crimes to access to justice was recalled.

The Drafting Committee included the word “applicable” in the second sentence to reflect the possibility that challenges to a determination about immunity might not only arise under the domestic legislation of the forum State but also under the international law applicable to the forum State. Regional human rights instruments and courts were raised as relevant examples that would fall within the scope of the “applicable law of the forum State”. The considerations animating this sentence will be further detailed in the commentary.

Draft article 14 is entitled “Determination of immunity”, as proposed by the Special Rapporteur in her seventh report.

Draft article 15

Mr. Chairperson,

I now turn to **draft article 15**. The draft article deals with transfer of the proceedings. It serves as an important safeguard, bearing in mind a balance of interests between the State of the forum and the State of the official. Draft article 15 is motivated by considerations of providing some safeguards in the case of transfer between the forum State and the State of the official. It will be recalled that in the *Arrest Warrant* case, the International Court of Justice emphasized that immunity from criminal jurisdiction and individual criminal responsibility were quite separate concepts. And, it observed further that immunities enjoyed under international law did not represent a bar to criminal prosecution in certain circumstances, including a situation in which criminal immunity under international law was not enjoyed in the person’s own country, thereby allowing trial by own courts in accordance with the relevant rules of domestic law.

Based on formulations proposed by the Special Rapporteur in her seventh report and reformulations submitted, taking into account the plenary debate, the draft article contains five paragraphs, which seek to follow a logical sequence. Even though some members expressed a preference for a simpler formulation that would set out the principle by, for example, stating that the forum State shall give good faith consideration to any request for transfer of proceedings, the Drafting Committee settled for a sequential approach, addressing the “who” and the “how” of

transfer, as well as issues of suspension and possible resumption, concluding with "without prejudice" provisions.

Paragraph 1 provides for the possibility of the State of the forum to transfer criminal proceedings to the State of the official. This might be done by the competent authorities of the State of the official, acting on their own accord or at the request of the State of the official. Following discussion in the Drafting Committee, the text of the paragraph was streamlined. Firstly, it uses the broad formulation "[t]he competent authorities of the forum State may, acting *proprio motu* or at the request of the State of the official…" instead of the phrase "[w]hen the competent authorities of the forum State determine that immunity does not apply" as earlier reformulated by the Special Rapporteur. While recognizing that cases at issue would mostly be those in which "immunity does not apply", the Drafting Committee felt that there might be other instances where transfer may be warranted for other reasons. It is understood that term "competent authorities" embraces competent authorities of the forum State, including its judicial authorities.

Secondly, the paragraph focuses on the transfer without inquiring into the various circumstances, within a State's internal organizational structure, triggering a transfer, which could include simple declining to exercise jurisdiction. It was also recognized, for example, that a transfer could be effected as a consequence of a determination by a court or tribunal.

Thirdly, an earlier iteration of the provision envisaged the possibility that the competent authorities of the forum State "may decline to exercise their jurisdiction and offer to transfer the criminal proceedings to the State of the official". For some members, the link between "may decline to exercise" and "offer to transfer" was problematic, as it was not clear whether the requirements were cumulative. Moreover, the formulation presented a risk of the forum State renouncing its obligation under international law to prosecute certain international crimes or to extradite. These concerns are addressed by the simplified formulation "offer to transfer the criminal proceedings to the State of the official," as well as by the without prejudice clause reflected in paragraph 5. The Drafting Committee decided to retain the word "offer" even though it was acknowledged that "offer to" could have been suppressed without compromising the

substance and scope of the paragraph. It was considered that the retention of "offer" was in consonant with the consensual formulation of the following paragraph 2.

Fourthly, while the Drafting Committee was aware that, in the practice, requests from third States usually form part of transfer of proceedings agreements or arrangements, also a scenario foreseen in the *Arrest Warrant* case, it settled on limiting paragraph 1 to relations between the forum State and the State of the official. This focused attention is without prejudice to the possibility of a transfer being effected to a third State under international law.

