Chapter V
Immunity of State officials from foreign criminal jurisdiction

A. Introduction

78. 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.[32] 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).[33]

79. 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).[34] The Commission was unable to consider the topic at its sixty-first (2009) and sixty-second (2010) sessions.[35]

80. 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.[36] The Special Rapporteur submitted eight reports. 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 during the sixty-eighth (2016) and sixty-ninth sessions (2017), her sixth report during the seventieth (2018) and seventy-first (2019) sessions, her seventh report during the seventy-first session (2019), and her eighth report during the seventy-second session (2021).[37]

81. At its seventy-third session (2022), the Commission adopted, on first reading, the entire set of draft articles on immunity of State officials from foreign criminal jurisdiction which comprised 18 draft articles and a draft annex, together with commentaries thereto.[38] It decided, in accordance with articles 16 to 21 of its statute, to transmit the draft articles, through the Secretary-General, to Governments for comments and observations.[39]

82. The Commission, at its seventy-fourth session (2023), appointed Mr. Claudio Grossman Guiloff as Special Rapporteur to replace Ms. Escobar Hernández, who was no longer a member of the Commission.[40]

83. At its seventy-fifth session (2024), the Commission had before it the first report of the Special Rapporteur (A/CN.4/775), as well as comments and observations received from Governments (A/CN.4/771 and Add.1 and 2). Following the debate in plenary, the Commission decided to refer draft articles 1 to 6, as contained in the Special Rapporteur's

[32] 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).

[33] *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.

[34] A/CN.4/601, A/CN.4/631 and A/CN.4/646, respectively.

[35] 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.

[36] *Ibid., Sixty-seventh Session, Supplement No. 10* (A/67/10), para. 266.

[37] A/CN.4/654, A/CN.4/661, A/CN.4/673, A/CN.4/686, A/CN.4/701, A/CN.4/722, A/CN.4/729, and A/CN.4/739, respectively.

[38] *Official Records of the General Assembly, Seventy-seventh Session, Supplement No. 10* (A/77/10), paras. 64–65.

[39] *Ibid.*, para. 66.

[40] *Ibid., Seventy-eighth Session, Supplement No. 10* (A/78/10), para. 250.

first report, to the Drafting Committee.[41] The Commission subsequently took note of draft articles 1, 3, 4 and 5,[42] as contained in the report of the Drafting Committee (see A/CN.4/L.1001) and provisionally adopted by the Committee at that session.[43]

B. Consideration of the topic at the present session

84. At the present session, the Commission had before it the second report of the Special Rapporteur (A/CN.4/780), as well as comments and observations received from Governments (A/CN.4/771 and Add.1–Add.3). The Special Rapporteur, in his second report, examined the comments and observations received from Governments on draft articles 7 to 18 and the draft annex, as adopted on first reading. He made proposals for consideration on second reading in relation to draft articles 7 to 18 and the draft annex, in light of the comments and observations made by States in both written comments and in the Sixth Committee.

85. At its 3702nd to 3707th meetings, from 28 April to 5 May 2025, the Commission considered the second report of the Special Rapporteur. At its 3707th meeting, on 5 May 2025, the Commission decided to refer draft articles 7 to 18 and the draft annex to the Drafting Committee, taking into account the comments and observations made during the plenary debate. The summary of the plenary debate can be found in paragraphs 107 to 162 below.

86. At its 3704th meeting, on 30 April 2025, the Commission provisionally adopted draft articles 1, 3, 4 and 5, which had been provisionally adopted by the Drafting Committee at the seventy-fifth session (see sect C.1 below).

87. At its 3718th meeting, on 23 May 2025, the Chair of the Drafting Committee introduced the report of the Drafting Committee on the topic (see A/CN.4/L.1017).[44] At the same meeting, the Commission took note of the report of the Drafting Committee, containing draft articles 7, 8 and 9, provisionally adopted by the Committee on second reading at the present session. The adoption of draft articles 7, 8 and 9 by the Commission was postponed to the seventy-seventh session, owing to the unavailability of time for the preparation, translation and consideration of corresponding commentaries, as a consequence of the reduced length of the present session.

88. At its 3722nd to 3724th meetings, on 27 and 28 May 2025, the Commission adopted the commentaries to draft articles 1, 3, 4 and 5, provisionally adopted at the present session on second reading (see sect. C.2 below).

1. Introduction by the Special Rapporteur of the second report

89. The Special Rapporteur recalled that the objective of the second reading was to streamline the text adopted on first reading and modify it only where there were compelling reasons to do so, whether owing to new developments in international law or to the need for clarification. He emphasized that his second report was based on a careful review of the extensive written and oral comments provided by States, as well as significant developments in national jurisprudence and legislation since 2022, particularly regarding the most serious international crimes. He further recalled that broad opportunities had been afforded to States to submit comments, including additional written observations, with respect to draft articles 7 to 18 and the draft annex. The report reflected a commitment both to achieving consensus and to remaining faithful to the evolution of international law.

90. The Special Rapporteur expressed appreciation for the Commission's work at its seventy-fifth session, when the Commission took note of draft articles 1, 3, 4 and 5, while

[41] *Ibid.*, *Seventy-ninth Session, Supplement No. 10* (A/79/10), para. 144.

[42] *Ibid.*, para. 145.

[43] Statement of the Chair of the Drafting Committee at the seventy-fifth session (2024) available on the website of the Commission at https://legal.un.org/ilc/guide/4_2.shtml.

[44] Statement of the Chair of the Drafting Committee at the seventy-sixth session (2025), available on the website of the Commission at http://legal.un.org/docs/?path=../ilc/documentation/english/statements/2025_dc_chair_statement_iso.pdf&lang=ES. Statements made at the 3718th meeting are reflected in document A/CN.4/SR.3718.

noting that draft article 2 would be adopted at the conclusion of the topic for methodological reasons.

91. Turning to draft article 7, on crimes under international law in respect of which immunity *ratione materiae* shall not apply, the Special Rapporteur recalled that there was general support by States for the proposition that there should be responsibility for the most serious crimes under international law. Some States considered it essential and valuable to list those crimes, while others favoured the adoption of a set of criteria rather than a list. Among the latter group, certain States expressed reservations about establishing a list, fearing that it might hinder the progressive development of the law by being interpreted as exhaustive. Conversely, those supporting a list invoked such arguments as the need for legal certainty. Taking into account the principles of international criminal law and the requirement of typification of crimes, the Special Rapporteur considered the arguments in favour of a list to be persuasive. On the question of the non-exhaustive nature of the list, he underlined that the draft articles did not exclude the possibility that additional international crimes could be incorporated in the future through the evolution of international law. He also noted that all non-governmental organizations that had commented on draft article 7, and whose comments he had requested the Secretariat to distribute to the Commission, had emphasized that the non-exhaustive nature of the list should be addressed either in the draft article itself or in the commentary.

92. The Special Rapporteur proposed the addition of the crimes of aggression, slavery, and the slave trade to the list of crimes. With respect to the crime of aggression, he outlined the grounds justifying its inclusion, for example: several States had requested it; aggression had long been recognized as one of the most serious crimes under international law, characterized as the "supreme international crime" by the Nuremberg Tribunal; omitting aggression could undermine efforts to prosecute it and risked creating an artificial hierarchy among serious international crimes; and its inclusion would align with the Commission's earlier work, including the Principles of International Law recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal,[45] the 1954 draft Code of Offences against the Peace and Security of Mankind[46] and the 1996 draft Code of Crimes against the Peace and Security of Mankind.[47] The Special Rapporteur also recalled that since 2017, when draft article 7 was provisionally adopted, jurisdiction over the crime of aggression had been activated by the International Criminal Court through the entry into force of the Kampala Amendments.[48] Those arguments had also been raised by States in their comments.

93. With regard to slavery and the slave trade, the Special Rapporteur indicated reasons supporting their inclusion. Those crimes were generally placed among the most serious international crimes, and broad consensus existed on their definition. Slavery and the slave trade, similarly to apartheid, torture and enforced disappearance, which were already included in the draft article, had been the subject of treaties aimed at their prevention, suppression and punishment. He noted the recent development whereby Sierra Leone had, on 16 April 2025, deposited a proposal to amend articles 7 and 8 of the Rome Statute of the International Criminal Court to classify slavery as a war crime and the slave trade as both a crime against humanity and a war crime. The Special Rapporteur further emphasized the long-standing international practice prohibiting slavery and the slave trade, with prohibitions dating back to the early nineteenth century. He observed that the prohibition of those crimes constituted a peremptory norm of general international law (*jus cogens*), as recognized in the draft conclusions on identification and legal consequences of peremptory norms of general international law (*jus cogens*).[49] The Special Rapporteur indicated that proposed changes

[45] *Yearbook … 1950*, vol. II, document A/1316, pp. 374 *ff*., paras. 98–127.

[46] *Yearbook … 1954*, vol. II, document A/2693, pp. 150 *ff*, para. 50–54.

[47] *Yearbook … 1996*, vol. II (Part Two), para. 50.

[48] Rome Statute of the International Criminal Court (Rome, 17 July 1998), United Nations, *Treaty Series*, vol. 2187, No. 38544, p. 3. For the Amendment to Article 8 of the Rome Statute of the International Criminal Court (Kampala, 10 June 2010), see *ibid*., vol. 2868, No. 38544, p. 197. For the Amendments to the Rome Statute of the International Criminal Court on the crime of aggression (Kampala, 11 June 2010), see *ibid*., vol. 2922, No. 38544, p. 199.

[49] *Official Records of the General Assembly, Seventy-seventh Session, Supplement No. 10* (A/77/10), paras. 43–44. See also General Assembly resolution 78/109 of 7 December 2023.

would also be reflected in the annex, including references to article 8 *bis* of the Rome Statute and article 1 of the 1926 Slavery Convention.[50]

94. Concerning the procedural safeguards contained in Part Four of the draft articles, the Special Rapporteur observed that States had regarded the safeguards as a crucial component of the work on the topic, given their role in balancing the rights of the forum State and the State of the official. He emphasized that the safeguards protected key principles of international and human rights law, particularly the assurance of due process for those accused of criminal offences. According to the Special Rapporteur, most States that had provided comments had welcomed the Commission's proposal to combine provisions on limitations or exceptions to immunity for international crimes with a coherent set of procedural safeguards. The Special Rapporteur noted that Part Four was widely seen by States as necessary to balance sovereign equality of States and peaceful relations between States with the imperative to combat impunity, while avoiding the risk of politicization. The Special Rapporteur concurred with the observation by States that some proposals reflected progressive development of international law, whereas others, notably the provisions on fair treatment and due process, constituted codification of customary international law.

95. With respect to draft article 8, on the application of Part Four, the Special Rapporteur recalled that it affirmed that procedural safeguards applied to both immunity *ratione personae* and immunity *ratione materiae*. Several States supported this holistic approach, citing the need for consistency and due process. However, some States called for further clarification, particularly regarding whether the safeguards applied at the investigation stage or only after formal charges had been brought. The Special Rapporteur recommended that the commentary clarify that procedural safeguards applied to all stages, thereby ensuring the rule of law and preventing arbitrary or politicized proceedings. Notwithstanding the usefulness of draft article 8, the Special Rapporteur nonetheless agreed with concerns regarding the phrases "shall be applicable in relation to any exercise of criminal jurisdiction" and "over an official of another State, current or former", which created confusion. He thus proposed changes to the provision to clarify them and avoid confusion concerning acts performed in a private capacity. For greater clarity, he also recommended dividing draft article 8 into two paragraphs. He stated that additional issues, including the relationship between draft article 7 and Part Four, could be developed further in the commentary.

96. Regarding draft article 9, on examination of immunity by the forum State, the Special Rapporteur recalled that it had been among the most debated provisions. It provided that the forum State must examine whether immunity was applicable before proceeding with the exercise of criminal jurisdiction. Some States had expressed concern that such a requirement might confer excessive discretion to national authorities and undermine the institution of immunity, while others emphasized the importance of early scrutiny to prevent wrongful arrests or proceedings. The Special Rapporteur recommended stressing in the commentary that said examination by the forum State must occur prior to any coercive act and must be guided by principles of good faith, proportionality and consultation with the State of the official. He also proposed inserting the phrase "as far as practicable" into the text to address concerns regarding urgent situations requiring prompt action by the forum State.

97. With regard to draft article 10, on notification to the State of the official, the Special Rapporteur noted that the obligation to notify the State of the official had been broadly welcomed as a vital procedural safeguard. Some States nevertheless had raised concerns regarding the timing and content of notification, particularly its potential impact on ongoing investigations and confidentiality. The Special Rapporteur proposed changes to paragraph 1 to address concerns by States. Concerning paragraph 3, he agreed with the suggestion of a State to delete the final phrase, as the first phrase of the paragraph already encompassed all accepted means of communication. He proposed similar amendments to draft articles 11, 12 and 13.

98. With regard to draft article 11, on invocation of immunity, the Special Rapporteur noted concerns raised by States as to whether invocation of immunity was necessary or

[50] Slavery Convention (Geneva, 25 September 1926), League of Nations, *Treaty Series*, vol. LX, No. 1414, p. 253.

whether immunity applied automatically. The Special Rapporteur proposed clarifying in the commentary that although immunity did not depend on formal invocation, invocation facilitated procedural clarity and inter-State dialogue. He further suggested that the commentary address concerns regarding potential abuse and recommend the principles of good faith and cooperation as guiding norms.

99. Regarding draft article 12, on waiver of immunity, the Special Rapporteur noted that most States had supported the requirement of express waiver as a reflection of existing international law, while other States proposed recognizing the possibility of implicit waiver. He recommended maintaining the requirement of express waiver to ensure respect for diplomatic relations and legal certainty. Nevertheless, he proposed that the commentary acknowledge that, in certain domestic legal systems, waiver might be inferred from unambiguous conduct; however, he emphasized that such interpretations should be approached with caution and respect for sovereign equality of States.

100. With regard to draft article 13, which permitted the forum State to request information from the State of the official, the Special Rapporteur observed that some States had sought clarification regarding the timing and the non-binding nature of such requests, and how they interact with notification and invocation obligations. He proposed that the commentary make clear that the draft article complemented, but did not replace, the mechanisms established under draft articles 10 and 11.

101. Regarding draft article 14, on determination of immunity, the Special Rapporteur noted concerns raised by some States that it could enable unilateral and potentially politicized decisions. He proposed emphasizing in the commentary that determinations on the applicability of immunity must be based on law, not on political considerations, and should strive for objectivity. He also underscored the importance of the mechanism of consultations and dispute resolution, where disputes persisted.

102. The Special Rapporteur observed that some States had expressed reservations regarding the enforceability and consistency of the mechanism envisaged in draft article 15, related to the transfer of criminal proceedings to the State of the official. He stressed that the provision was rooted in the principle of complementarity and mutual legal assistance. He proposed clarifying in the commentary that the forum State must consider whether the transfer served the interests of justice and was consistent with the gravity of the alleged crime.

103. With regard to draft article 16, on fair treatment of the State official, the Special Rapporteur noted that the provision had been widely welcomed by States. He recommended that the commentary elaborate on the concept of “fair treatment”, making reference to guarantees enshrined in international human rights instruments, such as the presumption of innocence, access to counsel, prompt notification of charges, and protection against arbitrary detention.

104. With respect to draft article 17, which encouraged States to engage in consultations to resolve disputes concerning immunity, the Special Rapporteur stated that most States endorsed the provision as a means of de-escalating tensions and seeking diplomatic solutions. He suggested clarifying that consultations were not a substitute for legal determinations, but rather a mechanism to avoid conflict and promote mutual respect among States.

105. On draft article 18, which provided for the peaceful settlement of disputes, the Special Rapporteur noted that several States supported the provision, while others urged caution in formalizing dispute settlement mechanisms. He proposed retaining the provision, while clarifying in the commentary that States were free to choose means of dispute resolution. He noted that the provision mirrored Article 33 of the Charter of the United Nations and reaffirmed the commitment of States to a peaceful legal order.

106. The Special Rapporteur concluded by stating that the arguments presented by States in favour of recommending that the draft articles serve as the basis for a convention had been particularly persuasive. He observed that a convention would provide a framework for negotiations, enabling States to refine provisions as necessary. He further stressed that certain draft articles, such as draft article 18, reflected a presupposition that they would form part of a treaty and would have limited effect outside such a context.

2. Summary of the debate

(a) General comments

107. Members expressed appreciation for the Special Rapporteur's second report, highlighting its clear structure and in-depth engagement with the comments of States. Several members also expressed gratitude for the work of the previous Special Rapporteurs, Mr. Kolodkin and Ms. Escobar Hernández. Some members expressed regret that the reduced length of the seventy-sixth session had limited their ability to fully present their views and led to an incomplete debate.

108. With respect to the objective and working methods of the second reading, some members supported the approach adopted by the Special Rapporteur, affirming that changes to the draft articles should be made only where compelling reasons existed. It was suggested that while the text should largely remain unchanged, substantial revisions to the commentaries could be considered where appropriate.

