

## Chapter VIII

### Immunity of State officials from foreign criminal jurisdiction

#### A. Introduction

119. The Commission, at its fifty-ninth session (2007), decided to include the topic “Immunity of State officials from foreign criminal jurisdiction” in its programme of work and appointed Mr. Roman A. Kolodkin as Special Rapporteur.<sup>1462</sup> At the same session, the Commission requested the Secretariat to prepare a background study on the topic, which was made available to the Commission at its sixtieth session (2008).<sup>1463</sup>

120. The Special Rapporteur submitted three reports. The Commission received and considered the preliminary report at its sixtieth session (2008) and the second and third reports at its sixty-third session (2011).<sup>1464</sup> The Commission was unable to consider the topic at its sixty-first (2009) and sixty-second (2010) sessions.<sup>1465</sup>

121. The Commission, at its sixty-fourth session (2012), appointed Ms. Concepción Escobar Hernández as Special Rapporteur to replace Mr. Kolodkin, who was no longer a member of the Commission.<sup>1466</sup> The Commission received and considered the preliminary report of the Special Rapporteur at the same session (2012), her second report during the sixty-fifth session (2013), her third report during the sixty-sixth session (2014), her fourth report during the sixty-seventh session (2015), her fifth report, which was considered during the sixty-eighth (2016) and sixty-ninth sessions (2017), and her sixth report, which was considered during the seventieth (2018) and the current seventy-first (2019) sessions.<sup>1467</sup> On the basis of the draft articles proposed by the Special Rapporteur in the second, third, fourth and fifth reports, the Commission has thus far provisionally adopted seven draft articles (see sect. C, below) and commentaries thereto. Draft article 2 on definitions is still being developed.<sup>1468</sup>

<sup>1462</sup> At its 2940th meeting, on 20 July 2007 (*Official Records of the General Assembly, Sixty-second Session, Supplement No. 10 (A/62/10)*, para. 376). The General Assembly, in paragraph 7 of its resolution 62/66 of 6 December 2007, took note of the decision of the Commission to include the topic in its programme of work. The topic had been included in the long-term programme of work of the Commission during its fifty-eighth session (2006), on the basis of the proposal contained in annex A of the report of the Commission (*Official Records of the General Assembly, Sixty-first Session, Supplement No. 10 (A/61/10)*, para. 257).

<sup>1463</sup> *Official Records of the General Assembly, Sixty-second Session, Supplement No. 10 (A/62/10)*, para. 386. For the memorandum prepared by the Secretariat, see [A/CN.4/596](#) and [Corr.1](#).

<sup>1464</sup> [A/CN.4/601](#), [A/CN.4/631](#) and [A/CN.4/646](#), respectively.

<sup>1465</sup> See *Official Records of the General Assembly, Sixty-fourth Session, Supplement No. 10 (A/64/10)*, para. 207; and *ibid.*, *Sixty-fifth Session, Supplement No. 10 (A/65/10)*, para. 343.

<sup>1466</sup> *Ibid.*, *Sixty-seventh Session, Supplement No. 10 (A/67/10)*, para. 266.

<sup>1467</sup> [A/CN.4/654](#), [A/CN.4/661](#), [A/CN.4/673](#), [A/CN.4/686](#), [A/CN.4/701](#), and [A/CN.4/722](#), respectively.

<sup>1468</sup> See *Official Records of the General Assembly, Sixty-eighth Session, Supplement No. 10 (A/68/10)*, paras. 48–49.

At its 3174th meeting, on 7 June 2013, the Commission received the report of the Drafting Committee and provisionally adopted draft articles 1, 3 and 4 and, at its 3193rd to 3196th meetings, on 6 and 7 August 2013, it adopted the commentaries thereto (*ibid.*, *Sixty-ninth Session, Supplement No. 10 (A/69/10)*, paras. 48–49).

At its 3231st meeting, on 25 July 2014, the Commission received the report of the Drafting Committee and provisionally adopted draft articles 2 (e) and 5 and, at its 3240th to 3242nd meetings, on 6 and 7 August 2014, it adopted the commentaries thereto.

At its 3329th meeting, on 27 July 2016, the Commission provisionally adopted draft articles 2, subparagraph (f), and 6, provisionally adopted by the Drafting Committee and taken note of by the Commission at its sixty-seventh session, and at its 3345th and 3346th meetings, on 11 August 2016, the Commission adopted the commentaries thereto (*ibid.*, *Seventy-first Session, Supplement No. 10 (A/71/10)*, paras. 194–195 and 250).

At its 3378th meeting, on 20 July 2017, the Commission provisionally adopted draft article 7 by a recorded vote and at the 3387th to 3389th meetings on 3 and 4 August 2017, the commentaries thereto (*ibid.*, *Seventy-first Session, Supplement No. 10 (A/72/10)*, paras. 74, 76 and 140–141).

## B. Consideration of the topic at the present session

122. The Commission had before it the sixth report (A/CN.4/722), on which debate had not been completed at the seventieth session, and the seventh report of the Special Rapporteur (A/CN.4/729). The sixth report had summarized the debates in the Commission and the Sixth Committee on draft article 7, dealing with crimes under international law in respect of which immunity *ratione materiae* should not apply. It then started to address the procedural aspects of immunity from foreign criminal jurisdiction, focusing in particular on: (a) timing; (b) the kinds of acts affected by immunity; and (c) the determination of immunity. The report did not include any proposals for new draft articles. The seventh report summarized the debates in the Commission at the seventieth session and in the Sixth Committee at the seventy-third session of the General Assembly and completed the examination of the procedural aspects of immunity regarding the relationship between jurisdiction and the procedural aspects of immunity. To that end, two draft articles concerning the consideration of immunity by the forum State and determination of immunity were proposed (draft articles 8 and 9). In addition, the seventh report addressed the remaining procedural aspects identified in the sixth report, including questions concerning the invocation of immunity and the waiver of immunity and two draft articles were proposed (draft articles 10 and 11). It also examined aspects concerning procedural safeguards related to the State of the forum and the State of the official, communication between the forum State and the State of the official, including the duty to notify to the official's State the intent to exercise jurisdiction by the forum State; exchange of information between the State of the official and the forum State; and cooperation and international legal assistance between the State of the official and the forum State, in particular the transfer of criminal proceedings from the forum State to the State of the official. In this regard, four draft articles were proposed (draft articles 12, 13, 14 and 15). Further, the report considered the procedural rights of the official, focusing on fair treatment and one draft article was proposed (draft article 16). The report also addressed the future work plan, anticipating work on first reading to be completed in 2020, at which also an eighth report would be submitted. It would consider remaining issues of a general nature, including: the possible implication on procedural rules of the relationship between the immunity of State officials from foreign criminal jurisdiction and international criminal jurisdiction; the possibility of establishing some mechanism for the settlement of disputes; and the possible inclusion of recommended good practices.

123. The Commission considered the sixth and seventh reports at its 3481st to 3488th meetings, from 15 to 19, 22 and 23 July 2019.

124. Following its debate on the reports, the Commission, at its 3488th meeting, on 23 July 2019, decided to refer draft articles 8 to 16, as contained in the Special Rapporteur's seventh report, to the Drafting Committee, taking into account the debate, as well as proposals made, in the Commission.

125. At its 3501st meeting, on 6 August 2019, the Chair of the Drafting Committee presented the interim report of the Drafting Committee on "Immunity of State officials from foreign criminal jurisdiction", containing draft article 8 *ante* provisionally adopted by the Drafting Committee at the seventy-first session (A/CN.4/L.940), which can be found on the website of the Commission.<sup>1469</sup> The Commission took note of the interim report of the

<sup>1469</sup> The report and the corresponding statement of the Chair of the Drafting Committee are available in the Analytical Guide to the Work of the International Law Commission: <http://legal.un.org/ilc/guide/gfra/shtml>. The draft article 8 *ante*, provisionally adopted by the Drafting Committee, reads as follows:

**"Draft article 8 *ante***

**Application of Part Four**

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

Drafting Committee on draft article 8 *ante*, which was presented to the Commission for information only.

