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

**Statement of the Chairman of the Drafting Committee,
Mr. Dire Tladi**

7 June 2013

Mr. Chairman,

I am pleased today to present the second report of the Drafting Committee, for the sixty-fifth session of the Commission, on the topic “Immunity of State officials from foreign criminal jurisdiction”. The report is contained in document, A/CN.4/L.814. It contains 3 draft articles, one of which is contained in Part I, while the remaining two are in Part II.

At the current session, the Drafting Committee devoted 9 meetings – the 10th to 18th – between 24 May and 4 June 2013, to the consideration of the 6 draft articles referred to it by the Commission on 24 May 2013. Before addressing the details of the draft articles, I should like to pay tribute to the Special Rapporteur, Ms. Concepción Escobar Hernández, whose mastery of the subject, guidance and cooperation greatly facilitated the work of the Drafting Committee. I am also grateful to Mr. Mathias Forteau, our distinguished Rapporteur, who readily took up the task of chairing the Drafting Committee in my absence on 24 May and performed admirably. I also thank the members of the Drafting Committee for their active participation and valuable contributions to the successful outcome. I would also wish to thank the Secretariat for its valuable assistance.

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Mr. Chairman,

I shall introduce the report of the Drafting Committee in two Parts.

The first part of my introduction covers **Part One** of the draft articles.

Part One, entitled **“Introduction”**, currently has one draft article. The title to this Part as proposed by the Special Rapporteur remains unchanged.

The Draft Committee worked on the basis of the 6 draft articles referred to it by the Plenary, as proposed by the Special Rapporteur in her second report (document A/CN.4/661). In the course of its work, additional working papers were prepared for the Drafting Committee by the Special Rapporteur, bearing in mind the comments made in Plenary, as well as the exchange of views in the Drafting Committee.

Draft article 1: Scope of the present draft articles

Draft article 1 is entitled **“Scope of the present draft articles”**. This reflects a slight modification of the original proposed title as translated, as the word “present” has been inserted. This is in concordance with the original Spanish text.

The two paragraphs comprising the present draft article are a reflection of the substance of draft articles 1 and 2, as proposed by the Special Rapporteur in her second report.

I will start with **paragraph 1**, which previously constituted the sole paragraph of draft article 1. As has been understood from the beginning, the draft articles apply to the immunity of State officials from foreign criminal jurisdiction. Accordingly, they only address State officials, and their immunity in relation to criminal jurisdiction arising from the horizontal relationship between one State and another.

A number of modifications were made to the initial draft article as proposed by the Special Rapporteur.

First, in the light of the comments made in the plenary debate, there was early agreement to delete, from the beginning of the draft article, the phrase “Without prejudice to the provisions of draft article 2...”, it being viewed, in the main, as unnecessary.

Secondly, instead of “These draft articles deal with...”, the more familiar formulation “The present draft articles apply to...” has been used. This formulation has been employed most recently in the draft articles on the Expulsion of Aliens, adopted on first reading in 2012. It would also be recalled that the Commission used a similar formulation in its draft articles on Jurisdictional Immunities of States and their Property, which formed the basis for the adoption by the General Assembly of the 2004 United Nations Convention on Jurisdictional Immunities of States and their property.

Thirdly, following on comments in plenary, the qualifier “certain” in reference to “State officials” has been deleted, as it was considered unnecessary for the present purposes in a draft article concerning the Scope; “certain” was deleted in spite of a concern expressed that this would be construed as an attempt to broaden the scope of immunity. It was in the final analysis determined that whether certain officials or all State officials are covered is a matter that will be dealt with in specific draft articles elaborating upon the distinction between immunity *ratione personae* and immunity *ratione materiae* in the context of the present topic. Furthermore, in light of questions raised in Plenary, as well as by the Special Rapporteur regarding the precise meaning of the term “official” or “officials”, in particular the need for linguistic alignment so as convey the same understanding in all languages, the use of the term in the draft articles will be subject to further consideration and was annotated to that effect with an asterisk.

Whether or not the draft articles should apply to the immunity of State officials “from the exercise of the criminal jurisdiction by another State”, as proposed by the Special Rapporteur, or simply a more direct reference to the immunity of State officials “from the criminal jurisdiction of another State” without the phrase “the exercise of”, was a subject of detailed discussion in the Drafting Committee. There were those members who felt that retention of “in the exercise of” in the formulation was crucial, as immunity did not arise in a vacuum. It arose in the context of jurisdiction. It was recalled that in the *Arrest Warrant* case, (*I.C.J. Reports 2002*, p. 3, para. 46) the International Court of Justice stated that it was only where a State has jurisdiction under international law that a question may arise with respect to immunity from the exercise of that jurisdiction.