Paragraph 2 provides for good faith considerations that apply to both the State of the forum and the State of the official. Firstly, in view of paragraph 1, where a transfer can be initiated at the request of the State of the official, the first sentence of paragraph 2 makes the point that the forum State shall consider in good faith a request for transfer of criminal proceedings. The second sentence then conditions an agreement to transfer to an undertaking that the State of the official would submit the case to its competent authorities for the purpose of prosecution. The formulation of the phrase "submit the case to its authorities for the purpose of prosecution" in the second sentence is informed by "The Hague" formula. The Drafting Committee noted that in its prior work including on the obligation to extradite or prosecute (*aut dedere aut judicare*) and on crimes against humanity it has shed light on the meaning of the phrase. Such understanding will be reflected in the commentary. Such submission for the purpose of prosecution is not merely formalistic. There has to be an effort to submit a dossier containing evidentiary and other information. Even though the paragraph is cast broadly to cover a wide range of crimes, the Drafting Committee noted that crimes under international law, including those referred to in draft article 7, may entail different treatment in the commentary in view of the obligations that international law imposes on States with respect to such crimes.

Paragraph 3 deals with suspension once transfer is agreed. It was considered that a transfer "agreed" provided a clearer meaning than a transfer "offered" as reflected in earlier versions. The Drafting Committee also simplified the text to refer to "suspend its criminal proceedings" instead of the earlier "suspend the exercise of criminal proceedings", presented as a formulation by the Special Rapporteur in the light of the Plenary debate, the import of which was considered to be

unclear. The “without prejudice” clause in the latter part of the paragraph employs the same language that the Drafting Committee has used in draft article 14, paragraph 4, subparagraph (b). Accordingly, it would mean that a suspension, for instance, would not preclude the forum State from conducting investigations as appropriate in relation to the matter to which a suspension relates.

Paragraph 4 provides the State of the forum with an opportunity to resume criminal proceedings, which it had earlier suspended. The text formulated by the Special Rapporteur, taking into account the debate in plenary, was streamlined by the Drafting Committee to make it concise and clearer.

I will address these changes in turn.

First, the opening of the paragraph starts with “[t]he forum State” because, as a drafting matter, it was considered that a reference to “[t]he competent authorities of the State of the forum” made the reading of the provision as a whole wordy and cumbersome. Omitting “the competent authorities of” does not jeopardize the content of the text.

Secondly, the phrase “can resume the exercise of their criminal jurisdiction when” was changed to “…may resume its criminal proceedings if…” In terms of drafting, “may resume” was considered as providing better clarity. The contingent “if” provides better certainty than “when”. Moreover, the use of “criminal proceedings” is consistent with the prior phrases used as opposed to the phrase “the exercise of their criminal jurisdiction” which was broader.

Thirdly, the phrase “after the transfer” which replaces the formulation “after having accepted the transfer” links better sequentially paragraph 4 to the preceding paragraph, as paragraph 3 relates to a transfer that has been agreed.

Fourthly, the Drafting Committee held an extensive debate on the conditions that could give rise to the suspension on the basis of a reformulation presented by the Special Rapporteur. In the main, it was considered that the conditions of no intention to bring the official concerned to

justice and of aiming to shield the official from criminal responsibility were subjective and that it was unclear whether they were cumulative. Moreover, it was noted that the difference between the two conditions was not easily discernible. Suggestions were therefore made to remove the element of subjectivity and to combine the two conditions. Furthermore, it was noted that the element of subjectivity was made worse by the additional qualifier envisaging that the competent authorities would ” conduct themselves in a manner”.

Even though the conditions were inspired by article 17 (2) of the Rome Statute, building upon the “unwilling or unable” standard in article 17 (1), the Drafting Committee was convinced that a link back to paragraph 2 could provide a solution, as that paragraph envisages that the State of the official would agree to “submit the case to its competent authorities for the purpose of prosecution”. As noted earlier, the submission for the purpose of prosecution is not simply formalistic. It envisages the State of the official providing evidentiary material to allow the competent authorities make the necessary determinations in good faith. The Drafting Committee accordingly settled on the phrase “does not promptly and in good faith submit the case to its competent authorities for the purpose of prosecution”. This condition links paragraph 4 better to paragraph 2.

