Translated from Russian

Comments of the Russian Federation on the draft articles on immunity of State officials from foreign criminal jurisdiction

In accordance with paragraph 6 of General Assembly resolution 77/103, the Russian Federation has the honour to provide comments on the draft articles on immunity of State officials from foreign criminal jurisdiction adopted on first reading by the International Law Commission at its seventy-third session.

The Russian Federation takes this opportunity to express its gratitude to the Special Rapporteurs Roman Anatolevich Kolodkin and Concepción Escobar Hernández, the Drafting Committee and the entire Commission for the work done on the topic of immunity. The reports of the Special Rapporteurs and the draft articles and the commentaries thereto have made an important contribution to the development of international law, clarifying the content of a number of international legal rules and reflecting their customary law character.

At the same time Russia believes that the draft articles require serious further analysis and refinement. In its current form, the text lacks a number of very important provisions and answers to a substantial number of questions arising in connection with the immunity of officials. Many of these questions are elaborated upon in the Commission's commentaries to the draft articles, but they fully deserve to be included directly in the text of the draft articles. Other questions are only outlined, without clear conclusions being provided; however, such conclusions need to be found and included in the draft text. Lastly, on a number of key questions, the Commission has, in the opinion of Russia, come to incorrect conclusions that are not consistent either with the objective content of current international law or with the needs of States for its development.

The main question among these is that of the so-called exceptions to immunity in respect of the most serious crimes under international law (draft article 7). Russia maintains that there are no such exceptions under customary international law and that such exceptions would carry a substantial risk of destabilizing international relations, without making any significant contribution to combating impunity. The attempt to "balance" draft article 7 with "procedural safeguards" cannot be considered adequate. Furthermore, as a result of this approach, the draft articles are overloaded with procedural provisions, while a number of important substantive legal issues are left aside.

Russia is also obliged to note that the draft articles have numerous technical flaws. The most significant of these are reflected in the comments set out below; however, Russia has chosen at this stage to refrain from a detailed editorial review of the draft articles in view of the large volume of substantive observations. Nonetheless, the volume of these observations and editorial shortcomings of the draft articles (and the commentaries thereto) demonstrate one thing: the Commission should carefully and in detail reconsider the draft articles in their entirety, taking into account the oral and written comments of States. No artificial deadlines should be established for the work on the topic (Russia has also expressed this wish in relation to other topics on the Commission's programme of work). The quality of the final product is far more important than the speed with which it is completed. The translation into Russian of the draft articles and the commentaries thereto also needs improvement.

The question of the final form of the Commission's work should be addressed after the refinement of the draft text. The draft articles as they stand, in the form of a draft international convention, cannot serve as the basis of such a convention.

Immunity of State officials from foreign criminal jurisdiction

Part One

Introduction

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.

[…]

The introductory provision set out in draft article 1, paragraph 1, does not in itself give rise to any observations. However, it has a practical meaning only if all the concepts contained in it – "immunity", "State officials", "criminal jurisdiction" – are clear to the reader (legal practitioner). Yet, of these concepts, only that of "State official" is defined in draft article 2 (Definitions).

According to paragraph (5) of the commentary to draft article 1, the Commission decided not to include in the draft articles definitions of the terms "criminal jurisdiction" and "immunity". The Russian Federation has previously expressed doubt as to whether it is possible or desirable to

formulate such definitions. However, in stating that position, Russia was assuming that the draft articles would indicate in some other way what was meant by the concepts in question. In particular, in what way do the draft articles distinguish criminal jurisdiction from other types of jurisdiction? What manifestations of criminal jurisdiction are precluded by immunity? In their current form, the draft articles do not provide answers to these questions. Yet they are by no means theoretical in nature.

"Criminal jurisdiction"

With regard to "criminal jurisdiction", it must be remembered that, in different States, different approaches are taken with regard to individual responsibility of natural persons for offences. It seems that it should be established in the draft articles or the commentaries thereto that immunity may exist not only in the context of acts that are formally placed in the category of "crimes" under national law, and not only in the context of procedures that are formally placed in the category of "criminal procedures", but also when holding an individual accountable for other acts and/or under other procedures that have a number of features in common with criminal prosecution for the commission of crimes.

For example, in the Russian Federation, in addition to the concept "crimes", which are covered by the Criminal Code and entail "criminal responsibility", there is also the concept of "administrative offences", which are covered by the Code of Administrative Offences and entail "administrative responsibility". In the administrative prosecution of an individual, there may be procedures and penalties that are comparable to those used in criminal proceedings. The Russian Federation believes that foreign officials may enjoy immunity from jurisdiction in respect of administrative offences, as provided in the Code of Administrative Offences itself.

There is a distinction in many national legal systems between different types of offences entailing individual responsibility and the corresponding procedures. Suffice it to point out the variety of terms used to denote crimes and other offences: "crimes" proper, "delicts" or "torts", "felonies", "misdemeanours", "contraventions", "infractions", and analogous concepts in other languages.

Moreover, in a number of States, "criminal jurisdiction" in the strict sense can be used only when a criminal case is brought before a court. In other States, including Russia, the concept of criminal proceedings also covers the acts of entities involved in the investigation of crimes, starting with the

institution of a criminal case by an official of the police or other law enforcement agency. It is obvious that the question of immunity may arise at the pretrial stage, which, accordingly, must be included in the concept of criminal jurisdiction for the purposes of the draft articles (see paragraph (7) of the commentary to draft article 8 and paragraph (5) of the commentary to draft article 9).

Thus, the Commission needs to find a way (in the text of the draft articles or in the commentaries thereto) to make clear to the reader where and how it draws the boundaries of the concept of criminal jurisdiction. The Special Rapporteur Ms. Escobar Hernández attempted to do so (A/CN.4/661, para. 42); the Commission's apparent inability to reach an agreed solution or produce an agreed text relating to this issue should not be a reason to abandon the task altogether.

"Immunity"

Similarly, as presented, the draft articles lack not only a definition but even a description of the concept of immunity. In the view of the Russian Federation, the draft text would benefit from the inclusion of a separate article establishing what forms of exercise of criminal jurisdiction are blocked by immunity. Both of the Commission's Special Rapporteurs examined this matter in detail (see A/CN.4/631, paras. 38–51, and A/CN.4/722, paras. 64–96). The Russian Federation favours an approach whereby immunity prevents the State exercising jurisdiction from taking steps to prevent a foreign official from performing his or her official functions (arrest, restriction of movement, summons to appear before a court or other body, freezing of bank accounts, etc.). On the other hand, steps that are not directed at a foreign official personally and do not prevent his or her activity (institution of criminal proceedings, evidence-gathering, questioning of witnesses, and inviting the official to voluntarily give testimony) cannot be considered violations of immunity. This approach is supported in particular by the judgment of the International Court of Justice in *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France),* in which the Court formulated the criterion "constraining act of authority" (*I.C.J. Reports 2008,* p. 177, at pp. 236-237, para. 170; see also para. (6) of the commentary to draft article 9).