Moreover, it was contended, in the light of the *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France)*, Judgment, (I.C.J. Reports 2008, p. 177, para. 170), that an assessment of whether or not there has been an attack on the immunity of an official would have to involve some form of subjection of that official to a constraining act of authority, and this would only arise as part of the “exercise of” jurisdiction. It was also considered that the deletion of the phrase might convey the impression that the scope of immunity was being broadened.

Some other members viewed these aspects as relevant for consideration in subsequent draft articles as they involved substantive considerations that went beyond a draft article on the Scope of the draft articles, which was the sole focus of draft article 1. It was also recalled that even though jurisdiction and immunity are related concepts they remained distinct, as each was governed by a separate body of law. Additionally, the use of the phrase “in the exercise of” created an impression that the scope of the draft articles was being limited, when such was not the intention at least in relation to the draft article on scope. The language of article 31 of the Vienna Convention on Diplomatic Relations was invoked as apposite as it simply provided, in a more direct fashion, that immunity was enjoyed “from the jurisdiction of the receiving State”. Adopting a more direct approach, draft article 1 now reads that: “The present draft articles apply to the immunity of State officials* from the criminal jurisdiction of another State.” It is understood that subsequent draft articles will address further the substantive and procedural aspects of the topic.

I shall now turn to **paragraph 2 of draft article 1**. This paragraph reflects the substance of draft article 2 originally proposed by the Special Rapporteur, which was entitled “Immunities not included in the scope of the draft articles”.

The journey to arriving at the present formulation was a circuitous one. Ultimately, it was decided that a brief and succinct formulation should be presented as part of draft article 1. As will be recalled, comments to merge draft articles 1 and 2 were already made in plenary.

The Drafting Committee's consideration of the provision began on the basis of a draft proposal prepared by the Special Rapporteur in the light of the debate in the Commission. The revised text, entitled "Immunities not affected by the present draft articles", was drafted as a without prejudice clause to take into account comments made in the plenary.

Upon the consideration of the revised text, and before the Drafting Committee ultimately decided to merge the original draft article 2 with the present draft article 1, there was a discussion on whether the phrase "...not affected by..." in the title of the proposed Draft article 2 conveyed the same meaning as the phrase "...without prejudice to..." in the text of the article. Some members had doubts and suggested that "not affected..." in the title be replaced by the phrase "not addressed", or, alternatively, that the title could read "Immunities outside the scope of the present draft articles". Additionally, it was proposed that there should be some symmetry between the proposed draft article 2 and draft article 1. Whereas the draft articles "...apply to..." in draft article 1, it was considered appropriate that in dealing with aspects which were not prejudiced by the draft articles, draft article 2, should provide that: "The present draft articles do not apply to..." The decision to merge draft articles 1 and 2 meant that the Drafting Committee did not have to decide on the title of draft article 2 as originally proposed. Such a merger into a single article is not without precedent. For instance, the 1975 Vienna Convention on the Representation of States in their relations with International Organizations of a Universal Character (article 2) and the 1997 Convention on the Law of the Non-navigational Uses of International Watercourses (article 1) follow a similar approach. Moreover, while the symmetry was seen as helpful, some members cautioned against using formulations that seem to depart from language used by the Commission previously in analogous situations, unless there are convincing reasons for doing so. In this connection, article 3 of the United Nations Convention on Jurisdictional Immunities of States and their Property, which was elaborated on the basis of draft articles prepared by the Commission, was commended as a model formulation that could be employed in elaborating the draft article.

I shall now turn to the specifics of the Drafting Committee's elaboration of the formulation contained in paragraph 2. Drawing upon the original language of draft article 2 submitted by the Special Rapporteur in her second report, the working paper prepared for the Drafting Committee, sought to capture the sense that the draft articles were without prejudice to:

- (a) Immunities established in the context of diplomatic or consular relations or a special mission;
- (b) Immunities established in headquarters agreements or in treaties that govern diplomatic representation to international organizations or establish the privileges and immunities of international organizations and their officials or agents;
- (c) Immunities established under other international treaties, in particular the treaties applicable to the military staff of a State while they are abroad;
- (d) Immunities granted unilaterally by a State to the officials of another State, in particular while they are in its territory.

