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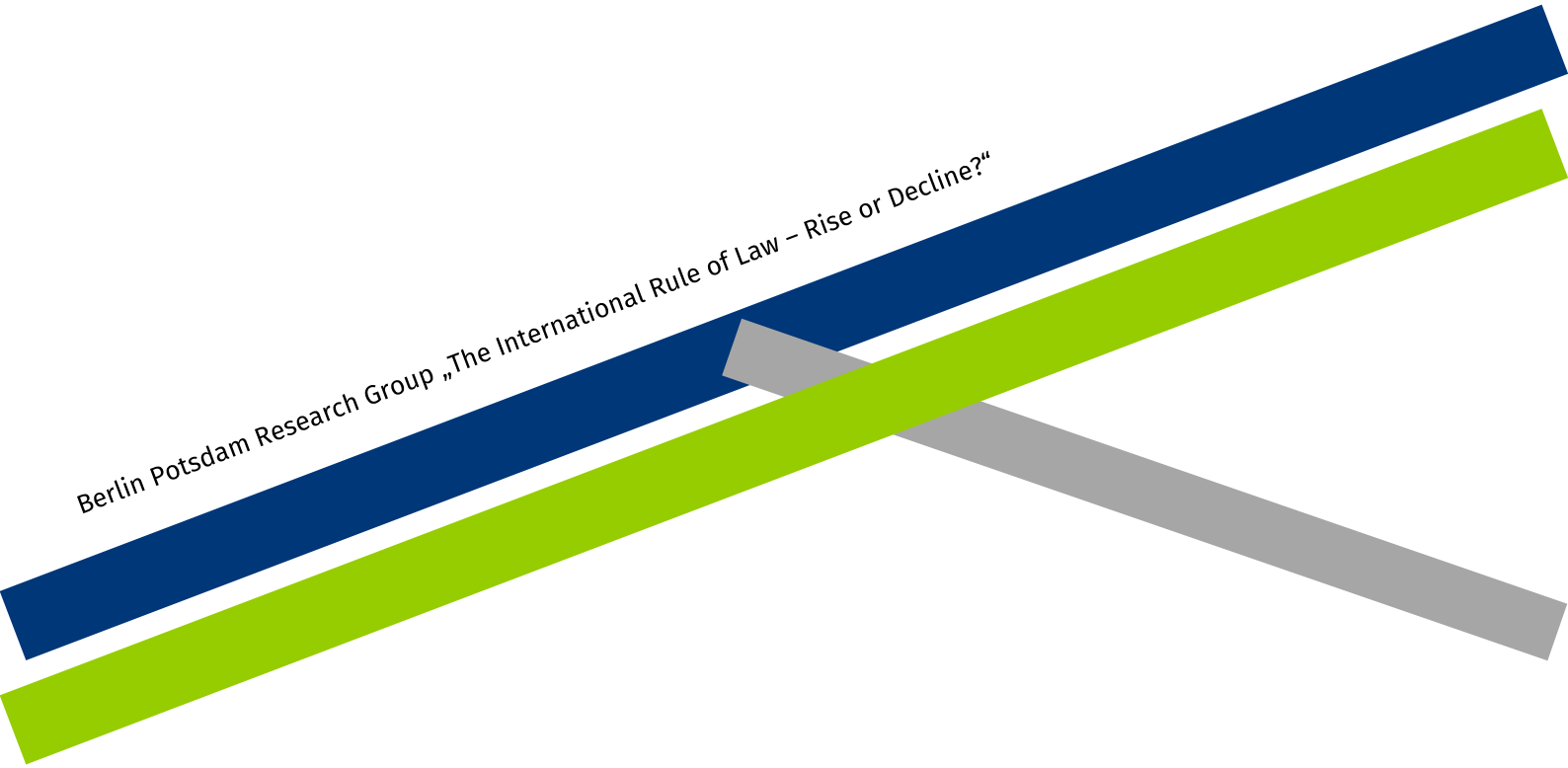
Isabel Walther

The Current Work of the International Law Commission on Immunity of State Officials from Foreign Criminal Jurisdiction – Comments on the Procedural Safeguards Provisionally Adopted in 2021



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Thielallee 69
14195 Berlin

info@kfg-intlaw.de
+49 (0)30 838-61521
www.kfg-intlaw.de

The Current Work of the International Law Commission on Immunity of State Officials from Foreign Criminal Jurisdiction

– Comments on the Procedural Safeguards Provisionally Adopted in 2021

Isabel Walther[1]

Abstract:

Four years after the much-discussed voting on limitations and exceptions to functional immunity of State officials (draft article 7) by the International Law Commission (ILC), the ILC has provisionally adopted new draft articles at its session in 2021. These proposals set out procedural safeguards of immunity of State officials. Such procedural safeguards are essential for a balanced approach to the topic of immunity of State officials from foreign criminal jurisdiction *which will help to overcome divisions on the matter in the international community and within the ILC. This may pave the way for an international treaty on immunity of State officials which would provide crucial guidance for practitioners dealing with cases of immunity of State officials. However, while the type and structure of the procedural safeguards provisionally adopted by the ILC are helpful, some key aspects remain unclear and should be refined.*

[1] Doctoral candidate, Humboldt University Berlin. During the 71st session of the International Law Commission (2019), the author was an assitant to Professor Georg Nolte (now Judge at the International Court of Justice), in his capacity as a member of the Commission. The author is grateful for discussions of her paper within the Berlin Potsdam Research Group and a Potsdam based doctoral colloquium, as well as to Janina Barkholdt, Associate Legal Officer at the International Court of Justice, and Jan Philipp Cludius, Humboldt University, for their help during the preparation of this paper.

Contents:

1. What are Procedural Safeguards of Immunity and Why do They Matter?

The ILC commenced its work on the topic "Immunity of State officials from foreign criminal jurisdiction" in 2007[2] which constitutes the longest currently running topic on the agenda of the ILC.[3] The ILC project, which was first guided by Roman Kolodkin and later by Concepción Escobar Hernández as Special Rapporteur, addresses two forms of immunity of State officials: Firstly, immunity *ratione personae* which is linked to the position held by Heads of State, Heads of Government and Ministers for Foreign Affairs and which covers all acts performed (whether in a private or official capacity) during or prior to their term of office.[4] Secondly, immunity *ratione materiae* which is limited to acts performed in an official capacity by a State official of any rank and which (contrary to immunity *ratione personae*) State officials continue to enjoy after their term of office.[5]

The ILC project fulfills the important role of addressing the gap which is left by the common international conventions on immunity which regulate specific forms of immunity, for example immunity of diplomatic[6] and consular officials[7] and of the State[8] by codifying and progressively developing[9] the existing international law on the matter of immunity of State officials. Accordingly, the scope of the Commission's work on the topic excludes immunity from criminal jurisdiction enjoyed under special rules of international law, in particular by persons who are connected with diplomatic missions, consular posts, special missions, international organizations and military forces of a State.[10] While the ILC has not yet made a decision on whether or not the final outcome will have the form of a draft treaty, some ILC members have indicated this preference at the ILC session in 2021.[11] The form of a draft treaty would reflect the nature as progressive development of most procedural safeguards regarding immunity of State officials which the ILC Special Rapporteur has affirmed regarding draft articles 12-15.[12]

For the purpose of drafting a treaty on immunity of State officials, the newly proposed draft articles on procedural safeguards have an essential role. Already the initial Memorandum by the Secretariat noted that the Commission's project on Immunity of State officials would need to "deal with multiple

[2] At the fifty-ninth session of the ILC in 2007, the Commission decided to include the topic "Immunity of State officials from foreign criminal jurisdiction" in its current program of work, Yearbook of the International Law Commission 2007, vol. II (Part Two), p. 90, para. 376.

[3] ILC, Report on the work of its seventy-second session (2021), UN Doc. A/76/10, ch. VI, para. 81, at p. 100.

[4] ILC, draft article 4, see e. g. ILC, *Rep. 2021* (fn. 3 above), para. 114, at p. 108.

[5] ILC, draft articles 5 and 6, see e. g. ILC, *Rep. 2021* (fn. 3 above), para. 114, at p. 108.

[6] See e. g. 1961 Vienna Convention on Diplomatic Relations, 500 UNTS 95 (entry into force on 24 April 1964; 193 States Parties) [VCDR].

[7] See e. g. 1963 Vienna Convention on Consular Relations, 596 UNTS 261 (entry into force on 19 March 1967, 181 States Parties) [VCCR].

[8] See e. g. 2004 United Nations Convention on Jurisdictional Immunities of States and Their Property, UN Doc. A/59/508 (not yet in force; 22 States Parties) [UNCSI].

[9] Cf. Article 1, paragraph 1 of the 1947 Statute of the International Law Commission, UNGA Res. 174 (II) of 21 November 1947.

[10] ILC, draft article 1, paragraph 2, see e. g. ILC, *Rep. 2021* (fn. 3 above), para. 114, at p. 107.

[11] Cf. ILC, *Rep. 2021* (fn. 3 above), para. 90, p. 102.

[12] ILC, Report on the work of its seventy-first session (2019), UN Doc. A/74/10, at p. 315, para. 139.

procedural issues which arise in the invocation and application of such immunity".[13] The issue of procedural provisions and safeguards gained importance and attention in 2011 on the occasion of the debate on possible limitations and exceptions to immunity[14] and also in 2017 when the Commission discussed and provisionally adopted draft article 7 on "crimes under international law in respect of which immunity *ratione materiae* shall not apply".[15] The work of the ILC on the project of immunity of State officials has been focusing on the issue of procedural provisions and safeguards since the ILC session in 2018.[16]

Procedural provisions and safeguards may be characterized as "meta-procedural", since in the work of the Commission, immunity from foreign criminal jurisdiction *itself* is regarded "as being procedural in nature".[17] It should be highlighted that the violation of procedural safeguards incurs the international responsibility of the State for a breach of the law on immunity.[18] Procedural safeguards should be understood as provisions of a procedural character which aim at safeguarding the correct application and enforcement of the rules on immunity of State officials by regulating the conduct which is required of the competent authorities.

Procedural safeguards constitute the final, pending step of the Commission's work on the project before completion of the first reading. Work on them may also contribute to bridging gaps and building consensus for the work of the Commission on immunity of State officials as a whole.[19] Such a consensual outcome was put into question when the Commission provisionally adopted the

[13] ILC, Immunity of State officials from foreign criminal jurisdiction, Memorandum by the Secretariat (2008), UN Doc. A/CN.4/596, para. 213.

[14] Sixth report on immunity of State officials from foreign criminal jurisdiction, by Concepción Escobar Hernández, Special Rapporteur (2018), UN Doc. A/CN.4/722, para. 28; cf. e. g. ILC, Report on the work of its sixty-third session (2011), UN Doc. A/66/10, para. 140 ("*It was also suggested that, as part of the topic, it might be useful to ensure adequate safeguards on prosecutorial discretion in order to avoid abuse*"); on the 2011 debate, van Alebeek, *The "international crime" exception in the ILC draft articles* (2018) 112 AJIL Unbound 27, 29.

[15] Cf. Sixth report by Ms. Escobar Hernández (fn. 14 above), paras. 28-34; Asterisk to both Part Two and Part Three, ILC, Report on the work of its sixty-ninth session (2017), UN Doc. A/72/10, p. 175, 176; Provisional summary records of the meetings of the ILC (2017): Mr. Wood (UN Doc. A/CN.4/SR.3360 and A/CN.4/SR.3378); Mr. Murphy (UN Doc. A/CN.4/SR.3362 and A/CN.4/SR.3378); Mr. Jalloh (UN Doc. A/CN.4/SR.3362 and A/CN.4/SR.3365); Mr. Huang (UN Doc. A/CN.4/SR.3364 and A/CN.4/SR.3378); Mr. Nolte (UN Doc. A/CN.4/SR.3365 and A/CN.4/SR.3378); Mr. Hmoud (UN Doc. A/CN.4/SR.3378).

[16] Sixth report by Ms. Escobar Hernández (fn. 14 above) and Seventh report on immunity of State officials from foreign criminal jurisdiction, by Concepción Escobar Hernández, Special Rapporteur (2019), UN Doc. A/CN.4/729.

[17] ILC, Report on the work of its sixty-fifth session (2013), UN Doc. A/68/10, ch. V, Commentary to draft article 1, p. 41 para. 8 [citing to: Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium), Judgment, I.C.J. Reports 2002, para. 60; Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening), Judgment, I.C.J. Reports 2012, p. 99, at paras. 58 and 100.].

[18] Cf. International Court of Justice, *Case Concerning Certain Questions of Mutual Assistance in Criminal Matters* (*Djibouti v. France),* Judgment, I.C.J. Reports 2008, p. 177, at p. 244, para. 196 ("*The State which seeks to claim immunity for one of its State organs is expected to notify the authorities of the other State concerned. This would allow the court of the forum State to ensure that it does not fail to respect any entitlement to immunity and might thereby engage the responsibility of that State.*"); Third report on immunity of State officials from foreign criminal jurisdiction, by Mr. Roman Anatolevich Kolodkin, Special Rapporteur (2011), UN Doc. A/CN.4/646, para. 61(b).

[19] Claus Kreß and Sévane Garibian, *Laying the Foundations for a Convention on Crimes Against Humanity - Concluding Observations* (2018), 16 Journal of International Criminal Justice 909, at p. 947-948; Claus Kreß, https://www.justsecurity.org/63227/letter-editor-germanys-extradition-request-gen-jamil-hassan-u-s-support/ (13 March 2019).

controversial[20] draft article 7[21] by a recorded vote which is unusual in the practice of the Commission. In response, several States in the Sixth Committee[22] highlighted the importance of a consensual outcome in 2017,[23] 2018[24] and 2019[25]; for example, delegations noted that a lack of consensus in the Commission on draft article 7 "might risk fragmentation of international law and that it could affect the Commission's standing with Member States". [26] Further, at the session of the Sixth Committee in 2017, 16 States indicated that draft article 7 did not reflect customary international law and another 24 States have expressed an ambiguous or insecure attitude regarding the legal character of draft article 7, paragraph 1, while only 5 States have more or less clearly expressed the view that this provision reflected existing customary international law.[27] At the same time, there is a trend in European States of more numerous and innovative prosecutions of current and former (Non-European) State officials for international crimes,[28] which particularly concern crimes committed in Syria[29] and Afghanistan.[30] These recent developments have once again put into the spotlight that the exercise of national criminal jurisdiction and the immunity of State officials may create tensions which require careful consideration with a view to avoiding both impunity and damage to international relations.