109. Other members advocated for a more ambitious approach, emphasizing that the second reading provided an opportunity to address shortcomings in the first-reading text and to meet the diverse expectations of States. A concern was raised that certain issues, such as the applicable regime for crimes committed in the territory of the forum State, had been insufficiently examined during the first reading. It was recalled that previous second readings conducted by the Commission, such as that of the articles on responsibility of States for internationally wrongful acts, had not rigidly adhered to a minimalist approach. It was emphasized that many members had not previously had the opportunity to express their views on certain issues under the topic.

110. Some members appreciated the Special Rapporteur's comprehensive compilation of recent judicial decisions, national legislation and comments of States. However, several members expressed the concern that the practice cited lacked geographical balance and relied too heavily on decisions from developed countries, with limited inclusion of perspectives from other countries. Calls were also made to consider regional instruments like the Malabo Protocol,[51] to proactively solicit input from underrepresented regions and to learn from consultation methods used by other international bodies, such as human rights treaty bodies.

111. Some members stressed that the Commission should look beyond written State comments and consider judicial decisions, academic writings and other evolving practice to better understand the law. It was stressed that both executive and judicial perspectives should be taken into account, given their distinct roles in shaping State practice and legal interpretation. It was emphasized that State silence, namely, when a State refrains from exercising criminal jurisdiction, could also be relevant in identifying customary international law. A more nuanced analysis of judicial decisions was called for, particularly with a view to assessing whether immunity was clearly invoked in the cases cited.

112. Regarding the nature of the draft articles, several members emphasized that the draft articles, or parts thereof, should be viewed as progressive development of international law rather than as codifying existing customary international law. It was stated that draft articles should offer added value beyond restating established law. However, a concern was raised that the draft articles contained *de lege ferenda* provisions that, if misunderstood, could cause serious harm to international relations on a highly sensitive matter.

113. Several members emphasized the need to strike a careful balance between sovereign equality of States and accountability for serious international crimes. A view was expressed that the draft articles should reflect the practical challenges faced by national prosecutorial authorities and that immunity should not impede investigations or preservation of evidence. It was also suggested that not all policy issues needed to be resolved within the Commission and could be appropriately left for States to address through negotiation.

114. A proposal was made to include a new draft article based on the judgment by the International Court of Justice in the case concerning *Certain Questions of Mutual Assistance*

[51] Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights (Malabo, 27 June 2014), available on the website of the African Union: https://au.int.

in Criminal Matters.[52] It was noted that such a proposal was supported by the principle of *aut dedere aut judicare*. Hope was expressed that the second reading would address and clarify certain concerns left unresolved in earlier sessions of the Commission, such as the conflation of civil and criminal immunity and the existence of inconsistencies and gaps in the draft articles.

(b) Draft article 7 (Crimes under international law in respect of which immunity *ratione materiae* shall not apply) and draft annex

115. Several members reiterated that immunity was not a bar for accountability, while recalling the principle of sovereign equality of States, the importance of stability of State relations and the exceptional nature of draft article 7. The diverging views of States and of members of the Commission regarding draft article 7 were recalled. According to some members, the Commission should strive for a more consensus-based or unified approach to draft article 7 on second reading. The view was expressed that consensus among members was fundamental to enhancing the Commission's credibility and authority. The importance of reflecting in the commentary the various views of members and of States on the provision was stressed, particularly if the outcome of the topic was in the format of draft articles with a recommendation for the General Assembly to negotiate a treaty. A number of members voiced support for retaining draft article 7 in the text, while some members reiterated their objections and reservations to the draft article as a whole. The view was expressed that the link between draft article 7 and the principle of universal jurisdiction ought to be examined.

116. A number of members raised concerns regarding the fact that the majority of the case law in relation to draft article 7 referred to in the Special Rapporteur's reports and in the commentaries adopted on first reading focused on a particular group of States and was not representative enough. It was considered important to research and analyse the case law of States from all regions of the world. Concerns were also raised with respect to the silence of several States on the issue of exceptions to immunity and the lack of general State practice. It was noted that decisions of courts and tribunals were not a source of international law and some of the decisions analysed by the Special Rapporteur in his second report were still subject to adjudication by higher courts. In that connection, it was pointed out that particular weight should be given to statements delivered by States in the Sixth Committee and elsewhere. The work of the Commission on the topic "Identification of customary international law" was recalled, specifically the definition of relevant practice contained in conclusion 8 and its commentary.[53]

117. Differing views were expressed as to whether draft article 7 reflected customary international law. Some members emphasized that draft article 7 reflected customary international law, as there was sufficient and longstanding practice to support that conclusion, while noting that, in the case of some international crimes, exception to immunity was also reflected in widely ratified treaties. Nevertheless, other members emphasized that the draft article did not reflect a rule of customary international law, as a "general trend" was not enough to establish State practice and *opinio juris*. The view was expressed that draft article 7 was a proposal for progressive development. Another view was expressed that the analysis in the second report did not contain convincing evidence of a "general trend" on the issue; regret was expressed that some examples found in the second report were irrelevant because, for example, they did not pertain to crimes under international law. It was deemed necessary to include more appropriate case law in the commentary. The importance of considering *in concreto* whether immunity could result in impunity in the case of international crimes

[52] *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France), Judgment, I.C.J. Reports 2008*, p. 177, at para. 196.

[53] *Official Records of the General Assembly, Seventy-third Session, Supplement No. 10* (A/73/10), para. 66. See also General Assembly resolution 73/203 of 20 December 2018, annex.

was stressed and the jurisprudence of the International Court of Justice,[54] the African Court on Human and Peoples' Rights[55] and the European Court of Human Rights[56] was recalled.

118. It was stated that the Commission should exercise caution and should not focus its debate on the nature of draft article 7, but rather on its mandate to promote progressive development of international law and its codification. Some members considered that the Commission did not need to make a differentiation as both codification and progressive development were within the Commission's mandate.

119. Members debated the question of territorial exception and whether it was appropriate to elaborate in the commentary the issue of crimes committed by foreign officials in the territory of the forum State, as proposed in paragraph 81 of the second report.

120. Several members favoured retaining a list of crimes in paragraph 1 of draft article 7, but stressed that the list should not be exhaustive and should allow for the future inclusion of crimes. Other members deemed that stating expressly that the list was not exhaustive could result in abuse and the arbitrary inclusion of a wide range of crimes. A concern was raised that an open-ended list would undermine legal certainty. Further discussion was called for on the methodology for selecting the crimes listed in the provision. A view was expressed that inclusion of crimes under international law should be based on express recognition by States. According to several members, the establishment of clear and practical criteria, or clear legal grounds, for identifying crimes that might be listed in paragraph 1 of draft article 7 was essential; it was suggested that the criteria could be developed in the commentary to the provision. It was recalled that a more general formulation that would exclude the application of immunity for the most serious crimes under international law had been proposed in the previous quinquennium and by some States in their comments, thereby allowing for the draft articles to keep apace with developments in international law. The use of the term "crimes under international law" in paragraph 1 of draft article 7 was questioned; it was stated that it was necessary to distinguish between crimes under treaties and those under customary international law, with the former being limited to contracting parties to the relevant treaty and the latter being universally accepted by States as crimes and as applicable to all. Some members expressed differing views on whether certain international crimes could be considered official acts and clarity in that regard was considered important. The view was expressed that certain crimes listed in the Malabo Protocol could be considered for inclusion in paragraph 1.

121. A number of members expressed support for the proposal by the Special Rapporteur to add the crimes of aggression, slavery and the slave trade to draft article 7, while others questioned the proposal. It was observed, *inter alia*, that those crimes were among the oldest examples of crimes under both customary international law and international treaty law, which in its separate work, the Commission had qualified as bearing a *jus cogens* character. Concerns were raised about, *inter alia*, the lack of general and representative State practice to support the proposal and issues related to the crime of aggression, in particular the complexity and practical challenges for national authorities, such as the determination by a national court of a State as to whether a foreign State had committed aggression. The explanation offered by the Commission not to include the crime of aggression in the commentary adopted on first reading was recalled; a suggestion was made to add a qualifier to the provision, should the Commission decide to include the crime of aggression. The view was expressed that the second report did not contain examples of criminal proceedings for the proposed three additional crimes and did not contain compelling reasons to add those three crimes. It was noted that some crimes, such as slavery, torture and enforced disappearance, already fell within the scope of crimes against humanity. Concerns about the exclusion of terrorism or acts of terrorism were reiterated and the argument was made that

[54] *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium), Judgment, I.C.J. Reports 2002*, p. 3; *Certain Questions of Mutual Assistance in Criminal Matters* (see footnote 52 above); *Jurisdictional Immunities of the State (Germany v. Italy : Greece intervening), Judgment, I.C.J. Reports 2012*, p. 99.

[55] *Ligue ivoirienne des droits de l'homme (LIDHO) and Others v. Côte d'Ivoire*, Application No. 041/2016, judgment, 5 September 2023.

[56] *Sassi and Benchellali v. France*, Nos. 35884/21 and 35886/21, Decision, 15 October 2024.

they needed to be included in the list, because of their impact on the international community as a whole. Other members, while rejecting terrorism and considering it a grave crime, were of the view that it should not be included in the list, for, *inter alia*, the reasons expressed in the commentary adopted on first reading on the lack of an agreed definition.

122. Various proposals were made, such as: (*a*) reordering the crimes listed in paragraph 1; (*b*) enumerating the crimes with a detailed explanation of the rationale for including each crime; (*c*) adding an explanation of the legal basis of inapplicability of immunity regarding each crime, separately indicating in the commentary whether the Commission considered it to be codification, progressive development or a combination of both; (*d*) shortening the list of crimes according to pre-agreed clear criteria; (*e*) replacing the text with a general one referring to the most serious crimes under international law or those of concern to the international community; (*f*) adding a new paragraph with a general reference to other crimes under international law for which it was established under international law that immunity *ratione materiae* from the exercise of foreign criminal jurisdiction should not apply; (*g*) moving the list of crimes to the commentary; (*h*) adding a new paragraph clarifying the definitions in the annex; and (*i*) making a distinction in paragraph 1 between international crimes qualified as such under treaties and those under customary international law. Some members did not favour adopting a general textual formulation for the provision, as a replacement of draft article 7 as adopted on first reading, because States would not have the opportunity to comment on it since the topic was at the second reading stage.

123. A suggestion was made to align the draft article and the draft annex with the draft conclusions on identification and legal consequences of peremptory norms of general international law (*jus cogens*) of 2022 and, in particular, draft conclusion 23 and the annex.[57] Others suggested adding the Geneva Conventions and Additional Protocol I[58] to the draft annex with respect to war crimes. Some members raised concerns regarding the reliance on the Rome Statute of the International Criminal Court in the draft annex, and the inclusion of crimes that were set out in treaties that were not universally ratified. Other members supported the reference to the Rome Statute and its definitions, as well as to the other treaties referred to in the draft annex which were considered as part of customary international law. Others stressed the fact that the pertinent definitions included in the Rome Statute and other treaties were the last definitions of the crimes listed in draft article 7. It was pointed out that criminalization of the offences listed in paragraph 1 had to be done in accordance with customary international law. The view was expressed that paragraph 2 and the annex should be deleted, as the proper place to mention relevant instruments in support of paragraph 1 would be the commentary.

(c) General comments to Part Four (Procedural provisions and safeguards)

124. Several members emphasized that Part Four aimed at ensuring fair trial safeguards for foreign State officials in the context of exercise of criminal jurisdiction. Some members highlighted that the procedural safeguards served to prevent the abuse or politicization of criminal jurisdiction, uphold sovereign equality of States and maintain peaceful relationships among States. The provisions were also seen as offering practical guidance to national authorities and helping to navigate complex and sensitive matters, and as able to reconcile divergent positions among States.

125. Some members considered that the current draft articles might unduly favour protecting immunity and should be rebalanced to protect the exercise of criminal jurisdiction by the forum State and the fight against impunity. The view was expressed that the procedural safeguards must not be diluted, and that any modifications, particularly those concerning notification of the State of the official, should be precisely formulated to avoid legal uncertainty or weakening the protections of State officials.

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[57] *Official Records of the General Assembly, Seventy-seventh Session, Supplement No. 10* (A/77/10), paras. 43–44.

[58] Geneva Conventions for the protection of war victims (Geneva, 12 August 1949), United Nations, Treaty Series, vol. 75, Nos. 970–973, p. 31, and Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) (Geneva, 8 June 1977), United Nations, *Treaty Series*, vol. 1125, No. 17512, p. 3.

126. It was asserted that certain provisions in Part Four reflected elements of progressive development rather than being firmly grounded in existing State practice. It was recalled that some draft articles, particularly those addressing notification and waiver, had been adopted by drawing analogy from existing treaties without a detailed analysis of State practice.

127. The view was expressed that, given their progressive nature, the procedural provisions should be understood as guidelines rather than binding obligations. Several members opposed the suggestion to divide up the draft articles and to transform Part Four into non-binding guidelines or conclusions. It was recalled that including the procedural safeguards within the draft articles, even when they were based on limited State practice, was consistent with the approach adopted in other parts of the project and could prevent future abuses. It was also cautioned that splitting the outcome could complicate future treaty negotiations and create uncertainty.

128. Several members expressed general support for the proposed changes to the text of Part Four proposed by the Special Rapporteur in the second report and considered that many concerns raised by States could be addressed in the commentary. Some members noted that certain issues on the scope of "criminal jurisdiction" should be addressed in draft article 2. It was suggested that the procedural rules in Part Four should distinguish more clearly between their application to immunity *ratione personae* and immunity *ratione materiae.* In that connection, attention was drawn to specific provisions where different procedural treatment could be warranted, such as draft articles 10, 14, 15 and 16.

(d) Draft article 8 (Application of Part Four)

129. Some members expressed support for the Special Rapporteur's proposed changes to draft article 8. Several members emphasized that the rewording of paragraph 1 offered a more coherent and logical delineation of the scope of application of the procedural safeguards, avoiding giving the wrong impression that Part Four could apply to acts committed by officials in their private capacity. Other members supported affirming the early-stage applicability of the safeguards under Part Four. Some members welcomed the division of the draft article into two distinct paragraphs to enhance clarity.

130. At the same time, several members noted that the phrase "that may affect the immunity of an official of another State" in paragraph 1 could introduce ambiguity. The change was also considered to risk weakening the link between draft article 7 and the procedural guarantees established in Part Four. According to another view, a determination as to whether someone enjoyed immunity should be made under draft article 14, rather than procedural safeguards being excluded from the outset on the basis that the acts in question were private.

131. Concern was expressed over the deletion of the phrase "current or former" in paragraph 1, as its removal might obscure the continuing relevance of immunity rules after the end of official positions. Proposals were made to amend the provision, including: use the term "in any stage" instead of "in any instance" in paragraph 1; and adding the phrase "at an early stage of" before "any instance that may involve the exercise of criminal jurisdiction". It was suggested that the relationship between procedural safeguards and immunity *ratione personae* required more careful treatment, and that the wording of paragraph 2 might cast doubt on the absoluteness of such immunity. The view was expressed that paragraph 2 might be redundant, given that the scope of application had already been established in paragraph1.

132. Calls were made for clarification of several issues in the commentary, including further explanation of the meaning and scope of the jurisdictional acts covered in paragraph 1. Some members considered that the commentary could distinguish between the procedural implications for immunity *ratione personae* and immunity *ratione materiae*. It was also proposed that the relationship between draft article 7 and Part Four be further clarified.

(e) Draft article 9 (Examination of immunity by the forum State)

133. Some members supported the addition of the phrase "as far as practicable" proposed by the Special Rapporteur in paragraph 1, viewing it as a useful way to introduce flexibility in urgent circumstances, such as where coercive measures were needed to prevent imminent harm. However, other members expressed concerns that the inclusion of the phrase might

lead to uncertainty and that a more precise formulation would be preferable. The use of the term "practicable" was questioned.

134. While some members supported the proposal to add "the immunity of" before "an official of another State" in paragraph 1, others questioned the need for such an addition.

135. The separation of the examination and determination of immunity in draft article 9 and draft article 14 was welcomed by several members, but a proposal was made to consider merging the two draft articles. A suggestion was made for the commentary to clearly articulate the distinct scopes of the two provisions.

136. Further clarification of the nature of the obligation to examine immunity, the thresholds for triggering the obligation and the consequence of examination was called for. Several members proposed to further explain whether the examination was an obligation of means or result and what acts fell within the concept. It was proposed that the notion of "awareness" in paragraph 1 should be understood to include "constructive knowledge", that is, when a person should have known. Suggestions were made to clarify what constituted an "instance" involving the exercise of criminal jurisdiction and to include a temporal element that immunity should be decided "expeditiously" and "*in limine litis*".[59]

137. A concern was raised that the reference to "inviolability" in paragraph 2, subparagraph (*b*), lacked conceptual clarity. It was suggested that the reference be removed from the text and addressed instead in the commentary. Some members questioned whether inviolability applied only to officials enjoying immunity *ratione personae*. A proposal was made to include a clear definition of "inviolability" in draft article 2, as follows: "the protection of a State official in the territory of the forum State that the official may enjoy under international law, including physical protection against measures that would amount to direct coercion such as arrest and detention".