Such a separate article on the concept of immunity could also provide for the following elements:

– The procedural nature of immunity (see paragraph (8) of the commentary to draft article 1; in the view of the Russian Federation, this characteristic is key to determining the nature of immunity, and it is incorrect to retain it only in the commentaries without including it directly in the text of the

draft articles);

– The principle that immunity is granted not for the personal benefit of officials but for the effective exercise of State functions (see paragraph (5) of the general commentary to the draft articles);

– Confirmation that immunity does not fully exempt an official from criminal responsibility or from the substantive rules of criminal law or, in cases in which the official is present in the territory of another State, from the obligation to comply with the laws and regulations of that State (see paragraph (8) of the commentary to draft article 1).

It could also be noted in the commentary to such an article that the words "*пользуются*", "enjoy", "*bénéficient*" and "*se benefician*" reflect prevailing usage and should not be interpreted as legitimizing some kind of benefit or pleasure that officials derive from immunity.

In addition, it could be clarified in the commentaries that the granting of immunity "for the effective exercise of State functions" means, in particular, the effort to protect an official from pressure from a foreign State in the form of a threat of criminal prosecution, and also from damage to his or her reputation that could arise from arbitrary accusations that he or she has committed crimes.

The presence of such a separate article containing a definition or detailed description of immunity would also make it possible to avoid certain technical issues that have arisen in connection with the draft articles (for example, the relationship between the concepts "immunity from jurisdiction" and "immunity from the exercise of jurisdiction" and the relationship between the "existence" and the "application" of immunity).

Article 1

Scope of the present draft articles

[…]

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

[…]

Draft article 1, paragraph 2, does not give rise to any observations.

The Russian Federation considers that military forces are mentioned in this paragraph by way of reference to international treaties governing the status of the military forces of a State that are lawfully located in the territory of another State (see paragraph (14) of the commentary to draft article 1). Accordingly, the paragraph does not concern the existence or absence of immunity from jurisdiction for the military forces of a State participating in armed conflict against another State that prosecutes them, for example, for the commission of war crimes. The Russian Federation supports the view, well established in international law, that combatants who have committed war crimes do not enjoy immunity from the jurisdiction of the adversary State. At the same time, this issue merits further study in the context of the definition of "official" (see the comments of the Russian Federation on draft article 2 below).

Article 1
Scope of the present draft articles
[…]
3. The present draft articles do not affect the rights and obligations of States Parties under international agreements establishing international criminal courts and tribunals as between the parties to those agreements.

The Russian Federation has stated on many occasions that it is against the inclusion in the draft articles of any separate rules relating to international criminal jurisdiction, and it continues to maintain that position. Russia is therefore opposed to draft article 1, paragraph 3, especially because, as currently drafted, it raises more questions than it answers.

In particular, it is difficult to accept that the relationship between the draft articles and obligations in the context of international criminal tribunals is formulated using a "without prejudice" construction. Such an approach would in fact mean giving the constituent instruments of international tribunals greater legal force than the rules set out in the draft articles. Yet it could equally well be argued that the development of the international criminal justice system should not in turn affect the immunity of State officials (at least officials of those States that do not participate in the international body in question).

Moreover, despite the criticism that has been voiced, the Commission has retained the wording

relating to “international agreements” establishing international courts. We still consider that wording infelicitous, if only because in practice international judicial bodies have not by any means been established solely on the basis of international agreements. Furthermore, the use of the word “agreements” itself appears to be a conscious rejection of the generally accepted term “treaties”, which requires convincing justification.

In its desire to “preserve the achievements of recent decades in the field of international criminal law” (paragraph (21) of the commentary to draft article 1), the Commission has lost sight of the really important practical issue that arises at the nexus of national criminal jurisdiction and the jurisdiction of international judicial bodies. It would seem necessary, in the commentaries, and perhaps also directly in the text of the draft articles, to include a provision that criminal procedure measures taken by the competent authorities of a State in respect of an official of another State in response to a request from an international justice body constitute a form of exercise of criminal jurisdiction by the first State and, accordingly, are covered by the rules on immunity. In other words, the obligations of a State in the context of the constituent treaty of an international justice body do not exempt that State from obligations to respect the immunity of officials of States that are not parties to that treaty.

Article 2

Definitions

For the purposes of the present draft articles:

(a) “State official” means any individual who represents the State or who exercises State functions, and refers to both current and former State officials;

[…]

The Russian Federation supports the inclusion in the draft articles of a separate article on definitions of terms and agrees that it is necessary to establish in that article definitions of “State official” and “act performed in an official capacity”. As mentioned above in its comments on draft article 1, Russia would not rule out the addition to this draft article of definitions of other terms, first and foremost the term “immunity”.

The text of draft article 2 (a) and (b) is generally acceptable.

With regard to subparagraph (a), the Russian Federation agrees with the choice of the English term

"State official" and the Russian term "*должностное лицо государства*". Russia notes the explanation in paragraph (18) of the commentary on the reasons for choosing particular terms to translate the concept into the other official languages. While it does not question the priority to be accorded to the speakers of each language in this regard, Russia would nonetheless suggest that the suitability of the word "*représentant*" (representative) in French be further assessed. This appears to potentially narrow the scope of the definition of the term "official": for example, a former official who is abroad on a private trip cannot in any way be a "*représentant*". It is also difficult to apply the word to lower-level officials, who nonetheless enjoy immunity. Finding clear equivalents of terms is important in part because there have been a number of controversial court decisions in French-speaking countries relating to immunity issues.

With regard to the content of the definition of the term "official", Russia suggests that the Commission further consider the possibility of reflecting in the text of the draft article the considerations currently set out in paragraphs (13) and (16) of the commentary. By analogy with article 4 of the 2001 articles on responsibility of States for internationally wrongful acts, the following wording could be added to the definition of "State official": "whether the individual exercises legislative, executive, judicial or any other functions, whatever position the individual holds in the organization of the State, and whatever his or her character as an official of the central government or of a territorial unit of the State" (see also A/CN.4/673, para. 144). This would remove possible doubts on the part of the legal practitioner as to whether any State officials do indeed enjoy immunity from foreign criminal jurisdiction.

Furthermore, Russia notes that there are a number of references in the commentaries to the draft articles to the possibility of a situation in which an official is not a national of the State that he or she serves (see paragraph (2) of the commentary to draft article 3 and paragraph (8) of the commentary to draft article 16). This point appears to be quite significant. An appropriate provision should be reflected either directly in the definition of the term "official" or in the commentary to draft article 2. It should also be emphasized in the commentary in that context that the rights of "the State of the official" are vested precisely in the State that the official serves or served and not the State of his or her nationality. At the same time, the State of nationality retains all the rights vested in it in connection with the official's nationality, including in the context of consular support and diplomatic protection.