As for the first element, there was a broad measure of agreement with respect to immunities concerning diplomatic, consular relations and special missions. These regimes are well established. Both customary and conventional law address these aspects. In relation to the second element, there was also a broad measure of acceptance with regard to missions to international organizations or delegations to organs of international organizations or international conferences. While some members favoured a reference also to the immunity of international organizations and agents thereof, as liberally understood in the Advisory opinion on the *Reparation for Injuries Suffered in the Service of the United Nations* (*I.C.J. Reports 1949*, p. 177), some doubted the relevance of such reference considering, in their view, that the draft articles only deal with the immunity of State officials. It was pointed out however that the immunity of officials of international organizations was governed by a separate regime, which should not be prejudiced, and

that it was conceivable that situations may arise where State officials may be seconded to an international organization and the two regimes may apply. As regards the third element, there was recognition that there are other agreements between States that provide immunity from criminal jurisdiction, including those of a military nature relating to visiting and stationed armed forces, as well as economic, cultural and technical assistance and cooperation agreements. Indeed, it was noted that State practice in this area is widespread; for example, the immunity of visiting forces is well recognized under customary international law. Some members nevertheless expressed some reluctance at any attempts to seemingly broaden the scope of the “without prejudice” clause. While immunities granted by States unilaterally on an ad hoc basis – the fourth element – were recognised, there was a reticence by a majority of the Drafting Committee to address this practice specifically in any draft.

Let me address a number of issues. First, in the working paper prepared by the Special Rapporteur for the Drafting Committee, the reference to “immunities” was qualified by the word “criminal” in brackets; but this formulation was discarded quite quickly as the phrase “criminal immunities” was not thought to convey the same meaning as “immunity from criminal jurisdiction.” Also disregarded, in favour of the present more precise and concise formulation, was a proposal that the chapeau be reformulated to refer to “...the rules applicable to...” so as to read: “The present draft articles are without prejudice to the rules applicable to...”. This formulation, which was supported by some members but was not ultimately agreed upon, was intended to obviate the “presumption of immunity” arguably suggested by the phrase: “The present draft articles are without prejudice to...”.

Secondly, there were also views expressed preferring references in the text to “international law”. It was thought that referring to immunities under international law, or to immunities “recognized” or “established” by international law would appropriately convey that the without prejudice clause related only to immunities enjoyed under international law.

Thirdly, it may be noted that from the start of its discussions on the provision, there was a general inclination in the Drafting Committee to include the regimes dealing with: (a) diplomatic immunities, consular immunities, immunities in relation to special missions, as well as immunities concerning missions to international organizations, or delegations to organs of international organizations or to international conferences; (b) international organizations; and (c) other regimes, including those dealing with situations covered in particular by status of forces agreements and applicable customary international law. Nevertheless, the Drafting Committee devoted some time to the question of how to best draft the without prejudice language, in light of the particular relationship of the unprejudiced regimes with the subject of the present draft articles. Since the present draft articles deal with the immunity of individuals, there was a partiality towards casting the formulations in relation to the unprejudiced regimes in such a way that they also referred to individuals, while bearing in mind that the immunities enjoyed belong to the State and can be waived at any time by the State or States concerned. Some members nevertheless felt that the focus should be more on the source of the immunities than the beneficiaries of such immunity. It was considered, though, that there was no need to mention specifically in the text the Conventions to which the elements related.

In the course of further discussion, two options were presented by the Special Rapporteur. One option provided in greater detail the scope of the without prejudice clause, outlining that the present draft articles were without prejudice to the immunity from criminal jurisdiction: (a) enjoyed/recognized under international law by/as applicable to persons in relation to/connected with diplomatic immunities, consular immunities, immunities in relation to special missions, missions to international organizations, or delegations to organs of international organizations or to international conferences; (b) enjoyed/recognized under international law by/as applicable to agents of international organizations; and (c) enjoyed/recognized under international law by/as applicable to other persons, including by military forces of another State. At this stage, the element concerning immunities granted unilaterally by a State to the officials of another State, in particular while such officials were in its territory, had been deleted.