(f) Draft article 10 (Notification to the State of the official)

138. Several members expressed support for the change to paragraph 1 allowing exceptions to the obligation to notify where "such notification would jeopardize the confidentiality of an ongoing investigation or the proper conduct of criminal proceedings". The change was deemed a pragmatic response to concerns raised by States regarding the potential adverse impact of notification on criminal justice processes. It was emphasized that the commentary should provide concrete examples of situations in which such exceptions might apply to ensure clarity and prevent potential abuse.

139. At the same time, some members raised concerns that introducing such exceptions might significantly weaken the safeguard of prior notification and shift discretion entirely to the forum State. A suggestion was made to clarify the scope of the proposed exception.

140. It was suggested that the triggering conditions for the obligation to notify should be clarified to include cases where the official claimed immunity, where the State of the official raised concerns or where the forum State initiated coercive measures. It was also suggested that the opening clause of paragraph 1 be revised to better align it with other provisions of Part Four.

141. Differing views were expressed as to whether paragraph 2 should be deleted. Several members proposed revising the paragraph to allow for greater flexibility.

142. With respect to paragraph 3, several members voiced support for removing the reference to mutual legal assistance treaties, noting that the reference was redundant and could be elaborated in the commentary. It was suggested that the commentary clarify the permissible channels for notification and whether diplomatic channels alone suffice for both sending and receiving such communications.

143. Some members called for the deletion or a more fundamental reconsideration of draft article 10 as a whole. Concerns were raised that the notification obligation lacked support in

[59] See International Court of Justice, *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights, Advisory Opinion, I.C.J. Reports 1999*, p. 62, at para. 63.

existing State practice and could seriously hinder efforts to combat impunity. Some members opposed the deletion of draft article 10 and reaffirmed the importance of the notification requirement as a procedural safeguard. It was observed that existing international instruments tended to require notification only after coercive measures had been taken.

(g) Draft article 11 (Invocation of immunity)

144. Concerning draft article 11, several members suggested clarifying in the commentary that invocation was not a prerequisite for the application of immunity. They emphasized that immunity must be considered *proprio motu* by the forum State, irrespective of whether it had been formally invoked. It was suggested that the issue should be clearly stated in the text itself rather than in the commentary. The view was expressed that invocation should be a prerequisite for the application of immunity, particularly in light of the judgment of the International Court of Justice in the case concerning *Certain Questions of Mutual Assistance in Criminal Matters*.[60]

145. Clarification was sought on the grounds for invoking immunity and on the legal value and procedural consequences of invocation, including whether it gave rise to additional obligations for the forum State and the impact of delayed invocation. It was also proposed that the link between invocation and determination be clarified and that it be stated that invocation did not create a presumption of immunity before the forum State.

146. With regard to the form of invocation specified in paragraph 2, support was voiced for requiring invocation to be express and in writing. At the same time, a question was raised as to whether such a requirement was supported by State practice, and it was suggested that the paragraph be deleted or, alternatively, that "shall" be replaced with "should". Some members proposed allowing for oral invocation in certain circumstances, such as in situations where there was an imminent threat of coercive measures.

147. With respect to paragraph 3, several members expressed support for removing the reference to mutual legal assistance treaties to avoid redundancy.

(h) Draft article 12 (Waiver of immunity)

148. Several members expressed support for the proposals presented in the second report, including the removal of the reference to mutual legal assistance treaties in paragraph 3, and the clarification that waiver must be express and in writing. It was noted that waiver may be granted either *proprio motu* or upon request by the forum State and may also be partial in nature. It was suggested that it be specified which authorities were competent to issue a waiver. Clarification was also requested on the issue of treaty-based waivers and on the revocation of waivers under paragraph 5. Several members supported the rule of irrevocability, citing the principle of good faith and the need for legal certainty. According to a different view, revocation, while generally impermissible, might be accepted by the forum State in individual cases or could constitute *lex specialis* based on the Commission's Guiding Principles applicable to unilateral declarations of States capable of creating legal obligations.[61] According to some members, the commentary should distinguish between revocation and invalidity, the latter being recognized under exceptional circumstances such as coercion, fraud or error, in line with articles 46 to 53 of the Vienna Convention on the Law of Treaties.[62]

(i) Draft article 13 (Requests for information)

149. Several members expressed support for retaining draft article 13, as it provided practical guidance for domestic authorities, appropriately reflected the discretionary nature of information requests and promoted bilateral communication to clarify jurisdictional issues

[60] *Certain Questions of Mutual Assistance in Criminal Matters* (see footnote 52 above), para. 196.

[61] *Yearbook ... 2006*, vol. II (Part Two), paras. 51–52. See also General Assembly resolution 61/34 of 4 December 2006, para. 3.

[62] Vienna Convention on the Law of Treaties (Vienna, 23 May 1969), United Nations, *Treaty Series*, vol. 1155, No. 18232, p. 331.

and to prevent misunderstandings. The proposed removal of references to mutual legal assistance treaties in paragraph 3 was also welcomed by some members.

150. Further clarification was requested in the commentary on the handling of confidential information, particularly involving personal data and national security, and on ensuring that refusal to provide information was not seen as prejudicial to the assessment of immunity.

(j) Draft article 14 (Determination of immunity)

151. A number of members expressed support for the proposal of the Special Rapporteur not to amend draft article 14. Support was also expressed for maintaining draft articles 9 and 14 as separate provisions, with the interrelation clearly explained in the commentary. It was proposed that any outstanding queries could be clarified in the commentary. However, the view was expressed that the guarantees in the provision, particularly in paragraph 3, were not sufficient and merited further study.

152. Concerning paragraph 2, the removal of the reference to waiver was proposed, to avoid the suggestion that a waiver of immunity was not decisive.

153. Concerning paragraph 4, the deletion of the exception regarding precautionary measures contained in the second sentence of subparagraph (*b*) was suggested. In that connection, it was noted that, according to the judgment of the International Court of Justice in the case concerning *Certain Questions of Mutual Assistance in Criminal Matters*, the determining factor in assessing whether there had been an attack on the immunity of an official was the subjection of the official to a constraining act of authority.[63] It was proposed that the first part of subparagraph (b) would be more precise if amended to refer to "coercive measures that may affect *the immunity of* the official". Some members proposed that, to reduce uncertainty, the reference to inviolability should be omitted and the matter explained in the commentary. The view was expressed that inviolability did not just apply to those officials enjoying immunity *ratione personae*.

(k) Draft article 15 (Transfer of the criminal proceedings)

154. Several members expressed support for the proposal of the Special Rapporteur not to amend draft article 15. It was noted that the provision served to balance the interests of the forum State and the State of the official. The view was expressed that transfer should be mandatory, as long as the State of the official agreed to submit the case to its own competent authorities for prosecution. It was suggested that, to address such concerns, the commentary should explain why transfer was discretionary and the conditions under which it would be appropriate. It was noted that, in some States, it would be impossible for the executive to compel the judiciary to comply with an international request to transfer. It was also suggested that the commentary could clarify the obligation of the State of the official upon a transfer to promptly and in good faith submit the case for prosecution and address the need to keep the forum State informed of important developments in the proceedings. It was noted that paragraph 4 was a guarantee against impunity, even if transfer were mandatory. The view was expressed that the presence of diplomatic representatives of the State of the official was a matter for the judicial authorities of the forum State.

(l) Draft article 16 (Fair treatment of the State official)

155. A number of members expressed support for the proposal of the Special Rapporteur not to amend draft article 16. It was emphasized that the provision played an important hortatory role, even though the procedural rights concerned were protected by other instruments. It was proposed to add a reference to international law in paragraph 3, which only referred to the laws and regulations of the forum State.

(m) Draft article 17 (Consultations)

156. Several members expressed support for the proposal of the Special Rapporteur not to amend draft article 17. The view was expressed that the provision appropriately balanced the

[63] See *Certain Questions of Mutual Assistance in Criminal Matters* (see footnote 52 above), para. 170.

interests of the forum State and the State of the official. In light of the comments of States, it was proposed that the provision be amended to a non-binding formulation or that the basis and intended flexibility of consultations be clarified in the commentary. It was noted that the provision also covered the obligation to notify.

(n) Draft article 18 (Settlement of disputes)

157. A number of members expressed support for the proposal of the Special Rapporteur not to amend draft article 18. Several members considered that a dispute settlement clause would be an important part of a potential treaty. It was noted that some of the treaties referred to in the draft annex themselves contained compromissory clauses.

158. The view was expressed that the provision should make clear that, pending recourse to a dispute settlement procedure, the situation of the State official had to be given special consideration if he or she remained in the forum State and that a stay of the domestic proceedings should be possible. Support was expressed for the view that time limits would need to be established for any dispute settlement in relation to pending criminal proceedings.[64] It was suggested that the effects of the initiation of dispute settlement proceedings be clarified in the commentary, as well as how such initiation would lead to the suspension of national proceedings.

159. Differing views were expressed as to whether an opt-out provision concerning the jurisdiction of the International Court of Justice should be added. Some members expressed concern that the opt-out provision departed from the formulation typically found in widely accepted criminal law treaties adopted by States. It was noted, however, that such an opt-out provision would allow States to pursue the settlement of disputes through other peaceful means and could enhance support for the draft articles. A number of members underscored that the eventual dispute settlement clause was a matter for negotiation by States, and that the Commission should therefore focus on providing its own views. The view was expressed that it was not for the Commission to propose an opt-out clause.

(o) Final form

160. Several members agreed with the Special Rapporteur that draft articles were the most appropriate format for the outcome of the topic. It was highlighted that the work on the topic so far had proceeded on the assumption that the outcome would be draft articles and, thus, changing the approach would affect the substance of the topic. The view was expressed that the draft articles could serve as the foundation for the negotiation of an international instrument.

161. With respect to the Commission's recommendation to the General Assembly, some members stated that the Commission should recommend to the Assembly that the draft articles be considered as a basis for the negotiation of a treaty on the topic. That would protect the sovereign right of States and respect the separation of competences between the Commission and the Sixth Committee. The view was expressed that now was not the time to recommend the negotiation of a treaty. Some members agreed that the recommendation of the Commission to the Assembly should follow the two-step approach proposed by the Special Rapporteur in paragraph 17 of his second report. The view was expressed that using the same text as the Commission's recommendation with respect to the draft articles on prevention and punishment of crimes against humanity might be more appropriate.[65] Other members were of the view that any discussion of the final output and recommendation to the General Assembly was premature, as the Commission would only be in a position to consider the recommendation once the final text was adopted. It was stated that the Commission should leave it to the discretion of States to decide on the future of the draft articles and should not prejudge or anticipate the future negotiated outcome of the draft articles.

[64] See A/C.6/77/SR.27, para. 20.

[65] *Official Records of the General Assembly, Seventy-fourth Session, Supplement No. 10* (A/74/10), para. 42.

(p) Future programme of work

162. Some members urged the Commission to undertake the second reading in a thorough manner and not proceed with haste given the sensitivity and importance of the topic. According to another view, the Commission should expedite its work on the topic to allow States to fully benefit from the outcome as soon as possible. Some members supported concluding the second reading at the Commission's seventy-seventh session.

3. Concluding remarks of the Special Rapporteur

163. In his summary of the debate, the Special Rapporteur focused first on general comments made by members, followed by specific comments on draft articles 7 to 18 and the draft annex. He assured members that comments regarding draft article 2 had also been taken into account.

164. The Special Rapporteur noted the overall support of members of the Commission for his approach to the second reading and the significant progress made by the Commission on the topic thus far. He highlighted that members shared the sentiment of States that the topic was of high importance and that it was imperative for the Commission to strike a balance between State sovereignty and combating impunity. He was of the view that the draft articles achieved a reasonable balance between a variety of concerns and reconciled a significant number of seemingly intractable conflicting opinions.

165. The Special Rapporteur stressed that the draft articles adopted on first reading were a result of careful and extensive consideration that took into account the comments by States, existing State practice and writings up to 2022. He reiterated his view that the practice of the Commission during second reading was to refine the text adopted on first reading and the Commission should only propose modifications to the draft articles where there were compelling reasons to do so. In his view, most of the outstanding issues raised by States could be dealt with in the commentary.

166. Regarding comments made by members on the geographical diversity of State practice, the Special Rapporteur expressed his agreement that the draft articles ought to be representative of the practice of States of all regions of the world. He indicated that practice cited in the commentary would be supplemented, particularly in the commentary to draft article 7. He stressed that there was limited State practice largely because the crimes giving rise to the inapplicability of immunity were exceptional crimes and not all States had been in the situation to prosecute foreign officials for such crimes.

167. The Special Rapporteur stated that there was general agreement among members that the most appropriate form for the final outcome of the topic was a set of draft articles that might be brought to the attention of States with the ultimate goal of concluding a treaty, while stressing that some provisions in the draft articles could only be given effect through the recommendation of the negotiation of a treaty. He opposed the idea of splitting the outcome so that some provisions would be presented in the form of draft articles and others as draft principles or conclusions. Regarding the recommendation to the General Assembly, he stated that proposing that the Assembly take note of the draft articles and negotiate a treaty at an appropriate time in the future provided States with the opportunity to address some contentious matters on the basis of the Commission's proposal.

168. On draft article 7, the Special Rapporteur acknowledged that differing views had been expressed by members. He stated that there was broad support for retaining draft article 7 in some form and, while recalling arguments raised by multiple members, noted that they were of the view that the provision largely reflected customary international law. He also stated that some members voiced support for retaining the provision even if in their view it did not reflect customary international law, and that most of those members still recognized a trend in State practice regarding the inapplicability of immunity in respect to certain international crimes. The Special Rapporteur recalled that a view had been expressed that the provision should be removed from the draft articles as it did not reflect existing law and that the State practice available demonstrated that support for exceptions to immunity was limited. The Special Rapporteur considered that, in light of the broad support for a provision on exceptions to immunity, and the spirit of flexibility shown by members, the Commission would be successful in its efforts to adopt a provision.

169. On the question of progressive development or codification, the Special Rapporteur saw merit in the opinion of some members that it would not be appropriate for the Commission to make a distinction between progressive development and codification in the commentary. According to the Special Rapporteur, the purpose of the draft articles was to serve as the basis for a treaty and States should have ample opportunity to discuss the scope of the provisions proposed.

170. Regarding the debate whether paragraph 1 of draft article 7 should contain a list of crimes or should be reformulated on more general terms, the Special Rapporteur agreed with members who had favoured a list, provided that the list was not exhaustive. He noted the suggestions that had been made to revise paragraph 1, including by reordering the crimes in the list. He stated that he would welcome discussing proposals in the Drafting Committee on how the nature of the provision could be clarified, either in the text of the provision itself or in the commentary. When recalling that members had discussed establishing criteria for crimes to be included in the list, the Special Rapporteur agreed that clear criteria was important and indicated that, although the commentary adopted on first reading already contained elements for such criteria, he would update the commentary.

171. The Special Rapporteur stated that, while there was broad support for inclusion of the crimes of aggression, slavery and the slave trade in paragraph 1, as proposed in the second report, some members had opposed adding those crimes. He noted the suggestions made for either the commentary or the text itself and indicated that he would be willing to discuss the various suggestions in the Drafting Committee. He recalled recent case law that could be relevant to the provision and that would be addressed in the commentary.

172. The Special Rapporteur addressed concerns raised by some members regarding the examples of practice included in the second report, stressing that such practice was not exhaustive. It was meant to bring to light the practice that had occurred since draft article 7 had been adopted on first reading, as well as practice that had not been included in his first report. He stated that the practice would nevertheless be reviewed before inclusion in the commentary. With regard to the issue of silence by States, the Special Rapporteur recalled that some members had pointed out the challenges of drawing conclusions based on "negative" State practice because it was difficult to determine the reasons behind it. On the relevance of the jurisprudence of the International Court of Justice in the case *Jurisdictional Immunities of the State*[66] and of the European Court of Human Rights in *Sassi and Benchellali v. France*,[67] the Special Rapporteur stated that they were not decisive for the current exercise, and the context of both decisions was critical. In conclusion, the Special Rapporteur believed that having a provision that contained an enumerated non-exhaustive list, including the three additional crimes he had proposed, had received broad support.

173. As to Part Four, the Special Rapporteur stated that there had been overwhelming support for the provisions therein and highlighted the value and importance of the safeguards in ensuring a balance between accountability and respect for sovereign equality of States. The Special Rapporteur also mentioned that Part Four was crucial to avoid politicization of draft article 7. While the Special Rapporteur concurred that some of the provisions of Part Four constituted progressive development, others – such as those related to fair treatment and due process – constituted codification. His views on the issue aligned more with the members who did not think that delineating between progressive development and codification was appropriate.

174. The Special Rapporteur noted that several members did not comment on some of the provisions in Part Four due to lack of time. He assured members that he had taken note of all the comments that had been made, including in their written statements, but in his summation, in the interest of time, he would focus on the provisions that received the most comments.

175. With respect to draft article 8, the Special Rapporteur stated that several members had supported his proposed changes, but noted that others believed that the proposed revised text would introduce ambiguity as to the application of the provision. The Special Rapporteur

[66] See footnote 54 above.
[67] See footnote 56 above.

considered that issues raised by members could be dealt with in the Drafting Committee and in the commentary.