## 1. Introduction by the Special Rapporteur of the sixth and seventh reports

126. The Special Rapporteur recalled that the Commission had not concluded its debate on the sixth report at the seventieth session last year, and it remained open for comments at the present session. Such comments could be made together with those concerning the seventh report, as both reports formed part of a comprehensive treatment of procedural aspects of immunity. In addition, the Special Rapporteur recalled that definitions with regard to the concepts of “criminal jurisdiction” and “immunity” are still pending for consideration in the Drafting Committee.<sup>1470</sup>

127. The Special Rapporteur recalled further that the sixth report<sup>1471</sup> had identified a number of issues to be addressed relating to procedural aspects, of which only the procedural implications for immunity arising from the concept of jurisdiction, in particular the “when”, the “what” and the “who”, were addressed in that report, by examining: (a) the timing of the consideration of immunity; (b) the acts of the authorities of the forum State that may be affected by immunity; and (c) the identification of the organ competent to decide whether immunity applies, without any draft articles being proposed. Accordingly, the seventh report completed the consideration of these aspects.

128. The Special Rapporteur explained that the seventh report was divided into an introduction and five chapters. The purpose of the introduction was to describe the current state of affairs of the topic and, above all, to present a summary of the debates on the Sixth Report held in 2018 (both in the Commission and the Sixth Committee of the General Assembly). Chapter I revisited the issue of the concept of jurisdiction and its impact on the procedural aspects of immunity that was included in the sixth report. It contains two draft articles (8 and 9) that are based on the review conducted in seventh report. Chapter II is devoted entirely to considering the invocation and the waiver of immunity and it too includes two draft articles devoted to the said legal concepts (10 and 11). Chapter III addresses a set of issues that, in essence, are procedural safeguards operating between the forum State and the State of the official, namely: the notification to the State of the official of the forum State’s intention to exercise jurisdiction over a foreign official; the exchange

<sup>1470</sup> The proposals by the Special Rapporteur currently in the Drafting Committee read as follow:

**“Draft article 3  
Definitions**

For the purposes of the present draft articles:

(a) The term ‘criminal jurisdiction’ means all of the forms of jurisdiction, processes, procedures and acts which, under the law of the State that purports to exercise jurisdiction, are needed in order for a court to establish and enforce individual criminal responsibility arising from the commission of an act established as a crime or misdemeanour under the applicable law of that State. For the purposes of the definition of the term ‘criminal jurisdiction’, the basis of the State’s competence to exercise jurisdiction is irrelevant;”

(A/CN.4/661, para. 42). In the draft articles provisionally adopted by the Commission, the definitions article is draft article 2.

“(b) ‘Immunity from foreign criminal jurisdiction’ means the protection from the exercise of criminal jurisdiction by the judges and courts of another State that is enjoyed by certain State officials;”

(A/CN.4/661, para. 46).

“(c) ‘Immunity *ratione personae*’ means the immunity from foreign criminal jurisdiction that is enjoyed by certain State officials by virtue of their status in their State of nationality, which directly and automatically assigns them the function of representing the State in its international relations;”

“(d) ‘Immunity *ratione materiae*’ means the immunity from foreign criminal jurisdiction that is enjoyed by State officials on the basis of the acts which they perform in the discharge of their mandate and which can be described as ‘official acts’”

(A/CN.4/661, para. 53).

<sup>1471</sup> See A/CN.4/722.

of information between both States; the possibility for the forum State to transfer the proceedings to the State of the official; and – lastly – the conduct of consultations between both States. The analysis of these issues provides the basis of draft articles 12, 13, 14 and 15. Chapter IV is devoted to the analysis of the procedural rights and safeguards of the official, and is the basis of draft article 16.

129. The Special Rapporteur underlined that an examination of the procedural aspects was justified considering particularly that the foreign criminal court in which immunity would be invoked would apply procedural rules, principles and processes that could hardly be ignored. Such proceedings necessarily involved a foreign national, whose status as a State official, and whether his acts were “performed in an official capacity” for immunity *ratione materiae* would be matters of determination. Moreover, such consideration had implications on the principle of sovereign equality in the relations between the forum State and the State of the official, which implied the need to strike a proper balance between the right of the forum State to exercise jurisdiction and the right of the State of the official to see the immunity of its officials respected. Also in balance was the respect for the immunity of State officials and the necessity of ensuring accountability for the commission of serious crimes under international law. Additionally, it was useful to ensure that, under all circumstances, State officials who may be affected by the action of a foreign jurisdiction were guaranteed procedural rights recognized under international human rights law.

130. Ultimately, the consideration of procedural aspects would not only provide certainty to both the forum State and the State of the official and help to reduce political considerations and potential abuse of process for political purposes or motives but also foster neutrality, thereby building trust between the forum State and the State of the official. This would mitigate any potential instability in international relations among States. Thus, the consideration of the procedural aspects would assist to ensure a proper balance in safeguarding legal principles and values of the international community.

131. In introducing the various draft articles, the Special Rapporteur stressed that the draft articles contained in her seventh report were designed to apply to the draft articles as a whole, including draft article 7, thereby responding to the concern of some members of the Commission that there is a need to ensure a simultaneous treatment of exceptions to immunity and the formulation of procedural guarantees.

132. The Special Rapporteur noted that draft articles 8 and 9 addressed the procedural aspects of immunity associated with the concept of criminal jurisdiction. Draft article 8<sup>1472</sup> referred to the consideration of immunity by the forum State, in particular, the timing at which it must be taken into account by the authorities of that State. This meant that immunity would be considered at the earliest possible time as soon as the State authorities became aware that a foreign official may be affected by the exercise of jurisdiction by the forum State. In any event, such consideration had to be before the indictment of the official and the commencement of the trial phase. The draft article was based on the assumption that immunity may also be assessed at earlier phases if coercive measures or other measures of constraining authority were taken that directly affected the official or had an impact on the performance of his functions.

133. Draft article 9<sup>1473</sup> was based on the recognition that the determination of immunity was for the courts of the State of the forum. This was without prejudice to the possible

<sup>1472</sup> The draft article proposed by the Special Rapporteur reads as follows:

**“Draft article 8**

**Consideration of immunity by the forum State**

1. The competent authorities of the forum State shall consider immunity as soon as they are aware that a foreign official may be affected by a criminal proceeding.
2. Immunity shall be considered at an early stage of the proceeding, before the indictment of the official and the commencement of the prosecution phase.
3. The immunity shall, in any case, be considered if the competent authorities of the State intend to take a coercive measure against the foreign official that may affect the performance of his or her functions.”

<sup>1473</sup> The draft article proposed by the Special Rapporteur reads as follows:

participation of other institutions or authorities of the forum State as determined under its legal system. Domestic law continued to be particularly relevant for the purposes of defining the procedure for determining immunity, which should be done in the light of the rules set out in the draft articles, taking into account also whether the State of the official had invoked or had waived immunity, as well as any information that the authorities of the forum State and the State of the official may have provided to the competent courts to rule on the immunity.

134. Draft articles 10 and 11 addressed matters of invocation and waiver of immunity. The Special Rapporteur stressed that the invocation and waiver of immunity ought not be confused with exceptions or limitations to immunity. Invocation involved the assertion of the right to immunity, while waiver denoted a renunciation. Draft article 10,<sup>1474</sup> according to the Special Rapporteur, recognized the right of any State to invoke the immunity of its officials against a State seeking to exercise jurisdiction. It was observed that invocation of immunity must be made as soon as the State of the official becomes aware that the forum State intended to exercise jurisdiction. Thus, the draft article contained a set of procedural rules for invoking immunity in order to guarantee legal certainty.