Paragraph 5 was submitted by the Special Rapporteur to address concerns raised in the Drafting Committee that the provision on transfer of proceedings does not address fully relations with third States and could conceivably create a conflict of obligations with respect to the obligation to extradite or prosecute provided for in various treaties in relation to crimes under international law. Paragraph 5, presented as a “without prejudice” clause, is intended not affect any other obligations that the forum State and the State of the official may have under international law. Unlike the text presented by the Special Rapporteur, the present text is broader in a couple of senses. It is not limited to “an obligation in relation with criminal matters due by” the forum State. It is cast in general terms as it was considered that other obligations might be implicated. Moreover, it covers both the obligations of the “forum State” and the “State of the official”.

Before I conclude on this draft article, allow me to address two other issues which are not addressed in the present draft article but were part of the earlier formulations and were discussed in the Drafting Committee.

First, the Drafting Committee decided to delete a paragraph providing that "[t]he criminal proceedings shall be transferred in accordance with the national law of the forum State and, as appropriate, any agreement between the forum State and the State of the forum, including the international cooperation and mutual judicial assistance agreements to which the forum State and the State of the official are parties". This provision was removed on the understanding that the substance of the provision will be addressed in the commentary. Some members felt that the paragraph was unnecessary particularly in the light of the present paragraph 5. Moreover, it was considered that the reference to the "national law of the forum State", more so, without also referring to that of the State of the official, was problematic and would potentially contradict obligations that a State might have under other rules of international law.

Secondly, the Drafting Committee decided to delete a paragraph providing that "[t]he competent authorities of the forum State may also decline to exercise their criminal jurisdiction and to transfer the criminal proceedings to an international criminal court or tribunal, in accordance with their national law and the applicable international law." This paragraph was kept pending awaiting discussion on paragraph 3 of draft article 1, previously proposed by the Special Rapporteur as draft article 18. Once agreement was reached paragraph 3, as described earlier, the draft paragraph was deleted, on the proposal of the Special Rapporteur.

The title of draft article 15 is **"Transfer of the criminal proceedings**.**"** The title presented in a reformulated text by the Special Rapporteur is shorter than "Transfer of proceedings to the State of the official", as proposed in her seventh report.

Draft article 16

Mr. Chairperson,

I now turn to **draft article 16.** Draft article 16 deals with fair treatment of the State official. The draft article contains three paragraphs and is based on a reformulated text proposed by the Special Rapporteur, taking into account the debate in plenary. The draft article as reformulated drew upon draft article 11 of the draft articles on Crimes against humanity, adopted by the Commission in 2019.

In the course of discussion of the draft article, the issue arose as to whether a draft article addressing fair treatment was worthy of inclusion in the draft articles given that the focus of the draft articles was on the immunity of State officials and not on their rights.

While some members considered such inclusion unnecessary as the draft articles would apply against the general background of the applicable law at the national and international levels, which would include the enjoyment of due process guarantees, the Drafting Committee in the final analysis opted for inclusion of a provision which would be tailored to the specific needs of the State official given the circumstances in which such an official could be found. It was noted that such a provision would serve as an additional safeguard.

Paragraph 1 is cast in general terms, laying down the principle guaranteeing an official of another State fair treatment. The original text was streamlined, in most part, motivated by the wish to have a concise and clear proposition. The opening phrase "[a]n official of another State" signals a focus towards the individual as opposed to the forum State.

The phrase "over whom the criminal jurisdiction of the forum State is exercised or could be exercised", replacing an earlier formulation "over whom the criminal jurisdiction of the forum State is intended to be exercised or exercised", seeks to capture an array of processes that might occur before, during and after criminal proceedings. It was considered superfluous to qualify such an allay of processes by "always," which was accordingly deleted.

The State official concerned, in language similar to paragraph 1 of draft article 11 of the draft articles on crimes against humanity, is guaranteed fair treatment, including 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. Unlike draft article 11, the present paragraph refers also “procedural guarantees”. Even though it is understood that “rights” include “guarantees”, the additional reference to “procedural guarantees” seeks to particularize certain guarantees that could conceivably be relevant in relation the process of determination of immunity, in any criminal proceedings that may be instituted against the official, as well as any coercive measures that may be taken against such an official. Some members were of the view that the additional reference to “procedural guarantees” was unnecessary and largely unsupported in treaty practice, as the United Nations Convention against Corruption for example uses “rights and guarantees”. The Drafting Committee also decided to retain the qualifier “his or her rights” in this paragraph and in paragraph 2, even though a discussion was held as to the usage of other alternative words that would reflect adequately United Nations gender policy considerations.