The other option was concise, collapsing the various elements into a single paragraph, but substantively reflecting the essence of the first option. It provided that:

“The present draft articles are without prejudice to the [existing] rules of international law governing the immunity from criminal jurisdiction in relation to diplomatic missions, consular posts, special missions, international organizations and military forces of a State.”

Even though the second option was ultimately considered to be too concise to allow for a proper understanding of the issues implicated by the provision, – for instance the simple reference to “international organization” sought to address a multitude of issues, – members of the Drafting Committee favoured it, for its simplicity, as the basis for further discussion. Members expressed preference for the deletion of the square bracketed word “[existing]” as it created temporal problems. It was also considered that the element of “enjoyed under international law by persons connected with” from the first option needed to be preserved and captured in the second preferred option, as the draft articles deal with the immunity concerning individuals. Some concern was also expressed regarding the exact scope of the reference to “military forces of a State” and it was suggested that there was need to qualify it by a reference to “special rules” relating to military forces of a States so that it is not interpreted as an exclusion clause. It was understood that the provision seeks to preserve the application of special regimes.

A further working paper was prepared by the Special Rapporteur, which provided that:

The present draft articles are without prejudice to the immunity from criminal jurisdiction enjoyed under international law by persons connected with diplomatic missions, consular posts, special missions, international organizations and military forces of a State.

For some members, this provision did not take into account other regimes that exist in the practice of States, such as agreements on economic, cultural and technical assistance. Accordingly, it was viewed essential to include other persons when covered by particular agreements. Some other members were, however, against any seeming further expansion of the provision. In the final analysis the following text, which now appears as paragraph 2, was agreed upon, even though some members expressed some reservations.

It is worth noting that draft paragraph 2 refers to “special rules of international law”. This is a term that the Commission has used in respect of article 55 of the articles on the responsibility of States for internationally wrongful acts. The commentary will explain further what is meant by persons connected with diplomatic missions, consular posts, special missions, international organizations and military forces of a State. An explanation will also be provided in the commentary with regard to the phrase “in particular”, which qualifies persons connected with diplomatic missions, consular posts, special missions, international organizations and military forces of a State. Some members attached importance to the practice that exists in relation to immunity from criminal jurisdiction in agreements on economic, cultural and technical assistance and cooperation. It is understood, however, that this category is exceptional in nature and it is not intended to broaden the scope of the paragraph.

I now invite you to turn to **Part II** entitled “**Immunity *ratione personae***”. This Part contains draft articles 3 and 4. The title to this Part as proposed by the Special Rapporteur remains unchanged.

Draft article 3: Persons enjoying immunity *ratione personae*

I will begin with draft article 3, entitled “**Persons enjoying immunity *ratione personae***”. The word “subjective” in the title as originally proposed for the draft article, “The subjective scope of immunity of *ratione personae*”, was viewed by some members to be confusing and obscure. A suggestion to use “beneficiaries” of immunity *ratione personae* was also considered to be imprecise. Found equally unsatisfactory were suggestions that the title should refer to persons “covered by immunity *ratione personae*” and “Persons covered by the present draft articles”. The Drafting Committee settled on the present title as it better captures the specific purpose of the draft article, namely the identification of persons who enjoy immunity *ratione personae*.

The present draft article largely reproduces the substance of draft article 4 proposed by the Special Rapporteur in her Second report. It will be recalled that the

initial formulation referred to “the exercise of criminal jurisdiction by States of which they are not nationals”. During the debate in Plenary, concern was expressed regarding the reference to nationality. In the view of the Drafting Committee, the *troika* enjoys immunity *ratione personae* not as a function of nationality, but as a function of being the holder of the office to which the draft article refers. The Drafting Committee thus decided to omit the phrase “of which they are not nationals”.

A proposal to refer to immunity from the exercise of criminal jurisdiction of “other States” was withdrawn once another proposal was made, as now reflected in the text, that the *troika* enjoy immunity *ratione personae* from the exercise of “foreign criminal jurisdiction”. This is language that has been used in draft article 1. The commentary would explain what is understood by “foreign criminal jurisdiction”. It essentially refers to the exercise of jurisdiction by another State. The relationship of that exercise in relation to “hybrid tribunals” will also be clarified.

Although the decisions to omit the reference to nationality and to insert the word “foreign” were the only substantive drafting changes to the draft article as originally proposed, the provisional adoption of draft article 3 was preceded by a detailed substantive discussion regarding the content of the draft article.