Another question that should be addressed in the commentary is whether the concept "official"

covers military personnel, and where the line is drawn between combatants (who do not enjoy immunity in respect of war crimes committed during armed conflict) and military officials (for example, members of the staff or central apparatus of the Ministry of Defence who arguably enjoy immunity on an equal footing with officials of other State bodies).

It is also of interest whether the concept "official" covers members of parliaments and other collegial bodies if they do not have their own individual powers. In the view of the Russian Federation, in the event of an attempt to prosecute a member of a collegial body for a decision of that body and/or for a vote to adopt a decision of that body, the question of immunity should be considered in the same way as it is considered in other cases. This idea should preferably be reflected in the commentary to draft article 2.

Article 2

Definitions

For the purposes of the present draft articles:

[…]

(b) an "act performed in an official capacity" means any act performed by a State official in the exercise of State authority.

With regard to subparagraph (b), the Russian Federation supports the proposed formulation, which suggests that any act that a State official performs in the exercise of State authority is an act performed in an official capacity and is therefore covered by immunity. Russia notes that the words "in the exercise of State authority" are consistent with articles 5 to 9 of the 2001 articles on State responsibility, which refer to the "exercise [of] elements of governmental authority" as a criterion for the attribution of conduct to a State.

Russia supports the idea that the starting point for characterizing an act as having been performed in an official capacity is the attribution of that act to the State (see paragraph (24) and the beginning of paragraph (25) of the commentary to draft article 2). Russia also agrees that the question of immunity may arise only in the performance of an act by an official; consequently, an act that is attributed to a State but is performed by an individual who is not an official (see articles 8, 9, 10 and 11 of the articles on State responsibility) does not give rise to immunity.

However, the Russian Federation cannot agree with some of the assertions included in the

Commission's commentary to draft article 2. In particular, it is puzzled by the assertion in paragraph (25) of the commentary that acts performed by officials purely in their own interest are not considered acts performed in an official capacity. Furthermore, it cannot agree that immunity does not cover acts performed by officials in excess of their authority or in contravention of instructions. Russia sees no reason to depart in this context from the logic of article 7 of the articles on State responsibility, under which the fact that an act is *ultra vires* does not prevent the attribution of the act to the State. In attempting to remove such acts from the scope of the concept of acts performed in an official capacity, the Commission confuses the question of the "capacity" in which an individual acts with the motivation for his or her actions. The idea that an act of an official that is attributable to a State for the purposes of State responsibility is at the same time considered to have been performed in a private capacity for the purposes of the individual's responsibility appears to be no more than a legal fiction.

In the view of the Russian Federation, the question of whether an act was performed in the interest of the individual or of the State and whether it was within or in excess of the official's authority must be decided by the State that the official serves. In practice, it is to be expected that, if an act is performed against the interests of that State, the State will not invoke the immunity of its official. If the State chooses to claim immunity, it thereby establishes that the act was performed in an official capacity and assumes international responsibility for the act in question. It would be absurd to afford the State exercising jurisdiction the possibility of disputing such a claim by the State of the official. A possible exception could be clear cases of abuse – that is, situations in which the State claims the immunity of an official in respect of an act that was obviously outside the scope of State functions – but such situations would also require detailed justification and in any case should remain the exception rather than the rule.

This is important also because leaving the resolution of the matter to the State exercising jurisdiction opens the door to abuse by that State. For example, in paragraph (33) of the commentary to draft article 2 (and also in paragraphs (25) and (26) of the commentary to draft article 7), the Commission asserts that acts of corruption cannot be considered official acts. This approach is contrary not only to objective reality (an official is capable of committing acts of corruption precisely because he or she is an official, and in the absence of such official capacity an act of corruption would be impossible), but also to the very purpose of immunity: if acts of corruption are excluded from the scope of immunity, States will be able to exert pressure on foreign officials under the threat of accusing them of corruption. This would impede the independent

exercise by these officials of their official functions, in violation of the principle of the sovereign equality of States, which the rules on immunity are designed to safeguard. (This does not mean that the Russian Federation seeks to ensure impunity for its officials who have committed acts of corruption. Combating corruption is an important priority of the Russian Government. Russia believes that efforts to combat corruption should be carried out within the framework of the national law of each State and the international treaties in that area, and supports the expansion of international cooperation to combat corruption.) The same logic applies to other acts that are difficult to reconcile with contemporary ideas of proper conduct by the State and its officials, but that cannot be performed without being an official.

Part Two

Immunity *ratione personae*

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.

The Russian Federation supports this draft article, which establishes (absolute) personal immunity for the "troika" of senior State officials.

However, Russia suggests that the Commission revisit the question of which other officials holding comparable positions might enjoy absolute immunity. These are officials whose duties are closely connected with international cooperation and/or with fundamental issues of State sovereignty. In other words, the criterion for granting absolute immunity could be the high risk that, in the event of an attempt by a foreign State to exercise criminal jurisdiction over the individuals in question, there would be obstacles to the discharge by such individuals of their duties, with negative consequences for the sovereign equality of States (see A/CN.4/601, paras. 120 and 121).

In addition, attention should be paid to those officials who, while not formally the highest-ranking or second highest-ranking officials in the State, de facto occupy a comparable position in the national hierarchy. Examples could include the following offices, functions or situations: Vice-President (especially in a country in which there is no separate office of Head of Government); former Head of State (especially if he or she is granted special honoured status, such as "founder of the State"); heir to the throne (especially if he or she formally or actually performs the functions of

regent); supreme spiritual or religious leader (especially if he or she performs State leadership functions); leader of the ruling party (especially in a State in which the role of the ruling party is enshrined in law in some form); commander-in-chief of the armed forces; representative of the monarch (viceroy or governor-general); and leader of a provisional or transitional governing body. Individuals who have been elected to the office of Head of State but who have not yet taken office (and, similarly, the heir to the throne in the period after the death of the monarch and before the official accession to the throne), and also individuals temporarily performing the duties of a given office (for example, the speaker of parliament when serving as Acting President), form a special category.

The Russian Federation considers it appropriate to consider this question in such detail partly because, in the history of our country over the course of the twentieth century, there were prolonged periods in which an individual who was unquestionably the national leader and the most senior State figure did not formally occupy any State office. There is no doubt that such individuals enjoyed personal immunity from foreign criminal jurisdiction. The question is how to reflect that situation in the draft articles.