[20] For the discussion of draft article 7 in the literature see for example: Peter Frank et al., *Functional Immunity of Foreign State Officials Before National Courts: A Legal Opinion by Germany's Federal Public Prosecutor General* (2021) 19 JICJ 697; Claus Kreß, 'Article 98' in Kai Ambos (ed), *Rome Statute of the International Criminal Court – Article-by-Article Commentary* (C.H. Beck 2021), 2585; Rosanne van Alebeek, 'Functional Immunity of State Officials from the Criminal Jurisdiction of Foreign National Courts' in Tom Ruys, Nicolas Angelet and Luca Ferro (eds), *The Cambridge Handbook of Immunities and International Law* (CUP 2019) 496; Michael Wood, *Lessons from the ILC's Work on 'Immunity of State Officials': Melland Schill Lecture, 21 November 2017*' (2019) 22 Max Planck Yearb UN Law Onl 34; Dire Tladi, *The international law commission's recent work on exceptions to immunity: Charting the course for a brave new world in international law?* (2019) 32 Leiden Journal of International Law 169; AJIL Unbound 'Symposium on The Present and Future of Foreign Official Immunity' (2018) 112 AJIL 1-37 [Curtis A Bradley, Sean D Murphy, Qinmin Shen, Philippa Webb, Mathias Forteau, Rosanne van Alebeek, Erika de Wet]; Hervé Ascensio and Béatrice I Bonafé, '*L'absence d'immunité des agents de l'Etat en cas de crime international: pourquoi en débattre encore*?' (2018) 122 Revue générale de droit international public 821; Janina Barkholdt and Julian Kulaga, *Analytical Presentation of the Comments and Observations by States on Draft Article 7, paragraph 1, of the ILC Draft Articles on Immunity of State officials from foreign criminal jurisdiction, United Nations General Assembly, Sixth Committee, 2017* (2018) KFG Working Paper Series No. 14, Berlin Potsdam Research Group, 'The International Rule of Law – Rise or Decline?', www.papers.ssrn.com/sol3/papers.cfm?abstract_id=3172104> 10-11.

[21] On limitations and exceptions to immunity *ratione materiae.*

[22] I. e. the Sixth Committee of the United Nations General Assembly. Note that the seventy-sixth session of the Sixth Committee in 2021 was held after this paper was submitted for review.

[23] ILC, "Topical summary of the discussion held in the Sixth Committee of the General Assembly during its seventy-second session (in 2017), prepared by the Secretariat" (2018), UN Doc. A/CN.4/713, at p. 11, para. 35.

[24] ILC, "Topical summary of the discussion held in the Sixth Committee of the General Assembly during its seventy-third session (in 2018), prepared by the Secretariat" (2019), UN Doc. A/CN.4/724, at p. 14, para. 65 ("*Several delegations recalled that draft article 7 was provisionally adopted by a recorded vote and a number of delegations urged the Commission to seek to achieve a consensual outcome*.").

[25] ILC, "Topical summary of the discussion held in the Sixth Committee of the General Assembly during its seventy-fourth session (in 2019), prepared by the Secretariat" (2020), UN Doc. A/CN.4/734, at p. 9, para. 31.

[26] ILC, Topical summary of the 2017 session (see fn. 23 above), at p. 11, para. 35.

[27] Barkholdt/ Kulaga, KFG Working Paper (see fn. 20 above), at pp. 9-10.

[28] This trend has been described as contributing to "breathing new life" into the exercise of universal criminal jurisdiction (UJ) and to its "quiet expansion" (cf. Wolfgang Kaleck and Patrick Kroker, *Syrian Torture Investigations in Germany and Beyond - Breathing New Life into Universal Jurisdiction in Europe?* (2018), 16 JICJ (2018) 165; Máximo Langer and Mackenzie Eason, *The Quiet Expansion of Universal Jurisdiction* (2019) 30 EJIL 779); cf. also Frank, *Functional Immunity of Foreign State Officials* (fn. 20 above), 729).

[29] E. g. sentence by the German OLG Koblenz (Higher Regional Court) of 24 February 2021, 1 StE 3/21 (Eyad A.).

[30] E. g. sentence by the German BGH (Federal Court of Justice) of 28 January 2021, 3 StR 564/19 (Ahmad Zaheer D).

It should not be overlooked in the debate on draft article 7 that the ILC provisionally adopted this rule on the premise that it will be accompanied by procedural safeguards of immunity.[31] The balancing of the sovereign rights of States involved and the principle of sovereign equality lie at the heart of international law relating to the immunity of States and their officials.[32] Procedural safeguards may substantially contribute to this balance[33] by providing legal certainty about the procedures which constitute elements of neutrality[34] and minimize the possibility of abuse and politicization.[35] Regarding the goal of procedural provisions and safeguards, there is broad agreement among ILC members.[36]

This paper argues that procedural safeguards may be a key for overcoming tensions in the ILC and in the international community regarding questions of the immunity of State officials: The availability of procedural safeguards replaces the "binary" status of (non-)enjoyment of immunity[37] with a situation in which the States concerned may pursue their relevant interests with the assistance and within the framework of different procedural steps. For a balanced approach to immunity *ratione materiae*, one of the procedural safeguards is essential: the invocation of immunity (draft article 10). This means that the forum State is not obliged to determine functional immunity *proprio motu*, but only if the State of the official has invoked it.[38] Thus, criminal prosecution may proceed unless the State of the official expresses its interest in immunity by invoking it. In doing so, the State of the official assumes responsibility for any internationally wrongful act in issue committed by such organs.[39] In sum, invocation and the other procedural safeguards enable an adequate balance between effectiveness of criminal prosecutions and stability in international relations. Nevertheless, some modifications to the draft articles provisionally adopted by the ILC in 2021 may be helpful and will be elaborated in this paper.

At the outset it should be noted that identifying the relevant State practice relating to procedural safeguards faces some challenges.[40] It was apparent from the outset of the ILC's work in 2008 that "a relative dearth of treatment of the topic's procedural aspects in both practice and doctrine"[41] would present considerable difficulties for the Commission's work. This situation has not substantially

[31] Asterisk to both Part Two and Part Three, ILC, *Rep. 2017* (fn. 15 above), pp. 175-176.

[32] Cf. ILC, Report on the work of its fifty-eighth session (2006), UN Doc. A/61/10, Recommendation of the Working-Group on the long-term programme of work, Annex I on Immunity of State officials from foreign criminal jurisdiction (Roman Anatolevich Kolodkin), at p. 192, para. 8.

[33] Seventh report by Ms. Escobar Hernández (fn. 16 above), para. 23.

[34] *Ibid*., para. 22.

[35] *Ibid*., paras. 22, 105 and 144.

[36] Regarding the ILC debate in 2018: *Ibid*., paras. 8-9; concerning the ILC debate in 2019: ILC, *Rep. 2019* (fn. 12 above), at p. 318, para. 150.

[37] Cf. Mathias Forteau, *Immunities and International Crimes before the ILC: Looking for Innovative Solutions* (2018) AJIL Symposium (fn. 20 above), 25.

[38] See section 2.d) below.

[39] Cf. ICJ, *Djibouti v. France* (fn. 18 above), para. 196: "[T]he State notifying a foreign court that judicial process should not proceed, for reasons of immunity, against its State organs, is assuming responsibility for any internationally wrongful act in issue committed by such organs."; cf. further Third report by Mr. Kolodkin (fn. 18 above), paras. 59-60.

[40] Cf. e. g. Alexandre Skander Galand, *What Counts as State Practice? The Koblenz Trial and Functional Immunity* (27 May 2020), https://www.justsecurity.org/70394/what-counts-as-state-practice-the-koblenz-trial-and-functional-immunity/ (last access on 13 January 2021).

[41] ILC, Memorandum by the Secretariat (fn. 13 above), para. 214.

changed over the following decade.[42] For example, the relevant State practice may often not be known publicly, when States consider cases involving immunity of State officials as politically sensitive and issues of confidentiality.[43] Moreover, in cases involving immunity of State officials there is often factual uncertainty regarding the *opinio juris* of the concerned States. For example, a variety of policy considerations as well as factual impediments may play a role when the State of an official does not invoke immunity.[44] Another challenge is posed by the high degree of interconnectedness between domestic criminal legal systems, international treaty law (in particular treaties on specific forms of immunity, conventions of international criminal law and mutual legal assistance treaties) as well as general international law in the area of immunity of State officials. Furthermore, the international conventions on specific forms of immunity (e. g. VCDR, VCCR, UNCSI) do not contain explicit provisions on most of the procedural safeguards proposed by the ILC (the main exception being waiver of immunity) which could serve as guidance for the procedural safeguards with respect to immunity within the scope of the ILC project. This demonstrates the pioneer character of the ILC's work and the importance such a draft treaty would have in practice. In the interest of providing practical guidance to States (particularly domestic courts)[45] and the principle of sovereign equality, it is helpful that the ILC is closing this gap by including procedural provisions and safeguards in its work on immunity of State officials.

While the type and structure of the procedural safeguards provisionally adopted by the ILC in 2021 are helpful, some key aspects remain unclear and should be refined. The present paper presents some suggestions in this regard. In the following, the procedural safeguards will be introduced and commented on one by one.

2. Comments on the New Draft Articles Provisionally Adopted at the ILC Session in 2021

At its session in 2021 the ILC provisionally adopted the following six draft articles on procedural safeguards regarding immunity of State officials:

- "Application of Part Four" (draft article 8 *ante*)
- "Examination of immunity by the forum State" (draft article 8)
- "Notification of the State of the official" (draft article 9)
- "Invocation of immunity" (draft article 10)
- "Waiver of immunity" (draft article 11)
- "Requests for information" (draft article 12)

a) Draft Article 8 *ante:* Application of Part Four

> The procedural provisions and safeguards in this Part shall be applicable in relation to any criminal proceeding against a foreign State official, current or former, that concerns any of the draft articles contained in Part Two and Part Three of the present draft articles, including to

[42] Sixth report by Ms. Escobar Hernández (fn. 14 above), para. 23.

[43] Cf. below at fn. 141.

[44] Wuerth, *Pinochet's Legacy Reassessed* (2012), 106 AJIL 731, 747, 749, 750-758; Joanne Foakes, *The Position of Heads of State and Senior Officials in International Law* (OUP 2014) pp. 174-175.

[45] Cf. Statement by Germany, session of the Sixth Committee in 2019, pp. 1-2, https://www.un.org/en/ga/sixth/74/pdfs/statements/ilc/germany_2.pdf; Preliminary report on immunity of State officials from foreign criminal jurisdiction, by Mr. Roman Anatolevich Kolodkin, Special Rapporteur (2008), UN Doc. A/CN.4/601, para. 41; Forteau, *Immunities and International Crimes* (fn. 37 above), 22, at p. 26.

the determination of whether immunity applies or does not apply under any of the draft articles.

(1) Introduction

Draft article 8 *ante* clarifies the scope of application of the procedural provisions and safeguards contained in the draft articles (i. e. Part Four). What at first glance may seem like an obvious statement, is best understood by its drafting history at the ILC session in 2019. The draft articles on procedural safeguards which had been proposed by the Special Rapporteur in 2019 provided almost exclusively general provisions (i. e. not addressing specifically the situation of immunity *ratione personae*, immunity *ratione materiae* or draft article 7).[46] Hence during the debate in 2019, a number of ILC members[47] expressed doubts regarding the automatic application of such general procedural provisions and safeguards to situations in which draft article 7 is applicable. Their main concern was the wording of draft article 7 according to which "immunity *ratione materiae* [...] shall not apply"[48] in situations covered by this provision. In order to clarify that general procedural provisions and safeguards also apply to situations covered by draft article 7, the Commission provisionally adopted draft article 8 *ante*.[49]

Apart from this question, some members called for specific safeguards, especially with respect to the application of draft article 7.[50] This question is still under consideration by the Commission.[51] There is, however, agreement that procedural safeguards are particularly important in situations of draft article 7,[52] a point which was also emphasized by several ILC members in the ILC debates in 2017[53] and 2018.[54] This aspect was further highlighted by States in their statements in the Sixth

[46] Seventh report by Ms. Escobar Hernández (fn. 16 above), Annex II.

[47] Provisional summary records of the meetings of the ILC (2019), Mr. Murphy, UN Doc. A/CN.4/SR.3481, at p. 17; Mr. Nolte, UN Doc. A/CN.4/SR.3483, at p. 4; Ms. Galvao-Teles, UN Doc. A/CN.4/SR.3483, at p. 13; Mr. Hassouna, UN Doc. A/CN.4/SR.3485, at p. 7, Mr. Reinisch, UN Doc. A/CN.4/SR.3487, at p. 19; Mr. Sturma, UN Doc. A/CN.4/SR.3487, at p. 23; see also ILC, *Rep. 2019* (fn. 12 above), at p. 319, para. 151.

[48] According to the respective commentary (ILC, *Rep. 2017* (fn. 15 above)), this wording serves only to determine the effects of draft article 7 (at p. 184, para. 12). The commentary further states that with these words the Commission intended to not take a view on the controversial question whether the listed crimes are to be interpreted "as a limitation (absence of immunity) or as an exception (exclusion of existing immunity)" to immunity *ratione materiae* (p. 184, para. 12). Similarly, the Commission sought to leave open whether the acts of such crimes constitute 'acts performed in an official capacity' (p. 183, para. 11).

[49] ILC, *Rep. 2021* (fn. 3 above), Commentary to draft article 8 *ante*, paras. 2-5, at p. 111.

[50] ILC, *Rep. 2019* (fn. 12 above), at p. 319, para. 151; concrete proposals were made for example by Mr. Nolte, Provisional summary record of the 3483rd meeting of the ILC (2019), UN Doc. A/CN.4/SR.3483, at p. 5; and by Mr. Wood, Provisional summary record of the 3487th meeting of the ILC (2019), UN Doc. A/CN.4/SR.3487, at p. 4.

[51] ILC, *Rep. 2019* (fn. 12 above), at pp. 319-320, paras. 151, 152, 154.

[52] ILC, *Rep. 2019* (fn. 12 above), at p. 319, para. 151; cf. Seventh report by Ms. Escobar Hernández (fn. 16 above), paras. 104, 144.

[53] Provisional summary records of the meetings of the ILC (2017): Mr. Wood (UN Doc. A/CN.4/SR.3360 and A/CN.4/SR.3378); Mr. Murphy (UN Doc. A/CN.4/SR.3362 and A/CN.4/SR.3378); Mr. Jalloh (UN Doc. A/CN.4/SR.3362 and A/CN.4/SR.3365); Mr. Huang (UN Doc. A/CN.4/SR.3364 and A/CN.4/SR.3378); Mr. Nolte (UN Doc. A/CN.4/SR.3365 and A/CN.4/SR.3378); Mr. Hmoud (UN Doc. A/CN.4/SR.3378).