176. Regarding draft article 9, the Special Rapporteur clarified that his proposal was to include the phrase "as far as practicable" in paragraph 1. Adding that phrase would introduce the necessary discretion for urgent or exceptional cases, such as when the official posed an imminent threat to public safety, without compromising the overarching obligation to examine immunity promptly.

177. On the issue of inviolability, the Special Rapporteur recalled the prior work of the Commission on the draft articles on diplomatic intercourse and immunities.[68] He highlighted that inviolability with respect to measures that would amount to direct coercion was a specific form of immunity from foreign criminal jurisdiction covering a broader set of jurisdictional acts. The Special Rapporteur recalled that the work on the present topic was not supposed to cover special regimes. He maintained that, absent a more specific legal regime, full inviolability only bestowed upon State officials enjoying immunity *ratione personae*. Accordingly, he expressed his view that no specific provision on inviolability was required, while acknowledging that the issue would be dealt with in the commentary.

178. With regard to draft article 10, the Special Rapporteur recalled the differing views of members on the provision and his proposed changes in paragraphs 1 and 3. He stated that all the issues raised had also been the object of extensive discussion during first reading. His proposal to add a qualifier was aimed at addressing some of the issues and he suggested discussing them in the Drafting Committee. The Special Rapporteur favoured keeping paragraph 2 for reasons of legal certainty, but expressed willingness to discuss its removal in the Drafting Committee, as suggested by some members.

179. On the calls by some members for clarification in the commentary of draft article 11, the Special Rapporteur indicated that he did not oppose expanding the commentary with regard to, *inter alia*, the value and legal consequences of invoking immunity, presumption of immunity and the form in which immunity should be invoked. As to the discussion on whether immunity was only applicable when invoked by the State official, the Special Rapporteur stated that, in several of the cases referred to in the commentary to draft article, as well in some cases cited in the second report, immunity had been considered by the forum State in spite of the lack of invocation. He also recalled the findings of the International Court of Justice in *Certain Questions of Mutual Assistance in Criminal Matters* that were relevant to the issue.

180. Regarding draft article 12, the Special Rapporteur indicated that he was still not convinced that the waiver could be revoked. He reiterated his proposal, which had been supported by some members, of including in the commentary a reference to general grounds of invalidity.

181. Concerning draft article 14, while noting that there had been great support for retaining it, the Special Rapporteur suggested that refinements to the text of paragraphs 2 and 4 could be discussed in the Drafting Committee to address concerns raised by members. In that connection, he stated that the Drafting Committee could refine the text pertaining to the determination of immunity.

182. With respect to draft article 18, the Special Rapporteur mentioned that there was broad support for retaining a provision on dispute settlement, in particular a preference that the draft articles be recommended as a basis for the negotiation of a treaty. Regarding suggestions made on the possibility of opting out of the provision or including time limits, the Special Rapporteur was of the view that those issues would be better addressed in the context of future treaty negotiation, but also indicated that the Drafting Committee could further consider them.

183. The Special Rapporteur noted the suggestion for an additional provision on the basis of paragraph 196 of *Certain Questions of Mutual Assistance in Criminal Matters*.[69] He

[68] *Yearbook … 1958*, vol. II, document A/3859, para. 53.

[69] See para. 114 above. *Certain Questions of Mutual Assistance in Criminal Matters* (see footnote 52 above), para. 196.

expressed doubts whether it would be advisable to include an entirely new provision at the stage of second reading, given that States would not have had the opportunity to comment on it. However, if the Commission decided that clarification on the issue was necessary, the Special Rapporteur would be amenable to addressing the matter in the commentary to draft article 11 on the invocation of immunity.

C. Text of the draft articles on immunity of State officials from foreign criminal jurisdiction provisionally adopted by the Commission on second reading at its seventy-sixth session

1. Text of the draft articles

184. The text of the draft articles provisionally adopted by the Commission, on second reading, at its seventy-sixth session is reproduced below.

…*

Article 1
Scope of the present draft articles

1. The present draft articles apply to the immunity of State officials from the criminal jurisdiction of another State.

2. The present draft articles are without prejudice to special rules of international law on immunity from criminal jurisdiction enjoyed in particular by persons connected with diplomatic missions, consular posts, special missions, international organizations and armed forces of a State.

3. The present draft articles do not affect the rights and obligations of States under international agreements establishing or relating to the operation of international criminal courts and tribunals as between the parties to those agreements.

…**

Article 3
Persons enjoying immunity *ratione personae*

Heads of State, Heads of Government and Ministers for Foreign Affairs enjoy immunity *ratione personae* from the exercise of foreign criminal jurisdiction.

Article 4
Scope of immunity *ratione personae*

1. Heads of State, Heads of Government and Ministers for Foreign Affairs enjoy immunity *ratione personae* only during their period of office.

2. Such immunity *ratione personae* covers all acts performed, whether in a private or official capacity, by Heads of State, Heads of Government and Ministers for Foreign Affairs during or prior to their period of office.

3. The cessation of immunity *ratione personae* is without prejudice to the rules of international law on immunity *ratione materiae*.

…***

* The Commission and the Drafting Committee have not yet considered the titles of parts on second reading.

** Draft article 2 has been retained in the Drafting Committee pending consideration of the remaining draft articles.

*** The Commission and the Drafting Committee have not yet considered the titles of parts on second reading.

Article 5
Scope of immunity *ratione materiae*

1. State officials enjoy immunity *ratione materiae* from the exercise of foreign criminal jurisdiction with respect to acts performed in an official capacity.

2. Immunity *ratione materiae* with respect to acts performed in an official capacity continues to subsist after the individuals concerned have ceased to be State officials.

3. Individuals who enjoyed immunity *ratione personae* in accordance with draft article 4, whose period of office has come to an end, continue to enjoy immunity with respect to acts performed in an official capacity during such period of office.

2. Text of the draft articles and commentaries thereto provisionally adopted by the Commission, on second reading, at its seventy-sixth session

185. The text of the draft articles and commentaries thereto provisionally adopted by the Commission, on second reading, at its seventy-sixth session is reproduced below.

Article 1
Scope of the present draft articles

1. The present draft articles apply to the immunity of State officials from the criminal jurisdiction of another State.

2. The present draft articles are without prejudice to special rules of international law on immunity from criminal jurisdiction enjoyed in particular by persons connected with diplomatic missions, consular posts, special missions, international organizations and armed forces of a State.

3. The present draft articles do not affect the rights and obligations of States under international agreements establishing or relating to the operation of international criminal courts and tribunals as between the parties to those agreements.

Commentary

(1) The purpose of draft article 1 is to define the scope of the draft articles on immunity of State officials from foreign criminal jurisdiction. It incorporates in a single draft article the dual perspective, positive and negative, that determines the scope. Paragraph 1 explains the cases to which the draft articles apply, while paragraph 2 contains a "without prejudice" clause, which excludes from the scope of the draft articles special regimes of international law on immunity of State officials. Paragraph 3 contains a clause referring to international agreements establishing or relating to the operation of international criminal courts and tribunals, which also remain outside the scope of the draft articles. In the past, the Commission has used various techniques for defining this dual perspective of the scope of a set of draft articles,[70] but in this case it was preferable to combine both perspectives in a single

[70] In the draft articles on jurisdictional immunities of States and their property (*Yearbook … 1991*, vol. II (Part Two), para. 28), the Commission chose to deal with the dual dimension of the scope in two separate draft articles, and this was ultimately reflected in the Convention adopted in 2004 (United Nations Convention on Jurisdictional Immunities of States and Their Property (New York, 2 December 2004), General Assembly resolution 59/38, annex, arts. 1 and 3). On the other hand, in the 1975 Vienna Convention on the Representation of States in Their Relations with International Organizations of a Universal Character (Vienna, 14 March 1975), United Nations, *Juridical Yearbook 1975* (Sales No. E.77.V.3), p. 87, or *Official Records of the United Nations Conference on the Representation of States in Their Relations with International Organizations, Vienna, 4 February–14 March 1975*, vol. II, *Documents of the Conference* (United Nations publication, Sales No. E.75.V.12), p. 207, document A/CONF.67/16, and in the Convention on the Law of the Non-navigational Uses of International Watercourses (New York, 21 May 1997, United Nations, *Treaty Series*, vol. 2999, No. 52106, p. 77), the various aspects of the scope are defined in a single article, which also refers to special regimes. Although the draft articles on the expulsion of aliens, adopted by the Commission on first reading in 2014 (*Official Records of the General Assembly, Sixty-ninth Session, Supplement No. 10* (A/69/10), paras. 44–45), also dealt with the scope in a single article consisting of two paragraphs,

draft article, since this presents the advantage of facilitating the simultaneous treatment of both perspectives of scope under a single title.

Paragraph 1

(2) Paragraph 1 establishes the scope of the draft articles in its positive dimension. To this end, in the paragraph, the Commission has decided to use the phrase "[t]he present draft articles apply to", which is the wording used recently in other draft articles adopted by the Commission that contain a provision referring to their scope.[71] The Commission decided that the scope of the draft articles should be defined as simply as possible, so it could frame the rest of the draft articles and not affect or prejudge the other issues to be addressed later in other provisions. The Commission used the language "from the criminal jurisdiction of another State" rather than "from the exercise of the criminal jurisdiction of another State", aligning the provision on the scope of the text with its title, as was done in article 1 of the United Nations Convention on Jurisdictional Immunities of States and Their Property. The Commission noted that, while the phrase "exercise of" is used in other draft articles, it did not find that the phrase was necessary to define the general scope of the draft articles and decided to reserve it for use in other parts of the draft articles in which it is more suitably placed.[72]

(3) Paragraph 1 covers the three elements defining the purpose of the draft articles, namely: (*a*) who are the persons enjoying immunity? (State officials); (*b*) what type of jurisdiction is affected by immunity? (Criminal jurisdiction); and (*c*) in what domain does such criminal jurisdiction operate? (The criminal jurisdiction of another State).

(4) As to the first element, the Commission chose to confine the draft articles to the immunity from foreign criminal jurisdiction that may be enjoyed by State officials. The term "State officials" has been defined in draft article 2 (*a*), to whose text and commentary attention is drawn. In the Commission's previous work, the persons enjoying immunity have been referred to using the term "officials".[73] However, the use of this term, and its equivalents in the other language versions, has raised certain problems,[74] and it should be noted that the terms used in the various language versions are neither interchangeable nor synonymous. Nonetheless, with a view to simplifying the text, the Commission has decided to retain the term "State official" to refer in general to all persons who enjoy immunity from foreign criminal jurisdiction contemplated in these draft articles. The expression "official of another State" used in some draft articles is equivalent to the expression "State official".

(5) Secondly, the Commission has decided to confine the scope of the draft articles to immunity from criminal jurisdiction. Following its practice in other projects in which it has dealt with immunity from criminal jurisdiction, the Commission has not considered it necessary to define what immunity and criminal jurisdiction mean. However, for merely descriptive purposes, it should be noted that the present draft articles address cases in which, by virtue of immunity, criminal jurisdiction cannot be exercised, criminal jurisdiction being the power of States to perform acts of varying nature whose ultimate purpose is to ensure accountability of individuals for criminal conduct.

(6) Thirdly, the Commission decided to confine the scope of the draft articles to immunity from "foreign" criminal jurisdiction, i.e. that which reflects the horizontal relations between

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the same draft articles include other separate provisions whose purpose is to keep certain special regimes within a specific scope.

[71] This wording has been used, for example, in draft article 1 of the draft articles on the expulsion of aliens.

[72] See draft articles 3 and 5, as well as draft articles 7, 8, 10, 14 and 16, as adopted on first reading, *Official Records of the General Assembly, Seventy-seventh Session, Supplement No. 10* (A/77/10), para. 68.

[73] The words used in the various language versions are as follows: المسؤولون (Arabic), 官员 (Chinese), "officials" (English), "*représentants*" (French), *должностные лица* (Russian) and "*funcionarios*" (Spanish).

[74] Preliminary report, *Yearbook … 2012*, vol. II (Part One), document A/CN.4/654, para. 66; and second report, *Yearbook … 2013*, vol. II (Part One), document A/CN.4/661, para. 32.

States. This means that the draft articles will be applied solely with respect to immunity from the criminal jurisdiction "of another State".

(7) It must be emphasized that paragraph 1 refers to "immunity … from the criminal jurisdiction of another State". The use of the word "from" creates a link between the concepts of "immunity" and "foreign criminal jurisdiction" (or jurisdiction "of another State") that must be duly taken into account. On this point, the Commission is of the view that the concepts of immunity and foreign criminal jurisdiction are closely interrelated: it is impossible to view immunity in abstract terms, without relating it to a foreign criminal jurisdiction which, even where it exists, will not be exercised by the forum State over an official of another State precisely because of the existence of immunity. Or, as the International Court of Justice has put it, "it is only where a State has jurisdiction under international law in relation to a particular matter that there can be any question of immunities in regard to the exercise of that jurisdiction".[75]

(8) The Commission regards immunity from foreign criminal jurisdiction as being procedural in nature. Consequently, immunity from foreign criminal jurisdiction does not exempt a person from criminal responsibility. It is a barrier to the exercise of a State's criminal jurisdiction against the officials of another State. This position was affirmed by the International Court of Justice in the *Arrest Warrant* case,[76] which is followed in the majority of State practice and in the literature.

Paragraph 2

(9) Paragraph 2 refers to cases in which there are special rules of international law on immunity from foreign criminal jurisdiction. This category of special rules has its most well-known and frequently cited manifestation in the regime of privileges and immunities granted under international law in diplomatic and consular relations.[77] However, there are other examples in contemporary international law, both treaty-based and custom based, which in the Commission's view should likewise be taken into account for the purposes of defining the scope of the present draft articles. The Commission considers that these special regimes are well established in international law, and that the present draft articles should not affect their content and application. It should be recalled that during the preparation of the draft articles on jurisdictional immunities of States and their property, the Commission acknowledged the existence of special immunity regimes, albeit in a different context, and specifically referred to them in article 3, entitled "Privileges and immunities not affected by the present articles".[78] The relationship between the regime for immunity of State officials from foreign criminal jurisdiction set out in the draft articles and the special regimes just mentioned was established by the Commission with the inclusion of a "without prejudice" clause in paragraph 2. Accordingly, the provisions of the present draft articles are "without prejudice" to what is set out in the special regimes. The framing of the provision as a "without prejudice" clause with respect to special rules of international law on immunity is intended to make clear that the provision does not affect either the immunity provided for by such rules, where such immunity exists, or any exceptions to it. Whether such immunity is available to a State official will depend on the special rules applicable to the official and the specific circumstances of the situation. The provision was also considered broad enough to preserve the inviolability and privileges enjoyed by certain persons under such special rules. Furthermore, the Commission chose to use the word "enjoyed" in paragraph 2 to maintain consistency with treaties establishing the kind of special rules referenced in the paragraph,

[75] *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium), Judgment, I.C.J. Reports 2002*, p. 3, at p. 19, para. 46. See also the Commission's commentary to article 6 of the draft articles on jurisdictional immunities of States and their property, particularly paragraphs (1)–(3) (*Yearbook … 1991*, vol. II (Part Two), pp. 23–24).

[76] *Arrest Warrant of 11 April 2000* (see footnote 75 above), p. 25, para. 60. The Court has taken the same position regarding State immunity: see *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening), Judgment, I.C.J. Reports 2012*, p. 99, at p. 124, para. 58, and p. 143, para. 100.

[77] See the Vienna Convention on Diplomatic Relations (Vienna, 18 April 1961), United Nations, *Treaty Series*, vol. 500, No. 7310, p. 95, art. 31; and the Vienna Convention on Consular Relations (Vienna, 24 April 1963), *ibid.*, vol. 596, No. 8638, p. 261, art. 43.

[78] *Yearbook … 1991*, vol. II (Part Two), pp. 21–22, draft article 3 and commentary thereto.

for example article 31 of the Vienna Convention on Diplomatic Relations, which concerns the immunity of diplomatic agents from the criminal jurisdiction of the receiving State.

(10) The Commission has used the term "special rules" as a synonym for the words "special regimes" in its earlier work. Although the Commission has not defined the concept of "special regime", attention should be drawn to the conclusions of the Study Group on the fragmentation of international law, particularly conclusions 2 and 3.[79] For the purposes of the present draft articles, the Commission understands "special rules" to mean those international rules, whether treaty or custom-based, that regulate the immunity from foreign criminal jurisdiction of persons connected with activities in specific fields of international relations. The Commission sees such "special rules" as coexisting with the regime defined in the present draft articles, the special regime being applied in the event of any conflict between the two regimes.[80] In any event, the Commission considers that the special regimes in question are only those established by "rules of international law", this reference to international law being essential for the purpose of defining the scope of the "without prejudice" clause.[81]

(11) The special regimes included in paragraph 2 relate in particular to three areas of international practice in which norms regulating immunity from foreign criminal jurisdiction have been identified, namely (*a*) the presence of a State in a foreign country through diplomatic missions, consular posts and special missions; (*b*) the various representational and other activities connected with international organizations; and (*c*) the presence of a State's armed forces in a foreign country. Although in all three areas treaty-based norms establishing a regime of immunity from foreign criminal jurisdiction may be identified, the Commission has not thought it necessary to include in paragraph 2 an explicit reference to such international conventions and instruments.[82]

(12) The first area includes special rules on the immunity from foreign criminal jurisdiction of persons carrying out specific functions in another State, whether on a permanent basis or otherwise, while connected with a diplomatic mission, consular post or special mission. The Commission takes the view that the rules contained, in particular, in the Vienna Convention on Diplomatic Relations, the Vienna Convention on Consular Relations and the Convention on Special Missions,[83] as well as the relevant rules of customary international law, fall into this category.