135. Concerning the form and procedure, the Special Rapporteur stated that invocation must be made in writing, and identify the official who would benefit from the immunity, as well as specify the type of immunity (whether *ratione personae* or *ratione materiae*). It was also stressed that, taking into account the diversity of legal systems, the draft article did not identify the invocation of immunity as being necessarily a judicial act alone. It offered sufficient flexibility to facilitate that the invocation of immunity through judicial authorities or the diplomatic channel. Further, it was noted that draft article 10 drew upon the distinction between immunity *ratione personae* and immunity *ratione materiae*. While the

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**“Draft article 9  
Determination of immunity**

1. It shall be for the courts of the forum State that are competent to exercise jurisdiction to determine the immunity of State officials from foreign criminal jurisdiction, without prejudice to the participation of other organs of the State which, in accordance with national laws, may cooperate with them.
2. The immunity of the foreign State shall be determined in accordance with the provisions of the present draft articles and through the procedures established by national law.
3. The competent court shall consider whether the State of the official has invoked or waived immunity, as well as the information provided to it by other authorities of the forum State and by the authorities of the State of the official whenever possible.”

<sup>1474</sup> The draft article proposed by the Special Rapporteur reads as follows:

**“Draft article 10  
Invocation of immunity**

1. A State may invoke the immunity of any of its officials from foreign criminal jurisdiction before a State that intends to exercise jurisdiction.
2. Immunity shall be invoked soon as the State of the official is aware that the forum State intends to exercise criminal jurisdiction over the official.
3. Immunity shall be invoked in writing and clearly, indicating the identity of the official in respect of whom the immunity is being invoked and the type of immunity being invoked.
4. Immunity shall be invoked preferably through the procedures established in cooperation and mutual judicial assistance agreements to which both States are parties, or through other procedures commonly accepted by said States. Immunity may also be invoked through the diplomatic channel.
5. Where immunity is not invoked directly before the courts of the forum State, the authorities that have received the communication relating to the invocation of immunity shall use all means available to them to transmit it to the organs that are competent to determine the application of immunity, which shall decide thereon as soon as they are aware of the invocation of immunity.
6. In any event, 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.”

invocation was unnecessary for the former as it had to be considered *proprio motu*, it was considered a procedural requirement for the latter.

136. Draft article 11<sup>1475</sup> considered waiver of immunity as a right of the State of the official. It must be express, clear and unequivocal, with the mention of the official concerned and, where applicable, the acts to which the waiver referred. The draft article did not provide for implicit waiver. Even in the case of a waiver deriving from a treaty, such a waiver was express if it could be deduced clearly and unequivocally from the terms of the treaty to which both the forum State and the State of the official are parties.

137. Regarding the form and procedure of waiver, the Special Rapporteur noted that they were the same as those set out in draft article 10.

138. With respect to the effects of waiver, the Special Rapporteur observed that, to ensure legal certainty, waiver of immunity was irrevocable. To this end, (a) once immunity was waived, the waiver applied to any act and any stage of the proceedings (including appeals and other legal recourse, as well as any arrest warrants or imprisonment) that might occur as a result of the exercise of criminal jurisdiction by the forum State; and (b) the waiver was solely and exclusively in relation to the official and the acts to which the waiver related.

139. Draft articles 12, 13, 14 and 15 deal with procedural safeguards applicable between the forum State and the State of the official, and were proposals *de lege ferenda* constituting progressive development of international law. The Special Rapporteur recalled the need for procedural safeguards was justified to prevent the political or abusive use of criminal jurisdiction against a foreign official, a matter stressed in both the Commission and in debates of the Sixth Committee. Such safeguards were aimed at protecting the interests of both the forum State and the State of the official. Moreover, they ought to be understood in a broad sense so as to, *inter alia*, (a) allow for the State of the official to invoke and waive immunity, which require knowledge of the intention to exercise jurisdiction by the forum State; (b) enable exchange of information between the authorities of the forum State and of the State of the official; (c) facilitate the exercise of criminal jurisdiction over the official by his own State; and (d) permit consultations between the forum State and the State of the official. The Special Rapporteur highlighted that it was extremely difficult to find uniformity in State practice and that treaty practice was varied and had its own peculiarities.

140. The Special Rapporteur stressed that the draft articles sought to assist to build mutual trust between the forum State and the State of the official; offer legal certainty to both; and help to eliminate the risk of politicization of the prosecution and of creating instability in inter-State relations.

141. On draft article 12,<sup>1476</sup> the Special Rapporteur underscored that it constituted an essential guarantee for the respect of the immunity of foreign officials by establishing the

<sup>1475</sup> The draft article proposed by the Special Rapporteur reads as follows:

**“Draft article 11**

**Waiver of immunity**

1. A State may waive the immunity of its officials from foreign criminal jurisdiction.
2. Waiver shall be express and clear and shall mention the official whose immunity is being waived and, where applicable, the acts to which the waiver pertains.
3. Waiver shall be effectuated preferably through the procedures set out in cooperation and mutual judicial assistance agreements to which both States are parties, or through other procedures commonly accepted by said States. A waiver of immunity may be communicated through the diplomatic channel.
4. A waiver that can be deduced clearly and unequivocally from an international treaty to which the forum State and the State of the official are parties shall be deemed an express waiver.
5. Where a waiver of immunity is not effectuated directly before the courts of the forum State, the authorities that have received the communication relating to the waiver shall use all means available to them to transmit it to the organs competent to determine the application of immunity.
6. Waiver of immunity is irrevocable.”

<sup>1476</sup> The draft article proposed by the Special Rapporteur reads as follows:

duty to notify any attempt to exercise jurisdiction over them to the State of the official. The duty to notify was seen as the first guarantee for a State to safeguard its interests by invoking or waiving the immunity. It was noted that notification should be made as soon as the competent authorities of the forum State have sufficient information to conclude the presence of a foreign official who could be subject to its criminal jurisdiction and such notification should contain all the elements allowing the State of the official to assess its interests.

142. As to the form and procedure for notification, the Special Rapporteur observed that a model similar to the invocation and waiver of immunity had been used. Recourse to the diplomatic channel was subsidiary.

143. The Special Rapporteur noted that draft article 13<sup>1477</sup> was premised on the recognition that the forum State would need information from the State of the official in order to decide on immunity, in particular with respect to immunity *ratione materiae*. Nevertheless, the Special Rapporteur underlined that the mechanism under the draft article provided a procedural guarantee that favoured both the forum State and of the State of the official. Paragraphs 4 and 6 contained provisions regarding refusal by the State of the official. The form and procedure for the request of information were modelled on the provisions on invocation, waiver and notification.

144. Draft article 14<sup>1478</sup> addressed the transfer of the criminal proceedings from the forum State to the State of the official. This mechanism is conceived in the draft article as a right

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**“Draft article 12  
Notification of the State of the official**

1. Where the competent authorities of the forum State have sufficient information to conclude that a foreign official could be subject to its criminal jurisdiction, the forum State shall notify the State of the official of that circumstance. For that purpose, States shall consider establishing in their domestic law appropriate procedures to facilitate such notification.
2. The notification shall include the identity of the official, the acts of the official that may be subject to the exercise of criminal jurisdiction and the authority that, in accordance with the law of the forum State, is competent to exercise such jurisdiction.
3. The notification shall be provided through any means of communication accepted by both States or through means provided for in international cooperation and mutual legal assistance treaties to which both States are parties. Where no such means exist or are accepted, the notification shall be provided through the diplomatic channel.”

<sup>1477</sup> The draft article proposed by the Special Rapporteur reads as follows:

**“Draft article 13  
Exchange of information**

1. The forum State may request from the State of the official information that it considers relevant in order to decide on the application of immunity.
2. That information may be requested through the procedures set out in international cooperation and mutual legal assistance treaties to which both States are parties, or through any other procedure that they accept by common agreement. Where no applicable procedure exists, the information may be requested through the diplomatic channel.
3. Where the information is not transmitted directly to the competent judicial organs so that they can rule on immunity, the authorities of the forum State that receive it shall, in accordance with domestic law, transmit it directly to the competent courts. For that purpose, States shall consider establishing in their domestic law appropriate procedures to facilitate such communication.
4. The State of the official may refuse a request for information if it considers that the request affects its sovereignty, public order (*ordre public*), security or essential public interests. Before refusing the request for information, the State of the official shall consider the possibility of making the transmission of the information subject to conditions.
5. The information received shall, where applicable, be subject to conditions of confidentiality stipulated by the State of the official, which shall be fulfilled in accordance with the mutual assistance treaties that provide the basis for the request for and provision of the information or, failing that, to conditions set by the State of the official when it provides the information.
6. Refusal by the State of the official to provide the requested information cannot be considered sufficient grounds for declaring that immunity from jurisdiction does not apply.”