[54] Provisional summary records of the meetings of the ILC (2018): Mr. Murase (UN Doc. A/CN.4/SR.3438); Mr. Nolte (UN Doc. A/CN.4/SR.3439); Mr. Huang (UN Doc. A/CN.4/SR.3439); Mr. Ruda Santolaria (UN Doc. A/CN.4/SR.3440); Mr. Murphy (UN Doc. A/CN.4/SR.3440); Ms. Oral (UN Doc. A/CN.4/SR.3440); Mr. Zagaynov (UN Doc. A/CN.4/SR.3440).

Committee of the General Assembly, for example, by several delegations during the seventy-second session in 2017.[55]

(2) Comments

In light of these considerations, draft article 8 *ante* is useful. Nevertheless, this provision (and the entire set of draft articles) may benefit from clarifying that they also cover claims to immunity of State officials with respect to obligations to give witness testimony. The current wording of draft article 8 *ante*[56] and the according Commentary[57] is potentially misleading in this sense.

b) Draft Article 8: 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.

(1) Introduction

Draft article 8 provides that the competent authorities of the forum State shall examine immunity in three instances: when they become aware that an official of another State may be affected by the exercise of its criminal jurisdiction (para. 1); before initiating criminal proceedings; and 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 (both para. 2). Draft article 8 combines two important procedural aspects regarding immunity of State officials: Firstly, the pronouncement by the ICJ that "questions of immunity are [...] preliminary issues which must be expeditiously decided *in limine litis*".[58] Both paragraphs are meant to reflect this aspect of "*in limine litis*" by expressing the idea that immunity is to be examined as soon as possible.[59] Accordingly, the Commentary to draft article 8 sets out a rather broad definition of the term "exercise of criminal

[55] Barkholdt/ Kulaga, KFG Working Paper (see fn. 20 above), at p. 11 ("31 States have emphasized the importance of procedural safeguards. 24 of these 31 States have emphasized the interdependence between the substantive content of Draft Article 7, paragraph 1, and the pending issue of procedural safeguards.").

[56] "[S]hall be applicable in relation to any criminal proceeding *against* a foreign State official, current or former" (emphasis added).

[57] While the respective Commentary notes that the phrase "against a foreign State official, current or former" reflected "the need for there to be a connection between the foreign State official and the criminal proceeding that the forum State seeks to carry out and in respect of which immunity might be applicable" (ILC, *Rep. 2021* (fn. 3 above), Commentary to draft article 8 *ante*, para. 8, p. 112), it should be clear that such "connections" include claims to immunity of State officials with respect to obligations to give witness testimony.

[58] ICJ, *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights, Advisory Opinion, I.C.J. Reports 1999,* p. 62, at p. 88, para. 63; see also p. 90, para. 67.

[59] ILC, *Rep. 2021* (fn. 3 above), Commentary to draft article 8, paras. 7, 9, at pp. 114-115.

jurisdiction",[60] while the (equally broad) definition of "criminal jurisdiction" for the purposes of the draft articles is still under consideration by the Drafting Committee.[61]

Secondly, draft article 8 raises the question of which type of measures in exercising criminal jurisdiction are prohibited by immunity. The second paragraph of draft article 8 contains "two cases as examples of acts that would always affect the official of another State and that, if they were to occur, could violate any immunity from foreign criminal jurisdiction that the official might enjoy" according to the Commentary.[62]

(2) Comments

Generally, it is very helpful that the ILC has elaborated on the question of which acts are precluded by immunity as well as the relevance of the *in limine litis* finding by the ICJ for immunity of State officials. However, the key aspect of draft article 8 remains open: What does "examination" of immunity mean and particularly, what legal effects flow from it? Put differently, what are the authorities obliged to do when they "examine" immunity? Are they allowed to detain a State official during the "examination" of his or her claim to immunity? And what implication does a possible inviolability of the State official have in these cases? Accordingly, the provision could benefit from some refinement in four main respects: with regard to the definition of "examination" of immunity (as distinguished from "determination" of immunity), the type of acts precluded by immunity, *in limine litis*, and the relationship between immunity and inviolability.

i. Definition of "Examination" of Immunity (as Distinguished from "Determination" of Immunity)

Arguably constituting the main deficiency of draft article 8, the exact meaning of "examination" of immunity remains unclear as well as what exact legal effects follow from it. According to the rather vague definition of "examination of immunity" in the Commentary, the term is understood as referring "to the measures necessary to assess whether or not an act of the authorities of the forum State involving the exercise of its criminal jurisdiction may affect the immunity from criminal jurisdiction of officials of another State. Thus, "examination" of immunity is a preparatory act that marks the beginning of a process that will end with a determination of whether or not immunity applies."[63]

[60] As "such acts carried out by the competent authorities of the forum State as may be necessary to establish the criminal responsibility, if any, of one or several individuals. These acts may be of different types and are not limited to judicial acts, and may include governmental, police, investigative and prosecutorial acts.", ILC, *Rep. 2021* (fn. 3 above), Commentary to draft article 8, para. 5, p. 113.

[61] Seventh report by Ms. Escobar Hernández (fn. 16 above), para. 28, at fn. 92 [cites to UN Doc. A/CN.4/661, para. 42]: "Criminal jurisdiction" was defined as "all of the forms of jurisdiction, processes, procedures and acts which, under the law of the State that purports to exercise jurisdiction, are needed in order for a court to establish and enforce individual criminal responsibility arising from the commission of an act established as a crime or misdemeanour under the applicable law of that State. For the purposes of the definition of the term 'criminal jurisdiction', the basis of the State's competence to exercise jurisdiction is irrelevant." The draft definition was referred to the Drafting Committee which did not yet address the definition in detail but decided that it would examine it at a later stage in its work on the topic (*ibid*., para. 28).

[62] ILC, *Rep. 2021* (fn. 3 above), Commentary to draft article 8, para. 9, p. 114.

[63] *Ibid*., Commentary to draft article 8, para. 1, p. 112.

According to this understanding, "examination" is intrinsically linked with the concept of "determination" of immunity in the sense of draft article 13. While the latter provision is still under consideration by the Drafting Committee, the Commentary stipulates a definition of "determination". According to this definition, "determination" of immunity is "understood as the process for deciding whether immunity applies or does not apply".[64]

Given this broad definition of "determination" by the ILC as indicated in the Commentary (especially for referring to a "process") it is not obvious how it is to be distinguished from "examination" of immunity. In addition, the reference to "the process for deciding" is rather vague, given that decisions whether immunity applies or does not apply may occur at several stages of the procedure, not only at the "determination" stage, in particular at the stage of "examination" of immunity (for example, the forum State may make the decision to provisionally not prosecute a foreign official potentially enjoying immunity *ratione materiae* while the factual basis of the claim to immunity is still being examined; the forum State may also make the decision that such an official is provisionally detained in the absence of an invocation of immunity).

This paper claims that the systemic relationship between "examination" and "determination" of immunity under the ILC draft articles is better captured in a more factual definition of both "examination" and "determination" of immunity (a position which may also find some support in the fact that the ILC renamed draft article 8 from "consideration" to "examination" of immunity[65]). Accordingly, "examination" is best understood as merely indicating the earliest possible point in time of a procedure which may affect a foreign official (i. e. reflecting the *in limine litis* idea, see below), from which on different legal effects follow. The main effect is that the competent authorities must be aware that a given procedure may affect a foreign official who may enjoy protection against certain measures of criminal enforcement by virtue of his or her immunity. This will regularly include the start of investigating the factual basis of a claim to immunity. In addition, the competent authorities should be aware that they may, depending on the circumstances, have to proceed to notify the State of the official of the possible affectedness of the official and be attentive to an invocation of immunity by that State (mostly relevant in cases regarding immunity *ratione materiae*), or immediately proceed with the determination of immunity (in cases involving immunity *ratione personae*).

On the other hand, "determination" should be defined as the (purportedly final) establishment of the facts concerning the preconditions of immunity by the authorities competent to exercise criminal jurisdiction and based thereon, a (preliminarily binding) decision whether or not immunity is enjoyed by a State official. This mainly factual understanding of determination is to be distinguished from other conceivable stages in the criminal procedure.[66] On this basis, the main difference between

[64] *Ibid*., *Rep. 2021* (fn. 3 above), Commentary to draft article 8 *ante*, para. 5, p. 111.

[65] ILC, Statement of the Chairperson of the Drafting Committee Ms. Patrícia Galvão Teles (3 June 2021) https://legal.un.org/ilc/guide/4_2.shtml#dcommrep, pp. 4-5.

[66] First, determination of immunity as understood in this paper does not mean the final legally binding decision on immunity. This would arguably be only at the last instance (when no more appeal is available) and thus, the obligation to consider all relevant facts and further procedural steps of immunity would take effect too late. The "*in limine litis*" requirement would not be met under this conception. Another possible conception of determination is "any legally relevant exercise of criminal jurisdiction" which implies taking a position with regard to immunity. In this case, determination and consideration of immunity would describe the same moment in time. Yet, for the reasons mentioned in the text different points in time concerning the immunity procedure should conceptually be distinguished. Thirdly, determination could be described as the

"examination" and "determination" of immunity is the required threshold of established evidence regarding the preconditions of immunity. While the factual indeterminacy may be (still) quite high at the first moment when immunity is initially to be considered, the following investigations are concluded by the determination of immunity. It is important to note that examination and determination may in practice take place simultaneously, especially in obvious cases of immunity which often will be the case regarding immunity *ratione personae* (i. e. whether the official is part of the "troika"[67] of a State). For example, in a car accident involving a foreign Head of State, whose status is well-known to the police officers involved, examination and determination of the existence of immunity will take place immediately (and all constraining measures against the Head of State are prohibited, cf. below). But even if consideration and determination *may* not be factually distinguishable in some cases, it is important to keep the two legal concepts apart in many other (not so obvious) cases. The ILC Special Rapporteur also insisted on keeping the two concepts apart.[68]

Maintaining this distinction between "examination" and "determination" as two different stages in the procedure is helpful, since the factual basis of a determination of immunity may change over a possibly long period of time for several reasons: As mentioned above, establishing the factual basis of a claim to immunity may take time. When the competent authorities encounter a suspect "*in flagranti*", they may not immediately be aware of the status of the State official or be able to verify a claim to immunity. Especially in cases of immunity *ratione materiae*, no common procedure is readily available for proving the enjoyment of immunity on the spot, as do protocol cards in cases of diplomats. Hence, investigating the factual basis of a claim to immunity *ratione materiae*, which is, whether a crime was committed as an act in an official capacity, may take some time. Only after the completion of the factual investigation can a determination on the (non-)existence of immunity be taken. In addition, the occurrence of other procedural steps will affect the factual basis and preconditions on which a determination of immunity is to be made, such as the notification by the forum State, the invocation[69] or waiver[70] of immunity by the State of the official, a transfer of the proceedings or a request for information.

commencement of the judicial proceedings, whereas consideration would mark the beginning of the pre-trial phase. However, such an understanding would not adequately take into account the diversity of criminal procedures which exist at the national level.

[67] I. e. Head of State, Head of Government or Minister for Foreign Affairs.

[68] The proposal made by some ILC members during the ILC debate in 2019 to abandon the distinction between these two notions and to combine the respective draft articles met with objection by the Special Rapporteur (UN Doc. A/CN.4/SR.3488, at p. 8). The Special Rapporteur clarified that in her view "consideration" of immunity meant the process of "'activation' of the issue of immunity by the competent authorities of the forum State" which was addressed by draft article 8 from the "temporal" perspective. On the other hand, "determination" of immunity "involved a decision on whether immunity applied or not in a particular case", thus focusing on the "result" and the factors which immediately determined it (such as the competent authorities and whether immunity was waived), Ms. Escobar Hernández (summing up the debate on her sixth and seventh reports), UN Doc. A/CN.4/SR.3488, at p. 8.

[69] Cf. below at 2.d) Such an invocation may only occur a considerable time after the duty to examine immunity is triggered. In most cases, a necessary precondition of invocation is the notification of the State of the official which must be conducted by the forum State. Further, the decision of the State of the official whether or not to invoke immunity may be complex and require some time.

[70] Cf. below at 2.e) A waiver of immunity may create another change by lifting the illegality of measures of criminal jurisdiction which were previously precluded by immunity. Moreover, for pursuing a waiver of immunity *ratione personae*, authorities of the forum State may want to notify the State of the official beforehand, which would need time.

ii. The Type of Acts Precluded by Immunity

Even though draft article 8 is linked to this important question,[71] the work of the ILC does not expressly explain what types of acts are precluded at the stage of "examination" of immunity. Yet in practice, the authorities need to know (especially at the earliest stages of a situation) whether they are allowed to detain a State official who *may or may not* enjoy immunity *ratione materiae* while the factual basis of this claim to immunity is still under "examination".

The ICJ held that "the determining factor in assessing whether or not there has been an attack on the immunity of the Head of State lies in the subjection of the latter to a constraining act of authority."[72] This leads to the conclusion that the immunity of State officials prohibits constraining acts of authority against them at any stages of the criminal procedure (including the pre-trial phase). The characteristic of such a "constraining act" is whether it places legal obligations on the State official.[73] The existence of a constraining act was described by the ICJ as the "determining factor", also vis-à-vis another characteristic of acts precluded by immunity as indicated by the ICJ, i. e. whether an act of authority of another State "would hinder him or her in the performance of his or her duties".[74] This 'performance element' as such is of limited relevance when dealing with immunity of State officials more generally,[75] particularly in cases involving former State officials.[76] Accordingly, the reference to the 'performance element' (which had been included by the Special Rapporteur in the original draft) was later deleted from the text of draft article 8.[77] It follows from the standards outlined above that there may be measures of criminal jurisdiction which are not precluded by immunity (i. e. measures which do not constitute constraining acts of authority), for example non-coercive measures in the course of a (preliminary) investigation.[78] Along similar lines, the ILC Commentary helpfully clarifies

[71] ILC, *Rep. 2021* (fn. 3 above), Commentary to draft article 8, para. 6, pp. 113-114.

[72] ICJ, *Djibouti v. France* (fn. 18 above), p. 177, at para. 170.

[73] Cf. ICJ, *Djibouti v. France* (fn. 18 above), p. 177, at para. 171: "In the present case, the Court finds that the summons addressed to the President of the Republic of Djibouti by the French investigating judge on 17 May 2005 was not associated with the measures of constraint provided for by Article 109 of the French Code of Criminal Procedure; it was in fact merely an invitation to testify which the Head of State could freely accept or decline. Consequently, there was no attack by France on the immunities from criminal jurisdiction enjoyed by the Head of State, *since no obligation was placed upon him* in connection with the investigation of the Borrel case." (emphasis added).

[74] Cf. ICJ, *Arrest Warrant* (fn. 17 above), at p. 22, para. 54; ICJ, *Djibouti v. France* (fn. 18 above), p. 177, at para. 170.