There was a proposal that sought to frame the draft article differently. It was suggested that the draft article should simply state that the draft articles “refer to Heads of State, Heads of Government or Ministers for Foreign Affairs in matters relating to immunity from criminal jurisdiction by other States”. This proposal did not generate support. This reformulation was premised on the notion that the word “enjoy” prejudged what it means to be accorded immunity *ratione personae*—a determination which, it was argued, should be reserved for a later draft article. In this regard, proposals were also made for the inclusion of a without prejudice or safeguard clause to indicate that the identification of the persons enjoying immunity in draft article 3 is without prejudice to other draft articles, including the future adoption of any exceptions to such immunity. In a similar vein, the addition of the phrase: “As provided in these articles” or “Consistent with these articles” was also proposed. While some members viewed these proposals as

reasonable, some other members doubted the viability of taking such a course of action at this stage. Ultimately, the Drafting Committee rejected any reformulation, additional language or safeguard clause on the basis that the text of the draft article as formulated merely identifies to whom immunity *ratione personae* applies, rather than what that immunity entails.

Concern regarding whether draft article 3 unduly prejudged later draft articles was also raised by some members with respect to the phrase “immunity from the exercise of”. As during the discussion on a similar point which arose in the context of draft article 1, some members expressed concern that the phrase may also prejudice the material scope of immunity from foreign criminal jurisdiction, which was to be elaborated upon in other draft articles. Some other members supported the inclusion of the phrase as it was thought to properly indicate that immunity from jurisdiction in this context refers only to the immunity from the exercise of jurisdiction, not from a State’s prescriptive jurisdiction. It was in particular recalled that in the *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening, (I.C.J. Reports 2012, para. 58)*, the International Court of Justice, in confirming the essentially procedural nature of the law of immunity, stated that it regulated the “exercise of jurisdiction in respect of particular conduct”. The Drafting Committee again discussed the possibility of including an asterisk or brackets to indicate the provisional nature of the language. Nevertheless, the Committee in the end decided to retain the phrase “the exercise of” without any qualifying symbol. The commentary would explicate further on these aspects.

You will also recall that there was significant debate in Plenary regarding whether the draft article proposed by the Special Rapporteur properly identified the the State officials who enjoy immunity *ratione personae* under international law. Several members indicated that, contrary to the draft article proposed by the Special Rapporteur, immunity *ratione personae* now extends beyond the *troika* as there was practice to that effect. On the other hand, some other members disputed whether Ministers for Foreign Affairs enjoy immunity *ratione personae* under customary international law. This matter was raised in the Drafting Committee. The commentary will provide examples of State practice and case law in respect of the *troika*. In provisionally adopting the text of draft

article 3 limited to the *troika*, it was recognized that other high-ranking officials of the State may benefit from immunity under rules of international law relating to special missions. The commentary to draft article 3 would clarify this point.

A reservation was nevertheless expressed regarding draft article 3 as a whole. It was contended that the Drafting Committee, as well as the Commission in Plenary, had not given adequate consideration to whether the list of persons in draft article 3 precisely reflected the state of international law on this subject. Such a point of view was opposed by some members.

Draft article 4: Scope of immunity *ratione personae*

I now draw your attention to draft article 4, entitled “**Scope of immunity *ratione personae***”. This draft article combines the substance of draft articles 5, entitled “**The material scope of immunity *ratione personae***” and draft article 6, entitled “**The temporal scope of immunity *ratione personae***”, as originally proposed by the Special Rapporteur in her second report.

It will be recalled that there were already in the plenary comments suggesting that draft articles 5 and 6 could be merged as there was an overlap in particular between what was contained in paragraph 2 of draft article 5 and draft article 6. Accordingly, following a brief discussion, the Special Rapporteur prepared a working paper which contained only the substance of paragraph 1 of draft article 5, as it was felt that paragraph 2 could be addressed in the context of the consideration of draft article 6. The new text only addressed the material scope of *immunity ratione personae* and read as follows:

The immunity *ratione personae* from the exercise of foreign criminal jurisdiction that is enjoyed by Heads of State, Heads of Government and Ministers for Foreign Affairs covers all acts, whether private or official, that are performed by such persons prior to or during their term of office.

The substance of this provision was generally found acceptable in the Drafting Committee, even though there was a general reservation registered regarding the

provision, with particular reference to persons covered, and whether they should be treated in the same manner.