Similarly, in addition to the Minister for Foreign Affairs, a State may have an office of minister for particular aspects of international cooperation (foreign trade, cooperation with countries of the region, etc.) There are also examples of States in which the most senior official responsible for international affairs is not the Minister for Foreign Affairs but another individual to whom the Minister for Foreign Affairs is subordinate.

It would appear that this issue could be resolved either by recognizing the possibility of granting absolute immunity to individuals outside the “troika”, or by recognizing the troika itself as a flexible concept that does not have to be understood specifically as three individuals (after all, there are countries in which the functions of Head of State are performed by two or even three individuals, but which also have a Head of Government and a Minister for Foreign Affairs).

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

Draft article 4 does not give rise to any objections, on the understanding that the considerations set out above in relation to draft article 3 necessitate editorial clarifications in draft article 4.

In the context of this draft article, the Russian Federation suggests that the Commission consider further whether the scope of immunity *ratione personae* is essentially the same as the scope of immunity *ratione materiae*. In other words, are there procedural measures of the State exercising jurisdiction that would be permissible in respect of officials who enjoy immunity *ratione materiae* but impermissible in respect of individuals who enjoy immunity *ratione personae*? In the sixth report of the Special Rapporteur (A/CN.4/722, section II.C), Ms. Escobar Hernández attempted, for each type of procedural measure, to draw a distinction between the effects of immunity *ratione personae* and of immunity *ratione materiae*. However, the associated conclusions have been practically excluded from the text of the draft articles.

Paragraphs 1 and 2 of draft article 4 contain the expression “term of office”, which is not entirely apt. That wording implies some kind of predetermined period of time. Such an approach might be applicable, for example, to presidents, who are elected for a specific period. However, with monarchs and ministers for foreign affairs, for example, as a rule there is no predetermined “term of office”. Furthermore, the concept “term of office” creates unnecessary doubt as to the applicability of immunity to officials whose term of office has been terminated (or extended) in disputed circumstances. It would be more appropriate to use wording that refers not to the “term” but to the fact of being in office. These considerations also apply to the expression “term of office” in draft article 6, paragraph 3.

Part Three
Immunity *ratione materiae*
Article 5
Persons enjoying immunity *ratione materiae*

State officials acting as such enjoy immunity *ratione materiae* from the exercise of foreign criminal jurisdiction.

Article 6

Scope of immunity *ratione materiae*

1. State officials enjoy immunity *ratione materiae* only 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 term of office has come to an end, continue to enjoy immunity with respect to acts performed in an official capacity during such term of office.

The combined meaning of draft article 5 and draft article 6, paragraph 1, is that immunity exists only when an official (1) acts as such and (2) performs an act in an official capacity. These two criteria are formulated in such a way as to suggest that each of them must be fulfilled independently of the other. Yet an official "acts as such" only when he or she performs "acts in an official capacity". There is no discernible gap between these concepts. It is impossible to imagine an act in the performance of which an individual acted in an official capacity (under draft article 5) but which itself turned out not to have been performed in an official capacity (under draft article 6), and vice versa. The Russian Federation therefore considers that the two criteria in question should be reduced to one criterion, the appropriate place for which would be draft article 6, paragraph 1. In that case, it would be necessary to further assess the desirability, in principle, of retaining draft article 5.

Article 7

Crimes under international law in respect of which immunity *ratione materiae* shall not apply

1. Immunity *ratione materiae* from the exercise of foreign criminal jurisdiction shall not apply in respect of the following crimes under international law:

(a) crime of genocide;

(b) crimes against humanity;

(c) war crimes;

(d) crime of apartheid;

(e) torture;
(f) enforced disappearance.
2. For the purposes of the present draft article, the crimes under international law mentioned above are to be understood according to their definition in the treaties enumerated in the annex to the present draft articles.

The Russian Federation has repeatedly stated its position on this draft article. Draft article 7 does not reflect customary rules of international law. Nor does it constitute progressive development of international law in a desirable direction.

It is a matter of particular regret that the Commission adopted draft article 7 by vote. This circumstance itself demonstrates that the draft article constitutes neither codification of existing rules nor universally supported progressive development. This is also evidenced by the diversity of views of States in the Sixth Committee.

Russia fully supports the arguments of those members of the Commission who voted against draft article 7, as set out in paragraph (12) of the commentary. (Here, tribute should be paid to the Commission for the fact that, having adopted draft article 7 by vote, it considered it necessary to set out in detail in the commentary the position not only of the majority but also of the minority.)

It should be emphasized in particular that the examples of judicial decisions and legislative acts included in the commentary (paragraph (9) and footnotes 1012, 1013 and 1014) by no means demonstrate the existence of a “trend” towards recognition of exceptions to immunity:

– These decisions and laws come from a small number of States, almost exclusively Western States. In the remaining regions of the world there is no such “trend”; demonstrating this by means of examples of judicial decisions might be difficult, for the simple reason that, if the rules on immunity are correctly applied, a case does not usually reach the stage of a judicial decision at all. In the West, too, national judicial practice in this regard is inconsistent (see footnote 1015).

– All the cases presented involve the State concerned attempting not to recognize the immunity of foreign officials from its own jurisdiction. There is no more reason to consider these cases a “trend” towards exceptions to immunity than there is to consider them violations of the rules of international law on immunity. Judicial decisions and laws in which the State waived the immunity

of its own officials from foreign jurisdiction would carry significantly more weight.

In attempting to formulate and justify exceptions to immunity as ostensibly arising from the need for harmonized application of the system of international law as a whole, that is, in attempting to present these exceptions as a purely legal phenomenon, the Commission repeatedly makes essentially political and, moreover, inconsistent arguments, thereby illustrating the artificiality of the entire construct of exceptions:

– Specifically, the main argument in favour of exceptions is the fact that they concern the most serious crimes under international law, in respect of which the entire international community has an interest in preventing impunity. However, in paragraph (21) of the commentary, the Commission justifies its decision not to include the crime of aggression among those crimes in respect of which there is an exception to immunity on the basis of purely political considerations, contrary to the position of a number of members of the Commission, who have characterized the crime of aggression as the most serious of all international crimes. As a result, in the case of genocide, apartheid, torture, etc., the seriousness of the crime is considered by the Commission to be grounds for not recognizing immunity, whereas in the case of aggression it is grounds for recognizing it.

– The political considerations presented in the commentary in relation to the crime of aggression are also fully applicable to the other serious international crimes: an accusation against a foreign official of genocide, apartheid, torture and so on, has no less a “political dimension” than an accusation of aggression. In footnote 1031, it is recognized that the determination by a national court that another State has committed an act of aggression would violate the principle of the sovereign equality of States. The same can be said at least for genocide and apartheid, and indeed, in general, an attempt to prosecute a foreign official violates the sovereign equality of States. This is precisely where the phenomenon of immunity itself arises.