Paragraph 2 deals with entitlements due to the State official who is “in prison, custody or detention in a forum State”. The reformulation of the Special Rapporteur, presented in the light of the plenary debate, initially sought to reflect the matter in terms of an obligation to “communicate without delay to the nearest representative of the State of the official the detention or any other measure affecting the personal freedom of the official, so that [the State official] may receive the adequate assistance in accordance with international law”.

In the preliminary discussions in the Drafting Committee, some members doubted the necessity of such a provision, noting in particular its inadequacy considering that it only dealt with matters concerning communication. It was also suggested that were the paragraph to be retained it would require broadening its scope, along the lines of paragraph 2 of draft article 11 of the draft articles on crimes against humanity. Thus, the obligation would seek not only to ensure that the State official has the ability to communicate, without delay, with the nearest appropriate representative of his or her State of the official, but also to be visited by them, as well as to be informed of his or her right of communication and of visitation.

Even with such potential broadening, some members wondered whether such broadening without a link to nationality would be consistent with existing rules, including, for example, article 38 of the Vienna Convention on Diplomatic Relations where a diplomatic agent who is a national

of or permanently resident in that State shall enjoy only immunity from jurisdiction, and inviolability, in respect of official acts performed in the exercise of his functions unless additional privileges and immunities are granted by the receiving State.

As presently drafted paragraph 2 is inspired by the language of paragraph 2 of draft article 11 of the draft articles on crimes against humanity. It has to be stressed however that, unlike paragraph 2 of the draft articles on crimes against humanity, which deals with the right of consular access, the present draft paragraph seeks to provide a different kind of protection intended to provide an additional safeguard in relation to a State official over whom the criminal jurisdiction of the forum State is exercised or could be exercised. There is therefore no link to "the State or States of which such person is a national or which is otherwise entitled to protect that person's rights or, if such person is a stateless person, of the State which, at that person's request, is willing to protect that person's rights'" as is typical of consular access provisions. It was considered that such a provision was justified by the relationship between the official and the State of the official, and the rationale that immunity is recognized in the interest of the State of the official and not the official.

The opening phrase of paragraph 2 refers to "[a]ny such person" in contrast to an earlier formulation "[a] foreign State official" as the former phrase better links paragraph 2 to paragraph 1. In this sense, "[a]ny such official" refers to "[a]n official of another State over whom the criminal jurisdiction of the forum State is exercised or could be exercised". Moreover, the right of consular access remains unimpaired by the provisions of paragraph 2. Given the scope of the present draft articles, the present paragraph, as is the case with all draft articles in this Part, is understood to refer to both current and former State officials.

Paragraph 3 provides that the rights referred to in paragraph 2 shall be exercised in conformity with the laws and regulations of the State in the territory under whose jurisdiction the person is present, provided that such laws and regulations do not prevent such rights being given the full effect for which they are intended. Although the rights referred to in paragraph 2 are to be exercised in conformity with the laws and regulations of the forum State, this does not mean that these laws and regulations can nullify the rights in question. The Drafting Committee discussed

whether paragraph 3 was necessary and some members sought its deletion. It was considered that the paragraph provided a necessary balance to paragraph 2. The prior reference in the draft to "the rights accorded under paragraph 2" has been changed to "the right referred to in paragraph 2" to signal that paragraph 2 creates a right independent of consular access. It draws upon paragraph 2 of draft article 11 of the draft articles on crimes against humanity, which is inspired by article 36, paragraph 2 of the Vienna Convention on Consular Relations.

Before concluding on this draft article, let me note that the proposal of the Special Rapporteur, formulated taking into account the plenary debate, had a paragraph, which was intended to be paragraph 2, according to which fair treatment was to be guaranteed in certain specific situations. These situations were in relation to determination of immunity, criminal proceedings once instituted, as well as coercive measures taken against the official. Following an extensive discussion in the Drafting Committee, the general sense among members was to delete such paragraph. It was pointed out that paragraph 1, which sets forth the general principle was sufficient as a safeguard. The paragraph was deleted on the understanding that the specific scenarios covered in the deleted paragraph would be highlighted in the commentary in relation to paragraph 1.