[75] This element is arguably fully covered by the criterion of a "constraining measure". Additionally, the hindrance of the performance of duties is not always relevant in cases of immunity *ratione personae* (for example, when the State official is travelling on vacation).

[76] Regarding immunity *ratione materiae*, the more specific standard of a constraining act of authority as one imposing legal obligations according to the *Djibouti v. France* case is particularly relevant since these officials may be out of office and thus, the criterion indicated by the ICJ in the *Arrest Warrant* case (hinderance in the performance of official duties) can only be indirectly relevant; c. f. Second report on immunity of State officials from foreign criminal jurisdiction, by Mr. Roman Anatolevich Kolodkin, Special Rapporteur (2010), UN Doc. A/CN.4/631, at para. 46. Thus, the standard which requires a "constraining measure" is capable of serving as a homogenous standard for determining the precluded acts of both immunity *ratione personae* and immunity *ratione materiae.*

[77] ILC, Statement of the Chairperson of the Drafting Committee (fn. 65 above), pp. 7-8.

[78] Cf. *Certain Criminal Proceedings in France (Republic of the Congo v. France)*, Provisional Measure, Order of 17 June 2003, *I.C.J. Reports 2003*, p. 102, at p. 106, para. 16; Joint Separate Opinion of Judges Higgins, Kooijmans and Buergenthal, ICJ, *Arrest Warrant* (fn. 17 above), p. 63, at p. 80; Second report by Mr. Kolodkin (fn. 76 above), at para. 42.

the applicable standards for which acts are precluded by immunity based on the jurisprudence of the ICJ:

> "As follows from the judgments of the International Court of Justice in the case concerning the *Arrest Warrant of 11 April 2000*[79] and in *Certain Questions of Mutual Assistance in Criminal Matters,*[80] a particular criminal procedure measure may affect immunity of a foreign official only if it hampers or prevents the exercise of the functions of that person by imposing obligations upon them. For example, the commencement of a preliminary investigation or institution of criminal proceedings, not only in respect of the alleged fact of a crime but also actually against the person in question, cannot be seen as a violation of immunity if it does not impose any obligation upon that person under the national law being applied. The forum State is also able to carry out at least the initial collection of evidence for this case (to collect witness testimonies, documents, material evidence, etc.), using measures which are not binding or constraining on the foreign official. […] The phrase "coercive measures that may affect an official of another State" refers to acts of the competent authorities of the forum State that are directed at the official and that may be carried out at any time as part of the exercise of criminal jurisdiction, regardless of whether or not criminal proceedings have been initiated. These are essentially *in personam* measures that may affect, *inter alia*, the official's freedom of movement, his or her appearance in court as a witness or his or her extradition to a third State." [81]

However, the ILC approach may benefit from some modification in three respects: First, draft article 8 (or at least the Commentary) should demonstrate more clearly to practitioners what acts are precluded at the stage of "examination" of immunity. The wording of draft article 8 according to which "the competent authorities of the forum State shall always examine the question of immunity […] before taking coercive measures that may affect an official of another State" does not make sufficiently clear that in cases of immunity *ratione personae*, the authorities must immediately determine the existence of the immunity and hence, all constraining measures against this official are prohibited. On the other hand, the ILC should explain that this procedure will in practice regularly substantially differ in cases of immunity *ratione materiae* for the role of the invocation of immunity:[82] Prior to the "determination" of immunity the competent authorities of the forum State may proceed with the exercise of criminal jurisdiction as long as the State of the official has not invoked such immunity. The competent authorities may not, however, take final or irreversible measures of constraint which would render the possibility of such invocation ineffective.[83] Hence, the crucial role of the invocation for the legal effects of immunity *ratione materiae* should be reflected in the context of draft article 8. The fact that both immunity *ratione personae* and immunity *ratione materiae* are covered by the same procedural provision of "examination" under draft article 8 which does not indicate any distinction between them, while in practice quite different procedures will take place in cases of the two types of immunity, should not be misleading. It is important to note that even though

[79] See ICJ, *Arrest Warrant* (fn. 17 above), p. 3, at p. 22, paras. 54 and 55.

[80] See ICJ, *Djibouti v. France* (fn. 18 above), p. 177, at pp. 236-237, paras. 170 and 171.

[81] ILC, *Rep. 2021* (fn. 3 above), Commentary to draft article 8, para. 6, pp. 113-114; para. 11, p. 115.

[82] Cf. ICJ, *Djibouti v. France* (fn. 18 above), at para. 196; Third report by Mr. Kolodkin (fn. 18 above), at paras. 17, 61 (f); Seventh report by Ms. Escobar Hernández (fn. 16 above), para. 52; see further below.

[83] Such precluded measures are for example: The destruction of documents or other pieces of evidence, the forced public auction of seized objects or execution of a death penalty. Instead, only preliminary measures and those subject to appeal may be taken.

"examination" of immunity *ratione materiae* does not exclude that the competent authorities proceed with the exercise of criminal jurisdiction in the absence of an invocation of immunity, the State and its official are not left without any protection. Such protection may derive from rules of international law on inviolability, international human rights law and international criminal law, amongst others.[84]

Secondly, it may be clarified that the question whether a constraining act of authority against a State official is at play is the *trigger* of the duty to "examine" immunity, but it is not the *immediate effect* of such "examination" that constraining measures are prohibited,[85] but this effect only follows from the "determination" of immunity. Nevertheless, in cases of a possible exercise of criminal jurisdiction against a State official who may be enjoying immunity *ratione personae*, it must be clear that constraining measures are prohibited from the outset (if and as long as immunity is not waived by the State of the official).

Thirdly, the ILC should further clarify the relationship between the first and second paragraph of draft article 8 which is misleading.[86] Assuming the concept of "examination" of immunity as proposed by the ILC,[87] it seems most helpful to reduce draft article 8 to one single paragraph. This would serve to simplify the provision, since its three elements express the same general rule:[88] Immunity shall be examined *before* (this reflects the idea of *in limine litis*) any constraining measure by the authorities of the forum State is taken with regard to a foreign official (i. e. those measures imposing legal obligations on the official). Even though the wording of the first paragraph seems to be broader and refer to an earlier point in time during the procedure than the instances covered by the second paragraph[89] ("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"[90]), the Commentary links

[84] In particular, criminal proceedings against State officials shall be conducted with the respect due to them by reason of their current or former official position and, if applicable, in a manner which will hamper their exercise of State authority (cf. draft article 2(f) of the provisionally adopted ILC draft articles on immunity of State officials) as little as possible (c. f. article 41, para. 3 1963 VCCR; even though this provision concerns consular officers who are still in office, the thrust of this provision is transposable to situations involving former State officials, since this provision is applicable when no immunity applies, Lee/ Quigley, *Consular Law and Practice* (OUP 2008), 3rd ed, 433) and outside the scope of inviolability (cf. article 41 VCCR, paragraphs 1 and 2)). On the equally relevant aspect of inviolability, see below.

[85] Otherwise, the „examination" of immunity would be a circular concept, since its condition equaled its effect (on the one hand, immunity would have to be examined if the competent authorities intended to take a constraining measure; on the other hand, when immunity had to be examined constraining measures would be prohibited).

[86] While it is helpful that the second paragraph is "without prejudice to paragraph 1", the Commentary describes the two instances set out in lit. a) and lit. b) of the second paragraph at one point as "examples" of the first paragraph (ILC, *Rep. 2021* (fn. 3 above), Commentary to draft article 8, para. 9, p. 114) and at the same time as the "special rule" while the first paragraph contained the "general rule" (*ibid*., paras. 2, 8, 9, at pp. 113-114). Yet the term "special rule" suggests that these rules are prevailing in the sense of *leges speciales* which create a tension to the "without prejudice" clause of the second paragraph.

[87] See above 2.b)(2)(i). Instead, this paper suggests a more factual definition of "examination" of immunity.

[88] Even though paragraph 1 couches this idea in a more temporal way ("When the competent authorities [...] become aware that an official of another State may be affected by the exercise of its criminal jurisdiction."), the element of "may be affected" aligns the provision with the precluded act standard, ILC, *Rep. 2021* (fn. 3 above), Commentary to draft article 8, para. 6, pp. 113-114 (cf. above).

[89] The situation under draft article 8, para. 2 a) will almost always and the one pursuant to draft article 8, para. 2 b) often take place later than the relevant point in time indicated in paragraph 1.

[90] Emphasis added.

the "affectedness" back to the precluded act standard[91] which equally underlies and determines the two cases listed in the second paragraph. Hence, one paragraph along the lines suggested above would suffice, be more clear and less prone to misunderstandings. Examples illustrating this rule are better placed in the Commentary. Further, while the ILC uses the wording 'coercive measures' to refer to 'act of authority' in the sense of the jurisprudence by the ICJ,[92] the respective terminology suggested here[93] might provide more clarity.

iii. Decisions on Immunity in limine litis

It is helpful that the ILC confirmed the relevance of the *in limine litis* finding by the ICJ for immunity of State officials, in particular at the stage of "examination" of immunity.[94] According to the ICJ in the Advisory Opinion on *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights,* "questions of immunity are [...] preliminary issues which must be expeditiously decided *in limine litis*".[95] While the *Special Rapporteur* Advisory Opinion concerned civil lawsuits on the national level,[96] the idea of *in limine litis* can be transposed to the beginning of a (pre-trial) investigation phase,[97] which is addressed in draft article 8, paragraph 1.

Accordingly, it should be clear that the competent authorities shall be aware of the question of immunity at the earliest moment in time of a possible exercise of criminal jurisdiction against a foreign State official. Such an "earliest possible" point in time is arguably characterized by the typical first indications that a person who may enjoy immunity may have committed a criminal offence. In addition, the competent authorities of the forum State need to be willing and able, at least in an abstract manner, to exercise criminal jurisdiction. This condition may in certain cases already be fulfilled before the State official is present on the territory of the forum State. Yet, the current draft of the ILC sets out a somewhat later point in time for the duty to examine immunity to arise: the moment before taking a constraining measure against a State official[98] which may occur significantly later in the process (for example, after extended investigations). Thus, the idea of *in limine litis* could be more fully transposed. The competent authorities of the forum State should be aware that the question of immunity might arise from the very first moment of an exercise of criminal jurisdiction

[91] ILC, *Rep. 2021* (fn. 3 above), Commentary to draft article 8, para. 6, pp. 113-114 ("a particular criminal procedure measure may affect immunity of a foreign official only if it hampers or prevents the exercise of the functions of that person by imposing obligations upon them. For example, the commencement of a preliminary investigation or institution of criminal proceedings [...] cannot be seen as a violation of immunity if it does not impose any obligation upon that person under the national law being applied."), see full citation above at fn. 81.

[92] *Ibid.*, para. 11, p. 115 ("Since such measures may differ from one domestic legal system to another, it was considered preferable to use the general wording "coercive measures" to refer to "act of authority", which was used by the International Court of Justice in the case concerning the *Arrest Warrant of 11 April 2000*, and is inspired by the reasoning of the Court in *Certain Questions of Mutual Assistance in Criminal Matters*." [cites to: *Arrest Warrant of 11 April 2000*, p. 22, para. 54; *Certain Questions of Mutual Assistance in Criminal Matters*, pp. 236-237, para. 170]).

[93] Further, the terms "measure", "exercise of criminal jurisdiction" and "act of authority" are used synonymously in the present paper (as not necessarily implying that they impose a legal obligation on the addressed person).

[94] ILC, *Rep. 2021* (fn. 3 above), Commentary to draft article 8, paras. 7, 9, at pp. 114-115.

[95] ICJ, *Special Rapporteur* (fn. 58 above), at p. 88, para. 63; see also p. 90, para. 67.

[96] *Ibid.,* at p. 72, paras. 16-17.

[97] Third report by Mr. Kolodkin (fn. 18 above), at para. 11; ILC, Memorandum by the Secretariat (fn. 13 above), at p. 143, para. 220; the finding by the ICJ was further examined in the context of immunity of State officials in the Seventh report by Ms. Escobar Hernández (fn. 16 above), at p. 21-22, para. 53.

[98] Since the "affectedness" standard in the first paragraph of draft article 8 is linked to the precluded act standard, see above at 2.b)(2)(ii).

which might affect a foreign official, even before measures imposing legal obligations are at issue.[99] *In limine litis* will arguably also have to be considered in the context of the determination of immunity under draft article 13[100] (as the duty to determine immunity *in limine litis*). In accordance with the elaborations above, the "examination" of immunity *in limine litis* does not mean that as of that moment all constraining measures against a State official are prohibited, but the precluding effect of immunity only follows from the determination of immunity.

iv. Immunity and Inviolability of State Officials

The inviolability of State officials and its legal effects is closely linked with the acts precluded by immunity. The role of inviolability should be clarified in the context of immunity of State officials, as some States in the sessions of the Sixth Committee in 2018 and 2019 also mentioned.[101] Thus, it is helpful that the ILC has addressed the issue in the context of draft article 8, even though to a limited extent.[102] For providing essential guidance to practitioners, it would be welcome if States encouraged the ILC to further explore the ramifications of inviolability in the context of immunity of State officials.

Inviolability is mentioned in paragraph 2, lit. b) of draft article 8.[103] While the Commentary recalls that the issue of inviolability itself lies beyond the scope of the draft articles, it nevertheless remarks the following:

> "while immunity from jurisdiction and inviolability are two distinct categories that are not interchangeable, it is nevertheless true that both are dealt with at the same time in various international treaties, such as the Vienna Convention on Diplomatic Relations [...]. The phrase "that the official may enjoy under international law" is intended to draw attention to the fact that not every official of another State, by the mere fact of being an official, enjoys inviolability."[104]

In addition, the Commentary notes that there may be a possible overlap between the protection conferred by immunity and by inviolability which is expressed in the text of draft article 8 ("coercive measures that may affect an official of another State, including those that may affect any inviolability") for example regarding the detention of a State official.[105]

It may be added to these elaborations that inviolability of State officials does not under certain circumstances reduce the scope of protection enjoyed by immunity. By contrast, the current ILC Special Rapporteur had suggested in her Sixth Report that due to the applicability of inviolability,

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[99] Cf. above at 2.b)(2)(ii).

[100] Which is still under consideration by the Drafting Committee of the ILC.

[101] E. g. statements in the Sixth Committee by Romania in 2018 (https://www.un.org/en/ga/sixth/73/pdfs/statements/ilc/romania_3.pdf) and by Japan in 2019 (https://www.un.org/en/ga/sixth/74/pdfs/statements/ilc/japan_2.pdf).

[102] (Which is in accordance with the title of the ILC project).

[103] "Without prejudice to paragraph 1, the competent authorities of the forum State shall always examine the question of immunity [...] 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." (emphasis added).

[104] ILC, *Rep. 2021* (fn. 3 above), Commentary to draft article 8, paras. 13, 14, at pp. 115-116.