<sup>1478</sup> The draft article proposed by the Special Rapporteur reads as follows:

of the forum state and not as an obligation. Therefore, the transfer of proceedings will be subjected to the national laws of the forum State and, where appropriate, to the conventions of international judicial assistance which bind both States. The effect of the referral is materialized in the “suspension” of the exercise of the jurisdiction of the forum State, which is now subject to the pronouncement of the State of the official on the exercise of its own jurisdiction. It was worth highlighting that – despite creating a right and not an obligation for the forum State – it is a useful instrument under certain circumstances to avoid the issue of immunity, or to solve the problems that may come up between affected states in relation to the determination of the applicability of immunity. And, in any case, it can operate as a useful instrument to avoid the problem of politicization or abuse of the exercise of jurisdiction by the forum State through the channel of allowing the State of the official to exercise its own jurisdiction.

145. Draft article 15,<sup>1479</sup> couched in general terms, regulated a flexible mechanism for consultations to facilitate the search for solutions when problems of any kind arose in the process of determining the applicability of immunity in a particular case or, if that was not possible, to agree on some avenue of dispute settlement existing under international law. It was stressed that it was a two-way mechanism (consultations) of bilateral nature (forum State – State of the official).

146. The Special Rapporteur noted that draft article 16<sup>1480</sup> addressed procedural rights and safeguards applicable to the foreign official. Although immunity was for the benefit of the State of the official, the exercise of jurisdiction by the forum State had a direct bearing on the State official. The draft article recognized the right of the State official to benefit from all fair treatment guarantees, including procedural rights and safeguards related to a fair and impartial trial. The draft article was modelled on the provision adopted by the Commission in the draft articles on prevention and punishment of crimes against humanity.

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**“Draft article 14**

**Transfer of proceedings to the State of the official**

1. The authorities of the forum State may consider declining to exercise its jurisdiction in favour of the State of the official, transferring to that State criminal proceedings that have been initiated or that are intended to be initiated against the official.
2. Once a transfer has been requested, the forum State shall suspend the criminal proceedings until the State of the official has made a decision concerning that request.
3. The proceedings shall be transferred to the State of the official in accordance with the national laws of the forum State and the international cooperation and mutual judicial assistance agreements to which the forum State and the State of the official are parties.”

<sup>1479</sup> The draft article proposed by the Special Rapporteur reads as follows:

**“Draft article 15**

**Consultations**

The forum State and the State of the official may consult, at the request of either, on matters concerning the determination of the immunity of the foreign official in accordance with the present draft articles.”

<sup>1480</sup> The draft article proposed by the Special Rapporteur reads as follows:

**“Draft article 16**

**Fair and impartial treatment of the official**

1. A State official whose immunity from foreign criminal jurisdiction is being examined by the authorities of the forum State shall benefit from all fair treatment safeguards, including the procedural rights and safeguards relating to a fair and impartial trial.
2. These safeguards shall be applicable both during the process of determining the application of immunity from jurisdiction and in any court proceeding initiated against the official in the event that immunity from jurisdiction does not apply.
3. The fair and impartial treatment safeguards shall in all cases include the obligation to inform the nearest representative of the State of the official, without delay, of such person’s detention or any other measure that might affect his or her personal liberty, so that the official can receive the assistance to which he or she is entitled under international law.
4. The official shall be treated in a fair and impartial manner consistent with applicable international rules and the laws and regulations of the forum State.”



147. Regarding the future programme of work on the topic, the Special Rapporteur recalled that her sixth report referred to the need of tackling, in a future report, the obligation to cooperate with an international criminal court and its possible impact on the immunity of foreign criminal jurisdiction of state officials. Besides, in her seventh report she mentioned that this issue had arisen before the International Criminal Court in relation to the Appeal request introduced by Jordan relating to the arrest warrant and surrender of the then President Al-Bashir. Regarding the decision of the International Criminal Court Appeals Chamber issued on 6 May 2019,<sup>1481</sup> she believed it was not necessary or useful for the current work of the Commission to start a discussion on this judgment. Moreover, it was worth noting that the decision of the General Assembly on the request of an advisory opinion from the International Court of Justice in relation to the immunity of Heads of State and its relationship with the duty to cooperate with the International Criminal Court was still pending. Therefore, she did not believe it was necessary to submit any specific proposal to the Commission at this point during the current session. Nonetheless, she keeps the option of coming back to this question in the next session from a broader perspective, which must not necessarily be referred exclusively to exceptions of immunity or procedural aspects (including procedural guarantees) of this topic. On the other hand, the Special Rapporteur also solicited views of members on (a) the possibility of dealing with the settlement of disputes; and (b) the desirability and the usefulness of addressing “good practices,” which could examine such issues as the referral of power to decide on the application of immunity to the highest courts; the definition of the functions of the Prosecutor; and the preparation of manuals for the authorities and organs of the State dealing with issues of immunity.

## 2. Summary of the debate

148. The present summary relates to the debate on the sixth and seventh reports of the Special Rapporteur at the present session. It should be read together with the summary of the debate on the sixth report at the seventieth session.<sup>1482</sup>

### (a) General comments

149. Members commended the Special Rapporteur for her extensive work on the seventh report which, together with the sixth report, provided a rich and detailed review and analysis of State practice, case law and academic literature relevant to procedural aspects. Some members pointed to the relevance of the work of the previous Special Rapporteur, as well as the memorandum by the Secretariat (A/CN.4/596 and Corr.1). While several members observed that the draft articles proposed in the seventh report should be more closely based on practice, members also appreciated the deductive methodology employed by the Special Rapporteur to provide *de lege ferenda* proposals in the progressive development of international law. The acknowledgment by the Special Rapporteur regarding the status of the proposals as constituting progressive development of international law was welcomed. The importance of taking into account State practice from more diverse regions was nevertheless underlined by some members. In that connection, a number of members offered relevant examples including domestic legislation, case law and bilateral agreements. The convenience to maintain consistency with the work of the Commission on other related topics such as crimes against humanity and peremptory norms of general international law (*jus cogens*), as well as the topic of universal criminal jurisdiction on the long-term programme of work, was also highlighted.

150. Concerning the approach to the procedural aspects of the topic, members underlined the importance of balancing essential legal interests, including respect for the sovereign equality of States, the need to combat impunity for international crimes, as well as the protection of State officials from the politically motivated or abusive exercise of criminal jurisdiction. In this regard, concerns expressed in the debates of the Commission and the

<sup>1481</sup> Situation in Darfur, Sudan, In the case of the *Prosecutor v. Omar Hassan Ahmed Bashir (Decision under article 87(7) of the Rome Statute on the non-compliance by Jordan with the request by the Court for the arrest and surrender of Omar Al-Bashir)*.

<sup>1482</sup> *Official Records of the General Assembly, Seventy-third Session, Supplement No. 10 (A/73/10)*, chap. VII.

Sixth Committee regarding the overpoliticization or abuse of the exercise of criminal jurisdiction over State officials were reiterated. In order to achieve a careful balance between those important interests, several members indicated that the procedural safeguards proposed in the draft articles should be strengthened.