(13) The second area includes special rules on the immunity from criminal jurisdiction enjoyed by persons connected with an activity in relation to or in the framework of an international organization. This category includes the special rules applicable to persons connected with missions to an international organization or delegations to organs of international organizations or to international conferences.[84] The Commission's understanding is that it is unnecessary to include in this group of special rules those that apply in general to the international organizations themselves. However, it considers that this category does include norms applicable to the agents of an international organization,

[79] *Yearbook … 2006*, vol. II (Part Two), para. 251.

[80] In its commentary to article 3 of the draft articles on jurisdictional immunities of States and their property, the Commission referred to this aspect in the following terms: "[t]he article is intended to leave existing special regimes unaffected, especially with regard to persons connected with the missions listed" (*Yearbook … 1991*, vol. II (Part Two), p. 22, para. (5) of the commentary). See also paragraph (1) of the commentary.

[81] The Commission also included a reference to international law in the above-mentioned article 3 of the draft articles on jurisdictional immunities of States and their property. It should be noted that the Commission drew special attention to this point in its commentary to the draft article, particularly paragraphs (1) and (3) thereof.

[82] It must be kept in mind that the Commission also did not list such conventions in the draft articles on jurisdictional immunities of States and their property. However, the commentary to draft article 3 (paragraph (2) thereof) referred to the areas in which there are such special regimes and expressly mentioned some of the conventions establishing those regimes.

[83] Convention on Special Missions (New York, 8 December 1969), United Nations, *Treaty Series*, vol. 1400, No. 23431, p. 231.

[84] This list corresponds to the one already formulated by the Commission in draft article 3, paragraph 1 (*a*), of the draft articles on jurisdictional immunities of States and their property.

especially in cases when the agent has been placed at the disposal of the organization by a State and continues to enjoy the status of State official during the time when the agent is acting on behalf of and for the organization. Regarding this second group of special regimes, the Commission has taken into account the Vienna Convention on the Representation of States in Their Relations with International Organizations of a Universal Character,[85] the Convention on the Privileges and Immunities of the United Nations[86] and the Convention on the Privileges and Immunities of the Specialized Agencies,[87] as well as other treaty-based and customary norms applicable in this area.

(14) The third area of special rules includes those on the immunity from criminal jurisdiction of persons relating to the lawful presence of the armed forces of a State in another State. This category includes the whole set of rules regulating the stationing of troops in the territory of a third State, such as those included in status-of-forces agreements and those included in headquarters agreements or military cooperation accords. Also included in this category are agreements made in connection with the short-term activities of armed forces in a foreign State.

(15) The list of the special rules described in paragraph 2 is qualified by the words "in particular" to indicate that the clause does not exclusively apply to these three areas of special rules. The Commission also drew attention to special rules in other areas that may be found in practice, particularly in connection with the establishment in a State's territory of foreign institutions and centres for economic, technical, scientific and cultural cooperation, usually on the basis of specific headquarters agreements, or in connection with the stationing of a State's paramilitary or police personnel on the territory of another State on the basis of a specific agreement.

(16) Lastly, it should be noted that the Commission considered the possibility of including in paragraph 2 reference to the practice whereby a State unilaterally grants a foreign official immunity from foreign criminal jurisdiction. However, the Commission decided against such inclusion.

(17) The Commission considered that the formulation of paragraph 2 should parallel the structure of paragraph 1. It must thus be borne in mind that the present draft articles refer to the immunity from foreign criminal jurisdiction of certain persons described as "State officials" and that, consequently, this subjective element should also be reflected in the "without prejudice" clause. The phrase "persons connected with" has been used in line with the terminology in the United Nations Convention on Jurisdictional Immunities of States and Their Property (art. 3). The scope of the term "persons connected with" will depend on the content of the rules defining the special regime that applies to them; it is therefore not possible *a priori* to draw up a single definition for this category. This is also true for civilian personnel connected with the armed forces of a State, who will be included in the special regime only to the extent that the legal instrument applicable in each case so establishes. The term "persons" is understood to refer to natural persons. Accordingly, the provision only concerns immunities enjoyed by individuals and not by, for example, a diplomatic mission or consular post itself.

(18) The combination of the terms "persons connected with" and "special rules" is essential in determining the scope and meaning of the "without prejudice" clause in paragraph 2. The Commission considers that the persons covered in this paragraph (*inter alia*, diplomatic agents, consular officers, members of special missions, agents of international organizations and members of the armed forces of a State) are excluded from the scope of the present draft articles, not by the mere fact of belonging to that category of officials, but by the fact that one of the special regimes referred to in draft article 1, paragraph 2, applies to them under certain circumstances. In such circumstances, the immunity from foreign

[85] Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character (Vienna, 14 March 1975), A/CONF.67/16; or United Nations, Juridical Yearbook 1975 (Sales No. E.77.V.3), p. 87.

[86] Convention on the Privileges and Immunities of the United Nations (New York, 13 February 1946), United Nations, *Treaty Series*, vol. 1, No. 4, p. 15, and vol. 90, p. 327.

[87] Convention on the Privileges and Immunities of the Specialized Agencies (New York, 21 November 1947), *ibid*., vol. 33, No. 521, p. 261.

criminal jurisdiction that these persons may enjoy under the special regimes applicable to them will not be affected by the provisions of the present draft articles.

Paragraph 3

(19) Paragraph 3 addresses the relationship between the present draft articles and the rights and obligations of States under international agreements establishing or relating to the operation of international criminal courts and tribunals as between the parties to those agreements.

(20) The Commission determined that an express reference to agreements relating to international criminal courts and tribunals was necessary in draft article 1, concerning the scope of the draft articles. Paragraph 3 emphasizes the separation and independence of the present draft articles, which do not affect the rights and obligations of States under agreements establishing or relating to the operation of international criminal courts and tribunals. Through this paragraph, the Commission sought to ensure that the present draft articles do not impair the achievements of such special legal regimes. The paragraph was also considered necessary to preserve existing rights and obligations of States in the event that a treaty is concluded on the basis of the present draft articles, which could otherwise be governed by the *lex posterior derogat legi priori* rule reflected in article 30 of the Vienna Convention on the Law of Treaties.[88]

(21) Paragraph 3 is inspired by article 26 of the United Nations Convention on Jurisdictional Immunities of States and Their Property, which, under the title "Other international agreements", reads as follows: "[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". The purpose of this paragraph is to preserve "the rights and obligations of States under international agreements establishing or relating to the operation of international criminal courts and tribunals as between the parties to those agreements".

(22) The expression "the rights and obligations of States" refers to any of the rights and obligations under a specific international agreement establishing or relating to the operation of an international criminal court or tribunal. The Commission has preferred this wording over other proposals such as "the question of immunity" regulated in such agreements or "the rules governing the functioning of international criminal tribunals", which were considered, respectively, as being too narrow or too broad in relation to the purpose of paragraph 3 of draft article 1. The phrase "international agreements establishing or relating to the operation of international criminal courts and tribunals" refers to the international rules considered to be special legal regimes for the purpose of paragraph 3 of draft article 1, bearing in mind the objective pursued by that clause. Therefore, this phrase does not mirror the wording of article 26 of the United Nations Convention on Jurisdictional Immunities of States and Their Property, because the phrase "which relate to matters dealt with in the present Convention" was not sufficiently clear to reflect the relationship between the present draft articles and the legal regimes applicable to international criminal courts and tribunals. The expression "international agreements" includes the constituent instrument of each international criminal court or tribunal, whether these agreements are concluded between States or between States and international organizations, including the Rome Statute of the International Criminal Court.[89]

(23) The phrase "or relating to the operation of" reflects both the broad scope of the provision and the reality that agreements other than those which establish international criminal courts and tribunals may be relevant. The Commission recognized that, for example, State obligations related to international criminal courts and tribunals can stem from provisions of the Charter of the United Nations, which may be used as a legal basis for their establishment or operation, including Article 25 in connection with relevant Security Council resolutions. For instance, the Security Council has created international tribunals by

[88] Vienna Convention on the Law of Treaties (Vienna, 23 May 1969), United Nations, *Treaty Series*, vol. 1155, No. 18232, p. 331.

[89] Rome Statute of the International Criminal Court (Rome, 17 July 1998), United Nations, *Treaty Series*, vol. 2187, No. 38544, p. 3.

resolutions adopted under Chapter VII of the Charter of the United Nations, with the corresponding obligations under the Charter.[90] Another case in point is the system of referrals by the Security Council to the International Criminal Court.[91] There may also be relevant agreements relating to the operation of hybrid or internationalized tribunals, which have often been created by provisions of domestic law, including as a result of initiatives originating from universal or regional international organizations.

(24) The Commission considered adding a subparagraph directly addressing international courts and tribunals established by international organizations. However, it decided that, as said courts and tribunals had their ultimate legal basis in a treaty, such a subparagraph was unnecessary.

(25) Paragraph 3 ends with the phrase "as between the parties to those agreements". The intention here is to highlight that conventional legal regimes applicable to international criminal courts and tribunals, as a matter of treaty law, apply only between the parties to the agreement establishing a particular international criminal court or tribunal. This drafting reflects the well-accepted tenet of the law of treaties, embodied in articles 34 and 35 of the Vienna Convention on the Law of Treaties, that a treaty cannot create obligations for a State that has not consented to be bound by it. This term does not, however, imply any statement whatsoever in relation to any other obligation that can be imposed upon States under international law, in particular by the Security Council or any other international organization.

Article 3
Persons enjoying immunity *ratione personae*

Heads of State, Heads of Government and Ministers for Foreign Affairs enjoy immunity *ratione personae* from the exercise of foreign criminal jurisdiction.

Commentary

(1) Draft article 3 lists the State officials who enjoy immunity *ratione personae* from foreign criminal jurisdiction, namely the Head of State, the Head of Government and the Minister for Foreign Affairs. The draft article confines itself to identifying the persons to whom this type of immunity applies, making no reference to its substantive scope.

(2) The Commission considers that there are two interlinked reasons, one representational and one functional, for according immunity *ratione personae* to Heads of State, Heads of Government and Ministers for Foreign Affairs. First, under the rules of international law, these three office holders represent the State in its international relations simply by virtue of their office, directly and with no need for specific powers to be granted by the State.[92] Second, they must be able to discharge their functions unhindered.[93] It is irrelevant whether those officials are nationals of the State in which they hold the office of Head of State, Head of Government or Minister for Foreign Affairs.

(3) The statement that Heads of State enjoy immunity *ratione personae* is not subject to dispute, given that this is established in existing rules of customary international law. In addition, various conventions contain provisions referring directly to the immunity from

[90] See Security Council resolutions 827 (1993), on establishment of the International Tribunal for Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991; and 955 (1994) on establishment of an International Tribunal for Rwanda and adoption of the Statute of the Tribunal.

[91] See Rome Statute of the International Criminal Court, arts. 13 (b) and 15 *ter*, and Relationship Agreement between the United Nations and the International Criminal Court (New York, 4 October 2004), United Nations, *Treaty Series*, vol. 2283, No. 1272, p. 195, art. 17.

[92] The International Court of Justice has stated that "it is a well-established rule of international law that the Head of State, the Head of Government and the Minister for Foreign Affairs are deemed to represent the State merely by virtue of exercising their functions" (*Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v. Rwanda), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 2006*, p. 6, at p. 27, para. 46).

[93] See *Arrest Warrant of 11 April 2000* (footnote 75 above), pp. 21–22, paras. 53–54, in which the International Court of Justice particularly emphasized the second element with respect to the Minister for Foreign Affairs.

jurisdiction of the Head of State. In this connection, mention should be made of article 21, paragraph 1, of the Convention on Special Missions, which expressly acknowledges that when the Head of State leads a special mission, he or she enjoys, in addition to what is granted in the Convention, the immunities accorded by international law to Heads of State on an official visit. Similarly, article 50, paragraph 1, of the Vienna Convention on the Representation of States in Their Relations with International Organizations of a Universal Character refers to the other "immunities accorded by international law to Heads of State". Along the same lines, albeit in a different field, the United Nations Convention on Jurisdictional Immunities of States and Their Property includes, in the saving clause in article 3, paragraph 2, an express reference to the immunities accorded under international law to Heads of State.

(4) The immunity from foreign criminal jurisdiction of the Head of State has also been recognized in case law at both the international and national levels. Thus, the International Court of Justice has expressly mentioned the immunity of the Head of State from foreign criminal jurisdiction in the *Arrest Warrant*[94] and *Certain Questions of Mutual Assistance in Criminal Matters*[95] cases. It must be emphasized that examples of national judicial practice, although limited in number and geographical representativeness, are consistent in showing that Heads of State enjoy immunity *ratione personae* from foreign criminal jurisdiction, both in the proceedings concerning the immunity of the Head of State and in the reasoning that such courts follow in deciding whether other State officials also enjoy immunity from criminal foreign jurisdiction.[96]

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[94] *Arrest Warrant of 11 April 2000* (see footnote 75 above), pp. 20–21, para. 51.

[95] *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France), Judgment, I.C.J. Reports 2008*, p. 177, at pp. 236–237, para. 170.

[96] National courts have on many occasions cited the immunity *ratione personae* from foreign criminal jurisdiction of the Head of State as grounds for their decisions on substance and their findings that criminal proceedings cannot be brought against an incumbent Head of State. In this regard, see Federal Republic of Germany, Re *Honecker*, Federal Supreme Court, Second Criminal Chamber, Judgment of 14 December 1984 (Case No. 2 ARs 252/84), reproduced in *International Law Reports*, vol. 80, pp. 365–366; Spain, *Rey de Marruecos*, National High Court, Criminal Chamber decision of 23 December 1998; France, *Gaddafi*, Court of Appeal of Paris, Judgment of 20 October 2000, and Court of Cassation, Judgment No. 1414 of 13 March 2001, *Revue générale de droit international public*, vol. 105 (2001); Spain, *Fidel Castro*, National High Court, plenary decision of the Criminal Chamber, 13 December 2007 (the Court had already made a similar ruling in two other cases against Fidel Castro, in 1998 and 2005); and *Case against Paul Kagame*, National High Court, Central Investigation Court No. 4 (Spain), indictment of 6 February 2008. Also in the context of criminal proceedings, but as *obiter dicta*, various courts have on numerous occasions recognized immunity *ratione personae* from foreign criminal jurisdiction in general. In those cases, the national courts have not referred to the immunity of a specific Head of State, either because the person had completed their period of office and was no longer an incumbent Head of State or because the person was not and had never been a Head of State. See Spain, *Pinochet (solicitud de extradición)*, National High Court, Central Investigation Court No. 5, request for extradition of 3 November 1998; United Kingdom, *Regina v. Bartle and the Commissioner of Police for the Metropolis and Others – Ex Parte Pinochet*, House of Lords, judgment of 24 March 1999, reproduced in *International Legal Materials*, vol. 38 (1999), p. 581; Belgium, *H.S.A.*, et.al. *v. S.A.*, et al. (indictment of Ariel Sharon, Amos Yaron and others), Court of Cassation, Judgment of 12 February 2003 (P-02-1139.F), reproduced in *International Legal Materials*, vol. 42, No. 3 (2003), pp. 596–605; Spain, *Scilingo*, National High Court, Criminal Chamber, Third Section, decision of 27 June 2003; France, *Association Fédération nationale des victimes d'accidents collectifs; Association des familles des victimes du Joola et al.*, Court of Cassation, Criminal Chamber, judgment of 19 January 2010 (09-84.818), *Bulletin des Arrêts, Chambre criminelle*, No. 1 (January 2010), p. 41; United Kingdom, *Khurts Bat v. Investigating Judge of the German Federal Court*, Administrative Court, High Court of Justice, judgment of 29 July 2011 ([2011] EWHC 2029 (Admin), *International Law Reports*, vol. 147, p. 633); and Switzerland, *A. c. Ministère public de la Confédération*, Federal Criminal Court (BB.2011.140), judgment of 25 July 2012. It should be emphasized that national courts have never denied that a Head of State has immunity from criminal jurisdiction, and that this immunity is *ratione personae*. It must also be kept in mind that civil jurisdiction, under which there is a greater number of judicial decisions, consistently recognizes the immunity *ratione personae* from jurisdiction of Heads of State. For example, see United States of America, *Rukmini S. Kline* et.al. *v. Yasuyuki Kaneko* et.al., Supreme Court of the State of New York, judgment of 31 October 1988 (535 N.Y.S.2d 1258) (141 Misc.2d 787); Belgium,

(5) The Commission considers that the immunity from foreign criminal jurisdiction *ratione personae* of the Head of State is enjoyed by persons who actually hold that office. The title given to the Head of State in each State, the status of Head of State (as a sovereign or otherwise) and the individual or collegial nature of the office are irrelevant for the purposes of the present draft articles.[97]

(6) The recognition of immunity *ratione personae* in favour of the Head of Government and the Minister for Foreign Affairs is a result of the fact that, under international law, their functions of representing the State have become recognized as approximate to those of the Head of State. Examples of this may be found in the recognition that there is no need to produce full powers in the case of the Head of State, Head of Government and Minister for Foreign Affairs for the conclusion of treaties[98] and the equality of the three categories of officials in terms of their international protection[99] and their involvement in the representation of the State.[100] The immunity of Heads of Government and Ministers for Foreign Affairs has been referred to in the Convention on Special Missions, the Vienna Convention on the Representation of States in Their Relations with International Organizations of a Universal Character and, implicitly, the United Nations Convention on Jurisdictional Immunities of States and Their Property.[101]

(7) All of the above-mentioned examples have emerged from the work of the Commission, which has on several occasions dealt with the question of whether expressly to include Heads of State, Heads of Government and Ministers for Foreign Affairs in international instruments.