Draft article 16 is entitled "Fair treatment of the official". The reference to "and impartial" was deleted from an earlier text as it is understood that "fair treatment" included such notions as "impartiality" and "independence". Draft article 16 precedes the draft article on consultations, which is now draft article 17. In the view of the Drafting Committee, the draft article on consultations is more related to the draft article on dispute settlement.

Draft article 17

Mr. Chairperson,

Let me now turn to **draft article 17**, which relates to consultations between the forum State and the State of the official. It was discussed whether establishing an obligation to consult with the word "shall" was appropriate in this provision. In this context, it was noted that the relevant

States might not have diplomatic relations or might be engaged in an armed conflict with each other. To this end, the wording “may consult” or “should consult” was proposed. However, it was considered that an obligation to consult was a valuable safeguard that did not impose a heavy burden on States and could help prevent the emergence of disputes. Flexibility with regard to its implementation is reflected by the inclusion of the words “as appropriate”. To the same end, the idea of beginning the provision with the words “when necessary” was also proposed.

As originally proposed, the provision was limited in scope to consultations concerning the determination of immunity in accordance with the present draft articles. This limitation was omitted as the Drafting Committee considered that consultations could concern any issue relating to immunity. The final part of the article rather makes clear that the scope of the provision is wide and relates to all matters relating to the immunity of the foreign official covered by the draft articles.

The title of draft article 17 is “Consultations”, as the Special Rapporteur proposed in her seventh report. As I mentioned earlier, it was decided to place the draft article directly before draft article 18, on settlement of disputes, as the subjects of the two provisions are related.

Draft article 18

Mr. Chairperson,

Let me now turn to the last **draft article 18** which, as I mentioned, relates to the settlement of disputes. The dispute settlement procedure is the final procedural safeguard provided for in the draft articles. It was noted that, as discussed in the plenary debate, the shape of this provision was intimately linked to the final form of the work of the Commission on the topic. It was considered that a binding provision would be most appropriate for a product that was intended to be the basis of negotiations for a treaty. The Drafting Committee had this in mind when drafting this provision, and noted the opportunity to use the provision to invite the views of States on both dispute settlement and the final form of the Commission’s work. For these reasons, the Drafting

Committee decided not to follow an alternative approach where draft article 18 would have provided a recommended procedure for dispute resolution.

While drafting the provision, draft article 15 of the Commission's draft articles on crimes against humanity was considered as a relevant model from which inspiration could be drawn. The importance of maintaining consistency with the Commission's recently drafted dispute settlement clauses was highlighted. Nevertheless, it was considered important that the Drafting Committee not simply copy and paste the Commission's prior work, in order to accommodate the specificities of the topic. The Drafting Committee was also reminded that it had not been the practice of the Commission to prepare disputes settlement clauses as they were often the object of negotiations among States.

The draft article adopted by the Drafting Committee has two paragraphs.

Paragraph 1 requires the forum State and the State of the official to seek a solution to any dispute concerning the application or interpretation of the draft articles by negotiation or by other peaceful means of their own choice. The Drafting Committee considered whether the paragraph should make a reference to consultations, including a possible cross-reference to draft article 17. It was noted that such a reference would make the link between the dispute settlement provision and the previous safeguards more explicit. It was also noted that not all matters related to the consultations in draft article 17 would be in the form of disputes in the sense of draft article 18. It was also decided not to include such reference as the Drafting Committee did not want to imply that consultations were a precondition for negotiations. The difficulty of distinguishing between consultations and negotiations in practice was also noted. Earlier proposals that linked the negotiations to prior consultations also resulted in a discussion whether it was better to say that a dispute "subsists" or "exists" following consultations. These considerations were avoided by omission of the reference to consultations and the choice of the opening words "in the event of a dispute".

The discussion whether the provision would be a binding dispute-settlement clause or a recommended procedure also had significant consequences for the wording of paragraph 1. Earlier

proposals of the Special Rapporteur referred to “differences with regard to the determination of immunity” and “disagreement on matters relating to immunity”. The Drafting Committee opted for the more familiar wording “dispute concerning the interpretation or application of the present draft articles” both to ensure consistency in terminology with paragraph 2 and as it moved towards a more traditional dispute settlement provision.