151. Members also highlighted the crucial link between the procedural aspects of the topic and the exceptions to immunity in respect of serious crimes under international law set out in draft article 7, which had been provisionally adopted by the Commission. In this connection, several members concurred with the Special Rapporteur, as she had explained in her introduction of the seventh report, that the procedural guarantees and safeguards proposed in draft articles 8 to 16 were applicable to the draft articles as a whole. Other members expressed concerns that draft articles 8 to 16, as presently drafted, did not sufficiently establish a link between the proposed procedural guarantees and safeguards and the application of draft article 7 nor address fully the procedures and guarantees necessary to avoid politically motivated prosecutions. The divergent views expressed by members in respect of the adoption of draft article 7 were reiterated. While the need to avoid reopening the debate on draft article 7 was stressed by a number of members, it was recalled by several members that States were evenly divided in their positions on draft article 7, taking into account the distinction between *lex lata* and *lex ferenda*. Therefore, some members emphasized the paramount importance of designing specific procedural safeguards to address concerns regarding the application of draft article 7. At the same time, it was cautioned by several members that the content of draft article 7 should not be undermined. It was noted in any event that further meaningful discussion of the topic was bound to entail an elaboration of a draft similar to draft article 7. Some other members doubted that the use of procedural safeguards could sufficiently cure the substantive flaws inherent in draft article 7, noting further that the draft article remained an obstacle to agreement within the Commission on the topic. Nonetheless, it was recognised by several members that certain proposals made by members in previous debates on the topic merited detailed consideration and provided a good basis for further discussion.

152. In this connection, some support was expressed for a proposal to clarify that the general procedural provisions and safeguards under draft articles 8 to 16 were applicable to the situations covered in draft article 7, and to formulate specific safeguards in relation to draft article 7. Three conditions for the exercise of jurisdiction by the forum State over a foreign State official pursuant to draft article 7 were proposed, namely: (a) the decision to institute criminal proceedings must be taken at the highest level of government or prosecutorial authority; (b) the evidence that the official committed the alleged offence must be fully conclusive; and (c) the forum State must have notified the State of the official of the intention to exercise jurisdiction and must have offered to transfer the proceedings to the courts of the State of the official or to an international criminal court or tribunal. Further, a view was expressed that the presence of the concerned State official in the territory of the forum State was also crucial. It was also considered by some members that there should be a presumption of immunity until determination of its absence was made. Moreover, some members viewed as imperative judicial review of any decision on immunity. Additional proposals were made in relation to the transfer of proceedings to the State of the official (see paragraphs 173–175 below). On the other hand, some alternative suggestions were made regarding the notion of “fully conclusive” as an evidentiary standard, including “reliable and sufficient” or “*prima facie*”, given that this was a matter that had to be considered as a preliminary matter before actual trial.

153. Further, some members stressed the need to achieve a balance between the interests of the forum State and those of the State of the official, in line with the principle of reciprocity. According to some members, draft articles 8 to 16 seemed to place more weight on the right to exercise jurisdiction of the forum State over the right to immunity of the State of the official. In this regard, it was suggested that more discretion should be granted to the State of the official in asserting immunity, although the possibility of abuse by the State of the official in blocking the exercise of jurisdiction by the forum State also raised concerns. Several members considered that draft articles 8 to 15 reflect a correct balance between the safeguards offered to the forum State and to the State of the official, and that they are a good basis for the Commission’s work on procedural provisions and safeguards.

154. Another issue that required clarification was the extent to which the distinction between immunity *ratione personae* and immunity *ratione materiae* was reflected in draft articles 8 to 16. Some members considered that all the procedural safeguards in draft articles 8 to 16 would apply to both types of immunity, while other members preferred to have separate draft articles addressing the different procedural aspects of immunity reflecting the difference between immunity *ratione personae* and immunity *ratione materiae*.

155. Members generally agreed that draft articles 8 to 16 could be streamlined and simplified. It was also considered important to cover all key points with sufficient clarity and detail to ensure that they are effective and operational. Some members viewed it appropriate for the draft articles to address only those procedural aspects that were directly related to the immunity of foreign State officials and to leave aside other issues to be regulated by existing treaties. The view was expressed regarding an apparent over-reliance in the draft articles on the judiciary in criminal procedure in civil law systems at the expense of other systems where executive and prosecutorial authorities played a more prominent role. Various proposals were also made to reorder the draft articles so that the proposed procedures would be better linked, adopting a new ordering that might start with draft articles 8, 12, 10, 11 and then draft article 9.

**(b) Specific comments**

*Draft articles 8 and 9 (Consideration and determination of immunity)*

156. Since national legal systems were varied and it was the prerogative of States to adopt internal procedures relating to immunity, it was noted by some members that the draft articles should aim to provide States with a common procedural framework to adopt in their domestic law without being overly prescriptive. In this regard, it was suggested that a simpler provision based on article 32, paragraphs 1 and 2, of the Vienna Convention on Diplomatic Relations would suffice. References to phrases like “consider immunity”, “affected by criminal proceedings” were considered vague and unclear. While it was observed that the consideration of immunity as proposed in draft article 8 could be framed in general terms taking into account the circumstances of each State, a proposal was made to provide that States should make efforts to enact or amend national laws governing procedures concerning determination of immunity in draft article 9. The relevance of applicable rules of international law in the determination of immunity under draft article 9 was also raised. Another view was that reference to national and international law could result in confusion.

157. Several members remarked that draft articles 8 and 9 should provide for a more flexible approach concerning the relevant organs of the forum State in the consideration and determination of immunity. Some members considered it sufficient to refer to the competent authorities of the forum State, while others preferred to simply refer to the forum State. At the same time, some members welcomed the acknowledgment that the courts of the forum State usually had the primary authority to determine immunity, as reflected in draft article 9. The concern was expressed that the courts of the forum State should be independent from, not subordinated to, the executive branch. In this regard, clarification was sought regarding the obligation by the courts of the forum State to consider information provided by other authorities.

158. Further, the need to address the role of the prosecutor in the process of consideration and determination of immunity, as well as the issue of control of prosecutorial discretion, was underlined. It was suggested that draft article 8 (consideration of immunity) be redrafted to include the consideration of immunity at the different stages of investigation, particularly with respect to different forms of detention in respect of immunity *ratione materiae*, and trial. Some members expressed the view that some limitations should be apply to draft article 8 in order to avoid a negative impact on the investigation.

159. A proposal was made to specify in draft article 9 that whatever State organ is involved, the determination of immunity should be made at a relatively high level. Given the importance of determining whether any exception to immunity was applicable under draft article 7, it was suggested that such determination be made by the courts of the forum

State, including the possibility of appeal to the highest courts. It was also noted that the determination of immunity by the forum State could be subject to a decision by an international criminal court or a treaty binding upon the forum State.

160. A number of members supported the requirement in draft article 8 for consideration of immunity at an early stage of the proceedings, even though there was need for precision as to the moment when such determination had to be made, such as “without delay”. Similarly, it would be useful for draft article 9 (Determination of immunity) to indicate at which stage of the proceedings determination of immunity should take place. Nonetheless, several members concurred with the principle that questions of immunity are of a preliminary nature which must be expeditiously decided *in limine litis*. It was also mentioned that the consequences of consideration of immunity by the forum State could include the immediate requirements of determination of immunity and notification of the State of the official by linking draft article 8 to draft articles 9 and 12.

161. In addition, several members agreed with the condition in draft article 8, paragraph 3, that immunity shall be considered before the forum State intends to take any coercive measures against the foreign State official. In this regard, it was suggested that examples be provided to illustrate acts of the forum State, including coercive measures, that would be affected by immunity, noting that special attention ought to be given to immunity *ratione materiae*. Some members pointed out that consideration of immunity in such cases should not be limited to situations when the foreign State official was on official duty. Moreover, if the foreign State official was presumed to be immune from coercive measures prior to the determination of immunity, that should be clarified in draft article 9.

162. A broader question was raised as to whether draft articles 8 and 9 should be reformulated to reflect the distinction between immunity *ratione personae* and immunity *ratione materiae*. Depending on the type of immunity involved, the timing of consideration of immunity by the forum State may vary (see paragraph 172 below).

*Draft articles 10 and 11 (Invocation and waiver of immunity)*

163. A number of members agreed in substance with draft article 10 (Invocation of immunity), whereas there were differing opinions regarding a differentiated approach between immunity *ratione personae* and immunity *ratione materiae*. In particular, it appeared from draft article 10, paragraph 6, that the forum State shall decide *proprio motu* in a case concerning immunity *ratione personae*, whereas the State of the official was expected to invoke immunity *ratione materiae* before consideration by the forum State. Not all members supported such a distinction.