– The commentary contains no legal arguments that exceptions should not apply to the “troika” of senior officials. This conclusion, too, was obviously reached by the Commission for solely political reasons, which highlights the weakness of the legal argument about the integrity of the international legal system.

– In the commentary to paragraph 3 of draft article 14, the Commission acknowledges that the application of draft article 7 may have a significant impact on the political relations between States

(paragraph (15)) and that draft article 7 opens the door to "politically motivated or improper use of exceptions to immunity". On the basis of this argument (which in itself should be an argument against draft article 7), the Commission advances a purely political requirement: that the question of immunity be considered at "an appropriately high level". Yet immunity is a legal rather than a political category. The forum State should not be given the "right" to "grant" immunity to a foreign official, especially not on the basis of political considerations. However, in the commentary it is expressly stated that the determination should be made by "authorities [that] have sufficiently high-level decision-making power".

– In addition, in draft article 14, paragraph 3 (b) (ii), the application of exceptions to immunity is dependent on whether any other State is exercising jurisdiction over the same crime. Yet such a fact cannot have anything to do with the existence or absence of immunity. In paragraph (26) of the commentary to draft article 14, this approach is justified by the desire to avoid a "conflict between respect for immunity and establishment of criminal responsibility". In this way, a political factor is again brought to bear in resolving a legal issue.

The artificiality of the grounds for exceptions to immunity is also demonstrated by the fact that, in order to justify those grounds, the Commission attempts to present such crimes as torture, corruption and a number of others as acts performed in a private capacity. It is quite obvious that such crimes can be committed solely in the performance of duties of officials, which means that they are acts performed in an official capacity (see also above in the context of draft article 2 (b)).

The Russian Federation believes that attempts by some States to prosecute officials of other States for the commission of the most serious crimes under international law are the best illustration of the very raison d'être of immunity. All such cases have led to strained political relations between States, and not one of them can be seriously considered an important step towards the prevention of impunity. Charging a foreign official with a serious international crime is in itself an infringement of the sovereign equality of States. Such a charge also interferes with the normal exercise by the official of his or her duties, not least because of the reputational damage caused by the charge. Furthermore, allowing exceptions to immunity would mean giving unscrupulous States significant leeway to exert pressure on foreign officials under the threat of being accused of a serious crime. Lastly, there is no logic in prohibiting States from charging foreign officials with relatively minor offences if they are allowed to charge them with the most serious crimes.

The international community has yet to develop effective mechanisms to prevent impunity for the most serious crimes under international law. The practice of recent decades shows that neither so-called “universal jurisdiction” nor international criminal justice constitute such mechanisms. In many cases, attempts to exercise national or international jurisdiction in violation of the immunity of officials have served only to prolong conflicts, thereby only exacerbating people’s suffering.

It is impermissible for a State to commit wrongful acts that constitute crimes under international law. However, the Russian Federation believes that mechanisms of accountability for such acts should remain primarily in the realm of inter-State relations. The waiver by States of the immunity of their officials or the prosecution by States themselves of their own officials can only be welcomed. However, attempts by individual States to hold officials of foreign States individually criminally responsible without the consent of those States are a bad-faith and improper substitution for the international legal responsibility of the State.

On the basis of the foregoing, the Russian Federation insists on the deletion of draft article 7 from the draft articles.

This does not prevent individual States from unilaterally waiving the immunity of their officials, whether in connection with specific acts or in general, including on a reciprocal basis in relations with other States that take a similar decision. Such unilateral acts or bilateral arrangements cannot impose any obligations on third States or limit their rights to the immunity of their officials.

Lastly, paragraph (27) of the commentary to draft article 7 refers to the case in which a crime is committed by a foreign official who is present in the territory of the State exercising jurisdiction without the consent of that State. Russia agrees that such crimes are not covered by immunity and proposes that this be recorded in the draft articles, as suggested by both Special Rapporteurs.

Part Four

Procedural provisions and safeguards

Article 8

Application of Part Four

The procedural provisions and safeguards in the present Part shall be applicable in relation to any exercise of criminal jurisdiction by the forum State over an official of another State,

current or former, that concerns any of the draft articles contained in Part Two and Part Three of the present draft articles, including to the determination of whether immunity applies or does not apply under any of the present draft articles.

This draft article does not give rise to any fundamental concerns, although from the technical point of view it seems excessively “heavy”.

The concept “forum State” is used for the first time in the draft article. Russia invites the Commission to further assess the appropriateness of this term, including in view of the fact that the question of immunity arises long before a criminal case actually reaches the forum, i.e. the courts (see, for example, paragraph (5) of the commentary to draft article 11). In this draft article specifically, the word “forum” could be deleted altogether without any loss of meaning.

Article 9

Examination of immunity by the forum State

1. When the competent authorities of the forum State become aware that an official of another State may be affected by the exercise of its criminal jurisdiction, they shall examine the question of immunity without delay.

2. Without prejudice to paragraph 1, the competent authorities of the forum State shall always examine the question of immunity:

(a) before initiating criminal proceedings;

(b) before taking coercive measures that may affect an official of another State, including those that may affect any inviolability that the official may enjoy under international law.

The Russian Federation supports this draft article. In particular, the wording “when ... an official ... may be affected by the exercise of ... criminal jurisdiction” merits support: it places an obligation on the State exercising jurisdiction to examine the question of immunity at an early stage and does not limit the obligation to situations in which there is an intention to apply some kind of coercive measures to the foreign official. It seems that, for practical purposes, early examination of the question of immunity is in the interests of both the State exercising jurisdiction and the State of the official. It is this approach that avoids the unnecessary diplomatic friction that occurs when the question of immunity arises at an advanced stage of a criminal case.

However, the draft article, while referring to the “examination” of the question of immunity,

contains no provisions on the consequences of such examination. As a result, there remains a lack of clarity as to the difference between the "examination" of the question of immunity under draft article 9 and the "determination" of immunity under draft article 14, including whether the two procedures occur together (the "examination" serving as the basis for the "determination") or whether they can occur separately from each other. Thus the relationship between the "examination" and the "determination" of immunity, on the one hand, and the procedures under draft articles 10 to 13, on the other, also remains unclear: should the procedures under draft articles 10 to 13 take place at some point between "examination" and "determination", or are other options possible? Perhaps the best solution would be to combine draft articles 9 and 14 in a single draft article.

With regard to draft article 9, paragraph 2, the use of the expression "initiating criminal proceedings" in subparagraph (a) should be further considered, and, in general, the Commission should clarify what procedural stage is meant. Judging by the commentary (paragraph (10)), it is the referral of the case to court, the commencement of the judicial stage of proceedings. From the point of view of the Code of Criminal Procedure of the Russian Federation, this stage could correspond to one of the following stages of criminal proceedings: drafting of the indictment by the investigator, approval of the indictment by the procurator, or referral of the criminal case to court (at this point, according to the terminology of the Code of Criminal Procedure, "criminal proceedings" move from the stage of "pretrial proceedings" to the stage of "judicial proceedings").