Mobutu v. SA Cotoni, Civil Court of Brussels, Judgment of 29 December 1988; Switzerland, *Ferdinand et Imelda Marcos c. Office fédéral de la police*, Federal Tribunal, Judgment of 2 November 1989 (ATF 115 Ib 496), partially reproduced in *Revue suisse de droit international et de droit européen* (1991), pp. 534–537 (English version in *International Law Reports*, vol. 102, p. 198); United States, *Lafontant v. Aristide*, District Court for the Eastern District of New York, Judgment of 27 January 1994, 844 F. Supp. 128; Austria, *W. v. Prince of Liechtenstein*, Supreme Court, Judgment of 14 February 2001 (7 Ob 316/00x); United States, *Tachiona v. Mugabe (*"*Tachiona I*"*)*, District Court for the Southern District of New York, Judgment of 30 October 2001 (169 F.Supp.2d 259); United States, *Fotso v. Republic of Cameroon*, District Court of Oregon, order of 22 February 2013 (6:12CV 1415-TC).

97 In this connection, the provisions of the Vienna Convention on the Representation of States in Their Relations with International Organizations of a Universal Character (art. 50, para. 1) and the Convention on Special Missions (art. 21, para. 1), which refer to the case of collegial bodies acting as Head of State, are of interest. On the other hand, the Commission did not see any need to include a reference to this category in the draft articles on the prevention and punishment of crimes against diplomatic agents and other internationally protected persons (*Yearbook … 1972*, vol. II, document A/8710/Rev.1, pp. 312–313, para. (2) of the commentary to draft article 1), and no reference was accordingly made in the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents (New York, 14 December 1973, United Nations, *Treaty Series*, vol. 1035, No. 15410, p. 167).

98 Vienna Convention on the Law of Treaties, art. 7, para. 2 (*a*). The International Court of Justice has made a similar statement on the capacity of the Head of State, Head of Government and Minister for Foreign Affairs to make a commitment on behalf of the State through unilateral acts (*Armed Activities on the Territory of the Congo (New Application: 2002)* (see footnote 92 above), p. 27, para. 46).

99 Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, art. 1, para. 1 (*a*).

100 In this connection, see the Convention on Special Missions, art. 21, and the Vienna Convention on the Representation of States in Their Relations with International Organizations of a Universal Character, art. 50.

101 Article 21 of the Convention on Special Missions, in addition to the Head of State, refers to the Head of Government and Minister for Foreign Affairs, although it does so in separate paragraphs (paragraph 1 refers to the Head of State and paragraph 2 refers to the Head of Government, Minister for Foreign Affairs and other persons of high rank). The same model is followed in the Vienna Convention on the Representation of States in Their Relations with International Organizations of a Universal Character, which also refers to the officials mentioned in separate paragraphs. By contrast, the United Nations Convention on Jurisdictional Immunities of States and Their Property includes only a mention *eo nomine* of the Head of State (art. 3, para. 2), and the other two categories of officials must be considered as included in the concept of "representatives of the State" found in article 2, paragraph 1 (*b*) (iv). See paragraphs (6) and (7) of the commentary to article 3 of the articles on jurisdictional immunities of States and their property, *Yearbook … 1991*, vol. II (Part Two), p. 22.

In this connection, it was noted that article 3 of the United Nations Convention on Jurisdictional Immunities of States and Their Property included a specific mention of the Head of State while excluding any express reference to the Head of Government and Minister for Foreign Affairs. However, there is very little reason to conclude that these examples mean that in the present draft articles the Commission must treat Heads of State, Heads of Government and Ministers for Foreign Affairs differently. It is even less reasonable to conclude that the Head of Government and Minister for Foreign Affairs must be excluded from draft article 3. A number of factors must be taken into account here. First, the present draft articles refer solely to the immunity from foreign criminal jurisdiction of State officials, whereas the Convention on Special Missions and the Vienna Convention on the Representation of States in Their Relations with International Organizations of a Universal Character refer to any kind of immunity that Heads of State, Heads of Government and Ministers for Foreign Affairs may enjoy. Second, the United Nations Convention on Jurisdictional Immunities of States and Their Property refers to the immunities of States; immunity from criminal jurisdiction remains outside its scope.[102] In addition, far from rejecting the immunities that may be enjoyed by the Head of Government and the Minister for Foreign Affairs, the Commission actually recognized them, but simply did not mention these categories specifically in article 3, paragraph 2, "since it would be difficult to prepare an exhaustive list, and any enumeration of such persons would moreover raise the issues of the basis and of the extent of the jurisdictional immunity exercised by such persons".[103] And third, it must also be borne in mind that all the examples mentioned above preceded the judgment by the International Court of Justice in the *Arrest Warrant* case.

(8) In its judgment in the *Arrest Warrant* case, the International Court of Justice expressly stated that "in international law it is firmly established that, as also diplomatic and consular agents, certain holders of high-ranking office in a State, such as the Head of State, Head of Government and Minister for Foreign Affairs, enjoy immunities from jurisdiction in other States, both civil and criminal".[104] This statement was later reiterated by the Court in the case concerning *Certain Questions of Mutual Assistance in Criminal Matters*.[105] Both of these judgments were discussed extensively by the Commission, particularly with regard to the Minister for Foreign Affairs. The Commission concluded that the *Arrest Warrant* case reflects customary international law and, accordingly, Ministers for Foreign Affairs enjoy immunity *ratione personae* from foreign criminal jurisdiction. In the view of the Commission, the position of the Minister for Foreign Affairs and the special functions he or she carries out in international relations constitute the basis for the recognition of such immunity from foreign criminal jurisdiction.

(9) As to the practice of national courts, the Commission has also found that, while there are very few rulings on the immunity *ratione personae* from foreign criminal jurisdiction of the Head of Government and almost none in respect of the Minister for Foreign Affairs, the national courts that have had occasion to comment on this subject have nevertheless always recognized that those high-ranking officials do have immunity from foreign criminal jurisdiction during their period of office.[106]

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[102] The statement that the Convention "does not cover criminal proceedings" was proposed by the Ad Hoc Committee set up on the subject by the General Assembly and was ultimately included in paragraph 2 of General Assembly resolution 59/38 of 2 December 2004, by which the Convention was adopted.

[103] Para. (7) of the commentary to article 3 (*Yearbook … 1991*, vol. II (Part Two), p. 22).

[104] *Arrest Warrant of 11 April 2000* (see footnote 75 above), pp. 20–21, para. 51.

[105] *Certain Questions of Mutual Assistance in Criminal Matters* (see footnote 95 above), pp. 236–237, para. 170.

[106] With regard to recognition of the immunity from foreign criminal jurisdiction of the Head of Government and the Minister for Foreign Affairs, see the following cases, both criminal and civil, in which national courts have made statements on this subject, either as the grounds for decisions on substance or as *obiter dicta*: France, *Ali Ali Reza v. Grimpel*, Court of Appeal of Paris, Judgment of 28 April 1961, *Revue générale de droit international public*, vol. 66, No. 2 (1962), p. 418 (reproduced also in *International Law Reports*, vol. 47, p. 275) (implicitly recognizes, *a contrario*, the immunity of a Minister for Foreign Affairs); United States, *Chong Boon Kim v. Kim Yong Shik and David Kim*, Circuit Court of the First Circuit, State of Hawaii, Judgment of 9 September 1963, reproduced in *American Journal of International Law*, vol. 58 (1964), pp. 186–187; United States, *Saltany and*

(10) As a result of the discussion, the Commission found that there are sufficient grounds in practice and in international law to conclude that the Head of State, Head of Government and Minister for Foreign Affairs enjoy immunity *ratione personae* from foreign criminal jurisdiction. Consequently, it has been decided to include them in draft article 3. The Commission considered that the term "enjoy", rather than "shall enjoy", was appropriate in this draft article because enjoyment of such immunity was an entitlement under customary international law and introducing the word "shall" seemed to inadvertently weaken the provision.

(11) The Commission also considered whether other State officials could be included in the list of the persons enjoying immunity *ratione personae*. The Commission took into account that high-ranking officials other than the Head of State, Head of Government and Minister for Foreign Affairs are becoming increasingly involved in international relations. It also took note that the use of the words "such as" in the *Arrest Warrant* case could be interpreted to extend the regime of immunity *ratione personae* to other high-ranking State officials. However, the Commission did not see the use of the words "such as" as widening the circle of the persons who enjoy this category of immunity, since the Court used the words in the context of a specific dispute, the subject of which was the immunity from foreign criminal jurisdiction of a Minister for Foreign Affairs.

(12) In the case concerning *Certain Questions of Mutual Assistance in Criminal Matters*, the International Court of Justice reverted to the subject of the immunity of high-ranking State officials other than the Head of State, Head of Government and Minister for Foreign Affairs. The Court dealt separately with the immunity of the Head of State of Djibouti and of the two other high-ranking officials, namely the Attorney General (*procureur de la République*) and the Head of National Security. With regard to the Head of State, the Court made a very clear pronouncement that in general, he or she enjoys immunity from criminal jurisdiction *ratione personae*, although that was not applicable in the specific case, since the invitation to testify issued by the French authorities was not a measure of constraint.[107] With regard to the other high-ranking officials, the Court stated that the acts attributed to them were not carried out within the scope of their duties;[108] it considered that Djibouti did not make it sufficiently clear whether it was claiming State immunity, personal immunity or some other type of immunity; and it concluded that "[t]he Court notes first that there are no grounds in international law upon which it could be said that the officials concerned were entitled to personal immunities, not being diplomats within the meaning of the Vienna Convention on Diplomatic Relations of 1961, and the Convention on Special Missions of 1969 not being applicable in this case".[109]

(13) In national judicial practice, a number of decisions deal with the immunity *ratione personae* from foreign criminal jurisdiction of other high-ranking officials. However, the decisions in question are not conclusive. While some of the decisions are in favour of the immunity *ratione personae* of high-ranking officials such as the minister of defence or minister of international trade,[110] in others, the national courts found that the person on trial

Others v. Reagan and Others, United States District Court for the District of Columbia, Judgment of 23 December 1988, 702 F. Supp 319, *International Law Reports*, vol. 80, p. 19; United States, *Tachiona v. Mugabe ("Tachiona I")* (footnote 96 above); Belgium, *H.S.A.*, et.al. *v. S.A.*, et.al. (indictment of Ariel Sharon, Amos Yaron and others), Court of Cassation, 12 February 2003 (footnote 96 above).

107 See *Certain Questions of Mutual Assistance in Criminal Matters* (footnote 95 above), pp. 236–240, paras. 170–180.

108 *Ibid*., p. 243, para. 191.

109 *Ibid*., pp. 243–244, para. 194. See, in general, paras. 181–197, *ibid.*, pp. 240–244.

110 In this connection, see United Kingdom, Re *General Shaul Mofaz* (Minister of Defence of Israel), Bow Street Magistrates' Court, Judgment of 12 February 2004, reproduced in International and Comparative Law Quarterly, vol. 53 (2004), p. 771; and United Kingdom, Re *Bo Xilai* (Minister for Commerce and International Trade of China), Bow Street Magistrates' Court, Judgment of 8 November 2005, reproduced in *International Law Reports*, vol. 128, p. 713, in which the immunity of Mr. Bo Xilai is acknowledged, not just because he was considered to be a high-ranking official, but particularly because he was on special mission in the United Kingdom. A year later, in a civil case, the United States executive branch recognized Mr. Bo Xilai's immunity because he was on special mission in the United States: *Suggestion of Immunity and Statement of Interest of the United States*,

did not enjoy immunity, either because he or she was not a Head of State, Head of Government or Minister for Foreign Affairs or because he or she did not belong to the narrow circle of officials who benefit from such treatment,[111] which illustrates the major difficulty

District Court for the District of Columbia, 24 July 2006 (Civ. No. 04-0649): see United States, District Court for the District of Columbia, *Weixum* et al. *v. Xilai*, 568 F. Supp. 2d 35 (D.D.C. 2008) (deferring to the executive branch's position). In France, *Association Fédération nationale des victimes d'accidents collectifs; Association des familles des victimes du Joola*, Court of Cassation, Criminal Chamber, 19 January 2010 (see footnote 96 above), the Court acknowledged in general terms that an incumbent minister of defence enjoys immunity *ratione personae* from foreign criminal jurisdiction, but in the specific case recognized only immunity *ratione materiae*, since the person on trial no longer held that office. In Switzerland, *A. c. Ministère public de la Confédération*, Federal Criminal Court, 25 July 2012 (see footnote 96 above), the Tribunal stated in general that an incumbent minister of defence enjoyed immunity *ratione personae* from foreign criminal jurisdiction, but in the case in question, it did not recognize immunity because Mr. Nezzar had completed his period of office, and the acts carried out constitute international crimes, depriving him also of immunity *ratione materiae.*

[111] An example of this is the case of *Khurts Bat v. Investigating Judge of the German Federal Court*, Administrative Court, High Court of Justice (United Kingdom), Judgment of 29 July 2011 (see footnote 96 above), in which the Court admitted, based on the International Court of Justice judgment in the *Arrest Warrant* case (see footnote 75 above), that "in customary international law certain holders of high-ranking office are entitled to immunity *ratione personae* during their term of office" (para. 55) as long as they belong to a narrow circle of specific individuals because "it must be possible to attach to the individual in question a similar status" (para. 59) to that of the Head of State, Head of Government and Minister for Foreign Affairs referred to in the above-mentioned judgment. After analysing the functions carried out by Mr. Khurts Bat, the Court concluded that he "falls outwith that narrow circle" (para. 61). Earlier, the Paris Court of Appeal also failed to recognize the immunity of Mr. Ali Ali Reza because, although he was Minister of State of Saudi Arabia, he was not the Minister for Foreign Affairs (see *Ali Ali Reza v. Grimpel*, Court of Appeal of Paris, 28 April 1961 (footnote 106 above)). Similarly, in a 2015 judgment, the Criminal Chamber of Court of Cassation of France denied the immunity *ratione personae* of a Second Vice-President responsible for defence and security because the official's functions were not those of a Head of State, Head of Government of Minister for Foreign Affairs. Court of Cassation, Criminal Chamber, 15 December 2015, No. 15-83.156. In the *United States of America v. Noriega* case, the Court of Appeals for the Eleventh Circuit, in its judgment of 7 July 1997 (appeals Nos. 92-4687 and 96-4471), stated that Mr. Noriega, former Commander in Chief of the Armed Forces of Panama, could not be included in the category of persons who enjoy immunity *ratione personae*, dismissing Mr. Noriega's allegation that at the time of the events, he had been Head of State, or *de facto* leader, of Panama. 117 F.3d 1206 (*International Law Reports*, vol. 121, p. 591). Another court in the United States, in the *Republic of the Philippines v. Marcos* case, District Court for the Northern District of California, Judgment of 11 February 1987 (665 F. Supp. 793), indicated that the Attorney General of the Philippines did not enjoy immunity *ratione personae*. In the *Fotso v. Republic of Cameroon* case, the executive branch informed the Court that the President of Cameroon enjoyed immunity as a sitting Head of State, and the case was dismissed. United States, District Court, District of Oregon, *Fotso v. Republic of Cameroon*, 25 January 2013, No. 6:12-cv-1415-TC, 2013 U.S. Dist. LEXIS 25424, at *2–6 (D. Ore. Jan. 25, 2013). The executive branch did not address the immunity of the Minister of Defence and the Secretary of State for Defence, but the court later found that those officials enjoyed immunity, given that they "acted in their official capacities". United States, District Court, District of Oregon, *Fotso v. Republic of Cameroon*, 16 May 2013, No. 6:12-cv-1415-TC, 2013 U.S. Dist. LEXIS 83948, at*3, *16–21 (D. Ore. May 16, 2013). It should be kept in mind that the two cases previously cited involved the exercise of civil jurisdiction. It must also be noted that on some occasions, national courts have not recognized the immunity from jurisdiction of persons holding high-ranking posts in constituent units within a federal State. In this connection, see the following cases: United Kingdom, *R. (on the application of Diepreye Solomon Peter Alamieyeseigha) v. The Crown Prosecution Service*, Queen's Bench Division (Divisional Court), Judgment of 25 November 2005 ([2005] EWHC 2704 (Admin)), in which the Court did not recognize the immunity of the Governor and Chief Executive of Bayelsa State in the Federal Republic of Nigeria; and Italy, *Public Prosecutor (Tribunal of Naples) v. Milo Djukanovic*, Court of Cassation, Third Criminal Section, Judgment of 28 December 2004 (Rivista di diritto internazionale, vol. 89 (2006), p. 568), in which the Court denied immunity to the President of Montenegro before it became an independent State. In Switzerland, *Evgeny Adamov v. Office fédéral de la justice*, Federal Tribunal of Switzerland, Judgment of 22 December 2005 (1A 288/2005) (available at http://opil.ouplaw.com, International Law in Domestic Courts [ILDC 339 (CH 2005)]), the Tribunal denied immunity to a former Minister of Atomic Energy of the Russian

involved in identifying the high-ranking officials other than the Head of State, Head of Government and Minister for Foreign Affairs who can indisputably be deemed to enjoy immunity *ratione personae*. It should also be pointed out that, in some of these decisions, the immunity from foreign criminal jurisdiction of a high-ranking official is analysed from various perspectives – immunity *ratione personae*, immunity *ratione materiae*, State immunity, immunity deriving from a special mission – reflecting the uncertainty in determining precisely what immunity from foreign criminal jurisdiction might be enjoyed by high-ranking officials other than the Head of State, Head of Government and Minister for Foreign Affairs.[112]