164. A proposal was made to indicate that, in a case where immunity *ratione materiae* was not invoked, the forum State should likewise consider or decide *proprio motu* as soon as it was aware of the status of the foreign State official or of the acts involved. Another proposal was that, for the purposes of immunity *ratione materiae*, the acts of the foreign State official should be considered separable, with the effect that invocation or waiver of immunity may be applicable to some acts but not others.

165. It was acknowledged that the right to invoke or waive immunity belonged to the State of the official, not to the official. However, some members noted that, as a practical matter, it was often the official who would be first to claim the immunity in practice. In this regard, it was suggested that States might be advised to stipulate the competent organ to invoke immunity in their domestic law. The obligations of the forum State should also be clarified in the event that immunity was claimed by the official but denied by the State, such as when for example a crime was committed by the official on the orders of the State.

166. Some members considered that the invocation of immunity was not a prerequisite for its application, as immunity existed as a matter of international law and others pointed out that there was no obligation to immediately invoke immunity. The view was expressed that there should be a presumption of immunity unless the State of the official clarified the lack of immunity or waived immunity. Another view was that the lack of invocation of immunity could serve an evidentiary purpose to that effect, but it should not preclude the State of the official from invoking immunity at a later stage. It was stressed that non-invocation of immunity should not be interpreted as a waiver. Nonetheless, it was

mentioned that there might be an exceptional possibility where the State of the official is presumed to have waived the immunity of its official if it fails to invoke immunity within a reasonable time after having been notified or made aware of the proceedings against the official. In the view of some members, it was hoped that the consequences of failing to invoke immunity would be clarified.

167. In relation to draft article 11 (waiver of immunity), several members agreed that waiver of immunity must be express as a general rule. Some considered that waiver must be express in all cases. Reference was also made to the view of the former Special Rapporteur, Mr. Kolodkin, who concluded that waiver of immunity should be express for the troika, but waiver could be either express or implied for other officials enjoying immunity *ratione personae* or immunity *ratione materiae*. Moreover, the issue of the appearance of a State before the courts of another State was raised for further consideration, although the view was also expressed that such appearance should not be interpreted as an express waiver of immunity. In respect of draft article 11, paragraph 4, it was doubted by several members that a treaty provision applicable between the forum State and the State of the official could be interpreted as an implied or express waiver. In this regard, drafting a without prejudice clause to this effect was mentioned as an alternative. It was also suggested this matter be treated in a separate provision as this was in effect a treaty exception.

168. As to the form of communication between the forum State and the State of the official, it was mentioned by some members that the requirement of invocation of immunity in writing did not necessarily reflect the international practice. Moreover, several members highlighted the central role of the diplomatic channel in communications between the forum State and the State of the official. The conduct of diplomacy through third-parties, such as intermediaries, was also mentioned. Support was generally expressed for a drafting proposal to emphasize the use of the diplomatic channel in a broader sense, in the context of invocation and waiver of immunity under draft articles 10 and 11, as well as the processes of notification, exchange of information and consultations under draft articles 12, 13 and 15 respectively. It was further noted that the States concerned should be free to decide on the most appropriate channel for communication.

169. It was proposed that invocation of immunity would trigger consultations between the two States concerned, with the effect of suspending the proceedings for a reasonable period during such consultations. In addition, it was suggested to clarify that the participation of the State of the official in the processes of exchange of information and consultations with the forum State could not be construed as an implied waiver of immunity.

170. Various positions were expressed on the irrevocability of waiver of immunity. Members generally supported the wording of draft article 11, paragraph 6, expressing the view that waiver should be presumed to be irrevocable, unless otherwise indicated by the State of the official. The need for consideration of such a provision was also highlighted, since revocation might be justified on other grounds such as concerning vital national interests.

*Draft articles 12 to 15 (Procedural safeguards between the forum State and the State of the official)*

171. Several members placed emphasis on the relevance of domestic law and the use of the diplomatic channel in the application of draft articles 12 to 15. Regarding draft article 12, members generally recognised the crucial relevance of notification into the general framework of procedural safeguards. Some members questioned whether a legal obligation upon the forum State to notify the State of the official, particularly in relation to immunity *ratione materiae*, could be established. It was observed that certain treaty provisions cited in the seventh report concerned notification of various States for the purpose of exercise of criminal jurisdiction by those States, not for the purpose of invocation of immunity, its determination or its waiver. Questions were also raised as to the practical implementation of the obligation of notification, such as whether the courts of a State would provide information to its executive branch, and whether the central authority of a State for mutual legal assistance would be the relevant authority for communicating notification with respect to immunity. Other members expressed support for imposing a limited obligation of notification. In particular, it was suggested by some members that notification of

information be excluded in circumstances which could create a risk that victims and potential witnesses might be harmed, evidence might be damaged or tampered with, or the official might abscond. Further, notification could be subject to conditions of confidentiality, as recognised in draft article 13, paragraph 5.

172. In respect of draft article 13 (Exchange of information), it was suggested that the scope of information that may be requested from the State of the official should be limited to the information necessary for the forum State to decide upon the application of immunity. Further, some members observed in respect of draft article 13, paragraph 4, that the grounds for refusal of a request for information were not necessarily limited to situations affecting sovereignty, public order, security or essential public interests, but might include other reasons, such as cases involving the political crime exception, violations of human rights, harassment or discrimination. Alternatively, it was proposed that the State of the official should have the right to refuse a request for information for any reasons without providing an explanation.

173. Concerning draft article 14 (Transfer of criminal proceedings), a number of members agreed with the Special Rapporteur that the transfer of proceedings to the State of the official was a useful tool in ensuring individual criminal responsibility of State officials while achieving a balance between respecting the sovereign equality of the State of the official and the right of the forum State to exercise criminal jurisdiction. The principles of complementarity and subsidiarity of the jurisdiction of the forum State, in relation to the primacy of the jurisdiction of the State of the official, were reiterated. In this regard, reference was made to State practice illustrating the transfer of proceedings from the forum State to the State of the official, conditioned upon the effective exercise of jurisdiction by the latter. In addition, how the principle of subsidiarity would operate in the context of the exercise of jurisdiction based particularly on the passive nationality principle was raised, and highlighted.

174. Several members suggested that draft article 14 should expressly provide that the State of the official may request a transfer of proceedings relating to its official from the forum State. In relation to draft article 14, paragraph 2, it was proposed that a request for the transfer of proceedings, either by the State of the official or the forum State, should have the effect of suspending the proceedings until the State concerned decides on such a request.

175. A number of proposals were also made with the aim of preventing the potential abuse of the transfer of proceedings. It was suggested that restrictions could be placed where the State of the official was unwilling or unable genuinely to investigate or prosecute its official, based on article 17 of the Rome Statute of the International Criminal Court. Likewise, the State of the official could be required to provide assurances in this regard as a condition for the transfer of proceedings. Further, in the case of a transfer of proceedings, the State of the official should be obliged to conduct such proceedings in good faith and in accordance with the highest recognized international judicial standards. Another proposal, inspired by article 20 of the Rome Statute, was to permit the official to be retried before the courts of the forum State if the proceedings transferred to the State of the official were for the purpose of shielding the official from criminal responsibility or conducted in a manner which was inconsistent with an intent to bring the official concerned to justice. In this connection, it was important to bear in mind the overall situation in the State of the official. The importance of the principle of *non-refoulement* was also mentioned. The inclusion of a provision to ensure that a forum State could not arbitrarily deny a request for the transfer of proceedings was suggested as well.

176. Emphasis was placed on the central role of consultations between the States concerned, as reflected in draft article 15. Drafting proposals were made to link or merge draft articles 13 and 15. Draft article 15 was generally supported, even though a suggestion was made to consider the timing of the consultations further.

*Draft article 16 (Procedural rights and safeguards pertaining to the official)*

177. While some members questioned whether the inclusion of draft article 16 was necessary, others found it useful for its emphasis on the procedural rights and safeguards

pertaining to the foreign State official, particularly in the context of protecting the official from politically motivated proceedings. Several members agreed with the Special Rapporteur that procedural rights and safeguards relating to fair treatment before an impartial tribunal were well-recognized in international law, including international human rights law, international criminal law and international humanitarian law. At the same time, it was suggested that it would be helpful to clarify the content of the procedural rights and safeguards proposed. The need to link such rights and safeguards to the application of draft article 7 was also mentioned. It was further suggested that draft article 16 might be extended to provide procedural safeguards for foreign State officials regardless of whether immunity is being examined in a particular case.