[105] Cf. ILC, *Rep. 2021* (fn. 3 above), Commentary to draft article 8, para. 14, at p. 116.

"the rules on immunity do not apply when detention is a purely executive act carried out in the context of the exercise of criminal jurisdiction by a court in the forum State".[106] However, it can be derived from the following considerations that inviolability does not reduce the protection conferred by immunity: Under international law, many State officials enjoying immunity *ratione personae*[107] or immunity *ratione materiae*[108] are also inviolable. In cases of immunity *ratione materiae*, the protection conferred by inviolability may be limited to official acts (*ratione materiae*)[109] and may be enjoyed only during the tenure of office. The latter is confirmed by the text and the *travaux préparatoires* of article 53, paragraph 4 VCCR which indicate that the protection conferred by inviolability under the VCCR is limited to *serving* consular officers. The ILC draft of the VCCR had provided that "with respect to acts performed by a member of the consulate in the exercise of his functions, his *personal inviolability and immunity* from jurisdiction shall continue to subsist without limitation of time"[110] (emphasis added). This draft was adopted by States in article 53, paragraph 4 VCCR with one change: "personal inviolability" was deleted.[111] Article 13 of the 2001 IDI Vancouver Resolution similarly provides that a former Head of State "enjoys no inviolability in the territory of a foreign State".[112]

The protection conferred by inviolability and by immunity may overlap,[113] particularly insofar as inviolability relates to the enforcement of criminal jurisdiction. Thus, the two concepts are not mutually exclusive.[114] Most importantly, if both inviolability and immunity apply to the same measure (i. e. their scope of protection overlaps), the protection conferred by inviolability arguably does not limit the protection based on immunity.[115] An instructive example in this regard is the inviolability of consular officers under the VCCR. While the institution of criminal proceedings against consular

[106] Sixth report by Ms. Escobar Hernández (fn. 14 above), paras. 73, 74.

[107] E. g. article 29 (Inviolability), article 31, para. 1 (Immunity) VCDR; article 28 and article 58 (Personal inviolability), article 30, para. 1 and article 60, para. 1 (Immunity from jurisdiction) 1975 Vienna Convention on the Representation of States in Their Relations with International Organizations of a Universal Character, UN Doc. Doc. A/CONF.67/16 (not yet in force; 34 States Parties); regarding Ministers for Foreign Affairs: ICJ, *Arrest Warrant* (fn. 17 above), at p. 23, para. 54.

[108] E. g. article 41 (Personal inviolability of consular officers), article 43, para. 1 VCCR.

[109] E. g. article 38, para. 1 VCDR (diplomatic agents who are nationals/ permanently resident in the receiving State).

[110] ILC, Draft Articles on Consular Relations, with commentaries (1961), YILC, at p. 122.

[111] Article 53, para. 4 VCCR reads: "However, with respect to acts performed by a consular officer or a consular employee in the exercise of his functions, immunity from jurisdiction shall continue to subsist without limitation of time."

[112] Institut de Droit International, Resolution on "Immunities from Jurisdiction and Execution of Heads of State and of Government in International Law", Session of Vancouver 2001.

[113] Cf. ICJ, *Arrest Warrant* (fn. 17 above), at pp. 30, para 70 ("The Court accordingly concludes that the issue of the warrant constituted a violation of an obligation of Belgium towards the Congo, in that it failed to respect the *immunity* of that Minister and, more particularly, infringed the *immunity* from criminal jurisdiction and the *inviolability* then enjoyed by him under international law."; emphases added); cf. also above fn. 107.

[114] To some extent, the current ILC Special Rapporteur seemed to suggest such mutual exclusiveness in her Sixth Report regarding cases in which detention takes place in the context of criminal proceedings before the forum court and is the result of an executive act, cf. Sixth report by Ms. Escobar Hernández (fn. 14 above), paras. 69, 73, 74.

[115] Cf. statement by Israel at the session of the Sixth Committee in 2018 (on 31 October 2018): Concerning "the Special Rapporteur's observations with regard to the distinction between immunity and inviolability", Israel recommended the Commission to "tread carefully" and adopt caution "so as not to undermine and even nullify the very essence of immunity of State officials from foreign criminal jurisdiction in this way" https://www.un.org/en/ga/sixth/73/pdfs/statements/ilc/israel_3.pdf.

officers, including their detention is possible (Article 41[116]), they enjoy some protection due to their inviolability, for example special treatment during the trial. Particularly, "the proceedings shall be conducted with the respect due" to them by reason of their official position.[117] Such limited protection by inviolability in cases of criminal proceedings creates, *prima facie*, some tension with their immunity *ratione materiae* (Article 43). However, the *travaux préparatoires* by the ILC clarify that the inviolability is in such cases aligned with immunity to the extent that they overlap (which results in an extension of inviolability). As the ILC stated in its Commentary to draft article 43[118] on "*Immunity* from jurisdiction" (which later became Article 43, paragraph 1 VCCR):

> "Since official acts are outside the jurisdiction of the receiving State, no criminal proceedings may be instituted in respect of them. Consequently, consular officials enjoy complete inviolability in respect of their official acts."[119]

For these reasons, it is claimed that the scope of protection conferred by inviolability does not limit the protection based on immunity of State officials. By affirming this, the ILC may provide essential guidance for practitioners on immunity of State officials.

In conclusion, this section on examination of immunity (draft article 8) made four main arguments. Firstly, factual definitions of "examination" and "determination" of immunity are suggested. Based thereon, the main difference between "examination" and "determination" of immunity is the required threshold of established evidence regarding the preconditions of immunity. While the factual indeterminacy may be (still) quite high at the first moment when immunity is initially to be considered, the following investigations are concluded by the determination of immunity. Secondly, the essential question of what the legal effects of examination of immunity are should be clarified by the ILC. This section demonstrated that once it is determined that immunity applies, such immunity precludes all constraining acts of exercising criminal jurisdiction against the official. In cases of immunity *ratione personae,* this will regularly occur already at the same time as the examination of immunity. Yet, in cases of immunity *ratione materiae* the determination will happen at a later stage in time (when investigating the factual basis of the claim to immunity is concluded) and may be influenced by an invocation of immunity *ratione materiae*. This crucial difference should be reflected in the ILC draft. Thirdly, the competent authorities have to consider the question of

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[116] Article 41 of the VCCR on "Personal inviolability of consular officers" reads:

"1. Consular officers shall not be liable to arrest or detention pending trial, except in the case of a grave crime and pursuant to a decision by the competent judicial authority.

2. Except in the case specified in paragraph 1 of this article, consular officers shall not be committed to prison or be liable to any other form of restriction on their personal freedom save in execution of a judicial decision of final effect.

3. If criminal proceedings are instituted against a consular officer, he must appear before the competent authorities. Nevertheless, the proceedings shall be conducted with the respect due to him by reason of his official position and, except in the case specified in paragraph 1 of this article, in a manner which will hamper the exercise of consular functions as little as possible. When, in the circumstances mentioned in paragraph 1 of this article, it has become necessary to detain a consular officer, the proceedings against him shall be instituted with the minimum of delay."

[117] Article 41, paragraph 3, second sentence VCCR.

[118] Draft article 43 sets out: "Members of the consulate shall not be amenable to the jurisdiction of the judicial or administrative authorities of the receiving State in respect of acts performed in the exercise of consular functions."

[119] 1961 ILC Draft Articles on Consular Relations, Yearbook of the International Law Commission, Vol. II (emphasis added), para. 2, at p. 117.

immunity at the earliest moment in time of a possible exercise of criminal jurisdiction against a foreign State official (i. e. at an earlier point in time as the current ILC draft indicates). This follows from the finding of the ICJ according to which "questions of immunity are [...] preliminary issues which must be expeditiously decided *in limine litis*".[120] Fourthly and lastly, for providing essential guidance to practitioners, the ILC should add to its elaborations that the scope of protection conferred by inviolability does not limit the protection based on immunity of State officials, even when the protection conferred by the two distinct concepts overlap.

c) Draft Article 9: Notification of 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.

(1) Introduction

Draft article 9 contains the obligation of the forum State to notify the State of the official before the competent authorities of the forum State initiate criminal proceedings or take coercive measures that may affect an official of another State (para. 1). The provision further sets out the minimum content of such a notification (para. 2), as well as the available channels for communicating it (para. 3). The Commentary to draft article 9 describes the essential role of the notification obligation for the entire set of procedural safeguards:

> "Since it is generally accepted that immunity from foreign criminal jurisdiction is granted to State officials for the benefit of the State, it is for the State, not the official, to decide on the invocation and waiver of immunity, and it is also for the State of the official to decide on the means by which to claim immunity for its official. However, in order for it to be able to exercise those powers, it must be aware that the authorities of a third State intend to exercise their own criminal jurisdiction over one of its officials. [...] At the same time, notification facilitates the opening of a dialogue between the forum State and the State of the official and thus becomes an equally basic requirement for ensuring the proper determination and application of the immunity of State officials from foreign criminal jurisdiction."[121]

The ILC determined "the identity of the official, the grounds for the exercise of criminal jurisdiction and the competent authority to exercise jurisdiction" as the minimum content of the notification. The Commentary argues that this requirement was warranted for the above-mentioned role of the notification. Accordingly, the notification "should always include sufficient information to enable the

[120] ICJ, *Special Rapporteur* (fn. 58 above), at p. 88, para. 63; see also p. 90, para. 67.
[121] ILC, *Rep. 2021* (fn. 3 above), Commentary to draft article 9, paras. 2, 4, at pp. 116-117.

State of the official to form a judgment as to whether the immunity from which one of its officials might benefit should be invoked or waived".[122]

(2) Comments

Draft article 9 is a key provision within the set of procedural safeguards for the reasons mentioned in the Commentary. There undoubtedly is a need for a strict notification obligation without exceptions as provisionally adopted by the ILC, since it is fundamental to the operation of other procedural safeguards of immunity. Such a notification does not depend on the consent of the concerned State official under article 36, paragraph 1, lit. (b) VCCR.[123] Most importantly, the notification is often necessary to enable the State of the official to realize its rights[124] to invoke or waive immunity.

However, such a strict notification obligation may raise a number of concerns: Firstly, notifying the intention to exercise criminal jurisdiction over a State official could result in the escape of the official from the jurisdiction of the forum State, before any measure of criminal jurisdiction could be taken against him or her. Secondly, after the notification, an intended or on-going criminal investigation may also otherwise be hampered, for example, by removing pertinent evidence. Thirdly, there might be a risk that revealing the identity of a State official, who is an alleged offender, leads to reprisals against this official or other people by the State on behalf of which the official had acted in an official capacity. Fourthly, information contained in such a notification may be confidential. Lastly, the forum State may not entertain diplomatic relations with the State of the official. The latter issue as well as more general concerns were also expressed by the German Federal Public Prosecutor General.[125]

[122] *Ibid*., Commentary to draft article 9, para. 9, p. 118.

[123] A strict notification obligation (without exceptions) regarding the immunity of State officials is not conflicting with article 36, para. 1, lit. (b) VCCR. For a (former) State official who is entitled to immunity *ratione personae* or *materiae* is not only a national of the State of the official. Immunity is enjoyed by State officials not for their own benefit, but immunity is a right of the State (see e. g. fn. 124). Therefore, international law on consular protection of nationals cannot offhandedly be transposed to State officials. It must also be noted that under international consular law, and perhaps even under article 36, para. 1, lit. (b) VCCR, the notification is not always subject to the consent of the detainee (cf. fn. 134, 135). Also note that article 36, para. 1, lit. (b) VCCR, like the whole VCCR, does not address the consular relations vis-à-vis refugees (conference resolution I, UNTS 1967, p. 466). Exploring these issues in more detail would exceed the scope of this paper.

[124] Cf. ICJ, *Djibouti v. France* (fn. 18 above), para. 188 ("The Court observes that such a claim [to immunity *ratione materiae* of State officials] is, in essence, a claim of immunity for the Djiboutian State, from which the *procureur de la République* and the Head of National Security would be said to benefit."); cf. further regarding invocation of immunity: *ibid*., para. 196 ("The *State* which seeks to claim immunity for one of its State organs is expected to notify the authorities of the other State concerned."); and regarding waiver of immunity: ICJ, *Arrest Warrant* (fn. 17 above), para. 61 ("[T]hey [incumbent or former Minister for Foreign Affairs] will cease to enjoy immunity from foreign jurisdiction if the *State* which they represent or have represented decides to waive that immunity.") (emphases added).

[125] "[S]uch a requirement [of the forum State to notify the State of the official] is hardly practical: Just imagine the Federal Public Prosecutor General having to inform the authorities of a state, which shares responsibility for a crime under international law (for example Syria), about his intent to investigate or arrest one of its high-ranking representatives. Additionally, there may be situations where the prosecuting state and the home country of the accused do not entertain diplomatic relations. It could then be quite difficult to identify and inform the competent authorities of the home country of the accused, especially while an armed conflict is taking place there. This could lead to a substantial delay of the proceedings, all the more so if the prosecuting state was generally obliged to undertake a serious effort for establishing contact." Frank, *Functional Immunity of Foreign State Officials* (fn. 20 above) 724.

These concerns may be addressed by some modifications of draft article 9 as regards the required timing and content of the notification as well as the channels for communication which will be elaborated in the following. In addition, it should be noted that the practical impact of these concerns relating to the notification obligation may be limited: Most importantly, there will often be alternative ways for a State of the official to find out about an intended or on-going criminal proceeding against one of its (former) State officials, particularly through media and for the operation of the principle under international human rights law of publicity of judgments in criminal proceedings.[126] For example, even though in the criminal proceedings against the former Syrian State officials *Anwar Raslan* and *Eyad al-Gharib* before the Higher Regional Court in Koblenz (Germany)[127] the Federal Public Prosecutor seemingly did not notify Syria about their detention,[128] the Syrian president was talking about the trial in a TV interview published in November 2019.[129] In the case of the former Uzbek Minister of Interior *Zokir Almatov* who visited Germany in 2005 for receiving medical treatment, criminal complaints were filed against him for torture and crimes against humanity,[130] but soon after reports about the complaints were published in the German news, *Almatov* left Germany before German authorities had secured his presence or questioned him.[131]

i. Required Timing of the Notification

The timing of the notification may crucially affect the effectiveness of a criminal proceeding against a State official, since notifying the State of the official at an early stage might render impossible or impede a criminal proceeding against the State official. For example, the notification could result in the removal of pertinent evidence or in the official escape from the jurisdiction of the forum State, before any measure of criminal jurisdiction could be taken against him or her. Hence, the timing of the notification obligation requires a careful balance between the effectiveness of criminal proceedings and the immunity of State officials. Accordingly, it is very helpful that the ILC in its Commentary acknowledged this necessary balancing of interests in relation to the timing of the notification obligation:

> "In view of the purpose of notification, it must be provided at an early stage, since otherwise it will not produce its full effects. However, the fact that notification may have unintended effects on the forum State's exercise of criminal jurisdiction, particularly at the earliest stages, cannot be overlooked. It was therefore considered necessary to strike a balance between the duty to notify the State of the official and the right of the forum State to carry out activities in

[126] E. g. article 14, paragraph 1 of the International Covenant on Civil and Political Rights, 999 UNTS 171 (entry into force on 23 March 1976; 173 States Parties); article 6, paragraph 1 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, CoE ref. no. 005 (entry in force on 3 September 1953; 47 States Parties); cf. section 173, paragraph 1 of the German Courts Constitution Act (GVG).