The use of “the exercise of” foreign criminal jurisdiction in the text was found acceptable. The provision, however, elicited a difference of views in the Drafting Committee on how the “acts” of the persons in question should be characterized. It will be recalled that in the *Arrest Warrant* case (*I.C.J. Reports 2002*, p. 3, para. 55), the International Court of Justice said that no distinction could be drawn for purposes of immunity *ratione personae* between acts performed by a Minister for Foreign Affairs in an “official” capacity, and those claimed to have been performed in a “private capacity”. It also could not draw a distinction between acts performed before the person concerned assumed office as Minister for Foreign Affairs and acts committed during the period of office.

The question thus arose in the Drafting Committee whether the acts should be described as “private or official” or as “acts performed in an official or private capacity”, the latter being viewed as more faithful to the language of the Judgment. The fact that quotation marks are used to qualify “official” capacity and “private capacity” in the judgment also gave rise to comments as to whether the Drafting Committee could use terms that the Court itself had not defined and were left in quotation marks. This was compounded by the fact that analogous instruments, like the Vienna Convention on Diplomatic Relations provides, in article 38, that the immunity from jurisdiction and inviolability of a diplomatic agent is “in respect of official acts performed in the exercise of his functions”. Article 40 of the Convention on Special Missions has similar language in respect of the representatives of the sending State of the special mission and the members of the diplomatic staff.

It was felt that there would be value added to the provision if the acts in question were somehow qualified. However, a suggestion that immunity covered “all acts regardless of their nature” was considered by some members to be obscure and raising more questions than answers.

Comments were also made that the material scope of immunity *ratione personae* could best be captured if it was preceded by a description of its temporal scope. Accordingly, it was suggested that wording along the lines of paragraph 1 of draft article 6 could precede the paragraph that was proposed for the material scope.

While the substance of paragraph 2 of draft article 6 was generally considered to be useful in the overall scheme, a comment was made questioning its relevance to Part II of the draft articles. Various views were expressed regarding how it was formulated, in particular that it seemed to prejudge matters that bear on immunity *ratione materiae*. In this connection, there was a suggestion to have a brief without prejudice clause relating to immunity *ratione materiae*.

To advance the discussions further, a working paper was prepared to these ends by the Special Rapporteur, which read as follows:

1. Heads of State, Heads of Government and Ministers for Foreign Affairs enjoy immunity *ratione personae* only during their term of office.
2. The immunity *ratione personae* covers all acts, [whether private or official performed by][whether performed in a private or official capacity by] Heads of State, Heads of Government and Ministers for Foreign Affairs prior to or during their term of office.
3. The expiration of immunity *ratione personae* is without prejudice to the fact that a former Head of State, Head of Government or Minister for Foreign Affairs may, after leaving office, enjoy immunity *ratione materiae* in respect of official acts performed while in office.

or

3. The expiration of immunity *ratione personae* is without prejudice to the application of the rules of international law concerning immunity *ratione materiae*.

Paragraph 1 was generally viewed favourably. In view of the addition of a new paragraph 1, the commencement of paragraph 2 was simplified. It was considered unnecessary to repeat the phrase “from the exercise of foreign criminal jurisdiction”. A clear preference to closely track the language in the *Arrest Warrant* case tilted the discussion towards the formulation “acts whether in a private or official capacity”. There was also preference for the alternative in paragraph 3 that did not prejudge the outcome of discussions on immunity *ratione materiae*. The problematic nature of the terms

“official acts” proposed in the alternative was recalled, with a suggestion being made that an asterisk be employed to indicate the provisional usage of the term “official acts”.

The formulation in the present draft article 4 reflects the outcome of the discussions.

Paragraph 1 stresses the important point that immunity *ratione personae* is enjoyed only during the term of office of the holder.

The drafting of paragraph 2 has been further simplified. Instead of repeating that: “The immunity *ratione personae* covers all acts” it refers to the immunity in paragraph 1, by using the phrase “Such immunity *ratione personae* covers all acts...”. It was also considered to be better drafting to qualify all acts as “performed, whether in a private or official capacity,” rather than all acts “whether performed in a private or official capacity”. The commentary would explain that term “acts”, which was considered to be a better word for the purposes of the present draft articles than “conduct”, encompasses “omissions”. It will be recalled that the articles on the responsibility of States for internationally wrongful acts refer to an internationally wrongful “act” of a State when “conduct consisting of an action or omission” is attributable to that State.