(14) The Commission has already referred to the immunity of other high-ranking officials in its draft articles on special missions and its draft articles on the representation of States in their relations with international organizations.[113] It must be recalled that these instruments only establish a regime under which such persons continue to enjoy the immunities accorded to them under international law beyond the framework of those instruments. However, neither in the text of the draft articles nor in the Commission's commentaries thereto is it clearly indicated what these immunities are and whether they do or do not include immunity from foreign criminal jurisdiction *ratione personae*. It must also be emphasized that although these high-ranking officials may be deemed to be included in the category of "representatives of the State" mentioned in article 2, paragraph 1 (*b*) (iv), of the United Nations Convention on Jurisdictional Immunities of States and Their Property, that instrument – as previously mentioned – does not apply to "criminal proceedings". Nevertheless, the Commission noted that high-ranking officials can enjoy the immunity regime of special missions, including immunity from foreign criminal jurisdiction, when they are on an official visit to a third State, which can offer a means of ensuring the proper fulfilment of the sectoral functions of this category of high-ranking officials at the international level.

(15) In view of the foregoing, the Commission considers that "other high-ranking officials" do not enjoy immunity *ratione personae* for the purposes of the present draft articles, but that this is without prejudice to the rules pertaining to immunity *ratione materiae*, and on the understanding that when they are on official visits, they might enjoy immunity from foreign criminal jurisdiction in accordance with the rules of international law relating to special missions. The Commission also notes that, as provided for in draft article 1, paragraph 2, the present draft articles are without prejudice to the application of such special regimes.

Federation in an extradition case; however, it acknowledged in an *obiter dictum* that it was possible that unspecified high-ranking officials could enjoy immunity.

[112] The decision in the *Khurts Bat v. Investigating Judge of the German Federal Court* case (see footnote 96 above) is a good example of this. In *Association Fédération nationale des victimes d'accidents collectifs*; *Association des familles des victimes du Joola* (see footnote 96 above), the Court ruled simultaneously, and without sufficiently differentiating its ruling, on immunity *ratione personae* and immunity *ratione materiae*. In *A. c. Ministère public de la Confédération* case (see footnote 96 above), after making a general statement about immunity *ratione personae*, the Court also considered whether immunity *ratione materiae* or the diplomatic immunity claimed by the person concerned could be applied. The arguments used by national courts in other cases are even more imprecise, as in the case of United States, *Kilroy v. Windsor*, District Court for the Northern District of Ohio, Eastern Division, which, in its judgment of 7 December 1978 in a civil case (Civ. No. C-78-291), recognized the immunity *ratione personae* of the Prince of Wales because he was a member of the British royal family and was heir apparent to the throne, but also because he was on official mission to the United States. Noteworthy in the *Bo Xilai* cases (see footnote 110 above) was the fact that, while both the British and United States courts recognized the immunity from jurisdiction of the Chinese Minister for Commerce, they did so because he was on an official visit and enjoyed the immunity derived from special missions.

[113] Draft articles on the representation of States in their relations with international organizations, adopted by the Commission at its twenty-third session, *Yearbook … 1971*, vol. II (Part One), document A/8410/Rev.1, p. 284. On other occasions the Commission has used the expressions "*personnalité officielle*" ("official") (draft articles on the prevention and punishment of crimes against diplomatic agents and other internationally protected persons, art. 1, *Yearbook … 1972*, vol. II, document A/8710/Rev.1) and "other persons of high rank" (draft articles on special missions, art. 21, *Yearbook … 1967*, vol. II, document A/6709/Rev.1 and Rev.1/Corr.1, p. 359).

(16) The phrase "from the exercise of" has been used in the draft article with reference both to immunity *ratione personae* and to foreign criminal jurisdiction. The Commission decided not to use the same phrase in draft article 1 (Scope of the present draft articles) so as not to prejudge the substantive aspects of immunity, in particular its scope, that will be taken up in other draft articles.[114] In the present draft article, the Commission has decided to retain the phrase "from the exercise of," since it illustrates the relationship between immunity and foreign criminal jurisdiction and emphasizes the essentially procedural nature of the immunity that comes into play in relation to the exercise of criminal jurisdiction with respect to a specific act.[115]

Article 4
Scope of immunity *ratione personae*

1. Heads of State, Heads of Government and Ministers for Foreign Affairs enjoy immunity *ratione personae* only during their period of office.

2. Such immunity *ratione personae* covers all acts performed, whether in a private or official capacity, by Heads of State, Heads of Government and Ministers for Foreign Affairs during or prior to their period of office.

3. The cessation of immunity *ratione personae* is without prejudice to the rules of international law on immunity *ratione materiae*.

Commentary

(1) Draft article 4 deals with the scope of immunity *ratione personae* from both the temporal (para. 1) and material standpoints (para. 2). Although each of these aspects is conceptually distinct, the Commission has chosen to cover them in a single article since this offers a more comprehensive view of the meaning and scope of the immunity enjoyed by Heads of State, Heads of Government and Ministers for Foreign Affairs. The Commission has decided to cover the temporal aspect first since this gives a better understanding of the scope of immunity *ratione personae*, which is limited to a specific period of time.

(2) With regard to the temporal scope of immunity *ratione personae*, the Commission has thought it necessary to include the adverb "only" so as to emphasize the point that this type of immunity applies to Heads of State, Heads of Government and Ministers for Foreign Affairs exclusively during the period when they hold office. This is consistent with the very reason for according such immunity, which is the special position held by such officials within the State's organizational structure and which, under international law, places them in a special situation of having a representational and functional link to the State in the ambit of international relations. Consequently, immunity *ratione personae* loses its significance when the person enjoying it ceases to hold one of those posts.

(3) This position has been upheld by the International Court of Justice, which stated in the *Arrest Warrant* case that:

> After a person ceases to hold the office of Minister for Foreign Affairs, he or she will no longer enjoy all of the immunities accorded by international law in other States. Provided that it has jurisdiction under international law, a court of one State may try a former Minister for Foreign Affairs of another State in respect of acts committed prior or subsequent to his or her period of office, as well as in respect of acts committed during that period of office in a private capacity.[116]

Although the Court was referring to the Minister for Foreign Affairs, the same reasoning applies, *a fortiori*, to the Head of State and the Head of Government. Moreover, the limitation of immunity *ratione personae* to the period of time in which the persons enjoying such immunity hold office is also recognized in the conventions establishing special regimes of immunity *ratione personae*, particularly the Vienna Convention on Diplomatic Relations and

[114] See para. (2) of the commentary to draft article 1 above.
[115] See *Arrest Warrant of 11 April 2000* (footnote 75 above), p. 25, para. 60; and *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)* (footnote 76 above), p. 124, para. 58.
[116] *Arrest Warrant of 11 April 2000* (see footnote 75 above), p. 25, para. 61.

the Convention on Special Missions.[117] The Commission itself, in its commentaries to the draft articles on jurisdictional immunities of States and their property, stated that "[t]he immunities *ratione personae*, unlike immunities *ratione materiae* which continue to survive after the termination of the official functions, will no longer be operative once the public offices are vacated or terminated".[118] The strict temporal scope of immunity *ratione personae* is also confirmed by various national court decisions.[119]

(4) Consequently, the Commission considers that after the period of office of the Head of State, Head of Government or Minister for Foreign Affairs has ended, immunity *ratione personae* ceases. The Commission has not thought it necessary to indicate the specific criteria to be taken into account in order to determine when the period of office of the persons enjoying such immunity begins and ends, since this depends on each State's legal order, and practice in this area varies. The term "period of office", as used in the English text, mirrors the terminology used by the International Court of Justice in the *Arrest Warrant* case[120] and was preferred to the phrase "term of office", which the Commission considered might refer only to fixed periods of time in office. The terms "*mandat*" and "*mandato*" in French and Spanish, respectively, were considered sufficiently clear.

(5) Only during the period of office does immunity *ratione personae* extend to all the acts carried out by the Head of State, Head of Government and Minister for Foreign Affairs, both those carried out in a private capacity and those performed in an official capacity. In this way, immunity *ratione personae* is configured as "full immunity".[121] This configuration reflects State practice.[122]

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[117] Vienna Convention on Diplomatic Relations, art. 39, para. 2; and Convention on Special Missions, art. 43, para. 2.

[118] It added: "All activities of the sovereigns and ambassadors which do not relate to their official functions are subject to review by the local jurisdiction, once the sovereigns or ambassadors have relinquished their posts" (*Yearbook ... 1991*, vol. II (Part Two), p. 18, paragraph (19) of the commentary to draft article 2, para. 1 (*b*) (v).

[119] Such decisions have often arisen in the context of civil cases, where the same principle of a temporal limitation for the immunity applies. See, for example, France: *Mellerio c. Isabel de Bourbon*, Court of Appeal of Paris, 3 June 1872, *Recueil général des lois et des arrêts 1872*, p. 293; *Seyyid Ali Ben Hamond, prince Raschid, c. Wiercinski*, Seine Civil Court, Judgment of 25 July 1916, *Revue de droit international privé et de droit pénal international*, vol. 15 (1919), p. 505; *Ex-roi d'Egypte Farouk c. S.A.R.L. Christian Dior*, Court of Appeal of Paris, Judgment of 11 April 1957, *Journal du droit international*, vol. 84, No. 1 (1957), pp. 716–718; *Société Jean Dessès c. prince Farouk et dame Sadek*, Tribunal de Grande Instance de la Seine, 12 June 1963, reproduced in *Revue critique de droit international privé* (1964), p. 689 (English version reproduced in *International Law Reports*, vol. 65, pp. 37–38); United States: In re *Estate of Ferdinand Marcos Human Rights Litigation; Hilao and Others v. Estate of Marcos*, United States Court of Appeals, Ninth Circuit, Judgment of 16 June 1994, 25 F.3d 1467 (9th Cir. 1994), *International Law Reports*, vol. 104, p. 119, at pp. 123 and 125. A British court recently found that the former King of Spain, Juan Carlos de Borbón y Borbón, has no longer enjoyed immunity *ratione personae* since his abdication. See United Kingdom, *Corinna Zu Sayn-Wittgenstein Sayn v. HM Juan Carlos Alfonso Víctor María de Borbón y Borbón*, High Court of Justice, Queen's Bench Division, Judgment of 24 March 2022, [2022] EWHC 668 (QB), para. 58. In the context of criminal cases, see Spain, *Pinochet* (footnote 96 above).

[120] *Arrest Warrant of 11 April 2000* (see footnote 75 above), p. 25, para. 61.

[121] The International Court of Justice refers to the material scope of immunity *ratione personae* as "full immunity" (*Arrest Warrant of 11 April 2000* (see footnote 75 above), p. 22, para. 54). The Commission itself, for its part, has stated with reference to the immunity *ratione personae* of diplomatic agents that "[t]he immunity from criminal jurisdiction is complete" (*Yearbook ... 1958*, vol. II, document A/3859, p. 98, paragraph (4) of the commentary to article 29 of the draft articles on diplomatic intercourse and immunities).

[122] See, for example, *Yaser Arafat (Carnevale re. Valente – Imp. Arafat e Salah)*, Italy, Court of Cassation, Judgment of 28 June 1985, *Rivista di diritto internazionale*, vol. 69, No. 4 (1986), p. 884; *Ferdinand et Imelda Marcos c. Office fédéral de la police*, Federal Tribunal (Switzerland), 2 November 1989 (footnote 96 above); *Regina v. Bartle and the Commissioner of Police for the Metropolis and Others – Ex Parte Pinochet*, House of Lords (United Kingdom), 24 March 1999 (footnote 96 above), at p. 592; *Gaddafi*, Court of Appeal of Paris, 20 October 2000 (footnote 96 above) (English version in *International Law Reports*, vol. 125, p. 490, at p. 509); *H.S.A.*, et al. *v.*

(6) As the International Court of Justice stated in the *Arrest Warrant* case, with particular reference to a Minister for Foreign Affairs, extension of immunity to acts performed in both a private and an official capacity is necessary to ensure that the persons enjoying immunity *ratione personae* are not prevented from exercising their specific official functions, since "[t]he consequences of such impediment to the exercise of those official functions are equally serious … regardless of whether the arrest relates to alleged acts performed in an 'official' capacity or a 'private' capacity".[123] Thus, "no distinction can be drawn between acts performed by a Minister for Foreign Affairs in an 'official' capacity, and those claimed to have been performed in a 'private capacity'".[124] The same reasoning must apply, *a fortiori*, to the Head of State and Head of Government.

(7) The full extent of immunity *ratione personae* is also reflected in the present draft articles, which do not establish any limitation or exception applicable to this type of immunity, in contrast to the case of immunity *ratione materiae* by virtue of draft article 7.

(8) As regards the terminology used to refer to acts covered by immunity *ratione personae*, it must be borne in mind that no single, uniform wording is actually in use. For example, the Vienna Convention on Diplomatic Relations makes no express distinction between acts carried out in a private or official capacity in referring to acts to which the immunity from criminal jurisdiction of diplomatic agents extends, and it is understood to apply to both categories.[125] Moreover, the terminology in other instruments, documents and judicial decisions, as well as in the literature, also lacks consistency, with the use, among others, of the expressions "official acts and private acts", "acts performed in the exercise of their functions", "acts linked to official functions" and "acts carried out in an official or private capacity". In the present draft article, the Commission has found it preferable to use the phrase "acts performed, whether in a private or official capacity", following the wording used by the International Court of Justice in the *Arrest Warrant* case.

(9) The definition of an "act performed in an official capacity" is set out in draft article 2, subparagraph (*b*). The Commission has not considered it necessary to define what is meant by "act performed in a private capacity", as this notion is residual in nature. As a result, it must be understood by default that any act not performed in an official capacity has been performed in a private capacity.

(10) The Commission has used the term "act" in the same sense and for the same reasons explained in the commentary to draft article 2, subparagraph (*b*), which contains the definition of "act performed in an official capacity".

(11) The acts to which immunity *ratione personae* extends are those that a Head of State, Head of Government or Minister for Foreign Affairs has carried out during or prior to his or her period of office. The reason for this relates to the purpose of immunity *ratione personae*, which is both to protect the sovereign equality of States and to guarantee that the persons

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S.A., et al. (indictment of Ariel Sharon, Amos Yaron and others), Court of Cassation (Belgium), Judgment of 12 February 2003 (footnote 96 above), at p. 599; *Issa Hassan Sesay a.k.a. Issa Sesay, Allieu Kondewa, Moinina Fofana v. President of the Special Court, Registrar of the Special Court, Prosecutor of the Special Court, Attorney-General and Minister of Justice*, Supreme Court of Sierra Leone, Judgment of 14 October 2005 (S.C. No. 1/2003); and *Case against Paul Kagame*, National High Court, Central Investigation Court No. 4 (Spain), indictment of 6 February 2008 (footnote 96 above), pp. 156–157. Among more recent cases, see *Association Fédération nationale des victimes d'accidents collectifs; Association des familles des victimes du Joola*, Court of Appeal of Paris, Investigating Chamber, Judgment of 16 June 2009, confirmed by the Court of Cassation, Judgment of 19 January 2010 (footnote 96 above); *Khurts Bat v. Investigating Judge of the German Federal Court*, Administrative Court, High Court of Justice (United Kingdom), 29 July 2011 (footnote 96 above), para. 55; and *A. c. Ministère public de la Confédération*, Federal Criminal Court (Switzerland), 25 July 2012 (footnote 96 above), legal ground No. 5.3.1. See also *Teodoro Nguema Obiang Mangue et autres*, Court of Appeal of Paris, Section Seven, Second Investigating Chamber (France), judgment of 13 June 2013.