However, the proposed wording "initiating criminal proceedings" could too easily be understood as synonymous with "instituting criminal proceedings" (see the phrase "institution of criminal proceedings" in paragraph (6) of the commentary, which in the Spanish text is rendered as "*incoación de una causa penal*"). The two English formulations are so close that they have been translated into Russian in the same way, although draft article 9, paragraph 2 (a), refers to a stage at which the question of immunity must be examined, whereas paragraph (6) of the commentary refers to a stage at which this is not required. Terminological clarity is needed here.

Article 10

Notification to the State of the official

1. Before the competent authorities of the forum State initiate criminal proceedings or take coercive measures that may affect an official of another State, the forum State shall notify

the State of the official of that circumstance. States shall consider establishing appropriate procedures to facilitate such notification.
2. The notification shall include, inter alia, the identity of the official, the grounds for the exercise of criminal jurisdiction and the competent authority to exercise jurisdiction.
3. The notification shall be provided through diplomatic channels or through any other means of communication accepted for that purpose by the States concerned, which may include those provided for in applicable international cooperation and mutual legal assistance treaties.

The Russian Federation agrees with the main thrust of this draft article, but believes that it needs further discussion.

In paragraph 1 of the draft article, the expression “initiate criminal proceedings” is apparently used in the same sense as in draft article 9, that is, referring to the commencement of the judicial stage of criminal proceedings. Russia suggests that the Commission further consider whether the State exercising jurisdiction is indeed required to notify the State of the official only at this stage of the proceedings. It would be more logical to provide that such an obligation arises at the same time as the obligation to “examine” the question of immunity within the meaning of draft article 9, paragraph 1, namely “when the competent authorities of the forum State become aware that an official of another State may be affected by the exercise of its criminal jurisdiction”.

Article 11

Invocation of immunity

1. A State may invoke the immunity of its official when it becomes aware that the criminal jurisdiction of another State could be or is being exercised over the official. Immunity should be invoked as soon as possible.
2. Immunity shall be invoked in writing, indicating the identity of and the position held by the official, and the grounds on which immunity is invoked.
3. Immunity may be invoked through diplomatic channels or through any other means of communication accepted for that purpose by the States concerned, which may include those provided for in applicable international cooperation and mutual legal assistance treaties.
4. The authorities before which immunity has been invoked shall immediately inform any other authorities concerned of that fact.

The Russian Federation supports the rule that immunity is invoked by the State. This reflects the nature of immunity, which is precisely for the benefit of the State and not the individual official.

In addition, it seems appropriate to provide explicitly in the draft articles that the official himself or herself is not entitled to "invoke" immunity (see paragraph (3) of the commentary). On the other hand, the draft articles should include a provision on how a possible declaration of immunity by an official should be treated (see A/CN.4/729, para. 55). It would probably be wrong to deny the legal consequences of such a declaration entirely (see A/CN.4/646, para. 15). Such a declaration by an official could be, for example, a reason to examine the question of immunity under draft article 9 and/or a reason to inform the State of the official under draft article 10. Moreover, it would be advisable for a State exercising jurisdiction confronted with such a declaration by a foreign official to refrain from acts that might irreversibly violate immunity.

The Commission's decision, set out in paragraph (4) of the commentary, not to identify which authorities are competent to invoke immunity is unconvincing. In certain practical circumstances, this may be important. For more on this, see below in the context of the waiver of immunity under draft article 12.

Other procedural elements that merit further consideration include the temporal element. On the one hand, draft article 11, paragraph 1, suggests that States invoke immunity "as soon as possible". On the other hand, according to paragraph (8) of the commentary, this does not preclude the invocation of immunity at any other time. It appears that such an approach actually allows the State of the official to wait for a long time (including when it has already been notified of the exercise of jurisdiction by a foreign State in respect of the official) and to take a decision to invoke immunity only at a late stage of criminal proceedings, including on the basis of the progress of the proceedings and the expected outcome. One would think such a tactic would be improper. There is reason to believe that, if the State of the official did not invoke immunity in a situation in which it had all the necessary prerequisites for doing so and had been duly notified, that fact might be decisive for concluding that the official did not have immunity. This issue needs further analysis in the general context of the relationship between the legal consequences of notification under draft article 10, invocation or non-invocation of immunity under draft article 11, and waiver or non-waiver of immunity under draft article 12.

The temporal element is also related to the question of whether the State of the official may claim

the official's immunity in respect of a particular act even before another State has attempted to exercise jurisdiction over the official. This probably cannot be ruled out completely. However, the legal consequences of such a claim should be examined: for example, the State exercising jurisdiction in such a situation should make a presumption of immunity but should be able to further assess the existence of grounds for immunity and/or request confirmation of immunity from the State of the official.

Lastly, the main question is: is it necessary to invoke immunity? In other words, are there circumstances in which the forum State is obliged to respect immunity even if it is not invoked? There is reason to believe so (the Commission confirms this in paragraph (10) of the commentary to draft article 14). One example is situations in which the grounds for immunity are obvious but the State of the official clearly had no way of knowing of another State's intention to exercise jurisdiction. This should be provided for in the draft articles.

Article 12

Waiver of immunity

1. The immunity of a State official from foreign criminal jurisdiction may be waived by the State of the official.
2. Waiver of immunity must always be express and in writing.
3. Waiver of immunity may be communicated through diplomatic channels or through any other means of communication accepted for that purpose by the States concerned, which may include those provided for in applicable international cooperation and mutual legal assistance treaties.
4. The authorities to which the waiver has been communicated shall immediately inform any other authorities concerned that immunity has been waived.
5. Waiver of immunity is irrevocable.

As with draft article 11, the Russian Federation supports the main thrust of draft article 12.

However, like invocation of immunity, in relation to waiver it is necessary to consider what the legal consequences of a "waiver" of immunity declared by the official himself or herself are. Such a "waiver" may take various forms: the official may state, for example, that he or she is "ready to stand trial to defend his or her good name" or "was acting in his or her private capacity and accepts full responsibility"; an official may voluntarily surrender to the authorities of the State exercising

jurisdiction, irrespective of the objections of his or her State. It is necessary to consider, and indicate at least in the commentary to draft article 12, what action the State exercising jurisdiction might take in such a situation. At a minimum, it appears that in this case immunity cannot be applied without an express declaration by the State of the official that immunity is being invoked.