178. Concerning draft article 16, paragraph 3, it was observed that the Vienna Convention on Consular Relations, which codified customary international law, only required consular notification upon the request of the detained individual. While it was noted by one member that a general right to consular assistance was not established under customary international law, the view was expressed by several members that more emphasis should be placed on consular assistance, particularly if the forum State intended to exercise criminal jurisdiction against an individual who has ceased to be a State official and the situation would be brought to the attention of the State of the official through consular assistance.

179. A number of drafting proposals were made. For the purpose of consistency, it was suggested by several members that similar language to draft article 11 of the draft articles on crimes against humanity be used.

**(c) Future programme of work**

180. Members generally supported the plan to complete the first reading of the draft articles in 2020, although sufficient time was needed for substantial consideration of the draft articles by the Commission. While some members welcomed the consideration of certain definitions, including “criminal jurisdiction,” proposed for draft article 2 (definitions), others preferred to do so at a later stage. Moreover, it was suggested that the Commission should address in its future work the issues of the *ultra vires* acts of State officials, the questions concerning inviolability in relation to immunity, considerations concerning recognition, as well as to revisit the question of the tort exception clause and its implications on criminal jurisdiction.

181. Taking into account the position of the Special Rapporteur in her introduction of the seventh report, most members agreed that the Commission did not need to enter into a debate on the judgment dated 6 May 2019 of the Appeals Chamber of the International Criminal Court in the case involving Jordan, although some members saw a need to address the relationship between the immunity of State officials from foreign criminal jurisdiction and the obligation of States to cooperate with international criminal courts or tribunals. It was noted that the Appeals Chamber judgment was, in any event, not the final word on the matter since African States were considering proposing that the General Assembly request an advisory opinion from the International Court of Justice on the consequences of legal obligations of States under different sources of international law with respect to immunities of Heads of State and Government and other senior officials. Some members voiced concerns about the possibility that the Special Rapporteur might consider this issue from a broad perspective, while other members were in favour of or did not oppose such an approach. Some members opined that this issue fell outside the scope of the topic, as reflected in draft article 1. Some other members reserved their position in this regard.

182. Members held differing views in relation to the question of whether the Special Rapporteur should propose a mechanism for the settlement of disputes between the forum State and the State of the official in the draft articles. A number of members were open to such a proposal, whereas some other members did not support it. It was recalled that consideration of this issue had been requested by African States within the context of discussions on universal jurisdiction. Some members suggested that a dispute settlement mechanism could be developed based on similar provisions prepared by the Commission in other topics, namely, draft article 15 of the draft articles on crimes against humanity, and draft conclusion 21 of the draft conclusions on peremptory norms of international law (*jus*

*cogens*). Concerns were also raised in relation to the feasibility and suitability of a dispute settlement mechanism that would operate other than as a treaty provision, and the need to avoid potentially undermining the draft articles as a whole.

183. As to the possible inclusion of recommended best practices on the topic, several members noted that it could be useful to States, particularly in reducing the risk of any abusive or politically motivated exercise of jurisdiction over State officials. At the same time, a number of members pointed out that this would need to be decided by the Commission depending on the final form envisaged by the Special Rapporteur.

184. A view was expressed that the Commission should adopt a clear position on the final outcome of work on the topic, noting in particular that a recommendation to elaborate a treaty would assist in overcoming some of the differences that relate to procedures and that some of the proposals made sense in relation to a treaty as an outcome.

### 3. Concluding remarks of the Special Rapporteur

185. In her summary of the debate, the Special Rapporteur expressed her satisfaction with the wide-ranging and substantive discussion of the sixth and seventh reports in 2018 (16 statements) and in 2019 (28 statements). The debate was rich and constructive both in 2018 and at the present session. She noted that the debate confirmed the importance of consideration of provisions on procedural guarantees and safeguards in the context of the topic, whose inclusion in the draft articles is an innovative proposal that could significantly help States. She noted the broad support offered by the members of the Commission with respect to draft articles 8 to 16. She also acknowledged the comments, suggestions, and criticisms made, and additional proposals on the substance, some of which could be addressed in the Drafting Committee. Regarding the suggestion made by the members of the Commission related with the reordering of the draft articles, she proposed to follow this sequence: draft articles 8, 12, 10, 11, 13, 9, 14, 15 and 16.

186. The Special Rapporteur reiterated that the draft articles on procedural provisions and safeguards should be considered as a whole in relation to the application of immunity. Their purpose was not to provide safeguards solely in respect of a specific case in which the question of immunity arose (especially in relation to draft article 7), but in respect of all situations where the application of immunity might arise. Their aim was to provide for mechanisms that ensured a balance among the various norms, principles and interests at play and to provide safeguards that ensured a balance between the forum State and the State of the official. Accordingly, she reaffirmed that the proposed draft articles applied to the draft articles taken as a whole, including draft article 7.

187. In that regard, she stated that she did not share the opinions expressed by some members of the Commission to the effect that draft articles 8 to 16 were not applicable to situations addressed in draft article 7. She said that the provisions concerning consideration of immunity, notification, invocation and waiver of immunity, exchange of information, determination of immunity, transfer of proceedings, consultations and the right of the foreign official to fair treatment applied to situations addressed in draft article 7. Nonetheless, the Special Rapporteur referred to the concern that some members of the Commission had expressed about the need to adopt special safeguards for draft article 7 and the proposals that some members had made in that regard. In that sense, she expressed her willingness for those specific proposals to be considered by the Drafting Committee when it examined the draft articles contained in her seventh report.

188. With regard to the terminology employed in draft articles 8 (Consideration of immunity) and draft article 9 (Determination of immunity), the Special Rapporteur said that the use of separate terms was deliberate, as each draft article referred to a different issue. The expression “consideration of immunity” was used to refer to the obligation of the forum authorities to initiate examination of the question of immunity as soon as they established that a foreign official was involved. The expression “determination of immunity” was used to refer to the act of deciding whether or not immunity applied in a specific case. Thus, while draft article 8 was principally temporal in scope, draft article 9 focused on which authority was competent to take a decision on whether immunity applied, the normative elements that the authority concerned must take into account in reaching that



decision, and whether certain circumstances pertained, such as whether immunity had been invoked, which could be essential to deciding whether immunity applied or not. Accordingly, she said that she did not consider it appropriate to use the same term in both articles, although she was open to considering different terminology in each case, such as for example “examination of the issue of immunity” (draft article 8) or “ruling on the applicability of immunity” (draft article 9). In any case, she was opposed to merging draft articles 8 and 9 into a single draft article.

189. In relation to draft article 8, she said that the majority of members of the Commission had supported the flexible approach it reflected, under which immunity should always be examined before the indictment of the official and/or the commencement of oral proceedings (i.e. in the judicial phase), or even earlier if the authorities of the forum State intended to take any coercive measure against the foreign official that might affect the performance of his or her functions. However, she took note of the comments of some members that the issue of considering immunity in relation to purely executive activities and in relation to any investigative activity should be examined in more detail, along with the need to consider the issue of the inviolability of the foreign official. With regard to those comments, she said that many of the issues raised could be dealt with in the context of defining the concept of “criminal jurisdiction”, to which end she had already made a proposal in 2013 that was with the Drafting Committee pending consideration. And she expressed satisfaction because the preparation of that definition had received wide support from members of the Commission. Similarly, she expressed her willingness to consider using the expression “without delay” instead of “at an early stage”. Lastly, the Special Rapporteur said that she was also open to considering using the alternative expressions “competent authorities”, “authorities of the forum State” or simply “forum State”.