[127] Both are being prosecuted for crimes against humanity including torture which they are suspected to have committed while working for the Secret Service in Syria (see fn. 29 above).

[128] Cf. Frank, *Functional Immunity of Foreign State Officials* (fn. 20 above), at fn. 126, p. 724.

[129] When an RT reporter asked the Syrian president Bashar al-Assad about the trial in a TV interview published in November 2019 the full names of the two officials were mentioned. At minute 17.50: https://www.rt.com/news/473087-us-hegemony-assad-interview/ (last access on 29 September 2020).

[130] The criminal complaints related to torture and crimes against humanity in relation to Uzbekistan's places of detention as well as to the Andijan massacre.

[131] Manfred Nowak et al. (eds), *United Nations Convention Against Torture and its Optional Protocol, A Commentary* (OUP 2019), pp. 258-259.

> the context of criminal jurisdiction that may affect multiple subjects and facts but will not necessarily affect the official of another State."[132]

Against this backdrop, the ILC made the helpful modification to move back the point in time at which the notification obligation arises (compared with the first draft by the Special Rapporteur[133]). However, for achieving more balance between the effectiveness of criminal proceedings and the immunity of State officials, it seems too strict to require a notification always "before" a measure of constraint. If carrying out a criminal proceeding against a suspected State official would otherwise become impossible (for example due to an escape of the suspect), issuing the notification should also be possible *immediately after* a constraining measure. These cases will naturally be limited to cases in which a criminal proceeding concerns a foreign official with respect to whom immunity *ratione materiae* might be invoked, since no measure of constraint against an official enjoying immunity *ratione personae* would be allowed as long as such immunity is not waived (see above). Such a provision may be inspired by the strict notification obligation *after* the detention of a suspect as it is contained in several conventions on international criminal law[134] as well as in (bilateral) consular agreements.[135]

ii. Required Content of the Notification

The ILC in its draft article 9 provided for a strict notification obligation with a high standard regarding the content required by a notification. Yet, a forum State may have an interest to reduce the content of a notification for a number of reasons, including confidentiality, rights of involved persons under criminal, human rights or refugee law, or the protection of an intended or on-going investigation against intrusion. As outlined above, there might be a risk that revealing the identity of a State official, who is an alleged offender, leads to his or her escape or to reprisals against this official or other people by the State on behalf of which the official acted in official capacity.

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[132] ILC, *Rep. 2021* (fn. 3 above), Commentary to draft article 9, para. 6, p. 117.

[133] Which read: „Where the competent authorities of the forum State have sufficient information to conclude that a foreign official could be subject to its criminal jurisdiction, the forum State shall notify the State of the official of that circumstance." (draft article 8, paragraph 1), Seventh Report by Ms. Escobar Hernández (fn. 16 above), Annex II.

[134] Cf. [numbers of States parties as of 24 October 2021] 1970 Convention for the Suppression of Unlawful Seizure of Aircraft, 860 UNTS 105 (185 States Parties), article 6, paragraph 4; 1971 Convention for Suppression of Unlawful Acts against the Safety of Civil Aviation 974 UNTS 177 (188 States Parties), article 6, paragraph 4; 1979 International Convention against the Taking of Hostages, 1316 UNTS 205 (176 States Parties), article 6, paragraph 6; 1984 Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment, 1465 UNTS 85 (172 States Parties), article 6, paragraph 4; 1997 International Convention for the Suppression of Terrorist Bombings, 2149 UNTS 256 (170 States Parties), article 7, paragraph 6; 1999 International Convention for the Suppression of the Financing of Terrorism, 2178 UNTS 197 (189 States Parties), article 9, paragraph 6; 2006 International Convention for the Protection of All Persons from Enforced Disappearance, 2716 UNTS 3 (64 States Parties), article 10, paragraph 2; 2007 ASEAN Convention on Counter Terrorism, Reg. No. 54629 SG of ASEAN (10 States Parties), article VIII, paragraph 6.

[135] See for example the following bilateral agreements: 70 bilateral agreements involving the United States of America (cf. § 236.1 (e) Apprehension, custody, and detention. https://ecfr.io/Title-08/sp8.1.236.a); 32 bilateral agreements involving the United Kingdom, "Table of Consular Conventions and Mandatory Notification Obligations" (Codes of practice C, Detention, treatment and questioning of persons by police officers, no. 7.2 Citizens of independent Commonwealth countries or foreign nationals), accessible at: https://www.gov.uk/government/publications/table-of-consular-conventions-and-mandatory-notification-obligations (accessed 20 November 2020).

Therefore, this paper claims that a forum State should be free to reduce the *content* of the notification "as appropriate", while maintaining a strict obligation of the forum State to notify the State of the official *without exception*. The qualifier "as appropriate" would make it possible to accommodate other relevant legal considerations of the forum State, as mentioned above. International law does not prescribe the exact content or elements which a notification should contain.[136] Rather, as the ILC Commentary rightly states, the notification must (only) enable the State of the official to make a sufficiently informed decision on whether or not to invoke the immunity of its State official. Most importantly, such a notification with content "as appropriate" brings to the attention of the State of the official that authorities of the forum State intend to prosecute a person who may enjoy immunity. On this basis, the State of the official will be able to make use of further procedural safeguards of its immunity (for example, invocation of immunity, request for transfer of proceedings, consultations, dispute settlement).

The qualifier "as appropriate" has already been used in the context of the notification obligation in the ILC articles on the prevention and punishment of crimes against humanity.[137] According to the commentary this qualifier means that:

> "in some circumstances the State may need to withhold some of the information it has uncovered, for example, to protect the identities of victims or witnesses or to protect an ongoing investigation. Nevertheless, such withholding of reporting must be undertaken in good faith."[138]

For example, in a notification with limited content, the identity of the accused (former) State official could be omitted, while the former position as an official of that State as well as the allegedly committed offences could be described in an abstract manner without mentioning concrete facts. For ensuring that the notification by the forum State contains the information necessary for enabling the State of the official to invoke immunity, the State of the official may request additional information if it considers that the information contained in the notification is not sufficient for making such decision. The forum State may also subject the provision of further information on the official in question or other information pertaining to the notification to assurances by the State of the official (e. g. to prevent reprisals against this official). Such requests for exchange of further information relating to immunity are also addressed by draft article 12 (see below).

In conclusion, the high standards as to the content required of a notification constitute a deficiency of draft article 10 and hence, the qualifier "as appropriate" should be added.

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[136] This content required of the notification depends also on the question whether there is a minimum content required of the *invocation* of immunity in international law. Yet, international law neither prescribes the content required of an invocation of immunity (see below).

[137] In article 9, paragraph 3 ("Preliminary measures when an alleged offender is present"): "When a State, pursuant to this draft article, has taken a person into custody, it shall immediately notify the States referred to in draft article 7, paragraph 1, of the fact that such person is in custody and of the circumstances which warrant his or her detention. The State which makes the preliminary inquiry contemplated in paragraph 2 of this draft article shall, *as appropriate*, promptly report its findings to the said States and shall indicate whether it intends to exercise jurisdiction." (emphasis added), ILC Report 2019 (fn. 12 above), p. 90.

[138] ILC commentary to article 9, para. 3, *ibid*., p. 91.

iii. Channels for Communication

The channel selected by the forum State for communicating the notification may address the above-mentioned concerns of confidentiality and situations in which the two States do not entertain diplomatic relations. It should also be noted at the outset that the virtually identical provisions of the draft articles adopted at the ILC session in 2021 (i. e. paragraph 3 of each draft article 9 to 12) should be streamlined into one (stand-alone) provision. Accordingly, the following comments apply to all of the respective provisions *mutatis mutandis*.

Generally, it is helpful that the ILC clarified, by modifying an earlier draft of the Special Rapporteur,[139] that the diplomatic channel is an equal, not subsidiary channel of communication. The important role of the diplomatic channel in communicating issues relating to immunity of State officials had been frequently emphasized in the 2019 debates both in the ILC[140] and in the Sixth Committee.[141] Similarly it is to be welcomed that the channels of communication mentioned in paragraph 3 exist in parallel and without hierarchy.[142] The current draft of the ILC is rather vague as to the communication through other channels than the diplomatic channel ("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.").

This provision should be refined in three respects: Firstly, the text of the draft article (or at least the Commentary) should more expressly reflect that communicating the notification is also possible "through the Secretary-General of the United Nations". This channel of communication may be particularly relevant in cases where the forum State does not entertain diplomatic relations with the State of the official.[143] Such a provision is included as an alternative to the direct bilateral communication of notifications in a number of conventions on international criminal law.[144]

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[139] Seventh report by Ms. Escobar Hernández (fn. 16 above), Annex II.

[140] ILC Rep 2019 (fn. 12 above), at p. 322, para. 168 ("[S]everal members highlighted the central role of the diplomatic channel in communications between the forum State and the State of the official.").

[141] ILC, Topical summary of the 2019 session (see fn. 25 above), at p. 6, para. 18.

[142] In the *Djibouti v. France* decision of the ICJ (fn. 18 above) the diplomatic channel and mutual legal assistance were both equally considered as channels for communicating the invocation of immunity, at para. 195 (emphasis added): "The Court must also observe that these various claims regarding immunity were not made known to France, *whether through diplomatic exchanges or before any French judicial organ*, as a ground for objecting to the issuance of the summonses in question. As recalled above, the French authorities rather were informed that the Djiboutian *procureur de la République* and Head of National Security would not respond to the summonses issued to them because of the refusal of France to accede to the request for the Borrel file to be transmitted to the Djiboutian judicial authorities."

[143] For example, at the diplomatic conference of the 1979 Hostages Convention this channel of communication was added to article 6, paragraph 2 upon a proposal by Singapore which was based *inter alia* on the argument that the State which is under the duty to notify might not entertain diplomatic relations with the addressed State. Lambert, *Terrorism and Hostages in International Law, A Commentary on the Hostages Convention 1979* (Cambridge, 1990), at pp. 175-176.

[144] [Numbers of States Parties as of 24 October 2021; for further details on the conventions see fn. 134 above] 1973 Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, 1035 UNTS 167 (180 States Parties), article 6, para. 1; 1979 International Convention against the Taking of Hostages, article 6, para. 2; 1997 International Convention for the Suppression of Terrorist Bombings, article 7, para. 6; 1999 International Convention for the Suppression of the Financing of Terrorism, article 9, para. 6; with regard to the Secretary General of ASEAN: 2007 ASEAN Convention on Counter Terrorism, article VIII, para. 6.

Secondly, the term "international cooperation treaties" is rather vague and should be clarified. Thirdly, the Commentary should take into account that international rules on mutual legal assistance, if and as far as applicable in the relation between the concerned States, can only to a limited extent be transposed to the exchange of information concerning the immunity of State officials. For the law on immunity of State officials is substantially different from the rules on mutual legal assistance regarding the legal bases and interests at stake: States have voluntarily committed themselves in a number of bilateral and multilateral agreements to enhancing mutual legal assistance for making criminal prosecutions more efficient.[145] However, all States are bound by international law on the immunity of State officials by virtue of customary international law as well as the principle of sovereign equality of States. This structural difference between mutual legal assistance and the law on immunity of State officials is particularly pertinent in the matter of grounds for refusal of mutual legal assistance.[146]

d) Draft Article 10: 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.

(1) Introduction

Draft article 10 recognizes the right of the State of the official to invoke the immunity of its State officials. It comprises a recommended time for the invocation ("as soon as possible" when the State of the official becomes aware that the criminal jurisdiction of another State could be or is being exercised over the official). Further, requirements for the form and content of the invocation are added ("in writing, indicating the identity of and the position held by the official, and the grounds on which immunity is invoked").

(2) Comments

Generally, it is very helpful that the ILC recognizes the right of invoking immunity, since this procedural safeguard – particularly in cases involving immunity *ratione materiae* – plays an essential

[145] E. g. 1959 European Convention on Mutual Assistance in Criminal Matters; 1992 Inter-American Convention on Mutual Assistance in Criminal Matters; 1992 Convention on Mutual Assistance in Criminal Matters, Economic Community of West African States; 2002 Protocol on Mutual Legal Assistance in Criminal Matters and Protocol on Extradition, Southern African Development Community; Arab League Convention on Mutual Assistance in Criminal Matters; Convention on Mutual Assistance in Criminal Matters between the Member States of the Community of Portuguese-speaking Countries; cf. further 1990 Model Treaty on Mutual Assistance in Criminal Matters; ILC articles on the prevention and punishment of crimes against humanity, draft article 14, para. 8 and draft annex.

[146] See below at II. 6. b).

role for the balance of the interests at stake in the context of immunity of State officials. Yet, it is crucial to note that the central questions of what legal effects an invocation of immunity or its non-invocation over a reasonable period of time have, was left open by the ILC at its session in 2021.[147] Instead, these questions "will be addressed later" in the context of considering other draft articles[148] (even though the natural place for dealing with these aspects seems to be in draft article 10 on invocation). This section offers some comments on the legal effects of an invocation of immunity *ratione materiae* and suggests modifying the strict requirements as to the content of the invocation.

i. The Legal Effects of an Invocation of Immunity ratione materiae

Four main legal effects of such an invocation of immunity may be considered: First, arguably the main legal effect of an invocation of immunity is that it triggers a duty of the forum State to determine immunity *ratione materiae* without delay.[149] This means that as long as the State of the official has not invoked the immunity *ratione materiae* of its official, the forum State *may* but *does not have to* determine whether or not immunity applies.[150] This position was supported by both the former and the current ILC Special Rapporteur on immunity of State officials.[151] It is based on jurisprudence of the ICJ[152] and supported by State practice.[153] In order to ensure that the legal effects of a possible invocation of immunity are not circumvented, the determination of immunity (draft article 13) should depend on the condition that a reasonable time for the State of the official to communicate an invocation has elapsed.[154] Yet, after such a reasonable time has elapsed, the competent authorities of the forum State may (but do not have to) proceed to determine whether immunity applies. This is also indicated by paragraph 2 of draft article 10 according to which immunity "should be invoked as soon as possible [when the State of the official becomes aware that the criminal jurisdiction of another State could be or is being exercised over the official]". When "a reasonable time" has passed,

[147] ILC, *Rep. 2021* (fn. 3 above), Commentary to draft article 10, para. 1, p. 122; cf. *ibid*., paras. 1-13, pp. 122-124.