123 *Arrest Warrant of 11 April 2000* (see footnote 75 above), p. 22, para. 55.

124 *Ibid*.

125 This is the conclusion to be drawn from reading article 31, paragraph 1, in conjunction with article 39, paragraph 2, of the Vienna Convention on Diplomatic Relations. Articles 31, paragraph 1, and 43, paragraph 2, of the Convention on Special Missions must be construed in the same way.

enjoying this type of immunity can perform their functions of representation of the State unimpeded throughout their period of office. In this sense, there is no need for further clarification regarding the applicability of immunity *ratione personae* to the acts performed by such persons throughout their period of office. As regards acts performed prior to the period of office, it must be noted that immunity *ratione personae* applies only if the criminal jurisdiction of a foreign State is to be exercised during the period of office of the Head of State, Head of Government or Minister for Foreign Affairs. This is because, as the International Court of Justice stated in the *Arrest Warrant* case, "no distinction can be drawn … between acts performed before the person concerned assumed office as Minister for Foreign Affairs and acts committed during the period of office. Thus, if a Minister for Foreign Affairs is arrested in another State on a criminal charge, he or she is clearly thereby prevented from exercising the functions of his or her office. The consequences of such impediment to the exercise of those official functions are equally serious, regardless of whether … the arrest relates to acts allegedly performed before the person became the Minister for Foreign Affairs or to acts performed while in office."[126]

(12) In any event, it must be noted that, as the Court also stated in the same case, immunity *ratione personae* is procedural in nature and must be interpreted, not as exonerating a Head of State, Head of Government or Minister for Foreign Affairs from criminal responsibility for acts committed during or prior to his or her period of office, but solely as suspending the exercise of foreign criminal jurisdiction during the period of office of those high-ranking officials.[127] Consequently, when the period of office ends, the acts carried out during or prior to the period of office cease to be covered by immunity *ratione personae* and may, in certain cases, be subject to the criminal jurisdiction that cannot be exercised during the period of office.

(13) Lastly, it should be noted that immunity *ratione personae* does not in any circumstances apply to acts carried out by a Head of State, Head of Government or Minister for Foreign Affairs after his or her period of office. Since they are now considered a "former" Head of State, Head of Government or Minister for Foreign Affairs, such immunity would have ceased when the period of office ended.

(14) Paragraph 3 addresses what happens with respect to acts carried out in an official capacity while in office by the Head of State, Head of Government or Minister for Foreign Affairs after his or her period of office ends. Paragraph 3 proceeds from the principle that immunity *ratione personae* ceases after the period of office ends. Consequently, immunity *ratione personae* no longer exists after the period of office ends. Nevertheless, it must be kept in mind that a Head of State, Head of Government or Minister for Foreign Affairs may, during his or her period of office, have carried out acts in an official capacity which do not lose that quality merely because the period of office has ended and may accordingly be covered by immunity *ratione materiae*. This matter has not been disputed in substantive terms, although it has been expressed variously in State practice, treaty practice and judicial practice.[128]

(15) To address these problems, paragraph 3 sets forth a "without prejudice" clause on the potential applicability of immunity *ratione materiae* to such acts. This does not mean that immunity *ratione personae* is prolonged past the end of the period of office of persons

[126] *Arrest Warrant of 11 April 2000* (see footnote 75 above), p. 22, para. 55.

[127] "Jurisdictional immunity may well bar prosecution for a certain period or for certain offences; it cannot exonerate the person to whom it applies from all criminal responsibility" (*ibid.*, p. 25, para. 60).

[128] Thus, for example, with reference to the immunity of members of diplomatic missions, the Vienna Convention on Diplomatic Relations expressly states that "with respect to acts performed by such a person in the exercise of his functions as a member of the mission, immunity shall continue to subsist" (art. 39, para. 2); the formulation is repeated in the Convention on Special Missions (art. 43, para. 1). In the judicial practice of States, this has been expressed in a wide variety of ways: reference is sometimes made to "residual immunity", the "continuation of immunity in respect of official acts" or similar wording. On this aspect, see the analysis by the Secretariat in its 2008 memorandum (A/CN.4/596 and Corr.1, available from the Commission's website, documents of the sixtieth session, paras. 137 *et seq.*).

enjoying such immunity, since that is not in line with paragraph 1 of the draft article.[129] Nor does it mean that immunity *ratione personae* is transformed into a new form of immunity *ratione materiae* that applies automatically by virtue of paragraph 3. The Commission considers that the "without prejudice" clause simply acknowledges the application of the rules on immunity *ratione materiae* to a former Head of State, Head of Government or Minister for Foreign Affairs. Paragraph 3 does not prejudge the content of the immunity *ratione materiae* regime, which is developed in Part Three of the draft articles.

(16) The draft article, as adopted on first reading, referred in paragraph 3 to "the application of" rules. That phrase was deleted to broaden the scope of the "without prejudice" clause. The paragraph is intended to preserve not only the rules that strictly concern the applicability of immunity *ratione materiae*, but also related rules on process and procedure. In addition, the word "concerning" was replaced with "on" in order to more clearly define the scope of the paragraph, and in response to the suggestion that "concerning" may include rules not directly related to immunity *ratione personae*. The appropriate changes were also made in the Spanish version, that is, replacing "*relativas a la*" with "*sobre*", while the French version remained unchanged in that regard. In the French version, "*l'extinction*" was replaced with "*la cessation*", to align the text with the usage in other relevant instruments and in light of comments made by States on the terminology.[130]

Article 5
Scope of immunity *ratione materiae*

1. State officials enjoy immunity *ratione materiae* from the exercise of foreign criminal jurisdiction with respect to acts performed in an official capacity.

2. Immunity *ratione materiae* with respect to acts performed in an official capacity continues to subsist after the individuals concerned have ceased to be State officials.

3. Individuals who enjoyed immunity *ratione personae* in accordance with draft article 4, whose period of office has come to an end, continue to enjoy immunity with respect to acts performed in an official capacity during such period of office.

Commentary

(1) Draft article 5 defines the scope of immunity *ratione materiae*. The provision outlines the general regime applicable to this category of immunity and covers its personal, material and temporal elements.

(2) The lack of symmetry between the draft articles covering immunity *ratione personae* and those covering immunity *ratione materiae* underscores the fact that these two regimes are distinct. While the basis for immunity *ratione personae* is the nature of the office held by the State official, the basis for immunity *ratione materiae* is the nature of the act performed by the State official.

(3) Paragraph 1 addresses the personal and material elements together. The intent is to place emphasis on the material element and on the functional dimension of immunity *ratione materiae*, thus reflecting the fact that acts performed in an official capacity are central to this category of immunity.

(4) The purpose of paragraph 1 is to indicate that immunity *ratione materiae* applies exclusively to acts performed by State officials in an official capacity, as the concept was defined in draft article 2 (*b*).[131] Consequently, acts performed in a private capacity are excluded from this category of immunity, unlike immunity *ratione personae*, which applies

[129] This has been confirmed by international courts and tribunals, such as, in the decision of the European Court of Human Rights in *M.M. v. France*. Application No. 13303/21, Decision, 23 May 2024.

[130] See art. 39, para. 2, of the Vienna Convention on Diplomatic Relations.

[131] See, draft article 2 (*b*) and paragraphs (21)–(35) of the commentary thereto, as adopted by the Commission on first reading. *Official Records of the General Assembly, Seventy-seventh Session, Supplement No. 10* (A/77/10), paras. 68–69.

to both categories of acts. This is not altered by the deletion of the word "only", which was considered redundant.

(5) The expression "State officials", as used in this draft article, is to be understood in the sense given to it in draft article 2, subparagraph (*a*), namely that a State official is: "any individual who represents the State or who exercises State functions". In contrast to the situation with persons enjoying immunity *ratione personae*, the Commission did not consider it possible, in the present draft articles, to draw up a list of persons enjoying immunity *ratione materiae*. Rather, the persons in this category must be identified on a case-by-case basis, by applying the criteria set out in draft article 2, subparagraph (*a*), which highlight the existence of a link between the official and the State. The commentary to draft article 2, subparagraph (*a*), must be duly kept in mind for the purposes of the present draft article.[132]

(6) The material scope of immunity *ratione materiae* as set out in draft article 5, paragraph 1, does not prejudge the question of limitations or exceptions to immunity, which is addressed in draft article 7.

(7) In addition, attention must be drawn to the fact that paragraph 1 uses the expression "from the exercise of foreign criminal jurisdiction", as draft article 3 does to refer to persons enjoying immunity *ratione personae*. This expression illustrates the relationship between immunity and foreign criminal jurisdiction and emphasizes the essentially procedural nature of the immunity that comes into play in relation to the exercise of criminal jurisdiction with respect to a specific act.[133]

(8) Paragraph 2 refers to the temporal element of immunity *ratione materiae* by placing emphasis on the permanent character of such immunity, which continues to produce effects even when the official who has performed an act in an official capacity has ceased to be an official. Such characterization of immunity *ratione materiae* as permanent derives from the fact that its recognition is based on the nature of the act performed by the official, which remains unchanged regardless of the position held by the author of the act. Consequently, for the purposes of immunity *ratione materiae* it is irrelevant whether the official who invokes immunity holds such a position when immunity is claimed, or, conversely, has ceased to be a State official. In both cases, the act performed in an official capacity will continue to be such an act and the State official who performed the act may equally enjoy immunity whether or not he or she continues to be an official. The permanent character of immunity *ratione materiae* has already been recognized by the Commission in its work on diplomatic relations,[134] has not been challenged in practice and is generally accepted in the literature.[135]

(9) The Commission chose to define the temporal element of immunity *ratione materiae* by stating that such immunity "continues to subsist after the individuals concerned have ceased to be State officials", following the models in the 1961 Vienna Convention on Diplomatic Relations[136] and the 1946 Convention on the Privileges and Immunities of the

[132] See paragraphs (3)–(20) of the commentary to draft article 2, as adopted by the Commission on first reading. *Ibid.*

[133] See, above, paragraph (16) of the commentary to draft article 3.

[134] See, *a contrario sensu*, paragraph (19) of the commentary to draft article 2, paragraph 1 (*b*) (v), of the draft articles on jurisdictional immunities of States and their property, adopted by the Commission at its forty-third session: "The immunities *ratione personae*, unlike immunities *ratione materiae* which continue to survive after the termination of the official functions, will no longer be operative once the public offices are vacated or terminated" (*Yearbook … 1991*, vol. II (Part Two), p. 18).

[135] See Institute of International Law, resolution on "Immunities from jurisdiction and execution of Heads of State and of Government in international law", which sets out – *a contrario sensu* – the same position in its article 13, paragraphs 1 and 2 (*Yearbook of the Institute of International Law*, vol. 69 (Session of Vancouver, 2001), p. 743, at p. 753); and "Resolution on the immunity from jurisdiction of the State and of persons who act on behalf of the State in case of international crimes", art. III, paras. 1–2 (*ibid.*, vol. 73 (Session of Naples, 2009), p. 226, at p. 227). The resolutions are available from the website of the Institute: www.idi-iil.org, under "Resolutions".

[136] Article 39, paragraph 2, of the Convention provides: "When the functions of a person enjoying privileges and immunities have come to an end, such privileges and immunities shall normally cease at the moment when he leaves the country, or on expiry of a reasonable period in which to do so, but shall subsist until that time, even in case of armed conflict. However, with respect to acts performed

United Nations.[137] The expressions "continues to subsist" and "have ceased to be State officials" are based on those treaties. Furthermore, the Commission used the term "individuals" to reflect the definition of "State official" in draft article 2, subparagraph (*a*).[138]

(10) Lastly, it should be noted that, although paragraph 2 deals with the temporal element of immunity, the Commission considered it appropriate to include an explicit reference to acts performed in an official capacity, bearing in mind that such acts are central to the issue of immunity *ratione materiae.* The Commission also considered this was important to avoid an overly broad interpretation of the permanent character of this category of immunity, which should not be understood to apply to other acts.

(11) The purpose of paragraph 3 is to define the model of the relationship that exists between immunity *ratione materiae* and immunity *ratione personae*, on the basis that they are two distinct categories. As a result, draft article 5, paragraph 3, is closely related to draft article 4, paragraph 3, which also deals with that relationship, albeit in the form of a "without prejudice" clause. In conformity with that paragraph,[139] immunity *ratione materiae* also applies to former Heads of State, Heads of Government and Ministers for Foreign Affairs since they fall under the definition in draft article 2, subparagraph (*a*), of "State officials". The Commission does not consider it necessary to refer explicitly to those officials in the present draft article, because their enjoyment of immunity *ratione materiae* stems from the nature of acts performed in an official capacity.

(12) Pursuant to draft article 4, paragraph 1, immunity *ratione personae* has a temporal aspect, since the Commission considered that after the period of office of the Head of State, Head of Government or Minister for Foreign Affairs has ended, immunity *ratione personae* ceases. However, such "cessation … is without prejudice to the rules of international law on immunity *ratione materiae*" (draft article 4, paragraph 3). As the Commission stated in the commentary to that draft article, "it must be kept in mind that a Head of State, Head of Government or Minister for Foreign Affairs may, during his or her period of office, have carried out acts in an official capacity which do not lose that quality merely because the period of office has ended and may accordingly be covered by immunity *ratione materiae*". The Commission also stated: "This does not mean that immunity *ratione personae* is prolonged past the end of the period of office of persons enjoying such immunity, since that is not in line with paragraph 1 of the draft article. Nor does it mean that immunity *ratione personae* is transformed into a new form of immunity *ratione materiae* that applies automatically by virtue of paragraph 3. The Commission considers that the 'without prejudice' clause simply acknowledges the application of the rules on immunity *ratione materiae* to a former Head of State, Head of Government or Minister for Foreign Affairs".[140]

(13) This is precisely the situation referred to in paragraph 3 of draft article 5. The paragraph proceeds on the basis that, during their period of office, Heads of State, Heads of

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by such a person in the exercise of his functions as a member of the mission, immunity shall continue to subsist."

[137] Article IV, section 12, of the Convention provides: "In order to secure, for the representatives of Members to the principal and subsidiary organs of the United Nations and to conferences convened by the United Nations, complete freedom of speech and independence in the discharge of their duties, the immunity from legal process in respect of words spoken or written and all acts done by them in discharging their duties shall continue to be accorded, notwithstanding that the persons concerned are no longer the representatives of Members." The 1947 Convention on the Privileges and Immunities of the Specialized Agencies follows the same model; in article V, section 14, it provides: "In order to secure for the representatives of members of the specialized agencies at meetings convened by them complete freedom of speech and complete independence in the discharge of their duties, the immunity from legal process in respect of words spoken or written and all acts done by them in discharging their duties shall continue to be accorded, notwithstanding that the persons concerned are no longer engaged in the discharge of such duties."

[138] For the meaning of the term "individual", see paragraph (6) of the commentary to draft article 2, as adopted by the Commission on first reading (see footnote 131 above).

[139] This provision reads: "The cessation of immunity *ratione personae* is without prejudice to the rules of international law on immunity *ratione materiae*." Concerning the scope of this "without prejudice" clause, see above, paragraph (15) of the commentary to draft article 4.

[140] Paras. (14) and (15) of the commentary to draft article 4 above.

Government and Ministers for Foreign Affairs enjoy broad immunity known as immunity *ratione personae*, which, in practical terms, includes the same effects as immunity *ratione materiae*. This does not prevent these State officials, after their period of office has ended, from enjoying immunity *ratione materiae*. Consistent with amendments adopted to draft article 4, the expression "term of office" was amended to "period of office" in draft article 5.

(14) The requirements for immunity *ratione materiae* will need to be fulfilled, namely: that the act was performed by a State official (Head of State, Head of Government or Minister for Foreign Affairs in this specific case), in an official capacity and during his or her period of office. The purpose of draft article 5, paragraph 3, is precisely to state that immunity *ratione materiae* is applicable in such situations. The paragraph therefore complements draft article 4, paragraph 3, which the Commission said, "does not prejudge the content of the immunity *ratione materiae* regime".[141]

(15) The wording of paragraph 3 is modelled on the Vienna Convention on Diplomatic Relations (art. 39, para. 2) and the Convention on the Privileges and Immunities of the United Nations (art. IV, sect. 12), which govern situations similar to those covered in the paragraph in question, namely the situation of persons who enjoyed immunity *ratione personae*, after the end of their period of office, with respect to acts performed in an official capacity during such period of office. The Commission has used the expression "continue to enjoy immunity" in order to reflect the link between the moment when the act occurred and the moment when immunity is invoked. Like the treaties on which it is based, draft article 5, paragraph 3, does not qualify immunity, but confines itself to the use of the generic term "immunity". Yet although the term is used without any qualification whatsoever, the Commission understands that the term is used to refer to immunity *ratione materiae*, since it is only in this context that it is possible to take into consideration the acts of State officials performed in an official capacity after their period of office has ended.

[141] Para. (15) of the commentary to draft article 4 above.