190. With regard to draft article 9, the Special Rapporteur reiterated, first and foremost, her conviction that it was for the courts of the forum State to determine immunity, although she took note of the comments of a certain number of members of the Commission on variations in national legal regimes and the fact that in some States such determinations were made by authorities other than the courts, even in some cases the executive authorities. She was therefore open to the Drafting Committee considering broader wording that would cover all the possible situations that might arise in national law. However, she emphasized that the internal judicial effects of a decision on the applicability of immunity would not permit such a decision to be classed as a mere “political act” or “act of government” that could be excluded from judicial review. With regard to what law applied in determining whether immunity was applicable, she reiterated that the decision should necessarily take into account the law of the forum State, the rules incorporated into the Commission’s draft articles defining the normative elements of immunity *ratione personae* and immunity *ratione materiae*, and other norms of international law that applied to the case in question.

191. The Special Rapporteur said that draft article 9 was the appropriate framework within which to consider the proposal on strengthening procedural guarantees in respect of draft article 7 that had been made by a member of the Commission in his statement to plenary, as the aim of that proposal was to establish certain additional safeguards for determining whether immunity applied or not in the event that any of the crimes under international law listed in that draft article were alleged. In respect of those safeguards, the Special Rapporteur expressed agreement with the requirement that immunity should be decided by the competent authorities of the forum State at the highest level. She said that it would also be desirable for the determination of immunity to be undertaken only if there was sufficient evidence that the foreign official could have committed the crimes imputed to him or her, but said that the use of the phrase “the alleged offence is fully conclusive” was not suitable, particularly because it implied that proceedings would be too far advanced to be compatible with the requirement that immunity must be considered at an early stage. Lastly, the Special Rapporteur said that she could also consider the question of the transfer of proceedings to the State of the official, which could be examined either in relation to draft article 9 or in the context of draft article 14, which already provided for a transfer mechanism. In any event, the Special Rapporteur said that, in her view, the supplementary safeguards should apply to all cases in which it was necessary to determine whether immunity *ratione materiae* of a State official applied (including if the applicability of draft article 7 was at issue), without there being any grounds at all to restrict it to cases involving

the possible commission of a crime under international law. Lastly, the Special Rapporteur said that she did not consider it appropriate to include the requirement that the State official must be on the territory of the forum State, as it did not take account of the wide variation in State legal systems in that regard.

192. With regard to draft article 11, the Special Rapporteur reiterated her position with regard to the separate procedures that should apply to invocation in the cases of immunity *ratione personae* and immunity *ratione materiae*, recalling that the same position had also been adopted by the previous Special Rapporteur, Mr. Kolodkin. However, she said that she was open to considering wording that would enable the distinction to be made more flexible for cases in which the authorities of the forum State were directly aware that the individual over whom they intended to exercise jurisdiction was a foreign official, for which purpose wording from the Vienna Convention on Consular Relations could be used. With regard to the time at which immunity should be invoked, she accepted the suggestion made by various members of the Commission to amend the wording of paragraph 2 of the draft article so as to take into consideration the different situations in which a State might find itself at the point of deciding whether to invoke the immunity of one of its officials. In any case, she reiterated that not invoking immunity could not automatically be understood as a waiver of immunity.

193. With respect of draft article 11, she reiterated that waiver of immunity was a right of the State of the official, which could not produce retroactive effects and which must be express and clear, while indicating her willingness for the Drafting Committee to explore the most appropriate way to refer to the manner in which a treaty could give rise to a waiver of immunity. She also stated that it would be useful for the Drafting Committee to examine the proposal put forward by a member of the Commission to the effect that the State of the official should waive immunity or offer to itself prosecute if it was alleged that the official concerned had committed serious crimes under international law.

194. Concerning the procedural elements common to both invocation and waiver of immunity, the Special Rapporteur drew attention to the broad consensus within the Commission with respect to the form of both acts and the organ competent to perform them. In that regard, she reiterated that both invocation and waiver should be formulated in writing and be precise as to content, and that the organ competent to invoke or waive immunity should be part of the judicial system of each State. With respect to the channel to be used to communicate to the forum State both invocation and waiver of immunity, she pointed out that the reference to mutual legal assistance mechanisms was justified on grounds of efficiency, without that entailing any prejudice to communication through the diplomatic channel. In that regard, she said that she was open to considering new wording that emphasized that invocation and waiver were habitually communicated through the diplomatic channel. The Special Rapporteur also referred in similar terms to communication via the diplomatic channel in connection with draft articles 12 and 13.

195. With regard to draft articles 12 to 15, the Special Rapporteur noted that in general they had received broad support. Regarding draft article 12 (notification), she reiterated its essential role in the proper functioning of the system of procedural guarantees, although she stated that the definition of the limits of the obligation of notification should be examined by the Drafting Committee.

196. With respect to draft article 13, the Special Rapporteur recalled that the exchange of information constituted an essential element for considering and determining immunity, in particular immunity *ratione materiae*. Regarding the refusal of the State of the Official to transmit the requested information, she reiterated that it would be useful to enumerate the grounds for such a refusal, or at least establish that the State of the Official “must consider the request in good faith”. In any event, she insisted that refusing to transmit the requested information cannot be the reason to declare that immunity does not apply. Moreover, she affirmed that draft article 13 could be supplemented by an explicit reference stating that the provision of information may in no case be interpreted as waiver of immunity or of recognition of the criminal jurisdiction of the forum State. The Special Rapporteur reiterated her opinion that the exchange of information provided for in draft article 13 can function in a bidirectional manner.

197. Regarding draft article 14, the Special Rapporteur emphasized the broad support it had received, with members of the Commission considering that the transfer of criminal proceedings to the State of the official was a useful instrument and an important element in the system of procedural safeguards. With regard to that mechanism, the Special Rapporteur clarified that the transfer of proceedings could take place both in situations where immunity did not apply and in those where it did. She also clarified that draft article 14 allowed for the transfer request to be made by either the forum State or the State of the official, although it would always be for the competent authorities of the forum State to decide on whether or not to transfer the proceedings to the State of the official. The Special Rapporteur stated that transfer of proceedings was based on the principles of subsidiarity and complementarity, since if the State of the official exercised its own jurisdiction to prosecute the official, it seemed logical that such jurisdiction should have priority over the jurisdiction of the forum State. However, she expressed the view – put forward by a good number of Commission members – that transfer of proceedings must not become an instrument for exempting the official from prosecution, which would constitute fraudulent use of the institution of “transfer of proceedings”, invalidate its useful effect and might have the undesired effect of facilitating impunity for the most serious international crimes. She therefore supported the proposal put forward by various Commission members to the effect that transfer of proceedings should be subject to the condition that the State of the official was genuinely able and willing to exercise jurisdiction and actually did so. The Special Rapporteur did not consider it necessary at the current stage to take a position on the transfer of criminal proceedings to an international criminal court.

198. With respect to draft article 15, the Special Rapporteur emphasized the broad support that the institution of consultations had received from Commission members, who had considered it a wide-ranging instrument that could even be useful in the context of the settlement of disputes. Accordingly, she said that consultations should receive separate treatment in the draft articles and that she was opposed to merging draft article 15 with any other procedural provision.

199. Regarding draft article 16, the Special Rapporteur affirmed its importance and its essential character, since it ensured that the foreign official would receive fair and impartial treatment from the forum authorities, both in the process of considering and determining immunity and also subsequently, if the authorities of the forum State considered that immunity did not apply. With regard to the content of the draft article and its relationship with other similar provisions recently adopted by the Commission within the framework of other topics, the Special Rapporteur indicated that those aspects could be dealt with by the Drafting Committee, taking into account the specificities of each topic.

200. Concerning future work, the Special Rapporteur reiterated her wish to provide a brief analysis, in general terms, on the relationship of the present topic with international criminal jurisdiction, bearing in mind the possibility of transfer the proceeding to an international tribunal. She confirmed that she will address the question of dispute settlement mechanisms, as well as best practices focusing on operational rather than normative aspects. She noted that questions concerning *ultra vires* acts and other remaining issues would be addressed in the commentaries.

201. In relation to the final form of the project, the Special Rapporteur noted that it was premature for the Commission to decide on whether or not a treaty was being elaborated; the current form of draft articles sufficed.