[148] *Ibid*., Commentary to draft article 10, para. 1, p. 122: "*This* draft article does not deal with the effects of invocation, which will be addressed later." (emphasis added).

[149] Cf. ICJ, *Djibouti v. France* (fn. 18 above), p. 177, at p. 244, para. 196: "The State which seeks to claim immunity for one of its State organs is expected to notify the authorities of the other State concerned. This would allow the court of the forum State to ensure that it does not fail to respect any entitlement to immunity and might thereby engage the responsibility of that State."; Third report by Mr. Kolodkin (fn. 18 above), at paras. 17, 61 (f) and (h); Seventh report by Ms. Escobar Hernández (fn. 16 above), para. 52.

[150] Cf. ICJ, *Djibouti v. France* (fn. 18 above), para. 196; cf. further Third report by Mr. Kolodkin (fn. 18 above), at paras. 17, 61 (f) and (h); Seventh report by Ms. Escobar Hernández (fn. 16 above), para. 52.

[151] Third report by Mr. Kolodkin (fn. 18 above), paras. 17; 61 (f); Seventh report by Ms. Escobar Hernández (fn. 16 above), para. 52.

[152] ICJ, *Djibouti v. France* (fn. 18 above), para. 196 ("The State which seeks to claim immunity for one of its State organs is expected to notify the authorities of the other State concerned.").

[153] Cf. for example, the practice of suggestions of immunity by the executive branch in the United States (Bradley, *Conflicting Approaches to the U.S. Common Law of Foreign Official Immunity* (2021) 115 AJIL 1, 9) and the practice of authorizations to prosecute by the Swedish Government in cases of universal criminal jurisdiction (Swedish Penal Code, ch. 2, sec. 5) which includes considerations of immunity (Martinsson and Klamberg, *Jurisdiction and Immunities in Sweden When Investigating and Prosecuting International Crimes*, in: Scandinavian Studies in Law (2020), vol. 66, at p. 68ff); statement by Italy, UN Doc. A/C.6/74/SR.28, p. 6, para. 27; cf. further Wuerth, *Pinochet's Legacy Reassessed* (2012), 106 AJIL 731, 742-765; regarding the exercise of universal criminal jurisdiction: cf. Mackenzie Eason, *The Quiet Expansion of Universal Jurisdiction* (2019), 30 EJIL 779–817, at p. 809.

[154] Without such a requirement, the forum State after notifying the State of the official (in accordance with draft article 9) could immediately proceed to determine immunity *ratione materiae*. In case the non-application of immunity *ratione materiae* was determined, the State official could be subject to any exercise of criminal jurisdiction, including constraining measures. However, if the State of the official had invoked immunity in such a case, the invocation of immunity would have had a suspensive effect and a presumptive effect in the determination of immunity (see below). These legal effects of invocation would hence be circumvented.

the invocation of immunity may under certain circumstances be precluded.[155] However it is important to note that the requirements for the timing of the invocation should not be too stringent, since the State of the official may require time for making the decision whether or not to invoke the immunity. This decision may be complex, particularly given the consequences of an invocation for the responsibility of the State of the official.[156]

Second, the invocation may lead to a presumption in favor of immunity when immunity is determined by the forum State (i. e. that the acts indicated in the invocation, if committed, were performed in an official capacity). This reflects the finding by the ICJ in the 1999 *Immunity from Legal Process of a Special Rapporteur* Advisory Opinion according to which the invocation by the UN Secretary-General of the immunity of an expert on mission for the United Nations "creates a presumption" in favor of immunity when it is determined by national courts.[157]

Third, the invocation of immunity may also initiate the process of a transfer of the proceeding to the State of the official (while the jurisdiction of the forum State is subsidiary). This reflects State practice on subsidiary jurisdiction.[158] According to the Special Rapporteur, "the transfer of criminal proceedings is based on the concept of subsidiary jurisdiction" which "may be fully transposed to the regime of immunity of State officials from foreign criminal jurisdiction".[159] Yet, her proposal of draft article 14 does not yet fully reflect the concept of subsidiary jurisdiction.[160] Moreover, procedural safeguards should be added for ensuring the proper prosecution of the State official in its "home" State: The transfer of proceedings should depend on assurances by the State of the official which demonstrate its willingness and ability to carry out proper proceedings against the official.[161] Furthermore, the forum State may resume the exercise of its jurisdiction if the criminal proceedings transferred to the State of the official were undertaken for the purpose of shielding the official concerned from criminal responsibility or conducted in a manner which, in the circumstances, was inconsistent with an intention to bring the official concerned to justice.[162]

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[155] See also below in the section on waiver (2.e).

[156] Cf. ICJ, *Djibouti v. France* (fn. 18 above), para. 196: "[T]he State notifying a foreign court that judicial process should not proceed, for reasons of immunity, against its State organs, is assuming responsibility for any internationally wrongful act in issue committed by such organs."; cf. further Third report by Mr. Kolodkin (fn. 18 above), paras. 59-60.

[157] Cf. ICJ, *Special Rapporteur* (fn. 58 above), at p. 87, para. 61: "When national courts are seised of a case in which the immunity of a United Nations agent is in issue, they should immediately be notified of any finding by the Secretary-General concerning that immunity. That finding, and its documentary expression, creates a presumption which can only be set aside for the most compelling reasons and is thus to be given the greatest weight by national courts."

[158] Cf. national legislation in Belgium, Croatia, Spain, and Switzerland, as well as domestic prosecutorial practices in Denmark, Germany, Norway, and the UK, and court practice in Austria, the Netherlands, and Spain (statement by Mr. Nolte in the ILC plenary session in 2019, fn. 50 above); cf. further statements by Ms. Galvão Teles in the ILC plenary sessions in 2018 and 2019, Provisional summary records of the 3440th and 3483rd meetings, UN Docs. A/CN.4/SR.3440 (2018), at pp. 5-7 and A/CN.4/SR.3483 (2019), at p. 12.

[159] Seventh report by Ms. Escobar Hernández (fn. 16 above), para. 141.

[160] Seventh report by Ms. Escobar Hernández (fn. 16 above), Annex II, at p. 74.

[161] Cf. statement by Mr. Nolte in the ILC plenary session in 2019 (fn. 50 above), at pp. 5, 7. In addition, for determining the willingness and ability the criteria contained in article 17, paragraphs 2 and 3 of the Rome Statute of the International Criminal Court may be taken into account.

[162] Cf. article 17, paragraph 2 of the Rome Statute of the International Criminal Court. Cf. further the proposal to include such language into draft article 14 made by Mr. Park in his statement in the ILC plenary session in 2019, Provisional summary record of the 3481st meeting, UN Doc. A/CN.4/SR.3481, at p. 12.

The fourth legal effect of an invocation may be a suspensive effect on the exercise of criminal jurisdiction by the forum State. This implies that "the authorities before which the immunity has been invoked shall suspend any coercive measure until a determination has been made under draft article 13 [9] as to whether immunity applies. Measures whose suspension would likely preclude a subsequent criminal proceeding against the official may remain in place."[163] Such a suspensive effect of the invocation would be in line with the jurisprudence by the ICJ according to which immunity precludes constraining measures against a State official.[164] It is claimed here that this precluding effect of immunity depends on the full establishment of the facts on which the claim to immunity is based (i. e. that the alleged act was conducted in an official capacity). This is only the case at the time when the determination of immunity is made, but not while the factual basis is uncertain. It is further crucial to note that the State of the official has the prerogative to invoke immunity[165] and thus, to confirm such official nature. This would also be in line with the jurisprudence of the ICJ relating to the invocation of immunity.[166] By affirming the suspensive effect, the ILC could make a significant contribution to addressing uncertainty existing in practice[167] and provide balanced guidance.[168]

ii. Requirements Regarding Content and Form of an Invocation

The strict requirements as to the content of the invocation under draft article 10 should be revisited by the ILC. International law does not prescribe the content required of an invocation of immunity.[169] As mentioned above,[170] the decision of the State of the official to invoke immunity may be complex. Moreover, given that the information provided to the State of the official through the notification by

[163] Proposal made by Mr. Murphy during the discussion of draft article 10, Statement of the Chairperson of the Drafting Committee (fn. 65 above), p. 21 ("The Drafting Committee decided not to include such proposal in draft article 10, but to consider it in the course of its work as it raised important issues of substance concerning procedural provisions and safeguards. […] In the final analysis, it was decided that Drafting Committee would consider the proposal, now named draft article X, at a later stage.").

[164] See above 2.b)(2)(ii).

[165] See above 2.d).

[166] *Ibid*.; in particular the pronouncement that "[t]he State which seeks to claim immunity for one of its State organs is expected to notify the authorities of the other State concerned" (ICJ, *Djibouti v. France* (fn. 18 above), at p. 244, para. 196); and the finding on a presumption in favor of immunity when immunity is determined by the forum State (cf. ICJ, *Special Rapporteur* (fn. 58 above), at p. 87, para. 61).

[167] For example, some scholars argue that the *in dubio pro reo* principle should apply analogously to factual uncertainties regarding procedural questions of immunity as a "in dubio contra procedere" principle (cf. e. g. Helmut Kreicker, *Völkerrechtliche Exemptionen II* (Duncker & Humblot 2007), p. 1315 with further references).

[168] For example, if a suspect claims to have acted in official capacity (with regard to the alleged crime under prosecution), the authorities even if acting in good faith will face the obstacle to investigate the facts constituting the official nature of the act. Thus, as long as no invocation of immunity has been made the competent authorities may be faced with the claim to immunity by the suspect as well as a possible inability to investigate the related facts. In this situation of factual uncertainty regarding the claim to immunity, guidance for the authorities on whether or not they may take coercive measures would be helpful. Otherwise, uncertainty may stall the criminal proceedings. Thus, in the interest of effective criminal prosecution it should be clarified that the authorities are allowed to take coercive measures and only upon the invocation of immunity coercive measures shall be suspended.

[169] Cf. no such requirement was mentioned by the ICJ in *Djibouti v. France* (fn. 18 above), para. 196 ("The State which seeks to claim immunity for one of its State organs is expected to notify the authorities of the other State concerned. This would allow the court of the forum State to ensure that it does not fail to respect any entitlement to immunity and might thereby engage the responsibility of that State. Further, the State notifying a foreign court that judicial process should not proceed, for reasons of immunity, against its State organs, is assuming responsibility for any internationally wrongful act in issue committed by such organs.").

[170] See at fn. 156 above.

the forum State may be limited "as appropriate",[171] the content required of the invocation is correspondingly limited. In addition, it should be clarified that the State of the official is free not to include an acknowledgement of the alleged facts based on which the forum State aims at prosecuting the official.[172] Moreover, the formal requirements of an invocation are too stringent. Invoking immunity in writing and doing so clearly may be recommended for legal certainty. Nevertheless, immunity may also be invoked orally, particularly when an exercise of jurisdiction against a State official is imminent.[173]

e) Draft Article 11: Waiver of Immunity

> 1. The immunity from foreign criminal jurisdiction of the State official may be waived by the State of the official.
> 2. Waiver 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.

(1) Introduction

Draft article 11 recognizes the right[174] of the State of the official to waive the immunity of its officials. It states that such waiver "must always be express and in writing" and is irrevocable. While international treaties on specific forms of immunity (of State officials) hardly contain provisions on the applicable procedure and procedural safeguards, most of them regulate waiver of immunity.[175] Thus, the ILC aligned draft article 11 largely with the already existing treaty provisions.[176]

The provision on irrevocability of waiver was controversial within the Commission.[177] There was some support for its deletion, since "neither the relevant treaties nor the domestic laws of States have expressly referred to the irrevocability of waivers of immunity, and the practice on this issue is

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[171] Cf. above 2.c)(2)(ii).

[172] Cf. ICJ, *Djibouti v. France* (fn. 18 above), para. 196 (emphasis added): "[T]he State notifying a foreign court that judicial process should not proceed, for reasons of immunity, against its State organs, is assuming responsibility for any internationally wrongful act in issue *committed* by such organs."

[173] Cf. ICJ, *Immunities and Criminal Proceedings (Equatorial Guinea* v. *France), Preliminary Objections, Judgment, I.C.J. Reports 2018*, p. 292, at p. 303, para. 25 ("The investigation more specifically concerned the way in which Mr. Teodoro Nguema Obiang Mangue acquired various objects of considerable value and a building located at 42 Avenue Foch in Paris. On 28 September 2011, investigators conducted an initial on-site inspection at 42 Avenue Foch in Paris and seized luxury vehicles, which belonged to Mr. Teodoro Nguema Obiang Mangue and were parked on the premises. While they were there, the Ambassador of Equatorial Guinea and a French lawyer representing that State arrived to protest the operations under way, invoking the sovereignty of Equatorial Guinea.").

[174] According to the Commentary, there is no obligation to waive immunity under the draft articles, ILC, *Rep. 2021* (fn. 3 above), Commentary to draft article 11, para. 4, p. 126.

[175] *Ibid*., Commentary to draft article 11, para. 2, at pp. 125-126.

[176] Cf. i. a. *ibid*., Commentary to draft article 11, para. 2, at pp. 125-126; para. 7-8, pp. 127-128.

[177] *Ibid*., Commentary to draft article 11, paras. 14-18, pp. 129-131.

limited".[178] Nevertheless, the ILC maintained the provision since it "reflects a general rule that manifests the principle of good faith and addresses the need to respect legal certainty". Yet, the Commentary, referring to the debate in the ILC, further suggests that exceptions to the irrevocability of waiver may be possible (for example, "when new facts not previously known to the State of the official come to light after immunity has been waived").[179]

(2) Comments

While the undertaking of the ILC to closely align draft article 11 with the respective provisions in international treaties on specific forms of immunity is of course useful, one aspect of the existing provisions has not been fully transposed to the ILC's draft: The idea that immunity of a State official can be waived by the State of the official through the latter's implicit consent to the concrete exercise of jurisdiction. Such a provision is included in several international treaties on specific forms of immunity.[180] Of course, these provisions do not directly address cases involving immunity of State officials from foreign criminal jurisdiction. However, this idea of implicit consent (to the exercise of jurisdiction) by the holder of the right to immunity cannot be ignored and should be transposed to the present context. The most prevalent example seems to be the non-invocation of immunity by the State of the official for a reasonable period of time and under certain circumstances, in particular after its prior notification by the forum State.[181] Legal certainty requires to set a high bar in terms of the clarity of an act by the State of the official for being qualified as a waiver and the possibility of a non-express waiver needs to be interpreted narrowly for being an exception. Such implicit consent to a concrete exercise of jurisdiction may or may not be called an "implicit waiver".