A thorough discussion was held on how precisely to phrase the obligation of States under this paragraph. The formulas “shall endeavour to settle”, which was used in the draft articles on crimes against humanity, and “shall negotiate” were considered. The Drafting Committee decided instead to use the wording “shall seek a solution”, borrowed from Article 33 of the Charter of the United Nations. The reference to Article 33 continues with the end of the paragraph, which reflects the fact the States involved may agree to attempt to resolve a dispute between them by a number of other peaceful means. This flexibility will be further explained in the commentary.

Paragraph 2 provides for the submission of the dispute to the International Court of Justice by either State concerned if a mutually acceptable solution cannot be reached in a reasonable time and if the States have not agreed to submit the dispute to another means of dispute settlement entailing a binding solution.

The Drafting Committee discussed whether the words “mutually acceptable” were necessary at the beginning of the paragraph. It was noted that the words emphasize that a negotiated solution should be reached genuinely, without undue influence. The question whether to use “cannot be reached” or “is not reached” was debated, with the Drafting Committee opting for the former as it was considered narrower and consistent with formulations used in other precedents. The Drafting Committee also considered whether to include a time-limit for negotiations. In her eighth report, the Special Rapporteur had proposed alternative time limits of six and twelve months, but these were considered inflexible. It was noted that the omission of a time-limit would enable the immediate submission of a dispute to the Court. The Drafting Committee opted for the limit “within a reasonable time”, which is a known standard that would allow the Court or other dispute-settlement body to determine according to the circumstances of the case whether attempts to negotiate were sufficient. Furthermore, the phrase “at the request of

either the forum State or the State of the official" appears directly after "shall" to emphasize that either State may seize the Court of the dispute.

A thorough discussion in the Drafting Committee led to the wording of the end of the paragraph. Some members of the Drafting Committee considered it important to refer to arbitration, which is also a traditional means of binding inter-State dispute settlement. The possibility that States might resort to regional courts, for example in the contexts of the African Union or the European Union, to settle disputes relating to matters concerning the present draft articles was also considered. The Drafting Committee did not wish to foreclose such a possibility and therefore adopted a reference to "any other means of settlement entailing a binding decision", borrowed from article 282 of the United Nations Convention on the Law of the Sea.

The Drafting Committee also considered whether to add an opt-out clause to paragraph 2 along the lines of paragraphs 3 and 4 of draft article 15 of the draft articles on crimes against humanity. While it was noted that such clauses were common in States' treaty practice, the Drafting Committee considered that it would be appropriate not to include one in the present provision for two main reasons. Firstly, it was considered that binding dispute settlement was an important additional safeguard for the State of the official, which justified its inclusion in Part Four of the draft articles and gave the provision a special relevance for this topic. Second, the Drafting Committee did not wish to prejudge the willingness of States to commit to binding dispute resolution. The Drafting Committee looked forward to receiving the views of States on the question.

Before concluding, I should note that the Drafting Committee considered the inclusion of a third paragraph, which would have, as an additional safeguard, invited the forum State to consider the suspension of any criminal proceedings pending the resolution of the dispute in accordance with paragraph 2. While some members saw the value of such a safeguard, concerns were raised about the implications of such a provision. These included concerns over interfering in the prerogatives of both international and domestic judicial systems, a lack of relevant practice, including of the International Court of Justice, and the human rights implications of the potentially years-long detention of the official while the dispute was to be settled at the international level.

For these reasons, a third paragraph was not included in the provision. The Drafting Committee agreed that it remained for the court or tribunal considering a dispute to decide whether an interim measure ordering the suspension of criminal proceedings would be appropriate.

The title of draft article 18 is “Settlement of disputes”, as proposed by the Special Rapporteur in her eighth report.

Having completed at the present session all draft articles comprising Part Four, the Drafting Committee adopted the title of the Part as a whole. The title “**Procedural provisions and safeguards”** as proposed by the Special Rapporteur, reflects the fact that Part Four has provisions of a procedural nature and includes safeguards required for the draft articles, thereby bringing some balance to the text.

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Mr. Chairperson,

This concludes my introduction of the third report of the Drafting Committee at the seventy-first session devoted to the topic, “Immunity of State officials from foreign criminal jurisdiction”. It is my sincere hope that the Commission will adopt today the draft articles on first reading.

I thank you for your kind attention.

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