Finally, to improve the drafting in paragraph 3, the phrase “The expiration of immunity” has been replaced by “The cessation of immunity...” .

Mr. Chairman, this completes my introduction of the draft articles provisionally adopted by the Drafting Committee.

Before I conclude my statement, however, allow me to report on the Drafting Committee’s consideration of draft article 2, on Definitions, which was also referred to it by the Commission. The draft article sought to group together concepts, definitions and terms that are to be understood in the elaboration of the present draft articles. The Special Rapporteur proposed for definition the terms (a) “criminal jurisdiction”, (b) “Immunity from foreign criminal jurisdiction”; (c) “Immunity *ratione personae*”; and (d) “Immunity

ratione materiae”, it being understood that further terms would be proposed as work on the topic progresses. Indeed, there were suggestions in the plenary, and as planned by the Special Rapporteur in paragraph 80 of the Second report, to define “official” and “official acts”. In the view the Special Rapporteur the definitions of immunity *ratione personae* and immunity *ratione materiae* were particularly useful as they constitute the essential pillars of the present work.

The Drafting Committee proceeded on the general understanding that the draft article on possible definitions was a work in progress and will be subject to further consideration in future. For the time being the draft article remains in the Drafting Committee and a rolling text will continue to be considered and developed.

The Drafting Committee engaged in a general exchange of views on the draft article. There was general recognition that there may be a need for a draft article on “Definitions” or on “Use of terms” for the purposes of the present draft articles. In the practice of the Commission, such types of articles have been prepared in the past. Some members, however, doubted the need to define the terms that the Special Rapporteur had proposed. It was for instance observed that the Vienna Convention on Diplomatic Relations, the Vienna Convention on Consular Relations and the Convention on Special Missions deal with criminal jurisdiction and immunity from criminal jurisdiction yet none of them has defined criminal jurisdiction. The point was however made that the peculiar nature of the present topic, which focuses on the immunity from foreign jurisdiction, may warrant a different approach.

It was also suggested that there was no need for any definition of immunity *ratione personae* and immunity *ratione materiae* as the content of these terms would be the subject of the current draft articles. Indeed, at the current session, the Commission has addressed the question of scope of immunity *ratione personae* and the persons who enjoy it. It was pointed out that, if need be, further definition could be provided for within a particular draft article. It was also suggested that any attempt to define immunity *ratione materiae* at the current stage would prejudice the consideration of matters of substance in respect of that immunity. The point was also made the definition of certain terms at this

time might foreclose any meaningful discussion of possible exceptions. Some members considered it useful to deal with immunity *ratione materiae*, and by defining that immunity there would be symmetry if immunity *ratione personae* was also defined.

In the event definitions were ultimately included for the purposes of the present topic, preference was expressed for a “Use of terms” draft article, rather than one entitled “Definitions”. Attention was also drawn to the usefulness, at the appropriate time, of drawing upon the provisions of paragraph 3 of article 2 of the United Nations Convention on Jurisdictional Immunities of States and their property, which provides that the use of terms would be without prejudice to the use of those terms or to the meanings which may be given to them in other international instruments or in the internal law of any State.

It was observed that there were aspects that were contained in the proposed definitions which could be used in the commentary or could form the substance of draft articles in future. This could be the case with respect to the question of inviolability, as some members suggested that it would need to be addressed. In view of the fact that immunity and inviolability are different concepts, some other members however expressed the need for caution, while others were opposed to the consideration of inviolability in the context of the present topic.

In addition to a general exchange of views, the Drafting Committee embarked on a preliminary exchange of views regarding the various definitions proposed by the Special Rapporteur. I refrain at this at this stage to address the details of the comments made on each proposed definition submitted by the Special Rapporteur. Suffice it to say that views in the Drafting Committee remained divided. Specific comments included suggestions on how the definitions might be improved, as well as alternative approaches to introducing the key concepts relevant for the topic. These proposals remain in the Drafting Committee for the time being and will be the subject of further reflection in its future deliberations. It is hoped that the discussions on these issues will assist the Special Rapporteur in her future consideration of the present topic.

Mr. Chairman,

This concludes my introduction of the second report of the Drafting Committee for the sixty-fifth session of the Commission. It is my sincere hope that the Plenary will be in a position to adopt the draft articles presented.

Thank you.