The possibility of implicit waivers has not explicitly been ruled out by the ILC, yet it seems to have been rejected with regard to waivers which are "deduced" from treaty law.[182] This rejection was the result of the ILC considering respective arguments made relating to the judgment delivered in the *Pinochet* case in the United Kingdom,[183] as well as regarding the interpretation of articles 27 and 98 of the Rome Statute of the International Criminal Court and the duty of States parties to cooperate with the Court. In this regard, the ILC clarified its view that "there are insufficient grounds for concluding that the existence of such treaty obligations can automatically and generally be

[178] *Ibid*., Commentary to draft article 11, para. 16, p. 130.

[179] *Ibid*., Commentary to draft article 11, para. 15, p. 130.

[180] Article 32, paragraph 3 VCDR ("The initiation of proceedings by a diplomatic agent or by a person enjoying immunity from jurisdiction under article 37 shall preclude him from invoking immunity from jurisdiction in respect of any counterclaim directly connected with the principal claim."); article 45, paragraph 3 VCCR; article 41, paragraph 3 Convention on Special Missions; article 31, paragraph 3 Convention on the Representation of States in their Relations with International Organizations of a Universal Character (fn. 107 above); article 8 UNCSI.

[181] Cf. Third Report by Mr. Kolodkin (fn. 18 above), para. 54-55 ("[I]t can be presumed that non-invocation of immunity by the State of the official can be considered consent by that State to the exercise of jurisdiction and, accordingly, a waiver of immunity").

[182] ILC, *Rep. 2021* (fn. 3 above), Commentary to draft article 11, para. 8, pp. 127-128: "[T]he Commission did not retain paragraph 4 of the draft article originally proposed by the Special Rapporteur in her seventh report, which was worded as follows: "A waiver that can be deduced clearly and unequivocally from an international treaty to which the forum State and the State of the official are parties shall be deemed an express waiver". While members of the Commission generally considered that the waiver of immunity may be expressly provided for in a treaty, there was some criticism of the use of the phrase "can be deduced", which was understood by some members as recognizing a form of implicit waiver."

[183] *Regina v. Bow Street Metropolitan Stipendiary Magistrate*, ex parte *Pinochet Ugarte (No. 3)*, United Kingdom, House of Lords, decision of 24 March 1999, [1999] UKHL 17, [2000] 1 AC 147.

understood to waive the immunity of State officials".[184] This position by the ILC may have found a clearer expression by introducing a without prejudice clause into the text of draft article 11 according to which this provision "is without prejudice to possible effects of treaties on the immunity of foreign State officials".[185] The consent which a State may give to renounce its immunity more generally by way of a treaty is a separate question which should not be confused with the concept of waiver.[186] A waiver is characterized by the fact that a State lifts immunity in an individual case.[187] Another without prejudice clause is still pending before the Drafting Committee, which concerns any exercise of criminal jurisdiction in the context of proceedings against State officials before international criminal courts and tribunals.[188]

f) Draft Article 12: 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.

(1) Introduction

Draft article 12 provides for certain requests for information between the forum State and the State of the official (paras. 1, 2), which shall be considered in good faith by the requested State (para. 4). The Commentary describes the potential overlap between draft article 12 and such information which was exchanged between the States concerned based on other procedural safeguards (particularly in the context of notification, invocation or waiver of immunity). On this basis, draft article 12 may have a complementary function when insufficient information was provided. In this sense, the Commentary notes that "requests for information become a necessary and useful tool for ensuring the proper functioning of immunity, while also strengthening cooperation between the States concerned and building confidence between them".[189]

(2) Comments

During the drafting process one major change to draft article 12 was made. A draft originally proposed by the Special Rapporteur, which listed the possible grounds for refusal of a request for

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[184] *Ibid*., Commentary to draft article 11, para. 9, p. 128.

[185] Cf. statement by Mr. Nolte in the ILC plenary session in 2019 (fn. 50 above), at p. 6.

[186] *Ibid*.

[187] *Ibid*.

[188] Draft article 18, as proposed by the Special Rapporteur in her Eight Report (UN Doc. A/CN.4/739, 2020), has been referred to the Drafting Committee at the ILC session in 2021 (this version of draft article 18 reads: „The present draft articles are without prejudice to the rules governing the functioning of international criminal tribunals.").

[189] The Commentary continues noting that "[t]he system for requesting information provided for in draft article 12 therefore serves as a procedural safeguard for both States.", ILC, *Rep. 2021* (fn. 3 above), Commentary to draft article 12, para. 5, p. 132.

information[190] was replaced with a more general obligation by the requested State to consider such a request in good faith (para. 4). While this result is very helpful, the reasoning in the Commentary should be reconsidered.

As mentioned above, the international rules on mutual legal assistance, if and as far as applicable in the relation between the concerned States, can only to a limited extent be transposed to the exchange of information concerning the immunity of State officials for the structural differences of the two regimes.[191] The previous version of draft article 12 contained grounds for refusal of information as enshrined in various international cooperation and mutual legal assistance instruments. Some of these grounds for refusal, i. e. sovereignty, public order (*ordre public)*, security or essential public interests, are now eluded to in the Commentary.[192] When applied to certain exchanges of information related to immunity, these grounds seem over-permissive and should be limited. Given the large discretion left to the requested State based on these grounds, some of these refusals in the immunity context would amount to violations of the immunity of State officials and its safeguards.[193] Therefore, the deletion of the previous draft provision on grounds for refusal of a request for information was important. The reasons for the deletion as mentioned in the Commentary include the following:

> "First, the original proposal listing the permitted grounds for refusal could be interpreted *a contrario* as recognizing an obligation to provide the requested information. Such an obligation, however, does not exist in international law, except in respect of specific obligations that may be laid down in international cooperation and mutual legal assistance agreements or other treaties. Second, the original proposal could conflict with any systems for requesting and exchanging information that may be established in international cooperation and mutual legal assistance treaties, which would in any case apply between the States parties."[194]

These reasons are somewhat misleading according to the elaborations above. The first reason in particular should not give rise to the misunderstanding of undermining the other procedural safeguards, in particular the notification obligation (which *is* an obligation of the forum State to provide the information). Nevertheless, on a more general note, it seems very helpful to highlight the principle of good faith in the context of procedural safeguards and matters relating to the immunity of State officials. Thus, the inclusion of the principle in draft article 12, paragraph 4 is welcome. The ILC might even consider in the future to expressly mention the obligation of all

[190] The proposal read: "The State of the official may refuse a request for information if it considers that the request affects its sovereignty, public order (*ordre public)*, security or essential public interests. Before refusing the request for information, the State of the official shall consider the possibility of making the transmission of the information subject to conditions." (draft article 13, paragraph 4), Seventh Report by Ms. Escobar Hernández (fn. 16 above), Annex II.

[191] See above at 2.c)(2)(iii).

[192] ILC, *Rep. 2021* (fn. 3 above), Commentary to draft article 12, para. 12, p. 133.

[193] With regard to information exceeding the minimum of information relating to immunity (including information in the context of the notification of immunity and information which is necessary for the State of the official to be able to decide on whether or not to invoke or waive immunity), mutual legal assistance arguably continues to be relevant. Naturally, there may be cases without a clear-cut dividing line between such information which is exchanged due to obligations under immunity law and such exchange of information under the law of mutual legal assistance.

[194] ILC, *Rep. 2021* (fn. 3 above), Commentary to draft article 11, para. 9, p. 3.

concerned States to act in good faith in matters relating to the immunity of State officials in a provision or in the Commentary.

As regards the drafting of draft article 12, its current scope of application is both too narrow and too broad: It is too narrow since paragraphs 1 and 2 limit the information which may be required to certain purposes (i. e. determination, invocation and waiver of immunity). However, the concerned States may also require other information for the purposes of facilitating certain procedural safeguards such as for the notification obligation by the forum State, the transfer of proceedings and dispute resolution. At the same time, draft article 12 is also too broad. While draft article 12 was created for a helpful purpose, its potential overlap with the other draft articles may lead to confusion and should not undermine the other provisions. Therefore, the text (of the draft article or of the Commentary) should clarify that the other draft articles, in particular the notification obligation (draft article 9) remain unaffected by draft article 12.

3. Conclusion

The new draft articles which the ILC has provisionally adopted at its session in 2021 set out procedural safeguards of immunity of State officials. This paper has argued that such procedural safeguards are essential for a balanced approach to the topic of immunity of State officials which will help to overcome divisions on the matter in the international community and within the ILC. This may pave the way for an international treaty on immunity of State officials which will provide much needed guidance to practitioners dealing with cases of immunity of State officials. The outcome of the ILC's work on this topic as having the form of a draft treaty would reflect the nature as progressive development of most procedural safeguards regarding immunity of State officials. However, while the type and structure of the procedural safeguards proposed by the ILC are helpful, some key aspects regarding the "examination" and invocation of immunity remain unclear. On these and the other draft articles, this paper made suggestions for refinements including the following:

Regarding the examination of immunity (draft article 8), four main arguments were made. Firstly, rather factual definitions of "examination" and "determination" of immunity were suggested. Based thereon, the main difference between "examination" and "determination" of immunity is the required threshold of established evidence regarding the preconditions of immunity. While the factual indeterminacy may be (still) quite high at the first moment when immunity is initially to be considered, the following investigations are concluded by the determination of immunity. Secondly, the essential question of what the legal effects of examination of immunity are should be clarified by the ILC. This paper demonstrated that once it is determined that immunity applies, such immunity precludes all constraining acts of exercising criminal jurisdiction against the official. In cases of immunity *ratione personae,* this will regularly occur already at the same time as the examination of immunity. Yet, in cases of immunity *ratione materiae* this determination will happen at a later stage in time (when investigating the factual basis of the claim to immunity is concluded) and may be influenced by an invocation of immunity *ratione materiae*. This crucial difference should be reflected in the draft of the ILC. Thirdly, the competent authorities have to consider the question of immunity at the earliest moment in time of a possible exercise of criminal jurisdiction against a foreign State official (i. e. at an earlier point in time as the current draft of the ILC indicates). This follows from the finding of the ICJ according to which "questions of immunity are [...] preliminary issues which must

be expeditiously decided *in limine litis*".[195] Fourthly, for providing essential guidance to practitioners, it would be welcome if the ILC further explored the ramifications of inviolability in the context of immunity of State officials. In this regard the ILC should add to its elaborations that the protection conferred by inviolability does not limit the protection based on immunity of State officials, even in cases where the scope of protection conferred by the two distinct concepts overlap.

With respect to the duty of the forum State to notify the State of the official (draft article 9), three main modifications were suggested for striking an appropriate balance between the effectiveness of criminal prosecutions and the immunity of State officials: Firstly, if carrying out a criminal proceeding against a suspected State official would otherwise become impossible (for example due to an escape of the suspect), issuing the notification should also be possible *immediately after* a constraining measure in cases involving immunity *ratione materiae*. Secondly, it was pointed out that the forum State should have the possibility to reduce the content of the notification "as appropriate" in case of conflicting legal interests, while still being under a strict notification obligation without exceptions. Thirdly, it was proposed to clarify that the UN Secretary General is a valid channel for communicating the notification (for example if no diplomatic relations exist between the concerned States).

Concerning the invocation of immunity (draft article 10) the central question of its legal effects was addressed (the decision on which was postponed by the ILC at its session in 2021). Four such effects of an invocation are conceivable: An invocation of immunity may trigger a duty of the forum State to determine immunity *ratione materiae* without delay. This means that as long as the State of the official has not invoked the immunity *ratione materiae* of its official, the forum State *may* but *does not have to* determine whether or not immunity applies. Further, the invocation may lead to a presumption in favor of immunity when immunity is determined by the forum State. The invocation of immunity may also initiate the process of a transfer of the proceeding to the State of the official (subsidiarity of the jurisdiction of the forum State). The fourth legal effect of an invocation may be that the authorities before which the immunity has been invoked shall suspend any coercive measure until the determination of immunity, while measures whose suspension would likely preclude a subsequent criminal proceeding against the official may remain in place. Further, it was remarked that both the requirements of content and form of the invocation as proposed by the ILC are too strict.

With regard to waiver of immunity the paper elaborated that draft article 11 should provide for a waiver through the implicit consent of the State of the official to the concrete exercise of jurisdiction against its official. Such inclusion would complete the alignment of draft article 11 with the relevant international treaties on immunities (and their drafts by the ILC). Moreover, a clause according to which draft article 11 is "without prejudice to possible effects of treaties on the immunity of foreign State officials" should be added.

Concerning requests for information (draft article 12), the ILC should clarify that the grounds on which requests for information related to immunity may be refused are limited and not over-permissive. Given the discretion regarding the refusal of requested information which is left to the requested State under the law on mutual legal assistance, some of these refusals may in the context of immunity of State officials amount to violations of such immunity and its safeguards. International

[195] ICJ, *Special Rapporteur* (fn. 58 above), at p. 88, para. 63; see also p. 90, para. 67.

law on mutual legal assistance, if applicable in the relation between the concerned States, can only to a limited extent be transposed to the exchange of information concerning the immunity of State officials for the structural differences of the two regimes.

The Author

Isabel Walther is a PhD candidate at Humboldt University Berlin and worked as a research assistant at the Berlin Potsdam Research Group “The International Rule of Law – Rise or Decline?”. During her law studies in Berlin and Geneva she specialized in public international law and worked at the Chair for Public Law, Public International Law and European Law (Prof. Dr. Georg Nolte) of Humboldt University. She assisted Professor Georg Nolte (now Judge at the International Court of Justice) in his capacity as a member of the International Law Commission of the United Nations (ILC) at the seventy-first session (2019) of the ILC in Geneva. Her PhD research focuses on procedural safeguards with respect to immunity of State officials from foreign criminal jurisdiction.

The Kolleg-Forschungsgruppe “The International Rule of Law – Rise or Decline?” examines the role of international law in a changing global order. We assume that a systemically relevant crisis of international law of unusual proportions is currently taking place which requires a reassessment of the state and the role of the international legal order. Do the challenges which have arisen in recent years lead to a new type of international law? Do we witness the return of a ‘classical’ type of international law in which States have more political leeway? Or are we simply observing a slump in the development of an international rule of law based on a universal understanding of values? What role can, and should, international law play in the future?

The Research Group brings together international lawyers and political scientists from three institutions in the Berlin-Brandenburg region: Freie Universität Berlin, Humboldt-Universität zu Berlin and Universität Potsdam. An important pillar of the Research Group consists of the fellow programme for international researchers who visit the Research Group for periods up to two years. Individual research projects pursued benefit from dense interdisciplinary exchanges among senior scholars, practitioners, postdoctoral fellows and doctoral students from diverse academic backgrounds.

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