In addition, as with invocation of immunity, it is necessary to consider which authorities are entitled to waive immunity. The Vienna Convention on Diplomatic Relations and the Vienna Convention on Consular Relations do not specify such authorities, and in the commentaries to the respective draft articles, the Commission indicated that a waiver of immunity should, as a rule, be declared by the head of the diplomatic mission or consular post concerned (see A/77/10, footnote 1082). In the case of these Conventions, such an approach is logical, since they refer to the immunities of embassy and consular staff, that is, subordinates of the ambassador and the consul general. The draft articles under consideration, on the other hand, deal with a very broad range of officials. Therefore, the Commission's decision not to identify, at least in general terms, which authorities are entitled to declare a waiver of immunity (paragraph (5) of the commentary) is unconvincing. It is easy to imagine disagreements between the various authorities of the State of the official on the question of waiving immunity (for example, the attorney general or the supreme court may consider it right to waive immunity, whereas the Ministry of Foreign Affairs or the State authority in which the official serves may be against it; another possibility is disagreement between branches of government or between political forces after a change of power, especially if it has occurred in an unconstitutional manner).

The following minimum requirements should apply here:

– When doubts arise as to the authority of the body declaring the waiver of immunity (including when conflicting notifications in that regard are received by the State exercising jurisdiction), it must be assumed that immunity has not been waived;

– A notification from one of the individuals authorized to represent a State in international relations (the "troika"), or from the ambassador of the State of the official in the State exercising jurisdiction, carries more weight than a notification from any other representative;

– In particular, if a representative of the State of the official provided notification of a waiver of immunity and then a member of the troika or the ambassador stated that the first representative had

not been authorized to do so, it should be assumed that immunity had not been waived.

In this context, the appropriateness of the provision in draft article 12, paragraph 3, on the use of "other means of communication" besides diplomatic channels to communicate a waiver of immunity also merits further consideration.

With regard to draft article 12, paragraph 2, Russia supports the rule that waiver must be "express". However, it seems appropriate to further consider the situation in which invocation of immunity is called for (for example, a foreign State seeks to exercise jurisdiction over a widely known act of a widely known official) but the State clearly (albeit tacitly, through inaction) refrains from invoking immunity. Does such conduct have legal consequences? Should it be considered a waiver of immunity, and how does this relate to the requirement that a waiver be in writing? Does such conduct affect the possibility of invoking immunity at later stages of proceedings (see above in the context of draft article 11)?

Paragraph (11) of the commentary to draft article 12 contains the valid assertion that a waiver may be partial. This should be established directly in the text of the draft article. Moreover, Russia believes that a waiver may be "partial" not only with reference to substance (i.e. in respect of certain acts of the official but not others), but also with reference to procedure. For example, the State of the official may waive immunity in respect of the official's appearance in court, but not in respect of his or her detention.

Article 13

Requests for information

1. The forum State may request from the State of the official any information that it considers relevant in order to decide whether immunity applies or not.
2. The State of the official may request from the forum State any information that it considers relevant in order to decide on the invocation or the waiver of immunity.
3. Information may be requested through diplomatic channels or through any other means of communication accepted for that purpose by the States concerned, which may include those provided for in applicable international cooperation and mutual legal assistance treaties.
4. The requested State shall consider any request for information in good faith.

Draft article 13 does not give rise to any observations.

Article 14

Determination of immunity

1. A determination of the immunity of a State official from the foreign criminal jurisdiction shall be made by the competent authorities of the forum State according to its law and procedures and in conformity with the applicable rules of international law.

2. In making a determination about immunity, such competent authorities shall take into account in particular:

(a) whether the forum State has made the notification provided for in draft article 10;

(b) whether the State of the official has invoked or waived immunity;

(c) any other relevant information provided by the authorities of the State of the official;

(d) any other relevant information provided by other authorities of the forum State; and

(e) any other relevant information from other sources.

[…]

The considerations set out above in the context of draft article 9 apply to this draft article: the relationship between "examination" and "determination" of immunity needs to be clarified, and perhaps draft articles 9 and 14 should be combined in a single draft article.

With regard to the "determination" of immunity, draft article 14 gives the impression that the authorities of the State exercising jurisdiction have the last word on the determination of immunity. Moreover, from the current wording, it would seem as if any decision of that State, if made on the basis of all the available information, is invariably legitimate.

In other words, the draft article is based on the assumption that the competent authority of the State exercising jurisdiction decides whether immunity exists or not. However, that is incorrect. Immunity is determined by international law and depends on the status of the official and the nature of his or her act. The competent authority of the State exercising jurisdiction merely records that status, the nature of the act and the position of the State of the official. It should not be granted an independent right, for example, to assess, in place of the State of the official, whether the act was performed in an official capacity.

In paragraph (1) of the commentary to draft article 14, the Commission characterizes the draft

article as “one of the most fundamental procedural safeguards”. However, in fact, by allowing the State exercising jurisdiction to “determine” immunity and by formulating, in draft article 14, paragraph 2, the criteria (factors) to be taken into account in such “determination”, the Commission creates conditions for the non-application of immunity in violation of international law. In fact, the competent authority of the State exercising jurisdiction is provided with a set of arguments (essentially pretexts) justifying the non-application of immunity. Yet it is clear that the existence or absence of immunity cannot depend on the existence or absence of sufficient information on the part of the State exercising jurisdiction, the existence or absence of notification under draft article 10 or other such factors.

In view of the foregoing, the Russian Federation considers it necessary to make it clear in draft article 14 that the rules on the “determination” of immunity provided for in the draft article are purely procedural and, moreover, recommendatory in nature. This applies both to the “determination” itself (it is by nature a statement of fact rather than a decision) and to the factors that are to be taken into account under draft article 14, paragraph 2. It is necessary to distinguish between, on the one hand, the existence/absence of immunity as an objective reality arising under international law from the status of the official and the nature of the act performed by him or her and, on the other hand, the application/non-application of immunity by the competent authorities of the State exercising jurisdiction as a procedural decision taken in the light of the available information. In addition, it would be appropriate to include a provision stating that the decision on whether or not to apply immunity may be reviewed at subsequent stages of the process, if new information is received.

If a “determination” of the absence of immunity by the State exercising jurisdiction contravenes applicable rules of international law, this constitutes a wrongful act of the State and entails international legal responsibility. This needs to be established at least in the commentary to the draft article.

Article 14

Determination of immunity

[…]

3. When the forum State is considering the application of draft article 7 in making the determination of immunity:

(a) the authorities making the determination shall be at an appropriately high level;
(b) in addition to what is provided in paragraph 2, the competent authorities shall:
(i) assure themselves that there are substantial grounds to believe that the official committed any of the crimes under international law listed in draft article 7;
(ii) give consideration to any request or notification by another authority, court or tribunal regarding its exercise of or intention to exercise criminal jurisdiction over the official.
[…]

The fundamental position of Russia that draft article 7 should be deleted extends to draft article 14, paragraph 3. A number of specific observations on this paragraph are made above in the context of draft article 7.

Article 14
Determination of immunity
[…]
4. The competent authorities of the forum State shall always determine immunity:
(a) before initiating criminal proceedings;
(b) before taking coercive measures that may affect the official, including those that may affect any inviolability that the official may enjoy under international law. This sub-paragraph does not prevent the adoption or continuance of measures the absence of which would preclude subsequent criminal proceedings against the official.
[…]

The last sentence of paragraph 4 (b) significantly undermines the meaning of immunity. In effect, it legitimizes the arrest of an individual who potentially enjoys immunity, pending final clarification of whether or not he or she enjoys immunity. Such an approach opens the door to the abuse of the exercise of jurisdiction in order to exert pressure on a foreign official or on his or her State.

It seems that this provision should, at a minimum, be limited to situations in which the competent authorities have prima facie compelling grounds to presume that an individual does not enjoy immunity, as well as to cases in which coercive measures are necessary to suppress a violent crime.

The considerations set out above in the context of draft article 9 apply to the stages of proceedings

referred to in paragraph 4 (a) and (b).

Article 14

Determination of immunity

[…]

5. Any determination that an official of another State does not enjoy immunity shall be open to challenge through judicial proceedings. This provision is without prejudice to other challenges to any determination about immunity that may be brought under the applicable law of the forum State.

This provision also needs further analysis, taking into account the fact that the State exercising jurisdiction should not be granted the independent right to decide whether an individual enjoys immunity. It is formulated in such a way as to suggest that the State of the official or the official himself or herself, faced with a decision that he or she does not have immunity, is forced to seek the reversal of that decision in the courts of the State exercising jurisdiction. Yet that procedure itself would mean submission to the jurisdiction of that State. However, the relationship between two States in respect of whether or not an official of one of those States has immunity from the jurisdiction of the other State should remain in the inter-State realm.

It would seem more appropriate for this provision to be limited to a general statement that it is for the State exercising jurisdiction to decide in its procedural laws whether and how such decisions may be appealed. This does not negate the understanding that, if a decision of a higher court is contrary to international law, it constitutes a wrongful act of a State.

Article 15

Transfer of the criminal proceedings

1. The competent authorities of the forum State may, acting *proprio motu* or at the request of the State of the official, offer to transfer the criminal proceedings to the State of the official.

2. The forum State shall consider in good faith a request for transfer of the criminal proceedings. Such transfer shall only take place if the State of the official agrees to submit the case to its competent authorities for the purpose of prosecution.

3. Once a transfer has been agreed, the forum State shall suspend its criminal proceedings,

without prejudice to the adoption or continuance of measures the absence of which would preclude subsequent criminal proceedings against the official.
4. The forum State may resume its criminal proceedings if, after the transfer, the State of the official does not promptly and in good faith submit the case to its competent authorities for the purpose of prosecution.
5. The present draft article is without prejudice to any other obligations of the forum State or the State of the official under international law.

The requirement in draft article 15, paragraph 2 – that the State of the official must agree to prosecute the official in order for the proceedings to be transferred to that State – seems excessive. It would seem more proportionate and appropriate to require the consent of the State of the official to a legal assessment of the official's act in terms of whether or not there are grounds for prosecution. This logic is generally reflected in paragraph (12) of the commentary, according to which the transfer of proceedings does not mean that the State of the official is obliged to prosecute the official. The current wording of paragraph 2, however, gives the impression that the refusal by the State of the official to prosecute the official legitimizes the exercise of jurisdiction by the forum State, that is, equates to a waiver of immunity.

In general, it is unclear how draft article 15 relates to standard treaties on legal assistance. It might be better to limit the provision to a brief article to the effect that the present draft articles do not preclude the implementation of treaties on legal assistance that provide for the possibility of transferring criminal cases.

The considerations on coercive measures set out above in the context of draft article 14, paragraph 4 (b), apply to paragraph 3.

Article 16

Fair treatment of the State official

1. An official of another State over whom the criminal jurisdiction of the forum State is exercised or could be exercised shall be guaranteed fair treatment, including a fair trial, and full protection of his or her rights and procedural guarantees under applicable national and international law, including human rights law and international humanitarian law.
2. Any such official who is in prison, custody or detention in the forum State shall be

entitled:
(a) to communicate without delay with the nearest appropriate representative of the State of the official;
(b) to be visited by a representative of that State; and
(c) to be informed without delay of his or her rights under this paragraph.
3. The rights referred to in paragraph 2 shall be exercised in conformity with the laws and regulations of the forum State, subject to the proviso that the said laws and regulations must enable full effect to be given to the purpose for which the rights referred to in paragraph 2 are intended.

It is hard to argue with the content of this draft article, but the appropriateness of its placement in the draft text is questionable. To a large extent, it reproduces obligations already incumbent on the State exercising jurisdiction on the basis of international rules on human rights and consular relations. It is not clear why they should be reproduced in the draft articles under consideration, especially on a selective basis.

For example, if it is specifically enshrined in draft article 16 that an official is entitled to a fair trial, it gives the impression that there should be a "fairer" trial for an official than for an "ordinary person". On the other hand, given this approach, it is unclear why the draft article does not directly stipulate that the use of torture, discrimination on ethnic grounds, etc., against an official are impermissible.

It seems that the draft article should generally indicate that the draft articles are without prejudice to the obligations of States in the field of human rights and consular relations. Apart from that, it would be possible to limit the draft article to those provisions that specifically govern the relevant relations involving officials:

– The right to communicate with a representative of the official's own State (so that the State of the official is made aware of the situation and can promptly claim immunity);

– The right of the State of the official to provide consular-like support, even if the official is not its national.

Article 17

Consultations

The forum State and the State of the official shall consult, as appropriate, at the request of either of them, on matters relating to the immunity of an official covered by the present draft articles.

We have no observations on draft article 17.

Article 18

Settlement of disputes

1. In the event of a dispute concerning the interpretation or application of the present draft articles, the forum State and the State of the official shall seek a solution by negotiation or other peaceful means of their own choice.

2. If a mutually acceptable solution cannot be reached within a reasonable time, the dispute shall, at the request of either the forum State or the State of the official, be submitted to the International Court of Justice, unless both States have agreed to submit the dispute to arbitration or to any other means of settlement entailing a binding decision.

The Russian Federation believes that consideration of this draft article is premature. It will make sense only if a decision is taken to develop a convention on the immunity of officials.

Annex

List of treaties referred to in draft article 7, paragraph 2

[…]

Given the fundamental position of the Russian Federation on the deletion of draft article 7, comments on the annex seem unnecessary.